

discriminate against Plan proposed to pay first group 100% while paying second group 0%. Plan must provide for same treatment for each claim in particular class. Plan did not violate this provision as each creditor within a specific class received the same treatment. However, Court concluded that separate classification violated Section 1122(a).

- (3610) *In re BWP Transport, Inc.*, Case No. 10-67778 (Bankr. E.D. Mi. 2011) – Presumption of unfair discrimination arises where there is (1) dissenting class; (2) another class of same priority; (3) and a difference in the plan's treatment that produces either a materially lower percentage recovery or allocates materially greater risk of default on dissenting creditor. Plan proponent can overcome presumption by showing that allocation of risk was consistent with the risk assumed by parties before bankruptcy. Although secured creditors have different collateral, all secured creditors have same priority. Plan proposed to pay dissenting secured creditor over 6 years while paying balance of secured claims over 5 years but also proposed to pay dissenting creditor materially higher rate of interest than remaining secured claims and plan proposed higher rate of interest on deficiency balance than on any other unsecured claims.
- (3611) *In re Mace*, 2011 WL 284435 (Bankr. M.D. Tn. 2011) – To determine if discriminatory treatment is “unfair”, courts consider (1) whether the discrimination is supported by a reasonable basis; (2) whether the debtor can confirm and consummate a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) how the class that is being discriminated against is treated. Creditor who held “bundled investment property loan” secured by multiple parcels of investment properties was not “similarly situated” with creditor who held mortgage on single piece of rental real estate. Further, even if the creditors were similarly situated, the discrimination would not be unfair. Discrimination has reasonable basis given significant differences in the nature of the collateral; discriminatory treatment was proposed in good faith and not for purposes of punishing creditor or for purposes of manipulating voting; and creditor was being offered same treatment as other creditors holding similar “bundled investment” loans.

10.11 Fair and Equitable – Secured Claims

- (3612) *In re Ivens Properties, Inc.*, 2014 WL 1873963 (Bankr. E.D. Tn. 2014) – To be fair and equitable with respect to secured creditor, plan must provide for creditor to retain lien until paid in full, and creditor must receive deferred cash payment totaling at least the allowed amount of the claim with a value as of the effective date of at least the value of the claim in property of the estate. Plan met first requirement by expressly stating that creditor would retain lien. Second requirement depends on value of collateral, determine in light of purpose of valuation and debtor's proposed disposition or use of the collateral. Code does not mandate date as of which valuation is to be determined, leaving it to Court to determine most appropriate date. Property was worth in excess of debt regardless of what date was used for valuation. Second part of test depends on appropriate interest rate. *Till* formula starts with prime rate which is admittedly a low estimate of the correct rate, and then requires creditor to present evidence for higher rate, with creditor bearing burden of proof on matters such as risk of default, rate of depreciation, liquidity of collateral, and administrative expenses of enforcement. While there is no fixed guideline for adjustments, adjustment typically range from 1% to 3%. Debtor's proposed rate of 2% over prime was reasonable where collateral was worth more than debt and there were no unusual factors as to the collateral.

10.12 Effect of Confirmation Order

- (3613) *Equipment Finders of Tennessee v. Fireman's Fund Insurance Co.*, 2012 WL 2126312 (Bankr. M.D. Tn. 2012) – After confirmation of Plan, Bankruptcy court cannot exercise jurisdiction over action brought by reorganized debtor based on state law and contract claims. Confirmation vested all of the property in the reorganized debtor. After confirmation, there is no bankruptcy estate nor any trust fund to be administered for benefit of creditors. Action could not even be “related to” the bankruptcy case where the outcome would have no effect on the confirmed plan or the funds paid to creditors; and action did not ask the court to interpret, construe, enforce or implement the confirmed plan.
- (3614) *State of Florida v. Davis*, Case No. 11-15040 (11th Cir. 2012) – State is not barred by discharge injunction from collecting past-due child support even where State has filed claim in Bankruptcy Court and claim had been disallowed. After confirmation of Debtor's Chapter 11 plan, and well past the claims bar date, the State filed a claim for outstanding child support. Bankruptcy Court disallowed the claim as late filed. Denial of claim in by Bankruptcy Court does not preclude later attempt to collect debt. Discharge injunction precludes only efforts to collect discharged obligations. Domestic Support Obligations are non-dischargeable as a matter of law and, therefore, is beyond the terms of the discharge injunction. To the extent that the Bankruptcy Court disallowed the claim, that ruling precluded payment through the confirmed plan but did not prohibit State from seeking payment other than through plan or from property of bankruptcy estate.
- (3615) *In re Clymer*, 2012 WL 1252978 (Bankr. N.D. Ohio 2012) – Following BAPCPA, in individual Chapter 11 case, Order Confirming Plan does not operate as discharge. Discharge in individual Chapter 11 is entered after completion of payments. Debtor's Motion for Final Decree and Entry of Discharge denied as premature where, based on terms of Plan, it was “unlikely” that debtor had completed payments under the plan.
- (3616) *Electric Reliability Council of Texas, Inc. v. May*, Case No. 08-40890 (5th Cir. 2010) – Confirmation of Plan replaces pre-petition obligations with restructured debt arrived at in the plan. Discharge does not eliminate pre-petition debts, but it effects an injunction against enforcement of pre-petition rights, and each claimant is given a new enforceable obligation based on treatment in plan. Pre-confirmation injunction against Creditor drawing on letter of credit for payment of pre-petition invoices did not enjoin Creditor from drawing on letter of credit for post-confirmation defaults under confirmed plan.
- (3617) *Ohio Truck & Trailer, Inc. v. Level Propane Gases, Inc.*, - 422 BR 93 (6th Cir. BAP 2010) – Confirmation of plan under Section 1141 binds all parties to terms of plan. Confirmation Order is res judicata on all issues raised or that could have been raised in confirmation proceedings. Issues regarding alleged fraud in the confirmation process or leading up to confirmation are issues that were or should have been raised in confirmation process. Issues of fraud raised by Creditor after confirmation were substantially the same as were raised prior

to confirmation.

- (3618) *Maxus Capital Group, LLC. v. Uhrich*, Case No. 09-8047 (6th Cir. BAP 2010) – Confirmation Order that that is not appealed is binding on all parties. Collateral attack by party who did not take direct appeal of Confirmation Order is prohibited by laches, finality and binding provisions of confirmed plan. Confirmation of plan has effect of a judgment and res judicata bars re-litigation of any issue that was or could have been raised in confirmation proceedings. Party who was aware of alleged fraudulent statements leading up to confirmation of plan who failed to raise those issues during confirmation and failed to take direct appeal precluded from collateral attack to revoke confirmation.

10.13 Revocation of Confirmation Order

- (3619) *Maxus Capital Group, LLC. v. Uhrich*, Case No. 09-8047 (6th Cir. BAP 2010) – Action to revoke confirmation order must allege sufficient facts to demonstrate that confirmation was obtained based on a representation or intentional omission by the plan proponent regarding one or more of the elements of Section 1129; that was materially false; that was either known to be false or was made with reckless disregard for the truth; intended for the Court to rely on; that the Court did rely on; and that as a consequence the Court entered a confirmation order. Allegations that officers and insiders of Debtor deliberately undervalued assets and financial documents were fully considered and rejected by the Bankruptcy Court in numerous collateral actions during course of Chapter 11 case. As the Bankruptcy Court has previously rejected the allegations of fraud prior to confirmation, another rejection of the same allegations in connection with confirmation does not support finding that Court was misled or that the Court relied on the misrepresentations. Further, Party failed to appeal confirmation order and so was barred by finality of Order and could not collaterally attack validity of the Order.

10.14 Interpretation of Confirmed Plan

- (3620) *Dow Corning Corp. v. Claimants' Advisory Committee*, 2010 WL 5128712 (6th Cir. 2010) – Bankruptcy Court's interpretation of confirmed plan is reviewed on abuse of discretion standard. District Court interpretation of confirmed plan as matter of first impression and not in the capacity of an appellate court is afforded lesser degree of deference and then only when the Court conducts hearing on issues presented. District Court should have held evidentiary hearing and considered extrinsic evidence on provisions of Chapter 11 plan that were ambiguous. However, where provisions of plan are capable of interpretation based solely on the language of the plan itself, no extrinsic evidence is necessary and District Court can construe language as a matter of law.

10.15 Modification of Confirmed Plan

- (3621) *Trendi Sportswear, Inc. v. Bank of Baroda*, 2014 WL 5066197 (2d Cir. 2014) – Debtor's confirmed plan cannot be modified after plan has been substantially consummated.

10.16 Absolute Priority Rule

- (3622) *Ice House America, LLC v. Cardin*, 2014 WL 1887583 (6th Cir. 2014) – BAPCPA did not abrogate absolute priority rule in individual Chapter 11 cases. Plan could not be confirmed over objection of unsecured creditor where plan proposed less than full payment while debtor would retain substantial equity in pre-petition assets. Section 1115 expanded definition of property of estate to include property acquired after commencement of case and earnings from services performed after commencement of case. Language of Section 1129 excludes from absolute priority rule only property acquired by debtor that is defined in Section 1115, which is limited to property acquired post-petition. Debtor is not permitted to retain any interest in property of estate that debtor owned as of the petition date over objecting, impaired unsecured creditor.
- (3623) *Dill Oil Co. v. Stephens*, 2013 WL 151193 (10th Cir. 2013) – Absolute priority rule remains in effect in individual Chapter 11 cases. Nothing in BAPCPA expressly overruled or vacated absolute priority rule and court would not lightly imply repeal. Section 1115 did not clearly express intent to overrule or abolish absolute priority rule.
- (3624) *Western Real Estate Equities, LLC v. Village at Camp Bowie I, LLP*, Case No. 12-10271 (5th Cir. 2013) – Code does not distinguish between discretionary or artificial impairment versus economically driven impairment. Plan that proposed to artificially impair unsecured class by paying them in full over three months satisfied Section 1129 as presenting an accepting impaired class. Artificial impairment did not render plan *per se* in bad faith. Plan confirmed where plan was proposed with legitimate and honest purpose to reorganize.
- (3625) *In re Ralph Roberts Realty, LLC*, Case No. 12-53023 (Bankr. E.D. Mi. 2012) – Plan that violates absolute priority rule cannot be confirmed over objection of unsecured creditors. Claim violates rule any time a lower class of claims or interests receives something on account if their claim or interest when superior impaired class opposes confirmation. Plan proposed that current interest holder would be given opportunity to retain ownership interest by waiving large pre-petition claim against debtor. Plan gave only the interest holder the opportunity to give new value and acquire ownership or reorganized debtor and did not allow anyone else to compete for this opportunity. To extent "new value" collar exists, it remains only to extent that parties other than the debtor or its principals is allowed to bid for the acquisition of the reorganized debtor. Exclusive right to contribute new value is, itself, an interest that is retained "on account of" prior interest and is not made available to others, granting prior owners superior and exclusive right to contribute new value. Although it may be unlikely that any third party would offer "new value" to obtain interest, that does not allow debtor to ignore "new value" rule and to create exclusive right in favor of principal.
- (3626) *In re Maharaj*, Case No. 11-1747 (4th Cir. 2012) – Congress did not abrogate absolute priority rule in individual Chapter 11 cases. Plan could not be confirmed over objection of class of unsecured creditors where plan also proposed that debtors would continue to own and operate auto body business and other personal assets. Debtor's argument that without ability to retain business, debtors would lack any

source of income from which to pay creditors was not sufficient basis to ignore Chapter 11 requirement.

- (3627) *Radlax Gateway Hotel, LLC v. Amalgamated Bank*, ____ US ____ (2012) – Chapter 11 plan that proposed to cram down value of collateral and then sell collateral free and clear of liens could not be confirmed where plan purported to deprive secured creditor of right to credit bid at the bankruptcy sale. Sale of property pursuant to Section 1129(b) allows sale free and clear as part of confirmed plan as long as sale complies with Section 363(k) which expressly authorizes credit bid. Debtor cannot use Section 1129(b)(2)(A)(iii) “indubitable equivalent” provision to circumvent Section 363 requirement for credit bid if property is to be sold.
- (3628) *In re Lindsey*, 2011 WL 344465 (Bankr. E.D. Tn. 2011), *aff’d* 2012 WL 4854718 (E.D. Tn. 2012), *appeal dismissed*, 726 F.3d 857 (6th Cir. 2013), *vacated after further appeal*, 2013 WL 5436968 (E.D. Tn. 2013) – Court vacated prior holding regarding absolute priority rule. Court had previously held that Majority of courts hold that individual Chapter 11 Plan is still subject to absolute priority rule. BAPCPA addition of Section 1129(b)(2)(B)(ii) which requires debtor to commit 100% of disposable income did not eliminate absolute priority rule from individual Chapter 11. Incorporation of Section 1115 only allows debtor to retain property acquired post-petition free of absolute priority rule. Section 1115 does not remove from absolute priority rule property owned by debtor pre-petition. Plan that provided for debtor to retain pre-petition assets while paying dissenting classes less than the full amount of claims was not fair and equitable and could not be confirmed. On further appeal, Sixth Circuit determined that appellate court lacked jurisdiction as Order being appealed was order denying confirmation of plan which is non-final, non-appealable order.
- (3629) *In re Maharaj*, 2011 WL 1753795 (Bankr. E.D. Va. 2011) – Individual Chapter 11 Plan is still subject to absolute priority rule. BAPCPA addition of Section 1129(b)(2)(B)(ii) which requires debtor to commit 100% of disposable income did not eliminate absolute priority rule from individual Chapter 11. Incorporation of Section 1115 only allows debtor to retain property acquired post-petition free of absolute priority rule. Section 1115 does not remove from absolute priority rule property owned by debtor pre-petition. Court could not confirm plan that proposed to retain debtor’s pre-petition homestead where unsecured creditors did not accept plan, as retention would violate absolute priority rule by permitting debtor to retain property while impairing dissenting class of unsecured creditors.

10.17 Absolute Priority – New Value Exception

- (3630) *In re Andrews*, 2015 WL 4608091 (Bankr. M.D. Tn. 2015) – Absolute priority rule applies in all chapter 11 cases including chapter 11 case filed by individual. Plan violated absolute priority rule as plan proposed less than full payment to creditors while allowing debtor to retain pre-petition property. New value corollary requires contribution of new value that is necessary or essential to success of debtor; new value must be money or money’s worth; and new value must be reasonably equivalent to value of assets retained. Debtor’s proposal to contribute future income is not “new value” as individual Chapter 11 debtor is already required to contribute debtor’s projected disposable income. Compliance with code requirement that debtor contribute future income cannot constitute “new value” as it does not add anything that that creditors are not already entitled to receive. New value was also not reasonably equivalent where actual cash to be contributed was \$104,000 but debtor would retain pre-petition asset valued at \$1.25 million.
- (3631) *In re Klosterman Development, Inc.*, 2013 WL 4605451 (Bankr. N.D. Ohio 2013) – New Value exception (or collar) to absolute priority rule allows holders of pre-petition interests to retain interest over dissenting impaired class only if the new value is money or money’s worth and provides capital to Debtor that is necessary for implementation of plan. Principal’s proposal to have debtor borrow money with Debtor co-signing the loan is not “new value” as principal is not providing any money or other items of value. Debtor would be the primary borrower and Debtor’s assets would be pledged as collateral. Principal was not actually contributing anything other than a signature on a loan that Debtor would be responsible to repay.

10.18 Final Decree

- (3632) *Hamadani v. Murphey*, 2012 WL 1969908 (M.D. Tn. 2012) – Alleged party in interest lacked standing to object to entry of final decree where party had sold his ownership interest in debtor prior to commencement of Chapter 11 case. Standing requires that the party must have a personal stake in the outcome of the matter. Party had no ownership interest in debtor-corporation and was not owed money by debtor-corporation and had no other direct personal stake in the corporation or the outcome of the Chapter 11 case.
- (3633) *In re Haines*, 2012 WL 1790219 (Bankr. N.D. Ohio 2012) – Motion for Entry of final Decree denied as Chapter 11 case had not been completed and debtor had not received a discharge. Final Decree and case closing in individual chapter 11 case requires more than just confirmation and payment of initial disbursements. Final Decree must wait until case is fully administered. Debtors have not received a discharge and the plan is not substantially consummated. Plan and latest post-confirmation operating report showed nearly \$166,000 remained owed to priority creditors; and large payment to secured creditors had not been made. Entry of a final decree would be premature. Debtor’s statement that entering Final Decree would allow cessation of Chapter 11 Quarterly Fees was not sufficient reason to issue final decree before completion of case administration.
- (3634) *In re Clymer*, 2012 WL 1252978 (Bankr. N.D. Ohio 2012) – Following BAPCPA, in individual Chapter 11 case, Order Confirming Plan does not operate as discharge. Discharge in individual Chapter 11 is entered after completion of payments. Debtor’s Motion for Final Decree and Entry of Discharge denied as premature where, based on terms of Plan, it was “unlikely” that debtor had completed payments under the plan.

B. Assumption or Rejection of Executory Contracts

10.19 Definition of “Executory”

- (3635) *In re Evans Coal Corp.*, 485 BR 162 (Bankr. E.D. Tn. 2013) – Debtor cannot assume contract that terminated pre-petition. Lease provided that lease would terminate automatically when lessee could no longer mine coal at reasonable profit. Lessee last mined coal at profit more than three years previously. Debtor’s “opinion” that coal can be mined at profit again at some point in the future does not alter fact that lease already terminated on its own terms. Lease also required Lessee to mine coal in accordance with all environmental laws and regulations, and Lessee was in substantial violation of applicable laws and regulations.
- (3636) *In re KY USA Energy, Inc.*, 2010 WL 4923644 (Bankr. W.D. Ky. 2010) - Generally accepted definition of an executory contract is a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other. The trial court should work backward from an examination of the purposes to be accomplished by rejection and, if they have been accomplished, then the contract cannot be said to be executory. It does not include a contract fully performed by one of the parties. Party judicially admitted in its Complaint against Debtor that party fully completed its obligations compelling holding that agreement was not executory.

10.20 Agreements Subject to Assumption or Rejection

- (3637) *In re Trinity Coal Corp.*, 2014 WL 3784244 (Bankr. E.D. Ky. 2014) – Where multiple contracts or agreements are intended to comprise one agreement or transaction, debtor cannot sever them for purposes of assumption or rejection. Multiple documents constituting integrated agreement must be either assumed or rejected in full. Whether several documents form one indivisible contract is a matter of contract interpretation governed by state law. Court will examine written agreement for evidence of the parties’ intent as evidenced by the purpose at the time of contract execution. Equitable considerations prevail over a mechanistic approach as to whether the contract is divisible or indivisible and thus enforceable taking into account objects to be attained and common sense of the situation. If the parties’ intent cannot be derived from the face of the documents, the Court must engage in a fact intensive inquiry considering a variety of factors. Documents evidenced intent that Agreements form one indivisible contract. Agreements were executed contemporaneously by the same parties, they all relate to the same subject matter, one Agreement specifically provided that the transaction would be canceled if the remaining Agreements were not executed, documents defined “entire agreement” to include the remaining Agreements and the multiple Agreements referenced each other, and sole consideration for the Agreements were the various property rights that the parties exchanged as part of the single transaction.

10.21 Time for Assuming or Rejecting

- (3638) *In re Caster*, 2010 WL 4274583 (Bankr. N.D. Ohio 2010) – Unexpired lease of personal property must be assumed within 60 days of order for relief or lease is deemed rejected by operation of law. Assumption of lease requires assumption of lease on the terms of the lease with no variation. Debtor who attempted to assume lease but to change term of purchase option from “payment in full at exercise” to payment over life of Chapter 11 Plan did not assume lease in unaltered form. Debtor’s purported assumption was invalid resulting in automatic lease rejection 60 days after order for relief.
- (3639) *Tencup Property, LLC v. Riley*, Case No. 09-065 (1st Cir. BAP 2010) - Section 365(d)(4) requires the trustee to decide whether to assume or reject a lease of non-residential real property within 120 days after the entry of the order for relief. If the trustee fails to act within 120 days, the lease is deemed rejected and the trustee must immediately surrender the leasehold to the lessor. However, no provision in the Bankruptcy Code or Rules requires the trustee to file a specific motion entitled “motion to reject.” Therefore, the trustee can give notice of intent to reject a lease in another kind of formal motion, such as a sale motion or a settlement motion. The critical question is one of adequate notice — parties to the contract or lease must be given adequate notice of the proposed rejection or assumption. Court can order retroactive rejection where aggregate of facts indicates lessor had ample notice of intent to reject leases and debtor had actually vacated premises and returned premises to the landlord prior to entry of formal order rejecting lease.
- (3640) *In re Greektown Holdings, LLC*, Case No. 08-53104 (Bankr. E.D. Mi. 2008) – Creditor’s Motion to Compel assumption of construction contract denied. Section 365(d)(2) permits Debtor to assume or reject executory contract up to date of confirmation of plan. Court has discretion to accelerate deadline to assume or reject. Court must balance interests of contracting party against interests of Debtor and the estate. Burden is on creditor to justify shortening of time. Creditor’s concerns about Debtor’s ability to pay for future construction as payments come due is not sufficient reason to accelerate deadline, where Debtor has made each post-petition payment in a timely manner and has already cured all pre-petition payment defaults. Contract scheduled to be fully complete in near future, at which time assumption or rejection becomes unnecessary, as opposed to typical executor contract that extends well beyond normal plan confirmation. Creditor will have administrative expense status for any post-petition construction payments, eliminating the need for accelerated assumption and creditor retains its full lien rights pending assumption. Benefit to creditor of early assumption outweighed by potential harm to Debtor.

10.22 Right to Assume

- (3641) *In re Cumberland Corral, LLC*, 2014 WL 948473 (Bankr. M.D. Tn. 2014) – Debtor cannot assume contract if applicable law excuses other party to the contract from accepting performance from or rendering performance to an entity other than the debtor and the other party does not consent. However, enforceable prohibition on assignment does not preclude assumption where debtor, after assuming, does not propose to assign but wants to retain contract. Franchise agreements prohibited assignment without consent of franchisor. However, debtor had no intention of assigning and sought to assume and continue to operate.
- (3642) *Ohio Skill Games, Inc. v. Pace-O-Matic, Inc.*, 2010 WL 2710522 (Bankr. N.D. Ohio 2010) – Debtor may assume Executory Contract even if Contract is not assignable pursuant to applicable non-bankruptcy law. Assumption by the Debtor maintains the parties relationship under the Agreement and does not require the other party to the contract to accept performance from an unknown third party

when it contracted for those services from Debtor. Purported pre-petition termination of agreement does not preclude assumption where contract allowed termination only for “material defaults”. Court concluded that alleged pre-petition defaults either did not exist in fact or were not material to permit termination of agreement. Further, certain defaults such as a failure to maintain sufficient inventory were disputed and, in any event, could be easily rectified. Although non-debtor party alleged that there were sums due and owing pre-petition, party failed to produce evidence of the amount allegedly owed, preventing Court from finding either that default was material or that debtor lacked ability to either cure or provide assurance of prompt cure.

10.23 Right to Assign

- (3643) *In re Appalachian Oil Co., Inc.*, 2009 WL 2843371 (Bankr. E.D. Tn. 2009) – Non-residential Lease that is terminated pre-petition leaves Debtor with no possessory or leasehold interest to become property of the estate and Debtor is not permitted to assume or assign that lease. Whether a lease has been terminated pre-petition is determined by applicable state law where the property is located. Where Landlord had failed pre-petition to clearly and unequivocally terminate the Lease, the Lease remained property of estate subject to assumption and assignment.

10.24 Curing Defaults and Future Performance

- (3644) *In re Cumberland Corral, LLC*, 2014 WL 948473 (Bankr. M.D. Tn. 2014) – Non-monetary, non-curable default does not preclude assumption of executory contract unless default is material or caused substantial economic detriment. Debtor failed two inspections within 12 month period but had addressed issues and passed all post-petition inspections, and there were no allegations that health or safety was compromised or that Franchisor suffered any actual monetary damages. As Debtor is now in compliance, non-curable non-monetary defaults would not preclude assumption. Further, while franchise agreements had cross-default provisions, and debtor admittedly was in default under one franchise agreement, cross-default would not preclude assumption where cross-defaulted agreements are not substantially connected, such that a failure to enforce the cross-defaults would deprive other party of essential part of its bargain. Franchise agreements were independent, executed at different times, for different locations, and there was no evidence that consideration for one franchise agreement supported other franchise agreement or that franchises were in any way economically interdependent.
- (3645) *In re Oreck Corp.*, 2014 WL 929614 (Bankr. M.D. Tn. 2014) – Claim for unpaid “stub rent”, representing the time between the first day of the bankruptcy filing and the date on which the first post-petition rent payment is due, is not entitled to administrative priority. Lease required payment of rent on first day of month. Debtor filed for bankruptcy on the 6th day of the month, without having paid the rent for that month. Court adopted “billing date” method to determine whether rent for month in which case is filed is considered pre-petition or post-petition rent. Obligation to pay rent for that month was pre-petition based on billing date. As rent for that month had completely accrued pre-petition, that rent cannot constitute post-petition administrative claim even for balance of month during which debtor continued to occupy premises. Only those lease payments that first became due after the commencement of the case constitute post-petition rent that can be afforded administrative priority.
- (3646) *In re Applellinois, LLC*, 2014 WL 297327 (Bankr. E.D. Ky. 2014) – Assumption of executory contract requires that debtor (A) cure all defaults or provides adequate assurance that it will promptly cure such defaults, (B) compensate or provides adequate assurance that it will promptly compensate the other party for any pecuniary loss resulting from any default, and (C) provide adequate assurance of future performance under the contract. Section 365 does not create independent right to attorney fees. Actual pecuniary loss is determined by amount that would be recovered under state law outside bankruptcy. Contract that allowed Franchisor to recover attorney fees in actions to construe or enforce franchise agreement did not encompass fees for assumption and assignment, as assumption and assignment did not raise issues of construction or enforcement of franchise agreement.
- (3647) *In re Evans Coal Corp.*, 485 BR 162 (Bankr. E.D. Tn. 2013) – Debtor cannot assume lease that required Lessee to mine coal in accordance with all environmental laws and regulations, where Lessee was in substantial violation of applicable laws and regulations and had no reasonable likelihood of complying with requirements. Property would be so burdensome given cost of remediation and compliance where Lessee had not been able to use property profitably for at least three years even without these additional costs.
- (3648) *Ohio Skill Games, Inc. v. Pace-O-Matic, Inc.*, 2010 WL 2710522 (Bankr. N.D. Ohio 2010) – Section 365 prohibits assumption of executory contract unless party seeking to assume cures all defaults, or provide adequate assurance of a prompt cure; (2) compensates, or provide adequate assurance of such compensation will be made, to a party who has suffered an “actual pecuniary loss;” and (3) provide adequate assurance of future performance.

10.25 Non-Competition Agreements

- (3649) *In re Spooner*, 2012 WL 909515 (Bankr. N.D. Ohio 2012) - Non-compete agreement is not “executory contract” that can be rejected under section 365. Chapter 13 plan that proposed to reject noncompetition agreement could not be confirmed as the plan violated section 1325(a)(1).
- (3650) *In re Houston*, Case No. 09-10769 (Bankr. W.D. Ky. 2009) – Section 365 permits a debtor to assume or reject an executory contract. An executory contract he is one under which the obligations of both parties are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the other party's performance. Whether a party's nonperformance of the remaining obligations under a contract would constitute a material breach is a factual question resolved through application of state law. Executory contract must be accepted or rejected as a whole. Debtor's request to reject only the portion of the agreement that includes the executory contract is not permitted.

10.26 Effect of Assumption

- (3651) *File v. Boersen Farms, Inc.*, 2014 WL 1017041 (Bankr. W.D. Mi. 2014) – Purchaser at bulk sale under Section 365 assumed leases that were identified in Purchase Agreement which included leases with Plaintiff. Purchaser did not exercise right to exclude leases from those being assumed within time permitted, and assumption became final at that point. Documents referred to debtor's assumption and assignment, and purchaser did not have separate right or authority to determine whether lease would be assumed or assigned under Section 365 as power rests solely in debtor-in-possession.
- (3652) *In re Caster*, 2010 WL 4274583 (Bankr. N.D. Ohio 2010) – Unexpired lease of personal property must be assumed within 60 days of order for relief or lease is deemed rejected by operation of law. Assumption of lease requires assumption of lease on the terms of the lease with no variation. Debtor who attempted to assume lease but to change term of purchase option from "payment in full at exercise" to payment over life of Chapter 11 Plan did not assume lease in unaltered form. Debtor's purported assumption was invalid resulting in automatic lease rejection 60 days after order for relief.

10.27 Grounds for Rejection

- (3653) *In re Bing Construction Company*, Case No. 11-57853 (Bankr. E.D. Mi. 2011) – Motion to Reject Executory Contract granted where evidence presented indicated that the cost of Debtor's performance would substantially exceed amount of remaining payments due to Debtor on contract. Assumption of contract would be substantial detriment to debtor and would harm both estate and creditor body as a whole, such that rejection would be in the best interests of the estate.

10.28 Effect of Rejection

- (3654) *Burival v. Roehrich*, 2010 WL 2882222 (8th Cir. 2010) – Debtor who rejects unexpired lease of non-residential real property must perform all obligations arising after the date of assumption. Rent obligations that accrue between Petition and rejection of executory contract must be performed when they arise. Post-petition pre-rejection obligation is not limited to value of the estate up through the date of rejection.

10.29 Failure to Timely Assume or Reject

C. Conversion to Chapter 7

10.30 On Request of Debtor

- (3655) *In re Valentin Company, LLC*, Case No. 08-58645 (Bankr. E.D. Mi. 2008) – Debtor's Ex Parte Motion to Convert Case denied. 11 USC Section 1112 and Federal Rule of Bankruptcy Procedure 1017 require 20 days notice of a Motion to Convert to all creditors and parties in interest.

10.31 On Request of Creditor

- (3656) *In re Vanilla Woodward, LLC*, Case No. 12-44862 (Bankr. E.D. Mi. 2012) – Case converted to Chapter 7 on Motion of US Trustee and Creditor. Court previously denied approval of disclosure statement and afforded debtor opportunity to amend. Debtor failed to amend as allowed. Debtor also evidenced overall failure to timely prosecute case, including multiple failures to appear for 341 meetings; striking lack of knowledge of representative who did finally appear for the 341 meeting; debtor's admitted failure to make timely required adequate protection payments; failure to make required disclosures in Statement of Financial Affairs and failure to amend when deficiencies were brought to debtor's attention; and knowing failure to amend SOFA to correct specific error brought to debtor's and counsel's attention at the 341 meeting.
- (3657) *In re Westgate Properties, Ltd.*, 2010 WL 2802511 (Bankr. N.D. Ohio 2010) – Section 1112(b)(1) permits court to dismiss or convert a case for cause based on best interests of creditors and the estate. Cause includes both a (1) continuing loss to or diminution of estate assets after the entry of the order for relief and (2) an absence of a reasonable likelihood of rehabilitation evidencing an inability to put back the debtor in good condition or re-establish on a firm, sound basis. Cause also exists where Debtor fails to timely to provide information reasonably requested by the United States trustee. Movant bears burden of proving by preponderance of evidence that cause exists. Cause existed where Debtor had filed three separate Chapter 11 cases in three years, each of which was filed solely to forestall foreclosure proceedings. Over the course of its three bankruptcy cases, the Debtor lost its primary tenant; there was no indication that the Debtor will soon have the former tenant's rental space filled, leaving Debtor unable to generate sufficient cash flow to service its debt to the Creditor. Secured Creditor expressed no desire to work with the Debtor leaving Debtor with no option except to cram down the Creditor's interest, which did not appear feasible as Debtor had not made any significant payments to the Creditor. Debtor continued to accrue unpaid real estate taxes and ongoing deferral of required maintenance resulted in continuing loss to and diminution of estate assets. Availability of financing necessary for reorganization was very speculative considering that the value of the underlying property has diminished and any further effort to reorganize appears futile. Debtor had only one significant asset; (2) the Debtor had few unsecured creditors whose claims were small in relation to the claims of the secured creditors; (3) the Debtor had few, if any, employees; (4) the principal asset of the Debtor was the subject of a foreclosure action at the time of the bankruptcy filing; and (5) the timing of the Debtor's bankruptcy filing, occurring just hours before foreclosure, evidences an intent to delay or frustrate legitimate efforts of the Debtor's secured creditors. Debtor also failed to provide information to the United States Trustee until the eve of the Hearings held on Dismissal or Conversion, and even then the information was not complete; and Debtor did not file its schedules and statement of financial affairs until the day of the hearing held to Dismiss or Convert.

10.32 On Request of United States Trustee

- (3658) *White v. McDermott*, 2015 WL 4612349 (E.D. Mi. 2015) – Cause exists for conversion of case from Chapter 11 to Chapter 7 where the

estate is suffering continuing or substantial loss to or diminution of assets and the absence of a reasonable likelihood of rehabilitation. Loss or diminution needs to be either continuing or substantial, not both. Estate was suffering continuing loss where monthly reports reflected expenses in excess of income on a recurring basis, and the deficit was compounded as debtors were not paying the mortgage or the automobile payment which would have increased deficit. "Likelihood of rehabilitation" requires that the debtor or some other party step in and stem losses and place debtor's enterprise back on solid financial footing in a reasonable time. Debtors lacked any reasonable likelihood of rehabilitation where debtor's plan and debtor's amended plan were both rejected by the Court. Debtor's initial plan was fatally defective as it sought to modify the rights of the holder of the mortgage on debtor's residence. Debtors then amended the plan but continued to propose to modify the non-modifiable mortgage, leaving debtor's amended plan with same fatal defect.

- (3659) *McDermott v. Junk*, 2015 WL 4380770 (Bankr. S.D. Ohio 2015) – Conversion more than warranted where debtors had negative income during Chapter 11; debtors' Chapter 11 Operating Reports mischaracterized certain funds received during Chapter 11; and debtors failed to maintain insurance or to pay property taxes on primary asset.
- (3660) *In re Wilderness Crossings, LLC*, Case No. 09-14547 (Bankr. W.D. Mi. 2010) – Section 1112(b)(1) allows the court to convert or dismiss a case in the best interests of creditors and the estate upon cause shown, unless the Court also finds unusual circumstances that make conversion or dismissal not in the best interests of creditors or the estate. Once "cause" is found, conversion or dismissal is mandatory unless Court specifically identifies "unusual circumstances".
- (3661) *In re Westgate Properties, Ltd.*, 2010 WL 2802511 (Bankr. N.D. Ohio 2010) – Section 1112(b)(1) permits court to dismiss or convert a case for cause based on best interests of creditors and the estate. Debtor's failure to provide information to the United States Trustee until the eve of the Hearings held on Dismissal or Conversion, and even then the information was not complete; and Debtor's failure to file schedules and statement of financial affairs until the day of the hearing held to Dismiss or Convert; constituted cause.
- (3662) *In re Oakland Hills Land Development, LLC*, Case No. 10-56463 (Bankr. E.D. Mi. 2010) - Debtor's ongoing mis-management warranted conversion of case to Chapter 7. Debtor's representative failed to appear for the First Meeting of Creditors without any reasonable explanation or grounds, particularly where Court had repeatedly warned Debtor's counsel of the date and time for the First Meeting and where companion case was also dismissed for failure of the representative to appear for the First Meeting of Creditors in that case. Court concluded that conversion, rather than dismissal, was in the best interests of creditors.
- (3663) *LaBankoff v. United States Trustee*, Case No. 09-1300 (9th Cir. BAP 2010) - Section 1112(b)(1) requires conversion or dismissal if cause is established absent unusual circumstances specifically identified by the court that establish that the requested conversion is not in the best interests of creditors and the estate; or if (1) there is a reasonable likelihood that a plan will be confirmed within a reasonable time, (2) the "cause" for dismissal or conversion is something other than a continuing loss or diminution of the estate coupled with a lack of reasonable likelihood of rehabilitation; and (3) there is reasonable justification or excuse for a debtor's act or omission and the act or omission will be cured in a reasonable time. Debtor's failure to confirm a plan within time set by Court at prior status conference permits conversion pursuant to Section 1112(b)(4) for failure to file or confirm a plan within the time fixed by Order of Court. Court had warned Debtor at prior status conference that reorganization would not be possible if funded solely by speculative recoveries from unfilled lawsuits or the "illusory" possibility of sale of patent rights, yet debtor filed proposed plan primarily based on these sources of income. Court correctly concluded that debtor could not realistically effectuate a plan as the funding sources were "not available or were illusory". Debtor made no showing that there were unusual circumstances presented in his case that should justify not converting the case. In addition, the bankruptcy court determined that there was no reasonable possibility that Debtor could confirm a plan in a reasonable time.

10.33 By Court

- (3664) *LaBankoff v. United States Trustee*, Case No. 09-1300 (9th Cir. BAP 2010) – Court has authority to *sua sponte* convert case under Section 105(a).
- (3665) *Mitan v. Duval*, 2009 WL 2059737 (6th Cir. 2009) - Bankruptcy Court has authority to *nunc pro tunc* convert case from Chapter 11 to Chapter 7 to prevent fraud or abuse of the bankruptcy system. Retroactive conversion does not violate Rule 2002(a)(4) which requires 20 days notice of the hearing. - retroactive relief dating back prior to the commencement of the 20 day notice period is appropriate as long as 20 days notice of the hearing itself is provided. Section 105 empowers Court to retroactively convert a case under "very absurd facts" where failure to do so would reward fraud and non-cooperation by Debtor. Case "full of extraordinary circumstances warranting equitable relief", warranted conversion *nunc pro tunc*. Apparent lack of assets or possible insolvent estate, standing alone, does not prohibit conversion rather than dismissal.

10.34 Burden of Proof

- (3666) *In re Wilderness Crossings, LLC*, Case No. 09-14547 (Bankr. W.D. Mi. 2010) – United States Trustee established "cause" for conversion where debtor had history of negative monthly income for each month after the petition date; debtor's failure to make court ordered adequate protection payments; and debtor's post-petition employment tax delinquencies. Debtor bears burden to demonstrate "unusual circumstances" to avoid conversion or dismissal once cause is found. "Unusual circumstances" include events not common in Chapter 11 that indicate that parties would be better served by leaving case in Chapter 11. Debtor demonstrated "unusual circumstances" where debtor was on verge of new financing where lender had already wire-transferred over \$2 million to Debtor's attorney's trust account to be used to purchase virtually all secured claims against Debtor and then doing long term debt restructuring that would allow Debtor to survive. Debtor provided evidence of deal in place between new lender and existing secured lenders that would permit new lender to acquire secured debt at substantial discounts and to also pay outstanding IRS obligations. Proposed transaction would reduce debt load

by more than \$1 million, or approximately one-third of total debt which will provide substantial assistance to debtor.

- (3667) *LaBankoff v. United States Trustee*, Case No. 09-1300 (9th Cir. BAP 2010) – Party requesting dismissal or conversion of Chapter 11 case bears burden of establishing by preponderance of the evidence that cause exists to convert the case from chapter 11 to chapter 7, or to dismiss the case, whichever is in the best interest of creditors and the estate. When the bankruptcy court acts without a movant, it may rely on the record before it in determining cause. Once cause has been established, the Court must convert or dismiss, unless the Court specifically identifies unusual circumstances that establish that such relief is not in the best interest of creditors and the estate; or if (1) there is a reasonable likelihood that a plan will be confirmed within a reasonable time, (2) the "cause" for dismissal or conversion is something other than a continuing loss or diminution of the estate coupled with a lack of reasonable likelihood of rehabilitation; and (3) there is reasonable justification or excuse for a debtor's act or omission and the act or omission will be cured in a reasonable time.

D. Dismissal

10.35 Defects in Petition

- (3668) *In re Detroit Hamtramck Auto Sales, Inc.*, Case No. 08-64124 (Bankr. E.D. Mi. 2008) – Chapter 11 case dismissed where Voluntary Petition filed by individual who is not an attorney. A corporation may not file bankruptcy petition except through an attorney.

10.36 Cause for Dismissal or Conversion

- (3669) *In re Premier Pest Management, Inc.*, Case No. 15-52811 (Bankr. E.D. Mi. 2015) – Case dismissed where debtor failed to appear at status conference and counsel failed to serve Order setting status conference on matrix as required. Case beset by problems including five different documents filed by debtor being stricken and failure to timely comply with order of court to file list of equity security holders by date specified, although list was ultimately filed after deadline.
- (3670) *In re Al-Hafiz, LLC*, Case No. 15-41324 (Bankr. E.D. Mi. 2015) – Debtor's failure to meet deadline in scheduling order to file combined plan and disclosure statement and failure to request extension of that deadline warranted dismissal of Chapter 11 case.
- (3671) *In re Al Huda Properties, LLC*, Case No. 15-41323 (Bankr. E.D. Mi. 2015) – Debtor's failure to meet deadline in scheduling order to file combined plan and disclosure statement and failure to request extension of that deadline warranted dismissal of Chapter 11 case.
- (3672) *The Village at Knapp's Crossing, LLC*, 2014 WL 2574033 (Bankr. W.D. Mi. 2014) – Court can dismiss case for "cause" where debtor has no reasonable prospects of proposing a confirmable plan in a reasonable time. Debtor lacked ability to confirm plan where only asset was largely vacant land and only prospect of reorganizing depended on construction and leasing of major shopping center. Property currently housed only one building housing a single tenant. Debtor had no source of funding for the transformation of raw land into a shopping center capable of generating sufficient revenue. Debtor's own financials showed substantial deficiency in income to cover construction costs or operating expenses. Debtor did not have firm commitment for any financing for the construction or development of site. Even if proposed financing materialized, amount of financing was not sufficient, after paying existing liens, to provide working capital or funds for development. Court would convert case to proceeding under Chapter 7 at request of creditors.
- (3673) *In re New Bride Missionary Baptist Church*, 2014 WL 1364975 (Bankr. E.D. Mi. 2014) – Court declined to approve disclosure statement where plan was facially unconfirmable. Plan appeared to gerrymander unsecured claims to isolate one larger unsecured claim in order to produce accepting impaired class. Court did not dismiss case but entered Order to Show Cause why case should not be dismissed to provide debtor with opportunity to promulgate confirmable plan.
- (3674) *In re Madison Heights Group, LLC*, 2013 WL 8060359 (Bankr. E.D. Mi. 2013) – Cause to dismiss case exists where there appears no viable way to reorganize debtor. Case would be dismissed where debtor's sole income was rent that had been absolutely and unconditionally assigned to creditor prior to commencement of case, as debtor had no funds with which to pay debt or to reorganize affairs.
- (3675) *In re Creekside Sr. Apartments, LP*, 2013 WL 1188061 (6th Cir. BAP 2013) – Bankruptcy Court order dismissing case under Section 1112 is reviewed for abuse of discretion. Dismissal under section 1112(b)(4)(A) requires party seeking dismissal to prove both a substantial or continuing loss or diminution of estate and an absence of any reasonable likelihood of rehabilitation. Court properly dismissed case where debtor, after protracted proceedings, had filed four disclosure statements and plans, none of which were confirmed because debtor failed to properly value tax credits that were appurtenant to debtor's primary assets. Plan also proposed separate classification of bank's deficiency claim from other unsecured claims, although plan proposed identical treatment for both classes. Debtor's cash flow projections indicated negative cash flow through at least 2020, and relied on large balloon payments although debtor had no indication as to amount those payments were anticipated to be or how debtor would make the payments. Case presented no evidence of any ability to reorganize within reasonable time. Ongoing negative cash flow constituted substantial or continuing loss, and financials indicated no reasonable likelihood of reorganization. Debtor failed to demonstrate any unusual circumstances that would establish that conversion or dismissal is not in the best interest of creditors.
- (3676) *Estate of Gray v. McDermott*, 2011 WL 946729 (E.D. Mi. 2011) – Court properly dismissed case *nunc pro tunc* at request of creditor where debtor was not eligible for relief under Chapter 11 in the first instance.

10.37 Dismissal With Prejudice to Re-filing

- (3677) *In re Lee*, 467 BR 906 (6th Cir. BAP 2012) – Bankruptcy Court properly dismissed individual Chapter 11 Case with prejudice to debtor filing another petition for relief for 180 days. Alleged mortgage creditor had standing to request dismissal. Creditor either held valid

assignment of note and mortgage or, if not, creditor had at least an equitable interest in note and mortgage sufficient to support standing as “creditor”. Although “bad faith” is not expressly enumerated in Section 1112 as a basis for dismissal, “cause” is flexible concept that incorporates bad faith as one possible basis. Bad faith is fact-specific determination based on totality of circumstances. Petition was debtor’s third Chapter 11 filing. Each of the prior two filings were dismissed because debtor failed to file required documents; failed to produce financial records at the prior Section 341 meetings; and failed to pay filing fees in at least one prior case. Debtor’s primary reason for filing was to stop foreclosure but debtor had no meaningful ability to reorganize in an honest or forthright fashion. Court can dismiss case with bar to refiling under Sections 109 and 349 for up to 180 days for cause. Serial filings designed to delay creditors, coupled with failure to file schedules, failure to pay filing fees, and failure to produce documents evidenced intent to frustrate the bankruptcy process rather than reorganize affairs.

- (3678) *In re Morris*, 2010 WL 3910222 (Bankr. N.D. Ohio 2010) – Court can dismiss case with prejudice to re-filing pursuant to Section 109(g) for 180 days. Court has authority under Section 105 and Section 349 to dismiss with prejudice for a period longer than 180 days to prevent an abuse of process. Dismissal with prejudice for two years warranted where Debtor has repeatedly filed such that Debtor has been under the protection of the Bankruptcy Code for all but a little over six months of the preceding 6 years. Morris filed his first chapter 13 case in 2004 which was subsequently dismissed in 2009 for failure to pay. Less than three months later, Debtor filed his second chapter 13 case which was dismissed for failure to appear at the confirmation hearing. A little over three months after that dismissal, Debtor filed his third chapter 13 case that was for failure to pay, failure to obtain credit counseling, failure to assert consistent exemptions and failure to comply with 11 U.S.C. Section 1325(a)(4). Seventeen days later, Debtor filed the instant case. Debtor has not made any meaningful payments to his creditors since dismissal of his first Chapter 13 case and has not made a mortgage payment in over a year or a payment on his car note in 2010. Debtor included the monthly payment on a disputed mortgage on his schedule J in this and did not take any steps in this case to have the Court rule on the validity of the mortgage. Debtor was less than cooperative in this case with complying with his statutory duties as a debtor. Debtor failed to attend the initial debtor’s conference with the U.S. Trustee; Debtor has not paid any portion of the case filing fee; Debtor did not pay any quarterly fees to the U.S. Trustee’s office nor has he filed any monthly operating reports; Debtor did not file the credit counseling as mandated by 11 U.S.C. Section 521; and Debtor has asserted exemptions which are not allowed by law. Debtor’s behavior at various hearings evidenced bad faith. The Court took large amounts of time to try and explain the statutory requirements to Debtor only to have him appear at the next hearing and feign ignorance. Debtor accused various judges and clerk’s office staff of attempting to thwart his efforts to obtain bankruptcy relief when the only thing they have done is required him to comply with the Bankruptcy Code.

E. Retention and Compensation of Counsel

10.38 Requirements for Retention

- (3679) *In re Ortega*, 2011 WL 3810287 (Bankr. W.D. Ky. 2011) – Court lacked authority to approve retention *nunc pro tunc*. Although case had been heavily litigated and counsel had performed extensive services, counsel failed to demonstrate any extraordinary circumstances that would warrant late filing of Application for retention. Although Court would certainly have approved retention had application been timely filed, Court cannot grant the Application and make it effective as to the date of the filing of the Petition absent extraordinary circumstances. Application for Retention would be approved effective with date of filing of Application only.
- (3680) *In re Sausa*, Case No. 10-55640 (Bankr. E.D. Mi. 2011) – Sections 327 and 330 and Federal Rule 2014 require counsel for Debtor in Chapter 11 to have retention approved by the Court. Where approval is not obtained, court can grant approval on a *nunc pro tunc* basis under “exceptional circumstances”. Counsel failed to obtain approval over long period of time notwithstanding several “milestones” which should have alerted Counsel to need to seek approval for retention. *Nunc pro tunc* application for retention and Counsel’s fee application both denied in their entirety.

10.39 Lack of Authorization to Retain Counsel

- (3681) *In re Machinery Maintenance Specialists, Inc.*, 2010 WL 7346416 (Bankr. E.D. Mi. 2010) – Section 327 requires court approval for debtor’s retention of counsel in Chapter 11 case. Section 330 authorizes compensation to be paid only to counsel whose retention is approved by the Court. Counsel who never filed Application for Retention and whose retention was never approved by the Court not entitled to compensation for services in Chapter 11 Case. Counsel never filed the application, there was no time pressure that would have prevented filing at commencement of case, counsel delayed more than one year after filing the case to seek approval for retention and then did so only after the United States Trustee filed a Motion for Turnover of the pre-petition retainer, and allowing counsel to keep the unapproved retainer would adversely affect other parties. Counsel required to disgorge to the United States Trustee the retainer received prior to commencement of the case.

10.40 Denial of Application to Retain Counsel – Effect

- (3682) *In re Moohaven Dairy, LLC*, Case No. 10-24239 (Bankr. E.D. Mi. 2011) – Denial of application for retention of counsel strips counsel of any authority to appear for or on behalf of debtor. Counsel’s continued activity purportedly on behalf of Debtor constituted contempt for which sanctions are available.

10.41 Compensation

- (3683) *In re Stetler Cross Ministries, Inc.*, 2010 WL 2696769 (Bankr. W.D. Ky. 2010), *aff’d sub nom Stetler Cross Ministries, Inc. v. McDermott*, 2011 WL 1434615 (W.D. Ky. 2011) – Section 330(a)(2) and Court’s broad and inherent authority permits bankruptcy court to order disgorgement of previously paid attorney fees where an attorney fails to satisfy the requirements of the Code and Rules. Debtor’s Counsel received a \$2000 fee although counsel never filed an application to have himself or his firm retained as counsel and never filed

an application for approval of compensation as required by sections 327, 330 and 331. Debtor's counsel in a Chapter 11 proceeding cannot be paid without seeking and obtaining prior court approval. There are few omissions more serious in a Chapter 11 case than the failure of a debtor's attorney to obtain court approval prior to securing payment for services rendered from a debtor's estate. Bankruptcy Code Rules strictly regulate the compensation of professionals for the purpose of preventing over-reaching. Failure to follow these rules, regardless of how *de minimis* the fee, cannot be overlooked by the Court. Further, Counsel did not place the unawarded fees in his trust account, but rather drew upon the funds, and spent them, all without Court approval. Although failure may have been inadvertent or negligent failure to disclose, the failure to seek Court approval by Debtor's counsel prior to accepting the fee and having his employment approved by the Court requires disgorgement.

XI. Chapter 13

A. Eligibility

11.1 Generally

- (3684) *In re Woods*, Case no. 11-72329 (Bankr. E.D. Mi. 2012) – Debtor's Chapter 13 petition that included reference to limited liability company as "all other names used by debtor" improperly attempted to join LLC as debtor. Debtor failed to amend petition to delete reference to LLC so that it would be clear that LLC had not filed bankruptcy. Case dismissed.
- (3685) *In re Scarlett*, Case No. 09-50320 (Bankr. E.D. Mi. 2012) – Debtor's Chapter 13 petition that included reference to limited liability company as "all other names used by debtor" improperly attempted to join LLC as debtor. Debtor failed to amend petition to delete reference to LLC so that it would be clear that LLC had not filed bankruptcy. Case dismissed.
- (3686) *In re Executive Business Corporation*, Case No. 08-46714 (Bankr. E.D. Mi. 2008) - Corporation is not eligible for relief under Chapter 13.

11.2 Section 109 – Regular Income

- (3687) *In re Gomery*, 2015 WL 349170 (Bankr. W.D. Mi. 2015) – Incarcerated debtor who had no income at all and had no reasonable prospect of having income in the future was not eligible. Chapter 13 requires debtor to have regular income.
- (3688) *In re Lovell*, 444 BR 367 (Bankr. E.D. Mi. 2011) – Debtor did not have "regular income" where debtor was unemployed and relied entirely on spouse for funds to make plan payments, where debtor's spouse was also debtor in separate Chapter 13 case. While support from non-filing spouse constitutes regular income as long as history of regularity and stability is provided, debtor's spouse in Chapter 13 is required to commit 100% of disposable income to funding spouse's own plan. Therefore, spouse did not have any income that could be given to debtor to fund her chapter 13 plan and debtor lacked "regular income" for purposes of Chapter 13 eligibility.

11.3 Section 109 – Debt Limits

- (3689) *In re Asch*, 2015 WL 4973196 (Bankr. E.D. Ky. 2015) – Court will rely primarily on debtor's schedules, checking only to see that schedules were made in good faith, as eligibility is determined by debts that existed on date of petition and not after a hearing. However, court is not bound by information in schedules where it appears to legal certainty that amount owed exceeds amount shown by debtor. If court has notice of possible manipulation, court can review other parts of record to determine whether amount and nature of debtors was reasonable or whether facts existed as of the petition date to demonstrate that schedules were manipulated. Schedules indicated effort by debtor to manipulate debts. Debtor failed to include pre-petition interest on secured debts; failed to schedule secured claim of IRS and stated that IRS debt was uncollectable; debtor listed mortgage debts as contingent and unliquidated although principal and interest amounts were easily calculated based on note and mortgage, and debtor was primary borrower and there were no events required to give rise to liability. Based on claims scheduled and proofs of claim filed, debtor's secured debt exceeded debt limits. Debtor given opportunity to convert case or case would be dismissed.
- (3690) *In re Shen*, 2011 WL 3236182 (Bankr. N.D. Ca. 2011) – Unsecured portion of undersecured debt is normally considered as unsecured debt for purposes of eligibility. However, where debtor's personal liability on note had been discharged in prior Chapter 7 case, any alleged deficiency balance is unenforceable and therefore is not included in calculation of unsecured debts in Chapter 13.
- (3691) *In re Hannon*, 455 BR 814 (Bankr. S.D. Fla. 2011) – Joint Chapter 13 Debtors with combined debts exceeding statutory limits are eligible for relief under Chapter 13 if each individual's debts are within limits. Case dismissed where each debtor, standing alone, had debts that exceeded Section 109 limits.
- (3692) *In re Bowley*, 2011 WL 4458928 (Bankr. D. Hawaii 2011) – Debtor not eligible for relief under Chapter 13 where schedules indicated claim secured by debtor's mortgage exceeded \$6 million.
- (3693) *In re Hurtt*, 2011 WL 1576085 (Bankr. E.D. Ky. 2011) – Court should first examine debtor's schedules to determine eligibility. Review is not limited to Schedule D, and court can consider all schedules as well as summary of schedules. Where schedules showed deficiency balances on secured claims that exceed unsecured debt limits, debtor is not eligible and case must be dismissed. Obligation is not "secured" for purposes of eligibility if the collateral belongs to third party and not to debtor.
- (3694) *In re Schumacher*, Case No. 10-57196 (Bankr. E.D. Mi. 2010) – Undersecured portions of secured claims and wholly undersecured claims are treated as unsecured claims for purposes of Section 109 eligibility. Although lien strip will not be final and effective until plan completion, Section 506 limits value of secured portion of claim to value of property. Any excess obligation is unsecured in determining eligibility.

- (3695) *In re Bowes*, 2009 WL 2983036 (Bankr. N.D. Ohio 2009) - Eligibility depends on noncontingent, unliquidated unsecured debts “on the date of the filing of the petition.” Chapter 13 eligibility should normally be determined by the debtor’s schedules, checking only to see if the schedules were made in good faith. The schedules (1) are the starting point of the eligibility inquiry, but may also be the ending point under certain circumstances; (2) the word “normally” used with respect to reliance on schedules implies exceptions for the proper application of a court’s discretion so long as the determination focuses on determining debts “on the date of filing,” and (3) eligibility determination should not depend on the claims allowance process or turn into separate satellite litigation that dominates and delays the Chapter 13 proceedings. Undersecured portion of secured claims are treated as unsecured debts for eligibility purposes. Court can consider Debtor’s Amended Schedule F where original Schedule F listed debts that were obligations of a failed corporation which were not guaranteed by Debtor and any potential liability would depend on piercing the corporate veil or some other theory. The Amended Schedules do not change any debts for which the Debtors were personally liable, but only deleted those debts for which Debtors were not personally liable and, therefore, represent a more accurate statement of the Debtors’ debts and obligations. Debts which are the subject of a valid pre-petition state court judgment must be included as those debts are not contingent or unliquidated.

11.4 Debt Limits – Unliquidated or Contingent Debts

- (3696) *In re Yuen*, 2013 WL 5567266 (Bankr. S.D. Tx. 2013) – Appeal of final judgment does not render debt unliquidated or contingent.
- (3697) *In re Perkins*, 2009 WL 2983034 (Bankr. N.D. Ohio 2009) – Eligibility depends on noncontingent, unliquidated unsecured debts “on the date of the filing of the petition.” Chapter 13 eligibility should normally be determined by the debtor’s schedules, checking only to see if the schedules were made in good faith. The schedules (1) are the starting point of the eligibility inquiry, but may also be the ending point under certain circumstances; (2) the word “normally” used with respect to reliance on schedules implies exceptions for the proper application of a court’s discretion so long as the determination focuses on determining debts “on the date of filing,” and (3) eligibility determination should not depend on the claims allowance process or turn into separate satellite litigation that dominates and delays the Chapter 13 proceedings. The Court must make an independent determination apart from Debtor’s schedules whether debts are contingent and unliquidated, particularly where Debtor’s schedules list every debt as contingent and unliquidated. Secured debt is treated as unsecured to the extent the claims exceed the collateral value. Claims based on mortgages and consensual secured lending arrangements are not contingent or unliquidated. Debtor’s personal liability for corporate debts will be contingent if there is no personal guarantee and no pre-filing determination of personal liability. However, personal liability premised on a personal guarantee is not contingent. Personal credit card debt is not contingent or unliquidated just because items were purchased for Debtor’s business. Debtor’s unsecured debt exceeded limits of Section 109 requiring dismissal of Debtor’s Chapter 13 Petition.
- (3698) *In re Frederick*, 2011 WL 5908957 (Bankr. E.D. Mi. 2011) – Debt is “liquidated” if the amount can be ascertained. Dispute over underlying liability does not render debt unliquidated where amount of claim can be calculated. Consent judgment entered prior to commencement of case liquidated claim at \$950,000. Debtor’s opinion or “belief” that creditor would ultimately agree to accept far less in satisfaction of claim did not render debt unliquidated. Whether debt is liquidated is determined as of date petition is filed without regard to whether the amount of the claim may be later reduced or even eliminated.
- (3699) *In re Croney*, 2011 WL 1656371 (Bankr. W.D. Wa. 2011) – For purposes of eligibility, debtor’s unconditional personal liability of corporate obligation is liquidated unsecured debt. Unconditional guarantee did not require lender to pursue recovery of collateral or take other collection actions against corporate borrower before pursuing guarantor rendering guarantor liable for full balance of loan. Collateral pledged by corporate borrower did not convert claim into secured claim as to debtor where there was no property of the debtor pledged as collateral.

B. Confirmation of Plan

11.5 Form of Plan

- (3700) *In re Rose*, 2015 WL 151221 (Bankr. W.D. Mi. 2015) – Court has authority to mandate use of standard form plan. To extent that plan permits changes, any changes must be applicable to the case at hand. Additional provisions that do nothing more than restate parties’ rights under the law thwart goal of providing streamlined method for reorganization and are not “alterations as may be appropriate to suit the circumstances”. Provision purporting to define effective date of the plan is unnecessary where plan is effective upon date order is entered by court on the docket absent some peculiar circumstance in the case. Blanket provision allowing debtors to pursue all Chapter 5 causes of action is unnecessary, duplicative and arguably conflicts with applicable law particularly where debtor could not identify any particular cause of action that debtor may want to pursue. Court would not prohibit provision requiring application of payments notwithstanding that plan already provided for allocation of payments where including additional provision was warranted precaution given history and circumstances of case.
- (3701) *In re Ott*, 2014 WL 1430009 (Bankr. S.D. Tx. 2014) – Bankruptcy court can mandate use of standard form plan that allows deviation only “for good cause shown”. Court would not approve deviation absent exceptional circumstances peculiar to debtor’s case.
- (3702) *In re Visintainer*, 435 BR 727 (Bankr. M.D. Fl. 2010) – Court has authority to promulgate mandatory form Chapter 13 plan. Form plan facilitates Court’s independent duty to ensure that plan complies with Code, and facilitates uniformity and efficient review of plans throughout district. Court’s adoption of mandatory model plan does not conflict with Code requirement that only the debtor is permitted to file a plan. Mandatory form plan allowed debtor to supplement plan with case specific provisions.
- (3703) *Diaz v. Zeman*, 462 BR 804 (Bankr. D. Colo. 2011) – Debtor cannot avoid local rule that requires use of local form plan. Required form of plan is within scope of rule making authority of court and does not violate provisions of Chapter 13.

- (3704) *In re Butcher*, Case No. 11-10545 (Bankr. D. Co. 2011) – Bankruptcy Court has authority to mandate form of Chapter 13 plan. Adoption of mandatory form plan does not exceed Court’s rule making powers as form plan does not violate either Section 1325 or Section 1329. Bankruptcy courts have “daunting challenge” to ensure that plans are in full compliance with Section 1325. Adoption of standard form plan reduces chances that court will confirm plan that does not comply.

11.6 100% Plans

- (3705) *In re Bailey*, 2013 WL 6145819 (Bankr. E.D. Ky. 2013) – Debtor who proposes full repayment to unsecured creditors not required to commit 100% of disposable income. Debtor could not be required to increase payments at end of 401-k loans just because increase would allow plan to complete at 100% dividend at earlier date.
- (3706) *In re McGehan*, 2013 WL 4069524 (Bankr. D. Colo. 2013) – Debtor who proposes 100% dividend cannot be compelled to pay larger payment and to shorten plan term. Although debtor had disposable income of more than \$4,000 per month, plan proposed payments of \$1,000 per month and full repayment of allowed claims. Plan complied with requirements of code, and debtor has no good faith obligation to pay more merely to shorten plan term. Above median debtor had 60 month applicable commitment period and was entitled to use entire plan term to pay 100% dividend even if debtor is not committing all disposable income.
- (3707) *In re Braswell*, 2013 WL 3270752 (Bankr. D. Ore. 2013) – Where a creditor objects, the debtor must either contribute 100% of disposable income or must pay interest to unsecured creditors. Debtor can pay 100% dividend to unsecured creditors over stretched out plan length and pay less than full disposable income each month, but must compensate unsecured creditors for the delay.
- (3708) *In re Hight-Goodspeed*, 486 BR 462 (Bankr. N.D. Ind. 2013) – While debtor who proposes to pay 100% to unsecured creditors is permitted to stretch out plan term and to pay less than full monthly disposable income, debtor must then pay interest to unsecured creditors. Chapter 13 requires debtor to either pay 100% of monthly disposable income or to pay interest to unsecured creditors to compensate for the delay in payment.
- (3709) *In re Winn*, 469 BR 628 (Bankr. W.D. N.C. 2012) – When debtor proposes plan that pays 100% to unsecured creditors, debtor is not required to commit 100% of disposable income. Debtor cannot be required to shorten plan term and pay 100% in less than 60 months. Although debtor’s budget contained “exorbitant” expenses for leasing home and retaining property with no equity, Section 1325 requires only that debtor either pay 100% or commit 100% of disposable income.
- (3710) *In re Richall*, 470 BR 245 (Bankr. D.N.H. 2012) – Section 1325 requires debtor to commit 100% of disposable income only when paying unsecured creditors less than a 100% dividend. Plan confirmed at 100% dividend even though plan payment was only one-half of debtor’s disposable income.

11.7 Requirements for Confirmation Generally

- (3711) *In re Weese*, Case No. 09-9268 (Bankr. W.D. Mi. 2010) – Court cannot confirm plan that does not comply, in all respects, with requirements of Code and Rules. Supreme Court in *Espinosa* mandated that Court has independent duty not confirm to plan that is inconsistent with requirements of Code, even absent an objection to confirmation by any creditor or the Chapter 13 Trustee. Court would not confirm Plan that proposed to strip unsecured second mortgage without adversary proceeding under Rule 7001. Court would not ignore Congress’s decision to require an adversary proceeding as a prerequisite to avoiding or invalidating liens or other interests in property, simply because it is expedient or because the creditor has not objected or filed a proof of claim. Bankruptcy courts are not licensed to disregard the Federal Rules of Bankruptcy Procedure or to turn a blind eye to the procedural shortcuts.
- (3712) *In re Peckens-Schmidt*, 2010 WL 2851520 (Bankr. W.D. Mi. 2010) – Court cannot confirm plan that does not comply, in all respects, with requirements of Code and Rules. Court would not confirm Plan that proposed to strip unsecured second mortgage without adversary proceeding under Rule 7001. Court would not ignore Congress’s decision to require an adversary proceeding as a prerequisite to avoiding or invalidating liens or other interests in property, simply because it is expedient or because the creditor has not objected or filed a proof of claim. Bankruptcy courts are not licensed to disregard the Federal Rules of Bankruptcy Procedure or to turn a blind eye to the procedural shortcuts. Plan failed to comport with the United States Bankruptcy Code and the Bankruptcy Rules and could not be confirmed even absent objection from affected creditor or the Chapter 13 Trustee.

11.8 “Means Forbidden by Law” – Section 1325(a)(2)

- (3713) *In re Johnson*, 2015 WL 3764728 (Bankr. W.D. Mi. 2015) – Debtor is not permitted to be in Chapter 13 where portion of income is derived from growing and sale of medical marijuana. Although debtor’s conduct is lawful under Michigan law, it remains illegal under Federal law. Bankruptcy Judge, as Federal Judge, must uphold federal law. Debtor cannot “segregate” marijuana income from other income and only use “other” income for plan payments as marijuana income necessarily impacts debtor’s expenses and impacts debtor’s ability to make plan payments even if marijuana income is not direct source of payments. Debtor can remain in Chapter 13 only if debtor closes business and destroys inventory and equipment.
- (3714) *In re Arenas*, 514 B.R. 887 (Bankr. D. Colo. 2014), *aff’d*, Case No. 14-046 (10th Cir. BAP 2015) – Debtor engaged in medical marijuana business, although legal as a matter of State law, violates Federal Law requiring dismissal of case. Court can deny request to convert where debtor would not be eligible for relief under Chapter 13 or where conversion would constitute lack of good faith. Reorganization efforts would be funded from profits of ongoing criminal activity under federal law and would necessarily require Chapter 13 Trustee to administer and distribute funds derived by debtors from operation of business in violation of federal law failed to comply with Section 1325(a)(3) which requires the plan to be proposed in good faith and not by any means forbidden by law. Monthly income from other sources was not sufficient to fund a plan and debtors’ ages and health issues indicated that there was on likely ability to increase income

and Trustee's acts in administering case would themselves constitute federal crimes.

11.9 Projected Disposable Income – Future Income

- (3715) *In re Grabarczyk*, 2012 WL 5409373 (Bankr. N.D. Ohio 2012) – Annual bonuses reasonably certain to be received although not known in amount are included in projected disposable income and must be paid to the trustee when received.

11.10 Projected Disposable Income – Litigation Recovery

- (3716) *In re Daniels*, 2013 WL 365107 (Bankr. E.D.N.C. 2013) – Proceeds of post-petition personal injury action are not disposable income in Chapter 13. After confirmation of plan, debtor suffered personal injury. Debtor amended Schedules to disclose and exempt claim and no party objected to the exemption. Court rejected majority holding that exempt income could still be disposable income. Court adopted minority position that exempt assets are excluded from disposable income. Congress did not intend disposable income to include recoveries on post-petition personal injury actions. If Congress had intended to include post-petition personal injury recoveries as disposable income, congress could have clearly stated such in Section 1306 and Section 1325.
- (3717) *Connor v. Carroll*, 2013 WL 150150 (6th Cir. 2013) – Proceeds of post-petition settlement of pre-petition personal injury litigation were not disposable income where amount of settlement was neither known nor virtually certain at the time of confirmation of the plan.
- (3718) *In re Mobley*, 2011 WL 6812551 (Bankr. E.D. Mi. 2011) – Proceeds of litigation that were received pre-petition and fully exempted did not constitute “disposable income”. Chapter 13 requires debtor to commit future earnings and future income to funding of plan. Post-petition income does not include pre-petition property or its proceeds.

11.11 Projected Disposable Income – Non-Filing Spouse

- (3719) *In re Blackshear*, 2015 WL 2405848 (E.D. Mi. 2015) – Debtor's Schedule I needs to disclose only the income of the non-filing spouse to the extent routinely contributed to household expenses. Debtor did not violate Section 521 by failing to disclose all income of the non-filing spouse and failure to disclose did not result in failure to prove either that debtor was contributing best efforts or that plan was feasible.
- (3720) *In re Hicks*, Case no. 12-64774 (Bankr. E.D. Mi. 2013) – Debtor's non-filing spouse not required to commit spouse's income for funding of debtor's plan where claims being administered in Chapter 13 consists of debts that debtor had prior to commencement of the case. Issue is fact question based on “whose debt is it”, and court will not require new spouse to contribute to payments of debts incurred prior to debtor's marriage where spouse is already contributing substantial portion of income to the plan on a voluntary basis. Spouse was not saving every dime of income and was already contributing large portion of income to household expenses, spouse permitted to retain balance of income for spouse's discretionary use including savings.
- (3721) *In re Stampley*, 2010 WL 4235317 (Bankr. E.D. Mi. 2010) – Where married debtor files individually, court calculates disposable income on debtor's family budget including income and expenses of non-debtor spouse. Failure to do so would leave debtor's unsecured creditors to subsidize spouse's expenses. Household expenses should be allocated between debtor and spouse based on proportionate income. Debtor who earned 66% of the household income would be allocated 66% of household expenses plus any sole expenses such as car payment and car insurance for debtor's car. Those expenses are then deducted from debtor's income to determine plan payment. Although Debtor's Schedule J indicated total disposable income of only \$165, allocation of expenses produced excess income of debtor of \$802 which would produce 100% dividend to unsecured creditors. Permitting debtor to allocate more than her proportionate share of income to the household expenses would unfairly prejudice debtor's creditors and would amount to a “gift” by debtor to her non-filing spouse.

11.12 Projected Disposable Income – Social Security Income

- (3722) *In re Hall*, Case No. 15-30749 (Bankr. E.D. Mi. 2015) – Social Security income is excluded from calculation of Current Monthly Income in Section 101(10A). Section 1325(b) defines disposable income as Current Monthly Income less certain deductions. As Social Security is not included in CMI, debtor is not required to include Social Security in calculating disposable income or plan payment. However, exclusion of income is not *per se* good faith under Section 1325(a)(3), which is separate obligation from Section 1325(b). If retained Social Security benefits enable debtor to lead extravagant lifestyle or to acquire luxury goods, failing to commit that income to plan is lack of good faith. Court could not reach conclusion where there was no evidence in record as to the uses for debtor's Social Security income that is not committed to the Plan.
- (3723) *In re Mihal*, 2015 WL 2265790 (Bankr. E.D. Mi. 2015) – Social Security income received by debtor is excluded in calculation of Current Monthly Income. Debtor's Chapter 13 Plan did not lack good faith where plan payment excluded debtor's social security income.
- (3724) *In re Worthington*, 2014 WL 1173316 (Bankr. S.D. Ind. 2014) – Social Security income received by debtor is excluded from calculation of Current Monthly Income. Debtor's Chapter 13 plan did not lack good faith where plan did not include substantial portion of social security income.
- (3725) *Mort Ranta v. Gorman*, 2013 WL 3286252 (4th Cir. 2013) – Debtor cannot be required to include Social Security income in calculating projected disposable income or plan payment, regardless of whether debtor is above or below median income. Projected disposable income is calculated using disposable income, adjusted in exceptional cases where future changes are known or virtually certain to occur.
- (3726) *In re Berry*, 2013 WL 249862 (Bankr. E.D. Wash. 2013) – Debtors with below median income not required to include income received from social security in determining projected disposable income. Calculation of disposable income, whether debtors are above median or

below, starts with calculation of CMI, which expressly excludes social security. While debtors can voluntarily agree to commit all or some portion of Social Security, debtors cannot be compelled to do so.

- (3727) *Drummond v. Welsh*, 711 F.3d 1120 (9th Cir. 2013) – Analysis of Good Faith includes whether debtor has misrepresented facts or manipulated code or acted in inequitable manner; debtor’s history of bankruptcy filings; whether debtor filed solely to frustrate collection of state court judgment; and other egregious behavior. Good faith for purposes of Chapter 13 confirmation does not require debtors to contribute social security for funding of plan. BAPCPA adopted rigid, mechanical means test to determine disposable income, which begins with Current Monthly Income which expressly excludes social security income. Plan proposed in accordance with very detailed calculations that Congress set forth does not lack good faith. Court will not substitute its judgment for that of Congress in determining how much of what type of income is to be included in calculating plan payment. Court cannot, under guise of “good faith” ignore requirements and limitations that Congress chose to enact. Where a Chapter 13 debtor calculates repayment plan and excludes social security income as Code allows, exclusion cannot constitute lack of good faith. Debtors cannot lack good faith merely because debtors do what Code allows. That debtors will retain Social Security without paying creditors is financial condition, not an inquiry into motivation which is the definition of good faith. Amount paid to unsecured creditors is not component of good faith, and requirements of good faith and disposable income are separate and distinct. Fact that excluding Social Security appears to circumvent stated purpose of requiring those who can pay to pay, Congress chose to implement that purpose through the means test, which excludes social security income.
- (3728) *Anderson v. Cranmer*, 2012 WL 5235365 (10th Cir. 2012) – Social Security of debtor and non-filing spouse are excluded from calculation of projected disposable income and do not need to be included in calculating plan payment. Exclusion of SSI from calculation of PDI was not lack of good faith that prevents confirmation of the plan.
- (3729) *Beaulieu v. Ragos*, Case no. 11-31046 (5th Cir. 2012) – Social Security benefits are not included in calculation of projected disposable income. Although Code does not define “projected disposable income” the definition of “disposable income” specifically excludes Social Security income; and definition of “current monthly income” similarly excludes Social Security income. In light of Congressional intent to exclude Social Security from CMI and disposable income, “it makes little sense to circumvent that prohibition by allowing social security income to be included in *projected* disposable income.” Conclusion is further bolstered by Social Security Act, 42 USC Section 407(a), enacted in 1935, that prohibits Social Security income from being subject to “any bankruptcy or insolvency law.” Debtors’ refusal to commit 90% of their Social Security income is not “bad faith” that would preclude confirmation where Debtors, as a matter of law, are not required to include SSI in calculating plan payment.
- (3730) *Baud v. Carroll*, 2011 WL 338001 (6th Cir. 2011) - Social Security income does not have any role in calculating “disposable income” or “projected disposable income” in Chapter 13. However, Court did not determine whether Social Security income had some other role in Chapter 13, such as in calculating Schedule I or in determining “monthly disposable income” on Schedule J.
- (3731) *In re Tobias*, Case No. 11-40453 (Bankr. E.D. Mi. 2011) – Debtor’s social security income is excluded in determining disposable income and projected disposable income pursuant to Section 101(10A). Debtor not required including Social Security Income on B22C. Debtor should list Social Security Income on Schedule I but is allowed to then deduct that income on Schedule J. Court did not address issue of whether deduction of Social Security Benefits constituted lack of good faith.
- (3732) *In re VanDyne*, 2011 WL 3664551 (Bankr. N.D. Ohio 2011) – Non-filing spouse unemployment income is included in determining disposable income in Chapter 13. Unemployment is not a benefit received under Social Security Act. Further, calculation of projected disposable income is not limited to mechanical approach in calculating CMI (from which Social Security would be excluded) but looks prospectively to determine ability to pay.
- (3733) *In re Mains*, 2011 WL 2160890 (Bankr. W.D. Mi. 2011) – Debtor who receives Social Security Income is required to include that income in determining projected disposable income under Section 1325(b). Exclusion of Social Security from calculation of CMI does not remove that income from consideration of Debtor’s good faith and must be considered with the rest of Debtor’s circumstances to determine if Debtor sincerely intends to repay creditors.
- (3734) *In re Herrmann*, 2011 WL 576753 (Bankr. D.S.C. 2011) - Above-median-income debtor’s failure to list his ongoing receipt of Social Security income in Schedule I resulted in Debtor’s plan lacking good faith. Debtor contended that social security income is not subject in any way to the bankruptcy case, does not have to be disclosed, and can be applied or used by the debtor for any purpose, including savings or luxury items, without implication of the good faith or confirmation standards. Court stated that Section 521(a)(1)(B) requires a debtor to file a schedule of current income without limitation or exclusion. Although Section 101(10A) excludes Social Security income for purposes of calculating “disposable income”, no exclusion for social security income is provided in § 521(a)(1)(B). Means test does not override Section 521(a)(1)(B) requirement to report current income and current expenses. Debtor’s failure to include Social Security income on Schedule I would result in the spouse assuming a disproportionate share of the household expenses, by allowing one spouse to effectively shield income from the payment of those expenses and forcing the other spouse to absorb those expenses. Section 521 and good faith require the disclosure of all income, including Social Security income, on Schedule I.
- (3735) *In re Vandenbosch*, 459 BR 140 (M.D. Fl. 2011) – Debtor cannot be required to include social security income on Schedule I or to include that in determining whether plan payment constitutes all disposable income. BAPCPA excludes social security from calculation. Because social security benefits are not a component of projected disposable income, a plan cannot be rejected for failure to include such benefits as projected disposable income. A necessary corollary is that a finding of bad faith may not be based upon such a failure.
- (3736) *In re Miller*, 2011 WL 95335 (Bankr. D.S.C. 2011) – Section 101(10A) excludes all social security benefits, regardless of recipient and regardless of whether contributed to debtor’s household expenses. Debtor’s non-filing husband received Social Security which he contributed in full each month for payment of household expenses. Debtor also received Social Security. Debtor not required to include

either her social security or that of her non-filing spouse in calculating Current Monthly Income or disposable income in Chapter 13.

- (3737) *In re Bartelini*, 434 BR 285 (Bankr. N.D.N.Y. 2010) – Social security is excluded from CMI under 101(10A). CMI is starting point to calculate projected disposable income. Therefore, debtor cannot be compelled to list Social Security in PDI calculation for purposes of plan payment.
- (3738) *In re Westing*, 2010 WL 2774829 (Bankr. D. Idaho 2010) - Above-median-income debtor's failure to account for Social Security income on Schedule I resulted in a lack of good faith. Current Monthly Income exclusion of Social Security in calculating "projected disposable income" under Section 1325(b), does not preclude the Court's consideration of that income when evaluating a plan for good faith. Debtor's plan proposed a monthly payment of only \$165 and would produce dividend of 1.9% while debtor had disposable income of more than \$2,300 if the Social Security was included.
- (3739) *In re Thomas*, 2010 WL 5630827 (Bankr. N.D. Ga. 2010) – Exclusion of Social Security income from Current Monthly Income does not provide a basis for a debtor to fail to disclose that income on Schedule I or monthly disposable income on Schedule J. Debtor's proposed retention of Social Security income would allow debtor to retain a substantial surplus at the expense of creditors, in violation of Section 1325(a)(3).
- (3740) *In re Welsh*, 440 BR 836 (Bankr. D. Montana 2010) - Congress' express exclusion of Social Security income from the calculation of Current Monthly Income, buttressed by 42 USC Section 407 which prohibits subjecting Social Security income to the operation of any bankruptcy or insolvency law, acted as an absolute prohibition against compelling a debtor to include Social Security income in either the calculation of CMI or in calculating income on Schedule I. Section 101(10A)(B) and 42 U.S.C. § 407 are two separate federal statutes, each more specific than § 1325(a)(3) with respect to SSI benefits. Section 1325(a)(3) does not include reference § 407 which § 407(b) requires in order to limit or otherwise modify §407(a)'s prohibition against the operation of any bankruptcy law against SSI. Trustee's good faith objection on the basis of SSI cannot be sustained without running afoul of 42 U.S.C. § 407(a). Good faith under Section 1325(a)(3) does not compel a debtor to include Social Security income on Schedule I.
- (3741) *In re Thompson*, 2010 WL 3583400 (8th Cir. BAP 2010) - Trustee's objection based on good faith overruled. Debtor received, but did not schedule, Social Security income. Forcing a debtor to include Social Security income would permit Section 1325(a)(3)'s general concept of "good faith" to control and "render meaningless" Section 1325(b)'s calculation of "ability to pay".
- (3742) *In re Olguin*, 429 BR 346 (Bankr. D. Colo. 2010) – Section 101(10A) excludes social security benefits received by debtor from calculation of CMI, but does not exclude social security benefits received by non-debtor and regularly contributed to household expenses. Debtor's grandparents resided with Debtor. Grandparents received social security and gave that to the Debtor to cover household expenses. Debtor must include the social security received by grandparents and contributed to household expenses in determining CMI.

11.13 Projected Disposable Income – Railroad Retirement Act

- (3743) *In re Scholz*, 447 BR 887 (9th Cir. BAP 2011) – Railroad Retirement Act benefits, while in the nature of Social Security, are not excluded from calculation of CMI. However, anti-alienation provision of RRA, 45 USC Section 231m(a) preempts any requirement to include RRA benefits in calculation of "projected disposable income". Debtor cannot be required to contribute RRA benefits in calculating PDI or determining plan payment.

11.14 Projected Disposable Income – Expiration of Secured Debt Payments

- (3744) *In re Grabarczyk*, 2012 WL 5409373 (Bankr. N.D. Ohio 2012) – Change in future expenses resulting from pay off of secured debt is known or reasonably certain at time of confirmation. Plan must propose to increase plan payments when car loan is paid off prior to completion of payments under plan.

11.15 Projected Disposable Income – Long Term Care Insurance

- (3745) *In re Melander*, 506 BR 855 (Bankr. D. Mn. 2014) – Long Term Care Insurance could not be deducted from calculation of disposable income absent evidence that the expense is necessary and reasonable. Although debtors purchased policy many years before filing bankruptcy, debtors did not present any evidence as to the reason for purchasing that policy or any other details that would allow court to permit deduction of \$440 per month in calculating disposable income.

11.16 Projected Disposable Income – Child Support

- (3746) *In re Brooks*, Case No. 14-2856 (7th Cir. 2015) – Child support received by debtor must be included in calculation of Current Monthly Income. However, above median debtor can then deduct child support income from Current Monthly Income to determine Disposable Income in Chapter 13 Case. Fact that debtor and her child were counted as household of 2 people for determining whether debtor was above or below median, and for determining appropriate national and local standard deductions in calculating Disposable income, did not preclude debtor for also deducting child support from CMI. Court would not permit deduction only if amount of support is grossly excessive in relation to essential expenses so as to amount to abuse of bankruptcy process.

11.17 Housing Expense

- (3747) *In re Konowicz*, 470 BR 725 (Bankr. D.N.J. 2012) – Plan not proposed in good faith and did not contribute all disposable income where debtor sought to retain home with excessive mortgage payment while paying dividend of only 10%.

11.18 "Reasonably Necessary" Expenses Generally

- (3748) *DeHart v. Knorr*, 2013 WL 5550209 (Bankr. M.D. Pa. 2013) – Child care expenses caused by debtor-husband’s volunteer work was not reasonably necessary expense. While debtor-husband’s work with Boy Scouts was admirable, it was not reasonable to deduct child care expenses that resulted from those activities in calculating the plan payment.

11.19 Projected Disposable Income – Actual and “Reasonably Necessary” Expenses

- (3749) *In re Scott*, 2013 WL 5567319 (Bankr. N.D. Ohio 2013) – Continuing the dichotomy between Schedules I and J and means test. Court concluded that plan did not contribute 100% of projected disposable income where amount to be paid to unsecured creditors was less than 60 times the “disposable income” calculated on Form 22C. Debtors’ Schedule I and J showed disposable income (after adjusting for housing expense that plan proposed to pay through trustee) of \$327.50, while Means Test shows disposable income under Section 1325(b)(2) of \$575.45. Debtors were “above median”. “Projected disposable income” uses disposable income calculated on form 22C times 60, thereby “projecting” disposable income (a defined term) over the life of the plan. Although court has discretion to take into account changes in income or expenses that are known or virtually certain, court lacks discretion to deviate from means test calculated disposable income by disregarding definition of disposable income. Fact that debtors’ disposable income on Schedule J was less than shown on means test did not allow court to disregard means test. Debtors did not show changes to expenses within scope of *Lanning*, but rather showed debtors inclination to spend over and above allowed deductions.
- (3750) *Drummond v. Welsh*, 711 F.3d 1120 (9th Cir. 2013) For “above median income” debtors, payments on secured loans are considered in calculating disposable income. Under BAPCPA, Congress determined that debtors may deduct secured debt payments, even on assets such as ATVs that would otherwise be considered “luxury goods”. Section 1325 mandates that disposable income “shall be determined” in accordance with Section 707(b)(2) which uses Current Monthly Income less specified deductions, one of which is secured debt payments. Section 707 does not limit secured debt payments to “necessary” secured debts or exclude payments on “luxury” goods. BAPCPA adopted mechanical approach to calculating disposable income and court would not alter or engraft other exceptions onto that definition.
- (3751) *In re VanDyne*, 2011 WL 3664551 (Bankr. N.D. Ohio 2011) – Although IRS Standards are not dispositive, they do provide evidence of reasonableness. Debtor failed to produce evidence that expenditures for items such as food (\$700); clothing (\$100); “husband’s bills” (\$562); recreation (\$150); and cigarettes (\$300); which produced a total expense for these items that exceeded IRS standards, was reasonable and would be disallowed to the extent beyond IRS standard. Utility expense disallowed to extent in excess of IRS standard where debtor did not provide any evidence of reasonableness of higher amount. Transportation expense of \$650 reasonable where debtor and non-filing spouse had daily commutes that totaled over 300 miles per day.
- (3752) *Dow Chemical Employees Credit Union v. Collins*, 2011 WL 2746210 (E.D. Mi. 2011) –Chapter 13 debtor does not have unbridled discretion to carve out for himself and his family whatever lifestyle he may choose, but must instead undergo a degree of belt-tightening. An unreasonably large amount devoted to discretionary expenses is not allowed under the Bankruptcy Code in determining “disposable income.” Bankruptcy courts are regularly confronted with deciding whether or not a debtor’s expenses are excessive or unreasonable and generally bankruptcy courts are not to substitute their values for those of the debtor. A court should question a debtor’s judgment when: (1) the debtor proposes to use income for luxury goods or services; (2) the debtor proposes to commit a clearly excessive amount to non-luxury goods or services; (3) the debtor proposes to retain a clearly excessive amount of income for discretionary purposes; (4) the debtor proposes expenditures that would not be made but for a desire to avoid payments to unsecured creditors; and (5) the debtor’s proposed expenditures as a whole appear to be deliberately inflated and unreasonable. Married debtor with non-filing spouse and three children that included \$300 per month for recreation and \$300 per month for non-filing spouse’s cigarettes where budget overall was not extravagant or luxurious.
- (3753) *In re Joest*, 2011 WL 1043559 (Bankr. N.D.N.Y. 2011) – For above median debtor, reasonably necessary expenses are controlled solely by Section 707(b)(2) without regard to separate inquiry as to the reasonable necessity of a specific expense under Section 1325(b)(2). Debtor, a single woman, sought to deduct the ownership expense for debtor’s two financed automobiles. Trustee argued that it was not “reasonably necessary” for a single debtor to retain two financed automobiles. Court stated that Section 707(b) deduction for automobile ownership expense was not tied to household size, but was limited only to two automobiles on which debtor was making payments. “Plain meaning” of 1325(b) and 707(b) allows for two ownership expense deductions as long as debtor has actual payments on two vehicles, without regard to whether it was reasonably necessary for debtor to retain both vehicles.
- (3754) *In re Cash*, Case No. 10-58607 (Bankr. E.D. Mi. 2011) – Debtor’s Plan failed to commit 100% of debtor’s disposable income where debtor proposed to retain and pay \$450 per month vehicle payment for car driven by 19 year old grandson while plan proposed 60 month term yielding no dividend to unsecured creditors. Disposable income is income received by the debtor which is not reasonably necessary for maintenance of debtor or a dependent of debtor. Unsecured creditors are not required to bear burden of debtor’s moral obligation to provide college education for children or grandchildren. Further, evidence did not indicate that grandson was actually a dependent of debtor, and at most grandson was only “partially” dependent on debtor. Confirmation denied.
- (3755) *In re Lofty*, 437 BR 578 (Bankr. S.D. Ohio 2010) – Section 1325 permits debtor to deduct expenses reasonably necessary for support of debtor or a dependent of debtor. Payment of mortgage, insurance and expenses for home owned by debtors but occupied by debtor’s adult son and grandson are not reasonably necessary expenses where property does not produce any income. Debtors’ efforts to assist son are “noble” but neither son nor grandson are dependents of debtors. “Dependent” requires more than a moral obligation for support. Party will be “dependent” only where there is some legal obligation for support. Debtors did not schedule son and grandson on Schedule I as dependents and Debtors did not claim son and grandson on Tax Returns as dependents.

11.20 Private School Tuition

(3756) *In re Golematis*, 2012 WL 3583154 (Bankr. E.D. Mi. 2012) – Debtor would not be allowed to deduct cost of private school expenses absent compelling circumstances, such as a special educational need or proof that the public school alternative would be academically inadequate. Mere preference for private or religious schooling is not sufficient.

(3757) *In re Crim*, 2011 WL 863452 (Bankr. M.D. Tenn. 2011) - \$500 tuition cost was reasonable and necessary for chronically ill child for whom no public school option was available.

11.21 Recreation Expense

(3758) *In re Golematis*, 2012 WL 3583154 (Bankr. E.D. Mi. 2012) – Expenses for children’s sports, figure skating, baseball and soccer were not excessive where debtors’ total family recreational budget was \$200 including these activities.

11.22 Home Maintenance

(3759) *In re Golematis*, 2012 WL 3583154 (Bankr. E.D. Mi. 2012) –Home maintenance expenses of \$266 were not unreasonable where \$120 was payment on a balance owed for roof repairs and \$146 was for general maintenance. Without the roof repair, house would have been uninhabitable; and balance of \$146 was “far less” than what other courts have concluded is excessive.

11.23 Modification of Mortgage on Principal Residence – Section 1322(b)(2)

(3760) *In re Colcord*, 2015 WL 5461543 (Bankr. E.D. Mi. 2015) – Anti-modification provision of Section 1322(b)(2) applies when only security for debt is in real property; the only security for the loan is the real property; and the real property is debtor’s principal residence. Assignment of rents provision in mortgage does not convert mortgage into one secured by collateral other than real property. While enforceable assignment of rents would create separate security interest and remove property from protection of Section 1322(b)(2), Michigan Law invalidates any assignment of rents in apartment building with less than 6 units. Debtor’s occupancy of one half of duplex while renting out other half was less than 6 units rendering assignment unenforceable, and leaving real property as sole collateral. However, duplex was not debtor’s “principal residence” where debtor lived in half and rented out half, and debtor had never resided in property as a whole. “Principal Residence” is defined in Section 101(13A) as property used as the principal residence of debtor. Debtor never resided in one half of property such that collateral for loan included property that was not debtor’s residence (although it was attached to debtor’s residence). Loan not within anti-modification protections of Section 1322(b)(2).

(3761) *Moore v. Caliber Home Loans, Inc.*, 2015 WL 5162482 (S.D. Ohio 2015) – Breach of contract action requires (1) the existence of a valid contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damages or loss to the plaintiff. Agreed order in Chapter 13 defining terms by which a default will be cured and payments maintained operates like a consent decree and effectively new contract between debtor and creditor. Holder of mortgage that cannot be altered under Section 1322(b)(2) retains all contract rights but can exercise those rights only in a manner consistent with the Code, Rules and any Court Orders. Debtor stated cause of action against mortgage servicer by alleging that debtor has made all payments due under the confirmed plan and consent order but the mortgage servicer failed to properly credit those payments and demanded a higher monthly payment than provided for in the plan and agreed order.

(3762) *White v. McDermott*, 2015 WL 4612349 (E.D. Mi. 2015) – Section 1123(b)(5) prohibits modification of mortgage secured only by debtor’s residence. Residence includes the residential structure and incidental property, defined as property commonly conveyed with principal residence in area where property is located. House and attached 40 acres of farmland were “residence” where debtor treated the property as a contiguous unit, placed single mortgage encumbering entire property, and location of property was such that conveyance of acreage was common and incidental to sales of residences themselves. Debtor’s initial plan was fatally defective as it sought to modify the rights of the holder of the mortgage on debtor’s residence. Debtors then amended the plan but continued to propose to modify the non-modifiable mortgage, leaving debtor’s amended plan with same fatal defect.

(3763) *In re Johnson*, 2015 WL 4053584 (Bankr. E.D. Tn. 2015) – Anti-modification provision of Section 1322(b)(2) applies only when security for loan is only real property that is the debtor’s principal residence”. Whether mobile home is within Section 1322(b)(2) depends on whether mobile home is affixed to property so as to become part of the realty; and whether debtor owns the underlying real estate. Debtor’s mobile home straddled the property line between debtor and his neighbor, such that one third of the home was on neighbor’s property and two-thirds on debtor’s property, the deck affixed to the mobile home was on debtor’s property but the driveway used for access was entirely on neighbor’s property. Significant portion of mobile home located on debtor’s property was sufficient to invoke protections of Section 1322(b)(2), even though a portion of the home was located on the neighbor’s property.

(3764) *In re Wollman*, 2014 WL 3778288 (Bankr. E.D. Tn. 2014) – Anti-modification provision of Section 1322(b)(2) applies only when the sole collateral is real estate that is used as debtor’s principal residence. Debtor could modify lien secured by both a mortgage on real property and a security interest in the manufactured house located on the land but which had not become affixed. Manufactured home was personal property such that lien was not secured exclusively by real property, even if debtor resided in manufactured home as residence.

(3765) *In re Espanol*, 2014 WL 1612393 (Bankr. D. Conn. 2014) – Anti-modification provision of Section 1322(b)(2) prohibited debtor from de-accelerating pre-petition mortgage based on pre-petition violation of due on sale clause.

(3766) *In re Brinkley*, 2013 WL 5935157 (Bankr. E.D. Mi. 2013) – Debtor’s residence for purposes of Section 1322, is location where debtor resided on date petition was filed. Debtor’s stated intention to vacate that premises at some point in the future does not alter conclusion that debtor cannot modify mortgage on residence as of petition date, even if debtor in fact vacates that premises at some point post-petition.

(3767) *Wallingford v. Green Tree Servicing, LLC*, 2013 WL 1777121 (6th Cir. 2013) – Section 1322(b)(2) prevents modification of mortgage on

real property that is debtor's principal residence. Whether mobile home is part of real property and encompassed within Section 1322(b)(2) depends on state law definition of mobile home and real property. Under Ohio law, mobile home becomes part of realty only if mobile home is permanently affixed *and* owner surrenders certificate of title. Mobile home was not part of real property where home was permanently affixed but debtor never surrendered certificate of title. Debtor could modify security interest in the mobile home.

- (3768) *In re Kelly*, 2013 WL 603138 (Bankr. E.D. Mi. 2013) – Court must determine whether property constitutes debtor's principal residence in considering possible modification of loan. Court would use "hybrid" approach, rejecting approach that looked at principal residence as of mortgage date or as of petition date. Debtor resided in one house on petition date. Plan proposed to surrender that house and for debtor to move into "rental" property and to modify the mortgage on the "rental" by bifurcating the mortgage into secured and unsecured claims. "Nuanced view" requires more than a blind look at debtor's residence as of the petition date. More important consideration is what property debtor intends to use as residence over life of Chapter 13 plan. Court would consider (1) where did the debtor reside on the date of filing of bankruptcy? (2) did the debtor move out of their principal residence either shortly before or after the filing of the bankruptcy? (3) did the debtor move into a property debtor had previously used as a rental property? (4) where does the debtor intend to reside for the duration of the bankruptcy? and (5) does the debtor retain title to the property even though debtor is not residing in the property at the time of filing for bankruptcy? (6) did the debtor start renting his/her principal residence to tenants around the time debtor filed for bankruptcy? Debtor's plan indicated that debtor intended to surrender prior principal residence and use former rental as principal residence during chapter 13 case. As such, mortgage on prior rental was protected from modification under Section 1322(b)(2).
- (3769) *In re Smith*, 2012 WL 1122975 (Bankr. N.D. Ohio 2012) – Debtor's post-confirmation Motion to Disallow Arrearage Claim and Deem Mortgage Current denied. Plan provided for treatment of mortgage arrearage but creditor did not file proof of claim. Court concluded that attempt to disallow pre-petition arrearage where creditor did not file proof of claim would constitute impermissible modification of mortgage which specifically allowed lender to collect delinquencies and arrearages.
- (3770) *Flickinger v. Americhoice Fed. Credit Union*, 2010 WL 4923933 (Bankr. M.D. Pa. 2010) - Existence of co-obligors did not forfeit protection from modification in § 1322(b)(2). Co-obligors did not grant security interest in collateral. Debtors failed to demonstrate that U.C.C.-1 filings executed prior to security interest in residence were related to mortgage note. Questions of fact about U.C.C. filings prevented judgment as matter of law.
- (3771) *In re Lopez*, 2010 WL 4875884 (Bankr. N.D. Cal. 2010) Security interest that included all easements, appurtenances, and fixtures, now or hereafter part of the property did not forfeit protection from modification in § 1322(b)(2). Additional collateral was of little or no independent value.
- (3772) *Shirk v. JPMorgan Chase Bank, N.A.*, ____ (Bankr. S.D. Ohio 2010) – Antimodification provision of Chapter 13, which prevents debtor from modifying rights of creditor whose claim is secured solely by interest in real property that is debtor's principal residence, is applicable to mortgage loans secured by interest in debtor's principal residence irrespective of whether holder of that secured claim when Chapter 13 petition is filed originated the loan or acquired it through assignment; key to applicability of provision is whether claimant holds a security interest in debtor's principal residence, and nature of transaction by which claimant acquired this security interest is irrelevant. 11 U.S.C.A. § 1322(b)(2).
- (3773) *In re Ramsey*, 2009 WL 3245303 (Bankr. M.D. Tn. 2009) – Creditor objected to Plan claiming that terms of Plan constituted improper modification of mortgage creditor's rights in violation of Section 1322(b)(2). Plan terms required Creditor to (1) apply the payments received from the trustee on pre-confirmation arrearages (defined as all sums included in the allowed proof of claim plus any post-petition pre-confirmation payments due) only to such arrearages; (2) deem the mortgage obligation as current at confirmation such that future payments, if made pursuant to the plan, shall not be subject to late fees, penalties or other charges; (3) provide at least 60 days written notice to the trustee, the debtors and the attorney for the debtors of any changes in the interest rate for any non-fixed rate or any adjustable rate mortgages or any change in the property taxes and/or the property insurance premiums and the effective date of any such adjustment; and (4) notify the trustee, the debtors and attorney for the debtors, in writing, of any protective advances or other charges incurred by the claimholder, pursuant to the mortgage agreement, within 60 days of making such protective advance or other charges. The Plan further required the Trustee to (1) make monthly ongoing mortgage payments commencing with the later of the month of confirmation or the month in which a proof of claim itemizing the arrears is filed by such claimholder; (2) file a motion and notice consistent with LBR 9013-1 no later than 60 days prior to the anticipated last payment under the plan, requesting the court find that the trustee has complied with the plan to maintain mortgage payments and to cure the pre-confirmation default and providing that if the claimholder asserts that the mortgage obligation is not contractually current at the time of the trustee's motion, then the claimholder shall, within 30 days of receipt of the motion, file a Statement of Outstanding Obligations, clearly itemizing all outstanding obligations it contends have not been satisfied as of the date of the Statement failing which the trustee shall submit an order declaring the mortgage current and all arrearages cured as of the date of the trustee's motion; and, upon discharge, the claimholder shall treat the mortgage as fully reinstated according to its original terms and fully current as of the date of the trustee's notice. Plan provision requiring notice of post-petition fees and expenses and payment changes is a permissible procedural mechanism to assist in the administration of the Case and is not an impermissible mortgage modification. A plan provision requiring mortgage creditors to distinguish and apply payments on prepetition arrearages and on ongoing continuing mortgage payments does not improperly modify mortgage creditors' rights; such a plan requirement simply restates the statutory scheme for curing mortgage arrears. Plan does not impermissibly modify the mortgage and complies with Section 1325.

11.24 Modification of Mortgage on Principal Residence – Attorney Fees

- (3774) *In re Maiké*, 2015 WL 5776007 (Bankr. E.D. Mi. 2015) – Attorney fees can be paid ahead of mortgage even if doing so delays ongoing payments to mortgage holder. Section 1322(b)(5) allows curing of default over reasonable period. Accrual of post-petition mortgage

payments is effectively a default that can be cured without violation anti-modification provision of Section 1322(b)(2). However, court will not confirm plan that pays attorney fees ahead of mortgage if doing so would result in no money being paid to mortgage holder. Total funds on hand with Trustee as of confirmation were \$3144.90. The remaining balance on attorney fees was \$2,910.00. Thus, Trustee had sufficient funds at first disbursement to pay fees in full and to pay mortgage \$234.90; and plan was thereafter funded in such a way to cure the post-petition default in 28 months and to pay pre-petition arrearage over another 20 months.

- (3775) *In re Hammon*, 2015 WL 4462179 (Bankr. W.D. Mi. 2015) – Attorney fee cannot be paid ahead of mortgage if doing so delays ongoing payments to mortgage holder. Funds on hand at confirmation would not be sufficient to pay the ongoing monthly obligation if counsel is paid in full from first disbursement, constituting improper modification of mortgage. Section 1326(b)(1) which requires payment of administrative expenses does not trump anti-modification provision of Section 1322(b)(5).
- (3776) *In re Beall*, Case no. 13-09232 (Bankr. W.D. Mi. 2014) – Attorney fees cannot be paid ahead of ongoing monthly mortgage payment without constituting improper modification of mortgage. Section 1322(b)(2) precludes modification of mortgage without consent of lender, which includes delays in payment of post-petition mortgage payments for payment of fees. Section 1326's generally requirement that administrative expenses be paid before or concurrently with payments to creditors does not trump Section 1322's express prohibition against modification of mortgage on principal residence. Plan which struck standard provision that attorney fees would be paid with funds remaining after payment of ongoing mortgage payments could not be confirmed over creditor's objection where Trustee would not have sufficient funds on hand at confirmation to pay attorney fees in full and also pay ongoing mortgage payment.
- (3777) *In re Rogers*, 500 BR 537 (Bankr. W.D. Mi. 2013) – Attorney fees cannot be paid ahead of ongoing monthly mortgage payment without constituting improper modification of mortgage. Section 1322(b)(2) precludes modification of mortgage without consent of lender, which includes delays in payment of post-petition mortgage payments for payment of fees. Section 1326's generally requirement that administrative expenses be paid before or concurrently with payments to creditors does not trump Section 1322's express prohibition against modification of mortgage on principal residence.

11.25 Modification of Mortgage on Principal Residence – Section 1322(b)(5)

- (3778) *In re Moore*, 2014 WL 4855011 (Bankr. W.D. Mi. 2014) – Where mortgage ballooned and became fully due and payable prior to commencement of case, loan fits within definition of Section 1322(c)(2) which allows debtor to “cure” defaults within reasonable time. Plan could not be confirmed where plan failed to provide for full payment of the loan within plan term but sought to maintain pre-balloon contractual payment while debtor attempted to refinance. “Default” that must be cured would be payment of balloon balance on loan within plan term.

11.26 Modification of Other Liens on Personal Residence

- (3779) *In re Slade-Lanier*, 2014 WL 2565919 (Bankr. N.D. Ohio 2014) – Tax certificate holder bound by terms of plan that proposed to pay a portion of the property tax claim with the unpaid portion to be treated as unsecured claim. Tax certificate holder had notice of the plan and the treatment of the claim but failed to object to proposed treatment. Court was not determining amount of tax claim, which would violate Section 505(a)(2)(C), but was only determining the treatment of the claim consistent with the terms of the confirmed plan.
- (3780) *In re Ange*, 2014 WL 2565916 (Bankr. N.D. Ohio 2014) – Section 1322(b)(2) prevents modification of security interest that is secured solely by debtor's principal residence. Security interest is a “lien created by an agreement”. Lien arising by statute as a result of unpaid property taxes results in creditor holding secured claim but lien is not “security interest”. Debtor can modify method of application of payments on property tax claim without violating Section 1322(b)(2).

11.27 Modification of Mortgage on Property Other Than Principal Residence

- (3781) *In re Wollman*, 2014 WL 3778288 (Bankr. E.D. Tn. 2014) – Anti-modification provision of Section 1322(b)(2) applies only when the sole collateral is real estate that is used as debtor's principal residence. Debtor could modify lien secured by both a mortgage on real property and a security interest in the manufactured house located on the land but which had not become affixed. Manufactured home was personal property such that lien was not secured exclusively by real property, even if debtor resided in manufactured home as residence.
- (3782) *Colbourne v. Oewen*, Case No. 12-14722 (11th Cir. 2013) – Debtor who is not eligible for discharge cannot cram down mortgage on non-residential property. Section 1325(a)(5) requires the secured creditor hold lien until either payment of underlying claim in full according to applicable non-bankruptcy law; or entry of discharge. Debtor's plan did not propose full payment of secured claim and debtor would not receive discharge, precluding any attempt to force creditor to release lien upon payment of bifurcated secured claim.
- (3783) *In re Proctor*, 2013 WL 3787424 (Bankr. E.D.N.C. 2013) – Debtor in Chapter 11 (which has same anti-modification provision as Section 1322) could modify mortgage on principal residence where, at time mortgage was obtained, property was not debtor's residence. Whether property constitutes principal residence depends on function of property at time mortgage was obtained. At that point, the property was a second home purchases as an investment. Fact that debtor later sold residence and moved into second home and used that as residence did not bring property within anti-modification provisions for principal residence.
- (3784) *Ryan v. U.S.*, Case No. 12-3398 (7th Cir. 2013) – Chapter 13 debtor cannot use Section 506 to bifurcate federal tax lien. Although lien was for amount far in excess of value of debtor's equity in assets, under *Dewsnup*, U.S. held valid secured claim that cannot be bifurcated.
- (3785) *Congrove v. Northern Hancock Bank & Trust, Co.*, 485 BR 841 (Bankr. N.D. Ohio 2013) – Property is protected from modification only if property is real property that is used by debtor as principal residence. Mobile home that was not permanently affixed to realty remains personal property that is not protected from bifurcation in Chapter 13.

- (3786) *Wallingford v. Green Tree Servicing, LLC*, 2012 WL 3779954 (S.D. Ohio 2012) – Mobile home was not considered part of realty for purposes of anti-modification provision of Section 1322(b)(2). Under Ohio law, mobile home becomes part of realty only if permanently affixed to realty and the certificate of title is surrendered to clerk of the court of common pleas. Although mobile home had been permanently affixed, certificate of title had not been surrendered. Mobile home did not constitute part of real property. Claim secured by lien on real property and on mobile home located on property not protected from modification as lien was secured by property other than “real property that is the debtor’s principal residence”.
- (3787) *Pawtucket Credit Union v. Picchi*, 448 BR 870 (1st Cir. BAP 2011) – Anti-modification provision of Section 1322(b)(2) does not prevent modification of mortgage on duplex even where debtor occupied one side of the property. Anti-modification provision applies only when the collateral is exclusively debtor’s principal residence, not when the property merely includes the debtor’s principal residence.
- (3788) *In re Starks*, 2011 WL 248521 (Bankr. E.D. Ky. 2011) – Mobile home that had active certificate of motor vehicle title and had not been affixed to real estate constituted personal property on which the secured claim would be modified.
- (3789) *In re Colbourne*, Case No. 10-983 (Bankr. M.D. Fl. 2010) - Debtor’s Motion to Value Secured Claims in Chapter 13 denied where Debtor had previously obtained discharge in Chapter 7 and was not eligible for discharge in Chapter 13. Claims secured by non-residential real property and motor vehicle could not be permanently modified absent a discharge, as any modification would not have any binding effect following the conclusion of the Chapter 13 Plan.

11.28 “Cure and Reinstate”

- (3790) *In re Wollman*, 2014 WL 3778288 (Bankr. E.D. Tn. 2014) – Anti-modification provision of Section 1322(b)(2) does not prohibit debtor from either curing defaults and maintaining payments; or curing or waiving defaults and completing contract payments during life of plan. Neither cure and maintain nor payment over life of plan constitutes impermissible modification of mortgage. Plan must propose prompt cure. Debtor could cure mortgage over 60 month life of plan – time to cure was not unreasonable on facts of case.
- (3791) *Deutsche Bank v. Tucker*, 621 F.3d 460 (6th Cir. 2010) - Section 1322(e) allows debtor to cure defaults determined in accordance with the underlying agreement and applicable non-bankruptcy law. “Default” includes all fees and costs allowed under the parties’ agreement even when the claim is otherwise undersecured.

11.29 Curing Mortgage Default After Foreclosure

- (3792) *TD Bank v. LaPointe*, 505 BR 595 (1st Cir. BAP 2014) – Section 1322(c)(1) creates uniform federal rule regarding date on which foreclosure sale is conducted. Sale is complete when the gavel falls at the sale. The sale occurs at the foreclosure sale when the sale is completed and the bidding processed is closed. Fact that title may not actually transfer until later date does not allow debtor to cure and reinstate as right terminated when sale gavelled down pre-petition.
- (3793) *Hopkins v. Federal Home Loan Corporation*, Case no. 13-14757 (E.D. Mi. 2014) – Chapter 13 debtor is not permitted to cure default pursuant to Section 1322 after foreclosure sale occurs. Post-sale remedy is limited to paying redemption costs before redemption expires. Filing Chapter 13 does not expand or extend redemption.

11.30 Cure and Reinstate – Reverse Mortgage

- (3794) *In re Carter*, Case No. 14-48000 (Bankr. E.D. Mi. 2014) – Reverse Mortgage matures when mortgagor passes away. In Chapter 13, where mortgagor is alive at date of filing and plan proposes to cure and reinstate default, maturity date is presumed to be after plan term as debtor anticipates surviving for full plan term. Debtor could cure default in reverse mortgage that resulted from non-payment of taxes by paying taxes (or by paying mortgagee if mortgagee paid taxes) over life of plan. However, plan cannot “cram down” mortgage on debtor’s residence as doing so would violate Section 1322(b)(5). Section 1322(b)(5) allows cram down only if original mortgage term expires within term of plan which was inconsistent with debtor’s assertion that debtor intended to reside in property for entire plan term.

11.31 Secured Claims Generally

- (3795) *In re Cashman*, 2011 WL 1565189 (Bankr. D. Hawaii 2011) – Claim against automobiles in which debtors had interest jointly with parents is secured claim even though debtors are not personally obligated on the notes. Auto loans are secured by debtor’s interest in the automobiles and that interest becomes property of the estate. Chapter 13 Plan can treat secured debts even where debtors have no personal liability on the claim.
- (3796) *In re Mullins*, 2011 WL 1791090 (Bankr. S.D. Ohio 2011) – The doctrine of collateral estoppel applies in Ohio when a fact or issue (1) was actually and directly litigated in the prior action; (2) was passed upon and determined by a court of competent jurisdiction; and (3) when the party against whom collateral estoppel is asserted was a party to the prior action. State Court Judgment foreclosing judicial lien and decreeing that all other liens are extinguished collaterally estopped mortgage creditor from asserting secured status in Chapter 13 proceeding. Debtor’s Plan failed to comply with Section 1325(a)(5) where plan purported to treat judicial lien creditor as unsecured claim.
- (3797) *Bank of the Prairie v. Picht*, 428 B.R. 885 (10th Cir. BAP 2010) – Debtors with no personal liability on mortgage as a result of prior Chapter 7 could not discharge mortgage by paying only value of property as of the date of the petition, where that value was far less than the balance owed. Lack of personal liability does not alter amount of claim, and Section 1325(a)(5) requires payment of the full amount determined under applicable non-bankruptcy law. Debtors could not bifurcate claim into “secured” portion and unsecured portion pursuant to Section 506 and pay only the secured portion, as Section 1325 refers to amounts due under applicable non-bankruptcy law

preventing use of Section 506 to bifurcate and reduce amount of secured claim.

11.32 Secured Claims – Interest Rate

- (3798) *In re Jones*, 2015 WL 4624481 (Bankr. E.D. Ky. 2015) – *Till* rate of interest is appropriate for paying secured claim in Chapter 13. Although Supreme Court decision in *Till* is plurality and non-binding as to methodology, Sixth Circuit has recognized *Till* as appropriate method of determining interest rate, rejecting pre-*Till* “coerced loan” method. Plan that provided for 5.25% on mobile home loan met *Till* standards for prime (3.25%) plus 2% “adjustment”.
- (3799) *In re Johnson*, Case No. 15-20959 (Bankr. E.D. Mi. 2015) – Court would adjust proposed interest rate to secured creditor in Chapter 13. Plan initially proposed rate of 5.25% on automobile and motorcycle loans, later increased to 6.25% after creditor objected, and Trustee objected to higher rate. Court concluded that initial rate calculated at prime plus 2% was insufficient where debtor purchased one of the vehicles less than one year pre-petition and purchased the other vehicle only 6 months pre-petition, and debtors had significant secured debt overall and little, if any, equity in vehicles to provide equity cushion. *Till* warranted slight adjustment to initial rate, to 5.75%.
- (3800) *In re Thomas*, 2014 WL 1761954 (Bankr. W.D. Mo. 2014) – Chapter 13 plan that proposed to retain car and pay contractual interest rate of 19.95 percent did not lack good faith. Debtor bought car during prior bankruptcy proceeding pursuant to court order that allowed debtor to incur debt at 19.95 percent. Debtor’s first case dismissed and debtor filed second case, and proposed to reduce interest rate to *Till* rate. Creditor objected based on prior court order in first case that determined interest rate and debtors amended plan to increase rate. Paying loan at higher rate, standing alone, was not lack of good faith particularly where prior court order at least implicitly determined that contract rate was appropriate rate. Further, even at lower rate, debtors’ plan proposed no dividend for unsecured creditors, so paying higher rate was not transferring money from unsecured creditors to secured creditor.
- (3801) *In re Gift*, 469 BR 800 (Bankr. M.D. Tn. 2012) – Property tax claim, as oversecured claim, is entitled to post-petition interest at the statutory rate. However, creditor is not entitled to secured status on penalty interest rate. Interest rate in Chapter 13 had only to ensure that stream of payments to taxing authority had present value which was at least equal to amount of the claim plus 12% state statutory interest. Where debtor had solvent estate, plan must also provide for payment of additional penalty interest rate as unsecured claim.
- (3802) *United Security Bank v. Garner*, 10-795 (11th Cir. 2011) – Where plan proposes to modify interest rate under Section 1325(a), oversecured creditor is entitled to interest at contract rate during period from petition to confirmation but post-confirmation is entitled only to *Till* rate. Creditor entitled to contract interest rate of 10.5% through confirmation but then at *Till* rate of 4.25%. Allowing oversecured creditor to continue to receive contract rate post-confirmation would provide windfall to creditor at expense of other creditors.
- (3803) *In re Dimery*, 2011 WL 2470057 (Bankr. N.D. Ohio 2011) – “Formula approach” adopted by Supreme Court plurality in *Till* requires court to use national prime plus appropriate “risk” factor. Sixth Circuit has indicated at least in dicta that Courts should use *Till* formula. Court used prime of 3.25% plus 2% “risk” adjustment.
- (3804) *First United Sec. Bank v. Garner*, 2011 WL 93763 (M.D. Ala. 2011) - Oversecured creditor was entitled to contract rate of interest until confirmation, then prime-plus rate established by *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (May 17, 2004). Section 1325(a)(5)(B)(ii) is more specific than § 506(b) and fixes cutoff date for accrual of contract interest at effective date of plan.
- (3805) *In re Blanton*, 2010 WL 4503188 (Bankr. N.D. Ohio 2010) – Section 1325(a)(5) requires secured creditors to receive interest to account for the time value of money. “Formula approach” adopted by Supreme Court plurality in *Till* requires court to use national prime plus appropriate “risk” factor. Sixth Circuit has indicated at least in dicta that Courts should use *Till* formula. Court rejected both the contract rate approach and the “prime with no risk adjustment” approach. Interest rate must be based on prime rate plus adjustment for risk, which normally will be 1% - 3%. Interest rate fixed at 5.25% representing prime of 3.5% plus 1.75% for risk, which falls near middle of risk range. Creditor produced no evidence that circumstances of case were exceptional or that deviation from formula was appropriate.

11.33 Secured Claims – Adequate Protection

- (3806) *In re Parsons*, 2012 WL 3763384 (Bankr. W.D. Ky. 2012) – Secured creditor in chapter 13 entitled to payments that provide adequate protection of security interest. Adequate protection payment of \$75 per month would be reasonable considering collateral is 2002 Dodge Ram that is rapidly depreciating. Confirmed Plan modified to provide for monthly payments to creditor of \$75 per month.

11.34 Secured Claims – Acceptance by Creditor

- (3807) *Bronitski v. Bea*, 2015 WL 3441169 (9th Cir. BAP 2015) – Secured creditor’s failure to object to proposed plan constitutes “acceptance” within scope of Section 1325(a)(5).
- (3808) *In re Maddox*, 2013 WL 3553395 (Bankr. ED. Tn. 2013) – Section 1325(a)(5) provides three alternative methods by which a Chapter 13 debtor may deal with the holder of each allowed secured claim provided for by the plan—acceptance of the plan by the secured creditor (§ 1325(a)(5)(A)); compliance with the Chapter 13 cramdown provisions (§ 1325(a)(5)(B)); or surrender of the collateral to the secured creditor (§ 1325(a)(5)(C). Acceptance of a chapter 13 plan by the holder of an allowed secured claim provided for by the plan satisfies the confirmation standard of section 1325(a)(5) with respect to such secured claim. Where creditor, with full notice of proposed treatment, accepts plan, Chapter 13 Trustee lacks standing to object to that proposed treatment. While Trustee is entitled to appear and be heard and has standing to raise any issue relevant to confirmation, Trustee does not have standing to object to proposed cram down of secured claim

where treatment is acceptable to the affected creditor.

11.35 Secured Claims – Property Taxes

- (3809) *Plymouth Park Tax Services, LLC v. Bowers*, 2014 WL 3558096 (6th Cir. 2014) – Purchaser of tax certificates holds a “tax claim” under Section 511 and is entitled to be paid principal amount shown on certificate plus interest at rate shown on certificate. Creditor who purchased certificate with successful bid of 0.25% entitled to be repaid in Chapter 13 plan for principal amount of certificate plus 0.25%. Creditor not entitled to statutory interest rate of 198% that would have accrued on taxes had certificate not been issued where debtor, under state law, had right to redeem by paying principal amount of certificate plus certificate rate of interest.
- (3810) *In re Ange*, 2014 WL 2565916 (Bankr. N.D. Ohio 2014) – Purchasers of property tax certificates step into shoes of taxing authority. Where plan proposed to pay County Tax Collector balance owed plus interest at 18%, and plan was confirmed on those terms, certificate holder became entitled to same treatment. Debtor could attempt to reduce interest rate by filing objection to proof of claim of certificate holder. Claim objections are designed to determine amount owed to creditor as of petition date. Applicable interest rate as of petition date was 18%, so balance owed as of petition date would be calculated using 18%. Plan did not propose to alter or modify interest rate for property taxes, so certificate holder remained entitled to interest at 18% post-petition, consistent with the terms of the confirmed plan. While debtor’s plan could have proposed to modify tax claim, it did not do so and debtor could not modify claim through the vehicle of an objection to proof of claim.
- (3811) *In re Bowers*, Case No 13-8014 (6th Cir. BAP 2013) – State law controls rate of interest paid on unpaid property tax claims pursuant to Section 511(a). Purchaser of tax certificates who bid .25% to acquire certificates entitled to interest at rate of .25%, not statutory rate on unpaid taxes that are owed to taxing authority. Chapter 13 plan properly treated tax certificate claims by proposing to pay principal plus interest at .25% over life of Chapter 13 plan. Under Ohio law, interest continues to accrue at certificate rate during any bankruptcy proceeding. Although state law provided that certificate holders are entitled, outside of bankruptcy, to receive principal plus interest at 18%, statute expressly limited interest during bankruptcy case to lower, certificate rate.
- (3812) *In re Martin*, 2013 WL 4094413 (Bankr. S.D.N.Y. 2013) – Debtor can redeem property from pre-petition tax foreclosure sale over life of chapter 13 plan. Debtor filed Chapter 13 after the sale occurred but before redemption expired. Debtor permitted to pay the redemption amount through chapter 13 plan as tax claim is secured claim that is subject to modification, including modification of any requirement to redeem in shorter time period.

11.36 Secured Claims – Balloon Payments

- (3813) *In re Guerrero*, 2015 WL 5162272 (Bankr. E.D. Wis. 2015) – Debtor can propose plan to cure balloon payment and pay lien in full over life of plan where loan matured and became fully due and payable prior to commencement of case.
- (3814) *In re Ramirez*, 2014 WL 1466212 (Bankr. S.D. Fl. 2014) – Plan that proposed balloon payment to retire first mortgage on investment property is feasible where debtor has significant equity in other property and earning capacity of debtor produces strong incentive to complete plan that crams unprotected mortgage. Permitting debtor to structure plan to provide affordable payments for 60 months and opportunity to refinance in month 60 using equity in home is consistent with congressional policies of allowing debtors flexibility in structuring plan.
- (3815) *In re Spark*, 2014 WL 1759553 (Bankr. M.D. Fl. 2014) – Plan that proposed monthly payments to secured creditor for 59 months and a single, lump sum payment in month 60 violated Section 1325 requirement for equal monthly payments. Balloon payment is, by definition, not equal monthly installment.

11.37 “Catch All” Provision in Hanging Paragraph

- (3816) *In re Tanguay*, 427 B.R. 663 (Bankr. E.D. Tenn. 2010) - Hanging paragraph’s one year catch-all provision includes motor vehicles purchased for non-personal use.

11.38 910 Car Claims – Modification of Interest Rate

- (3817) *In re Kemmery*, 516 BR 485 (N.D. Ohio 2014) – While lender’s lien on automobile purchased less than 910 days pre-petition cannot be stripped down, interest rate on claim can be modified pursuant to *Till*. Appropriate interest rate is prime of 3.25% plus 2% risk factor, for total rate of 5.25%.
- (3818) *In re Kelley*, 2012 WL 5457331 (Bankr. E.D. Ky. 2012) – Status of secured claim as 910-car claim does not preclude modification of claim to reduce interest rate pursuant to *Till*. Chapter 13 debtors eligible for discharge do not have to pay contract interest rates and other contract charges to accomplish release of liens through the confirmed plan, but lien release must await discharge when Section 1325(a)(5)(B)(i) applies. Creditor bound by confirmed plan that reduced interest rate from 20% to 4.25% even where claim was not subject to cram down under “hanging paragraph”.

11.39 910 Car Claims – Defined

- (3819) *In re Howard*, 597 F.3d 852 (7th Cir. 2010) - Car finance company had purchase money security interest in full amount of claim, including negative equity from trade in.
- (3820) *In re Dale*, 528 F.3d 568 (5th Cir. 2009) – Financing of negative equity does not defeat status of security interest as “purchase money”. Purchase money includes the price paid and all value given to enable the debtor to acquire the vehicle. Negative equity, gap insurance

and extended warranties are properly considered expenses incurred by the creditor in connection with the purchaser's acquisition of an interest in the vehicle.

- (3821) *AmeriCredit Financial Services v. Penrod*, 636 F.3d 1175 (9th Cir. 2010), *cert denied*. – Negative equity included in car loan is not part of the purchase money financing for purposes of the hanging paragraph. The payment of Debtor's remaining debt on her 1999 Ford Explorer is the payment of an antecedent debt, not an expense incurred in buying the new vehicle. Negative equity on Debtor's Ford Explorer was not sufficiently connected to the purchase of the Ford Taurus to establish a purchase-money security interest. A seller or lender can obtain a purchase money security interest only for new value, and closely related costs. Old value simply does not fit within that rubric. Negative equity charges related to Penrod's 1999 Ford Explorer would not qualify as new value under 11 U.S.C. § 547(a)(2). Broad language is employed to encompass third party financing, not to expand the scope of purchase money security interests.
- (3822) *In re Allen*, Case No. 09-13560 (Bankr. M.D. Tn. 2010) – New loan obtained by Debtor to "roll up" three pre-existing automobile loans into a single loan transaction destroyed loan's status as "purchase money security interest" removing loan from scope of "hanging paragraph". Consolidation loan did not make it possible to obtain a vehicle or other personal property as the Debtor already owned those assets. The fact that the loans that were re-financed and "rolled up" were themselves purchase money security interests did not convert refinance transaction into purchase money loan.
- (3823) *Nouvelle Credit Corp. v. Westfall*, 599 F.3d 498 (6th Cir. 2010) – Negative equity rolled into financing does not destroy "purchase money security interest" for purposes of the "hanging paragraph". Uniform Commercial Code defines "purchase money security interest" as all consideration paid for the acquisition of the car and is not limited to new or additional value. Financing will be "purchase money" if the underlying obligation (1) was all or part of the price of the collateral; and (2) value given to enable the debtor to acquire rights in or the use of the collateral.
- (3824) *Shaw v. Aurgroup Financial Credit Union*, 552 F.3d 447 (6th Cir. 2009) – Chapter 13 plan improperly attempted to bifurcate purchase money claim of creditor that had provided financing within 910 days prior to commencement of Chapter 13 case to allow Debtor to purchase a motor vehicle. So-called "hanging paragraph" requires that purchase money security interest secured by a motor vehicle purchased within 910 days of the filing of the case must be treated as entirely secured and either paid in full with interest or Debtor must surrender the property, unless the creditor accepts contrary treatment, either expressly or by a failure to object.
- (3825) *In re Thompson*, 2009 WL 1758757 (Bankr. N.D. Ohio 2009) – "Hanging paragraph" applies only to purchase money security interests whether collateral consists of automobile or "other thing of value". Motor vehicle cannot be "other thing of value" for purposes of avoiding restriction that vehicle has been purchased for personal use of Debtor. Debtor's plan that "crammed down" car secured by non-purchase money security interest confirmed.
- (3826) *In re Tyson*, Case No. 09-01179 (Bankr. W.D. Mi. 2009). Financing of the negative equity did not destroy the purchase money security interest and that as a result, the claim could not be bifurcated into secured and unsecured portions. The hanging paragraph requires, "a purchase money security interest securing the debt that is the subject matter of the claim." While most courts focus on the definition of purchase money security interest, this Court focused on the term "debt". The "debt" is the right to receive payment on account of the contract, which includes the negative equity, and this "debt" is secured by a purchase money security interest in the vehicle. Accordingly, the claim could not be bifurcated.
- (3827) *In re Hingiss*, 2010 WL 4941622 (Bankr. E.D. We. 2010) – Court can use equitable tolling to prevent circumvention of 910 Claim based on prior bankruptcy filing. Debtor filed a Chapter 13 case within 910 days of acquiring the vehicle. Debtor confirmed a plan that treated the claim as fully secured and provided for full payment of the claim. Court dismissed the case 9 days after confirmation on a Trustee Affidavit of Default. Three months later, Debtor filed another Chapter 13. This second case was filed beyond 910 days and the debtor sought to cram down the car. The Court found that the debtor had not acted in bad faith in the dismissal – the debtor lost his job right after confirmation and it took a couple months to find a new one. Equitable tolling extends the statute of limitations period where it is equitable to do so on a case-by-case basis. Equitable tolling does not assume any blameworthy conduct by the defendant. The 910 day lookback would be extended by the number of days that passed in the prior Chapter 13 case, resulting in the claim being non-modifiable under the infamous "hanging paragraph".

11.40 Surrender Generally

- (3828) *In re Ware*, 2015 WL 4389688 (Bankr. N.D. Il. 2015) – Surrender of collateral requires physical delivery to creditor and, in case of vehicles, surrender of certificate of title and keys. However, if debtor is unable to deliver physical possession through no fault of debtor, property can be surrendered for purposes of Section 1325 without physical delivery. Record must demonstrate that lack of possession is not the result of debtor's own actions or lack of good faith. Automobile stolen a year before case filed, properly reported to both police and insurance at time of theft, could not be returned as debtor was not in possession and lack of possession was not due to debtor's own culpable behavior. If debtor reacquires possession after confirmation, debtor must physically deliver vehicle to lender. If vehicle had been seized due to fault of debtor, for example unpaid parking tickets that caused vehicle to be impounded, surrender without possession would not fulfill debtor's good faith obligations.
- (3829) *Bank of New York Mellon v. Watt*, 2015 WL 1879680 (D. Ore. 2015) – Surrender of collateral in Chapter 13 means that debtor will not oppose creditor's ability to realize on collateral. Surrender does not divest debtor of ownership or obligations attendant to ownership. Vesting, on other hand, would transfer title to the grantee. Section 1325 allows treatment of secured claim by surrender but nothing in Section 1325 allows debtor to "vest" property in creditor effectively forcing creditor to accept title to property without voluntary acceptance of conveyance. Plan that proposed to vest property in secured creditor could not be confirmed over creditor's objection.

- (3830) *In re Eyerman*, 517 BR 800 (Bankr. S.D. Ohio 2014) – Creditor was not “secured” creditor in Chapter 13 case where property covered by security agreement consisted solely of property belonging to LLC and one parcel of land owned by debtors but did not include any personal property of debtors. Plan that proposed to treat creditor by surrendering interest in land and deeming deficiency balance to be unsecured for purposes of debtors’ Chapter 13 plan confirmed as creditor had no security interest in debtors’ personal property and surrender of real estate complied with Section 1325(a)(5).
- (3831) *In re Prior*, 2014 WL 585284 (Bankr. S.D. Ga. 2014) – Debtor cannot surrender collateral if debtor is not able to deliver possession or control of collateral. Surrender requires an affirmative act beyond merely abandoning of interest.
- (3832) *Santander Consumer USA, Inc. v. Brown*, 746 F.3d 1236 (11th Cir. 2014) – Replacement value of collateral applies when collateral is surrendered. Where replacement value of collateral exceeds debt, debt is satisfied on confirmation of the plan.
- (3833) *In re Plummer*, 2014 WL 1248039 (Bankr. M.D. Fl. 2014) – Surrender of collateral requires only that debtors make collateral available for secured creditor to exercise state law rights. Surrender does not obligate debtors to “deliver” property or to otherwise take any affirmative action. Debtor “surrenders” collateral when he allows the secured creditor to obtain possession by available legal means. Debtor is not required to convey title. Debtor did not violate Code or act inconsistent with stated intent to “surrender” when debtor refused to sign deed in lieu of foreclosure. Debtor took no steps to impede foreclosure process or to otherwise hinder creditor’s exercise of state law rights. Debtor’s continued occupancy of property, and rental of property after bankruptcy filing but before foreclosure, did not interfere with secured creditor’s ability to seek possession by legal means, as mortgagee had no right to possession until after transfer of title following foreclosure sale.
- (3834) *In re Brown*, 2014 WL 1245266 (11th Cir. 2014) – When collateral is surrendered in Chapter 13 Plan, debt is extinguished to extent of value of collateral. Value of Collateral is determined by replacement value of collateral. Prior decision in *Rash* using foreclosure value abrogated by BAPCPA provision of Section 1325(a)(5). Where replacement value of vehicle exceeded debt, debt was deemed satisfied in full upon surrender of collateral.
- (3835) *Brown v. Branch Banking & Trust Co.*, 477 BR 915 (Bankr. S.D. Ga. 2012) – Surrender of collateral does not obligation creditor to take affirmative action to transfer title or to foreclose. Creditor does not violate stay by failing to take any action to either foreclose or transfer title after confirmation of Plan.
- (3836) *In re Waltower*, 2012 WL 4758043 (Bankr. S.D. Ga. 2012) – Surrender of property in confirmed chapter 13 plan terminates automatic stay as to property. However, surrender does not convey title. Lender to whom property was surrendered had not foreclosed or taken title and, therefore, had no duty to maintain the property. Debtor’s failure to maintain property post-confirmation resulted in debtor being liable for damages to adjoining property owners for nuisance resulting from neglect and decay of property.
- (3837) *In re Paquette*, 2011 WL 5856265 (Bankr. E.D. Mi. 2011) – Plan provision that required creditor to file deficiency claim within 180 days after confirmation of plan that provided for surrender of property did not violate Code. Although creditor may not be able to complete foreclosure process within 180 days, but creditor had other options to quantify deficiency claim including motion to value collateral, motion to estimate deficiency, and amendment to secured proof of claim. Plan did not require creditor to actually foreclose to establish deficiency claim.

11.41 Surrender in Full Satisfaction

- (3838) *Santander Consumer USA, Inc. v. Brown*, 746 F.3d 1236 (11th Cir. 2014) – Replacement value of collateral applies when collateral is surrendered. Where replacement value of collateral exceeds debt, debt is satisfied on confirmation of the plan for debt that is not a “910-vehicle”.
- (3839) *In re Menden*, 2011 WL 4433621 (Bankr. N.D. Ohio 2011) – Creditor received constitutionally sufficient notice of Debtor’s Amended Chapter 13 Plan that provided for surrender of automobile in full satisfaction of debt. Service on Creditor at one of two notice addresses and electronic service on Creditor’s attorney who had filed a Notice of Appearance was sufficient to comply with Rule 2002. Even if service had not complied with Rule 2002, service on Creditor’s attorney was reasonably calculated, under all the circumstances, to apprise Creditor that its rights may be altered and to advise Creditor of opportunity to object. Confirmation of Plan was *res judicata* on surrender in full satisfaction. Creditor’s unsecured deficiency claim would be disallowed. However, Creditor would not be required to refund payments received from the Chapter 13 Trustee prior to the date on which the Proof of Claim was disallowed where Debtor waited almost three years after Trustee began distributions to file objection to claim.
- (3840) *Americredit Financial Services, Inc. v. Tompkins*, 604 F.3d 753 (2d Cir. 2010). Creditor could maintain unsecured claim for deficiency not satisfied by surrender and sale of “910 vehicle”.
- (3841) *In re Long*, 519 F.3d 88 (6th Cir. 2009) – “Hanging paragraph” added to section 1325(a)(5) does not preclude a creditor from asserting a deficiency claim when the Debtor surrenders a vehicle purchased within 910 days of the filing of bankruptcy. The amendment of section 1325 did not change the applicability of section 506 where the vehicle is being surrendered.

11.42 Secured Claims – Vesting Title in Creditor Permitted

- (3842) *In re Sagendorph*, 2015 WL 3867955 (Bankr. C.D. Mass. 2015) – Debtor can propose to treat secured creditor by vesting property in creditor at confirmation in satisfaction of the claim. Section 1325 allows a secured claim to be treated by surrender, which requires debtor to make collateral available for creditors and to cede his possessory right. Vesting, permitted pursuant to Section 1322(b)(9) conveys title, which by definition makes collateral available and cedes to creditor the right to possession. Vesting of property is not inconsistent with,

but is logical extension of, surrender. As vesting fulfills all requirements of surrender, vesting is not inconsistent with Section 1325(a)(5). Fact that state law does not permit borrower to convey property to lender without lender's consent does not prevent vesting as supremacy clause of constitution provides that federal law supersedes state law, and vesting is permitted by federal law through the bankruptcy code. Holding is also consistent with parallel provision in Chapter 11 which allows debtor to transfer property to creditor over creditor's objection. However, plan must still be proposed in good faith. Plan that proposes to vest in creditor property that is contaminated or vandalized, or that is encumbered or worth significantly less than debt without affording creditor right to participate as unsecured creditor for deficiency claim, may lack good faith.

- (3843) *In re Zair*, Case No. 14-74456 (Bankr. E.D. N.Y. 2015) – Section 1322(b)(9) allows debtor to vest title in secured creditor and provide that confirmation operates as deed of conveyance. While surrender and vesting are two different concepts, they are not mutually exclusive and Code's plain language allows Debtor to use both concepts in a plan. However, vesting cannot be done "in full satisfaction" and secured creditor must retain right to file deficiency claim.

11.43 Secured Claims – Vesting Title in Creditor Not Permitted

- (3844) *Bank of New York v. Watt*, 2015 WL 1879680 (D. Ore. 2015) – Section 1325 does not permit confirmation of plan over objection of secured creditor where plan proposes to vest title to property in creditor. Section 1325 allows confirmation only if creditor accepts plan or plan either provides for payments to creditor with creditor to retain lien or debtor surrenders property. Surrender means relinquishment of debtor's rights but does not impose on creditor a duty to accept title. Section 1322 lists permissible terms for plan but confirmation is governed by Section 1325. Section 1322 cannot create fourth option for dealing with secured claims by vesting title in creditor.
- (3845) *In re Davis*, Case No. 14-60616 (Bankr. S.D. Ga. 2015) – Plan that proposed to vest property in secured lender did not comply with Section 1325. Vesting involves immediate and non-consensual transfer of title, which is not the equivalent of surrender for purposes of Section 1325(a)(5).
- (3846) *In re Malave*, Case No. 13-13348 (Bankr. S.D. N.Y. 2014) – Debtor cannot use Section 1322(b)(9) to vest title in creditor, essentially forcing creditor to accept transfer involuntarily.
- (3847) *In re Smith*, Case No. 14-60627 (Bankr. S.D. Ga. 2014) - Plan cannot propose vesting of collateral in secured creditor. Code requires only that property be surrendered, which does not equate to transfer of title. Section of Code dealing with vesting does not require creditor to accept title to property and does not authorize court to enter order to compel creditor to either commence foreclosure or to accept quitclaim deed to property.
- (3848) *In re Rose*, 512 BR 790 (Bankr. W.D.N.C. 2014) – Plan cannot propose vesting of collateral in secured creditor. Code requires only that property be surrendered, which does not equate to transfer of title. Section of Code dealing with vesting does not require creditor to accept title to property and does not authorize court to enter order to compel creditor to either commence foreclosure or to accept quitclaim deed to property.
- (3849) *In re Coonfield*, 517 BR 239 (Bankr. E.D. Wa. 2014) – Creditor cannot be forced to accept title over objection. Plan that proposed to transfer property to secured creditor did not comply with Section 1325.
- (3850) *In re Rosa*, 495 BR 522 (Bankr. D. Hawaii 2013) - Provision of Chapter 13 plan that provided that confirmation order shall constitute a deed of conveyance of the property when recorded did not constitute "surrender" of property and could not be confirmed over objection of secured creditor. However, plan that included vesting provision would be confirmed where secured creditor did not object to proposed treatment. Plan provision went beyond mere surrender and proposed to vest title in first mortgage holder pursuant to Section 1322(b)(9) which provides that the plan may provide for the vesting of property of the estate, on confirmation of the plan, in the debtor or any other entity. Secured creditor's failure to object constitutes "acceptance" of the proposed treatment within Section 1325(a)(5)(A) as long as the secured creditor has received proper notice of the plan treatment.

11.44 Deficiency Claims – Limiting Provisions

- (3851) *In re Paquette*, 2011 WL 5856265 (Bankr. E.D. Mi. 2011) – Provision that required holders of secured claims on property being surrendered to file claims for deficiency balances did not violate Section 1325. Provision promoted plan feasibility and timely, orderly and fair administration of claims. Provision would not prohibit creditors from reaching agreement with debtor and the Chapter 13 Trustee as to the amount of the deficiency within the 180 day period; creditor could file a deficiency claim and allow the parties to object, with the court then determining the value of the collateral and liquidating the deficiency claim; asking court to value the property under procedures in Section 506 and Rule 3012; asking the court to estimate the amount of the deficiency claim under Section 502; or by filing a claim timely and then amending the claim at a later date to state the secured and unsecured portions of the claim once the value of the property is determined, either by a foreclosure sale or a valuation hearing.

11.45 Applicable Commitment Period

- (3852) *Plilar v. Stearns*, 2014 WL 1259569 (4th Cir. 2014) – Applicable Commitment Period is temporal. Debtors with above median income must propose 60 month chapter 13 plan even where disposable income on Form B22 is negative unless plan proposes 100% dividend in shorter time.
- (3853) *In re Skiles*, 2014 WL 92477 (Bankr. N.D. Ohio 2014) – Applicable Commitment Period depends on whether debtor's income is above or below median income for debtor's household size. In determining household size, court would not limit analysis to IRS definition of dependent, nor would court use "heads on beds" theory. Court would include only those individuals who acted as single economic unit

with debtor, defined as those who debtor financially supports and those who financially support the debtor. Individuals listed in debtor's tax return are rebuttably presumed to be members of debtor's household. Individuals not listed in most recent tax returns as dependents are rebuttably presumed not to be members of debtor's household. The party desiring a different conclusion has the initial burden of providing evidence showing the individual satisfies the "economic unit" definition. In determining whether person is part of "economic unit", court will consider degree of financial support provided to the individual by the debtor; degree of financial support provided to the debtor by the individual; extent to which individual and debtor share income and expenses; extent to which there is joint ownership or properly; extent to which there are joint liabilities; extent to which assets owned by debtor or the individual are shared, regardless of title; and any other type of financial intermingling or interdependency between debtor and individual. "Economic unit" will be construed expansively to include unmarried couple that shares living expenses in shared home and shared a significant amount of income and expenses; debtor, girlfriend, their child and her children from prior relationship, where debtor was primary source of support for girlfriend and her children; and adult daughter and her children where daughter and children were dependent on debtor for support. If information that may bear on includes a domestic relations order, such as a separation agreement or child custody order, but court may not accept domestic agreement that attempts to "even things out" and may not represent the economic realities of the parties. Official documents completed before the debtor's contemplation of bankruptcy such as an application for a residential loan or governmental assistance, which includes the debtor's household size may be relevant. Other information, such as receipts, bank statements, or credit card statements which either show or do not show costs consistent with caring for another may also be beneficial. Debtor's bald statement that an individual either is or is not part of the debtor's "household," without more, is insufficient when a good faith challenge is asserted. An adult capable of supporting himself, but who is not working without reasonable cause and lives off the generosity of the debtor, usually should be excluded from the debtor's "household," even if the adult would otherwise satisfy the requirements of the "economic unit" definition. A contrary rule would result in a debtor's creditors subsidizing the adult's decision not to work. Debtor failed to establish larger household size where tax return listed only one child, where debtor had shared custody of three children from prior marriage and had part-time custody. Fact that children spend a few days per month with debtor did not establish that debtor provided economic support or that children were part of "economic unit" of debtor rather than of ex-wife who had primary custody. Even if children were considered part of household they would be considered only as "part time" members with proper accounting for time spent with each parent and counted on fractional basis. Debtor's two children each lived with him approximately half of the time, and counted for a combined "one" person for means test purposes.

- (3854) *In re Gaut*, 2014 WL 293556 (Bankr. N.D. Ohio 2014) – Applicable commitment period is determined by whether debtor is above or below median income for a household of debtor's size. Court would use "economic unit" method of determining household size, rather than "heads on beds" analysis. On date of filing, Debtor resided in house with non-filing spouse, 19 year old son, and 20 year old daughter, her husband and her child. Only income in house was Debtor's disability. Debtor and spouse tax returns listed only the 19 year old son as dependent. Tax returns created rebuttable presumption of dependents, giving rise to presumption that debtor's household size was three. Court scheduled additional hearing to take further evidence on "economic unit" status of debtor's household.
- (3855) *Danielson v. Flores*, 2013 WL 4566428 (9th Cir. 2013) – Above-Median Debtor with negative disposable income has applicable commitment period of 5 years. ACP is temporal requirement and above median debtor must propose plan length of 60 months even where disposable income calculated pursuant to Section 1325 and Section 707 is negative number. Court reversed prior 9th Circuit decision in *Kagenveama*, 541 F.3d 868 (9th Cir. 2008), as in conflict with Supreme Court decision in *Lanning*, 130 S.Ct. 2464 (2010), and aligning itself with the Sixth, Eighth and Eleventh Circuits.
- (3856) *Baud v. Carroll*, 2011 WL 338001 (6th Cir. 2011) – Section 1325(b) ties "applicable commitment period" to Current Monthly Income and not calculation of "disposable income". Debtor who has Annualized Current Monthly Income in excess of applicable median income has an Applicable Commitment Period of 60 months regardless of whether calculated "disposable income" is positive, zero or negative.
- (3857) *In re Tennyson*, 611 F.3d 873 (11th Cir. 2010) - Applicable commitment period is temporal, establishing the minimum length of the plan, and not merely a multiplier. Above median debtor must propose 60-month plan unless paying 100% dividend. Linking "applicable commitment period" to "disposable income" would leave "applicable commitment period" an indeterminate term in light of *Lanning* approach that "projected disposable income" can vary based on multitude of factors. In order for "applicable commitment period" to have any definite meaning, its definition must be that of a temporal term derived from Section 1325(b)(4) and independent of Section 1325(b)(1).
- (3858) *Yoshikawa v. Carroll*, Case No. 10-11701 (E.D. Mi. 2011) – Citing Sixth Circuit Decision in *Baud*, Debtor with above median CMI has 60 month Applicable Commitment Period regardless of positive or negative disposable income.
- (3859) *In re Wolkens*, Case No. 10-40184 (Bankr. E.D. Mi. 2010) – Above Median Income Debtor with no disposable income does not have an applicable commitment period and so can confirm plan that runs less than 60 months without paying all claims in full, relying on District Court opinion in *In re Baud*, 415 BR 291 (Bankr. E.D. Mi. 2010).
- (3860) *Whaley v. Tennyson*, 2010 WL 2793941 (11th Cir. 2010) – Above median income debtor must be in plan for minimum of five years. "Plain language" of statute indicates that Applicable Commitment modifies "period" which is a measure or duration of time. Applicable Commitment Period as measure of time does not render Section 1322(d) limit useless as 1325(b) sets a minimum period at 5 years unless all unsecured claims are paid in full in a shorter time, while Section 1322(d) sets only a maximum length. To read applicable commitment period as temporal only would render 1325(b)(4)(B) superfluous. Although *Lanning* does not directly address issue, *Lanning* does state that Section 1325 formula does not exist in a vacuum. Applicable Commitment Period must have an existence independent of 1325(b) calculation of disposable income; otherwise, applicable commitment period would not have a fixed or definable

meaning. Congressional intent also indicates that Applicable Commitment Period is temporal, as Congress intended to require debtors to repay creditors the maximum amount they can afford.

- (3861) *In re Compann*, 2010 WL 4008311 (Bankr. N.D. Ga. 2010) – Applicable Commitment Period is determined by Current Monthly Income as defined in Section 101(10A). Debtor who has CMI above the applicable median has a 60 month ACP regardless of amount of “disposable income” as calculated on Means Test form. Self-employed debtor must calculate CMI using gross income, which will then determine ACP and plan length. Debtor is permitted to deduct business expenses only after CMI is determined to calculate Disposable Income.
- (3862) *In re Weigand*, 386 BR 238 (9th Cir. 2008) – Chapter 13 debtor engaged in business may not deduct ordinary and necessary business expenses from gross receipts for the purpose of calculating CMI. Business expenses are to be subtracted from CMI when calculating “disposable income.” Debtor with Current Monthly Income above median has 60 month Applicable Commitment Period.
- (3863) *In re Carpenter*, 2009 WL 1636246 (Bankr. E.D. Tn. 2009) – For above-median Debtor, “applicable commitment period” is temporal and not monetary or mathematical. Above median Debtor must be in plan for full 60 months unless plan proposes 100% dividend to creditors in shorter time. “Applicable Commitment Period” is not just part of mathematical equation. Fact that Debtor could pay to unsecured creditors an amount equal to 60 times calculated “disposable income” does not excuse requirement that Debtor commit all projected disposable income over 60 month plan term. Phrase “applicable commitment period” is composed of terminology that is not defined in the Code. Dictionary definitions of “Applicable” (defined as “fit or suitable for its purpose; appropriate”); “commitment” (defined as “the committing of oneself to a particular course of conduct”); and “period” (defined as “a length of time”) lead to conclusion that “applicable commitment period,” is the length of Debtor’s Chapter 13 Plan.
- (3864) *Baud v. Carroll*, 2009 WL 2876899 (E.D. Mi. 2009) *reversed Baud v. Carroll*, 2011 WL 338001 (6th Cir. 2011) – Section 1325(b) ties “applicable commitment period” to Current Monthly Income and not calculation of “disposable income”. Debtor who has Annualized Current Monthly Income in excess of applicable median income has an Applicable Commitment Period of 60 months regardless of whether calculated “disposable income” is positive, zero or negative.
- (3865) *Hildebrand v. Petro*, 2008 Fed. App. 0015P (6th Cir. BAP 2008) – “Projected Disposable Income” is not based on a mechanical application of the provisions of Sections 1325(b)(1) and (2). Section 1325(b)(2) defines “disposable income” as “current monthly income less specific expenses enumerated in Section 707(b)(2)(a) and (B). “Disposable income” is a backward looking determination based on the six months preceding the commencement of the bankruptcy case. “Projected” disposable income requires an examination of future events and factors likely to be in operation through the projection period. Section 1325(b)(1) requires an analysis of projected disposable income “as of the effective date of the plan”. Therefore, the inquiry must focus on the reality of the Debtor’s income and expenses at confirmation as disclosed on Debtor’s Schedules I and J. Although Debtors “disposable income” calculation resulted in negative income, Schedules I and J indicated that Debtors had total monthly net income of \$1386.33. Section 1325(b)(1) would require Debtor to make monthly payments in the amount of \$1386.33 in order to pay 100% of Debtor’s “projected disposable income”.
- (3866) *In re Dotson*, 2009 WL 11586554 (Bankr. N.D. Ohio 2009) – “Applicable commitment period” is a measure of time and not a multiplier or element in mathematical formula. Applicable Commitment Period for debtor with Current Monthly Income above the applicable median income Debtor is 60 months. Therefore, Plan must either provide a term of 60 months or must pay not less than 100% to all creditors in a shorter time. Plan which proposed 36 month term with no dividend to unsecured creditor failed to comply with Section 1325 and could not be confirmed.
- (3867) *Coop v. Frederickson*, 545 F.3d 652 (8th Cir. 2008) – “Applicable commitment period” is a measure of time and not a multiplier or element in mathematical formula. Applicable Commitment Period for debtor with Current Monthly Income above the applicable median income Debtor is 60 months. Therefore, Plan must either provide a term of 60 months or must pay not less than 100% to all creditors in a shorter time. Plan which proposed 36 month term with no dividend to unsecured creditor failed to comply with Section 1325 and could not be confirmed.

11.46 Disposable Income Distinguished From Projected Disposable Income

- (3868) *Plilar v. Stearns*, 2014 WL 1259569 (4th Cir. 2014) – “Disposable Income” and “Projected Disposable Income” are two different concepts. Disposable income is based entirely historical information, while projected disposable income is forward looking and takes into account known or virtually certain changes to income and expenses. Bankruptcy court can consider Schedules I and J to capture changes to disposable income.
- (3869) *Mort Ranta v. Gorman*, 2013 WL 3286252 (4th Cir. 2013) – Projected disposable income is calculated using disposable income, adjusted in exceptional cases where future changes are known or virtually certain to occur.
- (3870) *In re Aldridge*, 2011 WL 3889246 (Bankr. W.D. Ohio 2011) – Projected Disposable Income is calculated based on Means Test and Form B22C. Where debtors could not dispute math in calculations and could not point to any “known or virtually certain” changes sufficient to overcome statutory presumption of disposable income, debtors required to pay Disposable Income as calculated in B22C to unsecured creditors. Where debtors indicated that the “simply cannot pay” that amount into the plan, confirmation denied and case dismissed as any attempt to amend the plan would be futile.
- (3871) *Baud v. Carroll*, Case No. 09-10673 (E.D. Mi. 2009) – Debtors with above median income but who have no “disposable income” as calculated pursuant to section 1325 are not required to be in a 60 month Chapter 13 plan. Because the Debtors have no “projected disposable income” as calculated on the Form B22C, the “applicable commitment period” requirement “does not come into play”.

“Projected disposable income” is determined using a “formulaic approach” for above median Debtors. Projected disposable income is based on “current monthly income” as defined in section 101(10A) less “amounts reasonably necessary to be expended” as determined in accordance with section 707(b)(2)(A) and (B), to create “presumptive” projected disposable income. Thus, Debtors whose calculation of Monthly Disposable Income using the form B22C produced a negative number presumptively did not have “projected disposable income” merely because Schedule I exceeded Schedule J by \$400 per month. Burden is then upon objecting party to rebut presumption that Debtor’s “disposable income” as shown on form B22C does not reflect Debtor’s true “projected disposable income”. Positive net income shown on Schedules I and J is not sufficient to rebut presumption of form B22C’s accuracy, absent additional evidence demonstrating that Debtor’s pre- bankruptcy average income and expenses have improved recently in any material aspect. The fact that Debtor’s Schedules I and J indicate that Debtor has ability to pay more of their unsecured debts does not overcome the fixed formulas for identifying Debtors who can afford to repay their debts as “very clearly” established by Congress. As presumption of negative disposable income was not rebutted, Debtors were not subject to minimum “applicable commitment” and could confirm a plan which proposed only a 36 month plan term notwithstanding status of Debtors as “above median income” Debtors.

- (3872) *Hildebrand v. Thomas*, 395 BR 914 (6th Cir. BAP 2008) – The calculation of “disposable income” under Section 707 does not control the calculation of “projected disposable income” for purposes of section 1325(b)(1)(B). “Projected disposable income” is forward-looking and must be based on anticipated income over the life of the plan. “Projected disposable income” under Section 1325(b)(1)(B) will match “disposable income” under Section 1325(b)(2) if the Debtor’s income and expenses remained consistent from a date six months prior to filing through the effective date of the plan. However, where Debtor’s income or expenses have changed, the amount available for unsecured creditors from “projected disposable income” may be more or less than that reflected as “Monthly Disposable Income” on the form B22C. Thus, Debtor’s intention to surrender collateral in a Chapter 13 will not affect the calculation of “disposable income” but will affect the calculation of “projected disposable income” as that will no longer include a deduction for the secured claim which Debtor intends to surrender, even though the Debtor was able to take that deduction under the means test. Court cannot confirm a plan that fails to contribute 100% Debtor’s “projected disposable income”.
- (3873) *In re Petro*, 395 BR 369 (6th Cir. BAP 2008) - The calculation of “disposable income” under Section 707 does not control the calculation of “projected disposable income” for purposes of section 1325(b)(1)(B). “Projected disposable income” is forward-looking and must be based on anticipated income over the life of the plan. “Projected disposable income” under Section 1325(b)(1)(B) will match “disposable income” under Section 1325(b)(2) if the Debtor’s income and expenses remained consistent from a date six months prior to filing through the effective date of the plan. However, where Debtor’s income or expenses have changed, the amount available for unsecured creditors from “projected disposable income” may be more or less than that reflected as “Monthly Disposable Income” on the form B22C. Thus, Debtor’s intention to surrender collateral in a Chapter 13 will not affect the calculation of “disposable income” but will affect the calculation of “projected disposable income” as that will no longer include a deduction for the secured claim which Debtor intends to surrender, even though the Debtor was able to take that deduction under the means test. Court cannot confirm a plan that fails to contribute 100% Debtor’s “projected disposable income”.
- (3874) *In re Dotson*, 2009 WL 11586554 (Bankr. N.D. Ohio 2009) – “Projected disposable income” is not synonymous with “disposable income”. “Projected disposable income” is based on Debtor’s Schedule I and Schedule J. Although Debtor’s Means Test indicated that Debtor had negative disposable income, Debtor’s Schedules I and J indicated that Debtor had “monthly net income” of \$350.00. Debtor’s Chapter 13 Plan failed to commit 100% of Debtor’s “projected disposable income” could not be confirmed over objection of the Chapter 13 Trustee or unsecured creditors.

11.47 Tax Refunds as Disposable Income

- (3875) *In re Kehl*, Case No. 10-65068 (Bankr. E.D. Mi. 2011) – Tax refunds constitute “disposable income” in Chapter 13. Debtors who historically received tax refunds of \$4,000 per year would be required to contribute those to Chapter 13 plan absent evidence that refunds are necessary for support or maintenance of debtors.
- (3876) *In re Barbutes*, 2010 WL 3522420 (Bankr. M.D. Tn. 2010) – Debtor’s future tax refunds are generally considered “disposable income” that must be contributed to the plan funding. Debtor’s testimony that debtors “tried not to owe” at tax time and lack of any proof that future refunds were needed for the “maintenance or support” of the debtors rendered tax refunds disposable income. Plan that failed to commit 100% of future tax refunds could not be confirmed.

11.48 Exempt Assets as Disposable Income

- (3877) *In re Kirby*, 2012 WL 733884 (Bankr. D. Neb. 2012) – Proceeds of personal injury action are disposable income. Although debtor properly amended schedule B to disclose, and Schedule C to exempt, post-petition personal injury action as exempt, “majority view” holds that exempt property can be disposable income in a Chapter 13 case. Chapter 13 contains no language suggesting that exempt post-petition revenues are not Chapter 13 “income” and Section 1325(b)(2) expressly defines “disposable income” to mean income not needed for debtor’s support. Trustee’ plan modification granted to extent of additional funds necessary to pay creditors in full.

11.49 Ambiguous Provisions

- (3878) *In re Robbins*, 426 B.R. 265 (Bankr. W.D. Mich. 2010) - Proposed Chapter 13 Plan was neither clear nor feasible, warranting denial of confirmation without prejudice to amendment. On one hand, the Plan provided that all unsecured creditors will receive a 100% dividend, but on the other hand, it also provided that Sallie Mae will receive a *pro rata* distribution with other unsecured creditors and payments after the Plan’s repayment period ends. The notion that Sallie Mae’s payment rights will continue is inconsistent with the proposition that all unsecured creditors (of whom Sallie Mae is the largest) will receive a 100% dividend. If the Plan’s dividend were

truly *pro rata*, Sallie Mae would receive about 96 percent of each month's plan payment, and the other unsecured creditors would receive roughly 4 percent, which results in other unsecured creditors receiving far less than the 100% dividend the Debtor's Plan promises.

- (3879) *In re Woods*, 406 BR 293 (Bankr. N.D. Ohio 2009) – Provision in Chapter 13 Plan that real property would be surrendered in full satisfaction did not prevent secured creditor from filing unsecured deficiency claim. Creditor filed Proof of Claim before plan was confirmed, providing notice to debtor that creditor contested treatment in plan and that creditor would expect that any objection to the deficiency claim would be resolved through the claim resolution process.

11.50 Retirement Contributions

- (3880) *In re Reyes*, Case no. 15-45618 (Bankr. E.D. Mi. 2015) – Debtor is not permitted to deduct voluntary retirement contributions in calculating disposable income over objection of creditor or Trustee.
- (3881) *In re Pittman*, 2014 WL 946570 (Bankr. S.D. Ohio 2014) – Debtor not permitted to deduct voluntary 401-k contributions in calculating disposable income. Debtor must also increase disposable income upon final payment of 401-k loans. Terminating contributions and increasing payment when loan ends would provide dividend of at least 24% to unsecured creditors, rendering debtor's case abusive under Section 707(b)(3). Debtor's alleged anticipated tax liabilities and medical expenses and potential lost income from shoulder complications did not alter conclusion that case was abusive where debtor failed to present any corroborating testimony or documentation from any health care providers regarding injuries or potential medical expenses.
- (3882) *In re Scott*, 2013 WL 5567319 (Bankr. N.D. Ohio 2013) – Income made available after payment of 401-k loans must be included in calculating disposable income. Changes in expenses is known or virtually certain as of date of confirmation.
- (3883) *In re Manlove*, 2013 WL 1385747 (Bankr. E.D. Wa. 2013) – Debtor's voluntary contributions were not reasonably necessary where debtor was participant in employer funded pension plan and debtor would not be retiring for at least 20 years. Debtors had sufficient income to fund a plan of reorganization, resulting in debtor's Chapter 7 being abusive under Section 707(b)(3).
- (3884) *In re Bruce*, 484 BR 387 (Bankr. W.D. Wa. 2012) – Below median debtor permitted to continue to contribute to retirement account where amount was relatively nominal and debtor had reduced contributions prior to commencement of case in effort to pay creditors. Amount of contribution was amount necessary for debtor to obtain employer matching of contributions and debtor did not have large amount already set aside for retirement.
- (3885) *In re Rodriguez*, 487 BR 275 (Bankr. D. N.Mex. 2013) – Debtor's plan lacked good faith where debtor proposed to contribute \$733 per month to debtor's retirement fund for duration of plan. Although contribution was consistent with historical contributions, debtor's proposed contributions lacked good faith as primary creditor was ex-wife who held claim based on debtor's pre-petition misappropriation of funds from spouse's retirement account.
- (3886) *In re Rogers*, Case No. 12-32558 (Bankr. E.D. Mi. 2012) – Debtors cannot exclude post-petition voluntary retirement contributions in calculating disposable income.
- (3887) *In re Golematis*, 2012 WL 3583154 (Bankr. E.D. Mi. 2012) – Debtor-wife's 401-k contributions were not unreasonable where debtor-wife was 45 years old and had only \$14,000 in total retirement savings.
- (3888) *Parks v. Drummond*, 475 BR 703 (9th Cir. BAP 2012) – Debtors cannot deduct voluntary post-petition retirement contributions in calculating disposable income. Section 541(b)(7)(A) excludes retirement contributions as of the commencement of the case from property of the estate. Section 1306 expressly incorporates Section 541. Read together, "most reasonable" interpretation is that Section 541 excludes only contributions made pre-petition from calculation of disposable income. BAPCPA excludes from disposable income any post-petition payments on retirement loans but does not exclude post-petition contributions.
- (3889) *Seafort v. Burden*, 669 F.3d 662 (6th Cir. 2012) – Income made available once Debtors' 401(k) loan repayments are fully repaid is properly committed to the debtors' respective Chapter 13 plans for distribution to the unsecured creditors and may not be used to make voluntary retirement contributions. Congress's placement of 401(k) loan repayments within Chapter 13 itself and placement of the exclusion for voluntary retirement contributions elsewhere was deliberate. Congress did not intend to treat voluntary 401(k) contributions like 401(k) loan repayments, because it did not similarly exclude them from "disposable income" within Chapter 13 itself. Congress also does not consider voluntary contributions as reasonable and necessary expenses deductible from "disposable income," because it did not list them in § 707(b)(2)(A) & (B) and retirement contributions are excluded from the list of "necessary expenses" in Official Form 22C. Section 541(b)(7) excludes from property of the estate only those contributions made before the petition date. Congress intentionally limited the type of contributions to qualified retirement plans that would be excluded from disposable income only to contributions in effect as of the commencement of a debtor's bankruptcy case. Debtors who were not, as of the date of the petition, making contributions into their 401-k accounts but who were repaying 401-k loans could not begin contributing once loans were repaid. Additional funds available after loans are repaid constitute disposable income that must be contributed to Plan.
- (3890) *In re Beckerman*, 381 BR 841 (Bankr. E.D. Mi. 2008) – Retirement contributions are not per se included or excluded in calculating disposable income for purposes of Section 707(b)(3). Retirement contributions must be reasonably necessary for maintenance or support of debtor or a dependent of the debtor. Debtors' contribution of \$469 per month was reasonably necessary where debtors were 55 years old, had no savings for retirement and had no significant personal or real property. Although both debtors enjoyed stable employment and neither planned on retiring for a number of years, combination of age and lack of any meaningful retirement savings demonstrated that debtors would not be able to sustain retirement without continuing contributions. Amounts contributed were reasonably necessary and would be deducted in determining disposable income for purposes of Section 707(b)(3).

- (3891) *In re Egan*, 2011 WL 3902817 (Bankr. E.D. Pa. 2011) - Chapter 13 debtors are not prohibited from increasing amount of post petition contributions to 401(k) plan subject to review for good faith. Plan proposed to complete repayment of 401 (k) loans into thin increase amount of 401 (K) contributions by the amount of the loan payments. Congress did not include any qualifying language in section 541 which excludes "any amount" of retirement contributions from calculation of Current Monthly Income. Repayment of 401 (k) loans constitute changes that are known or virtually certain at the time of confirmation. Further, allowing increased contributions is consistent with congressional policy favoring personal retirement savings.
- (3892) *In re Parks*, 2011 WL 2493071 (Bankr. D. Montana 2011) - Section 541 excludes from calculation of Disposable Income any amounts withheld by an employer as of the petition date but does not insulate further retirement contributions from disposable income analysis.
- (3893) *In re McCullers*, 451 BR 498 (Bankr. N.D. Cal. 2011) - Section 541 excludes from project disposable income only prepetition voluntary retirement contributions. Chapter 13 debtors was Current Monthly Income greater than the applicable median family income cannot make any voluntary post petition contributions to a retirement plan if they creditor or the trustee objects under section 1325. There are circumstances in which a chapter 13 debtor can make post petition contributions to a qualified benefit plan absent and objection by the trustee or unsecured creditors. If the trustee or unsecured creditors object, court must determine reasonableness of voluntary contributions.
- (3894) *In re Kehl*, Case No. 10-65068 (Bankr. E.D. Mi. 2011) –Voluntary retirement contributions are not per se unreasonable and must be evaluated on case by case basis, looking to factors such as amount of existing retirement savings, debtor's age and expected time until retirement, annual income and overall budget, amount of monthly retirement contributions, and needs of any dependents. Contributions were not reasonable where debtors were in their early 30s and had \$22,000 in retirement savings. Debtors had annual income in excess of \$97,000 and proposed contribution was \$423 per month. If the debtors stopped contributing only during Chapter 13 plan and then resumed contributions, debtors would have more than \$230,000 in retirement savings by age 60.
- (3895) *In re Meyers*, Case No. 09-77897 (Bankr. E.D. Mi. 2010) – Reasonableness of 401-k contributions must be determined with reference to amount of existing retirement savings; debtor's age and time left until retirement; annual income and overall budget; amount of monthly contributions; and needs of dependents. Court would disallow 401-k deduction where debtor increased contribution on eve of bankruptcy in an effort to facilitate early retirement and debtor had second pension provided directly by employer as well as social security benefits that, combined, would permit debtor to adequately fund her retirement.
- (3896) *In re Divazio*, Case no. 10-74441 (Bankr. E.D. Mi. 2011) – Retirement contributions are not *per se* necessary, and depend on amount of existing retirement savings, debtor's age and time left to retirement, annual income and overall budget, amount of monthly contributions, and needs of dependents.
- (3897) *In re Duncan*, Case No. 10-72730 (Bankr. E.D. Mi. 2011) –Voluntary contributions to retirement plans are not per se unreasonable and must be examined on case-by-case basis looking to amount of existing retirement savings; debtor's age and time left until retirement; annual income and overall budget; amount of monthly contributions; and needs of dependents. Debtor was 42 years old and would likely retire in 20 years. Even reducing debtor's 401-k contributions by half would allow debtor to accumulate significant retirement savings while still paying 50% of unsecured debt.
- (3898) *In re Hoke*, 447 BR 835 (Bankr. N.D. Ohio 2011) –Court would add back debtors' voluntary 401-k contributions totaling over \$600 per month where debtors are young and in good health and there was no evidence of any exigency such as health or impending retirement.
- (3899) *In re Smith*, 2010 WL 2400065 (Bankr. N.D. Ohio 2010) – In determining disposable income for purposes of Chapter 13, debtor's contributions to voluntary retirement plan are excluded. Prior to the enactment of the Bankruptcy Abuse and Consumer Protection Act of 2005 ("BAPCPA"), most courts took a dim view of 401(k) contributions. Courts reasoned that such contributions compromised the tradeoff of temporary maximum repayment for permanent debt relief on which chapter 13 is premised. BAPCPA added section 541(b)(7), which excludes from property of the estate any amount withheld by an employer from the wages of employees for payment as contributions to an employee benefit plan that is subject to title I of the Employee Income Security Act of 1974 except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2). Debtors' contributions to 401(k) plans are excluded from the debtors' disposable income. However, debtor's "eve of bankruptcy" decision to commence or increase the amount of the contribution can still be considered in determining debtor's good faith or lack of good faith. Good-faith serves as a backstop against debtors who attempt to exploit Code provisions at the expense of bankruptcy policies including fairness to unsecured creditors. Further, section 541 limits reference to section 1325(b)(2) and does not exclude retirement contributions in determining good faith under section 1325(a)(3). Relevant factors include whether the debtor increased his contribution on the eve of bankruptcy, the amount of any such increase, the financial planning justification for any such increase, and the amount of the debtor's 401(k) contributions relative to the distribution to unsecured creditors. Such considerations prevent the good faith argument from becoming the last refuge of scoundrels for rogue creditors wishing to object to everything. Debtors' plan is proposed in bad faith where debtor increased his 401(k) contribution by five times on the eve of filing bankruptcy to a level far beyond what was typical for him; the increase reduced the distribution to unsecured creditors by more than half; and debtors presented no financial-planning justification for the increase. Debtors' 401(k) contributions went far beyond reasonably measured retirement planning and are unfair to unsecured creditors.

11.51 Retirement Loans

- (3900) *In re Farkas*, 2012 WL 3257855 (Bankr. E.D. Mi. 2012) – Retirement account contributions are not per se allowed or disallowed but must be evaluated on case by case basis looking at totality of circumstances including amount of existing savings, debtor's age, and years left until retirement. Debtor's 401-k loan payments were not reasonably necessary where debtor, age 39, already had \$127,000 in retirement savings plus separate pension plan through employer. Debtor was relatively young and had many years remaining before retirement.

11.52 Cramdown

- (3901) *In re Wollman*, 2014 WL 3778288 (Bankr. E.D. Tn. 2014) – Debtor can bifurcate lien that is secured by debtor’s interest in real estate and also in manufactured home in which debtor resided but which was not affixed to the real estate. Section 1322(b)(2) does not prevent modification or bifurcation of lien that is secured, in whole or in part, by personal property. Court valued collateral at amount listed in debtor’s schedules where debtor did not indicate that the debt was contingent, disputed or unliquidated and did not indicate any disagreement with the valuation asserted by creditor in debtor’s prior bankruptcy case. Lien would be bifurcated into secured and unsecured portion, with secured portion to be paid as “cure and maintain” where debtor would maintain contractual payments and cure arrearage over life of plan; and unsecured portion to be paid as general unsecured claim pro rata with all other unsecured claims. To extent treatment may be inconsistent with normal cure and maintain provisions, treatment proper because creditor’s proof of claim itself bifurcated lien amount consistent with amounts determined by court; and creditor did not object to bifurcation and “cure and maintain” where creditor’s only objection was to whether proposed “maintain” payment was proper amount under loan documents. Court recognized authority that normally Section 1322(b)(2) anti-modification and Section 1322(b)(5) are mutually inconsistent such that debtor can either cure and maintain debt in full or can modify or bifurcate and pay secured portion in full over life of plan.
- (3902) *Magee v. Weller*, 2013 WL 5366092 (S.D. Ohio 2013) – Code provisions that permit debtor to bifurcate liens on non-residential real property to extent lien exceeds value of collateral is not unconstitutional taking under Fifth Amendment. While bifurcation may alter secured creditor’s property rights, it does not completely destroy those rights and does not implicate the takings clause of the Fifth Amendment.
- (3903) *In re Thorpe*, 2011 WL 671935 (Bankr. E.D. Ky. 2011) – Debtor’s interest in mobile home that debtor was leasing on lease-purchase was property of estate. Debtor cannot cram down secured obligation on which debtor is not liable. Debtor leased a mobile home with option to purchase. At the time, Debtor’s seller was indebted to creditor and creditor held properly perfected security interest in the mobile home. Debtor could not cram down secured claim absent privity with the creditor. Debtor could not cram down the lease- purchase because Section 365 requires leases to be assumed or rejected in toto, and does not allow modification or alteration as part of assumption process.
- (3904) *Reinhardt v. Vanderbilt Mortgage and Finance, Inc.*, 563 F.3d 558 (6th Cir. 2009) – Anti-modification provision of Section 1322(b)(2) does not prohibit cramdown of lien which is secured by both real estate and the unattached mobile home located on that real estate. Section 1322(b)(2) prohibits only cram down of a security interest in real property that is the Debtor’s principal residence. Section 1322 contains two requirements: the property be real property; and the real property be the Debtor’s principal residence. If the claim does not pertain to “real property” it does not matter whether the claim is on the “Debtor’s principal residence”. Although the mobile home was located on the real property, the mobile home which constituted the Debtor’s principal residence was unattached personal property. As the creditor’s lien was secured by property other than in real property constituting the Debtor’s principal residence, section 1322(b)(2) did not prohibit the modification or cram down of that security interest.

11.53 Liquidation Analysis

- (3905) *In re Engle*, 2013 WL 4038625 (Bankr. S.D. Ohio 2013) – To determine whether plan meets “best interests of creditors” test, court must determine value, as of the effective date of the proposed Chapter 13 plan, of the property to be distributed to each unsecured creditor in Chapter 13, taking into account the Chapter 13 administrative expenses, and compare that to what creditors would receive in a liquidation under Chapter 7. Where avoidance actions would be successful in a Chapter 7, Plan must account for value of avoidance actions. Plan that proposed that Chapter 13 Trustee would pursue avoidance action and retain any proceeds did not meet liquidation analysis as Chapter 13 Trustee has no obligation to pursue recovery and Debtor cannot, through plan, attempt to force trustee to pursue preference action. Debtor can propose plan that calls for debtor to pursue recovery and pay proceeds to trustee, but cannot seek to impose obligation on trustee to pursue recovery.
- (3906) *In re Hilliard*, 2012 WL 1067691 (Bankr. E.D. Tn. 2012) - Debtor in divorce proceeding was awarded entire interest in marital home, provided that when, or if, the home was sold, debtor and her ex-husband would each receive one half of the proceeds. Ex-husband executed quitclaim deed to debtor which was properly recorded. As of the date of debtors bankruptcy petition, the property had not been sold. Although Domestic Relations Court apparently intended for ex-husband to retain equitable interest of property, that equitable interest was not disclosed in the public records and, therefore, a chapter 7 trustee would take title to the property free and clear of ex-husbands interest. Further, ex-husbands unrecorded interest in the proceeds of the sale would be unavoidable transfer, the value of which would be brought back into the estate for valuation purposes. Therefore, entire value of property must be considered in determining whether chapter 13 plan meets liquidation requirement for confirmation.
- (3907) *In re Sharp*, 394 BR 207 (Bankr. C.D. Ill. 2008) – Court must perform a hypothetical analysis to determine what, if anything, a Chapter 7 trustee would be able to distribute to unsecured creditors if a debtor’s estate were liquidated. To accomplish that analysis, the value of a debtor’s non-exempt property must first be determined. That value is then reduced by (i) the administrative expenses of a Chapter 7 case, including the costs of sale of the non-exempt property, (ii) the amount of all lien claims that would be enforceable against the non-exempt property in the Chapter 7 case, and (iii) the amount of priority claims allowable under Chapter 7 which would be paid with sale proceeds before a distribution to unsecured creditors. What remains is the minimum amount that must be paid to unsecured creditors through the Chapter 13 plan to meet the requirement of Section 1325(a)(4). Trustee’s reliance on old depreciation schedules to suggest that the price paid years ago for items is determinative of their value today is misplaced. Although more than \$12,000 was spent since 2002 for business equipment, it is doubtful that items such as a cellular telephone purchased in 2005 for \$61 or a shop vacuum purchased in 2006 for \$52 would retain much value. Court must also deduct expense of liquidating these items or the other administrative costs of a Chapter 7 case. Trustee failed to present any evidence that Chapter 7 trustee would pursue the Debtor’s assets because the value of the assets would have to be four to five times greater than what the Debtor estimates in order for a Chapter 7 trustee to liquidate the assets, pay the

Debtor his exemption, pay the costs of sale and other Chapter 7 expenses, and still have something meaningful to distribute to unsecured creditors.

11.54 Liquidation Discount Rate

- (3908) *In re Engle*, 2013 WL 4038625 (Bankr. W.D. Ohio 2013) – Liquidation requires that proceeds to be paid under Chapter 13 plan be reduced to present value to determine whether plan meets liquidation. *Till* rate is correct rate to use as discount factor. Debtor's proposed discount rate of less than 1% did not provide adequate discount. Trustee's proposed rate of 5.25% based on national prime rate of 3.25% plus 2% risk factor was reasonable rate.
- (3909) *McDonald v. Credit Acceptance Corp.*, 2011 WL 6643074 (E.D. Mi. 2011) – Interest rate that exceeds 3% risk factor not prohibited by *Till*. *Till* did not impose ceiling over prime as risk factor. Plan that provided for interest to secured creditor at 15% approved when contract rate was 24% and car was purchased only one week prior to filing.
- (3910) *First United Sec. Bank v. Garner*, 2011 WL 93763 (M.D. Ala. 2011) - Oversecured creditor was entitled to contract rate of interest until confirmation, then prime-plus rate established by *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (May 17, 2004). Section 1325(a)(5)(B)(ii) is more specific than § 506(b) and fixes cutoff date for accrual of contract interest at effective date of plan.
- (3911) *In re Villegas*, 09-41394 (Bankr. E.D. Mi. 2009) – The interest rate to be used to for purposes of Section 1325(a)(4) is determined according to *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). Plan that proposed interest to unsecured creditors at Federal Judgment rate of 0.43% could not be confirmed over objection of creditor or Chapter 13 Trustee (citing *In re Hoskins*, 2009 WL 1139407 (Bankr. N.D. W. Va. 2009)).

11.55 Unfair Discrimination Generally

- (3912) *Copeland v. Fink*, 742 F.3d 811 (8th Cir. 2014) – Unfair discrimination prohibition prevents confirmation of plan that pays nondischargeable, non-priority claims in full making no payments to general unsecured claims. Nondischargeability alone is not a basis for separate classification and preferential treatment.

11.56 Unfair Discrimination – Co-signed Debt

- (3913) *In re Russell*, 2013 WL 6858133 (Bankr. S.D. Ohio 2013) – Section 1322(b)(1) allows plan to discriminate where claim is one for consumer debt where debtor is jointly liable with another person. Exclusion of co-signed consumer claims does not allow co-signed creditor to receive more than the creditor would have received outside bankruptcy, such as by accelerating payments to cosigned creditors or allowing cosigned creditors to receive more than the amount they are owed. Section 1322(b)(1) also does not allow debtor to prefer co-signed debt where doing so would improperly allow debtor to shelter income and assets that are effectively debtor's. thus, debtor could not propose full payment of joint obligation with debtor's spouse to retain luxury automobile. Court approved plan that proposed higher payment to student loan creditors on obligations that were incurred by and for benefit of debtor and on which debtor's mother co-signed. Case presented quintessential facts that motivated congress to add the co-signed consumer debt clause.
- (3914) *Carrión v. Rivera*, Case No. 12-067 (1st Cir. BAP 2013) – Section 1322(b)(1) allows plan to discriminate where favored creditor is co-signed consumer debt. Debtor's obligation to co-operative association was co-signed by mother-in-law. Loan was secured by debtor's co-op shares, but value of shares was far less than total debt. Debtor proposed to surrender shares and to pay remaining unsecured deficiency in full while paying balance of claims at approximately 9%. Section 1325(b) requirement that projected disposable income be applied to make payments to unsecured creditors did not mandate pro-rata distributions to all unsecured creditors or preclude discrimination in favor of one or more as long as discrimination is not unreasonable. To determine if proposed discrimination is "unfair", court must consider whether claim is truly consumer co-debtor claim; whether the co-debtor undertook the underlying liability for debtor's benefit or vice versa; and whether plan otherwise satisfies requirements for confirmation including good faith. Co-signed debt for co-op was consumer debt where co-op was debtor's residence. Cosigned debt was for debtor's benefit for the same reason. In all other respects, debtor's plan complied with Section 1325.
- (3915) *Meyer v. Renteria*, 470 WL 838 (9th Cir. BAP 2012) – Section 1322(b)(1) allows a debtor to separately classify and preferentially treat consumer debt where that debt is guaranteed by a non-debtor. Plan that proposed to pay one creditor in full while paying other unsecured creditors little or nothing did not unfairly discriminate in violation of Section 1322(b)(1). Debt to be paid in full was guaranteed by debtor's mother; and debtor explained that purpose of discriminatory treatment was to prevent creditor from attempting to collect from mother. Court expressly left unanswered question as to whether discriminatory treatment where there is a co-obligor could ever be "unfair" in violation of Section 1322(b)(1).

11.57 Unfair Discrimination – Student Loans

- (3916) *In re Curry*, 2015 WL 1020641 (Bankr. C.D. Ill. 2015) – Court would not confirm plan that treated Income Contingent Repayment Plan for student loans as separately classified unsecured claim.
- (3917) *In re Kubezko*, Case No. 12-13766 (Bankr. D. Colo. 2014) – Proposed payment of student loans as separate classification to be paid as long term debt directly by debtor unfairly discriminated against other unsecured creditors. Separate classification allows student loan creditors to receive 50% dividend over life of plan while unsecured creditor would receive only 0.26%. However, if student loans are treated as general unsecured claims, unsecured creditor pool would receive more than 8%. Section 1322(b)(1) allows unsecured creditors to be placed in separate classes but requires that all such classes be treated fairly and without unfair discrimination. To determine

whether discrimination is unfair, court considers whether discrimination has reasonable basis; whether debtor can carry out plan without discrimination; whether discrimination is proposed in good faith; and whether degree of discrimination is directly related to basis or rationale for discrimination. Discrimination is not necessary to confirmation and implementation of plan where debtor would not make direct payments to secured creditors but would pay same amount into chapter 13 case, such that debtor did not suffer any hardship in making plan payments. Degree of discrimination was too great, as plan if confirmed with discriminatory treatment would substantially benefit student loan creditor at expense of other unsecured creditors. While Section 1322(b)(5) allows treatment of long term debts, that section does not afford debtor opportunity to discriminate or otherwise remove the protections under Section 1322(b)(1). Further, Section 1322(b)(1) precludes payment of interest on non-dischargeable debt unless all unsecured debts are paid in full. Allowing long term debt treatment of student loans would allow debtor to continue to pay interest on student loans while paying other unsecured creditors a dividend of less than 1%.

- (3918) *In re Jordahl*, 2014 WL 4250504 (Bankr. D. Mn. 2014) – Plan that proposed to separately classify and pay student loans as long term debt paid directly by debtor unfairly discriminated against other unsecured creditors. Plan would pay student loans in full plus interest, while remaining unsecured creditors would receive less than 10% of their allowed claims. Section 1322(b)(1) precludes unfair discrimination. Section 1322(b)(5) that allows curing and maintenance of payments on long term debt “notwithstanding Section 1322(b)” does not render Section 1322(b)(1) inapplicable. Treatment of long term debt must not unfairly discriminate against similarly situated creditors. Discrimination between unsecured debts is permitted only where (1) discrimination has reasonable basis; (2) debtor cannot carry out a plan without the discrimination; (3) discrimination is proposed in good faith; and (4) degree of discrimination is directly related to basis or rationale for discrimination. Non-dischargeability of student loans, standing alone, is not basis for discrimination. Potential for accrued interest on student loans over life of plan is not significant economic harm that would warrant potential discriminatory treatment. Alleged impairment of fresh start if debtor is not able to discriminate in favor of non-dischargeable loan is not sufficient to warrant discriminatory treatment. Discrimination was not necessary where debtor could promulgate confirmable and feasible plan without the discrimination. Degree of discrimination was also excessive where student loan creditors would receive 52% of debt over plan term while remaining unsecured creditors would receive between 6% and 10%. Plan also violated Section 1322(b)(10) as it proposed interest to student loans without paying all other allowed claims in full.
- (3919) *In re Brown*, 500 BR 255 (Bankr. S.D. Ga. 2013) – Debtor can separately classify student loan and treat as long term debt to be cured and maintained, and pay with interest, even if other creditors are not being paid in full. Section 1325(b)(10) restriction on payment of interest applies only to debts that are not subject to “cure and maintain”. Student loan obligation that is treated as “cure and maintain” is non-dischargeable under Section 1328.
- (3920) *In re Precise*, 501 BR 67 (Bankr. E.D. Pa. 2013) – Plan cannot pay 86% of student loans while paying only 8% of other unsecured claims. Payment of student loans would include continuing interest accruals in violation of Section 1322(b)(10).
- (3921) *In re Russell*, 588 BR 788 (Bankr. W.D. Ohio 2013) – Chapter 13 Plan did not unfairly discriminate by proposing greater dividend to debtor’s student loans that were co-signed by debtor’s mother than would be paid to other unsecured creditors.
- (3922) *In re Mason*, 2011 WL 2198345 (Bankr. N.D. W. Va. 2011) – Nature of student loan debts is different than other unsecured debts as student loan debts are generally excepted from any future discharge. Allowing separate classification and treatment is more consistent with Congressional policy as (1) a debtor will not be afforded a fresh start in bankruptcy if the debtor is defaulting on student loan payments over the term of a 3–5 year plan; (2) strong public policy supports the repayment of educational loans; (3) Congress prefers Chapter 13 over Chapter 7, and debtors in Chapter 7 fare better with making post-bankruptcy payments on student loan debts because a Chapter 7 debtor will not have been in forced default of student loan obligations for 3–5 years; and (4) other unsecured creditors in Chapter 13 are not harmed by the preferential treatment for student loan debt because unsecured creditors must receive a return in Chapter 13 that is equivalent to what they would receive in Chapter 7 pursuant to 11 U.S.C. § 1325(a)(4). To support separate classification, Debtor must be able to articulate a reason why the discriminatory treatment is being proposed, and be able to demonstrate that a lesser discriminatory means of treatment is not advisable. Court would not confirm Debtor’s plan that paid 72% of student loan debts, while making an 8% distribution to other unsecured creditors where Debtor did not show why a 62% or 52% payment to the student loan creditors and higher payment to unsecured creditors would not be appropriate.
- (3923) *In re Slone*, 2010 WL 3767317 (Bankr. N.D. Ohio 2010) – Debtor is not permitted to expense student-loan payment as doing so would permit debtor to prefer one creditor over another, similarly situated, creditor. Nondischargeability of a student loan is not, without more, a basis to permit a debtor to treat the student loan creditor more favorably than other unsecured creditors.
- (3924) *In re Rooney*, 2010 WL 2630245 (Bankr. N.D. Ohio 2010) – Nondischargeability of a student loan is not, without more, a basis to permit a debtor to treat the student loan creditor more favorably than other unsecured creditors. Congress specified the types of unsecured claims that should be treated more favorably than others in Section 507. Non-dischargeable student loan debts are not among those specified in § 507. To treat certain unsecured creditors more favorably simply because they hold a nondischargeable claim would elevate such claims to a priority status that was not intended by Congress.
- (3925) *In re Parrott*, Case No. 09-15726 (Bankr. E.D. Tn. 2009) – Debtor’s Chapter 13 Plan that sought to cure defaults on student loans and to pay the loans in full as long term debt unfairly discriminated against remaining unsecured creditors. The authority to treat an unsecured debt as a long-term debt is neither expressly nor logically an exception from the statutory rule that classifying unsecured claims cannot unfairly discriminate against any of the classes. Treating the student loan debts more favorably does not aid the debtors’ performance of the plan or otherwise provide a possible benefit for the other unsecured creditors. The classification is intended to reduce the balances due on the student loan debts after the debtors complete the plan. This will benefit the debtors because the unpaid balances can be discharged only if the debtors can prove that paying the debts would be an undue hardship. Attempting to pay more on

the student loan debts is good planning for the debtors' benefit with no benefit for the other unsecured creditors.

11.58 Good Faith – Generally

- (3926) *In re McDonald*, 2015 WL 1524096 (Bankr. W.D. La. 2015) – Even where plan commits 100% of disposable income, court can deny confirmation for lack of good faith where debtor proposes to retain luxury good encumbered by security interest. Debtor's plan proposed to retain 4-wheeler that was encumbered by lien in the amount of \$4500 while plan proposed total payments to unsecured creditors of \$1,000.00. Four wheeler was not reasonably necessary but was a luxury item. Debtor's job is not affected by not having four wheeler and while deer hunting may be more difficult, it is not dependent on ownership of four wheeler. Good faith has economic component that beyond disposable income test. Expense was not reasonably necessary but was luxury good, and while debtor may be inconvenienced that does not amount to necessity. Chapter 13 necessarily involves a sacrifice quotient. Payment for luxury item with little or no payment to unsecured creditors violates good faith test of Section 1325(a)(3).
- (3927) *In re Rolince*, 2015 WL 1321510 (Bankr. N.D. Ohio 2015) – Plan lacked good faith where debtor was not eligible for discharge because of prior Chapter 7 discharge; plan proposed to pay only unsecured claims with debtor's mortgage paid directly by debtor; and plan would produce, at most, \$134 for unsecured creditors after payment of trustee fee and attorney fee. Plan essentially sought to buy a 5 year stay of collection activities by creditors under circumstances where it was unlikely that creditors would ever receive anything more than a nominal payment and in all likelihood no payment as debtor would dismiss case once period passed for debtor to obtain discharge in subsequent Chapter 7 proceeding. Good faith requires a sincerely intended repayment of pre-petition debt consistent with debtor's available resources, not merely "parking" case while time runs to file a new Chapter 7.
- (3928) *In re Gomery*, 2015 WL 349170 (Bankr. W.D. Mi. 2015) – Confirmation of plan requires that debtor filed petition in good faith and proposes plan in good faith, with the debtor bearing the burden of proof on both issues. Good faith is amorphous concept that is flexible and fact specific based on sincerity of debtor in seeking relief; debtor's potential future earnings; circumstances under which debts were incurred; amount of proposed repayment to creditors; whether debt would be non-dischargeable in chapter 7; timing of petition; and whether debtor has been forthcoming with the court and creditors. Debtor lacked good faith where schedules omitted 50% ownership of corporation that owned valuable commercial real estate. Debtor's statements that he thought wife was sole shareholder was not credible where debtor was attorney with 25 years experience and all corporate documents including tax returns listed debtor as 50% owner. Debtor offered to have corporation sell property and remit 50% of proceeds (representing debtor's interest) only after omission of corporate interest had been discovered and objected to by trustee and unsecured creditor. It also appeared that debtor may have omitted interest in bank account into which his salary and draws from law firm were deposited. Debtor also caused law firm to make large transfers to third parties that were not properly disclosed in law firm's Chapter 7 case. Debtor's schedules failed to disclose any sporting goods and when asked under oath about a rifle that had been seen in debtor's home, debtor refused to answer citing the Fifth Amendment. Debtor filed Chapter 13 only after losing state court litigation and he was unable to obtain appellate bond to stay action pending appeal. Large portion of creditor's claim resulted from debtor's misconduct in state court litigation resulting in over \$300,000 in sanctions. Court would convert case to allow Chapter 7 Trustee to more fully investigate debtor's assets and financial affairs.
- (3929) *In re Asplund*, 2014 WL 5017833 (Bankr. E.D. Mi. 2014) – Good faith of debtor in Chapter 13 is fact driven. Debtor's Chapter 13 case lacked good faith where case was debtor's third case, and second chapter 13 within 3 years such that debtor had been continuously under the protection of the bankruptcy code for almost three years; debtor's was not entitled to a discharge; debtor had very few creditors other than obligations under marital settlement agreement that was more than three times the total amount owed to all other creditors; debtor had made minimal, if any, payments on obligations under marital settlement agreement and was attempting to recover other money that was being held pending further order of the domestic support court when case was filed; debtor filed this case immediately after an unfavorable ruling by the domestic relations court; and debtor's overall conduct that indicated that debtor was not making efforts to comply with settlement agreement but was in fact making great efforts to avoid paying. Debtor did not need relief from any other creditor and could just as easily have addressed financial issues arising out of domestic court orders outside bankruptcy, and plan was little more than an attempt to further delay the ex-spouse for three years without any meaningful payments on those debts.
- (3930) *Copeland v. Fink*, 742 F.3d 811 (8th Cir. 2014) – Good faith prevents confirmation of plan that pays nondischargeable, non-priority claims in full making no payments to general unsecured claims. Debtors' proposal to pay as much as possible on non-dischargeable claims while leaving nothing for remaining creditors proposes to protect creditors least in need of protection at expense of most vulnerable creditors.
- (3931) *In re Thomas*, 2014 WL 1761954 (Bankr. W.D. Mo. 2014) – Chapter 13 plan that proposed to retain car and pay contractual interest rate of 19.95 percent did not lack good faith. Debtor bought car during prior bankruptcy proceeding pursuant to court order that allowed debtor to incur debt at 19.95 percent. Debtor's first case dismissed and debtor filed second case, and proposed to reduce interest rate to Till rate. Creditor objected based on prior court order in first case that determined interest rate and debtors amended plan to increase rate. Paying loan at higher rate, standing alone, was not lack of good faith particularly where prior court order at least implicitly determined that contract rate was appropriate rate. Further, even at lower rate, debtors' plan proposed no dividend for unsecured creditors, so paying higher rate was not transferring money from unsecured creditors to secured creditor.
- (3932) *In re Brinkley*, 2013 WL 5935157 (Bankr. E.D. Mi. 2013) – Debtor's plan lacked good faith where plan proposed to retain rental property in Florida where rental income is less than monthly expenses. Retention of property would drain assets that would otherwise be available for payment to unsecured creditors.
- (3933) *In re Rodriguez*, 487 BR 275 (Bankr. D. N.Mex. 2013) – Debtor's plan lacked good faith where debtor proposed to contribute \$733 per month to debtor's retirement fund for duration of plan. Although contribution was consistent with historical contributions, debtor's proposed contributions lacked good faith as primary creditor was ex-wife who held claim based on debtor's pre-petition misappropriation

of funds from spouse's retirement account.

- (3934) *In re Kwiatkowski*, 486 BR 409 (Bankr. E.D. Mi. 2013) – Debtor's schedules lacked good faith where debtor intentionally understates debts in order to qualify for relief under Chapter 13. Debtor scheduled unsecured deficiency claims on foreclosed mortgages with amounts as "unknown" although Debtor knew that the actual balance was at least \$250,000.00, leaving debtor ineligible for relief under Chapter 13. Debtor was not unsophisticated, with Finance Degree from University of Michigan and prior ownership and operation of a mortgage company and employment as mortgage broker.
- (3935) *Drummond v. Welsh*, 711 F.3d 1120 (9th Cir. 2013) – Analysis of Good Faith includes whether debtor has misrepresented facts or manipulated code or acted in inequitable manner; debtor's history of bankruptcy filings; whether debtor filed solely to frustrate collection of state court judgment; and other egregious behavior. Good faith for purposes of Chapter 13 confirmation does not require debtors to contribute social security for funding of plan. BAPCPA adopted rigid, mechanical means test to determine disposable income, which begins with Current Monthly Income which expressly excludes social security income. Plan proposed in accordance with very detailed calculations that Congress set forth does not lack good faith. Court will not substitute its judgment for that of Congress in determining how much of what type of income is to be included in calculating plan payment. Court cannot, under guise of "good faith" ignore requirements and limitations that Congress chose to enact. Where a Chapter 13 debtor calculates repayment plan and excludes social security income as Code allows, exclusion cannot constitute lack of good faith. Debtors cannot lack good faith merely because debtors do what Code allows. That debtors will retain Social Security without paying creditors is financial condition, not an inquiry into motivation which is the definition of good faith. Amount paid to unsecured creditors is not component of good faith, and requirements of good faith and disposable income are separate and distinct. Fact that excluding Social Security appears to circumvent stated purpose of requiring those who can pay to pay, Congress chose to implement that purpose through the means test, which excludes social security income. Further, debtor's proposed secured debt payments on retained "luxury goods" did not evidence lack of good faith. For "above median income" debtors, payments on secured loans are not considered in calculating disposable income. Under BAPCPA, Congress determined that debtors may deduct secured debt payments, even on assets such as ATVs that would otherwise be considered "luxury goods". Section 1325 mandates that disposable income "shall be determined" in accordance with Section 707(b)(2) which uses Current Monthly Income less specified deductions, one of which is secured debt payments. Section 707 does not limit secured debt payments to "necessary" secured debts or exclude payments on "luxury" goods. BAPCPA adopted mechanical approach to calculating disposable income and court would not alter or engraft good faith exception onto that definition.
- (3936) *In re Hamade*, 2013 WL 663736 (Bankr. E.D. Mi. 2013) – Debtor has burden to prove that plan was filed in good faith and not by any unlawful means. Good faith is largely factual question, that demands that debtor be honest, forthcoming, truthful and frank, both to the Court and creditors. Court must determine whether debtor's plan satisfies purposes undergirding Chapter 13: a sincerely-intended repayment of pre-petition debt consistent with the debtor's available resources. Court should take into account the totality of the circumstances confronting a debtor, not simply his or her pre-plan conduct, when deciding whether or not to confirm a Chapter 13 plan. Non-exhaustive list of factors includes the amount of the proposed payments and the amount of the debtor's surplus; the debtor's employment history, ability to earn and likelihood of future increase in income; the probable or expected duration of the plan; the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court; the extent of preferential treatment between classes of creditors; the extent to which secured claims are modified; the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7; the existence of special circumstances such as inordinate medical expenses; the frequency with which the debtor has sought relief under the Bankruptcy Reform Act; the motivation and sincerity of the debtor in seeking Chapter 13 relief; the burden which the plan's administration would place upon the trustee; and, whether the debtor is attempting to abuse the spirit of the Bankruptcy Code. Plan that proposed 3% dividend not *de facto* in bad faith, as code does not require any minimum payment to creditors. Debtor had stable employment at modest salary that was not likely to change during the pendency of the case. Plan proposed 5 year term which did not weigh against good faith. Debtor's failure to produce documents related to an alleged loan by debtor's nephew to debtor did not evidence bad faith as transaction was informal in nature between family members and it did not appear that any documents actually existed relative to the transaction. However, debtor did fail to disclose sale of land or other source of funds to renovate debtor's business premises, which is negative in good faith inquiry. Although creditor held debt that might be non-dischargeable in Chapter 7, schedules indicated that this was not disguised Chapter 7 case filed to circumvent Section 523, but included numerous other debts owed to other creditors, rendering this factor neither positive nor negative on issue of good faith. Debtor did not have any recent bankruptcy filings and debtor indicated a genuine desire for a fresh start coupled with intent to pay creditors as far as debtor was capable. Creditor's objection to confirmation for bad faith overruled.
- (3937) *Meyer v. Lepe*, 470 BR 851 (9th Cir. BAP 2012) – In determining good faith, court must consider whether debtor acted equitably in presenting plan; whether debtor misrepresented facts in the plan or unfairly manipulated the code; or otherwise proposed plan in inequitable manner. Decision is "case by case" basis depending on totality of circumstances in particular case. Case filed solely to strip second mortgage was not "bad faith" that would prevent confirmation of plan. Other than second mortgage, debtor had total unsecured debt of only \$549 and debtor had monthly income that was more than sufficient to pay all monthly expenses and debts. Amount of proposed payments were not insignificant; any errors in schedules were the fault of lawyer and did not evidence lack of good faith; low amount of unsecured debt cannot render debtor ineligible for relief; case properly reorganized debts and dealt with unsecured classes; and creditor whose lien was being stripped did not oppose confirmation.
- (3938) *In re St. Vincent*, 2012 WL 879286 (Bankr. W.D. Mi. 2012) - Chapter 13 Plan was not filed in good faith where plan and schedules indicated existence of only a single creditor, a bankruptcy trustee overseeing the chapter 7 estate of a co-owner of debtor's home. The Chapter 7 Trustee had commenced adversary proceeding to sell the co-owner's interest in the property together with the interest of her co-tenants, including the debtor, pursuant to section 363(h). There was no dispute that the chapter 7 trustee did not hold a claim against the

debtor and was not a creditor of the debtor - the chapter 7 trustee did not have any right to payment from the debtor or any other interest in property of the debtor. Debtor's only purpose in filing the chapter 13 case was to frustrate the chapter 7 trustee's right to sell the real property. Debtors chapter 13 plan did not propose to pay any "claim" of the chapter 7 trustee but effectively sought to force the chapter 7 trustee to "sell" the property to the debtor. Debtor's plan did not qualify as a sincerely intended repayment of prepetition debt because neither the schedules nor the plan involved any prepetition debt whatsoever.

- (3939) *In re Lofty*, 437 BR 578 (Bankr. S.D. Ohio 2010) – In determining good faith, court will look at both pre-petition conduct and circumstances surrounding Chapter 13 filing based on totality of circumstances. Debtors' plan lacked good faith where debtors owned two parcels of real property that were occupied by their adult children while debtors themselves occupied an expensive and depreciating motor home. Debtors could sell motor home and move into one of residences, thereby using payments to build equity and reduce living expenses. Further, debtors' plan proposed to retain property in which adult son and grandson resided but with debtors making mortgage payments plus paying taxes, insurance and maintenance totaling \$3,000 per month. By paying the costs related to the housing of their son and grandson from their projected disposable income, the Debtors are choosing to support family members at the expense of the nonpriority unsecured creditors. That support impacts the amount of the Debtors' payments to unsecured creditors and is inconsistent with the requirement that a plan be proposed in objective good faith. Even if debtors' son was a dependent, debtors failed to demonstrate why suitable housing could not be obtained for less than \$3,000 per month to free up money for payment to unsecured creditors. Debtors proposed to retain two parcels of real estate and a Motor Home for themselves and their immediate family, plus a separate vehicle, while only paying a 7% dividend to nonpriority unsecured creditors. Debtors sought to retain the Motor Home, continue spending the winter months in a warmer climate and support their immediate family without considering other viable options.
- (3940) *In re McDonald*, 437 BR 278 (Bankr. S.D. Ohio 2010) – Good faith is defined by factual inquiry. Court must ultimately determine whether the debtor's plan, given his or her individual circumstances, satisfies the purposes undergirding Chapter 13: a sincerely-intended repayment of pre-petition debt consistent with the debtor's available resources. Sixth Circuit uses twelve-part test to determine whether a debtor's Chapter 13 plan was proposed in good faith: (1) the amount of the proposed payments and the amount of the debtor's surplus; (2) the debtor's employment history, ability to earn and likelihood of future increase in income; (3) the probable or expected duration of the plan; (4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court; (5) the extent of preferential treatment within classes of creditors; (6) the extent to which secured claims are modified; (7) the type of debt sought to be discharged and whether any such debt is non-dischargeable in Chapter 7; (8) the existence of special circumstances such as inordinate medical expenses; (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act; (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; (11) the burden which the plan's administration would place upon the trustee; and, (12) whether the debtor is attempting to abuse the spirit of the Bankruptcy Code. Debtors' plan not proposed in good faith even where plan committed 100% of debtors' disposable income, where plan proposed to retain a \$365,000 house with about \$358,000 in secured debt attached to it having mortgage payments of \$2,750 per month; two vehicles with secured debt totaling \$53-54,000 with monthly payments totaling \$1,182 (with the payment on one vehicle, acquired shortly before filing, of \$835 per month); a Harley Davidson motorcycle free and clear of liens that has not been sold; debtors had combined monthly gross income of approximately \$19,000, and are proposing to pay either a 0% dividend or a minimal dividend to non-priority unsecured creditors. Plan would reaffirm the secured debt on the Debtors' high-end home and cars and the tax liability for which Husband is personally obligated, at the expense of the Debtors' non-priority unsecured creditors who receive nothing.
- (3941) *In re Predragovic*, 2010 WL 3239360 (Bankr. N.D. Ohio 2010) – Good faith requires a review of the totality of the circumstances, including: (1) the debtor's income; (2) the debtor's living expenses; (3) the debtor's attorney's fees; (4) the expected duration of the Chapter 13 plan; (5) the sincerity with which the debtor has petitioned for relief under Chapter 13; (6) the debtor's potential for future earning; (7) any special circumstances, such as unusually high medical expenses; (8) the frequency with which the debtor has sought relief before in bankruptcy; (9) the circumstances under which the debt was incurred; (10) the amount of payment offered by debtor as indicative of the debtor's sincerity to repay the debt; (11) the burden which administration would place on the trustee; and (12) the statutorily-mandated policy that bankruptcy provisions be construed liberally in favor of the debtor. Allowance or disallowance of expenses on the means test is not determinative of good faith. Complying with the means test does not mean that any combination of expenses that leads to an equal or better financial number being paid to creditors is acceptable. Debtor's actual expenses for vehicle ownership and operating expenses were significantly less than the allowances shown on the means test, yet Debtor attempted to use IRS allowances, rather than actual expenses, to calculate a plan payment. Debtor used actual expenses for food and other expenses that far exceeded amount of IRS allowances for those items, thus using IRS standards when those exceeded actual but used actual when those were higher than IRS standards.
- (3942) *In re Smith*, 2010 WL 2400065 (Bankr. N.D. Ohio 2010) - The debtor bears the burden of demonstrating good faith. Bankruptcy court must ultimately determine whether the debtor's plan, given his or her individual circumstances, satisfies the purposes undergirding Chapter 13: a sincerely-intended repayment of pre-petition debt consistent with the debtor's available resources. Debtor's "eve of bankruptcy" decision to commence or increase the amount of the contribution can still be considered in determining debtor's good faith or lack of good faith. Good-faith serves as a backstop against debtors who attempt to exploit Code provisions at the expense of bankruptcy policies including fairness to unsecured creditors. Further, section 541 limits reference to section 1325(b)(2) and does not exclude retirement contributions in determining good faith under section 1325(a)(3). Relevant factors include whether the debtor increased his contribution on the eve of bankruptcy, the amount of any such increase, the financial planning justification for any such increase, and the amount of the debtor's 401(k) contributions relative to the distribution to unsecured creditors. Such considerations prevent the good faith argument from becoming the last refuge of scoundrels for rogue creditors wishing to object to everything. Debtors' plan is proposed in bad faith where debtor increased his 401(k) contribution by *five times* on the eve of filing bankruptcy to a level far beyond what was typical for him; the increase reduced the distribution to unsecured creditors by more than half; and debtors presented

no financial-planning justification for the increase. Debtors' 401(k) contributions went far beyond reasonably measured retirement planning and are unfair to unsecured creditors.

11.59 Good Faith – Social Security Income

- (3943) *In re Hall*, Case No. 15-30749 (Bankr. E.D. Mi. 2015) – Social Security income is excluded from calculation of Current Monthly Income in Section 101(10A). Section 1325(b) defines disposable income as Current Monthly Income less certain deductions. As Social Security is not included in CMI, debtor is not required to include Social Security in calculating disposable income or plan payment. However, exclusion of income is not *per se* good faith under Section 1325(a)(3), which is separate obligation from Section 1325(b). If retained Social Security benefits enable debtor to lead extravagant lifestyle or to acquire luxury goods, failing to commit that income to plan is lack of good faith. Court could not reach conclusion where there was no evidence in record as to the uses for debtor's Social Security income that is not committed to the Plan.
- (3944) *In re Mihal*, 2015 WL 2265790 (Bankr. E.D. Mi. 2015) – Social Security income received by debtor is excluded in calculation of Current Monthly Income. Debtor's Chapter 13 Plan did not lack good faith where plan payment excluded debtor's social security income.
- (3945) *In re Worthington*, 2014 WL 1173316 (Bankr. S.D. Ind. 2014) – Social Security income received by debtor is excluded from calculation of Current Monthly Income. Debtor's Chapter 13 plan did not lack good faith where plan did not include substantial portion of social security income.
- (3946) *Mort Ranta v. Gorman*, 2013 WL 3286252 (4th Cir. 2013) – Debtor cannot be required to include Social Security income in calculating projected disposable income or plan payment, regardless of whether debtor is above or below median income. Projected disposable income is calculated using disposable income, adjusted in exceptional cases where future changes are known or virtually certain to occur. Court noted that allowing debtor to exclude SSI in calculating projected disposable income is limited by other requirements of Section 1325 including liquidation and good faith.
- (3947) *In re Holls*, Case no. 13-46765 (Bankr. E.D. Mi. 2013) – Debtor's failure to include SSI in calculating the plan payment was a lack of good faith. Citing the court's decision in *In re Mains*, Court concluded that Debtors must list SSI in Schedule I and can use that income, as reasonably necessary, for living expenses, but anything left must be used for the plan payment, same as all other income.
- (3948) *In re Wise*, Case no. 13-44673 (Bankr. E.D. Mi. 2013) – Debtor's failure to commit social security for funding of plan constituted lack of good faith. Debtor proposed to retain more than \$43,000 in social security benefits over term of debtor's plan while paying unsecured creditors a nominal dividend.
- (3949) *Drummond v. Welsh*, 711 F.3d 1120 (9th Cir. 2013) – Analysis of Good Faith includes whether debtor has misrepresented facts or manipulated code or acted in inequitable manner; debtor's history of bankruptcy filings; whether debtor filed solely to frustrate collection of state court judgment; and other egregious behavior. Good faith for purposes of Chapter 13 confirmation does not require debtors to contribute social security for funding of plan. BAPCPA adopted rigid, mechanical means test to determine disposable income, which begins with Current Monthly Income which expressly excludes social security income. Plan proposed in accordance with very detailed calculations that Congress set forth does not lack good faith. Where a Chapter 13 debtor calculates repayment plan and excludes social security income as Code allows, exclusion cannot constitute lack of good faith. Debtors cannot lack good faith merely because debtors do what Code allows. That debtors will retain Social Security without paying creditors is financial condition, not an inquiry into motivation which is the definition of good faith. Amount paid to unsecured creditors is not component of good faith, and requirements of good faith and disposable income are separate and distinct. Fact that excluding Social Security appears to circumvent stated purpose of requiring those who can pay to pay, Congress chose to implement that purpose through the means test, which excludes social security income.
- (3950) *Anderson v. Cranmer*, 2012 WL 5235365 (10th Cir. 2012) – Social Security of debtor and non-filing spouse are excluded from calculation of projected disposable income and do not need to be included in calculating plan payment. Exclusion of SSI from calculation of PDI was not lack of good faith that prevents confirmation of the plan.
- (3951) *Beaulieu v. Ragos*, Case no. 11-31046 (5th Cir. 2012) – Social Security benefits are not included in calculation of projected disposable income. Although Code does not define "projected disposable income" the definition of "disposable income" specifically excludes Social Security income; and definition of "current monthly income" similarly excludes Social Security income. In light of Congressional intent to exclude Social Security from CMI and disposable income, "it makes little sense to circumvent that prohibition by allowing social security income to be included in *projected* disposable income." Conclusion is further bolstered by Social Security Act, 42 USC Section 407(a), enacted in 1935, that prohibits Social Security income from being subject to "any bankruptcy or insolvency law." Debtors' refusal to commit 90% of their Social Security income is not "bad faith" that would preclude confirmation where Debtors, as a matter of law, are not required to include SSI in calculating plan payment.
- (3952) *Mains v. Foley*, 2011 WL 2160890 (Bankr. W.D. Mi. 2011) – Debtor who receives Social Security Income is required to include that income in determining projected disposable income under Section 1325(b). Exclusion of Social Security from calculation of CMI does not remove that income from consideration of Debtor's good faith and must be considered with the rest of Debtor's circumstances to determine if Debtor sincerely intends to repay creditors.
- (3953) *In re Vandebosch*, 459 BR 140 (M.D. Fl. 2011) – Debtor cannot be required to include social security income on Schedule I or to include that in determining whether plan payment constitutes all disposable income. BAPCPA excludes social security from calculation. Because social security benefits are not a component of projected disposable income, a plan cannot be rejected for failure to include such benefits as projected disposable income. A necessary corollary is that a finding of bad faith may not be based upon such a failure.

- (3954) *In re Westing*, 2010 WL 2774829 (Bankr. D. Idaho 2010) - Above-median-income debtor's failure to account for Social Security income on Schedule I resulted in a lack of good faith. Current Monthly Income exclusion of Social Security in calculating "projected disposable income" under Section 1325(b), does not preclude the Court's consideration of that income when evaluating a plan for good faith. Debtor's plan proposed a monthly payment of only \$165 and would produce dividend of 1.9% while debtor had disposable income of more than \$2,300 if the Social Security was included.
- (3955) *In re Thomas*, 2010 WL 5630827 (Bankr. N.D. Ga. 2010) - Exclusion of Social Security income from Current Monthly Income does not provide a basis for a debtor to fail to disclose that income on Schedule I or monthly disposable income on Schedule J. Debtor's proposed retention of Social Security income would allow debtor to retain a substantial surplus at the expense of creditors, in violation of Section 1325(a)(3).
- (3956) *In re Welsh*, 440 BR 836 (Bankr. D. Montana 2010) - Congress' express exclusion of Social Security income from the calculation of Current Monthly Income, buttressed by 42 USC Section 407 which prohibits subjecting Social Security income to the operation of any bankruptcy or insolvency law, acted as an absolute prohibition against compelling a debtor to include Social Security income in either the calculation of CMI or in calculating income on Schedule I. Section 101(10A)(B) and 42 U.S.C. § 407 are two separate federal statutes, each more specific than § 1325(a)(3) with respect to SSI benefits. Section 1325(a)(3) does not include reference § 407 which § 407(b) requires in order to limit or otherwise modify § 407(a)'s prohibition against the operation of any bankruptcy law against SSI. Trustee's good faith objection on the basis of SSI cannot be sustained without running afoul of 42 U.S.C. § 407(a). Good faith under Section 1325(a)(3) does not compel a debtor to include Social Security income on Schedule I.
- (3957) *In re Miller*, 2011 WL 95335 (Bankr. D.S.C. 2011) - Section 101(10A) excludes all social security benefits, regardless of recipient and regardless of whether contributed to debtor's household expenses. Debtor's non-filing husband received Social Security which he contributed in full each month for payment of household expenses. Debtor also received Social Security. Debtor not required to include either her social security or that of her non-filing spouse in calculating Current Monthly Income or disposable income in Chapter 13.
- (3958) *In re Bartelini*, 434 BR 285 (Bankr. N.D.N.Y. 2010) - Social security is excluded from CMI under 101(10A). CMI is starting point to calculate projected disposable income. Therefore, debtor cannot be compelled to list Social Security in PDI calculation for purposes of plan payment.
- (3959) *In re Herrmann*, 2011 WL 576753 (Bankr. D.S.C. 2011) - Above-median-income debtor's failure to list his ongoing receipt of Social Security income in Schedule I resulted in Debtor's plan lacking good faith. Debtor contended that social security income is not subject in any way to the bankruptcy case, does not have to be disclosed, and can be applied or used by the debtor for any purpose, including savings or luxury items, without implication of the good faith or confirmation standards. Court stated that Section 521(a)(1)(B) requires a debtor to file a schedule of current income without limitation or exclusion. Although Section 101(10A) excludes Social Security income for purposes of calculating "disposable income", no exclusion for social security income is provided in § 521(a)(1)(B). Means test does not override Section 521(a)(1)(B) requirement to report current income and current expenses. Debtor's failure to include Social Security income on Schedule I would result in the spouse assuming a disproportionate share of the household expenses, by allowing one spouse to effectively shield income from the payment of those expenses and forcing the other spouse to absorb those expenses. Section 521 and good faith require the disclosure of all income, including Social Security income, on Schedule I.

11.60 Good Faith - Plan Length

- (3960) *In re Sampson-Pack*, 2014 WL 1320371 (Bankr. D. Md. 2014) - Debtor who proposes to pay 100% dividend but commits less than 100% of disposable income must also pay interest. Section 1325(b) requires either that debtor pay 100% of disposable income or pay creditors with interest. Debtor can either commit all disposable income and pay creditors in full in shorter time, or pay creditors over longer time with interest.
- (3961) *DeHart v. Humes*, 2013 WL 6536947 (Bankr. M.D. Pa. 2013) - Plan proposed for 60 months lacked any justification to for term longer than 36 months. Debtor apparently proposed to stretch out payments at lower amount than disposable income. Debtor's desire to lower plan payments but pay same total amount over 60 months as debtor would have paid over 36 months lacks any justification for longer plan term.
- (3962) *In re McGehan*, 2013 WL 4069524 (Bankr. D. Colo. 2013) - Debtor who proposes 100% dividend cannot be compelled to pay larger payment and to shorten plan term. Although debtor had disposable income of more than \$4,000 per month, plan proposed payments of \$1,000 per month and full repayment of allowed claims. Plan complied with requirements of code, and debtor has no good faith obligation to pay more merely to shorten plan term. Above median debtor had 60 month applicable commitment period and was entitled to use entire plan term to pay 100% dividend even if debtor is not committing all disposable income.
- (3963) *In re Cobb*, 2013 WL 266517 (Bankr. D.R.I. 2013) - Debtor's plan that proposed 100% dividend over 60 months did not lack good faith merely because debtor could pay off plan in shorter duration. Debtor's plan proposed to pay less than 100% of debtor's disposable income over life of plan. Had debtor committed all disposable income, plan would have completed in substantially shorter time. Absent evidence of misconduct or abuse, mere fact that debtor has ability to pay creditors over shorter period of time is not bad faith. Plan confirmed.

11.61 Plan Length and Disposable Income

- (3964) *In re Sampson-Pack*, 2014 WL 1320371 (Bankr. D. Md. 2014) - Plan that pays unsecured creditors in full in 60 months but does not contribute 100% of debtor's disposable income must pay interest on unsecured claims. Plan must either commit 100% of disposable income or pay creditors a total with a present value of at least 100% of claims.

- (3965) *In re Braswell*, 2013 WL 3270752 (Bankr. D. Ore. 2013) – Where a creditor objects, the debtor must either contribute 100% of disposable income or must pay interest to unsecured creditors. Debtor can pay 100% dividend to unsecured creditors over stretched out plan length and pay less than full disposable income each month, but must compensate unsecured creditors for the delay.

11.62 Good Faith – “Attorney Fee Only” Plans

- (3966) *Brown v. Gore*, 2014 WL 563601 (11th Cir. 2014) – Debtor lacked good faith in filing a petition and plan where purpose of Chapter 13 rather than Chapter 7 was to pay attorney fees in installments, where debtor had no non-exempt assets or income that would be seized in Chapter 7; Debtor’s income was barely enough to cover debtor’s expenses and was fixed as sole source was social security, and debtor did not have ability to earn more income; Chapter 13 trustee would have burden of collecting funds primarily for benefit of debtor’s attorney; and debtor was likely to default in Chapter 13 and end up without a discharge. Record contained no evidence that it was in debtor’s best interest to file a chapter 13. Although plan proposed 100% dividend to unsecured creditors over 36 months, debtor’s budget was only \$1214 per month, leaving room for \$150 plan payment, and leaving no margin for error or room for unforeseen expenses. Likelihood was that case would fail before any money would be paid to unsecured creditors. “If [debtor] could not save \$150 for five months to pay his attorney up front for a Chapter 7 petition, a Chapter 13 plan requiring him to pay \$150 monthly for three years seemed doomed to failure. The bankruptcy court emphasized the “abysmal failure rate of chapter 13 cases,” pointing out that in the Eastern Division of the Northern District of Alabama “approximately 65% of all chapter 13 cases fail before debtors complete their plans and become eligible for a discharge.
- (3967) *Sikes v. Crager*, 2012 WL 3518473 (5th Cir. 2012) – There is no *per se* rule against “attorney fee only” plans. Based on “totality of circumstances” test, plan did not lack good faith in light of debtor’s overall financial condition, mounting medical costs, increasing debts, and fact that based on debtor’s minimal income, even if debtor stopped paying on all credit card debt immediately, it would take a year for debtor to amass sufficient funds to file Chapter 7. Debtor’s decision to file Chapter 13 was not attempt to abuse Chapter 13 but was responsible decision given debtor’s particular circumstances.
- (3968) *Berliner v. Pappalardo*, 2012 WL 954860 (1st Cir. 2012) - Chapter 13 plan that pays only attorney’s fees is not bad faith *per se*. Debtor chose chapter 13 over chapter 7 because debtor lacked immediately available funds to pay Chapter 7 fees. Good faith is based on totality of circumstances that ultimately derives from concepts of equity. Fee-only plans, by definition, leave the vast majority of debts unsatisfied and may be vulnerable to abuse by attorneys seeking to advance their own interests without due regard for the interests of debtors; and such plans, by their very nature, create that appearance. However, this does not convert “fee only” plans into *per se* bad faith. There may be special circumstances, albeit relatively rare, in which this type of odd arrangement is justified. Alleged inability to immediately pay attorney fees for Chapter 7 did not demonstrate lack of good faith absent evidence that debtor had a pressing need for the appellant’s services, that he could not secure adequate representation that he could afford without resorting to a fee-only plan, or that it was infeasible to proceed *pro se*. Debtor acknowledged that he could have retained the appellant for representation in Chapter 7 if he had waited three months longer; and the record contains no compelling reason why a three-month wait would have been intolerable. Case remanded to Bankruptcy Court for further findings.
- (3969) *In re Johnson*, 2012 WL 909782 (Bankr. N.D. Al. 2012) –Chapter 13 dismissed for bad faith. Form 22 disclosed no presumption of abuse had debtors sought Chapter 7 relief. Although Chapter 13 plan proposed 18% dividend, parties conceded that primary motivation in filing Chapter 13 was to finance attorney fees over time. Term “fee only case” includes cases that provide some small distribution to unsecured creditors, where the “main purpose” for choosing chapter 13 as opposed to chapter 7 was to finance attorney fees. Chapter 13 in the Bankruptcy Code was not intended as a payment collection and enhancement device for attorneys. Majority of courts to consider the issue find chapter 13 cases filed in lieu of otherwise-available chapter 7 relief to finance attorney fees, which the debtor cannot afford to prepay, are not filed in good faith under section 1325. Chapter 7 case would enable Debtors to receive discharge in short order during which debtors would be protected by the automatic stay. In Chapter 7 Debtors would not be burdened with plan payments for three years, which may be insurmountable tasks; Chapter 7 discharge eliminates risk of default and dismissal of their cases followed by repeat performances. If allowed, these misguided debtors impermissibly burden chapter 13 trustees and bankruptcy courts with the administration of their cases which are subsidized by debtors in “legitimate” chapter 13 cases.

11.63 Domestic Support Obligations

- (3970) *In re Swonger*, Case No. 14-50807 (Bankr. E.D. Mi. 2014) – State court judgment of divorce that required debtor to pay off HELOC did not create domestic support obligation such that debtor’s failure to refinance HELOC would not impede confirmation of plan. Obligation was within section labeled “Property Division” and judgment itself otherwise barred spousal support other than as sanction for failure to refinance HELOC and State Court had not yet entered or considered any request for award of support based on debtor’s failure to refinance. Judgment distributed property and ordered payment of HELOC without regard to respective financial positions of the parties and instead intended simple, equal distribution of marital assets. However, provision of state court judgment that allowed Court to convert obligation to pay off HELOC into prospective award of domestic support if debtor did not timely pay HELOC warranted stay relief to send matter back to State Court to determine proper enforcement of judgment including potential imposition of prospective domestic support obligation.
- (3971) *In re Resendiz*, 2013 WL 6152921 (Bankr. S.D. Tx. 2013) – Chapter 13 plan must pay DSO with interest even where other unsecured creditors will receive less than full payment. DSO under state law includes not only principal amount of obligation but also all interest that accrues on any arrearage.
- (3972) *In re Thomas*, Case No. 13-8048 (6th Cir. BAP 2014) – Priority claims such as Section 101 (14A) domestic support obligations are priority claims that must be paid in full during Chapter 13 plan.

(3973) *In re Ashby*, 2013 WL 3216137 (Bankr. W.D. Ky. 2013) – Domestic Support Obligation is priority claim that must be paid in full over life of plan unless holder agrees to other treatment, pursuant to Section 1322(a)(2). Further, plan cannot be confirmed under Section 1325(a)(8) unless debtor is current in all DSO payments coming due after commencement of the case. Debtor's plan could not be confirmed over DSO claimant's objection where plan did not propose full payment of the arrearage within plan term, and debtor was months behind in post-petition DSO claims.

(3974) *In re Phile*, 490 BR 250 (Bankr. S.D. Ohio 2011) – Chapter 13 plan that provided that debtor's obligation to former spouse would be deemed to not constitute a domestic support obligation and would be discharged at end of plan could not be confirmed. Dischargeability of obligation could not be established through plan confirmation process, but required adversary proceeding.

11.64 Transfer of Property

(3975) *In re Dahlgren*, Case No. 11-2794 (3d Cir. 2012) – Plan that proposed "forced sale" of co-owner's interest in property could not be confirmed. Plan proposed that would effectively divest co-owner of ownership of property and instead treat co-owner as creditor. Chapter 13 did not provide any mechanism to strip ownership of property from co-owner.

11.65 Income Tax Claims

(3976) *In re Mazzarella*, 2013 WL 6051036 (Bankr. N.D. Ohio 2013) – Section 507(a)(8) defines priority tax claims as those measured by income and for which a return was last due, with extensions, less than three years prior to commencement of the case. Three year period is extended for any time period during which applicable non-bankruptcy law prevents actions to collect tax. While statute tolls running of three years for any time during which a prior bankruptcy case was pending, the time is not tolled based on pre-petition tolling agreement between taxpayer and governmental unit. Fines imposed on unpaid taxes are not compensatory in nature and are not entitled to priority status.

(3977) *In re Paradis*, 2012 WL 3938644 (Bankr. D. Me. 2012) – Section 1322 requires full payment of priority claims. Section 507(a)(8) determines whether taxes are priority or non-priority. Tax will be priority if the tax is measured by income and if the last date on which the return was due is more than three years prior to commencement of the case, unless Section 507(a)(8)(A)(i) extends the time. Time will be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days. Debtor filed for bankruptcy in June, 2011. Debtor had not obtained extension for filing 2007 return, meaning last date on which return could be filed was April 15, 2008. Thus, three year "lookback" presumably expired on April 15, 2011. Debtor's request for Offer in Compromise did not constitute "request by the debtor for a hearing" sufficient to suspend time. OIC process entails no hearing and is an administrative proposal designed to foster evaluation and negotiation. OIC stands apart from more formal proceedings that include a request for hearing and operate to suspend time. Taxes were not assessed within 240 days where taxes were assessed, at the latest, 291 days pre-petition and there was no action that would have tolled running of 240 day period. As no part of IRS unsecured claim was entitled to priority, Court would confirm plan that treated claim consistent with treatment of all other unsecured claims. Further, as non-priority taxes, obligation would be discharged in Chapter 13 plan pursuant to Section 1328.

(3978) *In re Shelly*, 458 BR 740 (Bankr. N.D. Ohio 2011) – Debtor's plan could not be confirmed where plan failed to demonstrate that full secured claim of IRS would be paid during Chapter 13 plan. Plan provision that called for debtors to commit additional amounts that were contingent on successful prosecution of pending legal malpractice action did not demonstrate that plan was sufficiently funded, where debtors did not demonstrate likelihood of success on merits or any other information concerning validity or amount of likely recovery. Section 1325(a)(5) requires that plan pay secured claim in full. Plan payments were not sufficient to pay the IRS secured claim, preventing confirmation.

(3979) *In re Senczysyn*, Case No. 09-49868 (Bankr. E.D. Mi.), *aff'd*, 2011 WL 500060 (E.D. Mi. 2010) – Debtor can file a proof of claim on behalf of a governmental agency for pre-petition taxes where the governmental agency fails to file a claim within the time permitted under Rule 3002. Debtor's Proof of Claim for 2008 taxes in case filed in March, 2009, properly stated claim for "pre-petition" taxes and Chapter 13 Plan properly provided for full payment of those taxes. Debtors had filed their tax returns prior to the filing of the case, resulting in an indisputable pre-petition relationship between the Debtors and the State; and the obligation arose out of pre-petition events, even if the liability was not "payable" until after the petition date. At best, claim may have been "unmatured" but the definition of Claim expressly includes unmatured obligations.

(3980) *In re Wilson*, Case No. 10-45791 (Bankr. E.D. Mi. 2010) – Chapter 13 case filed prior to April 15, 2010, could not fix 2009 tax liability or deem the governmental agency to have filed a proof of claim where no proof of claim has been filed. Plan that purports to fix amount of 2009 tax liability cannot be confirmed where no proof of claim has been filed. However, if either the governmental agency files a claim within the time permitted or the Debtor files a claim on behalf of the governmental agency as permitted under Rule 3004, then the claim must be paid in full as a priority claim pursuant to Section 1325.

11.66 Other Tax Claims

(3981) *In re Gift*, 469 BR 800 (Bankr. M.D. Tn. 2012) – Property tax claim, as oversecured claim, is entitled to post-petition interest at the statutory rate. However, creditor is not entitled to secured status on penalty interest rate. Interest rate in Chapter 13 had only to ensure that stream of payments to taxing authority had present value which was at least equal to amount of the claim plus 12% state statutory interest. Where debtor had solvent estate, plan must also provide for payment of additional penalty interest rate as unsecured claim.

(3982) *In re Pierrotti*, 645 F.3d 277 (5th Cir. 2011) – Chapter 13 Plan can treat IRS secured claim over life of plan, but Section 1325(b)(5) does

not allow debtor to reclassify IRS lien as “long term debt” on which the last payment would be due after expiration of the plan. IRS secured claim must be paid in full over term of plan unless IRS agrees to contrary treatment.

- (3983) *In re McDonald*, 437 BR 278 (Bankr. S.D. Ohio 2010) - Section 1322(a)(2) requires the payment of all priority tax claims within the Plan over the life of the Plan in deferred installments unless the holder of such claim agrees otherwise. Plan that provided for payment of the sales taxes “outside” the Plan contravenes §1322(a)(2) and the Plan cannot be confirmed over objection of the Taxing Authority.

11.67 Joint Cases – Substantive Consolidation for Plan Administration

- (3984) *In re Stampley*, 437 BR 825 (Bankr. E.D. Mi. 2010) – Section 302 provides that spouses may file joint case. Joint petition creates two separate estates, not one single estate. Court can determine under Section 302 the extent to which the estates should be consolidated, if at all. If estates are not consolidated, the estates remain separate. Where spouses had significantly different incomes, court should not consolidate estates so as to avoid using income from higher income spouse to subsidize payments to creditors of other spouse at expense of creditors of higher income spouse.

11.68 Best Interests of Creditors

- (3985) *In re Grabarczyk*, 2012 WL 909511 (Bankr. N.D. Ohio 2012) – To the extent that debtor's plan proposes to pay priority claims and chapter 13 administrative expenses through the chapter 13 plan, any deductions taken by debtors on line 49 and line 50 of the form B22C must be added back into the disposable income calculated on line 59 in order to ensure that the total proceeds available to unsecured creditors is not less than the presumptively disposable income shown on line 59 times 60. Priority creditors are not “unsecured creditors” were paid from projected disposable income. Instead, those payments are deducted before determining projected disposable income which is then allocated to payment of general unsecured creditors.
- (3986) *Meredith v. Weigl*, 2011 WL 2321884 (Bankr. S.D. Ga. 2011) – Section 1325(a)(4) requires that plan provided dividend to unsecured creditors in amount not less than what would be paid in Chapter 7. Plan must include value of avoidable pre-petition transfers in determining “best interests”. Plan could not be confirmed where plan failed to account for value of property transferred within one year prior to filing for no consideration.

11.69 Feasibility

- (3987) *In re Shefa, LLC*, 2015 WL 248496 (Bankr. E.D. Mi. 2015), *aff'd*, 2015 WL 4477911 (E.D. Mi. 2015) – Debtor must demonstrate that plan is feasible as condition of confirmation. Feasibility depends on reasonable probability of payment, and depends on factors including adequacy of capital structure, earning power of business, economic conditions, ability of management, probability of continuation of existing management, and any other related matter that impacts prospects of a sufficiently successful operation to allow performance of provisions of plan. Debtor's plan that involved redevelopment of empty former hotel was not feasible where debtor lacked any capital or income from business operations and lacked any commitment from any funding sources. Debtor had no ability to make monthly payments on secured claims or on County's \$1.8 million water and sewer claims that were entitled to treatment as unsecured claims.
- (3988) *In re Gomery*, 2015 WL 349170 (Bankr. W.D. Mi. 2015) – Debtor could not demonstrate ability to make payments as required by the plan. Debtor was currently incarcerated for solicitation of murder and had no income at all, yet plan proposed payments of \$100 per month. While plan payment was minimal, debtor failed to present evidence of any ability to make even this small payment.
- (3989) *Williams v. Wayne County Treasurer*, Case No. 14-11844 (E.D. Mi. 2014) – Feasibility requires proof that debtor has necessary resources to make all payments under plan. Debtor's plan lacked feasibility where required payments on secured debts exceeded debtor's income and debtor failed in effort to reduce value of property to level where debtor could sustain debt service.
- (3990) *In re Ramirez*, 2014 WL 1466212 (Bankr. S.D. Fl. 2014) – Plan that proposed balloon payment to retire first mortgage on investment property is feasible where debtor has significant equity in other property and earning capacity of debtor produces strong incentive to complete plan that crams unprotected mortgage. Permitting debtor to structure plan to provide affordable payments for 60 months and opportunity to refinance in month 60 using equity in home is consistent with congressional policies of allowing debtors flexibility in structuring plan.
- (3991) *In re Gundrum*, 2014 WL 1664280 (Bankr. S.D. Ohio 2014) – Cause exists to grant secured creditor relief from stay where debtor's chapter 13 plan was facially not feasible. Plan was hopelessly speculative where debtor repeatedly amended plan to reduce plan payments reflecting insufficient of income, and reliance on large lump sum payment at end of plan where there was no evidence that any lump sum would actually materialize.
- (3992) *Mort Ranta v. Gorman*, 2013 WL 3286252 (4th Cir. 2013) – Debtor cannot be required to include Social Security income in calculating projected disposable income or plan payment, regardless of whether debtor is above or below median income. However, Court can take into account SSI to extent offered by debtor for purposes of determining whether plan is feasible. Section 1325(a)(6) requires only that the debtor be able to make the payments, without limitation that payments can be made only from disposable income. Debtor is not prohibited from using available money that is excluded from definition of CMI in making plan payments.
- (3993) *In re Bodkin*, 2011 WL 6792775 (Bankr. N.D. Ohio 2011) - Failure of debtors to make direct payments on secured claims was evidence that plan lacked feasibility. Plan was not feasible when debtors had not made direct payments on secured claims, including mortgage, and house payment was 46% of budget. Debtors had made poor economic decisions prior to filing and proposed to retain all assets, while paying priority debt and little to unsecured creditors. Debtors demonstrated they could not live within budget by falling behind on scheduled debt payments.

- (3994) *In re Shelly*, 458 BR 740 (Bankr. N.D. Ohio 2011) – Debtor’s plan could not be confirmed where plan was entirely contingent on successful prosecution of pending legal malpractice action. Debtor did not demonstrate likelihood of success on merits or any other information concerning validity or amount of likely recovery.

11.70 Feasibility – Plan Dependent on Sale of Property

- (3995) *In re Milburn*, 2012 WL 5457424 (Bankr. E.D. Ky. 2012) – Plan that proposed to fund payments to creditors by selling property could not be confirmed where plan proposed 48 month period within which to sell property. Only evidence presented to court as to reasonable marketing time was bank’s real estate appraiser who testified that the property could most probably sell in 90 to 180 days. Confirmation denied without prejudice to debtor filing amended plan that provided for 180 days within which to market and sell property.
- (3996) *In re Weltlich*, 2012 WL 3782553 (Bankr. N.D. Ohio 2012) – Plan that proposed funding solely from sale of property confirmable where plan contained conditions to ensure sale of property; debtor had listed the property and was actively showing it; debtor had reduced the asking price materially to spur sale; and order required that property remained listed at all times. Court’s prior conditional stay order would remain in place, which had material financial projections that debtor so far had met, demonstrating ability to perform the plan. Plan was sincere effort to address financial difficulties, repay debts, and maximize financial resources. Debtor has significant incentive to complete plan as claims bar date passed and many creditors had not filed claims.
- (3997) *In re Milano*, 2012 WL 1965661 (Bankr. N.D. Ohio 2012) – Feasibility of plan that depends on sale of property requires evidence of amounts of claims that are secured by property to be sold; state of the market for the property; current sale prospects; existence and maintenance of equity cushion; terms of listing including asking price and marketing plans; and whether the plan contains a default or “drop dead” provision. Debtor’s generalized statements of what they believe property could be sold for was not sufficient to meet burden of showing feasibility. Further, profit and loss statement for business indicated that business was operating at a loss even before paying mortgage or salary to debtors. Business financials showed no significant change over the prior two years and no improvement in business that would allow debtors to afford significantly higher payment that would be required by plan modification.

11.71 Feasibility – Funding Dependent on Non-Debtor

- (3998) *In re Deutsch*, 2015 WL 1804006 (Bankr. C.D. Cal. 2015) – Debtor’s plan could not be converted where ability to make plan payments was entirely dependent on contributions by non-debtors. Debtor’s income, after deduction of expenses, was not sufficient to make plan payments required. Debtor included on Schedule I a contribution from her boyfriend of \$700 per month which debtor would use to make plan payment, and debtor filed affidavit of boyfriend stating that he would contribute and affidavit of debtor’s mother stating that if boyfriend could not contribute, she would. Affidavit from boyfriend was not convincing as relationship with boyfriend was relatively new and there was no evidence that it would last for entire term of case and there was no history of him providing support. Evidence also indicates that mother lacked financial resources to contribute to debtor. Plans that are dependent on third parties are not the “fresh start” envisioned by code and instead spread the debtor’s financial burdens onto third parties, the very antithesis of the fresh start.

11.72 60 Month Plan Length

- (3999) *In re Carr*, Case No. 06-51257 (Bankr. E.D. Mi. 2012) – Motion to Allow Trustee to Disburse Funds Received Post-Expiration denied where funds to be administered were received more than 60 months after plan confirmed. Motion constitutes a *de facto* plan modification that would impermissibly exceed five-year limit in Section 1329(c).

11.73 Expiration or Non-Accrual of Automatic Stay

- (4000) *In re Dyer*, Case No. 12-08030 (6th Cir. BAP 2013) – Presence of automatic stay is not condition of confirmation of plan. Chapter 13 plan that otherwise complies with Section 1325 is confirmable even where debtor failed to move to extend automatic stay in second filed case under Section 362(c)(3). None of the provisions of Section 1325(a) require the presence of the automatic stay as a condition of confirmation.

11.74 Disbursing Agent

- (4001) *In re Moore*, Case No. 15-90015 (Bankr. W.D. Mi. 2015) – Section 1326(c) creates rebuttable presumption that all disbursements under confirmed plan should be made by Chapter 13 Trustee where Trustee believes that Trustee can more effectively fulfill supervisory duty by having payments made through the Trustee, and absent some convincing reason, either business or otherwise, Trustee is entitled to require payments to be made directly to Trustee. Factors to be considered include (1) the degree of responsibility of the debtor, as evidenced by his past dealings with creditors; (2) the reasons contributing to the debtor’s need for filing a Chapter 13 petition and plan; (3) any delays that the trustee might make in remitting the monthly payment to the targeted creditor; (4) whether the proposed plan modifies the debt; (5) the sophistication of the target creditor; (6) the ability and incentive of the target creditor to monitor payments; (7) whether the debt is a commercial or consumer debt; (8) the ability of the debtor to reorganize absent direct payments; (9) whether the payment can be delayed; (10) the number of payments proposed to pay the targeted claim; (11) whether a direct payment under the proposed plan will impair the trustee’s ability to perform his standing trustee duties; (12) unique or special circumstances of a particular case; (13) the business acumen of the debtor; (14) the debtor’s post-filing compliance with statutory and court-imposed duties; (15) the good faith of the debtor; (16) the plan treatment of each creditor to which a direct payment is proposed to be made; (17) the consent, or lack thereof, by the affected creditor to the proposed plan treatment; (18) the ability of the trustee and the court to monitor future direct payments; (19) the potential burden on the trustee; (20) the possible effect upon the trustee’s salary or funding of the U.S. Trustee system; and (21) the potential for abuse of the bankruptcy system. Court would require payments through Trustee for mortgage rather than allowing debtor to pay mortgage direct where debtor had fallen behind in mortgage payments at least twice prior to commencement of case; debtor’s sole purpose in filing was to bring

mortgage current which is the very debt that debtor wants to pay directly; debtor did not evidence ability to reorganize through direct payments where debtor had already defaulted on mortgage twice and if he defaults again or cannot substantiate direct payment history, case would fail; direct payments interfere with Trustee's duty to assist debtor and to monitor payments and intercede in any payment disputes between debtor and mortgage company; debtor's post-petition conduct did not evidence ability to consistently make direct payments where debtor had missed 2 of 5 payments coming due under the plan as proposed; direct payments would deprive trustee of ability to monitor mortgage payments or to aid in resolving any disputes between debtor and creditor; and direct payments adversely affect funding of the Chapter 13 system, allowing debtor to obtain substantial benefits from system without bearing any of the costs of administration. Lender's stated preference for direct payments is entitled to deference, but standing alone is not sufficient to overcome presumption. Trustee can administer mortgage payments and any alleged delay in making the monthly payments (as the Trustee disburses on the first business day of the month when the mortgage payment is otherwise due on the first of the month) only slightly favors debtor as Trustee payments will still be received in a timely manner.

C. Objections to Confirmation

11.75 Procedural Requirements

- (4002) *In re Mickles*, Case No. 09-63670 (Bankr. E.D. Mi. 2010) - Creditor's Objection to confirmation overruled without prejudice where Creditor's Statement of Corporate Ownership was internally inconsistent and Creditor failed to file corrected Statement within time permitted by Court. In one place, the Statement indicated that there are two entities that directly or indirectly own 10% or more of the equity, but also placed an "X" in the box stating that there are no such entities.
- (4003) *In re Page*, Case No. 10-53720 (Bankr. E.D. Mi. 2010) - Creditor's Objection to confirmation overruled without prejudice where Creditor's Statement of Corporate Ownership was internally inconsistent and Creditor failed to file corrected Statement within time permitted by Court. In one place, the Statement indicated that there are two entities that directly or indirectly own 10% or more of the equity, but also placed an "X" in the box stating that there are no such entities.

11.76 Standing to Object

- (4004) *Belser v. Nationstar Mortgage, LLC*, Case No. 14-065 (1st Cir. BAP 2015) – Any party in interest may object to confirmation of plan. Party in interest is generally defined as one whose pecuniary interests are directly affected by bankruptcy proceedings. A creditor is generally considered a party in interest as an entity that holds a claim against the debtor, defined as a right to payment. In general, where creditor fails to timely file proof of claim, creditor lacks standing to object to confirmation. However, where creditor filed objection before expiration of claims bar date and before disallowance of any potential claim, creditor had standing to object to confirmation. Court did not have to reach issue of whether creditor could lose right to object to confirmation based on disallowance of claim where, at time objection filed, creditor was indisputably a creditor.
- (4005) *Findling v. Rapoport*, Adv. No. 11-6933 (Bankr. E.D. Mi. 2014) – Party in interest for purposes of standing to object is one with actual pecuniary interest in outcome of case. Where creditor's proof of claim had been disallowed for failure to produce evidence to support valid claim, creditor no longer had actual pecuniary interest in outcome of case.
- (4006) *State Bank of Florence v. Miller*, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6th Cir. BAP 2011) – Bank lacked standing to object to confirmation where Bank purchased property at foreclosure sale by credit bid for the entire amount of bid. Bank's debt was fully satisfied by the credit bid, and Bank no longer held any debt or obligation as to debtor.

11.77 Deadline for Filing

- (4007) *In re DuPuis*, Case No. 07-64523 (Bankr. E.D. Mi. 2008) - Objection to confirmation denied as untimely where Objection not filed until 7 months after confirmation of plan.
- (4008) *In re Ramsey*, 2009 WL 3245303 (Bankr. M.D. Tn. 2009) – Creditor objected to Plan claiming that terms of Plan constituted improper modification of mortgage creditor's rights in violation of Section 1322(b)(2). Plan terms required Creditor to (1) apply the payments received from the trustee on pre-confirmation arrearages (defined as all sums included in the allowed proof of claim plus any post-petition pre-confirmation payments due) only to such arrearages; (2) deem the mortgage obligation as current at confirmation such that future payments, if made pursuant to the plan, shall not be subject to late fees, penalties or other charges; (3) provide at least 60 days written notice to the trustee, the debtors and the attorney for the debtors of any changes in the interest rate for any non-fixed rate or any adjustable rate mortgages or any change in the property taxes and/or the property insurance premiums and the effective date of any such adjustment; and (4) notify the trustee, the debtors and attorney for the debtors, in writing, of any protective advances or other charges incurred by the claimholder, pursuant to the mortgage agreement, within 60 days of making such protective advance or other charges. The Plan further required the Trustee to (1) make monthly ongoing mortgage payments commencing with the later of the month of confirmation or the month in which a proof of claim itemizing the arrears is filed by such claimholder; (2) file a motion and notice consistent with LBR 9013-1 no later than 60 days prior to the anticipated last payment under the plan, requesting the court find that the trustee has complied with the plan to maintain mortgage payments and to cure the pre-confirmation default and providing that if the claimholder asserts that the mortgage obligation is not contractually current at the time of the trustee's motion, then the claimholder shall, within 30 days of receipt of the motion, file a Statement of Outstanding Obligations, clearly itemizing all outstanding obligations it contends have not been satisfied as of the date of the Statement failing which the trustee shall submit an order declaring the mortgage current and all arrearages cured as of the date of the trustee's motion; and, upon discharge, the claimholder shall treat the mortgage as fully reinstated according to its original terms and fully current as of the date of the trustee's notice. Plan provision requiring notice of post-petition fees and expenses and payment changes is a permissible procedural mechanism to assist in the administration of the Case and

is not an impermissible mortgage modification. A plan provision requiring mortgage creditors to distinguish and apply payments on prepetition arrearages and on ongoing continuing mortgage payments does not improperly modify mortgage creditors' rights; such a plan requirement simply restates the statutory scheme for curing mortgage arrears. Plan does not impermissibly modify the mortgage and complies with Section 1325.

11.78 Failure to Raise Objection

- (4009) *In re Rosa*, 2013 WL 3380166 (Bankr. D. Hawaii 2013) – Surrender does not transfer ownership of the surrendered property. Rather, “surrender” means only that the debtor will make the collateral available so the secured creditor can, if it chooses to do so, exercise its state law rights in the collateral. Surrender alone does not cut off the debtor's liability for association fees. However, provision of Chapter 13 plan that provided that confirmation order shall constitute a deed of conveyance of the property when recorded was valid provision where secured creditor did not object to proposed treatment. Plan provision went beyond mere surrender and proposed to vest title in first mortgage holder pursuant to Section 1322(b)(9) which provides that the plan may provide for the vesting of property of the estate, on confirmation of the plan, in the debtor or any other entity. Secured creditor's failure to object constitutes “acceptance” of the proposed treatment within Section 1325(a)(5)(A) as long as the secured creditor has received proper notice of the plan treatment.
- (4010) *In re McDonald*, 437 BR 278 (Bankr. S.D. Ohio 2010) – Trustee's failure to object to confirmation under Section 1325(a)(9) and Section 1308 based on debtors' failure to file tax returns due for prior 4 years coupled with Trustee's failure to produce evidence of non-compliance left Court with no basis to deny confirmation on that issue. Trustee failed to meet initial burden of proof of non-compliance.

11.79 Burden of Proof

- (4011) *In re McDonald*, 437 BR 278 (Bankr. S.D. Ohio 2010) – The objecting party has the initial burden to produce evidence in support of an objection. The Debtors have the ultimate burden of proof to show the requirements of 11 U.S.C. Section 1325 have been met.
- (4012) *In re Predragovic*, 2010 WL 3239360 (Bankr. N.D. Ohio 2010) – Debtor bears burden of Proof on objection to confirmation.

D. Effect of Confirmation

11.80 Generally

- (4013) *Moore v. Caliber Home Loans, Inc.*, 2015 WL 5162482 (S.D. Ohio 2015) – Breach of contract action requires (1) the existence of a valid contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damages or loss to the plaintiff. Agreed order in Chapter 13 defining terms by which a default will be cured and payments maintained operates like a consent decree and effectively new contract between debtor and creditor. Holder of mortgage that cannot be altered under Section 1322(b)(2) retains all contract rights but can exercise those rights only in a manner consistent with the Code, Rules and any Court Orders. Debtor stated cause of action against mortgage servicer by alleging that debtor has made all payments due under the confirmed plan and consent order but the mortgage servicer failed to properly credit those payments and demanded a higher monthly payment than provided for in the plan and agreed order.
- (4014) *In re Jackson*, Case No. 09-33790 (Bankr. E.D. Mi. 2015) – Chapter 13 Plan binds all parties including debtors. Provision of Plan dealing with claims at variance with plan provided that claim would be allowed as filed. Although Chapter 13 plan proposed to cram IRS claim and to pay any remaining balance as unsecured, IRS filed Proof of Claim with secured, priority and unsecured components and claim must be allowed and treated accordingly. IRS failure to object to proposed cram down did not alter IRS right to rely on provision that claims are treated as filed even if at variance with plan.
- (4015) *In re Best*, 2014 WL 3700698 (Bankr. N.D. Ohio 2014) – Creditor precluded from seeking stay relief where plan has been confirmed treating creditor's claim and creditor did not object to confirmation. Prior to petition, creditor foreclosed on mortgage and property was sold at sheriff sale. Debtor then filed Chapter 13 and filed plan that proposed to cure defaults and reinstate mortgage over 60 month term of plan. Plan was confirmed by the Court without objection. Creditor, post-confirmation, sought stay relief for cause based on pre-petition foreclosure sale. Court denied motion. Creditor is bound by confirmed plan including provision to cure and maintain ongoing mortgage payments. While creditor may have had valid objections to confirmation of plan based on pre-petition foreclosure sale as debtor is not permitted to cure a default after the sale has occurred, creditor is bound by confirmed plan where creditor failed to object.
- (4016) *In re Green*, 2014 WL 1089843 (Bankr. N.D. Ohio 2014) – Lender in contempt for failure to appear pursuant to an order to appear and show cause why it should not be held in contempt of the Order confirming Plan. Lender had knowledge of order to appear and show cause as clerk mailed order to lender through its registered agent and also at lender's principal office, and Post Office did not indicate that mail was undeliverable. Order specifically required lender to appear and explain why, when it was maintaining an insurance escrow for debtor, it also force placed insurance on property.
- (4017) *Hope v. Acorn Financial, Inc.*, 2013 WL 5366291 (11th Cir. 2013) – Chapter 13 Trustee who was aware of defect in recorded lien but recommended confirmation of plan that paid lien as secured claim was precluded from later seeking to contest validity of lien.
- (4018) *U.S. v. Monahan*, Case No. 12-084 (1st Cir. BAP 2013) – Chapter 13 Plan that provided for payment of IRS priority non-dischargeable claim but did not propose to pay interest did not discharge interest portion of tax debt. Chapter 13 plan can treat only allowed claims and per Section 502 post-petition interest is not allowed claim on unsecured debt. *Espinosa* did not compel different result where plan was silent on interest, such that IRS did not have notice that plan would discharge unpaid interest at completion of case.
- (4019) *McIntosh v. LaBarge*, Case No. 12-6070 (8th Cir. BAP 2013) – Court must either confirm or deny confirmation of plan as a whole. Court cannot pick and choose those provisions that will be confirmed and excise other provisions from effect of confirmation order.

- (4020) *In re Hall*, 2012 WL 5051357 (Bankr. E.D. Tn. 2012) – Confirmed plan is binding on debtor and creditors. Plan proposed to bifurcate car claim, and to pay secured portion in full with interest. Plan also proposed to pay portion of any allowed claim that exceeds the value indicated will be treated as an unsecured claim at 100%. Debtor could not later attempt to satisfy car claim at less than full payment. First, plan as confirmed required 100% dividend to unsecured portion of secured claim. Second, Section 1325(a)(5) allows lien to be stripped only if (a) creditor received full payment of contract balance, or (b) debtor receives discharge. In “Chapter 20” debtor as not entitled to discharge. Therefore, debtor could not require creditor to release lien unless creditor received full contract payment.
- (4021) *In re Tirone*, 2012 WL 3249551 (Bankr. N.D. Ohio 2012) – Debtor’s objection to proof of claim based on alleged conflict with confirmed plan sustained and claim disallowed to extent of conflict. Plan proposed to bifurcate claim secured by debtor’s automobile into a secured claim in amount of \$6,000 plus interest at 4%; with the balance to be paid as unsecured claim. Prior to confirmation, Creditor filed a proof of claim alleging that he collateral value was \$10,250 and asserting an interest rate of 14.95%. However, creditor did not object to confirmation of plan. After confirmation, debtor objected to proof of claim to extent inconsistent with confirmed plan. Court concluded that confirmed plan controlled. Debtor was not required to object to claim prior to confirmation of plan. After *Espinosa*, claims allowance process cannot trump confirmation process, and creditor cannot sit back and rely on filed claim while allowing plan to be confirmed with inconsistent terms or treatment.
- (4022) *In re Wright*, 461 BR 757 (Bankr. N.D. Iowa 2011) – Mortgage servicer’s failure to provide notice of payment changes to trustee, debtor and debtor’s attorney, and failure to respond to debtor’s request for payment information and failure to prepare and distribute annual statements showing activity on account constituted willful violation of terms of confirmed plan that contained provisions imposing obligations on creditor and creditor failed to object to confirmation.
- (4023) *Ginn v. CitiMortgage, Inc.*, 365 BR 84 (Bankr. D.S.C. 2012) – Preclusive effect of confirmation of Chapter 13 Plan precluded debtor from contesting assignee’s status as holder of mortgage. Chapter 13 plan expressly provided that purported mortgage assignee would be paid in the Chapter 13 case, affirmed continued applicability of pre-petition mortgage agreement, addressed acknowledged default, and provided for continued payment of contractual mortgage payments.
- (4024) *In re Smith*, 2012 WL 1122975 (Bankr. N.D. Ohio 2012) – Debtor’s Motion to Disallow Pre-Petition Mortgage Arrearage and Deem Mortgage Current denied. Debtor’s Motion alleged that lender failed to file proof of claim and, therefore, arrearage claim should be disallowed and mortgage deemed current. Confirmed Plan estimated arrearage at \$4,000 and contained provision that a proof of claim filed at variance would control the amount of the obligation. Implication of plan is that, in absence of claim, upon confirmation of plan the amount of the arrearage stated in the plan would control.
- (4025) *FNB Bank v. Carlton*, 2011 WL 3799885 (Bankr. N.D. Al. 2011) - Confirmed plan trumps expiration of automatic stay under section 362(c)(3)(B). Although automatic stay expired by operation of law 30 days after commencement of case, mortgage was properly treated in chapter 13 plan, mortgage company allowed plan to be confirmed without objection, and mortgage company received payments pursuant to confirmed chapter 13 plan. Pursuant to section 1327, confirmation of plan was binding on bank and bank was limited to remedies set forth in confirmed plan. The termination of the automatic stay, coupled with bank’s conduct in accepting plan payments and filing claims, and the express language of section 1327, precluded the bank from taking actions inconsistent with the terms of debtors chapter 13 plan. Lender’s pursuit of foreclosure action post-confirmation was in direct contravention of confirmed plan. Bank was guilty of contempt for willful violation of section 1327 entitling debtor to compensation for harm suffered as consequence of banks willful failure to abide by confirmation order.
- (4026) *Haney v. Educational Credit Management corp.*, 2011 WL 6000886 (Bankr. E.D. Ky. 2011) – Confirmed Chapter 13 Plan did not result in discharge of student loans where Plan did not have an provision that addressed age or discharge of student loans and discharge order was generic and did not provide for the discharge of the student loans. Absent some express provision in Plan providing for discharge of student loans, determination of dischargeability could be made only through adversary proceeding.
- (4027) *In re Smoak*, 2011 WL 4502596 (Bankr. S.D. Ohio 2011) – Terms of confirmed plan are binding on all creditors provided in the plan. If creditor believes that plan terms are ambiguous or otherwise objectionable, creditor must raise issue before confirmation. Creditor failed to object to Plan that proposed to reduce principal balance on residential mortgage, reduce interest rate, and provide for 10 year amortization with 5 year balloon, could not later object to validity of terms.
- (4028) *Wahrman v. Bajas*, 443 BR 768 (Bankr. E.D. Mi. 2011) – Creditor cannot raise “bad faith” in obtaining confirmation of plan where alleged “bad faith” is based on pre-confirmation conduct.
- (4029) *In re Carouthers*, 2011 WL 2181383 (Bankr. W.D. Mi. 2011) – Plan that confirmed claim of Credit Union as unsecured was binding on creditor, notwithstanding that creditor held a security interest in debtors’ vehicle. Although Debtors’ plan did not specifically name Credit Union as unsecured creditor, creditor was listed in Schedule F and plan specifically identified all creditors treated as secured, leaving Credit Union treated as unsecured creditor by implication. Credit Union failed to object to plan and plan was confirmed. Credit Union could not obtain relief from stay to assert security interest post-confirmation.
- (4030) *United Student Aid Fund v. Espinosa*, 130 S. Ct. 1367 (2010) – Order Confirming Chapter 13 Plan is binding on all creditors and parties with notice. Order is not void for purposes of Rule 60 merely because Plan as confirmed contained provisions that are otherwise prohibited by Bankruptcy Code or other applicable law. Due process requires notice “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Fact that actual notice was provided through service of plan rather than service of adversary proceeding was procedural defect that did not alter validity of notice itself. Given the Code’s clear and self-executing requirement for an undue hardship determination, the Bankruptcy Court’s failure to find undue hardship before confirming *Espinosa*’s plan was a legal error. But the order remains enforceable and binding

where the creditor had notice of the error and failed to object or timely appeal. Bankruptcy Court has independent duty, even absent an objection by a party in interest, to insure that the plan complies with the requirements of Section 1325 before confirming the plan. However, Court's confirmation of a plan that does not comply with Section 1325 does not prevent the plan as confirmed from being binding on all parties with notice, even where plan itself clearly violates some statutory provision.

- (4031) *U.S. v. De Kellis*, 2010 WL 3521916 (E.D. Ca. 2010) – *Espinosa* has no effect on dischargeability of student loan debt in Chapter 7. Although debtor filed Chapter 7 at a time when private student loans were dischargeable and scheduled those loans with proper notice, entry of Chapter 7 discharge did not operate as finding of dischargeable nature of student loans. Unlike *Espinosa*, which involved a plan, a confirmation hearing, and a confirmation order, Debtor's Chapter 7 discharge did not preclude collection of non-dischargeable student loans.
- (4032) *In re Armstrong*, 434 BR 120 (Bankr. S.D.N.Y. 2010) – Mortgage creditor's unsecured proof of claim for entire mortgage balance not affected by confirmation of Plan. Prior to commencement of case, lender foreclosed mortgage, but there were no bids at the scheduled foreclosure sale. Debtor's Plan stated that debtor intended to surrender the property but did not object to proof of claim. After creditor had been paid in full and case discharged, debtor brought action to recover payments from creditor to the extent of the value of the property "surrendered". Court concluded that debtor failed to object to proof of claim or to take any action until after case had been concluded, and that plan's statement that debtor "intended to surrender" the property was insufficient notice to the mortgage company that the property was actually surrendered and neither divested debtor of title to the property nor cut off the mortgage company's right to a deficiency judgment. "*Espinosa* is distinguishable because that case did not address the questions of a vague and ambiguous plan, or dueling characterizations of a debt as secured or unsecured. Further, Rule 60(b) is not at issue in this case. Indeed, the Court follows *Espinosa* because it holds the Debtors to their plan—the plan provides for payment of allowed unsecured claims, Trustco had an allowed unsecured claim because the Debtors did not object to the proof of claim, and the surrender provision is vague and was never consummated."
- (4033) *In re Wright*, 2010 WL 3522231 (Bankr. S.D. In. 2010) – Debtor's plan proposed student loan discharge by declaration. Creditor did not object to confirmation and Trustee objected on different grounds but did not assert this issue. After confirmation, Supreme Court issued *Espinosa*, and Trustee filed Motion to Set Aside Confirmation Order as result of "mistake". Court denied Motion as Trustee and creditors had full and proper notice of the offending provision and failed to object. Failure to object when the grounds are known or readily discernible is not a "mistake" for purposes of setting aside confirmation order.
- (4034) *In re Westerfield*, 403 BR 545 (Bankr. E.D. Tn. 2009) – Debtor's Chapter 13 plan, upon confirmation, becomes binding on all creditors and parties named or treated in the plan. Debtor's Chapter 13 plan would not alter status of ex-wife's Domestic Support Obligation claim from priority to unsecured where plan did not expressly state that confirmation would work such a change in status. Dissolution of Marriage decree required debtor to hold ex-wife harmless from the secured claims on the marital homestead. Debtor could not avoid that obligation by proposing a plan to surrender the home. Although plan clearly contemplated that debtor would not make further payments on the house, that did not constitute "clear notice" that debtor was attempting to avoid domestic support obligation and was not sufficient to alter status of DSO claim.
- (4035) *In re McLemore*, 426 B.R. 728 (Bankr. S.D. Ohio 2010) - Creditor, a tax certificate purchaser entitled to 18% interest by statute, was bound by res judicata effect of debtor's confirmed Chapter 13 Plan which called for Till interest in its claims. Chapter 13 debtor's confirmed plan was binding on tax claims purchaser, notwithstanding that this treatment allegedly conflicted with provision of the Bankruptcy Code dealing with tax claims. Tax claims purchaser, to extent that it believed it was protected from modification of interest rate, should have objected to plan at confirmation hearing.
- (4036) *Blevins v. National City Bank*, Case No. 09-3205 (Bankr. E.D. Mi. 2010) - Confirmation of Chapter 13 Plan is binding upon debtor and all creditors where Debtor's plan specifically treated Bank's second mortgage as allowed secured claim, debtor prohibited from attempting, post-confirmation, to "strip" second mortgage as entirely unsecured.
- (4037) *In re Woods*, 406 BR 293 (Bankr. N.D. Ohio 2009) – Provision in Chapter 13 Plan that real property would be surrendered in full satisfaction did not prevent secured creditor from filing unsecured deficiency claim. Creditor filed Proof of Claim before plan was confirmed, providing notice to debtor that creditor contested treatment in plan and that creditor would expect that any objection to the deficiency claim would be resolved through the claim resolution process.

11.81 Parties Bound

- (4038) *Fadel v. DCB United, LLC*, Case no. 12-1061 (9th Cir. BAP 2013) – Confirmation Order is binding on creditors of debtor, defined as any entity that has a claim against the debtor that arose at the time of or before the order for relief. Post-petition purchaser of property at foreclosure sale was not creditor as purchaser did not have any claim against debtor as of commencement of case. Purchaser of property first acquired interest after commencement of case. Purchaser's objection to confirmation does not convert purchaser into pre-petition creditor for purposes of Section 1327.

11.82 Distribution of Payments

- (4039) *In re Jackson*, Case No. 09-33790 (Bankr. E.D. Mi. 2015) – Chapter 13 Plan binds all parties including debtors. Provision of Plan dealing with claims at variance with plan provided that claim would be allowed as filed. Although Chapter 13 plan proposed to cram IRS claim and to pay any remaining balance as unsecured, IRS filed Proof of Claim with secured, priority and unsecured components and claim must be allowed and treated accordingly. IRS failure to object to proposed cram down did not alter IRS right to rely on provision that claims are treated as filed even if at variance with plan.

(4040) *In re Pajian*, 598 BR 708 (Bankr. N.D. Ill. 2014), *aff'd* 2015 WL 2182951 (7th Cir. 2015) – Distributions under confirmed plans may be made only on “allowed” claims. Allowed claim under Section 502 is one for which a proof of claim has been filed. Creditor who does not file claim not entitled to payment under plan.

(4041) *In re Marcola*, Case No. 07-23438 (Bankr. E.D. Mi. 2011) – Generally speaking, upon dismissal of Chapter 13 case, funds held by Chapter 13 Trustee are returned to the Debtor. If administrative claims exist, such as fees for debtor’s counsel, those expenses are paid and any remaining funds are paid to the debtors. However, where obligation exists to Internal Revenue Service based on debtor’s intentional diversion of funds, exceptional circumstances exist to support exception to rule. Funds on hand ordered to be paid to IRS without prejudice to debtor’s counsel seeking to collect fees directly from debtors after dismissal.

11.83 Vesting of Property of Estate

(4042) *In re Watt*, 2014 WL 5304703 (Bankr. D. Or. 2014) – Section 1322(b)(9) allows plan to vest title in property in third party upon confirmation. Plan that proposed to vest title to condominium in secured lender confirmable under Section 1322(b)(9) over objection of creditor. Creditor is not required to accept the proposed treatment as long as that treatment complies with Code, and Section 1322 expressly allows vesting in debtor or any third party. Plan also specifically stated that vesting did not alter validity, priority or extent of liens allowing creditor to foreclose post-confirmation.

(4043) *In re Hargis*, 2013 WL 4514090 (Bankr. N.D. Ohio 2013) – Property that reverts in debtor at confirmation is property that existed as of date of petition. Property that debtor acquires post-petition such as life insurance proceeds and proceeds of inherited 401-k are property of estate that do not revert and remain property of estate.

(4044) *In re Robinson*, Case No. 09-13005 (Bankr. W.D. Mi. 2010) – Upon confirmation of plan, property of the estate re-vests in the debtor unless the plan provides otherwise. Automatic stay under section 362(c)(3), if not extended, terminates as to the debtor and as to property of the debtor, but not as to property of the estate. Therefore, confirmed plan where stay expired did not protect automobile from repossession after plan confirmed and automobile re-vested in Debtor.

11.84 Surrender of Collateral Upon Confirmation

(4045) *In re Pyburn*, 23014 WL ____ (Bankr. N.D.W. Va. 2014) – Creditor did not violate stay by bringing in rem action to reform mortgage signed by debtor husband but not debtor wife, where creditor had obtained relief from stay as to property in question, trustee had abandoned any interest in property, debtors surrendered any interest in property as part of confirmed Chapter 13 Plan, and creditor affirmatively stated that creditor did not seek payment from debtor husband or debtor wife and sought only to foreclose mortgage.

(4046) *Williams v. Federal National Mortgage Ass’n*, 2013 WL 5445883 (E.D. MI. 2013) – Debtor’s Plan as modified provided for surrender of property. Debtor could not maintain post-confirmation action against lender based on alleged breach of agreement for loan modification. Surrender obligated debtor to surrender title to lender and could not thereafter allege that debtor retained any interest in the property.

(4047) *In re Rosa*, 2013 WL 3380166 (Bankr. D. Hawaii 2013) – Surrender does not transfer ownership of the surrendered property. Rather, “surrender” means only that the debtor will make the collateral available so the secured creditor can, if it chooses to do so, exercise its state law rights in the collateral. Surrender alone does not cut off the debtor’s liability for association fees. However, provision of Chapter 13 plan that provided that confirmation order shall constitute a deed of conveyance of the property when recorded was valid provision where secured creditor did not object to proposed treatment. Plan provision went beyond mere surrender and proposed to vest title in first mortgage holder pursuant to Section 1322(b)(9) which provides that ht plan may provide for the vesting of property of the estate, on confirmation of the plan, in the debtor or any other entity. Secured creditor’s failure to object constitutes “acceptance” of the proposed treatment within Section 1325(a)(5)(A) as long as the secured creditor has received proper notice of the plan treatment.

(4048) *In re Waltower*, 2012 WL 4758043 (Bankr. S.D. Ga. 2012) – Surrender of property in confirmed chapter 13 plan terminates automatic stay as to property. However, surrender does not convey title. Lender to whom property was surrendered had not foreclosed or taken title and, therefore, had no duty to maintain the property. Debtor’s failure to maintain property post-confirmation resulted in debtor being liable for damages to adjoining property owners for nuisance resulting from neglect and decay of property.

(4049) *Arsenault v. JP Morgan Chase Bank*, 456 BR 627 (Bankr. S.D. Ga. 2011) – Lender did not violate Automatic Stay or Section 1327 by failing to take action to recover possession of property that plan surrendered. Lender has no obligation to accept surrender, foreclosure or transfer of title. While Code allows debtor to surrender, it does not impose on lender a reciprocal duty to assume ownership or take possession of the property and does not relieve debtor of ongoing burdens of ownership.

(4050) *Maple Forest Condominium Association v. Spencer*, 2010 WL 3909985 (Bankr. E.D. Mi. 2010), *reversed in part*, Case No. 1014413 (E.D. Mi. 2011) – Section 1325(a)(5) permits debtor to treat secured debt by “surrender” of collateral. “Surrender” entitles the secured creditor to enforce all rights in collateral including a right of possession. Surrender, without more, does not operate as transfer of title and does not vest title in secured creditor and does not extinguish the claims of the secured creditor relating to the collateral.

11.85 Application of Payments – Section 524(i)

(4051) *Pompa v. Wells Fargo Home Mortgage, Inc.*, 2012 WL 2571156 (Bankr. S.D. Tx. 2012) – Under Section 524(i), creditor’s is required to credit payments as directed in the plan. Failure to properly credit payments constitutes violation o discharge injunction and creates remedy as to debts that are long term obligations that are not discharged under Section 1328. Deeming misapplication of plan payments a violation of discharge injunction does not impermissibly modify home mortgage lender’s rights in violation of Section 1322, but merely enforces plan provisions and ensures that completion of plan actually results in fresh start.

11.86 Modification of Secured Claims

- (4052) *In re Strzelecki*, 509 BR 671 (Bankr. W.D. Ark. 2014) – Secured creditor whose lien is crammed down in confirmed plan entitled to insurance proceeds up to full amount of debt when car destroyed post-confirmation. Section 1325(a)(5)(B) provides that secured claims retain liens until earlier of full payment under applicable non-bankruptcy law or the entry of a discharge. Creditor entitled to payment of proceeds to full extent of debt even if amount exceeds “crammed down” balance owed under plan.
- (4053) *In re Slade-Lanier*, 2014 WL 2565919 (Bankr. N.D. Ohio 2014) – Tax certificate holder bound by terms of plan that proposed to pay a portion of the property tax claim with the unpaid portion to be treated as unsecured claim. Tax certificate holder had notice of the plan and the treatment of the claim but failed to object to proposed treatment. Court was not determining amount of tax claim, which would violate Section 505(a)(2)(C), but was only determining the treatment of the claim consistent with the terms of the confirmed plan.
- (4054) *In re Ange*, 2014 WL 2565916 (Bankr. N.D. Ohio 2014) – Section 1322(b)(2) prevents modification of security interest that is secured solely by debtor’s principal residence. Security interest is a “lien created by an agreement”. Lien arising by statute as a result of unpaid property taxes results in creditor holding secured claim but lien is not “security interest”. Debtor can modify method of application of payments on property tax claim without violating Section 1322(b)(2).

11.87 Discharge or Release of Secured Claims

- (4055) *In re James*, 2014 WL 1614466 (Bankr. W.D. Ark. 2014) – Secured creditor entitled to payment of insurance proceeds up to full amount of debt where plan “crammed” secured claim and plan was confirmed before vehicle was damaged. While plan valued vehicle at amount lower than total debt and amount of insurance proceeds exceeded the “unpaid” balance on the secured portion of the claim, lender nonetheless entitled to proceeds as Section 1325 requires that lender retain lien until earlier of discharge or payment under applicable non-bankruptcy law. Debtor had not received discharge and lender had not been paid in full under applicable non-bankruptcy law, so lien on vehicle extended to insurance proceeds up to remaining balance owed on debt.
- (4056) *In re McKee*, Case no. 10-58266 (Bankr. E.D. Mi. 2013) – Creditor holding secured claim is not entitled to be paid more on secured claim than that proposed in confirmed plan. Plan proposed to modify claim secured by automobile to reduce principal and interest, with undersecured portion being treated as unsecured. Post-confirmation, automobile was totaled in an accident. Creditor sought to recover insurance to extent of full balance remaining on contract. Recovery from insurance limited to lower balance owed on secured claim as modified, based on amount of secured claim stated in plan less payments made by Chapter 13 trustee. Fact that car was totaled and to be paid by insurance did not authorize creditor to receive more on secured claim than amount proposed in confirmed plan.
- (4057) *In re Bolden*, Case No. 07-30132 (Bankr. E.D. Mi. 2012), *aff’d*, 2013 WL 3897048 (E.D. Mi. 2013) – Creditor holding lien on debtor’s vehicle bound by terms of confirmed plan that modified contract to reduce interest rate and reduced principal and provided for full payment within plan term. “Only logical interpretation” of plan was that finance contract would be paid in full after debtor made the required number of payments. Creditor did not object to confirmation of plan and did not notify trustee after specified number of payments that lender thought it was owed more money. Although debtor was not entitled to discharge, creditor required to release lien where creditor had been paid stated market value of collateral plus stated interest rate, even if total paid was not sufficient to pay lien under applicable non-bankruptcy law. District Court held that plan did not “cram down” the debt where the plan stated that the claim was modified, even if the modification included reduction in the principal balance. Rather, the plan proposed to modify the claim under Section 1322(b)(2) by bifurcating the claim into secured and unsecured portion and then proposed payment of the secured portion in full. Even though a debtor may not be entitled to a discharge, the debtor can nonetheless permanently modify a secured loan in the plan.

11.88 Direct Pay Obligations

- (4058) *In re Rogers*, 2013 WL 3422702 (Bankr. E.D.N.C. 2013) – Discharge under chapter 13 discharged debtor’s liability for deficiency resulting from post-discharge default and foreclosure. Section 1328 makes the discharge applicable to all debts provided for in the Chapter 13 plan. Debtor’s plan provided for lender’s claim by requiring debtors to make direct payments directly to creditor. Section 1322(b)(5) discharge exception for long term debt did not apply as plan did not provide for curing of any delinquency or default. Section 1322(b)(2) did not apply as debtor did not modify the lender’s rights under the note and deed of trust. Any deficiency judgment is not excluded from the scope of the discharge.

11.89 Actions in Violation of Confirmed Plan – Remedy

- (4059) *Harchar v. IRS*, 2012 WL 3968162 (6th Cir. 2012) – Bankruptcy code does not provide private right of action for alleged creditor actions that are inconsistent with confirmed plan. Even if IRS acted inconsistent with confirmed plan, Debtor’s remedy was not separate adversary proceeding against IRS but action under Section 105 to enforce plan.

11.90 Post-petition Claims

- (4060) *In re Spencer*, 2014 WL 1599869 (Bankr. N.D. Ohio 2014) – Post-petition creditor cannot be required to participate in Chapter 13 case to recover debt. Section 1305 permits post-petition creditor to participate, but if creditor elects to remain outside bankruptcy case, creditor can pursue collection against debtor and property of debtor, even if collection imperils successful Chapter 13 proceeding. Section 1305 does not permit debtor to file claim on behalf of post-petition creditor.

E. Revocation of Order Confirming Plan

11.91 Time for Bringing

- (4061) *Wahrman v. Bajas*, 443 BR 768 (Bankr. E.D. Mi. 2011) – Adversary proceeding to revoke confirmation was premature when filed 7 days before debtor’s plan was confirmed. Correct procedure is to object to confirmation, not attempt to revoke confirmation. Action to revoke confirmation must be brought within 180 days of the date of entry of the Order Confirming Plan.

11.92 Grounds

- (4062) *In re Davis*, Case No. 12-33624 (Bankr. E.D. Mi. 2015) – Order Confirming Chapter 13 Plan set aside under Rule 60(b)(4) where creditor did not have notice of the proceedings prior to confirmation of plan. Where creditor lacks notice, confirmation order is void as to that creditor and court abuses discretion by denying motion to set aside. Evidence indicated that debtor transposed digits in creditor’s address resulting in creditor no receiving notice of case until well after confirmation order entered.
- (4063) *In re Rodriguez*, 2013 WL 1716110 (3d Cir. 2013) – Sole basis to set aside Confirmation Order is for fraud under Section 1330. General provisions of Rule 60 governing rehearings are not applicable to rehearing or reconsideration of Confirmation Order. Bankruptcy Court correctly rejected creditor’s request to set aside the confirmation order or to hold valuation hearing where creditor did not allege any fraud as required under Section 1330.
- (4064) *Wahrman v. Bajas*, 443 BR 768 (Bankr. E.D. Mi. 2011) – Court can revoke confirmation order obtained through fraud. Creditor must prove: (1) that the debtor made a representation regarding compliance with Section 1325 which was materially false; (2) that the representation was either known by the debtor to be false, or was made without belief in its truth, or was made with reckless disregard for the truth; (3) that the representation was made to induce the court to rely upon it; (4) that the court did rely upon it; and (5) that as a consequence of such reliance, the court entered confirmation.

F. Modification of Order Confirming Plan

11.93 Compliance With Code Generally

- (4065) *In re Deavila*, Case No. 07-3609 (Bankr. W.D. Mi. 2010) – Court has independent duty to review proposed modifications to determine whether modification complies with requirements of Code. Court cannot approve a modification that is inconsistent with the Code, even in the absence of objections by creditors or the Chapter 13 Trustee. The Supreme Court in *Espinosa* admonished bankruptcy courts to scrutinize plans for conformity with the Code even in the absence of objections and that admonition is equally applicable to plan modifications.

11.94 Grounds – Error in Order Confirming Plan

- (4066) *In re Harris*, Case No. 08-63253 (Bankr. E.D. Mi. 2009) – Order Confirming Plan would be modified where terms of Order were inconsistent with Court’s text order. Confirmation Order purported to award counsel fees in the sum of \$3,000.00. Court’s text order indicated that fees were to be awarded by Fee Application only. Written Confirmation Order amended to provide that compensation and reimbursement of expenses shall be by application only.

11.95 Altering Treatment of Secured Creditor

11.96 Surrender of Previously Retained Collateral in Full Satisfaction

- (4067) *In re Deavila*, Case No. 07-3609 (Bankr. W.D. Mi. 2010) – Debtor permitted to modify plan to surrender collateral to secured creditor in full satisfaction where confirmed plan provided for payment of the claim directly by debtor “outside the plan”. Proposed modification does not adversely affect secured creditor as plan as confirmed preserved the creditor’s lien and nothing in the modification is inconsistent with creditor’s rights as mortgagee. Modification does not purport to reclassify deficiency from secured to unsecured and does not alter rights of unsecured creditors in any way.

G. Modification of Plan Post-Confirmation

11.97 Generally

- (4068) *In re Szumanski*, Case No. 10-22054 (Bankr. E.D. Mi. 2015) – Section 1229 is substantively identical to Section 1329 and allows modification of Chapter 12 Plan for same reasons and to modify plan to same extent as would be applicable in Chapter 13. Modifications are permitted only to increase or reduce payments on claims of particular class; extend or reduce time for payments; or alter amount of distribution to creditor to take into account payments to creditors from third parties. Proposed modification to reduce dividend from 100% to 2% of allowed claims is permissible modification under Section 1229.
- (4069) *In re Nunez*, 2014 WL 4473842 (Bankr. D Colo. 2014) – Court would deny debtor’s request to modify plan where debtor did not provide to Trustee updated Schedules I and J, tax returns or current paystubs. Documentation was necessary to allow Trustee to evaluate feasibility of modification that sought to increase debtor’s plan payment and to ensure compliance with requirement that debtor file all tax returns. Further, Section 541 requires debtor to cooperate with Trustee, and duty does not cease upon confirmation of plan. Further, Section 521 requires debtor to produce tax returns on request and to file annual income and expense reports, and trustee and creditors have right under Section 1329 to seek to modify plan modification if documents indicate that debtor has ability to increase plan payments.
- (4070) *James C. Warr & Assoc. v. Ruskin*, 2012 WL 4855180 (E.D. Mi. 2012) – Attorney not entitled to compensation for time spent in attending hearing on plan modification where proposed modification failed to advance any legitimate reason for modifying plan. Modification asked only that plan be modified but failed to state any reason why the plan needed to be modified or why relief was warranted. Proposed modification was so woefully lacking in any factual basis that counsel knew or should have known that modification was doomed to fail

for lack of any detail, such that any services rendered in connection with the modification were clearly unnecessary. Extremely brief modification that did not explain why a modification was necessary other than to note that modification “is necessary for the Plan to calculate timely” is insufficient to justify relief sought, and contained no information that would be probative on issue of good faith which was fatal to the modification.

- (4071) *In re Milano*, 2012 WL 1965661 (Bankr. N.D. Ohio 2012) – Under Sixth Circuit law, party is permitted to modify plan to change amount and timing of payments, but not total amount of claim. Modifications tend to disturb binding effect of confirmed plan and Section 1329 must be interpreted narrowly.

11.98 Good Faith

- (4072) *In re Manning*, Case No. 09-72605 (Bankr. E.D. Mi. 2015) – Plan modification to excuse obligation to remit tax refunds lacked good faith where debtors did not remit tax refunds over duration of case and filed modification after plan expiration. Debtors had ample opportunities over life of case to send in tax refunds or to excuse obligation to do so. Debtor’s willful disregard of obligations indicated that last-minute plan modification was not in good faith but was mere last minute attempt to evade obligations. Debtor cannot ignore the obligation to remit tax returns and refunds, then get to the end of the case, and then, after expiration, ask for wholesale excusal of tax returns and refunds. The court will not ignore the commitments made when the plan was confirmed.
- (4073) *In re Henderson*, Case No. 09-74589 (Bankr. E.D. Mi. 2015) – Plan modification to excuse obligation to remit tax refunds lacked good faith where debtor did not remit refunds over life of case and waited until after expiration to seek to excuse obligation in its entirety.
- (4074) *In re Ramsey*, 507 BR 736 (Bankr. D. Kan. 2014) – Plan modification lacked good faith and did not comply with Section 1322. Modification sought to pay post-petition priority taxes but funding was not sufficient to pay taxes in full over remaining life of plan. Further, debtor sought to pay taxes for which debtor budgeted but failed to pay, continuing pre-petition pattern of failing to timely pay taxes and debtor did not otherwise account for funds that were budgeted but not used for payment of taxes post-petition.
- (4075) *In re Coats*, 509 BR 836 (Bankr. W.D. Mi. 2014) – Exception to automatic stay for domestic support obligations does not extend to obligations beyond those for support and maintenance. Debtor and ex-spouse violated stay when they returned to domestic relations court for purposes of modifying property division and altering scope of indemnification claim of non-debtor spouse in such a way as to increase the burden on debtor and debtor’s estate. Modification allowed non-debtor to withhold substantial sum from alimony and support to pay joint creditor, with debtor then seeking to modify plan to reduce plan payment to account for the additional withholding and attendant lower income. Evidence indicated lack of good faith as debtor was attempting to cause debtor’s unsecured creditors to pay for debtor’s improper modification of property settlement.
- (4076) *In re Hargis*, 2013 WL 4514090 (Bankr. N.D. Ohio 2013) – Plan modification must be in good faith, as determined by totality of circumstances. Debtor demonstrated a change of circumstances where Debtor’s husband, a co-debtor and the sole income producer, passed away during chapter 13 case, which supported finding of good faith. Debtor received a large life insurance payment and a cash payment on Husband’s 401-k, but otherwise had no income as Debtor had not worked for at least 15 years. While debtor used insurance to purchase condominium, debtor did so to reduce her housing expense from a rental of \$1500 per month to a payment for condo fees and taxes of only \$438 per month. However, debtor did receive a large insurance payout and spent one-half of that purchasing the condo and also purchasing a new vehicle, and wanted to make minimal plan payments just sufficient to pay non-dischargeable priority claims, while having a monthly budget in excess of \$2500. At end of case, debtor would receive a discharge, own a condo worth \$200,000 plus two vehicles, plus \$150,000 in liquid assets, producing a net worth in excess of \$350,000, while paying creditors only 50% of their claims versus 80% as provided in confirmed plan. Modification lacked good faith where debtor would substantially improve financial position while reducing dividend to unsecured creditors.
- (4077) *In re Cluckey*, 2012 WL 6721052 (Bankr. N.D. Ohio 2012) – Debtors who fell behind on post-petition taxes could not modify plan to reduce dividend in order to free up cash to pay those taxes. Confirmed plan required debtors to pay all post-petition taxes to the tax authorities. Debtors systematically under-withheld which produced excess undisclosed net cash flow each month, and failed to pay resulting tax liabilities. Debtors violated confirmation order without any meaningful explanation and amended budget reflected no belt tightening and debtors incurred additional unapproved post-petition liabilities including automobile payments. Debtors’ modification effectively asked unsecured creditors to bail debtors out of their post-petition tax problems without cause and without taking sufficient responsibility for the under-withholding.
- (4078) *In re Walpole*, 2010 WL 2696847 (Bankr. N.D. Ohio 2010) – Section 1329 requires that all modifications be proposed in good faith. Debtor’s request to modify a plan to retain the proceeds of an asset which debtor had failed to disclose in the first instance lacked good faith. At the time of commencement of debtor’s case, debtor owned a life estate in property owned by debtor’s mother. Debtor failed to disclose that life estate or the value of that life estate in debtors schedules and failed to include the value of that life estate in the Plan’s liquidation analysis, resulting in confirmation of a plan that failed to pay creditors the actual liquidation value of the debtor’s estate. After debtor’s mother died, debtor requested court permission to sell the property and to retain a portion of the proceeds. Had debtor’s mother not died while the case was open, court may never have discovered debtor’s omission and debtors may have pocketed 100% of the proceeds of the property after receiving a discharge in underfunded plan. Allowing debtors to profit from the sale of a hidden asset would be “patent bad faith”. Further, expenses for which debtors sought to use proceeds were included within the range anticipated by debtor’s budget such that debtors failed to demonstrate any need for the proceeds to pay these expenses.

11.99 Liquidation Value

- (4079) *In re Cochran*, Case No. 06-45912 (Bankr. E.D. Mi. 2011) – Plan modification can reset value of assets to effective date of plan as

modified where modification results from change in financial condition unrelated to change in asset values. Debtor's plan was confirmed at 100% plus interest as the liquidation analysis showed \$17,000 in non-exempt equity and claims were scheduled at less than \$1,000. When debtor suffered loss of income such that debtor could no longer afford plan payment, debtor sought to modify the plan to reduce the payments and to reduce the dividend to 0%. Debtor argued that the value of debtor's home (the only non-exempt asset) had dropped so precipitously that the mortgage balance exceeded the value of the home, resulting in a liquidation as of the date of the modification of \$0, so the plan modification that proposed to pay \$0 to unsecured creditors met liquidation. Section 1329 allows the liquidation analysis to be reset as long as the balance of the requirements for a plan modification are met – change in circumstances, debtor still committing best efforts, good faith, no evidence of intentional dissipation of assets – and as long as the plan meets liquidation recalculated as of the date of the plan modification, it works. Debtor would not be allowed to modify the plan only because liquidation had dropped, but the debtor can use that drop to meet Section 1325(a)(4) as part of an otherwise allowable plan modification.

11.100 Ambiguous Terms

- (4080) *In re Love*, Case No. 06-30968 (Bankr. E.D. Mi. 2012) – Rule 3015 requires plan modification to state how modification would affect claims and creditors. Modification that stated only that Debtor proposed to modify the plan to account for tax refunds that were not remitted to the trustee, and did not indicate that debtor intended any other changes in the plan, did not provide adequate notice that modification would somehow alter or reduce amount of secured claim. Body of modification did not state that modification changed any term of creditor's claim, but asserted only that the balance on the claim according to the trustee's records was \$2,230.57 and that the amount that would be paid on the claim over the duration of the plan would be \$2,088.22. Although confirmed plan modification is binding on all parties, neither modification nor Certificate of No Response provided property notice to creditor of intent to alter treatment of claim. Creditor not bound by terms of plan modification.

11.101 Feasibility

- (4081) *In re Ramsey*, 507 BR 736 (Bankr. D. Kan. 2014) – Plan modification lacked good faith and did not comply with Section 1322. Modification sought to pay post-petition priority taxes but funding was not sufficient to pay taxes in full over remaining life of plan. Further, debtor sought to pay taxes for which debtor budgeted but failed to pay, continuing pre-petition pattern of failing to timely pay taxes and debtor did not otherwise account for funds that were budgeted but not used for payment of taxes post-petition.
- (4082) *In re Garajau*, 2014 WL 268695 (Bankr. D. Mass. 2014) – Plan modification that is not feasible cannot be approved. Plan modification proposed to increase dividend to unsecured creditors but did not increase the plan payment, such that the proposed higher dividend would not be met.
- (4083) *In re Milano*, 2012 WL 1965661 (Bankr. N.D. Ohio 2012) – Debtor must prove that any proposed modification of plan is feasible. Debtor's plan called for sale of commercial property and pay-off of mortgage in first year of plan. When property did not sell, debtors sought to modify the plan to cure and maintain mortgage, which would require significant increase in plan payments. Debtor testified that increased plan payments could be made if debtors sold their house and also because business income had increased. Debtors failed to demonstrate feasibility as debtors failed to present an appraisal or other competent evidence of value of debtors' home. Feasibility of plan that depends on sale of property requires evidence of amounts of claims that are secured by property to be sold; state of the market for the property; current sale prospects; existence and maintenance of equity cushion; terms of listing including asking price and marketing plans; and whether the plan contains a default or "drop dead" provision. Debtor's generalized statements of what they believe property could be sold for was not sufficient to meet burden of showing feasibility. Further, profit and loss statement for business indicated that business was operating at a loss even before paying mortgage or salary to debtors. Business financials showed no significant change over the prior two years and no improvement in business that would allow debtors to afford significantly higher payment that would be required by plan modification.

11.102 Grounds - Change of Circumstances

- (4084) *In re Martin*, 2013 WL 6196566 (Bankr. N.D. Ohio 2013) – Section 1329 does not require substantial and unanticipated change to support modification. Trustee demonstrated basis to modify plan to increase plan payments where debtors' income increased since confirmation of the plan.
- (4085) *In re Milano*, 2012 WL 1965661 (Bankr. N.D. Ohio 2012) – Sixth Circuit has not addressed "change in circumstances" requirement for plan modification. However, Court should consider whether there has been a change in circumstances as inherent in consideration of other factors including good faith and feasibility.
- (4086) *In re VanDyne*, 2011 WL 3664551 (Bankr. N.D. Ohio 2011) – Trustee's Plan Modification based on Debtor's Amended Schedules I and J filed after confirmation is exception from general res judicata effect of confirmed plan. Trustee could not have known at the time of confirmation that debtor's post-confirmation schedules would show significant changed income and expenses.
- (4087) *Storey v. Pees*, 392 BR 266 (6th Cir. BAP 2008) – Trustee's Motion to Modify confirmed plan based on pre-confirmation miscalculation of plan length would be denied. Under section 1327, a confirmation order is res judicata and not subject to collateral attack. Section 1329 permits the plan to be modified for one of four specific reasons. Section 1329 sets no standard as to when a post confirmation modification is permitted. Section 1327 precludes modification of a confirmed plan under section 1329 to address issues that were or could have been decided at the time the plan was originally confirmed. Modification under section 1329 is limited to matters that arise post confirmation and is based on the premise that, during the life of the plan, circumstances may change, and parties should have the ability to modify the plan accordingly. Trustee would not be permitted to modify plan to address an issue that could have been decided at confirmation had the trustee or an unsecured creditor with an allowed claim objected.

11.103 Grounds – Error in Order Confirming Plan

- (4088) *In re Szumanski*, Case No. 10-22054 (Bankr. E.D. Mi. 2015) – Court would modify plan under Section 1229 where Order Confirming Plan erroneously referenced 100% dividend when debtors intended dividend to be 2% and plan funding as approved by Court was consistent with 2% dividend and there was no evidence that debtors ever intended or could ever afford 100%. Reference in Order was good faith error based on misinterpretation of sources of plan funding.

11.104 Reclassification of Claims

- (4089) *In re Gibson*, 2015 WL 1343984 (Bankr. E.D. Ky. 2015) – Section 1329 does not allow post-confirmation modification to change classification of claim from secured to unsecured. Confirmed plan treated claim as secured despite possibility that lien was not properly perfected. Status of claim as secured was determined at confirmation of plan.
- (4090) *Hazelwood v. Fifth Third Bank*, 2014 WL 3534054 (Bankr. W.D. Ky. 2014) – Modification is not legally available to reclassify claim confirmed as secured to treat as unsecured. Although confirmed plan treated mortgage creditor as fully secured and would have precluded any attempt by debtor to treat debt as unsecured, debtor later modified plan to make lien retention subject to avoidance powers under Section 544 and lender did not object to that modification. Request to modify plan specifically referenced intent to bring action against lender. While modification sought relief that was not available and court would have sustained objection had one been made, creditor did not object and became bound by terms of plan as modified. Lender is bound by terms of plan as modified including provision allowing debtor to contest validity of mortgage.
- (4091) *In re Milano*, 2012 WL 1965661 (Bankr. N.D. Ohio 2012) – Debtor's confirmed plan treated mortgage on debtor's business as fully secured. Debtor's plan proposed to sell the property and pay off the mortgage in full. After the property did not sell, debtors sought to modify the plan to change the treatment from "pay in full during plan" to "cure and maintain" which would allow mortgage to run well beyond confirmed plan term. Modification did not seek to alter status of claim or to bifurcate claim into secured and unsecured portions. Modification still proposed full payment of the allowed secured claim and sought only to change the timing of those payments to run for the original term of the mortgage rather than being paid during the Chapter 13 plan. Creditor would retain mortgage and lien would otherwise be unaltered. Modification permitted under Section 1329.
- (4092) *Charlick v. Community Choice Credit Union*, 444 B.R. 762 (Bankr. E.D. Mi. 2011) – Debtor could not modify plan post-confirmation to change status of second mortgage from secured to general unsecured. Section 1329 lists matters that can be the subject of a post-confirmation plan modification. Classification of claims is not included, and classification is *res judicata* pursuant to Section 1327.
- (4093) *Blevins v. National City Bank*, Case No. 09-3205 (Bankr. E.D. Mi. 2010) - Confirmation of Chapter 13 Plan is binding upon debtor and all creditors where Debtor's plan specifically treated Bank's second mortgage as allowed secured claim, debtor prohibited from attempting, post-confirmation, to "strip" second mortgage as entirely unsecured. Section 1329 limits post-confirmation plan modification to four specific circumstances. Debtor's attempt to reclassify Bank's claim from secured to unsecured is an impermissible extension of the four enumerated modification rights under section 1329 and would violate *In Re Nolan* and *Storey v. Pees*.
- (4094) *In re Miller*, Case No. 06-32425 (Bankr. S.D. Ohio 2010) - Post-confirmation Proof of Claim filed by First Mortgage holder that indicated that Second Mortgage was entirely unsecured not basis to modify plan to change treatment of second mortgage from secured to unsecured. Prohibition against modifying confirmed plan to reclassify secured claim applies equally to real property and vehicle financing claims.
- (4095) *In re Crisp*, 2010 WL 2465446 (Bankr. W.D. Tn. 2010) – Debtor cannot modify confirmed plan to reclassify secured claim as unsecured following post-confirmation repossession and sale of vehicle. Section 1329 limits plan modifications to (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; (2) extend or reduce the time for such payments; (3) 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; or (4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance. Section 1329 does not allow the debtor to alter, reduce or reclassify a previously allowed secured claim. Claim is not subject to reclassification merely because Debtor was involuntarily dispossessed of property rather than a post-confirmation voluntary surrender. Allowing Debtor to reclassify secured claim would impermissibly allow him to shift the burden of depreciation to the creditor.
- (4096) *In re Enders*, Case No. 308-04229 (Bankr. M.D. Tenn., 2010) – Plan modification approved to surrender debtor's residence, reduce plan payment, and disallow mortgage claim. Debtor's plan provided for retention of mortgage, payment of ongoing mortgage payment, and cure of pre-petition arrears. One year later, mortgage company provided notice that the ongoing mortgage payment increased from \$1756.00 per month to \$2275.00 per month. Debtor responded by filing modification seeking to surrender house as debtor could no longer afford the required plan payment. Mortgage company did not object to the plan modification. Trustee objected citing *Nolan*, 232 F.3d 528 (6th Cir. 2000) that claim confirmed as secured must remain secured even after post-confirmation surrender of collateral. Court distinguished *Nolan* as involving depreciating automobile, not real estate; and that *Nolan* involved unsecured deficiency balance on secured claim. In this case, there was no indication of any deficiency and mortgage holder did not oppose modification that allowed mortgage holder to file unsecured deficiency claim.

11.105 60 Month Maximum Plan Length

- (4097) *Shovlin v. Klaas*, Case No. 15-0802 (W.D. Pa. 2015) – Although court cannot confirm plan that contemplates term beyond 60 months, court is not required to dismiss case merely because case reaches 60 months without completing. Debtor who substantially complied with

plan and needed to make only one final payment to achieve discharge will be given additional time. Section 1307 gives court discretion to dismiss for material default, but does not mandate dismissal even for material default where dismissal would be unfair or unduly harsh.

- (4098) *In re Carr*, Case No. 06-51257 (Bankr. E.D. Mi. 2012) – Motion to Allow Trustee to Disburse Funds Received Post-Expiration denied where funds to be administered were received more than 60 months after plan confirmed. Motion constitutes a *de facto* plan modification that would impermissibly exceed five-year limit in Section 1329(c).

11.106 Lien Stripping

- (4099) *Hazelwood v. Fifth Third Bank*, 2014 WL 3534054 (Bankr. W.D. Ky. 2014) – Debtor can exercise derivative standing under Section 544 to contest validity of unrecorded mortgage. Although confirmed plan treated mortgage creditor as fully secured and would have precluded any attempt by debtor to treat debt as unsecured, debtor later modified plan to make lien retention subject to avoidance powers under Section 544 and lender did not object to that modification. Request to modify plan specifically referenced intent to bring action against lender. Lender is bound by terms of plan as modified including provision allowing debtor to contest validity of mortgage.
- (4100) *In re Calloway*, Case No. 11-8059 (6th Cir. BAP 2012) – Rule 60(b) Motion for Relief from Confirmation Order did not assert mistake, inadvertence or excusable neglect sufficient to warrant relief. Debtors confirmed chapter 13 plan provided for payment of first mortgage and second mortgage as secured claims. Debtor's failure to propose a lien strip of the second mortgage prior to confirmation did not constitute "excusable neglect" sufficient to set aside confirmation order and allow debtors to belatedly prosecute lien strip action. Debtors were aware prior to confirmation of debtors chapter 13 plan that the value of the property may be less than the balance owed on the first mortgage. However, debtors, relying on counsel, chose to wait until after confirmation and until after the claim bar date had passed before determining that the second mortgage was potentially subject to being stripped.
- (4101) *Blevins v. National City Bank*, Case No. 09-3205 (Bankr. E.D. Mi. 2010) - Confirmation of Chapter 13 Plan is binding upon debtor and all creditors where Debtor's plan specifically treated Bank's second mortgage as allowed secured claim, debtor prohibited from attempting, post-confirmation, to "strip" second mortgage as entirely unsecured. Section 1329 limits post-confirmation plan modification to four specific circumstances. Debtor's attempt to reclassify Bank's claim from secured to unsecured is an impermissible extension of the four enumerated modification rights under section 1329 and would violate *In Re Nolan* and *Storey v. Pees*.
- (4102) *In re Miller*, Case No. 06-32425 (Bankr. S.D. Ohio 2010) - Post-confirmation Proof of Claim filed by First Mortgage holder that indicated that Second Mortgage was entirely unsecured not basis to modify plan to change treatment of second mortgage from secured to unsecured. Prohibition against modifying confirmed plan to reclassify secured claim applies equally to real property and vehicle financing claims.
- (4103) *In re Crisp*, 2010 WL 2465446 (Bankr. W.D. Tn. 2010) – Debtor cannot modify confirmed plan to reclassify secured claim as unsecured following post-confirmation repossession and sale of vehicle. Section 1329 limits plan modifications to (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; (2) extend or reduce the time for such payments; (3) 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; or (4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance. Section 1329 does not expressly allow the debtor to alter, reduce or reclassify a previously allowed secured claim. Claim is not subject to reclassification merely because Debtor was involuntarily dispossessed of property rather than a post-confirmation voluntary surrender. Allowing Debtor to reclassify secured claim would impermissibly allow him to shift the burden of depreciation to the creditor.
- (4104) *Charlick v. Community Choice Credit Union*, 444 B.R. 762 (Bankr. E.D. Mi. 2011) – Section 1327 precludes attempt to modify plan post-confirmation to strip a claim that was treated as secured in plan as proposed. Valuation of property and status of lien as potentially entirely unsecured are issues that are or could have been raised at confirmation, precluding later attempt to modify plan to strip allegedly wholly unsecured second mortgage.

11.107 Disposable Income

- (4105) *Germeraad v. Powell*, Case No. 14-3129 (E.D. Ill. 2014) – Chapter 13 Trustee can request plan modification to increase plan payments where debtor's income rose substantially since confirmation of Plan. Nothing in BAPCPA changed the fundamental rule of Section 1329 that modification is permissible to increase plan payments based on increase in debtor's ability to pay using requirements of Section 1325 of good faith, best interests of creditors, and feasibility, based on debtor's current income and expenses and actual ability to repay creditors.
- (4106) *Neidich v. Lorenzo*, 2014 WL 1877408 (S.D. Fl. 2014) – Projected disposable income test does not apply to post-confirmation modification of plan.
- (4107) *In re Swain*, 509 BR 22 (Bankr. E.D. Va. 2014) – Section 1325(b) disposable income test does not apply to modifications. However, modifications must comply with feasibility, best interests of creditors and good faith. Debtor's proposed modification to increase payments met requirements of Section 1325(a) where amended schedules demonstrated that higher payment was feasible, higher payments would increase dividend to unsecured creditors, and modification was otherwise in good faith. Fact that trustee calculated disposable income to be higher than that included in modification was not basis to deny modification.
- (4108) *In re Powers*, 2014 WL 1274067 (Bankr. C.D. Ill. 2014) – Section 1325(b) requirement for 100% of disposable income does not apply to plan modifications under Section 1329. Trustee's plan modification that sought to increase debtor's plan payment based solely on debtor's increased income rejected by court. Trustee's plan modification based entirely on principal that disposable income can and should be recalculated denied.

- (4109) *In re Swain*, 2014 WL 1311439 (Bankr. E.D. Va. 2014) – Section 1325(b) does not apply to plan modifications under Section 1329. After confirmation of plan, IRS filed priority claim that caused plan payment to be insufficient. Debtors proposed to modify plan to increase plan payment for three months to provide additional funding to pay IRS claim, and then to reduce plan payment to lower amount. Trustee objected, asserting that debtors' disposable income exceeded both the greater payment proposed for payment of priority taxes and lower amount proposed for remainder of plan term. Court concluded that Section 1325(b) does not apply to plan modifications and debtor is not required to determine plan payment using standards in 1325(b)(2) or (3). Debtors' failure to offer what trustee calculated as actual disposable income did not prevent approval of the modification of the plan. Court noted that Trustee did not raise issue of good faith.
- (4110) *In re Pasley*, 2014 WL 1199558 (Bankr. E.D. Ca. 2014) – Projected disposable income test of Section 1325(b) is not incorporated into plan modifications under Section 1329. However, good faith requirement of Section 1325(a)(3) brings into plan modifications a requirement that debtors continue to use best efforts.
- (4111) *In re Barnes*, 506 BR 777 (Bankr. E.D. Wi. 2014) – Disposable income test under Section 1325(b) is not incorporated into and does not apply to modification under Section 1329. However, good faith element of Section 1325(a)(3) is incorporated into Section 1329.
- (4112) *In re Martin*, 2013 WL 6196566 (Bankr. N.D. Ohio 2013) – Under Section 1329, confirmed plan can be modified to increase or decrease amount of plan payment, and must meet good faith, feasibility, and other requirements. Good faith looks at consideration of totality of circumstances including income, living expenses, special circumstances such as unusually high medical expenses, amount of plan payment as indicia of debtor's sincerity, and the statutorily mandated policies that bankruptcy code be liberally construed in favor of debtor. Feasibility requires that debtor be able to make the payments and otherwise comply with the plan as modified. Plan modification that indicates clear inability to make the payments is not feasible. Section 1325(b) does not apply, meaning that court will not determine either income or expenses as specified in the means test, but consider actual income and actual expenses. Modification that proposed to increase payments by pro-rated amount of anticipated tax refunds was not feasible as payments would depend on calculation of future refunds that are difficult to calculate, hard to predict, and may not materialize. While future tax refunds must be remitted, it is not appropriate to include those in the plan payment itself where doing so would leave debtor unable to make ongoing plan payments. Expenses must be reasonable and actual at time of modification; and while court is not bound by IRS guidelines, court can use those guidelines in determining reasonable expenses. Utility expenses, while higher than IRS guidelines, were fully documented and supported debtor's amended Schedule J. Cell phone expense of \$215 per month was not reasonable as debtors have right to basic phone service but not texting, mobile internet or non-essential phone calls forces unsecured creditors to subsidize luxury expenses. Transportation expenses of \$645 per month were reasonable given that debtors lived reasonably central to work and other obligations which produced long daily commutes for husband and long weekly trips for medical treatments. Debtors' high medical expenses were supported by documentation to establish actual amount of expenses and existence of medical conditions.
- (4113) *In re Fleck*, 2013 WL 4462202 (Bankr. N.D. Ohio 2013) – Trustee's plan modification granted where tax returns indicated that debtors' income increased \$18,000 since commencement of case, such that debtors had additional disposable income that could be contributed to plan. Debtors also attempted to maintain budget for four people, including debtor's daughter and granddaughter who debtors were initially supporting at confirmation of plan but who, based on current tax returns, were no longer claimed by debtors as dependents and who earned income but did not contribute that income to household. Viewed as "economic unit" debtors could not simultaneously include daughter and granddaughter for determining household size and expenses and then ignore income received by daughter and granddaughter in calculating household income.
- (4114) *In re Hargis*, 2013 WL 4514090 (Bankr. N.D. Ohio 2013) – Section 1325(b) requirement for payment of disposable income is not applicable to a post-confirmation plan modification. Section 1325(b) defines disposable income using a historical basis relating to pre-petition time period. Using that definition for plan modifications makes no sense, particularly where Section 1329 incorporates the requirements of Section 1325(a) but not (b).
- (4115) *In re Kirby*, 2012 WL 733884 (Bankr. D. Neb. 2012) – Proceeds of personal injury action are disposable income. Although debtor properly amended schedule B to disclose, and Schedule C to exempt, post-petition personal injury action as exempt, "majority view" holds that exempt property can be disposable income in a Chapter 13 case. Chapter 13 contains no language suggesting that exempt post-petition revenues are not Chapter 13 "income" and Section 1325(b)(2) expressly defines "disposable income" to mean income not needed for debtor's support. Trustee's plan modification granted to extent of additional funds necessary to pay creditors in full.
- (4116) *In re Loveday*, 2012 WL 1565479 (Bankr. N.D. Ohio 2012) – Debtor's proposed modification sought to allow debtor to sell oil and gas rights on debtor's real property and to allow debtor to retain proceeds for alleged additional expenses. Debtor sought to retain \$3,100 in medical expenses. Since confirmation of plan, debtor had incurred \$5,500 in medical expenses while debtor's budget included a medical expense budget that, since confirmation, would have paid only \$2,400 of those expenses, warranting excusal of \$3100 to cover additional non-budgeted expenses. Debtor also permitted to use \$600 to purchase appliances. Debtor's budgeted amount for home maintenance of \$100 was far below National and Local Standards that excusal of \$600 to purchase appliances appeared to be reasonably necessary. Debtor also supported excusal of \$1,000 for car repairs where debtor and his wife owned two older cars, one of which needed significant repairs, and debtor's budget had only \$150 budgeted for transportation which included maintenance, repairs and gasoline. Court also allowed debtor to retain \$3300 for future expenses. Although debtor had not yet incurred those expenses, given the expenses that debtor had already incurred that far exceeded budgeted items, Court concluded that debtor likely would continue to incur expenses for medical and transportation in excess of the budgeted amounts and that debtor would need to use retained funds to pay for these expenses.
- (4117) *In re Crim*, 2011 WL 863452 (Bankr. M.D. Tenn. 2011) - Disposable income test is not applicable to plan modification. A proposed modified plan should satisfy the general requirements for confirmation such as the good faith requirement, the "best interest of

creditors” test, and the feasibility test. Section 1329 does not incorporate the “projected disposable income” test, as set forth in § 1325(b). Income and expenses are not calculated according to the method provided by § 1325(b) but are based debtor's actual income and expenses at the time of the proposed modification are used to determine whether the payments should be adjusted. However, this does not provide debtor with *carte blanche* on expenses, and Court must still determine the reasonableness and necessity of expenses in the context of sustaining the basic needs of the debtor and dependents, and must still balance interests of debtors and creditors. Debtor's motion to modify confirmed plan, reducing distribution to unsecured creditors from 100% to 30%, while maintaining private school tuition payments, was granted. Testimony demonstrated that \$500 tuition cost was reasonable and necessary for chronically ill child for whom no public school option was available.

11.108 Changing Disbursing Agent

- (4118) *In re Vela*, 2015 WL 1152720 (Bankr. W.D. Mi. 2015) – Section 1329 allows modification for limited purposes only. Debtor's confirmed plan provided for cure and maintain of mortgage with payments through the trustee. After the mortgage was brought current through Michigan's Hardest hit program, debtor filed a plan modification to allow debtor to make ongoing payments directly. Plan modification fell within limited scope of Section 1329 as modification would minimally shorten plan term and would reduce disbursements to at least one class of claims, that being the Trustee, and proposed to alter distributions to mortgage company on account of payments made by other parties. However, disbursing agent is determined by Section 1326(c) which creates presumption that Trustee should be disbursing agent, unless the confirmation order provides for a different disbursing agent. Modification does not produce new Order Confirming Plan as there is only one confirmation order in any Chapter 13 case. Proposal to alter disbursing agent as part of plan modification violates Section 1326(c) in violation of Section 1329 and Section 1325(a)(1). Issue of who is the disbursing agent must be determined at confirmation and determination controls over remaining term of plan.

11.109 Post-Petition Property

- (4119) *In re White*, 2014 WL 2006560 (Bankr. N.D. Ala. 2014) – Insurance proceeds received by one debtor following death of co-debtor in Chapter 13 must be paid into plan to extent funds are not otherwise exempt. Debtor was not owner of policy so could not exempt proceeds. Receipt of life insurance proceeds by one debtor constituted change of circumstances that warranted plan modification.

11.110 Procedural Requirements

- (4120) *In re Keen*, Case No. 09-79637 (Bankr. E.D. Mi. 2010) - Motion to Incur Debt and to Retain 2009 Tax Refund was defective as seeking more than one type of relief in the same motion, each of which had differing requirements regarding notice, service and non-response certification. To extent Motion sought to excuse tax refunds, motion is a plan modification pursuant to Guideline 6 with 21 days notice required, while Motion to incur debt requires only 14 days notice.

11.111 Changing Plan Length

- (4121) *In re Pasley*, 2014 WL 1199558 (Bankr. E.D. Ca. 2014) – Below median debtor who confirmed plan with 60 month term could modify plan to shorten term to 44 months where original intent of plan to reinstate mortgage accomplished in shorter time that originally contemplated. Debtors had 36 month applicable commitment period and plan as confirmed provided 0% dividend to unsecured creditors. Plan was originally proposed as 60 month term because plan estimated that it would take 60 months to cure mortgage and car. Debtors later obtained mortgage modification that brought mortgage current and allowed debtor to pay off car in only 44 months. Shortening of plan term after achieving objectives of original filing does not evidence lack of good faith, and Section 1329 expressly allows modification to shorten plan term. There was no evidence that debtors were attempting to manipulate code or that at time of confirmation debtors had any reason to believe that mortgage would later be modified such that debtors could complete the plan earlier than 60 months. While unsecured creditors may have anticipated recovery based on entire 60 month plan, statute required only that debtor commit disposable income for applicable commitment period, which was 36 months, such that unsecured creditors had no right to expect any payments beyond 36 month ACP. While debtor had the ability to continue to make plan payments for full duration of plan, Section 1325 and Section 1329 required only that debtor make plan payments for duration of ACP. Debtors could shorten plan term notwithstanding ability to pay as long as shortened term still complied with minimum ACP.
- (4122) *In re Barnes*, 506 BR 777 (Bankr. E.D. Wi. 2014) – Section 1329 expressly allows shortening of plan term. Debtor who was below median income but who confirmed plan with term of 60 months not barred as matter of law from modifying plan to shorten plan term. However, debtor failed to demonstrate any change in circumstances warranting shortening of term where evidence indicated that debtor could continue to make plan payments over remaining term of plan as confirmed. To shorten plan term, debtor must prove some change in circumstances that inhibits ability to fund plan through remainder of original term.
- (4123) *In re Berberoglu*, Case No. 10-53436 (Bankr. E.D. Mi. 2013) – Debtor cannot modify plan to shorten plan term absent change in circumstances since confirmation of plan that would warrant deviation from res judicata effect of confirmed plan. Below median debtor confirmed plan with 42 month term producing 7% dividend. After 36 months, plan had paid 7%, debtor sought to shorten term to 36 months. Court denied modification as debtor did not have any change in circumstances and only basis to modify was because debtor wanted out of the case.
- (4124) *In re Buck*, 2010 WL 5463063 (Bankr. N.D. Ga. 2010) - Applicable Commitment Period is determined at the petition date based entirely on pre-petition income. Following confirmation of 60 month plan, debtor- husband lost his job. As a result, although CMI at the commencement of the case rendered debtors “above median”, updated income dropped the debtors into the “below median” category. Debtors sought to modify the plan to reduce the term from 60 months to 36 months, arguing that the changed circumstances should no longer obligate them to a 60 month term. The Court rejected the attempt to shorten the plan term, holding that the “applicable

commitment period” is determined by debtors’ CMI which is entirely “pre- petition focused”.

- (4125) *In re Grutsch*, 2011 WL 2600638 (Bankr. D. Kn. 2011) – Provisions of Section 1325(b) do not apply to plan modifications. Debtor who was originally above median and had plan confirmed with 60 month term and who later retired and had reduction in income could modify plan to shorten term to 36 months as long as modification complied with good faith requirement. Disposable income and applicable commitment period provisions of Section 1325(b) do not apply to plan modifications.
- (4126) *In re Heideker*, 2011 WL 2432913 (Bankr. M.D. Fl. 2011) – Applicable Commitment Period applies to plan modifications. Debtors with above median income cannot modify confirmed plan to less than 60 months unless modification also commits 100% dividend.

11.112 Curing Post-Petition Defaults on Secured Claims

- (4127) *In re Gardstein*, 2013 WL 3306095 (Bankr. E.D. Mi. 2013)- Court would lift stay for cause based on debtor’s failure to make all post-petition mortgage payments after confirmation of Chapter 13 Plan. Debtor’s Plan as confirmed provided for payment of the arrearage through the Trustee, but provided for direct payments of the ongoing mortgage by the debtor. Although the parties did not agree on the amount of the post-confirmation missed payments, the evidence indicated that there was at least some delinquency. However, Court would delay effect of stay relief to provide debtor with opportunity to cure arrearage through a plan modification.
- (4128) *In re Long*, 2011 WL 2881243 (Bankr. W.D. Mi. 2011) – Debtor cannot modify plan to cure post-petition defaults on home mortgage loan under cure-and-maintain plan. Section 1322(b)(2) precludes modification of mortgage secured solely by debtor’s residence. Section 1322(b)(5) permits debtor to cure pre-petition defaults on home mortgage. Section 1329 permits modification only to (1) increase or reduce amount to be paid a particular class of claims provided for under the plan; (2) extend or reduce the time within which to pay a particular class of claims provided for under the plan; (3) adjust amounts to be paid a particular claimant in order to account for other payments received by the creditor outside of the plan; and (4) reduce plan payments to reflect increases in health insurance premiums. Even if Section 1322(b)(5) allows cure of post-petition defaults in mortgage payments, Section 1329 cannot modify the terms of the mortgage to allow post-petition payments to be restructured over the objection of the creditor. Court cannot use equitable power to override specific limitations found in Section 1329. Post-confirmation amendment process under Section 1329 does not permit Debtors a second chance to use Chapter 13 as a means to alter what otherwise are Creditor's rights under its agreement to foreclose on its mortgage.

H. Lien Stripping

11.113 Permissible

- (4129) *Fisette v. Keller*, 455 BR 177 (8th Cir. B.A.P. 2011) - Bankruptcy court ruled that 11 U.S.C. Section 1322(b)(2) prevented the debtor from modifying the rights of the junior lienholders, precluding stripping of lien where value of property was less than amounts owed on senior liens and encumbrances. On appeal, the Eighth Circuit BAP reversed, concluding that Section 1322(b)(2) anti-modification provision did not apply to wholly undersecured junior lienholders, and their rights could properly be modified. On further appeal, Eighth Circuit concluded it lacked appellate jurisdiction as BAP reversed and remanded for further proceedings, rendering BAP order a non-final order. Order by definition contemplated further judicial activity rendering appeal at this point interlocutory.
- (4130) *Woolsey v. Citibank, N.A.*, Case No. 11-4014 (10th Cir. 2012) – Debtor cannot strip wholly underwater second mortgage in Chapter 13. Section 506(d) allows court to void a lien that is not an allowed secured claim. Creditor filed proof of claim, and claim was not subject to valid objection, rendering claim “allowed”. Claim cannot be disallowed under Section 502(b)(1) as the secured claim is enforceable under the mortgage documents pursuant to applicable state law. Citing *Dewsnup*, court concluded that an allowed secured claim for purposes of Section 506 is a claim that is allowed (as creditor’s claim was here) and “secured” by a lien that is valid under state law, as creditor’s lien is here. Value of collateral has no bearing on lien-voiding language of Section 506(d). In dicta, court indicated that Section 1322(b)(2) may provide separate way to strip lien by allowing modification of rights of holders if the limitation on modification of secured claims is interpreted to require some value to support the claim (citing, among other Circuits, *In re Lane*, 280 F.3d 663 (6th Cir. 2002)).

11.114 Discharge Required

- (4131) *Victorio v. Billingslea*, 470 BR 545 (S.D. Ca. 2012) – Court properly denied confirmation of plan that proposed to strip lien in case where debtor was not eligible for discharge. Section 1325 does not permit permanent removal of unsecured junior lien absent entry of discharge. Although confirmed plan allowed debtor to strip off junior lien during pendency of case, lien would reattach when plan was concluded.
- (4132) *In re Gerardin*, Case No. 10-16511 (Bankr. S.D. Fl. 2011) – Lien may not be stripped if debtor is not eligible for discharge. Section 1325 requires that the lender retain its lien until either paid in full per applicable non-bankruptcy law or the debtor receives a discharge.
- (4133) *In re Colbourne*, Case No. 10-983 (Bankr. M.D. Fl. 2010) - Debtor's Motion to Value Secured Claims in Chapter 13 denied where Debtor had previously obtained discharge in Chapter 7 and was not eligible for discharge in Chapter 13. Claims secured by non-residential real property and motor vehicle could not be permanently modified absent a discharge, as any modification would not have any binding effect following the conclusion of the Chapter 13 Plan.
- (4134) *In re Quiros-Amy*, 456 BR 140 (Bankr. S.D. Fl. 2011) – Debtor cannot strip second mortgage. Section 1325(a)(5) requires that lien remain until entry of discharge. Where there will be no discharge, no basis to remove the lien.

- (4135) *In re Lindskog*, 2011 WL 1576561 (Bankr. E.D. Wis. 2011) – Debtor who is not entitled to discharge cannot strip second mortgage. Section 1325(a)(5) requires that creditor retain lien until either debt is repaid or the debtor receives a discharge. Allowing the lien strip would circumvent *Dewsnup v. Timms* and would be contrary to Sections 348(f)(1)(C) and 349(b)(1)(C) which provide for avoided liens to “spring back” if the case is converted or dismissed.

11.115 Discharge Not Required

- (4136) *In re Cain*, 513 BR 316 (6th Cir. BAP 2014) – Debtor can strip lien in Chapter 20 where debtor is not entitled to discharge.
- (4137) *Wells Fargo Bank, NA v. Scantling*, 2014 WL 2750349 (11th Cir. 2014) – Chapter 13 debtor can strip wholly unsecured second mortgage even where debtor is not eligible for discharge under Section 1328(f).
- (4138) *Branigan v. Davis*, 2013 WL 1926407 (4th Cir. 2013) – Chapter 13 debtor can strip wholly unsecured mortgage even where debtor is not eligible for discharge because of prior chapter 7 discharge. Section 506(a) results in wholly unsecured mortgage being rendered unsecured as a matter of law. Under Section 1322, plan can alter treatment of unsecured debts. Plan proposes to modify unsecured mortgage by removing it from property. Section 1325(a)(5) is not implicated as mortgage is not “secured claim” as matter of law, which is prerequisite for application of Section 1325(a)(5).
- (4139) *In re Scotto-DiClemente*, 459 BR 558 (Bankr. D.N.J. 2011) – Bankruptcy code does not condition ability to strip lien on eligibility for discharge. Section 1325(a)(5) does not apply because wholly unsecured second mortgage is not “secured” claim pursuant to Section 506.
- (4140) *In re Jennings*, 454 BR 252 (Bankr. N.D. Ga. 2011) – Lien strip is available in Chapter 13 notwithstanding prior discharge in Chapter 7 such that debtor is not eligible for discharge in Chapter 13 proceeding as long as case is filed in good faith.
- (4141) *David v. TD Bank, NA*, 447 BR 738 (Bankr. D. Md. 2011) – Discharge not required to strip wholly unsecured second mortgage.
- (4142) *Frazier v. Real Time Resolutions*, 469 BR 889 (S.D. Ca. 2012) – Debtor can strip off wholly unsecured second lien even where debtor is not eligible for discharge. Lien would be stripped off at completion of plan despite fact that debtor is not entitled to discharge.
- (4143) *In re Fair*, 2011 WL 1486021 (E.D. Wis. 2011) – Section 506 permits debtor to strip entirely unsecured junior lien even if debtor is not eligible for discharge. Section 1325(a)(5) requirement that creditor retain lien until discharge does not apply as Section 1325(a)(5) applies only to secured creditor. Where there is no value to support the claim, the claim is unsecured pursuant to Section 506 and restrictions of Section 1325(a)(5) do not apply.
- (4144) *In re Davis*, 2011 WL 1460433 (Bankr. D. Md. 2011) – Wholly unsecured lien may be stripped even if debtor is not eligible for discharge. In Chapter 13 cases, a debtor's ability to strip off an unsecured junior mortgage lien is governed by two Bankruptcy Code provisions; Sections 506 and 1322(b). Court adopted minority position that right to strip wholly unsecured lien is arises from Section 506 and is not dependent on discharge under Section 1325 and 1328. Plan that proposes to strip second lien following Chapter 7 in which debtor's personal liability was extinguished is not *per se* bad faith.
- (4145) *In re Scantling*, Case No. 11-0369 (Bankr. M.D. Fl. 2012) - Chapter 13 debtor ineligible for discharge can strip off wholly unsecured junior lien at completion of payments under plan. Section 1325(a)(5) does not apply because wholly unsecured liens are not allowable secured claims.
- (4146) *Fisette v. Keller*, 2011 WL 3795138 (8th Cir. BAP 2011) – Debtor can strip off wholly unsecured mortgage even in cases where debtor is not eligible for discharge. Strip is effective upon completion of obligations under plan and is not contingent on discharge.
- (4147) *In re Coryell*, Case No. 09-54760 (Bankr. E.D. Mi. 2009) – Debtor can strip wholly unsecured second mortgage even where Debtor is not eligible for a discharge. There is no requirement that a discharge be received in order to strip a second mortgage. However, property cannot vest free and clear at confirmation but must remain property of the estate until plan completion.
- (4148) *In re Grignon*, 2010 WL 5067440 (Bankr. D. Or. 2010) - Debtor not eligible for discharge because of § 1328(f) can strip off wholly unsecured junior mortgage when current Chapter 13 case is filed in good faith. Nothing in the Code prohibits a debtor who is ineligible for a Chapter 13 discharge from filing a Chapter 13 case or prohibits such a debtor from stripping off a wholly unsecured lien.

11.116 Primary Residential Collateral

- (4149) *In re Beck*, 2014 WL 4549014 (Bankr. D. Hawaii 2014) – Debtor can strip in Chapter 13 lien held by IRS and lien held by condominium association where property value was less than amount owed on superior liens.
- (4150) *Kreitzer v. Household Realty Corp.*, 489 BR 698 (Bankr. S.D. Ohio 2013) – Section 1322(b)(2) precludes modification of claim that is secured solely by mortgage on debtor's principal residence. Including in mortgage an assignment of “miscellaneous proceeds” defined as any compensation, settlement, award of damages, or proceeds paid by any third party for damage to property, condemnation or other taking of property, conveyance in lieu of condemnation, or misrepresentation concerning value or condition of property. Courts have uniformly concluded that including standard provisions such as insurance or “rents, royalties and profits” do not constitute additional security as used in Section 1322(b)(2). Proceeds are inextricably bound to the property itself as part of the possessory bundle of rights rather than being independent security for loan.

11.117 Non-Primary Residential Collateral

- (4151) *In re Lanois*, 2014 WL 4449805 (Bankr. D.R.I. 2014) – Mortgage on multiunit can be modified even if debtor uses one of the units as his

personal residence as long as the security interest extends to other units. Debtor can modify mortgage to reduce balance to be paid to current value of collateral and pay that amount plus interest over life of plan. Debtor is not required to maintain private mortgage insurance on mortgage that is subject to modification.

- (4152) *In re Hall*, 2012 WL 5051357 (Bankr. E.D. Tn. 2012) – Confirmed plan is binding on debtor and creditors. Plan proposed to bifurcate car claim, and to pay secured portion in full with interest. Plan also proposed to pay portion of any allowed claim that exceeds the value indicated will be treated as an unsecured claim at 100%. Debtor could not later attempt to satisfy car claim at less than full payment. First, plan as confirmed required 100% dividend to unsecured portion of secured claim. Second, Section 1325(a)(5) allows lien to be stripped only if (a) creditor received full payment of contract balance, or (b) debtor receives discharge. In “Chapter 20” debtor as not entitled to discharge. Therefore, debtor could not require creditor to release lien unless creditor received full contract payment.

11.118 Procedure

- (4153) *In re Rodriguez*, 2013 WL 1716110 (3d Cir. 2013) – Bank could not challenge confirmation order that stripped second mortgage from property in absence of fraud. Debtor’s plan proposed to strip lien and bank filed objection. Bank failed to appear at confirmation hearing and court confirmed plan and stripped lien. Confirmation order is the controlling order in Chapter 13. Bank erred when it failed to appear and present its objection to confirmation. Bank had proper notice and could have appeared. Confirmation was final order under Section 1327 and Bank presented no basis to set aside order under Section 1330.
- (4154) *Bennett v. Springleaf Financial Services*, 2012 WL 113363 (Bankr. S.D. Ohio 2012) – Valuation of property stated in Chapter 13 Plan that was confirmed controls value of property for purposes of lien strip. Plan provided that property would be valued at amount stated in appraisal filed with the court unless a creditor object, and that the appraisal would become binding upon confirmation. Value established in confirmed plan controlled in later adversary proceeding to strip second mortgage. Plan sufficiently advised creditors that valuation stated in filed appraisal would control unless objections were filed. Under *Espinosa*, terms of confirmed plan bind all parties where plan sufficiently advised creditors of terms and afforded creditor opportunity to object. Preamble to Plan stated, in bold face, that plan sought to value property and that confirmation of the plan would also constitute a valuation hearing. Plan provision allowed debtor to file adversary within 30 days following confirmation. Debtor entitled to summary judgment in Adversary based on value determined in confirmed plan.
- (4155) *In re Weese*, Case No. 09-9268 (Bankr. W.D. Mi. 2010) – Court would not confirm Plan that proposed to strip unsecured second mortgage without adversary proceeding under Rule 7001. Court would not ignore Congress’s decision to require an adversary proceeding as a prerequisite to avoiding or invalidating liens or other interests in property, simply because it is expedient or because the creditor has not objected or filed a proof of claim. Bankruptcy courts are not licensed to disregard the Federal Rules of Bankruptcy Procedure or to turn a blind eye to the procedural shortcuts. Plan failed to comport with the United States Bankruptcy Code and the Bankruptcy Rules and could not be confirmed even absent objection from affected creditor or the Chapter 13 Trustee.
- (4156) *In re Peckens-Schmidt*, 2010 WL 2851520 (Bankr. W.D. Mi. 2010) – Court would not confirm Plan that proposed to strip unsecured second mortgage without adversary proceeding under Rule 7001. Court would not ignore Congress’s decision to require an adversary proceeding as a prerequisite to avoiding or invalidating liens or other interests in property, simply because it is expedient or because the creditor has not objected or filed a proof of claim. Bankruptcy courts are not licensed to disregard the Federal Rules of Bankruptcy Procedure or to turn a blind eye to the procedural shortcuts. Plan failed to comport with the United States Bankruptcy Code and the Bankruptcy Rules and could not be confirmed even absent objection from affected creditor or the Chapter 13 Trustee.
- (4157) *In re Ruhstaller*, Case No. 09-18376 (Bankr. S.D. Ohio 2010) – Plan that clearly stated that Bank’s second mortgage would be stripped based on a lack of equity above the amount owed on the First Mortgage could be confirmed and lien stripped. Sixth Circuit does not require adversary proceeding and that unsecured mortgage can be stripped by plan confirmation without a separate motion to value property. Lien is avoided pursuant to section 1327(c) which is effective upon plan confirmation with no other requirements. Although filing a Motion may be better practice, it is not required by the Code.
- (4158) *In re Rader*, Case No. 08-67718 (Bankr. E.D. Mi. 2009) - Motion to strip lien denied without prejudice. Action to strip lien must be prosecuted by adversary proceeding unless the affected creditor stipulates to the relief requested.

11.119 Necessary Parties – Jointly Owned Property

- (4159) *Alvarez v. HSBC Bank USA, NA*, 2013 WL 5737704 (4th Cir. 2013) – Debtor cannot strip off lien on property owned by debtor and non-filing spouse as tenants in the entireties. Only the debtor’s interest in the property was property of the estate rather than the whole of the property.
- (4160) *In re Pierre*, 468 BR 419 (Bankr. M.D. Fl. 2012) – Debtor cannot strip lien off property owned by debtor and non-filing spouse as tenants by entireties. Entireties property belongs to neither spouse individually but each spouse holds the whole or the entirety. Neither spouse can sell, forfeit, lease or encumber any part of the estate without the consent of the other.
- (4161) *Strausbough v. Co-Op Services Credit Union*, 426 BR 243 (Bankr. E.D. Mi. 2010), *aff’d sub. nom In re Tomasi*, Case No. 10-11609 (E.D. Mi. 2010) – An individual debtor can avoid a junior lien on real property owned as tenants by the entireties. Under § 506(a) each secured claim is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property. A bankruptcy estate’s interest in entireties property is in whatever equity is available in the entireties property that can be liquidated for the benefit of the joint creditors of the debtor and the non-filing spouse. Where there are no joint creditors or where there is no equity in the property over and above senior liens and encumbrances, the estate does not acquire any interest in the property on which a secured claim can be

based. In this case, there is no dispute that the value of the property is less than the balance owed on the first mortgage, leaving no equity available to pay joint claims and leaving the estate with no interest in the entireties property. Because the bankruptcy estate has no interest in the entireties property, the second mortgage holder has no interest in the estate's interest in the property and the second mortgage holder's claim is not an allowed secured claim.

11.120 Necessity for Proof of Claim

- (4162) *In re Brisco*, 486 BR 422 (Bankr. N.D. Ill. 2013) – Filing of proof of claim by creditor is prerequisite to determination of secured status. Where creditor does not file claim, creditor does not have “allowed claim” within scope of Section 1322(b)(2). As such, the lien cannot be stripped.

11.121 Valuation Date

- (4163) *In re Fuqua*, 2015 WL 5678361 (Bankr. E.D. Mi. 2015) – Valuation date is presumptively the petition date but presumption is rebuttable by relevant circumstances including amount of time that has passed between petition date and confirmation date; volatility of the market and whether there has been a substantial change in value between the petition and confirmation dates; whether the party materially benefitting from the delay is responsible for the delay or is perceived as trying to manipulate the process for that party's benefit; and likelihood that property will or will not be disposed of or become relatively useless during the life of the plan. Court used valuation date near confirmation date where case had been pending for two years due largely to debtor's choice to file case under Chapter 7, convert case to Chapter 11, reconvert to Chapter 7 and finally convert to Chapter 13 in which debtor sought to “cram down” two rental properties. Likelihood was that property values had increased significantly over that time period such that valuation date near confirmation was appropriate choice.
- (4164) *Reconco v. Partners for Payment Relief III, LLC*, 2014 WL 1295721 (Bankr. E.D. Va. 2014) – Valuation date for determining whether lien can be stripped is petition date. Debtor and creditor rights are generally determined as of petition date; proofs of claim are determined as of petition date; property of estate is generally determined as of petition date; and using petition date is most consistent with overall scheme of bankruptcy.
- (4165) *In re Gutierrez*, 2013 WL 6198220 (Bankr. C.D. Ca. 2013) – Value of collateral for purposes of determining extent of security interest is determined as of petition date. As of petition date, value of property was less than balance owed to first mortgage, allowing debtor to avoid second and third mortgages. By the time of confirmation of the plan, the value of the property increased to exceed the balance owed on the first mortgage. Court concluded that appreciation of the property post-petition did not prevent stripping of second and third mortgages, as property did not have equity in excess of first mortgage as of petition date.
- (4166) *In re Garn*, 2013 WL 5723746 (Bankr. D. Utah 2013) – Under Section 506(a)(1), court is to value property based on purpose of the valuation and how the collateral is to be used. In lien strip cases, purpose of valuation is to determine whether junior mortgage is secured creditor, which is determined as of petition date. Thus, value of property is determined as of petition date.
- (4167) *In re Cahill*, 2013 WL 6705155 (Bankr. D.N.H. 2013) – Purpose of valuation is to determine whether plan can strip lien. Lien strip would be effective as of confirmation of plan. Thus, value must be determined as of a date that is reasonably proximate to confirmation date.

11.122 Valuation and Secured Status

- (4168) *In re Moore*, Case No. 14-3740 (Bankr. W.D. Mi. 2014) – Court has jurisdiction to enter final order in valuation issue. Court treats request for lien strip as request to value under Rule 3012 as a contested matter. Issues are central to confirmation of Chapter 13 Plan which is core proceeding. Court accepted debtor's appraiser's opinion where debtor's appraiser worked almost exclusively in relevant market area while creditor's appraisal focused largely on Grand Rapids, such that debtor's appraiser had conducted 300 local properties per year for 30 years while creditor's appraiser appraised a total of 32 over the past few years total. Debtor's appraiser personally visited the property inside and out and took pictures to confirm physical condition of property including deficiencies and unfinished nature of some rooms. Creditor's appraiser relied too heavily on transactions that had not yet closed, while debtor's appraiser used comparable sales that had actually closed.
- (4169) *Williams v. Wayne County Treasurer*, Case No. 14-11844 (E.D. Mi. 2014) – Valuation of property for purposes of Section 506 is factual determination that will not be overturned on appeal unless it is clearly erroneous. Bankruptcy Court's weighing of one party's appraisal more heavily than opposing party appraisal not clearly erroneous where court explained reasons why court found one appraisal to be more persuasive, including timing of comparables, location of comparables, and use to which debtor put the property.
- (4170) *Richards v. Community Choice Credit Union*, 2013 WL 6164442 (Bankr. E.D. Mi. 2013) – In determining value, court would disregard alleged comparable sales that were too dissimilar from debtors' property or which were sold on a date too remote from petition date to provide useful measure of value of debtors' property as of petition date. Sales that closed between 7 months and 12 months prior to petition date were too remote to be reliable where evidence indicated that property values had risen substantially in intervening time periods but lender's appraiser presented no evidence to demonstrate amount of change or impact of increasing values on comparable sales.
- (4171) *In re McKinney*, 2013 WL 6139714 (Bankr. E.D. Mi. 2013) – Absent recent, arms-length sale of property, valuation is not precise or certain endeavor. Plaintiff failed to sustain burden of proof that property was worth no more than \$197,946, which was amount owed on first mortgage.
- (4172) *In re Williams*, 2012 WL 4757803 (Bankr. E.D. Tn. 2012) – Where Chapter 13 plan proposes for debtor to retain residence, value must be based on comparable arm's length sales. Foreclosure value is not appropriate as debtor intends to stay in property. Arm's length value does

not ignore reality of market that involves distressed sales, short sales, and sales of bank owned property. High volume of foreclosures or distressed sales will lower asking price, but seller of foreclosed home will still be more likely to negotiate lower price than would be the case between two arm's length parties, neither acting under compulsion. Operate valuation date is date of confirmation hearing. Debtor's appraisal, which relied almost exclusively on foreclosed properties, was not as persuasive as creditor appraisal that relied on arms length sales. Value of house exceeded balance owed on first mortgage, although court not required to specifically determine value.

- (4173) *In re Beck*, 2012 WL 1889789 (Bankr. W.D. Ky. 2012) – Strip denied where debtor failed to produce sufficient evidence to show value of property in amount less than owed on first mortgage. Second mortgage holder produced appraisal showing significant equity beyond first mortgage. Debtors responded only with property tax assessments. Tax assessments were insufficient to overcome presumption that bank's claim is secured as alleged in proof of claim as well as the appraisal itself.
- (4174) *Clay v. CSB Bank*, 2011 WL 5922428 (Bankr. E.D. Mi. 2011) – In determining whether second mortgage can be stripped, Court does not need to determine actual value of residence. Court must only determine whether the value of the residence is greater or less than the balance owed on the prior mortgage. Appropriate valuation is the replacement value, defined as the cost the debtor would incur to obtain a like asset for the same proposed use. Plaintiff's appraisal was not as credible where appraiser relied on three comparable homes that varied significantly from debtor's home, with two homes being substantially larger and one substantially smaller. Appraiser used at least one foreclosed property, which is entirely appropriate, but appraiser did not make any adjustments to account for distressed nature of sale. Appraiser also made unexplained reduction in value by \$8,500 because he thought lower price represented a "better value". Issues prevented appraisal from being overly reliable resulting in debtors' failing to meet their burden of proof.
- (4175) *Thomas v. Citimortgage, Inc.*, 459 BR 708 (Bankr. E.D. Mi. 2011) – Court is not bound by respective priorities of mortgages at time case filed. Creditors' post-petition subordination agreement by which second recorded mortgage was elevated over first recorded mortgage effectively adjusted priorities to reflect priorities intended by Debtor and creditors at time new first mortgage was granted. After implementation of subordination agreement, second recorded mortgage attained first priority and could no longer be stripped in Chapter 13.
- (4176) *Kessler v. Bank of America*, Case No. 10-5933 (Bankr. E.D. Mi. 2011) – Bank's appraisal did not support alleged value where appraiser either did not observe or did not adjust for conditions at property that would adversely affect value including a sagging roof that needed to be replaced; a broken central air conditioning unit; a driveway in need of repaving; three broken cement window sills; and a defective sewer line that needed replacing. Bank's appraiser also limited "comparables" to non-HUD owned properties, which are known to be distressed sales of properties often in very poor condition and instead limited comps to non-distress sales with no reflection of distressed properties in the area which would further depress sales and prices. Debtor's appraiser was both a licensed appraiser and active real estate broker and had practical experience that, combined with deficiencies in Bank's appraisal, tipped the balance in favor of Debtor's appraiser, concluding that property was worth less than balance owed on first mortgage.
- (4177) *Siler v. Citibank, NA*, Case No. 09-6926 (Bankr. E.D. MI. 2010) – In lien strip action, court is not required to determine actual value of property, but only to determine whether value is greater or lesser than balance owed on superior liens and mortgages. Court would discount opinion of appraiser that was based solely on distressed sales as failing to take into account factors such as home condition, location, number of comparable homes on market in neighborhood where property located. All four comparables in Debtor's appraiser's report were distress sales with no adjustments for condition while evidence was that at least two of the properties were in significantly worse condition than debtor's home. Proper valuation must take into account all types of sales (distressed and non-distressed), and other factors. Debtor whose appraisal was based solely on distressed sales failed to meet burden of proof in adversary to strip lien.
- (4178) *In re Kattouah*, Case No. 09-53287 (Bankr. E.D. Mi. 2010) – Court discounted value determined by appraiser where appraiser assumed that value of property stated in loan application was correct and discounted the value based on that application. Although evidence supported assumed decrease in value of 5% per year, Appraiser failed to independently determine correct starting value. Debtor's Appraisal was more accurate where that appraisal began with an independent valuation as of the application date, although that value was significantly lower than the value stated by borrower in the application. Court concluded that valuation for mortgage application purposes was not done for the same purpose as the appraisal for bankruptcy purposes, particularly where it has become "fairly well documented" that prior to 2007 valuations in connection with mortgage applications were routinely inflated.
- (4179) *In re Ruhstaller*, Case No. 09-18376 (Bankr. S.D. Ohio 2010) – Whether mortgage is secured is determined by Section 506. Claim is secured if value of collateral exceeds claims of senior encumbrances. Section 506 allows value to be determined in conjunction with "any hearing" on a plan affecting the creditor's interest, including confirmation of proposed Chapter 13 Plan. Debtor is not required to file separate Motion under Rule 3012 to determine value. Debtor testified that property was worth only \$150,000 and Debtor's appraiser testified that the value was \$159,000.00. Bank failed to present any evidence of value and first mortgage debt exceeded \$167,000.00, leaving Bank entirely unsecured.

11.123 Partially Secured Mortgage – Generally

- (4180) *Shelton v. CitiMortgage, Inc.*, 477 BR 749 (8th Cir. BAP 2012) – Debtor cannot strip partially secured lien on sole basis that creditor failed to timely file proof of claim. Section 506(d) allows avoidance of lien that is void. However, failure to file proof of claim does not invalidate lien. Liens pass through bankruptcy unless avoided on their merits. Debtors did not assert that lien was avoidable on any ground other than the untimeliness of proof of claim.

11.124 Partially Secured Mortgage – Maturity Within Plan Term

- (4181) *In re Tekavec*, 2012 WL 3471386 (Bankr. E.D. Wis. 2012) – Line of Credit partially secured by second mortgage on Debtor's home

subject to bifurcation under Section 1322(b)(2) where Line of Credit matured annually, resulting in final payment coming due during term of plan. Although loan had automatic one-year renewals, the renewals did not alter fact that loan had an “original” maturity date that would occur prior to debtor’s completion of plan payments. Section 1322(c)(2) expressly permits modification of loan that is secured only by security interest in debtor’s principal residence where final payment on the loan is due before the due date for the final payment under the plan. Section 1322(c)(2) controls over Section 1322(b)(2) in this circumstance. Debtor’s plan that proposed to bifurcate Line of Credit would be confirmed once valuation of property is resolved.

11.125 Mechanic’s Lien

- (4182) *Thigpen v. Father & Sons Home Improvement II, Inc.*, 2014 WL 1246116 (Bankr. N.D. Il. 2014) – Debtor in chapter 13 can strip off wholly unsecured liens. Under Illinois law, properly perfected mortgage lien takes priority even over previously recorded first mortgage to the extent of the value added as a result of the work. Contractor added entire second floor, which undoubtedly enhanced value of property at least somewhat, which would stand as security for lien ahead of mortgage debt. While mortgage balance may have exceeded value of property, the mechanic’s lien was superior and was not “wholly” or even partially, undersecured.

11.126 Following Chapter 7 Discharge – Deficiency Claim

- (4183) *In re Rosa*, 2014 WL 6999380 (Bankr. N.D. Ca. 2014) – Mortgage creditor whose claim was entirely unsecured is not entitled to unsecured claim in Chapter 13 case. Debtor’s personal liability was discharged in Chapter 7 and nothing in Chapter 13 would resurrect that liability for purposes of an allowed unsecured claim in Chapter 13.
- (4184) *In re Collier*, Case No. 13-55371 (Bankr. E.D. Mi. 2014) – Chapter 7 discharge ends personal liability but mortgage rides through unaffected. Chapter 7 discharge does not eliminate the debt – discharge only prevents collection from debtor personally and does not extinguish debt or eliminate creditor’s right to recover against property or against sources other than debtor. Lien and note are not discharged in prior chapter 7 even though creditor could not pursue recovery from debtor. Entire balance of note passes through and remains enforceable as unsecured claim in Chapter 13 case.
- (4185) *In re Scantling*, 465 BR 671 (Bankr. M.D. Fl. 2012) – Where unsecured liability has been discharged in prior Chapter 7 case, creditor holds neither a secured claim by virtue of Section 506 valuation nor an unsecured claim that is enforceable against debtor. Creditor does not have any allowed claim in subsequent Chapter 13 proceeding.
- (4186) *In re Sweitzer*, 2012 WL 3647130 (Bankr. D. Md. 2012) – Order discharging debtors of any personal liability to creditor in prior Chapter 7 case, along with order allowing debtors to “strip off” creditor’s lien, as wholly unsupported by any equity in property, in their subsequent Chapter 13 case, precluded allowance of claim even as general unsecured claim.
- (4187) *In re Okosisi*, 451 BR 90 (Bankr. D. Nv. 2011) – Once lien is avoided, unsecured claim that is represented by non-recourse debt is unsecured claim in Chapter 13 case.

11.127 Lien Strip – Eligibility for Discharge

- (4188) *Branigan v. Davis*, 2013 WL 1926407 (4th Cir. 2013) – Lien strip is available in Chapter 13 even where debtor is not eligible for discharge, adopting the majority rule.
- (4189) *In re Wong*, 488 B.R. 537 (Bankr. E.D.N.Y. 2013) – Lien strip is available in Chapter 13 even where debtor is not eligible for discharge, adopting the majority rule.
- (4190) *In re Jennings*, 454 BR 252 (Bankr. N.D. Ga. 2011) – Lien strip is available in Chapter 13 notwithstanding prior discharge in Chapter 7 such that debtor is not eligible for discharge in Chapter 13 proceeding as long as case is filed in good faith. However, plan could not be confirmed as plan did not treat unsecured deficiency claim.

I. Sale of Assets – Section 363

11.128 Generally

- (4191) *In re Moore*, 2015 WL 1569848 (Bankr. W.D. Mi. 2015) – Request to sell assets in confirmed Chapter 13 case must be brought by Motion under Section 363. Court rejected stipulation signed by Debtor, Secured Creditor and Chapter 13 Trustee requesting order allowing sale of vehicle, without prejudice to motion under Section 363 for sale of vehicle.

J. Discharge

11.129 Domestic Support Certification

- (4192) *In re Levy*, 2014 WL 1323165 (Bankr. N.D. Ohio 2014) – Court would allow joint debtor to act on behalf of deceased debtor to file certification of domestic support obligations. While certificate was important to allow court to determine that all domestic support obligations had been complied with, which is requirement for entry of discharge, process of filing certificate is the product of a local rule rather than a code requirement; administration of the case remains possible even if certification is not filed; and number of cases that will be impacted by holding is minimal. Court would instead require person seeking to complete case to file a notice whether there is a probate estate or whether creation of one is expected and if not, why not; the identification of the person signing the notice and the relationship to the deceased debtor; a foundation that the statements are made on personal knowledge; and acceptable proof of death.

11.130 Requirements Generally

- (4193) *Schlegel v. Billingslea*, Case No. 14-1132 (9th Cir. BAP 2015) – Debtor is not eligible for discharge where debtor makes all plan payments but does not meet the minimum percentage dividend provided in the Plan during the Applicable Commitment Period.
- (4194) *In re Young*, Case No. 06-6385 (Bankr. W.D. Mi. 2012) – To be eligible for a discharge, debtor must make all plan payments and must meet the dividend proposed in the confirmed plan. Stated dividend is minimum that plan must yield. Right to discharge is linked to completion of all payments under plan. Debtors who have failed to make all plan payments not entitled to discharge even if stated dividend has been met notwithstanding the payment delinquency.

11.131 Converted Cases

- (4195) *In re Williams*, Case No. 14-1038 (Bankr. W.D. Mi. 2014) – Court cannot grant discharge in Chapter 13 where discharge was entered in Chapter 7 prior to conversion. Section 727(a)(10) allows debtor to waive discharge. However, waiver of discharge must be filed before entry of the discharge. After discharge entered, it is too late for debtor to waive. No creditor or other party in interest was requesting that discharge be vacated and there were no allegations by debtor of any conduct that would warrant revocation of discharge under Section 727(d). Fact that debtor realized after entry of discharge that debt to State for overpayment of unemployment benefits would be non-dischargeable in Chapter 7 did not constitute cause to revoke discharge and allow debtor to obtain discharge under Chapter 13.
- (4196) *In re Voshell*, Case No. 13-0454 (Bankr. W.D. Mi. 2013) – Section 1328(f) precludes entry of a discharge in Chapter 13 if the debtor received a discharge in a case filed under chapter 7 during the preceding 4 years. Debtor received a discharge in the current case, precluding debtor from receiving a subsequent discharge if debtor's case is converted. Debtor cannot waive prior discharge as Section 727 allows a debtor to waive a discharge only before the discharge is entered, and there is no basis for a debtor to revoke his own discharge. Debtor did not allege that discharge was result of fraud, where only issue was continued enforcement action by ex-wife holding non-dischargeable domestic support obligation order and there was no indication that ex-wife in any way committed some bad act that led to entry of discharge. Debtor's regret at proceeding under Chapter 7, or belief that debtor would be better off in another chapter, is not a basis to set aside a discharge. As debtor would not receive a discharge in Chapter 13 if case is converted, it was not clear whether debtor still wanted to convert case. Court denied motion to convert without prejudice to debtor filing another motion within 14 days, in which case the court would grant the motion without delay.

11.132 Time Between Cases

- (4197) *In re Davis*, 2015 WL 3484561 (Bankr. E.D. Mi. 2015) – Section 1328(f) precludes entry of discharge where debtor received discharge in Chapter 7 case filed less than four years prior to commencement of Chapter 13 case. Court can enter order determining that debtor is not entitled to discharge even in absence of motion filed by creditor. Rule 4004 which provides for motion to object to discharge within 60 days of 341 meeting does not alter provision of 1328(f) which precludes discharge without any party filing Motion.
- (4198) *In re Wilkinson*, 2014 WL 1347116 (Bankr. D. Kan. 2014) – “Case filed under” as used in 1328(f) refers to petition under which prior case was filed not chapter under which prior case was discharged. Debtor filed first case under Chapter 13, later converted to Chapter 7 and discharged. Three years later, debtor filed for relief under Chapter 13 again and Trustee objected to discharge based on debtor's discharge under Chapter 7. Court concluded that prior case was filed under Chapter 13, such that two year lookback under 1328(f) applies. As debtor's second case was filed more than 2 years after earlier Chapter 13 filing, Section 1328(f) did not deny discharge in second case.
- (4199) *In re Gregory*, 2014 WL 1089806 (Bankr. N.D. Ohio 2014) – Section 1328(f) precludes entry of discharge where debtor received discharge in Chapter 7 case filed less than four years prior to commencement of Chapter 13. Section 1328(f) does not set any deadline for objecting to discharge. Rule 4004, prior to December, 2010 amendments, had no deadline. Debtor received discharge in Chapter 7 filed 10 months prior to commencement of Chapter 13. Fact that Trustee waited until end of case to object to discharge did not render objection untimely or allow court to enter discharge notwithstanding Section 1328(f). Delay in filing motion did not prejudice debtor because debtor did not change position in reliance on lack of objection. Fact that debtor continued to make plan payments is not prejudice. For cases filed on or after December 1, 2010, objection to discharge must be filed within 60 days after date first set for first meeting of creditors.
- (4200) *In re Rumer*, 2014 WL 1089802 (Bankr. N.D. Ohio 2014) – Section 1328(f) precludes entry of discharge where debtor received discharge in Chapter 7 case filed less than four years prior to commencement of Chapter 13. Section 1328(f) does not set any deadline for objecting to discharge. Rule 4004, prior to December, 2010 amendments, had no deadline. Debtor received discharge in Chapter 7 filed 10 months prior to commencement of Chapter 13. Fact that Trustee waited until end of case to object to discharge did not render objection untimely or allow court to enter discharge notwithstanding Section 1328(f). Delay in filing motion did not prejudice debtor because debtor did not change position in reliance on lack of objection. Fact that debtor continued to make plan payments is not prejudice. For cases filed on or after December 1, 2010, objection to discharge must be filed within 60 days after date first set for first meeting of creditors.
- (4201) *In re Pickett*, 2014 WL 1089804 (Bankr. N.D. Ohio 2014) – Section 1328(f) precludes entry of discharge where debtor received discharge in Chapter 7 case filed less than four years prior to commencement of Chapter 13. Section 1328(f) does not set any deadline for objecting to discharge. Rule 4004, prior to December, 2010 amendments, had no deadline. Debtor received discharge in Chapter 7 filed 10 months prior to commencement of Chapter 13. Fact that Trustee waited until end of case to object to discharge did not render objection untimely or allow court to enter discharge notwithstanding Section 1328(f). Delay in filing motion did not prejudice debtor because debtor did not change position in reliance on lack of objection. Fact that debtor continued to make plan payments is not prejudice. For cases filed on or after December 1, 2010, objection to discharge must be filed within 60 days after date first set for first meeting of creditors.
- (4202) *In re Squeo*, Case No. 10-73733 (Bankr. E.D. Mi. 2010) – Debtor not eligible for discharge under Section 1328 where debtor had filed petition for relief in Chapter 13 less than 4 years after date of petition in prior Chapter 7 proceeding.

- (4203) *Carroll v. Sanders*, 551 F.3d 397 (6th Cir. 2008) – Provision of Section 1328(f)(1) denying a discharge to a Chapter 13 Debtor who previously received a discharge within the four-year period preceding the Chapter 13 petition is measured from date of filing petition in prior case to date a petition in current Chapter 13, not from the date of the discharge in the prior case. Section 1328(f)(1) does not prohibit the granting of a discharge to a Debtor whose Chapter 13 petition was filed more than four years after the date of Debtor's prior Chapter 7 case of less than four years after the bankruptcy Court issued the discharge in the prior Chapter 7 case.

11.133 Scope and Effect Generally

- (4204) *Jennings v. Bodrick*, 2014 WL 1818487 (Bankr. S.D. Ohio 2014) – Even if proven, debt that would be excepted from discharge under Section 523(a)(6) in Chapter 7 is not excepted from discharge in Chapter 13. Adversary proceeding to except claim from discharge in Chapter 13 case failed to state cause of action.
- (4205) *State of Florida v. Davis*, Case No. 11-15040 (11th Cir. 2012) – State is not barred by discharge injunction from collecting past-due child support even where State has filed claim in Bankruptcy Court and claim had been disallowed. After confirmation of Debtor's Chapter 11 plan, and well past the claims bar date, the State filed a claim for outstanding child support. Bankruptcy Court disallowed the claim as late filed. Denial of claim in by Bankruptcy Court does not preclude later attempt to collect debt. Discharge injunction precludes only efforts to collect discharged obligations. Domestic Support Obligations are non-dischargeable as a matter of law and, therefore, is beyond the terms of the discharge injunction. To the extent that the Bankruptcy Court disallowed the claim, that ruling precluded payment through the confirmed plan but did not prohibit State from seeking payment other than through plan or from property of bankruptcy estate.
- (4206) *Murawski v. Campbell*, Case No. 08-3178 (Bankr. E.D. Mi. 2010) – Discharge pursuant to section 1328 does not discharge debts within specific sections of section 523 including debts for restitution were damages awarded in a civil action against the debtor as a result of a willful or malicious injury by the debtor that causes personal injury to an individual.

11.134 Scope and Effect – Mortgage Claims

- (4207) *Matteson v. Bank of America, NA*, 2015 WL 4719556 (6th Cir. BAP 2015) – Debtor's personal liability for long term debt treated in Plan under Section 1322(b)(5) is not discharged in Chapter 13. Secured creditor is not required to file proof of claim even where Chapter 13 Plan contemplates payments to the creditor on long term debt. Failure to file proof of claim does not affect validity, priority or extent of lien. Bankruptcy Court erred when, post-discharge, court entered judgment reducing amounts owed to lender by amounts lender would have received had lender filed a proof of claim. Creditor has right to ignore bankruptcy proceedings and enforce lien for satisfaction of debt. Failure to file proof of claim only means that creditor will not receive payments from Chapter 13 Trustee, but does not alter the validity or extent of creditor's lien.
- (4208) *In re Dibling*, 2014 WL 3827818 (Bankr. S.D. Ohio 2014) – Mortgage creditor violated discharge order and order deeming mortgage current by failing to adjust records to reflect that debtor's mortgage was current through date of discharge. Debtor awarded reasonable attorney fees incurred as result of creditor's failure to adjust records including fees incurred in foreclosure suit brought by creditor following discharge based on erroneous records.
- (4209) *In re Rogers*, 494 BR 664 (Bankr. E.D.N.C. 2013) – Mortgage that was current when case filed discharges any deficiency judgment. Section 1328 excepts from the discharge only mortgage claims that are treated as "cure and maintain" under Section 1322(b)(5) and does not apply to mortgages, even long term debt, that are not "cured".

11.135 Hardship Discharge

- (4210) *In re Conn*, 2015 WL 3777958 (Bankr. N.D. Ohio 2015) – Debtor required to prove that failure to complete plan is due to circumstances for which debtor should not justly be held accountable; that payments to unsecured creditors meet the Chapter 7 liquidation amount; and that modification of the plan is impracticable. After death of debtor, Rule 1016 allows the case to proceed as though death had not occurred, based on best interests of debtor's surviving spouse and creditors. Although probate estate indicated that debtor's property may have had equity, no creditors filed claims in probate estate, and mortgages on property made it likely that property could not be sold for sufficient sum to produce meaningful result in bankruptcy estate beyond payment of mortgages. Allowing hardship discharge to deceased debtor would relieve spouse from claims of pre-petition creditors while not adversely affecting creditors who could have, but did not, file claims in probate case.
- (4211) *Schlegel v. Billingslea*, Case No. 14-1132 (9th Cir. BAP 2015) – Debtors not entitled to hardship discharge based on failure of plan to pay required dividend where debtors knew from the time of confirmation that plan would not produce dividend required yet failed to take any action during life of case to address issue. Debtors had more than 4 years to address issue yet waited until the 60th month of the plan and then filed Motion for Hardship Discharge.
- (4212) *In re Ingram*, Case No. 11-68905 (Bankr. E.D. Mi. 2015) – Following debtor's death, only Personal Representative duly appointed according to state law is empowered to make decisions on behalf of estate. ON death of debtor, attorney loses authority to act on behalf of estate unless attorney is later retained by PR. Motion for Hardship Discharge denied without prejudice where there was no evidence that person directing filing of Motion was duly appointed PR.
- (4213) *In re Hennessy*, 2013 WL 3939886 (Bankr. N.D.N.C. 2013) – When a debtor dies while in confirmed chapter13 plan, case can either be dismissed or can continue as if debtor was still alive. However, Rule 1016 does not provide for hardship discharge based on death of debtor. Further, hardship discharge would not benefit debtor but would only benefit debtor's heirs at expense of unsecured creditors. Plan provided for full payment of unsecured debts, and if hardship discharge was entered, creditors would be precluded from asserting claims against probate estate.

- (4214) *In re Murray*, Case No. 07-41134 (Bankr. E.D. Mi. 2011) – Motion for Hardship Discharge denied without prejudice for lack of standing. Debtor passed away and attorney filed Motion. Upon death of debtor, attorney’s authority to act for debtor terminated automatically. Motion could be filed only by personal representative duly appointed by the probate court.
- (4215) *In re Hughes*, Case No. 06-49561 (Bankr. E.D. Mi. 2010) – Hardship discharge under Section 1328(b) requires proof that debtor’s failure to complete the payments required by the plan results from circumstances for which the Debtor should not be held accountable; value was of the effective date of the plan of property actually distributed is not less than what would have been paid had case been commenced under Chapter 7; and modification of the plan is not practicable. To prove that failure to make payments is not something for which the Debtor should be held accountable, Debtor should produce evidence that economic circumstances occasioning loss of employment were not foreseeable at time of confirmation; the exact skills and abilities of the Debtor; availability or lack of availability of employment in the same or comparable area in light of skills and abilities of Debtor; efforts of debtor to obtain employment; availability to debtor of any other type of employment and efforts to obtain employment. Court found that unemployment alone may be sufficient grounds for hardship discharge and expressly rejected requirement of “catastrophic circumstances”, but Debtor failed to present any evidence of ability or efforts to find new employment.

11.136 Early Payoff of Plan

- (4216) *In re Sizemore*, 2013 WL 6328160 (Bankr. E.D. Ky. 2013) – Debtor can payoff plan prior to plan expiration only by remitting a sum sufficient to pay all allowed claims in full. Debtor who received proceeds of life insurance on deceased ex-spouse could not remit only the balance necessary to meet the confirmed 64% dividend, but must remit sum sufficient to pay 100%.
- (4217) *In re Smith*, 2011 WL 2343895 (Bankr. M.D. Fl. 2011) – Debtor permitted to pay off plan prior to expiration of applicable commitment period by lump sum that is sufficient to meet dividend required by confirmed plan. Debtor’s Motion stated in bold, capital letters that the relief requested may deprive creditors of a potentially higher dividend if the debtor’s income increased in the future provided sufficient notice to creditors of the effect of the early payoff. Court approved modification over objection of Chapter 13 Trustee where no creditor objected and “by their silence, essentially voted with their wallets and opted to receive immediate payment.”

11.137 Objections to Discharge

- (4218) *Toste v. Smedberg*, Case no. 13-1266 (9th Cir. BAP 2014) – Court lacks jurisdiction to consider action to except debt from discharge under Section 523(a)(6) during pendency of Chapter 13 case. Section 523(a)(6) is not excepted from scope of general discharge under Section 1328, such that court cannot grant effective relief in adversary proceeding. Creditor can maintain action only if debtor seeks hardship discharge under Section 1328(b) as hardship discharge does not include debts that would otherwise be excepted from discharge under Section 523(a)(6).
- (4219) *Wahrman v. Bajas*, 443 BR 768 (Bankr. E.D. Mi. 2011) – Creditor cannot seek to deny discharge under Section 727 while case is pending in Chapter 13. Adversary dismissed without prejudice to re-file if and when case is ever converted to Chapter 7.

11.138 Waiver of Discharge

- (4220) *In re McGee*, 2014 WL 5488266 (Bankr. E.D. Ky. 2014) – Bankruptcy attorney allowed to waive discharge in his own Chapter 13 case as part of resolution of sanctions proceedings conducted by bankruptcy court. Record raised substantial issues regarding dischargeability of debts owed to former clients under Section 523, and attorney fully understood ramifications of waiver of discharge; and it appeared in attorney’s best interest to waive discharge in order to put disciplinary proceedings behind him in an expeditious manner.
- (4221) *In re Chadwick*, Case No. 12-10118 (Bankr. W.D. Mi. 2013) – Debtor and creditor can stipulate to order waiving discharge as to specific claim. Waiver of discharge is not reaffirmation of debt and so is not bound by requirements for reaffirmation. Waiver affects only rights as between debtor and the specific creditor, such that waiver could be accomplished by stipulation signed only by debtor and creditor. Court would approve stipulation and enter order excepting debt from discharge.

K. Scope of “Super Discharge”

11.139 Domestic Support Obligation – Sections 523(a)(5) and (a)(15)

- (4222) *Rismiller v. Schweitzer*, 2015 WL 5918031 (Bankr. N.D. Ohio 2015) – Property settlement awards are discharged in Chapter 13 if debtor receives full discharge under Section 1328(a). However, property settlement awards are not discharged in Chapter 13 if debtor receives hardship discharge under Section 1328(b). Dischargeability or non-dischargeability is self executing depending on which type of discharge is granted. Whether obligation is support or property settlement depends on whether debt is owed to or recoverable by former spouse, is in the nature of support, and was established by separation or divorce decree. Debtor’s obligation to pay joint mortgage debt is “claim” of spouse as spouse would have right under “hold harmless” provision of decree to recover from debtor if spouse is required to pay mortgage payment, giving rise to contingent claim. Whether obligation is in nature of support where the decree does not designate it as such depends on whether the state court or parties intended to create a support obligation; whether the obligation has the actual effect of providing necessary support; if the first two conditions are satisfied, whether the obligation is so excessive as to be unreasonable under traditional concepts of support; to the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purposes of federal bankruptcy law. Court will look to traditional state law indicia of support including (1) a label such as alimony, support, or maintenance in the decree or agreement, (2) a direct payment to the former spouse, as opposed to the assumption of a third-party debt, and (3) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits; as well as disparity in earning power of parties, need for economic support and stability, presence of minor children, marital fault, evidence of negotiations or understandings as to intended purpose of assumption of debt. Court could not determine on summary judgment whether debtor’s

assumption of mortgage obligation was intended to be support obligation or whether loan assumption enabled Plaintiff to provide a home for their minor children or whether, without the loan assumption, plaintiff could not maintain the daily necessities, such as food, housing and transportation.

- (4223) *In re Thomas*, Case No. 13-8048 (6th Cir. BAP 2014) – Chapter 13 distinguishes between Section 523(a)(5) domestic support obligations, which are not dischargeable; and Section 523(a)(15) post-marital obligations such as property settlements that are dischargeable.
- (4224) *Faircloth v. Hapner*, 2011 WL 6941489 (Bankr. N.D. Tn. 2011) – Obligation to pay mortgage was not included in divorce judgment as alimony or support and obligation does not otherwise qualify under Section 101(14A). Obligation is with the scope of Section 523(a)(15) as obligation owed to former spouse which is dischargeable under Section 1328.

11.140 Section 1328(a)(2)

- (4225) *In re McDowell*, 2010 WL 3790318 (Bankr. E.D. Tn. 2010) – Section 1328(a)(2) excludes from the Chapter 13 discharge any obligation determined to be non-dischargeable under Section 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

11.141 Section 1328(a)(4)

- (4226) *Toste v. Smedberg*, Case no. 13-1266 (9th Cir. BAP 2014) – Section 1328(a)(4) excepts from discharge debts for personal injury or death. Damages based entirely on state law of nuisance, arising out of debtor's use of real property, is harm only to property interest and does not constitute "personal injury". Court did not reach issue of whether "personal injury" would include emotional distress where underlying state court judgment did not reflect any damages for emotional distress, mental anguish or physical harm, or any other damages other than interference with property interests which itself is not "personal injury".
- (4227) *Murawski v. Campbell*, Case No. 08-3178 (Bankr. E.D. Mi. 2010) – Complaint to deny discharge in Chapter 13 proceeding which referenced Section 523(a)(6) would be treated as action to deny discharge of debt under Section 1328(a). Although Section 1328(a) does not incorporate Section 523(a)(6) as debt which is not dischargeable in Chapter 13, the similarity of the statutory language between Section 523(a)(6) and Section 1328(a)(4) is sufficient to allow the Court to consider the dischargeability of the debt under standards set forth in Section 1328(a)(4). Section 1328(a)(4) excepts from discharge any debt for damages awarded in a civil action arising from personal injury caused by willful or malicious injury, which is a lower standard than Section 523(a)(6) which requires willful and malicious injury, but does require that the damages be "awarded". Jury verdict that determined liability and damages for assault and battery would be "award" even though bankruptcy petition prevented State Court from entering judgment based on the verdict. Section 1328(a)(4) does not require that "award" be reduced to an enforceable judgment.
- (4228) *Waag v. Permann*, 418 BR 373 (8th Cir. BAP 2009) – Section 1328(a)(4) does not require existence of prepetition judgment for willful or malicious injury to be excepted from discharge. Use of word "awarded" is yet not used to denote "past tense" but rather is a limiter on "restitution" and "damages". As long as damages are, at some point, "awarded", those damages will be nondischargeable even if those damages are not awarded until after entry of the discharge in bankruptcy.

11.142 Penalties Owed to Governmental Agencies

- (4229) *Michigan Unemployment Insurance Agency v. Andrews*, 2015 WL 5813418 (Bankr. E.D. Mi. 2015) – Penalties owed to governmental agency, normally made non-dischargeable in Chapter 7 under Section 523(a)(7) are not listed in Section 1328 as debts that are excluded from discharge. Where Congress identified certain debts as excepted from discharge, implication is that all other debts are dischargeable in Chapter 13 super-discharge. Penalties incidental to fraud claim for overpayment of unemployment benefits are dischargeable as falling under Section 523(a)(7). While damages that are normally incidental to claim for fraud that is excepted from discharge under Section 523(a)(2) are themselves excepted from discharge under same section, where incidental damages consist of penalties owed to governmental unit. Specific provisions of Section 523(a)(7) supersede general provisions of Section 523(a)(2).

11.143 Discharge Injunction

- (4230) *Kilbourne v. CitiMortgage, Inc.*, 2014 WL 1230307 (Bankr. S.D. Ohio 2014) – Lender violated discharge injunction when creditor, after entry of discharge in Chapter 13 proceeding, demanded and received payment of pre-petition attorney fees, late fees and costs as part of request by debtors for payoff as part of refinancing with new lender.
- (4231) *In re Jones*, 2012 WL 5385682 (Bankr. E.D. Ky. 2012) – Lender violated discharge injunction by filing state court foreclosure action that also sought to collect debt as personal liability after discharge in completed Chapter 13 proceeding. Although Discharge injunction does not carry private right of action, Court can enforce injunction through contempt proceedings. Sanctions are warranted where creditor's violation is willful, which requires that creditor have knowledge of discharge and that creditor willfully brought state court action to recover discharged debt. Sanctions awarded for attorney fees incurred as a result of creditor's conduct in sum of \$2047.50.
- (4232) *Kowall v. GMAC Mortgage, LLC*, Case No. 10-3221 (Bankr. E.D. Mi. 2011) – Section 524(a)(2) injunction replaces automatic stay as to actions to collect debts from debtor personally. Section 524 does not contain a private cause of action, but Court can enforce discharge injunction through contempt. Contempt requires proof that defendant violated a specific order with knowledge of the order allegedly violated. Complaint failed to state cause of action where complaint failed to allege either that the debtor received a discharge or that the creditor had knowledge of the discharge. Contempt appropriate where actions are intended to coerce payments and not where actions have some other, lawful purpose. Creditor's action in reporting loan to credit reporting agency is not inherently action to collect debt. Debtor failed to allege that creditor reported loan information for improper purpose or that creditor had taken any action designed to

coerce payment with no lawful purpose.

L. Rule 3002.1

11.144 Applicability – Non-principal Residence

- (4233) *In re Gurdano*, 2012 WL 2402789 (Bankr. S.D. Fl. 2012) – Notice of Payment Change filed in case where security is not personal residence is of no effect. Debtor is not required to object to Notice.
- (4234) *In re Wallett*, 2012 WL 4062657 (Bankr. D. Vt. 2012) – Creditor holding mortgage on property that is not debtor's principal residence not bound by Rule 3002.1 and not required to file response to Trustee's Notice of Final Cure. Although Rule 3002.1 does not expressly state that it does not apply to non-principal residential loans, logical inference from language of Rule limits applicability to principal residences.
- (4235) *In re Bolden*, Case No. 07-30132 (Bankr. E.D. Mi. 2012) – Creditor holding lien on debtor's vehicle not required to file response to Trustee's Notice of Final Cure. Rule 3002.1 applies only to loan secured by principal residence and where mortgage continues beyond life of plan. Car financing did not involve car and did not involve "continuing" secured debt.

11.145 Applicability – Grant of Relief From Stay

- (4236) *In re Holman*, 2013 WL 1100705 (Bankr. E.D. Ky. 2013) – Rule 3002.1 applies where plan treats security interest in debtor's principal residence as cure and maintain under Section 1322(b)(5). Obligations under Rule 3002.1 do not end when stay relief is granted. Although debt may no longer be paid under the plan, the debt is still provided for under the confirmed plan. Trustee and debtors have continuing need for disclosures. Stay lift does not terminate debtor's interest in property and debtor may desire to retain property by refinancing or to sell property prior to foreclosure. Disclosures keep debtor informed as to interest rate changes, late fees and penalties, all of which assists the debtor in proceeding after the stay lift, and also assist the trustee and debtor in reviewing any post-foreclosure deficiency claim.
- (4237) *In re Marquez*, Case No. 11-12659 (Bankr. W.D. Mi. 2012) – Court excused further compliance with Rule 3002.1 where, after confirmation of plan, creditor received relief from automatic stay. Stay lift terminates any opportunity for debtor to "cure and maintain" payments under the plan.
- (4238) *In re Thonga*, 2012 WL 5050669 (Bankr. E.D. Wis. 2012) – Rule 3002.1 does not apply to mortgage on principal residence where stay is later lifted. Rule applies only to creditors that have filed claims secured by a security interest in the debtor's residence. Creditor withdrew its claim after entry of order lifting stay. Creditor no longer was a "holder of a claim" as required by the Rule.
- (4239) *In re Kraska*, 2012 WL 1267993 (Bankr. N.D. Ohio 2012) – Court declined to waive compliance with Rule 3002.1 in connection with Order Granting Relief From Stay. Although debtor's plan provided for the surrender of the property, nothing in Rule 3002.1 limits its applicability to cases where debtor retains property. Rule applies to all claims secured by a mortgage on the principal residence, and whether debtor intends to keep or surrender property does not change fact that as of the petition date and as of the confirmation date, the mortgage does encumber the principal residence and will continue to do so until foreclosure proceedings are complete. Mortgage company likely will be filing claim and Rule is designed to assist in evaluating and implementing claim and to account for payment changes and costs and advances that may be incurred prior to completion of foreclosure proceedings.

On Rehearing, Court reconsidered and agreed to waive compliance with Rule 3002.1 where the property is surrendered in the Plan. The United States Trustee has filed a Motion for Rehearing which remains pending as of the date of preparation of this material.

11.146 Applicability – Obligation Treated in Plan

- (4240) *In re Garduno*, 2012 WL 2402789 (Bankr. S.D. Fla. 2012) – Rule 3002.1 applies only where claim is provided for under Section 1325(b)(5). Plan that provided that lender would receive "\$0.0" did not treat bank and effectively left bank out of plan entirely. Creditor not required to file any notices and, to extent notices are filed, notices are a nullity to which debtor not required to object.

11.147 Applicability – Property Surrendered at Confirmation

- (4241) *In re Hager*, Case No. 11-63365 (Bankr. E.D. Mi. 2011) – Rule 3002.1 does not apply where property is surrendered at confirmation. Rule 3002.1 applies only where plan as confirmed calls for "cure and maintain".

11.148 Applicability – "Direct Pay" Mortgage

- (4242) *In re Merino*, 2012 WL 2891112 (Bankr. M.D. Fl. 2012) – Rule 3002.1 applies only to "cure and maintain" obligations. Debtor was current in mortgage payments as of commencement of case and paid mortgage directly to lender during pendency of chapter 13. As debtor was current at petition, there was nothing to "cure". Mortgage was not within scope of Section 1322(b)(5) and, therefore, not within scope of Rule 3002.1.

11.149 Conflict with Local Rule – Preemption

- (4243) *In re Lee*, 2012 Bankr. LEXIS 1465 (Bankr. N.D. Ohio 2012) – Chapter 13 Trustee's Notice and Motion of Intent to Declare Debtor Current and Reinstated on Wells Fargo Bank, N.A., c/o Chase Home Finance, LLC's Secured Claim denied. Trustee also filed a Notice of Final Cure Mortgage Payment pursuant to new Rule 3002.1. Intent of both of the Trustee's filed documents is the same: to provide of record evidence that Debtor has cured the default on the mortgage on his principal residence being paid through his confirmed Chapter 13 plan. Trustee's separate Motion was "belt and suspenders" attempt to obtain separate Order that is no longer permitted under Rule 3002.1.

Rule 3002.1 is a comprehensive procedural path for reaching the result sought by the Trustee. The Motion is not provided for under and now conflicts with that procedural path and creates procedural confusion for the court and the parties and threatens the creditor's entitlement to at least 21 days for response. Because the Motion conflicts with and confuses that procedure, the creditor's objection will be sustained and the Motion will be denied, without prejudice. The Notice and the process set forth in Rule 3002.1 of the Federal Rules of Bankruptcy Procedure will control.

11.150 Notice of Payment Change – Failure to Provide

- (4244) *In re Garza*, 2012 WL 4738651 (Bankr. S.D. Tx. 2012) – Creditor who fails to provide annual RESPA reconciliation waives any right to recover the resulting deficiency. Analogizing to Rule 3002.1, court ruled that creditor's failure to provide notice of payment changes in years 2008, 2009 and 2010 precluded creditor from recovering shortfall in payments that resulted. However, creditor's failure to comply could not provide basis for sanctions against creditor as rule did not apply in 2008, 2009 or 2010 and creditor had no reason to know at that time that Rule would later be adopted that would require notices.
- (4245) *In re Wright*, 461 BR 757 (Bankr. N.D. Iowa 2011) – Mortgage servicer's failure to provide notice of payment changes to trustee, debtor and debtor's attorney, and failure to respond to debtor's request for payment information and failure to prepare and distribute annual statements showing activity on account constituted willful violation of terms of confirmed plan that contained provisions imposing obligations on creditor and creditor failed to object to confirmation.

11.151 Notice of Payment Change - Excusal of Compliance – HELOC

- (4246) *In re Pillow*, Case No. 11-11688 (Bankr. W.D. Mi. 2013) – Rule 9006 allows Court to alter deadlines set forth in Rule 3002.1 for filing notices of mortgage payment changes. Where interest rate changes frequently and produces nominal monthly payment changes, it is not reasonable to require lender to file notice at least 21 days prior to effective date. Objective of Rule 3002.1 is normal adjustments for taxes and periodic interest rate changes, not for interest rate changes that happen frequently under HELOC. Further, clerical and legal expenses of lender in filing notices are recoverable from the debtor, resulting in an increase in the burden on debtor for otherwise minor changes in monthly payments. Court would authorize creditor to file payment changes every 6 months, but would also required lender to file quarterly reports in the final year of the plan to allow debtor to address impact on confirmed plan in time to take action to conclude case.
- (4247) *In re Marquez*, Case No. 11-12659 (Bankr. W.D. Mi. 2012) – Court considered, but did not rule on, whether timing for filing Notices of Payment Change can be altered under Rule 9006(b).
- (4248) *In re Adkins*, 2012 WL 3860593 (Bankr. N.D. Ohio 2012) – Court cannot excuse compliance with Rule 3002.1 even for second mortgage that is Home Equity Loan of Credit on which interest rate changes frequently. Rule applies to any mortgage secured by principal residence and does not permit court to create exceptions even if compliance with rules produces hardship or where compliance with rule is difficult.

11.152 Expenses for Filing

- (4249) *In re White*, 2012 Bankr. LEXIS 1884 (Bankr. E.D.N.C. 2012) – Preparation and filing of notice of payment change is ministerial action that does not require assistance of counsel. Filing of Notice is not compensable expense.
- (4250) *In re Adams*, 2012 WL 1570054 (Bankr. E.D.N.C. 2012) – Cost of preparing and filing Notice of Payment Change is not compensable expense. Mortgage companies have routinely served notices of mortgage payment change on debtors without assistance of attorney. Rule 3002.1 changed parties that must be served with notice and provided new official forms, but did not change underlying services.
- (4251) *In re Baines*, 2012 LEXIS 2980 (Bankr. M.D.N.C. 2012) - Cost of preparing and filing Notice of Payment Change is not compensable expense. Rule 3002.1 changed parties that must be served with notice and provided new official forms, but did not change underlying services. Preparation is normal business function that does not require assistance of attorney.
- (4252) *In re Hunt*, 2012 LEXIS 2981 (Bankr. M.D.N.C. 2012) - Cost of preparing and filing Notice of Payment Change is not compensable expense. Rule 3002.1 changed parties that must be served with notice and provided new official forms, but did not change underlying services. Preparation is normal business function that does not require assistance of attorney.

11.153 Sanctions for Non-Compliance

- (4253) *In re Garza*, 2012 WL 4738651 (Bankr. S.D. Tx. 2012) – Creditor who fails to provide annual RESPA reconciliation waives any right to recover the resulting deficiency. Analogizing to Rule 3002.1, court ruled that creditor's failure to provide notice of payment changes in years 2008, 2009 and 2010 precluded creditor from recovering shortfall in payments that resulted. However, creditor's failure to comply could not provide basis for sanctions against creditor as rule did not apply in 2008, 2009 or 2010 and creditor had no reason to know at that time that Rule would later be adopted that would require notices.

11.154 Notice of Postpetition Fees and Expenses – Generally

- (4254) *In re Delise*, Case No. 12-42111 (Bankr. E.D. Mi. 2012) – Secured creditor cannot include in pre-petition arrearage claim charges for post-petition attorney fees, even if services were rendered prior to confirmation. Pre-petition arrearage claim by definition excludes any and all post-petition fees and costs. Creditor required to request recovery of post-petition fees and costs by filing Notice of Post-Petition Mortgage Fees, Costs and Expenses pursuant to Rule 3002.1.
- (4255) *In re Pasko*, Case No. 12-41172 (Bankr. E.D. Mi. 2012) - Secured creditor cannot include in pre-petition arrearage claim charges for post-petition attorney fees, even if services were rendered prior to confirmation. Pre-petition arrearage claim by definition excludes any and all

post-petition fees and costs. Creditor required to request recovery of post-petition fees and costs by filing Notice of Post-Petition Mortgage Fees, Costs and Expenses pursuant to Rule 3002.

- (4256) *In re Rusch*, Case No. 11-67578 (Bankr. E.D. Mi. 2012) – Secured creditor cannot include in pre-petition arrearage claim charges for post-petition attorney fees, even if services were rendered prior to confirmation. Pre-petition arrearage claim by definition excludes any and all post-petition fees and costs. Creditor required to request recovery of post-petition fees and costs by filing Notice of Post-Petition Mortgage Fees, Costs and Expenses pursuant to Rule 3002.1.
- (4257) *In re Sheppard*, 2012 WL 1344112 (Bankr. E.D. Va. 2012) – Creditor is not required to file notice of post-petition fees and expenses where sums have already been approved in separate court order. Creditor filed motion for relief from stay. In consent order resolving motion, stay remained in place and creditor was awarded attorney fees and costs incurred in prosecution of motion. Creditor later filed Rule 3002.1 notice seeking same fees and costs. Rule 3002.1 notice struck by court as sums had already been awarded by court. Although Rule 3002.1 appears absolute in requiring notice, purpose of rule is fulfilled by court order in lieu of notice.

11.155 Failure to File Timely

- (4258) *In re Tuneberg*, 2012 WL 3744719 (Bankr. S.D. Tx. 2012) – Court unable to rule on Debtor’s objection to Notice of Postpetition Fees where debtor failed to submit sufficient information from which Court could determine recoverability of charges.

11.156 Notice of Postpetition Fees and Expenses – Expenses for Filing

- (4259) *In re Adams*, 2012 WL 1570054 (Bankr. E.D.N.C. 2012) – Secured creditor not entitled to recover attorney fees for filing notices of mortgage payment changes. Mortgage companies routinely serve notices of mortgage payment changes without assistance of an attorney. Although Rule 3002.1 changed the method of service, and provided new forms, it does not have any effect on the underlying services.

11.157 Sanctions

- (4260) *In re Pompa*, 2012 WL 2571156 (Bankr. S.D. Tx. 2012) – Rule 3002.1 did not preempt court’s ability to issue sanctions under Section 105 based on creditor’s charging of improper fees and improperly applying payments.

11.158 Trustee’s Notice of Final Cure – Generally

11.159 Notice of Final Cure – Failure to Respond

- (4261) *In re Mehilli*, Case No. 09-76137 (Bankr. E.D. Mi. 2015) – Court will not take action where Creditor response is filed after expiration of deadline to file response and after entry of discharge.

11.160 Notice of Final Cure – Creditor Response

- (4262) *In re Love*, Case No. 06-30968 (Bankr. E.D. Mi. 2012) – Creditor responded to Trustee’s Notice, alleging that creditor had balance due on account. Debtor alleged that account was paid according to the Trustee records and so no balance was due. Court reconciled amounts due under loan documents and compared that to total amount paid by Trustee, and determined balance remaining. Discrepancy between creditor records and Trustee records resulted from ambiguous plan modification that apparently attempted to reduce balance due without proper notice. Once court determined that modification did not effectively reduce balance, then payments by trustee were not sufficient to pay actual balance owed.

11.161 Notice of Final Cure – Expenses for Filing Response

- (4263) *In re Wallett*, 2012 WL 4062657 (Bankr. D. Vt. 2012) – Creditor holding mortgage on property that is not debtor’s principal residence not bound by Rule 3002.1 and not required to file response to Trustee’s Notice of Final Cure. As such, creditor not entitled to recover cost of filing unnecessary response.
- (4264) *In re Carr*, 2012 WL 930337 (Bankr. E.D. Va. 2012) – Creditor may not charge a debtor a fee for filing a response to the Chapter 13 trustee’s Notice of Final Cure Payment, which is required under the bankruptcy rule governing notice relating to claims secured by security interest in a debtor’s principal residence; the response is not a pleading, but is simply a statement by the creditor as to the status of the loan at the conclusion of the plan, the statement can be derived simply and quickly from creditor’s records and poses no significant burden on creditor, as it is a business function, akin to issuing a receipt for payments received under the plan or providing an annual escrow statement, that can be done by a claims administrator in creditor’s own office, and no legal analysis is generally required. If the Chapter 13 trustee or debtor contests the creditor’s response to the Notice of Final Cure Payment, the matter becomes a contested matter and would proceed as any other contested matter, with the creditor entitled to legal representation, and, if the underlying loan documents and non-bankruptcy law permit the recovery of attorney fees, and the Bankruptcy Code does not prohibit those fees, attorney fees in successfully defending creditor’s response to trustee’s notice would be recoverable.

11.162 Notice of Final Cure – Debtor’s Response

- (4265) *In re Bodrick*, 2013 WL 5583600 (Bankr. N.D. Ohio 2013) – Rule 3002.1 does not obligate debtor to file response if creditor files opposition to notice of final cure. Creditor’s notice that it disagrees with the notice of final cure affords debtor and the trustee an opportunity to file a motion to determine, but does not mandate such a filing. Debtor’s non-filing of any motion in response to creditor’s response disagreeing with the notice of final cure does not waive or estop debtor from later contending that the loan was current as of date of notice of final cure or at any later date. Debtor’s adversary complaint filed against lender after bankruptcy case was reopened, that

asserted that lender had failed to properly credit post-petition payments, was not precluded by earlier notice of final cure, entry of discharge, or order closing case.

M. Dismissal

11.163 Voluntary Dismissal – Absolute Right to Dismiss

- (4266) *In re Fisher*, 2015 WL 1263354 (Bankr. W.D. Va. 2015) – Debtor has absolute right to voluntarily dismiss Chapter 13 Case. Denial of request on equitable grounds would circumvent Supreme Court ruling in *Law* which precludes use of equitable principals to circumvent plan language of Code.
- (4267) *In re Gorges*, Case No. 14-53911 (Bankr. E.D. Mi. 2015) – Debtor has absolute right to voluntarily dismiss Chapter 13 proceeding. However, court can condition dismissal on retention of jurisdiction to grant additional relief on motion for sanctions against debtor and counsel that was filed before case was dismissed.
- (4268) *In re Thompson*, 2015 WL 394361 (Bankr. E.D. Ky. 2015) – Section 1307 affords debtor absolute right to dismiss case. Pending motion to convert filed by UST does not supplant that right absent proof of bad faith, citing *Marrama*. Fact that debtor may have had substantial non-exempt equity in real property sufficient to pay claims in full not “bad faith” for purposes of Section 1307. While trustee may have been correct that conversion would be “winning proposition for all involved parties”, that does not afford court discretion to disregard plain meaning of Section 1307.
- (4269) *In re Meskos*, Case No. 10-72179 (Bankr. E.D. Mi. 2012) – Debtor has absolute right to dismiss Chapter 13 proceeding notwithstanding allegations by Trustee of undisclosed assets and income. Section 1307(b) is unqualified and does not include an imputed “bad faith” exception.
- (4270) *Procel v. U.S. Trustee*, 467 BR 297 (Bankr. S.D.N.Y. 2012) – Recognizing substantial split of authority, Court concluded that binding Second Circuit precedent allowed debtor absolute right to voluntarily dismiss even where Chapter 13 petition was part of scheme to hinder, delay or defraud creditors. Court questioned continued viability of pre-*Marrama* precedent but concluded that Second Circuit’s prior holdings had not clearly been abrogated by *Marrama* and court was therefore bound to follow those precedents.
- (4271) *In re Williams*, 435 BR 552 (Bankr. N.D. Ill. 2010) – Chapter 13 debtor whose case had not previously been converted from another chapter had absolute right to dismiss case, which could not be denied on ground that debtor had acted in bad faith.
- (4272) *In re Mangual*, 2010 WL 5185392 (Bankr. D.P.R. 2010) – Although raising questions after Court’s decision in *Marrama* and recognizing substantial split of authority, Court concluded that Debtor had absolute right to dismiss Chapter 13 case. However, Court has authority to impose conditions on dismissal. Court properly dismissed case on debtor’s request for voluntary dismissal but imposed 1 year bar to refiling where material omissions and inaccuracies in schedules called into question whether debtor intended to abuse process but findings did not amount to level of bad faith.
- (4273) *In re Hamlin*, 2010 WL 749809 (Bankr. E.D.N.C. 2010) – debtors have the absolute right to dismiss pursuant to Section 1307(b). However, that right is not entirely unconditional. Section 349 permits courts to impose conditions on dismissal if appropriate to prevent abuse of process.

11.164 Voluntary Dismissal – No Absolute Right to Dismiss

- (4274) *In re Criscuolo*, 2014 WL 1910078 (Bankr. E.D. Va. 2014) – Chapter 13 debtor does not have absolute right to dismiss chapter 13 case where debtor’s bad faith conduct evidences intent to abuse letter or spirit of code. Court can condition dismissal and impose sanctions as long as sanctions do not contravene any explicit provision of code. Court can grant debtor’s request to voluntarily dismiss but impose bar to future filings consistent with Section 1307.
- (4275) *In re Cyncynatus*, 2013 WL 3864310 (Bankr. N.D. Ohio 2013) – Section 1307(b) does not afford debtor an absolute right to dismiss where debtors acted in bad faith in the bankruptcy case. Dismissal denied and case converted to Chapter 7 where debtors owned a Florida timeshare that had not been disclosed; debtors transferred real estate before they filed the case in an effort to convert a non-exempt asset to an exempt asset; debtors did not actually live at the property they claimed as exempt homestead; debtors failed to account for proceeds from the 2011 sale of inherited property in Florida. Totality of circumstances firmly established that the debtors filed and proceeded with their bankruptcy case in bad faith. They did not tell the truth in their initial filing about their residence, the amount of cash they had on hand, the fact that Jerry owned a Florida timeshare, or Jerry’s sale of the inherited Florida property and their continued possession of some of the sale proceeds. Debtors did not have a good faith basis for claiming a homestead exemption in the Miner Road property. The deception continued when the debtors made undisclosed payments on the note secured by the Florida timeshare, stopping only when the trustee uncovered the payments. Additionally, Jerry lied when he testified at trial that he had not found new employment, thus deliberately underplaying his ability to fund their chapter 13 plan and suggesting that they had to dismiss their case for that reason. There are no special circumstances that would counterbalance these actions and failures to act. Debtors acted in bad faith when they filed their bankruptcy case and continued in that spirit throughout.
- (4276) *Taylor v. Winnecour*, 462 BR 527 (Bankr. W.D. Pa. 2011) – Debtor does not have absolute right to dismiss a Chapter 13 case that has not previously been converted from another chapter, without regard to debtor’s basis for seeking dismissal, to status of proceedings, or to consequences of dismissal on creditors. Court may consider factors such as debtor’s good faith and whether debtor is using bankruptcy process in abusive way in deciding whether to grant dismissal motion. Debtor filed bankruptcy, took advantage of the automatic stay of matters pending against her, and caused her creditors to appear in matters before this court and to file actions against her. Effect of

dismissal, which would once again force creditors back into other courts after Debtor delayed their suits in those courts and would further the abuse of process of which Debtor has already been found culpable. Debtor's effort to dismiss the case was next effort in litigious past to put her creditors to great expense while side-stepping any real effort to reconcile or satisfy their debts. If the bankruptcy were dismissed, then the District Court would once again face proceedings on the sanctions it ordered; the state court would once again face proceedings on creditor's fraudulent conveyance action; the state court would once again face proceedings in the effort to collect on judgment; creditors would once again be faced with litigation in multiple forums in an effort to liquidate their claims or collect on their judgments or defend abusive actions; and, the chapter 13 Trustee would have expended substantial time, effort and costs in the on-going effort to identify assets that, if an avoidance and recovery action is successful, will be more than sufficient to pay all of the creditors in full.

- (4277) *In re Kotche*, 457 BR 434 (Bankr. D. Md. 2011) – Debtor does not have absolute right to voluntarily dismiss. Debtor's conduct, in omitting from her bankruptcy schedules valuable jewelry purchased for her by her ex-husband, and in moving to voluntarily dismiss case once her misconduct was brought to attention of bankruptcy court, smacked of bad faith and warranted denial of dismissal motion.
- (4278) *In re Caola*, 422 BR 13 (Bankr. D.N.J. 2010) – Chapter 13 debtor's right to voluntarily dismiss his or her case is not absolute when there has been showing of bad faith conduct; to allow debtor to voluntarily dismiss case with impunity would render conversion provision a dead letter and open up bankruptcy courts to myriad of potential abuses. Request for dismissal denied where, prior to petition, debtor engaged in potentially fraudulent transfer by conveying property owned by debtor and spouse jointly into spouse's name alone.
- (4279) *In re Armstrong*, 408 BR 559 (Bankr. E.D.N.Y. 2009) – Following Supreme Court decision in *Marrama v. Citizens Bank of Massachusetts*, debtor does not have absolute right to dismiss Chapter 13 case where debtor's conduct evidences bad faith. Debtor entered into a post-petition contract to sell real property for \$1.5 million without seeking the permission of the Trustee or the authority of the Court and request for dismissal was apparent effort to conceal transfer and permit debtor to retain substantial non-exempt funds that would otherwise have been available for payment to creditors.
- (4280) *Jacobsen v. Moser*, 609 F.3d 647 (5th Cir. 2010) – Debtor does not have absolute right to dismiss Chapter 13 where debtor has acted in bad faith and has abused the bankruptcy process. Debtor's schedules failed to list multiple parcels of real estate in which Debtor had an interest and Debtor was attempting to sell at least one parcel without disclosing the parcel or the transaction to the court or creditors; failed to disclose multiple transfers that occurred pre-petition including quit claiming away property to family members; the omission of six rental properties or the income received; and a business venture in Oslo, Norway operated by Debtor's cousin. Request to dismiss would be denied and case converted.
- (4281) *Rosson v. Fitzgerald*, 545 F.3d 764 (9th Cir. 2008) - In light of *Marrama*, debtor does not have absolute right of voluntary dismissal under Section 1307(b), but is qualified by the authority of a bankruptcy court to deny dismissal on grounds of bad-faith conduct or "to prevent an abuse of process." Debtor wrongfully retained proceeds of arbitration that were committed to the Chapter 13 plan and used the proceeds to improve and renovate debtor's home. Debtor never provided the bankruptcy court with an explanation of what happened to the missing funds. Debtor failed to deliver the funds as ordered and then, when taken to task for failing to do so, invoked his supposedly absolute right to withdraw from the bankruptcy process by requesting that his Chapter 13 petition be dismissed. Under these circumstances, bankruptcy court correctly concluded that Debtor sought to voluntarily dismiss his case in order to "abscond with [estate] proceeds." Denial of voluntary dismissal to prevent abuse of bankruptcy process is action specifically approved of by Court in *Marrama*.

11.165 Voluntary Dismissal – After Conversion from Chapter 7

- (4282) *In re Seidl*, 2013 WL 2109447 (Bankr. N.D. Ohio 2013) – Debtor has no right to voluntarily dismiss Chapter 13 where case was filed as Chapter 7 and converted upon a finding of presumed abuse under Section 707. Debtor's Motion to Dismiss where Debtor did not provide notice of Motion to Creditors or other parties in interest, without prejudice to Debtor re-filing the motion with proper notice to all parties.

11.166 Failure to File Documents

- (4283) *In re Coppenvolle*, Case No. 11-65164 (Bankr. E.D. Mi. 2011) – Motion for Extension of Time denied for failure to comply with local rules. Motion failed to indicate whether attorney attempted to obtain concurrence of Trustee in the relief requested; and failed to indicate that objections must be filed within three days. Further, debtor did not file required documents even after filing motion and before motion date requested in motion for extension.
- (4284) *In re Souders*, Case No. 10-68760 (Bankr. E.D. Mi. 2010) - Letter requesting additional time to file documents denied for failure to demonstrate good cause.
- (4285) *In re Tudgay*, Case No. 10-43763 (Bankr. E.D. Mi. 2010) – Debtor's failure to file schedules, means test form, Statement of Financial Affairs and a Chapter 13 Plan by deadline established by court required dismissal.
- (4286) *In re Chavis*, Case No. 06-59328 (Bankr. E.D. Mi. 2009) - Debtor's failure to file amendments by the time ordered by Court resulted in dismissal of case where Order provided that if Debtor failed to file the required amendments "the Court may dismiss this case without further notice or hearing."
- (4287) *In re Richards*, Case No. 03-47950 (Bankr. E.D. Mi. 2008) - Debtor's failure to file and serve a proposed plan modification and file amended Schedules as Ordered by Court within the deadline prescribed resulted in dismissal of case.
- (4288) *In re Noell*, Case No. 06-49184 (Bankr. E.D. Mi. 2008) - Debtor's failure to file and serve a proposed plan modification and file amended Schedules as Ordered by Court within the deadline prescribed resulted in dismissal of case.

- (4289) *In re Rice*, Case No. 08-71658 (Bankr. E.D. Mi. 2009) - Debtor's failure to file Adversary Proceeding to strip second mortgage within the deadline prescribed by the Court resulted in dismissal of case.
- (4290) *In re Mitanoski*, 08-49612 (Bankr. E.D. Mi. 2009) – Debtor's failure to file and serve proposed plan modification and Amended Schedules within time prescribed by Court Order resulted in dismissal of case.

11.167 Failure to File Amended Plan

- (4291) *In re Henry*, 2015 WL 4605352(6th Cir. BAP 2015) – Bankruptcy Court did not abuse discretion in dismissing pro se debtor's case after denying confirmation and affording debtor two weeks to file amended plan, but debtor failed to file amended plan as required. Debtor knew of deadline to submit amended plan and trustee was "extremely thorough" in explaining to debtor what needed to be done, yet debtor failed to comply.

11.168 Death of Debtor – Pre-Confirmation

- (4292) *In re Digiantomasso*, Case No. 12-46397 (Bankr. E.D. Mi. 2012) – Chapter 13 Case must be dismissed where debtor died after filing petition but prior to confirmation. Rule 1016 allows a chapter 13 to continue after death of debtor if further administration is possible and in the best interest of the parties. However, Section 1325(a)(6) requires that the "debtor" shall make payments under the plan. Death of debtor appears to preclude confirmation as debtor will not make payments under the Plan. Rule 1016 permits cases to continue post confirmation but does not allow a reconfirmation case to proceed where the debtor dies before confirmation.
- (4293) *In re Seitz*, 430 BR 761 (Bankr. N.D. Tx. 2010) – Chapter 13 allowed to proceed where debtor-husband died before the First Meeting of Creditors. The debtor-wife was appointed as executor of husband's estate, and could appear and testify at the §341 Meeting for both herself and her deceased husband.

11.169 Death of Debtor – Post-Confirmation

- (4294) *In re Raffone*, Case No. 13-61907 (Bankr. E.D. Mi. 2015) – Death of debtor post-confirmation does not require dismissal of case. However, case can proceed only if debtor's personal representative appears in case or otherwise takes actions consistent with Rule 1016. Where personal representative failed to make appearance in response to Court's Order to Show Cause, Chapter 13 proceeding dismissed as to decedent.
- (4295) *In re Conn*, 2015 WL 3777958 (Bankr. N.D. Ohio 2015) – Debtor required to prove that failure to complete plan is due to circumstances for which debtor should not justly be held accountable; that payments to unsecured creditors meet the Chapter 7 liquidation amount; and that modification of the plan is impracticable. After death of debtor, Rule 1016 allows the case to proceed as though death had not occurred, based on best interests of debtor's surviving spouse and creditors. Although probate estate indicated that debtor's property may have had equity, no creditors filed claims in probate estate, and mortgages on property made it likely that property could not be sold for sufficient sum to produce meaningful result in bankruptcy estate beyond payment of mortgages. Allowing hardship discharge to deceased debtor would relieve spouse from claims of pre-petition creditors while not adversely affecting creditors who could have, but did not, file claims in probate case.
- (4296) *In re Uren*, Case No. 13-90369 (Bankr. W.D. Mi. 2014) – Death of one co-debtor in joint Chapter 13 is not basis to disallow claims. Rule 1016 provides that upon death of debtor, case proceeds as though death had not occurred.
- (4297) *In re Hennessey*, 2013 WL 3939886 (Bankr. N.D. Calif. 2013) – After death of debtor, Rule 1016 allows for case to continue or be dismissed. Debtor's estate is not entitled to hardship discharge because that remedy is not allowed under Rule 1016. Death of debtor is not circumstance for which debtor is not accountable under Section 1328(b) precluding entry of hardship discharge.
- (4298) *In re Levy*, 2014 WL 1323165 (Bankr. N.D. Ohio 2014) – Bankruptcy code contains no guidance on how case should proceed if debtor dies during case. Rule 1016 indicates that case may be dismissed or, if further administration is possible, case may proceed and be concluded as if death had not occurred. Debtor is not entitled to discharge unless debtor completes requirements including completing instructional course concerning personal financial management; and certification from debtor that all amounts payable on a DSO that have come due have been paid. Court must also find that there is no reasonable cause to believe that debtor has violated Section 522(q)(1) and that there is a pending proceeding in which debtor may be found guilty of a felony as described in Section 522(q)(1). Debtor's failure to file a DSO Certificate is not impediment to discharge as DSO debts are excluded from the discharge in any event, such that certification is more form than substance, and there is no impediment to another person filing the DSO Certificate on behalf of the deceased debtor. Court will also allow third party to file certification regarding 1322(h) given very narrow scope of matters included. Identity of person who can act on behalf of deceased debtor is determined on case by case basis. Person purporting to file documents necessary for discharge must be person with specific knowledge of deceased debtor's finances, and must file affidavit outlining a sufficient factual foundation. Person seeking to file end of case documents must file motion, properly served with notice, setting out (1) whether there is a probate estate or whether one is anticipated and, if not, why not; (2) the identity of the person seeking to act, his or her relationship to the debtor, and sufficient facts to establish a foundation for personal knowledge, all of which must be in affidavit; and (3) acceptable proof of death such as death certificate.
- (4299) *In re Hennessey*, 2013 WL 3939886 (Bankr. N.D.N.C. 2013) – When a debtor dies while in confirmed chapter 13 plan, case can either be dismissed or can continue as if debtor was still alive. However, Rule 1016 does not provide for hardship discharge based on death of debtor. Further, hardship discharge would not benefit debtor but would only benefit debtor's heirs at expense of unsecured creditors. Plan provided for full payment of unsecured debts, and if hardship discharge was entered, creditors would be precluded from asserting claims against probate estate.

- (4300) *In re Murray*, Case No. 07-41134 (Bankr. E.D. Mi. 2011) – Motion for Hardship Discharge denied without prejudice for lack of standing. Debtor passed away and attorney filed Motion. Upon death of debtor, attorney's authority to act for debtor terminated automatically. Motion could be filed only by personal representative duly appointed by the probate court.

11.170 Payment Default

- (4301) *In re Camacho*, Case No. 08-59975 (Bankr. E.D. Mi. 2008) - Confirmation of Chapter 13 Plan denied and case dismissed where Debtor failed to appear for either the status conference or the contested confirmation hearing and failed to provide any proof that Debtor had mailed payments to the Trustee that had not yet posted on the Trustee records.
- (4302) *In re McMahon*, Case No. 07-62863 (Bankr. E.D. Mi. 2008) - Case properly dismissed where Debtor did not cure the default in payments in a timely manner as required by the Trustee's Notice of Default.

11.171 ECF Deficiency

- (4303) *In re Pfeiffer*, Case No. 09-52554 (Bankr. E.D. Mi. 2009) – Case dismissed where counsel's electronic signature on voluntary petition did not match the ECF login. Deficiency not corrected within time allowed by Court.

11.172 Good Faith – Section 1307

- (4304) *In re Cummings*, 2014 WL 7202109 (Bankr. W.D. Mi. 2014) – “Cause” to dismiss case for lack of good faith is determined under totality of circumstances. Including (i) the debtor's income, (ii) the debtor's living expenses, (iii) the debtor's attorney's fees, (iv) the expected duration of the plan, (v) the sincerity with which the debtor has petitioned for relief, (vi) the debtor's potential for future earning, (vii) special circumstances, such as high medical costs, (viii) the circumstances under which the debt was incurred, and (ix) the amount of payment offered by the debtor as indicative of the debtor's sincerity, and (x) the statutorily mandated policy that bankruptcy provisions be construed liberally in favor of the debtor. Debtors case lacked good faith and would be dismissed. Debtors were retired and had an income other than pension and social security and evidence indicated that debtors had taken steps to reduce expenses. Debtors did not work and did not present any evidence that debtors would be medically unable to work but record was unclear on that point. Plan term proposed minimum 36 months but could run up to 60 months as necessary to complete the plan and while debtors could have proposed 60 month plan in first instance, that standing alone was not sufficient to find bad faith. However, debtors schedules were materially inaccurate including a failure to disclose diamond and emerald ring and diamond and sapphire ring; failed to disclose ongoing payments to debtor's divorce attorney to pursue appeal of domestic support order. Debtors schedules listed more than \$38,000 in credit card debt, much of which was used by debtor to fight with ex-spouse. Domestic Support obligation owed to ex-spouse exceeded \$172,000 was by far the largest creditor. Debtors were not subject to any collection or judicial proceedings other than domestic support hearings that resulted from debtor's failure to comply with prior court orders. Debtors proposed to retain cottage at more than \$10,000 per year for mortgage and operating expenses rather than paying creditor the sums owed under domestic support award. Entire case appeared to be motivated not by desire to restructure debts but by desire to avoid paying ex-spouse. Debtors purchased two new vehicles on eve of filing and proposed to retain both where there was no indication that debtors, both retired, had need for two vehicles. Debtors did not dispute a grossly overstated secured claim allegedly owed to debtors' son, although the parties ultimately admitted that the claim was overstated.
- (4305) *In re Lehr*, 2012 WL 3763925 (Bankr. N.D. Ca. 2012) – Dismissal for bad faith depends on (1) whether debtor misrepresented facts in the petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed the petition in an inequitable manner; (2) the debtor's histories of filings and dismissals; (3) whether the debtor intended to defeat state court litigation; and (4) whether egregious behavior is present. Lack of any one factor is not fatal to conclusion that case was filed in bad faith. Although case was debtor's first filing, record indicated that debtor made many misrepresentations in schedules and statement financial affairs including misrepresenting debtor's residence in effort to claim homestead exemption on property that was not debtor's home; sale of automobile on eve of filing for substantially less than value of car; failure to disclose sale of car in first instance and question as to whether car was actually sold as debtor continued to have use and possession after alleged sale date; debtor failed to disclose lease of storage unit large enough to house contents of 4 bedroom home and leased two other units under false names in effort to conceal existence; schedules listed nominal personal property, none of which would have required a storage facility; failure to disclose security deposit paid to prior landlord which had not been returned; failed to list time share unit in Hawaii; and failed to list jewelry, artwork and wine collection. Single creditor held majority of debt and bankruptcy was effort to evade that obligation. Totality of circumstances indicted egregious conduct designed to unfairly manipulate bankruptcy process.
- (4306) *In re Mehlhose*, 469 BR 684 (Bankr. E.D. Mi. 2012) – Debtors' case dismissed with 2 year bar to re-filing as case filed in bad faith. Almost all of the listed debts had been excepted from discharge in prior bankruptcy case, such that Chapter 7 proceeding could not serve any legitimate purpose and appeared to be continuation of debtor's state and bankruptcy court course of conduct designed solely to hinder, delay and defraud creditors. Debtors' filing under Chapter 7 was a waste of time, and caused undue and unnecessary delay of at least three months and caused the Trust to incur unnecessary expense in filing a motion to dismiss what was then a senseless Chapter 7 case. Debtors lied under oath substantially understating actual income on Schedule I. Given magnitude of difference between stated income and calculated income based on pay stubs, debtors must have known, and in fact did know, that Schedule I was false when debtors signed and certified its accuracy. Had Schedule I been accurate, it would have disclosed substantial income that could have been used to fund Chapter 13 plan. Belated conversion of case to Chapter 13 would not avoid dismissal where petition itself was tainted with fraud and lack of good faith, itself warranting dismissal under Section 1307(c).
- (4307) *Tennessee Bank, NA v. Hansen*, 2012 WL 1156409 (Bankr. E.D. Tn. 2012) – Section 1307 allows court to dismiss case for “cause”, including a lack of good faith in the institution of the case. Cause is based on the totality of circumstances, including sincerity with which

debtor has petitioned for relief; amount of the proposed plan payment; the nature of the debt; how the debt arose; the timing of the petition; whether the debt would be dischargeable in Chapter 7; debtor's motive in filing; how debtor's actions affected creditors; treatment of creditors both before and after filing; and whether debtor has been forthcoming with the Court and creditors. Court can also consider factors pertaining to good faith in the plan confirmation process, including amount of proposed payments; employment history and ability to earn; probable or expected duration of plan; accuracy of debtor's schedules and statements and whether any alleged inaccuracies are an attempt to mislead court; extent of preferential treatment between classes; extent to which secured claims are modified; existence of special circumstances such as inordinate medical expenses; frequency with which debtor sought relief; motivation and sincerity of debtor in seeking relief; administrative burdens of administering case; and whether debtor is abusing the spirit of the Code. Record did not support dismissal. Bank alleged that debtors knew house on which Bank held mortgage was being used to produce methamphetamines and that production so contaminated the entire structure that, after foreclosure, Bank had to gut house and suffered large losses as a result. Bank did not produce evidence that debtors knew of contamination and debtors were not aware of illegal activities which were being undertaken by debtors' grandson. Plan proposed substantial payments and to surrender house with bank holding deficiency claim. There were no irregularities in the schedules or statement of affairs. Damages to house were caused by grandson but debtors had no knowledge of activities or damages and did not cause or intentionally allow damages.

11.173 Failure to Prosecute – Section 1307(c)(1)

- (4308) *DeVito v. Pees*, Case No. 09-8072 (6th Cir. BAP 2010) – Section 1307 permits court to dismiss case for “unreasonable delay that is prejudicial to creditors.” Repeated delays in confirmation process on case that was not complex causing case to remain unconfirmed after more than one year did not warrant dismissal. Although delays may have been unreasonable, delays were not prejudicial where Debtors were making all plan payments and had paid in a total of over \$20,000.00. No creditors appeared at the confirmation hearings to oppose further adjournments. Burden of dismissal would fall disproportionately on creditors who would be deprived of their pro-rata share of funds on hand.
- (4309) *In re Camacho*, Case No. 08-59975 (Bankr. E.D. Mi. 2008) - Confirmation of Chapter 13 Plan denied and case dismissed where Debtor failed to appear for either the status conference or the contested confirmation hearing and failed to provide any proof that Debtor had mailed payments to the Trustee that had not yet posted on the Trustee records.
- (4310) *In re Thornton*, Case No. 08-64703 (Bankr. E.D. Mi. 2009) - Case dismissed at confirmation hearing because Debtor failed to appear at the confirmation hearing and failed to give the Chapter 13 Trustee copies of tax returns making it impossible to complete the § 341 meeting of creditors on two different occasions.

11.174 Nonpayment of Fees or Charges – Section 1307(c)(2)

11.175 Failure to File Plan Timely – Section 1307(c)(3)

11.176 Failure to Commence Payments – Section 1307(c)(4)

11.177 Denial of Confirmation – Section 1307(c)(5)

- (4311) *Miller v. Marshall*, 2014 WL 4674804 (7th Cir. 2014) – Court correctly denied confirmation and dismissed case where plan committed debtor to make only 3 monthly payments of \$200 each while debtor had unsecured debt in excess of \$80,000. Debtor made the three payments provided in the proposed plan but did not make any other payments and did not amend the plan to comply with requirements of Section 1325 notwithstanding extended opportunity to do so.
- (4312) *Williams v. Wayne County Treasurer*, Case No. 14-11844 (E.D. Mi. 2014) – Bankruptcy court correctly dismissed case where, based on court's valuation of debtor's property, debtor could not propose a feasible plan. Plan proposed to value commercial property at \$28,000 and to pay secured claim accordingly. Court determined that property value was actually \$100,000 and the secured claim would be allowed in the full amount in excess of \$80,000 and debtor lacked the income to fund a plan to extent necessary to comply with Section 1322 and Section 1325.
- (4313) *In re Ashby*, 2013 WL 3216137 (Bankr. W.D. Ky. 2013) – Dismissal is warranted where plan cannot be confirmed for failure to provide for payment of priority claims and where debtor has not paid all DSO obligations coming due commencement of the case.
- (4314) *In re Aldridge*, 2011 WL 3889246 (Bankr. W.D. Ohio 2011) – Debtors' case dismissed where debtors could not confirm plan and given debtors' financial condition any further effort to amend would be futile.

11.178 Material Default – Section 1307(c)(6)

- (4315) *Shovlin v. Klaas*, Case No. 15-0802 (W.D. Pa. 2015) – Although court cannot confirm plan that contemplates term beyond 60 months, court is not required to dismiss case merely because case reaches 60 months without completing. Debtor who substantially complied with plan and needed to make only one final payment to achieve discharge will be given additional time. Section 1307 gives court discretion to dismiss for material default, but does not mandate dismissal even for material default where dismissal would be unfair or unduly harsh.
- (4316) *In re Morrison*, 2010 WL 4929604 (Bankr. E.D. Okla. 2010) - Default in payment of post-petition taxes was not cause for conversion to Chapter 7 when debtors were not in material default under confirmed plan and conversion was not in best interest of creditors. Debtors were 25 months into 60-month plan, were current in plan payments and were making progress paying prepetition taxes. Debtors were in default of post-petition taxes and were ordered to pay post-petition taxes, to remain current on post-petition taxes, and to timely file post-petition tax returns while case was pending.

- 11.179 Revocation of Confirmation – Section 1307(c)(7)
- 11.180 Termination of Confirmed Plan – Section 1307(c)(8)
- 11.181 Failure to File Documents – Section 1307(c)(9) and (10)
- 11.182 Failure to Pay Domestic Support – Section 1307(c)(11)
- (4317) *In re Ashby*, 2013 WL 3216137 (Bankr. W.D. Ky. 2013) – Section 1307(c)(11) allows court to dismiss or convert case if debtor fails to pay domestic support obligation that first became payable after the date of filing of the petition. Section 1307(c)(11) is limited to payments that first come due post-petition and does not look to payment of pre-petition arrearages. Debtor's failure to pay post-petition DSO constitutes grounds for dismissal.
- 11.183 Failure to Comply with Orders of Court
- (4318) *In re Cline*, Case No. 11-8075 (6th Cir. BAP 2012) – Court properly dismissed Chapter 13 case based on debtor's willful failure to abide by orders of court. Federal Rule of Bankruptcy Procedure 7037 and 9014 allow court to enter sanctions for failure to comply with discovery order including but not limited to entry of default. UST sought deposition of debtor. Debtor sought protective order which was denied, and court admonished debtor that debtor must appear for the deposition and produce the requested documents. Debtor failed to appear and court entered Order to Show Cause why Court should not grant pending UST Motion to Dismiss. Debtor again failed to appear, and court entered Order granting UST Motion to dismiss by default as sanction. Debtor had no lawful reason to fail to comply with discovery requests. Debtor's actions prejudiced UST in connection with the pending Motion to Dismiss based on alleged lack of good faith of debtor. Debtor had already been warned that failure to cooperate in discovery would result in dismissal, yet debtor continued to fail to comply. Court attempted less drastic sanction by entering Order to Show Cause to give debtor one additional chance to cooperate, but debtor failed to appear, leaving the court with "no alternative" but to dismiss the case by default.
- 11.184 Failure to Pay Post-Petition Taxes
- (4319) *In re Ambrosius*, 2015 WL 4915451 (Bankr. E.D. Wis. 2015) – Failure to pay post-petition income taxes is not basis to dismiss case where confirmed Chapter 13 plan did not require debtor to pay post-petition taxes. Creditor can elect to participate in Plan by filing Claim under Section 1305, or creditor can elect not to participate in Chapter 13 case. By same token, debtor is not required to pay Section 1305 claims that are not filed because Section 1322(b)(6) is equally permissive, not mandatory.
- 11.185 Bar to Refiling
- (4320) *In re Criscuolo*, 2014 WL 1910078 (Bankr. E.D. Va. 2014) – Chapter 13 debtor does not have absolute right to dismiss chapter 13 case where debtor's bad faith conduct evidences intent to abuse letter or spirit of code. Court can condition dismissal and impose sanctions as long as sanctions do not contravene any explicit provision of code. Court can grant debtor's request to voluntarily dismiss but impose bar to future filings consistent with Section 1307.
- (4321) *In re Mehloose*, 469 BR 684 (Bankr. E.D. Mi. 2012) – Section 105 and Court's inherent authority to issue sanctions for bad faith or willful misconduct permits court to dismiss case with bar to later refile. Debtors' case dismissed with 2 year bar to re-filing as case filed in bad faith. Almost all of the listed debts had been excepted from discharge in prior bankruptcy case, such that Chapter 7 proceeding could not serve any legitimate purpose and appeared to be continuation of debtor's state and bankruptcy court course of conduct designed solely to hinder, delay and defraud creditors. Debtors' filing under Chapter 7 was a waste of time, and caused undue and unnecessary delay of at least three months and caused the Trust to incur unnecessary expense in filing a motion to dismiss what was then a senseless Chapter 7 case. Debtors lied under oath substantially understating actual income on Schedule I. Given magnitude of difference between stated income and calculated income based on pay stubs, debtors must have known, and in fact did know, that Schedule I was false when debtors signed and certified its accuracy. Had Schedule I been accurate, it would have disclosed substantial income that could have been used to fund Chapter 13 plan. Belated conversion of case to Chapter 13 would not avoid dismissal where petition itself was tainted with fraud and lack of good faith, itself warranting dismissal under Section 1307(c).
- (4322) *In re Cline*, Case No. 11-8075 (6th Cir. BAP 2012) – Court properly dismissed Chapter 13 case with 2 year bar to refile. Section 109 allows court to prevent abuse of bankruptcy system where debtor files series of meritless petitions to improperly obtain benefit of automatic stay for purposes of staving off state court litigation. Sections 105 and 349 provide independent bases to dismiss a case with an extended bar to refile. Case dismissed with 2 year bar where case was debtor's 4th petition in three years; debtor's prior chapter 13 cases were unsuccessful; Chapter 13 Trustee and creditors objected to confirmation of plan in this case; at least one prior case was filed on eve of foreclosure sale; debtor had not made a mortgage payment in nearly 5 years; and debtor has systematically thwarted the creditor's efforts to pursue non-bankruptcy remedies.
- (4323) *In re Mangual*, 2010 WL 5185392 (Bankr. D. P.R. 2010) – Section 1307 does not provide absolute right to dismissal where dismissal would be bad faith. Section 349 allows court to condition voluntary dismissal where circumstances are such that debtor's petition evidences an intent to abuse the bankruptcy process does not warrant denial of a request to dismiss but dismissal does present opportunity for future bad faith conduct as to creditors Case dismissed with 1 year bar to refile.
- (4324) *In re Mallory*, 2011 WL 338826 (S.D. Tex. 2011) - Dismissal with prejudice to refile for 180 days was appropriate when debtor refused to make payments to Trustee for three months, causing \$19,000 delinquency in payments where debtor did so to prevent distributions to creditor whose standing the debtor contested. Proper remedy for disputed claim is to object to claim, not refusal to abide by plan. Willful nature of plan default warranted strong sanction of dismissal with prejudice. Under section 105(a), the bankruptcy court has the ability

to make any order that was appropriate for enforcing or implementing the court's orders or rules, and the judge could raise the issue *sua sponte*. Section 349(a) would normally limit the judge to dismissing without prejudice, but Debtor's willful refusal to make a plan payment as required by the court and the court's rules constituted basis to dismiss case with prejudice pursuant to 11 U.S.C. Sections 109(g) and 349(a).

- (4325) *In re Rush*, Case No. 10-55737 (Bankr. E.D. Mi. 2010) – Debtor prohibited for filing another petition jointly or individually without an attorney for period of 180 days. Debtor's filing 175 days after entry of order dismissed by Court *sua sponte*.
- (4326) *Cusano v. Gene Klein*, 2010 WL 2593921 (6th Cir. BAP 2010) – Court properly dismissed Chapter 13 Petition barring debtor from re-filing for two years and limiting the effective of the automatic stay should debtor file any future voluntary petition. Debtor and Creditors had been engaged in extensive state court litigation which Debtor lost. Debtor engaged in serial Chapter 13 filings with no attempt to actually reorganize affairs but instead in attempt to hinder and delay Creditor's collection efforts. Debtor's third Chapter filing resulted in Debtor's filing numerous motions and adversary proceedings which produced an Order directing one Defendant to turn over \$2,300 to Debtor but otherwise denying Debtor any relief. Debtor's schedules in third Chapter 13 case were materially inaccurate including failing to list a potential legal malpractice claim on which Debtor filed a complaint in State Court only one month after the petition date and in which Debtor sought damages in excess of \$400,000.00; and failed to disclose receipt of funds that were subject to Creditor's lien. Debtor failed to appear at the first meeting of creditors and failed to produce documents are ordered by the Court including Debtor's prior tax returns. After Creditor filed a Motion to Convert Case to Chapter 7, Debtor sought to voluntarily dismiss. Court concluded that Debtor's Notice of Voluntary Dismissal did not terminate the Court's jurisdiction and that although Debtor had a right to dismiss the Chapter 13, Court could impose conditions and limitations on that dismissal if Debtor acts in bad faith. Serial filings are not necessarily dispositive of bad faith, but serial filings and voluntary dismissals are evidence of bad faith, particularly where the filings occur on the eve of a significant event such as foreclosure or creditor examination in aid of execution. Court has jurisdiction to impose bar to re-filing. Section 109 allows 180 day bar, but does not limit court's ability to impose longer bar if appropriate. Section 105 and Section 349 allow Court to enter such orders as may be appropriate to protect the authority of the court including bars to re-filing and limitations on the automatic stay in future bankruptcy cases.

11.186 Distribution of Funds – Dismissal Before Confirmation

- (4327) *In re Brandon*, Case No. 14-23735 (Bankr. N.D. Md. 2015) – *Harris* does not apply to case dismissed before confirmation. Funds on hand with trustee must be distributed according to Section 1326 which requires payment of any unpaid claim under Section 503(b), with balance of funds to be returned to debtor.
- (4328) *In re Kirk*, 2015 WL 5097741 (Bankr. N.D. Ohio 2015) – *Harris* does not apply to case dismissed before confirmation. Dismissal is governed by Section 349 which states that unless the court orders otherwise, funds revert in the debtor. However, Section 1326 provides that after dismissal, the trustee is to pay allowed administrative expenses and any payments due to creditors, and to refund any remaining amount to debtor. Specific directives in Section 1326 control over general provision of Section 349. Attorney fees awarded for services through dismissal are administrative expenses under Section 503(b) and are to be paid prior to refund to debtor. However, unpaid adequate protection payments are not yet due and owing to creditors as court has not yet entered order directing payments of adequate protection. Although local administrative order required payment of pre-confirmation adequate protection to the Trustee rather than to the creditor, that did not translate into an order awarding creditor adequate protection payments prior to confirmation.
- (4329) *In re Halabu*, 2012 WL 5306128 (Bankr. E.D. Mi. 2012) – Section 1326(a)(2) requires that when case is dismissed before confirmation, funds on hand with the Chapter 13 Trustee must, to the extent there are no payment due to creditors, refund to the debtor after deducting claims allowed under Section 503(b). Payments "due to creditors" would be pre-confirmation adequate protection payments required by Section 1326(a)(1)(B) and (C), which apply only to leases or security interests in personal property. Holder of mortgage on debtor's residence did not have right to adequate protection payments and is not entitled to distribution of funds on hand when case is dismissed pre-confirmation.
- (4330) *Rice v. Ables*, 2013 WL 174189 (Bankr. E.D. Ark. 2013) – Where case is dismissed before confirmation, funds held by Trustee are subject to garnishment to extent not needed to pay administrative claims. Court rejected Trustee's argument that Section 1326 required return of funds to debtor. Upon dismissal, automatic stay terminated and property in possession of trustee ceased to be property of estate. As such, funds were subject to writ of garnishment or attachment issued by State or Federal Court.
- (4331) *In re James*, 2013 WL 1700933 (Bankr. N.D. Ill. 2013) – Funds on hand at dismissal are to be paid first to unpaid administrative expenses including attorney fees, with balance of funds returned to debtor. State court writ of garnishment served on Trustee was invalid as issued in violation of Barton doctrine. Further, distribution of funds is controlled by Section 1326 which mandates that funds go to debtor. State court garnishment was pre-empted by the supremacy clause of the Federal Constitution.

11.187 Distribution of Funds – Dismissal After Confirmation

- (4332) *In re Edwards*, 2015 WL 5601577 (Bankr. S.D. Ill. 2015) – Funds on hand with Trustee when case is dismissed post-confirmation must be returned to the debtor. Under Section 349(b)(3), debtor has vested right in all post-petition property and wages in possession of trustee. Dismissal vacates chapter 13 plan preventing trustee from distributing funds in accordance with plan terms.
- (4333) *Williams v. Marshall* 2014 WL 1457828 (N.D. Ill. 2014) – Undistributed funds in possession of trustee as of date of dismissal must be returned to debtor. Chapter 13 plan no longer exists after dismissal of case and trustee can no longer act "under the plan". Section 349 provides that dismissal of Chapter 13 reverts in debtor all property of the estate and effectively undoes the bankruptcy case to extent possible. Funds on hand with the trustee are property of the estate and must be returned to debtor.

- (4334) *In re Tejchma*, Case No. 09-9138 (Bankr. W.D. Mi. 2013) – In Chapter 12 case, court held that under Section 349(b), Court has discretion to order that funds on hand at dismissal be disbursed to confirmed plan. Trustee is bound to act in accordance with confirmed plan and neither debtors nor creditors nor any other party in interest may assert any claims or rights inconsistent with plan. Although debtor has sought dismissal and all parties agree that dismissal is warranted, case has not yet been dismissed and plan remains in effect until dismissal. Even after dismissal, that does not necessarily vacate plan or unwind actions taken while plan was in effect. While dismissal would not necessarily unwind the plan or require disbursements other than in accordance with confirmed plan, court also determined that cause existed to prevent funds from reverting to debtor at dismissal. Requiring funds to be disbursed to creditors was consistent with the plan, on which creditors relied to their detriment, and disbursement to creditors would be in the best interests of creditors.
- (4335) *In re Hamilton*, 2013 WL 2151457 (Bankr. M.D. Tn. 2013) – Funds on hand with Trustee at dismissal of case after confirmation of Plan must be used to pay any outstanding administrative costs including any previously awarded attorney fees, and any remaining balance must be returned to the debtor. Creditors have no right to payment by the Trustee post-dismissal even from funds received by the trustee pre-dismissal.
- (4336) *In re Michael*, 699 F.3d 305 (3d Cir. 2012) – Upon conversion or dismissal, Chapter 13 estate terminates. All funds on hand as of dismissal or conversion must be returned to debtor.
- (4337) *In re Strauder*, 2011 WL 4597377 (Bankr. N.D. Ohio 2011) – Upon dismissal of case post-confirmation, funds received through dismissal date must be distributed by trustee in accordance with plan. Debtor's request that funds be returned rather than distributed to creditors as inconsistent with the applicable statutes and the Confirmation Order.
- (4338) *In re Hufford*, 460 BR 172 (Bankr. N.D. Ohio 2011) – At dismissal, normal rules for distribution apply to funds received by trustee through dismissal date.
- (4339) *In re Marcola*, 2011 WL 7628980 (Bankr. E.D. Mi. 2011) – Generally speaking, upon dismissal of Chapter 13 case, funds held by Chapter 13 Trustee are returned to the Debtor. If administrative claims exist, such as fees for debtor's counsel, those expenses are paid and any remaining funds are paid to the debtors. However, where obligation exists to Internal Revenue Service based on debtor's intentional diversion of funds, exceptional circumstances exist to support exception to rule. Funds on hand ordered to be paid to IRS without prejudice to debtor's counsel seeking to collect fees directly from debtors after dismissal.

11.188 Garnishment of Funds in Possession of Trustee

- (4340) *In re James*, 2013 WL 1700933 (Bankr. N.D. Ill. 2013) – State court writ of garnishment served on Trustee was invalid as issued in violation of Barton doctrine where creditor did not seek bankruptcy court permission before applying to state court for writ of garnishment directed to Trustee. Further, distribution of funds is controlled by Section 1326 which mandates that funds go to debtor. State court garnishment was pre-empted by the supremacy clause of the Federal Constitution.

N. Conversion

11.189 On Request of Debtor

11.190 On Request of Chapter 13 Trustee

- (4341) *In re Pantelides*, 2014 WL 690264 (Bankr. N.D. Ohio 2014) – Trustee's motion to convert granted. After case filed, debtor discovered that debtor owned interest in mother's real estate. Interest was not disclosed until more than 2 years after confirmation of the plan. Court rejected debtor's argument that he was not aware of the recorded deed and therefore did not "accept" the deed. Recorded deed constitutes prima facie evidence of acceptance of deed and conveyance of title without any formal or informal acceptance. Presumption of delivery can be overcome only by evidence that recipient did know of and expressly rejected transfer.
- (4342) *In re Carter*, 2013 WL 4039039 (Bankr. E.D. Ky. 2013) – In considering whether cause exists under Section 1307 to convert case to Chapter 7 for "cause", Court must consider totality of circumstances and whether conversion is in best interests of creditors. Factors include whether debtor has been forthcoming with the court and creditors, debtor's income; debtor's living expenses; debtor's attorney's fees; expected duration of the chapter 13 plan; sincerity with which the debtor has petitioned for relief under chapter 13; debtor's potential for future earning; special circumstances, such as unusually high medical expenses; frequency with which the debtor has sought relief before in bankruptcy; circumstances under which the debt was incurred; amount of payment offered by debtor as indicative of the debtor's sincerity to repay the debt; burden which administration would place on the trustee; and statutorily-mandated policy that bankruptcy provisions be construed liberally. Trustee failed to demonstrate cause to convert case based solely on debtor's failure to disclose personal injury action in schedules, SOFA or at Section 341 meeting. While non-disclosure is a serious offense, debtor's explanation was sufficient to indicate that non-disclosure was inadvertent where debtor had consulted with personal injury attorney but had not filed suit, nor had attorney determined that debtor had viable cause of action, as of date of commencement of case. Further, upon learning that debtor may recover money in the action, debtor promptly advised the Chapter 13 Trustee of the proposed settlement indicating lack of bad faith or attempt to wrongfully conceal recovery at expense of creditors. Creditors also would do better in Chapter 13 as debtor voluntarily agreed to remit proceeds to Chapter 13 trustee and to give up exemption to which debtor would have been entitled, causing recovery to creditors to be greater than would have been accomplished in Chapter 7.

11.191 Recovery of Funds by Trustee

- (4343) *Gallagher v. Dockery*, Case No. 13-1368 (9th Cir. BAP 2014) – Chapter 13 Trustee loses ability to recover funds paid in error after conversion of case to Chapter 7. After case was converted, Chapter 13 Trustee filed final report indicating the trustee would refund \$8,000 to debtor, and issued a check to the debtors for the refund. When no party lodged an objection, the Trustee issued a declaration that there had been no objection to the final report and the court issued an order discharging the Chapter 13 trustee and exonerating her bond. The Trustee later determined that debtor's counsel's fees which had been awarded by the court had not been paid, and the Chapter 13 Trustee began efforts to recover amount erroneously refunded to debtors rather than being paid to counsel. Trustee would not use Section 542 to require turnover by debtors. Upon conversion to Chapter 7, any post-petition earnings or money in the hands of the Chapter 13 Trustee did not constitute property of Chapter 7 estate but represented proceeds of post-petition earnings and wages. Where property is not property of estate, there is no basis under Section 542 to compel turnover. The Chapter 13 Trustee, upon conversion, was required to refund to Debtor all funds on hand pursuant to Section 1326(a)(2) and Section 348(f)(1)(A) free and clear of claims of creditors including administrative claims that had been allowed but not paid. Trustee could not use Section 105 to recover funds because any relief under Section 105 would directly contravene specific sections of the Code applicable to funds upon conversion. Section 105 does not permit court to do anything inconsistent with limitations of mandates of Code.

11.192 Distribution of Funds – Conversion Before Confirmation

- (4344) *In re Spraggins*, 2015WL 5227836 (Bankr. D.N.J. 2015) – Funds on hand in case converted prior to confirmation must be returned to debtor. Trustee lacks authority to pay attorney fees, administrative expenses, or creditors from funds on hand as of moment of conversion.
- (4345) *In re Beckman*, 2015 WL 5297726 (Bankr. S.D. Ca. 2015) – In case converted prior to confirmation, Trustee lacks authority to distribute funds on hand as of conversion. All post-petition payments must be refunded to Debtor, adopting *In re Beauregard*, 533 BR 826 (Bankr. D.N. Mex. 2015). Trustee cannot pay attorney fees, other administrative expenses, or any payments to creditors.
- (4346) *In re Brandon*, Case no. 14-23735 (Bankr. D. Md. 2015) – In case converted prior to confirmation, Trustee has lingering duty to complete administration of case including compliance with provision of Section 1326 that requires payment of attorney fees and other administrative expenses prior to refunding balance to debtor, rejecting court's holding in *In re Beauregard*, 533 BR 826 (Bankr. D.N. Mex. 2015).
- (4347) *In re Zulinsky*, Case no. 15-47315 (Bankr. E.D. Mi. 2015) – Funds on hand with chapter 13 trustee when case converts prior to confirmation must be refunded to debtor notwithstanding separate order of court directing trustee to hold funds for payment of attorney fees. Trustee lacks authority to deal with funds in any way other than to refund to debtor.
- (4348) *In re Sowell*, 2015 WL 4718588 (Bankr. D. Mn. 2015) – Funds on hand with chapter 13 trustee when case converts prior to confirmation must be refunded to debtor without payment of administrative expenses or attorney fees. Supreme Court decision in *Harris* mandated change in local practice that allowed fees to be paid prior to refund to debtor. It would be inappropriate for any order regarding a fee application filed after conversion to contain a provision directing Chapter 13 Trustee to pay fees.
- (4349) *In re Ulmer*, 2015 WL 3955258 (Bankr. W.D. La. 2015) – Funds on hand with chapter 13 trustee when case converts must be refunded to debtor. Attorney would not be permitted to seek payment of pre-confirmation attorney fees where debtor was considering conversion of case. Request for pre-authorization and payment of administrative expense in anticipation of conversion is prohibited by *Harris*.
- (4350) *In re Beauregard*, 533 BR 826 (Bankr. D.N. Mex. 2015) – Funds on hand with Chapter 13 Trustee when case is converted prior to confirmation must be refunded to debtor without offset for payment of administrative expenses. *Harris* changed common practice under which funds would be held to permit counsel to file fee application or to pay fees prior to returning undistributed funds to debtor.
- (4351) *In re Riviera*, 2013 WL 5661477 (Bankr. D.P.R. 2013) – Chapter 13 Trustee must refund to debtor all proceeds received by trustee, after payment of administrative expenses, when case is converted to Chapter 7 prior to confirmation of plan.
- (4352) *Gallagher v. Dockery*, Case No. 13-1368 (9th Cir. BAP 2014) – Upon conversion, Chapter 13 Trustee loses authority to deal with funds on hand and funds must be immediately returned to debtor. Neither Section 1326 nor Section 348 authorized trustee to administer funds or to disburse funds other than to debtor, except as necessary to pay administrative fees awarded prior to date of conversion. Where attorneys did not obtain fee order until after date of conversion, attorneys could not compel trustee to pay fee order from funds on hand as of date of conversion and trustee lacked statutory authority to do so.

11.193 Distribution of Funds – Conversion After Confirmation

- (4353) *In re Spraggins*, 2015WL 5227836 (Bankr. D.N.J. 2015) – Funds on hand in case converted after confirmation must be returned to debtor. Trustee lacks authority to pay attorney fees that were previously awarded but are unpaid as of moment of conversion.
- (4354) *In re Beauregard*, 533 BR 826 (Bankr. D.N. Mex. 2015) – Funds on hand with Chapter 13 Trustee when case is converted after confirmation must be refunded to debtor without offset for payment of administrative expenses. Upon conversion, trustee becomes former trustee and lacks any authority to distribute funds according to confirmed plan.
- (4355) *Harris v. Viegelahn*, 135 S.Ct. 1829 (2015) – Funds in possession of Chapter 13 Trustee when case is converted must be returned to debtor and are not available for payment to creditors. After conversion, trustee becomes former trustee whose services are terminated and trustee no longer has authority to act under Chapter 13.
- (4356) *In re Markham*, 2013 WL 6903753 (Bankr. D. Mass. 2013) – Funds on hand with Trustee must be disbursed pursuant to confirmed plan upon conversion of case to Chapter 7. Debtor has no interest in undisbursed plan payments derived from debtor's post-petition income

that are in the possession of the Trustee.

- (4357) *In re Michael*, 2012 WL 5278411 (3d Cir 2012) – Funds received under confirmed plan in possession of Trustee on date of conversion must be returned to debtor and not delivered either to creditors or Chapter 7 trustee, even if funds were received by Trustee as plan payments prior to conversion of case, unless conversion was done in bad faith under Section 348(f)(2). Conversion is backdated to petition date effectively revoking confirmation of plan and leaving disbursement of funds as if case had not been confirmed. Section 1326 requires funds in unconfirmed case to be refunded to debtor after payment of allowed administrative expenses. Chapter 7 trustee has no claim to the funds.
- (4358) *In re DeHart*, 446 BR 665 (D.M.D. Pa. 2011) – Trustee loses authority to distribute funds received under confirmed plan when case is converted. Funds on hand must be returned to debtor and not delivered either to creditors or Chapter 7 trustee, even if funds were received by Trustee as plan payments prior to conversion of case.

11.194 Distribution of Funds – Assignment of Proceeds

- (4359) *Harris v. Viegelahn*, 135 S.Ct. 1829 (2015) – Funds in possession of Chapter 13 Trustee when case is converted must be returned to debtor and are not available for payment to creditors. After conversion, trustee becomes former trustee whose services are terminated and trustee no longer has authority to act under Chapter 13. “Assignment” of funds attached to notice of conversion did not allow Trustee to pay attorney fees as Trustee no longer had any authority over funds or property of estate on conversion.

O. Borrowing Money Post-Petition

11.195 Motions Generally

- (4360) *In re Reinhart*, Case No. 10-21696 (Bankr. E.D. Mi. 2012) - Provisions of confirmed Chapter 13 Plan require court authorization to incur debt post-confirmation. Trustee has supervisory function to cause debtors to think twice before requesting new debt which may require the Trustee to deny that request.

11.196 Notice

- (4361) *In re Reinhart*, Case No. 10-21696 (Bankr. E.D. Mi. 2012) – Debtor’s request to incur debt post-petition must be presented to Chapter 13 Trustee. If trustee concurs, no further notice to creditors is required.

11.197 Burden of Proof

- (4362) *In re Connelly*, 2011 WL 1515413 (Bankr. W.D. Ky. 2011) – Motion to Incur Debt to purchase residence denied where debtors provided no information as to the closing costs, including the amount, or the source of payment for the closing costs; failed to provide a copy of the contract; and debtors borrowed against their 401K for the down payment without any authority from the Court and in violation of the provisions of the confirmation order. Debtors did not state how much they borrowed, or what their repayment obligation is on the 401K loan without which the Court could not ascertain whether the debtors can afford to borrow the money requested, cannot know if they can afford to pay the closing costs, if any, and cannot know if the debtors can afford to make the 401K loan payments used to make the down payment.

XII. Adversary Proceedings

A. Jurisdiction

12.1 Dismissal of Bankruptcy Case

- (4363) *In re Bankston*, 2015 WL 6126440 (Bankr. E.D. Tn. 2015) – Dismissal of main case ordinarily results in loss of jurisdiction over all aspects of case including pending contested matters. Court can retain jurisdiction if doing so is consistent with principals of pendant jurisdiction where retention is for purpose of vindicating court’s own authority and enforcement of its own rules, such as applications for attorney fees and contempt for violation of stay. Factors to be considered include (1) judicial economy; (2) fairness; (3) convenience; and (4) comity. Court would retain jurisdiction to consider alleged disclosure of personally identifiable information as issues involve Bankruptcy Code Section 107 and Rule 9037, which relate to court’s power to prevent court record from being misused to facilitate identity theft or other unlawful harm to debtor. Judicial economy will be served as matter has been fully briefed and resolution will address all issues, and will assist counsel for other debtors with court’s understanding of powers under Section 107. Comity was not issue as there is no related state court case to which bankruptcy court can or should defer.
- (4364) *Taleb v. Kramer*, Case No. 15-4745 (Bankr. E.D. Mi. 2015) – Dismissal of main case requires dismissal of adversary proceeding. On dismissal of main case, there is no longer any case within meaning of 28 USC 1334 or 157, and adversary cannot be considered to arise in or arise under or be related to case under Title 11. Court loses jurisdiction on dismissal of main case, mandating dismissal of adversary proceeding.
- (4365) *Michigan unemployment Insurance Agency v. Edwards*, Case No. 15-4496 (Bankr. E.D. Mi. 2015) – Dismissal of main case requires dismissal of adversary proceeding. On dismissal of main case, there is no longer any case within meaning of 28 USC 1334 or 157, and adversary cannot be considered to arise in or arise under or be related to case under Title 11. Court loses jurisdiction on dismissal of main case, mandating dismissal of adversary proceeding.
- (4366) *Armstrong v. Internal Revenue Service*, Case No. 11-1554 (9th Cir. BAP 2013) – Bankruptcy court does not automatically lose jurisdiction

over adversary proceeding when underlying bankruptcy case is dismissed. Bankruptcy court can retain jurisdiction based on economy, convenience, fairness and comity. Although bankruptcy court assumed lack of jurisdiction, dismissal was nonetheless proper where court's decision not to retain jurisdiction was supported in the record. Adversary proceeding had been pending only 6 weeks when case was dismissed; no discovery had been taken; service of process on the defendants was questionable; no dispositive motions had been filed, and no trial had been commenced. Convenience of parties was not factor as adversary had been pending only 6 weeks, and debtor could have filed new bankruptcy case and re-filed adversary proceeding, which is of minimal inconvenience insufficient to warrant retention of jurisdiction. No party was prejudiced by dismissal and comity weighed in favor of dismissal. Adversary proceeding did not raise any issues of bankruptcy law. Adversary was based on federal tax law and there was no indication that bankruptcy court had specialized knowledge or ability to adjudicate issues.

- (4367) *In re Rodriguez*, 2012 WL 589553 (Bankr. D.N.J. 2012) – Dismissal of underlying bankruptcy case does not automatically deprive bankruptcy court of jurisdiction over adversary proceeding. Court retains jurisdiction to consider actions that allegedly violated stay. Dismissal of case does not automatically validate actions taken in violation of stay.
- (4368) *In re Wcislak*, 446 BR 827 (Bankr. N.D. Ohio 2011) – Motion for damages for alleged violation of automatic stay dismissed following dismissal of underlying Chapter 13 case. Section 349 does not deprive Court of ability to proceed with motion after dismissal where there remains a basis for the court to adjudicate matter. Whether court retains jurisdiction is entirely discretionary with Court and is not mandatory regardless of basis of underlying action. Damages for stay violations are of the type of action for which retention of jurisdiction may be particularly appropriate. Court declined to retain jurisdiction where alleged stay violation was minor and technical, involving sending of only one letter; and debtor's case was dismissed for willful failure to abide by orders of the Court including inability to formulate a plan, failure to make plan payments, and non-disclosure of large tax refunds.
- (4369) *Clarke v. Shofner*, 2011 WL 3511524 (Bankr. E.D. Tn. 2011) – Adversary proceeding is normally dismissed when underlying case is dismissed, as bankruptcy court jurisdiction depends on proceeding's nexus to the underlying bankruptcy case. However, dismissal is not mandatory and court can retain jurisdiction for good cause. Court should consider judicial economy; whether the court has previously ruled on significant issues; whether dismissal would be unfair to one party; and general deference to state court to determine state court causes of action. Adversary proceeding to determine validity and priority of competing liens would be dismissed where court had not ruled on any significant issues, parties had not engaged in any meaningful discovery, and issues presented were entirely state law based.
- (4370) *Brown v. First State Bank Mortgage Company*, Case No. 10-4004 (Bankr. E.D. Mi. 2010) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case was dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 157(b)(1).
- (4371) *Taunt v. Jamil*, Case No. 09-6571 (Bankr. E.D. Mi. 2010) – Plaintiff cannot voluntarily dismiss adversary proceeding merely by Notice of Voluntary Dismissal once Defendant has filed an Answer. Federal Rule of Civil Procedure 41(a) requires either a stipulation of dismissal or an Order of Dismissal.
- (4372) *Taunt v. Shaytoa*, Case No. 09-6547 (Bankr. E.D. Mi. 2010) – Plaintiff cannot voluntarily dismiss adversary proceeding merely by Notice of Voluntary Dismissal once Defendant has filed an Answer. Federal Rule of Civil Procedure 41(a) requires either a stipulation of dismissal or an Order of Dismissal.
- (4373) *Dye-Shelman v. Wells Fargo Bank*, Adv. No. 08-4902 (Bankr. E.D. Mi. 2008) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case was dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 157(b)(1).
- (4374) *Huffman v. Chase Home Finance, LLC*, Adv. No. 09-4155 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case is dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).
- (4375) *Nathan v. Hendricks*, Adv. No. 08-4273 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case is dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).
- (4376) *Kyewski v. Countrywide Home Loans*, Adv. No. 09-4292 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case is dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).
- (4377) *Daniel v. LaSalle Bank*, Adv. No. 08-5276 (Bankr. E.D. Mi. 2008) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 157(b)(1).
- (4378) *Huston v. First Mariner Bank*, Adv. No. 09-4178 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case is dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).
- (4379) *McDermott v. Harajli*, Adv. No. 09-5031 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case was dismissed after the adversary complaint was filed. Dismissal of the underlying case resulted in no case pending under Title 11, depriving court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

12.2 Relationship of Adversary to Bankruptcy Case

- (4380) *French v. Smithey*, 2012 WL 3958060 (Bankr. N.D. Ohio 2012) – Bankruptcy court lost jurisdiction to hear fraudulent transfer action brought by Chapter 7 trustee under state fraudulent transfer law. After commencement of adversary, Trustee sold and transferred all of the Trustee’s right and interest in the alleged fraudulent transfer litigation to non-debtor parties. Plaintiffs did not seek to prosecute claims on behalf of estate and if plaintiffs prevailed, they, not the estate, would receive the benefit. Plaintiffs would not be prejudiced as plaintiffs could bring action in state court. Outcome of litigation could not conceivably affect either the discharge or the payment of claims and for all intents and purposes constituted a dispute solely between two parties. Adversary case dismissed.
- (4381) *Church Joint Venture v. Blasingame*, 2012 WL 2064417 (Bankr. W.D. Tn. 2012) – Where court has jurisdiction in first instance, court can later lose jurisdiction where events occur such that jurisdiction would not have existed in the first instance had those events occurred before adversary complaint had been filed. Later loss of jurisdiction does not eliminate power of federal court to consider and rule on matter. However, where jurisdiction originally resulted from ancillary pendent or “supplemental” to a federal claim pursuant to 28 USC Section 1367(a), court should and is allowed to relinquish jurisdiction over the supplemental claim if the federal claim falls out of the case before the judgment. As a general rule, court would not retain jurisdiction over “related to” adversary proceeding where underlying bankruptcy case is dismissed. The Chapter 7 Trustee brought actions to recover avoidable transfers pursuant to State law, over which the Court had initial jurisdiction as arising under Title 11 as part of collection of property of estate. While case was pending, Trustee sold cause of action to third party following which the Trustee ceased to have any interest in the action. Court concluded that sale of asset resulted in loss of jurisdiction as there was no longer any pending federal cause of action and state causes of action were “supplemental” to the original federal jurisdiction without any independent bases for asserting federal jurisdiction. Court deferred on consideration as to whether to retain case notwithstanding loss of federal jurisdiction pending further briefing, although court leaned strongly toward relinquishing case to state court absent showing of prejudice to parties.
- (4382) *Meoli v. Huntington National Bank*, 2011 WL 3610050 (Bankr. W.D. Mi. 2011) – Bankruptcy Court lacks jurisdiction to enter final judgment on contract and tort claims absent consent of parties. Only Article III Court can enter final judgment on claims based on state law, even where claims are raised as part of claims resolution process and the party against whom recovery is sought has filed proof of claim.
- (4383) *Gilchrist v. Bank of America National Association*, Adv. No. 09-4411 (Bankr. E.D. Mi. 2009) – Court lost jurisdiction over adversary proceeding when Bankruptcy Trustee abandoned underlying causes of action. After abandonment, case no longer involved property of the estate and did not raise issues created by Bankruptcy Code, as it asserts only state law claims. No cause of action remained that would have effect on bankruptcy estate. As such, adversary proceeding no longer arose under Title 11; no longer arose in a case under Title 11; and no longer was related to case under Title 11 as required by 28 USC Sections 1134, 157(a) and 157(b)(1).
- (4384) *Doucet v. Drydock Coal Co.*, 2009 WL 1687775 (6th Cir. BAP 2009) – Trustee has standing and Court has jurisdiction over action brought by Trustee concerning administration of estate, determination of validity, priority or extent of liens, and other proceedings affecting liquidation of estate. Debtor’s argument that restrictive legend on stock prevented Trustee from obtaining an interest in stock does not affect standing of Trustee to bring action to determine whether stock is property of estate.
- (4385) *Lewis v. McClatchey*, 2009 WL 1372945 (Bankr. S.D. Ohio 2009) – Bankruptcy Court lacks jurisdiction over litigation between two parties neither of whom are the debtor and that does not involve property of estate.
- (4386) *Allard v. Coenen*, 419 BR 21 (Bankr. E.D. Mi. 2009) – Chapter 7 Trustee had standing to maintain adversary proceeding arising out of alleged violations of ERISA. Although cause of action under ERISA belongs to the Pension Plan and not to the Corporation itself, the Chapter 7 Trustee overseeing the liquidation of the Debtor-Corporation could bring the adversary and the Court would have jurisdiction as “related to” the administration of the bankruptcy estate. BAPCPA expressly amended Section 704 to require that where the Debtor was an administrator of an ERISA plan, the Chapter 7 Trustee must perform the obligations of a plan administrator. Although Congress did not amend the provisions of 28 USC Sections 1334 and 157 which control the Court’s jurisdiction, the Court concluded that dismissal of this case was not required notwithstanding that the cause of action alleged was entirely non-bankruptcy in origin and the “proper plaintiff” – the pension plan – was not a debtor in bankruptcy. The claims being pursued were not property of the bankruptcy estate and none of the recovery would be property of the estate or benefit creditors of the debtor. The actions would be non-core proceedings even though Section 704(a)(11) would appear to require the Trustee to pursue those actions. However, the Court would have “related to” jurisdiction as the outcome of the adversary proceeding could conceivably have an effect on the estate being administered in bankruptcy where the Trustee reasonably advanced, and in the future likely would reasonably advance, funds of the bankruptcy estate to pay (a) attorney fees, accountant fees, and expenses for performing the Trustee’s duty to administer the ERISA Plan, not including the prosecution of this adversary proceeding; and (b) attorney fees, expert witness fees, and other litigation expenses relating to this adversary proceeding; and to the extent the Trustee is successful in recovering on these claims for the ERISA Plan, the Plan will reimburse the bankruptcy estate for the fees and expenses the estate has advanced which would ultimately affect distribution to creditors of the bankruptcy estate by the extent to which the ERISA Plan reimburses the bankruptcy estate for the fees and expenses the estate has paid to enable the Trustee to administer the Plan, including prosecution of this adversary proceeding.

12.3 “Arising In”, “Arising Under” and “Related to”

- (4387) *Salamy v. Compo*, 2015 WL 6434135 (Bankr. E.D. Mi. 2015) – Court lacked jurisdiction in action against two non-debtor entities where actions were based entirely on state law claims and did not arise in or under Code. Action was not related to bankruptcy where outcome could have no conceivable impact on bankruptcy estate. Action alleged that non-debtor LLC illegally kept commissions and referral fees amounting to conversion but other than fact that debtor was member of LLC, there was no nexus between causes of action and bankruptcy

court. Plaintiff sought only money judgment against non-debtor and entry of judgment would have an effect on bankruptcy estate.

- (4388) *In re CS Dip, LLC*, 2015 WL 5920892 (Bankr. M.D. Tn. 2015) – In considering settlement that involves injunction against actions by third parties, court must first determine whether it has jurisdiction to enjoin claims that would fall within injunction. If so, court must then determine if it has authority to enter injunction. Third, court must closely review scope of bar order. Court has “related to” jurisdiction where action could conceivably have any effect on estate being administered, or could alter debtor’s rights, liabilities, options or freedom of action. “Related to” jurisdiction requires some nexus between the related civil proceeding and the title 11 case, such as a dispute over property of estate or because outcome of dispute will have impact on estate. Claims against debtor’s insurance company were part of bankruptcy estate and became assets of liquidating trust through confirmed plan such that resolution of dispute with insurance company regarding scope of insurance liability was within core jurisdiction of bankruptcy court. However, proposed settlement that would enjoin all actions against insurer where injured party may have independent state law claims directly against insurer for “bad faith” refusal to settle, which would entail only rights of insurer and injured party and would not have impact on estate or on post-confirmation assets. Court otherwise has constitutional jurisdiction to review settlement as rights of third parties being settled are incidental to valuation and liquidation of asset of estate and incidental to adjustment of claims against debtor. Bar order must be carefully tailored to extinguish only claims by non-settling defendants against settling defendants where injury to non-settling defendants is liability to underlying plaintiffs, for damages such as indemnity or contribution, such that damages are measured by defendant’s liability to plaintiff. There is no legal basis to bar claims where the injured party has independent damages beyond those of any liability of settling defendants to plaintiff. Settlement agreement was overbroad as proposed bar order would bar actions directly against insurer for bad faith or violation of consumer protection statutes by injured third parties which are damages not measured by claims against Debtor directly.
- (4389) *Hennessy v. Muirfield Association, Inc.*, 2015 WL 5704358 (Bankr. S.D. Ohio 2015) – While jurisdictional grant under 28 USC Section 1334 is broad, it is not unlimited. Congress granted comprehensive jurisdiction to bankruptcy courts so that courts can deal efficiently and expeditiously with all matters connected with bankruptcy case, but there must be some nexus between a civil proceeding and the Bankruptcy case itself such that outcome could conceivably have an effect on the bankruptcy case being administered, or affects the debtor’s rights, liabilities, options or freedom of action and which impacts on handling and administration of case. Cross claims between debtor’s mortgage company and debtor’s homeowners association lacked any connection to bankruptcy case. Outcome would have no impact on bankruptcy as neither HOA nor lender filed claims in Chapter 7 estate and neither party will participate in distributions from estate. Even if claims had been filed, outcome of dispute would only lead to substitution of one claimant for the other, without altering the debtor’s underlying liability as a whole. Fact that outcome could, theoretically, lead to HOA imposing lien on debtor’s property was too tenuous and in any event would not impact administration of Chapter 7 case.
- (4390) *Gardner v. Potestivo & Associates*, Case no. 15-4355 (Bankr. E.D. Mi. 2015) – Bankruptcy court has very limited jurisdiction, encompassing only actions that arise in, arise under or are related to a case under Title 11. Court lacked jurisdiction to hear adversary brought by debtor against lender and law firm for alleged wrongful foreclosure where Court had already determined that debtor did not have interest in property and only owner of property, debtor’s husband, was not party to the bankruptcy case. Complaint did not arise in or under Code and as outcome of case could not have any conceivable effect on debtor’s estate or case administration, court lacked related to jurisdiction.
- (4391) *CH Holding Co. v. Miller Parking Co.*, 2015 WL 3868648 (E.D. Mi. 2015) – “Related to” jurisdiction is broad and encompasses any civil action that could conceivably have impact on bankruptcy estate, or it outcome could alter debtor’s rights, liabilities, options or freedom of action or in any way impacts on handling and administration of estate. Mere fact that there may be common issues of fact between civil proceeding and bankruptcy is not sufficient, and there must be some nexus between the civil proceeding and the bankruptcy. Action alleging that principal of debtor wrongfully removed funds from debtor for payment of personal attorney fees was “related to” bankruptcy case. Issue is whether principal converted funds belonging to debtor in which case the funds would remain those of the debtor and the estate would have a claim against either the principal that allegedly wrongfully removed the funds or the recipient of those funds. Although complaint allegedly sought recovery only against principal, effect of action would be to allow creditor to jump ahead of other creditors and seize funds that were property of the debtor.
- (4392) *National Union Fire Insurance Company v. CMH Liquidating Trust*, 2015 WL 3843408 (E.D. Mi. 2015) – Core proceedings are those that involve a cause of action created or determined by a statutory provision of title 11 or could arise only in bankruptcy cases. If the proceeding does not invoke a substantive right created by federal bankruptcy law and is one that could exist outside of the bankruptcy, then it is not a core proceeding. Action by Trustee was state law breach of contract case. Although defendant intended to assert provisions of bankruptcy code as defense, assertion of defenses does not convert non-core proceeding into core proceeding.
- (4393) *U.S. v. Cordes*, 2015 WL 3775575 (E.D. Mi. 2015) – Actions to determine dischargeability of tax liabilities and for damages for alleged violations of the automatic stay by IRS necessarily turned on bankruptcy code provisions regarding discharge and bankruptcy definition of “property of the estate” and as such were core proceedings, arising in a bankruptcy case. Court would not withdraw reference over core proceedings. Court would withdraw reference over two non-core causes of action, one to determine whether related entity was “alter ego” of debtor and one for determination of IRS as secured creditor, as each of these turned on state and non-bankruptcy federal statutes.
- (4394) *Schwab Industries, Inc. v. Huntington National Bank*, 2015 WL 2412317 (N.D. Ohio 2015) – Action is “related to” Bankruptcy if outcome of proceeding could conceivably have any effect on estate being administered. Whether Bankruptcy Court has “related to” jurisdiction is inherently factual question regarding relationship between action and bankruptcy case. Action alleging legal malpractice by debtor’s counsel during bankruptcy case is inherently a core proceeding that arises in or is related to bankruptcy.
- (4395) *Scott v. Bank of America*, 2015 WL 643334 (Bankr. W.D. Mi. 2015) – To extent cause of action arose post-petition, it is not property of estate. Bankruptcy Court can exercise jurisdiction only if outcome of lawsuit could conceivably have impact on case administration.

Although outcome would have impact on Chapter 7 debtor personally, litigation would not impact Chapter 7 estate and lacked any nexus to the estate or to the administration of the estate. As such, court lacked subject matter jurisdiction over cause of action.

- (4396) *Rachmale v. Conese*, 2014 WL 4129537 (Bankr. E.D. Mi. 2014) – Action is “related to” bankruptcy if outcome could conceivably have any effect on bankruptcy estate. Suit by shareholder alleging that directors of bankruptcy company attempted to wrongfully “squeeze him out” could affect bankruptcy case as directors who were defendant had indemnification claims against company.
- (4397) *File v. Boersen Farms, Inc.*, 2014 WL 1017041 (Bankr. W.D. Mi. 2014) – Bankruptcy court has jurisdiction to interpret and enforce its own orders. Court had jurisdiction to determine scope of Order allowing sale and assumption of leases to determine whether particular lease was included in leases purchased and assumed. Order allowing sale and assumption of leases under Section 365 was core proceeding and court had jurisdiction to enter orders as part of continuation of that core matter. However, having determined that purchaser did assume lease, dispute became one between non-debtor lessor and non-debtor lessee and court could not exercise jurisdiction to determine whether lessee had subsequently breached lease, as issue was one solely of state law between two non-debtor entities. Issues lacked sufficient nexus to bankruptcy case to warrant exercise of “related to” jurisdiction where outcome would not have any impact on bankruptcy estate or debtor’s liabilities, rights or property.
- (4398) *Murk’s Village Markets, Inc. v. Bank of America*, Case No. 13-80141 (Bankr. W.D. Mi. 2013) – State law tort claims brought by debtor’s employer against debtor’s creditors for recovery of embezzled funds did not arise in a bankruptcy case or arise under the case, where all of the operative facts including the embezzlement, payment and loss, all occurred pre-petition. Actions were not related to the bankruptcy case as the outcome of the actions would not have any conceivable impact on the case. To extent Employer was successful in recovering funds from creditors, funds would be returned to employer and not to estate. Other than fact that debtor was the embezzler, there was no connection between state law claims and bankruptcy estate and outcome of actions would have no impact on bankruptcy case or estate. However, jurisdictional allegations supported separate basis for diversity jurisdiction. Court recommended that district court withdraw reference and exercise independent basis for jurisdiction over action, rather than dismissing action and requiring plaintiff to institute new proceeding.
- (4399) *Paradise Productions, LLC v. Chalin*, 2013 WL 1969310 (Bankr. E.D. Ky. 2013) – Action by debtor for specific performance of real estate sales contract entered into pre-petition is “related to” bankruptcy. Outcome of sale would produce assets available for distribution to creditors and would affect administration of estate.
- (4400) *CPC Livestock, LLC v. Fifth Third Bank, Inc.*, 2013 WL 1411222 (W.D. Ky. 2013) – 28 USC Section 1334 grants jurisdiction to District Court cases filed under Title 11; proceedings arising under Title 11; proceedings arising in a case under Title 11; and proceeding related to a case under Title 11. The “case filed” addresses just the petition and main bankruptcy case commencement. Proceeding is “related to” if outcome could conceivably have any effect on estate being administered, unless connection to estate is so extremely tenuous as to not satisfy jurisdictional requirement. Action was related to case where Plaintiffs had also filed claims in case and if plaintiffs prevail, estate would be diminished or extinguished. Further, even for plaintiffs who did not file claims, any recovery from Fifth Third would increase amount of Fifth Third’s claim for indemnification by debtor which affects size of estate and length of bankruptcy case.
- (4401) *Tomassi v. MDS, Inc.*, 2013 WL 1636435 (W.D. Ky. 2013) – Action is “related to” bankruptcy for purposes of jurisdiction if proceeding could conceivably effect estate being administered in bankruptcy; if the outcome could alter debtor’s rights, liabilities, options, or freedom of action (either positively or negatively); or which impacts handling and administration of bankrupt estate. Bankruptcy Court had “related to” jurisdiction over debtor’s state court claim for pre-petition wrongful termination once action was removed to bankruptcy court, as outcome of litigation could produce additional funds for distribution to creditors.
- (4402) *In re Brown*, 484 BR 322 (Bankr. E.D. Ky. 2012) – Court lacked jurisdiction to determine whether debtor was beneficiary under will where maker of will was still alive. Debtor’s mere expectancy of inheritance is not property of estate and outcome of litigation could not impact estate, creditors or case administration.
- (4403) *Johnston v. City of Middletown*, 484 BR 698 (Bankr. S.D. Ohio 2013) – Bankruptcy court lacks jurisdiction to determine whether debtor is potentially responsible party for unpaid employment taxes. Case was no asset Chapter 7 proceeding. Determination of status as potentially responsible party could not have any conceivable effect on estate, as it did not affect property of estate or impact distributions to creditors. Issue did not arise in a case under Title 11 as those are issues that by their very nature could only arise in Bankruptcy case. Issue did not arise under bankruptcy code as those are limited to actions that are created or determined by the bankruptcy code itself, and dispute over potentially responsible party arose under tax laws independent of bankruptcy case. Although adversary complaint was couched as request for declaratory judgment that tax obligation was discharged, substance sought declaration that debtor was not “responsible party” for purposes of tax laws. Proceeding was not “core” as it did not fit within any of the subcategories of Section 157 and does not impact, in any way, the administration of the estate, allowance of claims, or distributions to creditors.
- (4404) *CH Holding Company v. Miller Parking Co.*, 2012 WL 5463128 (E.D. Mi. 2012) – State court cause of action is “related to” bankruptcy case if outcome of that proceeding could conceivably have any effect on estate being administered in bankruptcy. Cause of action does not need to seek relief directly from debtor, if the action could alter the debtor’s rights, liabilities, options or freedom of action. State court action that sought to pierce corporate veil and reach assets of shareholders was “related to” where bankruptcy trustee had brought same claims against shareholders and sought same relief from same limited pool of money in the hands of the same defendants.
- (4405) *Marshall v. PNC Bank*, 2012 WL 4471580 (Bankr. S.D. Ohio 2012) – “Related to” jurisdiction requires that action have some conceivable effect on outcome of bankruptcy estate. Court lacks jurisdiction over FDCPA claims that arose entirely post-discharge. Action under FDCPA does not arise in or under the Code and is not related to the case. Fact that Debtor’s FDCPA Claim and claim for violation of the discharge injunction share a common factual nexus is not sufficient to establish jurisdiction. Debtor’s FDCPA Claim could not have any

conceivable effect on the Debtor's bankruptcy estate as claims arising from post-petition actions are not property of the estate and proceeds cannot be used to improve payments to creditors. Any recovery on the FDCPA Claim will inure solely to the benefit of the Debtor.

- (4406) *Johnson v. Fifth Third Bank*, 476 BR 493 (W.D. Ky. 2012) – Action “arises in” a case under Title 11 where the proceeding must by its very nature not exist outside of the bankruptcy context, and includes items such as administrative matters, orders to turn over property, and determination of validity, extent and priority of liens. Complaint that stated state law claims for conversion, theft and unjust enrichment did not arise in bankruptcy case. Further, suits between non-debtor parties based on state law claims do not arise under Code. Sixth Circuit has adopted expansive definition of a “related to” proceeding to encompass any action where the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. However, where connection to estate is extremely tenuous, action would not satisfy the jurisdictional requirement. State-court action brought by cattle sellers against debtor's lender, alleging lender intentionally froze debtor's accounts without informing the debtor, with knowledge that the debtor would purchase a large sum of cattle the following day, was “related to” the debtor's bankruptcy. Cattle sellers were listed as creditors in the debtor's bankruptcy, where they sought to recover the value of the cattle sold to the purchaser and also sought to recover from debtor's lender. To the extent that the sellers were successful in their case against lender, their claims in the bankruptcy estate would be reduced or extinguished. Potential reduction in claim against estate constitutes conceivable effect sufficient to confer “related to” jurisdiction.
- (4407) *GLC, Ltd. v. Smith*, 475 BR 618 (Bankr. S.D. Ohio 2012) – Bankruptcy Court is court of limited jurisdiction. Court lacks subject matter jurisdiction to hear cases that are not at least “related to” bankruptcy, such that outcome of case could have some conceivable effect on estate or case administration. Adversary defendant's third-party complaint for indemnification and contribution was not related to bankruptcy case. Both parties were non-debtors, the indemnification claim could not be said to have any effect on debtor's estate or the underlying bankruptcy case, the unjust enrichment and conduit claims were likewise unrelated because they were simply additional theories to obtain the same relief sought by indemnification, and the setoff claim was even more remote, as it was not an independent claim but was dependent upon success under one of the first three counts. Ultimately, the third-party complaint was about the rights created under defendant's divorce decree, which presented a complex issue under state law that was better left to the interpretation of the state divorce court.
- (4408) *French v. Johnson Law Group*, 2012 WL 3292854 (Bankr. N.D. Ohio 2012) – Court lacks jurisdiction to enter final judgment in action brought by Chapter 7 Trustee against law firm that allegedly agreed to provide pre-petition debt settlement services without compliance with Section 526. Action is core proceeding as it involves substantive rights created by the bankruptcy code. Ancillary state law claims for breach of contract, unjust enrichment and fraudulent misrepresentation became property of estate when case was filed and were related to the bankruptcy case as any recovery would be an asset available for distribution to creditors, but are not core proceedings as they do not invoke a substantive right created under the code. Court may not enter final judgment on related but non-core claims. In light of interrelatedness of claims, court would submit entire matter to district court on proposed findings of fact and conclusions of law.
- (4409) *Equipment Finders of Tennessee v. Fireman's Fund Insurance Co.*, 2012 WL 2126312 (Bankr. M.D. Tn. 2012) – After confirmation of Plan, Bankruptcy court cannot exercise jurisdiction over action brought by reorganized debtor based on state law and contract claims. Confirmation vested all of the property in the reorganized debtor. After confirmation, there is no bankruptcy estate nor any trust fund to be administered for benefit of creditors. Action could not even be “related to” the bankruptcy case where the outcome would have no effect on the confirmed plan or the funds paid to creditors; and action did not ask the court to interpret, construe, enforce or implement the confirmed plan.
- (4410) *RFP Oil Co., Inc. v. Michigan Gasoline Traders, Inc.*, Case No. 11-3290 (Bankr. E.D. Mi. 2011) – Core proceedings include matters arising under Title 11, which is the bankruptcy petition itself; civil proceedings arising in a case under title 11, which are those created or determined by a statutory provision of title 11; and proceedings “arising in” a case under title 11, which are proceedings that by their very nature could only arise in the bankruptcy and cannot exist outside the bankruptcy. “Related to” proceedings are those that could conceivably have an effect on the estate being administered. Action is related to if the outcome could alter the debtor's rights, liabilities, options or freedom of action in a way that impacts case administration. Cause of action based on state law that seeks damages from debtor is not “core” where plaintiff does not assert claim in the bankruptcy case; or where plaintiff files proof of claim reserving right to withdraw proof of claim upon remand. Plaintiff's non-core proceedings which sought entry of monetary judgment against debtor could conceivably affect the administration of the case even where Plaintiff has agreed that it seeks recovery solely against a guarantor and would not recovery from the estate, resting in non-core proceedings that are “related to” the estate. Count of complaint that sought recovery from guarantor only is non-core and cannot have any impact on administration of estate, such that non-core proceeding is not related to.
- (4411) *Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Action for contempt based on alleged violation of discharge injunction is clear “core” proceeding over which Court has subject matter jurisdiction. Count of complaint based on alleged violation of 42 USC Section 1983 for alleged violation of debtor's civil rights was non-core and, because action could have no effect on either the estate or administration of the case, action was not “related to”. Court lacks subject matter jurisdiction over Section 1983 claim as claim is one that can be heard only by Article III judge.
- (4412) *McKinstry v. Sergeant*, 442 B.R. 567 (E.D. Ky. 2011) – Causes of action assigned to liquidating trustee based on pre-bankruptcy actions that purportedly led to bankruptcy filing were “related to” bankruptcy for purposes of jurisdiction. “Related to” jurisdiction exists even after confirmation of Chapter 11 Plan where claims were based on pre- and mid-bankruptcy conduct and were specifically reserved to the liquidating trustee in the confirmed plan. Actions would be referred to bankruptcy court for further proceedings.
- (4413) *Uber v. Nelnet, Inc.*, 443 BR 500 (Bankr. S.D. Ohio 2011) – Core proceedings include: 1) those “arising under title 11” such as causes of action created or determined by a statutory provision of the Bankruptcy Code; and 2) “arising in” proceedings which are those that, by their very nature, could arise only in bankruptcy cases. A bankruptcy court is vested with full judicial power to hear and decide core

proceedings pursuant to 28 U.S.C. § 157(b)(1). A non-core proceeding is one that does not invoke a substantive right created by federal bankruptcy law and is one that could exist outside of ... bankruptcy but may still be related to bankruptcy if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy or could alter the debtors' rights, liabilities, options or freedom of action. Bankruptcy court has jurisdiction to hear non-core but "related to" proceedings, its powers are limited to submission of proposed findings of fact and conclusions of law to the district court for de novo review. Debtor's complaint against student lender for declaratory relief regarding amounts accruing post-petition on non-dischargeable loan exceeds court's jurisdiction. All issues arise under non-bankruptcy law and outcome will not have any impact on administration of debtor's case. However, Court does have jurisdiction to determine whether creditor properly accounted for all sums paid to it through the Chapter 13 plan as efforts to collect sums paid through plan would constitute violation of terms of confirmed plan.

- (4414) *LaVoie v. LaVoie*, 2011 WL 2464169 (Bankr. W.D. Mi, 2011) – Bankruptcy Court has jurisdiction to consider adversary proceeding for violation of discharge injunction. Action is core proceeding as it involves administration of the case and is an action created or determined by a provision of Title 11.
- (4415) *McTevia & Associates, LLC v. United States Debt Recovery III, LP*, 446 BR 808 (E.D. Mi. 2011) – Bankruptcy Court retains jurisdiction post-confirmation of Chapter 11 plan to resolve disputes concerning claims that were included in confirmed plan. Creditor's claim was traceable to terms of confirmed plan that called for collection of assets by liquidating trustee and payment to creditor. As long as bankruptcy case remained open post-confirmation, Bankruptcy Court retained jurisdiction to enforce terms of plan. Action asserting breach of contract arising out of confirmed plan is core proceeding. Once bankruptcy case is closed, however, Court would lose jurisdiction over actions and parties would be left to non-bankruptcy remedies for breach of the confirmed plan.
- (4416) *Swain v. U.S.*, 2010 WL 3832046 (Bankr. E.D. Mi. 2010) – Court has subject matter jurisdiction over actions that arise in, arise under or are related to a case under Title 11. "Arising under Title 11" refers to the bankruptcy petition itself under Sections 301, 302 and 303. "Arising Under" refers to those proceedings that involve a cause of action created or determined by a statutory provision of Title 11 and could arise only in bankruptcy. "Related to" means that the outcome of the proceeding could conceivably have an effect on the estate being administered. Debtor's action to determine validity, priority and extent of Debtor's liability to the Internal Revenue Service was statutory proceeding under the Internal Revenue Code and, at best, is "related to". However, action could not have any impact on the bankruptcy case where the parties already stipulated that to the extent liability existed, it was non-dischargeable; and only issue remaining was whether there was a liability. Outcome of litigation was immaterial as the case involved an insolvent estate and the existence and amount of the debt, admitted to be non-dischargeable, could not in any way impact the administration of the estate or the validity or scope of the discharge. Case dismissed.
- (4417) *Baker v. Simpson*, 2010 WL 2977329 (2d Cir. 2010) – Action for legal malpractice, conversion, negligence, fraud and intentional misrepresentation brought by Debtor against former bankruptcy counsel was constituted action "arising in" the bankruptcy case over which Bankruptcy court had exclusive jurisdiction. The fact that the "origin" of the claims was found in state law is not dispositive where claims that appear to be based in state law are really an extension of the proceedings already before the bankruptcy court. Professional malpractice claims alleged were "inseparable from the bankruptcy context" and that the doctrine of permissive rather than mandatory abstention applied.

12.4 Personal Jurisdiction Over Defendant – "Minimum Contacts"

- (4418) *Redhawk Global, LLC v. World Projects International*, 2013 WL 2948383 (S.D. Ohio 2013) – Federal Court exercising federal question jurisdiction may exercise personal jurisdiction over any person located within, or who has minimum contacts with, the United States. Unlike State Court jurisdiction which would be applicable in diversity jurisdiction case, under federal question jurisdiction, defendant does not need to have had minimum contacts with specific forum for purposes of due process. Although defendant never did business in Ohio and arguably did not have "minimum contacts" with Ohio, that was not relevant to action brought in Bankruptcy court where Rule 7004 allows for nationwide exercise of jurisdiction. Bankruptcy Rules apply where action is one brought "under Title 11". Action is brought "under Title 11" if the bankruptcy code created the cause of action or if the action is determined by statutory provision of bankruptcy code. Action is "related to" title 11 if the outcome could have some conceivable effect on case administration. Complaint was brought under title 11 where majority of counts sought recovery under provisions of bankruptcy code including avoidance of preferential and fraudulent transfers and remaining counts were "related to" as involving counts that would affect assets and liabilities of debtor.
- (4419) *Steed v. Buckalew*, 2009 WL 3493597 (Bankr. E.D. Tn. 2009) – Personal jurisdiction is a three-part test, requiring (1) proper service, (2) subject matter jurisdiction, and (3) consistency with other legal limits on the exercise of jurisdiction. Mailing of Complaint by First Class Mail sufficient under Federal Rules of Bankruptcy Procedure, even if State law where Defendant resides does not permit service by mail. To determine whether Defendant has sufficient minimum contacts with the forum, in a "federal question" case the issue focuses on whether the Defendant had minimum contacts with the United States as a whole, not whether the Defendant had minimum contacts with the particular state in which the federal court sits. Defendant who resided in Florida indisputably had minimum contacts with the United States and could be sued in Tennessee Bankruptcy Court in action under Section 548.
- (4420) *Simon v. ASIMCO Technologies, Inc.*, 410 BR 765 (Bankr. E.D. Mi. 2009) – Court can assert personal jurisdiction over defendant only to the extent due process permits. Non-resident defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; the cause of action must arise from the defendant's activities there; and the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. Corporate Defendant's actions in convening board meetings in the United States at which affairs of company were decided constitutes "purposeful availment" of rights and privileges of conducting business in United

States. Complaint alleged causes of action based expressly on policies approved and enacted at board meeting alleged sufficient causal connection between actions and forum to support jurisdiction and creates sufficient nexus between action and forum to make exercise of jurisdiction reasonable.

12.5 Personal Jurisdiction Over Defendant – Forum Selection Clauses

- (4421) *I.E. Liquidation, Inc. v. Litostrj Hydro, Inc.*, 2015 WL 5307446 (Bankr. N.D. Ohio 2015) – Otherwise valid and enforceable forum selection clause will be enforced in adversary proceeding unless extraordinary circumstances unrelated to convenience of parties clearly disfavors transfer. Where the contract contains a forum selection clause, the plaintiff's choice of forum merits no weight and all private interest factors are deemed to weigh in favor of enforcement of clause. Court may consider public interest factors including enforceability of any judgment rendered by another court, administrative burden of piling up litigation in congested courts, the burden of imposing jury duty on members of a community with little relation to the litigation, the interest of a community in having localized controversies litigated locally, and the appropriateness of trying diversity cases in a forum most at home with the governing law. Forum selection clause designated Canada as correct forum. Court congestion slightly favored US forum as case had already been pending in Canada for years and while ready for trial likely would not be tried for another 5 years while trial in US would be far quicker. Litigation costs strongly favored Canada as case has been pending in Canada for years and transfer back to US would greatly increase costs and produce duplicate expenses. Both Canada and US had substantial interest in litigation as one party was US Corporation and other party was Canadian Corporation and forum selection clause appeared to require application of Canadian law and Canadian Courts would be far better able to apply Canadian law. Transfer to US would produce possibility of additional litigation regarding enforcement of US judgment in Canada.
- (4422) *Icenhower v. Diaz-Barba*, 22014 WL 3978491 (9th Cir. 2014) – Bankruptcy Court can decline to enforce forum selection clause if enforcement would contravene strong public policy of the forum in which the case is brought. Bankruptcy Code has primary purpose of centralizing all litigation regarding debtor's assets and legal obligations such that Bankruptcy Court will decline to honor contractual forum selection clause in core proceedings. Court declined to enforce forum selection clause in action to avoid post-petition transfer of property of estate.
- (4423) *Price v. PBG Hourly Pension Plan*, 921 F.Supp.2d 764 (E.D. Mi. 2013) – Contractual forum selection clauses are to be enforced absent strong showing that clause was either obtained by fraud, duress or unconscionable means; designated forum would ineffectively or unfairly handle suit; or designated forum would be so seriously inconvenient that requiring plaintiff to bring suit there would be unjust. Labor contract between employer and union that included forum selection clause indicated that clause was not procured by fraud but through negotiations of terms with union; designated forum, Southern District of New York, could effectively and fairly handle action; and litigating in New York was not so onerous where both parties had adequate resources to fund litigation in New York versus Michigan.
- (4424) *KFC Corp. v. Wagstaff*, 2013 WL 3166165 (W.D. Ky. 2013) – Party to contract may waive its right to challenge personal jurisdiction by consenting to personal jurisdiction through forum selection clause. Forum selection clauses are prima facie valid and are one way in which contracting parties agree in advance to jurisdiction of particular court. Forum Selection clauses will be disregarded only where enforcement is fundamentally unfair or unreasonable, such as where the clause results from fraud, undue influence or overwhelming bargaining power. Guarantor of note can be held to forum selection clause in note where guarantee obligates guarantor to "full payment, performance and observation" of all agreements in the note. However, where guarantee covers only "prompt payment when due" of sums under the note, the guarantor is not bound by a forum selection clause in the note but not in the guarantee itself. Further, note and guarantees were not signed at same time, evidencing a lack of integration between the note and the guarantee.

12.6 Limitations on Jurisdiction – Probate Exception

- (4425) *Kiser v. Olsen*, 2015 WL 507496 (E.D. Ohio 2015) – Probate exception to Federal Court jurisdiction does not extend to disputes regarding inter vivos trusts, even if trust was intended to act as "will substitute".
- (4426) *Meoli v. Thrun*, Case No. 13-80072 (Bankr. W.D. Mi. 2013) – Federal courts routinely resolve issues involving trusts and trustees notwithstanding probate exception to jurisdiction. Probate exception to federal jurisdiction does not apply where there is no probate proceeding pending in which a probate court has custody or jurisdiction over the Trust *res*.
- (4427) *In re Brown*, 484 BR 322 (Bankr. E.D. Ky. 2012) – Under "probate" exception to Federal Jurisdiction, Bankruptcy Court lacked jurisdiction to approve settlement to extent that settlement provided that new will prepared by debtor for her husband would be invalid. Probate exception precludes federal court from exercising jurisdiction over probate or annulment of a will or administration of decedent's estate. Declaratory relief requested finding that new will was enforceable and valid and that debtor was entitled to take property as beneficiary of new will. Relief falls squarely into prohibition against federal court taking action to annul a will.

12.7 Limitations on Jurisdiction – FIRREA

- (4428) *Sicherman v. National Credit Union Administration Board*, 2015 WL 4430423 (N.D. Ohio 2015) – Financial Institution Reform, Recovery, and Enforcement Act ("FIRREA") overrides Bankruptcy Court jurisdiction over property that the Trustee contends is property of the estate. NCUA Board is charged with placing insolvent or undercapitalized credit unions in conservatorship or liquidation and succeeds to all right, title, power and privilege of the credit union. Where credit union is placed into receivership before debtor files bankruptcy, any disputes between debtor or trustee and credit union regarding validity, priority or extent of liens must be resolved by FIRREA provisions. Bankruptcy Court lacks jurisdiction to adjudicate any claim or action for payment from credit union or any action seeking to determine rights with respect to assets of credit union. Adversary seeking to invalidate lien held by credit union is action to determine rights to asset of failed credit union over which exclusive jurisdiction is vested in NCUAB.

12.8 Limitations – *Rooker-Feldman*

- (4429) *Gardner v. Potestivo & Associates*, Case no. 15-4355 (Bankr. E.D. Mi. 2015) – Rooker-Feldman doctrine precludes Bankruptcy Court from acting as appellate court for decisions rendered by State court. Plaintiff had previously brought same cause of action in lawsuits in both State and Federal Court brought prior to commencement of bankruptcy case. Current Adversary asked Court to effectively determine correctness of those prior decisions in violation of Rooker-Feldman.
- (4430) *In re Duckett*, 2015 WL 5002522 (Bankr. N.D. Ohio 2015) – Section 350 allows court to reopen case to administer assets, accord relief to debtor, or for other cause. Reopening case is ministerial act that has not independent legal significance and determines nothing with respect to merits. However, where court cannot grant any effective relief if case is reopened, court will deny request to reopen. Court lacked authority to afford debtor relief where, after conclusion of bankruptcy case, mortgage holder commenced foreclosure proceedings, obtained state court judgment and sold property, and State Court also denied debtor’s Motion to Dismiss Fraudulent Foreclosure as issues regarding lender’s standing to foreclose had already been raised and decided in state court. Debtor sought to reopen bankruptcy case to again contest mortgage holder’s standing to foreclose. *Rooker-Feldman* precludes losing party in state court from asking federal court to review correctness of decision. Debtor lost in state court and was complaining of injuries caused by state court judgments entered before debtor sought relief in federal court, and debtor was essentially asking federal court to determine whether state court had correctly determined standing to foreclose.
- (4431) *White v. McDermott*, 2015 WL 4612349 (E.D. Mi. 2015) – *Rooker-Feldman* precludes Federal Court review of state court orders where federal court would essentially be acting as appellate court determining correctness of state court ruling. Debtor’s objection to mortgage company proof of claim based on argument that mortgage was invalid barred as State Court had already considered arguments and entered judgment of foreclosure in favor of lender. *Rooker-Feldman* includes issues argued and resolved by state court plus issues that are inextricably intertwined with claims raised in state court. Assertion that mortgage was invalid is nothing more than attempt to relitigate issues decided by state court in foreclosure action. Fact that state court judgment is on appeal when bankruptcy case is filed does not avoid impact of *Rooker-Feldman* as doctrine applies to interlocutory orders and all other orders of state courts. Debtor’s recourse is through state appellate procedures only.
- (4432) *Grant v. Unifund CCR, LLC*, 2014 WL 2444600 (9th Cir. 2014) – Federal Court lacked jurisdiction over suit brought by debtor against collection agency alleging that agency was attempting to collect state court judgment although debtor was allegedly never served with complaint and that agency improperly garnished funds and took other actions to collect state court judgment. Allegations concerning service and validity of judgment were necessarily determined in state court litigation and Federal Courts lack jurisdiction under Rooker-Feldman to act as de facto appellate court. Federal Court could not grant relief to debtor without effectively setting aside state court judgment which would constitute improper exercise of federal jurisdiction. However, Federal Court, having determined that Rooker-Feldman deprived court of jurisdiction, erred in dismissing case with prejudice. Court should have remanded case to state court for further proceedings.
- (4433) *In re Lancett*, 2014 WL _____ (Bankr. W.D.N.C. 2014) – Bankruptcy court lacked jurisdiction to review state court foreclosure order. Debtor essentially asked bankruptcy court to review correctness of state court order in violation of *Rooker-Feldman*.
- (4434) *Bell v. Countrywide Home Loans*, 2014 WL 2618618 (W.D. Ky. 2014) – *Rooker-Feldman* deprives federal courts of jurisdiction over cases brought by state court losers complaining if injuries caused by state court judgments rendered before the district court proceedings commenced, and that invite district court review and rejection of those judgments. Complaint that contested lender’s standing to foreclose mortgages dismissed where prior state court litigation generated final judgment that expressly found that lender had standing, and that judgment was affirmed on appeal. Current action asked district court to sit as quasi-appellate court and enter an order that would circumvent state court final judgment and prior rulings on lender’s standing to maintain action.
- (4435) *Gleason v. GVL Lake properties, LLC*, 2014 WL 1779442 (Bankr. E.D. Ky. 2014) – Federal court lacks jurisdiction to consider correctness of State court orders. After bankruptcy had concluded, member of LLC commenced action in state court against debtor for declaratory relief that upon filing bankruptcy, debtor forfeited interest in LLC. State Court agreed and entered judgment that under state law, debtor lost rights in LLC. Debtor’s subsequent suit in bankruptcy case to regain membership rights sought to reconsider correctness of state court action which is barred by Rooker-Feldman. Suit was brought by state court loser, complaining of injuries caused by state court judgment rendered before district court proceedings commenced and invited district court review and rejection of that judgment.
- (4436) *Silagy v. Protz*, 2014 WL 1345302 (Bankr. N.D. Ohio 2014) – *Rooker-Feldman* protects jurisdictional division of authority between federal and state courts by preventing lower federal court from sitting as appellate court over state decision. Doctrine governs state court losers complaining of injuries caused by state court judgments rendered before the federal court proceedings commenced and that invite district court review and rejection of that judgment. Trustee’s motion for turnover of debtor’s marital interest that was awarded in pre-petition dissolution of marriage action did not attempt to undercut or reverse state court order; instead, turnover sought to enforce state court order by requiring remittance to trustee of property that had already been determined by state court as debtor’s interest in marital property. State court had not valued property awarded to debtor, leaving bankruptcy court with task of valuing debtor’s interest in the asset. Trustee was not seeking to alter or amend state court order or to seek relief that was inconsistent with state court order.
- (4437) *Skyway Investment Corp. v. Tushman*, 2013 WL 5015591 (6th Cir. 2013) – Federal court is precluded from reviewing correctness of state court judgment. Action challenging execution of deed would be dismissed where deed was executed pursuant to state court judgment, and action would necessarily involve determining the propriety of the state court order.
- (4438) *J. Edward Kloian Foundation v. Findling*, 2013 WL 6859143 (E.D. Mi. 2013) - Federal court lacks jurisdiction under Rooker-Feldman to

review orders entered by state courts. Federal courts cannot act as “super-appellate” courts to review correctness of state court orders. If the source of the alleged injury is the state court order, federal courts lack jurisdiction to hear case. Rooker-Feldman precluded federal court from considering whether plaintiff was the alter-ego of its founder, where state court had already entered judgment against founder and entered supplemental order finding that foundation was alter-ego and ordering assets held by foundation to be sold to pay judgment against founder. Federal court complaint sought declaration that foundation was not alter-ego and to enjoin sale of assets previously ordered by state court, and would necessarily have required federal court to consider accuracy of state court determinations.

- (4439) *Cline v. Mortgage Electronic Registration Systems, Inc.*, 2013 WL 6687257 (S.D. Ohio 2013) – Rooker-Feldman precludes federal court from looking behind state court judgment. Rooker-Feldman prevents federal court from reviewing alleged claims of error in state court decision.
- (4440) *In re Medlar*, 2013 WL 6152325 (Bankr. N.D. Ohio 2013) –Bankruptcy court lacked jurisdiction under Rooker-Feldman to look behind foreclosure judgment itself, precluding debtor from alleging any invalidity in the foreclosure or sale process that had already been validated by state court orders.
- (4441) *Dickow v. JPMorgan Chase Bank*, 2013 WL 6051018 (E.D. MI. 2013) – Rooker-Feldman precludes federal court review of issues resolved in state court proceedings. State court judgment awarding possession of property to foreclosing lender including findings that lender had standing to pursue foreclosure and that trial court had jurisdiction to enter judgment of possession. Federal Court complaint alleging invalidity of foreclosure sale based on lack of recorded assignment of mortgage was necessarily decided in state court, and federal court would not reconsider that holding. Federal court is not “super-appellate” court with authority to review or reverse state court judgments.
- (4442) *Kapla v. FNMA*, 485 BR 136 (Bankr. E.D. Mi. 2012), *aff’d* 2014 WL 346019 (E.D. Mi. 2014) – Adversary complaint, to extent it sought to challenge validity of foreclosure sale of property and entry of state court order awarding possession based on deed received from successful purchaser, was prohibited by *Rooker-Feldman*. Counts directly challenged validity of deed and state court judgment and action would require Bankruptcy court to review state court lawsuit and make finding that state court judgment was incorrect on merits.
- (4443) *Wheeler v. Federal National Mortgage Assn.*, 2013 WL 2200398 (E.D. Mi. 2013), *report and recommendation adopted*, 2013 WL 3456966 (E.D. Mi. 2013) – *Rooker-Feldman* precludes Federal Court review of State Court order of eviction. Invalidation of foreclosure sale would directly attack validity of foreclosure, requiring court to reverse state court judgment.
- (4444) *In re Sinta*, 2013 WL 1946185 (E.D. Mi. 2013) – *Rooker-Feldman* precludes Federal Court review of State Court order of eviction. Debtor filed Chapter 13 to prevent eviction following foreclosure sale and expiration of redemption. Bankruptcy Court granted stay relief and debtor appealed. Court refused to stay eviction proceedings as Federal court lacks jurisdiction to review State court eviction order.
- (4445) *In re Leigh*, 2013 WL 1787964 (Bankr. S.D. Ohio 2013) – Rule 60(b)(4), incorporate by reference through Bankruptcy Rule 9024, requires a court to set aside a judgment where the court finds the judgment to be void. If the judgment is void, then the court lacks the ability to consider equitable or other factors and the court must vacate the judgment. A judgment is void only in the rare instance where it is premised either on jurisdictional error such that the court lacks jurisdiction over the party or over the subject matter of the dispute; or where a violation of due process deprives party of notice or opportunity to be heard. Rooker-Feldman resulted in Order sustaining objection to claim being void for lack of subject matter jurisdiction. Bankruptcy Court lacks jurisdiction under Rooker-Feldman to reconsider validity of mortgage or amount of debt where mortgage has been foreclosed in judicial proceeding and state court has issued judgment determining status of mortgage and determining amount of debt. Objection to claim in bankruptcy court was effort to look behind state court determinations of validity and amount of lien which is precluded by Rooker-Feldman.
- (4446) *Kellner v. Fifth Third Bank*, 2013 WL 1785481 (Bankr. S.D. Ohio 2013) – Rooker-Feldman prevents federal court from engaging in what amounts to appellate review of state court proceedings. Rooker-Feldman precludes federal courts other than Supreme Court from considering whether state court judgment was unconstitutional or violated federal law. However, Rooker-Feldman does not prevent federal court from considering matters that are independent of the state court order itself, even if federal claims deny legal conclusion previously reached by state court. Further, doctrine does not apply to third parties not in privity with parties to state court action. Bankruptcy Court not precluded by Rooker-Feldman from considering whether lender had properly perfected lien on property based on prior state court final judgment of foreclosure. Trustee was asserting independent grounds under Section 544 to avoid lien which did not challenge correctness of state court judgment that, as between parties, lien was valid and enforceable. Further, Trustee is not in privity with debtor at state court level.
- (4447) *Young v. Fannie Mae*, 2013 WL 12842332 (N.D. Ohio 2013) – Rooker-Feldman doctrine precludes Federal review of state court decisions even if challenges allege that state court action was unconstitutional. Federal review of state court judgments is limited to Supreme Court. Unsuccessful party in state court case is precluded from seeking what amounts to appellate review of state court order by federal court. Cause of action based on alleged wrongful foreclosure precluded by Rooker-Feldman where state court had entered final judgment foreclosing mortgage.
- (4448) *Sandweiss Law Center, PC v. Kozlowski*, 2013 WL 396255 (E.D. Mi. 2013) – *Rooker-Feldman* precludes Federal Court review of state court orders. Plaintiff’s actions against debtor which alleged only that state court divorce judgment improperly distributed marital assets sought merely to overturn state court judgment in violation of *Rooker-Feldman*.
- (4449) *Rugiero v. Dinardo*, 2012 WL 4800059 (6th Cir. 2012) – *Rooker-Feldman* precludes Federal court review of State court orders and judgments that are rendered prior to commencement of bankruptcy case. However, *Rooker-Feldman* does not preclude Federal Court review of efficacy and validity of State Court actions taken after commencement of bankruptcy case. Federal Court could exercise properly

invoked concurrent jurisdiction to determine whether obligation is non-dischargeable Domestic Support Obligation notwithstanding State Court judgment entered post-petition that declared the obligation to be domestic support.

- (4450) *In re Kaid*, 2012 WL 1929906 (Bankr. E.D. Mi. 2012) – Federal Court is barred by Full Faith and Credit Act, 28 USC 1738, from looking behind or disregarding state court judgment. Where State court had already entered judgment in favor of creditor on guarantee of corporate obligation, Bankruptcy Court precluded from finding that creditor lacked standing to assert claim. Creditor had sold the note and mortgage but retained the guarantee, and then instituted litigation to collect on the guarantee and state court entered judgment. *Rooker-Feldman* precluded Bankruptcy Court from reconsidering whether creditor had standing to enforce the guarantee or whether severance of guarantee from note and mortgage precluded enforcement by original creditor.
- (4451) *Assasepa v. JPMorgan Chase Bank*, 2012 WL 88162 (S.D. Ohio 2012) – *Rooker-Feldman* doctrine stands for the proposition that parties who lose in state court may not seek federal court review of the state-court proceedings. *Rooker-Feldman* does not preclude federal review if the plaintiff presents an independent claim even if predicate of federal claim denies legal conclusion that state court has reached. If the source of the injury is the state court judgment, then *Rooker-Feldman* precludes review. If the source of the injury is some other source, such as the actions of a third party, then plaintiff can maintain an independent cause of action. Plaintiff's complaint alleged violations of federal law including TILA and RESPA throughout the foreclosure process and that lender committed fraud by using "robo-signed" documents. Any injury plaintiff may have suffered is not the result of the foreclosure judgment itself, but of the processes and conduct throughout the loan and foreclosure process. Thus, actions may not be precluded by *Rooker-Feldman*.
- (4452) *Rugiero v. Dinardo*, 2012 WL 4800059 (E.D. Mi. 2011) – *Rooker-Feldman* precludes Bankruptcy Court from reconsidering correctness of state court judgment. State Court had concurrent jurisdiction to determine whether obligation owed to creditor was non-dischargeable domestic support obligation under exception to automatic stay. *Rooker-Feldman* precludes Bankruptcy Court from reconsidering or reviewing that conclusion.
- (4453) *In re Mayer*, 41 BR 702 (E.D. Mi. 2011) – *Rooker-Feldman* is implicated when a plaintiff complains of being injured by a state court decision. *Rooker-Feldman* is not implicated simply because a party attempts to litigate an issue in federal court that has already been litigated in state court. Where a federal plaintiff presents some independent claim, even if that claim denies a legal conclusion that a state court has reached in a case to which he was a party, *Rooker-Feldman* does not prevent Federal Court from asserting jurisdiction. Court will then look to state law to determine whether the defendant prevails under principles of preclusion. Action to avoid alleged preferential transfer of property, created when State Court imposed constructive trust, was not attack on validity of Final Judgment but only sought to determine effect of judgment in light of principals of bankruptcy law. Debtor's attack on provision of Divorce Judgment that purported to impress constructive trust was attack on prohibited by *Rooker-Feldman*. However, where Divorce Judgment was not clear as to whether specific property was subject to constructive trust, Bankruptcy Court can review matter to determine whether Divorce Judgment was sufficient to impose constructive trust.
- (4454) *Edwards v. Thornton*, 2011 WL 134894 (6th Cir. 2011) – Action alleging violation of automatic stay violated *Rooker-Feldman*. Defendant transferred property pursuant to State Court Final Judgment. Court precluded from considering argument that underlying State Court judgment was void as Federal Court lacks subject matter jurisdiction to review validity of State Court judgment. Attack is not one on method used to enforce judgment, but on validity of judgment itself, which is matter which Federal Court cannot collaterally review.
- (4455) *Miller v. Deutsche Bank National Trust Co.*, 2011 WL 1807015 (10th Cir. BAP 2011) – Debtor prohibited from contesting lender's standing to enforce mortgage where issues had previously been addressed by State Court in proceeding to confirm non-judicial foreclosure sale.
- (4456) *Essek v. Vanderbilt Mortgage, Inc.*, 2011 WL 97716 (E.D. Ky. 2011) – *Rooker-Feldman* precludes District Court action for damages resulting from state court foreclosure proceeding.
- (4457) *In re Bunting*, Case No. 07-20864 (Bankr. E.D. Mi. 2010) – *Rooker-Feldman* doctrine prohibits party losing in state court from seeking what in substance would be appellate review of the state court judgment in Federal Court based on the claim that the state court judgment violates the loser's federal rights or claims based on alleged state court errors in construing federal law or constitutional claims. State and federal claims need not be identical as long as the relief requested in federal court would effectively reverse the state court decision or void its ruling. Bankruptcy Court precluded from looking behind state court divorce judgment that resulted from long and extensive trial proceedings and multiple appellate proceedings including determination of amounts owed by debtor to ex-spouse. However, Court is not precluded for reviewing debtor's claim of credits owed and offsets to the judgment amount using standards set under Rule 3001.
- (4458) *Willis v. Chase Home Finance, LLC.*, 2010 WL 3430712 (N.D. Ohio 2010) – *Rooker-Feldman* doctrine prohibits Federal Court from reviewing propriety of state court judgment of foreclosure. Where federal relief can only be predicated upon a conviction that the state court was wrong, action constitutes a prohibited appeal of the state court judgment. *Rooker-Feldman* doctrine precludes a district court's jurisdiction where the claim is a specific grievance that the law was invalidly or unconstitutionally applied in plaintiff's particular case as opposed to a general constitutional challenge to the state law applied in the state action.
- (4459) *In re Perkins*, Case No. 09-32328 (Bankr. E.D. Mi. 2010) - *Rooker-Feldman* does not preclude Bankruptcy Court from reconsidering amount of claim where State Court Judgment was a default judgment and the State Court calculations of damages appears to result from mistake. State Court Judgment contained numerous mathematical errors as restful of Court's failure to calculate "cost to cover" for undelivered goods, failed to credit debtor certain amounts, and failed to account for payments made by debtor.

- (4460) *Jones v. Federal National Mortgage Association*, Case No. 10-1042 (Bankr. N.D. Ohio 2010) - Rooker- Feldman prohibits Federal Court review of the proceedings already conducted by lower tribunal to determine whether it reached its result in accordance with law and applies to interlocutory orders and judgments of lower state courts. If the state court decision is the source of the injury, the doctrine bars jurisdiction in Federal court. If, on the other hand, the plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached then Federal Court has jurisdiction subject to state law determination principles of preclusion. State court denial of Motion to Dismiss based on alleged lack of standing does not preclude Federal Court from considering standing as state court order determined only that complaint stated cause of action and did not constitute final order on issue.
- (4461) *Williams v. Franklin Towers Homeowners Association, Inc.*, Case No. 08-55109 (9th Cir. 2010) - Rooker-Feldman prohibits Federal Court appellate review of State Court Order denying Motion to disqualify judge.
- (4462) *Madera v. Ameriquest Mortgage Co.*, 586 F.3d 228 (3d Cir. 2009) – Rooker-Feldman doctrine prevents Chapter 13 Debtor’s action to rescind mortgage under TILA where State Court has already issued Judgment of Foreclosure. Rooker-Feldman prevents Federal Court for exercising appellate jurisdiction over State Court judgments. Rescission action effectively seeks finding that mortgage was invalid which would negate effect of foreclosure judgment in State Court. In foreclosing mortgage, State Court expressly or implicitly deemed mortgage valid.
- (4463) *Hunt v. LAJ, Inc.*, 2009 WL 2601921 (Bankr. E.D. Tn. 2009) – A State Court Judgment that purports to modify the discharge is void *ab initio*. However, where State Court Judgment is based on a debt that was not discharged, the State Court Judgment is not void and the Rooker-Feldman doctrine prevents Federal Court review of the State Court Judgment. Debtor defaulted under the confirmed Chapter 11 Plan and the creditor obtained a judgment in State Court. Debtor sought injunction in Bankruptcy Court claiming that Creditor was attempting to recover the entire claim and not just that portion of the claim that Debtor was to pay pursuant to the confirmed Chapter 11 Plan. Confirmation of the Plan discharged the pre-petition liability and replaced that with a “new” claim based on the treatment in the confirmed Plan. Creditor’s action to recover amounts owed under the confirmed Plan did not constitute attempt to collect discharged debt, but only debt owed pursuant to the confirmed Plan as to which the discharge injunction did not apply. Rooker-Feldman would bar any effort by Debtor to dispute in the Bankruptcy Court the amount properly owed to Creditor pursuant to the confirmed Plan where the action had already been brought in and ruled on by State Court.
- (4464) *Hamilton v. Herr*, 540 F.3d 367 (6th Cir. 2008) - Rooker-Feldman doctrine prevents Federal Court from looking behind state Court judgment and acting as “super-appellate Court” for matters within the State Court jurisdiction. However, effect of discharge in bankruptcy is entirely federal matter, and State Court lacks jurisdiction to enforce a claim that has been discharged in Bankruptcy. Therefore, Rooker-Feldman does not preclude Bankruptcy Court from entering orders to enforce discharge. “State Courts are allowed to construe the discharge in bankruptcy, but what they are not allowed to do is construe the discharge incorrectly, because an incorrect application of the discharge order would be equivalent to a modification of the discharge order. Similarly, the state-Court judgment in the case at hand would constitute a modification of the discharge in bankruptcy only if the debt was actually discharged pursuant to the bankruptcy Court’s discharge order.” Action remanded to the bankruptcy Court to determine whether the debt was discharged. If the debt was discharged, then the state-Court judgment was a modification of the discharge order and is void *ab initio*. If the debt was not discharged pursuant to the bankruptcy Court’s discharge order, then the state-Court judgment was not a modification of the discharge order and the Rooker-Feldman doctrine would bar federal-Court jurisdiction.

12.9 Limitations – Jurisdictional Priority

- (4465) *Silagy v. Protz*, 2014 WL 1345302 (Bankr. N.D. Ohio 2014) – Jurisdictional priority rule provides that when actions involving nearly identical parties and issues have been filed in two different district courts, the court in which the first suit was filed should generally proceed to judgment. Rule applies only to courts of equal rank at the same level of government. Rule did not prevent Federal Court from ruling even if same action had already been filed in state court, as the courts involved separate levels of government.

12.10 Particular Causes of Action

- (4466) *Rosenfeld v. Rosenfeld*, 2015 WL 4623586 (Bankr. E.D. Mi. 2015) – Bankruptcy court lacks subject matter jurisdiction when court cannot fashion effective relief in adversary proceeding. Adversary seeking to deny debtor discharge dismissed where plaintiff had already received an order declaring debt to be excepted from discharge. Adversary did not propose any relief as to plaintiff than was greater than that already awarded.
- (4467) *Wellness International Network, Ltd. v. Shariff*, ____ S.Ct. ____, 2015 WL 2456619 (2015) – Parties can consent to Bankruptcy Court exercise of jurisdiction over matters normally reserved for District Court where matters are within statutory authority of Bankruptcy Court but would otherwise be beyond constitutional authority. Consent does not need to be express. Parties can consent by implication as long as consent is knowing and voluntary, with inquiry focused on whether litigation or counsel was made aware of need for consent and right to refuse but still voluntarily appeared to try the case in the Bankruptcy Court.
- (4468) *Miller v. Bruemmer*, 2014 WL 3568371 (Bankr. E.D. Mi. 2014) – Third party complaint for pre-petition legal malpractice is beyond court’s jurisdiction. Chapter 7 trustee sued recipient of allegedly fraudulent transfer. Transferee filed third party complaint against attorney who allegedly advised debtor and transferee to make transfer for legal malpractice. Claim was one arising under state law that was fully cognizable in state court and had no connection or relationship to bankruptcy code or case. Case did not arise under or in Title 11 as case did not present any issues of law created by bankruptcy code. Case was not related to bankruptcy as outcome of third party complaint could not have any conceivable impact on bankruptcy estate. Claims were being asserted by one non-debtor against another non-debtor and proceeds of those proceedings, if any, would not be within scope of bankruptcy estate. Although there may be overlap of issues in

main case and third party case, overlap of issues and considerations of judicial economy are not a basis for the court to exercise subject matter jurisdiction where none exists by statute and exercise would exceed constitutional power of bankruptcy court. Consent of all parties also cannot create subject matter jurisdiction where none otherwise exists.

- (4469) *Equipment Finders of Tennessee v. Fireman's Fund Insurance Co.*, 2012 WL 2126312 (Bankr. M.D. Tn. 2012) – After confirmation of Plan, Bankruptcy court cannot exercise jurisdiction over action brought by reorganized debtor based on state law and contract claims. Confirmation vested all of the property in the reorganized debtor. After confirmation, there is no bankruptcy estate nor any trust fund to be administered for benefit of creditors. Action could not even be “related to” the bankruptcy case where the outcome would have no effect on the confirmed plan or the funds paid to creditors; and action did not ask the court to interpret, construe, enforce or implement the confirmed plan.
- (4470) *Rhiel v. Central Mortgage Company*, 444 BR 871 (Bankr. S.D. Ohio 2011) – Court lacked jurisdiction over third party complaint filed by property owner against notary public for failing to properly notarize and record deed. Although defective deed allowed Trustee to recover property in action against owner, owner's negligence action against notary was not core matter and did not involve debtor or property of the estate. District Court can exercise “supplemental jurisdiction” pursuant to 28 USC Section 1367 over claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. Bankruptcy Courts may lack authority to exercise supplemental jurisdiction as Section 1367 refers to “district court”. Assuming Bankruptcy Court could do so, Court declined to exercise supplemental jurisdiction where claims raised novel issues of state law regarding liability of notary public or closing agent to purchaser on “third party beneficiary” theory. Exercising supplemental jurisdiction would not materially aid the disposition of the case as the case would be within court's “related to” jurisdiction, requiring court to issue report and recommendations to District Court which would delay resolution; and it is possible that defendant would have right to jury trial at state law which Bankruptcy Court lacks authority to conduct.
- (4471) *Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Count of complaint based on alleged violation of 42 USC Section 1983 for alleged violation of debtor's civil rights was non-core and, because action could have no effect on either the estate or administration of the case, action was not “related to”. Court lacks subject matter jurisdiction over Section 1983 claim as claim is one that can be heard only by Article III judge.
- (4472) *Harker v. Countrywide Homes, Inc.*, 2010 WL 3908978 (S.D. Ohio 2010) – Section 105 does not authorize private right of action against non-party creditor. Trustee could not use Section 105 as basis for action against mortgage creditor based on alleged misrepresentations by creditor that it owned Debtor's note and mortgage. Trustee cannot maintain declaratory relief action against creditor where all other substantive counts of complaint have already been dismissed. Action for injunctive relief to enjoin creditor from (i) misrepresenting to Bankruptcy Courts, bankruptcy trustees, and creditors of estates that it is a creditor of the debtors' bankruptcy estates and that it is the holder of notes or mortgages on real estate of the debtors on the date of debtors' bankruptcy petitions; (ii) misrepresenting to Bankruptcy Courts, bankruptcy trustees, and creditors of estates the true holder of the notes and related mortgages; (iii) failing to disclose that the true holder failed to properly record or did not timely record assignments of the mortgages, in the land records of the proper governmental office in the state in which the real property covered by the mortgage is situated; (iv) filing pleadings, motions, or any other filings in any court containing any such misrepresentations; and (v) requiring Countrywide to correctly represent the true chain of ownership of notes and related mortgages to Bankruptcy Courts, bankruptcy trustees, and creditors of estates dismissed where Trustee had adequate remedies in ability to object to proof of claim and to bring action under Rule 9011.

12.11 Authority of Bankruptcy Court to Enter Final Judgment – Generally

- (4473) *Wellness International Network, Ltd. v. Shariff*, ____ S.Ct. ____, 2015 WL 2456619 (2015) – Parties can consent to Bankruptcy Court exercise of jurisdiction over matters normally reserved for District Court where matters are within statutory authority of Bankruptcy Court but would otherwise be beyond constitutional authority. Consent does not need to be express. Parties can consent by implication as long as consent is knowing and voluntary, with inquiry focused on whether litigation or counsel was made aware of need for consent and right to refuse but still voluntarily appeared to try the case in the Bankruptcy Court.
- (4474) *Hagan v. Koviack Irrigation and Farm Services, Inc.*, 2014 WL 5426876 (Bankr. W.D. Mi. 2014) – Court has jurisdiction to enter final judgment in preference action under Section 547. Defendant in action was creditor in case and court cannot complete claim allowance process without first resolving preference action.
- (4475) *Executive Benefits Insurance Agency v. Arkison (Bellingham Insurance Agency)*, ____ US ____, 2014 WL 2560461 (2014) – Bankruptcy Court has jurisdiction to enter final orders in core proceedings and to enter findings of fact and conclusions of law in non-core proceeding. Matter that is defined as core proceeding but exceeds bankruptcy court Article I jurisdiction is not “core” proceeding allowing court to enter proposed findings of fact and conclusions of law. Although bankruptcy court order is captioned “Final Judgment”, District Court on appeal considered issues using *de novo* standard, which is same standard that would have been applied had “Judgment” been captioned “Findings of Fact and Conclusions of Law”. District Court's *de novo* review of “Judgment” was sufficient for Article III Jurisdictional purposes and cured any error in bankruptcy court's entry of “Judgment” rather than “Proposed Findings”.
- (4476) *Stern v. Marshall*, 131 S. Ct. 2594 (2011) – A return to jurisdiction 30 years after *Northern Pipeline* - Bankruptcy Court lacks jurisdiction to enter final judgments even in “core” proceeding where case is based solely on state common law cause of action, is

between two private parties, does not flow from federal statutory scheme, and would not necessarily be resolved in ruling on objection to proof of claim. Creditor filed proof of claim and also filed adversary proceeding alleging that debtor defamed creditor and sought determination that debt based on defamation was not dischargeable. Debtor filed a counterclaim for tortious interference with an expected inheritance. Although counterclaim would constitute "core" proceeding as Section 157(c)(2)(C) defines any counterclaim by the estate against a person who filed a proof of claim. However, Constitutional limitations prevent Bankruptcy Court from exercising jurisdiction over "core" proceeding even where defendant arguably consented to jurisdiction by filing proof of claim and failing to contest issue prior to entry of Judgment. Article III of the Constitution vests jurisdiction solely in the District Court for actions that do not flow from the Bankruptcy Code or where are dependent for resolution on state common law and involve two private parties. Article III prevents the entry of a final, binding judgment by a bankruptcy court, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime.

12.12 Authority of Bankruptcy Court to Enter Final Judgment - Dischargeability Actions

- (4477) *Dietz v. Ford*, Case No. 12-60036 (9th Cir. 2014) – Bankruptcy court has inherent jurisdiction over action to except debt from discharge. Dischargeability issues are central to federal bankruptcy proceedings and are necessarily resolved during the process of allowing or disallowing claims. Bankruptcy court has constitutional jurisdiction to enter judgment determining debt to be non-dischargeable. Court also has jurisdiction to liquidate amount of claim as part of resolution of adversary proceeding. Determination of amount of non-dischargeable debt is inexorably intertwined with determination that debt is not dischargeable.
- (4478) *Hart v. Southern Heritage Bank*, 2014 WL 1663029 (6th Cir. 2014) – Court has jurisdiction after *Stern* to enter final monetary judgment in action under Section 523(a)(2). Liquidating claim is inherently part of claims allowance process and did not implicate any state law counterclaims brought by debtor against creditor and issues of dischargeability are entirely dependent on bankruptcy law and fall within scope of court's express jurisdiction. Fact that debtor may have had counterclaims that, if asserted, may have caused *Stern* issue did not change outcome where debtor did not assert those counterclaims in Section 523 action.
- (4479) *Cai v. Shenzhen Smart-In Industry Co.*, Case No. 12-56656 (9th Cir. 2014) – Bankruptcy Court has jurisdiction after *Stern* to enter final monetary judgment in action under Section 523(a)(2). Liquidating state law counterclaim is inherently part of claims allowance process and issues of dischargeability are entirely dependent on bankruptcy law and fall within scope of court's express jurisdiction.
- (4480) *Eaton v. Ford Motor Credit Co., LLC*, 2012 WL 3579644 (M.D. Tn. 2012) – Bankruptcy court has jurisdiction under *Stern* to enter final judgments in non-dischargeability actions. Discharge is fundamental part of bankruptcy process.

12.13 Authority of Bankruptcy Court to Enter Final Judgment – Post-Petition Causes of Action

- (4481) *Schultze v. Chandler*, Case No. 12-15186 (9th Cir. 2014) – Bankruptcy court has jurisdiction to enter final judgment in adversary proceeding brought by member of Unsecured Creditor Committee against Committee counsel for alleged malpractice. Post-petition claim against court appointed professional is core proceeding because attorney's employment and compensation were approved by Bankruptcy Court and duties pertained solely to administration of estate and cause of action arose out of the performance of those duties. Fact that cause of action was based on state law professional malpractice did not preclude finding of "core" as cause of action against counsel for Committee could not exist outside of bankruptcy case. Case dismissed because counsel owed duty to Committee as a whole, and did not owe duty to individual members of Committee.

12.14 Authority of Bankruptcy Court to Enter Final Judgment – Consent of Parties

- (4482) *Wellness International Network, Ltd. v. Shariff*, ____ S.Ct. ____, 2015 WL 2456619 (2015) – Parties can consent to Bankruptcy Court exercise of jurisdiction over matters normally reserved for District Court where matters are within statutory authority of Bankruptcy Court but would otherwise be beyond constitutional authority. Consent does not need to be express. Parties can consent by implication as long as consent is knowing and voluntary, with inquiry focused on whether litigation or counsel was made aware of need for consent and right to refuse but still voluntarily appeared to try the case in the Bankruptcy Court.
- (4483) *In re BP*, 735 F.3d 239 (5th Cir. 2013) – Parties cannot consent to bankruptcy court entry of final judgment on state court claims. Article III jurisdiction limits bankruptcy court jurisdiction and parties cannot cure constitutional deficiency by consent.

12.15 Authority of Bankruptcy Court to Enter Final Judgment – State or Non-Bankruptcy Federal Law Claims

- (4484) *Wellness International Network, Ltd. v. Shariff*, ____ S.Ct. ____, 2015 WL 2456619 (2015) – Parties can consent to Bankruptcy Court exercise of jurisdiction over matters normally reserved for District Court where matters are within statutory authority of Bankruptcy Court but would otherwise be beyond constitutional authority. Consent does not need to be express. Parties can consent by implication as long as consent is knowing and voluntary, with inquiry focused on whether litigation or counsel was made aware of need for consent and right to refuse but still voluntarily appeared to try the case in the Bankruptcy Court.
- (4485) *Executive Benefits Insurance Agency v. Arkison (Bellingham Insurance Agency)*, ____ US ____, 2014 WL 2560461 (2014) – Bankruptcy Court has jurisdiction to enter final orders in core proceedings and to enter findings of fact and conclusions of law in non-core proceeding. Matter that is defined as core proceeding but exceeds bankruptcy court Article I jurisdiction is not "core" proceeding allowing court to enter proposed findings of fact and conclusions of law. Although bankruptcy court order is captioned "Final Judgment", District Court on appeal considered issues using *de novo* standard, which is same standard that would have been applied had "Judgment" been captioned "Findings of Fact and Conclusions of Law". District Court's *de novo* review of "Judgment" was sufficient for Article III Jurisdictional purposes and cured any error in bankruptcy court's entry of "Judgment" rather than "Proposed Findings".

- (4486) *Langland v. Cadwallader*, 2013 WL 1737360 (Bankr. W.D. Mi. 2013) – Complaint to liquidate contract claim held by debtor prior to commencement of bankruptcy and based entirely on state law is not core proceeding and Bankruptcy Court lacks jurisdiction to enter final judgment. Complaint sought to recover on promissory notes between debtor and defendants that substantially preceded bankruptcy proceeding. Default by defendants in failing to respond to complaint does not constitute consent by defendants to entry of judgment. Court would enter report and recommendations on Plaintiff's Motion for Default Judgment for review by District Court.
- (4487) *In re City of Detroit*, 2013 WL 5425104 (Bankr. E.D. Mi. 2013) – Under *Stern*, when a claim is a state law action independent of the bankruptcy code and not necessarily resolvable by a ruling on the creditor's proof of claim, the bankruptcy court cannot enter a final judgment but is limited to entry of proposed findings of fact and conclusions of law. Otherwise state law based claims can be asserted in bankruptcy court and ruled upon where claims are asserted in effort to disallow claim. Bankruptcy Court has jurisdiction to enter final orders on eligibility of municipality to file Chapter 9 proceedings. Eligibility to file chapter 9 stems directly from rights established by the bankruptcy code. Although legal basis to oppose eligibility may turn on state or non-bankruptcy federal law, that does not deprive court of jurisdiction to enter final order regarding eligibility for bankruptcy protection.
- (4488) *TTOD v. Lim*, 2012 WL 3257882 (E.D. Mi. 2012) – Counterclaim brought by Chapter 7 trustee against creditor sought relief under State and Common Law remedies. Bankruptcy Court lacks jurisdiction to enter final judgment. Reference would be withdrawn to allow case to proceed in Article III district court.
- (4489) *French v. Johnson Law Group*, 2012 WL 3292854 (Bankr. N.D. Ohio 2012) – Court lacks jurisdiction to enter final judgment in action brought by Chapter 7 Trustee against law firm that allegedly agreed to provide pre-petition debt settlement services without compliance with Section 526. Action is core proceeding as it involves substantive rights created by the bankruptcy code. Ancillary state law claims for breach of contract, unjust enrichment and fraudulent misrepresentation became property of estate when case was filed and were related to the bankruptcy case as any recovery would be an asset available for distribution to creditors, but are not core proceedings as they do not invoke a substantive right created under the code. Court may not enter final judgment on related but non-core claims. In light of interrelatedness of claims, court would submit entire matter to district court on proposed findings of fact and conclusions of law.
- (4490) *Tolliver v. Bank of America*, 464 BR 720 (Bankr. E.D. Ky. 2012) - Bankruptcy Court lacks jurisdiction to enter final judgment on complaint alleging violations of state consumer protection act. Adversary complaint filed in response to proof of claim filed by creditor does not sport and exercise of jurisdiction by the bankruptcy court clerk purely state law claims unless both parties consent to entry of a final judgment by the bankruptcy court. However, those portions of the adversary complaint which were predicated on the enforceability of the loan documents in determination of the charges authorized under the loan documents constitutes the type of claims which are "necessarily resolved" in the claims objection process over which the court has jurisdiction and can enter a final judgment.
- (4491) *Ortiz v. Aurora Health Care, Inc.*, Case No. 10-3465 (7th Cir. 2011) – Bankruptcy court does not have constitutional authority to issue a final judgment in adversary proceedings involving claims defined by state law and that were independent of federal bankruptcy law. The adversary proceedings were filed by the debtors against a creditor who had filed a proof of claim. Although the debtors' claims were "core proceedings", the claims were ordinary state law claims that would not generally be resolved in the claims allowance process. As such, the Court decided that the debtors' claims must be adjudicated by an Article III court, and the bankruptcy court did not have authority to issue final judgment on the merits of the debtors' claims.
- (4492) *Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) - Debtor filed action for injunction to compel City to continue water service and for damages for alleged improper assessment of late fees and efforts to collect pre-petition, discharged portion of account. Complaint which was based on 42 USC Section 1983 was suit at common law which is assigned solely to Article III Court for resolution. However, court does have jurisdiction over those portions of complaint that sought damages for alleged violations of Section 362 and Section 366 and discharge injunction under Sections 727 and 524.
- (4493) *In re Peacock*, 2011 WL 3874461 (Bankr. M.D. Fl. 2011) - Court can exercise jurisdiction over suit brought by Chapter 7 Trustee for violations of Florida Consumer Collections Practices Act. Action is only "related to" case and so is not core proceeding. As such, Court can consider and enter final judgment only with consent of parties. Defendant consented to jurisdiction in answer to complaint and by failing to raise issue until eve of trial.
- (4494) *In re Olde Prairie Block Owner, LLC*, 201 WL 3792406 (Bankr. N.D. Il. 2011) - Bankruptcy court lacks constitutional authority to enter final judgment on state law counterclaim that is not necessarily resolved in the process of ruling on the creditor's proof of claim. Creditor filed proof of claim based on debtor's failure to repay loan. Debtor filed counterclaim alleging rescission and breach of good faith. Resolution of issues is necessarily implicated by resolution of creditor's proof of claim, allowing bankruptcy court to enter final judgment.
- (4495) *Chernich v. Cayo*, 2011 WL 1596228 (Bankr. W.D. Mi. 2011) – Action by Trustee to recover pre-petition accounts receivable owed to debtor is a state law cause of action over which Court has only "related to" jurisdiction. As matter is not "core proceeding", Court lacks jurisdiction to enter final judgment. Court would instead issue Report and Recommendation on Plaintiff's Motion for Default Judgment for District Court review.

12.16 Authority of Bankruptcy Court to Enter Final Judgment – Fraudulent Transfer Claims

- (4496) *Silgay v. Morris*, 2013 WL 5705630 (Bankr. N.D. Ohio 2013) – Bankruptcy court lacks jurisdiction to enter final judgment in fraudulent transfer action based on state law where defendant has not filed proof of claim in case. Although fraudulent transfer action is core proceeding, court cannot adjudicate what amounts to "private rights". Court can conduct hearings and issue report and recommendations to District Court for entry of final judgment.

- (4497) *Austin v. FNMA*, 2013 WL 2898037 (E.D. Mi. 2013) – Court would not exercise discretion to withdraw reference to consider motion for Rule 2004 Examination based on Debtor’s attempt to bring action against lender to recover fraudulent transfers. Action to recover fraudulent transfer can be brought solely by Trustee and involved pure bankruptcy matters that belong in Bankruptcy Court within Bankruptcy Court’s jurisdiction.
- (4498) *Still v. Hopkins*, 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Court not required to determine at early stages of fraudulent transfer and preference action whether Court has jurisdiction over action. If Court can exercise jurisdiction under *Stern*, court will do so. If it is ultimately determined that Court lacks jurisdiction to enter final judgment, action would also be “related to” case as outcome of action will have impact on administration of case, such that court can enter proposed findings of fact and conclusions of law for consideration by District Court.
- (4499) *Meoli v. Huntington National Bank*, Adv. No. 07-80037 (Bankr. E.D. Mi. 2012) – Court lacks jurisdiction to enter potentially multi-million dollar judgment based on alleged fraudulent transfers.
- (4500) *Sweet v. Chambers*, Adv. No. 11-3071 (Bankr. E.D. Mi. 2012) – Court lacks authority to enter final judgment in fraudulent transfer action. However, lack of jurisdiction does not require dismissal. Bankruptcy court can preside over all pre-trial matters and case can be referred to District Court for trial.
- (4501) *Official Committee of Unsecured Creditors v. Energy Coal Resources, Inc.*, 472 BR 731 (E.D. Ky. 2012) – Bankruptcy Court, as non-Article III Court, has jurisdiction to enter final judgments on fraudulent transfer and preference claims.
- (4502) *Richardson v. Checker Acquisition Corporation*, 2012 WL 87041 (Bankr. W.D. Mi. 2012) – Court has jurisdiction to enter final judgments in actions to recover fraudulent transfers and preferential transfers. *Stern* decision is extremely narrow and does not deprive Bankruptcy Court of jurisdiction to enter final judgments except in those limited types of counterclaims outlined in *Stern*. Further, even if Court may lack jurisdiction to enter final judgment, Court retains jurisdiction to handle matters where no final order is presently contemplated or necessary and issues may be resolved before Court’s authority to enter final judgment is required.
- (4503) *Meoli v. Huntington National Bank*, 2011 WL 3610050 (Bankr. W.D. Mi. 2011) – Bankruptcy Court lacks jurisdiction to enter final judgment in action to recover damages for fraudulent transfers absent express consent by all parties. Final judgment awarding money damages would deprive defendant of property without due process, as judgment would not be entered by Article III judge. Bankruptcy Court must instead issue written report and recommendations and forward those to the District Court for review.

12.17 Authority of Bankruptcy Court to Enter Final Judgment – Preferential Transfers

- (4504) *Hagan v. Koviack Irrigation and Farm Services, Inc.*, 2014 WL 5426876 (Bankr. W.D. Mi. 2014) – Court has jurisdiction to enter final judgment in preference action under Section 547. Defendant in action was creditor in case and court cannot complete claim allowance process without first resolving preference action.
- (4505) *Still v. Hopkins*, 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Court not required to determine at early stages of fraudulent transfer and preference action whether Court has jurisdiction over action. If Court can exercise jurisdiction under *Stern*, court will do so. If it is ultimately determined that Court lacks jurisdiction to enter final judgment, action would also be “related to” case as outcome of action will have impact on administration of case, such that court can enter proposed findings of fact and conclusions of law for consideration by District Court.
- (4506) *Onkyo Europe Electronics GMBH v. Global Technovations, Inc.*, 694 F.3d 705 (6th Cir. 2012) – In preference action, once Bankruptcy Court determines that amount paid by debtor exceeded value of assets received, Court had jurisdiction to determine the amount of the overpayment and to order the transferee to pay excess. Transferee, as “good faith” transferee, was entitled to offset value of property transferred by purchase price paid, with the remaining balance being the preferential transfer that must be repaid. Creditor filed proof of claim and adversary proceeding was brought as a defense to proof of claim. Under *Stern*, Bankruptcy Court has jurisdiction to enter money judgment where action is based on state law, where action is itself integral to the claims resolution process. Judgment not limited to amount necessary to offset claim amount. Court has jurisdiction to enter affirmative relief beyond disallowance of claim itself.
- (4507) *Official Committee of Unsecured Creditors v. Energy Coal Resources, Inc.*, 472 BR 731 (E.D. Ky. 2012) – Bankruptcy Court, as non-Article III Court, has jurisdiction to enter final judgments on fraudulent transfer and preference claims.
- (4508) *Richardson v. Checker Acquisition Corporation*, 2012 WL 87041 (Bankr. W.D. Mi. 2012) – Court has jurisdiction to enter final judgments in actions to recover fraudulent transfers and preferential transfers. *Stern* decision is extremely narrow and does not deprive Bankruptcy Court of jurisdiction to enter final judgments except in those limited types of counterclaims outlined in *Stern*. Further, even if Court may lack jurisdiction to enter final judgment, Court retains jurisdiction to handle matters where no final order is presently contemplated or necessary and issues may be resolved before Court’s authority to enter final judgment is required.
- (4509) *Richardson v. BDSM Corp.*, 2011 WL 4793343 (Bankr. W.D. Mi. 2011) – Although preference action has its origins in Bankruptcy Code, ultimate relief would be to seek collection by taking property of non-debtor. Defendant who defaulted by not responding to complaint did not consent to Bankruptcy Court jurisdiction. Because of uncertainty as to scope of *Stern*, court would adopt prudent course and issue Report and Recommendation to District Court, in effort to insulate Judgment from later collateral attack.
- (4510)

12.18 Authority of Bankruptcy Court to Enter Final Judgment – Adjudication of Claims and Liens

- (4511) *First National Bank v. Crescent Electric Supply Co.*, Case No. 12-10386 (5th Cir. 2013) – Bankruptcy Court has jurisdiction to resolve disputes regarding validity, priority and extent of liens as between lender and various mechanics and materialmen’s liens against property of the estate.
- (4512) *Lawson v. Conley*, 2012 WL 4845854 (Bankr. S.D. Ohio 2012) – Court has constitutional authority to enter final judgment in non-dischargeability action to also liquidate amount of previously unliquidated claim of creditor against debtor.
- (4513) *Waldman v. Stone*, 2012 WL 5275241 (6th Cir. 2012) – Bankruptcy Court had authority to disallow claim where claim resulted from creditor’s own fraud perpetrated on the debtor. Although the debtor’s claims against creditor did not themselves arise under federal law (all were based on state law fraud), even a state law claim can be asserted and adjudicated by bankruptcy court as a defense to a claim asserted by the creditor, as it relates to the bankruptcy case and is at least related to the bankruptcy case as the outcome “conceivable” has an impact on the outcome of the case. However, Bankruptcy court lacked jurisdiction to enter further judgment in favor of debtor and against creditor awarding damages arising out of that same fraudulent conduct. Article III, Section 1 of the Constitution vests jurisdiction for non-bankruptcy matters exclusively in the District Court. Issue to be adjudicated involved one solely of “private rights” that exist outside of and independent of the bankruptcy code. Affirmative claims required proofs beyond those necessary to resolve objection to claim itself, and included both actual and punitive damage claims. Case remanded for Bankruptcy Court to convert judgment into proposed findings of fact and conclusions of law for review and action by District Court.

12.19 Authority of Bankruptcy Court to Enter Final Judgment – Confirmed Plan

- (4514) *In re SAI Holdings, Ltd.*, 2012 WL 3185826 (Bankr. N.D. Ohio 2012) – Subject matter jurisdiction is governed by 28 USC Section 1334. Parties cannot create or confer subject matter jurisdiction over a dispute. Court lacked jurisdiction over dispute arising out of property held by Chapter 11 Debtor’s Liquidating Trust as part of confirmed and consummated Chapter 11 Plan. Creditor’s challenge to Liquidating Trustee’s decisions, although impacting the value of the property held by the Trust, did not provide the required close nexus to the bankruptcy proceedings to support jurisdiction. Any nexus is remote. The Motion addresses decisions made by the Liquidating Trustee 4 years after confirmation of the Plan. The Motion did not involve a pre-petition or pre-confirmation claim. All of the facts underlying the action occurred years after confirmation and consummation of the plan. At confirmation, all property vested in the Liquidating Trustee. As such, the property in the Trust was no longer property of the estate and court lacked authority to order property abandoned as property was not held by bankruptcy trustee.

12.20 Authority of Bankruptcy Court to Enter Final Judgment – Turnover from Non-Debtor

- (4515) *Moyer v. Koloseik*, Case No. 11-80269 (Bankr. W.D. Mi. 2012) – Due process principals delineated in *Stern* must be construed broadly. A narrow construction allows courts to retain actions that properly should be handled by Article III Courts. Action to recover under Section 542(b) is an action brought by the Trustee to recover money from non-debtor. Although there is no doubt that if the defendant owes money to the estate, the defendant should be made to answer. However, fact that money is owed to the estate is not basis to ignore limitations and precepts of Article III that the final judgment be entered by an Article III Court. Defendant does not consent to entry of final judgment merely by defaulting. Waiver of a right to have an Article III Court enter the final judgment requires knowing and intentional relinquishment of right. Mere silence, even if that results in a default judgment, is not a waiver. Rule 55, which allows entry of a final judgment by the clerk when the complaint seeks damages in a sum certain, cannot trump constitutional limitations on power of Article I court. Action sent to District Court with report and recommendation for entry of final judgment.
- (4516) *Hagan v. Classic Products Corp.*, Case No. 11-80417 (Bankr. W.D. Mi. 2011) – Court declined to extend *Stern* to avoidance and recovery action under Chapter 5, particularly where the amount involved is relatively small. 28 USC Section 157 is not a jurisdictional statute and Court is not required to raise the issues *sua sponte*. Complaint alleged cause of action and Defendant failed to answer or timely respond. Court could enter final default judgment or could issue Report and Recommendation which would be unopposed and adopted by the District Court. Court would enter Final default Judgment that avoided the transfer and awarded monetary relief for the amount of the transfer.

12.21 Authority of Bankruptcy Court to Enter Final Judgment – Section 544 “Strong Arm” Powers

- (4517) *Tribble v. Wells Fargo Bank, N.A.*, 2011 WL 3583278 (Bankr. W.D. Mi. 2011) – Bankruptcy Court is constitutionally prohibited from entering a final order in core proceedings based on State law claims absent explicit consent of the parties. Bankruptcy Court retains constitutional jurisdiction to render final judgment in action that arises under Title 11 even if that resolution necessarily relies on state law for determination. Action by Trustee to avoid lien under Section 544 is action “arising in” or “arising under” Bankruptcy Code allowing Bankruptcy Judge to constitutionally enter Final Judgment.

12.22 Authority of Bankruptcy Court to Enter Final Judgment – Stay Issues and Discharge Injunctions

- (4518) *Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) - Debtor filed action for injunction to compel City to continue water service and for damages for alleged improper assessment of late fees and efforts to collect pre-petition, discharged portion of account. Complaint which was based on 42 USC Section 1983 was suit at common law which is assigned solely to Article III Court for resolution. However, court does have jurisdiction over those portions of complaint that sought damages for alleged violations of Section 362 and Section 366 and discharge injunction under Sections 727 and 524.

12.23 Authority of Bankruptcy Court to Enter Final Judgment – Property of Estate

- (4519) *In re Ambac Financial Group, Inc.*, 2011 WL 4436126 (Bankr. S.D.N.Y. 2011) - Bankruptcy Court has jurisdiction to approve

compromise and settlement of claim that is property of the estate. Debtor-in- possession brought shareholder derivative action against former directors and then sought to settle those claims.

B. Venue

12.24 Generally

- (4520) *Gold v. Bandman*, 2012 WL 2160968 (E.D. Mi. 2012) – Order denying Motion to dismiss based on improper venue is not final, appealable order. Although Appellant did not file separate Motion for Leave to appeal, under Rule 8003 appellate court can treat notice of appeal itself as request for leave to appeal. District Court’s issuance of a scheduling order is ministerial task and does not constitute order authorizing interlocutory appeal. Appellant failed to demonstrate any substantial grounds to overturn Bankruptcy Court Order. Bankruptcy Court’s conclusion that 28 USC Section 1409(b) does not apply to avoidance actions because those arise under Title 11 with venue being appropriate in district where case is pending; rather than action arising in or related to Title 11 where venue is appropriate only in the district court where the defendant resides. Although there was split of authority on the issue at the Bankruptcy Court level, the majority of decisions were consistent with that reached by Bankruptcy Court. Further, immediate appeal would not materially advance the litigation but would only delay litigation and increase costs without reaching ultimate issue as to whether Trustee could recover allegedly fraudulent transfers.

12.25 Forum Selection Clauses

- (4521) *ImagePoint, Inc. v. BFS Retail & Commercial Operations, LLC*, 2013 WL 2457900 (E.D. Tn. 2013) – 28 USC Section 1404 requires transfer of case where contract between parties contains valid forum selection clause. Although forum selection clauses are not dispositive, forum selection clauses will be enforced unless enforcement is unfair or unreasonable. Where valid forum selection clause exists, burden is on plaintiff to show why clause should not be enforced and action transferred. In determining whether to transfer a case under § 1404(a), in addition to considering the forum-selection clause, the Court must consider (1) the convenience of witnesses; (2) the location of relevant documents and relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of the operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) the forum’s familiarity with the governing law; (8) the weight accorded the plaintiff’s choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances. Enforcement was not inconvenient where some witnesses were located in Tennessee and others in Illinois, the chosen forum. Operative facts did not control where dispute was between Tennessee company and Illinois Company about work that occurred in various states. Clause included “any litigation” between the parties, which was broad enough to encompass both contract and quantum meruit claims. Although plaintiff has fewer resources than defendant, that is not basis to disregard otherwise valid forum selection clause.

12.26 “Small-dollar” Venue

- (4522) *In re Nukote International, Inc.*, 2011 WL 3874473 (Bankr. M.D. Tn. 2011) – 28 USC Section 1409 states general rule for venue that adversary proceedings arising in, arising under or related to bankruptcy case is proper in district where bankruptcy case is pending. however, Section 1409(b) provides that in any action by the trustee arising in or related to a bankruptcy case to recover a debt against a non-insider of less than \$11,725, venue is proper only in the district where the defendant resides. Section 1409(b) excludes from “small dollar venue” rule any proceeding “arising under” a case under Title 11. Trustee’s action to recover preferential transfer “arises in” a Bankruptcy case, triggering “small-dollar venue” exception.

12.27 Change of Venue – Chosen Venue Proper

- (4523) *Brown v. Florida Coastal Partners, LLC*, 2014 WL 2169561 (S.D. Ohio 2014) – Motion for change of venue denied where Motion sought to change “venue” of action from State Court to Federal Court. Proper vehicle is removal under 28 USC Section 1446.
- (4524) *Construction Data Solutions, LLC v. Grant*, 2013 WL 4462706 (Bankr. N.D. Ohio 2013) – “Strong presumption” for venue over adversary proceeding to be placed in same District where bankruptcy case is pending. Court can transfer venue for interests if justice, based on 1) whether transfer would promote the economic and efficient administration of the bankruptcy estate; 2) whether the interests of judicial economy would be served by the transfer; 3) whether the parties would be able to receive a fair trial in each of the possible venues; 4) whether either forum has an interest in having the controversy decided within its borders; 5) whether the enforceability of any judgment would be affected by the transfer; and 6) whether the plaintiff’s original choice of forum should be disturbed; with primary focus on efficient and effective administration of estate. Substantial interrelationship between adversary to except debt from discharge and the main asset of the bankruptcy estate favored leaving adversary in jurisdiction where main action was pending, to allow Chapter 7 trustee to effectively monitor action and assess impact on estate’s largest asset. Adverse impact that would result from transfer outweighed any concerns about state law claims or any connection between non-forum state and underlying causes of action. Transfer also not proper for convenience of parties where only physical evidence consists of business records that are easily transportable, parties have relatively equal financial ability to litigate in chosen forum, and witnesses would be equally inconvenienced regardless of forum in which action is ultimately tried.
- (4525) *Apperson v. Old Fort Banking Co.*, 2012 WL 4760799 (Bankr. W.D. Ky. 2012) – “Strong presumption” for venue over adversary proceeding to be placed in same District where bankruptcy case is pending. Transfer of venue where venue is otherwise proper is in the discretion of the Bankruptcy Court, to be changed with caution. Movant must prove either that transfer is in the interests of justice or that transfer would serve the convenience of the parties. In considering “interests of justice” Courts will consider: 1) whether transfer would promote the economic and efficient administration of the bankruptcy estate; 2) whether the interests of judicial economy would be served by the transfer; 3) whether the parties would be able to receive a fair trial in each of the possible venues; 4) whether either forum has an

interest in having the controversy decided within its borders; 5) whether the enforceability of any judgment would be affected by the transfer; and 6) whether the plaintiff's original choice of forum should be disturbed. In determining convenience of parties, court must consider (1) location of the plaintiff and defendant, (2) ease of access to the necessary proof, (3) convenience of the witnesses and the parties and their relative physical and financial condition, (4) availability of the subpoena power for unwilling witnesses (5) expense of obtaining unwilling witnesses and (6) whether the issues are those where state law governs; and (7) local interest in having localized controversies decided locally. Transfer would not be in interest of justice where transferring court has extensive experience in bankruptcy case while transferee court has no knowledge of case; and transfer would unnecessarily increase expenses of administration of case. Parties could receive fair trial in either forum and neither forum has a particular interest in the outcome. However, convenience of parties warranted transfer. Action had tenuous connection to Kentucky. Debtor and both defendants are located in Ohio, and most if not all witnesses and evidence are in Ohio. Requiring defendants to produce multiple witnesses in a forum more than 5 hours away, with attendant traveling costs supports transfer, particularly where Trustee's travel costs would be minimal by comparison.

- (4526) *Foser v. SLM Financial Corp.*, 2012 WL 3264991 (W.D. Ky. 2012) – Court can transfer venue of otherwise properly located case in interest of justice and for convenience of witnesses. Party seeking transfer bears burden to present strong evidence to warrant transfer. Court will consider (1) the convenience of witnesses; (2) the location of the relevant documents and relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of the operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) the forum's familiarity with the governing law; (8) the weight accorded plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances. Student Loan Creditor's concern that failure to transfer venue could lead to inconsistent results not warranted where student loan debts could not be discharged in primary obligor's bankruptcy. Defendant in this case was co-signor. Even if co-signor prevailed in action asserting forgery, that would not in any way impact creditor's ability to recover from bankruptcy debtor. Alleged "burdens of travel" were insufficient as the current venue lay only 6 miles from venue to which creditor sought transfer.
- (4527) *In re Barnes*, Case No. 10-55870 (Bankr. E.D. Mi. 2010) - Debtors' unopposed Motion to Transfer Venue denied where Motion failed to demonstrate that transfer was in the interest of justice or for the convenience of the parties as required by 28 USC Section 1412.
- (4528) *Steed v. Buckalew*, 2009 WL 3493597 (Bankr. E.D. Tn. 2009) – In determining whether to change venue "in the interest of justice" under Section 1404 and Section 1412, Court must consider (1) convenience of witnesses; (2) availability of judicial process to compel the attendance of unwilling or uncooperative witnesses; (3) location of the relevant documents or records, and the relative ease of access to sources of proof; (4) residence and convenience of the parties; (5) relative financial means of the parties; (6) locus of the operative facts and events that gave rise to the dispute or lawsuit; (7) each forum's familiarity with the governing law; (8) the deference and weight accorded to the plaintiff's choice of forum; and (9) trial efficiency, fairness, and the interests of justice based on the totality of the circumstances. Defendant's conclusory assertion that the witnesses to the transaction were located in Florida not sufficient to overcome presumption that action filed in correct venue should remain in that venue, where Defendant failed to identify these witnesses or provide sufficient information to allow court to determine what and how important their testimony may be. Defendant's argument that documents related to transaction were located in Florida insufficient where Defendant failed to explain why documents could not be copied, mailed, e- mailed, faxed or otherwise sent to Tennessee. Although all events pertaining to transfers occurred in Florida and transferred property largely remained in Florida, all documents relating to transfers and items of personal property involved could be easily relocated to Tennessee. Plaintiff's choice of venue is entitled to great deference and will be rejected only where another venue is clearly preferable. Leaving case in Tennessee would further judicial economy and efficiency where similar preference actions were already pending in Tennessee and Court was familiar with Debtor and other underlying issues.

12.28 Change of Venue – Chosen Venue Improper

- (4529) *KFC Corp. v. Wagstaff*, 2013 WL 3166165 (W.D. Ky. 2013) – Where court lacks personal jurisdiction over defendant, court can either dismiss case or transfer case to a more suitable court. Court need not resolve whether it has authority to adjudicate claim (subject matter jurisdiction) or jurisdiction over the defendant before it can determine whether a more suitable forum exists. Defendants were co-guarantors of corporate obligations of the Corporate Debtors who had filed Chapter 11 proceedings in Minnesota Plaintiff had participate in those bankruptcy proceedings. Plaintiff's actions to enforce guarantees of defendants were "related to" defendants' individual Chapter 11 proceedings as the outcome could conceivably have an effect on administration of the case by impacting possible indemnification claims by the defendants against the Debtor. Although any indemnification claims are indefinite and may or may not ever arise, contingent nature of obligation does not prevent obligation from being related to bankruptcy case. 28 USC allows transfer of "related to" proceedings where transfer serves interest of justice. Transfer is appropriate where transfer would be to court where related bankruptcy is pending, enhancing economics of administration of estate and fostering judicial efficiency given location of most witnesses and parties. Neither Minnesota nor Kentucky held an overwhelming interest in resolution of controversy or the ability of the parties to obtain a fair trial.

C. Trial

12.29 Generally

- (4530) *In re Merena*, Case No. 08-1342 (9th Cir. BAP 2009) – Trial court denial of request to bifurcate trial of claims under Section 523 from trial of claims under Section 727 is reviewed for abuse of discretion. Lower Court will abuse its discretion is the court's application of the correct legal standard was illogical, implausible, or without support in inferences that may be drawn from the facts in the record. Trial court can bifurcate action to avoid prejudice to a party or to promote judicial economy. Trial court correctly denied request to bifurcate where bifurcation would have required parties to litigate section 727 claim at one time and return at a later, indeterminate date, to litigate section 523 claim which would do nothing but increase litigation costs for all parties. Denial of bifurcation would produce a more efficient

use of judicial resources and would promote judicial economy while also assisting debtor in obtaining “fresh start” by avoiding unnecessary delays in deciding issues raised.

12.30 Arbitration

- (4531) *Robinson v. Alston*, 2015 WL 105821 (11th Cir. 2015) – Party waives right to arbitrate where party acts inconsistently with arbitration right and conduct prejudices other party. Defendant waived arbitration where party ignored requests by opposing party to institute arbitration proceedings and instead chose to hire bankruptcy attorney and place party in bankruptcy. Party then participated in both district court and bankruptcy court proceedings, driving up costs and attorney fees for opposing party.
- (4532) *Johnson v. Stellar Recovery, Inc.*, 2014 WL 5705027 (E.D. Mi. 2014) – Arbitration agreement does not require written agreement between parties. Debtor purchased phones from independent cell phone dealer and Terms and Conditions provided that terms were agreed to upon activation of phones. Debtor did not sign any document that included an arbitration agreement and did not sign the Terms and Conditions. However, absent a written and signed agreement, there is no presumptively enforceable arbitration agreement and Court must conduct trial to determine whether party agreed to submit disputes to arbitration. Evidence was disputed for purposes of summary judgment where debtor filed affidavit stating that she never saw and was never referred to any agreement that contained arbitration clause. However, even if arbitration agreement existed between debtor and cell carrier, there was no arbitration agreement between debtor and debt collector acting on behalf of cell carrier.
- (4533) *Flinkkote Co. v. Aviva, PLC*, 769 F.3d 215 (3d Cir. 2014) – Federal Arbitration Act expresses strong federal policy in favor of resolving disputes through arbitration. Arbitration is strictly a matter of contract and where a party has not agreed to arbitrate, the courts have no authority to mandate that he do so. In ruling on Motion to Compel Arbitration, court must consider (1) whether there is a valid agreement to arbitrate between the parties and, if so, (2) whether the merits-based dispute in question falls within the scope of that valid agreement. Party who is non-signatory to an arbitration agreement, may be equitably bound to arbitrate under traditional principles of contract and agency law. Party will be bound where party has directly benefitted from terms of contract and maintains that other provisions of contract should be enforced as to him or otherwise attempts to enforce terms of contract that it likes while attempting to disavow those that party does not like. Party can also be bound where party either intentionally leads another to change position in reliance on party’s conduct. Party alleging estoppel must show that party lacked knowledge or means of obtaining knowledge of truth of matters in question; reasonable reliance on conduct of party against whom estoppel is asserted; and party suffered prejudicial change in position in reliance. Party failed to demonstrate reliance where opposing party initially consented to arbitration as part of attempt to mediate dispute but later chose to litigate matter, where party was signatory to underlying contract in which opposing party specifically reserved right to litigate disputes such that party seeking arbitration knew of actual state of facts. Further, there was no reasonable basis to rely on party’s statements regarding arbitration where mediation agreement did not contemplate arbitration in lieu of litigation if mediation was unsuccessful.
- (4534) *Blackburn v. Capital Transaction Group, Inc.*, 2014 WL 923316 (E.D. Tn. 2014) – Federal law establishes liberal policy favoring arbitration agreements. Claims in bankruptcy are subject to arbitration unless the issues presented derive exclusively from the provisions of the Bankruptcy Code. Dispute underlying claim in bankruptcy case was based on pre-petition contract and issues were controlled by state law. Court properly entered order requiring parties to arbitrate dispute consistent with terms of arbitration clause.
- (4535) *Washington v. Roosen, Varchetti & Oliver, PPLC*, 894 F. Supp. 2d 1015 (W.D. Mi. 2012) – Court could not compel arbitration when issue presented under Rule 12(b)(6) as credit card agreement which contained alleged arbitration clause was not attached to the complaint as an exhibit. In considering a motion to dismiss under Rule 12(b)(6), court is limited to four corners of complaint, and could not consider additional documents attached to Motion itself but not part of the complaint.
- (4536) *Green v. G. Reynolds Sims & Assoc, P.C.*, 2013 WL 1212775 (E.D. Mi. 2013) – Federal Arbitration Act makes arbitration clauses generally enforceable. Arbitration clause in Credit Card Agreement sufficiently broad to encompass alleged action against collection agency for breach of Fair Debt Collection Practices Act. Sole issues for Court to consider are whether the dispute is one within the substantive scope of the arbitration agreement and whether the arbitration agreement itself was validly obtained, judged by state law generally applicable to contracts and not specific to arbitration agreements. If Court concludes that dispute is within scope of enforceable arbitration agreement, court must either stay proceedings or dismiss proceedings. Further, if agreement delegates to arbitration the issue of whether the dispute falls within scope of arbitration clause or the validity of the arbitration clause as a whole, that dispute must also be submitted to the arbitrator for resolution. Action stayed pending arbitration including arbitration of disputes concerning enforceability and validity of arbitration agreement itself.
- (4537) *Ackerman v. Eber*, Case No. 10-4974 (9th Cir. 2012) – Federal Arbitration Act provides that arbitration agreement is to be valid, irrevocable and enforceable absent ground to revoke the contract. Court must stay litigation if the issue in the proceeding is arbitrable. Bankruptcy code does not create any exception to the FAA and Bankruptcy Court can deny enforcement of arbitration agreement only if there is an “inherent conflict” between arbitration and underlying purposes of Code. Issues in arbitration were so closely intertwined with dischargeability proceedings under Section 523 such that arbitration would conflict with underlying policies of the Code. Dischargeability is at heart of bankruptcy code. Plaintiff was seeking arbitration proceedings to establish liability and damages that would then be used as collateral estoppel in adversary proceeding under Section 523.
- (4538) *Pfeiffer v. Dominion Management of Delaware*, 2011 WL 4005504 (Bankr. E.D. Pa. 2011) - Bankruptcy Court required to stay adversary proceeding pending arbitration where contract between parties contained valid arbitration agreement and matters in dispute fell within scope of claims designated in arbitration clause.

- (4539) *In re Rust of Kentucky, Inc.*, 2010 WL 4510894 (Bankr. W.D. Ky. 2010) - Court would not stay adversary proceeding and compel arbitration were contractual conditions to obligation to arbitrate were not fulfilled prior to commencement of bankruptcy case. Party requesting arbitration failed to participate in mandatory mediation and direct discussions which were conditions precedent to arbitration requirement. Although courts have a clear preference for arbitration, court may refuse request for arbitration were arbitration was not commenced prior to adversary proceeding being filed; all parties to the arbitration are parties in the underlying bankruptcy; Court is familiar with and routinely adjudicates breach of contract cases; Debtor also has no prospect of confirming a plan until adversary proceeding is resolved; retaining case before Court would not produce piecemeal litigation; and arbitration would subject the estate to needless expense.

12.31 Bifurcation of Issues for Trial

- (4540) *DeGirolamo v. McIntosh Oil Co.*, 2014 WL 739126 (Bankr. N.D. Ohio 2014) – Court can bifurcate issues in case for separate hearings if the issues presented do not result in “evidentiary overlap”. Factual issues of good faith under Section 548(c) substantially overlap issues giving rise to liability in first instance under “actual fraud” prong of Section 548. Accordingly, those issues should be considered at a single evidentiary hearing rather than being bifurcated for separate trial.

D. Non-Bankruptcy Actions

12.32 Referral to Bankruptcy Court

- (4541) *Church Joint Venture v. Grusin*, 2012 WL 1982337 (W.D. Tn. 2012) – Under Court’s Administrative Procedure, any action filed in United States District Court that arises under or is related to case under Title 11 is automatically referred to Bankruptcy Court. Chapter 7 Trustee commenced litigation in District Court against Debtor’s former attorney for malpractice. Action constitutes property of estate as cause of action arose pre-petition; therefore, action “arises in” a bankruptcy case making referral to Bankruptcy Court automatic under Administrative Procedure.
- (4542) *McKinstry v. Sergeant*, 442 B.R. 567 (E.D. Ky. 2011) – District Court considering removal of action to bankruptcy court must first determine whether District Court has jurisdiction over action. If Court lacks jurisdiction, case cannot be referred even with consent of opposing party. Causes of action assigned to liquidating trustee based on pre-bankruptcy actions that purportedly led to bankruptcy filing were “related to” bankruptcy for purposes of jurisdiction. “Related to” jurisdiction exists even after confirmation of Chapter 11 Plan where claims were based on pre- and mid-bankruptcy conduct and were specifically reserved to the liquidating trustee in the confirmed plan. Actions would be referred to bankruptcy court for further proceedings.
- (4543) *U.S. v. Vestal*, 2011 WL 1627985 (N.D. Ohio 2011) – District Court would not refer to Bankruptcy Court action to determine tax liabilities. Connection to bankruptcy case was tangential where bankrupt party was potential claimant to assets of taxpayer depending on amount of tax liability as ultimately determined. Bankruptcy Trustee had already abandoned the possible claim and the Bankruptcy Court had granted stay relief to allow case to proceed at District Court. Action was not core proceeding in bankruptcy case, particularly in light of trustee abandonment of asset and outcome of District Court proceeding could not have any effect on or relate to the bankruptcy case.
- (4544) *Omega Consulting v. Kirwood General Hospital*, Case No. 10-13231 (E.D. Mi. 2011) – 28 USC Section 157(a) permits District Court to refer any or all proceedings relating to a bankruptcy case to the Bankruptcy Court for disposition. Bankruptcy Court has jurisdiction to determine whether matter is “core” or “non-core”. Matter referred to Bankruptcy Court to determine whether Creditor’s attempt to garnish unclaimed funds remaining from liquidation of debtor constitutes core proceeding and, if so, may supervise the distribution of those funds. Bankruptcy Court also has jurisdiction to determine whether creditor’s actions violated automatic stay and to interpret and enforce its own orders. Even if dispute is not “core” proceeding, it is an action to obtain unclaimed funds that could conceivably have an effect on the bankruptcy case, giving Bankruptcy Court jurisdiction as matter is “related to” bankruptcy case.
- (4545) *McKinstry v. Sergeant*, 2011 WL 94606 (E.D. Ky. 2011) – Before District Court can consider referring matter to Bankruptcy Court, District Court must first determine whether bankruptcy court can exercise jurisdiction over the referred matter. Although Bankruptcy Court can determine whether the matter is core or non-core, that does not relieve District Court of obligation to determine jurisdiction in the first instance. “Related to” is a broad grant of jurisdiction. Bankruptcy Court has jurisdiction as the causes of action all arise out of the confirmed Chapter 11 plan and were prosecuted by the liquidation trust named in the Plan and in which the Plan vested the causes of action. Bankruptcy jurisdictional statute does not distinguish between pre- and post-confirmation jurisdiction. Although Bankruptcy Court may be more reluctant to exercise jurisdiction post-confirmation, that decision is prudential, not jurisdictional.
- (4546) *Omega Tool Corp v. Alix Partners, LLP.*, 2009 WL 1868410 (E.D. Mi. 2009) – District Court has authority to refer litigation pending in District Court based on diversity jurisdiction to Bankruptcy Court where matter in controversy is “related to” a pending Chapter 11. A civil proceeding is related to bankruptcy if the outcome of that proceeding *could conceivably have any effect* on the bankruptcy estate. A case between two non-Debtor parties is “related to” a bankruptcy proceeding when the outcome of the case may increase or decrease claims against the Debtor. Action brought against Debtor’s principals is attempt to recover from defendants the same damages that constitute the claim against the estate. Therefore, any recovery would reduce the claims against the Debtor and make more funds available for distribution to other creditors. Further, recovery by plaintiff could result in indemnification claims by defendants against Debtor thereby creating new unsecured claim affecting distributions to creditors. Court is not required to determine whether there are ground to later withdraw the reference before granting a Motion to Refer the case to the Bankruptcy Court in the first instance. Motions to Withdraw the Reference are to be considered only after the controversy has been referred.

E. Withdrawal of Reference

12.33 Mandatory

- (4547) *In re Brown*, 2015 WL 2416143 (S.D. Ohio 2015) – District Court must withdraw reference if resolution requires consideration of both Title 11 and laws of the United States. Motion to Withdraw Reference must be made as soon as possible after moving party is aware of grounds to withdraw reference. Debtors failed to timely seek to withdraw reference where debtors had been in bankruptcy since 2011 and had repeatedly, and unsuccessfully, attempted to withdraw reference as to adversary proceedings and had unsuccessfully filed two separate adversary proceedings against lender and had otherwise exhausted all possible remedies in bankruptcy court. Current motion to withdraw reference over entire bankruptcy case was nothing more than an attempt to stall or delay proceedings.
- (4548) *CitiMortgage, Inc. v. Crawford*, 2012 WL 1867518 (S.D. Ohio 2012) – Under 28 USC Section 157(d), a district court “shall” withdraw the reference “if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” Court granted motion to withdraw reference where defendant failed to file any response to the Motion to Withdraw Reference within time permitted. After Lender commenced foreclosure proceedings, defendant filed a Class Action counterclaim alleging breach of contract, misrepresentations, and violation of State Deceptive Trade Practices Act. Lender then filed Motion to Withdraw the reference, and defendant failed to file any response or opposition.
- (4549) *Antiock Company Litigation Trust v. Morgan*, Case No. 09-3409 (Bankr. S.D. Ohio 2010) – A motion to withdraw the reference is mandatory if the District resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce. Withdrawal is mandatory only mandatory when ‘substantial and material’ consideration of non- Bankruptcy Code law is necessary for the resolution of a case or proceeding. The application of established federal law to particular facts has been determined to not constitute a “significant and material” application. Adversary proceeding involving ERISA did not require mandatory withdrawal of the reference. Bankruptcy Court would not be addressing novel issues of law and would be merely applying existing law to new facts. Although the specific facts are complex the applicable law is settled.
- (4550) *In re Matheson Industries, Inc.*, 408 B.R. 888 (E.D. Mich. 2009). Creditor, who was defendant in an adversary proceeding initiated by the Chapter 7 trustee, moved to withdraw the reference and move the dispute to the district court. The district court held that the allegations of bid rigging and other interference with the auction of injection molding machines that creditor neglected to perfect a security interest in, did not require mandatory withdrawal of reference, nor was permissive withdrawal of the reference granted. So, the adversary proceeding remained with the bankruptcy court.
- (4551) *Lewis v. Negri Bossi USA, Inc.*, Case No. 09-11623 (E.D. Mi. 2009) – Withdrawal of reference is mandatory when resolution of proceeding requires consideration of both Bankruptcy Code and other laws of the United States. Complaint alleging that defendant attempted to improperly “chill” bidding at bankruptcy auction and that defendant attempted to control property of estate are actions based on Bankruptcy Code and do not require consideration of antitrust restrictions under Sherman Act. Plaintiff’s decision to include in complaint only “core” matters in effort to ensure case remained in Bankruptcy Court did not constitute “forum shopping” but was an election of causes of action.
- (4552) *Angelucci v. Farmers Bank & Trust Co.*, 2009 WL 798805 (E.D. Ky. 2009) – Withdrawal of reference is mandatory when resolution of the case will require substantial and material consideration of non- Bankruptcy Code statutes.
- (4553) *Stevenson v. Polymerica, Ltd.*, 2009 WL 230598 (E.D. Mi. 2009) – Withdrawal of reference mandatory under 28 USC Section 157 where resolution of case requires consideration of both Bankruptcy Code and other laws of the United States regulating organizations of activities affecting interstate commerce. Mandatory withdrawal requires that substantial and material consideration of non-bankruptcy law will be required in the proceeding and that a resolution would require “significant interpretation” of non - Bankruptcy law. Mandatory withdrawal denied where consideration of underlying action will require “some consideration” but not “substantial and material” consideration of non-Bankruptcy law.
- (4554) *Anderson v. Countrywide Home Loans, Inc.*, 395 BR 7 (E.D. Mi. 2008) – Court not required to withdraw reference in action brought by Debtor for violation of automatic stay and alleged violations of Home Owner’s Loan Act (12 USC Section 1461 *et seq*) and Real Estate Settlement Procedures Act (12 USC Section 2601 *et seq*). “Substantial and material” standard excludes from mandatory withdrawal cases involving “straightforward application of a federal statute to a particular set of facts”. Non-Bankruptcy law will be implicated in the decision but will not be “substantial and material” as the claims are primarily Bankruptcy law related, based on alleged violations of automatic stay and discharge injunction.
- (4555) *Prince v. Countrywide Home Loans, Inc.*, 2008 WL 4572545 (E.D. Tn. 2008) – Withdrawal of reference is mandatory only when “substantial and material” consideration of non-Bankruptcy law is necessary to determine outcome. That Bankruptcy Court may have to “consider” non-bankruptcy statutes is not enough for mandatory withdrawal. Plaintiff’s claims based on Real Estate Settlement Procedures Act and Fair Debt Collection Practices Act involve matters routinely considered by Bankruptcy Courts. Statutes do not require specialized expertise that Bankruptcy Court lacks and record does not demonstrate that resolution of claims will require “substantial and material” consideration of RESPA and FDCPA in comparison to the other claims in made in the Bankruptcy Court. Judicial economy and orderly administration of dispute best served by Bankruptcy Court continuing to administer the entire case.

12.34 Discretionary – Cause for Withdrawal

- (4556) *Walker v. Selene Finance, LP*, 2015 WL 19967446 (M.D. Tn. 2015) – First inquiry in considering request for discretionary withdrawal of reference is whether cause of action is core proceeding. Bankruptcy court can hear and enter final judgment in core proceeding, and can hear and enter proposed findings of fact and conclusions of law in non-core proceeding. Action to determine validity of claim is core proceeding such that withdrawal of reference would be denied. To extent cause of action asserted other matters not directly related to

claims adjudication, bankruptcy court would issue proposed findings and matters were at least related to core proceedings, such that allowing matters to remain in bankruptcy court would promote judicial economy and uniformity in case administration and would reduce expenses and burden on parties by having one court adjudicate all matters at one time.

- (4557) *National Union Fire Insurance Company v. CMH Liquidating Trust*, 2015 WL 3843408 (E.D. Mi. 2015) – Whether “cause” exists to withdraw reference depends on whether action is core or non-core; the most efficient use of judicial resources; potential cost and delay from withdrawal of reference; uniformity of bankruptcy administration; whether withdrawal is effort to forum shop; and any other related factor the court deems appropriate. District Court has authority to make determination of whether adversary proceeding is core or non-core and is not required to defer to bankruptcy court for that determination. Bankruptcy court’s decision as to whether matter is core or non-core would be subject to appeal to district court, such that allowing district court to make determination in first instance promotes judicial economy. Core proceedings are those that involve a cause of action created or determined by a statutory provision of title 11 or could arise only in bankruptcy cases. If the proceeding does not invoke a substantive right created by federal bankruptcy law and is one that could exist outside of the bankruptcy, then it is not a core proceeding. Action by Trustee was state law breach of contract case. Although defendant intended to assert provisions of bankruptcy code as defense, assertion of defenses does not convert non-core proceeding into core proceeding. Even where withdrawal of reference is appropriate, court can defer ruling where case is in early stages, bankruptcy court continues to address proceedings which are related but beyond the scope of the adversary proceeding that could produce inconsistent results, and no party will be prejudiced by allowing bankruptcy court to preside until matter is ready for trial.
- (4558) *Dzierzawski v. Vulpina, LLC*, 2015 WL 3843612 (E.D. Mi. 2015) – Whether “cause” exists to withdraw reference depends on whether action is core or non-core; the most efficient use of judicial resources; potential cost and delay from withdrawal of reference; uniformity of bankruptcy administration; whether withdrawal is effort to forum shop; and any other related factor the court deems appropriate. If matter is core proceeding, bankruptcy court has power to enter final judgment. Where matter is non-core, bankruptcy court cannot enter final judgment which provides stronger case for withdrawing reference as matter will inevitably involve district court proceedings. However, where party is entitled to jury trial, status of matter as core proceeding is less important as bankruptcy court lacks authority to conduct jury trial over objection of any party, and matter will have to be referred to district court for trial. Court has discretion to delay withdrawal of reference if allowing matters to remain in bankruptcy court would expedite resolution and promote judicial economy. Court would defer where matter was in early stages of litigation, certainty and timing of trial were far from clear, and bankruptcy court had already adjudicated a number of discovery disputes and was familiar with the underlying issues. Withdrawal of reference could also produce duplicate efforts as similar discovery matters would remain in bankruptcy court on related proceedings and could produce inconsistent rulings.
- (4559) *U.S. v. Cordes*, 2015 WL 3775575 (E.D. Mi. 2015) – Whether “cause” exists to withdraw reference depends on whether action is core or non-core; the most efficient use of judicial resources; potential cost and delay from withdrawal of reference; uniformity of bankruptcy administration; whether withdrawal is effort to forum shop; and any other related factor the court deems appropriate. Court will not withdraw reference where underlying case is core matter, arising out of the Bankruptcy Code and that would not exist outside the bankruptcy case. Court denied request to withdraw reference as actions requested determination of dischargeability of tax liabilities and damages for alleged violations of the automatic stay by IRS. Actions necessarily turned on bankruptcy code provisions regarding discharge and bankruptcy definition of “property of the estate”. Court would withdraw reference over two non-core causes of action, one to determine whether related entity was “alter ego” of debtor and one for determination of IRS as secured creditor, as each of these turned on state and non-bankruptcy federal statutes.
- (4560) *In re Brown*, 2015 WL 2238097 (S.D. Ohio 2015) – Court has discretion to withdraw reference with consideration to whether action is core or non-core and whether bankruptcy court can enter final judgment. Moving party filed adversary alleging that action was core proceeding and moving party also expressly consented to bankruptcy court jurisdiction even if case is non-core. Considerations of judicial economy, uniformity of bankruptcy administration, conservation of debtor and creditor resources, expediting bankruptcy process, the lack of a right to jury trial, and evidence of forum shopping all supported denial of request for withdrawal.
- (4561) *Irvin v. Faller*, 2015 WL 2151926 (W.D. Ky. 2015) – District Court can withdraw reference of matter to Bankruptcy Court on motion that is timely filed and on showing of cause. Cause to withdraw reference is based on balancing of factors including whether matter is core or non-core; whether right to jury trial exists; judicial economy; promoting uniform bankruptcy administration; whether motion indicates forum shopping or creates risk of confusion; conservation of creditor and debtor resources; and expediting bankruptcy process. Proceeding is “core” if it invokes substantive right provided by Title 11 or that by its nature could arise only in context of bankruptcy case. Action to except debt from discharge is core proceeding. While facts underlying action may raise state court claims for defamation and abuse of process that do not, themselves, emanate from Title 11, the relief sought was unique to bankruptcy and could arise only in bankruptcy case. Defendant had no right to jury trial on action to except debt from discharge, although claims were based on state law causes of action that, themselves, would have been subject to jury trial. Action to except debt from discharge is equitable in nature not subject to Seventh Amendment requirement for jury trial. Further, debtor voluntarily submitted himself to bankruptcy court jurisdiction over case when debtor filed for bankruptcy in first instance, thereby acquiescing in bankruptcy court exercise of jurisdiction. Debtor cannot simultaneously seek bankruptcy protection and then complain that bankruptcy forum deprives him of state law rights.
- (4562) *Getzler Heinrich & Assoc. LLC v. Wojcik*, 2015 WL 235819 (N.D. Ohio 2015) – Bankruptcy Court lacks jurisdiction to enter final judgment in action brought by trustee under Section 544 to recover allegedly fraudulent transfers using state fraudulent transfer law. Defendant had timely requested jury trial and bankruptcy court lacked ability to conduct jury trial. Pretrial proceedings had been completed and case was ready for trial, such that all remaining judicial work was beyond the statutory and constitutional limits of the bankruptcy court’s authority. Motion to withdraw reference made after completion of pretrial proceedings was timely.

- (4563) *Williams v. Flying J, Inc.*, 2014 WL 7411798 (W.D. Tn. 2014) – 28 USC Section 157 permits court to withdraw reference for cause. Cause is not defined but is based on factors such as whether cause of action is core or non-core; whether action is legal or equitable in nature; efficient use of judicial resources; prevention of forum shopping; and effect of rulings on uniformity of case administration in bankruptcy. Complaint alleged multiple counts including one “non-core” state law claim. Bankruptcy court can enter final judgment on core proceedings and enter report and recommendations on non-core matter, such that judicial economy would be furthered by allowing matters to remain in bankruptcy court. Request for jury trial is not basis to withdraw reference at early stages of case. Bankruptcy Court can preside over case including ruling on potentially dispositive motions. Once case is ready for trial, reference can be withdrawn and matter can proceed at that point in District Court.
- (4564) *Brown v. Florida Coastal Partners, LLC*, 2014 WL 2169561 (S.D. Ohio 2014) – Court can withdraw reference for “cause”. Court would not withdraw reference of adversary proceeding previously filed in Bankruptcy case where adversary proceeding had already been dismissed by bankruptcy court with prejudice.
- (4565) *McKinstry v. Genser*, 2014 WL 549202 (E.D. Ky. 2014) – District Court withdrew reference to determine motion for sanctions for spoliation of evidence. Withdrawal of reference would promote judicial economy as court had previously withdrawn reference over entire case except for certain matters, and resolution of spoliation motion would exceed scope of matters that remained in Bankruptcy Court. Spoliation motion could be equally decided by District Court or Bankruptcy Court as District Court retained jurisdiction over matter as a whole. Spoliation sanctions bore no special connection to bankruptcy case itself and there was no special expertise of bankruptcy court that would favor resolution by that court.
- (4566) *PNC Bank, NA v. Fairburn*, 2013 WL 5604362 (N.D. Ohio 2013) – Court generally will not withdraw reference of core proceeding. However, determination of core versus non-core should be first made by bankruptcy court. Court would deny Motion to Withdraw Reference as premature, pending determination by bankruptcy court as to whether proceedings are core or non-core.
- (4567) *Hauk v. Dan’s Excavating, Inc.*, Case No. 13-11607 (E.D. Mi. 2013) – Court may withdraw reference for cause shown. Cause depends on weighing goals of promoting uniformity in case administration, reducing forum shopping, fostering economical use of resources, and expediting bankruptcy process. Debtor filed adversary complaint against non-debtor in bankruptcy court. In complaint, debtor alleged that matter was not core proceeding but that debtor consented to bankruptcy court exercise of jurisdiction. Debtor’s consent to bankruptcy court jurisdiction extended to allowing bankruptcy court to conduct jury trial. Even if bankruptcy court then lacked jurisdiction to enter final order, court was not required to withdraw the reference as court could consider matter on report and recommendation from bankruptcy court after trial. Motion evidenced effort to forum shop. But for bankruptcy, action would have been pending in state court as there was no independent basis for federal jurisdiction. Debtor appeared to be steering case to district court by first filing in bankruptcy court and then seeking to move it to federal court by withdrawing reference.
- (4568) *Austin v. FNMA*, 2013 WL 2898037 (E.D. Mi. 2013) – Court would not exercise discretion to withdraw reference to consider motion for Rule 2004 Examination based on Debtor’s attempt to bring action against lender to recover fraudulent transfers. Action to recover fraudulent transfer can be brought solely by Trustee and involved pure bankruptcy matters that belong in Bankruptcy Court. Request to withdraw reference, to extent based on Order Lifting Stay entered by Bankruptcy Court, was too late, and to extent related to alleged fraudulent transfer was matter governed entirely by Title 11 and within Bankruptcy Court’s jurisdiction.
- (4569) *Okke v. Okke*, 513 BR 896 (Bankr. W.D. Mi. 2013) – 28 USC Section 1334(c)(1) provides for permissive abstention based on effect or lack of effect on efficient administration of case; extent to which state law issues predominate over bankruptcy issues; difficulty or unsettled nature of applicable state law; presence of related proceedings in state court or other non-bankruptcy court; jurisdictional basis, if any, other than 28 USC Section 1334; degree of relatedness or remoteness of proceeding to main bankruptcy case; substance rather than form of asserted core proceeding; feasibility of severing state law claims from core proceedings to allow state court to enter judgments that would be enforced by bankruptcy court; burden on court’s docket; likelihood that commencement of proceedings in bankruptcy involve forum shopping; presence of non-debtor parties; and any unusual or significant factors. Although bankruptcy court traditionally defers to state court in domestic matters, in this case the parties had extensively negotiated regarding treatment of wife’s claim in Chapter 13 plan resulting in plan that pays wife \$1400 per month. Although Code reserves to State court the amount of any DSO payment, it preserves to federal court division of former marital property. Issues did not involve jury trial and legal issues were not difficult or unsettled. Retaining case did not present any burden on court as Chapter 13 plan had already been confirmed and debtor was performing as required.
- (4570) *Apperson v. Bleckner*, 2012 WL 4324930 (W.D. Ky. 2012) – District Court has discretion to withdraw reference and to have action considered by District Court for “cause”. Withdrawal is appropriate where the cause is shown to be compelling or truly exceptional circumstances. Status of matter as “core” versus “non-core” does not control withdrawal, as bankruptcy court can hear and consider non-core matters subject to the requirement of a report and recommendation with the District Court to enter the actual judgment. Judicial economy and the resources of the parties are best served by the court that is most familiar with the parties and the issues performing the first review of those issues. District Court’s review of those findings and conclusions *de novo* is an efficient use of the courts’ and the parties’ resources. *Stern* did not mandate withdrawal of reference in adversary proceeding involving contractual indemnity claim against debtor. Timely demand for jury trial did not require abstention as bankruptcy court can preside over matter and enter final judgments in core matters or reports and recommendations in non-core matters and may otherwise preside over case until a trial is actually necessary and the possibility of summary judgment is extinguished. Motion to Withdraw Reference denied without prejudice to renewal if and when case is actually ready for trial.
- (4571) *In re Church Street Health Management, LLC*, 2012 WL 4035971 (M.D. Tn. 2012) – 28 USC Section 157 allows District court to withdraw reference to bankruptcy court for cause. Congressional intent is to have bankruptcy matters resolved by bankruptcy court unless rebutted by some contravening policy. Courts must consider (1) whether the proceeding is “core” or “non-core;” (2) the efficient

use of judicial resources; (3) the delay and costs to the parties; (4) promoting uniformity of bankruptcy administration; (5) the prevention of forum shopping; and (6) other related factors, such as expediency of the bankruptcy process and whether there has been a jury trial demanded. Creditor sought to withdraw reference concerning Creditor's Motion to Modify the Automatic Stay to allow litigation to proceed in non-bankruptcy forum. Motion to Terminate or Alter Automatic Stay is core proceeding as automatic stay is one of fundamental debtor protections afforded under Code. Bankruptcy Court had already ruled on Motion and bankruptcy court is in better position to assess issues and effect of lifting stay.

- (4572) *TTOD v. Lim*, 2012 WL 3257882 (E.D. Mi. 2012) – Counterclaim brought by Chapter 7 trustee against creditor sought relief under State and Common Law remedies. Bankruptcy Court lacks jurisdiction to enter final judgment. Reference would be withdrawn to allow case to proceed in Article III district court. Inability of Bankruptcy Court to constitutionally enter final judgment is “cause” under 28 U.S.C. § 157(d) to warrant withdrawal of the reference to the bankruptcy court.
- (4573) *Official Committee of Unsecured Creditors v. Entergy Coal Resources, Inc.*, 472 BR 731 (E.D. Ky. 2012) – Courts consider the following factors to determine whether cause exists: (1) judicial economy; (2) uniformity in bankruptcy administration; (3) reducing forum shopping and confusion; (4) fostering economical use of the debtor's and creditor's resources; (5) expediting the bankruptcy process; and (6) the presence of a jury demand. Further, whether matter is core or non-core is central question, as bankruptcy courts can enter final judgments in core proceedings but cannot do so in non-core proceedings. However, core versus non-core is not the controlling issue. Mix of core and non-core actions did not mandate withdrawal of reference where core proceedings predominate and to extent proceedings involve non-core matters, bankruptcy court can issue report and recommendations to District Court. Judicial economy is furthered by allowing matter to remain in bankruptcy court as bankruptcy cases are regularly handled by bankruptcy judges and that they have special expertise in handling these particular cases. Underlying case had been pending in bankruptcy court for over 2 years allowing court to become familiar with the facts and circumstances. Although several defendants are entitled to jury trials, bankruptcy court can retain jurisdiction over pre-trial proceedings including dispositive motions, and reference can be withdrawn once matter is ready for trial.
- (4574) *Boyd v. King Par, LLC*, 2011 WL 5509873 (Bankr. W.D. Mi. 2011) – Court may withdraw the reference for “cause”. Court will consider (1) whether claim is core or non-core; (2) the most efficient use of judicial resources; (3) what delay and cost would result; (4) whether withdrawal would promote or inhibit uniformity of bankruptcy administration; (5) prevention of forum shopping; and (6) other factors that the Court considers relevant. Trustee's action to recover fraudulent transfers under both state and federal law is “core” proceeding. Although Court may or may not be able to enter final judgment in light of *Stern*, Court can nonetheless preside over matter and determine ability to enter final judgment at later date. Defendant's right to jury trial does not require immediate withdrawal of reference as Bankruptcy Court still has jurisdiction to enter final judgment and to entertain all other pretrial proceedings including motions for summary judgment, and reference can be withdrawn immediately before trial, if appropriate. Efficient use of judicial resources would be promoted by leaving case with Bankruptcy Court as Court is familiar with eh parties, court is familiar with fraudulent transfer proceedings in general and allowing Bankruptcy Court to oversee discovery and pre-trial matters would promote uniformity of bankruptcy administration. If after discovery and resolution of pre-trial matters it appears that the case requires a jury trial, court will withdraw reference at that time and refer matter to District Court for trial.
- (4575) *Welch v. Gordulic*, 2011 WL 2490943 (N.D. Ohio 2011) – District court should consider whether the proceeding is non-core and, thus, whether the bankruptcy court has jurisdiction to hear it; the goals of promoting uniformity in bankruptcy administration, reducing forum shopping and confusion; and expediting the bankruptcy process as well as whether a jury demand has been made. Trustee alleged that the adversary proceeding is a core proceeding, an allegation admitted by Defendant in his answer. Even if the proceeding were non-core, judicial economy weighed against withdrawal where case proceeded in bankruptcy court for six months prior to the filing of the motion to withdraw the reference and case continued to proceed through bankruptcy court for an additional year after the filing of the motion. Bankruptcy court was far more familiar with the issues in the adversary proceeding. Allowing bankruptcy court to proceed promoted uniformity in bankruptcy administration and reduced forum shopping where the adversary proceeding represented the only hope creditors had for realizing a distribution on their claims.
- (4576) *Antiock Company Litigation Trust v. Morgan*, Case No. 09-3409 (Bankr. S.D. Ohio 2010) – In determining cause for discretionary withdrawal of the reference, a district court can consider promoting uniformity in bankruptcy administration, reducing forum shopping and confusion, fostering the economic use of the debtors' and creditors' resources, and expediting the bankruptcy process. District Court will not withdraw reference at early stage of proceedings based merely on a demand for a jury trial. Bankruptcy courts cannot conduct a jury trial without the consent of all the parties but Bankruptcy Court can preside over matter until it is ready for trial, at which point the reference can be withdrawn for purposes of the trial only. Court will not exercise discretion to withdraw reference at early stage of proceeding where the complaint contains both core and non-core causes of action. Court can delay withdrawing the reference until the time of trial. Judicial economy does not support permissive withdrawal of the reference at the pre-trial stage of this litigation even where adversary proceeding bears “limited commonality” to other actions already pending at District Court where there was no evidence that leaving proceedings in two different courts would cause harm or result in duplicate discovery or pre-trial proceedings.
- (4577) *Ormsby v. First American Title Company*, 591 F.3d 1199 (9th Cir. 2010) – District Court properly withdrew reference of Motion to Tax Attorney Fees arising out of appeal of judgment of non-dischargeability. Withdrawal of reference supported by judicial economy.
- (4578) *Steed v. Knox Forex Group, LLC*, 2009 WL 2929424 (Bankr. E.D. Tn. 2009) – District Court may withdraw reference for “cause”. Permissive withdrawal of reference is not intended to be an escape hatch from Bankruptcy Court, and the reference will be withdrawn only for a compelling cause. Court should consider whether the matter at issue is a “core” proceeding; judicial economy; promotion of uniformity in bankruptcy administration; reduction in forum shopping; conservation of creditor and Debtor resources; expediting the bankruptcy process; and a jury demand. Core proceedings are less likely to be withdrawn as core proceedings invoke substantive rights created by bankruptcy law. Defendant's demand for a jury trial weighs heavily in favor of withdrawing the reference.

Demand for a jury trial, standing alone, constitutes sufficient “cause” to withdraw the reference. Defendant is entitled to jury trial on action to recover fraudulent transfers as long as Debtor has preserved the right by making a timely demand for a jury trial and defendant has not filed any claims against the bankruptcy estate.

- (4579) *Lewis v. Negri Bossi USA, Inc.*, Case No. 09-11623 (E.D. Mi. 2009) – Withdrawal of reference is permissive for “cause” based on (1) whether the claim is core or non-core, (2) most efficient use of judicial resources, (3) delay and costs to the parties, (4) uniformity of bankruptcy administration, (5) prevention of forum shopping, and (6) other related factors. Claims asserted by Plaintiff were predicated on Sections 362 and 363 of the Bankruptcy Code and constituted “core” proceedings. Efficiency of administration improved by allowing matter to remain in Bankruptcy Court which has more familiarity with facts and issues. Plaintiff’s decision to include in complaint only “core” matters in effort to ensure case remained in Bankruptcy Court did not constitute “forum shopping” but was an election of causes of action.
- (4580) *Omega Tool Corp v. Alix Partners, LLP.*, 2009 WL 1868410 (E.D. Mi. 2009) – District Court can withdraw reference for “cause” based on (1) whether the claim is core or non-core, (2) most efficient use of judicial resources, (3) delay and costs to the parties, (4) uniformity of bankruptcy administration, (5) prevention of forum shopping, and (6) other related factors. Non-core proceeding with jury demand does not make future withdrawal of reference inevitable. District Court must consider (1) whether the case is likely to reach trial, (2) whether protracted discovery with Court oversight will be required, and (3) whether the bankruptcy Court has familiarity with the issues presented.
- (4581) *Polar Molecular Corp. v. Petroleum Enhancer, LLC*, 2009 WL 902080 (E.D. Mi. 2009) – Reference of adversary proceeding to Bankruptcy Court would be withdrawn where there was already pending before the District Court another adversary for which the reference had been withdrawn, there was substantial similarity of facts between the two adversaries, and judicial efficiency and economy would be promoted by consolidating the two pending adversaries through the close of discovery.
- (4582) *Angelucci v. Farmers Bank & Trust Co.*, 2009 WL 798805 (E.D. Ky. 2009) – District Court can withdraw the reference of either a core or a non-core proceeding. Withdrawal of reference is discretionary for cause shown on timely motion. “Cause” includes (1) judicial economy, (2) uniformity in bankruptcy administration, (3) reducing forum shopping and confusion, (4) fostering economical use of the Debtor’s and creditor’s resources, (5) expediting the bankruptcy process, and (6) the presence of a jury demand.
- (4583) *Silverman & Morris, PLLC v. Uniform Color Company Services, LLC*, 2009 WL 365650 (E.D. Mi. 2009) – District Court has discretion to withdraw reference for “cause”. “Cause” includes right to a jury trial and efficient use of judicial resources. Core proceeding does not deprive defendant of right to jury trial under Seventh Amendment.
- (4584) *Dirt Road Enterprises, LLC v. Equilon Enterprises, LLC*, 2009 WL 248489 (S.D. Ohio 2009) – Court should withdraw reference only in extraordinary, unusual, or compelling circumstances. Court will consider whether the proceeding is core or non-core; whether it is legal or equitable in nature; the efficient use of judicial resources; prevention of forum shopping; and the effect of the ruling on uniformity in administering bankruptcy law. Demand for a jury trial weighs in favor of withdrawal because bankruptcy Courts cannot hear jury trials without the consent of the parties.
- (4585) *Anderson v. Countrywide Home Loans, Inc.*, 395 BR 7 (E.D. Mi. 2008) – Court would not exercise discretion to withdraw reference in action based on alleged violations of Automatic Stay and Discharge Injunction as well as Home Owner’s Loan Act (12 USC Section 1461 *et seq*) and Real Estate Settlement Procedures Act (12 USC Section 2601 *et seq*). Matters are within the special expertise of the Bankruptcy Court; claims are all core proceedings; plaintiff does not allege any state law claims; and judicial economy will be served by leaving matter with Bankruptcy Court which is already familiar with the matters presented.
- (4586) *Burgess v. Lee Acceptance Corp.*, 2008 WL 4388270 (E.D. Mi. 2008) – Permissive withdrawal requires consideration of (1) whether the claim is core or non-core; (2) what is the most efficient use of judicial resources; (3) what is the delay and what are the costs to the parties; (4) what will promote uniformity of bankruptcy administration; (5) what will prevent forum shopping; and (6) other related factors.
- (4587) *Gold v. Dobday Manufacturing Co., Inc.*, 2008 WL 4239146 (E.D. Mi. 2008) – Although 28 USC Section 157(d) permits Court to withdraw reference, Congress intended that Bankruptcy Courts hear and adjudicate bankruptcy matters. Demand for jury trial may constitute “cause” for withdrawal.
- (4588) *McClatchey v. Nicole Energy Marketing, Inc.*, 2009 WL 1416056 (S.D. Ohio 2009) – Permissive withdrawal requires “compelling or extraordinary circumstances” which require the District Court to take such an extraordinary step. Court to consider factors including whether the withdrawal would contravene the goal of uniformity and efficiency in the administration of bankruptcy law; whether withdrawal would allow a dissatisfied litigant to engage in forum shopping; whether the parties’ resources would be unnecessarily expended if the matter were withdrawn; and whether the withdrawal would facilitate the bankruptcy process. Court denied request for permissive withdrawal where Chapter 11 Trustee had pending liquidating plan that could resolve all issues between parties, and Trustee had negotiated sale of major assets of Debtor that could result in transfer of fraudulent transfer claims to creditors which would substantially alter causes of action.
- (4589) *Fokkena v. Countrywide Home Loans, Inc.*, 2008 WL 3932153 (N.D. Ohio 2008) – Permissive withdrawal of reference based on non-exclusive list of factors including judicial economy; uniformity in bankruptcy administration; reducing forum shopping and confusion; conserving Debtor and creditor resources; expediting the bankruptcy process; whether a party has requested a jury trial; and whether the proceeding is core or non-core. If one or more of these factors exist, the District Court has discretion to withdraw the reference. District Court would not withdraw reference where Motion for Sanctions was based on abusive actions before the Bankruptcy Court; the claim

implicates the inherent powers of Bankruptcy Court; Bankruptcy Court was more familiar with the issue making the matter more efficiently handled by the Bankruptcy Court; Bankruptcy Court will be in a better position to gauge the propriety of the allegedly improper filings; and Motion to Withdraw Reference filed in response to an adverse party's motion for sanctions raising forum shopping concerns. Court would not withdraw reference in action seeking sanctions against creditor for filing proof of claim where creditor failed to ensure the accuracy of its filings. Creditor filed proof of claim and objected to confirmation although Debtor did not own the property which was the subject of creditor's mortgage.

12.35 Timing of Motion

- (4590) *In re Brown*, 2015 WL 2238097 (S.D. Ohio 2015) – Motion to withdraw reference must be made as soon as possible after moving party is aware of grounds to withdraw reference. Moving party waited for more than one year after commencement of adversary proceeding where moving party was, at all times, aware of grounds for removal and grounds were fundamental basis of adversary proceedings commenced by moving party evidenced nothing more than attempt to forum shop, stall and engage in obstructionist tactics.
- (4591) *Irvin v. Faller*, 2015 WL 2151926 (W.D. Ky. 2015) – District Court can withdraw reference of matter to Bankruptcy Court on motion that is timely filed and on showing of cause. Motion is “timely” if made as soon as possible after moving party becomes aware of grounds to withdraw reference, or at first reasonable opportunity after moving party is aware of grounds to withdraw reference. Motion brought one year after commencement of adversary proceeding, and after parties had filed various motions including motions for summary judgment and the setting of motion for oral argument was not timely. Grounds for removal, based on circumstances surrounding underlying debt. Were at all times evident from face of complaint and defendant has notice from outset of adversary that grounds existed to seek withdrawal of reference. Instead, defendant waited until day before oral argument on plaintiff's motion for summary judgment, indicating a desire to forum shop rather than to actually protect defendant's interests.
- (4592) *Getzler Heinrich & Assoc. LLC v. Wojcik*, 2015 WL 235819 (N.D. Ohio 2015) – Motion to withdraw reference made for first time after completion of pretrial proceedings was timely. Bankruptcy Court lacks jurisdiction to enter final judgment in action brought by trustee under Section 544 to recover allegedly fraudulent transfers using state fraudulent transfer law. Defendant had timely requested jury trial and bankruptcy court lacked ability to conduct jury trial. Pretrial proceedings had been completed and case was ready for trial, such that all remaining judicial work was beyond the statutory and constitutional limits of the bankruptcy court's authority.
- (4593) *PNC Bank, NA v. Fairburn*, 2013 WL 5604362 (N.D. Ohio 2013) – Court has discretion to withdraw reference on timely filed motion. Motion to withdraw reference filed three months after debtor filed adversary proceeding and less than one month after defendant filed an answer to the complaint was not untimely. Bankruptcy court had not set briefing schedule or approved any potential discovery plan in bankruptcy court. Chronology of case indicated that three months between complaint and motion was not unreasonable.
- (4594) *Madden v. Ontility, LLC*, 2013 WL 3324223 (Bankr. E.D. Mi. 2013) – Bankruptcy court recommended withdrawal of reference in connection with adversary proceeding, where defendant had right to jury trial and did not consent to trial in the bankruptcy court, leaving bankruptcy court without power to proceed. Prior motion to withdraw the reference had been denied as premature as case was not ready for trial, without prejudice to either party re-filing motion when case was ready for trial. Claims in case were non-core proceedings related to bankruptcy case, removing them from ability of bankruptcy court to hear under *Stern*.
- (4595) *Official Committee of Unsecured Creditors v. Entergy Coal Resources, Inc.*, 472 BR 731 (E.D. Ky. 2012) – Motion to Withdraw Reference requires motion to be filed as soon as possible after the moving party is aware of grounds for withdrawal of reference or at the first reasonable opportunity after the moving party is aware of grounds for withdrawal of reference. Motion was timely where adversary proceeding was initiated on June 22, 2011 and Amended Complaint was filed on August 19, 2011. Motions to withdraw reference were filed between October 31 and November 10, 2011, less than three months after the Amended Complaint was filed; and moving Defendants had advised Plaintiff early on that they intended to file motions for withdrawal of the reference.
- (4596) *Steed v. Knox Forex Group, LLC*, 2009 WL 2929424 (Bankr. E.D. Tn. 2009) – Court would withdraw the reference where trial was imminent and granting the motion would not be premature or inconsistent with interest of judicial economy.
- (4597) *Omega Tool Corp v. Alix Partners, LLP.*, 2009 WL 1868410 (E.D. Mi. 2009) – Court will not withdraw reference based on jury demand at early stages of case as Bankruptcy Court can consider and make recommendations on dispositive motions based on proposed findings of fact and conclusions of law, which could obviate jury trial demand. Withdrawal of reference based on jury demand becomes appropriate only if and when the case becomes “trial ready”.
- (4598) *Polar Molecular Corp. v. Petroleum Enhancer, LLC*, 2009 WL 902080 (E.D. Mi. 2009) – Reference of adversary proceeding to Bankruptcy Court would be withdrawn where there was already pending before the District Court another adversary for which the reference had been withdrawn, there was substantial similarity of facts between the two adversaries, and judicial efficiency and economy would be promoted by consolidating the two pending adversaries through the close of discovery.
- (4599) *Angelucci v. Farmers Bank & Trust Co.*, 2009 WL 798805 (E.D. Ky. 2009) – Motion to withdraw reference premature where Bankruptcy Court had not determined whether case was core or non-core; Bankruptcy Court authorized to decide dispositive motions subject to the parties' rights to appeal as parties had consented to Court's exercise of jurisdiction over non-core matters; and pending demand for jury trial did not compel withdrawal of reference until it appeared case would actually proceed to trial. Judicial economy and uniformity would be furthered by allowing case to remain in Bankruptcy Court as case had been pending in the Bankruptcy Court for more than a year; Bankruptcy Court was more familiar with the parties, their claims, and the substantive law; resolution of the adversary proceeding would affect priority of liens in the Chapter 7 proceedings; removing case would waste the parties' resources, the resources of both Courts, and would unnecessarily slow the bankruptcy process; and timing of request to withdraw the reference indicated intent to

shop for a more favorable forum.

- (4600) *Silverman & Morris, PLLC v. Uniform Color Company Services, LLC*, 2009 WL 365650 (E.D. Mi. 2009) – Although Bankruptcy Court could manage all pre-trial matters and the District Court could reconsider withdrawing the reference when the case is ready for trial, District Court found that judicial economy would be better served by withdrawing reference now rather than reconsider the issue later.
- (4601) *Dirt Road Enterprises, LLC v. Equilon Enterprises, LLC*, 2009 WL 248489 (S.D. Ohio 2009) – District Court would deny motion to withdraw without prejudice where the Bankruptcy Court was better suited to conduct the pretrial proceedings; adversary proceedings were complex; underlying bankruptcy proceedings have been pending for more than one year; adversary proceedings have been pending for approximately six months; Bankruptcy Court had adjudicated dismissal motions and was more familiar with case; and resolution of the adversary proceedings will affect the bankruptcy. Parties could renew Motion to Withdraw Reference once there is an imminent trial date.
- (4602) *Stevenson v. Polymerica, Ltd.*, 2009 WL 230598 (E.D. Mi. 2009) – “Better and normal practice” is to deny without prejudice motion for withdrawal of reference made early in the case so that the Bankruptcy Court may manage the pre-trial phase of the litigation. Withdrawal may be revisited when the case is ready for trial.
- (4603) *Gold v. Dobday Manufacturing Co., Inc.*, 2008 WL 4239146 (E.D. Mi. 2008) – Demand for jury trial may constitute “cause” for withdrawal; however withdrawal of the reference is premature at early stage of litigation. Better practice is to allow Bankruptcy Court to manage pre-trial phase of litigation with District Court to reconsider withdrawal of reference when case is ready for trial.

12.36 Burden of Proof

- (4604) *Dirt Road Enterprises, LLC v. Equilon Enterprises, LLC*, 2009 WL 248489 (S.D. Ohio 2009) – Party seeking discretionary withdrawal of reference bears burden of proof.

12.37 Waiver of Right to Object

- (4605) *CitiMortgage, Inc. v. Crawford*, 2012 WL 1867518 (S.D. Ohio 2012) – Under 28 USC Section 157(d), a district court “shall” withdraw the reference “if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” Court granted motion to withdraw reference where defendant failed to file any response to the Motion to Withdraw Reference within time permitted. After Lender commenced foreclosure proceedings, defendant filed a Class Action counterclaim alleging breach of contract, misrepresentations, and violation of State Deceptive Trade Practices Act. Lender then filed Motion to Withdraw the reference, and defendant failed to file any response or opposition.
- (4606) *Hagan v. Okony*, 2008 WL 4722747 (W.D. Mi. 2008) – Failure to object to Court’s Report and Recommendation on Motion to Withdraw Reference constitutes waiver of any further review by District Court. District Court will adopt Report and Recommendation without further consideration or argument. Bankruptcy Court entered report recommending that reference be withdrawn as matter was non-core and Bankruptcy Court could not enter a final judgment. Defendant failed to respond to the Complaint and a default had been entered. Withdrawal of reference appropriate for purposes of allowing District Court to enter Final Default Judgment.

12.38 Stay of Proceedings While Pending

- (4607) *In re City of Detroit*, 2013 WL 5425104 (Bankr. E.D. Mi. 2013) – Rule 5011(c) provides that the filing of a motion to withdraw the reference or for abstention does not stay administration of the case or any proceeding except that the bankruptcy court can enter a stay pending disposition of the motion. Granting of stay would be exception, not the general rule, and will be granted only when the party requesting the stay can meet the standards for preliminary injunctive relief under Rule 65. Creditors seeking to stay proceedings in bankruptcy court pending motion to withdraw reference must prove likelihood that reference will be withdrawn, that creditor will seek irreparable harm if a stay is not granted, that any harm suffered by the non-moving parties would not exceed that which would be suffered by the creditors if the stay is denied, and that a stay would be in the public interest. Creditors failed to demonstrate any likelihood that reference would be withdrawn, where basis for withdrawal was alleged lack of jurisdiction by the bankruptcy court to issue final ruling on eligibility of City to be debtor under Chapter 9. Issues presented were created by and arose directly out of bankruptcy code, such that Court has jurisdiction to issue final order. Creditors were not likely to suffer any irreparable harm, as any future order entered by the court would be subject to appellate review at that time. Debtor would suffer substantial harm and public interest would not be served by stay where City had need to proceed with process expeditiously to address financial conditions.

12.39 Appeal of Grant or Denial of Motion

- (4608) *Smith v. Bluegrass Mortgage Services, Inc.*, Case No. 10-5785 (6th Cir. 2012) – District Court Order denying Motion to Withdraw Reference is non-final, non-appealable order.
- (4609) *K & B Capital, LLC v. Official Unsecured Creditors’ Committee*, 2009 WL 1747834 (6th Cir. 2009) – Order denying motion to withdraw a reference and have proceeding adjudicated in District Court is a non-final, non-appealable order.

12.40 Stay Pending Appeal

- (4610) *Antioch Company Litigation Trust v. Morgan*, Case No. 09-3409 (Bankr. S.D. Ohio 2010) – Appeal of Order Denying Motion to Withdraw Reference does not divest Bankruptcy Court of jurisdiction. Bankruptcy Court may stay proceedings during pendency of appeal if moving party can show (1) the likelihood that the pending motion to withdraw will be granted (i.e. likelihood of success on the merits); (2) that the movant will suffer irreparable harm if the stay is denied; (3) that the non-movants will not be substantially harmed by

the stay; and (4) the public interest will be served by granting the stay. Movant failed to demonstrate that District Court would withdraw reference in the early stages of litigation and failed to demonstrate irreparable harm based solely on allegation that Bankruptcy Court may overstep jurisdictional bounds. Stay of proceedings would only delay Plaintiff's attempt to collect funds on behalf of creditors and would result in harm to Plaintiff with no corresponding benefit to the defendants. Denial of stay furthers public interest in efficient and expeditious resolution of pending litigation without unnecessary delay.

F. Abstention and Removal

12.41 Actions Subject to Removal or Abstention

- (4611) *Rajapakse v. Wells Fargo Home Mortgage*, 2015 WL 4133179 (W.D. Tn. 2015) – Case can be removed from state court to federal court where action could have been brought in federal court in first instance. Notice of Removal alleged that parties were diverse and amount in controversy exceeded \$75,000 and party opposing removal did not contest either of these elements.
- (4612) *Muheljic v. Bank of America*, 2014 WL 6085869 (D.M.D. 2014) – Case can be removed to Federal Court only when there is independent basis for federal jurisdiction. Action improperly removed based on diversity where parties were diverse, with plaintiff being a Tennessee resident and B of A being a National Banking Association with its principal place of business in North Carolina. However, defendant failed to demonstrate that action met \$75,000 amount in controversy requirement. Complaint sought some unspecified amount that was not self-evidently greater or less than diversity amount, leaving defendant to prove by preponderance of evidence that amount in controversy exceeded jurisdictional requirement. If action seeks equitable relief, then jurisdictional limit is determined by economic value of the rights that plaintiff seeks to protect. Where the underlying action seeks equitable relief based on alleged wrongful foreclosure, “economic value” is based on fair market value of property, not the balanced owed on the mortgage. Evidence indicated that value was far below threshold where appraised value of property was \$24,000; and successful bid at contested foreclosure sale was \$40,000.00. Although statute on which cause of action was based allowed attorney fees and costs, it was highly unlikely that fees would be sufficient to meet jurisdictional limit. Action remanded as improperly removed.
- (4613) *Lightfoot v. Cendant Mortgage Corp.* 2014 WL 4922246 (9th Cir. 2014) – Action against Federal National Mortgage Association (FNMA) subject to removal from state court to federal court. Statutory provision in FNMA charter that FNMA can sue or be sued “in any court of competent jurisdiction, State or Federal” created federal question jurisdiction. Federal Court properly dismissed complaint originally filed in State Court based on state law causes of action where causes of action were identical to those resolved in prior federal litigation and dismissal was proper exercise of federal court jurisdiction.
- (4614) *Crehan v. Maiden Lane, LLC*, 2014 WL 467568 (W.D. Mi. 2014) – Action can be removed from State Court to Federal Court if Federal Court would have had jurisdiction in first instance. Action against Federal Home Loan Mortgage Corporation based on alleged wrongful foreclosure deemed to arise under laws of the United States, such that District Court had “federal question” jurisdiction, such that Defendant could remove action to Federal Court. Nominal defendants Maiden Lane entities were created by Federal Reserve Bank of New York and are mere corporate entities created to facilitate efforts of Federal Reserve to address foreclosure crisis. Federal Reserve Bank was real party in interest for purposes of federal question jurisdiction and removal.
- (4615) *CPC Livestock, LLC v. Fifth Third Bank, Inc.*, 2013 WL 1411222 (W.D. Ky. 2013) – Removal from state court to federal court is proper in any civil action where the Federal Court would have had jurisdiction in the first instance. Where jurisdiction would be based on diversity jurisdiction, fraudulent joinder of non-diverse defendants will not defeat diversity for purposes of federal jurisdiction. Fraudulent joinder requires evidence that plaintiff could not have established cause of action against non-diverse defendant as matter of state law. Action must be remanded for lack of diversity if there is any colorable basis for predicting that a plaintiff may recover from the non-diverse defendant. In considering remand, court must determine whether court had jurisdiction as of date of removal. Defendant filed Notice of Removal filed after First Amended Complaint caused removal of case. Plaintiff's later filed second amended complaint did not control jurisdiction for purposes of remand, as first amended complaint was the operative complaint at time case removed in first instance. Although first amended complaint joined non-diverse defendant, complaint did not demonstrate no possibility of recovery by plaintiff.
- (4616) *Baer v. Cabrian*, 2012 WL 1430934 (Bankr. E.D. Ky. 2012) – State Court has concurrent jurisdiction with Bankruptcy Court to determine dischargeability of debt under Section 523(a)(5). Adversary proceeding dismissed where Bankruptcy Court had already abstained from ruling on issue pursuant to 28 USC Section 1334 to allow parties to proceed in State Court.
- (4617) *Church Joint Venture v. Grusin*, 2012 WL 1982337 (W.D. Tn. 2012) – 28 USC Section 1334(c) addresses mandatory and discretionary abstention in favor of state court adjudication. Section 1334 does not provide any basis for abstention in favor of United States District Court in which action is pending, even if action is based on state law.
- (4618) *In re T.S.P. Inc.*, 2011 WL 1431473 (Bankr. E.D. Ky. 2011) – 28 USC Section 1441 allows a case to be removed to Bankruptcy Court only if the action is a civil action brought in state court. Administrative proceedings such as proceedings before Kentucky Department of Labor for alleged safety violations is not a civil action brought in state court and cannot be removed to Bankruptcy court. Section 1452 permits the debtor to remove to Bankruptcy Court any civil action except for tax court proceedings, actions by governmental units to enforce police or regulatory powers, or action over which the district court would not have jurisdiction. Administrative proceedings are not “civil actions” and cannot be removed under Section 1452.
- (4619) *Essek v. Vanderbilt Mortgage, Inc.*, 2011 WL 97716 (E.D. Ky. 2011) – Court would abstain in action against mortgage lender based on foreclosure proceedings where those proceedings remained pending and ongoing in State court. District Court's involvement would unnecessarily interfere with ongoing state judicial proceedings.

- (4620) *McKibben v. Fair Finance Company*, Case No. 10-50494 (Bankr. N.D. Ohio 2010) – State Court litigation subject to removal to bankruptcy court pursuant to Section 1441 and 1452. Bankruptcy Court is not required to have had original jurisdiction over the case as long as case relates to a proceeding under Title 11 to support removal under Section 1452. Case is “related to” if the outcome of the proceeding could conceivably have some effect on the bankruptcy estate. State court litigation against Debtor would affect estate as any award to the plaintiffs in that action would necessarily diminish the funds available for the remaining creditors. Court would not abstain or remand where abstention would cause delay of administration of estate; the issues presented were analogous to issues routinely covered in bankruptcy cases; Bankruptcy Court was capable of adjudicating the issues presented; and case was related to bankruptcy based on the possible impact on creditors.
- (4621) *In re Michigan Tractor and Machinery Co. v. Red Top Rentals, Inc.*, Adv. Case No. 09-5064 (Bankr. E.D. Mi. 2010) – 28 U.S.C. Section 1452 allows removal of any claim or cause of action if the district court has jurisdiction over the action under Section 1334. Section 1134 lists four types of matters over which the district court has jurisdiction: (1) “cases under title 11,” (2) “proceedings arising under title 11,” (3) proceedings “arising in” a cause under title 11, and (4) proceedings “related to” a case under title 11. A civil proceeding is “related to” the bankruptcy if the outcome of that proceeding that could conceivably have any effect on the estate being administered, or if the outcome could alter the debtor’s rights, liabilities, options or freedom of action. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact upon the bankruptcy estate – certainty, or even likelihood, of such an impact is not a requirement. Civil action against corporate debtor’s president based on president’s personal guarantee is “related to” the bankruptcy estate. Corporate president is listed as co-debtor on other corporate obligations and, to extent that creditor recovers against president, that recovery will reduce creditor’s claim against assets of the bankruptcy estate.

12.42 Grounds – Mandatory Abstention

- (4622) *Giese v. Community Trust Bank*, 2015 WL 5299468 (Bankr. E.D. Ky. 2015) – Court must abstain from action based on state law claim or cause of action where court could not have asserted jurisdiction but for bankruptcy proceeding. Mandatory abstention requires that the claims be based entirely on state law; that the only basis for jurisdiction is “related to” jurisdiction; action was commenced in state court; and state court can timely adjudicate action. Mandatory abstention is not appropriate in core proceeding. State court action constituted core proceeding where action challenged division of proceeds of sale of debtor’s assets between two different creditors and bankruptcy court had already entered final, non-appealed order distributing funds pursuant to confirmed Chapter 11 Plan. State court complaint included the majority of counts alleging bad acts taken in the bankruptcy case and the very causes of action were based on facts that happened during bankruptcy pursuant to orders of the bankruptcy court.
- (4623) *Etterbeek v. APTCAP, LLC*, 521 BR 811 (Bankr. E.D. Mi. 2014) – Bankruptcy Court must abstain from hearing action removed from state court where abstention is timely requested; civil proceedings are based on state law; sole basis for federal jurisdiction is connection to bankruptcy case; proceedings were commenced in state forum that can timely adjudicate causes of action; and civil proceeds are non-core. State law action brought by one group of members of Debtor-LLC against other members were non-core proceedings where all actions were based entirely on state law and neither invoked nor depended on either bankruptcy case or bankruptcy code. Neither the Trustee nor the debtor were either plaintiff or defendant and plaintiff did not seek any relief in lawsuit against bankruptcy estate. Action had no effect on administration of estate and did not seek recover property of estate or affect liquidation of estate assets. Action was not “related to” bankruptcy case for purposes of allowing Bankruptcy Court to exercise jurisdiction where outcome of case would not have any conceivable impact on estate or case administration. All elements of mandatory abstention were present requiring court to abstain and send matter back to state court.
- (4624) *In re STAR Dynamic Corp.*, 2014 WL 407370 (Bankr. S.D. Ohio 2014) – Federal Courts are required to abstain and remand matters to state courts where (1) there is a timely abstention motion; (2) the claims are based on state law; (3) there is no independent federal jurisdictional basis other than the bankruptcy filing; (4) the claim is “related to” but not “arising in” or “arising under” Title 11; (5) there is a pending parallel action commenced in state court; and (6) the action can be timely adjudicated by the state court. In determining whether action can be timely adjudicated in state court, court will consider length of time that state court has expended on case, proximity of case to trial, and whether allowing case to remain in state court would have negative impact on bankruptcy case. Facts indicated that state court would not be able to expeditiously handle matter where complaint needed to be amended and there was no reason to believe state court could otherwise resolve dispute without impairing ability of bankruptcy to proceed. Issue presented was ownership of assets and technology of debtor, and bankruptcy could not proceed without final determination of “who owns what” sufficient to allow debtor to complete going concern sale of property free and clear of adverse interests and liens.
- (4625) *Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. v. Wade*, 2013 WL 5944091 (Bankr. W.D. Tn. 2013) – For mandatory abstention to apply, a proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding. Plaintiff’s actions against debtor met first four requirements, where plaintiff, prior to bankruptcy case, brought suit in state court alleging that debtor had misappropriated corporate funds and breached fiduciary obligations. All claims were based on state law; federal court lacked jurisdiction absent bankruptcy; state court had jurisdiction; and state court could timely adjudicate the matter. However, adjudicating litigation directly implicates claims allowance process as outcome will determine existence and amount of claims against estate such that action is a core proceeding; and plaintiff had also brought adversary seeking to except debt from discharge under Section 523 based on same operative facts and transactions, which is also core proceeding.
- (4626) *Villages of Capital Pointe, LLC v. Huntington Bank*, 2013 WL 4523305 (E.D. MI. 2013) – To invoke mandatory abstention, a proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding. Mandatory abstention

did not apply as parties were “diverse” for purposes of diversity jurisdiction, creating basis for federal jurisdiction not predicated on Title 11.

- (4627) *Okke v. Okke*, 513 BR 896 (Bankr. W.D. Mi. 2013) – Mandatory abstention does not apply to core proceedings. Adversary proceeding sought determination as to title of former marital assets. State court judgment of dissolution of marriage was not clear on title to the assets. Debtor filed action for turnover of assets in possession of ex-spouse. State court had awarded assets to debtor and debtor filed Chapter 13 before state court could reconsider award. As such, as of date of commencement of case, debtor had legal or equitable interest that became property of estate at commencement of case.
- (4628) *CPC Livestock, LLC v. Fifth Third Bank, Inc.*, 2013 WL 1411222 (W.D. Ky. 2013) – 28 USC Section 1334 requires Bankruptcy Court and District Court to abstain in any proceeding based on state law claim or state law cause of action where the cause of action does not arise under Title 11 or arise in a case under Title 11, where the action could not have been commenced in Federal Court but for the Bankruptcy filing. For mandatory abstention to apply, a proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding. Complaint was based entirely on state law fraudulent transfer statute and bankruptcy court lacked independent basis for jurisdiction as parties were not diverse and action did not present any substantial element of federal question. Action did not arise under Title 11 where action did not require court to determine validity or priority of any lien, but was action to recover fraudulent transfers; and did not arise in the case because the action was not based on bankruptcy code and by its very nature could have and did exist outside bankruptcy context.
- (4629) *Tomassi v. MDS, Inc.*, 2013 WL 1636435 (W.D. Ky. 2013) – Before addressing possible abstention, court must first determine whether court has jurisdiction in first instance. If so, court must abstain if action is based on state law claim that could not have been commenced in Federal court except for the pending bankruptcy case, if the action can be timely adjudicated in state court. Motion for abstention filed in District Court would be remanded to Bankruptcy Court for consideration, as Bankruptcy Court is in best position to determine whether action involves core proceeding such that abstention would be inappropriate.
- (4630) *Timco, LLC v. T and M Sales Agency, Inc.*, 2013 WL 150105 (6th Cir. 2013) - Mandatory abstention provision of 28 USC Section 1334 precludes appellate review of Order remanding case to State Court. Action was based on state law, action was non-core proceeding, no basis existed for federal jurisdiction other than pending bankruptcy case, and action could be timely adjudicated in State court of competent jurisdiction.
- (4631) *In re Trish Enterprises, LLC*, Case No. 12-21729 (Bankr. E.D. Mi. 2012) – 28 USC Section 1334(c)(2) requires bankruptcy court to abstain when (1) a motion is timely filed; (2) proceedings are based on state law claims or causes of action; (3) claim is related to bankruptcy case but did not arise in or under the bankruptcy case; (4) only basis for original jurisdiction is the bankruptcy filing; (5) state law claim is the subject of an action pending in state court; and (6) state court action can be timely adjudicated. Prior to commencement of bankruptcy case, Plaintiff and debtor were engaged in litigation in state court based on alleged breach of contract. Motion for abstention filed one month post-petition is timely. State court action concerning enforceability of lease is state law claim. Although claim was related to bankruptcy case, it arose strictly under state law and did not arise from Bankruptcy Code. Only basis for federal jurisdiction was pendency of bankruptcy case – case did not have any independent basis for federal jurisdiction, either based on federal question or on diversity of citizenship. State law cause of action was pending when bankruptcy was filed, and claim has largely been adjudicated or can be quickly adjudicated.
- (4632) *Johnson v. Fifth Third Bank*, 476 BR 493 (W.D. Ky. 2012) – 28 USC Section 1334 requires abstention over cause of action where the action (1) is based on a state law claim or cause of action; (2) lacks a federal jurisdictional basis absent the bankruptcy; (3) is or can be commenced in a state forum of appropriate jurisdiction; (4) is capable of timely adjudication; and (5) is a non-core proceeding. Court would abstain in action by sellers of cattle against Debtor’s Bank. Action was based entirely on state law causes of action for conversion, unjust enrichment, and theft. Court lacked diversity jurisdiction because complaint did not reach \$75,000 threshold. Action had been commenced in state court and later removed to Federal court – element does not require that action have been filed in state court before bankruptcy is filed, only that it has been or can be timely filed in state court. Although defendant claimed a right to indemnity from debtor, claim was not absolute as it appeared that bank may have been culpable, removing action from scope of indemnity agreement. Action could proceed against bank without being stayed by bankruptcy, although bank’s indemnity claim against debtor was stayed. Action was non-core as case did not invoke substantive right created by the bankruptcy code and was not action to determine validity, priority or extent of lien, but was state law cause of action for damages for torts of conversion, unjust enrichment and theft.
- (4633) *RFP Oil Co., Inc. v. Michigan Gasoline Traders, Inc.*, Case No. 11-3290 (Bankr. E.D. Mi. 2011) – Mandatory abstention requires that the proceeding (1) be based on state law claim or cause of action; (2) lack any independent basis for federal jurisdiction unrelated to bankruptcy case; (3) be commenced in state court of appropriate jurisdiction; (4) be capable of timely administration; and (5) be a non-core proceeding. Court must separately scrutinize each cause of action and ground for relief to determine if the claim is a core claim, a “related to” claim or an unrelated claim over which the Court lacks jurisdiction. Joinder of core and non-core proceedings does not convert non-core proceedings into core proceedings. Core proceedings include matters arising under Title 11, which is the bankruptcy petition itself; civil proceedings arising in a case under title 11, which are those created or determined by a statutory provision of title 11; and proceedings “arising in” a case under title 11, which are proceedings that by their very nature could only arise in the bankruptcy and cannot exist outside the bankruptcy. “Related to” proceedings are those that could conceivably have an effect on the estate being administered. Action is related to if the outcome could alter the debtor’s rights, liabilities, options or freedom of action in a way that impacts case administration. Cause of action based on state law that seeks damages from debtor is not “core” where plaintiff does not assert claim in the bankruptcy case; or where plaintiff files proof of claim reserving right to withdraw proof of claim upon remand. State law claim against

guarantor of corporate debtor's debts is dispute between two non-debtors which is non-core. Debtor's counterclaim brought in response to non-core complaint is by definition non-core. Where proceedings are non-core, court must abstain and cannot hear matters. Plaintiff's non-core proceedings which sought entry of monetary judgment against debtor could conceivably affect the administration of the case even where Plaintiff has agreed that it seeks recovery solely against a guarantor and would not recovery from the estate, rusting in non-core proceedings that "related to" the estate. Count of complaint that sought recovery from guarantor only is non-core and cannot have any impact on administration of estate, such that non-core proceeding is not related to. Court would mandatorily abstain from hearing non-core counts of complaint where creditor timely filed motion for abstention; claims were based on state law and lacked any basis for federal jurisdiction; claims were commenced in state court pre-petition; and state court an timely adjudicate claims to avoid any unfavorable effects on bankruptcy proceeding. Court would permissively abstain over one "related to" non-core count where it would be more efficient to have all proceedings determined in a single proceeding and separate litigation of claims in two different courts would complicate administration of debtor's estate. Discovery in state court proceeding has already closed and case was ready for trial, meaning that state court litigation would proceed more efficiently and with less disruption. Non-debtor has right to jury trial which is compelling argument for abstention.

12.43 Grounds – Permissive Abstention

- (4634) *In re Hakes*, Case no. 14-32139 (Bankr. E.D. Mi. 2015), *reconsideration denied*, (Bankr. E.D. Mi. 2015) – 28 USC Section 1334 allows court to permissively abstain in interest of comity with state courts or respect to state law, or otherwise in the interest of justice. Factors to consider include effect of abstention on efficient administration of estate; extent to which state law issues predominate; difficulty or unsettled nature of state law; presence of related proceedings commenced in non-bankruptcy forum; jurisdictional basis for Bankruptcy Court other than Section 1334; degree of relatedness or remoteness of proceedings to main bankruptcy case; substance rather than form of asserted "core" proceedings; feasibility of severing state law claims from core bankruptcy matters to allow judgment to be entered by state court but enforced by bankruptcy court; burden of case on bankruptcy court's docket; likelihood that commencement of action in bankruptcy court is forum shopping; existence of a right to jury trial; presence of non-debtor parties; and any other unusual or significant factors. Court would permissively abstain from state law action where litigation has been pending in state court for 2 years prior to commencement of bankruptcy case, and state court had extensive contact with and knowledge of the case, the parties, and the underlying facts. Issues presented were entirely state law based. Bankruptcy court lacked any jurisdictional basis other than fact that one party was debtor in bankruptcy and but for bankruptcy case, action could not have been brought in Federal court. Defendant has demanded jury trial in action which would preclude bankruptcy court from conducting trial. Granting of abstention necessarily carries with it a modification of automatic stay to allow parties to litigate in non-bankruptcy forum and stays dischargeability adversary proceeding based on same facts and circumstances until state court proceedings are resolved.
- (4635) *Etterbeek v. APTCAP, LLC*, 521 BR 811 (Bankr. E.D. Mi. 2014) – Bankruptcy Court can abstain from hearing action removed from state court where abstention is consistent with interests of justice and comity with state courts. Factors to consider include effect or lack of effect on case administration; extent to which state law issues predominate; difficulty or unsettled nature of applicable state law; presence of related proceeding commenced in state court; jurisdictional basis for federal court jurisdiction beyond pending bankruptcy case; substance rather than form of alleged core proceeding; feasibility of severing state law claims from core bankruptcy matters; burden on court docket; likelihood that commencement of bankruptcy proceeding was result of forum shopping; existence of right to jury trial; presence of non-debtor parties; and other unusual or significant factors. State law action brought by one group of members of Debtor-LLC against other members were non-core proceedings where all actions were based entirely on state law and neither invoked nor depended on either bankruptcy case or bankruptcy code. Neither the Trustee nor the debtor were either plaintiff or defendant and plaintiff did not seek any relief in lawsuit against bankruptcy estate. Action had no effect on administration of estate and did not seek recover property of estate or affect liquidation of estate assets. Action was not "related to" bankruptcy case for purposes of allowing Bankruptcy Court to exercise jurisdiction where outcome of case would not have any conceivable impact on estate or case administration. All elements of permissive abstention were present allowing court to abstain and send matter back to state court.
- (4636) *Junk v. Citimortgage, Inc.*, 2014 WL 2985937 (Bankr. S.D. Ohio 2014) – Court would lift stay and permissively abstain from state court litigation where abstention would have little if any effect on bankruptcy proceedings; state law issues dominated litigation; state law was unsettled on the controlling issues; bankruptcy court would not have had jurisdiction but for filing of bankruptcy by one party; there was some indication of forum shopping by debtors who filed bankruptcy in Ohio and then commenced adversary proceeding to litigate same issues as had been subject of South Carolina action and only after they had suffered series of adverse rulings in state court; and continuing in state court would avoid piecemeal litigation and be consistent with comity with state courts.
- (4637) *Cohen v. Schonsheck*, 2014 WL 1153728 (E.D. Mi. 2014) – Permissive abstention will be based on factors including (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than the form of an asserted core proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-debtor parties. The test is a multi-factor balancing test, and it is not necessary the very element be satisfied or weigh in favor of abstention. Adversary proceeding to determine debt to be non-dischargeable does not prevent abstention just because same operative facts are basis for state court litigation. Factual basis for adversary proceeding was different than factual basis for state court litigation such that resolution of adversary would not impinge on state court jurisdiction. Case had been pending in state court for two

years and if court does not abstain, efforts of state court would be wasted. Allowing state court to proceed would further efficient administration of estate; state law issues predominate action for fraud; there are pending proceedings in the state court; the issues were not so directly related to the bankruptcy case such that the state court could not adjudicate issues presented; removal to bankruptcy court smelled of forum shopping, and there were multiple non-debtor parties. Only jurisdictional basis was bankruptcy case, as there was no independent basis for federal jurisdiction. Further, underlying bankruptcy case had already been dismissed, presenting no reason why the Federal Court should retain control over what was now a purely state court matter.

- (4638) *PRN Pharmaceutical Services, LP v. Brownsburg Healthcare LLC*, 2014 WL 906121 (W.D. Ky. 2014) – Permissive abstention is exception rather than rule. Court must consider whether abstention is in interest of justice or in respect to comity with state courts. Factors include effect or lack of effect on administration of bankruptcy estate; extent to which state law claims predominate over bankruptcy issues; difficulty or unsettled nature of state law; presence of related proceedings in either state or bankruptcy court; jurisdictional basis for federal court other than 28 USC Section 1334; degree of relatedness or remoteness to bankruptcy case; substance, rather than form of core proceeding, feasibility of severing state law claims from core bankruptcy matters; burden on federal court docket; likelihood that bankruptcy was forum shopping by one party, existence of right to jury trial, presence of non-debtor parties, and any other unusual or significant factor. Court would abstain where action began as “garden variety” state court litigation; the adversary presented no issues of federal law; there were no independent bases for federal court jurisdiction; and action involved at least seven non-debtor parties. Principal claims were against defendants other than the debtor and only connection to bankruptcy case was claims filed by defendants for indemnification. Resolution of state court action only tangentially impacted bankruptcy case. Plaintiff had right to jury trial which could be conducted more efficiently by state court. State law claims were easily severable from any core proceedings and post-trial enforcement of state court judgment could be handled in bankruptcy court. Case was not ready for trial and transfer of action to state court would not adversely impact bankruptcy administration.
- (4639) *Villages of Capital Pointe, LLC v. Huntington Bank*, 2013 WL 4523305 (E.D. MI. 2013) – Permissive abstention is based on (1) the effect or lack of effect on the efficient administration of the estate if a court abstains; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted “core” proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of this court’s docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; (12) the presence in the proceeding of nondebtor parties; and (13) any unusual or other significant factors. Plaintiff’s (Debtor’s) Motion denied. Although defendant was not creditor, its wholly owned subsidiary is. Issue is narrow issue of state law, and there were not state court proceedings pending. There was no indication of forum shopping and parties waived right to jury trial.
- (4640) *American Discount Cycle Mart, Inc. v. Chuby*, 2013 WL 3457723 (Bankr E.D. Mi. 2013) – Factors considered in the analysis of permissive abstention are (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than the form of an asserted core proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court’s docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-debtor parties. Court would permissively abstain in favor of State Court where Complaint sought relief under state law for alleged conspiracy to convert vehicles belonging to plaintiff and included counts for conversion, conspiracy, unjust enrichment, fraudulent conveyances, and interference with business relationships. State law predominated; there was pending state court proceeding that had proceeded for over one year and was moving toward trial; Bankruptcy Court jurisdiction over the counts against the non-debtor defendants was tenuous at best; timing evidenced element of forum-shopping by Plaintiffs; there may be a right to a jury trial in the state court; and obviously the many of the defendants were non-debtor parties. Although court would not abstain over counts objecting to discharge and dischargeability under Sections 727 and Section 523, Court would abstain as to all remaining counts, notwithstanding possible inconsistent verdicts in the state court action versus the Section 523 and 727 action.
- (4641) *Meoli v. Thrum*, Case No. 13-80072 (Bankr. W.D. Mi. 2013) – Court is not required under probate exception to jurisdiction to abstain where there is no action pending in probate court concerning Trust *res*. Court can permissively abstain in interest of justice of comity with state courts or respect for state law. Action against trustee of probate trust in which debtor held beneficial interest for alleged breaches of fiduciary duty could be equally well served in state court or bankruptcy court. However, interests of comity and respect for state law favored abstention. After *Siern*, ability of Bankruptcy Court to enter final judgment was in question. All questions were ones of state law and Michigan’s relatively new trust statute, favoring state court resolution of unsettled questions of state law, and state court had unquestionable ability to render final judgment.
- (4642) *CPC Livestock, LLC v. Fifth Third Bank, Inc.*, 2013 WL 1411222 (W.D. Ky. 2013) – Permissive abstention warranted where interest of justice and comity with state courts support allowing state court to handle proceedings. Court will consider (1) the extent to which state law issues predominate over bankruptcy issues; (2) the unsettled nature of the applicable state law; (3) the jurisdictional basis; (4) the impact on the efficient administration of the estate; (5) the degree of relatedness to the bankruptcy case; (6) the presence of a related proceeding commenced in state court or other non-bankruptcy court; and (7) the existence of forum shopping. Court would abstain where state law issues predominate and action did not involve any federal causes of action; action presented unsettled questions of state law

including applicable statutes of limitations, misrepresentations and common law fraud; although case was related to bankruptcy, abstention would not adversely affect deficient administration of bankruptcy case; and while outcome could implicate claims against estate, the connection was tenuous at best where total claims exceeded \$60 million while claims at issue in this case were less than \$1 million. State Courts were already handling other related claims and there was no evidence of forum shopping in attempt to evade proper exercise of jurisdiction or any fraudulent purpose.

- (4643) *Johnston v. City of Middletown*, 484 BR 698 (Bankr. S.D. Ohio 2013) – Assuming Court had jurisdiction to rule on issue of debtor’s status as responsible party for unpaid employment taxes, court would abstain. Abstention is permissible when interests of justice or comity would be better served. Lists of non-exclusive factors includes : (1) effect or lack of effect on efficient administration of estate if court abstains; (2) the extent to which state law issues predominate over bankruptcy issues; (3) difficulty or unsettled nature of applicable state law; (4) presence of related proceeding commenced in nonbankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) degree of relatedness or remoteness of the proceeding to main bankruptcy case; (7) substance rather than form of asserted core proceeding; (8) feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) burden of this court's docket; (10) likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) existence of a right to a jury trial; (12) presence in the proceeding of non-debtor parties; and (13) any unusual or other significant factors. Court would abstain from determination of debtor as responsible party. Action had no impact on administration of estate as case was no asset Chapter 7 that had been fully administered. Controlling issues were non-bankruptcy, based entirely on tax laws. Alternative forums existed within which matters could be efficiently resolved. Bankruptcy court had no independent basis for jurisdiction other than as ancillary to bankruptcy case. There was no evidence of forum shopping, no right to jury trial.
- (4644) *CH Holding Company v. Miller Parking Co.*, 2012 WL 5463128 (E.D. Mi. 2012) – District Court would not permissively abstain where allowing litigation to continue in state court would interfere with administration of bankruptcy case. Plaintiff’s state court complaint seeking to pierce debtor-corporation’s veil and reach assets of shareholders substantially overlapped with Chapter 7 Trustee’s action seeking same relief. Although some of the relief sought by Plaintiff may not affect administration of case, those claims directly impacted the purposes and goals of Title 11.
- (4645) *Duncan v. Deutsche National Bank Trust Co.*, 2012 WL 4322667 (N.D. Ohio 2012) – Bankruptcy court properly abstained from counterclaims filed by debtor in response to Bank’s proof of claim. Counterclaims alleged multiple counts based on Fair Debt Collection Practices Act, RESPA, and 18 separate state law causes of action. Although filed as response to claim, issues were not core proceedings. Resolution of claims would not assist in the administration of assets as all were directed at enforceability of allegedly assigned note and mortgage. State law issues predominated and there were already two related state court cases pending when debtor filed for bankruptcy protection. Causes of action were not based on and were easily separated from main bankruptcy law. Fact that one count of 21 total was allegedly a core proceeding did not preclude abstention, particularly where that issue was to determine value of property which is not properly an adversary proceeding in the first instance. Bankruptcy court could retain that discrete issue as contested matter while abstaining on all remaining issues in favor of state court.
- (4646) *Moyer v. Carlyle*, Case No. 11-80450 (Bankr. W.D. Mi. 2012) – Bankruptcy Court has broad discretion to abstain from hearing matters over which it would otherwise have jurisdiction in the interests of justice or in the interest of comity with State Courts or State law. Discretionary abstention extends even to core matters when court determines to defer to State court jurisdiction. Court must consider effect on efficient administration of estate; extent to which state law issues predominate; difficulty or unsettled nature of applicable law; presence of a related proceeding commenced in State court or other non-bankruptcy forum; jurisdictional basis for federal jurisdiction if other than Section 1334; degree of relatedness or remoteness of the proceedings to the main bankruptcy case; substance rather than form of alleged core proceeding; feasibility of severing state law claims from core matters to allow judgments to be entered in State court with enforcement left to bankruptcy court; burden on bankruptcy court docket; likelihood that commencement of proceeding in bankruptcy court involves forum shopping by one of the parties; existence of right to jury trial; and presence in proceeding of non-debtor parties. Court would abstain from hearing legal malpractice suit brought by Trustee against debtor’s prior attorney. Defendants have not consented to bankruptcy court entry of final judgment or to bankruptcy court conduct of jury trial resulting in inefficiency and delay. State court jurisdiction is beyond question and bankruptcy court can conduct all proceedings, including jury trial, in full. Adversary proceeding based entirely on state law governing attorney’s professional responsibility which is traditionally within State control. All claims are between Michigan residents, such that there is no basis for federal court jurisdiction other than Section 1334.
- (4647) *Dodd v. Micek*, 2012 WL 4107230 (Bankr., E.D. Ky. 2012) – A bankruptcy court may, *sua sponte*, in the interest of justice, comity with State courts or respect for State law, abstain from hearing a particular proceeding arising in a bankruptcy case. Factors to consider in determining whether permissive abstention is appropriate include: (1) the effect of abstention upon the administration of the estate; (2) the extent to which state law issues predominate; (3) the difficulty of applicable state law; (4) the existence of a jurisdictional basis other than the bankruptcy court's jurisdiction; (5) the feasibility of permitting judgment to be entered in state court; (6) the burden on the bankruptcy court's docket; (7) evidence of forum shopping; (8) a right to a jury trial combined with a refusal to consent to jury trial before the bankruptcy judge; (9) the financial condition of the parties; and (10) whether there are non-debtor parties involved. Court would abstain where only remaining issue was validity of alleged attorney fee lien grounded entirely in state law, that is whether Kentucky law permits an attorney fee award to attach to a maintenance award in domestic proceeding. Issue was one of first impression and Divorce court has expertise that makes it more appropriate forum. State court has jurisdictional basis as state court entered order that forms the basis of the dispute. Resolution of dispute would not have no effect possible effect on bankruptcy case as trustee already filed report of no distribution.
- (4648) *Kozel v. Andrews*, 2012 WL 1790292 (Bankr. N.D. Ohio 2012) – 28 U.S.C. § 1334(c)(1) allows a district court in the interest of justice, or

in the interest of comity with State courts or respect for State law to abstain from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Factors to consider include (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than the form of an asserted core proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgment to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-debtor parties. This is a multi-factor balancing test where every element need not be met and not all factors need to weigh in favor of permissive abstention for it to be appropriate. Abstention appropriate where complaint consisted entirely of state law claims over which the state court is capable of presiding; there was no jurisdictional basis in bankruptcy court other than Section 1334; entire complaint consisted of non-core proceedings; causes of action can be easily severed from any issues in bankruptcy proceeding; and matter is not related to bankruptcy case to any significant degree and outcome of complaint will not have any effect on administration of the case. Further, defendants have reserved the right to demand a jury trial and did not consent to trial by jury by the bankruptcy court. All of the defendants are non-debtor parties. If proceeding is unduly delayed in state court, court would consider a motion to vacate order of abstention.

- (4649) *RFP Oil Co., Inc. v. Michigan Gasoline Traders, Inc.*, Case No. 11-3290 (Bankr. E.D. Mi. 2011) – Court can abstain where interests of justice or interests of comity dictates. Court will consider effect or lack of effect on efficient administration of bankruptcy case; extent to which state law issues predominate; difficulty or unsettled nature of applicable state law; presence of related proceedings commenced in state court; existence of basis for federal jurisdiction other than bankruptcy proceeding; degree of relatedness or remoteness of proceeding to main bankruptcy case; substance of the relief requested; feasibility of severing state law claims from core proceedings; burden on court docket; likelihood that commencement of proceedings in bankruptcy court involves forum shopping; existence of right to jury trial; presence of non-debtor parties; and any other unusual or significant factors.
- (4650) *IRS v. Hayes*, 2011 WL 2490945 (E.D. Mi. 2011) – IRS failed to demonstrate basis for permissive abstention to allow proceedings to be heard in Tax Court. Co-obligor had already defaulted in the collection proceedings, eliminating any concerns about comity. Judicial economy would be promoted by allowing matter to proceed in Bankruptcy Court.
- (4651) *In re T.S.P. Co., Inc.*, 2011 WL 1431473 (Bankr. E.D. Ky. 2011) – 28 USC Section 1334(c)(2) requires court to which action has been removed to abstain if (1) the case is based on a state law claim or cause of action which, although related to a title 11 case, did not arise under Title 11 or out of a Title 11 case; (2) the case could not have been commenced in Federal court absent the fact of a bankruptcy petition; and (3) if the case were commenced in State court, it could be timely adjudicated. Action pending before state department of labor for alleged safety violations did not meet diversity requirements and did not raise federal question, precluding Federal court from exercising jurisdiction; and state administrative proceeding afforded timely resolution of issues presented. Court would mandatorily abstain from proceeding.
- (4652) *Willis v. Chase Home Finance, LLC.*, 2010 WL 3430712 (N.D. Ohio 2010) – *Younger* doctrine requires Federal Court to abstain where there are pending state court proceedings that implicate an important state interest and the state proceedings afford an adequate opportunity to raise federal questions. Pending State court foreclosure action precluded Federal Courts from asserting jurisdiction in an action for loan fraud, illegal foreclosure or breach of loan modification where issues could be adequately raised in State Court proceedings.
- (4653) *Baker v. Simpson*, 2010 WL 2977329 (2d Cir. 2010) – Mandatory abstention applies when a proceeding based upon a state law claim or state law cause of action is “related to” a case under Title 11 but does not arise under or arise in a case under Title 11. A proceeding “arising in” Title 11 is one that is not based on any right expressly created by Title 11, but nevertheless, would have no existence outside of the bankruptcy. Action for legal malpractice, conversion, negligence, fraud and intentional misrepresentation brought by Debtor against former bankruptcy counsel was constituted action “arising in” the bankruptcy case. The “appellant’s relationship with all appellees arose only in connection with his Title 11 proceeding. Bankruptcy Court has the ability to review the conduct of attorneys who are appointed by the court to aid a person in need of counsel in a proceeding pursuant to Title 11. Professional malpractice claims alleged were “inseparable from the bankruptcy context and that the doctrine of permissive rather than mandatory abstention applied.
- (4654) *In re Mayer*, Case No. 09-60536 (Bankr. E.D. Mi. 2010) – Permissive abstention is proper where: (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other non- bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. §1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted “core” proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of the bankruptcy court’s docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial; (12) the presence in the proceeding of non-debtor parties; and (13) any other significant factors. Court would not abstain from dispute over whether State Court Divorce judgment created constructive trust in specific assets for payment of Debtor’s attorney fees. Bankruptcy Court could adjudicate related state law claims; issues involved necessarily impacted on administration of estate including possible preference litigation; resolution in State Court would necessarily result in further proceedings in Bankruptcy Court, resulting in duplication of judicial effort and expense; Bankruptcy Court can efficiently handle the issues presented; the only non-debtor parties in the State Court are the creditors who have actively participated in the Bankruptcy proceeding; no party demanded a jury trial and there would

be no right to a jury trial if the matter were returned to State Court; and there are no unusual or significant factors that would indicate that abstention would produce better or more efficient result.

- (4655) *LaBankoff v. GMAC Mortgage, LLC.*, Case No. 09-1294 (9th Cir. BAP. 2010) – A bankruptcy court may abstain from hearing an adversary in the interests of justice or in the interest of comity with State courts or respect for State law. Permissive abstention is proper where: (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of the bankruptcy court's docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of non-debtor parties. Court properly abstained where all allegations in the complaint were "non-core" and arose entirely from pre-bankruptcy conduct and claims were principally state law claims that could have been pursued in state court and three of four plaintiffs and at least two defendants were neither debtors nor creditors in the bankruptcy case.
- (4656) *In re Porrello*, Case No. 07-10053 (Bankr. N.D. Ohio 2009) – Bankruptcy courts have the authority to abstain from hearing matters that may be heard in state court within sound discretion of the bankruptcy judge and can be raised sua sponte. A Court will consider (1) the effect on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted 'core' proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of non-debtor parties. Court would abstain from ruling on Debtor's objection to Claim Debtor will not receive a general discharge in bankruptcy and the outcome of the objection would have no effect on the efficient administration of the Debtor's estate; the lack of other pending bankruptcy matters combined with the presence of a related fraud claim proceeding pending in state court; Debtor's estate has been fully administered by the case trustee; and the relief sought herein is truly a matter rooted in state law. Court remanded the Debtor's Objection to Claim to the appropriate state court for its consideration and determination.
- (4657) *Lone Star Fund V (U.S.), L.P. v. Barclays Bank Plc*, 594 F.3d 383 (5th Cir. 2010) – Court can remove non-bankruptcy case to federal court pursuant to 28 USC Sections 1334(b) and 1452(a) where the underlying action is "related to" a pending bankruptcy proceeding. "Related to" jurisdiction includes any litigation where the outcome could alter, positively or negatively, the debtor's rights, liabilities, options, or freedom of action or could influence the administration of the bankrupt estate. An indemnification provision in which the bankrupt debtor agrees to indemnify one party to a transaction is a sufficient nexus to allow removal of action between other party to transaction and unrelated third party. Mortgage company originated loans and sold loans to buyer, with agreement to indemnify buyer from any losses on mortgages that defaulted. Buyer in turn sold the mortgages to third party with similar indemnification provision. When mortgages defaulted, third party sued buyer on indemnification provision. Buyer removed action to Federal Court where the underlying bankruptcy case was pending. To the extent Buyer was liable to third party on its indemnification provision, Buyer would have corresponding claim against debtor. Therefore, claims of third party against Buyer were sufficiently "related to" bankruptcy to support removal.
- (4658) *MR Crescent City, LLC., v. Draper*, 588 F.3d 822 (4th Cir. 2009) – 28 USC Section 1447(c) permits imposition of legal fees against a party who removed a case from state court to federal court if the federal court later remands the case to the state court. Section 1447(c) authorizes recovery of fees only from party who caused case to be removed, and does not create personal liability of attorney for party who filed removal petition. Section 1447 does not repeal "American Rule" presumption that each party to litigation bears its own fees and costs or that only parties to proceeds can be held responsible for payment of legal fees. Fee shifting statutes must be construed narrowly and will not be construed to include awarding fees against counsel for a represented party absent clear indication that Congress intended that result.
- (4659) *Collins & Aikman Litigation Trust v. Detkowski*, 2009 WL 1469630 (E.D. Mi. 2009) - Action for personal injury or death – 28 USC Section 157(b)(5) requires that the action be tried either in the District Court where the bankruptcy case is pending or in the District Court where the claim arose, as determined by the District Court where the bankruptcy case is pending. Section 157 does not prohibit the District Court from abstaining entirely in favor of pending State Court suit as provided in 28 USC Section 1334(c)(1). Factors to determine whether abstention is appropriate include (i) whether the District Court's exercise of jurisdiction will result in piecemeal litigation, with the pending personal injury suit going forward as to other non-Debtor parties who cannot be transferred out of the jurisdiction they are now in, (ii) whether issues of state law are predominant, (iii) considerations of judicial economy, (iv) effect of abstention on the efficient administration of the bankruptcy estate, and (v) the degree of relatedness of the personal injury suit to the bankruptcy case. Abstention is appropriate where State Court personal injury action includes claims against non-Debtor defendants that could not be transferred and which would require personal injury suit to be tried twice in different Courts; state issues predominate in personal injury action with federal law playing no role whatsoever; State Court suit has progressed through the pre-trial phase and is now ready for trial; and there is no reason to believe that the claims against Debtor could not be tried in a similarly expeditious manner.

Alleged increased cost to Debtor of litigating in State Court not sufficient to overcome factors that support abstention where State Court is still proximate to and is actually located in same District as bankruptcy case and Debtor failed to produce any evidence that litigating in State Court would actually be significantly more expensive than doing so in District Court.

- (4660) *Commonwealth of Kentucky v. Young Oil Corp.*, 2009 WL 1475512 (E.D. Ky. 2009) – Action by governmental unit to enforce police or regulatory power is not subject to removal to either Bankruptcy Court or District Court after the defendant files for bankruptcy protection. Action by governmental unit to enforce State Securities Act is not adjudication of private right but is effectuation of public policy precluding removal to Federal Court. Action must be remanded to Kentucky Court.

12.44 Timeliness of Notice of Removal

- (4661) *Akwei v. JBS USA LLC*, 2014 WL 2457389 (W.D. Ky. 2014) – Notice of removal must be filed within 30 days of the date on which either the initial pleading or an amended pleading is filed that allows the parties to first ascertain that the action is or has become removable. Time starts to run from date on which defendant has solid and unambiguous information that a case is removable, and is based on defendant's actual knowledge. Initial complaint sought only recovery of 6 months back wages which totaled about \$12,000, plus unspecified amounts for "mental anguish". Plaintiff in the Amended Complaint for the first time asserted damages exceeding \$75,000 threshold for federal court jurisdiction. Notice of removal filed within 30 days of filing of amended complaint was timely.
- (4662) *NYCB Mortgage Co., LLC v. Capital Financial Mortgage Corp.*, 2014 WL 535706 (N.D. Ohio 2014) – Defendants can remove state court action to federal court if action could have been brought in federal court in first instance. Request for removal must be joined by all defendants and must be filed within 30 days of summons where basis for removal can be determined from initial pleading; or 30 days from receipt of another paper that indicates a previously unremovable case becomes removable. Joinder of defendants is not required if non-joining defendant has not been served with process at time of removal petition, or non-joining defendant is merely nominal or formal party.
- (4663) *Church Joint Venture v. Graphic Enhancement Technologies Corp.*, 2013 WL 3929725 (W.D. Tn. 2013) – State Court action pending at commencement of bankruptcy case can be remove to Federal Court upon timely filed notice of removal. Notice must be filed no later than the longer of (1) 90 days after the order for relief; or (2) 30 days after entry of an order terminating a stay; or (3) 30 days after a trustee qualifies in a Chapter 11 Case. Petition constitutes order for relief triggering running of 90 day limit. Court's Order denying debtor a discharge constitutes an order terminating the stay. Notice of Removal filed more than 90 days after commencement of case and more than 30 days after order denying discharge was untimely. Case must be remanded back to state court.
- (4664) *Lunan v. Jones*, 489 WL 711 (Bankr. E.D. Tn. 2012) – Chapter 7 Trustee's 30 day window to request removal did not run until trustee was formally served with summons and complaint. Mere "receipt" of summons and complaint is not sufficient – technical requirements for service must be fulfilled before time period commences.
- (4665) *Michigan Tractor and Machinery Co. v. Red Top Rentals, Inc.*, Adv. Case No. 09-5064 (Bankr. E.D. Mi. 2010) – 28 U.S.C. Section 1446 requires notice of removal of a civil action or proceeding to be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. If civil action was initiated before commencement of the bankruptcy case, a party has 90 days after the bankruptcy petition is filed to seek removal if the State court proceeding is "related to" the bankruptcy proceeding. A civil proceeding is "related to" the bankruptcy if the outcome of that proceeding that could conceivably have any effect on the estate being administered, or if the outcome could alter the debtor's rights, liabilities, options or freedom of action. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact upon the bankruptcy estate – certainty, or even likelihood, of such an impact is not a requirement. Civil action against corporate debtor's president based on president's personal guarantee is "related to" the bankruptcy estate. Corporate president is listed as co-debtor on other corporate obligations and, to extent that creditor recovers against president, that recovery will reduce creditor's claim against assets of the bankruptcy estate. Thus, corporate president had 90 days from commencement of the bankruptcy case to seek removal under section 1452 and Federal Rule 9027.

12.45 Waiver of Right to Remove

- (4666) *Akwei v. JBS USA LLC*, 2014 WL 2457389 (W.D. Ky. 2014) – Defendant waives right to remove where defendant expresses clear and unequivocal waiver of intent to remove. Waiver does not include defensive actions in state court short of efforts that result in actual disposition of action. Defendant did not waive right to remove by filing answer to complaint and amended complaint or by exchanging interrogatories and requests for production.

12.46 Procedure

- (4667) *Cart Cherokee Basin Operating Co. v. Owens*, ____ S. Ct. ____ (2015) – Notice of removal needs only to contain a plausible allegation that the action involves an amount in controversy in excess of the jurisdictional requirement. District Court incorrectly remanded case where notice contained statement that amount in controversy met requirement but did not contain any evidentiary foundation for that contention. Removal notice is governed by normal rules of pleading, which requires allegation that case meets jurisdictional standard but does not require evidentiary foundation to support allegation.
- (4668) *In re T.S.P. Co., Inc.*, 2011 WL 1431473 (Bankr. E.D. Ky. 2011) – A party removes a case under 28 U.S.C. § 1441 by taking three procedural steps: (1) filing a notice of removal in the federal court; (2) filing a copy of this notice in the state court; and (3) giving prompt written notice to all adverse parties. Once these steps are taken, removal is effective and the state court "shall proceed no further unless and until" the federal court remands the matter. Although underlying action was not properly removable under 28 USC Sections 1441 or

1442, the notice of removal nonetheless divested state tribunal of jurisdiction and action should not have proceeded.

- (4669) *McKibben v. Fair Finance Company*, Case No. 10-50494 (Bankr. N.D. Ohio 2010) – State Court litigation subject to removal to bankruptcy court pursuant to Section 1441 and 1452. Section 1441 requires the joinder or consent of all co-defendants to a Notice of Removal. Failure to obtain consent mandates that court deny removal of action to Bankruptcy Court. However, Section 1452(a) provides a separate basis to remove action that is “related to” a bankruptcy case without the consent of all co-defendants.
- (4670) *Mills v. Ellis*, 2010 WL 3218590 (Bankr. N.D. Ohio 2010) – Rule 9027 requires that the party filing Notice of Removal promptly serve the Notice of Removal on all parties to the removed action. Mailing a copy of the State Court Notice of Filing Notice of Removal is not the same as serving a copy of the Notice of Removal itself. Service of the notice of removal alerts parties in the removed case to the change of court, as well as starts the clock for filing a motion to remand or to respond to the complaint if time remains to do so. Further, the Notice of Removal was not accompanied by any pleading which would have placed issue of non-dischargeability before the Bankruptcy Court. Remedy for failure to promptly serve Notice of Removal is to remand case to court from which it was removed.

12.47 Removal – Consent of All Defendants

- (4671) *NYCB Mortgage Co., LLC v. Capital Financial Mortgage Corp.*, 2014 WL 535706 (N.D. Ohio 2014) – Defendants can remove state court action to federal court if action could have been brought in federal court in first instance. Request for removal must be joined by all defendants and must be filed within 30 days of summons where basis for removal can be determined from initial pleading; or 30 days from receipt of another paper that indicates a previously unremovable case becomes removable. Joinder of defendants is not required if non-joining defendant has not been served with process at time of removal petition, or non-joining defendant is merely nominal or formal party. Defendant may waive formal service of process and voluntarily join litigation. If defendant waives service prior to filing of removal petition, that defendant must also consent to removal for purposes of unanimity of defendants. Fact that non-joining defendant was under receivership did not excuse unanimity requirement for removal. Defendant was not “nominal party” were complaint contained sever causes of action directed specifically against it, including action for specific performance. Although party may not have assets or ability to answer judgment does not mean that party has no legal interest in outcome of action.
- (4672) *Crehan v. Maiden Lane, LLC*, 2014 WL 467568 (W.D. Mi. 2014) – Only defendants on which service has been effectuated are required to join in request for removal.
- (4673) *Crockett v. Mutual of Omaha Bank*, 2013 WL 2384388 (M.D. Tn. 2013), *report and recommendations adopted*, 2013 WL 3335113 (M.D. Tn. 2013) – Defendant has a right to remove action from State Court to District Court if the district court has basis for original jurisdiction. However, as removal encroaches on state court jurisdiction, statutes regarding removal are to be strictly construed. If an action lists multiple defendants, all defendants who have been properly joined and served must join in or consent to removal. Request for removal signed by only 2 of 4 listed and served defendants violates rule of unanimity and must be remanded to state court.

12.48 Burden of Proof

- (4674) *Cohen v. Schonsheck*, 2014 WL 1153728 (E.D. Mi. 2014) – Bankruptcy court has broad latitude in ruling on Motions to Abstain. Appellate court will not reverse absent a showing that the bankruptcy court committed clear error of judgment in the conclusion reached after weighing or relevant factors.
- (4675) *RFP Oil Co., Inc. v. Michigan Gasoline Traders, Inc.*, Case No. 11-3290 (Bankr. E.D. Mi. 2011) – Party seeking abstention bears burden of proof on every element of abstention. Failure to satisfy even one factor will be fatal to request.

G. Remand

12.49 Grounds

- (4676) *Muheljic v. Bank of America*, 2014 WL 6085869 (D.M.D. 2014) – Case can be removed to Federal Court only when there is independent basis for federal jurisdiction. Action improperly removed based on diversity where parties were diverse, with plaintiff being a Tennessee resident and B of A being a National Banking Association with its principal place of business in North Carolina. However, defendant failed to demonstrate that action met \$75,000 amount in controversy requirement. Complaint sought some unspecified amount that was not self-evidently greater or less than diversity amount, leaving defendant to prove by preponderance of evidence that amount in controversy exceeded jurisdictional requirement. If action seeks equitable relief, then jurisdictional limit is determined by economic value of the rights that plaintiff seeks to protect. Where the underlying action seeks equitable relief based on alleged wrongful foreclosure, “economic value” is based on fair market value of property, not the balanced owed on the mortgage. Evidence indicated that value was far below threshold where appraised value of property was \$24,000; and successful bid at contested foreclosure sale was \$40,000.00. Although statute on which cause of action was based allowed attorney fees and costs, it was highly unlikely that fees would be sufficient to meet jurisdictional limit. Action remanded as improperly removed.
- (4677) *Williamson v. Recovery Limited Partnership*, 2014 WL 4748430 (S.D. Ohio 2014) – District Court can abstain and remand matter to state court where there are parallel state court proceedings pending and remand is in interests of wise judicial administration, conservation of judicial resources, and a comprehensive disposition of litigation. Proceedings are “parallel” if there is substantial similarity, not necessarily identity of issues of facts. However, district court had jurisdiction over parties who were not parties to state court action, leaving district court in better position to conclude all issues in litigation. Case had been pending 8 years in district court and court was fully aware of issues and case, while state court had far more limited exposure to case and remand would require extensive work by state court to gain basic understanding of case. Legal issues were entirely controlled by federal maritime law. While action was originally filed in state court,

it was removed shortly thereafter and has remained in federal court since, mooted any issue regarding the state court's initial acquisition of jurisdiction. Remand denied where remand would delay proceedings and inject additional delays without furthering judicial convenience or economies.

- (4678) *Collette v. Wal-Mart Stores East, LP*, 2013 WL 6634959 (E.D. Tn. 2013) – Whether diversity exists to support Federal Court jurisdiction is determined when complaint is filed. However, if the plaintiff later amends the complaint to include identity of previously unidentified defendants, diversity must be determined at time of filing of amended complaint, and if amendment destroys diversity, court must remand case as federal court no longer has jurisdiction.
- (4679) *Anthony Marano Company v. Sherman*, 925 F.Supp.2d 864 (E.D. Mi. 2013) – District Court has authority to sua sponte order remand for lack of subject matter jurisdiction. Although Notice of Removal asserted diversity jurisdiction, Notice did not allege any facts showing plaintiff's citizenship and Defendant did not respond to order to show cause why the case should not be remanded. Failure to allege sufficient jurisdictional facts results in the absence of jurisdiction. Once District Court remanded action, Court lacked jurisdiction to reconsider or reopen the case.
- (4680) *Church Joint Venture v. Graphic Enhancement Technologies Corp.*, 2013 WL 3929725 (W.D. Tn. 2013) – State Court litigation would be remanded where notice of removal was not timely filed.
- (4681) *Lunan v. Jones*, 489 BR 711 (Bankr. E.D. Tn. 2013) – Court can remand action to state court where there is no independent basis for federal jurisdiction. Although state court action included count for violation of federal civil rights under 42 USC Section 1983 over which the District Court would have federal jurisdiction, there is no statutory authority to refer an action under Section 1983 to the Bankruptcy Court. Removal was otherwise proper where state court litigation involved action against Chapter 7 trustee by non-debtor for allegedly wrongfully selling assets that did not belong to the debtor. Action is "related to" bankruptcy case where it could conceivably have an effect on administration of estate. Every claim pertains to the Trustee's conduct while administering the assets of the bankruptcy estate under authority of, and pursuant to orders of bankruptcy court. Plaintiff sought disgorgement of funds Trustee received in official capacity as the chapter 7 trustee and court-appointed auctioneer, and damages for the conduct that the bankruptcy court ordered. To extent that a reviewing court would determine that bankruptcy court's orders were improper, that the Trustee utilized the wrong bankruptcy procedure and/or committed a fraud on the bankruptcy court, or that Trustee is required to disgorge funds received in official capacity, Plaintiff's claims will have an impact on the bankruptcy estate. Further, action brought in state court was core proceeding as directly involving the liquidation of assets of the estate which is core proceeding under 28 USC Section 157.
- (4682) *CPC Livestock, LLC v. Fifth Third Bank, Inc.*, 2013 WL 1411222 (W.D. Ky. 2013) – In considering whether Federal court has jurisdiction over State court action removed to federal court, Court must use complaint in place at time of removal. Where Plaintiff had filed an initial complaint plus two amended complaints before request for removal was filed, Court would base federal jurisdiction on allegations contained in Second Amended complaint. Removal is appropriate where Second Amended Complaint states diversity of citizenship between all plaintiffs and all defendants. However, non-diversity will not prevent removal if joinder of non-diverse defendants is done for fraudulent purpose of defeating Federal Court jurisdiction. Joinder will be fraudulent where Plaintiff could not have maintained action against non-diverse defendants as a matter of state law. If there is colorable or reasonable basis for predicting that state law might impose liability on facts alleged, then joinder is not fraudulent. Record did not conclusively establish that actions against non-diverse defendants would have been barred by statute of limitations. Federal Jurisdiction sufficient for removal can also be based on federal question, if action is created by federal law; or state law claim necessarily raises disputed federal issue that is substantial, and exercise of jurisdiction would not disburse balance of state and federal judicial responsibilities.
- (4683) *CH Holding Company v. Miller Parking Co.*, 2012 WL 5463128 (E.D. Mi. 2012) – District Court can remand case to state court where action was pending in state court prior to commencement of bankruptcy case and was removed based on commencement of bankruptcy case. Complaint sought to pierce corporate veil of debtor to impose liability on shareholders. Action related to bankruptcy case as action to pierce corporate veil is one that belongs first to the corporation, and recovery would affect estate, even if cause of action is entirely state law based. Further, Chapter 7 Trustee of debtor had commenced separate action in bankruptcy court seeking same relief. Court not required to remand case where case "related to" pending bankruptcy.
- (4684) *Anderson v. Banks*, 2012 WL 3637910 (Bankr. E.D. Tn. 2012) – 28 USC Section 1452 allows Bankruptcy Court to remand any action that was removed to Bankruptcy Court as a result of the bankruptcy filing. Bankruptcy Court could not remand action that was filed in the first instance in the Bankruptcy Court. Remand means "send back", not "sent elsewhere". Remand is contemplated only to allow action to be sent back to state court from which it was removed.
- (4685) *Brown v. Metropolitan Life Insurance Company*, 2011 WL 6826638 (W.D. Ky. 2011) – When considering request for remand, court must examine whether case was properly removed to federal court in the first instance. Where action was removed based on alleged federal subject matter jurisdiction, cause of action must arise under Constitution, laws or treaties of United States or if Congress has completely pre-empted particular area of law. ERISA claim is pre-empted if the state law claim could also have been brought pursuant to ERISA enforcement provision. Plan falls within ERISA if plan covers participants because of their employee status and the employer maintains the plan. Open membership organization that operates welfare benefit plan is not ERISA plan. State court lawsuit alleging violation of state regulations for operation of welfare benefit program not pre-empted by ERISA. Action should not have been removed as action was not based on Federal law and state law claims were not pre-empted, such that no independent basis for federal jurisdiction existed.
- (4686) *Mills v. Ellis*, 2010 WL 3218590 (Bankr. N.D. Ohio 2010) – Rule 9027 requires that the party filing Notice of Removal promptly serve the Notice of Removal on all parties to the removed action. Mailing a copy of the State Court Notice of Filing Notice of Removal is not the same as serving a copy of the Notice of Removal itself. Remedy for failure to promptly serve Notice of Removal is to remand case to

court from which it was removed.

- (4687) *Michigan Tractor and Machinery Co. v. Red Top Rentals, Inc.*, Adv. Case No. 09-5064 (Bankr. E.D. Mi. 2010) - Courts have discretion to remand state law causes of action whenever doing so presents appropriate equitable grounds. The factors to be taken into account include: 1) duplicative and uneconomical use of judicial resources in two forums; 2) prejudice to the involuntarily removed parties; 3) forum non conveniens; 4) the state court's ability to handle a suit involving questions of state law; 5) comity considerations; 6) lessened possibility of an inconsistent result; and 7) the expertise of the court in which the matter was originally pending. Court would not remand action against corporate president on personal guarantee where we men would result in duplicate dividend uneconomical use of judicial resources and would produce a substantial possibility of inconsistent results. Burden of litigating in bankruptcy court was not prejudicial to creditor given that creditor is already a party to the bankruptcy case and will be litigating corporate debtor's liability. Although claims were based in state law, claims did not raise unique issues of state law that would see the adjudicative abilities of the bankruptcy court. Creditor's motion for remand denied.

12.50 Equitable Remand

- (4688) *Rachmale v. Conese*, 2014 WL 4129537 (Bankr. E.D. Mi. 2014) – 28 USC Section 1452(b) allows court to remand “on any equitable ground”. Factors include duplicative and uneconomical use of judicial resources to resolve matters in two separate forums; prejudice to parties adverse to party seeking remand; the convenience of the proposed remand forum; the state court's ability to handle the matter including the applicability of state law; considerations of comity between courts; the likelihood of inconsistent results. And the expertise of the court to which the case would be remanded. Suit by shareholder alleging that directors of bankruptcy company attempted to wrongfully “squeeze him out” would be equitably remanded as action presented no possibility of dual litigation in both bankruptcy court and state court and no risk of inconsistent holdings. Impact on bankruptcy estate would be minimal as only exposure of debtor is potential obligation to indemnify directors which turns on whether plaintiff can prevail in the first instance and whether the defendants acted with bad faith, all of which can economically be resolved by state court, and any indemnification recovery would be unsecured claim to be paid a minimal distribution. Plaintiff had right to jury trial that could not be conducted by bankruptcy court. Case was in early stages such that remand presented no risk of prejudice to defendant. All acts giving rise to cause of action arose in Michigan and only connection to bankruptcy court was happenstance that debtor filed bankruptcy in Delaware. Action is based entirely on state law and state court could competently address issues. Comity dictated remand as federal court will be hesitant to act where state court issues substantially predominate. Action remanded to state court.
- (4689) *Cohen v. Schonscheck*, 2014 WL 1153728 (E.D. Mi. 2014) – Equitable remand takes into consideration many of the same factors as permissive abstention. Court can consider any equitable grounds in considering whether remand is appropriate, including (1) duplicative and uneconomical use of judicial resources in two forums; (2) prejudice to the involuntarily removed parties; (3) forum non conveniens; (4) the state court's ability to handle a suit involving questions of state law; (5) comity considerations; (6) lessened possibility of an inconsistent result; and (7) the expertise of the court in which the matter was originally pending. Equitable remand appropriate where matters were entirely state law based; state court has been handling case for two years prior to removal; state court had ability to handle matters; and remand posed no impediment to administration of bankruptcy case as bankruptcy had already been dismissed.
- (4690) *RFP Oil Co., Inc. v. Michigan Gasoline Traders, Inc.*, Case No. 11-3290 (Bankr. E.D. Mi. 2011) – Even if grounds do not support abstention, court can equitably remand case to state court where leaving case in bankruptcy court would be duplicative and uneconomical use of judicial resources in two forums. Substantial overlap of facts and background of litigation involving core and non-core proceedings so overlap that to retain the core claims would produce entirely duplicative and uneconomical use of resources.

12.51 Appellate Review

- (4691) *Yaldo v. Homeward Residential, Inc.*, 2015 WL 4636627 (6th Cir. 2015) – District Court Order remanding eviction proceeding to state court based on lack of jurisdiction is non-appealable order. Notice of removal was untimely in first instance.
- (4692) *Timco, LLC v. T and M Sales Agency, Inc.*, 2013 WL 150105 (6th Cir. 2013) - Mandatory abstention provision of 28 USC Section 1334 precludes appellate review of Order remanding case to State Court. Action was based on state law, action was non-core proceeding, no basis existed for federal jurisdiction other than pending bankruptcy case, and action could be timely adjudicated in State court of competent jurisdiction.
- (4693) *Auto Owners Insurance v. Rossi*, 444 BR 170 (6th Cir. BAP 2011) – Order remanding case to state court from which it was removed is not appealable order pursuant to 28 USC Section 1447(d). Whether Bankruptcy Court correctly stated that it lacked subject matter jurisdiction as basis for remand, Order of Remand was not reviewable to determine whether Bankruptcy Court's conclusion of jurisdiction was correct.

H. Standing to Prosecute

12.52 Generally

- (4694) *Schwab Industries, LLC v. Huntington National Bank*, 2015 WL 5561347 (Bankr. N.D. Ohio 2015) – Plaintiff in adversary proceeding must demonstrate both prudential and constitutional standing. Constitutional standing requires that debtor has suffered an injury in fact to a legally protected interest that is concrete, particularized, actual and imminent; there must be causal connection between injury and conduct complained of; and it must be likely, rather than speculative, that injury would be redressed by successful resolution of action. Prudential standing addresses judicially self imposed limits on exercise of federal jurisdiction. Corporation, as survivor of Chapter 11 proceeding lacked standing to bring action where plan as confirmed vested causes of action in Liquidating Trust. Further, action against

bankruptcy counsel for malpractice is vested in corporation and became property of Liquidating Trust, and principal's re-purchase of stock of surviving debtor did not restore claims to either the surviving company or the stockholder personally.

- (4695) *Joseph and David Johnsman Ltd. v. Egbert*, 2015 WL 4873014 (Bankr. N.D. Ohio 2015) – Standing requires that plaintiff has suffered an actual injury in fact as a result of the alleged actions of defendant, and that injury can be redressable by favorable decision. Injury-in-fact requirement is “hard floor” of Article III and cannot be removed by statute. Court could not determine on summary judgment whether Debtor sufficiently demonstrated that sale of assets post-petition in violation of Section 549 produced any actual damage to debtor as debtor voluntarily entered into transaction and debtor failed to demonstrate that price received was disproportionate to value of assets sold. Although Debtor alleged that property was worth far more than sale price, Debtor did not introduce evidence of value of assets as of the date of the sale, resulting in genuine issue of material fact. Potential grant of lien in favor of defendant as alleged good faith transferee under Section 550 did not deprive Debtor of standing where defendant did not introduce evidence of any improvements to the property transferred by Debtor.
- (4696) *Stevenson v. Ocwen Loan Servicing, LLC*, 2015 WL 2083513 (E.D. Mi. 2015) – Upon filing for bankruptcy, debtor loses standing to pursue any legal or equitable claims as claims become property of estate and can be pursued only by Trustee unless claims are abandoned by Trustee. Fact that litigation is brought against creditor who, as creditor, would share in proceeds pro rata with other claims does not create conflict of interest for Chapter 7 Trustee as Trustee does not represent affected creditor.
- (4697) *Hadley v. Chrysler Group, LLC*, 2014 WL 988962 (E.D. Mi. 2014) – Constitutional standing requires invasion of legally protected interest that is concrete and particularized and not merely speculative or conjectural, and is actual or fairly imminent, and bears a causal connection to the conduct complained of and can be redressed by favorable decision. Plaintiffs in class action suit failed to demonstrate sufficient injury based on alleged failure of Defendant to perform gratuitous promise to repair vehicles, where Defendant has not withdrawn its promise or otherwise failed to perform repairs. Plaintiffs vague allegations of “diminished value”, expenses and costs of diagnosis of problem, and expenses of obtaining alternate transportation were not sufficient. As to costs of diagnosis, Defendant has already publically announced cause of issue well before Plaintiffs paid for any “diagnosis” and any costs of diagnosis were not attributable to Defendant’s alleged delay in repairing vehicle, and Defendant nonetheless agreed to reimburse those costs rendering that issue moot. Bald assertions of other “damages” were too vague and unsupported to sustain standing.
- (4698) *Schwab v. Oscar*, 2014 WL 232113 (Bankr. N.D. Ohio 2014), *aff’d*, 517 BR 72 (6th Cir. BAP 2014) – Alleged cause of action for malpractice by debtor’s bankruptcy counsel constituted property of estate over which Trustee had exclusive standing unless Trustee abandoned cause of action. Plaintiff filed suit against Defendant and Trustee, claiming that suit was attempt to either force the Trustee to bring action or to force Trustee to assign cause of action to plaintiff. Standing must be determined when complaint is filed. Complaint indicated on its face that as of date of filing, only Trustee had standing to bring action.
- (4699) *Crone-Schierloh v. Hammock*, 2014 WL 321973 (S.D. Ohio 2014) – Constitutional standing requires that plaintiff have suffered injury in fact that is concrete and particularized or actual and imminent, rather than hypothetical or conjectural; that the challenged conduct be causally connected to the injury; and a favorable court decision would provide redress or remedy. Constitutional standing is different standard than statutory standing. Statute granted ERISA plan participants standing to bring action against Plan managers. However, where plan participants could not demonstrate any specific injury, plaintiffs lacked constitutional standing, such that Federal Court lacked jurisdiction and case must be dismissed.
- (4700) *Wilhoite v. Suntrust Bank*, 2014 WL 505171 (Bankr. M.D. Tn. 2014) – Upon commencement of case, all pre-petition causes of action become property of estate. Debtor lacks standing to pursue pre-petition cause of action absent abandonment by Trustee.
- (4701) *Tyler v. DH Capital Management, Inc.*, 2013 WL 5942072 (6th Cir. 2013) – All pre-petition causes of action become property of estate upon filing, and only the trustee has standing to pursue actions post-petition. Cause of action for alleged violation of Fair Debt Collection Practices Act was pre-petition claim where crux of argument was that creditor violated FDCPA by filing suit against debtor. Suit was filed before bankruptcy commenced, although debtor was not served with the complaint until post-petition. All elements of cause of action occurred prior to commencement of bankruptcy, such that claim constituted pre-petition cause of action. Debtor lacked standing to pursue recovery.
- (4702) *Epps v. United States*, 2013 WL 4096001 (W.D. Tn. 2013) – Commencement of bankruptcy case creates an estate which includes all causes of action that debtor had as of the date of commencement. In Chapter 7, Bankruptcy Trustee is sole party with standing to pursue causes of action. In Chapter 13, debtor retains standing to pursue claims that are property of the estate.
- (4703) *Northedge v. Beckett*, Case No. 13-80089 (Bankr. W.D. Mi. 2013) – Debtor has at least colorable standing in Chapter 13 to pursue action based on avoiding powers under Section 544. To extent debtor seeks relief under Section 522(h) to preserve exemption rights, debtor has standing as Section 522(h) specifically authorizes debtor to pursue avoidance to extent necessary to preserve exemptions.
- (4704) *Rugiero v. Flagstar Bank, FSB*, 2013 WL 1316910 (E.D. Mi. 2013), *rehearing denied*, 2013 WL 3849930 (E.D. Mi. 2013) – Owner of property lacks standing to prosecute action for alleged violation of Michigan foreclosure laws regarding mediation where violation, if any, occurred prior to commencement of bankruptcy case. Upon filing of bankruptcy, action became property of estate and only trustee could thereafter maintain action. Owner is also precluded from challenging foreclosure once redemption has expired. Upon expiration of redemption, title vests absolutely in the purchaser at the sale and there is no basis for a court to alter that outcome. To extent owner has any remedy, that is limited to either contesting sale before redemption expires, or holding over after redemption and contesting foreclosure sale as part of summary proceedings for possession. Only exception is where mortgagor makes strong showing of fraud or irregularity. Fraud requires false statements by lender. Defect under Section 600.3205 requires proof that failure to comply with statutory foreclosure laws resulted in prejudice to owner, such that owner would have been in better position to preserve interest in property had lender not failed to

comply with statute. Allegation that debtor does not recall receiving notice of foreclosure sale does not rise to level of either fraud or prejudice. Debtor did not present any facts that would entitle him to render the foreclosure sale voidable. Debtor admittedly was aware that a foreclosure sale of his home was going to occur and he was not misled into believing that one might not occur and, there is no evidence that he made any effort convert the summary proceedings to a judicial foreclosure or to redeem the property after the foreclosure sale, but prior to expiration of the redemption period. Debtor had the advice of counsel, at least during the summary eviction proceedings, such that there was no basis for the Federal Court to disturb foreclosure process.

- (4705) *CSX Transportation, Inc. v. Denardo*, 2013 WL 1213067 (E.D. Mi. 2013) – Upon filing for bankruptcy, all pre-petition causes of action held by debtor become property of estate and may only be prosecuted by the Trustee. Undisclosed assets are not administered and are not deemed abandoned at closing of case, but remain property of the estate even after the case is closed. Plaintiff, allegedly harmed by pre-petition fraudulent transfers, lacked standing to prosecute actions after debtor filed bankruptcy petition. Chapter 11 case closed without confirmation of plan could be re-opened to administer undisclosed causes of action for alleged pre-petition fraudulent transfers. If Bankruptcy Court concludes that re-opening is not warranted or that, after re-opening, trustee abandons causes of action, then Plaintiff, as party allegedly injured by transfer, would have standing to prosecute fraudulent transfer actions.
- (4706) *Kentucky Automotive Center of Grayson, LLC v. Nissan North America Inc.*, 2013 WL 663574 (E.D. Ky. 2013) – Standing requires that the plaintiff has suffered an injury in fact which is traceable to the acts or omissions of the defendant and which is redressable. If asserting a statutory cause of action, plaintiff must also demonstrate that plaintiff is a member of the group of persons intended to be protected by the statute. Plaintiff must also be asserting own legal rights as opposed to the rights to third persons. Plaintiff lacked standing to contest bankruptcy sale where plaintiff did not make a bid at the sale. Unsuccessful third party's bid did not constitute an injury to plaintiff's bidding rights or sale procedures. Plaintiff also failed to demonstrate standing under Kentucky Motor Vehicle Sales Act as Act applies only to dealerships, new motor vehicle dealers, manufacturers, distributors, factory branches, and factory representatives. Plaintiff did not fit into any statutory category as plaintiff was merely unsuccessful potential purchaser of dealership who claimed that manufacturer unreasonably refused to consent to sale. Although the potential seller would fall within statute, plaintiff could not assert rights held by third party.
- (4707) *Duran v. Mortgage Electronic Registration Systems, Inc.*, 2013 WL 444450 (N.D. Ohio 2013) – Article III standing requires that plaintiff demonstrate that conduct of which plaintiff complains causes an injury in fact that a favorable judgment would redress. The injury must be concrete and particularized, and the harm must be actual or imminent, not conjectural or hypothetical. "Prudential standing" is separate requirement that plaintiff assert only his or her legal rights or interests and prohibits actions that are based on legal rights or interests of third parties or that are generalized grievances best resolved in the legislative branch. Debtor lacks standing to contest alleged validity of mortgage assignment. Debtor was not party to mortgage assignment in question and validity or invalidity of assignment did not impact or alter debtor's obligation to pay.
- (4708) *Auday v. Wet Seal Retail, Inc.*, 2012 WL 5259002 (6th Cir. 2012), *appeal after remand*, 2013 WL 2457717 (E.D. Tn. 2013) – Pre-petition cause of action arising out of alleged pre-petition age discrimination is property of estate that can be prosecuted only by, and in the name of, the Trustee, unless the trustee abandons the cause of action. Debtor failed to schedule cause of action and failed to later amend schedules to disclose cause of action. Although Trustee became aware of cause of action before discharge entered, entry of discharge did not abandon cause of action or allow debtor to pursue action in her own name. Final Judgment entered in favor of debtor must be vacated as debtor lacked standing to pursue action in her own name. Action remanded to District court to either allow amendment of complaint to substitute trustee as plaintiff or to dismiss without prejudice. On remand, District Court concluded that debtor lacked standing to pursue action for legal or equitable relief, and that actions belonged solely to the Trustee. Court could not permit joinder of trustee, as trustee is sole party in interest, requiring substitution of Trustee for debtor.
- (4709) *Van Sickle v. Fifth Third Bankcorp.*, 2012 WL 3230430 (E.D. Mi. 2012) – Causes of action that accrued before plaintiff filed for bankruptcy are property of bankruptcy estate. Debtor lacks standing to prosecute actions in his own name. Complaint dismissed pursuant to Rule 17(a)(1) as plaintiff was not real party in interest.
- (4710) *Mitrano v. US*, 2011 WL 4459102 (Bankr. E.D. Va. 2011) – Debtor lacks authority to pursue avoidance action under Section 544. Avoidance power is granted only to Trustee. Powers of debtors are enumerated in Section 1303 and trustee's avoidance powers are not included in that list.
- (4711) *Simmerman v. Ocwen Financial & Mortgage Services, Inc.*, 463 BR 47 (Bankr. S.D. Ohio 2011) – Although debtor's causes of action become estate property upon filing a Chapter 13 bankruptcy petition, Chapter 13 debtors have standing to bring claims in their own name on behalf of the bankruptcy estate. Debtor has more power over estate assets and a better ability to pursue lawsuits than a Chapter 13 trustee.
- (4712) *Commonwealth Property Advocates, LLC v. Mortgage Electronic Registration System, Inc.*, Case No. 10-4182 (10th Cir. 2011) – Owner of property allegedly the subject of a wrongful foreclosure action has standing to contest enforceability of mortgage even where owner was not maker of note or signor of mortgage and lacked any privity with lender. Allowing foreclosure action to proceed created risk of direct injury to property owner sufficient for purposes of standing.
- (4713) *US Bank, NA v. Barbee*, 2011 WL 6141648 (6th Cir. BAP 2011) – Debtor has derivative standing to pursue avoidance action where bank allegedly failed to perfect lien on title of mobile home.
- (4714) *Borders v. King*, 2011 WL 3352468 (Bankr. E.D. Ky. 2011) – Creditors have no standing to prosecute a fraudulent transfer action in their own right and for their own benefit during a bankruptcy even if they would have had standing to do so outside of bankruptcy. The Trustee has the exclusive right to bring an action for fraudulent conveyance pursuant to 11 U.S.C. § 548 and/or § 544 during the

pendency of bankruptcy proceedings.

- (4715) *Rankin v. Lavan*, Case No. 09-1087 (6th Cir. 2011) – Debtor’s undisclosed claim of ownership of real property was not disclosed in bankruptcy schedules, became property of estate on filing of case. Absent abandonment, only the Trustee has standing to pursue claims based on failed purchase and sale of real estate where all elements of action arose prior to commencement of case. Adversary proceeding prosecuted by Debtor post-petition properly dismissed as Debtors lacked standing to pursue action.
- (4716) *Lincoln Electric Company v. Manahan*, 2011 WL 3516201 (N.D. Ohio 2011) – Causes of action for alleged fraudulent transfers by debtor constitute property of estate. Actions are not individual as to any creditor but constitute actions which benefit creditor body as a whole.
- (4717) *Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – Borrower has standing to challenge foreclosure as long as action is brought before expiration of redemption period. Complaint contesting foreclosure sale filed 7 days before sale date timely filed. Subsequent expiration of redemption does not render action moot.
- (4718) *In re Ferrette*, 2011 WL 940409 (E.D. Mi. 2011) – Adversary proceeding challenging validity of foreclosure sale dismissed where sale occurred prior to commencement of bankruptcy case. After the property had been sold at the sheriff’s sale, debtor lost his opportunity to obtain any relief from the bankruptcy court to void the sale or extend the redemption period.
- (4719) *Lessl v. CitiMortgage, Inc.*, 2011 WL 4351673 (E.D. Mi. 2011) – Owner may hold over after foreclosure sale by advertisement and contest validity of sale in summary proceeding for possession. However, Court will not overturn foreclosure sale absent strong showing of fraud or irregularity.
- (4720) *Nett v. Wells Fargo Home Mortgage, Inc.*, 2011 WL 1519166 (E.D. Mi. 2011) – Owner retains standing to contest validity of foreclosure sale even after redemption period has run. Owner can challenge foreclosure validity as part of summary eviction proceedings or as part of separate proceeding.
- (4721) *IRS v. Hayes*, 2011 WL 2490945 (E.D. Mi. 2011) – Debtor has standing to bring adversary against IRS to determine amount of tax debt and to recover potential overpayment. Debtor has “clear interest” in issues relating to the scope of the discharge. Tax debts were admittedly non-dischargeable, so amount of tax debt directly impacted the discharge. Fact that any money recovered as overpayments would be property of estate and would be distributed to creditors did not deprive debtor of standing as outcome is “clearly related” to the administration of the estate.
- (4722) *JGR Associates, LLC v. Brown*, 2011 WL 9153 (Bankr. E.D. Mi. 2011) – “Standing” for purposes of adversary proceeding requires “Article III” Standing, which requires that the action directly affect a right or the pecuniary interest of the plaintiff. Standing also requires “prudential” standing, which requires that only the “real party in interest” bring the adversary. A person with Article III standing may still lack prudential standing. Defendant’s claim that plaintiff was not real party in interest must be timely raised or will be waived. Defendant’s assertion that plaintiff was not real party in interest, not made until first day of trial, was untimely.
- (4723) *Morris v. Paine*, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Court can dismiss action where complaint fails to assert a private right of action, as complaint fails to state a cause of action pursuant to Rule 12(b)(6).
- (4724) *Harker v. Countrywide Homes, Inc.*, 2010 WL 3908978 (S.D. Ohio 2010) – Section 105 does not authorize private right of action against non-party creditor. Trustee could not use Section 105 as basis for action against mortgage creditor based on alleged misrepresentations by creditor that it owned Debtor’s note and mortgage. Trustee cannot maintain declaratory relief action against creditor where all other substantive counts of complaint have already been dismissed. Action for injunctive relief to enjoin creditor from (i) misrepresenting to Bankruptcy Courts, bankruptcy trustees, and creditors of estates that it is a creditor of the debtors’ bankruptcy estates and that it is the holder of notes or mortgages on real estate of the debtors on the date of debtors’ bankruptcy petitions; (ii) misrepresenting to Bankruptcy Courts, bankruptcy trustees, and creditors of estates the true holder of the notes and related mortgages; (iii) failing to disclose that the true holder failed to properly record or did not timely record assignments of the mortgages, in the land records of the proper governmental office in the state in which the real property covered by the mortgage is situated; (iv) filing pleadings, motions, or any other filings in any court containing any such misrepresentations; and (v) requiring Countrywide to correctly represent the true chain of ownership of notes and related mortgages to Bankruptcy Courts, bankruptcy trustees, and creditors of estates dismissed where Trustee had adequate remedies in ability to object to proof of claim and to bring action under Rule 9011.
- (4725) *Spradlin v. Baker*, 2010 WL 2612585 (Bankr. E.D. Ky. 2010) – Creditor has standing to pursue recovery under Section 547 where funds that would be recovered would not be exempt and would be available for distribution to creditors.
- (4726) *Moses v. Howard University Hospital*, Case No. 08-7087 (D.C. Cir. 2010) – The trustee, as the representative of the bankruptcy estate, is the real party in interest, and is the only party with standing to prosecute causes of action belonging to the estate once the bankruptcy petition has been filed. The commencement of Chapter 7 bankruptcy extinguishes a debtor’s legal rights and interests in any pending litigation, and transfers those rights to the trustee, acting on behalf of the bankruptcy estate. An outstanding legal claim that is abandoned by the trustee reverts back to the original debtor-plaintiff. Whatever interest passed to the trustee when Debtor filed for Chapter 7 bankruptcy was extinguished when Trustee abandoned the cause of action in this case. At that point, the Debtor re-acquired standing to prosecute the action as if the bankruptcy had never been filed.
- (4727) *Countrywide Home Loans v. Dickson*, 427 BR 399 (6th Cir. BAP 2010), *aff’d* 2011 WL 3768684 (6th Cir. 2011) – Debtor has direct and derivative standing to pursue action under Section 522(h) and Sections 544 and 547 where the creditor obtained the judgment lien during the preference period. Court has equitable power to allow Debtor to pursue avoidance actions where the Trustee fails or refuses to do so. Chapter 13 Trustee typically lacks resources to pursue avoidance action and lacks ability to sell assets to fund a war chest for litigation.

- (4728) *Kirschner v. KPMG, LLP.*, 590 F.3d 186 (2d Cir. 2009) – State law governs whether of corporate insiders can be computed to Corporation which would result in trustee for debtor corporation lacking standing to recover against third parties for damages to creditors. Corporate insiders engaged in complicated structure which resulted in completion of corporate assets and expense of creditors. After Corporation filed bankruptcy, Liquidating Trustee sought to bring actions against corporate insiders, professionals and advisers for fraud, breach of fiduciary duty and malpractice. District Court concluded that Bankruptcy Trustee lacked standing to seek recovery on behalf of debtor company against third parties for injuries incurred by the misconduct of debtor's controlling managers. "Adverse-interest" exception will prevent imputation of insiders conduct to Corporation only where the corporate officers have "totally abandoned" the corporation's interests and the insiders are acting entirely for their own benefit. District court concluded that at first interest exception applies only where insiders intended to benefit only themselves and that corporation was harmed by the scheme, not nearly that corporate management did not intend to benefit the company under circumstances where the company may have received some incidental benefit. The Second Circuit, noting that the controlling issues were once purely of New York State Law, certified the issues to the New York Court of appeals for further proceedings.
- (4729) *Gilchrist v. Bank of America*, Adv. No. 09-4411 (Bankr. E.D. Mi. 2009) - Adversary proceeding commenced by Debtor while case pending under Chapter 13 becomes property of estate upon conversion to Chapter 7. Debtors did not claim any exemption in the causes of action and the Chapter 7 trustee has not abandoned the causes of action. Only the Chapter 7 trustee may prosecute the claim(s), and Debtors' continuing prosecution of these claims would violate the automatic stay.
- (4730) *Hyundai Translead, Inc. v. Johnson Truck & Trailer Repair, Inc.*, 555 F.3d 231 (6th Cir. 2009) - Bankruptcy Code permits the Court to grant derivative standing to creditors to pursue avoidance claims on behalf of the Estate where the Chapter 7 Trustee declines to do so. Section 544's reference to authorizing the trustee to pursue avoidance actions does not limit the Court's equitable or statutory ability to permit creditors to act in place and stead of the Trustee where that is in the best interests of the estate. Derivative standing is equally available in Chapter 7 and Chapter 11 cases. To support derivative standing, party moving for derivative standing must show that: (1) a demand was made on the trustee (or Debtor-in- possession) to act, (2) the trustee (or Debtor-in-possession) declined, (3) a colorable claim exists that would benefit the estate, and (4) the trustee's (or Debtor-in-possession's) inaction was an abuse of discretion.
- (4731) *Casden v. Burns*, 2009 WL 103620 (6th Cir. 2009) - Shareholder lacked standing to pursue action against former officers and directors of corporation for breach of fiduciary duty where approval of corporation's Chapter 11 plan cancelled corporate stock and extinguished shareholder's right to bring derivative claims. Purported deprivation of shareholder rights does not convert a derivative claim into a direct claim. The incidental loss of shareholder rights does not constitute an injury that is distinct from the harm suffered by all shareholders. Alleged loss of shareholder rights would not give rise to a direct individual action.
- (4732) *Brennan v. Slone*, 2008 WL 4569946 (6th Cir. 2008) - Chapter 7 Trustee had standing to pursue fraudulent transfer against transferee where property transferred was subject to a security interest in favor of third party and as part of transfer the secured party released the security interest. Trustee's efforts to recover fraudulently transferred assets was not action taken merely to enforce the rights of one creditor (in which case the Trustee would lack standing) but was effort to preserve rights of estate and of creditors as a whole. If property transferred was over-encumbered such that any recovery would benefit only the secured creditor then the Trustee would lack standing as the recovery, if any, would benefit only the secured creditor. But where the secured creditor voluntarily released the security interest at the time of the transfer, any property recovered would be for benefit of estate and creditors.
- (4733) *Wuliger v. Manufacturers Live Insurance Company*, 567 F.3d 787 (6th Cir. 2009) - Constitutional requirements for standing require plaintiff to show: (1) it has suffered injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) injury is fairly traceable to challenged action of defendant; and (3) it is likely, as opposed to merely speculative, that injury will be redressed by favorable decision. Plaintiff must also satisfy three prudential standing requirements: (1) plaintiff must assert his own legal rights and interests, without resting claim on rights or interests of third parties; (2) claim must not be generalized grievance shared by large class of citizens; and (3) in statutory cases, plaintiff's claim must fall within zone of interests regulated by statute in question.

12.53 Ratification

- (4734) *Automotive Finance Corp. v. Leonard*, 2012 WL 1565120 (Bankr. E.D. Tn. 2012) – For purposes of Section 523(a)(2), (4) or (6), party with standing is creditor to whom debt is owed. Real party in interest is the one who, under the applicable substantive law, has the legal right which is sought to be enforced or is the party entitled to bring suit. Legend on promissory note that stated that obligation had been sold to AFC Funding Corp. raised question as to whether American Funding Corp. had standing. However, where plaintiff lacks standing, Court should not dismiss action until real party in interest has opportunity to either join or ratify action. Party can "ratify" action by unequivocal statement authorizing the continued prosecution and stating that the party agrees to be bound by results. Affidavits filed by AFC Funding sufficient to stating that AFC was the servicer and specifically authorized action to be brought by Automotive Finance Corp. and agreed to be bound by result.

12.54 Intervention - Mandatory

- (4735) *United Methodist Publishing House, Inc. v. Family Christian, LLC*, 2015 WL 2061780 (Bankr. W.D. Mi. 2015) – Federal Rule of Civil Procedure 24 allows a party to intervene as a matter of right if granted by federal statute, or if the party claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest unless its interest is already adequately protected by other parties. In considering motion to intervene, court will consider timeliness of motion; moving party's substantial interests; impairment of the movant's ability to protect its interest absent intervention; and adequate representation by other parties. Interest must be "significantly protectable" meaning that the

interest must be direct and substantial. Unsecured creditor's committee had sufficient interest in litigation regarding competing claims to ownership of assets used and possessed by debtor to give rise to substantial interest of committee on behalf of all unsecured creditors. However, Committee had ability to protect interests without intervention, by monitoring adversary proceeding and through committee's close relationship with debtor. Further, any proposed compromise would be subject to court approval giving the committee yet another opportunity to protect its interests. Committee also has right to request permission to file adversary briefs at appropriate times and stages of case. If committee later discovers that defenses are being impaired or claims compromised, committee can seek derivative standing or request appointment of trustee. Committee also could not demonstrate potential for inadequate representation. Where the party seeking intervention shares the same ultimate objective as a party to the suit, there is a presumption of adequate representation. Absent proof that the representing party is in collusion with opposing party, that representative is actually pursuing interest that is adverse to proposed intervenor, or that the representative is failing to fulfill duty, party cannot sustain burden of showing inadequate representation. While relationship between debtor and potential purchaser created a possibility of an adverse interest, no evidence indicated the actual existence of any collusion or assertion of adverse position.

- (4736) *Matthews v. Educational Credit Management Corp.*, 2011 WL 836925 (E.D. Ky. 2011), *aff'd* 2013 WL 791520 (6th Cir. 2013) – Assignee of guarantor of student loan debt had sufficient interest to support intervention in action to determine dischargeability under Section 523. Intervenor demonstrated timely request to intervene; guarantor had substantial legal interest in case; applicant's ability to protect interests would be impaired if intervention was denied; and applicant's interests were not otherwise adequately represented. Primary lender's status as defendant in case did not provide adequate representation of guarantor who held distinct interests, particularly where primary lender defaulted by failing to respond to adversary complaint.
- (4737) *Bailey v. White*, 2009 WL 928595 (6th Cir. 2009) – Federal Rule of Civil Procedure 24(a) requires party seeking to intervene to demonstrate (1) application is timely; (2) applicant must have substantial legal interest in the subject matter of the action; (3) applicant's ability to protect that interest must be impaired if intervention is not granted; and (4) parties already present in the action do not adequately represent applicant's interest. District Court properly denied motion to intervene as untimely where action had been pending for 17 months including litigation over preliminary injunction, class certification and discovery. Proposed intervenors knew about their interests in the case before the complaint was filed and had adequate opportunity to participate in fairness hearing and review documents voluntarily produced by the parties. Court will consider 5 factors in determining whether request for intervention is timely: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

12.55 Intervention – Permissive

- (4738) *United Methodist Publishing House, Inc. v. Family Christian, LLC*, Case No. 15-80062 (Bankr. W.D. Mi. 2015) – Federal Rule of Civil Procedure 24 allows permissive intervention where party has a conditional right to intervene by federal statute, or where the party has a claim or defense that shares common questions of law or fact with the main case. Court must exercise discretion by considering whether intervention will unduly delay or prejudice the adjudication of the claims between the existing parties. Court will not allow intervention by unsecured creditor committee where intervention would lead to increased costs and duplication of effort, and committee can object to any proposed compromise. Committee sought to assert same defenses as were already being asserted by debtors and intervention could prejudice rights of plaintiff by forcing plaintiff to incur additional costs by having to respond to pleading and discovery requests from both debtor and committee who share same defenses.

12.56 Joinder and Severance

- (4739) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Joinder of party is appropriate where adding party will not deprive court of jurisdiction and either (i) absent joinder, court cannot afford complete relief; or (ii) person claims an interest in subject matter of action such that disposition in absence of person will either impair or impede person's ability to protect interest, or would leave an existing party subject to double or multiple or otherwise inconsistent obligations. Joinder of third parties in litigation between Debtor and Defendant concerning ownership of real property where parties to be joined claimed ownership interests in same property and court could not determine Debtor's actual ownership interest in property unless additional parties were joined to the action.
- (4740) *White Family Companies, Inc. v. PNC Bank*, 2015 WL 1245915 (Bankr. S.D. Ohio 2015) – Joinder requires that party to litigation bring all causes of action that arise out of same facts and transactions in single action. However, joinder requires fully mature cause of action at time underlying litigation was filed. Where defendant's right to pursue recovery against third party did not mature until defendant lost fraudulent transfer action brought by trustee. Defendant's later action against third party, predicated on same transaction and same facts, was not barred by party's failure to join action in first action.
- (4741) *Auday v. Wet Seal Retail, Inc.*, 2013 WL 2457717 (E.D. Tn. 2013) – Rule 17 allows substitution of trustee for debtor unless parties fail to substitute trustee for debtor in reasonable time. Once Trustee substitutes in, action proceeds as if it had originally been commenced by real party in interest, where trustee, having been substituted, ratifies the original filing by the debtor. Ratification requires Trustee to authorize continuation of action and agree to be bound by results. Trustee did not ratify action where Trustee did not take any action to prosecute action but directed debtor to pursue the action on her own. Trustee's affidavit stating that trustee was aware of the prosecution did not amount to ratification as affidavit neither asserted control over action nor agreed to be bound by outcome. Rule 25 allows for substitution of party where party, during pendency of action, obtains assignment or transfer of the litigation. Action was transferred by Debtor to Trustee upon filing of bankruptcy case regardless of whether action had been commenced pre-petition. Trustee would be substituted in as if action had been brought by trustee in first instance. Where original action was commenced within statute of limitations, trustee as

substituted party can maintain action as if trustee was party in first instance and brought action within statute of limitations period.

- (4742) *Sequatchie Mountain Creditors v. Detweiler*, 2012 WL 4120386 (N.D. Ohio 2011) –Amendment of complaint should be permitted where justice requires. Court must consider whether there has been undue delay; lack of notice to opposing party; bad faith by moving party; repeated failure to cure deficiencies in prior amendments; and a futility of amendments; with notice and substantial prejudice being critical factors. Amendment to complaint to add parties as additional plaintiffs is permitted if (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action. Opposing party did not demonstrate prejudice merely because case had been pending for 21 months, where opposing party had already conducted discovery into possible causes of action by as-of-then persons who were not plaintiffs. Although confusion regarding proper plaintiffs was result of poor drafting by plaintiff, that alone did not present prejudice. Discovery had not closed and there would be substantial overlapping testimony were all of the plaintiffs purchased lots in the same real estate development. Court’s desire to move cases on docket did not warrant denial of amendment, although court could limit discovery to avoid unnecessary delays in light of 21 month delay by plaintiff in naming proper parties.
- (4743) *Smith-Boughan, Inc., v. Sun Bank*, 2009 WL 2901521 (Bankr. N.D. Ohio 2009) – Joinder of parties is appropriate where Plaintiff’s causes of action arise out of the same transaction or occurrence when the likelihood of overlapping proof and duplication in testimony indicates that separate trials would result in delay, inconvenience, and added expense to the parties and to the Court. Court has discretion to sever properly joined parties for convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. Severance is not favored and will not be granted where the risks of prejudice and confusion are outweighed by other factors including the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources. Action by Plaintiff for breach of construction contract against Defendant-Contractor was substantially related to Plaintiff’s claims against Bank that was holding retainage to be paid under the contract. If proceeds are severed, Bank could assert Plaintiff’s failure to complete construction as a defense to the “retainage” action, thereby requiring Plaintiff to try the contract issues twice. Duplicate trials would be inefficient and expensive as the contract issues will involve fact-intensive, complex construction litigation which the court believes would impose a tremendous burden on both Plaintiff and its witnesses if litigated in two separate forums and would create a meaningful risk of inconsistent adjudications.

12.57 Class Actions

- (4744) *In re Biery*, 2014 WL 1431947 (Bankr. E.D. Ky. 2014) – Rule 9014 allows court to apply class action rule in Rule 7023 to motion for contempt for violation of discharge order. Class procedures were superior to individual actions as class procedures enhance likelihood that each potential class member’s contempt claims will be adjudicated and any systemic violation of discharges by defendants would be identified. Discharge orders are the cornerstone of bankruptcy and alleged violations implicate the integrity and core function of the bankruptcy court. Unless matters are allowed to proceed as class action, court may never find out whether defendants are systemically violating discharge order or fashion effective remedy if violations are systemically occurring. While amount of damages that each class member may suffer are individualized, the underlying harm resulting from defendants’ alleged systemic sending of demand letters to discharged debtors raises identical legal questions as to liability.
- (4745) *Bent v. ABMD, Ltd.*, 2010 WL 4780776 (Bankr. S.D. Ohio 2010) – Bankruptcy Court can certify class where proponent establishes (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Proponent must also certify that action complies with Rule 23(b). Key elements to defining a class include: (1) specifying a particular group that was harmed during a particular time frame, in a particular location, in a particular way, and (2) facilitating a court’s ability to ascertain its membership in some objective manner. Class of plaintiffs defined as those working for Defendant within specific time frame sufficiently definite. 293 total affected class members met the “numerous” requirement. Alleged mass layoffs in violation of WARN act constituted sufficient commonality and resulted in class representatives having claims that are typical of all members of the class. Class representatives qualified to act as none had any interest that was adverse to the interests of the class itself. The questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.
- (4746) *Wilborn v. Wells Fargo Bank, N.A.*, Case No. 09-20415 (5th Cir. 2010) – Bankruptcy Court can certify class action under 28 USC Section 157 and 1334, where class certification otherwise complies with Federal Rule 23. Rule 23(b)(3) requires the court to find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Court must assess how the matter will be tried on the merits, by identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class. Court must determine whether proposed classes are sufficiently cohesive to warrant adjudication by representation in light of the relevant claims, defenses, facts, and substantive law presented in the case. Plaintiffs’ complaint is based on the claim that for each named plaintiff and each unnamed class member Wells Fargo impermissibly charged post-petition fees and costs without obtaining approval from the bankruptcy court, as purportedly required by Title 11 and the Federal Rules of Bankruptcy Procedure failed to demonstrate required predominance or superiority, particularly with respect to damages. Court also concluded that there was a substantial split between the Bankruptcy Courts as to whether a secured creditor is required to obtain approval under Section 506 and Rule 2016 before assessing contractually allowed fees. Although all members of the putative class were debtors in bankruptcy, the cases of the individual named plaintiffs varied from debtor to debtor and illustrated the many underlying circumstances of the charges that would need to be considered. The circumstances surrounding the charging of fees require an individual

assessment of the claims. The bankruptcy court cannot require Wells Fargo to simply disgorge all fees that were not previously approved because it is evident that there has been a wide "array of charges tailored" to each individual debtor. The differing circumstances of the debtors render the reasonableness of the individual charges a fact-specific inquiry rather than a class-oriented decision. The rulings of different bankruptcy judges during their cases may affect the computation of allowable charges by Wells Fargo.

12.58 Exhausting of Administrative Remedies – Actions Against United States

- (4747) *Nurses' Registry and Home Health Corp. v. Burwell*, 2015 WL 4254002 (Bankr. E.D. Ky. 2015) – In deciding whether to grant a stay pending appeal, courts must consider four factors: (1) the likelihood that the party moving for stay will prevail on merits of appeal; (2) the likelihood that moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if court grants stay; and (4) the public interest in grant of stay. Federal government not entitled to stay of order enjoining government from suspending Medicare payments and permitting debtor to use cash collateral where government failed to demonstrate any likelihood of success on merits of appeal on government's contention that Bankruptcy court lacked jurisdiction over unexhausted Medicare Act dispute. Court is not required to defer to exhaustion of agency remedies where delay would mean that there would be no meaningful opportunity for judicial review. Had court waited for Medicare process to play out while Medicare continued to suspend payments, debtor would have become defunct and debtor never would have had opportunity to argue for turnover.
- (4748) *Pomerence v. Bird*, 2014 WL 4920932 (8th Cir. 2014) – 28 USC §7422 prohibits any action to recover taxes alleged to have been erroneously or illegally assessed or collected until the party exhausts administrative remedies. Complaint by debtor claiming that IRS garnished wages for payment of discharged tax liabilities dismissed where plaintiff did not exhaust administrative remedies.
- (4749) *In re Ballard*, 502 BR 311 (Bankr. S.D. Ohio 2013) – Alleged failure to exhaust administrative remedies is not jurisdictional defect. Failure of taxpayer to seek recourse against US using administrative remedies does not deprive court of jurisdiction, but may preclude plaintiff from recovering in court action until administrative remedies are exhausted.

I. Commencement

12.59 Technical Requirements

- (4750) *Casab v. Grand Sky Enterprise Co., Ltd.*, 2015 WL 753365 (E.D. Mi. 2015) – Adversary proceeding is commenced when complaint is filed with clerk. Inadvertent omission of counsel's phone number, otherwise required by ECF guidelines, did not constitute defect in complaint or warrant dismissal of action.

12.60 Filing Fee – Failure to Pay

- (4751) *Szold v. Guy*, Case No.15-4603 (Bankr. E.D. Mi. 2015) – Adversary dismissed where plaintiff failed to pay filing fee by date established in Order of Court.

12.61 Filing Fee - Waiver

- (4752) *Hart v. Wood*, 2015 WL 4276272 (W.D. Tn. 2015) – Court can deny request for *in forma pauperis* filing of complaint where complaint is frivolous, fails to state cause of action, or seeks monetary relief against party who is immune from that relief. Complaint alleged causes of action based on FDCPA and RESPA that were, on the face of the complaint, time barred. Complaint also failed to allege that defendant was "debt collector" within scope of FDCPA where party was acting exclusively as trustee for purposes of initiating non-judicial foreclosure. Party is not "debt collector" if party is acting solely for purpose of enforcing security interest.
- (4753) *Wheeler v. Law Offices of John D. Clunk Co., LPA*, 2015 WL 1880415 (N.D. Ohio 2015) – Plaintiff's request to waive filing fee denied and case dismissed where plaintiff failed to demonstrate an inability to pay the filing fee. Court will not lightly grant request for *in forma pauperis* status. Plaintiff's application failed to disclose all assets and income information; indicated that plaintiff paid rent but failed to disclose to whom rent was paid or for what, as plaintiff resided in property at issue in case; debtor owned multiple corporations that were not disclosed; and although plaintiff contends he was not able to pay the filing fee, he did pay the \$400 fee to remove the case from state court to federal court with no explanation as to why plaintiff was able to pay removal fee but could not pay filing fee.
- (4754) *Smith v. LeGare*, 2013 WL 5417212 (Bankr. N.D. Ohio 2013) – Court lacks authority under 28 USC Section 1930 to waive a filing fee for a creditor to commence an adversary proceeding.
- (4755) *Brown v. Orlans Associates, PC*, 2013 WL 1506016 (E.D. Mi. 2013) – 28 USC Section 1915(a) permits court to waive filing fee by person who submits an affidavit that discloses all assets and states that the person is unable to pay the fees or give security for payment of the fees. If a motion to proceed without payment of fees and is accompanied by a facially sufficient affidavit, court should allow complaint to be filed.

12.62 Filing Fee – Refund of

- (4756) *In re Henkel*, 2015 WL 5684118 (Bankr. N.D. Ohio 2015) – Filing fee for motion for relief from stay is set by Judicial Conference. Courts are allowed to waive fees in accordance with Judicial Conference policy but cannot refund fees paid upon filing even if the fee is paid in error unless the clerk accepted the fee without authority. Fee was not collected without authority where creditor filed Motion for Relief From Stay, notwithstanding that Motion was filed in error and was entirely unnecessary as case had already been discharged and close, and there was no stay in effect at time.
- (4757) *Richmond v. National Collegiate Student Loan Trust 2007-2*, 2015 WL 5333812 (Bankr. N.D. Ohio 2015) – Debtor who paid filing fee to

institute adversary where debtor was not required to pay filing fee not automatically entitled to refund of erroneously paid fee. Fee will be refunded only if fee was collected without authority or if the fee was collected due to administrative error on part of clerk. There was no administrative error by clerk's acceptance of tendered payment. However, clerk lacked authority to accept fee where Miscellaneous Fee Schedule states that "This fee must not be charged if ... the debtor is the plaintiff". Provision speaks directly to lack of authority of clerk to charge or collect filing fee for adversary proceeding, such that fees must be refunded on request of debtor.

- (4758) *In re Raypholtz*, 2015 WL 2375394 (Bankr. N.D. Ohio 2015) – Court has authority to waive filing fees in accordance with Judicial Conference policy. However, if fee is paid erroneously, neither fee statute nor Judicial Conference requires fee to be refunded unless fees are collected without authority or due to administrative error by clerk. Governmental creditor paid fee to file motion for relief from stay when creditor was otherwise exempt from paying fee. Although creditor erred in paying fee, there was no administrative error by clerk in collecting fees. Judicial Conference Miscellaneous Fee Schedule states that federal agencies should not be charged fees. Clerk collected fee without authority to do so. Fees should not have been charged, and fact that fee was paid inadvertently did not change that fact, and fees must be refunded to Federal agency on request.

12.63 Generally – Time For

- (4759) *In re Stough*, 2012 WL 2563848 (Bankr. N.D. Ohio 2012) – Action under Section 523(a)(2), (4) or (6) must be brought within 60 days after date first set for meeting of creditors. Deadline promotes prompt administration of estate and fresh start by allowing debtor to enjoy finality and certainty of relief. Failure to provide creditor notice of proceeding, however, can excuse late filed complaint as failure to provide notice constitutes failure of fundamental due process. Complaint untimely where not filed within 60 days and where creditor did not seek extension of deadline before deadline expired. Minor error in creditor address will not constitute failure of notice or form basis to excuse untimely filing of adversary if it appears likely that creditor received notice notwithstanding error. Creditor received appropriate notice of proceedings where, although matrix contained typographical error in address, where address was off by one digit. Creditor was large Hospital and it appears likely that the Hospital would have received the notice. Evidence indicated that notice had not been returned to noticing center, and it is likely that Post Office would have known and recognized the minor error in the address and delivered the notice.
- (4760) *Alfes v. Educational Credit Management Corp.*, 2011 WL 3795107 (Bankr. E.D. Mi.) *aff'd* 2011 WL 3651319 (E.D. Mi. 2011), *aff'd* 709 F.3d 631(6th Cir. 2013) – Amended complaint dates back to date of initial complaint as long as claim arises out of same transaction, conduct or occurrence. Although amended complaint added new theory of liability, it was premised on the same facts and debtor had full notice of the allegations based on the initial complaint. Debtor was unable to demonstrate any prejudice by allowing amended complaint filed only one day after filing of initial complaint, before debtor took any action in response.
- (4761) *In re Rutherford*, 427 BR 656 (Bankr. S.D. Ohio 2010) – Court would deem complaint timely filed although Complaint was filed in main case and not as separate adversary and creditor failed to pay the requisite filing fee. Creditor's attorney was obviously unfamiliar with administrative procedures for electronic case filing (ECF) in the Southern District of Ohio would be afforded opportunity to re-docket non-dischargeability complaint in separate adversary proceeding and to pay required filing fee, so that creditor's non-dischargeability claims could be decided on merits.
- (4762) *Probuild Company, LLC v. Doria*, Case No. 10-11914 (E.D. Mi. 2010) – Rules 4007 and 9006 govern time for filing adversary complaint objecting to dischargeability of debt. Where 60-day deadline to file adversary falls on weekend or legal holiday, deadline to file adversary is extended to first business day thereafter.

12.64 Extension of Time – Granted

- (4763) *In re McKenzie*, 2012 WL 4742708 (E.D. Tn. 2012) – Equitable tolling provides that statute of limitations will not bar claim if plaintiff, despite diligent efforts, did not discover injury until after limitations period expired. Courts will consider (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement. Court can consider any other factors that court deems appropriate, but must apply doctrine sparingly. Court equitably tolled statute notwithstanding evidence that the Trustee was extremely experienced and could not feign ignorance of notice and filing requirements; and also could have exercised greater diligence. Trustee mistakenly believed creditor's only collateral was real estate despite schedules indicating debtor owned a number of interests and ran a variety of businesses. Trustee failed to act upon email that included several attachments relevant to the matters at hand. Court concluded that notwithstanding Trustee's lack of diligence, alleged transfer at issue was not disclosed in schedules and schedules were not amended to disclose until 2 weeks after statute of limitations expired; and other actions of creditor were misleading and created false impressions. While creditor may not have had affirmative duty to disclose certain facts, creditor had ample opportunity to correct misimpressions and misunderstandings that led to Trustee's initial decision not to pursue action until after statute had expired.

12.65 Extension of Time – Denied

- (4764) *In re Stough*, 2012 WL 2563848 (Bankr. N.D. Ohio 2012) – Action under Section 523(a)(2), (4) or (6) must be brought within 60 days after date first set for meeting of creditors. Deadline promotes prompt administration of estate and fresh start by allowing debtor to enjoy finality and certainty of relief. However, time limit is not jurisdictional and court can extend deadline where debtor's dilatory behavior caused delay in filing adversary. Equitable tolling applies where Plaintiff (1) lacks actual notice of filing requirement; (2) lacks constructive knowledge of filing requirement; (3) has been diligent in pursuing one's rights; (4) demonstrates that late filing did not prejudice the defendant; and (5) demonstrates that conduct in remaining ignorant of the notice requirement was excusable. Court would not equitably toll time where creditor received actual notice of deadlines in Notice of Commencement, even if, because of creditor's internal

processes, the notice was not delivered to the proper person. Creditor did act diligently to protect rights after creditor became aware of bankruptcy and debtor would not have been prejudiced if the deadline were extended. However, creditor did not act reasonably in remaining ignorant of deadline. Creditor, plus three of its agents, were all scheduled and all received the Notice of Commencement. There was no reasonable basis for creditor to have remained ignorant for so long a duration.

- (4765) *Cummings v. Ehrhart*, Adv. No. 12-3101 (Bankr. E.D. Mi. 2012) – Deadline for filing is not jurisdictional. In considering whether to extend deadline, court must consider lack of actual notice of filing requirements; lack of constructive notice of filing requirements; diligence in pursuing one's rights; absence of prejudice to defendant; and reasonableness of plaintiff's remaining ignorant of notice requirements. Plaintiff did not produce any evidence that defendant delayed or contributed to the delay in plaintiff's filing of adversary. No evidence that defendant led plaintiff to believe that an extension of time would be agreed or that there were any communications between attorneys. Plaintiff failed to file motion to extend time before expiration of deadline and in fact waited unto more than a month after expiration of deadline. Plaintiffs were not sufficiently diligent in pursuing rights before expiration of deadline. Although defendant did not show any prejudice, defendant did have expectation of entry of discharge after deadline for filing actions expired.
- (4766) *JP Morgan Chase, NA v. Harris*, Case No. 10-6706 (Bankr. E.D. Mi. 2011) – Rule 4007 which requires adversary proceedings under Section 523(a)(2), (4) and (6) to be filed within 60 days of 341 meeting is statute of limitations that is not jurisdictional and may be extended or waived and is subject to equitable tolling. Plaintiff failed to demonstrate cause to extend time to file Adversary proceeding where parties previously stipulated to one extension of time to a date specific and creditor did not file adversary proceeding until one day after expiration of agreed upon extension. Equitable tolling requires (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing creditor's rights; (4) absence of prejudice to defendant; and (5) plaintiff's reasonableness in remaining ignorant of filing requirement. Parties were aware of and had discussions about looming deadline but did not have any agreement about further extensions. Plaintiff had ample notice of deadline and opportunity to act either by filing complaint or by filing motion seeking additional extension. Failure to file based on counsel's calendar error is not "excusable neglect" that would form basis to extend time to file adversary complaint.
- (4767) *In re McConkey*, 2011 WL 1436431 (Bankr. D. Md. 2011) – Rule 4007 which requires adversary proceedings under Section 523(a)(2), (4) and (6) to be filed within 60 days of 341 meeting is statute of limitations that is not jurisdictional and may be extended or waived and is subject to equitable tolling. In order to establish equitable tolling, Plaintiff must show that failure to file a complaint within the time provided was the result of (1) extraordinary circumstances, (2) beyond Plaintiff's control or external to Plaintiff's own conduct, (3) that prevented Plaintiff from filing on time. Errors of counsel that prevent timely filing are neither extraordinary or external. Complaint was not timely filed because Plaintiff's counsel was unfamiliar with the Rules and so was not aware of need to file the complaint within 60 days. Creditor's Motion for Relief From Stay filed to permit state court litigation to proceed did not constitute Motion for Extension of Time to file adversary proceeding where the motion did not allege that Plaintiff was attempting to have debt declared non-dischargeable.
- (4768) *Guillen v. Wilson*, Adv. No. 06-4608 (Bankr. E.D. Mi. 2009) - Creditor's Motion for Extension of Time to file documents in connection with an adversary proceeding objecting to the dischargeability of certain debts denied as moot as the adversary proceeding had been dismissed before the Motion was filed.

12.66 Ripeness

- (4769) *Bowers v. United States*, 2014 WL 7745851 (Bankr. N.D. Ohio 2014) – Ripeness prevents court from prematurely adjudicating disputes or becoming involved in abstract disputes. Case must present real, present controversy between parties having adverse legal interests, and that is definite and concrete, not hypothetical or abstract. If there is no present case or controversy, action is not constitutionally ripe and court lacks subject matter jurisdiction as there is no live "case or controversy". Complaint that sought determination that IRS claim for unpaid taxes not ripe where IRS admitted in response to complaint that limitations period had run. As the parties agreed on the outcome, there was no live case or controversy. Count of complaint that sought to determine dischargeability of tax debt was not ripe as debtors had filed plan that proposed full payment of the taxes and if debtors complete plan there will be nothing left to discharge, but if they fail to complete plan debtors would not receive discharge. Accordingly, there was no need for court to determine dischargeability. Count of complaint that sought determination of dischargeability of tax penalties not ripe as IRS conceded that penalties accrued more than three years pre-petition and are dischargeable, presenting no dispute for court to determine.
- (4770) *In re Gourlay*, 2013 WL 4414827 (E.D. Mi. 2013) – Court will not rule on matters that are not ripe or that seek strictly advisory opinion. Motion for order clarifying that debts may be subject to non-dischargeability action under Section 523 sought advisory opinion where party had not actually commenced any adversary proceeding. Motion sought opinion of court as to what may happen in an as-yet unfiled action.
- (4771) *Erikson v. Internal Revenue Service*, 2013 WL 2035875 (Bankr. E.D. Mi. 2013) – Action does not present any justiciable controversy unless action demonstrates concrete and particularized injury that is actual or imminent, as opposed to conjectural or hypothetical; a fairly traceable causal connection between injury and alleged conduct; and likelihood that injury would be redressed by favorable decision. Court lacks jurisdiction to rule in action that is not ripe or in which plaintiff lacks standing. Action brought by debtor against IRS for declaratory relief regarding dischargeability of taxes was not ripe for adjudication. Debtors filed for Chapter 7 and included non-priority taxes in scheduled debts. Debtors then received a discharge. Debtors brought adversary seeking order that tax debts be discharged. Parties agreed that taxes were unsecured and non-priority such that only possible exception would be Section 523(a)(1)(C), that returns were fraudulent or that debtors made willful attempt to evade taxes. IRS responded that it has no present intent to bring a claim against debtors for fraudulent returns, nor did IRS have any information that would warrant an investigation. Debtors' adversary sought to deal with what was only a remote possibility that IRS may, at some point in the future, conduct an investigation and that that following that investigation. IRS

may at some point commence enforcement activity. Plaintiff did not allege any injury in fact and as IRS had not begun enforcement actions, any possible harm was remote and hypothetical. Further, if IRS commenced action in future, Debtors would be allowed to raise discharge as bar to those proceedings.

- (4772) *Winget v. JP Morgan Chase Bank*, 537 F.3d 565 (6th Cir. 2008) – Guarantors action against lender for alleged violation of asset purchase agreement was not ripe for adjudication where no actions have yet been brought to enforce the Guarantee Documents. Any attempt to bring a claim before the lender attempts to repossess the collateral is premature as it rests upon contingent future events that may not occur as anticipated or at all.

J. Service of Process

12.67 Deadline for Service

- (4773) *Casab v. Grand Sky Enterprise Co., Ltd.*, 2015 WL 753365 (E.D. Mi. 2015) – Rule 4, incorporated through Bankruptcy Rule 7004, requires service within 120 days after complaint is filed, failing which the case can be dismissed after notice to plaintiff. Court must extend deadline to achieve service on showing by plaintiff of good cause, and has discretion to extend time even absent showing of good cause. Court can extend deadline even after initial time to serve has expired. Appellant failed to demonstrate any abuse of discretion where court extended deadline and defendant could not show prejudice as defendant was fully aware of commencement of case from the outset.
- (4774) *MERV Properties, LLC v. Friedlander*, 2015 WL 2097811 (Bankr. E.D. Ky. 2015) – Rule 7004 provides that if service is not effectuated within 120 days of filing of complaint, action must be dismissed as to un-served defendant, or extend time for service on showing of good cause. Good cause requires showing of reason why service was not obtained within time permitted. Good cause requires proof that plaintiff made reasonable and diligent effort to obtain service. Plaintiff did not make reasonable effort where plaintiff mailed summons to defendant at address that defendant had not used for at least 3 years before the attempted service. Plaintiff sent summons to defendant by certified mail return receipt requested, and never received the signed receipt which should have alerted plaintiff to possible defect in service, yet plaintiff did not take any steps to inquire of validity of service. Even in absence of showing of good cause, court has discretion to allow additional time for service, where whether a significant extension of time would be required; whether extension would prejudice defendant other than inherent prejudice in having to defend suit; whether defendant has actual notice of action; whether dismissal without prejudice would substantially prejudice plaintiff as action would be time-barred; and whether plaintiff made good faith effort at service. Court declined to extend time where it had been 230 days since case filed yet no proper service had been obtained; defendant has no knowledge of lawsuit until well after time for service had expired and after date set by court for completion of discovery; and discovery had completed, motions for summary judgment filed and case set for trial.
- (4775) *Degirrolamo v. Primary Colors Design Corp.*, 2013 WL 6092447 (Bankr. N.D. Ohio 2013) – Federal Rule 4, incorporated by reference in Federal Rule of Bankruptcy Procedure 7004, requires service of complaint within 120 days of commencement of case. If service is not accomplished in that time, court can either dismiss action without prejudice or grant plaintiff additional time. Plaintiff failed to demonstrate good cause to extend time where, after filing case, plaintiff made no efforts at all to serve defendant. Inaction, even as to unnamed, unknown defendant, is not good cause. Absent showing of good cause, court can in its discretion extend time, based on length of time that extension would require; any prejudice beyond mere pendency of lawsuit that would be suffered by defendant; whether defendant has actual notice of action; whether dismissal would substantially prejudice plaintiff; and whether plaintiff made good faith efforts to attempt service. Dismissal would substantially prejudice plaintiff as statute of limitations has now expired, such that dismissal would prevent refiling of case. However, plaintiff still had not identified defendant and had waited almost 2 years before filing action and even beginning to attempt to discover names of possible defendants. Plaintiff now had that information and could proceed to expeditiously serve defendants. Court would grant short extension to December 31, 2013 for service to be accomplished.
- (4776) *Spirit SPE Portfolio 2007-1 LLC v. Paxos*, 2013 WL 865582 (Bankr. N.D. Ohio 2013) – Rule 7004(h) requires service to be complete within 120 days of filing the complaint. If Plaintiff can establish good cause, Court must extend time for service. Plaintiff failed to show good cause where Plaintiff served debtor but failed to serve debtor's counsel as required by Rule 7004. Court has discretion to extend time even in absence of good cause, where required extension is of short duration; extension is not prejudicial to defendant; defendant had actual notice so lawsuit; dismissal without prejudice would substantially prejudice plaintiff as lawsuit would be time barred; and plaintiff made good faith efforts at proper service. Requested extension was just 8 days. Debtor had actual notice of lawsuit and filed both motion for extension of time to file responsive pleading and motion to quash service. Plaintiff's action would be barred by statute of limitations, such that dismissal would effectively be with prejudice; and debtor failed to demonstrate any actual prejudice. Court prefers to resolve matters on merits and plaintiff could cure any defect in service by immediately serving copy of complaint on debtor's attorney.

12.68 Rule 7004

- (4777) *MERV Properties, LLC v. Friedlander*, 2015 WL 2097811 (Bankr. E.D. Ky. 2015) – Rule 7004 allows personal service by mail addressed to defendant's home or principal place of business. Absent effective service, court lacks jurisdiction unless defendant has taken action to voluntarily submit himself to court jurisdiction. Summons and complaint addressed to business address for business in which defendant has been managing member insufficient where business ceased operating in 2011 and dissolved in 2012. Address used was neither residence nor principal place of business of defendant. Fact that defendant may have used address at some point in the past does not make that address perpetually available for service.
- (4778) *In re Slayton*, 509 BR 90 (Bankr. E.D. Mi. 2014) – Rule 7004 requires service on a corporation by mailing the pleading "to the attention of an office, a managing or general agent, or to any other agent authorized by appointment of by law to receive service of process". Motion

addressed to “Chrysler Benefit Express, ATTN: Bankruptcy Department” did not name any particular officer or agent to whom the motion was addressed; and was not sufficient under state law as Motion was not “delivered” to an officer, managing or general agent, or other agent authorized by appointment or law. General mailing to corporate entity, without specifying person to whom mailing is addressed, is not sufficient under Rule 7004.

- (4779) *Smith v. Vista Hills Partners, LLC*, 2014 WL 1779377 (Bankr. S.D. Ohio 2014) – Rule 7004 allows service of process on business by mailing addressed to an officer, managing or general agent, or any other agent authorized by appointment or law to receive service. Debtor’s mailing of complaint to Corporation, without specifying any particular officer or agent to receive service, did not comply with Rule 7004. Court lacked jurisdiction over defendant to enter relief. Rule 7004 also allows service as authorized by state law. Ohio state law allows service on LLC by serving agent authorized by appointment or law to receive service; or by serving the company at its usual place of business, or by serving a member or manager; and allows service to occur by Certified Mail or commercial carrier that utilizes deliver requiring a signed receipt. Debtor mailed summons and complaint to defendant by ordinary first class mail, which was not sufficient. Default judgment denied where there was no evidence of proper service.
- (4780) *Frates v. Wells Fargo Bank, NA*, Case no. 13-1366 (9th Cir. BAP 2014) – Service of Motion to Avoid Judicial Lien that complied with requirements of Federal Rule 7004. Debtor mailed Motion to Bank’s CEO by certified mail at proper address and also mailed copy to person who signed proof of claim on behalf of creditor. Debtor did not serve attorney for creditor where attorney had not appeared in bankruptcy case, although attorney did represent creditor in state court litigation. State court representation is not authorization to accept service and does not constitute appearance by attorney in case for purposes of Rule 7004.
- (4781) *French v. Williams*, 2014 WL 1017604 (Bankr. N.D. Ohio 2014) – Service of Order on Debtor by mail to debtor’s address on file with Court was sufficient even though mail was returned undeliverable. Service by mail is not ineffective or invalidated where mail is not received because debtor fails to apprise court of correct address. Debtor is required by Rule 4002 to file with court notice of change or address. Debtor cannot avoid consequences of failing to appear where failure resulted from debtor’s violation of Rule 4002.
- (4782) *Crow v. Ocwen Loan Servicing, LLC*, 2013 WL 4668558 (Bankr. N.D. Ohio 2013) – Service on corporate entity can be accomplished by mailing a copy of the summons and complaint to the attention of an officer, managing or general agent, or other agent authorized by appointment of law to receive service. Service was sufficient where certificate of service indicated that plaintiff mailed the required documents by certified mail to the Defendant and also mailed copies by certified mail to two individually named members of the Board of Directors at the address of the corporate headquarters. Addressing mailing to a specific named person constitutes mailing “to the attention of” as required by Rule 7004; and members of board of directors would be assumed to be agents to accept service of process.
- (4783) *Pixler v. Huff*, 2013 WL 3423530 (W.D. Ky. 2013) – Absent defendant’s consent to waive service, Plaintiff must serve defendant following formal procedure for service of process. Record indicated that Plaintiff never obtained summons directed to defendant signed by clerk and bearing court seal.
- (4784) *Spirit SPE Portfolios 2007-1 LLC v. Paxos*, 2013 WL 865582 (Bankr. N.D. Ohio 2013) – Rule 7004(h) requires that if the debtor is represented by an attorney, service must also be made on the attorney.
- (4785) *Spidle v. Hogan*, 2013 WL 1504053 (M.D. Tn. 2013) – Complaint against United States for actions taken in official capacity must be served by (i) delivering a copy of the summons and of the complaint to the United States Attorney for the district where the action is brought; or sending a copy of each by registered or certified mail to the civil-process clerk at the United States attorney’s office; and sending a copy of each by registered or certified mail to the Attorney General of the United States in Washington, DC; and if the action challenges an order of a non-party agency or officer of the United States, sending a copy of each by registered or certified mail to the agency or officer. Plaintiff failed to demonstrate proper service where Plaintiff only served the named defendant by US Mail but did not even attempt service on US Attorney or on the Attorney General. If Plaintiff intended to sue government official or agency, then service must be accomplished by serving the United States and also the named officer. Plaintiff allegedly served the named individual but did not serve the United States. Action dismissed for failure to achieve proper service within time permitted.
- (4786) *Jahn v. Clayton*, 2012 WL 112940 (Bankr. E.D. Tn. 2012) – Court can deny entry of default where evidence indicates that debtor did not receive summons or complaint. Service on debtor by mailing to address shown on petition is sufficient service even if it was substantially likely that debtor did not reside there as debtor’s chapter 13 plan surrendered the property more than 2 years earlier. Debtor had continuing duty to advise court of current address. Any failure to maintain current address on record of court is fault of debtor that does not defeat propriety of service.
- (4787) *IRS v. Hayes*, 2011 WL 2490945 (E.D. Mi. 2011) – Federal Rule of Civil Procedure 4(e) governs service within the United States, and allows service by delivery to the individual’s dwelling or usual place of abode. Debtor’s temporary employment outside of the United States did not alter status of debtor’s home in Michigan as his “usual place of abode”. Debtor’s wife was someone of suitable age who resided at the same premises; debtor listed the property as his residence in his Chapter 7 bankruptcy schedules; and debtor claimed an exemption under U.S.C. § 522(d)(1), for the property.
- (4788) *American Home Mortgage Servicing, Inc. v. Johnson*, 2011 WL 2115652 (E.D. Ky. 2011) – Rule 7004 governs services of process in adversary proceedings. It permits service by first class mail upon a corporation by mailing a copy of the summons and complaint to the attention of an officer or any other agent authorized by appointment or by law to receive service of process. Request for Notices filed in main Bankruptcy Case stating that notice should be directed to an appointed agent for service of process does not supersede Rule 7004. Summons addressed to Corporate President at correct corporate address constitutes proper service even if person served and address used differed from that in the Request for Notice.

- (4789) *PNC Mortgage v. Rhiel*, 2011 WL 1043949 (S.D. Ohio 2011) – Rule 7012 requires that if a complaint is duly served, a defendant to serve a responsive pleading within 30 days after issuance of summons. If summons is not properly served, defendant has no obligation to respond and court cannot enter default based on failure to respond. Service by mail on a corporation must be addressed to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. Complaint mailed to the attention of “Officer, Managing or General Agent” without specific name of person to be served did not comply with Rule 7004. Although defendant undisputedly received notice, that was not sufficient to cure defective service.
- (4790) *In re Miller*, Case No. 06-32425 (Bankr. S.D. Ohio 2010) - Contested matter must be served in the same manner as a summons under Rule 7004. When service is to be made on an "insured depository institution," Rule 7004(h) requires service by certified mail addressed to an officer of the institution. Debtors' post-confirmation plan modification was not properly served where certificate of service acknowledging service on FDIC insured depository institution at three somewhat different addresses, only by regular mail and without direct service on any individual, officer or specific department. Order Modifying Plan based on defective service vacated pursuant to Rule 60(b).
- (4791) *LaBankoff v. GMAC Mortgage, LLC.*, Case No. 09-1294 (9th Cir. BAP 2010) – Service on an attorney for a party is not sufficient service in an adversary proceeding. Rule 7004(b)(3) requires service by mail to the attention of an officer, managing or general agent, or any other agent authorized by appointment or by law to receive service. Without proof that the attorney has been designated as agent to accept process, service on the attorney is not sufficient. The party effectuating service bears the burden of proof that the person served is authorized to accept service. Attorney can become an implied agent for service where the attorney repeatedly represented that client in the underlying bankruptcy case, and where the totality of the circumstances demonstrates the intent of the client to convey such authority, based on extensive involvement in the underlying bankruptcy proceeding coupled with evidence that the Attorney previously had been served with papers in the bankruptcy proceeding on behalf of the client without objection and the party's acknowledgement that the attorney acts as general counsel and is regularly and routinely consulted on bankruptcy matters. Attorney whose only connection with bankruptcy case was filing of Notice of appearance 18 days before the alleged service evidenced no intent of the client to appoint the attorney as an agent for service.
- (4792) *Sims v. US Bank Home Mortgage*, Adv. No. 08-5066 (Bankr. E.D. Mi. 2008) - Service failed to comply with Bankruptcy Rule 7004(b)(3) where Plaintiff mailed summons and complaint to corporation but failed to specify any particular, named individual who is an officer, managing or general agent, or agent authorized to receive service.
- (4793) *Steed v. Buckalew*, 2009 WL 3493597 (Bankr. E.D. Tn. 2009) –Mailing of Complaint by First Class Mail sufficient under Federal Rules of Bankruptcy Procedure, even if State law where Defendant resides does not permit service by mail.
- (4794) *Duetsche Bank National Trust Company v. Rogan*, 2009 WL 3415462 (E.D. Ky. 2009) –Service of Complaint by mail must be addressed to the attention of an officer, managing or general agent, or to any other agent authorized by appointment or law to receive service of process. Creditor's Proof of Claim which listed “Bankruptcy Department” as agent for receipt of all notices regarding Bankruptcy Case constituted “appointment” for purposes of service of complaint. Mailing of complaint to a department other than that specified in the Proof of Claim did not constitute proper service of the complaint rendering default judgment void for lack of personal jurisdiction.

12.69 Failure to Serve

- (4795) *Szold v. Guy*, Case No.15-4603 (Bankr. E.D. Mi. 2015) – Plaintiff's failure to serve the complaint and summons by deadline established by Rule 7004 dismissed after Court entered order allowing plaintiff an additional 7 days to obtain service and plaintiff still failed to serve defendants.
- (4796) *Crehan v. Maiden Lane, LLC*, 2014 WL 467568 (W.D. Mi. 2014) – Case dismissed as to un-served defendants where Plaintiff failed to obtain service in more than 9 months since commencement of action. Plaintiff's statement that he was “too busy with other matters” to attend to service of process did not excuse compliance with Federal Rule 4.
- (4797) *LaBankoff v. GMAC Mortgage, LLC.*, Case No. 09-1294 (9th Cir. BAP 2010) – Court disregarded Supplemental Certificate of Service and concluded that defendant had not been properly served where the Court record reflected that Plaintiff had never filed the “Supplemental Certificate” and Plaintiff's own Motion for Default referenced earlier date on which proper service had not been made and failed to reference alleged later, proper service.
- (4798) *Galloway v. Reis*, Case No. DT 09-10374 (Bankr. W.D. Mich. 2010) – Personal service of Summons and complaint on defendant ineffective where personal service occurred 39 days after summons issued. Rule 7004(e) required service within 10 (now 14) days after issuance of summons. After expiration of time to serve, Summons became stale and could not confer personal jurisdiction. Service of summons by mail ineffective where Plaintiff timely mailed summons to Defendant but failed to mail a copy to debtor's counsel as required by Rule 7004(g). Service by mail does not require proof of receipt by debtor, but does require mailing to debtor and, if represented by counsel, to debtor's counsel. Service of process is means by which Court acquires personal jurisdiction – Court must insist on strict compliance with service requirements.
- (4799) *Greenhill v. Beneficial Michigan, Inc.*, Adv. No. 08-5668 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed where Plaintiff had three chances to properly serve Defendant with the adversary but failed to do so and offered no excuse or explanation for failure.
- (4800) *Simon v. ASIMCO Technologies, Inc.*, Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Federal Rule of Civil Procedure, incorporated through Bankruptcy Rule 7012, allows for service of an adversary proceeding complaint on corporation by first class mail addressed to the

attention of an officer, managing or general agent, or other agent authorized by appointment or applicable law to receive service. Service properly made on person identified on defendant's website as "CEO" notwithstanding assertion by defendant that party had resigned as CEO prior to the date on which service was made. However, certificate of service failed to show service on individual defendant – court lacked jurisdiction over individual defendant.

K. Parties

12.70 Necessary and Indispensable Parties

- (4801) *Still v. Hopkins*, 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Rule 7019 defines "required party" as one who is subject to service of process; whose joinder will not deprive court of subject matter jurisdiction; and that either in absence of party, court cannot accord complete relief, or that the person claims an interest in the action and disposing of action in absence of party may as a practical matter impede or impair the person's ability to protect their interest or leaves an existing party subject to double or inconsistent obligations. A person or entity is only indispensable, within the meaning of Rule 19, if (1) it is necessary, (2) its joinder *cannot* be effected, and (3) the court determines that it will *dismiss the pending case* rather than proceed in the case without the absentee. In normal case, where debtor has completely divested himself of any interest in property that is subject of the action, Debtor is not necessary party as debtor has no interest in the outcome of the matter. Trustee sought to set aside transfer of property owned by debtor, which granted fee title to debtor's children but retained a life estate for debtor. Debtor's life estate constituted an interest in the real property that is the subject of the action and is so situated that disposing of the adversary may impair or impede Debtor's ability to protect that interest. Resolution of adversary involves Debtor's claim of exemption and court cannot accord complete relief among parties absent Debtor's joinder. Court can join debtor without raising issues of subject matter jurisdiction. However, Debtor did not have interest in property that would be impaired by outcome of adversary where debtor's interest was limited to the monetary value of \$12,500, and no particular right to actually use or possess the specific property. If trustee prevails in adversary and sells property, debtor will receive \$12,500 and will have opportunity to protect debtor's interest at that point. Debtor is not indispensable party to adversary to avoid transfer as fraudulent.
- (4802) *Lyon v. Rappaport*, 2011 WL 652744 (6th Cir. BAP 2011) – Sixth Circuit has three-step analysis to determine whether a case should proceed in the absence of a particular party. Court must first determine whether person is necessary to the action. If so, the court must determine whether the party is within the Court's jurisdiction. Finally, the court must determine whether equity and good conscience would permit case to proceed or whether the missing party is indispensable. Case should be dismissed only if party is indispensable and is beyond the jurisdiction of the court or cannot be joined without destroying subject matter jurisdiction. Party was not indispensable where full relief would be afforded among the parties without the joinder of the additional party. Defendant's potential liability for fraudulent transfers was independent of any potential liability of any third party not joined in the suit as defendant was individually responsible for any damages the plaintiff may recover. However, omitted party was necessary and could be joined without destroying court's jurisdiction. Proper course of action is not to dismiss case, but to order joinder of necessary party.

12.71 FDIC as Receiver

- (4803) *Shirk v. JPMorgan Chase Bank, N.A.*, (Bankr. S.D. Ohio 2010) – Creditors of financial institution that has been placed in receivership by FDIC are required to comply with administrative claims process of FIRREA. Creditor not permitted to assert claims against the bank that assumed the failed bank's assets as result of FDIC receivership. Negligence, misrepresentation, and Truth in Lending Act (TILA) claims which mortgage borrowers sought to assert against successor-in-interest to original mortgage lender, which had acquired their loan from the FDIC after original lender was placed in FDIC receivership, were subject to jurisdictional bar of FIRREA, and could not be pursued in federal court absent exhaustion of borrowers' administrative remedies; claims were all based upon acts or omissions of original mortgage lender.
- (4804) *Jahn v. Bedford Consulting Group, LLC.*, 2010 WL 3632147 (Bankr. E.D. Tn. 2010) – Trustee could not institute action to recover fraudulent transfers against Federally Insured Depository Institution after institution had been taken over by FDIC as receiver. Pursuant to provisions of Financial Institutions Reform, Recovery and Enforcement Act of 1999, exclusive jurisdiction of all claims against failed institution must be brought through FIRREA administrative proceedings.

12.72 Identity of Plaintiffs

- (4805) *Sequatchie Mountain Creditors v. Detweiler*, 2011 WL 3471519 (Bankr. N.D. Ohio 2011) – Caption of Complaint that named various individuals "known as the Sequatchie Mountain Creditors" joined only named individuals as plaintiffs and did not join members of the Sequatchie Mountain Creditor group that were not specifically named. Federal Rule of Civil Procedure 10(a), made applicable through Federal Rule of Bankruptcy Procedure 7010, requires title of complaint to name all parties with specificity.

L. Pleadings

12.73 Calculation of Deadlines – Generally

- (4806) *Kim v. U.S. Department of Education*, Adv. No. 10-80774 (Bankr. W.D. Mi. 2012) – Debtors failure to serve initial summons did not create any obligation of defendant to respond. Defendant's failure to respond within 30 days of service of original complaint could not support entry of default. Suit against US DOE is suit against US or an agency or officer thereof, with the defendant having 35 days to respond. Amended Summons served December 22 and US filed answer on January 26, exactly 35 days after service. Answer was timely, precluding entry of default.
- (4807) *Allstate Insurance Company v. Harris*, Adv. No. 09-6215 (Bankr. E.D. Mi. 2012) – Rule 9006 provides for additional three days in

calculating deadline to respond, and applies whether the pleading was served by mail or electronically through Court's ECF system. Court order required service of answer within 14 days of service of amended complaint. Amended complaint filed and served on June 1. Allowing 14 days produces deadline of June 15, plus three additional days extends deadline to June 18. Answer filed on June 18 was timely under Rule 9006.

12.74 Complaint

- (4808) *West v. Home Savings & Loan*, 2015 WL 18839333 (Bankr. N.D. Ohio 2015) – Complaint must contain short and plain statement showing plaintiff is entitled to relief and must contain sufficient facts to state claim that is plausible on its face. Labels and conclusions and formulaic recitation of elements of cause of action are not sufficient. Claim has facial plausibility when plaintiff pleads factual content that allows court to draw reasonable inference that defendant is liable for the misconduct alleged. Complaint must state more than a sheer possibility that defendant acted unlawfully. Where well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, complaint fails to show that pleader is entitled to relief. Complaint that is jumble of allegations and mélange of statutory citations is stated caused of action where court could glean sufficient facts to indicate that debtor received a discharge under Chapter 7 and was now bringing suit against creditor for violation of discharge injunction. However, complaint did not state viable legal theory as there is no private right of action for damages for violation of discharge injunction. Remedy lies in contempt proceedings, not separate lawsuit for damages.
- (4809) *Vogt v. Hastings*, 2014 WL 2212159 (Bankr. N.D. Ohio 2014) – Letter to court construed as complaint under Section 523(a)(2) failed to state cause of action. Fraud must be pled with specificity. Letter asserted date that loan was made and amount of loan, but did not allege any facts that would establish fraud. Statements that debtor made “no real effort to repay” and debtor was an “able bodied man who conned me out of my savings” were not sufficient to establish anything more than breach of contract.
- (4810) *DWR International, Inc. v. Job*, 2013 WL 1438035 (S.D. Ohio 2013) – Transfer can be avoided under Uniform Fraudulent Transfer Statute if made either with actual intent to hinder, delay or defraud creditors; or if made for lack of reasonably equivalent value. Actual fraud can be demonstrated through circumstantial evidence, such as (1) Whether the transfer or obligation was to an insider; (2) Whether the debtor retained possession or control of the property transferred after the transfer; (3) Whether the transfer or obligation was disclosed or concealed; (4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit; (5) Whether the transfer was of substantially all of the assets of the debtor; (6) Whether the debtor absconded; (7) Whether the debtor removed or concealed assets; (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred; (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor. Complaint sufficiently alleged fraud under *Twombly* standard where complaint alleged that the Plaintiff had sued the defendant prior to the date on which the defendant transferred assets to insider; that defendant transferred assets and money aggregating over \$1.6 million with knowledge of the pending litigation; defendant did not receive any value in exchange for the transfer; and that defendant was insolvent at the time of the transfer. Specific factual allegations supported at least 5 “badges of fraud” sufficient to state cause of action under *Twombly* standard.
- (4811) *Moyer v. Koster*, Case No. 12-80174 (Bankr. W.D. Mi. 2012) – Adversary complaint seeking to recover allegedly fraudulent transfers must do more than parrot the statutory elements for constructively fraudulent transfers. Trustee's complaint alleging numerous transfers by debtor to third parties as part of “ponzi scheme” sufficiently alleged debtor's intent to hinder, delay and defraud creditors which meets the *Iqbal* and *Twombly* standard. Very nature of a Ponzi scheme allows court to infer fraudulent intent. Complaint is based on multiple transactions and ongoing artifice and deception going back many years, and it would be impossible for Trustee to enumerate every misrepresentation in the context of a Ponzi scheme. However, complaint did not state cause of action for transfers allegedly made by debtor's “alter ego” entities because complaint referenced only transfers “from the debtor” with no reference to any transfers allegedly made by any third party and did not state that property transferred was property of the debtor, amounts allegedly transferred by each of the transferors, or when during the relevant “look back” period the transfers occurred.
- (4812) *Sharrieff v. Huntington Bank*, 2012 WL 3253160 (W.D. Tn. 2012) – Court can summarily dismiss action where complaint fails to state cause of action or to demonstrate court's jurisdiction. Plaintiff did not file complaint to commence action. Instead, Plaintiff filed Affidavit of Negative Averment, Opportunity to Cure, and Counterclaim that contained few coherent factual allegations. Plaintiff alleged that Huntington sold the original note but failed to give credit to Plaintiff's account” and that the “note was created on my credit, and signature, and was not an asset of” Defendants. Remainder of Plaintiff's filing is unintelligible. The case caption describes Plaintiff as a Third Party Plaintiff in Admiralty, yet this is not an admiralty case. The filing contends that Defendants do not have the original note, and it refers to “Dishonor in commerce, Theft, Fraud, Conspiracy, and Racketeering and Trespassing authorized by U.S. Code Title 18.” The filing avers that Plaintiff tendered a lawful payment to Huntington to settle his debt and that, by accepting the payment, Defendants have “chosen to dishonor [Plaintiff's] lawful payment and [have] refused to zero the account.” Plaintiff further avers that “Lawful Money no longer is available for payment of debt in our economic system.” To the extent complaint alleged violations of 18 USC Sections 241 and 242, those are criminal statutes for which no civil remedy is available. To the extent complaint attempted to state cause of action for RICO, allegations were well short of Rule 9 requirement that party must plead with particularity fraud or mistake. Allegations of complaint were insufficient to determine whether diversity jurisdiction existed and did not establish any independent basis for federal court jurisdiction given failure to state any legally cognizable federal cause of action.
- (4813) *Degirrolamo v. McIntosh Oil Co.*, 2012 WL 2603429 (Bankr. N.D. Ohio 2012) – Complaint alleging actual fraud must state with particularity the circumstances constitute fraud. Intent and knowledge can be pled generally as long as complaint alleges facts that show

motive and opportunity to commit fraud or strong circumstantial evidence of conscious misbehavior or recklessness. Complaint contained sufficient factual allegations of “badges of fraud” including that business transactions between Debtor and Defendant were not customary and that Defendant knew it was purchasing items at deeply discounted prices. Under Ohio state law, preference action requires “(1) a sale, conveyance, transfer, mortgage, or assignment made by a debtor; (2) in contemplation of insolvency; (3) with a design to prefer; and (4) the receiving party knew of the insolvency and intent to prefer. Complaint sufficiently alleged insolvency by alleging that at the time Debtor made the transfers, it lacked the ability to meet its financial obligations. Complaint sufficiently alleged “design to prefer” by alleging that sales of fuel at below market prices resulted in Debtor’s inability to pay suppliers, leading to involuntary petition. Fraudulent transfers based on constructive intent requires that transfers be made when Debtor is insolvent. Complaint that alleged only that Debtor made transfers while Debtor was having cash flow shortage coupled with allegation of deepening insolvency as result of transactions suggested that Debtor was insolvent to start, but was not sufficient to provide factual notice of alleged insolvency. Debtor would be permitted to amend to better plead this issue. State law on constructive fraud required that the transfers occur after a claim of a creditor arose. Complaint that alleged only that Debtor purchases fuel from Marathon for resale did not establish that Marathon was creditor of Debtor at time of transfers.

- (4814) *Richardson v. Checker Acquisition Corporation*, 2012 WL 87041 (Bankr. W.D. Mi. 2012) – Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “ ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’ Plaintiff’s obligation to provide the grounds for relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.
- (4815) *Lyon v. Rappaport*, Case No. 10-8059 (6th Cir. 2011) – Action to recover fraudulent transfer under Section 548 must be pled with specificity. Complaint that failed to plead factual basis for every element of cause of action would be dismissed. Mere “formulaic recitation” of elements of statute is insufficient.
- (4816) *Morris v. Paine*, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Rule 9 requires that complaint alleging fraud or mistake must state with particularity circumstances constituting fraud or mistake. Plaintiff must, at a minimum, allege the time, place and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud. Debtor’s complaint very generally alleged that the three Bankruptcy Judge defendants tried to play a game of “bait and switch” by constantly having a judge who was not assigned to his bankruptcy case hear a particular matter; and that the defendants conspired against him to deprive him of his property by confirming no automatic stay was in effect when his prior chapter 13 case was filed. Debtor did not plead fraudulent allegations with any specificity as to date, time, place, etc.. Even if he had, claims of the judges playing “bait and switch” with him are wholly without merit. A bankruptcy judge in one judicial district is not prohibited from hearing another case in that same district. Section 362(c)(4)(A)(i) mandates that if a debtor has had “2 or more single or joint cases ... pending within the previous year ... that were dismissed ... the stay under subsection (a) *shall not go into effect* upon the filing of the later case.” Subsection ii provides that if a creditor requests an order confirming the automatic stay did not go into effect pursuant to § 362(c)(4)(A)(i), “the court *shall promptly enter an order confirming no stay is in effect.*” A Bankruptcy Judge has no discretion in issuing said order. If the debtor has had 2 or more pending cases within the last year, the Judge *must* enter an order confirming no stay was in effect. Defendants’ simply did what the Bankruptcy Code dictated they must do.
- (4817) *Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894 (M.D. Tn. 2009) - Although a complaint need not plead detailed factual allegations, those allegations must be enough to raise a right to relief above the speculative level. The factual allegations must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief. Although Federal Rule of Civil Procedure 8 establishes a “liberal system of notice pleading, plaintiff’s must plead more than labels and conclusions, or a formulaic recitation of the elements of a cause of action.
- (4818) *D.A.N. Joint Venture, III, LP v. Shekerjian*, Adv. No. 08-5724 (Bankr. E.D. Mi. 2009) – In evaluating Motion to Dismiss, Court views complaint in light most favorable to plaintiff. Court must review allegations in complaint without reference to extrinsic evidence. Complaint to deny discharge under Section 727(a)(2)(A) requires disposition or concealment of property and subjective intent to hinder or delay creditors. Allegations that Debtor failed to list numerous corporate entities in schedules and pattern of shifting assets state cause of action. Action under Section 727(a)(2)(B) requires transfer, removal, destruction, mutilation or concealment of property with actual intent to hinder or delay creditors after the Petition date. Allegations that Debtor formed entities post-petition but pre-conversion and failed to disclose those entities as assets constituted concealment sufficient to survive Motion to Dismiss. Action under Section 727(a)(4)(A) requires statement under oath that was false, made with knowledge of falsity and that materially affected bankruptcy case and includes both false statements and omissions. Allegation that Debtor owed creditor in excess of \$2.5 million but creditor was not included in schedules sufficient to survive Motion to Dismiss.

12.75 Third Party Complaint

- (4819) *Rathinam v. Ashok Spiritual Healing Center*, 2015 WL 4132809 (S.D. Ohio 2015) – Third party complaint appropriate only where defendant may have right to indemnity or contribution from third party for some or all claims against defendant. Third party complaint that did not state cause of action against alleged third party defendant for either indemnity or contribution dismissed.
- (4820) *Swain v. Swain*, 2010 WL 2812727 (Bankr. N.D. Ohio 2010) – Defendant in adversary proceeding can file third party complaint to join non-parties where proposed third party defendant is jointly liable with main defendant or where third party defendant may have derivative liability. Third-party defendant’s liability must be derivative and must flow to the third-party plaintiff; mere liability by the third-party defendant to the main plaintiff will not suffice. Third-party practice usually involves claims in the nature of contribution,

indemnity, and subrogation. Third party complaint not proper merely because claims arise out of same transaction where third party liability is independent of primary action. Third party complaint dismissed where allegations, if true, would make third party defendant liable directly to the primary defendant; outcome of main action does not drive outcome of third party action; and defendant could maintain direct action against third party defendant in unrelated adversary proceeding. Plaintiff's main action was for non-dischargeability under Section 523(a)(2). Nothing in the third party complaint could leave the third party defendants secondarily liable to debtors.

12.76 Responsive Pleadings – Deadline for Filing

- (4821) *McDermott v. Junk*, 2015 WL 4380770 (Bankr. S.D. Ohio 2015) – Rule 7012 requires answer or responsive pleading be filed within 30 days of issuance of summons. Request for extension must be filed before deadline expires. Rule 9006 allows court to extend time after expiration of initial period only for excusable neglect. Debtors failed to show excusable neglect in failing to file answer or responsive pleading by expiration of allowed period.

12.77 Answer and Affirmative Defenses

- (4822) *Peters v. Credit Protection Assn, LP*, 2014 WL 1049913 (S.D. Ohio 2014) – Sixth Circuit does not require affirmative defenses to be subject to heightened pleading standards of *Twombly* and *Iqbal*. Affirmative defenses do not need to show that defendant is entitled to affirmative relief and may be pled in general terms as long as it gives plaintiff fair notice of defense. Affirmative defense that alleged only that plaintiff's claims are barred by doctrines of estoppel, waiver, unclean hands, and other equitable doctrines. Upon information and belief, Plaintiff's equitable claims are barred by his own action or inaction and his own conduct or misconduct sufficient to apprise plaintiff of nature of defenses. Affirmative defense that did nothing more than preserve right to amend affirmative defenses not subject to striking as any future attempt to amend to add defenses would be subject to Rule 15.
- (4823) *McDermott v. Swanson*, Case No. 12-6028 (8th Cir. BAP 2012) – In action to deny discharge under Section 727(a)(3), debtor's justification for failing to keep or maintain records is not affirmative defense that must be pled. Lack of justification is essential element of Plaintiff's case. Allegation that merely negates element of plaintiff's prima facie case is not an affirmative defense and is not waived merely because defendant does not plead that in response to the complaint.
- (4824) *Gordon v. Ameriquest Mortgage Corp.*, 2011 WL 1659873 (Bankr. N.D. Ga. 2011) – Affirmative defenses must be pled with same specificity as is required of complaint itself. The Court decisions in *Iqbal* and *Twombly* are equally applicable to affirmative defenses. Affirmative defenses stated as summary conclusions with no statement of the factual basis for the defense would be stricken.
- (4825) *Phillips v. Deutsche National Trust*, Case No. 09-6109 (Bankr. N.D. Ohio 2010) - Answer to complaint must be filed within 30 days unless the court sets a different time. Court can extend the time even after the time has expired if the failure to file the answer in a timely manner is caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control. In determining whether neglect is excusable the Court should consider 'all relevant circumstances including the danger of prejudice, the length of the delay, the reason for the delay, and whether the movant acted in good faith. Court would extend time to file answer where it is unlikely that the plaintiffs would be prejudiced by allowing the defendants to respond as evidenced by the plaintiffs' reluctance to prosecute their case. Further, parties were involved in settlement discussions and, at one time, believed that the case would settle.
- (4826) *Hunts with Double Indoor, LLC, v. Daniel A. Peyerck Living Trust*, Case No. 10-4525 (Bankr. E.D. Mi. 2010) – Michigan Statute of Frauds prohibits promise made to creditor to pay debts owed by third party unless the promise is in writing and signed by the party agreeing to make the payments. However, Statute of Frauds does not apply where third party assured debtor directly that third party would pay debtor's obligations. A promise to pay the debts of another does not fall within the Statute of Frauds when the promise is made directly to the debtor rather than to a creditor. Therefore, the oral promise made to the debtor that third party would pay debtor's debts is enforceable as long as the promising party received consideration for the promise.
- (4827) *General Motors Acceptance Corporation v. Flynn*, Case No. 08-8109 and 08-8110 (6th Cir. BAP 2009) - Trustee's complaint is not subject to affirmative defenses which are based on the pre-petition conduct of the Debtor. Defenses of waiver, estoppel, laches, setoff, accord and satisfaction, and negligence, all based on Debtor's pre-petition conduct did not bind the Trustee as Trustee lacked privity with the Debtor and the defenses constitute defenses personal to the Debtor.
- (4828) *Gold v. Deloitte & Touche, LLP*, 2009 WL 1738465 (E.D. Mi. 2009), *aff'd*, 2010 WL 3782187 (6th Cir. 2010) – Cause of action for professional negligence is governed by state law. Negligence requires (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. Proof of causation requires both cause in fact and legal, or proximate, cause. When a number of factors contribute to produce an injury, one actor's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in producing the injury. Where evidence indicated that nobody relied on audit report prepared by defendants, plaintiff could not maintain cause of action for professional negligence. Further, plaintiff cannot recover where defendant's alleged negligence prevented third parties from learning about, and stopping, improper transactions of which plaintiff was fully aware.

12.78 In Pari Delicto

- (4829) *Hagan v. Baird*, 2015 WL 24922 (6th Cir. 2015) - *In pari delicto* defense under Michigan law does not allow plaintiff to recover against defendant when plaintiff was at least as culpable as defendant and where cause of action requires wrongful intent. Trustee, as representative of Debtor's estate, takes claims subject to any defenses that could have been asserted had debtor brought action in its own right. Proposed amended complaint alleged that defendant and her husband were the sole officers, directors, and shareholders of the debtor; and that defendant, her husband and the debtor conspired to transfer assets from the corporation to the defendant. Defense was not

available to action for conversion as conversion under Michigan law does not require wrongful intent, only an intentional act that deprives another of property. Defense does apply to cause of action for embezzlement as embezzlement requires affirmative wrongful intent. Defense does not apply where one party to transaction was innocent of any wrongful intent and party had ability to stop transaction. Wife who was corporate officer with Husband lacked fraudulent intent in transaction in which debtors obtained control of corporate assets and entire transaction was engineered solely by husband and wife merely signed documents where told. As wife was in position to stop transaction and wife lacked wrongful intent, the transaction lacked the requisite mutuality of intent preventing application of defense.

- (4830) *Bondi v. Bank of America*, 2011 WL 135825 (2d Cir. 2011) – *In pari delicto* defense is available as defense to action brought by Trustee to same extent it would have been available had action been brought directly by debtor prior to commencement of bankruptcy case. Trustee's status as Trustee does not insulate Trustee from Debtor's prior conduct, and Trustee steps into shoes of debtor in all actions and is subject to same defenses. *In pari delicto* prevents a party from suing others for a wrong in which the party itself participated.
- (4831) *Unencumbered Assets Trust v. JP Morgan Chase Bank*, 2011 WL 1397813 (S.D. Ohio 2011) – *In pari delicto* defense can be raised against a bankruptcy trustee to the same extent that the defense could have been raised against the debtor. *In pari delicto* defense is available only when: (1) the plaintiff bears at least substantially equal responsibility for the wrongs he seeks to redress, and (2) preclusion of suit would not significantly interfere with the purposes of the law or harm the public interest. Substantially equal responsibility requires plaintiff to be an active, voluntary participant in the unlawful activity that is the subject of the suit. Unless the degrees of fault are essentially indistinguishable or the plaintiff's responsibility is clearly greater, the *in pari delicto* defense should not be allowed, and the plaintiff should be compensated. Corporate debtor was entirely controlled by principals who used corporate debtor to perpetuate massive fraud and to loot corporate assets. Interests of corporate debtor and principals were so closely aligned and principals exercised such high degree of control as to warrant imputation knowledge of principals to corporate debtor. Chapter 7 Trustee could not recover damages from defendant where defendant participated in allegedly fraudulent scheme masterminded and implemented by debtor's principals as principals, and by extension corporate debtor, bore substantially equal responsibility for the losses.

12.79 Statute of Limitations

- (4832) *R.A.M Produce Distributors, LLC v. Cipriano*, 2015 WL 3441212 (E.D. Mi. 2015) – Action against principal of corporation that purchased perishable agricultural products is action for breach of fiduciary duty owed by principal of purchaser to seller under PACA, to hold and preserve statutory trust assets for benefit of seller. Action by seller against principal is not action to collect debt as the debt runs from the purchaser corporation to the seller, and there was no personal guarantee or undertaking by principal to pay debt. Statute of Limitations is state law limitations period for actions for breach of fiduciary duty. Action against principal to except debt from discharge untimely where action not brought until after state statute of limitations expired on actions for breach of fiduciary duty, even if statute of limitations on collection of underlying debt itself has not expired.
- (4833) *U.S. v. Curtis*, 2014 WL 3444947 (5th Cir. 2014) – Statute of limitations on charge of bankruptcy fraud for concealment of assets begins to run on day after entry of discharge and not day of discharge itself.
- (4834) *Grace v. LVNV Funding, Inc.*, 2014 WL 2167487 (W.D. Ky. 2014) – Collection agency that reported debt at amount that included unlawful interest violated FDCPA. Creditor charged 1.5% per month "service charge" on unpaid account. Court determined that "service charge" was actually disguised interest at rate in excess of statute usury statute. Inclusion of "service charge" in total debt reported to credit bureaus constituted attempt to collect amount not permitted by law; false representation of the character, amount or legal status of debt; and communicating information that is known to be or should be known to be false. Record was unclear as to whether false reporting occurred within one year statute of limitations period. FDCPA would not support action based on so called "serial violation" – original report would not be construed as "continuing" or repeating. Court did not determine whether statute of limitations runs from original reporting or whether "discovery rule" applies, finding that it was not necessary to do so on this record.
- (4835) *Young v. Countrywide Home Loans*, 2014 WL 935308 (M.D. Tn. 2014) – Statute of limitations for fraud runs from date on which defrauded party discovered, or reasonably should have discovered, allegedly fraudulent conduct. Debtor's allegations that lender falsified documents in connection with debtor's loan application were barred by statute of limitations where debtor and lender closed loan more than five years after closing of loan, where closing documents signed by debtor at closing would have provided reasonable notice to debtor of allegedly forged documents.
- (4836) *Bridge v. Ocwen Federal Bank*, 2013 WL 4784292 (N.D. Ohio 2013) – Statute of limitations does not preclude foreclosure based on earlier default, where debtor, in response to demand from lender, cured prior default, and debtor continued to make payment on the note. After later default, lender accelerated note and demanded full payment. Foreclosure based on this latest default was brought within statute of limitations as action was brought well within 2 years of the last default and acceleration.
- (4837) *Hood v. Chase Manhattan Mortgage Corp.*, 2013 WL 1629306 (E.D. Mi. 2013) – Statute of limitations for fraud runs from time claim accrues, which is date on which the wrong is committed regardless of when discovered. Alleged fraud in loan documents occurred when parties executed loan agreement, not date on which Plaintiff allegedly discovered the fraud. Limitations period under RESPA is either one year (relating to kickbacks, unearned fees and title insurance) or three years (mortgage servicing). Both limitations periods run from date of the occurrence, which is generally the date of closing of the loan. Truth in Lending Act has one year statute of limitations for damage actions and three years for rescission, both of which accrue from date of consummation of the transaction. Home Ownership and Equity Protection Act statute of limitations is three years from the date of the violation which is generally the original loan closing date. Statute of limitations for state law malpractice claim is two years from the date on which the claim arises, regardless of whether plaintiff has notice of the violation.

- (4838) *USACM Liquidating Trust v. Deloitte & Touche*, Case No. 11-15626 (9th Cir. 2013) – Section 108 does not extend statute of limitations where applicable state statute of limitations expired prior to commencement of bankruptcy case. Corporation was aware of inaccurate audits where principals of corporation were active participants in the underlying fraud that was not discovered by auditors. Knowledge of principals was imputed to corporation. As such, corporation knew or should have known of the errors in the audits on the dates the audits were prepared which was outside the state statute, Corporation’s argument that it did not actually discover the errors until years later did not overcome imputation of knowledge of principals to corporation years earlier, even if the alleged errors related to the wrongful acts of the principals which the principals had every incentive to conceal.
- (4839) *Fogel v. Shabat*, Case no. 12-3888 (7th Cir. 2013) – Appointment of interim trustee in case converted from Chapter 13 to Chapter 7 does not toll statute of limitations pursuant to Section 546. Statute of limitations to avoid transfers is 2 years from commencement of case. Section 546 provides for extension of deadline for one additional year if the appointment or election of “the first trustee” under Section 702 occurs before the expiration of the initial 2 year term. Debtor converted case from Chapter 13 to Chapter 7 one day short of 2 years after initial bankruptcy filing. Interim trustee was appointed on date of conversion, but permanent trustee was not appointed until 45 days later, after creditors attempted but failed to elect permanent trustee. Section 546 expressly references Section 702, which is the permanent trustee; and does not reference Section 701 regarding appointment of an interim trustee. The permanent trustee was not appointed or elected within the two year period from commencement of the case, and the statute of limitations expired on the avoidance actions.
- (4840) *Allstate Insurance Company v. Harris*, 474 BR 816 (Bankr. E.D. Mi. 2012) – Statute of Limitations in action against attorney for professional malpractice expires 2 years after the claim accrues or 6 months after plaintiff discovers, or should have discovered, the malpractice, whichever is later. Claim for legal malpractice “accrues” when the attorney discontinues serving the plaintiff in a professional capacity as to the matters involved, regardless of when plaintiff actually discovers the claim. Statute of Limitations expired more than 2 years before case commenced where attorney stopped acting as Plaintiff’s attorney in various state court matters, even though plaintiffs did not know that attorney was purportedly acting on behalf of Plaintiff. Although attorney’s actions gave every appearance to courts and to other parties in action that attorney represented Plaintiff, Plaintiff never in fact hired, or even met, attorney, and Plaintiff had no knowledge that attorney purportedly represented Plaintiff until more than 2 years later. Action dismissed.
- (4841) *Brandt v. Weyant*, 2010 WL 3719102 (Bankr. M.D. Tn. 2010) – Provision of Servicemembers’ Civil Relief Act that period of service “may not” be included in computing time is discretionary and does not mandate extension of statute of limitations in action brought by soldier. Although Plaintiff was a life-long member of the armed forces and was currently on active duty, nothing indicated that Plaintiff’s status as active duty in any way precluded or inhibited Plaintiff from prosecuting action. Plaintiff failed to present sufficient evidence of hardship to warrant invocation of discretionary extension of statute of limitations.
- (4842) *Torrez v. Eley*, Case No. 09-1464 (10th Cir. 2010) – Court can dismiss case on grounds of statute of limitations on Motion to Dismiss where time frames appearing on the face of the complaint make it clear that the right sued upon has been extinguished. Plaintiff’s complaint demonstrated that Plaintiff waited 6 years to bring malpractice action against Bankruptcy Trustee. Trial Court properly granted Rule 12(b)(6) motion to dismiss where complaint conclusively demonstrated that statute of limitations had long since expired.
- (4843) *Gold v. Deloitte & Touche, LLP*, 2009 WL 1664583 (E.D. Mi. 2009) – Cause of action for “aiding and abetting breach of fiduciary duty” is subject to three-year statute of limitations under Michigan law because it is a common law Court claim. Claim barred by statute of limitations where bankruptcy petition filed March 28, 2003 but adversary complaint not filed until March 31, 2006.

12.80 Statute of Limitations – Section 544

- (4844) *River City Resort, Inc. v. Frankenberg*, 2014 WL 3385234 (Bankr. E.D. Tn. 2014) – Statute of limitations on action to recover fraudulent transfer is the longer of the statute provided under Section 548 or the remaining limitation period under state law where debtor seeks to recovery under Section 544 and there was actual creditor who could have pursued recovery absent bankruptcy filing. Debtor brought action under state law to recover fraudulent transfer, such that limitation period would be 4 years from date of transfer. Although action was brought outside period allowed by Section 548, action was brought under state law within 4 years of date of transfer.

12.81 Statute of Limitations – Section 108

- (4845) *Taunt v. Coenen*, 2015 WL 5635278 (Bankr. E.D. Mi. 2015) – Section 108 fixes statute of limitations on pre-petition causes of action that have not expired prior to commencement of case at later of non-bankruptcy statute of limitations period or two years after petition date.
- (4846) *Johnston v. MidFirst Bank*, 2015 WL 5175147 (N.D. Ohio 2015) – Statute of limitations was not extended by plaintiff’s Chapter 13 petition as limitations period had already expired prior to commencement of bankruptcy case. Section 108 suspends a limitation period if the period has not expired pre-petition but does not create new limitation period where limitation period has previously expired.
- (4847) *In re Szymanski*, Case no. 10-22054 (Bankr. E.D. Mi. 2015) – Section 108(c) addresses time periods for actions by non-debtor against debtor, and extends time for the longer of the applicable statute of limitations or 30 days after stay is lifted to file action. Section 108 does not toll statute during period of bankruptcy and if statute otherwise expires during case, action must be commenced within 30 days of termination of stay.
- (4848) *USACM Liquidating Trust v. Deloitte & Touche*, Case No. 11-15626 (9th Cir. 2013) – Section 108 does not extend statute of limitations where applicable state statute of limitations expired prior to commencement of bankruptcy case. Corporation was aware of inaccurate audits where principals of corporation were active participants in the underlying fraud that was not discovered by auditors. Knowledge of principals was imputed to corporation. As such, corporation knew or should have known of the errors in the audits on the dates the audits were prepared which was outside the state statute, Corporation’s argument that it did not actually discover the errors until years later did

not overcome imputation of knowledge of principals to corporation years earlier, even if the alleged errors related to the wrongful acts of the principals which the principals had every incentive to conceal.

12.82 Statute of Limitations - Tolling

- (4849) *Fillinger v. Sampson*, Case no. 14-4097 (6th Cir. 2015) – Fair Debt Collection Practices Act has one year statute of limitations. Without addressing whether equitable tolling was available under FDCPA, Court held that Plaintiff failed to prove fraudulent concealment as required if court is to equitably toll statute. Equitable tolling requires that defendant concealed underlying conduct; plaintiff was prevented from discovering cause of action by that concealment; and plaintiff exercised due diligence to discover cause of action. Plaintiff's complaint failed to allege with particularity any facts that would support finding that defendant concealed true identity of creditor, where plaintiff never made inquiry. Mere silence of party is not sufficient – concealment requires some trick or contrivance intended to exclude suspicion and prevent inquiry.
- (4850) *Cheatom v. Quicken Loans*, 2014 WL 4922305 (6th Cir. 2014) – Equitable estoppel to toll statute of limitations requires conduct or language amounting to representation of material fact; party to be estopped must have been aware of true facts; party to be estopped must have intended that representation be acted on or that it was reasonably likely that party to be estopped so intended; party asserting estoppel must have been unaware of true facts; and party asserting estoppel must have reasonably relied on representations. For purposes of statute of limitations, plaintiff must show that defendant took affirmative steps to prevent plaintiff from suing in time, such as by hiding evidence or promising not to plead statute of limitations and plaintiff's failure to act in time was not result of plaintiff's own lack of diligence. Plaintiff failed to show basis for equitable estoppel where plaintiff did not allege any representations by defendants or that defendants knew any statements were false, or that plaintiff relied on any representations in deciding not to commence litigation at earlier date; and plaintiff did not allege any reason why plaintiff did not know of operative facts that form basis of action before limitations period expired or that claims could not have been discovered with exercise of reasonable diligence. Limitation period can also be extended by equitable tolling which does not require any impropriety on defendant's part but results where plaintiff, despite exercising due diligence, remains unaware of cause of action, and is based on lack of notice of requirement to file suit; lack of constructive knowledge of filing requirement; diligence in pursuing one's rights; absence of prejudice to other party; and plaintiff's reasonableness in remaining ignorant of legal requirements. Plaintiff's complaint demonstrated that plaintiff believed from inception of loan relationship that there were facts that could give rise to legal claim yet plaintiff waited 10 years before bringing suit. Plaintiff alleged only that defendant intentionally understated mortgage loan costs and then charged higher amount at the closing itself, such that plaintiff was fully aware of facts yet failed to file suit within limitations period.
- (4851) *Simmons v. BAC Home Loan Servicing, LLC*, 2014 WL 3844788 (M.D. Tn. 2014) – Equitable tolling allows court to toll statute of limitations where litigant's failure to meet deadline unavoidably arose from circumstances beyond litigant's control, and depends on 1) lack of notice of the filing requirement, 2) lack of constructive knowledge of the filing requirements; 3) diligence in pursuing one's rights, (4) absence of prejudice to the defendant, and (5) plaintiff's reasonableness in remaining ignorant of the particular legal requirement. Equitable tolling based on fraudulent concealment requires proof that (1) the defendant concealed the conduct that constitutes the cause of action; (2) the defendant's concealment prevented the plaintiff from discovering the cause of action within the limitations period; and (3) until discovery plaintiff exercised due diligence in trying to find out about the cause of action. Plaintiff did not allege any facts that would demonstrate that lender somehow prevented plaintiff from discovering cause of action based on alleged violation of Fair Debt Collections Practices Act. Plaintiff alleged only that defendant failed to provide information to him which is insufficient to support equitable tolling based on fraudulent concealment.
- (4852) *Hood v. Chase Manhattan Mortgage Corp.*, 2013 WL 1629306 (E.D. Mi. 2013) – Statute of Limitations can be equitably tolled where defendant fraudulently conceals operative facts that are basis of cause of action notwithstanding due diligence by Plaintiff to discover facts. Plaintiff did not establish basis for equitable tolling where Plaintiff did not make any effort to obtain allegedly withheld documents until well after statute of limitations had expired.
- (4853) *In re Vertrue Inc. Marketing and Sales Practices Litigation*, 2013 WL 1607295 (6th Cir. 2013) – Commencement of Class Action litigation suspends applicable statutes of limitations as to all asserted members of the class who would have been parties had the action been permitted to proceed as a class action. All members have the right to file individual claims if class certification is denied as long as those actions are commenced within the time remaining on the statute of limitations.

12.83 Laches

- (4854) *In re Peake*, 2012 WL 3262747 (Bankr. E.D. Mi. 2012) – Laches requires proof that plaintiff delayed filing suit for unreasonable and inexcusable length of time from the time plaintiff knew or reasonably should have known of the claim, and the delay operated to prejudice of defendant. Further, there is "strong presumption" that the delay is not unreasonable where the statute of limitations has not lapsed. Creditor's action to declare debt non-dischargeable under Section 523(a)(5) not barred by laches. Any delay in commencement of case was result, at least in part, of debtor's failure to schedule debt. Further, actions under Section 523(a)(5) can be brought at any time. Statute of limitations on action founded on judgment or decree is 10 years, and action was commenced less than 10 years after entry of divorce. Debtor failed to produce evidence of prejudice based on delay.

12.84 First Breach Rule

- (4855) *Bennett v. Bank of America*, 2015 WL 5063271 (E.D. Ky. 2015) – Lender cannot be held liable for breach of contract by failing to modify loan where borrower had already defaulted on loan, thereby committing first breach. Once borrower breached, lender no longer had any duty of performance and borrower was precluded from bringing action based on unexecuted part of contract. Further, complaint did not

allege any particular breach of the loan agreement resulting from lender's failure to negotiate a modification where nothing in the loan agreement required or obligated lender to negotiate any modification.

- (4856) *Moretti v. Bank of New York Mellon*, 2015 WL 1036450 (6th Cir. 2015) – First Breach Rule precludes party who first breaches agreement from maintaining action against other party based on subsequent breach or failure to perform. Debtor did not produce any evidence to support argument that lender breached the loan agreement first where lender sent letter to debtor advising of payment increase based on escrow adjustment that was consistent with the loan documents themselves.

12.85 Economic Loss Rule

- (4857) *Doering v. JPMorgan Chase Bank*, 2015 WL 5460702 (E.D. Mi. 2015) – Economic loss rule precludes action based on tort where cause of action arises out of contractual relationship and plaintiff alleges only economic damages. Proper cause of action is one for breach of contract. Causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and fraudulent misrepresentation all arose out of loan and mortgage contract and were barred by economic loss rule.

12.86 Repudiation

- (4858) *Moretti v. Bank of New York Mellon*, 2015 WL 1036450 (6th Cir. 2015) – Repudiation of contract requires unequivocal declaration of intent not to perform. Repudiation requires more than confusion or misunderstanding. Debtor failed to demonstrate that lender repudiated loan modification agreement where debtor produces no evidence that lender declared an intent not to perform. At best, debtor pointed to areas of confusion and while letters may have been less than models of clarity, they were consistent with requirements of the loan documents.

12.87 Cross Claims

- (4859) *Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6th Cir. BAP 2009) – Creditor's "cross-claim" in adversary proceeding was actually attempt to recover damages against Debtor for which creditor failed to file a proof of claim. Creditor cannot use cross claim to circumvent requirement of Federal Rule of Bankruptcy Procedure 3002 that a creditor timely file a claim by the claim deadline.

12.88 Motion to Dismiss

- (4860) *West v. Home Savings & Loan*, 2015 WL 3962569 (Bankr. N.D. Ohio 2015) – In determining sufficiency of complaint, court must identify factual allegations and determine whether allegations, if true, state basis for relief. Fact that complaint was disjointed or contained surplus or unnecessary allegations did not mandate dismissal where court was able to determine operative facts and conclude that facts stated cause of action. Complaint fairly alleged that defendant was scheduled as creditor, that plaintiff's personal liability was discharged, and that defendant continued efforts to collect past due payments.
- (4861) *Advantage Windows, Inc. v. Dunn*, 2013 WL 1553007 (Bankr. E.D. Tn. 2013) – If four corners of complaint states cause of action, dismissal under Rule 12(b) is improper. In considering Rule 12 Motion, court must consider only the complaint and any exhibits incorporated. Defendant's motion to dismiss included additional documents not referenced in the complaint. Those additional documents would not be considered in connection with a Rule 12 motion. If documents outside the complaint are considered, the court must convert the motion to dismiss into a motion for summary judgment and give the parties a reasonable time to present all evidence in support of such a Rule 56 motion.
- (4862) *Hood v. Chase Manhattan Mortgage Corp.*, 2013 WL 1629306 (E.D. Mi. 2013) – Motion to dismiss under Rule 12 is limited to matters contained within 4 corners of complaint and properly referenced exhibits. Court denied Defendant's Motion where could have had to consider matters outside the complaint, including Plaintiff's bankruptcy file. Motion denied without prejudice to defendant filing Motion for Summary Judgment. Court can dismiss action based on statute of limitations if the defect is apparent from face of complaint.
- (4863) *M-Heat v. Jost*, Adv. No. 12-4868 (Bankr. E.D. Mi. 2012) – Court would not consider grounds for motion to dismiss that are raised for first time in reply to defendant's response to the motion. It is impermissible to raise note issue for first time in reply brief as opposing party has no opportunity to respond.
- (4864) *Lee-Taylor v. Martin*, 2011 WL 6032835 (Bankr. N.D. Ohio 2011) – Motion to Dismiss under Rule 12 requires that complaint fail to state cause of action on its face. Court cannot consider matters beyond 4 corners of complaint. Motion to Dismiss based on Collateral estoppel required review of documents and matters beyond 4 corners of complaint. Motion denied without prejudice to Defendant renewing Motion using proper procedure for Summary Judgment.
- (4865) *Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Plaintiff's failure to establish jurisdiction in Complaint is basis to dismiss adversary complaint. However, that Complaint alleges as basis for jurisdiction an inapplicable statute does not mandate dismissal where factual allegations of complaint are sufficient to demonstrate existence of jurisdiction. Action for contempt based on alleged violation of discharge injunction is clear "core" proceeding over which Court has subject matter jurisdiction. Failure to cite specific statute on which claim is based is not fatal defect where factual allegations are sufficient to apprise defendant of substance of action. Complaint for violation of automatic stay failed to state cause of action where complaint alleged that debt was included in bankruptcy and defendant continued efforts to collect, but did not allege that defendant knew either of commencement of bankruptcy case or existence of automatic stay.
- (4866) *Anthony v. Miller*, 2011 WL 3585603 (Bankr. N.D. Ohio 2011) – Motion to Dismiss under Rule 12(b)(6) for failure to state cause of action must be made either in separate pleading before a responsive pleading is filed or in the initial responsive pleading. Motion to

Dismiss filed well after Defendant filed answer to complaint was untimely and must be denied, even where based on failure to plead fraud with specificity as required by Rule 9. However, Court exercised inherent authority to require pro se plaintiff to file amended complaint where “complaint” in the form of letter initially mailed to court was unfocused and request for relief was not tied to any Code provision and was unclear as to whether Plaintiff sought relief against both debtors or only one of the two.

- (4867) *Morris v. Paine*, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Case will be dismissed where Complaint based on statutes that did not provide for private right of action. 18 USC Section 1346 (defining criminal violation for fraud), 18 USC Section 1918 (sedition) and 10 U.S.C. Section 333 (insurrection) are criminal statutes for which no private right of action exists. Action under 42 USC Section 2000d is one for discrimination in state and local government programs. Bankruptcy Judges and Trustees are not within the scope of defendants defined in Section 2000d and Debtor’s prior bankruptcy filings did not constitute the receipt of federally provided financial assistance which is required under Section 2000d. Eleventh Amendment creates protection for state from Federal interference, but does not provide any independent basis for action by private individual.
- (4868) *Spradlin v. Baker*, 2010 WL 2612585 (Bankr. E.D. Ky. 2010) – Rule 12(b)(6) made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 7012(b), is for failure to state a claim upon which relief can be granted. Complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. The complaint must possess enough heft to show that the pleader is entitled to relief. Court, in determining such a motion must presume that the factual allegations of the complaint are true and all reasonable inferences are to be made in favor of the nonmoving party. The purpose of a motion to dismiss is to assess the legal sufficiency of a complaint, not to judge the weight of evidence which might be offered in its support. Court does not have to accept every allegation in the complaint as true in assessing its sufficiency nor sweeping and unwarranted averments of fact or legal conclusions, deductions or opinions couched as factual allegations. Motion to Dismiss denied where Plaintiff alleged that Defendant agreed to limit exemptions and Defendant did not counter the Plaintiff’s declaration and defendant produced no other challenge to the sufficiency of the Complaint.
- (4869) *Swanigan v. Northwest Airlines, Inc.*, 2010 WL 2465387 (W.D. Tn. 2010) - Motion to dismiss for failure to state a claim only tests whether a cognizable claim has been pled. Court can dismiss meritless cases which would otherwise waste judicial resources and result in unnecessary discovery. Complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief and it must provide the defendant with fair notice of what the plaintiff’s claim is and the grounds upon which it rests. Complaint must provide more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do. Complaint must have a factual foundation, and the mere possibility that a plaintiff might later establish some set of undisclosed facts to support recovery is insufficient to survive a 12(b)(6) challenge. Court must accept as true all factual allegations in the complaint and construe them in the light most favorable to the plaintiff. Only well-pleaded facts must be taken as true, and the court need not accept legal conclusions or unwarranted factual inferences. Where parties rely on materials outside the pleadings, Court has discretion to treat Motion as Motion for Summary Judgment under Rule 56.
- (4870) *Bowen v. Mountain Commerce Bank*, 2010 WL 2430777 (Bankr. E.D. Tn. 2010) - Moving party in a Rule 12(b)(6) Motion has the burden of proving that no claim exists. Complaint is to be liberally construed, but must more than bare assertions or legal conclusions. Factual allegations in the complaint must be presumed to be true, and reasonable inferences must be made in favor of the nonmoving party but court need not accept unwarranted factual inferences. Complaint must present enough facts to state a claim to relief that is plausible on its face. Claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not a “probability requirement,” but requires more than a sheer possibility that a defendant has acted unlawfully. Complaint for damages for alleged violation of discharge injunction did not allege that bank acted or failed to act in an attempt to collect a discharge debt, which is an essential element of a discharge violation. Complaint alleged that bank had been paid in full during debtor’s chapter 13 proceeding, leaving no debt left owing for the bank to collect and preventing finding that conduct of which debtors complained was an attempt by the bank to collect a debt. Reporting of credit information about a debtor or refusing to remove credit information posted about a debtor does not constitute an act to collect the debt in violation of a discharge injunction absent evidence to establish a link between the act of reporting and the collection or recovery of the discharge debt. Creditor’s refusal to update the status of a debt on a credit report after a request has been made by the debtor can result in a discharge injunction if creditor deliberately refuses to change reporting of debts from “past due or owing, charged off as bad debt” rather than “discharged in bankruptcy” notwithstanding request by debtor to update reports. Debtor’s complaint fails to state cause of action where complaint alleged only that bank failed to remove a negative reference from credit bureau without providing any details explaining the allegations and failed to contain anything more than “unadorned, the-defendant-unlawfully-harmed-me” accusations. Complaint failed to identify in any respect what the debtor’s claim the bank reported on a credit report; failed to attach a copy of the offensive report; and referred merely to “negative reference” without providing any factual explanation or support for the allegations.
- (4871) *Smith v. Bluegrass Mortgage*, 2010 WL 2368279 (Bankr. E.D. Ky. 2010) – A complaint is subject to dismissal if it fails to allege a required element which is necessary to obtain relief sought or if a bar to relief is apparent from the face of the complaint. The court’s task under Rule 12(b)(6) is then to determine the sufficiency, and not the merits, of the Complaint. To survive a motion to dismiss, complaint does not need detailed factual allegations. However, plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. Court, in determining such a motion must presume that the factual allegations of the complaint are true and all reasonable inferences are to be made in favor of the nonmoving party. Motion to dismiss is to assess

the legal sufficiency of a complaint, not to judge the weight of evidence which might be offered in its support. In considering motion to dismiss, court does not have to accept every allegation in the complaint as true in assessing its sufficiency. Allegations must be "well-pleaded" and the court need not accept sweeping and unwarranted averments of fact or legal conclusions, deductions or opinions couched as factual. Complaint objecting to debtor's discharge would be dismissed where Complaint contained "sweeping and unwarranted averments of fact," most of which appear to be accusations of misdeeds by various non-party judges, attorneys, trustees, and other parties at whose hands the Plaintiff believes he has been wronged. Complaint did not contain any allegation sufficient to state a claim that is plausible on its face to sustain any action against this Defendant, if for no other reason that Debtor was a Corporation and would not be entitled to a discharge as a matter of law.

- (4872) *Maxus Capital Group, LLC. v. Uhrich*, Case No. 09-8047 (6th Cir. BAP 2010) – In deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court will construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff. Dismissal is proper only when it appears beyond doubt that plaintiff can prove no set of facts in support of a claim for relief. Court is not required to accept unwarranted legal conclusions or factual allegations. Action to revoke confirmation order must allege sufficient facts to demonstrate that confirmation was obtained based on a representation or intentional omission by the plan proponent regarding one or more of the elements of Section 1129; that was materially false; that was either known to be false or was made with reckless disregard for the truth; intended for the Court to rely on; that the Court did rely on; and that as a consequence the Court entered a confirmation order. Allegations that officers and insiders of Debtor deliberately undervalued assets and financial documents were fully considered and rejected by the Bankruptcy Court in numerous collateral actions during course of Chapter 11 case. As the Bankruptcy Court has previously rejected the allegations of fraud prior to confirmation, another rejection of the same allegations in connection with confirmation does not support finding that Court was misled or that the Court relied on the misrepresentations. Further, Party failed to appeal confirmation order and so was barred by finality of Order and could not collaterally attack validity of the Order.
- (4873) *Nehasil v. Greiner*, 430 BR 446 (E.D. Mi. 2010) – Rule 12(b)(6) allows court to dismiss complaint that fails to state claim upon which relief can be granted. Court can determine whether Plaintiff is entitled to legal relief assuming every allegation in the complaint is true, and will all inferences construed most favorably to Plaintiff. Complaint must contain either direct or inferential allegations regarding all material elements of cause of action. Complaint cannot rely on mere labels or conclusions and must be more than a formulaic recitation of elements of cause of action. Complaint must contain sufficient factual allegations to state a claim that is plausible on its face. Federal Rule 9 requires fraud to be plead with particularity, although state of mind such as malice, intent and knowledge may be plead generally. Complaint that specifically referred to state court fraud judgment is sufficient to provide Defendant with full understanding of Section 523 complaint. Complaint that does not specifically cite Section 523(a)(2)(A) nonetheless states cause of action where Complaint is predicated on State Court fraud judgment. State court judgment for fraud which required that Defendant have obtained money as a result of the fraud.
- (4874) *Budzynski v. Stephens*, Case No. 10-4230 (Bankr. E.D. Mi.), *aff'd* 2010 WL 4286186 (E.D. Mi. 2010) – When addressing a motion to dismiss under rule 12, court should construe complaint in light most favorable to plaintiff, accepting all factual allegations as true. Court is not required to accept legal conclusions where unwarranted factual inferences are true. Court should determine whether complaint contains either direct or inferential allegations respecting material elements of claim.
- (4875) *Torrez v. Eley*, Case No. 09-1464 (10th Cir. 2010) – Court can dismiss case on grounds of statute of limitations on Motion to Dismiss where time frames appearing on the face of the complaint make it clear that the right sued upon has been extinguished. Plaintiff's complaint demonstrated that Plaintiff waited 6 years to bring malpractice action against Bankruptcy Trustee. Trial Court properly granted Rule 12(b)(6) motion to dismiss where complaint conclusively demonstrated that statute of limitations had long since expired.
- (4876) *Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894 (M.D. Tn. 2009) - In deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court will "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." The Federal Rules of Civil Procedure require only that a plaintiff provide "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." The court must determine only whether "the claimant is entitled to offer evidence to support the claims," not whether the plaintiff can ultimately prove the facts alleged. It may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Challenges to the merits of a plaintiff's claim should be "dealt with through summary judgment under Rule 56. To survive a motion to dismiss, factual allegations must be enough to raise a right to relief above the speculative level - a well-pleaded complaint may proceed, even if it appears "that a recovery is very remote and unlikely. Complaint that is nothing more than conclusions is not entitled to the assumption of truth. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.
- (4877) *D.A.N. Joint Venture, III, LP v. Shekerjian*, Adv. No. 08-5724 (Bankr. E.D. Mi. 2009) – In evaluating Motion to Dismiss, Court views complaint in light most favorable to plaintiff. Court must review allegations in complaint without reference to extrinsic evidence. Complaint to deny discharge under Section 727(a)(2)(A) requires disposition or concealment of property and subjective intent to hinder or delay creditors. Allegations that Debtor failed to list numerous corporate entities in schedules and pattern of shifting assets state cause of action. Action under Section 727(a)(2)(B) requires transfer, removal, destruction, mutilation or concealment of property with actual intent to hinder or delay creditors after the Petition date. Allegations that Debtor formed entities post-petition but pre-conversion and failed to disclose those entities as assets constituted concealment sufficient to survive Motion to Dismiss. Action under Section 727(a)(4)(A) requires statement under oath that was false, made with knowledge of falsity and that materially affected bankruptcy case and includes both false statements and omissions. Allegation that Debtor owed creditor in excess of \$2.5 million but creditor was not included in schedules sufficient to survive Motion to Dismiss.

12.89 Motion to Strike Pleadings

- (4878) *Rathinam v. Ashok Spiritual Healing Center*, 2015 WL 4132809 (S.D. Ohio 2015) – Motion filed and served by ECF would not be stricken based on opposing party’s alleged failure to receive pleading. Even if party was not ECF participant, party did receive and file response to motion and did not evidence any prejudice based on opposing party’s alleged failure to serve motion by mail. However, court did direct that all future pleadings be served on party by mail rather than through ECF procedures.
- (4879) *Smith v. Bluegrass Mortgage*, 2010 WL 236279 (Bankr. E.D. Ky. 2010) – Complaint objecting to debtor’s discharge would be stricken where debtor was a Corporation and would not be entitled to a discharge as a matter of law.
- (4880) *Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6th Cir. BAP 2009) – Motion to strike affirmative defenses are disfavored as resolution requires Court to evaluate legal merits of a defense before the factual background of the case is fully developed. Court can strike affirmative defense that is legally insufficient, immaterial, impertinent or scandalous. A defense is legally insufficient if it cannot succeed under any circumstances; immaterial if it bears no essential or important relationship to the primary claim for relief; impertinent if it contains statements that do not pertain to or are unnecessary to the issues in question; and scandalous if they improperly cast a derogatory light on the opposing party. Bankruptcy trustee is not in privity with the Debtor and the alleged wrongdoing of the Debtor cannot be imputed to the trustee or serve as a defense against the trustee’s fraudulent transfer claim. Court properly struck defenses that were based on alleged fraudulent conduct of Debtor, estoppel, waiver and negligence of the Debtor and its employees as those defenses attempted to impermissibly attribute to the trustee the wrongdoing of the Debtor. Defenses of accord and satisfaction and set off are not defenses to a fraudulent transfer action. Latches defense struck where trustee brought avoidance action more than one year after case commenced but within time permitted under section 546(a).

12.90 Amendments to Pleadings – Matter of Right

- (4881) *Rathinam v. Ashok Spiritual Healing Center*, 2015 WL 4132809 (S.D. Ohio 2015) – Rule 15 permits party to amend complaint once as a matter of right within 21 days after service or 21 days of service by defendant of either responsive pleading or motion to dismiss. Amended complaint filed after expiration of time permitted in Rule 15 stricken by court.

12.91 Leave to Amend Complaint

- (4882) *Doering v. JPMorgan Chase Bank*, 2015 WL 5460702 (E.D. Mi. 2015) – Court will deny motion to amend where proposed amended complaint fails to state cause of action leaving amendment a futile act.
- (4883) *Continental Casualty Co. v. Harsha*, 2015 WL 5168592 (E.D. Mi. 2015) – Decision to grant or deny motion to amend pleading is within sound discretion of the court. Amendment will not be permitted in instances of undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, or futility of amendment. Leave to amend complaint granted where complaint initially joined one defendant and after that defendant filed for bankruptcy, complaint was amended to drop that defendant. Plaintiff then timely filed motion for relief from stay in bankruptcy court and timely sought to amend complaint to re-add defendant when bankruptcy court lifted stay for that purpose. Record contained no evidence of bad faith or undue delay.
- (4884) *Carpenter v. Monroe Financial Recovery Group, Inc.*, 2015 WL 4724785 (E.D. Mi. 2015) – Court will freely grant leave to amend unless amendment is result of undue delay, bad faith by the moving party, repeated failure to cure defects by previously-allowed amendments, futility of proposed amended complaint, or undue prejudice to opposing party. Amendment allowed where revisions were de minimus and offered only to clarify the scope of the claims asserted, not to raise any new legal theory or factual basis for claims presented. Fact that defendant responded to motion to amend and will have to file response to amended complaint do not amount to showing of significant prejudice, as defendant will not be required to prepare additional defense strategies or expend additional resources to defend against new claims.
- (4885) *Dearborn Tree Service, Inc. v. Gray’s Outdoor Services, LLC*, 2015 WL 4459331 (E.D. Mi. 2015) – Although court should freely grant request to amend complaint, right to amend is not automatic or absolute. Court must consider delay in filing, lack of notice to opposing party, bad faith by the moving party, repeated failure to cure deficiencies by prior amendments, undue prejudice to opposing parties and futility of amendment. Delay itself is not enough to deny motion to amend. Motion denied where amendment was sought very late in proceedings, plaintiff had at least 6 months notice of facts giving rise to requested amendment yet failed to seek leave to amend, and amendment would prejudice defendant. Plaintiff filed motion for leave to amend on date set by court for filing dispositive motions and a week after defendant filed motion for summary judgment. Although plaintiff had notice of possible claim, plaintiff waited until after discovery cutoff to seek leave to amend and reopening discovery would prejudice defendant who has already filed motion for summary judgment.
- (4886) *Brown v. Florida Coastal Partners*, 2015 WL 4205157 (S.D. Ohio 2015) – Court will deny Motion to Amend Complaint where proposed amended complaint fails to state cause of action on its face; or undue delay, bad faith or dilatory motive on part of plaintiff; repeated failure to cure deficiencies in previously filed amendments; or futility of amendment. Undue delay depends on factors such as length of delay, whether dispositive motions have already been granted, whether new allegations would require opponent to expend significant additional recourses to conduct discovery and prepare for trial, and whether amendment would significantly delay disposition of action. Motion to amend would cause undue delay and prejudice. Action had already been pending more than a year and proposed amendment would introduce new parties and entirely new causes of action which would require additional discovery and significantly delay resolution of action. Denial would not prejudice plaintiff as plaintiff is free to pursue new causes of action against new proposed defendants in separate litigation.

- (4887) *West v. Home Savings & Loan*, 2015 WL 18839333 (Bankr. N.D. Ohio 2015) – Leave to amend complaint will be denied where proposed amended complaint fails to state viable legal theory. Complaint alleging violation of discharge injunction failed as matter of law as there is no private right of action for violation of Section 524. Proposed amended complaint, which still sought to bring suit for violation of discharge injunction continued fatal defect of seeking relief that is not available as matter of law, such that amendment would be futile.
- (4888) *Landis v. Baker*, 2015 WL 1568377 (Bankr. N.D. Ohio 2015) – Rule 15 allows plaintiff to amend complaint as a matter of right within 21 days of service of complaint or within 21 days after service of Rule 12 motion. After expiration of 15 days, complaint can be amended only by leave of court. Plaintiff's amended complaint stricken where amended complaint filed after 21 days permitted by Rule 15 and plaintiff did not obtain either consent of the opposing party or leave of court, and plaintiff did not attach any proposed amended complaint that showed that the fatal pleading deficiencies in prior complaint were or could be cured. If party files amended complaint in violation of Rule 15, court does not abuse its discretion in dismissing complaint with prejudice.
- (4889) *Branch v. 30th District Court*, 2015 WL 515391 (Bankr. E.D. Mi. 2015) – Court will not grant leave to amend complaint where proposed amended complaint would be subject to motion to dismiss for failure to state cause of action. Complaint seeking to declare debtor's liability for pre-petition traffic tickets for running a red light; driving on suspended license; and no proof of insurance are excepted from discharge under 11 USC Section 523(a)(7). Debtor could not prevail as matter of law in complaint that sought to discharge those obligations.
- (4890) *McCord v. Resurgent Mortgage Servicing*, 2014 WL 4109622 (W.D. Ky. 2014) – Plaintiff will be granted leave to amend complaint freely when justice requires. Motion to amend should be denied only when proffered amendment cannot withstand motion to dismiss under Rule 12(b)(6) or when amendment would otherwise be futile. Proposed amendment would be allowed where amendment added specific factual allegations necessary to survive motion to dismiss for failure to allege facts with specificity and particularity. Amendment did not add cause of action or change parties and case was in its infancy such that amendment did not prejudice any party.
- (4891) *Brown v. Florida Coastal Partners, LLC*, 2014 WL 2169561 (S.D. Ohio 2014) – Leave to amend complaint will be freely given when justice requires. However, motion for leave to amend may be denied where court finds undue delay, bad faith or dilatory motive on party of moving party; repeated failure to cure deficiencies by amendments previously allowed; undue prejudice to opposing party; or futility of amendment. Proposed amendment is futile if amendment would not withstand a motion to dismiss under Rule 12(b)(6). Proposed amendment that sought to join attorneys for mortgage servicer in action for slander of title was not futile on its face where complaint alleged that attorneys falsely represented the identity of the holders of the mortgage that was the subject of foreclosure action. While attorneys may have had valid defenses, court would not look beyond four corners of proposed amended complaint in determining whether amendment would survive Rule 12 motion.
- (4892) *AFF Ohio, LLC v. Jelinger*, 2014 WL 1329554 (Bankr. N.D. Ohio 2014) – Motion to amend complaint denied where amended complaint raised entirely new theories of liability based on entirely new and different facts. Initial complaint requested dismissal of case under Section 707(b) based on debtor's alleged "failure" of means test. Amended complaint sought to assert claim under Section 707(a), not based in any way on means test but on alleged failure to disclose assets. While leave to amend should be freely granted, discretion becomes more limited if amendment would require modification of scheduling order. In that event, court will allow amendments only for good cause, which requires consideration of whether amendment will prejudice party opposing amendment and acceptable explanation why the moving party waited for such an extended time to seek to amend after becoming aware of new or additional causes of action. Proposed amended complaint had none of the factual allegations that formed the basis of the original complaint. Allowing amendment would require new scheduling order setting new discovery deadlines and new deadlines for dispositive motions, plus a new trial date where the current scheduling order set trial to begin in two weeks.
- (4893) *Boyd v. Baird*, 2013 WL 6858456 (W.D. Mi. 2013) – Court should deny leave to amend where amended complaint would not withstand motion to dismiss under Rule 12(b)(6). Leave to amend complaint to add count for conversion against principals of debtor corporation properly denied where debtor and the defendant were equally culpable in the underlying transaction. *In pari delicto* defense under Michigan law does not allow plaintiff to recover against defendant when plaintiff was at least as culpable as defendant. Trustee, as representative of Debtor's estate, takes claims subject to any defenses that could have been asserted had debtor brought action in its own right. Proposed amended complaint alleged that defendant and her husband were the sole officers, directors, and shareholders of the debtor; and that defendant, her husband and the debtor conspired to transfer assets from the corporation to the defendant. All actions were taken with full knowledge and consent of the debtor and debtor was at least equally at fault, precluding recovery.
- (4894) *Embraer Aircraft Maintenance Services, Inc., v. AeroCentury Corp.*, 2013 WL 5936723 (M.D. Tn. 2013) – Leave to amend is to be freely given when justice requires, where underlying facts or circumstances relied upon by plaintiff may be proper subject of relief. Court should deny leave to amend only if the party seeking leave has engaged in undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, or futility of the amendment. Plaintiff's request to amend to add specific allegations regarding Court's personal jurisdiction over defendant, filed in response to Defendant's motion to dismiss, would be allowed. Motion to amend was filed within weeks after completion of briefing on defendant's motion to dismiss, which does not evidence any unreasonable delay. Plaintiff's failure to include specific allegations in original complaint was understandable given remaining allegations in complaint. Defendant would not be prejudiced by amendments. Fact that defendant has expended time and incurred fees and costs in drafting and filing motion to dismiss and briefs in support is not "prejudice" as amendment would not prevent defendant from fairly defending action on merits. Amendment was not futile as amendment contained specific factual allegations to support finding that defendant has purposely availed itself of the rights to transact business in Tennessee sufficient to support long arm jurisdiction.
- (4895) *Hood v. Chase Manhattan Mortgage Corp.*, 2013 WL 1629306 (E.D. Mi. 2013) – Plaintiff should be granted leave to amend complaint on

liberal basis. However, Rule 15 allows amendment only with opposing party's consent or with leave of court. Plaintiff did not request consent of opposing party and did not file Motion for leave to file amended complaint. However, Plaintiff included in response to Motion to Dismiss a request to be allowed to file an amended complaint. Although Plaintiff failed to comply with any procedural requirement, court would allow amendment subject to determination that amended complaint states cause of action.

- (4896) *Reed v. U.S. Bancorp.*, 2013 WL 1249231 (E.D. Tn. 2013) – Plaintiff may amend complaint to change the party or the naming of the party against whom a claim is asserted and that amendment will relate back to the date of the original pleading if: (1) the claim asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, (2) the added party received notice of the suit in the 120 days following the filing of the original complaint, (3) the notice was such that the added party will not be prejudiced in maintaining a defense on the merits, and (4) the added party knew or should have known that but for a mistake of the identity of the proper party, the action would have been brought against it. Focus is not on whether Plaintiff should have known identity of correct party, but whether correct party knew or should have known that it would have been named but for an error. Amendment to add correct party is not new cause of action that precludes relation back. Amendment demonstrated that Plaintiff attempted to sue correct party, not to add a new party against whom Plaintiff would assert new claims. Corporate relationships between originally named defendant and later, corrected defendant were complex; the correct defendant was at all times aware of the claims including a determination by the EEOC of a right to sue; and once the mistake was discovered, Plaintiff acted quickly to correct the error.
- (4897) *Adamovic v. Lazarevic*, 2012 WL 3778946 (Bankr. E.D. Tn. 2012) – Rule 7015, which incorporates Federal Rule 15, allows amendments of pleadings only with the consent of opposing party or with leave of court. Court should freely grant leave where justice requires.
- (4898) *Haney v. Educational Credit Management Corp.*, 2012 WL 3693533 (E.D. Ky. 2012) – Plaintiff has no automatic right to amend complaint after dismissal. Court has discretion to determine whether to permit amendment and can consider undue delay in filing motion. Motion to amend denied where at the time the original complaint was filed, debtor was in full possession of relevant facts and could have raised issues earlier in the proceeding.
- (4899) *Shapiro v. Harajli*, 2012 WL 255326 (Bankr. E.D. Mi. 2012) – Court can deny request to file amended complaint where doing so would prejudice defendant; or where filing an amended complaint would be futile. Trustee did not unduly delay in requesting leave to file amended complaint where assertion of new claim would not require defendant to expend significant additional resources to conduct discovery and prepare for trial and would not significantly delay the resolution of the action. However, Plaintiff failed to identify in request for leave to amend any particular claim that Plaintiff would add and, based on Court's earlier ruling on Summary Judgment, it did not appear that Plaintiff could plead any facts or cause of action that would support a meritorious cause of action against defendant.
- (4900) *Richardson v. Checker Acquisition Corporation*, 2012 WL 87041 (Bankr. W.D. Mi. 2012) – Request for leave to file Amended Complaint must be requested in written motion unless made during a hearing. The requirement for a written motion in Rule 7(b)(1) and Bankruptcy Rule 9013 serves two functions, a record-making function and a notice function. The record-making function permits the court and the parties to determine what occurred. The notice function permits the opposing party and the court to prepare adequately. Rule 7(b)(1) assures that parties will know of contentions and requests in a litigation and will have the opportunity to oppose—or at least address—such views and demands. Oral argument on previously filed Motion to Dismiss is not the type of hearing where an Oral motion to amend is proper. On proper request, plaintiff should be given at least one chance to amend the complaint before dismissal with prejudice, but Court is not required to permit amendment where proposed amendment would be futile. Plaintiffs alleged delay in requesting leave to amend, resulting in two hearings rather than just one, would not be basis to deny Motion to Amend. However, Court could award defendant attorney fees and costs incurred in attending second, avoidable, hearing.
- (4901) *Stevens v. Citizens Tri-County Bank*, 2011 WL 6812807 (Bankr. E.D. Tn. 2011) – Court denied Motion to Amend Complaint where proposed Amended Complaint failed to state cause of action.
- (4902) *Cornwell Quality Tools Company v. Paavo*, Case No. 11-10831 (E.D. Mi. 2011) – Court properly denied Creditor's Motion to Amend Complaint where proposed amended complaint failed to state a cause of action.
- (4903) *Appalachian Oil Co., Inc. v. Kentucky Lottery Corp.*, 2011 WL 3742045 (Bankr. E.D. Tn. 2011) – Leave to amend should be freely granted, absent evidence of undue delay, bad faith or dilatory motive, undue prejudice to opposing party, or futility of amendment. Proposed amendment is futile if it would not withstand Motion to Dismiss under Rule 12(b)(6).
- (4904) *Sequatchie Mountain Creditors v. Detweiler*, 2012 WL 4120386 (N.D. Ohio 2011) –Amendment of complaint should be permitted where justice requires. Court must consider whether there has been undue delay; lack of notice to opposing party; bad faith by moving party; repeated failure to cure deficiencies in prior amendments; and a futility of amendments; with notice and substantial prejudice being critical factors. Amendment to complaint to add parties as additional plaintiffs is permitted if (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action. Opposing party did not demonstrate prejudice merely because case had been pending for 21 months, where opposing party had already conducted discovery into possible causes of action by as-of-then persons who were not plaintiffs. Although confusion regarding proper plaintiffs was result of poor drafting by plaintiff, that alone did not present prejudice. Discovery had not closed and there would be substantial overlapping testimony were all of the plaintiffs purchased lots in the same real estate development and claims of the proposed new plaintiffs were the same as the existing plaintiffs, where the claims turned on when each plaintiff learned of the land for sale, whether timber rights were involved, and whether the purchased was financed. . Court's desire to move cases on docket did not warrant denial of amendment, although court could limit discovery to avoid unnecessary delays in light of 21 month delay by plaintiff in naming proper parties.
- (4905) *Imagepoint, Inc. v. GM-DI Leasing Corp.*, 2010 WL 3037436 (Bankr. E.D. Tn. 2010) - Leave to amend should be freely given when

justice so requires. Courts should consider undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of the amendment. Amendment will be “futile” if no set of facts can be proved that would constitute a valid and sufficient claim. Amendment was not “unduly delayed” where adversary complaint was filed while case was pending in Chapter 11 and was later converted to Chapter 7, Amended Complaint was filed less than one year after commencement of the case; discovery was still pending; Trustee has not previously requested leave to amend; Chapter 7 case had large number of complex proceedings pending at the time of the Trustee's appointment. Even if delay is “unjustified” leave to amend will not be denied where delay was not intended to harass or causes any ascertainable prejudice to the party opposing the motion. To determine “prejudice”, court will consider whether the assertion of the new claim or defense would require the opponent to expend significant additional resources to conduct discovery and prepare for trial; significantly delay the resolution of the dispute; or prevent the plaintiff from bringing a timely action in another jurisdiction. Record did not demonstrate prejudice where discovery was still ongoing and there was no assertion that the addition of these new claims will delay the scheduled trial. Allowing amendment would be more economical and efficient than a new action. Both the old and the new claims arise out of the same agreements and overlap with respect to the setoff contentions.

- (4906) *Dottore v. National Staffing Services, LLC*, 2010 WL 2891705 (N.D. Ohio 2010) – Decision to permit amendments is within the discretion of the court. A court may deny a motion to amend on the basis of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, or futility of the proposed amendment. Delay alone—regardless of length—is an insufficient basis for a court to deny an otherwise appropriate motion for leave to amend where delay is not intended to harass and does not cause any ascertainable prejudice. Prejudice depends on whether the amendment would 1) require the opposing party to expend significant additional resources to conduct discovery and prepare for trial; 2) significantly delay the resolution of the dispute; or 3) prevent the plaintiff from bringing a timely action in another jurisdiction. Discovery taken in case provided clear notice that Plaintiff had some sort of fraud action against Defendant and allegations of fraud were largely based on same allegations as initial complaint, precluding any finding of prejudice and amendment would not require expenditure of significant additional resources as Defendant had already engaged in discovery relevant to fraud claim.
- (4907) *Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894 (M.D. Tn. 2009) - After responsive pleadings are filed, a party may amend its complaint only with leave of court or with written consent of opposing counsel. Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading should be freely given "when justice so requires." Leave should be given unless there is a showing of undue delay, bad faith or dilatory motive on the part of the moving party, undue prejudice to the non-moving party, or futility of the proposed amendment. Motion for Leave to Amend granted where Defendant failed to demonstrate that amendments would be "futile" or that claim would be subject to dismissal if asserted in the Amended Complaint.
- (4908) *Winget v. JP Morgan Chase Bank*, 537 F.3d 565 (6th Cir. 2008) – District Court is not required to grant leave to amend the complaint where the Court reaches the legal conclusion that the proposed amendment would not survive a motion to dismiss. Further, District Court is not required to grant leave to amend where the party has failed to seek leave to file an amendment. District Court is not required to grant leave to amend where plaintiff failed to file amended complaint until after District Court entered final judgment dismissing the case.
- (4909) *Lewis v. McClatchey*, 2009 WL 1607773 (S.D. Ohio 2009) – Although Motion for Leave to Amend should be freely granted when justice requires, Court may deny leave to amend in cases of bad faith, dilatory motive, or undue prejudice to opposing party. Motion for Leave to Amend denied where motion was not made until three months after case was dismissed; new claims bore no connection to claims asserted originally; proposed amendment involved claims against two entities that were not parties to the suit; and proposed amendment failed to state claim upon which relief could be granted rendering proposed amendment futile.

12.92 Amendment to Pleadings – Leave to Amend Answer

- (4910) *Sweet v. Blue Skies Energy, LLC*, Case No 14-3156 (Bankr. E.D. Mi. 2015) – Whether party will be granted leave to amend answer to add affirmative defenses and counterclaims depends on whether moving party has complied with court's scheduling order; and whether moving party has acted diligently and potential prejudice to non-moving party. Although motion to amend was filed after date specified in scheduling order, court would modify scheduling order to allow amendment to be filed where evidence did not indicate any lack of diligence and plaintiff could not demonstrate prejudice. Issues to be raised in counterclaim were initially raised indirectly in affirmative defenses and in motion for summary judgment. Defendant moved diligently to amend once court announced ruling on motion for summary judgment where issue was actually argued. Plaintiff could not demonstrate prejudice where underlying facts were raised in connection with prior affirmative defenses and amendment would not produce inordinate delay or expenditure of time, money or resources by plaintiff or any loss of any services previously performed.
- (4911) *River City Resort, Inc. v. Frankenberg*, 2014 WL 3385234 (Bankr. E.D. Tn. 2014) – Defendant permitted to amend answer to assert additional defenses or assert counterclaim where defendant has not unduly delayed in seeking to amend pleadings and amendment would not be futile as matter of law. Courts should freely grant leave to amend when justice requires. Debtor would be permitted to amend where debtor sought to amend very shortly after obtaining standing to file counterclaim; issues in counterclaim were same issues as were being litigated in state court proceeding prior to commencement of bankruptcy case; and there was no assertion of bad faith or repeated failure to cure deficiencies in prior amendments. There was no evidence of prejudice where matter was not set for imminent trial and parties agreed that additional discovery was necessary regardless of whether counterclaim was permitted.
- (4912) *DAGS II, LLC v. Huntington National Bank*, 2013 WL 6884242 (W.D. Mi. 2013) – An answer to a complaint can be amended within 21 days after service of the answer; or after 21 days with leave of court. Court should grant leave freely when justice requires. Court can deny leave where there exists undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by

amendments previously allowed, undue prejudice to opposing party, futility of the amendment, or other grounds as determined by the trial court. Defendant would be allowed to amend answer to change response to specific paragraph in complaint from admission to denial. Plaintiff could not demonstrate prejudice where admission was directly contradicted by denial in same answer. In response to all discovery requests, defendant responded consistent with defendant's position that the allegation was denied. Proposed amendment was at early stage of litigation and would not cause any additional discovery expense.

12.93 Amendments to Pleadings – Relation Back

- (4913) *Bowden v. American Home Mortgage Servicing, Inc.*, 2013 WL 195672 (6th Cir. 2013) – Proposed amended complaint would not relate back, and so would be untimely, where plaintiff had previously filed an original and two amended complaints and yet never raised matter that plaintiff now sought to assert.
- (4914) *Render v. Render*, Adv. No. 11-3414 (Bankr. E.D. Mi. 2012) – Leave to Amend should be liberally granted. Complaint will relate back if the amended claim arises out of the same conduct, transaction or occurrence as the original complaint. Amended complaint can add new legal theory as long as it arises out of the same transaction or occurrence. Allegations in amended complaint to object to discharge were identical to actions alleged in original complaint, which supported conclusion that amended complaint related back.
- (4915) *Adamovic v. Lazarevic*, 2012 WL 3778946 (Bankr. E.D. Tn. 2012) – Amended complaint relates back to date of prior pleading if the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out, or attempted to be set out, in the original pleading. Amendment related back where original complaint sought to deny discharge under Sections 272(a)(2), (3), (4), (5), (6) and (7) and to except debt from discharge under Section 523(a)(4). Amendment that sought to add counts under Section 523(a)(2) and (6) were sufficiently related to the prior claims to relate back. Opposing party would not have been surprised by amendment as new claims were all based on same facts as original complaint and will require similar evidence to support the claims; and there was no evidence of undue delay.
- (4916) *Richardson v. Checker Acquisition Corporation*, 2012 WL 87041 (Bankr. W.D. Mi. 2012) – Court would not rule in whether amended complaint dates back in advance of any motion filed by defendant to dismiss based on statute of limitations. If Defendant seeks dismissal, then court will determine whether amended complaint states new actions or are causes of action that are related to the previously alleged causes of action.
- (4917) *Krupski v. Costa*, 130 S. Ct. 2485 (2010) – Rule 15(c) has three requirements before an amended complaint, including against a newly named defendant, can relate back to the original complaint. First, the claims must have arisen out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; second, the newly added defendant must have received such notice of the action that it will be not be prejudiced in defending on the merits; and third, the newly added defendant knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.
- (4918) *DeGirolamo v. Quarry Golf Club, LLC*, 2011 WL 4372699 (Bankr. N.D. Ohio 2011) – Proposed Amended Complaint demonstrated sufficient relationship to original Complaint for purposes of relating back where Amended Complaint was based on web of interrelated transactions and each transaction involved the same players and property. Proposed added party knew or should have known that Trustee was asserting claims based on transactions in which proposed party was involved and that but for information not originally known by the Trustee the party would have been named in the first instance. Party to be added failed to demonstrate any prejudice beyond conclusory statement that the party would be prejudiced. Party was represented by same attorney and had same business address and same managing member as other parties already in case.
- (4919) *Appalachian Oil Co., Inc. v. Kentucky Lottery Corp.*, 2011 WL 3742045 (Bankr. E.D. Tn. 2011) – Leave to amend cannot be granted if statute of limitations has expired after filing of initial complaint, unless amendment relates back to date of original complaint. To relate back, amendment must assert claim or defense that arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading. If the facts in the original complaint put the defendant on notice that it could be called to answer for the allegations in the amended complaint, the amended complaint will date back. Original complaint alleged preferential transfer when Debtor allegedly paid same invoice twice. Amended complaint to include set off based on double payment was within same facts as Defendant already knew Debtor complained of double payment under different legal theory. However, proposed amendment to add cause of action for post-petition transfers would not date back and nothing in the original complaint related to any transaction or transfer that occurred post-petition. As original complaint was based exclusively on pre-petition facts and allegations, amended complaint that would not date back to the extent it now sought to recover post-petition transfers.
- (4920) *In re Fries*, 2010 WL 3700205 (Bankr. W.D. Ky. 2010) – Creditor not permitted, after deadline for filing non-dischargeability actions, to amend otherwise timely filed Complaint under Section 727 to add non-dischargeability count under Section 523(a)(4), even if Section 523(a)(4) action was premised on same set of facts. Action under Section 523 has gross differences as to the type, measure and burden of proof, as well as differing legal effects on the debtors should judgment be entered in favor of the plaintiff.
- (4921) *Jahn v. Bedford Consulting Group, LLC*, 2010 WL 3632147 (Bankr. E.D. Tn. 2010) – Amended Complaint will not relate back to original filing where amended complaint adds new parties not named in complaint originally filed. Complaint that corrects misidentification of party will relate back, but not one that adds entirely new party.
- (4922) *Stevenson v. Daudlin*, Case No. 10-5075 (Bankr. E.D. Mi. 2010) – Amended pleading dates back where the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. Amended complaint would not date back and would be untimely where original complaint sought to deny discharge under Section 727(a)(4)(D) for failure to produce documents, while amended complaint would seek to deny discharge based on alleged false statements

and omissions under Section 727(a)(4)(A) that were discovered once documents requested were provided. Causes of action had different bases and relied on proof of different allegations.

- (4923) *Dottore v. National Staffing Services, LLC*, 2010 WL 2891705 (N.D. Ohio 2010) – Amended Complaint that arises out of same conduct, transaction or occurrence set forth or attempted to be set forth in original pleading dates back to filing of pleading being amended. Where complaint was timely filed within Statute of Limitations, amended complaint filed after Statute expired would date back and be deemed timely where amendment arose out of the same conduct, transaction and occurrence set forth in the original complaint and contained much of the same language as the original claim.
- (4924) *Computer Business World v. Jamil*, Adv. No. 09-4419 (Bankr. E.D. Mi. 2009) - Adversary Complaint filed on the last day to file contained incorrect name of Defendant in style but accurately referred to Defendant throughout text. Amended Complaint filed three days later to correct error in Defendant's name. Amended Complaint will relate back if (1) the claim asserted in the amended pleading arises out of the same conduct, transaction or occurrence set forth in the original pleading; (2) the party brought in by the amendment received notice of the institution of the action so the party is not prejudiced in maintaining a defense on the merits; (3) the party brought in by the amendment knew or should have known that, but for a mistake concerning the identity of the proper party the action would have been brought against the party; and (4) elements (2) and (3) must occur within the period provided by Rule 4(m) for service of the summons and complaint (within 120 days from the date of the filing of the complaint). Claims asserted in Complaint and Amended Complaint were identical and Defendant received electronic notice of the Adversary Proceeding when initially filed and had been named as a Defendant throughout. Defendant should have known that action would have been brought against him but for clerical error. Amended Complaint related back.

12.94 Scheduling Order

- (4925) *Fick v. Fick*, 2015 WL 5145114 (Bankr. N.D. Ohio 2015) – Motion to extend deadlines set out in scheduling order are governed by Rule 7016(b)(4), which incorporates Federal Rule 16. Party seeking to extend deadlines to permit additional discovery requires consideration of (1) when the moving party learned of the issue that is the subject of discovery; (2) how the discovery would affect the ruling below; (3) the length of the discovery period; (4) whether the moving party was dilatory; and (5) whether the adverse party was responsive to discovery requests. Proceeding had been pending for less than one year and discovery period covered only 5 months. Defendant did not wait until last minute to pursue discovery and party from whom defendant sought discovery engaged in dilatory tactics including rejecting the discovery request as “overly broad” requiring defendant to alter and resubmit request. Although there was no indication of bad faith or any pattern of delay by plaintiff, extension of discovery cutoff was warranted. Court extended deadline for completion of discovery.
- (4926) *Norris v. First Federal Savings & Loan of Lorain*, 2012 WL 1565602 (Bankr. N.D. Ohio 2012) – Rule 26 requires that party must provide a computation of damages claimed by the disclosing party. Plaintiff failed to make a sufficient disclosure where complaint sought \$5,000 in damages and supplemental discovery responses indicated damages of \$4,500 but failed to include the computation of those damages as required by Rule 26.
- (4927) *Lawyers Title Insurance Company v. McKenzie*, Adv. No. 08-4641 (Bankr. E.D. Mi. 2009) - Court refused to approve Parties Stipulation to Modify Scheduling Order to extend time to file dispositive motions and to adjourn Final Pretrial and Trial dates. Parties seeking to modify Scheduling Order must demonstrate good cause. Agreement of the parties, without more, does not constitute "cause".

12.95 Attorney Fees as Element of Recovery

- (4928) *Sharma v. Salcido*, Case No. 12-1302 (9th Cir. BAP 2013) – Court erred in awarding attorney fees in action under Section 523(a)(2). In general, parties to litigation are responsible for payment of their own fees unless attorney fee awards are authorized by contract or statute. Bankruptcy code itself does not afford general right to recover attorney fees. Bankruptcy court cannot award attorney fees unless creditors would be entitled to attorney fees had the action been concluded in state court without any bankruptcy intervention. If attorney fees are awarded in Section 523 action, that award is also non-dischargeable, but that standing alone does not support award of fees in first instance. Attorney fee provision that authorized award in any action to enforce or interpret agreement did not encompass fees for non-dischargeability action based on fraudulent inducement to enter into that agreement or any alleged fraud that led up to execution of agreement.
- (4929) *Antioch Company Litigation Trust v. Morgan*, 2011 WL 1670952 (Bankr. S.D. Ohio 2011) – Plaintiff's claim for attorney fees from defendant must be plead as a separate count in the complaint and not as an adjunct to another substantive count. Court for fees must be plead with specificity and must, at a minimum, plead the legal and factual basis for an award of attorney fees.

12.96 Offer of Judgment

- (4930) *Cook v. Franklin Credit Management Corporation*, 2015 WL 1756815 (Bankr. M.D. Tn. 2015) – Where defendant in adversary proceeding makes offer of judgment that plaintiff declines, if plaintiff later recovers amount less than offer, defendant can recover attorney fees and costs incurred after date of offer under Rule 68 and Bankruptcy Rule 7068. Judgment included any amounts awarded for attorney fees by plaintiff. Thus, defendant's offer, which was greater than principal amount recovered, was less than total judgment amount once attorney fees were awarded, precluding award of attorney fees to defendant. Further, court is not obligated to award attorney fees even if defendant prevails where record indicates that offer was not intended to propose settlement of litigation, as amount offered was far less than what had already been incurred by debtor in prosecuting adversary proceeding and defendant escalated litigation costs by chronically failing to comply with discovery requests and by raising same issues numerous times rather than comply with agreed order previously entered.

M. Preemption

12.97 Conflict with State Law

- (4931) *In re Bratt*, 2015 WL 894472 (Bankr. M.D. Tn. 2015) – State law that has purpose or effect of interfering with effectiveness of federal statute is invalid as unconstitutional. State statute that attempted to define post-petition penalties for unpaid taxes a “interest” violated Section 506 and Section 511 as state was attempting to collect penalties that are not allowed under Section 506.

12.98 Bankruptcy Preemption of Non-Bankruptcy Law Causes of Action

- (4932) *Kline v. Mortgage Electronic Security Systems*, 2010 WL 3796584 (Bankr. S.D. Ohio 2010) – Bankruptcy Code preempts state law as to events and actions occurring in bankruptcy proceeding. Debtor not entitled to maintain non-bankruptcy causes of action based on Federal Truth In Lending Act, Ohio Consumer Protection Statutes or common law breach of contract and unjust enrichment based on proof of claim filed that asserts amounts due for bankruptcy fees and accrued late charges. Bankruptcy Code is complex set of laws necessary to regulate the rights of debtors and creditors that protects the bankruptcy process from even slight incursions and disruptions that would result from non-bankruptcy causes of action.

N. Financial Institutions Reform Recovery and Enforcement Act (FIRREA)

12.99 Generally

- (4933) *Shirk v. JPMorgan Chase Bank, N.A.*, _____ (Bankr. S.D. Ohio 2010) – Creditors of financial institution that has been placed in receivership by FDIC are required to comply with administrative claims process of FIRREA. Creditor not permitted to assert claims against the bank that assumed the failed bank’s assets as result of FDIC receivership. Negligence, misrepresentation, and Truth in Lending Act (TILA) claims which mortgage borrowers sought to assert against successor-in-interest to original mortgage lender, which had acquired their loan from the FDIC after original lender was placed in FDIC receivership, were subject to jurisdictional bar of FIRREA, and could not be pursued in federal court absent exhaustion of borrowers’ administrative remedies; claims were all based upon acts or omissions of original mortgage lender.
- (4934) *Jahn v. Bedford Consulting Group, LLC.*, 2010 WL 3632147 (Bankr. E.D. Tn. 2010) – Trustee could not institute action to recover fraudulent transfers against Federally Insured Depository Institution after institution had been taken over by FDIC as receiver. Pursuant to provisions of Financial Institutions Reform, Recovery and Enforcement Act of 1999, exclusive jurisdiction of all claims against failed institution must be brought through FIRREA administrative proceedings.

O. Dismissal

12.100 Failure to Prosecute

- (4935) *HALO Wireless, Inc. v. Tennessee Regulatory Authority*, 2012 WL 5248858 (M.D. Tn. 2012) – Cause of action commenced by debtor prior to commencement of Chapter 7 case dismissed for failure to prosecute where Chapter 7 Trustee indicated that Debtor would not pursue cause of action. Court issued order allowing any party 14 days to file response indicating why case should not be dismissed, failing which the case would be dismissed with prejudice.
- (4936) *Kohut v. Lampos*, Case No. 10-6206 (Bankr. E.D. Mi. 2010) – Motion for Extension of Time to submit Order dismissing adversary case denied where failure to timely submit proposed Order would result in Court’s entry of Order of Dismissal without prejudice. If the parties believe that further action is needed to approve a settlement agreement, the parties can request reopening of the case for that purpose.
- (4937) *M-Tech Associates, LLC v. General Motors Company*, Case No. 09-6794 (Bankr. E.D. Mi. 2010) – Adversary Proceeding dismissed where parties advised court that matter had been settled but failed to submit a proposed Order embodying the resolution.
- (4938) *Taj Graphic Enterprises, LLC v. LWD Creditors Committee*, Case No. 09-6952 (Bankr. E.D. Mi. 2010) – Adversary proceeding dismissed where Plaintiff failed to serve “Order Confirming Action Taken at October 25, 2010, Status Conference” as required.
- (4939) *Lee Wholesale Supply, Inc. v. Strunk*, Case No. 09-7216 (Bankr. E.D. Mi. 2010) – Adversary Proceeding dismissed where Plaintiff failed to file an Application for Default Judgment within 14 days of Clerk’s entry of Default.
- (4940) *Morabito v. Cothorn*, Case No. 10-6046 (Bankr. E.D. Mi. 2010) – Adversary Proceeding dismissed where Plaintiff failed to file an adversary cover sheet, failed to issue a summons, failed to serve a summons or complaint, and failed to pay adversary filing fee within time permitted by Court.
- (4941) *Merchants Credit Resource v. Yesayan*, Case No. 10-5268 (Bankr. E.D. Mi. 2010) - Adversary proceeding dismissed with prejudice where Plaintiff failed to file amended complaint within time permitted by Court.
- (4942) *Dakmak v. Hutchinson*, Case No. 09-6941 (Bankr. E.D. Mi. 2010) – Adversary proceeding dismissed by Court sua sponte where parties failed to appear for final pretrial conference and failed to submit Joint Final Pretrial Order.
- (4943) *Taunt v. Chebbani*, Adv. No. 08-5158 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed by Court sua sponte where parties failed to appear for final pretrial conference and failed to submit Joint Final Pretrial Order.
- (4944) *Americredit Financial Services, Inc. v. Burgess*, Adv. No. 09-4549 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed by Court sua sponte where parties failed to appear for final pretrial conference and failed to submit Joint Final Pretrial Order.

12.101 Voluntary Dismissal

- (4945) *Cogent Solutions Group, LLC v. Brown*, 2013 WL 6116052 (S.D. Ohio 2013) – Rule 41 permits plaintiff to request voluntary dismissal of action without prejudice. Whether to grant voluntary dismissal is within sound discretion of trial court, and court can deny request where defendant would suffer plain legal prejudice. Whether dismissal would result in plain legal prejudice demands on defendant's effort and expense in preparing for trial; excessive delays or lack of diligence by plaintiff in prosecuting action; insufficiencies in plaintiff's explanation of need for dismissal; and whether case is pending summary judgment by defendant. If granted, court can condition dismissal on payment of costs and attorney fees incurred by defendant where plaintiff did not act in good faith in filing or prosecuting action; defendant incurred substantial costs where action was at advanced state of proceedings; plaintiff unduly delayed in requesting dismissal; and where work could not be used in any subsequently filed action.
- (4946) *Reyes v. Burer*, Case No. 11-8070 (6th Cir. BAP 2012) - Bankruptcy Court improperly dismissed adversary complaint with prejudice where plaintiff filed notice of voluntary dismissal without prejudice. Rule 41 of the Federal Rules of Civil Procedure vests voluntary dismissals within the sound discretion of the trial court. However, adversary proceeding is not to be dismissed with prejudice where plaintiff did not request dismissal with prejudice and court did not give plaintiff notice of intention to dismiss with prejudice. Plaintiff is entitled to opportunity to be heard in opposition to dismissal with prejudice and must be given opportunity to withdraw request for voluntary dismissal and proceed with litigation.
- (4947) *Toder-Stokes v. Wells Fargo Bank*, Adv. No. 09-4506 (Bankr. E.D. Mi. 2009) - Debtor's "Notice of Withdrawal of Adversary Complaint and Summons" filed in main bankruptcy case treated as Notice of Dismissal of adversary case. Adversary Complaint in this case was duplicate of already pending adversary proceeding.

12.102 Voluntary Dismissal Without Prejudice

- (4948) *Cory v. Bennett*, 2015 WL 5105178 (W.D. Ky. 2015) – Federal Rule 41 allows a court to dismiss a case on request of the plaintiff, with the dismissal being without prejudice to plaintiff re-filing litigation at later date unless otherwise ordered by the court. Court's decision to dismiss case is reviewed on abuse of discretion standard. Rule 41 is intended to protect non-moving party from unfair treatment. Attorney fees can be awarded if necessary to compensate defendant for unnecessary expenses that litigation caused. Whether dismissal would prejudice defendant depends on defendant's effort and expense of preparation for trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and whether a motion for summary judgment has been filed by the defendant. Moving party demonstrated that (i) little time or expense had been expended in preparation for trial, as the majority of time in the case had been spent on settlement and the appeal of that settlement; (ii) they timely prosecuted the action; (iii) they offered adequate reason for their request; and (iv) Cory had filed no motion for summary judgment at the time of their dismissal motion. Dismissal would not unfairly prejudice defendant and Court's dismissal without prejudice did not meet standard of "plain legal prejudice" sufficient to overturn lower court's exercise of discretion. Court also has discretion to award attorney fees but is not required to do so. Non-moving party did not assert claim to attorney fees in opposing dismissal without prejudice and so court did not abuse discretion in not awarding fees as a condition of dismissal.

12.103 Lack of Subject Matter Jurisdiction

- (4949) *Superior Materials, Inc. v. Mehlhose*, Case No. 10-5811 (Bankr. E.D. Mi. 2010) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).
- (4950) *J.L. Gislason, II, Trust v. Hardcastle-Melhouse*, Case No. 10-5797 (Bankr. E.D. Mi. 2010) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).
- (4951) *Dye-Shelman v. Wells Fargo Bank*, Adv. No. 08-4902 (Bankr. E.D. Mi. 2008) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).
- (4952) *Huffman v. Chase Home Finance, LLC*, Adv. No. 09-4155 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).
- (4953) *Nathan v. Hendricks*, Adv. No. 08-4273 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).
- (4954) *Kyewski v. Countrywide Home Loans*, Adv. No. 09-4292 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).
- (4955) *Daniel v. LaSalle Bank*, Adv. No. 08-5276 (Bankr. E.D. Mi. 2008) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).
- (4956) *Huston v. First Mariner Bank*, Adv. No. 09-4178 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter

jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 157(b)(1).

12.104 Dismissal as Moot

- (4957) *Ellman v. Griebel*, Case No. 12-5534 (Bankr. E.D. Mi. 2015) – Dismissal of main bankruptcy case renders adversary proceeding moot. Court loses subject matter jurisdiction as there is no longer any pending case under Title 11, such that adversary proceeding ins no longer proceeding “arising under title 11, or arising or related to” a case under Title 11.
- (4958) *Hadley v. Chrysler Group, LLC*, 2014 WL 988962 (E.D. Mi. 2014) – Litigation between Purchasers of vehicles and manufacturer of vehicles to determine whether a safety defect existed in the vehicles rendered moot when manufacturer issued recall notices admitting defect. Recall notice issued prior to commencement of litigation, such that there was never any “live” dispute over which court could exercise jurisdiction. Defendant had already conducted repairs and there were no allegations that repairs were insufficient to cure the defect. Complaint that repairs “should have been done quicker” is not sufficient to support jurisdiction where repairs have been done and plaintiffs could not point to any damages resulting from repairs.
- (4959) *TCF Bank v. Sammut*, Adv. No. 12-4649 (Bankr. E.D. Mi. 2012) – Section 523 action dismissed as moot once discharge denied under Section 727.
- (4960) *Savage v. Sammut*, Adv. No. 12-4653 (Bankr. E.D. Mi. 2012) – Section 523 action dismissed as moot once discharge denied under Section 727.
- (4961) *Stevenson v. Wicker*, Adv. No. 12-4459 (Bankr. E.D. Mi. 2012) – Adversary proceeding rendered moot by entry of Order denying debtor a discharge. Case dismissed.
- (4962) *Aerostar Castings & Molds, LLC v. Stewart*, Adv. No. 12-4593 (Bankr. E.D. Mi. 2012) – Adversary proceeding by Plaintiff against debtors dismissed as moot where Court had already entered judgment denying debtors a discharge.
- (4963) *Humphrey v. Morgan*, 2012 WL 1390246 (Bankr. E.D. Tn. 2012) – Action to except debt from discharge under Section 523 rendered moot when debtor waived a discharge. Adversary proceeding dismissed.
- (4964) *Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give meaningful relief, then the case is moot and must be dismissed. Voluntary cessation of conduct does not render moot action for injunctive relief unless events make it clear that conduct would never reoccur. Voluntary cessation, even if permanent, does not render moot action for damages or contempt for past conduct.
- (4965) *Braun v. Citizens Bank*, Case No. 10-7116 (Bankr. E.D. Mi. 2011) – Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.
- (4966) *Champney v. Comerica Bank*, Case No. 10-6841 (Bankr. E.D. Mi. 2010) - Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.
- (4967) *Stewart v. Citifinancial, Inc.*, Case No. 10-6713 (Bankr. E.D. Mi. 2010) - Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.
- (4968) *Pendley v. Regional Medical Center*, Case No. 10-4033 (Bankr. W.D. Ky. 2010) - Adversary proceeding to recover money garnished during preference period dismissed as moot where creditor voluntarily returned money to debtor.
- (4969) *Superior Materials, LLC v. Mehlhose*, Case No. 09-6904 (Bankr. E.D. Mi. 2010) – Adversary Proceeding to declare debts non-dischargeable under section 523 dismissed as moot where court, in separate adversary proceeding, entered default judgment denying debtor a discharge under section 727.
- (4970) *Carmody v. Citimortgage*, Case No. 09-6611 (Bankr. E.D. Mi. 2010) – Adversary Proceeding to strip second mortgage rendered moot by Debtor’s stated intention to convert proceedings to Chapter 7. Although Debtor had not yet filed a Notice of Conversion, Debtor failed to appear for hearing on Motion for Summary Judgment based on stated intention to convert where Debtor had absolute right to convert.
- (4971) *Stokes v. Wells Fargo Bank, N.A.*, Adv. Case no 09-4483 (Bankr. E.D. Mi. 2009) - Adversary proceeding to determine extent of second mortgage lien rendered moot upon entry of a stipulated order determining the extent of the second mortgage.
- (4972) *Scott v. Banks*, Adv. No. 09-4272 (Bankr. E.D. Mi. 2009) - Adversary proceeding to determine extent of second mortgage lien rendered moot upon entry of a stipulated order determining the extent of the second mortgage.
- (4973) *Patterson v. Homecomings Financial, LLC*, Adv. No. 09-4466 (Bankr. E.D. Mi. 2009) - Adversary proceeding to determine extent of second mortgage lien rendered moot upon entry of a stipulated order declaring that upon entry of a discharge the second mortgage would be extinguished, terminated and discharged.

12.105 Dismissal by Court *Sua Sponte*

- (4974) *In re Hann*, 2009 WL 2872813 (E.D. Mi. 2009) - Court has inherent authority to dismiss a complaint or appeal sua sponte for lack of subject matter jurisdiction; or where the allegations of the complaint are totally implausible, attenuated, insubstantial, frivolous, or devoid of merit. Debtor's adversary proceeding constituted a convoluted but calculated attempt to circumvent the State of Michigan civil proceedings related to Debtors conviction and incarceration. Debtor's complaint that the State failed to "turnover" items which had been seized under the Michigan Forfeiture Act lacked any basis in law.

12.106 Bar to Filing or Re-filing

- (4975) *Yan Sui v. Marshack*, 2014 WL 5840246 (9th Cir. 2014) – "Pre-filing Orders" that require court permission before seeking access to courts should be rarely used and only if courts ensure that orders do not impermissibly trample a party's due process rights. However, federal courts can impose a bar to filing to regulate the activities of abusive litigants by imposing carefully tailored restrictions appropriate under the circumstances. Court must first make factual substantive findings as to the frivolous or harassing nature of the litigant's actions including both the number and content of the claims, and that claims have been meritless. Order that prohibited litigant from commencing adversary proceedings unless court found that initiating documents were "meritorious" exceeded scope of permitted bar order as bankruptcy court cannot properly determine merit in all cases just from the initial document. Order also failed to contain required findings of fact where order referenced "tremendous amount to litigation" and that plaintiffs made same arguments "over and over" and "lost on appeal at every level" but failed to identify any facts to support finding that party's actions were frivolous or harassing. Party did not initiate proceedings but exercised due process rights by opposing motions filed in bankruptcy action, seeking reconsideration of adverse orders, and initiating appeals and fact that party may have been unsuccessful does not, alone, give rise to necessary factual findings to support bar order.

12.107 Failure to Pay Filing Fee

- (4976) *In re Logan*, 2012 WL 3628771 (Bankr. N.D. Ohio 2012) – Miscellaneous fee schedule of Bankruptcy Court does not provide express authority to waive filing fee in action by creditor to challenge dischargeability of debt. However, 28 USC Section 1930(f)(3) allows court to waive fees in accordance with Judicial Conference policy. Although no parameters exist for exercise of discretion, Court concluded that based on creditor's assertion of indigent status was sufficient to waive filing fee in this case.
- (4977) *Ricci v. Grier*, Adv. Case No. 10-4727 (Bankr. E.D. Mi. 2010) – Adversary Proceeding dismissed where Plaintiff failed to pay filing fee within deadline established by Order of Court.
- (4978) *In re Rutherford*, 427 BR 656 (Bankr. S.D. Ohio 2010) – Court would deem complaint timely filed although Complaint was filed in main case and not as separate adversary and creditor failed to pay the requisite filing fee. Creditor's attorney was obviously unfamiliar with administrative procedures for electronic case filing (ECF) in the Southern District of Ohio would be afforded opportunity to re-docket non-dischargeability complaint in separate adversary proceeding and to pay required filing fee, so that creditor's non-dischargeability claims could be decided on merits.

P. Default

12.108 Generally

- (4979) *Sharma v. Salcido*, Case No. 12-1302 (9th Cir. BAP 2013) – Court can issue default final judgment declaring debt to be non-dischargeable under Section 523(a)(2) where well pleaded allegations of complaint are sufficient to meet all elements of cause of action. Default entered by court established truth of all well pled allegations in complaint and court needed only to determine whether those factual allegations met requirements of Section 523. Court was not required to hold separate hearing on damages where damages had already been liquidated in agreed final judgment in state court, as Federal court would be required to give state court judgment preclusive effect.
- (4980) *Langland v. Cadwallader*, 2013 WL 1737360 (Bankr. W.D. Mi. 2013) – Complaint to liquidate a contract claim held by debtor prior to commencement of bankruptcy and based entirely on state law is not core proceeding and Bankruptcy Court lacks jurisdiction to enter final judgment. Complaint sought to recover on promissory notes between debtor and defendants that substantially preceded bankruptcy proceeding. Default by defendants in failing to respond to complaint does not constitute consent by defendants to entry of judgment. Court would enter report and recommendations on Plaintiff's Motion for Default Judgment for review by District Court.
- (4981) *Bennett v. Holley*, 2013 WL 791549 (E.D. Mi. 2013) – Bankruptcy Court properly entered default against defendant who failed to participate in preparation of pre-trial statement, failed to appear for the pre-trial conference, and failed to file any objection to amount of damages itemized by Plaintiff.
- (4982) *French v. Johnson Law Group*, 2012 WL 3292854 (Bankr. N.D. Ohio 2012) – Entry of clerk's default for failure of defendant to respond to the complaint does not automatically entitle plaintiff to judgment. Court must independently review well pleaded allegations to determine if complaint demonstrates all elements of the relief. Court has discretion to conduct a hearing to determine the truth of any allegation and to determine damages.
- (4983) *IRS v. Hayes*, 2011 WL 2490945 (E.D. Mi. 2011) – Final Default Judgment must not differ in kind from, or exceed amount, demanded in pleadings. Government's complaint alleged outstanding tax debt of \$40,970.30. Actual tax debt was \$38,663.18, which was amount requested in Motion for Default Judgment. Discrepancy in amount did not preclude entry of default judgment, as amount requested did not exceed amount listed in complaint and was not different in kind from the debt described in the pleadings. However, actual amount remained unliquidated where IRS was also pursuing recovery from co-obligor. Until that action was completed and amounts recovered credited to debtor's account, exact calculation of liability was not possible. Motion for Default Judgment denied without prejudice to IRS

renewing motion once liability is liquidated.

- (4984) *Perkons v. American Acceptance, LLC*, 2010 WL 4922916 (D. Ariz. 2010) – Granting default judgment is within the Court's sound discretion. In exercising that discretion, the Court may consider such factors as (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action[,] (5) the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. Default judgment warranted where Defendant failed to file Answer to complaint and Defendant discharge attorney but failed to retain new counsel in time permitted by Court. Plaintiff would suffer prejudice if default judgment was not entered because she would be without recourse for recovery. Complaint adequately alleged several violations of the FDCPA and the defendant has not asserted that the complaint fails to state a FDCPA claim. The sum of money at stake is not completely disproportionate or inappropriate to the allegations made in the complaint. Court would construe all well-pled allegations in favor of plaintiff and defendant made no attempt to challenge the allegations in the complaint related to damages. Defendant's failure to file an answer was not due to excusable neglect given that the defendant, either through prior counsel or through notices sent directly to it by the plaintiff and the Court, has had notice of everything filed in this action, and the defendant's default has made it impossible to render a decision on the merits.
- (4985) *In re Couch*, Case No. 09-30805 (Bankr. E.D. Mi. 2010) – Creditor failed to amend Proof of Claim within the time permitted but did amend the claim prior to entry of an Order disallowing the claim. Defaults are generally disfavored and are reserved for rare occasions where no doubt exists that default is proper. Where doubt exists as to whether default should be granted or vacated, doubt should be resolved in favor of defaulting party. Court would not disallow claim by default where amended claim was filed, although untimely. Court did award Debtor attorney fees incurred as a result of Creditor's failure to timely amend.
- (4986) *Harmon Autoglass Intellectual Property, LLC v. Leiferman*, Case No. 10-6007 (8th Cir. 2010) – Bankruptcy Court correctly struck defendant's answer and entered default judgment in favor of plaintiff in non-dischargeability action. Federal Rule of Bankruptcy Procedure 7037, which incorporates Federal Rule of Civil Procedure 37, permits Court to enter sanctions for failure to obey an Order regarding discovery. Court should resort to sanction of dismissal only when the failure to comply with Court's Orders regarding discovery is due to willfulness, bad faith or fault of the non-responding party; and where non-compliance with Order is prejudicial to the other party. Defendant failed to cooperate in discovery for nearly one year while adversary was pending. Court repeatedly advised Defendant that lack of cooperation would lead to sanctions including striking pleadings and entry of default judgment. Notwithstanding multiple extensions of time to comply, Defendant never meaningfully complied with multiple court orders compelling discovery.

12.109 Jurisdiction

- (4987) *Salamy v. Compo*, 2015 WL 6434135 (Bankr. E.D. Mi. 2015) – Court must first determine whether court has jurisdiction before entering default, even where defendants failed to respond or to raise jurisdictional objection. Court lacked jurisdiction in action against two non-debtor entities where actions were based entirely on state law claims and did not arise in or under Code. Action was not related to bankruptcy where outcome could have no conceivable impact on bankruptcy estate. Action alleged that non-debtor LLC illegally kept commissions and referral fees amounting to conversion but other than fact that debtor was member of LLC, there was no nexus between causes of action and bankruptcy court. Plaintiff sought only money judgment against non-debtor and entry of judgment would have on effect on bankruptcy estate.

12.110 Entry – Discretion of Court

- (4988) *Merritt v. Layne*, 2014 WL 4723081 (Bankr. E.D. Ky. 2014) – Whether to enter judgment of default is vested in discretion of court and requires court to examine merits of claim before entering judgment. Default establishes well pled factual allegations of complaint but court must consider whether unchallenged facts support legitimate cause of action.
- (4989) *Smith v. Vista Hills Partners, LLC*, 2014 WL 1779377 (Bankr. S.D. Ohio 2014) – Court cannot enter default judgment where record shows that defendant was not properly served with complaint as required by Rule 7004. Court also will deny request for default judgment where well pled allegations of complaint fail to state claim on which relief can be granted. Adversary complaint that sought to strip second mortgage on theory that first mortgage had foreclosed out second mortgage failed to state cause of action where complaint indicated that court had entered foreclosure judgment but no sale had occurred. Liens are extinguished only when foreclosure sale is complete and confirmed. Until that point, the second mortgage holder has an interest in the property subject to the eventual foreclosure sale.
- (4990) *Sharma v. Salcido*, Case No. 12-1302 (9th Cir. BAP 2013) – In considering whether to enter default as sanction for failure of a defendant to participate in litigation, court must consider possibility of prejudice to plaintiff; merits of plaintiff's claim; sufficiency of complaint; sum of money at stake; possibility of a dispute concerning material facts; whether default was due to excusable neglect; and strong policy favoring decision on merits. Defendant's discovery misconduct already led to delays and increased costs and, but for default judgment, likely would have continued to prejudice plaintiff by additional delays and expenses. Complaint sufficiently stated cause of action under Section 523(a)(2) such that well pled allegations, taken as true, were sufficient to support entry of final judgment as a matter of law. Amount of money in controversy was significant as plaintiff was unemployed person in dire financial straits and debtor convinced plaintiff to hand over all of the debtors remaining assets. There was no genuine dispute as to material facts of underlying ponzi scheme. Defendant's failure to participate in discovery was not excusable neglect, and discovery abuses led to sanctions which ultimately led to entry of default. Policy favoring adjudication merits did not overcome other factors in this case.
- (4991) *World Savings Community Bank v. Skidmore*, 2011 WL 6254877 (Bankr. N.D. Ohio 2011) – Court has discretion to deny entry of default even where defendant has failed to timely respond to complaint. court should take into account: 1) possible prejudice to the plaintiff; 2) the

merits of the claims; 3) the sufficiency of the complaint; 4) the amount of money at stake; 5) possible disputed material facts; 6) whether the default was due to excusable neglect; and 7) the preference for decisions on the merits. Plaintiff failed to request entry of default until prompted by court and defendant promptly responded to that motion. None of the parties have attempted to move case forward. Defendant's failure to file answer attributable to miscommunication as there were two separate adversary proceedings filed arising out of same events, and defendant responded to one but was not aware of need to separately respond to second. Case presented serious questions of law and fact that needed court review and amount at stake was significant to both plaintiff and debtor. Defendant granted leave to file late answer.

12.111 Setting Aside

- (4992) *Blevins v. Herzig*, 2015 WL 6459994 (Bankr. W.D. Ky. 2015) – Standard for vacating clerk's default for failure to file responsive pleading is different than standard for vacating default judgment. Vacating clerk's default requires shoeing of "good cause" while vacating a final judgment uses standards set under Rule 60(b). Whether good cause exists depends on (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable conduct of the defendant led to the default. Additional litigation expense if default is vacated is not prejudice as plaintiff must assume when filing action that litigation will take time and cost money. Demonstration of meritorious defense is a very low standard, requiring little more than a hint of a suggestion of a good defense. Court must find only that there is a reason for a decision on the merits. Motion asserted that defendant had a defense and requested opportunity to assert that defense. While Motion did not itself state the precise defense, Motion was filed by experienced bankruptcy counsel who represented that a defense would be forthcoming sufficient to meet "meritorious defense" standard. Whether default is result of culpable conduct of debtor is far lower standard than "excusable neglect" under Rule 60(b) and requires only some demonstration that defendant is deserving of equitable relief. Although debtor should perhaps have known of time constraints, debtor was not litigation attorney and debtor did not unduly delay in retaining counsel to handle the case, only to have that attorney later deny the representation, following which debtor quickly obtained new counsel who immediately filed motion to vacate default. Entire process from filing complaint to Motion to Vacate was less than 2 months.
- (4993) *Rajala v. Taylor*, Case No. 13-020 (10th Cir. BAP 2013) – Motion to vacate judgment must be first presented in court that entered judgment. Where debtor never filed a motion to set aside judgment in bankruptcy court, appellate court lacked ability to set aside order. Setting aside judgment is in discretion of trial court and appellate court cannot conclude that trial court abused discretion when trial court was never presented with the issue in the first instance.
- (4994) *Bennett v. Holley*, 2013 WL 791549 (E.D. Mi. 2013) – Bankruptcy Court properly denied request to set aside default where defendant failed to participate in drafting pre-trial statement, failed to appear for pre-trial conference, and failed to file objection to Plaintiff's statement of damages. Defendant's assertion that the failure to respond was caused by dissolution of prior law firm and delays in migration of data from old computer to new computer, which resulted in defendant's calendar to fail to update to show deadlines did not constitute excusable neglect. All of the events that led up to entry of default occurred prior to dissolution of firm or any computer issues. Defendant was fully aware of any deadlines before any alleged shut down of firm and planned shutdown was not type of "clerical or office problem" that establishes excusable neglect.
- (4995) *S & D Investors, LLC v. Langley*, 2012 WL 3555484 (Bankr. W.D. Mi. 2012) – Rule 60 allows court to set aside default only for one of the 6 reasons listed. Court cannot vacate default where debtor demonstrates possible valid defense but does not demonstrate any basis under Rule 60. Defendant cannot be relieved of a default judgment unless the default was the product of mistake, inadvertence, surprise, or excusable neglect. It is only when the defendant can carry this burden that defendant will be permitted to demonstrate the existence of a meritorious defense and the absence of substantial prejudice to the plaintiff should relief be granted. Defendant failed to demonstrate excusable neglect under Rule 60(b)(1) where court advised defendant of need to move to set aside default early in case but defendant waited until one year after entry of the judgment to seek relief. Defendant failed to demonstrate newly discovered evidence for purposes of Rule 60(b)(2). Defendant knew of potential defense of identity theft before judgment was entered. Separate lawsuit by another person against alleged identity thief was not "newly discovered". Rule 60(b)(6) requires extraordinary or exceptional circumstances which are not addressed by any of the other subparagraphs. Meritorious defense coupled with plea for "interests of justice", standing alone, is not sufficient for Rule 60(b)(6).
- (4996) *Rogan v. Litton Loan Servicing, LP*, 2011 WL 4445651 (6th Cir. BAP 2011) – Court can vacate default under Rule 55 for good cause, and may set aside default judgment under Rule 60(b) for good cause. Adversary defendant who had transferred any and all interest in the underlying mortgage had valid excuse for not responding to adversary complaint seeking to set aside mortgage, and defendant did not assert any interest and assumed defendant had no reason to file an answer. Default was not result of culpable conduct of defendant and defendant had valid defense to action, and plaintiff could not demonstrate prejudice as plaintiff had no valid cause of action in the first instance.
- (4997) *Wheat v. Reiser*, 2011 WL 2559551 (S.D. Ohio 2011) – Bankruptcy Court properly entered default and denied motion to set default aside. Party did not attend scheduled pre-trial conferences, did not participate in Rule 26 conference, and did not respond to discovery requests, and failed to attend trial. To set aside default, party must demonstrate that default was not the product of the defaulted party's culpable conduct.
- (4998) *Kohut v. Rigney*, 2011 WL 2693662 (E.D. Mi. 2011) – Bankruptcy Court properly vacated default under Rule 60(b)(4). Court concluded that service of process was improper and failed to comply with due process. Default also properly vacated under Rule 60(b)(6) where case presents an "unusual and extreme circumstance where principles of equity mandate relief and undue hardship will result if relief is not granted." Trustee sought to seize Defendant's sole asset in which neither the Debtor nor the Trustee have a stake and as to which the Trustee lacked a viable legal theory.

- (4999) *PNC Mortgage v. Rhiel*, 2011 WL 1043949 (S.D. Ohio 2011) – Rule 7012 requires that if a complaint is duly served, a defendant to serve a responsive pleading within 30 days after issuance of summons. If summons is not properly served, defendant has no obligation to respond and court cannot enter default based on failure to respond. Service by mail on a corporation must be addressed to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. Complaint mailed to the attention of “Officer, Managing or General Agent” without specific name of person to be served did not comply with Rule 7004. Although defendant undisputedly received notice, that was not sufficient to cure defective service.
- (5000) *Kohut v. Rigney*, Case No. 07-6287 (Bankr. E.D. Mi. 2011) – Motion for Relief under Rule 60(b)(1-3) must be brought within one year of entry of default judgment. Judgment will be void under Rule 60(b)(4) only when the service of process was improper. Service by mail is controlled by Rule 7004(b) which permits service by mail to the individual’s dwelling house or usual place of abode. Service is not proper where mailed to an address that is not Defendant’s dwelling house or usual place of abode even if the address is the only address known to Plaintiff. Improper service results in a lack of due process as defendant was not properly notified of pendency or action, warranting setting aside default judgment. Defendant’s “last known address” is not the address for proper service under Rule 7004. Further, Plaintiff’s action was legally insufficient to sustain a judgment compelling relief from judgment under Rule 60(b)(6). Divorce judgment in 1998 conveyed ex-husband’s property interest in marital homestead to ex-wife. Husband delivered quit claim deed to ex-wife contemporaneously with divorce decree, but Wife failed to record that deed until January, 2007. Delay in recording deed did not leave ex-husband with property interest as that interest ceased to exist by virtue of the divorce decree. Husband’s bankruptcy filing within 90 days of date on which deed was recorded did not result in deed being fraudulent or preferential, because recording of deed did not operate to transfer title or divest debtor of interest in property.
- (5001) *Town & Country Co-op, Inc. v. Ward*, 2010 WL 4286211 (Bankr. N.D. Ohio 2010) - Rule 7055 incorporates Rule 55 and Rule 60(b) as basis for setting aside a default. Section 60(b)(1) allows relief for mistake, inadvertence, surprise or excusable neglect. Court must consider (1) prejudice to plaintiff if default vacated; (2) whether a meritorious defense exists; (3) whether the defendant should be held accountable for failure to respond to the complaint; and (4) whether the default is the result of culpable conduct by the plaintiff. Defendant advised plaintiff of desire to retain counsel only 4 days after complaint was served; defendant contacted counsel and thought counsel was going to represent him only to later learn the attorney declined; defendant contacted another attorney who could not undertake case because of a conflict; defendant filed motion for extension of time which contained detailed information on his attempts to obtain counsel and thought that motion had been granted based on a misunderstanding of a court order; and defendant did retain counsel who contacted Plaintiff’s counsel before Plaintiff filed Motion for Default. Entry of default was not caused by any culpable conduct of Defendant and was the result of mistake or excusable neglect. Defendant filed Motion to Vacate Default only 4 days after entry, and there were at least 4 months remaining before the case was set for trial, resulting in no prejudice to plaintiff. Defendant’s Motion demonstrated facially possible defenses based on lack of knowledge or intent and lack of and misrepresentations, raising clear issues of fact as to underlying causes of action.
- (5002) *J.L. Giselson, III, Trust v. Mehlhose*, Case No. 09-6907 (Bankr. E.D. Mi. 2010) – Debtor’s Motion to Reopen Case, etc., construed as Motion for Reconsideration of Default Judgment, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion failed to allege any facts from which the Court could determine whether there was any excusable neglect in the failure by Debtor or Debtor’s attorney in failing to file answer. Further, attorney’s failure to file answer is chargeable to Debtor and does not constitute excusable neglect for purposes of setting aside Default Judgment.
- (5003) *In re Miller*, Case No. 06-32425 (Bankr. S.D. Ohio 2010) - Contested matter must be served in the same manner as a summons under Rule 7004. When service is to be made on an “insured depository institution,” Rule 7004(h) requires service by certified mail addressed to an officer of the institution. Debtors’ post - confirmation plan modification was not properly served where certificate of service acknowledging service on FDIC insured depository institution at three somewhat different addresses, only by regular mail and without direct service on any individual, officer or specific department. Order Modifying Plan based on defective service vacated pursuant to Rule 60(b).
- (5004) *Duetsche Bank National Trust Company v. Rogan*, 2009 WL 3415462 (E.D. Ky. 2009) – Default Judgment must be vacated where record indicated that Defendant had never been served with the Complaint. Service of Complaint by mail must be addressed to the attention of an officer, managing or general agent, or to any other agent authorized by appointment or law to receive service of process. Creditor’s Proof of Claim which listed “Bankruptcy Department” as agent for receipt of all notices regarding Bankruptcy Case constituted “appointment” for purposes of service of complaint. Mailing of complaint to a department other than that specified in the Proof of Claim did not constitute proper service of the complaint rendering default judgment void for lack of personal jurisdiction.
- (5005) *Q Technology, Inc. v. Allard*, Case No. 08-14655 (E.D. Mi. 2009) – In deciding whether excusable neglect exists under Rule 60(b)(1), Court must consider the length of the delay, the reason for the delay, whether the movant acted in good faith, the potential impact of the delay on judicial proceedings, and the danger of prejudice to the other party. Excusable neglect sufficient to set aside default requires that default not result from Defendant’s culpable conduct. Party will be culpable if is motivated by an intent to thwart judicial proceedings, or shows a reckless disregard for the effect of the movant’s conduct on those proceedings. Defendant’s conscious decision not to respond to complaint served by US Mail and decision to ignore that complaint because Defendant did not realize that service by mail was warranted and thought that personal service was required constitutes culpable conduct and therefore cannot constitute excusable neglect. Further, relief is not warranted under Rule 60(b)(6) where the factual basis is the same as Defendant’s argument under Rule 60(b)(1). Rule 60(b)(6) requires extraordinary circumstances which must include that the defaulted party be faultless in the delay.

- (5006) *Miller v. Fint*, 2009 WL 2913927 (Bankr. W.D. Ky. 2009) – Rule 7055(c) of the Federal Rules of Bankruptcy Procedure states that for good cause the court may set aside a judgment by default in accordance with Rule 60(b) of the Federal Rules of Civil Procedure. Rule 60(b) permits the court to relieve a party from final judgment in cases of mistake, inadvertence, surprise or excusable neglect. Defendant failed to demonstrate excusable neglect. The Summons and Complaint were sent to Defendant's mailing address as listed with the Court, which was Defendant's last known address and where he had been served with a copy of the Debtor's Petition. The Summons was not returned as incorrectly delivered. Defendant's claim that he did not receive notice of the adversary proceeding is not sufficient to overcome the presumption that it was received. Defendant admitted that during the course of the bankruptcy case, Defendant and his wife separated and he moved to a new address but never informed the Court of his new address. Defendant knew that he did not often receive all of his mail from his spouse but failed to diligently pursue whether he was receiving all of his mail. Whether Defendant has a meritorious defense is irrelevant where Defendant cannot meet the threshold standard of establishing excusable neglect.
- (5007) *Rogan v. Countrywide Home Loans, Inc.*, 2009 WL 2959665 (6th Cir. BAP 2009) – Bankruptcy Court improperly vacated default judgment. Pursuant to Federal Rule 60, a default judgment may be vacated only upon a showing of "extraordinary circumstances". Defendant failed to file an appearance in the action until 59 days after the answer to the complaint was due and 55 days after the default judgment had been entered. Defendant failed to file a motion to vacate the default judgment until 73 days after the response was due. Defendant's allegation that a change of statutory agent for service of process around the time the complaint was served may have resulted in delay in the complaint being properly routed did not demonstrate any exceptional circumstance to warrant relief under Rule 60(b)(6). Defendant, as moving party, bears burden of proof of facts to demonstrate unusual or extreme circumstances or how extreme or undue hardship would result from the failure to vacate the default judgment. Defendant's failure to timely respond to a properly served complaint, without more, does not constitute a basis to vacate a default judgment.
- (5008) *In re Alfes*, Case No. 05-55084 (Bankr. E.D. Mi. 2009), *aff'd* 2011 WL 3651319 (E.D. Mi. 2011), *aff'd* 709 F.3d 631(6th Cir. 2013) – Federal Rule of Civil Procedure 60, incorporated by Federal Rule of Bankruptcy Procedure 9024, sets forth 6 grounds to grant relief from a Judgment or Order: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. Rule 60(b)(6) applies only in exceptional or extraordinary circumstances not addressed by the other 5 enumerated grounds, and where principals of equity mandate relief and where extreme and undue hardship will result if the Order is not set aside. A meritorious defense, standing alone, does not constitute exceptional or extraordinary circumstances.

12.112 Final Judgment After Default

- (5009) *Salamy v. Compo*, 2015 WL 6434135 (Bankr. E.D. Mi. 2015) – Court must first determine whether court has jurisdiction before entering default, even where defendants failed to respond or to raise jurisdictional objection. Court lacked jurisdiction in action against two non-debtor entities where actions were based entirely on state law claims and did not arise in or under Code. Action was not related to bankruptcy where outcome could have no conceivable impact on bankruptcy estate. Action alleged that non-debtor LLC illegally kept commissions and referral fees amounting to conversion but other than fact that debtor was member of LLC, there was no nexus between causes of action and bankruptcy court. Plaintiff sought only money judgment against non-debtor and entry of judgment would have no effect on bankruptcy estate.
- (5010) *Merritt v. Layne*, 2014 WL 4723081 (Bankr. E.D. Ky. 2014) – Whether to enter judgment of default is vested in discretion of court and requires court to examine merits of claim before entering judgment. Default establishes well pled factual allegations of complaint but court must consider whether unchallenged facts support legitimate cause of action. Plaintiff not entitled to judgment of non-dischargeability under Section 523(a)(2), (4) or (6) where complaint did not plead sufficient facts to demonstrate fraudulent intent as required by Section 523(a)(2), where complaint alleged only that plaintiff loaned money and that defendant materially misrepresented intention and ability to repay, but did not allege any facts to support allegations. Mere failure to repay loan is not misrepresentation. Complaint failed to state cause of action under Section 523(a)(4) for fraud or defalcation while acting in fiduciary capacity as complaint failed to allege existence of actual or technical trust between parties pursuant to which debtor was to hold property solely for benefit of plaintiff; and there was no evidence that plaintiff entrusted funds to debtor for specific purpose but that debtor fraudulently used funds for debtor's own purposes as necessary to establish embezzlement; and complaint admitted that plaintiff willingly gave money to debtor precluding finding of larceny. Rather, complaint alleged only that plaintiff made loan to debtor to enable debtor to purchase truck, and that debtor thereafter failed to repay loan. Complaint also failed to state cause of action under Section 523(a)(6) where complaint failed to allege that debtor borrowed money from plaintiff with intent to cause willful and malicious injury to plaintiff and there was no evidence of any intent to cause harm.
- (5011) *Bowers v. Banks*, 2013 WL 1091634 (Bankr. E.D. Tn. 2013) – To obtain default judgment, Plaintiff must properly serve the defendant with process; plaintiff must seek entry of default by demonstrating that the opposing party has failed to answer or otherwise respond to the complaint; if the defendant has entered an appearance, then the defendant must be served with notice at least seven days before the hearing; the plaintiff must submit an affidavit stating that the defendant is not an infant or incompetent person; and, plaintiff must submit an affidavit stating whether the defendant is in military service, or if plaintiff is unable to determine whether the defendant is in military service, stating so. Affidavit must include more than a "bare assertion" based "upon information and belief," and must set forth specific facts establishing the plaintiff's efforts to determine whether the defendant is in military service. Conservator for incompetent defendant "appeared" by appearing at scheduling conferences and show cause hearings and filed statements in the adversary proceeding. Fact that Conservator was later determined not to be proper representative as Conservator was not attorney, and pleadings and papers filed by

Conservator were stricken did not eliminate fact that Conservator did appear and received notice of the proceedings including the request for default judgment.

Q. Settlement

12.113 Approval by Court Required

- (5012) *Miller v. Lim*, 2014 WL 1922634 (E.D. Mi. 2014) – Bankruptcy trustee has authority to seek to settle claims available to debtor, but any proposed settlement is subject to approval of bankruptcy court within court’s “significant discretion”.
- (5013) *In re 3D Resorts-Bluegrass, LLC*, 2013 WL 6019117 (Bankr. W.D. Ky. 2013) – Bankruptcy Court has authority to consider proposed settlement of claims between Chapter 11 Trustee and governmental entities for alleged violations of state law and consumer protection regulations.
- (5014) *In re Fodale*, 2013 WL 663729 (Bankr. E.D. Mi. 2013) – Trustee has authority, subject to court approval, to settle claims available to debtor.
- (5015) *In re Ridley*, 2012 WL 3154843 (Bankr W.D. Ky. 2012) – Bankruptcy Rule 9019(a) authorizes a trustee to seek a compromise or settlement of claims available to the debtor, upon motion and after notice and a hearing.
- (5016) *Hindelang v. Mid-State Aftermarket Body Parts, Inc.*, 2012 WL 1233019 (6th Cir. 2012) – Trustee in bankruptcy has authority to settle claims that are available to debtor, but any settlement is subject to approval by Bankruptcy Court. Approval or denial is vested in “significant discretion” of Bankruptcy Court. However, Court must not “rubber stamp” settlement or just rely on trustee’s word that settlement is reasonable.
- (5017) *Rankin v. Lavan*, Case No. 09-1087 (6th Cir. 2011) – Court has discretion to approve proposed settlement by virtue of Rule 9019(a) which directs that court may approve settlement or compromise on motion by the Trustee and after notice and hearing.
- (5018) *Ames v. Rubin*, 2011 WL 1630139 (N.D. Ohio 2011) – Federal Rule of Bankruptcy Procedure 9019(a) governs procedure to obtain approval of settlement of adversary.

12.114 Approval by Court Not Required

12.115 Limits on Jurisdiction

- (5019) *In re Reis Borough Building, LLC*, 2014 WL 5529604 (Bankr. W.D. Mi. 2014) – Court would not reopen case to enforce a stipulation between debtor and creditor where the stipulation was signed before dismissal but not approved by Court as of date of dismissal. Court would be reluctant to exercise post-dismissal jurisdiction particularly where parties have adequate remedies in state court.
- (5020) *Brown v. Brown*, 2013 WL 2338233 (E.D. Ky. 2013) – Bankruptcy Court had jurisdiction to approve settlement of adversary proceeding brought by Debtor to invalidate post-nuptial agreement. Debtor commenced adversary while case was pending as Chapter 11. After case converted, Chapter 7 trustee proposed to resolve adversary with judgment that endorsed the Antenuptial agreement as valid and binding. Debtor contended that court lacked jurisdiction to approve settlement as court lacked jurisdiction to approve or disapprove of Antenuptial agreement. Court concluded that Bankruptcy Court had jurisdiction. Issues involved were within scope of court jurisdiction as court had jurisdiction over all property of estate including debtor’s interest, if any, in the Antenuptial agreement and any property that debtor would be entitled to as a result of marriage. Action to invalidate Antenuptial was core proceeding as action involved administration of estate property, the very definition of “core proceeding”. Action was core proceeding and settlement resolve that core proceeding giving Bankruptcy Court jurisdiction to enter order. Section 542(a)(5) inclusion of property received within 180 days of petition did not exclude debtor’s interest in the Antenuptial agreement even if debtor did not receive, and was not entitled to receive, property under that agreement within that 180 day period. Antenuptial agreement existed as of petition date and debtor’s initial complaint regarding validity was filed only 11 days after petition, bringing agreement and litigation squarely within Section 541. To extent that debtor sought money judgment, debtor’s right, if any, vested when action had begun pre-petition in state court. Although scope of relief was not determined, debtor’s legal rights existed as of petition date and became property of estate, regardless of when liquidated. Further, debtor’s statutory rights to equitable distribution also became property of estate even if divorce proceedings had not been determined, where divorce proceeding had commenced prior to commencement of case. Right to equitable distribution vested as of commencement divorce subject only to being liquidated at some future date.
- (5021) *In re Brown*, 2012 WL 3670640 (E.D. Ky. 2012) – Court cannot approve portion of settlement agreement where action would exceed court’s jurisdiction. Court lacked authority to approve portion of settlement agreement that purported to declare debtor’s will “void ab initio”. Probate exception to federal court jurisdiction defined in *Marshall v. Marshall*, 547 US 293 (2006) prohibits federal court from entering orders relating to probate or annulment of will or administration of estate. Further, as the maker of the will was not yet dead, any finding concerning validity of will would be premature as issue was not yet ripe. However, portion of settlement agreement that would declare Antenuptial Agreement void is not within domestic support exception under *Marshall*, as issues do not involve divorce decree, award of maintenance or custody determination.

12.116 Standards for Approval

- (5022) *In re CS Dip, LLC*, 2015 WL 5920892 (Bankr. M.D. Tn. 2015) – In evaluating proposed settlement under Rule 9019, court must apprise itself of all facts necessary to evaluate the settlement and make an informed and independent judgment as to whether the compromise is fair and equitable, based on (a) probability of success in the litigation; (b) difficulties, if any, to be encountered in the matter of collection;

(c) complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) paramount interest of the creditors and a proper deference to their reasonable views in the premises. Bankruptcy judge need not hold mini-trial or write an extensive opinion and need only apprise itself of the relevant facts and law to allow an informed and intelligent decision may be made, with the reasons for decision. Underlying action was hotly contested, with debtor seeking coverage for claims exceeding \$40 million while insurer alleged no duty to cover based on alleged massive failure by insured to disclose material information during policy procurement process. There was no dispute that if debtors prevailed, defendant, a large national insurer, would be able to answer for the judgment. However, litigation was massive and complex and there was real risk that debtor's liquidating trustee may run out of money before case is completed. Proposed settlement amount of \$39 million was reasonable. However, settlement was not fair to third parties whose claims directly against insurer for bad faith or violation of consumer protection statutes would be barred as settlement did not propose to compensate those third parties for loss of right of direction action against insurer.

- (5023) *In re Myers*, 2015 WL 5175021, *amended*, 2015 WL 5254954 (Bankr. N.D. Ohio 2015) – Court must determine if proposed settlement is fair and equitable. bankruptcy judge has duty to apprise himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated and should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possibilities of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Sixth Circuit adopted a four-part inquiry for compromises, requiring a court to consider (1) the probability of success if litigated, (2) the complexity, expense, delay, etc. of litigation, (3) collectability concerns, and (4) the interest of creditors, including their reasonable views on the compromise. Where proposal is settlement of Section 727 action, court must also consider public interest. Bankruptcy Trustee is afforded some deference to decision based on business judgment rule, also referred to as a rebuttable presumption rule, that protects disinterested trustee so long as decision is within range of what an informed businessman would rationally decided under the circumstances. Collectability supported compromise where trustee spent 4 years combing through debtor's financial affairs including pre-petition and post-petition financials and concluded that debtors had very little income and were living on withdrawals from IRA and loans from friends and family. Business was operating at a loss and debtors had no non-exempt assets. After years of litigation, trustee was unable to come up with convincing evidence that debtor should be denied discharge, particularly where debtor has been cooperative and provided numerous documents to trustee. Allegation that debtor concealed interest in corporation was weak where trustee found no flow of income suggesting ownership, no wire transfers, no W-2 forms, and no checks or cancelled checks, and there were no stock certificates, subscriptions, options or "sweat equity" deals. While there may have been suggestions of ownership, there was no evidence of any actual ownership.
- (5024) *In re LPN Healthcare Facility, Inc.*, 2015 WL 3648672 (Bankr. S.D. Ohio 2015) – Approval of settlement is based on probability of success of litigation; difficulties to be encountered in collection; complexity of litigation including expense, inconvenience and delay; and paramount interests of creditors. Settlement approved where substantial time had passed between events leading to cause of action resulting in difficulty with witness recollections and the death of one key witness. Future success by trustee fairly debatable given evidentiary issues. Further litigation would be long and expensive given need for significant number of expert witnesses and complexity of records. Although deal may not be perfect, approval requires only that deal yield benefits to all while extracting relatively equal measures of pain.
- (5025) *In re Horvath*, 2015 WL 1000284 (Bankr. N.D. Ohio 2015) – Motion to approve settlement of state court litigation partially denied where evidence did not indicate that settlement was in best interest of estate. Court will consider probability of success in litigation; difficulty if any in collection judgments that may be rendered; complexity of litigation and expense, inconvenience and delay; and paramount interest of creditors. Settlement of "whistleblower" case for \$1,000 approved as trustee presented evidence that there was little or no probability of success. Settlement of additional undisclosed claim against Bank approved in exchange for \$25,000 where debtor placed no value on the claim and Trustee lacked funds to otherwise pursue recovery. Trustee's proposed settlement of appeal approved where only remedy if successful would be unwinding of receivership which would not put funds in hands of estate, and continued prosecution of appeal would be lengthy and expensive and settlement would result in lender's claims being satisfied and would release \$30,500 in garnished funds being held by lender. However, proposed settlement agreement with bank was ambiguous as to what assets and money would be paid to estate and what amounts would be owed to lender before lender satisfied its claim and released the garnished funds; and certain inconsistencies made further litigation likely. Although structure of settlement was reasonable, ambiguities and uncertainty in settlement agreement precluded approval of that portion of the overall settlement.
- (5026) *In re Seebach*, Case No. 14-0036 (Bankr. W.D. Mi. 2014) – Motion to Approve Settlement must clearly set out matters to be resolved. Motion to Approve Settlement denied where Motion stated that it intended to approve settlement of one matter but also included order allowing trustee to sell automobile free and clear of liens. Caption of Motion did not disclose additional relief beyond settlement of dispute with debtor and body of motion did not discuss sale of automobile beyond oblique reference. Motion did not provide adequate notice to lienholder or any other party in interest.
- (5027) *In re Myers*, 2015 WL 400545 (Bankr. N.D. Ohio 2015) – Party seeking court approval of compromise bears burden to show that compromise is fair and equitable, based on (1) the probability of success if litigated, (2) the complexity, expense, delay, etc. of litigation, (3) collectability concerns, and (4) the interest of creditors, including their reasonable views on the compromise. Proposal to compromise claim over disputed funds of \$1.9 million with estate to receive \$1.5 million not unreasonable given complexity of case and difficulty for either Trustee to prove cause of action or defendant to prove defenses. Continued litigation could generate attorney fees in excess of \$500,000 further depleting the assets available for creditors. Court was unable to determine collectability as trustee failed to present any evidence beyond conclusion that he looked into it and thought the defendant to be uncollectable, which is not sufficient for court to evaluate settlement. Settlement would also require dismissal of Section 727 action against debtor which is not in the best interests of creditors absent more proof concerning likelihood of success in that proceeding. Although debtor was not contributing funds to the

settlement, his spouse was contributing meaningful amounts of money to the settlement as well as a release of claims, sufficient to constitute a valid attempt by debtor to reach reasonable resolution. Ultimately, trustee's failure to produce evidence on probability of success and collectability left court unable to determine that settlement was reasonable.

- (5028) *In re Nicole Gas Production, Ltd.*, 2014 WL 4855005 (Bankr. S.D. Ohio 2014) – Court must determine whether settlement is fair and equitable, taking into account all of the facts and circumstances to determine whether proposed settlement is in range of reasonableness. Proposed settlement of causes of action brought by estate for \$250,000 was within range where low end of possible recovery if litigation proceeded as \$80,000 and high end was \$680,000.
- (5029) *In re McInerney*, 2014 WL 4258302 (Bankr. E.D. Mi. 2014) – Proposed settlement is fair and reasonable. Settlement would produce \$1million for estate which would pay all administrative and priority claims in full and provide substantial dividend to unsecured creditors. Trustee's ability to prevail was questionable as case turned on testimony of debtor which was not likely to be found credible. Although settlement amount is far less than debtor's estimate of potential claim value, and is less than trustee's estimate of claim value, risks of litigation were substantial and settlement was in best interests of creditors who would receive substantial payment in far shorter time than if claim is litigated to conclusion.
- (5030) *Baker v. Residential Funding Company, LLC*, 2014 WL 3767843 (E.D. Mi. 2014) – Court must determine whether proposed settlement is fair and equitable, taking into account likelihood of success on merits, delay and expense of continuing litigation, difficulties that may be encountered in collection of any judgment, and paramount interest of creditors with a proper deference to their views. Court approved settlement of case against mortgage company for alleged mortgage fraud. Debtors initially failed to disclose cause of action and did not bring action until after entry of discharge. Trustee later discovered pending litigation and reached proposed settlement with lender. Debtors claim for wrongful foreclosure was very weak where redemption had already expired and state law requires fraud in foreclosure process itself. Further, even fraud in foreclosure process renders sale voidable, not void, and debtors failed to demonstrate any prejudice in alleged error in mortgage assignment. Litigating would postpone recovery for creditors and result in lost time value of money and value of finality. Debtors' claim that the amount of the settlement was in adequate where debtors presented no evidence that creditor might face substantial liability. Debtors' mere speculation that litigation may have significant value is not sufficient to reject settlement.
- (5031) *Miller v. Lim*, 2014 WL 1922634 (E.D. Mi. 2014) – Bankruptcy court must apprise itself of all facts necessary to evaluate settlement and make informed and independent judgment as to whether compromise is fair and equitable, taking into account probability of success in litigation, difficulties if any in collection, complexity of the litigation and expense, inconvenience and delay, and paramount interest of creditors with proper deference to their reasonable views. Court did not abuse discretion where creditor's argument that settlement would impair creditor's rights to indemnification where creditor could present no evidence that settlement would in any way complicate enforcement of indemnity. Creditor's allegation that asset involved was worth more than trustee's asserted valuation insufficient where creditor did not present any evidence of value and only offer to purchase submitted to trustee supported value asserted by trustee. Complexity of issues illustrated by three separate but intertwined adversary proceedings and extensive factual and legal issues that were hotly disputed amply supported court's conclusion that probability of success and recovery were debatable.
- (5032) *Baker v. Residential Funding Company, LLC*, 2014 WL 1600358 (E.D. Mi. 2014) – Court can approve settlement that is "fair and equitable", based on probability of success in litigation; difficulties, if any, to be encountered in collection; complexity of litigation and expense, inconvenience and delay paramount interest of creditors with proper deference to their reasonable views. Approval of compromise is in discretion of court and appeared to be fair and equitable as there was substantial risk that absent a settlement, the action would be decided adverse to the estate; and that even if the appeal were successful, the amount of the debt far exceeded value of property such that there was no benefit to estate. Settlement allowed estate to recover \$20,000 from mortgage holder and avoided litigation, with attendant costs, that most likely would have been unsuccessful. Party seeking stay could not demonstrate anything more than a "mere possibility" of success on appeal, far less than the "likelihood" required for stay.
- (5033) *In re 3D Resorts-Bluegrass, LLC*, 2013 WL 6019117 (Bankr. W.D. Ky. 2013) – Court must form educated estimate of complexity, expense and likely duration of litigation, possible difficulties of collecting on any judgment that may be obtained, and other factors relevant to a full and fair assessment of the wisdom of proposed settlement. Factors include probability of success, difficulties to be encountered in collection, complexity of litigation and expense, inconvenience and delay necessarily attending it, and paramount interests of creditors with due deference to creditors' reasonable views. Action against Trustee was brought by multiple governmental and consumer protection agencies, and prevailing would require prevailing in at least three separate proceedings. Settlement would extract estate from disputes while allowing individual property purchasers to pursue actions against mortgage holder if they chose to do so; and would put \$300,000 into estate for benefit of creditors. Trustee was defendant in actions such that continued litigation did not present any opportunity to recover funds for benefit of estate separate from settlement itself.
- (5034) *In re McInerney*, 2013 WL 5674462 (Bankr. E.D. Mi. 2013) – Bankruptcy court must make independent judgment as to whether compromise is fair and equitable, and must weigh conflicting interests of relevant parties, considering factors including probability of success on merits, complexity and expense of litigation, and reasonable views of creditors. Court declined to approve settlement of claim potentially worth \$14 million for a payment of \$250,000.00. While the probability of success was debatable, as debtor had already lost at trial court and matter was on appeal, court determined that debtor had substantial basis for appeal and appeared likely to prevail; to the extent that debtor prevailed, the defendant was fully collectable; issues were not complex and were governed by well established law; and trial attorneys had case on contingency basis minimizing risk to creditors from costs of litigation. Recovery by debtor on cause of action would produce sufficient funds to pay all claims in full. However, settlement amount would produce, at best, a nominal dividend to unsecured creditors, such that creditors had little, if anything, to lose by rejection of the settlement. While settlements are generally

avored, given strength of debtor's claims, minimal if any harm to creditors by rejection of settlement, and substantial "upside" to creditors if debtor prevails, settlement was not fair and equitable.

- (5035) *Brown v. Brown*, 2013 WL 2338233 (E.D. Ky. 2013) – Bankruptcy Court properly approved settlement of action between debtor and ex-spouse regarding validity of Antenuptial agreement which included court approval of validity of Antenuptial agreement. Court must consider litigation's likelihood of success; difficulty in collecting on claims; litigation's complexity and expense, inconvenience and delay; and creditors' assessment of settlement. Debtor's claim to invalidate Antenuptial did not appear to have substantial chance of success on merits where Antenuptial appeared to have been lawfully and validly negotiated and executed and that debtor had complete information and adequate representation at the negotiation and execution of agreement. Agreement was not substantively unconscionable just because agreement allowed debtor to retain substantial millions that he brought to marriage, while giving debtor relatively small amount. Fact that agreement did not equally divide assets did not make agreement manifestly unfair – it merely allowed each party to retain the property that party brought to the marriage and divided any property acquired during the marriage. As it appeared that debtor's cause of action was essentially meritless, approval of settlement that ended litigation and eliminated ongoing costs and expenses was reasonable under circumstances.
- (5036) *In re Batt*, 2013 WL 849219 (Bankr. W.D. Ky. 2013) – Courts are required to form educated estimate of complexity, expense and likely duration of litigation, as well as possible difficulties in collecting any judgment, and any other factors relevant to a full and fair assessment of wisdom of proposed settlement. Courts will consider: (a) the probability of success in the litigation, including value and likely outcome of claims to be settled; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. Proposed settlement was reasonable where merits of claim presented close questions of fact; settlement would avoid lengthy, expensive and complex litigation; and would preserve assets of Chapter 7 while producing additional funds for distribution to creditors. Settlement would avoid likely substantial difficulties in collection and would avoid possibility that one or more defendants would, themselves file bankruptcy and thwart any collection efforts. Proposed settlement was above the lowest point in the range of reasonableness and would foster economic interests of creditors by increasing pool of assets available and shortening time for distribution of those assets. Settlement of Section 727 action is not objectionable merely because debtor is "buying a discharge" as that would prevent settlements in all Section 727 cases.
- (5037) *In re Fodale*, 2013 WL 663729 (Bankr. E.D. Mi. 2013) – Trustee has authority, subject to court approval, to settle claims available to debtor. Court cannot act as rubber stamp and must affirmatively apprise itself of the underlying facts and make independent judgment as to whether compromise is fair and equitable. Court will consider (a) probability of success in litigation; (b) difficulties, if any, to be encountered in collection; (c) complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) paramount interest of creditors and proper deference to their reasonable views. Trustee's proposed settlement reasonable where settlement produced \$60,000 for estate and (a) there were no viable causes of action on behalf of the estate against the creditor, his trust, or any entities he owns; (b) the money was actually lent by creditor to the Debtor, and creditor has properly perfected security interest of approximately \$7,500,000; and (c) broad scope of release was not impediment where there were no viable claims against the creditor.
- (5038) *In re Schwartz*, 2012 WL 4965287 (Bankr. W.D. Ky. 2012) – Federal courts have developed four factors bankruptcy court should consider: (a) probability of success in litigation; (b) difficulties in collection; (c) complexity of litigation involved, and expense, inconvenience and delay necessarily attending it; (d) paramount interest of creditors and proper deference to their reasonable views. Court approved settlement of debtor's claim against prior attorney for malpractice. While Trustee had strong claims against some defendants, other claims were more tenuous, leaning neither for nor against settlement. Similarly, trustee would likely have little difficulty collecting from some defendants but a great deal collecting from others, leaning neither for nor against settlement. Complexity of malpractice claims, and expense of continued litigation, discovery, trial, appellate costs and attorney fees were likely to be substantial and full trial and likely appeal would result in substantial delay, particularly where underlying bankruptcy had been pending 8 years. Trustee indicated on behalf of creditors that settlement would favor creditors by allowing prompt distribution to creditors, and trustee's business judgment indicated that settlement was in best interests of estate and creditors. Where cause of action was property of estate, Trustee was not required to contact debtor to obtain consent to settlement.
- (5039) *Rabin v. Skoda, Minotti & Co.*, 2012 WL 3201932 (N.D. Ohio 2012) – In considering possible approval of settlement of adversary proceeding brought by Trustee, Court will consider: (1) the probability of success in litigation; (2) the complexity of the litigation involved, as well as the expense, inconvenience and delay necessarily attendant to the litigation; (3) the difficulties to be encountered in collecting or enforcing any judgments that might be rendered; and (4) the paramount interest of creditors with proper deference to their reasonable views. Terms of the compromise are fair and equitable and in the best interests of the bankruptcy estate where settlement would assure an opportunity of recovery to the estate for the distribution to creditors and avoid the cost and uncertainties of litigation.
- (5040) *In re Brown*, 2012 WL 3670640 (E.D. Ky. 2012) – Under Bankruptcy Rule 9019(a), Bankruptcy court has affirmative obligation to apprise itself of the underlying facts and to make an independent judgment as to whether the compromise is fair and equitable. The court must weigh the conflicting interests of all relevant parties, considering the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors. Bankruptcy judge need not conduct mini-trial or write extensive opinion but must be apprised of the relevant facts and law so that he can make an informed and intelligent decision and set out the reasons for that decision. Among factors bankruptcy judge should consider are [i] the litigation's probability of success, [ii] the litigation's complexity, [iii] the litigation's attendant expense, inconvenience, and delay (including the possibility that disapproving the settlement will cause wasting of assets) and [iv] the creditors' objections to the settlement; however, the creditors' views are not controlling. Settlement approved where Trustee thoroughly evaluated benefits of the proposed Settlement Agreement and the weakness of the Estate's claims and was supported overwhelming weight of the evidence. Trustee is a very experienced bankruptcy professional who has worked as a trustee for a large part

of his career and has experience in determining whether claims of a bankruptcy estate should be resolved to benefit that estate, the valuation of claims and assets of an estate and benefits obtained by estates under such agreements. Evidence in this case clearly shows that the claims the Estate has against the Conservator Parties, which the Estate is compromising, have little value while the Estate is obtaining the right to liquidate approximately \$1,000,000 in assets and to distribute the proceeds to creditors. In addition, the Defendants' subordination agreement giving creditors, other than the Defendants, rights to the first \$100,000 in distributions is highly beneficial to the Estate and the other allowed creditors. Expense of continued litigation would be significant and clearly outweighs any benefit the Estate could realize from such litigation. Finally, no creditors objected to the proposed Settlement Agreement.

- (5041) *In re Ridley*, 2012 WL 3154843 (Bankr. W.D. Ky. 2012) – Bankruptcy court should consider when determining if a compromise or settlement should be approved (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. Settlement of actions for malpractice approved where litigation would be lengthy and expensive, as costs for pre-trial preparation, trial and appeals would likely be substantial and would substantially prolong proceedings before any recovery to creditors. Case had already been pending for 2 years. Settlement would provide creditors with immediate recovery without further delays and risks of litigation and collection. Business judgment of Trustee also supported settlement as supporting paramount interests of creditors in receiving recovery.
- (5042) *Hindelang v. Mid-State Aftermarket Body Parts, Inc.*, 2012 WL 1233019 (6th Cir. 2012) – Chapter 7 Trustee's Motion to Approve settlements in two federal court lawsuits granted. Court cannot merely "rubber stamp" proposed settlement or merely rely on Trustee's word that settlement is reasonable. Court must apprise itself of underlying facts and make independent judgment as to whether settlement is fair and equitable. Court must consider probabilities of ultimate success; and must form educated estimate of complexity, expense and likely duration of litigation as well as possible difficulties in collecting on any judgment; and should consider any other factors the Court deems relevant to a full and fair assessment of the wisdom of proposed settlement with view toward paramount interests of creditors. Objecting creditor did not present any evidence of collusion among parties. Debtor's non-bankruptcy counsel was experienced in trademark infringement litigation which was basis for both suits. Parties had sufficient time to conduct discovery in underlying litigation. Going to trial would have been time consuming, expensive and risky, and proposed settlement which would pay estate more than \$1 million was far preferable to possible zero dollar recovery. Major witness for the debtor was uncooperative and potentially hostile. Area of law was complex. Proposed settlement amount was far in excess of average jury verdicts in similar litigation and any litigation would likely be followed by appeals that would further delay administration of case and increase expenses. Further, only 2 creditors objected to the settlement, while the remaining creditors, including the largest creditors, were unanimous in support of the settlement.
- (5043) *Rankin v. Lavan*, Case No. 09-1087 (6th Cir. 2011) – Bankruptcy Court has significant discretion to approve settlements. Court must make sure that the settlement is faire and equitable. Court must make independent judgment by review of all facts necessary for an intelligent and objective opinion of probabilities of ultimate success; and must form an educated opinion on the complexity, expense and likely duration of litigation, possible difficulties in collection on any judgment, and any other factor relevant to full and fair assessment of the wisdom of proposed compromise. Court approves settlement of litigation where prospects for success were exceedingly slim; debtors did not have sufficient funds to consummate transaction as required by contract; and any benefit to creditors would have been minimal as Trustee would have been required to immediately resell property at price that likely would not have produced net gain in excess of proposed settlement amount.
- (5044) *In re SCBA Liquidation, Inc.*, 2011 WL 2636854 (Bankr. W.D. Mi. 2011) – To evaluate the fairness and equity of the proposed settlement, the court must weigh four major factors: (1) the probability of success in the litigation; (2) the difficulties of collecting any judgment; (3) the complexity of the litigation and the expense, inconvenience, and delay necessarily attending it; and (4) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. Court approved settlement of adversary where defendant paid estate \$5 million and withdrew claim in exchange for full release. After 65 days of trial, factual issues were substantial and there were significant questions of law regarding defendant's liability. Creditor's general opposition that the Trustee could not state with certainty the impact on the estate or the pro rata distribution to creditors would not preclude settlement, where these issues also depended on outcome of numerous other proceedings filed to liquidate claims. Alleged delay by the Chapter 7 Trustee in realizing difficulty in prevailing not basis to reject settlement that ultimately produced benefit (including withdrawn claims) of approximately \$9 million. Creditor's argument that in "hindsight" litigation was not warranted no basis to reject settlement that produced benefit to estate and creditors.
- (5045) *Ames v. Rubin*, 2011 WL 1630139 (N.D. Ohio 2011) – Court must apprise itself of the underlying facts and make an independent judgment as to whether the compromise is fair and equitable. Court must weigh conflicting interests of all relevant parties, considering such factors as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors. Settlement is fair and equitable and is in the best interests of the estate. Court would approve settlement where claims brought by Trustee were plausible but were not assured and Trustee faced risk that these claims could be dismissed on the pending motions to dismiss, on summary judgment, or that the claims may fail at trial leaving Trustee with no recovery for the estate while incurring great expense prosecuting the action. Director's and Officer's insurance policy had a declining balance, with over \$3 million having already been spent out of a \$10 million policy before even reaching discovery. Even if Trustee secured judgment there were substantial concerns about collectability given the financial state of the Defendants and the declining balance of the insurance policy. Trustee's determination that this settlement is in the best interest of the estate is entitled to great weight and no creditor objected to the settlement on the grounds that it is not in the estate's best interest.
- (5046) *General Motors Acceptance Corporation v. Flynn*, Case No. 08-8109 and 08-8110 (6th Cir. BAP 2009) - Bankruptcy Courts have significant discretion to approve or reject proposed settlements and compromises. Court must consider probability of ultimate success

and costs attendant to litigation including complexity, expense, inconvenience, delay, and the likely duration of a lawsuit and difficulties in collecting on judgment. Court improperly approved settlement that was predicated on an agreement between the Trustee and creditor regarding certain offsets notwithstanding that the Bankruptcy Court previously determined that creditor was not entitled to the offsets as a matter of law.

- (5047) *Engman v. Boyd*, Case No. 1:09-cv-151 (W.D. Mi. 2008) – In determining whether to approve a proposed settlement, bankruptcy Court must consider whether the disposition proposed is fair and equitable including whether the proposed settlement is the best alternative available to the estate under the circumstances taking into particular consideration whenever other alternatives the objecting party or parties might pose. Court must consider the strength of the claim asserted, the difficulty, expense, and a way that may come from leading the client, and the core spun a net benefit to the state and creditors of settling the claim without litigation in order to determine whether the proposed settlement is reasonable and in the best interest of the estate. Implicit in that consideration must also be the Court's separate determination of whether the proposed disposition is consistent with the Trustees duties as the estate fiduciary. District Court. may set aside Bankruptcy Court's decision only if that decision constitutes an abuse of discretion, as decision to approve a proposed settlement is bound up in the ever-changing facts and circumstances of the bankruptcy case. The bankruptcy Court need not conclusively determine whether and to what extent they claim will be successful or a proposed defense may be dispositive. The Court need only apprise itself of the relevant issues and make an informed judgment on the reasonableness of the proposed settlement.
- (5048) *Bailey v. White*, 2009 WL 928595 (6th Cir. 2009) - Court should approve the settlement only after a hearing "and on finding that it is fair, reasonable, and adequate." Several factors inform this inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.
- (5049) *Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6th Cir. BAP 2009) – Bankruptcy Court has significant discretion to approve or disapprove a settlement with compromise. Bankruptcy Court is under affirmative duty to apprise itself of all necessary facts as to make informed and independent judgment as to whether the settlement is fair and equitable to the non-settling parties. Factors to be considered include probability of ultimate success should be claimed he litigated and costs attendant to such litigation in terms of complexity, expense, inconvenience, delay and the likely duration of a lawsuit including possible difficulties of collecting on any judgment. Court must compare the terms of a compromise with the likely rewards of litigation, but is not required to conduct mini-trial when evaluating a settlement. Proponent of settlement agreement bears burden of showing by preponderance of evidence that the proposed settlement is fair and equitable. Bankruptcy Court properly refused to approve the settlement by which defendant would have received credits far in excess of what the bankruptcy Court concluded was the maximum which defendant could sustain in that litigation. Proposed settlement which would have given defendant a credit of more than \$100,000 not fair and equitable report concluded that defendant could reasonably establish a credit of only \$20,000 and had "serious doubt" that Debtor owed defendant any credit as claimed by defendant.

12.117 Standing to Object

- (5050) *In re Horvath*, 2015 WL 1000284 (Bankr. N.D. Ohio 2015) – Debtors generally lack standing to object to proposed settlement of pre-petition litigation by trustee as debtor normally has no pecuniary interest in outcome, as outcome will not produce funds for debtor. However, debtor had standing where outcome of settlement would impact amount of funds available to pay non-dischargeable tax liabilities and would therefore impact debtor's post-bankruptcy financial condition.
- (5051) *In re B & P Holdings, Inc.*, 2011 WL 5909669 (Bankr. W.D. Mi. 2011) – Standing requires that a party have a pecuniary interest in the outcome of the matter. Corporate shareholder does not have standing where assets of case will be insufficient to pay claims, leaving no surplus for distribution to shareholders. Trustee's adversary against shareholder for alter ego and veil piercing did not indicate any likelihood of success. Resolution of the matter to be settled did not impact shareholder even though amount of recovery would reduce any liability of shareholder where there was minimal chance that shareholder would be liable and court could take into account settlement of other adversary in evaluating any possible liability of shareholder in alter ego action.

12.118 Burden of Proof

- (5052) *Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6th Cir. BAP 2009) – Proponent of settlement agreement bears burden of showing by preponderance of evidence that the proposed settlement is fair and equitable.

12.119 Setting Aside Settlement

- (5053) *Cory v. Leasure*, 2015 WL 4354330 (W.D. Ky. 2015) – To set aside settlement based on fraud, party must establish by clear and convincing evidence: (a) material representation (b) which is false (c) known to be false or made recklessly (d) made with inducement to be acted upon (e) acted in reliance thereon and (f) causing injury. Allegations of fraud unrelated to execution of settlement agreement cannot be used to void settlement. Settlement can be set aside for undue influence that is of sufficient force to destroy the free agency of the grantor and to constrain him to do, against his will, that which he would otherwise have refused to do and requires more than a bare showing that the opportunity for its imposition existed. Financial difficulties may make one more susceptible to duress but that alone is not sufficient to constitute undue influence. Duress must involve actual or threatened violation or restraint on person contrary to law to compel person to execute agreement.
- (5054) *Cuyahoga Valley Ry. Co. v. U.S. Bank Trust, NA*, 2013 WL 611369 (6th Cir. 2013) – Settlement agreements are a type of contract, formation and enforceability of which are governed by state law. If agreement is clear and unambiguous, court is not required to hold evidentiary hearing to enforce agreement. Court must conduct evidentiary hearing where situation presents substantial factual issues

related to formation or consummation of agreement. Lack of signatures alone does not render settlement agreement unenforceable. Court required to conduct evidentiary hearing to determine whether agreement was enforceable where not signed or whether there were other requirements or conditions before agreement would be enforceable.

12.120 Interpretation of Settlement Agreement

- (5055) *Cuyahoga Valley Ry. Co. v. U.S. Bank Trust, NA*, 2013 WL 611369 (6th Cir. 2013) – Material factual disputes as to whether settlement agreement was enforceable without signature of all parties and whether one party would be bound by agreement prior to completion of satisfactory accounting required evidentiary hearing to determine whether agreement was enforceable. Affidavit filed by one party indicating that party had advised other signatories that party would not enter into any settlement agreement until accounting was complete raised material issues as to validity of agreement.
- (5056) *Lefkowitz v. Gainey*, Case No. 10-8090 (6th Cir. BAP 2011) – Court must enforce settlement agreement as agreed to by the parties and is not permitted to alter terms of agreement. Settlement announced on record did not expressly address one specific issue. Court could examine record as whole and conclude that parties had certain specific intent. Court concluded that where settlement agreement did not mention impact on litigation involving third parties, settlement was not intended by parties to have preclusive effect.

12.121 Settlement Agreement – Injunctions Against Non-Debtor

- (5057) *In re CS Dip, LLC*, 2015 WL 5920892 (Bankr. M.D. Tn. 2015) – In considering settlement that involves injunction against actions by third parties, court must first determine whether it has jurisdiction to enjoin claims that would fall within injunction. If so, court must then determine if it has authority to enter injunction. Third, court must closely review scope of bar order. Court has “related to” jurisdiction where action could conceivably have any effect on estate being administered, or could alter debtor’s rights, liabilities, options or freedom of action. “Related to” jurisdiction requires some nexus between the related civil proceeding and the title 11 case, such as a dispute over property of estate or because outcome of dispute will have impact on estate. Claims against debtor’s insurance company were part of bankruptcy estate and became assets of liquidating trust through confirmed plan such that resolution of dispute with insurance company regarding scope of insurance liability was within core jurisdiction of bankruptcy court. However, proposed settlement that would enjoin all actions against insurer where injured party may have independent state law claims directly against insurer for “bad faith” refusal to settle, which would entail only rights of insurer and injured party and would not have impact on estate or on post-confirmation assets. Court otherwise has constitutional jurisdiction to review settlement as rights of third parties being settled are incidental to valuation and liquidation of asset of estate and incidental to adjustment of claims against debtor. Bar order must be carefully tailored to extinguish only claims by non-settling defendants against settling defendants where injury to non-settling defendants is liability to underlying plaintiffs, for damages such as indemnity or contribution, such that damages are measured by defendant’s liability to plaintiff. There is no legal basis to bar claims where the injured party has independent damages beyond those of any liability of settling defendants to plaintiff. Settlement agreement was overbroad as proposed bar order would bar actions directly against insurer for bad faith or violation of consumer protection statutes by injured third parties which are damages not measured by claims against Debtor directly.
- (5058) *Papas v. Buchwald Capital Advisors, LLC*, 728 F.3d 567 (6th Cir. 2013) – In evaluating settlement that would enjoin prosecution of actions by non-debtors, court must determine whether outcome of actions that would be enjoined would affect the bankruptcy estate. Although enjoining of claims of non-parties is disfavored, Court does have authority under Section 105 to release a non-debtor from liability as a condition of a settlement. Bar order must be carefully tailored to ensure that only claims that are extinguished are those where the injury relates to the non-settling defendant’s liability to the plaintiff, such as claims for indemnity or contribution. Bar order that included claims arising out of or reasonably flowing from facts and allegations in adversary proceeding may be excessively broad given potential to bar independent claims for damages. Case remanded to District Court for further consideration of bar order under guidance provided in opinion.
- (5059) *Apps v. Morrison*, Case no. 12-15451 (11th Cir. 2013) – Bankruptcy Court did not abuse discretion in approving settlement that included Bar order prohibiting continued prosecution of cases in State Court by non-debtor. Principals of Debtor were subject to multiple suits in state court arising out of collapse of Debtor. Trustee brought action against principals to recover fraudulent transfers. Trustee determined that principals had \$1 million of available assets that could be used to satisfy fraudulent transfer claims, but that funds would be exhausted if principals were required to defend state court cases. Trustee and principals agreed to settlement that provided for payment to estate of \$800,000 coupled with bar against further litigation against Debtor and the non-debtor principals. State court actions were related to bankruptcy, and as such within court’s jurisdiction, as outcome of state court litigation could have had effect on administration of bankruptcy by reducing funds available to estate by \$800,000 settlement amount. Settlement was consistent with paramount interest of creditors where, absent settlement, creditors would receive nothing, and principals were parting with 80% of their available assets. Although settlement would produce dividend of only 2% of unsecured creditors, that is better than creditors would have done without settlement.

12.122 Sanctions

- (5060) *In re Harbaugh*, 2014 WL 3378577 (Bankr. S.D. Ohio 2014) – Party who fails to complete settlement without just cause is subject to sanctions. Court should consider whether failure to complete settlement was meritless; whether party knew or should have known that there was no basis to fail; and motive was for improper purpose such as harassment. Creditor’s failure to complete settlement warranted sanctions where creditor admitted that she was capable of communicating with counsel and understood and agreed to settlement terms. Creditor’s assertion that creditor was under treatment for depression and illness did not excuse compliance where creditor did not consult with medical providers or seek treatment for depression and was not incapable of caring for herself and managing personal affairs.

R. Collateral Estoppel and Res Judicata

12.123 Elements Generally

- (5061) *Morris v. Charron*, Case No. 15-80086 (Bankr. W.D. Mi. 2015) – Section 523(a)(6) requires proof that debtor intended to cause injury or acted in such a way as to believe that injury is substantially certain to result. Mere intentional act that causes injury is insufficient, although injury that results does not need to be exact injury intended. Action is malicious when taken without just cause or excuse or in conscious disregard of duties, but does not require ill will or spite. Examples of debts that are non-dischargeable include intentional infliction of emotional distress, malicious prosecution, conversion, assault, false arrest, intentional libel, and deliberate vandalizing of property, as well as contempt penalty imposed by court. Principles of collateral estoppel apply if issues in dischargeability action were actually raised and litigated in prior court in action involving same parties and prior court entered judgment based on those issues with party to be estopped having had a full and fair opportunity to litigate the issues. Fact that state law would have permitted court to enter contempt sanctions without proof that conduct was willful or malicious did not deprive judgment of collateral estoppel effect where findings in judgment went well beyond minimal standards imposed by state law and amply demonstrated that conduct met higher standard of willful and malicious. State court order finding debtor to be in contempt of court amply supported finding that debt was non-dischargeable. Debtor had full knowledge of entry of court order enjoining corporate defendant from transferring assets and knowingly and intentionally engaged in scheme to cause corporation to transfer assets in direct violation of court order. Court made extensive findings regarding debtor's knowledge of the existence, terms and duration of the injunction and described debtor's conduct as "textbook" example of contempt of court. State court award to Plaintiff of attorney fees and costs incurred as a result of debtor's violation of injunction constituted damages for purposes of Section 523(a)(6). Actual injury to person or physical property is not required where conduct led directly to actual loss with contempt award designed to indemnify the injured party from harm resulting from contemptuous conduct.
- (5062) *In re Spittler*, Case No. 14-31693 (Bankr. E.D. Mi. 2015) – Collateral estoppel applies in objections to claims if claim has been subject to prior litigation that culminated in a valid final judgment and issues were actually litigated and necessarily determined. Issue is actually litigated if it is put into issue by pleadings, submitted to trier of fact, and determined by trier of fact, although a full trial is not necessarily required. Issue is necessarily determined if resolution is essential to judgment. Default judgment in state court suit by creditor against debtor collaterally estops debtor from contesting validity or amount of debt in subsequent objection to proof of claim.
- (5063) *Risk v. Hunter*, 2015 WL 4643836 (Bankr. N.D. Ohio 2015) – Issue preclusion applies in dischargeability actions and prevents re-litigation of issues that were already fully and fairly litigated in another forum. Estoppel requires (1) party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (3) issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and (4) issue must have been identical to the issue involved in the prior suit. State court judgment established that plaintiff was the owner of steel beams that were wrongfully cut up and taken by debtor. Issue of ownership and debtor's actions in cutting up and removing beams were specifically litigated in state court action that resulted in damage award to plaintiff. However, state court judgment did not establish that debtor acted willfully and maliciously.
- (5064) *Cornerstone Industries Corp v. Kaufman*, 2015 WL 4692569 (Bankr. W.D. Ky. 2015) – Collateral estoppel prevents defendant from re-litigation factual elements of non-dischargeability claims. Issue preclusion requires four components: (1) identity of issues; (2) a final decision or judgment on the merits, (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a prior losing litigant. State court judgment was collateral estoppel in action to except debt from discharge where state court action was based on breach of fiduciary duty by assisting a former employee in competing with Plaintiff in violation of fiduciary duties owed by the Debtor to Plaintiff as a former officer of the corporation.
- (5065) *Jennings v. Bodrick*, 2015 WL 4437559 (Bankr. S.D. Ohio 2015) – Collateral estoppel and res judicata are related concepts that constitute doctrine of issue preclusion and prevent the relitigation of issues determined by valid final judgment entered by another court. Collateral estoppel, also known as issue preclusion, prohibits relitigating an issue that was also an issue in the prior case, was actually litigated, and the determination of which was necessary to the outcome in the prior action. Res judicata, also known as claims preclusion, bars assertion of claim if there has been a final decision by court of competent jurisdiction in a prior proceeding between same parties or their privies, where the issue in the later case was or should have been litigated in the prior action and there is an identity of the causes of action. Prior judgment in favor of debtor in action brought in first bankruptcy case denying plaintiff's objection to dischargeability under Section 523(a)(2) against debtor precluded action in later bankruptcy case to except same debt from discharge. Action was brought by same party seeking same relief under complaint that was virtually identical to complaint in earlier case that produced final judgment in favor of debtor, and matter was actually litigated in the prior case. Fact that the prior bankruptcy case was dismissed after entry of final judgment did not deprive final judgment of its validity or enforceability. However, prior action did not preclude complaint under Section 523(a)(6) where, although issues were raised in the prior case, the Order in the prior case made no findings but instead dismissed complaint for failure to state cause of action where prior case was Chapter 13 and there was no basis under Section 1328 to except debt from discharge. Current case is Chapter 7 and issue is properly brought in this case as debt could be excepted from discharge in Chapter 7.
- (5066) *Brown v. Florida Coastal Partners*, 2015 WL 4205157 (S.D. Ohio 2015) – Party claiming issue preclusion under either res judicata or collateral estoppel must show (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. If party seeks to use issue preclusion offensively, then either party or his privy must have been party to litigation. Complaint seeking damages for alleged violation of Fair Debt Collection Practices Act barred as issues were same as

issues that were, or could have been, raised in state court in foreclosure action which had already produced final judgment, as were issues about allegedly fraudulent back-dating of assignments, slander of title, and contests as to validity of mortgage assignments. All of the issues were actually presented to state court and were actually decided by state court in entering final judgment of foreclosure.

- (5067) *In re City of Detroit, Michigan*, 2015 WL 2165018 (Bankr. E.D. Mi. 2015) – Debtor’s objection to claim sustained where multiple prior orders in multiple other courts had determined that City was not liable to creditor. Res judicata effect of prior federal court orders is determined by federal common law, which requires (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their ‘privies’; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action. Creditor had previously sued City and Court entered Summary Judgment in favor of City, which constituted final decision on merits. Parties were identical in earlier cause of action and claim in bankruptcy case arose out of same conduct of City concerning alleged wrongful seizure of personal property and demolition of structures on real property. Although bankruptcy claim included alleged damages to other items of personal property not specifically alleged in prior complaint, res judicata includes items which were raised or which could have been and should have been included.
- (5068) *Landis v. Baker*, 2015 WL 1568377 (Bankr. W.D. Ohio 2015) – Ohio law of collateral estoppel requires (1) The party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) There was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (3) The issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and (4) The issue must have been identical to the issue involved in the prior suit. Final Judgment in State Court that awarded punitive damages did not establish non-dischargeability of underlying claim. Ohio law allows award of punitive damages only on finding that defendant acted with actual malice, defined as hatred, ill will or spirit of revenge, or conscious disregard for rights and safety of third person that has great possibility of causing substantial harm. Complaint failed to plead sufficient facts to warrant collateral estoppel effect, where complaint did not allege whether judgment was by default or after litigation; nature and types of causes of action underlying complaint; and failed to specify amount of damages; and did not attach copy of judgment itself.
- (5069) *White Family Companies, Inc. v. PNC Bank*, 2015 WL 1245915 (Bankr. S.D. Ohio 2015) – Claim can be barred by doctrine of collateral estoppels only if claim was fully mature at time underlying litigation was filed. Where defendant’s right to pursue recovery against third party did not mature until defendant lost fraudulent transfer action brought by trustee. Defendant’s later action against third party, predicated on same transaction and same facts, was not barred by issue preclusion.
- (5070) *Go Wireless, Inc. v. Lehrmitt*, 2015 WL 351211 (Bankr. W.D. Ky. 2015) – Final Judgment entered by state court entitled to preclusive effect to same extent as judgment would be afforded by court in which judgment was initially entered. Judgment by default is just as conclusive as any other judgment and is entitled to preclusive effect.
- (5071) *Jarbou v. JP Morgan Chase Bank*, 2014 WL 5361983 (E.D. Mi. 2014), *aff’d* 2015 WL 4604181 (6th Cir. 2015) – Res judicata requires (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; (4) an identity of the causes of action. Borrower’s action to contest validity of foreclosure proceeding was barred by res judicata where prior actions in both state court and federal court established that foreclosure was proper; proceedings were between same parties; there was no allegation of new evidence; and claims were all identical in substance to claims previously brought and adjudicated adverse to borrower. Current claims were either identical to prior claims or were based on same transaction or core proceedings and could have been brought in prior proceedings. Party’s simple displeasure with outcome of judicial process is not sufficient reason to permit them to re-litigate same issues over and over again.
- (5072) *Brown v. Florida Coastal Partners*, 2014 WL 5107706 (S.D. Ohio 2014) – Res judicata encompasses claim preclusion, which prevents party from raising in later litigation claims based on same facts as prior litigation and that were, or could have been, asserted in prior litigation; and issue preclusion, also called collateral estoppel, which prevents party from attempting to litigate claims that were actually decided in the prior case. Issue preclusion requires that precise issue raised was raised and actually litigated in prior action; determination of issue must have been necessary to outcome of prior proceeding; prior proceeding must have resulted in final judgment; and party against whom estoppel is asserted must have had full and fair opportunity to litigate the issue in prior proceedings.
- (5073) *MarketGraphics Research Group, Inc. v. Berge*, 2014 WL 4929423 (Bankr. M.D. Tn. 2014) – Where prior judgment is from federal court and involves federal question, federal issue preclusion law applies. Where prior judgment is from federal court applying state law, state law where the court sits applies.
- (5074) *Bell v. Countrywide Home Loans*, 2014 WL 2618618 (W.D. Ky. 2014) – Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action. Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be identical, with inquiry focusing on whether they both arise from the same transactional nucleus of facts. If the two suits concern the same controversy, then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action. Preclusion includes not only of those issues upon which the court was required to form an opinion and pronounce judgment but also of matters included with those issues and matters that, with the exercise of reasonable diligence, might have been raised at the time. Plaintiff’s complaint that contested lender’s standing to foreclose barred by both issue preclusion and claim preclusion where plaintiff asserted lack of standing in state court foreclosure action and state court expressly found that lender had standing, and final judgment affirmed on appeal with appellate court also finding that lender had standing.
- (5075) *Liggett v. Schwartz*, 2014 WL 1028960 (E.D. Mi. 2014) – *Res judicata* requires (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their ‘privies’; (3) an issue in the subsequent action which was litigated or

which should have been litigated in the prior action; and (4) an identity of the causes of action. Res judicata does not apply where order that is allegedly res judicata is reversed or rendered moot by subsequent developments. Confirmation Order in chapter 13 would not have res judicata effect where appellate court determined that debtor was ineligible for Chapter 13 relief, rendering appeal of remainder of confirmation order moot.

- (5076) *Cline v. Mortgage Electronic Registration Systems, Inc.*, 2013 WL 6687257 (S.D. Ohio 2013) – Claim preclusion forecloses successive litigation of same claim regardless of whether new litigation raises same issues as were raised in prior action. Issue preclusion bars successive litigation of issues of fact or law that were actually litigated and resolved, even if the issues arise in context of different claim. State court Judgment of foreclosure precluded later litigation concerning validity of alleged assignment to foreclosing lender. Conduct occurring prior to entry of foreclosure judgment necessarily included in and resolved by judgment, either because claims were actually litigated or because new action sought to assert same issues in context of different claims.
- (5077) *Butts v. Deutsche Bank National Trust Co.*, 2013 WL 5923216 (N.D. Ohio 2013) – Four elements of claim preclusion are: (1) prior final, valid decision on the merits by a court of competent jurisdiction; (2) second action involving the same parties, or their privies, as the first; (3) second action raises claims that were or could have been litigated in the first action; and (4) second action arises out of the transaction or occurrence that was the subject matter of the previous action. State court foreclosure judgment precluded later action by owner contesting validity of promissory note and mortgage. Parties were identical; validity of note and mortgage was or could have been raised in state court litigation; state court judgment of foreclosure was final judgment by court of competent jurisdiction; and there was sufficient identity of actions as foreclosure action and current prosecution both arose out of the same transaction or series of transactions and arose out of the same core of operative facts.
- (5078) *Myers v. Peoples Bank of Ewing*, 2013 WL 5310181 (E.D. Tn. 2013) – Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim. Bankruptcy Court Order lifting stay to allow bank to proceed with litigation does not determine any issue in litigation but only determines whether creditor has colorable claim against estate.
- (5079) *Auto Owners Insurance Company v. Fitzgerald*, 2013 WL 4853316 (Bankr. N.D. Ohio 2013) – State Probate Court judgment established that debtor, as personal representative of estate, had (1) a pre-existing fiduciary relationship, (2) debtor breached that relationship, and (3) the estate suffered a resulting loss. Under Ohio law, there are four elements to the application of the doctrine of collateral estoppel: (1) a final judgment on the merits after a full and fair opportunity to litigate the issue; (2) the issue was actually and directly litigated in the prior action and must have been necessary to the final judgment; (3) the issue in the present suit must have been identical to the issue in the prior suit; and (4) the party against whom estoppel is sought was a party or in privity with the party to the prior action. Debtor was party to state court proceeding that imposed surcharge based on debtor's self-dealing and failure to properly administer assets. Debtor actively participated in and defended action for surcharge by filing response to motion for surcharge and appeared at and participated in the hearing that resulted in judgment. Issue of breach and loss were actually litigated in and determined by state court.
- (5080) *Kreitzer v. Household Realty Corp.*, 489 WL 6998 (Bankr. S.D. Ohio 2013) – Collateral estoppel requires (1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action. If State Court judgment is entitled to preclusive effect, issue preclusion also prevents later consideration of compulsory counterclaim that was not asserted. Purpose is to avoid multiple rounds of litigation that concern a single transaction or occurrence, and sweeps in all claims that are “logically related” to the claims adjudicated in the state court proceeding.
- (5081) *Green v. Baiardi*, 2013 WL 1010656 (Bankr. E.D. Mi. 2013) – Collateral estoppel precludes relitigation of issues in a subsequent but different cause of action between same parties, where prior proceeding resulted in valid final judgment and issue was actually and necessarily litigated.
- (5082) *Key Bank v. Hartmann*, 2013 WL 1312013 (E.D. Ky. 2013) – Collateral estoppel requires 5 elements: (1) at least one party to be bound in the second case must have been a party in the first case; (2) the issue in the second case must be the same as the issue in the first case; (3) the issue must have been actually litigated; (4) the issue was actually decided in that action; and (5) the decision on the issue in the prior action must have been necessary to the court's judgment and adverse to the party to be bound. Settlement of claims in agreement between debtor, Lender and committee was not considered “actually litigated” where it appeared that parties negotiated agreement without involvement of Court, and only court order was one approving the settlement agreement without contest. Underlying action presented no evidentiary hearing, no dispositive motions and no actual proof of any issue. Settlement was not collateral estoppel as to later action by Lender against principals of debtor based on personal guarantees.
- (5083) *Bean v. Farrar*, 2103 WL 1317877 (E.D. Mi. 2013) – Under Arizona law, final judgment entered by Arizona Court collaterally estop further litigation where parties to the prior action are the same as the parties to the current action; and the pertinent issue was actually and necessarily decided in prior case. Defendant actively participated in case during 4 year pre-trial process, yet failed to appear for the trial and instead filed for bankruptcy. Arizona court entered default against defendant, took testimony on issues of damages, and issued final judgment finding that defendant had committed fraud and awarded damages.
- (5084) *Young v. Fannie Mae*, 2013 WL 12842332 (N.D. Ohio 2013) – Res judicata precludes second action on a claim, or any part of a claim, that has previously been adjudicated, as well as any action that could have been raised in earlier action. Parties who do not assert counterclaims

in initial action are precluded from bringing those claims as separate action after entry of final judgment in original case. Counterclaims for alleged wrongful foreclosure were logically related to foreclosure action itself and were res judicata as to any effort to raise same issues in separate action.

- (5085) *CSX Transportation, Inc. v. Denardo*, 2013 WL 1213067 (E.D. Mi. 2013) – Issue preclusion requires (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. Plaintiff's claim to standing to assert pre-petition causes of action not determined by prior Court Order that allowed Plaintiff to conduct post-judgment discovery. Order allowing discovery is not final judgment on the merits as required. Order also did not involve same issues as presented by Defendants' Motion to dismiss based on Plaintiff's alleged lack of standing, as Order was limited to parameters of what could be discoverable in a context that is much broader than what would be allowed in evidence in fact-finding proceeding.
- (5086) *Kentucky Automotive Center of Grayson, LLC v. Nissan North America Inc.*, 2013 WL 663574 (E.D. Ky. 2013) – Claim is barred by res judicata if (1) there is a final decision on merits by court of competent jurisdiction; (2) subsequent action involves same parties or their 'privies'; (3) issue in subsequent action was litigated or should have been litigated in prior action; and (4) an identity of causes of action. Plaintiff's action alleging violation of Kentucky Motor Vehicle Sales Act barred by res judicata where claims related to franchisee's bankruptcy and were initially brought by plaintiff in that bankruptcy action. Complaint alleged that debtor's bankruptcy court appointed CLO wrongfully passed over plaintiff's bid to award franchise to different bidder during bankruptcy auction. Bankruptcy court was court of competent jurisdiction to consider validity of sale, and bankruptcy court order confirming sale constituted "final decision on merits" of propriety of sale.
- (5087) *Lucas County Department of Job & Family Services v. Perrin*, 2013 WL 509130 (Bankr. N.D. Ohio 2013) – Court would afford preclusive effect to administrative order determining that debtor received food assistance by falsely representing that debtor and spouse did not live together. Debtor had full and fair opportunity to litigate issues at agency level and issues were actually litigated. Agency issued final order resolving issues that were core of non-dischargeability action, finding that debtor falsely represented that he was not living with his spouse, that the debtor knew the statement was false, that he made the statement with intent that the State rely on the statement in considering food assistance, and that the state relied on the statement as a condition of eligibility for aid.
- (5088) *Gurjal v. Kalinowski*, Adv. No. 11-6030 (Bankr. E.D. Mi. 2012) – Actual fraud does not require misleading omissions or misrepresentations, and encompasses any intentional scheme to deprive or cheat another of property or a legal right. Plaintiff must prove course of conduct intended to deceive, justifiable reliance, and proximate cause. Plaintiff sued debtor in state court to pierce corporate veil, alleging that debtor as sole member of corporation comingled finances, failed to maintain corporate records, and otherwise used corporate entity as extension of personal financial accounts, had complete identity of interests with corporation to permit piercing of corporate veil to make debtor's personal assets available to corporate creditors. State court judgment did not establish fraud as corporate veil can be pierced either for fraud or where honoring the corporate structure would subvert justice. Absent express finding by state court of fraud, state court order did not necessarily determine the issue of fraud as required for collateral estoppel.
- (5089) *Dean v. Hunter*, 2012 WL 4343869 (Bankr. E.D. Tn. 2012) – Under Virginia law, party asserting collateral estoppel must satisfy five requirements: (1) the parties to the two proceedings must be the same or in privity; (2) the prior proceeding must have resulted in a valid and final judgment against the party against whom preclusion is sought or his privity; (3) the factual issue to be precluded must have been actually litigated in the prior proceeding; (4) the factual issue to be precluded must have been essential to the judgment in the prior proceeding; and (5) there must be mutuality - that is, a party is generally prevented from invoking the preclusive force of a judgment unless that party would have been bound had the prior litigation of the issue reached the opposite result. Issue must be identical to issue previously litigated. State court judgment collaterally estopped debtor in action under Section 523(a)(4). Plaintiff sued for embezzlement and larceny. Although state court judgment was not clear on which theory judgment was based, allegations and evidence presented supported both theories of liability. Although judgment did not state that debtor acted fraudulently or intentionally, State court award of punitive damages supported finding of intent where state law required showing of actual malice for an award of punitive damages.
- (5090) *Dantone v. Dantone*, 477 B.R. 28 (6th Cir BAP 2012) – Plaintiff's state court judgment not entitled to preclusive effect in action under Section 523(a)(4). State court complaint contained claims for breach of fiduciary duty, common law conversion, statutory conversion and negligence, in connection with artifacts for shipwreck that plaintiff delivered to debtor for display in store. Judgment that does not specify which of alternative causes of action on which judgment is based can nonetheless have preclusive effect where record of state court proceedings leads to only one conclusion regarding basis for judgment. Amount of judgment left no doubt that judgment included treble damages for statutory conversion.
- (5091) *Morris v. Brown*, 2012 WL 2989236 (6th Cir. 2012) – Collateral estoppel requires that the issues in the first case be identical as those in the case where estoppel is to be applied and that action involve same parties or their privities. Action by property owner against three people who allegedly trespassed on Plaintiff's property was not same as action brought by two defendants against debtor for contribution. Action also did not raise same issues. Plaintiff's action against defendants alleged only that defendants trespassed on plaintiff's land. Defendants' action against debtor for intentional and willful injury did not establish any injury or damage to property of co-defendants or that debtor acted in such a way as to either intend to cause injury to co-defendants or that debtor's actions were substantially certain to cause harm to co-defendants. Absent identity of issues, judgment in state court action would not be collateral estoppel on issues of dischargeability of debts. Even if state court judgment could have been collateral estoppel, state court findings only established that debtor entered plaintiff's land with intent to convert timber, but did not establish that actions were willful and malicious. Mere intent to convert plaintiff's timber did not amount to willful and malicious injury to property of co-defendants.

- (5092) *Tweedie v. Semeniuk*, Case No. 10-5605 (Bankr. E.D. Mi. 2012) – Judicially confirmed arbitration award is entitled to preclusive effect. Under Michigan law, collateral estoppel applies where there is identity of parties to proceedings; there is valid final judgment in first proceeding; same issue was actually litigated; and party against whom doctrine is asserted had full and fair opportunity to litigate in the prior proceeding.
- (5093) *Hussein v. Shugarman*, 2012 WL 2150335 (Bankr. N.D. Ohio 2012) – Collateral estoppel promotes judicial economy by preventing the same parties or their privies from re-litigating facts and issues in a subsequent suit that were fully litigated in a prior suit. Collateral estoppel principles apply to bankruptcy proceedings and can be used in nondischargeability actions to prevent the re-litigation of issues already decided in another forum such as a state court. Pursuant to the full faith and credit principles of 28 U.S.C. § 1738, Bankruptcy Court must give the same issue preclusion effect to a state court judgment as it would be given under that state's law. Party asserting collateral estoppel must prove four elements: (1) A final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (2) The issue must have been actually and directly litigated in the prior suit and must have been necessary to the final judgment; (3) The issue in the present suit must have been identical to the issue involved in the prior suit; and (4) The party against whom estoppel is sought was a party or in privity with a party to the prior action. Arbitration decision confirmed by the state court having jurisdiction over the matter is entitled to preclusive effect. Confirmed arbitration award was collateral estoppel in action under Section 523(a)(2)(A) and (a)(6). Arbitration award included specific findings of fact that Defendant intentionally used false and forged contractor affidavits to deceive the Plaintiffs, the Plaintiffs were deceived and damaged by the Plaintiff and Plaintiffs then had to pay the unpaid suppliers, causing Plaintiffs to pay for the same work twice, the Defendant acted with the willful intent to injure the Defendant and the Defendant acted with actual malice toward the Plaintiffs.
- (5094) *In re Rathore*, 2012 WL 2131133 (E.D. Mi. 2012) – Action is barred by res judicata where prior state court action resulted in final judgment on merits; both actions are between the same parties; the issue in the second action should have been litigated in the first action; and the claim is identical in both actions. An involuntary dismissal of Plaintiff's complaint in the first action constitutes an adjudication on the merits. Plaintiff's action to recover allegedly fraudulent transfers from debtors and their transferees was barred by res judicata. Plaintiff had previously brought action in Michigan State Court. State court dismissed action where Plaintiff failed to comply with Order that required Plaintiff to respond to discovery, to retain new counsel, and to amend the complaint to add necessary parties. State Court's order was final adjudication on action. Actions were the same and involved the same parties. Issues could have and should have been litigated in State Court action. The State Court action was identical to the action that Plaintiff now sought to bring in bankruptcy court. Bankruptcy court properly dismissed case as barred by res judicata.
- (5095) *Savage v. Murphy*, 2012 WL 2006310 (Bankr. W.D. Ky. 2012) – Under Kentucky law, default judgment is given preclusive effect and will be given that effect in action to except debt from discharge. Defendant was arrested, indicted and pled guilty to assault. Plaintiff then filed action in state court and received default judgment for actual and punitive damages. Judgment held non-dischargeable. "Assault is almost the very definition of willful and malicious injury. ... There is no doubt that the defendant committed assault upon the Plaintiff, having plead guilty to that crime." Final default judgment established all elements of assault and was entitled to preclusive effect.
- (5096) *In re Liber*, 2012 WL 1835164 (Bankr. N.D. Ohio 2012) – Trustee could not object to creditor's claim where claim was subject of valid state court judgment. Although Trustee may have had valid argument as to why debtor should not have been liable for debts arising out of corporation's liquidation of ERISA qualified pension plan, as it appeared that debtor did not have "effective control" over corporate entity, Trustee precluded from disputing debt as creditor had already obtained Judgment in United States District Court against Debtor individually as a person in "effective control". Default judgment is nonetheless entitled to res judicata effect where there was no evidence that the District Court judgment was improper or the result of fraud or collusion and defendant had full knowledge of pendency of action but chose not to appear or defend.
- (5097) *Tweedie v. Hermoyian*, 466 BR 348 (Bankr. E.D. Mi. 2012) – Judicially confirmed arbitration award is entitled to preclusive effect. Under Michigan law, collateral estoppel applies where there is identity of parties to proceedings; there is valid final judgment in first proceeding; same issue was actually litigated; and party against whom doctrine is asserted had full and fair opportunity to litigate in the prior proceeding.
- (5098) *Clearview Designs, Inc. v. Angelilli*, 2012 WL 76033 (Bankr. N.D. Ohio 2012) – Collateral estoppel, or issue preclusion, precludes re-litigation of issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment, even if decided as part of a different claim or cause of action. Collateral estoppel will apply where (1) The party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) There was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (3) The issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and (4) The issue must have been identical to the issue involved in the prior suit. State Court Judgment in favor of Plaintiff for violation of State Trade Secrets Act constitutes judgment between same parties for purposes of Collateral Estoppel. State Court judgment found that Debtor caused injury and intended to cause injury or that injury was substantially likely to occur when Debtor misappropriated trade secrets. Judgment further determined that Debtor had no legal right to misappropriate the trade secrets constituting malicious actions. Issues in Section 523(a)(6) action were determined in State Court Judgment. Collateral estoppel required summary judgment in favor of Plaintiff determining debt to be non-dischargeable.
- (5099) *Newton v. Sims*, 2011 WL 6000852 (Bankr. E.D. Tn. 2011) – Collateral estoppel requires that the issue in the subsequent litigation be identical to that resolved in the earlier litigation; the issue was actually litigated and decided in the prior action; the resolution of the issue was necessary and essential to the judgment on the merits in the prior litigation; the party to be stopped was a party to the prior litigation or was in privity with a party; and the party to be estopped had a full and fair opportunity to litigate the issue. Decision denying action to deny debtor alleged discharge under Section 727 based on debtor's fraudulent transfer of assets on eve of bankruptcy filing found as matter

of fact that alleged transfers were not made with fraudulent intent so as to bar discharge. Trustee collaterally estopped in subsequent fraudulent transfer action based on alleged actual fraud in connection with same transfer.

- (5100) *In re Damron*, 457 BR 662 (Bankr. S.D. Ohio 2011) – Administrative Hearing determining that debtor fraudulently obtained workers compensation benefits was preclusive in action under Section 523(a)(2). Administrative hearings will be given preclusive effect if (1) the administrative body acted in a judicial capacity; (2) there is an identity of parties and issues; (3) the administrative body resolved factual disputes that were clearly relevant to the issues properly before it; and (4) the parties have had a full and fair opportunity to litigate and seek review of any adverse findings.
- (5101) *Murtha v. Spencer*, 2011 WL 4101092 (Bankr. W.D. Mi. 2011) – Under Michigan law, collateral estoppel applies when: (1) there is identity of parties across the proceedings; (2) there was a valid, final judgment in the first proceeding; (2) the same issue was actually litigated and necessarily determined in the first proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. Judgment of divorce is valid and binding final judgment that determined whether obligations were in the nature of support or property settlement which was the very issue pending before this court.
- (5102) *Simon v. JPMorgan Chase Bank*, 2011 WL 3701828 (Bankr. E.D. Mi. 2011) - In the Sixth Circuit, a claim is barred by the res judicata effect of prior litigation if each of these four elements are established: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their “privies”; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action. Order granting creditor relief from stay is not res judicata on issue of validity of underlying lien of avoidability of lien under Sections 544 and 547. Order on stay relief motion is limited in scope and does not impact same legal or factual issues as are present in action under Section 544 and 547. Procedural differences – stay relief is contested matter done by motion versus preference litigation which requires adversary proceeding – preclude holding that stay lift is res judicata or collateral estoppel on adversary proceeding. Issues in stay lift are far more limited and based on different facts than preference litigation, defeating any allegation of “identity” of causes of action.
- (5103) *Jones v. Leedey*, 2011 WL 3678925 (Bankr. E.D. Mi. 2011) – Collateral estoppel bars re-litigation by the same parties of legal or factual issues actually raised and determined in an earlier proceeding whereby the court’s decision is conclusive against the parties in subsequent proceedings. Party asserting estoppels must prove (1) that the issue sought to be precluded is identical to an issue decided in an earlier proceeding; (2) that the issue sought to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding; (3) that the judgment in the earlier proceeding has become final; (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding; and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded. State court judgment that contained specific finding that debtor removed and converted money from Plaintiff without proper authority or justification, the amount of \$131,489.99 was sufficient to support collateral estoppels judgment in adversary under Section 523(a)(4).
- (5104) *Bell v. Sims*, Case No. 11-4802 (Bankr. E.D. Mi. 2011) – Collateral estoppel requires that issue be actually litigated and determination must be essential to the underlying judgment. Basis for underlying judgment must be clear, definite and unequivocal. Judgment would not be preclusive where State Court complaint alleged causes of action for breach of contract, promissory estoppel, unjust enrichment and fraud, and judgment did not specify on which of the causes of action the judgment was based.
- (5105) *King’s Welding & Fabricating, Inc. v. King*, 2011 WL 2837915 (Bankr. N.D. Ohio 2011) *aff’d* 2012 WL 3732514 (N.D. Ohio 2012) – Issue preclusion, also known as collateral estoppel, requires entry of final judgment determining the fact or matter sought to be precluded. Orders granting or denying partial summary judgment do not have preclusive effect because they are not final, appealable judgments on the merits.
- (5106) *Old Republic National Title Insurance Co. v. Licavoli*, Case No. 084065 (Bankr. E.D. Mi. 2011) – Federal Court will give state administrative agency fact findings same preclusive effect as would applicable state courts. In Michigan., administrative determinations are adjudicative in nature and collateral estoppel applies when the parties are the same or substantially identical; the administrative proceeding resulted in a valid final judgment; and the issue in question was actually litigated.
- (5107) *In re Mullins*, 2011 WL 1791090 (Bankr. S.D. Ohio 2011) – The doctrine of collateral estoppel applies in Ohio when a fact or issue (1) was actually and directly litigated in the prior action; (2) was passed upon and determined by a court of competent jurisdiction; and (3) when the party against whom collateral estoppel is asserted was a party to the prior action. State Court Judgment foreclosing judicial lien and decreeing that all other liens are extinguished collaterally estopped mortgage creditor from asserting secured status in Chapter 13 proceeding.
- (5108) *Clark v. Springhart*, 450 BR 725 (Bankr. S.D. Ohio 2011) – Judicial proceedings of state court have same preclusive effect as judgment would be afforded under state law. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of *res judicata* in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, the second action is based upon a different claim and the judgment in the first action precludes re-litigation of only those issues actually and necessarily litigated and determined in the first suit. Under South Carolina law, default judgment does not have preclusive effect as issues were not actually litigated; and would not have res judicata effect because bankruptcy proceeding was one to determine dischargeability which could not have been determined by State Court.
- (5109) *In re Henney*, 2011 WL 1642853 (W.D. Mi. 2011) – Judicial proceedings of state court have same preclusive effect as judgment would be afforded under state law. Michigan law requires (1) a question of fact essential to the judgment must have been actually litigated and determined in a valid, final judgment; (2) the same parties must have had a full (and fair) opportunity to litigate the issue; and (3) “there must be mutuality of estoppel. State court judgment not preclusive on issue of debtor’s intoxication at time of accident where debtor

was not a party to that action.

- (5110) *Bowling v. Jones*, 2011 WL 204280 (Bankr. E.D. Tn. 2011) – Collateral estoppel, or issue preclusion, is an “extension” of the doctrine of res judicata, and its purposes are to relieve the parties of multiple lawsuits, conserve judicial resources, and promote finality by preventing inconsistent decisions. Federal courts must give state court judgments “the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered. State Court final judgment that evidenced all elements of non-dischargeability of debt would be collateral estoppel in action under Section 523.
- (5111) *POH Assisted Living, LLC v. Sunrise Assisted Living Management, Inc.*, Case No. 10-6097 (Bankr. E.D. Mi. 2010) – Full Faith and Credit Act, 28 USC Section 1738, requires federal court to give preclusive effect to state court judgment when the court of the state in which the judgment was entered would do so. Res judicata bars claims actually litigated plus all claims that arise from the same transaction and that could have been raised but were not. Order dismissing case with prejudice constitutes a judgment for purposes of res judicata; state court proceeding involved same parties; and arose out of same management agreement and alleged breaches that were the subject of the state court action. Where third party in second case asserts res judicata as a defense, res judicata can still apply even though third party was neither party in the prior suit nor in privity with one who was a party. Action against third party for conspiracy, based on the same events as formed the basis of the prior state court action, was precluded by res judicata.
- (5112) *Thomas v. City of Detroit*, Case No. 10-5909 (Bankr. E.D. Mi. 2010), *aff’d*, 2011 WL 3706669 (E.D. Mi. 2011) – Party owing a debt possesses right of recoupment if that party has a cognizable claim for damages against the party seeking to collect on the debt. Absent any legal obligation owed by the person seeking to collect debt, Debtor had no right of recoupment that could be asserted. Where District Court previously ruled that Debtor had no claims against City, Debtor’s alleged claims against City were res judicata and could not assert recoupment as defense to City’s Proof of Claim.
- (5113) *Educational Credit Management Corporation v. Alfes*, Case No. 10-5557 (Bankr. E.D. Mi. 2010), *aff’d* 2011 WL 3651319 (E.D. Mi. 2011), *aff’d* 709 F.3d 631(6th Cir. 2013) – Res judicata requires final decision on the merits by a court of competent jurisdiction; subsequent action between same parties or their privies; issue in the subsequent action either was or should have been litigated; and identity of causes of action. Default judgment entered in adversary to determine dischargeability of student loan was not res judicata in later action against separate student lender. Default against one defendant has no res judicata effect as to second defendant in same action. Order in favor of second defendant dismissing Plaintiff’s action as matter of law is res judicata in later action between plaintiff and second defendant for alleged violations by second defendant of discharge injunction where second defendant instituted collection proceedings on student loan debt post-discharge.
- (5114) *Hudson & Muma, Inc. v. Muma*, Case No. 09-5227 (Bankr. E.D. Mi. 2010) – Bankruptcy Court required to afford state court judgment preclusive effect to the same extent a court in the state in which the judgment was rendered would give the judgment preclusive effect. Under Michigan law, state court judgment is entitled to preclusive effect if the state court proceedings culminated in a valid final judgment and the issue was (1) actually litigated and (2) necessarily determined. State court judgment finding that debtor did not commit fraud was not preclusive on issue where state court used “clear and convincing evidence” standard but standard under Section 523 is “preponderance of evidence”. Judgment for misappropriation of trade secrets did not require finding of either willfulness or malice as required for non-dischargeability under Section 523(a)(6), so final judgment was not preclusive on that issue. Res Judicata bars a second action when (1) the prior action was decided on the merits, (2) both actions involved the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first action. Under Michigan law, res judicata is broadly interpreted to preclude litigation of every claim arising out of the same transaction that the parties, exercising reasonable diligence, could have raised but did not. Res judicata did not preclude action to recover allegedly converted checks where Debtor had already been convicted and ordered to pay restitution. Action at state court that arose out of Debtor’s relationship with former employer for other breaches of duty would not have included claims that were already subject to criminal court order of restitution for purposes of res judicata.
- (5115) *In re McDowell*, 2010 WL 3790318 (Bankr. E.D. Tn. 2010) –Factual findings in State Court Judgment have collateral estoppel effect to the same extent as that Judgment would be afforded preclusive effect by law of state where judgment was entered. Under Georgia law, the Plaintiff may demonstrate the elements of collateral estoppel by showing that the issue was (1) raised in a prior proceeding, (2) actually litigated and decided, (3) necessary to final judgment and (4) the party to be estopped had full and fair opportunity to litigate the issue.
- (5116) *Daniels v. Miller*, 2010 WL 3724780 (Bankr. E.D. Ky. 2010) – Default judgment must contain express findings of fact and conclusions of law to be given preclusive effect in subsequent litigation between the parties. The court being asked to give preclusive effect to a default judgment in a subsequent litigation must have some reliable way of knowing that the decision was made on the merits. The best evidence would be findings of fact and conclusions of law by the court entering the default judgment. State Court default judgment predicated on allegations of fraud would not have preclusive effect where State Court Judgment did not contain any findings of fact and stated only that the Debtor, “having filed no answer and made no objections in writing or in person, ... [the Court] finds that the Defendant committed fraud upon the Plaintiff” left the Bankruptcy Court with no way to determine whether the judgment of fraud was made on the merits of the case.
- (5117) *Phillips v. Weissert*, Case No. 09-8032 (6th Cir. BAP 2010) - Where state court determines factual question using the same standards as the bankruptcy court would use, collateral estoppel should be applied to promote judicial economy. Default Judgment would be given preclusive effect where default determined only liability, and damages were subsequently actually litigated at which Debtor appeared and had a full and fair opportunity to litigate that issue. However, default judgment that determined only liability and damages, but did not consider whether conduct was “willful and malicious” as defined in the Bankruptcy Code would not constitute collateral estoppel on issue of non-dischargeability.

- (5118) *Fairdale Area Community Ministries, Inc. v. Hollingsworth*, 2010 WL 3447590 (Bankr. W.D. Ky. 2010) – Collateral estoppel may be used in the bankruptcy context to preclude parties from re-litigating issues previously litigated in a state court forum. Collateral estoppel may be applied in dischargeability proceedings, such as this adversary proceeding. To invoke collateral estoppel, a party must (1) show the precise issue was raised in the prior proceeding between the same parties or parties in privity with them, (2) show it was actually litigated, and (3) show that its determination was necessary to the outcome in state court. State Court Judgment for conversion constituted collateral estoppel on issues pertaining to dischargeability under Section 526(a)(6) where state court found not only that Hollingsworth converted Ministries property, but that he also intended to interfere with Ministries' possession. Issue of conversion was central finding in state court litigation; matter was actually litigated where Debtor participated in discovery and had opportunity to respond to Motion for Summary Judgment but chose not to do so, allowing Judgment to be entered unopposed; and issue of conversion was necessary to outcome in state court, were State Court needed to find that Debtor converted Plaintiff's property with intent to deprive Plaintiff of rightful possession.
- (5119) *Willis v. Chase Home Finance, LLC.*, 2010 WL 3430712 (N.D. Ohio 2010) – In the case of a completed foreclosure action, plaintiff seeks to litigate matters which were raised or which should have been raised in the state court foreclosure and eviction proceedings, a federal court must give a state court judgment the same preclusive effect it would have in the courts of the rendering state. Under Ohio law, an existing final judgment or decree is conclusive as to all claims which were or might have been litigated in the first lawsuit. The doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action he files, or forever be barred from asserting it. Plaintiff's federal court action alleging loan fraud, illegal foreclosure and breach of loan modification agreement were issues that were or could have been raised in state court foreclosure proceeding and so were barred from further review by *res judicata*.
- (5120) *In re Perkins*, Case No. 09-32328 (Bankr. E.D. MI. 2010) - State Court Default Judgment in case where defendant did not appear was not "actually litigated" and is not entitled to preclusive effect.
- (5121) *Kelly v. Aho*, Case No. 08-3101 (Bankr. E.D. Mi. 2010) - Full Faith and Credit Act applies in dischargeability proceedings. Court must determine whether a state court judgment would receive preclusive effect in the state where it was rendered. If so, Bankruptcy Court must give judgment preclusive effect unless an exception to the Full Faith and Credit Act applies. Preclusive effect depends on whether the question of fact raised in the later case was actually litigated in the prior case where both parties had full and fair opportunities to litigate the issue. A claim is "actually litigated" when put into issue in the pleadings, submitted to the trier of fact, and determined; and where the determination is essential to the prior judgment and can be clearly ascertained. Parties are precluded unless party against whom judgment to be imposed could not, as a matter of law, have appealed the judgment in the initial action; or the issue is one of law and the second action either presents claims that are unrelated to those in the prior action or there has been a change in controlling law; or new determination is warranted by differences in quality of procedures or extensiveness of jurisdiction; or party against whom preclusion is sought had a higher burden of proof in the first action than would be present in the new action or the burden of proof has been shifted to the party seeking to impose estoppel; or there is some other clear and convincing need to a new determination of the issue.
- (5122) *Livingston v. Transnation Title Insurance Co.*, 2010 WL 1404530 (6th Cir. 2010) – Principles of collateral estoppel apply in non-dischargeability actions. Michigan Supreme Court has held that collateral estoppel precludes re-litigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined. Collateral estoppel applies only where the basis of the prior judgment can be ascertained clearly, definitely, and unequivocally. The inability of a court to determine the basis for the prior judgment precludes defense of collateral estoppel. A judgment affirmed on appeal has conclusive effect, but if the appellate court affirms on grounds that differ from those relied upon by the lower court, the conclusiveness of the judgment as *res judicata* and as collateral estoppel are governed by the appellate decision. Thus if the trial court rests its judgment on two grounds, each of which is independently adequate to support it, the judgment is conclusive as to both; but if the appellate court affirms on one ground without passing on the other, the second ground is no longer conclusively established under the collateral estoppel doctrine. The issue must be identical to that determined in the prior action to have been actually litigated. Court will look beyond the pleadings to consider both the "factual focus" of the prior proceedings and whether the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue. For an issue to have been "necessarily determined," it must have been essential to the judgment. Fraud for purposes of non-dischargeability action is defined by federal bankruptcy law and by state common law in state court, requiring Bankruptcy Court to determine whether the state law counts adjudicated by the state trial court and the Michigan Court of Appeals require identical elements to an action under 11 U.S.C. Section 523(a)(2)(A). Under 11 U.S.C. Section 523(a)(2)(A), a creditor must prove: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false misrepresentation; and (4) its reliance was the proximate cause of the loss. Intent requires actual or positive fraud, not merely fraud implied by law, meaning that the debtor must have acted maliciously and in bad faith. Under Michigan law, actionable fraud requires: (1) That defendant made a material representation; (2) that it was false; (3) that when the defendant made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that the defendant made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that plaintiff thereby suffered injury. Under Michigan law, fraud will not be presumed but must be proven by clear, satisfactory and convincing evidence. Accordingly, the elements of a fraud claim under Michigan law are identical to those necessary to determine non-dischargeability under 11 U.S.C. §523(a)(2)(A). In affirming the state trial court on the fraud count, the Michigan Court of Appeals repeatedly invoked the Debtors' knowledge of their misrepresentations including the retention and expenditure of monies by defendants that should have been used to discharge the second mortgage; Debtors' unpersuasive arguments that they were uninformed or mistaken regarding their financial obligations; Debtor-wife's purposeful ignorance of the terms of the documents she was signing; Debtor-wife's failure to take steps to make certain she was properly informed regarding the documents she was signing; and Debtor-wife retained the monetary benefit from her attorney-in-fact's exercise of authority and never

disclaimed his actions. State court rulings and factual findings support finding of “bad faith” and “actual or positive fraud”.

- (5123) *Guerra & Moore, Ltd. v. Cantu*, 2010 WL 3059175 (5th Cir. 2010) – Parties may invoke collateral estoppel in certain circumstances to bar re-litigation of issues relevant to dischargeability and collateral estoppel can provide an alternate basis to satisfy the elements of Section 523(a)(6). Effect of judgment rendered by a Texas state court, determined by Texas rules of issue preclusion. Under Texas law, collateral estoppel bars re-litigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same cause of action. Judgment finding Debtor has tortuously interfered with a contract was not collateral estoppel on issue of dischargeability under Section 523(a)(6) where Texas law did not require proof of intent to injure as element of tortious interference claim. Where underlying state claim does not have as one of its elements one of the requirements for a finding of non-dischargeability, state court judgment is not collateral estoppel on dischargeability to the extent of the issues not covered by the state court judgment.
- (5124) *State of Michigan v. Turner*, Case No. 09-5413 (Bankr. E.D. Mi. 2010) – Collateral Estoppel and res judicata require a pre-Bankruptcy finding by a Court or State or Federal Administrative Agency in a proceeding in which the party to be bound has had notice and an opportunity to appear. An internal determination by the Michigan Unemployment Agency that debtor improperly received benefits, where Agency did not conduct hearing and debtor was not provided notice or an opportunity to appear is not entitled to preclusive effect on that issue. Fact that debtor was given opportunity to contest or litigate factual determination only after the Agency had made its initial determination did not constitute an opportunity to contest or litigate the factual determinations prior the determination being issued.
- (5125) *Hogan v. George*, Case No. 09-5065 (Bankr. E.D. Ky. 2009) – In order to determine if collateral estoppel applies, the Court must look to the law of the state which rendered the judgment to see if the courts of that state would give the judgment preclusive effect. Colorado courts apply the doctrine of collateral estoppel if (1) the issue precluded is identical to the issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted was a party in the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. Collateral estoppel may be employed in cases involving dischargeability questions if the precise issue was raised in the prior proceeding between the same parties or parties in privity with them, if it was actually litigated, and if its determination was necessary to the outcome in state court.
- (5126) *Heynen v. Webb*, Case No. 09-3182 (Bankr. E.D. Tn. 2010) – Plaintiff in adversary under Section 523(a)(2) and 523(a)(6) not entitled to preclusive effect of State Court Order that found Debtor liable but did not liquidate damages. Collateral estoppel requires (1) that the issue sought to be precluded is identical to an issue decided in an earlier proceeding; (2) that the issue sought to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding; (3) that the judgment in the earlier proceeding has become final; (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding; and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded. A final judgment that resolves all of the parties' claims and leaves the court with nothing to adjudicate is required for a finding of collateral estoppel. An interim order that adjudicates liability but does not resolve damages to which the Plaintiff was entitled remained to be decided is not and cannot support collateral estoppel.
- (5127) *Ohio Truck & Trailer, Inc. v. Level Propane Gases, Inc.*, - 422 BR 93 (6th Cir. BAP 2010) – Confirmation of plan under Section 1141 binds all parties to terms of plan. Confirmation Order is res judicata on all issues raised or that could have been raised in confirmation proceedings. Action is barred by res judicata where (1) there has been a final decision on the merits in the first action; (2) the second action involves the same parties, or their privies; (3) the second action raises an issue actually litigated or which should have been litigated in the first action; and (4) there is an identity of the cause of action. Confirmation Order is “final judgment” for purposes of res judicata. All creditors constitute parties to the first action for purposes of res judicata effect of confirmation order. Issues regarding alleged fraud in the confirmation process or leading up to confirmation are issues that were or should have been raised in confirmation process. Issues of fraud raised by Creditor after confirmation were substantially the same as were raised prior to confirmation.
- (5128) *McDonald v. Redstone Federal Credit Union*, Case No. 09-12652 (11th Cir. 2010) – elements of res judicata in Alabama are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits. Res judicata prohibits party from re-litigating the same cause of action against the same defendant or a different claim not previously litigated but which arises out of the same evidence.
- (5129) *Double v. Cole*, Case No. 08-3371 (Bankr. N.D. Ohio 2009) – Collateral estoppel, also known as issue preclusion, precludes re-litigation of a matter actually litigated and decided in another forum. Bankruptcy Court will give state court judgment the same preclusive effect that the judgment would have under the law of the State where the judgment was rendered. Under Ohio law, collateral estoppel requires: (1) A final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (2) The issue must have been actually and directly litigated in the prior suit and must have been necessary to the final judgment; (3) The issue in the present suit must have been identical to the issue involved in the prior suit; and (4) The party against whom estoppel is sought was a party or in privity with a party to the prior action. Agreements executed solely between private parties, even if accomplished within the framework of litigation, do not qualify as nor have the force of a judgment for purposes of collateral estoppel unless the agreement is incorporated into a final judgment. Dismissal of the prior suit after execution of a settlement agreement is fatal to collateral estoppel as the issue has never been actually litigated before the prior court. Thus, settlement agreement executed between plaintiff and debtor, following which case was voluntarily dismissed by plaintiff, would not support finding of collateral estoppel as to dischargeability of debt.
- (5130) *Nehasil v. Grenier*, Case No. 09-14011 (E.D. Mi. 2010) *aff'd* Case No. 10-2242 (6th Cir. 2012) – Collateral estoppel bars re-litigation of issues previously decided in when the issues were raised in a different cause of action between same parties. Ultimate issues underlying

first action must also be involved in the second action, and parties must have had full opportunity to litigate issues in prior case. State Court action for fraud required proof of (1) material misrepresentation; (2) that was false; (3) was known to be false, or made recklessly, without knowledge of truth, and as a positive assertion; (4) that was made with intention that other party should act on it; (5) that the other party acted in reliance on the statement; and (6) that the other party suffered injury. Michigan Fraud judgment is sufficient to support finding of non-dischargeability under Section 523(a)(2)(A) under doctrine of collateral estoppel.

- (5131) *Sullivan v. Smith*, Case No. 10-4335 (Bankr. E.D. Mi. 2010) – Collateral estoppel can be applied by bankruptcy court to avoid re-litigating any grounds for non-dischargeability which were litigated in a prior proceeding. If a state court judgment would receive preclusive effect in the state where it was rendered, bankruptcy court must give that judgment preclusive effect. State court judgment rendered by default is entitled to same preclusive effect. However, Michigan courts do not give collateral estoppel to consent judgments. Court concluded that post judgment forbearance agreement which merely stated that judgment indebtedness “is not dischargeable and bankruptcy” did not have preclusive effect where forbearance agreement did not contain specific factual statements identifying the false representations and related facts which would be required for a determination under section 523(a)(2).
- (5132) *Murawski v. Campbell*, Case No. 08-3178 (Bankr. E.D. Mi. 2010) – Res judicata refers to the preclusive effect of a judgment and prevents re-litigation of the very same claim. Collateral estoppel refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same of different claim. Claim under Section 523(a)(2) is not precluded by res judicata where state court never entered judgment due to automatic stay. Res judicata does not control dischargeability action as Section 523 claims are solely within the jurisdiction of the Federal Court and the issues addressed in the state court could not be identical with those of Section 523 as those issues did not exist at the time of the state court litigation because debtor had not yet filed for bankruptcy.
- (5133) *Tomlin v. Crownover*, 2009 WL 2843370 (Bankr. E.D. Tn. 2009) – Full Faith and Credit Clause of the United States Constitution requires that judicial proceedings of any state had the same effect in every chord within the United States that they had in the originating court. Federal court must give state court judgment the same effect it would have under state law for purposes of res judicata and collateral estoppel. Res judicata deals with the effect of an earlier judgment on a claim asserted by a party in later litigation. Collateral estoppel deals with factual findings necessary to prove a claim. Plaintiff an action under section 523(a)(2) and (a)(6) can rely on state court judgment to establish claim that debtor violated Tennessee Consumer Protection Act. However, Tennessee judgment is not res judicata on issue of whether debt is accepted from discharge as federal courts have exclusive jurisdiction to determine discharge ability of claims. Collateral estoppel principles do apply to non-dischargeability proceedings. When the state court has determined factual issues using standards identical to those in dischargeability proceedings, collateral estoppel bars re-litigation of those issues in bankruptcy court.
- (5134) *Sher v. Dunbar*, 2010 WL 4038741 (Bankr. W.D. Mi. 2010) – Final but unconfirmed arbitration award entitled to preclusive effect under doctrine of collateral estoppel. Effectiveness of arbitrator’s decision does not depend upon confirmation by a state court. Collateral estoppel would apply where both parties had a full and fair opportunity to litigate the issues and it would be unfair to provide either party with a “second bite at the apple”. We litigating the same issues in the context of a non-discharge ability action would be inconsistent with federal policy in favor of arbitration and would be wasteful of judicial resources. Collateral estoppel may be invoked where (one) the issue precluded is the same one involved in the prior proceeding; (two) the issue was actually litigated in the prior proceeding; (three) determination of the issue was a critical and necessary part of the decision in the prior proceeding; and (four) the prior forum provided the party against whom estoppel is asserted a full and fair opportunity to litigate the issue. Record demonstrated that issue of fraud was actually litigated and that conclusion that party did not commit fraud with necessary part of arbitrator’s decision.
- (5135) *Winget v. JP Morgan Chase Bank*, 537 F.3d 565 (6th Cir. 2008) – Action is barred by res judicata if (1) a final decision on the merits has been reached by a Court of competent jurisdiction; (2) a subsequent action is brought between the same parties or their privies; (3) the issue in the subsequent action was or should have been actually litigated in the prior action; and (4) the current cause of action is identical to the cause of action in the prior case. Creditor precluded by doctrine of res judicata from challenging a bankruptcy sale in the bankruptcy Court had previously entered an order approving the proposed sale and that order had become final and non-appealable. A bankruptcy Court order authorizing sale of part of the estate constitutes a final judgment on the merits for res judicata purposes.
- (5136) *Sanderson Farms, Inc. v. Gasbarro*, 2008 WL 4764118 (6th Cir. 2008) - State Court judgment is entitled to preclusive effect in a non-dischargeability action if the law of the state would give collateral estoppel effect to the judgment. To assert collateral estoppel under Ohio law, a party must plead and prove the following: (1) the party against whom collateral estoppel is sought was a party-or in privity with a party-in the previous action; (2) there was a final judgment on the merits in the previous action after a full and fair opportunity to litigate the issue; (3) the issue was actually and directly litigated in the previous action and was necessary to the final judgment; and (4) the issue in the present action is identical to the issue involved in the previous action.
- (5137) *ABS Industries, Inc. v. Fifth Third Bank*, 2009 WL 1811915 (6th Cir. 2009) – “[A] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” Claim preclusion consists of four elements: (1) prior final, valid decision on the merits by a Court of competent jurisdiction; (2) a second action involving the same parties or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action. Privity merely requires a mutuality of interest, including identity of desired result; and identification of interest of one person with another as to represent the same legal right. Principle-agency relationship is sufficient to establish privity.
- (5138) *Collins & Aikman Corp. v. Valeo*, Adv. 07-5587 (Bankr. E.D. Mi. 2009) - Order confirming plan of reorganization constitutes a final judgment for res judicata purposes. Res judicata does not apply to claims asserted prior to entry of the Order Confirming Plan. Therefore,

res judicata was not defense to adversary proceedings to avoid preferential transfers filed prior to entry of the Order Confirming Debtors' Plan of Reorganization.

- (5139) *Huntington National Bank v. Moore*, 2009 WL 1974233 (Bankr. N.D. Ohio 2009) – State Court judgment entitled to same preclusive effect that the order would have in State Court proceeding. “Issue preclusion” prevents re-litigation of issue that was actually and necessarily litigated and determined by Court of competent jurisdiction.
- (5140) *Computer Business World v. Jamil*, Adv. No. 09-4419 (Bankr. E.D. Mi. 2009) - Factual findings of State Court decision that is on appeal are entitled to collateral estoppel effect, subject only to possible reversal of the decision. Bankruptcy Court must give preclusive effect to State Court Order to same extent that Order would receive in the State where the judgment was rendered. Collateral estoppel precludes the re-litigation of an issue in a subsequent, different action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was actually litigated and necessarily determined.
- (5141) *Winget v. JP Morgan Chase Bank*, 537 F.3d 565 (6th Cir. 2008) – Claim is barred by res judicata if (1) a final decision on the merits has been reached by a Court of competent jurisdiction; (2) a subsequent action is brought between the same parties or their privies; (3) the issue in the subsequent action was or should have been actually litigated in the prior action; and (4) the current cause of action is identical to the cause of action in the prior case. A bankruptcy Court order authorizing sale of part of the estate constitutes a final judgment on the merits for res judicata purposes.
- (5142) *RDM Holdings, Ltd. v. Continental Plastics Company*, Case No. 278912 (Mich. Ct. App. 2008) – Court must apply federal law in determining whether doctrine of res judicata requires dismissal of case where judgment on which res judicata would be based was entered by federal Court. Accordingly, where issue turns on impact of intervening bankruptcy case, federal claim preclusion law will apply in determining the preclusive effect of any actions in the bankruptcy Court.

12.124 Same Parties

- (5143) *Leonard v. RDLG, LLC*, 2015 WL 1534520 (E.D. Tn. 2015) – Default judgment entered as sanction for failure to abide by orders of court entitled to same preclusive effect as order would be given at state law. Debtor had full and fair opportunity to litigate issues where debtor actively participates in litigation until court entered sanction order striking pleadings and entering default judgment. Debtor had full notice that if debtor failed to comply with orders of court, the result would be an order striking pleadings and entering default, yet debtor continued to defy orders of court.
- (5144) *Wells v. THB America*, 2014 WL 5324095 (Bankr. E. D. Mi. 2014) – Chapter 7 Trustee could not use state court judgment that found that transfer of assets by debtor to third party was fraudulent transfer where Chapter 7 Trustee was not party to that action and was not in privity with any party to that action. Collateral estoppel requires mutuality of estoppel. As Chapter 7 Trustee would not be estopped as he was not a party to state court action, Trustee cannot rely on estopped effect of judgment against third party.
- (5145) *KFC Corporation v. Kazi*, 2014 WL 4914427 (W.D. Ky. 2014) – Sole shareholder of corporation is “privy” of corporation for purposes of res judicata. Principal precluded from asserting defenses to action to enforce guarantee of corporate guaranty where corporation unsuccessfully asserted defenses in prior action brought by lender.
- (5146) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Chapter 7 Trustee is bound by pre-petition judgment adverse to debtor to same extent that debtor itself is bound. Chapter 7 Trustee stands in shoes of debtor and is bound by terms of pre-petition Judgment for purposes of *res judicata* and collateral estoppel.
- (5147) *Citizens Insurance Company v. King*, 2013 WL 5770275 (Bankr. E.D. Mi. 2013) – Prior adjudication has preclusive effect only where prior litigation involved same parties and produced a mutuality of estoppel. Debtor’s guilty plea and criminal conviction for felonious assault with a deadly weapon carries no preclusive effect in subsequent litigation brought by insurer to declare debt non-dischargeable, as insurer was not party to criminal proceeding and would not have been bound by adjudication had debtor been adjudicated not guilty. While guilty plea may be relevant in dischargeability litigation, plea does not prevent debtor from contesting that elements of Section 523(a)(6) are met.
- (5148) *In re Stepp*, 2013 WL 4853328 (Bankr. N.D. Ohio 2013) – Debtor is not estopped from asserting exemption in tax refund merely because state court divorce judgment declared refund to be marital property and ordered refund to be distributed. Debtor’s failure to assert a right of exemption in funds in state court did not preclude debtor from claiming exemption in bankruptcy. Divorce action was between debtor and spouse. Spouse was not party to Trustee’s objection to exemption and trustee was not in privity with spouse. Further, the issue of exemption was neither litigated nor necessary to be litigated in divorce action.
- (5149) *Porter v. Chase Home Finance, LLC*, Case No. 10-80587 (Bankr. W.D. Mi. 2013) –Trustee had full right to litigate validity of mortgage and to enter into settlement that dismissed action with prejudice, and then abandoned real estate back to debtor. Debtor obtained interest in real estate from the trustee and is in privity with trustee in connection with real estate for purposes of res judicata. Dismissal with prejudice bound debtor as privy with trustee and debtor’s later action against mortgage company was barred.
- (5150) *Green v. Baiardi*, 2013 WL 1010656 (Bankr. E.D. Mi. 2013) – State Court receiver was “same party” where prior judgment was in action between debtor and ex-husband, and receiver had been appointed only after entry of final judgment where debtor refused to cooperate in sale of property as ordered. Order that was basis for action under Section 523(a)(6) was state court order awarding receiver fees and costs to which debtor and receiver were actual parties.

12.125 Claims Actually and Necessarily Litigated

- (5151) *Gray v. Vinsant*, 2015 WL 5882291 (Bankr. E.D. Tn. 2015) – To except debt from discharge under Section 523(a)(2)(A), plaintiff must prove that debtor obtained money or property from or belonging to plaintiff through material misrepresentations that debtor either knew were false when made or were made with gross recklessness, that debtor intended to deceive plaintiff and that plaintiff justifiably relied on debtor's representations, and that the false representations were proximate cause of plaintiff's loss. Collateral estoppel can be used to prove elements of action if (1) issue sought to be preclude is identical to issue in earlier proceeding; (2) issue to be precluded was actually raised and litigated and decided on merits in earlier proceeding; (3) judgment in earlier proceeding has become final; (4) party against whom estoppel is asserted was party to, or was in privity with party to, prior action; and (5) party against whom estoppel is asserted had full and fair opportunity to litigate issue. Judgment in state court was not collateral estoppel where it was not clear that court considered issues in state court action that were central to Section 523 action as state court judgment did not indicate whether debtor's actions amounted to conduct intended to deceive or were instead result of negligent misrepresentation which does not rise to level of fraud for purposes of Section 523. Complaint contained multiple causes of action and judgment did not make any finding of fact, merely stating that judgment was entered in favor of plaintiff and against debtor. While action potentially fit within scope of Section 523(a)(2)(A), it was not clear that state court made requisite findings regarding intent.
- (5152) *Yeager v. Wilmers*, 2015 WL 5579440 (Bankr. S.D. Ohio 2015) – Willful and malicious injury requires that debtor act with intent to cause injury or acts in manner that is substantially certain to cause injury; and that debtor's conduct be in conscious disregard of one's duties or without just cause. State Court judgment finding debtor liable for battery was not collateral estoppel in dischargeability action where element of battery at state law required intent to cause harmful or offensive conduct and that in fact produced harmful or offensive conduct but did not require finding that debtor acted willfully or maliciously. Bankruptcy court findings of fact following de novo hearing supported holding of non-dischargeability where debtor caused injury by assaulting plaintiff outside a bar, causing plaintiff to fall to the ground. Fact that debtor was not convicted of crime was irrelevant given different burdens of proof. While evidence indicated that debtor may not have intended conduct to cause specific harm that resulted, evidence indicated that debtor intended to cause some harm, and it is not required that debtor intend to cause the precise injury that resulted.
- (5153) *Crawford v. Katz*, 2015 WL 2401643 (S.D. Ohio 2015) – Tenant's action under Fair Debt Collection Practices Act based on alleged conduct in eviction proceedings barred by res judicata where State Court had already entered final judgment of eviction. Res Judicata includes all claims that were raised or could have been raised in state court proceeding. Tenant could have raised FDCPA claims either as defense to or as a counterclaim in eviction proceedings. Factual claims and allegations in FDCPA action arose out of same transaction that were the subject of the state court eviction proceeding and repeat many of the allegations asserted in the state court counterclaim in the eviction proceeding.
- (5154) *In re City of Detroit, Michigan*, 2015 WL 2165018 (Bankr. E.D. Mi. 2015) – Debtor's objection to claim sustained where multiple prior orders in multiple other courts had determined that City was not liable to creditor. Res judicata effect of prior federal court orders is determined by federal common law, which requires (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies'; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action. Creditor had previously sued City and Court entered Summary Judgment in favor of City, which constituted final decision on merits. Parties were identical in earlier cause of action and claim in bankruptcy case arose out of same conduct of City concerning alleged wrongful seizure of personal property and demolition of structures on real property. Although bankruptcy claim included alleged damages to other items of personal property not specifically alleged in prior complaint, res judicata includes items which were raised or which could have been and should have been included.
- (5155) *Duley v. Thompson*, 2015 WL 1622053 (Bankr. S.D. Ohio 2015) – Issue preclusion, also known as collateral estoppel, applies only when the issue to be precluded was necessary to the prior judgment and was actually litigated. If prior judgment is default judgment, it must contain express findings to be given preclusive effect. To be "actually litigated" in default judgment, moving party must have submitted admissible evidence apart from the pleadings and based on evidence submitted court must make findings of fact and conclusions of law that are sufficiently detailed to support application of collateral estoppel. Complaint and judgment finding that debtor failed to assist in creating an accounting of trust assets and recitation that certain certificates of deposit were closed and money deposited into trust checking accounts were not sufficient to sustain scienter requirement of action under Sections 523(a)(2), (4) or (6). Default judgment made no findings of fact at all, and did not establish either a breach of fiduciary duty or any other intentional misconduct beyond allegation that assets were unaccounted for, without any allegation as to whether this was result of wrongful act or mere negligence or inadvertence. While expenses may have been found to be unreasonable, that does not amount to intent to cause injury.
- (5156) *Leonard v. RDLG, LLC*, 2015 WL 1534520 (E.D. Tn. 2015) – Default judgment entered as sanction for failure to abide by orders of court entitled to same preclusive effect as order would be given at state law. Issues are "actually litigated" if debtor substantially participated in proceedings prior to entry of default as sanction for failure to abide by orders of court. Debtor substantially participated where debtor engaged several attorneys, served and responded to discovery request, and appeared at the pre-trial conferences. Debtor had full and fair opportunity to litigate issues where debtor actively participates in litigation until court entered sanction order striking pleadings and entering default judgment. Debtor had full notice that if debtor failed to comply with orders of court, the result would be an order striking pleadings and entering default, yet debtor continued to defy orders of court.
- (5157) *Long v. Baah*, 2015 WL 160738 (Bankr. E.D. Tn. 2015) – Collateral estoppels requires identity of legal or factual issues decided in earlier proceedings. Fact that issue as to which preclusion is sought is similar to issues in prior proceeding is not sufficient. Determination of issues that are not necessary to the judgment are in the nature of dicta and are not entitled to preclusive effect, thus ensuring that preclusive effect is not given to determinations that did not receive close judicial attention. State court final judgment not entitled to preclusive effect in later action under Section 523(a)(2) where complaint sounded in breach of contract, fraudulent misrepresentation and fraudulent inducement. Final judgment awarded damages and attorney fees but did not state the specific claim on which the judgment was based and

did not make any findings of fact beyond those related to breach of contract. State court's padding reference that defendant obtained property through false representations and "at least a constructive fraud" not sufficient as judgment contained no findings of fact as to actual fraud and "constructive fraud" is not sufficient to support action under Section 523(a)(2) as it does not have an express intent requirement but rather is a breach of duty that could deceive others or injure public interest regardless of intent.

- (5158) *Bank of Kentucky v. Nageleisen*, 2014 WL 7408931 (Bankr. E.D. Ky. 2014) – Final judgment is not res judicata or collateral estoppel where findings of judgment are secondary or alternative findings where judgment is based on alternate ground that is clearly primary. State court judgment that set aside transfer of property as constructively fraudulent based on lack of consideration not res judicata on issue of whether transfer was also willful and malicious merely because state court alternatively posited that transferor also had fraudulent intent. Statement regarding fraudulent intent was secondary and made only after court had concluded that transfer was constructively fraudulent.
- (5159) *Grant v. Unifund CCR, LLC*, 2014 WL 2444600 (9th Cir. 2014) – Debtor's action alleging that debt collector violated Fair Debt Collection Practices Act by failing to provide required written notice barred by res judicata where Debtor previously filed suit alleging exactly same conduct and basis and District Court previously entered final judgment determining that collector did comply with notice requirements. Claims in second case were identical to claims in first case and arose out of same facts and transactions. District Court correctly dismissed second case as barred by res judicata.
- (5160) *MarketGraphics Research Group, Inc. v. Berge*, 2014 WL 4929423 (Bankr. M.D. Tn. 2014) – Whether final judgment has preclusive effect depends on whether findings of state court raise same issues as are raised in subsequent litigation. Prior court judgment for Tennessee Consumer Protection Act is not preclusive under Section 523(a)(6) where state statute required finding that defendant willfully or knowingly violated statute but did not require finding of malice and district court order did not include findings of malice. Judgment for copyright violation also was not preclusive in later Section 523(a)(6) action where statute required proof that debtor copied protectable elements of the work. District Court found that debtor's infringement was willful but did not include any finding of malice. Finally, judgment against debtor for violation of federal Anticybersquatting act was not preclusive where statute did not require finding of either intent to cause harm or malice, instead requiring finding of bad faith intent to profit and there were no findings of fact in district court judgment of either willfulness or malice.
- (5161) *Gambino v. Koonce*, 757 F.3d 604 (7th Cir. 2014) – State court judgment for slander of title established requisite fraudulent intent for purposes of Section 523(a)(2)(A). Action for slander of title under state law required proof that debtor made a false and malicious publication that disparaged plaintiff's title, that plaintiff suffered injury, and that debtor acted with malice. Malice exists if debtor knew the statements were false or had serious doubts about truth. State court made express findings that debtor recorded false deeds and fraudulent leases in effort to obtain loans from financial institution under circumstances where debtor admitted that he fabricated documents and only possible explanation for conduct was to perpetrate fraud. Debtor's fraudulent intent was the basis of state court decision sufficient for issue to have been actually litigated. Although lesser element of recklessness would have been sufficient to find debtor liable for slander of title, State Court Judgment clearly indicated that court did not use recklessness or gross negligence, but found actual intent to commit fraud.
- (5162) *SunTrust Bank v. Bennett*, 2014 WL 4199092 (Bankr. M.D. Tn. 2014) – Collateral estoppel bars relitigation by the same parties of factual issues actually raised and determined in the prior proceedings. Party asserting estoppel bears burden to show that issue was in fact, determined in the prior suit and that resolution was necessary to the judgment. Issue of fraud was not necessarily litigated in action brought by bank to recover overdrafts where issue of fraud was, at best, incidental to collateral to relief. Cause of action was based on UCC liability and contractual liability for overdrafts, and neither complaint nor judgment contained any facts or findings regarding any alleged fraud. Passing reference by court to "fraud" in last sentence of the order, which merely restates language of code, is not sufficient to establish that fraud was "necessary" to the judgment.
- (5163) *Trost v. Trost*, 2014 WL 1891354 (Bankr. W.D. Mi. 2014) – Collateral estoppel requires that the same issue was actually and necessarily adjudicated in prior proceedings. There was no question that prior litigation determined that debtor had converted property belonging to plaintiff. Although final judgment did not use phrase "willful and malicious", factual findings in final judgment sufficiently established factual predicate to mandate finding that debtor's conversion of plaintiff's property was willful. Plaintiff owned the assets in question, and all parties knew that plaintiff owned the assets. Despite that knowledge, debtor took, and retained the assets following repeated requests by plaintiff to return the assets. Debtor's actions could not be "unwitting" or "unintentional" and was substantially certain to cause injury, meeting "willful" standard of Section 523(a)(6). Factual findings in prior judgment also established that debtor took and retained plaintiff's property without cause or excuse, fulfilling "malicious" requirement. Prior Court Judgment awarding plaintiff \$108,797.06 is non dischargeable under Section 523(a)(6).
- (5164) *Smith v. Vista Hills Partners, LLC*, 2014 WL 1779377 (Bankr. S.D. Ohio 2014) – State Court Order foreclosing first mortgage did not finally determine validity of second mortgage where foreclosure sale had not occurred. Adversary complaint that sought to strip second mortgage on theory that first mortgage had foreclosed out second mortgage failed to state cause of action where complaint indicated that court had entered foreclosure judgment but no sale had occurred. Liens are extinguished only when foreclosure sale is complete and confirmed. Until that point, the second mortgage holder has an interest in the property subject to the eventual foreclosure sale. While final judgment established that upon completion of foreclosure process, second mortgage would be foreclosed, that event had not occurred.
- (5165) *Brown v. Ausley*, 2014 WL 1044252 (Bankr. W.D. Tn. 2014) – Judgment against debtor was collateral estoppel for purposes of Section 523(a)(6) if findings of fact in state court judgment established each element of non-dischargeability action. While state court judgment established most of the elements of action, state court did not decide, and did not need to decide under state law, whether debtor's actions were willful and malicious. State court judgment that liquidated debt owed by debtor to tenant would be given collateral estoppel effect.

- (5166) *McCallum v. Pixley*, 2014 WL 288046 (Bankr. E.D. Mi. 2014) – A “true default judgment” is entitled to preclusive effect under Michigan law as to any issues that were essential to support the judgment, to same extent as if judgment had been rendered following answer and contest. However, estoppel is not “all or nothing” proposition and does not preclude party from later contesting issues that were not actually and necessarily decided in prior action. State court default judgment against debtor for conversion established that debtor wrongfully asserted dominion and control over property of debtor, but did not determine all issues presented in complaint under Section 523(a)(2) and (a)(6) where state court judgment did not make finding that false statement were “material” for purposes of Section 523(a)(2); or that debtor’s conduct was “willful and malicious” as required by Section 523(a)(6).
- (5167) *Cameron v. Thomas*, 2014 WL 509327 (Bankr. E.D. Tn. 2014) – State court denial of punitive damages in action for breach of fiduciary duty did not collaterally estop finding of breach of fiduciary duty under Section 523(a)(4). Fiduciary capacity requires express or technical trusts, not merely those resulting from wrongful conduct. State law on punitive damages required the “most egregious of wrongs” where defendant acted intentionally, fraudulently, maliciously or recklessly, and must be proved by clear and convincing evidence. For purposes of Section 523(a)(4), defalcation does not require malice or intentional fraud, but only knowledge of or gross recklessness in respect to the improper nature of the fiduciary behavior, and must be proved only by preponderance of evidence. Differing standards of conduct and differing burdens of proof precluded finding that lack of punitive damages prevented finding of breach of fiduciary duty.
- (5168) *Chamberlain v. Messer*, 2013 WL 603738 (Bankr. E.D. Mi. 2013) – Collateral estoppel effect of state court default judgment does not bind bankruptcy court where complaint alleged not only fraud in inducement, tortious interference with contract and conversion, but also included simple breach of contract, and judgment did not specify which cause or causes of action formed basis of judgment. Issues that would be relevant to action under Section 523(a)(2), (4) and (6) were not “necessarily determined” in final judgment.
- (5169) *Tyler v. DH Capital Management, Inc.*, 2013 WL 5716131 (6th Cir. 2013) – Plaintiff’s voluntary dismissal without prejudice is not adjudication on merits for res judicata purposes.
- (5170) *In re Stepp*, 2013 WL 4853328 (Bankr. N.D. Ohio 2013) – Debtor is not estopped from asserting exemption in tax refund merely because state court divorce judgment declared refund to be marital property and ordered refund to be distributed. Debtor’s failure to assert a right of exemption in funds in state court did not preclude debtor from claiming exemption in bankruptcy. Divorce action was between debtor and spouse. Spouse was not party to Trustee’s objection to exemption and trustee was not in privity with spouse. Further, the issue of exemption was neither litigated nor necessary to be litigated in divorce action.
- (5171) *Forristall v. McCaulley*, 2013 WL 3052843 (Bankr. E.D. Mi. 2013) – Claims are not actually and necessarily litigated where matters were not essential to underlying state court judgment. State Court judgment based on unfair and deceptive practices statute did not require proof of, and court did not make any finding regarding, justifiable reliance by creditor on debtor’s representations. State statute also did not require, and State Court did not make any findings whether, debtor’s statement were both knowing and intentional. Further, state court judgment did not establish willful and malicious actions by debtor where state statute did not require finding of malice or intent to cause harm. Although State Court judgment posited possible alternative bases for entry of judgment that would have included findings of intent and reliance, those were not in fact the grounds on which the Court based its judgment and, therefore, were not essential to judgment as required to have preclusive effect.
- (5172) *Kreitzer v. Household Realty Corp.*, 489 WL 6998 (Bankr. S.D. Ohio 2013) – Final Judgment in state court foreclosure proceeding was not res judicata or collateral estoppel as to amount of lender’s fees and costs, where the judgment did not indicate that court had actually considered amounts of those fees. Judgment awarded amount but did not indicate any consideration of itemized charges or make any finding of reasonableness. Further, judgment stated that it did not allow “one or more specific items” that were precluded by State Law, and it appeared that proof of claim may have included additional charges that were incurred after entry of State court judgment. However, State Court judgment was entitled to res judicata and collateral estoppel effect on whether lender had standing to enforce mortgage. Any dispute as to proper party entitled to enforce mortgage based on alleged defective assignment of mortgage to lender or any alleged fraud in connection with that transfer would be compulsory counterclaims logically connected to main action to foreclose mortgage. Debtor’s failure to assert any defenses or raise any counterclaims in state court as to right of lender to foreclose would be estopped and subject to res judicata.
- (5173) *Green v. Baiardi*, 2013 WL 1010656 (Bankr. E.D. Mi. 2013) – Action regarding dischargeability of debt owed to receiver was not actually and necessarily litigated in state court proceeding. State Court proceeding addressed only amount of fees and expenses that receiver was entitled to receive. There was no allegation in state court proceeding that debtor had acted in any willful or malicious manner toward receiver and state court made no such finding in awarding receiver fees and costs.
- (5174) *Yust v. Henkel*, 2013 WL 1785415 (Bankr. S.D. Ohio 2013) – Collateral estoppel precludes re-litigation of claims raised and claims that could have been raised based on same operative facts as those that underlie the State Court Judgment. State court judgment against debtor for fraud and breach of contract precluded counterclaims of breach of contract in connection with creditor’s later action to except debt from discharge. Bankruptcy complaint involved same parties and same nucleus of facts and debtor could have raised counterclaims in state court action.

12.126 Valid Final Judgment – Generally

- (5175) *Wells v. THB America*, 2014 WL 5324095 (Bankr. E.D. Mi. 2014) – Final Judgment entered by State Court after commencement of bankruptcy case was entered in violation of automatic stay and was at best voidable. Judgment did not constitute valid final judgment for purposes of collateral estoppel.
- (5176) *Brown v. Florida Coastal Partners*, 2014 WL 5107706 (S.D. Ohio 2014), *reconsideration denied*, 2014 WL 5384052 (S.D. Ohio 2014) –

State court foreclosure action that was removed to federal court before final judgment was entered did not present “final judgment on merits” for purposes of collateral estoppel. Although court made interlocutory findings that plaintiff was holder and owner of note and mortgage in connection with motion to substitute party plaintiff, that order did not amount to “final judgment” for purposes of determining that plaintiff was, in fact, proper party plaintiff.

- (5177) *Kreitzer v. Household Realty Corp.*, 489 WL 6998 (Bankr. S.D. Ohio 2013) – State Court summary judgment in foreclosure action is valid final judgment for purposes of res judicata and collateral estoppel.
- (5178) *Green v. Baiardi*, 2013 WL 1010656 (Bankr. E.D. Mi. 2013) – State Court order awarding Receiver fees in post-judgment proceedings constituted final judgment for purposes of collateral estoppel at least as to amount of fees owed to receiver.

12.127 Valid Final Judgment - Involuntary Dismissal of Complaint

- (5179) *In re Rathore*, 2012 WL 2131133 (E.D. Mi. 2012) – Action is barred by res judicata where prior state court action resulted in final judgment on merits; both actions are between the same parties; the issue in the second action should have been litigated in the first action; and the claim is identical in both actions. An involuntary dismissal of Plaintiff’s complaint in the first action constitutes an adjudication on the merits. State court action where Plaintiff failed to comply with Order that required Plaintiff to respond to discovery, to retain new counsel, and to amend the complaint to add necessary parties. State Court’s order was final adjudication on action. Actions were the same and involved the same parties. Issues could have and should have been litigated in State Court action. The State Court action was identical to the action that Plaintiff now sought to bring in bankruptcy court. Bankruptcy court properly dismissed case as barred by res judicata.

12.128 Dismissal With Prejudice

- (5180) *In re Gandy*, 2013 WL 3216130 (Bankr. E.D. Tn. 2013) – Dismissal with prejudice of adversary proceeding is final judgment for purposes of res judicata. Losing party could not later file another adversary complaint seeking same relief against same parties.
- (5181) *Porter v. Chase Home Finance, LLC*, Case No. 10-80587 (Bankr. W.D. Mi. 2013) – Federal court order dismissing lawsuit with prejudice operates as final disposition of all claims that were or could have been raised in litigation. Chapter 7 trustee commenced litigation against mortgage company challenging validity of mortgage. Action was resolved with dismissal with prejudice, and trustee abandoned real estate to Debtor. Debtor then filed action against mortgage company contesting validity of mortgages on same basis as was alleged by Trustee. Trustee had full right to litigate validity of mortgage and to enter into settlement that dismissed action with prejudice. Debtor obtained interest in real estate from the trustee and is in privity with trustee in connection with real estate for purposes of res judicata.

12.129 Valid Final Judgment – Arbitration Award

- (5182) *Smith-Broughan, Inc. v. SunTrust Bank*, 2015 WL 5885350 (Bankr. N.D. Ohio 2015) – Valid arbitration award is collateral estoppel where issues raised in arbitration are same as issues in bankruptcy proceeding, involving same parties, and actually and necessarily determined. Arbitration award was not collateral estoppel on whether funds held by bank were property of estate where arbitrator decided only that one party did not breach contract with debtor such that arbitrator never reached issue of whether plaintiff had set off rights against other party, which was lynchpin of Bank’s defense.
- (5183) *Bowe v. Kilmartin*, 508 BR 35 (Bankr. W.D. Ky. 2014) – Arbitration award that has been confirmed by state court is valid final judgment for purposes of collateral estoppel. However, award did not collaterally estopp debtor in action under Section 523(a)(6) where award was based solely on debtor’s guilty plea to a misdemeanor charge of simple assault and did not make specific findings either that debtor acted with intent to cause harm or that actions were malicious as required by Section 523(a)(6).

12.130 Valid Final Judgment - “True Default Judgment”

- (5184) *In re Spitler*, Case No. 14-31693 (Bankr. E.D. Mi. 2015) – Collateral estoppel applies in objections to claims if claim has been subject to prior litigation that culminated in a valid final judgment and issues were actually litigated and necessarily determined. Issue is actually litigated if it is put into issue by pleadings, submitted to trier of fact, and determined by trier of fact, although a full trial is not necessarily required. Issue is necessarily determined if resolution is essential to judgment. Default judgment in state court suit by creditor against debtor collaterally estops debtor from contesting validity or amount of debt in subsequent objection to proof of claim.
- (5185) *The Gladys Ragsdale Trust v. Tostige*, 2015 WL 5449997 (Bankr. E.D. Mi. 2015) – Default judgment is entitled to preclusive effect on issues raised and determined by prior court order. However, collateral estoppel does not apply if underlying judgment is product of fraud on court. Bankruptcy court abstained from issue of whether state court judgment was result of fraud on court as state court was in better position to determine merits of arguments, and abstention was consistent with interests of justice and comity with State court.
- (5186) *Duley v. Thompson*, 2015 WL 1622053 (Bankr. S.D. Ohio 2015) – Issue preclusion, also known as collateral estoppel, applies only when the issue to be precluded was necessary to the prior judgment and was actually litigated. If prior judgment is default judgment, it must contain express findings to be given preclusive effect. To be “actually litigated” in default judgment, moving party must have submitted admissible evidence apart from the pleadings and based on evidence submitted court must make findings of fact and conclusions of law that are sufficiently detailed to support application of collateral estoppel. Complaint and judgment finding that debtor failed to assist in creating an accounting of trust assets and recitation that certain certificates of deposit were closed and money deposited into trust checking accounts were not sufficient to sustain scienter requirement of action under Sections 523(a)(2), (4) or (6). Default judgment made no findings of fact at all, and did not establish either a breach of fiduciary duty or any other intentional misconduct beyond allegation that assets were unaccounted for, without any allegation as to whether this was result of wrongful act or mere negligence or inadvertence. While expenses may have been found to be unreasonable, that does not amount to intent to cause injury.

- (5187) *Brown v. Ausley*, 2014 WL 1044252 (Bankr. W.D. Tn. 2014) – State court default judgment that liquidated debt owed by debtor to tenant would be given collateral estoppel effect, although state court judgment was not preclusive as to non-dischargeability where judgment did not contain requisite factual findings and resolution of state court claims did not require finding of “willful and malicious” for purposes of Section 523(a)(6).
- (5188) *McCallum v. Pixley*, 2014 WL 288046 (Bankr. E.D. Mi. 2014) – A “true default judgment” is entitled to preclusive effect under Michigan law as to any issues that were essential to support the judgment, to same extent as if judgment had been rendered following answer and contest.
- (5189) *Yust v. Henkel*, 2013 WL 1785415 (Bankr. S.D. Ohio 2013) – Under Ohio law, default judgment that has not been vacated, reversed or set aside on appeal is valid final judgment entitled to preclusive effect.
- (5190) *Comerica Bank v. Kory*, 2013 WL 1340215 (Bankr. E.D. Mi. 2013) – State Court “stipulated default judgment” entered after defendant filed answer and affirmative defenses, participated in discovery and asserted position that defendant did not sign the underlying documents was true default judgment entitled to collateral estoppel effect as to validity of defendant’s signature on loan documents. Defendant and Plaintiff entered into “stipulated default judgment” in which defendant withdrew all pleadings and allowed default judgment to be entered. Collateral estoppel precluded defendant from asserting in later nondischargeability proceeding that defendant had not signed the loan documents in question. Although Michigan probably affords collateral estoppel effect to default where defendant does not appear or defend, in this case defendant also substantially participated in litigation before default judgment was entered which warrants collateral estoppel effect.
- (5191) *Dean v. Hunter*, 2012 WL 4343869 (Bankr. E.D. Tn. 2012) – Under Virginia law, fact that judgment is by default does not preclude finding that issue was actually litigated where defendant failed to appear but testimonial and documentary evidence was presented *ex parte*.
- (5192) *McCallum v. Pixley*, Case No. 10-6665 (Bankr. E.D. Mi. 2011) – Under Michigan Law, a “true default judgment”, defined as one entered without the defendant having participated in defending the case, is entitled to preclusive effect in later action between the same parties. “True default” meets “actually litigated” requirement for estoppel under Michigan law.

12.131 Valid Final Judgment - Separation Agreement and Dissolution of Marriage

- (5193) *Silgay v. Morris*, 2013 WL 5705630 (Bankr. N.D. Ohio 2013) – Voluntary marital separation agreement that distributes property is not entitled to preclusive effect even if later incorporated into final judgment. Even if property is distributed by court rather than through voluntary settlement, goals of state court to achieve equitable distribution are different than bankruptcy code goal of reasonable equivalence. Reasonable equivalence turns on value surrendered versus value received, while equitable distribution looks to factors such as duration of marriage, desirability to award family home to spouse that will care for children, liquidity, and other factors designed to achieve fairness in distribution.
- (5194) *Suhar v. Bruno*, Case no. 11-8081 (6th Cir. BAP 2012) – Separation Agreement and attendant Order dissolving marriage is not entitled to preclusive effect and court can look behind statement in Order that division of property is fair, just and equitable in considering possible constructive-fraudulent transfer. Unlike contested divorce proceedings in which the parties actually litigate, decree granting agreed dissolution entered upon submission of settlement agreement that is parties’ resolution reached without any assistance from court is not an issue that has actually been litigated. Further, decree does not demonstrate identity of parties as dissolution judgment is between debtor and ex-spouse, while fraudulent transfer action is brought by Trustee on behalf of all creditors. Standards for fairness in dissolution of marriage action is not the same as issue of reasonably equivalent value in fraudulent transfer case, such that court could enter dissolution judgment that meets state statutory standards but not meet “reasonable equivalence” standard.

12.132 Valid Final Judgment - Default Judgment – Failure to Defend

- (5195) *Duley v. Thompson*, 2015 WL 1622053 (Bankr. S.D. Ohio 2015) – Issue preclusion, also known as collateral estoppel, applies only when the issue to be precluded was necessary to the prior judgment and was actually litigated. If prior judgment is default judgment, it must contain express findings to be given preclusive effect. To be “actually litigated” in default judgment, moving party must have submitted admissible evidence apart from the pleadings and based on evidence submitted court must make findings of fact and conclusions of law that are sufficiently detailed to support application of collateral estoppel. Complaint and judgment finding that debtor failed to assist in creating an accounting of trust assets and recitation that certain certificates of deposit were closed and money deposited into trust checking accounts were not sufficient to sustain scienter requirement of action under Sections 523(a)(2), (4) or (6). Default judgment made no findings of fact at all, and did not establish either a breach of fiduciary duty or any other intentional misconduct beyond allegation that assets were unaccounted for, without any allegation as to whether this was result of wrongful act or mere negligence or inadvertence. While expenses may have been found to be unreasonable, that does not amount to intent to cause injury.
- (5196) *Go Wireless, Inc. v. Lehrmitt*, 2015 WL 351211 (Bankr. W.D. Ky. 2015) – Final Judgment entered by state court entitled to preclusive effect to same extent as judgment would be afforded by court in which judgment was initially entered. Judgment by default is just as conclusive as any other judgment and is entitled to preclusive effect.
- (5197) *SunTrust Bank v. Bennett*, 2014 WL 4199092 (Bankr. M.D. Tn. 2014) – Collateral estoppel bars relitigation by the same parties of factual issues actually raised and determined in the prior proceedings. Party asserting estoppel bears burden to show that issue was in fact, determined in the prior suit and that resolution was necessary to the judgment. Default judgment is collateral estoppel as to well pled factual allegations in complaint as to all matters other than unliquidated damages. State court complaint did not contain sufficient factual

allegations of fraud for purposes of Section 523(a)(2) where word “fraud” was used only once in the complaint and did so only in echoing the language of the Code. Complaint alleged only that debtor deposited checks and later withdrew funds, and deposits later bounced leaving overdrafts in debtor’s account.

- (5198) *Forristall v. McCauley*, 2013 WL 3052843 (Bankr. E.D. Mi. 2013) – Under Texas law, “post-answer” default judgment is entitled to preclusive effect. Defendant filed an answer in state court litigation but did not appear at the trial. Trial court took evidence and entered judgment, which is sufficient for collateral estoppel purposes.
- (5199) *Bean v. Farrar*, 2103 WL 1317877 (E.D. Mi. 2013) – Under Arizona law, final judgment entered by Arizona Court collaterally estop further litigation where parties to the prior action are the same as the parties to the current action; and the pertinent issue was actually and necessarily decided in prior case. Defendant actively participated in case during 4 year pre-trial process, yet failed to appear for the trial and instead filed for bankruptcy. Arizona court entered default against defendant, took testimony on issues of damages, and issued final judgment finding that defendant had committed fraud and awarded damages.
- (5200) *Dantone v. Dantone*, 477 B.R. 28 (6th Cir BAP 2012) – State court judgment is entitled to preclusive effect only to extent state courts in state where judgment was issued would give judgment preclusive effect. In dicta, court stated that Michigan courts do not give preclusive effect to default judgments. However, court refused to rule based on this issue where debtor did not raise issue in lower court or in the briefs at the appellate court.
- (5201) *McCuride v. Strozewski*, 458 BR 397 (Bankr. W.D. Mi. 2011) – Bankruptcy court will afford judgment same preclusive effect as it would have had in state court in which judgment was entered. Michigan law precludes re-litigation of valid final judgment where issue was actually litigated and necessarily determined. Case was “actually litigated” where defendant appeared, filed pleadings, attended mediation, and participated in discovery. Judgment was ultimately entered when defendant failed to appear for a status conference. Defendant’s actions in participating up to the eve of trial is sufficient participation to have issues actually determined.

12.133 Valid Final Judgment - Default Judgment – “Penalty Default”

- (5202) *Chudzinski v. Hanif*, 2015 WL 1981518 (Bankr. E.D. Mi. 2015) – Whether default judgment entered as sanction is entitled to preclusive effect depends on the degree of participation of the defaulted party prior to the default; whether the causes of action are pled with sufficient specificity such that the allegations, if deemed admitted, would support finding of non-dischargeability; whether default was entered against one or multiple defendants; whether damages awarded in default judgment are linked to specific cause of action or whether amount is lump sum not allocated to particular claim; if damages are awarded in lump sum and causes of action pled include both dischargeable and non-dischargeable actions, whether total amount of damages for non-dischargeability count have been actually and necessarily determined. If the defendant participated in action and allegations, if deemed admitted, would support finding of non-dischargeability, court can conclude that liability is conclusively presumed and leave issue of damages for further litigation. Judgment entitled to preclusive effect where debtor actively participated and had full opportunity to litigate defenses, and default entered only after debtor repeatedly failed to comply with discovery requests, with debtor preferring to stall and avoid discovery than litigate.
- (5203) *Leonard v. RDLG, LLC*, 2015 WL 1534520 (E.D. Tn. 2015) – Default judgment entered as sanction for failure to abide by orders of court entitled to same preclusive effect as order would be given at state law. Issues are “actually litigated” if debtor substantially participated in proceedings prior to entry of default.
- (5204) *Anderson v. Fisher*, 2014 WL 4494869 (6th Cir. BAP 2014) – Default judgment entered based on defendant’s refusal to comply with court orders compelling discovery is valid final judgment for collateral estoppel and res judicata purposes. Final Judgment specifically found, based on well pled allegations in complaint, that debtors committed negligence, fraud, conversion, negligent and intentional infliction of emotional distress, outrageous conduct and deceit, reserving jurisdiction to award compensatory and punitive damages.

12.134 Valid Final Judgment – Criminal Proceedings

- (5205) *Yeager v. Wilmers*, 2015 WL 5579440 (Bankr. S.D. Ohio 2015) – Willful and malicious injury requires that debtor act with intent to cause injury or acts in manner that is substantially certain to cause injury; and that debtor’s conduct be in conscious disregard of one’s duties or without just cause. State Court judgment finding debtor liable for battery was not collateral estoppel in dischargeability action where element of battery at state law required intent to cause harmful or offensive conduct and that in fact produced harmful or offensive conduct but did not require finding that debtor acted willfully or maliciously. Bankruptcy court findings of fact following de novo hearing supported holding of non-dischargeability where debtor caused injury by assaulting plaintiff outside a bar, causing plaintiff to fall to the ground. Fact that debtor was not convicted of crime was irrelevant given different burdens of proof. While evidence indicated that debtor may not have intended conduct to cause specific harm that resulted, evidence indicated that debtor intended to cause some harm, and it is not required that debtor intend to cause the precise injury that resulted.
- (5206) *v. Kilmartin*, 2014 WL 1281488 (Bankr. W.D. Ky. 2014) – Under New Jersey law, guilty plea cannot be used for collateral estoppel purposes. Plea may be evidence in subsequent civil action as admission but is not conclusive proof of the facts of the underlying offense.

12.135 Valid Final Judgment – Pending Appeal

- (5207) *Jackson v. Spencer*, 2015 WL 6162945 (Bankr. W.D. Mi. 2015) – Collateral estoppel does not apply where underlying judgment is on appeal but lower court findings of fact are still binding as res judicata unless underlying judgment is reversed. State Court judgment established facts to find that debt was not dischargeable.
- (5208) *Cornerstone Industries Corp v. Kaufman*, 2015 WL 4692569 (Bankr. W.D. Ky. 2015) – Collateral estoppel prevents defendant from re-

litigation factual elements of non-dischargeability claims. Issue preclusion requires four components: (1) identity of issues; (2) a final decision or judgment on the merits, (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a prior losing litigant. Fact that order is on appeal does not deprive judgment of res judicata effect.

- (5209) *Brown v. Florida Coastal Partners*, 2015 WL 4205157 (S.D. Ohio 2015) – Fact that underlying judgment is on appeal does not divest judgment of estoppel effect.

12.136 Orders – Prior Bankruptcy Proceedings

- (5210) *Garner v. Select Portfolio Servicing, Inc.*, 2015 WL 5634449 (E.D. Mi. 2015) – Borrower’s contention that alleged holder of mortgage was not, in fact, holder based on allegedly defective assignment of mortgage was not barred by collateral estoppel, where lender had previously sought relief from stay to foreclose mortgage and issue of status of movant as the party holding the note and mortgage was actually raised and litigated in stay lift proceeding. Stay lift order does not constitute a final judgment on merits of underlying claim, but is only procedural matter allowing parties to proceed in different forum.
- (5211) *Jennings v. Bodrick*, 2015 WL 4437559 (Bankr. S.D. Ohio 2015) – Collateral estoppel and res judicata are related concepts that constitute doctrine of issue preclusion and prevent the relitigation of issues determined by valid final judgment entered by another court. Collateral estoppel, also known as issue preclusion, prohibits relitigating an issue that was also an issue in the prior case, was actually litigated, and the determination of which was necessary to the outcome in the prior action. Res judicata, also known as claims preclusion, bars assertion of claim if there has been a final decision by court of competent jurisdiction in a prior proceeding between same parties or their privies, where the issue in the later case was or should have been litigated in the prior action and there is an identity of the causes of action. Prior judgment in favor of debtor in action brought in first bankruptcy case denying plaintiff’s objection to dischargeability under Section 523(a)(2) against debtor precluded action in later bankruptcy case to except same debt from discharge. Action was brought by same party seeking same relief under complaint that was virtually identical to complaint in earlier case that produced final judgment in favor of debtor, and matter was actually litigated in the prior case. Fact that the prior bankruptcy case was dismissed after entry of final judgment did not deprive final judgment of its validity or enforceability. However, prior action did not preclude complaint under Section 523(a)(6) where, although issues were raised in the prior case, the Order in the prior case made no findings but instead dismissed complaint for failure to state cause of action where prior case was Chapter 13 and there was no basis under Section 1328 to except debt from discharge. Current case is Chapter 7 and issue is properly brought in this case as debt could be excepted from discharge in Chapter 7.

12.137 Particular Claims Barred

- (5212) *PRN Funding, LLC v. Cole*, 2015 WL 6122078 (Bankr. N.D. Ohio 2015) – Non-dischargeability of debt can be based on collateral estoppel effect of pre-bankruptcy state court judgment. Collateral estoppel requires that the party against whom collateral estoppel is sought was a party-or in privity with a party-in the previous action; there was a final judgment on the merits in the previous action after a full and fair opportunity to litigate the issue; the issue was actually and directly litigated in the previous action and was necessary to the final judgment; and the issue in the present action is identical to the issue involved in the previous action. Whether state court judgment is sufficient requires comparison of elements found by state court with elements of subsection of Section 523 under which action is brought. State court judgment found debtor liable on three separate theories, fraud, breach of contract and conversion. Elements of fraud action were identical to elements under Section 523(a)(2), although neither breach of contract nor conversion met the identity of causes of action requirements. Findings of state court sufficiently stated to allow court to determine that elements of fraud were found, but were not sufficiently stated to allow court to apportion damages between various causes of action. Collateral estoppel applied to state court judgment to extent judgment was based on fraud, but Court could not determine on summary judgment the proper apportionment of damages between the non-dischargeable fraud claim and the dischargeable claims for conversion and breach of contract.
- (5213) *Casab v. Grand Sky Enterprise Co., Ltd.*, 2015 WL 753365 (E.D. Mi. 2015) – Plaintiff must prove: (1) the debtor obtained money, property, services or credit through a material misrepresentation, either express or implied, that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) the creditor’s reliance was the proximate cause of loss. Elements of cause of action can be proven by collateral estoppel where state court gives preclusive effect on issues presented. State court judgment established non-dischargeability of debt where judgment specifically found that statements were false when made, that debtor knew statements were false, statement were made with intent that plaintiff would rely, and plaintiff did rely and lacked any reason to doubt debtor’s representations. Judgment established each and every element of action under Section 523(a)(2). Entire state court judgment was predicated on state court fraud action and all damages found by state court flowed from fraudulent conduct, leaving entire state court judgment excepted from discharge.
- (5214) *Schwab Industries, Inc. v. Huntington National Bank*, 2015 WL 5561347 (Bankr. N.D. Ohio 2015) – Order approving counsel’s compensation was res judicata on potential claim of debtor against counsel for post-petition malpractice. Claims either were or could have been litigated in context of fee application process and resolution of process constituted final judgment for res judicata purposes.
- (5215) *Crawford v. Katz*, 2015 WL 2401643 (S.D. Ohio 2015) – Tenant’s action under Fair Debt Collection Practices Act based on alleged conduct in eviction proceedings barred by res judicata where State Court had already entered final judgment of eviction. Res Judicata includes all claims that were raised or could have been raised in state court proceeding. Tenant could have raised FDCPA claims either as defense to or as a counterclaim in eviction proceedings. Factual claims and allegations in FDCPA action arose out of same transaction that were the subject of the state court eviction proceeding and repeat many of the allegations asserted in the state court counterclaim in the eviction proceeding.
- (5216) *Smith v. Lerner, Sampson & Rothfuss*, 2015 WL 1809311 (N.D. Ohio 2015) – Borrower’s RICO action based on allegedly fraudulent

assignment of mortgage barred by res judicata where State Court had previously entered final judgment foreclosing mortgage and indicating that lender was the real party in interest.

- (5217) *Mission Compound, LLC v. Keisler*, 2015 WL 1775155 (Bankr. E.D. Tn. 2015) – Plaintiff’s adversary arising out of alleged fraud in debtor’s pledge of stock interests barred by res judicata and collateral estoppel. While in Chapter 11, debtors asserted that plaintiff did not hold pledge of stock as stock was held as tenants by entireties and only debtor-husband signed pledge agreement. In course of Chapter 11, Court held hearing and concluded that stock had been properly pledged by both husband and wife and creditor held perfected security interest in entirety of stock. Case later converted to Chapter 7 and plaintiff brought action alleging that husband committed fraud by representing that he held all of the stock of the corporation and that he was pledging all of the stock to secure plaintiff’s lien, when in fact husband only owned half interest in stock; and had plaintiff known of true state of affairs, plaintiff would not have entered into loan in first instance. Prior judgment determined that stock was validly pledged in full, precluding any element of reliance on representations of debtor, as debtor represented that plaintiff would receive pledge of 100% interest in stock and plaintiff, in fact, received that pledge. Even if husband misrepresented actual status of ownership of stock, plaintiff received what he bargained for.
- (5218) *Richardson v. Caswell*, 2015 WL 1403015 (Bankr. W.D. Ky. 2015) – State court judgment is entitled to preclusive effect in adversary proceeding to same extent judgment would be afforded preclusive effect under applicable state law. Issue preclusion prevents parties from re-litigating issues that were actually litigated and decided in prior proceeding, and requires that prior proceeding involve same issue; issue was actually litigated, issue was actually decided. And resolution was necessary component of prior decision. State court judgment against debtor for fraud raised identical issue where estate court judgment expressly determined that debtor obtained money through material misrepresentation that debtor knew was false when made, debtor intended to deceive creditor, creditor justifiably relied on representation, and reliance was proximate cause of loss. Debtor falsely stated that corporation was profitable, inducing creditor to invest, when debtor knew that corporation was losing money and on verge of failing, and had creditor known of true state of corporation, creditor would not have invested. Jury refusal of award of punitive damages did not conflict with finding that debtor acted intentionally and did not establish that debt would be dischargeable.
- (5219) *Van Duzer v. US Bank, NA*, 2014 WL 4416304 (5th Cir. 2014) – Complaint alleging irregularities in mortgage origination including role of MERS as nominee and originator’s role in initial loan dismissed where cause of action raised same issues as were raised as defenses in prior judicial foreclosure proceeding that produced final judgment in favor of lender determining loan to be enforceable.
- (5220) *Simmons v. BAC Home Loan Servicing, LLC*, 2014 WL 3844788 (M.D. Tn. 2014) – Plaintiff’s complaint alleging wrongful foreclosure dismissed based on res judicata where plaintiff had filed at least four prior federal lawsuits contesting validity of note and mortgage and of foreclosure and each of the four prior cases were dismissed on merits and dismissals were affirmed on appeal. While new lawsuit alleged new or different theories and statutes, action was based on same nucleus of facts that were at issue in prior cases and prior cases involved either same defendants or their privies. All of the claims in the current lawsuit either were, or could have been, raised in any of the prior actions.
- (5221) *In re Kelley*, Case No. 11-90559 (Bankr. W.D. Mi. 2014) – Trustee’s objection to secured claim sustained where prior court order allowing sale of property determined that the only interest in the property was that of the mortgage company. Creditor filed a secured claim based on a state court order imposing a constructive trust. Thereafter, the Trustee, proposed to sell the property free and clear of liens, noting that the only secured claim shown in the chain of title was that of the mortgage company. The Trustee served the motion on creditors who did not file any opposition to the relief requested. The Order approving the sale determined that the only interest in the property other than Debtors’ was that of the mortgage company and ordered distribution of the proceeds accordingly. The Trustee then objected to the creditor’s secured claim, asserting that based on the court’s prior order, the claim was unsecured. The Court sustained the objection, noting that the creditor had full knowledge of the Trustee’s Motion and assertions in the motion that there were no other parties holding an interest in the property but failed to object and so were bound by the Order allowing the Section 363 sale. While the court likely would not have approved the Section 363 sale (or at least retained jurisdiction to determine entitlement to proceeds and the validity of creditor’s claim) had the creditor opposed the sale or at least filed a response to the sale asserting an interest, creditor’s failure to do so left creditor bound by the terms of the order approving sale, effectively extinguishing any interest which creditor had or claimed to have had in the property. Objection sustained to extent of secured status with claim allowed as unsecured only.
- (5222) *Dunn v. Campbell*, 2014 WL 2722755 (Bankr. W.D. Ky. 2014) – State court judgment was res judicata on issues relating to willful and malicious conduct of debtor. State court jury expressly found that debtor committed conversion when debtor sold motorcycle for \$18,000 but then refused to transfer the title to the purchaser. Issue of conversion was actually and necessarily litigated and decided by state court. State Court judgment established that debtor violated a restraining order and that debtor acted in willful and malicious manner. Debtor cannot use Section 523(a)(6) adversary to relitigate issues of liability and damages that were previously considered and ruled upon by state court.
- (5223) *Hopkins v. Federal Home Loan Corporation*, Case no. 13-14757 (E.D. Mi. 2014) – Debtor’s attempt to contest validity of foreclosure sale precluded by res judicata where state court had previously rejected debtor’s challenges to foreclosure process and had issued writ of possession.
- (5224) *Ohio Valley Wholesale Distributors, Inc. v. Nasir*, 2014 WL 708898 (Bankr. E.D. Ky. 2014) – State court final judgment was collateral estoppel in action under Section 523 where final judgment expressly found that Debtor committed fraud with intent to defraud, which are same issues as are presented in action under Section 523(a)(2). Standard of proof at state law was clear and convincing evidence, which is greater burden than preponderance of evidence used in Bankruptcy cases.
- (5225) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – State court judgment that awarded title to assets to party and

entered eviction order against debtor pre-petition was res judicata on issue of ownership of assets. Chapter 7 Trustee precluded from bringing action to contest title to assets. Lawsuit was pre-petition action that ended with valid and non-appealable final judgment. Chapter 7 Trustee, as successor to debtor, is bound by the terms of that Judgment to same extent as debtor. The final judgment expressly adjudicated title to the assets in dispute in this adversary proceeding and necessarily determined ownership of those assets.

- (5226) *General Motors, LLC v. Gunner*, 2013 WL 6628629 (Bankr. E.D. Mi. 2013) – State Court Judgment in favor of Plaintiff against Defendant precluded later claim in Section 523 action that Plaintiff was not the holder of the claim. Ownership of and standing to pursue recovery of claim necessarily determined by State Court.
- (5227) *In re Gandy*, 2013 WL 3216130 (Bankr. E.D. Tn. 2013) – Court would not extend time to object to dischargeability where issues regarding dischargeability had already been determined in final judgment entered earlier in case. Any later attempt by plaintiff to contest dischargeability would be res judicata. Case commenced as Chapter 13. Movant filed adversary to declare debts non-dischargeable. That action was concluded by entry of final judgment in favor of debtor which dismissed all counts with prejudice. After case was converted to Chapter 7, creditor sought extension of time to re-file same adversary proceeding. Later action is barred by res judicata. Fact that case was converted from one chapter to another after entry of initial judgment does not vitiate prior judgment or eliminate effect of that judgment. Prior judgment was final decision by court of competent jurisdiction; subsequent action was between same parties; issue in subsequent litigation was or should have been litigated in prior action; and there was identity of causes of action.
- (5228) *Her, Inc. v. Barlow*, 2012 WL 1165503 (Bankr. S.D. Ohio 2012), *aff'd*, Case No. 13-8018 (6th Cir. BAP 2013) – Statutory damage award for violation of Federal Anticybersquatting Consumer Protection Act constitutes award for willful and malicious injury and is non-dischargeable under Section 523(a)(6). District Court Judgment found Debtor registered and used the internet domain names of debtor's direct competitor to diverted to debtor's web site traffic intended for Debtor's competitor. Debtor acted intentionally with a bad faith intent to profit, and willfully and deliberately violated the ACPA. Debtor exhibited bad faith intent to profit by registering and using the domain names associated with competitor. Debtor's use of the domain names could harm the goodwill of Plaintiffs' marks and was designed to achieve some commercial gain. Debtor admitted that he registered five of the six domain names hoping internet users would "Google" the personal names of the Plaintiffs and discover that Plaintiffs were "not smart enough" to register their own names, which ultimately would embarrass Plaintiffs among their peers and customers. Debtor conceded that he found it "funny" that Plaintiffs were "not smart enough ... to register their own names." Debtor acted intentionally, knowingly registering and using direct competitor's names in web sites. Debtor acted willfully as he either willed and desired harm or believed that injury was substantially certain to occur. Actions were clearly malicious – Debtor's actions were innocently registering what Debtor imagined to be a proper domain name but later determined that his choice caused confusion among consumers, nor did Debtor defendant not know and understand the potential harm the domain registration could cause to their rightful owners.
- (5229) *Barracco v. JP Morgan Chase Bank, N.A.*, 2011 WL 3329755 (E.D. Mi. 2011), *aff'd* 2012 WL 3198531 (6th Cir. 2012) – Judicially confirmed arbitration award was collateral estoppel in separate action between same parties. Although arbitration award was unclear as to whether award included plaintiff's claims against defendant, State Court entered Order Confirming Arbitration award that stated that the award disposed of all claims between the parties, including the defendant. Confirmed Arbitration award, which did not award any damages against defendant, displaced earlier entered default judgment as Order confirming incorporated Arbitration Award in its entirety.
- (5230) *Tweddie v. Semeniuk*, Case No. 10-5605 (Bankr. E.D. Mi. 2012) – Judicially confirmed arbitration award is entitled to preclusive effect in action to except debt from discharge for false representations under Section 523(a)(2). Complaint in arbitration action alleged at least 17 separate false representations made by debtor and alleged that representations were made with intent to deceive and that debtor failed to disclose falsity of statements, and that based on the false representations debtor obtained money from plaintiff. Although arbitration complaint did not specifically allege that reliance was justifiable, complaint did make sufficient factual allegations to support justifiable reliance as parties were close personal friends since childhood, spanning more than 50 years; that parties had socialized and done business together over the years; and that because of existing relationships plaintiff placed great confidence and trust in debtor. Arbitration award also supported determination that debt was non-dischargeable based on fraudulent pretense, where award made extensive factual findings regarding debtor's failure to disclose material information and non-disclosures at a time when debtor knew that information would have been material to plaintiff's decision to invest in debtor's business. Findings of fact also established that plaintiff relied on debtor's failure to disclose; that debtor knew and intended that plaintiff would rely; and that plaintiff advanced funds to debtor based on debtor's failure to disclose. Arbitrator's findings of fact established total amount of plaintiff's claim and established the amount of that total that was attributable to the false representations, and bankruptcy court was bound by that amount in entering judgment declaring debt to be non-dischargeable.
- (5231) *Peebles v. Hayes*, 2012 WL 2682788 (Bankr. M.D. Tn. 2012) – Debtor caused willful and malicious injury to neighboring property owner where Debtor intentionally built home higher than required, graded lot so as to drain toward neighbor, and turned all of the downspouts toward Plaintiff's property, causing water to literally cascade onto Plaintiff's property when it rained. Debtor's actions, at a minimum, caused a nuisance that resulted in damages to Plaintiff. State court's judgment that "more likely than not" the actions were intentional and done with intent to cause harm to plaintiff was sufficient to apply collateral estoppel in adversary action.
- (5232) *In re Rathore*, 2012 WL 2131133 (E.D. Mi. 2012) – Action is barred by res judicata where prior state court action resulted in final judgment on merits; both actions are between the same parties; the issue in the second action should have been litigated in the first action; and the claim is identical in both actions. An involuntary dismissal of Plaintiff's complaint in the first action constitutes an adjudication on the merits. Plaintiff's action to recover allegedly fraudulent transfers from debtors and their transferees was barred by res judicata. Plaintiff had previously brought action in Michigan State Court. State court dismissed action where Plaintiff failed to comply with Order that required Plaintiff to respond to discovery, to retain new counsel, and to amend the complaint to add necessary parties. State Court's order

was final adjudication on action. Actions were the same and involved the same parties. Issues could have and should have been litigated in State Court action. The State Court action was identical to the action that Plaintiff now sought to bring in bankruptcy court. Bankruptcy court properly dismissed case as barred by res judicata.

- (5233) *Tweddie v. Hermoyan*, 466 BR 348 (Bankr. E.D. Mi. 2012) – Judicially confirmed arbitration award is entitled to preclusive effect in action to except debt from discharge for false representations under Section 523(a)(2). Complaint in arbitration action alleged at least 17 separate false representations made by debtor and alleged that representations were made with intent to deceive and that debtor failed to disclose falsity of statements, and that based on the false representations debtor obtained money from plaintiff. Although arbitration complaint did not specifically allege that reliance was justifiable, complaint did make sufficient factual allegations to support justifiable reliance as parties were close personal friends since childhood, spanning more than 50 years; that parties had socialized and done business together over the years; and that because of existing relationships plaintiff placed great confidence and trust in debtor. Arbitration award also supported determination that debt was non-dischargeable based on fraudulent pretense, where award made extensive factual findings regarding debtor's failure to disclose material information and non-disclosures at a time when debtor knew that information would have been material to plaintiff's decision to invest in debtor's business. Findings of fact also established that plaintiff relied on debtor's failure to disclose; that debtor knew and intended that plaintiff would rely; and that plaintiff advanced funds to debtor based on debtor's failure to disclose. Arbitrator's findings of fact established total amount of plaintiff's claim and established the amount of that total that was attributable to the false representations, and bankruptcy court was bound by that amount in entering judgment declaring debt to be non-dischargeable.
- (5234) *McCuride v. Strozewski*, 458 BR 397 (Bankr. W.D. Mi. 2011) – Determination as to whether debt results from willful and malicious injury and whether debt should be excepted from discharge lies solely in bankruptcy court. However, court will apply collateral estoppel where there is prior final judgment that incorporates findings of fact and determine whether, based on the facts that were actually and necessarily determined in the other tribunal, matter rises to level of willful and malicious. State court judgment for intentional infliction of emotional distress established that debtor either intended to cause harm or was so reckless that reasonable person would now harm would result, and that actions were extreme and outrageous demonstrated that actions were willful and malicious.
- (5235) *Busenhart v. Repass*, 2011 WL 6013089 (Bankr. E.D. Ky. 2011) – State Court Judgment holding that actions of debtor, although potentially libelous, did not cause any damage to Plaintiff collaterally estopped Plaintiff from recovering under Section 523(a)(6). Once the issue of damages had been fully and fairly litigated in state court action, bankruptcy court would give preclusive effect to state court judgment.
- (5236) *Baumgart v. Laurie*, 2011 WL 3879507 (Bankr. N.D. Ohio 2011) – Property that is held by debtor as trustee is not property of the estate. Trustee's recovery of property in adversary proceeding for fraudulent transfer precludes debtor from later arguing that property was held in trust for third person. Had property been held in trust, transfer to third party would not have been a transfer of an interest of the debtor in the property which would have precluded finding of fraudulent transfer. Judgment at least implicitly rejected argument for purposes of res judicata.
- (5237) *Barracco v. JPMorgan Chase Bank, N.A.*, 2011 WL 3329755 (E.D. Mi. 2011), *aff'd* 2012 WL 3198531 (6th Cir. 2012) – Where state court has confirmed arbitration award that determined that debtor was not indebted to creditor, Full Faith and Credit Statute, 28 USC Section 1738, requires that Bankruptcy Court honor the arbitration award. State Court arbitration award entitled to same preclusive effect as would be given by State Court in which arbitration occurred. Ultimate issue in arbitration was amount, if any, of deficiency balance owed after foreclosure. Arbitrator's decision that debtor was not further indebted to creditor was preclusive on issue and required disallowance of creditor's claim.
- (5238) *Livingston v. Transnation Title Insurance Co.*, 2010 WL 1404530 (6th Cir. 2010) – Elements of a fraud claim under Michigan law are identical to those necessary to determine non-dischargeability under 11 U.S.C. § 523(a)(2)(A). In affirming the state trial court on the fraud count, the Michigan Court of Appeals repeatedly invoked the Debtors' knowledge of their misrepresentations including the retention and expenditure of monies by defendants that should have been used to discharge the second mortgage; Debtors' unpersuasive arguments that they were uninformed or mistaken regarding their financial obligations; Debtor-wife's purposeful ignorance of the terms of the documents she was signing; Debtor-wife's failure to take steps to make certain she was properly informed regarding the documents she was signing; and Debtor-wife retained the monetary benefit from her attorney-in-fact's exercise of authority and never disclaimed his actions. State court rulings and factual findings support finding of "bad faith" and "actual or positive fraud".
- (5239) *Hogan v. George*, Case No. 09-5065 (Bankr. E.D. Ky. 2009) – State Court litigation established that Defendant's failure to list known defects in written Disclosure Form connection with sale of real property gave false information to the claimant in the course of a transaction in which the defendant had a financial interest or use of the claimant in a business transaction; that defendant was negligent in communicating the information; defendant gave information with the intent or knowing that the claimant would act or decide not to act in reliance on the information; claimant relied on the information supplied by the defendant; and reliance on the information supplied by the defendant caused damage to the claimant; supported final judgment under Section 523(a)(2)(A) as fraudulent representations and as actual fraud based on collateral estoppel.
- (5240) *McDonald v. Redstone Federal Credit Union*, Case No. 09-12652 (11th Cir. 2010) – Failure to timely object to claim of exemptions is res judicata on exempt status of assets. Creditor prohibited from later arguing in State Court that exemption was improper or that amount claimed exceeded amount allowable by law.
- (5241) *Maxus Capital Group, LLC. v. Uhrich*, Case No. 09-8047 (6th Cir. BAP 2010) – Confirmation Order that that is not appealed is binding on all parties. Collateral attack by party who did not take direct appeal of Confirmation Order is prohibited by laches, finality and binding

provisions of confirmed plan. Confirmation of plan has effect of a judgment and *res judicata* bars re-litigation of any issue that was or could have been raised in confirmation proceedings. Party who was aware of alleged fraudulent statements leading up to confirmation of plan who failed to raise those issues during confirmation and failed to take direct appeal precluded from collateral attack to revoke confirmation.

- (5242) *MacDonald v. Gunther*, Case No. 08-8108 (6th Cir. BAP 2009) – Arbitration award confirmed by an appropriate court is entitled to same preclusive effect as would be given to a decision of that court. *Res judicata* and collateral estoppel prevent a party from attempting to relitigate in Federal Court matters that were or should have been advanced in the prior action. Allocation of costs and expenses of arbitration is necessarily one of the matters decided by the arbitrator. Although parties had pre-arbitration agreement concerning allocation of costs and expenses, parties failed to present that agreement to the arbitrator and the arbitrator did not award costs or expenses in the award. Creditor's claim for arbitration costs and expenses based on the pre-arbitration agreement is barred. Claim allowed for the amount awarded by the arbitration and denied as to any additional costs or expenses.
- (5243) *ABS Industries, Inc. v. Fifth Third Bank*, 2009 WL 1811915 (6th Cir. 2009) – Where plaintiff previously sued lead Bank in loan syndication and that case was dismissed with prejudice, plaintiff's subsequent action against participant banks was barred by *res judicata*. Plaintiff alleged in prior lawsuit that lead bank was not agent for participant banks and was now prohibited from "about-face attempt to retract its allegations of agency".
- (5244) *Baker v. Wentland*, 2009 WL 2132639 (Bankr. N.D. Ohio 2009) - Debtor who plead guilty to criminal fraud and ordered to pay criminal restitution collaterally estopped from denying liability or contesting damages in action to deny discharge under Section 523(a)(4). Full amount of criminal award deemed non-dischargeable.
- (5245) *Computer Business World v. Jamil*, Adv. No. 09-4419 (Bankr. E.D. Mi. 2009) - Arbitrator's decision in action that alleged fraud in the inducement against Debtor constitute determination of all issues necessary to finding of non-dischargeability under Section 523(a)(2)(A). Fact that decision may have been on appeal does not prevent decision from being given preclusive effect until and unless reversed on appeal.
- (5246) *Lewis v. McClatchey*, 2009 WL 1372945 (Bankr. S.D. Ohio 2009) - Action against Chapter 7 Trustee for allegedly fraudulent conduct in sale of property of estate barred by *res judicata* where Plaintiff's claims had already been rejected in multiple other actions.
- (5247) *RDM Holdings, Ltd. v. Continental Plastics Company*, Case No. 278912 (Mich. Ct. App. 2008) –Chapter 7 trustee's final report and final account and entry of order by bankruptcy Court closing estate constitutes final order of bankruptcy Court which can support finding of *res judicata*. Creditor could not assert fraudulent transfer claim against recipient of transfers from Debtor prepetition where those actions were not pursued in a bankruptcy proceeding, either by the trustee or by the creditor. Fraudulent transfer actions could have been brought in a bankruptcy Court.
- (5248) *Lewis v. Countrywide Home Loans*, 2009 WL 2777005 (E.D. Mi. 2009) – Debtors confirmed Chapter 13 plan provided for the surrender of Debtor's residence to the mortgage company. Debtor is prohibited by *res judicata* from post-confirmation, instituting legal proceedings against mortgage company for alleged violation of Truth in Lending Act. *Res judicata* bars the re-litigation of any issue decided or which could have been decided at confirmation. Plaintiff could have asserted TILA claims prior to confirmation of their Chapter 13 plan. Plaintiff's attempt to re-litigate the issue is barred.

12.138 Particular Claims Not Barred

- (5249) *Hazelwood v. Fifth Third Bank*, 2014 WL 3534054 (Bankr. W.D. Ky. 2014) – Debtor's proposed modification of confirmed plan to allow debtor to avoid unrecorded mortgage not barred by collateral estoppel or *res judicata*. *Res judicata* applies only where issue in new proceeding was previously litigated. Confirmation of chapter 13 plan did not litigate rights of debtor to avoid lien as part of plan modification.
- (5250) *Wilmers v. Yeager*, 2013 WL 5863059 (Bankr. S.D. Ohio 2013) – Section 523(a)(6) requires finding that injury was both willful and malicious. State court judgment against debtor for battery against creditor not entitled to preclusive effect where judgment did not demonstrate that injuries were willful and malicious. Similarly, state court judgment would not be given preclusive effect against willful and malicious merely because state court declined to award punitive damages. However, state court judgment was preclusive as to whether debtor committed battery and amount of damages suffered by creditor as a result. State court judgment was not clear as to whether debtor's action were intended to cause injury, or whether debtor intended the act that led to injury.
- (5251) *Collision Shop of America, Inc. v. Maurer*, 2013 WL 1316718 (Bankr. E.D. Mi. 2013) – Action to determine dischargeability of debt based on fraud is not collaterally estopped or subject to *res judicata* based on state court judgment for breach of contract. Fact that creditor did not include fraud count in complaint at state court is not preclusive as to whether debt is non-dischargeable, as creditor at state court level would not have had reason to seek relief that would produce non-dischargeability judgment where bankruptcy was not yet filed.
- (5252) *McDermott v. Swanson*, Case No. 12-6028 (8th Cir. BAP 2012) – State court finding that Debtor did not keep records of business activities did not bar debtor from denying that he has insufficient records in action to deny discharge under Section 727(a)(3). Minnesota statute on which judgment was based did not require finding that defendant failed to keep records, and there was no indication that state court relied on that fact in rendering decision in state court action. Further, state court judgment against debtor and two others, jointly and severally, for funds allegedly wrongfully received did not collaterally estop debtor from denying receipt of funds, as state court judgment did not indicate whether debtor ever received any funds or amounts, versus how much may have been received by other defendants. Issues decided in prior litigation were not identical to those presented in Section 727 action for purposes of collateral estoppel.

- (5253) *Tweedie v. Semeniuk*, Case No. 10-5605 (Bankr. E.D. Mi. 2012) – Judicially confirmed arbitration award not entitled to preclusive effect in action to except debt from discharge for fraud under Section 523(a)(2). Arbitration award did not establish any fraudulent conduct by debtor independent of misrepresentations and false pretenses. Record did not indicate that the parties litigated issue of actual fraud where findings of fact by arbitrator, while lengthy, did not address factual issues surrounding fraud claim. Factual findings were also insufficient to establish breach of fiduciary duty where factual findings did not establish that funds advanced by plaintiff were placed in trust or were intended to be placed in trust or were intended for purposes other than as an investment in business to be used in business. Absent evidence of pre-existing express or technical trust relationship, plaintiff cannot prevail under Section 523(a)(4). Arbitration award not collateral estoppel on issue of willful and malicious injury under Section 523(a)(6). Arbitration complaint did not allege that debtor's actions were willful and malicious, but alleged only that actions were "wanton and willful", precluding finding that issues of willful and malicious were actually litigated. Arbitration award also did not find that debtor ever intended to injure plaintiff. Although award made numerous findings that debtor intended to deceive plaintiff, that does not equate to finding the debtor intended that plaintiff would lose those funds or that debtor was substantially certain that plaintiff would suffer injury.
- (5254) *Tweedie v. Hermoyan*, 466 BR 348 (Bankr. E.D. Mi. 2012) – Judicially confirmed arbitration award not entitled to preclusive effect in action to except debt from discharge for fraud under Section 523(a)(2). Arbitration award did not establish any fraudulent conduct by debtor independent of misrepresentations and false pretenses. Record did not indicate that the parties litigated issue of actual fraud where findings of fact by arbitrator, while lengthy, did not address factual issues surrounding fraud claim. Factual findings were also insufficient to establish breach of fiduciary duty where factual findings did not establish that funds advanced by plaintiff were placed in trust or were intended to be placed in trust or were intended for purposes other than as an investment in business to be used in business. Absent evidence of pre-existing express or technical trust relationship, plaintiff cannot prevail under Section 523(a)(4). Arbitration award not collateral estoppel on issue of willful and malicious injury under Section 523(a)(6). Arbitration complaint did not allege that debtor's actions were willful and malicious, but alleged only that actions were "wanton and willful", precluding finding that issues of willful and malicious were actually litigated. Arbitration award also did not find that debtor ever intended to injure plaintiff. Although award made numerous findings that debtor intended to deceive plaintiff, that does not equate to finding the debtor intended that plaintiff would lose those funds or that debtor was substantially certain that plaintiff would suffer injury.
- (5255) *McCallum v. Pixley*, Case No. 10-6665 (Bankr. E.D. Mi. 2011) – Under Michigan Law, a "true default judgment", defined as one entered without the defendant having participated in defending the case, is entitled to preclusive effect in later action between the same parties. Court must determine what issues were "actually determined" as part of default judgment. Legal standards for judgment in Michigan for Fraud meets requirements of legal standards under Section 523(a)(2)(A). However, factual allegations in State Court Complaint, even if assumed to be true, failed to support action under Section 523(a)(2) where complaint never alleged any reasonable reliance by Plaintiff on any representation by Debtor. Allegations of complaint established that even minimal investigation would have uncovered alleged fraudulent statements, making any reliance, although actual, not reasonable as required for action under Section 523(a)(2). State Court complaint for conversion could meet requirements of "willful and malicious" under Section 523(a)(6) if conversion under Michigan is based on willful and intentional deprivation of another of property. However, allegations of complaint failed to demonstrate willful and malicious where complaint alleged only that debtor converted property, as Michigan also allows action for conversion for unwittingly converting property or for use of property in improper ways or improper purpose, even where use did not actually deprive another of possession. Judgment for conversion, that did not expressly find willful and malicious conversion as opposed to "unwitting" conversion, did not establish all elements of willful and malicious injury.
- (5256) *In re McDowell*, 2010 WL 3790318 (Bankr. E.D. Tn. 2010) – Factual findings in State Court Judgment have collateral estoppel effect to the same extent as that Judgment would be afforded preclusive effect by law of state where judgment was entered. Under Georgia law, the Plaintiff may demonstrate the elements of collateral estoppel by showing that the issue was (1) raised in a prior proceeding, (2) actually litigated and decided, (3) necessary to final judgment and (4) the party to be estopped had full and fair opportunity to litigate the issue. Factual findings in State Court judgment did not conclusively demonstrate that Debtor's actions were evidence of fraud as required for non-dischargeability for embezzlement or that Debtor wrongfully obtained possession of Plaintiff's property as required for non-dischargeability for larceny. Parties entered into contractual arrangement and Debtor's actions were the result of a dispute over contractual performance and entitlement to property or proceeds of sale of property.
- (5257) *Hogan v. George*, Case No. 09-5065 (Bankr. E.D. Ky. 2009) – Action under Section 523(a)(6) requires that debt arise from willful and malicious injury. Debt must result from conduct that is both willful and malicious. Willfulness requires intent to cause injury, not merely intentional act that results in injury. State Court litigation that permitted finding based on finding of "willful or malicious" could not support entry of judgment based on collateral estoppel, as State Court did not find that actions were both willful and malicious.
- (5258) *Walker v. Sallie Mae Servicing Corp.*, Case No. 09-6022 (8th Cir. BAP 2010) – Although Discharge Order generally is res judicata on all issues that are or could have been considered at time of entry, Discharge Order will not prevent later consideration of dischargeability of student loan on basis of undue hardship. Student loans are only "self executing" exception to discharge where Debtor bears the burden of proving entitlement to a discharge. Debtor permitted to bring action for to determine dischargeability of student loans for hardship more than 4 years after entry of Discharge Order.
- (5259) *Sanderson Farms, Inc. v. Gasbarro*, 2008 WL 4764118 (6th Cir. 2008) - State Court action to pierce corporate veil did not conclusively establish that defendant's actions were willful and malicious. Ohio law permits piercing corporate veil where the defendant exercised control over the corporation but does not require that control be gained or exercised with malice or fraud.
- (5260) *Collins & Aikman Corp. v. Valeo*, Adv. 07-5587 (Bankr. E.D. Mi. 2009) - Res judicata does not apply where a claim is expressly reserved by the litigant in the earlier bankruptcy proceeding. Therefore, res judicata not applicable to fraudulent transfer actions pending

at time of confirmation of Debtor's Plan that specifically preserved "Causes of Action arising or permitted under chapter 5 of the Bankruptcy Code or applicable state law, including preferences under § 547 of the Bankruptcy Code and fraudulent transfers." Res judicata cannot apply to claims asserted prior to entry of the Order Confirming Plan. Therefore, res judicata was not defense to adversary proceedings to avoid preferential transfers filed prior to entry of the Order Confirming Debtors' Plan of Reorganization.

- (5261) *Collins & Aikman Corp. v. Valeo*, Adv. 07-5587 (Bankr. E.D. Mi. 2009) - Debtor's prior assertion in first day motion that cash management system that pooled money from various subsidiaries into one account and paid expenses for various subsidiaries out of that account would result in significant benefit to Debtor not clearly inconsistent with action to recover specific individual transfers to specific defendants out of that account.
- (5262) *Huntington National Bank v. Moore*, 2009 WL 1974233 (Bankr. N.D. Ohio 2009)—Divorce judgment which was not clear as to whether Debtor had misrepresented assets to Creditor and lack of necessity to determine alleged misrepresentations to Creditor as part of divorce proceeding (although Court did need to address Debtor's alleged financial misconduct in order to divide marital assets) did not preclude litigation of that issue in action to determine dischargeability pursuant to section 523.
- (5263) *RDM Holdings, Ltd. v. Continental Plastics Company*, Case No. 278912 (Mich. Ct. App. 2008) – Creditor not prohibited from bringing action to pierce the corporate veil of the Debtor's parent corporation. There is no legal basis for a subsidiary to attempt to pierce the corporate veil of its own parent. Accordingly, cause of action could not have been maintained by the Chapter 7 trustee and, therefore, survives the bankruptcy proceeding. Further, claims of "successor liability" against company which took over operations after Debtors Chapter 7 filing were not actions which could have been brought in a bankruptcy case. Those actions would constitute non-core proceedings as the actions would lie solely between creditors and the alleged successor corporation.

12.139 Defensive Collateral Estoppel

- (5264) *In re Onworth*, 2015 WL 5781512 (Bankr. W.D. Mi. 2015) – Collateral estoppel requires that (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. Doctrine of "defensive collateral estoppel" allows lender to raise prior judgment as defense where plaintiff had full and fair opportunity to litigate issue in prior proceeding. Debtor's allegation that taxes were illegal was unsupported. Federal Court had previously determined in action between debtor and governmental entities that entities were lawfully created and had power to levy taxes under State law. Although lender was not party to separate federal action Debtor would not be allowed to raise same challenges in context of claim litigation.
- (5265) *Tankersley v. Lynch*, 2014 WL 1096307 (Bankr. E.D. Mi. 2014) – Defensive collateral estoppel is where defendant seeks to prevent plaintiff from relitigating an issue that the plaintiff has previously litigated unsuccessfully in another action against the same or a different party. Defensive collateral estoppel applies in non-dischargeability case and requires that the precise issue have been actually litigated and was determinative of the outcome of the prior proceeding; the prior proceeding must have resulted in a final judgment on merits; and person to be estopped must have had opportunity to fully and fairly litigate. Defensive estoppel does not require mutuality between parties as long as plaintiff had opportunity to litigate same issue in prior action. Company of which debtor was officer as found by arbitrator to have committed breaches of statutes in connection with sale of assets, but specifically found that company did not commit fraud, which defendant contended prevented plaintiff from prevailing in action to have debt owed by debtor held non-dischargeable as incurred by fraud. Arbitrator finding not collateral estoppel as burden of proof for fraud under state law was clear and convincing evidence, while burden under Section 523 is preponderance of evidence. Further, it was unclear whether plaintiff had opportunity to litigate issues of fraud by debtor as arbitration was specifically limited to conduct of company and excluded any evidence regarding personal fraud of debtor. Fact that plaintiff was compelled to arbitrate rather than to litigate also mitigated against estoppel effect, as plaintiff in arbitration proceedings did not have the full procedural opportunities that would be available in bankruptcy adversary proceeding.

12.140 Reversal of Underlying Judgment

- (5266) *Schaller v. Paulsen*, Case No. 12-80166 (Bankr. W.D. Mi. 2015) – Adversary Judgment predicated on collateral estoppel effect of state court judgment would be vacated under Rule 60(b)(5) where state court judgment was later reversed on appeal. Given extensive litigation that had already occurred in State Court, Bankruptcy Court would hold adversary proceeding in abeyance pending final determination by State Court.

S. Stare Decisis

12.141 Binding Effect of District Court Decisions

- (5267) *In re Silverman*, 2010 WL 3169415 (9th Cir., 2010) – District Court decisions do not bind Bankruptcy Courts in other districts. BAP decisions are persuasive but are not binding on any Bankruptcy or District Court.

12.142 Binding Effect of Federal Court Decisions on State Court

- (5268) *First Place Bank v. Casino Concepts by Design, Inc.*, 2013 WL 3351572 (Mi. App. 2013) – State Courts are bound by decisions of United States Supreme Court on matters of federal law, but are not bound by decisions of any other federal courts. Michigan Court of Appeals not bound by Sixth Circuit precedent merely because Michigan lies within scope of Sixth Circuit.

T. Claim Preclusion

12.143 Defined

- (5269) *White Family Companies, Inc. v. PNC Bank*, 2015 WL 1245915 (Bankr. S.D. Ohio 2015) – Claim can be barred by doctrine of collateral estoppels only if claim was fully mature at time underlying litigation was filed. Where defendant’s right to pursue recovery against third party did not mature until defendant lost fraudulent transfer action brought by trustee. Defendant’s later action against third party, predicated on same transaction and same facts, was not barred by issue preclusion.
- (5270) *Amedisys, Inc. v. Hosch*, 2012 WL 3740685 (6th Cir. 2012) – Claim preclusion is the effect of a judgment in foreclosing litigation of a matter that has never been litigated, but should have been litigated in earlier proceeding. Claim preclusion requires (1) final decision on merits in earlier action; (2) subsequent action between same parties or privies; (3) issue in later action that should have been litigated in earlier action; and (4) identity of causes of action. Prior suit involved dispute over ownership of funds allegedly pledged by borrower. Second suit also involved dispute over title to funds and involved same parties, all claims raised in second suit could have been raised in first suit, and new claims were merely different legal theories on which claims could have been based in first case.

U. Judicial Estoppel

12.144 Elements

- (5271) *Harper-Cox v. Gateway-Detroit East*, 2015 WL 3652750 (E.D. Mi. 2015) – Judicial estoppel is discretionary equitable doctrine used to preserve integrity of judicial process by preventing party from engaging in cynical gamesmanship. Judicial estoppel generally requires that a party assert a later position that was inconsistent with prior position; that party succeeded in persuading court to accept earlier position such that acceptance of the later position would create impression that either first court or second court was misled; and the party seeking to assert the position would derive an unfair advantage or impose an unfair detriment on opposing party or that omission was result of mistake or inadvertence. Detrimental reliance by opposing party is not required. Although debtor had filed three separate EEOC complaints at time of filing Chapter 13, debtor did not disclose actions to bankruptcy court until after debtor had received EEOC determinations, instituted suit in District Court, and for an additional two months after defendant filed motion to dismiss based on judicial estoppel. However, action would not be barred where debtor, albeit belatedly, did disclose actions to bankruptcy court and bankruptcy court approved debtor’s continued prosecution of action with condition that all proceeds be paid to Chapter 13 case.
- (5272) *Brown v. Allstate Property and Casualty Insurance Co.*, 2015 WL 1646684 (E.D. Mi. 2015) – Judicial estoppel forbids party from taking position inconsistent with one successfully and unequivocally asserted by same party in prior proceeding. Judicial estoppel does not apply to cases of conduct amounting to nothing more than mistake or inadvertence. Failure to disclose claim in bankruptcy is inadvertent where debtor lacks knowledge of factual basis for undisclosed claims or where debtor lacks any motive for concealment. Judicial estoppel does not bar debtor’s later claim against insurance company when property is later destroyed by fire. Debtor’s valuation of property in bankruptcy schedules, while markedly lower than amount asserted in insurance claim, did not amount to fraud where purposes and timing of valuations were inherently different and not necessarily equivalent valuation. Further, valuation in bankruptcy case was value available to repay creditors while value for insurance purposes was replacement value which is inherently different. If there are specific assets that debtor now claims lost but which were not disclosed to bankruptcy court in first instance, estoppel would prevent debtor from recovering on insurance policy, but for assets that were listed (even in cumulative line item) in schedules but at lower values, estoppel does not apply.
- (5273) *Pruitt v. McLaren Regional Medical Center*, 2015 WL 1729612 (E.D. Mi. 2015) – Judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as a part of a final disposition. Debtor’s failure to disclose pending employment discrimination claim in Bankruptcy schedules constitutes an assertion of a position in the bankruptcy case that is contrary to the one now being advanced in the District Court litigation. Debtor has continuing duty to disclose all potential causes of action and disclosure is at the very core of the bankruptcy process. Evidence did not support finding of inadvertence as debtor had full knowledge where litigation had been filed and was pending for four months prior to bankruptcy petition; and debtor had interest in concealing as debtor has motivation to minimize income and assets in bankruptcy case. Debtor never took any steps to advise bankruptcy court of the litigation, further evidencing that debtor’s failure to disclose was not inadvertent.
- (5274) *Pavelka v. Allstate Property and Casualty Co.*, 2015 WL 1221393 (E.D. Mi. 2015) – Judicial estoppel is equitable doctrine that prevents party from prevailing in one phase of case on an argument and then relying on a contradictory theory at another phase of the litigation. Prior position must be inconsistent with later position and assertion must lead to unfair advantage. Debtor’s value of assets in bankruptcy case was not inconsistent with later assertion of value in insurance claim that arose when debtor’s home burned down post-discharge. Debtor’s valuation in bankruptcy case was predicated on liquidation value, while values in insurance claim were based on replacement value. Section 506(a)(2) requires debtor to use replacement cost if the item stands as collateral for loan but does not mandate use of replacement cost for other personal property. Debtor’s personal property was no collateral for loan – as such, debtor justified in valuing property at lower, liquidation amount. Debtor did not obtain unfair advantage by valuation differential because in Bankruptcy the trustee would be concerned with liquidation value of assets in determining whether to administer assets, and there was no indication that trustee would have administered assets even if debtor listed them at “replacement” value as trustee would have made own determination of liquidation value.
- (5275) *Orkies v. Midland Funding, LLC*, 2015 WL 796360 (W.D. Ky. 2015) – Debtor’s failure to disclose potential cause of action bars debtor from bringing or maintaining action post discharge. Debtor can avoid estoppel only by showing that debtor lacked knowledge of potential claim and lacked any motivation for concealment. Debtor has knowledge of potential claim if debtor has enough information to suggest that debtor may have possible action, even if debtor does not know specific legal basis. Debtor’s post-discharge reopening of case to disclose cause of action did not avoid estoppel effect where debtor did so only after defendant asserted estoppel as defense. After the fact

effort to disclose is not sufficient to show lack of bad faith.

- (5276) *Vehicle Market Research, Inc. v. Mitchell International, Inc.*, 2014 WL 4627852 (10th Cir. 2014) – Judicial estoppel applies where (1) a party takes a position clearly inconsistent with an earlier-taken position; (2) adopting the later, inconsistent, position would create an impression that either the earlier or the later court was misled; and (3) allowing the party to change their position would give them an unfair advantage. Court will be cautious in applying doctrine to prevent party from being able to vindicate rights, while at the same time keeping inconsistent statements in check. Court can use lesser weapons such as allowing party to be impeached with prior inconsistent statements, and should invoke judicial estoppel only where other less forceful remedies are inadequate to protect integrity of judicial system.
- (5277) *In re Asplund*, 2014 WL 5017833 (Bankr. E.D. Mi. 2014) – Judicial estoppel requires that party to be estopped have previously asserted inconsistent position and received relief based on that assertion. Debtor not estopped from denying that obligation is child support notwithstanding that debtor previously asserted in state court that obligation was child support, where state court expressly rejected debtor's position.
- (5278) *Trimas Corp. v. Meyers*, 2014 WL 3376958 (6th Cir 2014) – Judicial estoppel prevents party who has asserted position in prior litigation and prevailed based on that assertion from later asserting inconsistent position in subsequent litigation. Where plaintiff previously sued under Supplemental Executive Retirement Plan and was unsuccessful, plaintiff not judicially estopped from bringing new action under original Executive Retirement Plan.
- (5279) *In re Mitchell*, 2014 WL 1725819 (Bankr. N.D. Ohio 2014) – Judicial estoppel prevents party from asserting position in litigation and obtaining relief based on that assertion from making contrary assertion in later proceedings. Debtor repeatedly disavowed ownership of real property in state court. When debtor later filed bankruptcy, debtor listed property in Schedule A and claimed property as exempt in Schedule C. While debtor clearly made prior inconsistent representations, there was no evidence that State court ever accepted representations or that debtor obtained any relief predicated on those representations, where court set aside alleged transfers from debtor to third parties in first instance.
- (5280) *Geller v. American Insurance Co.*, 2014 WL 920740 (E.D. Mi. 2014) – Judicial estoppel prevents party who assumed certain position in legal proceeding, and succeeds in maintaining that position, from asserting a contrary position merely because his interests have changed. First, party's later position must be 'clearly inconsistent' with its earlier position. Second, Judicial acceptance of an inconsistent position in a later proceeding would create perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations and poses little threat to judicial integrity. Third, the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. Debtor estopped from recovering on personal property insurance policy. Policy provided that policy was void if insured made any false statements relating to insurance or presentation of claim. Debtor made numerous false statements in prior bankruptcy proceeding by failing to disclose ownership of multiple valuable items of personal property, for which debtor later made a claim against insurance after alleged theft. Bankruptcy schedules listed the total value of his personal property as \$2,550.00 including "furs and jewelry", valued at \$50.00." Plaintiff subsequently submitted an insurance claim seeking \$90,225 including \$69,975 for jewelry that he owned prior to bankruptcy filing, including a 14 carat gold ring with a 1.78 carat diamond, 18 carat gold chain (weight of 149 grams), 14 carat bracelet (weight of 38 grams), 14 carat gold ring with 6 diamonds, and stud earring with a 1.25 carat diamond. Insurance policy voided in its entirety based on fraudulent statements in connection with claim.
- (5281) *Kemp v. Thi of Michigan at Detroit, LLC*, 2014 WL 793651 (E.D. Mi. 2014) – The doctrine of judicial estoppel prevents a party from asserting a position contrary to one that the party asserted under oath in a prior judicial proceeding if the prior court adopted the contrary position in a preliminary or final disposition. Doctrine is to protect the integrity of the judicial process by preventing parties from abusing the process through gamesmanship. Judicial estoppel does not apply where the prior inconsistent position amounted to no more than mistake or inadvertence. Doctrine applies where party asserts inconsistent position in other action and obtains relief based on that assertion, and then asserts contrary position in later action.
- (5282) *Javery v. Lucent Technologies, Inc., Long Term Disability Plan*, 741 F.3d 686 (6th Cir. 2014) – Judicial estoppel prevents debtor from later asserting a cause of action that was not disclosed in bankruptcy schedules and obtains relief based on that omission. Debtor can avoid effect of judicial estoppel where non-disclosure was the result of mistake or inadvertence, does not act in bad faith, and lacks a motive to conceal the claim. Debtor not judicially estopped from pursuing disability claim where debtor disclosed claim to bankruptcy attorney in writing and failure to disclose was fault of attorney, not debtor. There was no evidence of bad faith or intent to conceal by debtor. Further, disability claim would have been exempt had it been disclosed, such that debtor had no motive to conceal the action.
- (5283) *Axis Surplus Insurance Company v. Flugence*, Case No. 13-30073 (5th Cir. 2013) – Chapter 13 debtor has continuing duty to disclose causes of action that arise post-petition and post-confirmation. Debtor failed to amend schedules to disclose post-petition cause of action for automobile accident. Judicial estoppel applies where party to be estopped has asserted legal position that is inconsistent with prior position; court accepted the prior position; and the party did not act inadvertently. Debtor had full knowledge of cause of action as debtor brought suit but did not disclose cause of action to bankruptcy court, constituting the assertion of an inconsistent position. Inadvertence requires that the debtor either did not know of the inconsistent position or lacked motive to conceal. Debtor knew of personal injury claim and knew that claim had not been previously disclosed, and debtor had motive to conceal in order to keep claim from creditors. Debtor judicially estopped from pursuing undisclosed cause of action. However, Chapter 13 Trustee not estopped as Trustee did not have notice of the cause of action or make any assertions in bankruptcy court that would be inconsistent with assertion of post-petition cause of action and can pursue cause of action for total value of recovery, even if total recovery exceeds amounts due to creditors. In that event, any surplus proceeds would be returned to debtor.

- (5284) *Myers v. Peoples Bank of Ewing*, 2013 WL 5310181 (E.D. Tn. 2013) – judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position ‘either as a preliminary matter or as part of a final disposition. Debtor not estopped from disputing validity of debt merely because debtor listed debt in bankruptcy schedules without indicating that the debt was disputed. There was no evidence that scheduling was done with any intent to mislead bankruptcy court by scheduling debt as undisputed.
- (5285) *Thompson v. Bruister & Associates, Inc.*, 2013 WL 4507734 (M.D. Tn. 2013) – Doctrine of judicial estoppel preserves integrity of courts by preventing a party from abusing the judicial process through cynical gamesmanship. Doctrine will bar employment related claims not disclosed in bankruptcy proceedings where (1) the debtor assumed a position contrary to one she asserted under oath while in bankruptcy; (2) bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) the debtor's omission did not result from mistake or inadvertence. Judicial estoppel recognizes the importance of debtor's affirmative and ongoing duty to disclose assets, including unliquidated litigation interests. Even if doctrine results in benefit to defendant, judicial estoppel nonetheless applies to protect the importance of full and honest disclosure on bankruptcy process. Party asserting judicial estoppel is not required to prove that omissions were in bad faith – debtor must prove a lack of bad faith by pointing out evidence where debtor attempted to correct initial non-disclosure and to demonstrate that omission was result of inadvertence or mistake. Evidence indicated that debtors never informed bankruptcy trustee or court of pending action, establishing a lack of good faith in the non-disclosure. Plaintiffs made no effort to substitute trustee as party in interest even though motion for summary judgment based on judicial estoppel had been pending for 10 months.
- (5286) *Epps v. United States*, 2013 WL 4096001 (W.D. Tn. 2013) – Judicial estoppel prevents party from asserting in Bankruptcy Court that debtor has no causes of action and then, after obtaining relief from Bankruptcy Court, attempting to change positions by asserting a cause of action. Debtor's cause of action is judicially estopped where Debtor did not list in bankruptcy schedules a cause of action where debtor knew of action at time bankruptcy case commenced yet did not disclose that in schedules or otherwise prior to entry of Order confirming Chapter 13 Plan. Court presumed that debtor had a motive to conceal where debtor did not present any contrary evidence, and debtor did not present any evidence that failure to disclose was result of mistake or otherwise lacked bad faith.
- (5287) *Buzulencia v. Ohio Bell Telephone Co.*, 2013 WL 4049679 (N.D. Ohio 2013) – Judicial estoppel requires court to consider whether debtor's non-disclosure is result of mistake or inadvertence, based on whether: (a) debtor lacked knowledge of the factual basis of the undisclosed claims; (b) debtor had a motive for concealment; and (c) the evidence indicates an absence of bad faith. Debtor did not fail to disclose cause of action where, at time of commencement of bankruptcy, debtor had not filed a lawsuit or sought assistance of counsel, and had only a union grievance pending, where grievance sought only reinstatement of debtor's employment. Once debtor actually filed litigation, debtor promptly reopened bankruptcy case and disclosed action and the Trustee was fully advised of the matter, indicating that debtor lacked any intent to conceal. Bankruptcy trustee is not judicially estopped from appearing in and prosecuting action based on debtor's failure to disclose cause of action in schedules, and is not precluded from prosecuting action merely because debtor claimed value of action exempt where, even allowing exemption as claimed, action could produce recovery sufficient to generate proceeds for creditors.
- (5288) *Quin v. County of Kauai*, Case No. 10-16000 (9th Cir. 2013) – Judicial estoppel does not preclude prosecution of action where failure to disclose action is result of mistake or inadvertence. Debtor indicated that failure to disclose cause of action for husband's loss of employment was because debtor did not understand that she could have had cause of action. When creditor raised issue at trial court, debtor promptly sought to reopen bankruptcy case and to list the lawsuit as an asset. Debtor's attorney acknowledged that failure to disclose was result of misunderstanding. Five months after debtor amended the schedules the Chapter 7 trustee abandoned the cause of action and re-closed the Chapter 7 estate. Although re-opening of case does not necessarily cure failure to disclose in first instance, where evidence indicates that failure to disclose was result of mistake, prompt correction of that mistake will preclude application of judicial estoppel.
- (5289) *Hayden v. GR Spring & Stamping, Inc.*, 2013 WL 2382831 (Bankr. E.D. Ky. 2013) – Judicial estoppel requires: (1) plaintiff assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) the omission did not result from mistake or inadvertence. In determining whether omission resulted from mistake or inadvertence, court considers whether: (1) debtor lacked knowledge of factual basis of the undisclosed claims; (2) debtor had a motive for concealment; and (3) an absence of bad faith including debtor's attempts to advise the bankruptcy court of omitted claim. Debtor failed to disclose possible EEOC claim in bankruptcy schedules although debtor was fully aware of facts supporting claim. Debtor did not take any steps to correct omission and discharge was entered. Five months after entry of the discharge, Debtor commenced litigation. Litigation was barred by judicial estoppel where debtor had knowledge of claim but failed to disclose it. Debtor had motive to conceal, as doing so would allow debtor to retain asset while discharging debt. Debtor failed to evidence good faith where debtor never at any point attempted to correct non-disclosure or to advise court or trustee of omission. Debtor's first effort to disclose did not occur until after defendant filed motion to dismiss, which did not support finding of good faith.
- (5290) *Taylor v. Praxair*, 2013 WL 2393095 (E.D. Mi. 2013) – The doctrine of judicial estoppel applies where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Elements are (1) Debtor assumed a position that was contrary to the one that [he] asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) Debtor's omission did not result from mistake or inadvertence. In determining whether omission resulted from mistake or inadvertence, this court considers whether: (1) Debtor lacked knowledge of factual basis of undisclosed claims; (2) Debtor had a motive for concealment; and (3) the evidence indicates an absence of bad faith.

- (5291) *Cook v. St. John Health*, 2013 WL 2338376 ((E.D. Mi. 2013) – Judicial estoppel requires a clear inconsistency between the later and earlier positions; that the court was persuaded to accept the earlier position such that acceptance of the later position would create perception that court was misled; and that prior inconsistent statements not be the result of mistake or inadvertence. Non-disclosure is inadvertent where debtor lacks knowledge of factual basis for claims and where debtor lacked motive to conceal. Debtor failed to list pending employment discrimination claim in petition, statement of financial affairs, or schedule B. After confirmation of plan, plaintiff filed suit but did not amend schedules to disclose claim, although debtor did amend schedules on three separate occasions for other reasons. Debtor had motive to conceal as it is always in debtor's interests to minimize assets. Debtor made no attempt to amend to disclose until more than 4 months after defendant filed motion for summary judgment based on judicial estoppel. Bankruptcy court confirmed plan based on prior representation that not such claims existed. Plaintiff's action dismissed based on judicial estoppel.
- (5292) *Lubber, Inc. v. Optari, LLC*, 2013 WL 1245679 (M.D. Tn. 2013) – Judicial estoppel is equitable doctrine that prevents party from assuming a certain position in judicial proceedings and prevailing, and then attempting to assert a contrary position. Judicial estoppel in bankruptcy context requires that: debtor assumed a position that was contrary to the one that was earlier asserted under oath in the bankruptcy proceedings; bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and debtor's omission did not result from mistake or inadvertence. Whether conduct resulted from mistake or inadvertence depends on whether debtor lacked knowledge of the factual basis of the undisclosed claims; whether debtor had a motive for concealment; and whether the evidence indicates an absence of bad faith. Court unable to determine that debtor's failure to disclose possible cause of action was due to bad faith, where debtor fully disclosed the information to the Bankruptcy Trustee and Trustee could have inquired into the precise nature of the claim from sources including debtor's litigation counsel. Evidence did not indicate that Trustee filed Report of No Distribution based on debtor's statements rather than on results of Trustee's own inquiry.
- (5293) *Harrah v. DWS, Inc.*, 852 F.Supp.2d 900 (N.D. Ohio 2012) – Disclosure obligations of consumer debtors is at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving bankruptcy discharge. Debtor's disclosure obligation is a continuing one that does not end once the forms are submitted to the bankruptcy court but continues after the Chapter 13 plan is confirmed. Judicial estoppel barred former employee's claims against former employer for age discrimination and retaliation, where employee failed to list those claims against employer on her schedule of assets in her Chapter 13 bankruptcy proceeding, she did not amend her schedule to include the claims against employer until almost three years after she filed her Chapter 13 petition and after the bankruptcy court entered order confirming the bankruptcy plan, and only did so after employer moved for judgment on the pleadings.
- (5294) *Simmerman v. Ocwen Financial & Mortgage Services, Inc.*, 463 BR 47 (Bankr. S.D. Ohio 2011) - Judicial estoppel is an equitable doctrine which bars a party from asserting a position that is contrary to one the party has asserted under oath in a prior proceeding, where the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition. Doctrine should be applied with caution to avoid impinging on truth seeking function of court. Judicial estoppel applies in bankruptcy to bar a debtor from pursuing a cause of action for his own benefit after the debtor intentionally failed to disclose the cause of action, which was properly part of the bankruptcy estate. Judicial estoppel is inappropriate if the failure to disclose the cause of action was inadvertent, such as when a debtor lacks knowledge of the factual basis for the undisclosed claim, or the debtor had no motive to conceal the potential claim. Court could not determine on Motion to Dismiss what was disclosed in the prior Chapter 13 case or whether any failure to disclose in the prior case was inadvertent or without motive.
- (5295) *In re Stiltnier*, 2012 WL 1805423 (Bankr. E.D. Tn. 2012) – Judicial estoppel requires more than mere inadvertence in failing to disclose cause of action. Although debtor told attorney of cause of action, attorney erroneously determined that cause of action was barred by statute of limitations and chose not to disclose. Debtor voluntarily disclosed cause of action at Section 341 meeting and continued to apprise Chapter 7 Trustee of developments concerning claim. Debtor's bankruptcy case remains open and has never been closed. Other than the fact of the initial omission itself, there was no evidence that the Debtor was acting in bad faith or in an attempt to conceal his possible malpractice claim. Debtor informed his bankruptcy attorney prior to filing his bankruptcy case about the claim and it was his attorney who erroneously concluded that the claim should not be scheduled. The Debtor also advised his personal injury attorney, before the bankruptcy filing, that he was seeking bankruptcy relief. At his meeting of creditors Debtor fully disclosed in sworn testimony on the record that he had a potential medical malpractice claim, and then subsequent to the meeting he followed up this disclosure by continuing to answer and provide any information requested by the Trustee. Debtor's delay in amending claimed exemptions and schedules resulted from confusion regarding paperwork and reliance on attorneys to advise of necessary steps.
- (5296) *Auday v. Wet Seal Retail, Inc.*, 2012 WL 124080 (E.D. Tn. 2012), *aff'd on other grounds* 2012 WL 5259002 (6th Cir. 2012) – Judicial estoppel bars party from asserting a position that is contrary to one asserted under oath in a prior proceeding where the court adopted the contrary position either as a preliminary matter or as part of a final disposition. Debtor's failure to disclose employment discrimination claim in bankruptcy schedules and receipt of discharge based on statements in those schedules was inconsistent with debtor's later lawsuit against employer.
- (5297) *Official Committee of Unsecured Creditors v. Dwyer, Cambre & Suffern*, 2011 WL 3879501 (Bankr. N.D. Ohio 2011) – Judicial estoppel applies to prevent party from asserting inconsistent positions. Unsecured Creditors Committee is separate entity from Debtor. Committee is not responsible for statements made by Debtor in Bankruptcy Schedules and is not judicially estopped from asserting fraudulent transfer action based on alleged omissions in Schedules.
- (5298) *Mark A. Goldman & Assoc. P.C. v. Kattouah*, 2011 WL 2533657 (E.D. Mi. 2011) – Isolated and contradictory statement in answer to complain filed by creditor is not a binding judicial admission to a material fact. To constitute "admission" statement must be deliberate, clear and unambiguous. Court has broad discretion to relieve party of consequences of admission in appropriate case.
- (5299) *Whitten v. Fred's Incorporated*, 601 F.3d 231 (4th Cir. 2010) – Judicial estoppel precludes a party from adopting a position that is

inconsistent with a stance taken in prior litigation. The purpose of the doctrine is to prevent a party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process. Judicial estoppel generally requires: the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation; the position at issue must be one of fact as opposed to one of law or legal theory; the prior inconsistent position must have been accepted by the court; and the party against whom judicial estoppel is to be applied must have intentionally misled the court to gain unfair advantage. This bad faith requirement is the determinative factor.

- (5300) *Swanigan v. Northwest Airlines, Inc.*, 2010 WL 2465387 (W.D. Tn. 2010) - Judicial estoppel is an equitable doctrine that protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. Action is barred by judicial estoppel where: (1) the party's later position must be clearly inconsistent with its earlier position; (2) the party must have succeeded in persuading a court to accept its prior position, suggesting that either the first or the second court was misled; and (3) there must be the potential for the party to derive an unfair advantage on the opposing party if not estopped. Estoppel will not be appropriate where failure to disclose is result of mistake or inadvertence, evidenced by a lack of knowledge of the factual basis for the undisclosed claim or that debtor, aware of action, has no motive for concealment. Constant affirmative efforts to conceal action demonstrate that omission was not in good faith or inadvertent. Debtor filed petition with Title VII action pending before EEOC failed to list action on schedules. Debtor admitted that she failed to Debtor disclose the action until after Court confirmed Chapter 13 Plan. Court's confirmation of the Plan constitutes adoption of Debtor's statement that she has no potential causes of action. Plaintiff does not dispute that she had such knowledge. Debtor's argument that because she will pay her creditors at one hundred percent (100%), she possessed no motive to conceal the claims where Debtor did not amend the Plan to increase the percentage paid to Debtor's unsecured creditors until after the Defendant filed a Motion to Dismiss for judicial estoppel. Amending the plan only after the Motion to Dismiss suggests intentional concealment of the instant claims in an attempt to keep any proceeds from this cause of action. Debtor's amendments continued to misrepresent nature of claim, valuing the claim in Amended Schedule B at \$1,000 while demanding in Title VII pleadings at EEOC and the Rule 26 disclosure that she sought damages will in excess of \$1.7 million.
- (5301) *Moses v. Howard University Hospital* – Case No. 08-7087 (D.C. Cir. 2010) – Judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding. Judicial estoppel is an equitable doctrine invoked by a court at its discretion. There are at least three questions that a court should answer in deciding whether to apply judicial estoppel: (1) Is a party's later position clearly inconsistent with its earlier position? (2) Has the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled? (3) Will the party seeking to assert an inconsistent position derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped? Judicial estoppel can bar a debtor from pursuing a cause of action in district court where that debtor deliberately fails to disclose the pending suit in a bankruptcy case if there is a meaningful connection between that proceeding and the judicial proceeding in which judicial estoppel is sought.
- (5302) *G-I Holdings, Inc. v. Reliance Ins. Co.*, 586 F.3d 247 (3d Cir. 2009) – In diversity cases, whether an action is barred by judicial estoppel will be determined using federal law, not otherwise applicable state law. Under federal law, judicial estoppel generally applies where party asserts (1) irreconcilably inconsistent positions; (2) adopted in bad faith; and (3) where estoppel addresses the harm and no lesser sanction is sufficient. As a general rule, a party who asserts a position that is not accepted by a court will not be precluded from asserting an inconsistent or contrary position. There may be circumstances where judicial estoppel will apply even where a court has not adopted the prior position, where doing so is necessary to neutralize threats to judicial integrity, such as reliance on statements by a debtor in bankruptcy on which creditors relied.
- (5303) *Sher v. Dunbar*, Case No. DT 09-06496 (Bankr. W.D. Mi. 2010) – Judicial estoppel is judicially created doctrine designed to protect court's integrity by preventing parties from playing fast and loose with judicial machinery. Judicial estoppel requires (1) the party's later position must be inconsistent with its earlier position; (2) the party asserting the inconsistent position must have successfully persuaded the court to accept that position so that acceptance of it later in consistent position would create the perception that the prior court was misled; and (3) the party asserting inconsistent positions would gain an unfair advantage. Debtor's counsel who previously argued that arbitration proceeding was flawed and award should not be confirmed later asserted inconsistent position by arguing that unconfirmed arbitration award should be afforded collateral estoppel effect. However, debtor's counsel's prior assertion was not the basis on which the court ruled in the prior matter – therefore, counsel was not precluded from asserting an inconsistent position. Further, debtors were not gaining an unfair advantage as creditor was seeking to confirm the arbitration award and, therefore, debtor's argument that the award should be considered binding was not inconsistent with relief that the creditor itself had requested.
- (5304) *ABS Industries, Inc. v. Fifth Third Bank*. 2009 WL 1811915 (6th Cir. 2009) – Judicial estoppel prevents party from alleging and prevailing based on allegations from later making inconsistent allegations in another proceeding. Plaintiff that alleged in prior lawsuit that lead bank was not agent for participant banks was prohibited from “about-face attempt to retract its allegations of agency”.
- (5305) *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe, LLP*, 546 F.3d 752 (6th Cir. 2008) - Where party to action asserts a position and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Judicial estoppel is an equitable doctrine that preserves the integrity of the Courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment. Judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior Court adopted the contrary position either as a preliminary matter or as part of a final disposition. A Court should also consider whether the party has gained an unfair advantage from the Court's adoption of its earlier inconsistent statement. There is no set formula for

assessing when judicial estoppel should apply but at a minimum, a party's later position must be 'clearly inconsistent' with its earlier position. Judicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the Court because the doctrine precludes a contradictory position without examining the truth of either statement.

- (5306) *Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Judicial estoppel does not prevent Trustee from asserting positions in current adversary proceeding that are inconsistent with allegations in prior adversary proceeding where Court rejected allegations in prior action. Judicial estoppel requires that the party against whom judicial estoppel is asserted must have successfully persuaded the Court to accept contradictory position.
- (5307) *In re Blöse*, 2009 WL 2982932 (Bankr. W.D. Ky. 2009) – Judicial estoppel prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. Judicial estoppel “preserve[s] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship.” The three considerations that are typically relevant in determining whether judicial estoppel should apply: (1) “a party's later position must be clearly inconsistent with its earlier position”; (2) “whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceedings would create the perception that either the first or the second court was misled”; and (3) “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” Judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition. Judicial estoppel does not apply where the prior inconsistent position occurred because of “mistake or inadvertence.” Failure to disclose a cause of action may be deemed inadvertent where (1) the debtor lacks knowledge of the factual basis of the undisclosed claim, or (2) the debtor has no motive for concealment of the claim.

12.145 Parties Estopped

- (5308) *Harris v. FDIC*, 2013 WL 6049002 (E.D. Mi. 2013) – Judicial estoppel precludes debtor from pursuing causes of action that were not disclosed as assets. Husband had previously filed bankruptcy but failed to list alleged causes of action arising out of foreclosure of home owned by debtor and non-debtor spouse. Fact that non-debtor spouse would not be judicially estopped from pursuing action does not give debtor the right to pursue that action in his name.
- (5309) *Mowder v. Permanent General Assurance Corp. of Ohio*, 2013 WL 5923766 (N.D. Ohio 2013) – Debtor's failure to disclose asset in initial bankruptcy case does not estop Chapter 7 Trustee from pursuing recovery of asset. Debtor failed to list an alleged copyright in bankruptcy schedules. Defendant later allegedly used the copyrighted material without permission and debtor brought suit. Defendant sought to dismiss based on judicial estoppel. Debtor reopened his bankruptcy case and the Chapter 7 trustee intervened in the litigation. As the debtor was no longer the real party in interest, the trustee would not be estopped from pursuing recovery. Fact that debtor might receive a portion of any award that the trustee wins does not mean that case should be dismissed.
- (5310) *Axis Surplus Insurance Company v. Flugence*, Case No. 13-30073 (5th Cir. 2013) – Chapter 13 debtor has continuing duty to disclose causes of action that arise post-petition and post-confirmation. Debtor failed to amend schedules to disclose post-petition cause of action for automobile accident. Debtor judicially estopped from pursuing undisclosed cause of action. However, Chapter 13 Trustee not estopped as Trustee did not have notice of the cause of action or make any assertions in bankruptcy court that would be inconsistent with assertion of post-petition cause of action.
- (5311) *EEOC v. New Breed Logistics*, 2013 WL 4495114 (W.D. Tn. 2013) – Judicial Estoppel bars only party who made inconsistent declaration from asserting later position. Debtor's failure to disclose cause of action for discrimination in bankruptcy schedules may have estopped debtor from later pursuing action, but defendant failed to identify any inconsistent statement made by EEOC. EEOC action is not simply to recover money for aggrieved claimant, but is intended to enforce statutes against discrimination and to vindicate public interest. Although employee may receive some collateral benefit from recovery, that does not create the identity of interests that would be necessary to impute omissions of debtor to EEOC.
- (5312) *Stevenson v. Haddad*, 2013 WL 3214981 (6th Cir. 2013) – Debtor's errors or omissions are not attributable to Trustee for purposes of judicial estoppel.
- (5313) *Stevenson v. Malloy*, 2012 WL 5306046 (6th Cir. 2012) – Debtor's alleged wrongdoing cannot be basis for estoppel of Chapter 7 trustee who is real party in interest and who did not participate in the wrongdoing. Trustee's pursuit of state court action that was pending on petition date but not listed in schedules could not be dismissed for judicial estoppel as Trustee had not made any inconsistent representations.

12.146 Particular Claims Barred

- (5314) *Vehicle Market Research, Inc. v. Mitchell International, Inc.*, 2014 WL 4627852 (10th Cir. 2014) – Debtor not estopped from bringing action to pierce corporate veil based on debtor's position as shareholder in allegedly injured corporation merely because debtor valued stock interest at \$0.00 in prior bankruptcy filing. While debtor may have had hope that stock could be worth something if future litigation was successful, that did not establish that debtor knew of actual valuation.
- (5315) *Haddad v. Randal S. Miller Associates, PC*, 2014 WL 5303001 (6th Cir. 2014) – Debtors were judicially estopped from alleging that husband forged wife's signature on mortgage rendering mortgage void. After lender commenced foreclosure, debtors filed bankruptcy. Schedule A listed property subject to mortgage; Schedule D listed the mortgage without indicating that the debt was in any way disputed; and Debtors' Statement of Intentions stated that debtors intended to retain the property and reaffirm the debt. All of the documents were

signed by both debtor husband and debtor wife under penalty of perjury. Debtors' statements constitute affirmative representations that would be inconsistent with debtors' new assertion that the mortgage was void. Debtors knew at time of bankruptcy filing of factual basis to dispute the mortgage as the issue had been raised in a counterclaim filed in a pre-petition lawsuit; and had clear motive to conceal the claim because if they did not reaffirm the mortgage the trustee could sell the home to pay creditors.

- (5316) *Kemp v. Thi of Michigan at Detroit, LLC*, 2014 WL 793651 (E.D. Mi. 2014) – Debtor's claim for employment discrimination barred by judicial estoppel. Debtors did not disclose in bankruptcy schedules a claim for employment discrimination in schedules or in Statement of Financial Affairs. Bankruptcy petition was filed after debtor had been terminated and after she filed charges with EEOC alleging wrongful termination and discrimination. Debtor failed to amend schedules or SOFA after commencement of case to disclose, although debtor id damned SOFA for other reasons, and did so after she filed second charge with EEOC and received at least one of two right-to-sue notices. Debtor had actual knowledge of claims as evidenced by charges filed by debtor with EEOC. Further, debtor commenced litigation while bankruptcy was still pending yet failed to amend schedules or SOFA or otherwise inform either Bankruptcy Court or Chapter 7 Trustee. Debtor had motive to conceal as debtor would have personally gained at expense of creditors had she been allowed to prevail in litigation. Debtor's utter failure to take even minimal steps to correct the omissions for an extended period of time, and even then allegedly only informed Trustee by amending Schedule C to claim asset as exempt, but the amended Schedule C did not set forth any basis for the exemption and did not estimate the value of the claim. Debtor did not amend Schedule B or SOFA to disclose pending litigation. Debtor allegedly left voice mail for trustee but did not follow up on that message. Debtor can overcome presumption of bad faith only by showing repeated affirmative attempts to inform Court and Trustee. Debtor's vague amendment to Schedule C and one alleged telephone message were not sufficient constitute "repeated attempts" to ensure that court and trustee were aware. Further, one day after the bankruptcy case was closed, Debtor served her initial disclosure in discrimination lawsuit alleging damages in excess of \$300,000, yet debtor never informed court or trustee that debtor believed that action had substantial value.
- (5317) *Sinkfield v. State Farm Insurance Co.*, 2013 WL 5954540 (E.D. Mi. 2013) – Debtor estopped to recover on homeowners insurance policy where evidence indicated that claim was fraudulently inflated. Debtor filed Chapter 7 and listed total personal property of \$4,000 and valued her home at \$27,000, and debtor received a discharge in that case. Eighteen months later, debtor's home was destroyed by fire and debtor submitted claim for damage to the home of \$143,000 and lost personal property valued at \$170,000.00. Claim was fraudulent where debtor had listed minimal assets in Chapter 7 and would be estopped from denying those values, and debtor did not demonstrate any ability to have amassed \$166,000 in additional personal property after bankruptcy where debtor's income was minimal.
- (5318) *Windham v. East Ohio Gas*, 2013 WL 5216429 (N.D. Ohio 2013) – Debtor's failure to list action for wrongful termination in bankruptcy schedules resulted in action being dismissed for judicial estoppel. Debtor had filed challenge with EEOC months before filing bankruptcy, yet debtor did not list claim or pending EEOC investigation in bankruptcy schedules. Based on bankruptcy filing, causes of action became property of bankruptcy estate and only the Trustee had standing to pursue recovery absent evidence that Trustee abandoned claims in course of case administration.
- (5319) *Payne v. Central Defense Services, LLC*, 2013 WL 3974575 (W.D. Tn. 2013) – Debtor's action for wrongful termination barred by judicial estoppel. Debtor filed EEOC complaint 2 months prior to filing Chapter 13 petition yet failed to disclose discrimination charge he had filed two months earlier, although debtor did disclose another discrimination charge he had filed against a former employer. Debtor's Chapter 13 plan was confirmed based on the inaccurate schedules. On the same date, debtor received a "right to sue" letter from the EEOC. About eight weeks later, debtor filed a pro se complaint against former employer. Although debtor on two separate occasions mentioned the bankruptcy proceeding in the District Court, debtor never amended bankruptcy schedules or took steps to advise bankruptcy court of pendency of action. Debtor had factual knowledge of claim as evidenced by EEOC complaint filed two months prior to commencement of bankruptcy case. Debtor had motive to conceal as doing so would minimize proceeds for creditors and allow Debtor to retain recovery. Debtor failed to disclose cause of action to bankruptcy attorney. To extent Debtor claimed that his attorney failed to advise Debtor of need to disclose, evidence indicated that Debtor's failure to disclose was none-the-less in bad faith, particularly when coupled with Debtor's ongoing failure to disclose. Amendment to disclose cause of action filed after defendant filed Motion to Dismiss does not show lack of bad faith, but only conduct taken only after wrong doing had been discovered and disclosed by adverse party.
- (5320) *Bone v. Taco Bell of America, Inc.*, 2013 WL 3848755 (W.D. Tn. 2013) – Debtor's action for pre-petition wrongful termination barred by judicial estoppel. Debtor scheduled contingent action in Schedule B and disclosed it in Statement of Financial Affairs and claimed it as exempt, with no objection by Trustee. However, Debtor valued the asset in Schedules at \$0.00 as contingent and unliquidated. Debtor's assertion in the bankruptcy filing that the action was worth \$0.00 was inconsistent with debtor's assertions in the bankruptcy case that the action had value, and debtor never attempted to amend the schedules to disclose that debtor believed that the action had value. Bankruptcy Court relied on debtor's assertion that claim was worth nothing in granting discharge. Debtor fully knew of factual basis of claim that made claim valuable where debtor filed suit demanding damages in excess of \$25,000 while bankruptcy case was still pending; and had incurred almost \$10,000 in medical bills even before filing bankruptcy. Debtor had motive to mis-state value of claim to obtain benefit of exemption that would otherwise have been limited to no more than \$10,000, allowing debtor to keep any proceeds for herself. Record indicated lack of good faith as debtor had an ongoing duty to disclose value of claim yet never filed any amendments.
- (5321) *Curry v. Rother International, L.P.*, 2013 WL 3874702 (W.D. Tn. 2013) – Chapter 13 Debtor's action against former employer for discrimination based on sex barred by judicial estoppel. Debtor was aware of potential claim as debtor had already filed EEOC complaint prior to commencement of bankruptcy case. Debtor's Schedule B stated that debtor was not party to any lawsuits or administrative proceedings and also stated that debtor did not have any contingent or unliquidated claims. At no point in the Petition, Schedules or SOFA did debtor mention discrimination claim. Documents were signed by debtor under penalty of perjury stating that the answers were true and correct. After commencement of bankruptcy case but prior to confirmation of plan, debtor filed suit in Federal Court against former employer for discrimination. Debtor did not bring this suit to the attention of the Court or the Trustee. Shortly thereafter, the Court

confirmed debtor's Chapter 13 plan. More than one year later, debtor amended her bankruptcy schedules to disclose, for the first time, an "expected EEOC settlement" from debtor's former employer resulting from the discrimination suit. Debtor assumed contrary position in bankruptcy case by stating that debtor did not have any suits or claims. Bankruptcy court adopted that position in confirming debtor's plan. Omission was not result of mistake or inadvertence. Debtor was fully aware of factual basis of claim prior to commencement of bankruptcy case, where debtor had already filed complaint with EEOC and received Notice of Right to Sue from EEOC. Debtor had motive to conceal asset in effort to minimize assets and income, thereby reducing amount Debtor would have to pay creditors in Chapter 13 and allowing Debtor to retain full benefits of undisclosed asset. Debtor did not amend to disclose until Employer's attorney in discrimination suit raised issue of judicial estoppel based on failure to disclose and indicated that counsel would be filing Motion to Dismiss based on lack of disclosure. Debtor's failure to disclose until after opposing party evidenced intent to seek dismissal evidences a lack of good faith on part of Debtor as debtor did not disclose until compelled to do so by events in litigation rather than any true, good faith attempt to disclose previously undisclosed action.

- (5322) *Curry v., Aerotek, Inc.*, 2013 WL 3146812 (W.D. Tn. 2013) – Chapter 13 Debtor's action against former employer for discrimination based on sex barred by judicial estoppel. Debtor was aware of potential claim as debtor had already filed EEOC complaint prior to commencement of bankruptcy case. Debtor's Schedule B stated that debtor was not party to any lawsuits or administrative proceedings and also stated that debtor did not have any contingent or unliquidated claims. At no point in the Petition, Schedules or SOFA did debtor mention discrimination claim. Documents were signed by debtor under penalty of perjury stating that the answers were true and correct. After commencement of bankruptcy case but prior to confirmation of plan, debtor filed suit in Federal Court against former employer for discrimination. Debtor did not bring this suit to the attention of the Court or the Trustee. Shortly thereafter, the Court confirmed debtor's Chapter 13 plan. More than one year later, debtor amended her bankruptcy schedules to disclose, for the first time, an "expected EEOC settlement" from debtor's former employer resulting from the discrimination suit. Debtor assumed contrary position in bankruptcy case by stating that debtor did not have any suits or claims. Bankruptcy court adopted that position in confirming debtor's plan. Omission was not result of mistake or inadvertence. Debtor was fully aware of factual basis of claim prior to commencement of bankruptcy case, where debtor had already filed complaint with EEOC and received Notice of Right to Sue from EEOC. Debtor had motive to conceal asset in effort to minimize assets and income, thereby reducing amount Debtor would have to pay creditors in Chapter 13 and allowing Debtor to retain full benefits of undisclosed asset. Debtor did not amend to disclose until Employer's attorney in discrimination suit raised issue of judicial estoppel based on failure to disclose and indicated that counsel would be filing Motion to Dismiss based on lack of disclosure. Debtor's failure to disclose until after opposing party evidenced intent to seek dismissal evidences a lack of good faith on part of Debtor as debtor did not disclose until compelled to do so by events in litigation rather than any true, good faith attempt to disclose previously undisclosed action.
- (5323) *Taylor v. Praxair*, 2013 WL 2393095 (E.D. Mi. 2013) – The doctrine of judicial estoppel applies where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Elements are (1) Debtor assumed a position that was contrary to the one that [he] asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) Debtor's omission did not result from mistake or inadvertence. In determining whether omission resulted from mistake or inadvertence, this court considers whether: (1) Debtor lacked knowledge of factual basis of undisclosed claims; (2) Debtor had a motive for concealment; and (3) the evidence indicates an absence of bad faith. Debtor failed to disclose pending EEOC claim in bankruptcy schedules in Chapter 7 case. Debtor received discharge and case was closed as "no asset" case. Debtor did not lack knowledge of claim as debtor had brought claim a year prior to commencing bankruptcy case. However, record was unclear as to whether attempted to conceal, where record was unclear as to whether debtor told attorney and attorney failed to list claim. In light of ambiguity in record, court would not dismiss case based on judicial estoppel.
- (5324) *Cook v. St. John Health*, 2013 WL 2338376 ((E.D. Mi. 2013) – Judicial estoppel requires a clear inconsistency between the later and earlier positions; that the court was persuaded to accept he earlier position such that acceptance of the later position would create perception that court was misled; and that prior inconsistent statements not be the result of mistake or inadvertence. Non-disclosure is inadvertent where debtor lacks knowledge of factual basis for claims and where debtor lacked motive to conceal. Debtor failed to list pending employment discrimination claim in petition, statement of financial affairs, or schedule B. After confirmation of plan, plaintiff filed suit but did not amend schedules to disclose claim, although debtor did amend schedules on three separate occasions for other reasons. Debtor had motive to conceal as it is always in debtor's interests to minimize assets. Debtor made no attempt to amend to disclose until more than 4 months after defendant filed motion for summary judgment based on judicial estoppel. Bankruptcy court confirmed plan based on prior representation that not such claims existed. Plaintiff's action dismissed based on judicial estoppel.
- (5325) *Kimberlin v. Dollar General Corp.*, 2013 WL 1136563 (6th Cir. 2013) – Debtor's action against former employer who fired debtor after debtor reported that supervisor assaulted her barred by judicial estoppel. Debtor had previously filed Chapter 13. Debtor was fired after confirmation of the Plan but before debtor made the final payment under the Plan. Debtor never amended her schedules or other bankruptcy documents to disclose potential claim against employer. After debtor completed plan and received discharge, debtor files suit against employer. Debtor assumed contrary position in Bankruptcy court by failing to amend schedules to disclose action. Court relied on debtor's contrary position in entering a discharge where debtor had paid only 3% to unsecured creditors as required by the confirmed Plan; and debtor's omission did not result from mistake or inadvertence. Although termination of employment occurred very close to the end of debtor's plan, had debtor disclosed the action the Court could have fashioned a remedy that would permit creditors to recover additional proceeds; or the court could have converted the case to one under Chapter 7 or dismissed it outright. Debtor made no effort to disclose cause of action to Court or Trustee, evidencing a lack of good faith and an intent to conceal. Lower court properly dismissed action based on judicial estoppel.

- (5326) *Pees v. Citimortgage*, 2012 WL 4465505 (Bankr. S.D. Ohio 2012) – Plan proposed to surrender property to mortgage holder confirmed by court. After confirmation, Trustee became aware of possible defect in mortgage execution which could permit mortgage to be set aside. Trustee's later action to avoid mortgage barred by judicial estoppel. Confirmation of plan was res judicata on issues regarding status of mortgage. Plan disclosed existence and treatment of mortgage and Chapter 13 trustee never contested validity of mortgage or opposed confirmation based on alleged defect in mortgage. Trustee's present position regarding avoidability of lien was inconsistent with that taken at confirmation hearing and allowing trustee to now change positions would result in unfair detriment to mortgage lender.
- (5327) *In re DeGroot*, Case No. 05-12996 (Bankr. W.D. Mi. 2012), *aff'd* 484 BR 311 (6th Cir. BAP 2012) – Section 544 deems any property that is scheduled under Section 521 is abandoned if not administered at the closing of the case. Property that is not abandoned and is not administered remains property of estate. Court can order otherwise based on circumstances of case. Debtor never properly scheduled receivable owed by ex-wife, and trustee's knowledge of unscheduled asset, without more, does not reconstitute asset in debtor at closing. Debtor must strictly comply with obligations to schedule asset in order to earn the return. However, Trustee also failed to take steps to administer the receivable before filing "no asset" notice and notice to close case. Trustee would be judicially estopped from now administering receivable. Trustee took position that receivable was fully administered in response to pressure from UST to close cases, thereby inducing Court to close case. Trustee then sat quietly for several years with no contact with ex-wife and no effort to collect receivable. Unique circumstances of case indicated that trustee was engaged in "cynical gamesmanship" by failing to administer asset of which trustee was well aware. Evidence also indicated that ex-wife relied on trustee's inaction in making financial decisions over years since closing of bankruptcy case including substantial expenditures for family needs and efforts to renegotiate mortgage.
- (5328) *Dickerson v. Federal Express*, 2010 WL 8747316 (W.D. Tn. 2010) – Judicial estoppel applies where debtor knows of alleged cause of action but intentionally fails to disclose action in bankruptcy documents. Debtor failed to amend documents to disclose post-petition cause of action for employment discrimination although debtor filed charges with EEOC based on termination of employment. Debtor has ongoing duty to disclose – duty to disclose does not end when bankruptcy forms are submitted to the court. Debtor did not take any steps to advise Chapter 13 trustee of cause of action although Chapter 13 continued for at least one year after Debtor's complaint to EEOC. Circumstances indicated that debtor intended to conceal cause of action for purposes of keeping proceeds rather than have proceeds become part of bankruptcy estate. Failure to disclose could not be inadvertent as debtor was fully aware that debtor was in Chapter 13 proceeding at time claims filed with EEOC and debtor did not make any effort to inform the trustee or the court of the accrual of the cause of action.
- (5329) *Love v. Tyson Foods, Inc.*, Case No. 10-60106 (5th Cir. 2012) – Debtor's complaint for damages based on alleged discrimination and retaliation dismissed based on the doctrine of judicial estoppel. Debtor/Plaintiff failed to disclose claim and lawsuit for discrimination and retaliation in bankruptcy proceeding that existed at time of plan confirmation. Detrimental reliance by litigant is not necessary element of judicial estoppel because the doctrine of judicial estoppel is designed to protect the judicial system rather than the litigants. Judicial estoppel is particularly appropriate when an asset is undisclosed in bankruptcy and debtor pursues a claim in a separate proceeding based on the undisclosed asset and the omission is not inadvertent. A failure to disclose a claim is inadvertent only where a debtor lacks knowledge of the claim or has no motive to conceal the claim. Debtor filed a claim with EEOC 30 days after commencing chapter 13 proceeding and more than four months prior to confirmation of debtors chapter 13 plan. Nonetheless, debtor never disclosed a claim either in the initial schedules or in any amendments.
- (5330) *Seus v. Kohler Co.*, 2012 WL 1071235 (E.D. Tn. 2012) - Debtor's action for product liability based on an alleged defective lawnmower dismissed based on judicial estoppel. Although debtor knew of claims for at least five months prior to commencement of debtor's chapter 7 case, debtor did not list those claims in either the original petition or in the numerous amendments filed by debtor between commencement of the case and the entry of the chapter 7 discharge. Two months after receiving discharge, debtor filed action against manufacturer and seller of lawnmower. Debtor assumed a position that was contrary to the one asserted under oath in the bankruptcy proceeding that no cause of action existed; and bankruptcy court adopted that representation in entering the discharge in debtor's chapter 7 case.
- (5331) *Auday v. Wet Seal Retail, Inc.*, 2012 WL 124080 (E.D. Tn. 2012), *aff'd on other grounds*, 2012 WL 5259002 (6th Cir. 2012) – Judicial estoppel bars party from asserting a position that is contrary to one asserted under oath in a prior proceeding where the court adopted the contrary position either as a preliminary matter or as part of a final disposition. Debtor's failure to disclose employment discrimination claim in bankruptcy schedules and receipt of discharge based on statements in those schedules was inconsistent with debtor's later lawsuit against employer. Debtor never included potential lawsuit in schedules and never amended schedules to disclose. Duty of disclosure is a continuing one. Sending letter to Chapter 7 Trustee advising of cause of action prior to entry of discharge is not sufficient to avoid judicial estoppel. Letter to Trustee is not functional equivalent of amending schedules or making proper disclosure to the Bankruptcy Court and creditors.
- (5332) *Young v. Independent Bank*, slip op. No. 299192 (Mich. Ct. App. September 20, 2011) -the Michigan Court of Appeals affirmed dismissal of a lawsuit the plaintiff failed to schedule in her Chapter 7 bankruptcy case. Court of Appeals applied bankruptcy law and Sixth Circuit precedent that an unscheduled cause of action is not abandoned to the debtor and remains an asset of the bankruptcy estate. Thus the debtor did not have standing to pursue the lawsuit.
- (5333) *Hamlin v. Baptist Memorial Hospital*, 2011 WL 901208 (W.D. Tn. 2011) – Plaintiff's failure to disclose claim for discrimination in schedules or statement of financial affairs, although Debtor was simultaneously pursuing those actions in District Court, precluded by judicial estoppel. Debtor's failure to list suit constituted assumption of inconsistent position on which the bankruptcy court relied. Failure to disclose was not inadvertent or result of mistake, as debtor had knowledge of claims when bankruptcy schedules were filed and debtor had motive to conceal and debtor evidenced bad faith by failing to amend bankruptcy schedules to disclose the claims after the issue became known.

- (5334) *Player v. Kansas City Southern Railway Co.*, 2011 WL 1790494 (W.D. La. 2011) – Debtor failed to list pending action for racial discrimination in schedules and at the 341 meeting denied being involved in any lawsuits where debtor was suing anyone. Debtor convinced the court and the trustee that debtor had no potential or pending claims, obtaining relief based on misrepresentations to the court. Debtor could not prove that omissions were inadvertent. It is not necessary that the omission be done with “deceitful motive”. Inadvertence applies only when debtor lacks knowledge of the claim or lacks motive to conceal it. Debtor admittedly knew of pending lawsuit when bankruptcy filed and had motive to conceal lawsuit in effort to protect proceeds from creditors.
- (5335) *Pikeville Energy Group, LLC v. Spradlin*, Case No. 09-8074 (6th Cir. BAP 2010) - Post-petition lender who failed to obtain court permission before providing financing and then repeatedly stated to the court that lender would not seek administrative expense claim estopped from administrative claim. Subsequent conversion of case to Chapter 7 does not alter conclusion that creditor's repeated statements during Chapter 11 proceeding estopped administrative claim.
- (5336) *Dorbeck v. Sykora*, 2010 WL 3245327 (Bankr. E.D. Mi. 2010) – Debtor barred from pursuing action against former employer for wrongful termination. Debtor's schedules failed to disclose that debtor: (a) is a shareholder of Galleon International Corporation owning 178,000 shares of Galleon stock (44.5% of the total outstanding) having a book value as determined by debtor of \$7 million; (b) was the president and a member of the board of directors of Galleon from November 2005 through June 17, 2009; (c) is one of the inventors and co-owners of the patents related to Galleon's business; and (d) is entitled to salary and dividends from Galleon for his work on its behalf since Galleon's formation in November 2005. Debtor's Schedules also failed to disclose that Debtor is, and has been since 2002, a principal of Pivotal Technologies. Debtor knowingly misrepresented several critical matters when filing his Chapter 13 petition, and now seeks to recover what could be a substantial amount of money for the assets the Debtor denied having when he filed the bankruptcy petition.
- (5337) *Moses v. Howard University Hospital* – Case No. 08-7087 (D.C. Cir. 2010) – Debtor failed to list pending action in Bankruptcy Schedules and Statement of Financial Affairs and continued to hold himself out before the District Court as a proper plaintiff even though Debtor had already filed and was pursuing claim at the time Debtor filed bankruptcy petition. Debtor obtained a discharge without disclosing the action and succeeded in hiding the inconsistency from the courts creating the perception that either the trial court or the Bankruptcy court (or both) was misled. Debtor set up a situation in which he could gain an advantage over his creditors by keeping any damages for solely himself, to the detriment of his creditors and adversely affected the Trustee, who might have settled this case early or decided not to pursue it. Debtor's actions in the bankruptcy proceedings and before the District Court were related. Debtor represented that he had no legal claims before the bankruptcy court and obtained a discharge based on that representation and now wants to assert the opposite in order to win a second time. Debtor cannot avoid judicial estoppel by claiming that his failure to disclose this lawsuit in the bankruptcy court or his maintenance of the suit in District Court were the result of inadvertence or mistake where Debtor listed other pending lawsuits that, unlike the instant case, reduced the overall value of his assets through wage garnishment. Debtor cannot cure failure to disclose by reopening his Chapter 7 case, amending his Statement of Financial Affairs, and inviting Trustee to intervene in the suit. Allowing a debtor to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them.
- (5338) *Kaufman v. Robinson Property Group, Ltd.*, Case No. 09-60758 (5th Cir. 2010) – Debtor who failed to disclose known personal injury claim in bankruptcy schedules creates “clear inconsistency” by stating that she “had no claims”, prohibited from pursuing action after completion of bankruptcy. Inconsistent positions result in judicial estoppel against later pursuit of personal injury action.
- (5339) *ABS Industries, Inc. v. Fifth Third Bank*, 2009 WL 1811915 (6th Cir. 2009) – Judicial estoppel prevents party from alleging and prevailing based on allegations from later making inconsistent allegations in another proceeding. Plaintiff that alleged in prior lawsuit that lead bank was not agent for participant banks was prohibited from “about-face attempt to retract its allegations of agency”.
- (5340) *In re Blose*, 2009 WL 2982932 (Bankr. W.D. Ky. 2009) – A cause of action is an asset that must be scheduled pursuant to Section 521. Debtor's failure to list a cause of action amounts to an affirmative statement that no such action exists. Debtor will be judicially estopped from pursuing an undisclosed cause of action after obtaining a discharge on the basis that no such action exists. Pursuing an undisclosed cause of action creates an inconsistency sufficient to support judicial estoppel. By granting a discharge and closing this “no asset” case, this Court adopted Debtor's statement that she had no potential causes of action. Judicial estoppel does not apply where the prior inconsistent position occurred because of “mistake or inadvertence.” Failure to disclose a cause of action may be deemed inadvertent where (1) the debtor lacks knowledge of the factual basis of the undisclosed claim, or (2) the debtor has no motive for concealment of the claim. Debtor testified in State Court deposition that Debtor knew of her potential claims at the time of she filed for relief under Chapter 7 and admitted that although she had spoken with an attorney prior to the filing of the bankruptcy case, she never scheduled the claim nor amended the schedules to do so post-petition. Debtor clearly had motive to conceal claim, as any post-discharge recovery would come to her rather than to the estate. Debtor's ongoing concealment also evidenced bad faith. Debtor did not disclose these claims to the Trustee or this court until after the Defendant moved for summary judgment in state court. Debtor waited over *seven years* before notifying the Trustee and the court as to her claims. Debtor did not orally notify the Trustee at the meeting of creditors or correspond with the Trustee with how to proceed with her claims. Only after Debtor realized that her state law claims were in peril did she move to reopen the case to list the lawsuit as an asset. Debtor immediately claimed the lawsuit exempt. Debtor's actions were “too little, too late”. Debtor is judicially estopped from pursuing undisclosed causes of action.
- (5341) *Whitten v. Fred's, Incorporated*, 601 F.3d 231 (4th Cir. 2010) - Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation. Debtor who suffered injuries and incurred medical expenses cannot recover those expenses from tortfeasor to the extent those expenses are discharged in subsequent bankruptcy proceeding. Debtor can recover medical

expenses that are not discharged, such as future medical expenses after the bankruptcy case was closed, and she is free to argue that Fred's is liable for those post-bankruptcy medical expenses.

12.147 Particular Claims Not Barred

- (5342) *Thompson v. Cunningham*, 2015 WL 4610193 (W.D. Ky. 2015) – Judicial estoppel prevents a party from playing fast and loose with court by taking one position and obtaining relief based on that position and then later changing positions to obtain additional relief. Plaintiff made affirmative representation that plaintiff did not have any causes of action when plaintiff filed for bankruptcy and received a discharge based on those representations. However, omission on schedules was inadvertent and there was no evidence of intent to mislead the court. Further, defendant continued with conduct that allegedly violated consumer protection act for two years after commencement of the bankruptcy case.
- (5343) *Garcimonde-Fisher v. Area203 Marketing, LLC*, 2015 WL 1912679 (E.D. Tn. 2015) – Judicial estoppel applies only where plaintiff had duty to disclose and failed to do so. Debtor had no duty to disclose in bankruptcy schedules a claim for employment discrimination or wrongful termination where debtor did not have claim as of date of filing for relief under Chapter 7. Debtor was not fired and did not suffer any adverse employment event until 4 months after filing. Cause of action would not have constituted property of estate and would debtor was not required to disclose causes of action that accrued, for the first time, post-petition.
- (5344) *Ambron v. PNC Bank*, 2015 WL 3407596 (W.D. Mi. 2015) – Debtor not estopped from bringing action against former employer for wrongful termination based on judicial estoppel, where debtor did not suffer any adverse employment event until well after debtor filed for Chapter 7 relief. At time of bankruptcy filing, debtor was employed in good standing and did not have a termination claim that would have been property of bankruptcy estate. Debtor, not the estate, suffered the post-petition harm and cause of action was not property of the estate. Under circumstances, debtor had no duty to disclose post-petition cause of action.
- (5345) *Boodram v. Coomes*, 2015 WL 1248809 (W.D. Ky. 2015) – To extent pre-petition causes of action exist in favor of debtor, those causes of action become property of bankruptcy estate and only Trustee has standing to pursue recovery. Debtor's Amended Schedule B listed "potential damages from the civil Suit" and contained case name and case number. Disclosure was sufficient even though it did not specifically identify causes of action or specific claims, as disclosure provided sufficient information to Trustee to allow Trustee to investigate matter further.
- (5346) *Crankshaw v. CSX Transp., Inc.*, 2013 WL 5276573 (E.D. Tn. 2013) – Debtor not estopped from asserting claim that arose more than 30 days after debtor completed payments under chapter 13 plan. Although bankruptcy case was still open when claim arose, and debtor did not receive discharge until 90 days after claim arose, evidence did not disclose any intent by debtor to deceive or conceal. Debtor had paid all of the payments under the Chapter 13 Plan and had paid all creditors who had filed claims, and only two creditors who had not been paid had not filed claims and were not entitled to be paid.
- (5347) *Owens v. Dolgencorp, LLC*, 2013 WL 5181524 (S.D. Ohio 2013) – Debtor failed to disclose action for alleged violation of Family Medical Leave Act. Two months after debtor was allegedly wrongfully terminated, debtor filed for relief under Chapter 13. Debtor's schedules and Statement of Financial Affairs did not disclose any potential claim and debtor never informed the Court or the Trustee of the possibility of any claim although debtor's plan expressly required the debtors to keep the trustee informed. However, record indicated that non-disclosure may have been inadvertent, sufficient to preclude entry of summary judgment, where debtor may have been aware of facts surrounding termination but not that the facts may amount to claim against employer. Seven month gap between bankruptcy filing and debtor first consulting an attorney created issue of fact as to whether debtor knew of potential claim. Once debtor became aware of issue, debtor filed motion to substitute trustee as real party in interest. If granted, trustee would not be judicially estopped. Record was not sufficiently developed for court to enter summary judgment.
- (5348) *BACM 2001-I Central Park West, LLC v. Gersten*, 2012 WL 8887160 (N.D. Ohio 2012) – Creditor's non-filing of proof of claim after Trustee issued notice of no assets and notice not to file claims is not assertion of position that creditor lacks a claim against debtor. Creditor is not judicially estopped from pursuing recovery from third parties who also may be obligated on debt merely because creditor did not file proof of claim. Non-filing of proof of claim is not assertion of any position. Further, bankruptcy notice expressly stated that creditors should not file proof of claim.
- (5349) *Taylor v. Praxiar*, 2013 WL 2393095 (E.D. Mi. 2013) – The doctrine of judicial estoppel applies where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Elements are (1) Debtor assumed a position that was contrary to the one that [he] asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) Debtor's omission did not result from mistake or inadvertence. In determining whether omission resulted from mistake or inadvertence, this court considers whether: (1) Debtor lacked knowledge of factual basis of undisclosed claims; (2) Debtor had a motive for concealment; and (3) the evidence indicates an absence of bad faith. Debtor failed to disclose pending EEOC claim in bankruptcy schedules in Chapter 7 case. Debtor received discharge and case was closed as "no asset" case. Debtor did not lack knowledge of claim as debtor had brought claim a year prior to commencing bankruptcy case. However, record was unclear as to whether attempted to conceal, where record was unclear as to whether debtor told attorney and attorney failed to list claim. In light of ambiguity in record, court would not dismiss case based on judicial estoppel.
- (5350) *Eckhardt v. Federated Capital Corp.*, Case no. 12-12668 (E.D. Mi. 2012) – Judicial estoppel requires that party take action in one court or action that is inconsistent with position being asserted in later action. Creditor who sued original obligor on credit card not estopped from

later filing suit against third party who assumed debts as part of asset purchase agreement with original obligor. Debtor assumed debts and became guarantor of payment. Suit against original obligor is not inconsistent with later action against guarantor.

- (5351) *EEOC v. CRST Van Expedited, Inc.*, 2012 WL 1583026 (8th Cir. 2012) – Debtor’s failure to disclose sexual harassment claim in schedules would estop debtors from pursuing recovery but did not bar action by EEOC.
- (5352) *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011) – Chapter 7 Trustee is not precluded by judicial estoppel from pursuing recovery of litigation that was not disclosed by debtor. Although grounds existed to find that debtor was judicially estopped, Trustee will not be estopped absent evidence of unusual circumstances demonstrating some element of fault of Trustee.
- (5353) *Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) - Borrower’s action contesting validity of foreclosure sale not barred by judicial estoppel. At time debtor filed first bankruptcy case, debtor did not know of grounds to file complaint against mortgage company and many of the facts underlying the action did not occur until after first bankruptcy case had been dismissed. Debtors did disclose potential cause of action in schedules in second case in “other liquidated debts owed to debtor”. Action may have been better disclosed under “suits and administrative proceedings” but disclosure was sufficient to place court and parties in interest on notice.
- (5354) *Whitten v. Fred’s, Incorporated*, 601 F.3d 231 (4th Cir. 2010) - Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation. Debtor not barred from asserting claim post-discharge where debtor listed potential claim and Trustee chose to abandon the claim. Debtor’s decision to institute litigation after abandonment of the asset without “supplementing” bankruptcy schedules to indicate suit had been filed did not constitute concealment as debtor had no duty to supplement the schedules at that point. Debtor’s actual disclosure of the claims precludes a finding that she acted in bad faith.
- (5355) *Followell v. Mills*, 2009 WL 723132 (6th Cir. 2009) - Judgment obtained by fraud may be set aside by the Court where enforcement of the judgment would be manifestly unconscionable. The party attacking a judgment based on fraud on Court must prove by clear and convincing evidence (1) conduct, (2) on the part of an officer of the Court, (3) directed to the “judicial machinery” itself, (4) that was intentionally false or undertaken with either willful blindness to, or reckless disregard for, the truth; (5) that was either in the nature of a positive averment or a concealment under circumstances that gave rise to duty to disclose; and (6) that deceived the Court. Conduct must have actually subverted the judicial process” by preventing the judicial machinery from performing in the usual manner to impartially adjudicate the case presented. Chapter 11 representative’s action to recover money paid to creditor where creditor’s claim was based on an allegedly fraudulently obtained judgment failed to prove either that the creditor made any representations leading to entry of the judgment that the creditor knew were false or with reckless disregard for truth; and failed to prove how the Court rendering the judgment was misled or deceived.
- (5356) *In re Two Springs Membership Club*, 408 B.R. 475 (Bankr. N.D. Ohio 2009). Judicial estoppel only barred party from presenting argument on issue; it did not preclude resolution of the issue in its favor.

V. Equitable Estoppel

12.148 Elements

- (5357) *Brainger v. JAO Distributors, Inc.*, 2015 WL 4910970 (S.D. Ohio 2015) – Equitable estoppel requires that party to be estopped has through words or conduct caused other party to believe certain set of facts existed and must have been aware of falsity. PACA trust claimant not estopped from asserting PACA trust where, although trust license had expired, all parties believed that license had been properly renewed at time of transaction. Fact that parties later discovered that USDA had erroneously failed to renew license did not create any estoppel as there were no knowingly false representations at time of transaction.
- (5358) *Joseph and David Johnsman Ltd. v. Egbert*, 2015 WL 4873014 (Bankr. N.D. Ohio 2015) – Equitable estoppel is an equitable doctrine invoked to avoid injustice in particular cases to thwart a litigant from achieving an advantage by misleading another into action or inaction. Party asserting equitable estoppel must establish: (1) the party to be estopped must have used conduct or language amounting to a misrepresentation of material fact; (2) that party must have been aware of the true facts; (3) that party must have had an intention that the representation be acted on; (4) the party asserting estoppel must have been unaware of the true facts; and (5) the party asserting estoppel must have detrimentally and justifiably relied on the representation. Defendant offered no evidence that it was induced to purchase equipment and assets from debtor in violation of Section 363 and Section 549, where party was fully aware of debtor’s pending bankruptcy and fully aware of all facts and circumstances of transaction and proceeded with transaction notwithstanding.

12.149 Governmental Action

- (5359) *O’Rourke v. United States*, 587 F.3d 537 (2d Cir. 2009) – Governmental agency will not be equitably estopped absent evidence of affirmative misconduct. Even if IRS was negligent in maintaining Certified Mail log, no evidence presented that the failure was the failure was result of “affirmative misconduct” sufficient to preclude IRS from relying on Log to demonstrate mailing of notice of deficiency.

12.150 Elements – Fraudulent Transfer

- (5360) *Shapiro v. Jamil*, Case No. 08-70828 (Bankr. E.D. Mi. 2010) – Equitable estoppel requires (1) conduct or language amounting to a representation of material fact; awareness of the true facts by the party to be estopped; intention by party to be stopped that party asserting estoppel has a right to believe that the former’s conduct is intended; unawareness of the true facts by the party asserting estoppel; and detrimental and justifiable reliance. Party must, by representation, admission or silence intentionally or negligently induce

another party to believe certain facts, the other party justifiable relies and acts on this belief, and the other party will be prejudiced if the party to be estopped is permitted to deny the existence of the facts as represented. Debtor's conduct in listing assets in personal tax returns that Debtor later asserted he did not own would not from basis of equitable estoppel where there was no evidence that the debtors intended the Trustee to rely on the information in the tax returns or that the Trustee was aware of or actually relied on those statements. Statements made in Debtor's tax returns for the years 2003 through 2006 would not from basis for estoppel by Trustee where Debtor did not commence bankruptcy proceeding until 2009.

W. Promissory Estoppel

12.151 Elements

- (5361) *Gibson v. Mortgage Electronic Registration Systems*, 2014 WL 2091258 (W.D. Tn. 2014) – Promissory estoppel requires a promise made with the expectation that party to whom promise is made will rely on it, and that person does in fact rely to their detriment. Detriment must be substantial in economic sense; must have been foreseeable to the promisor; and promisee must have reasonably relied. Borrower failed to present any evidence of reasonable reliance on alleged promise to cancel foreclosure sale. The only allegation of “reliance” is statement that had borrowers known that foreclosure sale was not cancelled, they would have “done something” without any allegation as to what they would have done or how that would have changed outcome.
- (5362) *Goss v. ABN Amro Mortgage Group*, 2013 WL 6698041 (6th Cir. 2013) – Borrower could not maintain action against lender for alleged breach of agreement to modify loan where the lender never signed loan modification. Borrower's action for promissory estoppel against lender was predicated on unsigned loan modification agreement. Under Michigan law, the Statute of Frauds precludes enforcement against any financial institution of any promise or commitment to make, renew, modify or extend loan unless the agreement is in writing and signed by financial institution. Where lender did not sign, statute of frauds precluded action against lender for promissory estoppel. Lender's acceptance of payments on terms of trial loan mod did not waive requirement that loan modification be signed.
- (5363) *Mullins v. FNMA*, 2013 WL 5707798 (E.D. Mi. 2013) – Promissory estoppel requires a promise, that the promisor should reasonably have expected to induce an action of a definite and substantial character on the part of the promisee, and that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. Although lender allegedly orally indicated that plaintiff had been approved for loan modification, plaintiff's complaint indicated that plaintiff never received any paperwork confirming any loan modification and never made any payments after being advised of the loan modification, and that plaintiff thereafter received notice of the foreclosure sale. Even if lender made promise regarding loan modification, plaintiff could not show reliance or that plaintiff took action in reliance on promise that was detrimental.
- (5364) *Pugh v. Bank of America*, 2013 WL 3349649 (W.D. Tn. 2013) – Promissory estoppel requires a promise which the promisor reasonably expects to induce action or forbearance on party of the promisee or a third party and that does induce action or forbearance. Promissory estoppel requires that (1) the detriment suffered in reliance was substantial in an economic sense; (2) the substantial loss to the promisee in acting in reliance was foreseeable by the promisor; and (3) the promisee acted reasonably in justifiable reliance on the promise as made. Promissory estoppel is alternative to express contract, and does not depend on a finding of an express contract but does require the establishment of an enforceable contract. Bank's statements that it would consider a request for loan modification was not sufficient where plaintiff did not allege that any misrepresentations were intentional or knowing or reckless, or without any intention to perform. Bank only promised to consider a loan modification, not that a loan modification had been approved.
- (5365) *LeBlanc v. Bank of America, NA*, 2013 WL 3146829 (W.D. Tn. 2013) – Promissory estoppel is based on promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance. Promise is binding if injustice can be avoided only by enforcement of the promise. Plaintiff must show (1) that a promise was made; (2) that the promise was unambiguous and not unenforceably vague; and (3) that they reasonably relied upon the promise to their detriment. Promissory estoppel is available only where there is no valid, enforceable contract between parties. Plaintiff and defendant had existing, valid contractual relationship in the form of the underlying loan and mortgage. Plaintiff's action for promissory estoppel sought to impose changes to the terms of the loan and mortgage by imposing a loan modification. Promissory estoppel cannot be used to modify terms of existing contractual agreements. Plaintiff also failed to allege any conduct by lender akin to fraud, where complaint did not allege any specific promise, when any promise was made, or who made it.

X. Law of the Case

12.152 Elements

- (5366) *Schwab v. Oscar*, 517 BR 72 (6th Cir. BAP 2014) – Law of case applies where court makes ruling in case that either is not appealed or that is affirmed on appeal. Bankruptcy Court previously dismissed adversary proceeding holding that plaintiffs lacked standing. Plaintiffs did not appeal that order and order became law of case. Plaintiffs could not later contest that ruling under Rule 60 as holding was law of case. Rule 60 is not intended as substitute for appeal of orders when those orders are entered. Motion for Rule 60 relief also did not contest conclusion of lack of standing but only asked court to reinstate adversary and allow plaintiff to obtain assignment of cause of action from Trustee which would then create standing. Because plaintiff lacked standing to bring action in first instance as determined by earlier court decision, plaintiff also lacked standing to seek relief under Rule 60.
- (5367) *Liggett v. Schwartz*, 2014 WL 1028960 (E.D. Mi. 2014) – Law of the case applies where the court has made prior rulings in case, which become controlling for subsequent states of that same litigation. Reversal of order confirming Chapter 13 Plan does not eliminate law of case application for issues and findings that were not basis for reversal on appeal.

- (5368) *Mason v. Ocwen Loan Servicing, LLC*, 2013 WL 4052905 (Bankr. E.D. Ohio 2013) – Law of the case means that issues decided at early stage of litigation, either explicitly or by necessary inference, constitute law of the case that will not be reconsidered unless (1) substantially different evidence is raised at trial; (2) subsequent contrary view of law is decided by controlling authority; or (3) decision is clearly erroneous and would work manifest injustice. Trial court had already determined that recording of *lis pendens* coupled with entry of foreclosure judgment constituted perfection of previously unperfected lien. Creditor precluded by law of case from later arguing that *lis pendens* alone was sufficient to perfect where state court had later vacated the judgment itself. Creditor did not demonstrate any different evidence on issues of recording; there was no change in the law as court was applying pre-existing state law that required both *lis pendens* and judgment of foreclosure to constitute perfection; and there was no evidence that prior ruling was either erroneous or would produce manifest injustice.
- (5369) *Gonsalves v. Belice*, Case No. 11-048 (1st Cir. BAP 2012) – On remand, court is to consider only issues on which case has been remanded. Lower court must follow letter and spirit of mandate, taking into account appellate court opinion and circumstances it embraces. Bankruptcy court dismissed Section 523(a)(3) action for failure to state cause of action. Appellate court reversed and remanded “to consider the merits” of the claim. On remand, bankruptcy court again dismissed case based on alleged failure of creditor to timely file complaint. On further appeal, appellate court reversed again. Court held that prior order directed bankruptcy court to consider action on merits. Bankruptcy court’s dismissal of action on procedural grounds, without reaching merits, violated law of case as established in first appeal.
- (5370) *Williams v. Franklin Towers Homeowners Association, Inc.*, 2010 WL 2780974 (9th Cir. 2010) - Under the law of the case doctrine, one panel of an appellate court will not reconsider questions that another panel has decided on a prior appeal in the same case.
- (5371) *In re Lundeen*, Case No. 0951277 (Bankr. S.D. Ohio 2010) – “law of the case” applies only in the case in which the court made the decision on which law of the case is based. Party cannot rely on decision made in separate case, brought by separate plaintiffs, even if the other case involved identical issues against same defendant. Further, law of the case does not apply where the decision relied on recognized unresolved factual issues that could alter the decision.
- (5372) *Kendrick v. CIT Small Business Lending Corp.*, 2009 WL 2835754 (Bankr. E.D. Ky. 2009) - When a court decides upon a rule of law, that decision governs the same issues in subsequent stages in the same case. The doctrine precludes a court from reconsideration of issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition. When an appellate court issues a decision and remands the case to the lower court for further proceedings, the trial court is bound to proceed in accordance with the mandate and law of the case as established by the appellate court. The trial court is required to implement both the letter and the spirit of the appellate court’s mandate, taking into consideration the appellate court’s opinion and the circumstances it embraces. Law of the case may be disregarded only where one of three exceptional circumstances exists: (1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice.

12.153 Particular Claims Barred

- (5373) *Gibson v. Mortgage Electronic Registration Systems*, 2014 WL 2091258 (W.D. Tn. 2014) – Law of the case precluded plaintiff from amending complaint to state cause of action contesting defendant’s standing to foreclose mortgage. Plaintiff brought initial complaint contesting standing. On Motion to Dismiss, court concluded that defendant was the owner and holder of the note and mortgage and was entitled to foreclose. Standing of defendant was established and plaintiff would not be permitted to amend complaint to re-assert issue of lack of standing.
- (5374) *Williams v. Franklin Towers Homeowners Association, Inc.*, Case No. 08-55109 (9th Cir. 2010) - Debtor’s appeal of Bankruptcy Court remand order barred by law of the case where Debtor has previously appealed that order and the appellate court affirmed.
- (5375) *Kendrick v. CIT Small Business Lending Corp.*, 2009 WL 2835754 (Bankr. E.D. Ky. 2009) – Bankruptcy Court bound by decision of Appellate Court that the notary statement contained in Defendant’s mortgage did not comply with the requirements of KRS 423.130 and the mortgage was, therefore, unrecordable as a matter of law and so was avoidable as a preference. On remand, Creditor argued that the mortgage was also recorded as a “fixture filing” that should be considered a perfected security interest in the fixtures attached to the real estate. Bankruptcy Court concluded that prior holding of Appellate Court that mortgage was invalid rendered Mortgage invalid for all purposes. Creditor would not be permitted to circumvent Appellate Court’s holding by attempting to re-characterize the invalid mortgage as a “fixture filing”.

12.154 Particular Claims Not Barred

Y. Evidentiary Issues

12.155 Generally

- (5376) *In re Second Chance Body Armor, Inc.*, 421 B.R. 823 (Bankr. W.D. Mich., 2010) – Court must apply Rules of Evidence with an eye to the fundamental purpose of fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. Court can admit evidence that would be “problematic” and can exclude that evidence later if it proves to be irrelevant or inadmissible. Court cannot necessarily determine full admissibility of evidence during middle of trial, as admissibility may not be clear until the case is fully developed. A party will not be barred in advance from presenting evidence that the opposing party asserts is unduly prejudicial. Court can determine probative value and potential undue prejudice only in the context of the trial. Court will not prematurely exclude evidence

and will not exclude evidence merely to be expedient.

12.156 Privilege – Time for Asserting Generally

- (5377) *Norris v. First Federal Savings & Loan of Lorain*, 2012 WL 1565602 (Bankr. N.D. Ohio 2012) – Assertion of attorney-client privilege in response to discovery request must be made before deadline to respond to discovery. Party waived privilege by partially responding to Request for Admissions without assertion of privilege, and cannot later assert privilege in response to Motion to Compel Discovery.
- (5378) *Holly Performance Products, Inc. v. United States*, 457 BR 598 (Bankr. W.D. Ky. 2011) - Claims of privilege that were not raised with respect to documents that were the subject of subpoena until after bankruptcy court had already entered its order enforcing subpoena were not timely raised, and could be denied on that basis.

12.157 Fifth Amendment Privilege

- (5379) *Hazelrigg v. U.S. Trustee*, Case No. 13-1230 (9th Cir. BAP 2013) – Although debtor is permitted to assert fifth amendment privilege in bankruptcy proceedings, debtor must do so on a question-by-question basis and cannot merely assert blanket refusal to testify or provide documents based on fifth amendment. If debtor properly invokes fifth amendment, court cannot compel debtor to answer but court can include negative implications of assertion of privilege in resolving the issues involved.
- (5380) *General Motors Corp. v. Heraud*, Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Party to adversary proceeding can invoke Fifth Amendment privilege. Trier of fact can draw adverse implications from the invocation of privilege, and party invoking privilege cannot introduce any other evidence on the issue involved. Court is not required to abate adversary proceeding to await outcome of criminal proceeding.

12.158 Attorney-Client Privilege

- (5381) *Ford Motor Company v. Michigan Consolidated Gas Co.*, 2015 WL 6470830 (E.D. Mi. 2015) – The attorney-client privilege applies where legal advice is sought from a legal advisor where the communication was made for the purpose of obtaining legal advice from a lawyer. Privilege can also apply to communications between consultant and attorney when the communication is made to assist the attorney in giving legal advice to the client. Party asserting the attorney-client privilege must identify the withheld documents with sufficient particularity to enable opposing counsel to intelligently argue that the privilege ought not be applied and must include an index of the documents purportedly protected by attorney-client privilege and must include a particularized description of the contents of each document.
- (5382) *In re Johnson*, 2015 WL 4619885 (Bankr. S.D. Ohio 2015) – Court would enter protective order precluding creditors from taking depositions of debtor’s attorneys. Discovery from opposing attorney is permissible only where party seeking discovery demonstrates that no other means exists to obtain the information and the information sought is both relevant and non-privileged. However, party can waive privilege by asserting “reliance on counsel” defense. Debtor did not waive privilege or assert reliance of counsel where debtor’s motion to convert case from Chapter 11 to Chapter 7 merely stated, “after consultation with counsel” that debtor concluded that conversion was in best interests of estate. Statement in no way disclosed or described communications between attorney and debtor and elements of burden of proof regarding conversion did not in any way implicate any communications between attorney and debtor.
- (5383) *In re Horvath*, 2015 WL 2195060 (Bankr. N.D. Ohio 2015) – Relationship of attorney and client for purposes of privilege arises when a person manifests an intention to obtain legal services from attorney and attorney either consents or fails to negate consent when person reasonably believes relationship to exist. Test is whether the putative client reasonably believes that the relationship exists and that attorney will advance interests of client. Attorneys did represent debtor in unrelated state court litigation, giving rise to attorney-client privilege. Privilege protects only communication between debtor and attorney and does not preclude discovery of underlying facts known to debtor and communicated to attorney. Similarly, when attorney learns facts from third parties and conveys that information to the client, the client’s knowledge of the facts is not privileged, only the content of the communication. Facts underlying causes of action listed in debtor’s Schedules and the valuation of those causes of action were not privileged in discovery to be taken of debtor because information to be gained consisted of facts underlying claims, not communications with attorneys regarding claims. Even if confidences existed, Chapter 7 trustee, as successor to causes of action, had standing to waive privilege when, on balance, trustee’s duty to maximize estate and represent interests of estate outweighs policies underlying privilege. Discovery sought information concerning claims being asserted by trustee against third parties, claims that debtor wanted the trustee to pursue. Sole purpose was to augment estate for creditors and trustee’s interests coincided with policy encouraging clients to make full disclosure to counsel, which outweighs any harm to debtor which was virtually non-existent in light of limited waiver sought.
- (5384) *In re Behr Dayton Thermal Products, LLC*, 2014 WL 1424970 (S.D. Ohio 2014) – When client is solvent corporation, attorney-client privilege is controlled by officers and directors who must act in conformance with fiduciary obligations to corporation. When control of corporation passes to new management, whether through takeover, merger or normal succession, new managers control privilege and can waive it as to communications by former managers. Former managers have no control over privilege even as to communication in which former managers were involved because privilege belongs to the corporate client controlled by current management. When corporation enters bankruptcy, the trustee in bankruptcy assumes control of the right to waive the privilege. Once corporation was closed and liquidated in bankruptcy by liquidating trustee, only trustee held power to assert or waive privilege. Management and officers of now-defunct corporation lack standing to assert privilege on behalf of corporation.
- (5385) *In re Cardinal Fastener & Specialty Co.*, 2012 WL 425858 (Bankr. N.D. Ohio 2013) – Section 542 mandates turnover to Trustee of all financial information, including books, documents, records and papers relating to debtor’s property or financial affairs. Trustee’s right to demand turnover is expressly subject to any applicable privilege including attorney-client and work product. Attorney client privilege

under Federal Law applies (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived. Only the client can invoke the privilege. Chapter 7 Trustee controls privilege as to communications between Debtor and special counsel retained while case was in Chapter 11. Debtor as the client is entitled to assert or waive privilege and Chapter 7 trustee controls the debtor post-conversion. To extent special counsel represented by Debtor and its officers and directors individually, privilege applies to prevent disclosure to third parties but does not preclude use of or restrict access to communications between attorney and joint clients as to matters in which they had a common interest and collectively consulted counsel. Special counsel represented Debtor and Directors and Officers in insurance litigation which precluded individual joint-clients from asserting privilege to prevent disclosure to Chapter 7 Trustee.

- (5386) *In re Elkins*, 2012 WL 4327044 (Bankr. N.D. Ohio 2012) – Attorney-client privilege applies to documents: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to the purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except where the protection has been waived. It includes correspondence that reveals the client's motivation for seeking legal representation, the nature of the services to be provided, strategies for litigation, and other confidential information exchanged during representation.
- (5387) *Degirolo v. Daily & Haskins*, 2011 WL 6000799 (Bankr. N.D. Ohio 2011) – Whether Chapter 7 Trustee can waive attorney-client privilege on behalf of individual debtors is determined on a case by case basis. Case by case approach is designed to balance interests of full and frank discussion in attorney-client relationship and potential harm to debtor against the trustee's duty to maximize the estate for benefit of creditors. Trustee permitted to waive privilege for purposes of pursuing professional malpractice action against debtor's counsel. Trustee and debtor are not in adversarial relationship. Trustee did not seek information to use against debtors. Recovery by the trustee would benefit debtors. The role of the defendant law firm was central to the Trustee's case against the firm and the trustee's overriding duty to act on behalf of the estate.
- (5388) *Holly Performance Products, Inc. v. United States*, 457 BR 598 (Bankr. W.D. Ky. 2011) – Documents that would have been protected by attorney-client privilege lost privilege when turned over to accountant.
- (5389) *In re Rapoport*, Case No. 11-45373 (Bankr. E.D. Mi. 2011) – Court would not prohibit or restrict Rule 2004 Examination based on possible attorney-client privilege issues. Privilege issues are more properly dealt with in the context of the examination and the specific questions posed. Attorney-client privilege does not attach to (1) the existence of the attorney client relationship or the identity of the client unless the identity of the client would somehow divulge the nature of the advice sought; (2) the purpose for which the attorney was retained and the terms of the engagement including the fee arrangement; (3) the factual circumstances surrounding the alleged privilege including, the date the communication took place, the identities of the participants, and the names of persons who received allegedly privileged documents; and (4) billing statements and hourly records except to the extent those contain privileged information. Further, privilege may be asserted or waived only by the client or the attorney acting on behalf of the client.
- (5390) *State Farm Mutual Automobile Insurance Company v. Hawkins*, 2011 WL 595810 (E.D. Mi. 2011) – crime-fraud exception to the attorney-client privilege is predicated on the recognition that where the attorney-client relationship advances the criminal enterprise or fraud, the reasons for the privilege fail. Crime-fraud exception applies where the party shows that there is a reasonable basis to (1) suspect the perpetration or attempted perpetration of a crime of fraud and (2) that the communications were in furtherance thereof. The crime-fraud exception applies only where the advice from an attorney refers to future, not past, wrongdoing and requires proof that client's communication was seeking advice in furtherance of crime or fraud. Attorney's unilateral actions in furthering crime or fraud does not trigger exception to privilege.
- (5391) *GATX Corp. v. Appalachian Fuels, LLC*, 2010 WL 5067688 (E.D. Ky. 2010) - The attorney-client privilege attaches to confidential communications between an attorney and client that are made for the purpose of facilitating the rendition of professional legal services to the client. Documents that are primarily business related are not privileged. When communications contain both legal advice and non-legal considerations, a court must consider whether the predominant purpose of the communication is to render or solicit legal advice. The burden of establishing the existence of a privilege rests with the party asserting the privilege. The burden of showing that a privilege has not been waived also falls on the party claiming the privilege. A privilege is waived by a voluntary disclosure in a Federal proceeding, and extends to undisclosed materials if (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness be considered together. Inadvertent disclosure does not operate as a waiver if: (1) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (2) the holder promptly took reasonable steps to rectify the error. Party failed to identify any particular document that was allegedly "inadvertently" disclosed, leaving Court to assume the disclosure of these documents was not inadvertent. Only 25 pages out of over 200 that actually contained some form of privileged communication which does not necessarily support a finding of an intentional waiver of the attorney-client privilege and party producing documents timely sought the return of the documents it considers privileged once disclosure became known.

12.159 Common Interest Doctrine

- (5392) *Ford Motor Company v. Michigan Consolidated Gas Co.*, 2015 WL 6470830 (E.D. Mi. 2015) – Common-interest doctrine protects from discovery otherwise privileged communications that are shared with party with "common interest" where, absent the common interest, disclosure would eviscerate the privilege. Common interest doctrine applies where the parties are represented by separate attorneys but share a common legal interest, allowing privileged communication to be exchanged without waiving privilege. Parties must have an identical legal interest with respect to the subject matter of the communication and the underlying shared communication must be privileged. Designating document as both attorney-client privilege and protected under common-interest is appropriate as, for the

common-interest doctrine to apply, the underlying communication must first be privileged.

- (5393) *In re Cardinal Fastener & Specialty Co.*, 2012 WL 425858 (Bankr. N.D. Ohio 2013) –To extent special counsel represented by Debtor and its officers and directors individually, privilege applies to prevent disclosure to third parties but does not preclude use of or restrict access to communications between attorney and joint clients as to matters in which they had a common interest and collectively consulted counsel. Special counsel represented Debtor and Directors and Officers in insurance litigation which precluded individual joint-clients from asserting privilege to prevent disclosure to Chapter 7 Trustee.

12.160 Work Product Privilege

- (5394) *In re Horvath*, 2015 WL 2195060 (Bankr. N.D. Ohio 2015) – Work product privilege is distinct from attorney-client privilege and protects the tangible and intangible material which reflects the attorney’s efforts in preparing a case, including patterns of investigation, assembling information, determination of relevant facts, and preparation of legal theories and strategies. Doctrine shields materials sought by adversary of the attorney’s client where there is actual adversarial relationship or materials were created in anticipation of litigation where that was objectively reasonable. Trustee could obtain materials as Trustee was not adversary of debtor with regard to pre-petition claims that trustee sought to bring against third parties. Debtor wanted trustee to pursue claims and work product does not allow attorney to withhold from trustee work product prepared for debtor pre-petition as long as the trustee and the debtor are not adversarial.
- (5395) *In re Black Diamond Mining Co., LLC*, 507 BR 209 (E.D. Ky. 2014) – Counsel for Chapter 11 debtor had obligation to turn over client file to liquidating trustee who was seeking to pursue actions against debtor’s former officers. Client file is property of client. Trustee, as representative of Debtor, had right to client file. File subject to turnover under Section 542 as property of estate. Attorneys cannot invoke work product privilege against its own clients. Work product protects attorney litigation materials from discovery to prevent opposing counsel from “free riding” on counsel’s trial preparation. Work product is limited to materials sought by an adversary of client and does not protect documents where client itself seeks access. Firm does not have right to withhold “internal” documents. Presumption is that documents must be turned over to client.
- (5396) *In re Cardinal Fastener & Specialty Co.*, 2012 WL 425858 (Bankr. N.D. Ohio 2013) – Work-product doctrine protects attorney’s trial preparation materials from discovery. Work product includes tangible and intangible materials which reflects attorney’s efforts at investigating and preparing a case. Work-product does not normally protect situations where client is asking for access to documents and information created or collected by counsel in the scope of the representation. Chapter 7 Trustee stepped into shoes of debtor and is the client, such that counsel for debtor prior to conversion to Chapter 7 could not shield information from Chapter 7 Trustee. To extent work-product was developed in course of representing joint clients, work product cannot be used to shield materials from one of those clients.
- (5397) *In re Elkins*, 2012 WL 4327044 (Bankr. N.D. Ohio 2012) – The work-product doctrine protects an attorney’s trial preparation materials from discovery to preserve the integrity of the adversarial process. The work-product doctrine is a procedural rule of federal law.... [Federal Rule of Civil Procedure] 26(b)(3) protects (1) “documents and tangible things”; (2) “prepared in anticipation of litigation or for trial”; (3) “by or for another party or its representative.” Work product applies only to party to the litigation. Documents prepared for one who is not party to the present suit are not protected by work product. City could not assert work product privilege where City was not party to present action.
- (5398) *Holly Performance Products, Inc. v. United States*, 457 BR 598 (Bankr. W.D. Ky. 2011) - Work product privilege does not apply to documents that were not prepared in anticipation of litigation. Documents prepared in anticipation of the claims process in the bankruptcy case does not necessarily equate to litigation.

12.161 Accountant-Client Privilege

- (5399) *Wells v. THB America, LLC*, 2012 WL 3678602 (Bankr. E.D. Mi. 2012) – Michigan law provides accountant-client privilege with respect to information relative to and connection with an examination or audit of, or report on, books, records, or accounts that the accountant or a person employed by the accountant was employed to make. Information derived from or as a result of professional service rendered by CPA is confidential and privileged. Chapter 7 Trustee’s attempts to recover work papers and correspondence relating to Defendant’s 2008 tax return fell within ambit of privilege. Accountant’s work on tax returns is clearly within scope of privilege. However, privilege is limited to information provided by client to accountant, not to information provided by accountant to client. Court would review documents to determine extent to which documents contained information provided by client and, therefore privileged; and which documents contain only information generated by accountant or third parties that is not privileged.
- (5400) *Holly Performance Products, Inc. v. United States*, 457 BR 598 (Bankr. W.D. Ky. 2011) – Documents prepared by accountant are not covered by work product privilege and there is no Federally recognized accountant-client privilege. Documents provided to tax preparer for purposes of compiling tax returns are not privileged. Documents that would have been protected by attorney-client privilege lost privilege when turned over to accountant.

12.162 Membership Lists

- (5401) *In re Deliverance Christian Church*, 2011 WL 6019359 (Bankr. N.D. Ohio 2011) – Membership lists are subject to heightened protections because of potential chilling effect on First Amendment freedom of association. Creditor failed to demonstrate need for Church to produce membership list disclosing names of all members. Numbers of members on the rolls, number of people attending services, number of people financially supporting Church would be subject to discovery, but actual membership list is beyond scope of permitted discovery and is privileged.

12.163 Expert Witnesses

- (5402) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Appraisal of debtor’s principal asset was not admissible as appraisal and affidavit in support of appraisal stated only that the person doing the valuation was licensed auctioneer and owner of an auction company but did not set forth any facts to show that he is competent to appraise asset in question, and failed to state the effective date on which the valuation is based or to allow conclusion that stated value reflected value as of date of transfer as appraisal was dated 2 years after date of transfer in question.
- (5403) *DiGirolamo v. McIntosh Oil Co.*, 2015 WL 4555579 (Bankr. N.D. Ohio 2015) – Expert witness may present opinion testimony if grounded in his expertise and a proper evidentiary basis if: (1) the expert is qualified as such by knowledge, skill, experience, training, or education; (2) the testimony is relevant, meaning it will assist the trier of fact to understand the evidence or to determine a fact in issue; and (3) the testimony is reliable, meaning it is based on sufficient facts or data, is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. Court must make preliminary assessment of whether reasoning and methodology is valid and applies to the facts of the case. Witness permitted to testify where witness has extensive personal experience in industry based on over 10 years in business with significant volume. Testimony of pricing trends and terms of particular transactions that were out of the norm was relevant to issue of whether defendant acted in good faith. Testimony based on information learned from other sources was sufficiently reliable as information was of a type reasonably and normally used in the industry on a day-to-day basis, and opposing party could cross examine witness and challenge the weight that should be afforded testimony.
- (5404) *Satija v. Permanent General Assurance Corp. of Ohio*, 2014 WL 1664557 (N.D. Ohio 2014) – Federal Rule of Evidence 702 allows expert testimony where witness has specialized knowledge that will help trier of fact to understand evidence or determine fact in issue. Testimony must be based on sufficient facts or data and use reliable principals and methods, and be product of application of the principals and methods to the facts of the case.
- (5405) *Rosenberg v. DVI Receivables, XIV, LLC*, 2012 WL 3870351 (Bankr. S.D. Fl. 2012) – Expert witnesses are normally not permitted to testify as to meaning or interpretation of law. Trial judge is to be jury’s sole source of explanation of applicable bankruptcy law. Allowing parties to present witnesses would create risk of confusion concerning applicable law. District Court jury instructions would cover bankruptcy law and standards to determine whether involuntary petition was filed in bad faith and the consequences of a bad-faith filing. Although Federal Rule of Evidence 704 permits an expert witness to give expert testimony that “embraces an ultimate issue to be decided by the trier of fact,” an expert witness is prohibited from rendering a legal opinion because doing so would usurp the court’s role and possibly confuse the jury.
- (5406) *Synergeering Group, LLC v. Jonatzke*, 2012 WL 36554464 (Bankr. E.D. Mi. 2012) – Rule 702 allows expert testimony if based on sufficient facts or data and is the product of reliable principles and methods. Expert can rely on facts or data that have been provided to expert or those which expert personally observed. If experts in the particular field would reasonably rely on those types of facts or data, then the underlying facts or data need not themselves be admissible for the opinion to be admitted. Court must determine whether opinion rests on reasonable foundation or is instead unsupported speculation.
- (5407) *Advantage Bank v. Starr*, 2012 WL 2921451 (Bankr. N.D. Ohio 2012) – Expert testimony is appropriate on any matter where the expert’s knowledge will help the trier of fact to understand the evidence or determine a fact in issue. Expert testimony is not normally appropriate to offer a legal conclusion that invades the province of the Court to determine applicable law. However, Trial court has discretion to admit or exclude expert testimony that arguably contains a legal conclusion due to the difficult nature of determining whether a legal conclusion is implicated by the testimony. Proposed expert witnesses for Plaintiff in dischargeability proceeding provided reports that stated in part that, “I have been told that Mrs. Starr’s representations in this regard were false, that she had previously transferred the property to a self-settled trust and gave a mortgage on the property to her ex-husband, Chris Starr, on account of an undisclosed debt. I have also been told that Advantage Bank would not have twice modified the promissory note given by Ms. Starr and would have been able to protect its interests prior to Ms. Starr’s bankruptcy had Ms. Starr been truthful. ... I have been provided copies of the personal financial statements Ms. Starr provided to Advantage Bank which state that Advantage Bank was relying on the truth and accuracy of her disclosures.” Reports also stated, “In my experience and in my professional opinion, it is customary for lenders such as Advantage Bank to rely on the truth and accuracy of financial disclosures concerning the ownership of borrowers’ homes. The vast majority of borrowers are truthful in these disclosures. It is not customary for lenders to confirm the ownership of personal residences in personal financial statements provided by borrowers, particularly when such assets are not being taken as collateral as it costs time and money to do so. ... In my opinion, Advantage Bank’s reliance on the truth and accuracy of Irene Starr’s statement that she was the owner of the above described real property was reasonable and customary.” Testimony admissible as it stated the opinion of the experts concerning customary practices of lenders in reviewing financial disclosures. Language did not state legal conclusion, but provided basis and reasoning for opinion that Bankr relied on representations when extending Debtor credit.
- (5408) *In re Creekside Senior Apartments, LP*, 477 B.R. 40 (6th Cir. BAP 2012) – Federal Rule of Evidence 702 governs testimony of expert witnesses. Before allowing expert testimony, court must determine that the witness is qualified by knowledge, skill, experience, training or education; that the testimony is based on sufficient facts or data; that the testimony is the product of reliable principles and methods; and that the witness has applied the principles and methods reliably to the facts of the case. The court must not initially determined credibility or accuracy of opinion but must only ensure that the opinion is based on reliable factual foundation and not speculation. Expert testimony must be on issue that will assist trier of fact – testimony must be sufficiently tied to facts of case and there must be ‘fit’ between testimony and an actual factual issue in the trial. Whether appraisal conforms to one particular standard is not factor in determining admissibility of opinion, but can be used as basis to contest reliability and weight. Use of accepted methodology but use of flawed data does not require exclusion of opinion but can be used to contest reliability and weight. To the extent that the appraiser used accepted methodology but

allegedly used “extraordinary assumptions”, those assumptions go to the weight of the opinion and can be used on cross-examination, but are not a basis to exclude opinion testimony in its entirety.

- (5409) *Smoky Mountain Title, Inc. v. Tennessee State Bank*, 2012 WL 122539 (Bankr. E.D. Tn. 2012) – Court has broad discretion to exclude untimely expert witness testimony. Court should not exclude testimony unless allowing the testimony would be both unjustified and harmful, and the failure to provide the expert information earlier results in prejudice. Opinion testimony of a “non-expert” must be rationally based on perceptions of the witness, helpful to a clear understanding of the testimony, and not based on “technical knowledge” within the scope of Federal Rule of Evidence 702. Expert witness opinions are based on specialized knowledge. Affidavit of untimely disclosed expert witness was not opinion of “non-expert” where opinion related to status of title and recorded documents in the public records and was based on the witness's lengthy experience in real estate, title, closings and escrow matters. Although the witness was also a “fact” witness and could offer factual testimony concerning the closing of the transaction itself, the witness proposed to go beyond that and offer expert testimony that had not been the subject of Rule 26 disclosures and would be prejudicial as the opposing party would not have a meaningful opportunity to prepare for rebuttal.
- (5410) *Nelson v. Walnut Investment Partners, L.P.*, 2011 WL 2711318 (S.D. Ohio 2011) – Expert testimony is admissible under Rule 702 if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. A witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. The trial judge must act as a gatekeeper, admitting only that expert testimony that is relevant and reliable. Trial court must initially determine whether the reasoning or methodology used is scientifically valid and is properly applied to the facts at issue in the trial, considering: 1) whether the scientific knowledge can or has been tested; 2) whether the given theory or technique has been published or been the subject of peer review; 3) whether a known rate of error exists; and 4) whether the theory enjoys general acceptance in the particular field. Admissibility does not depend on the correctness of the expert's conclusions but the soundness of his methodology. Opinion of business valuation expert was admissible where expert was provided with extensive written materials. Although expert did not speak with the owner or visit the physical location of the property, these matters went to the credibility, rather than the admissibility, of the report.
- (5411) *Hall v. Huntington National Bank*, 2011 WL 1135955 (N.D. Ohio 2011) – Bankruptcy Court properly permitted expert to testify although party proffering expert failed to fully comply with Federal Rule 26(a)(2) regarding pre-trial disclosures. Party provided notice that expert witness would be called and provided a preliminary judicial report, in compliance with an order of the Bankruptcy Court, that it would use as an exhibit at the evidentiary hearing and provided opponent with full opportunity to *voir dire* the witness regarding qualifications before permitting expert to testify. Any omissions, such as the failure to provide information on his prior opinion testimony, were not prejudicial, since they would not have been beneficial to opposing counsel or helpful to the court. Potential financial interest of expert in outcome of case goes to weight of evidence and credibility of witness and not admissibility *vel non*.
- (5412) *In re Gainey Corporation*, Case No. GG 08-09092 (Bankr. W.D. Mi. 2008) - Bankruptcy Court can, on its own initiative, appoint an expert witness pursuant to Federal Rule of Evidence 706(a). Retained expert would not be appointed as a professional for either the Debtor or any specific creditor, although expert could be appointed as expert for Creditors Committee on request of that Committee where possible future retention could benefit the estate and assist in administration and eliminate delay and expense. Expert witness fees would be paid pursuant to Federal Rule of Evidence 706 and would be borne by Debtor and can use cash collateral for that purpose.

12.164 Trade Secrets

- (5413) *In re Deliverance Christian Church*, 2011 WL 6019359 (Bankr. N.D. Ohio 2011) – Trade Secrets are generally defined as any information on scientific or technical information, method, or business information or plans that derive independent economic value from not being generally known or generally ascertainable and that are subject to reasonable efforts to maintain secrecy. Financial summary information is not generally regarded as trade secret. Further, debtor previously provided lender with similar information in similar format without objection, indicating a lack of efforts to maintain secrecy.
- (5414) *In re Waring*, 406 BR 763 (Bankr. N.D. Ohio 2009) - Court is required to protect trade secrets, confidential research and development, or commercial information, although Court has discretion to determine what type of protection is required. "Trade Secret" is process or device for continuous use in the operation of the business such as procedures related to the sale of goods or to other operations in the business. Factors include: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others involved in the business; (3) the measures taken to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of money or effort which was expended to develop the information; and (6) the ease or difficulty by which the information could be acquired or duplicated by others. "Commercial Information" is information that is so critical to an entity's operations that disclosing the information will unfairly benefit that entity's competitors.

12.165 11 USC Section 107(b)

- (5415) *In re Deliverance Christian Church*, 2011 WL 6019359 (Bankr. N.D. Ohio 2011) – Section 107 does not create any independent basis for a privilege, but establishes a framework within which a privilege can be asserted as to any matter to be filed with a court. Party cannot use Section 107 to oppose discovery request as discovery materials are not ordinarily filed with the Court and so are not open to public review. Further, creditor's proposed protective order, which precluded filing or disclosure of information to third parties, would cure any possible opposition to discovery under Section 107.

12.166 Constitutional Limitations on Discovery

- (5416) *In re Deliverance Christian Church*, 2011 WL 6019359 (Bankr. N.D. Ohio 2011) – First Amendment requires higher level of scrutiny before discovery will be ordered from a religious institution to ensure proper balance of First Amendment rights with need for information. Party from whom discovery is sought must first present prima facie case of entitlement to First Amendment privilege by demonstrating that the discovery information would impinge on some protected aspect of the organization’s activities. Church met burden of showing that compelled disclosure of membership lists and private information of donors including addresses, social security numbers, and amounts given, would have chilling effect on relationship with membership and giving, and impinges in the privacy right that goes hand in hand with free association. Creditor demonstrated need for financial information in summary form, but did not demonstrate compelling need for personal information including donor names and addresses. Debtor proposed reasonable solution to disclose information but to replace personally identifying information with unique number for each donor, which allows Creditor to review financial information without unnecessarily disclosing personal information or impinging on First Amendment rights.

12.167 Hearsay – Government Report

- (5417) *In re Second Chance Body Armor, Inc.*, Case No. GT 04-12515 (Bankr. W.D. Mi. 2010) – Government reports investigating alleged defects in bullet proof vests were admissible under Federal Rule of Evidence 803(8) in litigation against supplier of materials. The report contained only factual findings based on two phases of testing and did not include “subjective feelings and beliefs of individual scientists”. Defendant failed to demonstrate that the report was not “trustworthy”. Factors to consider in determining “trustworthiness” include (1) timeliness of the investigation; (2) the investigator’s skill and experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view toward possible litigation. Court concluded that the reports were trustworthy where the reports were prepared at the direction of the United States Attorney General shortly after potential defects in the vests were disclosed and the investigations were performed by persons with a high level of skill and experience. The reports were prepared to inform law enforcement personnel about potential safety related issues and not in anticipation of future litigation.

12.168 Hearsay – Business Records Exception

- (5418) *Hudson v. Martingale Investments, LLC*, 504 BR 569 (9th Cir. BAP 2014) – Rule 803 does not require evidence custodian to testify that person has knowledge of facts set out in records to be authenticated. Business record exception requires foundation for admission that documents are kept in regular course of business, if the document was kept in normal course and regularly relied on the document. Record not admissible where witness did not testify that record was kept in regular course of business or that business regularly relied on document.

12.169 Subsequent Remedial Measures

- (5419) *In re Second Chance Body Armor, Inc.*, Case No. GT 04-12515 (Bankr. W.D. Mi. 2010) – Federal Rule of Evidence 407 normally bars evidence of subsequent remedial measures following an “event” that causes injury. Rule 407 does not apply outside of a specific accident or occurrence. Action did not involve claim for personal injury or wrongful death. Instead, action was one for breach of contract for sale and delivery of defective materials. Defendant’s study designed to create a new product was not a subsequent measure intended to address the problems with prior products. Further, the information involved testing and discussions by Defendants’ scientists and did not involve any actual modifications to design or manufacture. Rule 407 prohibits evidence of subsequent remedial measures, not evidence of a party’s analysis of its own product.

12.170 Parole Evidence Rule

- (5420) *Ramco-Remodel America Corp. v. Wallis*, 2015 WL 5098639 (W.D. Tn. 2015) – Parol evidence cannot be used to interpret contract that is unambiguous on its face. If a term of a contract is ambiguous or requires explanation, parol evidence can be admitted to supplement terms of contract. Consent Order entered by Court was brief and unambiguous and interpretation argued by defendant was not the result conveyed by the express and objective terms of the Order. Although defendant contended that Order was intended to release third party liability, nothing in the order mentions any release of any third party and parol evidence could not be used to contradict or add to terms of Order.
- (5421) *Moretti v. Bank of New York Mellon*, 2015 WL 1036450 (6th Cir. 2015) – Parole evidence rule precludes introduction of extrinsic documents or testimony where contract or agreement itself is unambiguous. Debtor failed to demonstrate any ambiguity in loan modification where debtor testified that debtor understood terms of modification, agreed to it, and began performance under modification. Debtor could not use subsequent communications with lender to create ambiguity where no ambiguity existed in the modification in the first instance.
- (5422) *Gordon v. Wehrle*, 2010 SL 3835223 (N.D. Ohio 2010) – Bankruptcy Court properly excluded oral testimony that would directly contradict terms of written agreement. Parties stipulated that underlying agreement was unambiguous, rendering parole evidence of meaning of agreement inadmissible.
- (5423) *Lund v. Jevne*, Case No. 08-56655 (9th Cir. 2009) – Bankruptcy Court properly excluded oral testimony that would directly contradict terms of written agreement. Prior to bankruptcy, debtor signed promissory note promising to repay debt with interest. Debtor precluded from later introducing evidence that payee orally promised that he would not sue on the outstanding debt and would only use the 2001 agreement for purposes of obtaining a tax deduction. The parole evidence rule bars introduction of prior or contemporaneous oral representations that contradict integrated terms of a written agreement. Where fraud claim is based on alleged false promises that are excluded by parol evidence rule, evidence of the contrary terms is irrelevant as a matter of law. Fraud action cannot be based on alleged

fraudulent promise not to sue that is inconsistent with written terms of agreement itself.

12.171 Judicial Notice

- (5424) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Court can take judicial notice of Debtor's bankruptcy schedules and contents of court docket in adversary proceeding to recover fraudulent transfer.
- (5425) *Buchanan v. Pilgrim's Pride Corp.*, 2011 WL 3047333 (E.D. Tn. 2011) - Court may take judicial notice of proceedings in other courts, including the related bankruptcy matter.

12.172 Waiver – Inadvertent Disclosure

- (5426) *Samaritan Alliance, LLC v. Commonwealth of Kentucky*, 2013 WL 653624 (Bankr. E.D. Ky. 2013) – Federal Rule of Evidence 502 provides that disclosure of an otherwise privileged document does not waive the privilege if the disclosure is inadvertent; holder of privilege took reasonable steps to prevent disclosure; and holder promptly took reasonable steps to rectify error. Party failed to demonstrate any reasonable steps to prevent or rectify disclosure of e-mails. Party acted too slowly where party waited more than 20 days after being notified of disclosure of potentially privileged e-mails and until a day after the e-mails were used in a deposition before making any objection or request for return of the documents, and party did not lodge objection to use of e-mails at the deposition. Disclosure is more likely to be inadvertent where disclosure involves large number of documents. Here, total number of pages produced was only 645, which was not so large as to prevent adequate review before production. Content of e-mails was central to issue, which imposed heightened duty to review – disclosure of such important documents suggests that party waived any privilege that may have attached.

12.173 Video Testimony

- (5427) *In re Mikolajczyk*, 2015 WL 3505135 (Bankr. W.D. Mi. 2015) – Federal Rule of Civil Procedure 43, applicable in bankruptcy through Rule 9017, allows the Court to receive testimony by video conference for good cause in compelling circumstances. Strict requirements of Rule highlights importance or presenting live testimony to impress on witnesses importance of the undertaking and to assist fact finder in evaluating credibility and demeanor of witness. Alleged expense in transporting three witnesses from Kalamazoo to Marquette for hearing is not “compelling circumstance” but is a routine and ordinary inconvenience.

12.174 Settlement Discussions

- (5428) *Ramco-Remodel America Corp. v. Wallis*, 2015 WL 5098639 (W.D. Tn. 2015) – Federal Rule of Evidence 408, made applicable in Bankruptcy by virtue of Federal Rule of Bankruptcy Procedure 9017, prohibits introduction of conduct or statements made during compromise negotiations about a claim. Underlying claim was clearly disputed as parties disagreed about whether there was any claim at all. Evidence of settlement discussions would necessarily be used to prove the validity of the claim in violation of Rule 408. Negotiations ultimately produced Consent Order. Any discussions during settlement negotiations could have effect of nullifying Order as drafted and could have chilling effect on future communications, supporting exclusion of testimony under Rule 408.

Z. Discovery

12.175 Generally

- (5429) *Sutter v. Saxon Mortgage Services, Inc.*, Case no. 06-3150 (Bankr. E.D. Mi. 2015) – Bankruptcy Court would not authorize discovery where parties were also litigating in state court and parties could seek discovery as part of state court proceeding without bankruptcy court involvement.
- (5430) *In re Merena*, Case No. 08-1342 (9th Cir. BAP 2009) – Defendant who failed to take discovery for over six months while adversary proceeding was pending would not be granted continuance or delay of trial to prepare. Party never sought to compel discovery and adversary proceeding had waited until either the trial before requesting continuance. Party was aware from entry of scheduling order a trial would occur approximately 4 months later. Party's failure to diligently pursue discovery does not constitute grounds to request an adjournment of the scheduled trial.

12.176 Motion for Leave to Take Discovery

- (5431) *In re Xunlight Corp.*, 2015 WL 6143086 (Bankr. N.D. Ohio 2015) – Rule 2004 allows court to authorize discovery and issuance of subpoena in court's discretion. Subpoena issued by creditor in case directed to Trustee quashed where creditor did not first file Motion for Rule 2004 exam.
- (5432) *In re Cotter*, Case No. 14-51270 (Bankr. E.D. Mi. 2015) – Motion for leave to take discovery denied where there was no pending contested matter and motion failed to demonstrate good cause for allowing discovery.
- (5433) *In re Innatech, LLC.*, Case No. 10-49380 (Bankr. E.D. Mi. 2010) – Plaintiff's Ex Parte Emergency Motion for Leave to Take Discovery denied where Motion failed to state anything specific about what subject matter party sought discovery on, preventing Court from properly assessing party's need for discovery.

12.177 Subpoenas – Rule 26

- (5434) *In re Xunlight Corp.*, 2015 WL 6143086 (Bankr. N.D. Ohio 2015) – Rule 26 allows discovery under certain circumstances, but does not permit discovery where no claim has been asserted against party seeking discovery. Request for subpoena by potential target of possible avoidable transfer action seeking information and documents in possession of the Trustee was premature where no claim has been asserted

against party seeking subpoena or any other party.

12.178 Duty to Cooperate

- (5435) *New Products Corporation v. Tibble*, Case No. 13-80252 (Bankr. W.D. Mi. 2015) – Counsel owes duty to third parties from whom discovery is sought to avoid saddling recipients of requests from undue burden or expense. Subpoenas sought 36 categories of documents dating back 10 years with no effort to tailor or narrow scope to avoid unnecessary efforts by recipient. Counsel refused to respond to requests from attorney for recipients requesting additional time to respond or to assess enormous breadth and scope of the request or amount of work necessary to assess the demands, and effort to gather and produce potentially responsive materials and that request includes items that counsel must have known constituted privileged communications. Rather than responding to recipient's concerns, plaintiff served another round of subpoenas directed to another third party, this one seeking 58 categories of documents dating back 10 years, where target of subpoena was company that did not exercise option to purchase debtor's property. Plaintiff repeatedly refused to meet with attorneys for the recipients to discuss ways to narrow and target the discovery and to reduce costs and burden of responding. Plaintiff also refused to consider protective order that would preserve privileges in event of inadvertent disclosure and instead responded with third set of subpoenas directed to another recipient that was equally overbroad in both scope and time. Unable to obtain cooperation from Plaintiff, recipients engaged in efforts to produce documents in response to subpoenas. Initial computer search by firm that specializes in electronic discovery turned up more than 2.8 million pages of potentially responsive documents that through further efforts of company and attorneys for recipients narrowed scope to 15,500 potentially relevant files. Recipient advised that it would look to plaintiff to cover cost of discovery which was approaching \$150,000, but plaintiff continued to refuse to attempt to narrow scope and refused to sign or even comment on protective order. With full knowledge that recipients were attempting to comply, plaintiff filed motions to compel discovery that was unnecessary. Rule 45 allows court to impose costs of discovery where subpoena imposes expenses on non-party that are significant. Court awarded costs in excess of \$165,000 jointly and severally against Plaintiff and counsel.

12.179 Depositions

- (5436) *In re Johnson*, 2015 WL 4619885 (Bankr. S.D. Ohio 2015) – Court would enter protective order precluding creditors from taking depositions of debtor's attorneys. Discovery from opposing attorney is permissible only where party seeking discovery demonstrates that no other means exists to obtain the information and the information sought is both relevant and non-privileged. However, party can waive privilege by asserting "reliance on counsel" defense. Debtor did not waive privilege or assert reliance of counsel where debtor's motion to convert case from Chapter 11 to Chapter 7 merely stated, "after consultation with counsel" that debtor concluded that conversion was in best interests of estate. Statement in no way disclosed or described communications between attorney and debtor and elements of burden of proof regarding conversion did not in any way implicate any communications between attorney and debtor.
- (5437) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Motion to exclude parties from depositions denied. Rules of civil procedure do not contemplate exclusion of party from discovery process. Federal Rule of Evidence 615, allows a court to exclude witnesses from court proceedings, does not apply in discovery matters pursuant to Rule 30(c)(1).
- (5438) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Notice of deposition served by mail only 4 days before scheduled deposition (and using 3 days for mailing, received one day before scheduled date) did not provide reasonable notice as required by Rule 30 and court would not compel deponent to appear.
- (5439) *Pidcock v. Goddard*, 2015 WL 1365591 (Bankr. N.D. Ohio 2015) – Rule 345 normally prevent subpoena that would require person to appear at location more than 100 miles from home. However, geographic limitation does not apply where subpoena allows for production of documents that excuses appearance if documents are provided. Production of documents alone does not require personal appearance.
- (5440) *PRN Funding, LLC v. Cole*, 2013 WL 5964010 (Bankr. N.D. Ohio 2013) – Depositions of parties are governed by Rule 7030, which incorporates Federal Rule 30. Attendance by a party does not require issuance of a subpoena. Debtor's failure to appear after being properly noticed for deposition would be subject to sanctions under Rule 7037.
- (5441) *Norris v. First Federal Savings & Loan of Lorain*, 2012 WL 1565602 (Bankr. N.D. Ohio 2012) – Motion to Adjourn Deposition denied where pattern of conduct indicated lack of good faith in participating in the discovery process. Plaintiff failed to advise Defendant of alleged scheduling issues when the notices of deposition were received, causing Defendant to prepare for the depositions on the assumption that they would be proceedings as noticed. Plaintiff advised Defendant that after 5:00 in the afternoon that Plaintiff would not be attending depositions set for following date. When Defendant rescheduled the depositions for a week later, Plaintiff filed a Motion to Adjourn those deposition one day before the re-scheduled date.

12.180 Depositions - Perpetuation of Testimony

- (5442) *Pegasync Technologies, Inc. v. Patros*, 2014 WL 2763620 (E.D. Mi. 2014) – Federal Rule of Civil Procedure 27(a) allows a party to perpetuate testimony before commencing legal proceedings where party expects to be a party to an action but cannot presently bring it or cause it to be brought; party can demonstrate subject matter of action and petitioner's interest in that; fact that petitioner wants to establish the testimony and reasons to perpetuate it; names or descriptions of the persons whom are expected to be adverse parties when the action is filed; and names, addresses and anticipated testimony of each proposed deponent. Purpose is to protect against possible loss of testimony if party has to wait, such as where witness may be unavailable at a future date, either because of age or infirmity, or some imminent risk of immediate death. Petitioner anticipated litigation against Patros in possible bankruptcy case regarding non-dischargeability of debts, alleging that perpetuation was necessary because of debtor's health, age, memory and possible retention of and deletion of documents. Petitioner sought to perpetuate testimony of the potential debtor, the Petitioner's president; and a third party loan consultant for the loan between Petitioner and the potential debtor. Petitioner could not presently bring action as potential debtor had not yet filed bankruptcy.

However, petitioner failed to demonstrate any need to protect against a loss of the desired testimony. Deposition allowed of witness who was age 72 and suffered from serious health problems including two recent heart surgeries, and chronic anemia. However, there was no particularized danger of loss of testimony from either of the two remaining proposed witnesses which would support deposition to perpetuate testimony.

12.181 Request for Admissions

- (5443) *Tobin v. Florida Bar*, 2014 WL 4233368 (11th Cir. 2014) – Request for admissions cannot be used to establish legal conclusion. Florida Bar admission that Bar is not governmental unit did not preclude Court from concluding to the contrary. Admission of a legal conclusion is not proper under Rule 36. Party may not request an admission of a legal conclusion but only facts, application of law to facts, or opinions about either.
- (5444) *Ferguson v. Clark*, 2014 WL 4109794 (E.D. Mi. 2014) – Failure to timely respond to request for admissions deems matters admitted. Where matters admitted conclusively establish defense to action, defendant entitled to summary judgment.
- (5445) *Bank of America v. Killgrove*, 2013 WL 7018546 (Bankr. E.D. Mi. 2012) – Party may not decline to admit or deny based on alleged lack of knowledge unless the party also states that the party made reasonable inquiry and that the information it knows or can readily obtain is insufficient to admit or deny. Defendant's response failed to include this statement. Court would grant Motion to Compel defendant to reply.
- (5446) *Oak Street Funding, LLC v. Blair*, 2013 WL 2154795 (Bankr. E.D. Tn. 2013) – Defendant who failed to respond to Request for Admissions within 30 days of service and who failed to request extension of time to respond would be deemed to have admitted all matters requested and those items would be conclusively determined for purposes of consideration of motion for summary judgment.
- (5447) *Norris v. First Federal Savings & Loan of Lorain*, 2012 WL 1565602 (Bankr. N.D. Ohio 2012) – Responses to requests for admissions must be forthright, specific and unconditional. Responding party can assert lack of knowledge only after making reasonable inquiry. Party's failure to admit or deny actions allegedly taken by party's own attorney, and instead assertion that party did not know what their attorney did, failed to indicate a reasonable inquiry. Responses indicated lack of good faith and indicated that party made little or no effort to properly respond. Court deemed Requests for Admission to be deemed admitted pursuant to Rule 36.
- (5448) *GATX Corp. v. Appalachian Fuels, LLC*, 2010 WL 5067688 (E.D. Ky. 2010) – Party to whom Request for Admissions is directed can assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny. Answers to Request for Admissions that stated that the party made a reasonable inquiry regarding the subject matter of the request for admission, and the information that the party has, or can readily obtain, was insufficient for it to answer the request conforms with Rule 36.

12.182 Interrogatories

- (5449) *Bank of America v. Killgrove*, 2013 WL 7018546 (Bankr. E.D. Mi. 2012) – An interrogatory is not objectionable merely because it asks for opinions or contentions that relate to application of law to fact. However, an interrogatory that asks solely for case citations is not within scope of rule. Answers must not be evasive or incomplete. Interrogatory seeking valuation of relevant assets is permissible. Motion to Compel granted to extent that answers failed to contain the substance required under Rule 36(a)(4).
- (5450) *Norris v. First Federal Savings & Loan of Lorain*, 2012 WL 1565602 (Bankr. N.D. Ohio 2012) – Each interrogatory must, to the extent not objected to, be responded to separately and fully in writing. Party responding is not generally required to conduct extensive research but must make reasonable effort to respond. Responses that stated “unknown” and “unknown at this time” were insufficient as the responses were not fully and complete and there was no indication that party made reasonable effort to respond.
- (5451) *GATX Corp. v. Appalachian Fuels, LLC*, 2010 WL 5067688 (E.D. Ky. 2010) – Federal Rule of Civil Procedure 33 states that an interrogatory may relate to any matter that is relevant and nonprivileged. The party upon whom interrogatories are served must answer each interrogatory separately and fully. Party did not properly respond to interrogatory that stated “If you stated that you lack sufficient information to either admit or deny any Request for Admission served upon you ... then for each Request to which you gave such a response please describe in detail your method and scope of inquiry into its subject matter and describe in detail all information that is known or readily obtainable by you” by responding that the party “made a thorough search of its files and records. Plaintiff also made inquiries of former and current employees of both GATX and GE Capital Corporation. Plaintiff has propounded discovery requests upon Larry Addington in an attempt to gain information regarding the subject matter of this request. At the time Plaintiff answered this request, Addington had been uncooperative and almost completely unresponsive to Plaintiff's discovery. All information that was known or readily obtainable by Plaintiff at the time of its answer to these requests was provided to Defendant in Plaintiff's response to discovery. Discovery is not complete on the subject matters of these requests.” Responding party must provide details of party's attempt to comply with Rule 36 and identify any documents it has disclosed during discovery that may be responsive to the interrogatory.

12.183 Production of Documents

- (5452) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Party not required to respond to request for production of documents that is not timely served as required by court's scheduling order. Where request for production served less than 30 days prior to discovery cutoff, request was untimely as party to whom request directed is allowed 30 days to respond, which would be beyond discovery cutoff.
- (5453) *In re Stambaugh*, 2015 WL 2437906 (Bankr. S.D. Ohio 2015) – Rule 2004 allows examination of any entity relating to acts, conduct or property or to the liabilities and financial condition of the debtor or to any matter which may affect administration of estate. Examinations

are broad in scope and geared to determine whether litigation should be commenced, but examination must not be unduly disruptive or costly and far outweigh benefits of the information. United States Trustee request for documents from debtor's mortgage company not unreasonable or overburdensome where request related to multiple collection notices from lender after lender acquired the loan and relation to stay provisions of Section 362. Creditors are obligated to structure internal systems and mechanisms to minimize opportunity for even inadvertent stay violations that require debtors to spend time and expense to return to bankruptcy court. Further, discovery was necessary to discover why debtor received four separate collection notices, two of which were posted after debtor's counsel contacted lender, and discovery of loan transfer processing process and procedures would clarify issues. Stay violations are common and systemic problems that involve many debtors and many cases, placing UST in unique position to act.

- (5454) *Pidcock v. Goddard*, 2015 WL 1365591 (Bankr. N.D. Ohio 2015) – Rule 34 normally prevent subpoena that would require person to appear at location more than 100 miles from home. However, geographic limitation does not apply where subpoena allows for production of documents that excuses appearance if documents are provided. Production of documents alone does not require personal appearance.
- (5455) *Reese v. CNH America, LLC*, 2014 WL 354254 (E.D. Mi. 2014) – Party responding to subpoena for documents must either produce documents as they are kept in the ordinary course of business, or organize and label them to correspond to categories of documents listed in subpoena. Court can order supplement to production of documents to require producing party to identify the production numbers of documents to correspond to the subpoena.

12.184 Protective Orders

- (5456) *In re Johnson*, 2015 WL 4619885 (Bankr. S.D. Ohio 2015) – Court would enter protective order precluding creditors from taking depositions of debtor's attorneys. Discovery from opposing attorney is permissible only where party seeking discovery demonstrates that no other means exists to obtain the information and the information sought is both relevant and non-privileged. However, party can waive privilege by asserting "reliance on counsel" defense. Debtor did not waive privilege or assert reliance of counsel where debtor's motion to convert case from Chapter 11 to Chapter 7 merely stated, "after consultation with counsel" that debtor concluded that conversion was in best interests of estate. Statement in no way disclosed or described communications between attorney and debtor and elements of burden of proof regarding conversion did not in any way implicate any communications between attorney and debtor.
- (5457) *Pidcock v. Goddard*, 2015 WL 1365591 (Bankr. N.D. Ohio 2015) – Rule 45 requires party issuing subpoena to mitigate burden to the responding party. Court can limit discovery that is unduly burdensome, considering needs of case, amount in controversy, parties resources and importance of discovery in resolving issues. Court would limit discovery directed to non-party where non-party would suffer burden of production and documents are equally available from the opposing party.
- (5458) *Samaritan Alliance, LLC v. Commonwealth of Kentucky*, 2013 WL 653624 (Bankr. E.D. Ky. 2013) – Court can, for good cause, issue order to protect party from annoyance, embarrassment, oppression, or undue burden or expense, and may forbid inquiry or limit scope of disclosure to certain matters. Party failed to show good cause why protective order should be granted where motion alleges only that party is concerned about questions that may be asked at a future deposition. Party failed to provide any information that may establish either that the inquiry would invade any privilege or otherwise be burdensome or oppressive.
- (5459) *In re Munaco*, Case No. 11-69588 (Bankr. E.D. Mi. 2012) – Although styled Motion for Protective Order, Motion actually sought declaratory relief that Trustee does not have grounds to object to discharge. Relief requested was premature as Trustee had not filed nor indicated that Trustee intended to file any adversary proceeding. If Trustee files an adversary, Debtor will have the full opportunity to defend. Trustee did not have pending any motion to compel discovery or to seek any sanctions against debtor.
- (5460) *In re Elkins*, 2012 WL 1981787 (Bankr. N.D. Ohio 2012) – Federal Rule of Civil Procedure 26, incorporated by reference in Federal Rule of Bankruptcy Procedure 7026, allows court to enter protective order to protect party or person from embarrassment, annoyance, oppression, or undue burden or expense. Party seeking protective order in response to discovery request must articulate specific facts showing a clearly defined and serious injury resulting from the discovery sought. Potential for annoyance, embarrassment, oppression or undue burden must be illustrated with a particular and specific demonstration of fact rather than just stereotyped or conclusory allegations. United States issued subpoena to non-party. Person from whom discovery was requested failed to demonstrate any basis for protective order that would have precluded United States from turning over information gained to any other law enforcement agency for legitimate law enforcement purposes. Party could not demonstrate any potential injury if the documents indicate a potential criminal violation and are then turned over to law enforcement agencies for further investigation.

12.185 Time for Taking Discovery

- (5461) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Court would not extend discovery cutoff under pretrial order where record lacked any showing of good cause for an extension. Scheduling order had been entered more than 4 months prior and plaintiff had filed a plethora of other pleadings, yet failed to offer any explanation as to why plaintiff was not able to promulgate discovery request in timely manner.
- (5462) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Document request not served until after discovery cutoff date in pretrial order was untimely. Party receiving request not required to respond and court would not compel production. Notice of deposition served by mail only 4 days before scheduled deposition (and using 3 days for mailing, received one day before scheduled date) did not provide reasonable notice as required by Rule 30 and court would not compel deponent to appear.

12.186 Motion to Compel

- (5463) *In re Hart*, 2014 WL 505356 (Bankr. E.D. Tn. 2014) – Federal Rule 69, incorporated in adversary proceedings in Rule 7069, allows court

to obtain discovery from any person including the debtor. Rule 37, incorporated through Rule 7037, allows court to compel discovery when party fails to respond. Defendant suffered judgment that was not stayed pending appeal, allowing Judgment Creditor to take discovery for purposes of collection. Court would compel Judgment Debtor to respond to discovery requests. Court reserved jurisdiction on issue of attorney fees for motion to compel, to give Judgment Debtor an opportunity to present evidence that failure to respond to discovery requests was substantially justified, or that award of attorney fees would otherwise be unjust.

- (5464) *In re McInerney*, 2012 WL 2974660 (Bankr. E.D. Mi. 2012) – Debtor in Chapter 11 case failed to comply with discovery requests directed to Debtor’s ability to confirm and then to consummate a Chapter 11 plan. Debtor refused to answer questions at a Rule 2004 exam regarding debtor’s sources of consulting income and failed to respond to questions regarding Debtor’s prospects for future employment which was essential to debtor’s ability to fund Chapter 11 plan. Debtor stated only that debtor was “uncomfortable” discussing employment prospects as those had not been finalized. Debtor disclosed for the first time at the hearing on sanctions that debtor had located employment and signed consulting agreement, although debtor did not disclose this consulting agreement at the Rule 2004 exam taken only 8 days earlier. Debtor’s claim that any discussion of possible employment would have been speculative was not legal basis to refuse to answer questions. Debtor should have testified openly and honestly about possible prospects and to the extent prospects were speculative or unsettled, debtor could have explained that in his testimony.
- (5465) *Silagy v. Pachan*, 2010 WL 4286218 (Bankr. N.D. Ohio 2010) - Before considering a motion to compel, the court requires sincere effort to resolve the dispute without court intervention. Plaintiff made satisfactory efforts where Plaintiff sent repeated communications to Defendant but Defendant refused to communicate. Order compelling discovery warranted where Defendant responded to the requests only after Plaintiff filed a motion to compel, Defendant offered no explanation for her failure to timely respond to the discovery, nor is an explanation given for her failure to communicate with Plaintiff. It appears the motion to compel was the catalyst for the discovery responses. Defendant failed to timely respond to the discovery requests without substantial justification. Defendant instructed to provide appropriate verification of discovery responses. Defendant’s failure to timely respond to Plaintiff’s request for admissions results in requested items being deemed admitted.
- (5466) *Rhiel v. Hook*, 2009 WL 2182594 (Bankr. S.D. Ohio 2009) – Party not entitled to compel discovery where party has failed to make good faith effort to resolve dispute before seeking intervention of Court. Motion to Compel must certify that party has in good faith conferred or attempted to confer with opposing party and must state who, where, how and when the parties attempted to resolve the dispute. Certification that made only general allegations without specifics did not constitute certification of “good faith effort”. Letter that “demanded” compliance not good faith effort to resolve dispute but was threat to seek judicial involvement if opposing party did not accede to movant’s demands.
- (5467) *First Mutual Bank v. Burkett*, Adv. No. 09-4130 (Bankr. E.D. Mi. 2009) - Motion to Compel Response to Discovery denied where discovery not served until after deadline set forth in Court’s Adversary Proceeding Scheduling Order. Defendant failed to demonstrate good cause as required to amend or modify Scheduling Order.
- (5468) *In re Johnson*, 408 B.R. 115 (Bankr. S.D. Ohio 2009) - Movant did not satisfy “conferment” or “good faith” requirements for motion to compel discovery from plaintiff Chapter 7 trustee.

12.187 Sanctions – Rule 37 and 7037

- (5469) *Ford Motor Company v. Michigan Consolidated Gas Company*, 2015 WL 6470830 (E.D. Mi. 2015) – Federal Rule 37 allows court to impose costs where one party succeeds on Motion to Compel Discovery unless the party against whom costs are sought asserted a position that was substantially justified. Motion to Compel that was granted in part and denied in part, where non-producing party had made reasonable assertions of privilege and issues were complex, did not warrant imposition of costs.
- (5470) *Spirit SPE Portfolio 2007-LLC v. Paxos*, 2014 WL 7407590 (Bankr. N.D. Ohio 2014) – Rule 7037 requires court to award reasonable expenses incurred in motion to compel discovery unless motion to compel was filed before movant attempted in good faith to obtain discovery without resort to court; opposing party’s failure to respond was substantially justified; or other circumstances make award of sanctions unjust. Generally, if party fails to provide evidence explaining failure to comply, sanctions should be awarded. Defendant entitled to sanctions including attorney fees where plaintiff repeatedly failed to provide discovery even after having been given and extension, and plaintiff failed to produce any evidence to support an adequate explanation,
- (5471) *Spirit SPE Portfolio 2007-LLC v. Paxos*, 2014 WL 2547711 (Bankr. N.D. Ohio 2014) – Rule 37, adopted by reference in Rule 7037, allows court to award costs and fees to party who obtains Order to Compel opposing party to provide discovery. Sanctions can include reasonable expenses and fees against party or deponent whose conduct necessitated the motion to compel. Court cannot grant fees for time expended prior to making the motion itself or time related to scheduling and rescheduling the depositions. While depositions had to be postponed because documents had not been produced, it did not make sense to schedule depositions prior to receipt of documents so time expended in scheduling and rescheduling was not reasonable.
- (5472) *PRN Funding, LLC v. Cole*, 2013 WL 5964010 (Bankr. N.D. Ohio 2013) – Debtor’s failure to appear at deposition notwithstanding proper notice under Rule 7030 and issuance of a subpoena to attend warranted sanctions under Rule 7037. Possible sanctions range from dismissing action to entering default judgment to entering order to compel attendance. Debtor’s failure to appear at two duly noticed depositions; debtor’s refusal to attend for reasons unsupported by law; debtor’s failure to seek protective order; and debtor’s cessation of communications with debtor’s counsel warranted entry of default judgment excepting debt from discharge.
- (5473) *Bash v. Osler*, 2013 WL 592110 (N.D. Ohio 2013) – Striking defenses and entry of final judgment against defendant warranted by defendant’s ongoing failure to cooperate with discovery. Defendant had previously been sanctioned for litany of discovery related non-

compliance including failure to respond when due, incomplete responses, and filing to respond to Motion to Compel Discovery. Defendant failed to purge as allowed by prior order and continued to fail to comply notwithstanding warning by the court that continued failure to comply could lead to entry of judgment by default. In assessing sanctions courts consider four factors: (a) whether failure to cooperate in discovery is due to willfulness, bad faith or fault, (b) whether adversary was prejudiced by party's failure to cooperate in discovery, (c) whether party was warned that failure to cooperate could lead to sanction, and (4) whether less drastic sanctions were imposed or considered before dismissal or default was ordered. Discovery conduct is willful when there is a conscious disregard and intentional failure to comply. Based on earlier sanction order and repeated admonitions by court, defendant's conduct was clearly willful and intentionally disregarded obligations. Ultimate sanction appropriate where discovery defaults rendered prosecution of the action an impossibility and defendants have had more than one full year to cooperate. Warning was given repeatedly that default judgment may be possible for continued non-compliance. Lesser sanctions would not be availing given defendant's repeated disregard of prior orders and warnings.

- (5474) *Bakdaleyeh v. Warpup*, Adv. No. 11-3041 (Bankr. E.D. Mi. 2012) – Court can enter any order that the court deems appropriate to deal with party's failure to make disclosures or comply with discovery. Although court can dismiss case where plaintiff fails to comply, court should not immediately go to drastic and harsh remedies unless it appears that those remedies are necessary or that less severe sanctions would not induce compliance. Case presented relatively straightforward question of violation of Michigan Builders Trust Fund Act. Plaintiff ordered to produce all documents intended to be utilized at trial and to respond to all outstanding discovery requests within 14 days, with defendant to have additional 42 days to complete discovery.
- (5475) *In re McInerney*, Case No. 11-58953 (Bankr. E.D. Mi. 2012) – In determining sanctions, court must determine whether party's failure to comply with discovery rules is due to willfulness, bad faith or fault; whether the adversary was prejudiced; whether the party was warned that failure to comply could lead to dispositive relief such as dismissal; and whether less drastic sanctions were imposed or considered before dispositive relief is ordered. Debtor's refusal to provide discovery was conscious and intentional, where debtor refused to testify about future employment prospects without legal basis to object, and based solely on debtor's belief that the prospects were speculative. Information was essential to confirmability of debtor's chapter 11 plan. Creditor was clearly prejudiced as creditor was not able to prepare for contested hearing on confirmation of debtor's Chapter 11 plan and had debtor been permitted to testify as to new employment, creditor would have been surprised and would have had no opportunity to investigate. Adequate relief can be granted short of dispositive order by giving creditor additional opportunity to obtain full discovery of debtor's future consulting and employment prospects including an additional Rule 2004 exam at which debtor will fully answer all questions. Court would also require debtor to reimburse creditor's attorney fees incurred because of Debtor's failure to provide discovery.
- (5476) *Norris v. First Federal Savings & Loan of Lorain*, 2012 WL 1966285 (Bankr. N.D. Ohio 2012) – Federal Rule of Civil Procedure 37, incorporated by reference in Federal Rule of Bankruptcy Procedure 7037, provides that if a party fails to provide information as required by Rule 26(a), party shall not be allowed to use that information as evidence on motion, hearing or trial unless failure was either harmless or substantially justified. Court entered order requiring defendant to provide computation or documentation of damages by date specific, failing which court would entertain motion in limine to exclude evidence. Where party fails to appear for deposition, court can also award reasonable fees and expenses of other party associated with the deposition. Party had pattern of non-responding and stalling during discovery process, forcing opposing party to file numerous pleadings that would have been unnecessary had party complied with discovery requests, causing prejudice to opposing party and unnecessarily delaying and prolonging litigation.
- (5477) *Norris v. First Federal Savings & Loan of Lorain*, 2012 WL 1565602 (Bankr. N.D. Ohio 2012) – Sanctions were appropriate based on party's lack of good faith in the discovery process. Party failed to answer majority of discovery requests. Requests were not burdensome, did not require an unreasonable amount of time to answer, and constitute basic, normal discovery requests. Sanctions included fees and costs in an amount to be determined after submission of records to detail the reasonable legal fees and costs that are directly attributable to the motion to compel.
- (5478) *Melody v. Bank of America*, 2012 WL 1155704 (Bankr. N.D. Ohio 2012) - Attorney who failed to make good faith responses to discovery requests sanctioned under Federal Rule of Civil Procedure 37. Attorney filed standard response to multiple interrogatories, requests for production of documents, and request for admissions merely stating "This request is vague, ambiguous, and overly broad and burdensome; requests irrelevant, immaterial or inadmissible information or information protected by privilege and/or contains questions in violation of law, rule or regulation." Attorney later acknowledged in response to inquiry from court that attorney "used boilerplate language in all of these objections, which language did not, in fact, apply to this case. ... [Attorney] inserted the admittedly inapplicable boilerplate and intended to supplement the answers when she got more information." Show Cause Order dissolved based on Attorney's representation that Attorney will no longer handle discovery requests in this matter.
- (5479) *Sequatchie Mountain Creditors v. Detweiler*, 2011 WL 2650591 (Bankr. N.D. Ohio 2011) – Court would not dismiss case for failure of plaintiff to comply with discovery rules. Although Plaintiff was more than one year late in responding, Defendant did acknowledge that Plaintiff ultimately had complied. Court would impose sanctions in the form of attorney fees and expenses incurred by Defendant in effort to obtain discovery and filing Motion to Compel.
- (5480) *Rhiel v. Hook*, 2009 WL 2182608 (Bankr. S.D. Ohio 2009) – Sanctions imposed against party who failed to appear for deposition. Failure to attend is not excused unless party has filed Motion for Protective Order within reasonable time. Motion for Protective Order filed 2 hours prior to scheduled commencement of deposition did not excuse party's obligation to appear or prevent award of sanctions where party had notice of deposition for more than one month yet failed to timely raise any objection to the deposition. Party would be required to pay Trustee's costs and expenses directly attributable to party's failure to appear.
- (5481) *In re Johnson*, 408 B.R. 127 (Bankr. S.D. Ohio 2009). Defendant's last minute filing of motion for protective order did not excuse failure to attend deposition to be held by Chapter 7 trustee that had been noticed and scheduled.

12.188 Sanctions – Spoliation of Evidence

- (5482) *McKinstry v. Genser*, 2014 WL 3611329 (E.D. Ky. 2014) – In considering claim of spoliation of evidence, court must determine whether party had duty to preserve documents at the time when the party with control of the documents destroyed them; whether the party destroyed the documents with a culpable state of mind; and whether a reasonable trier of fact would have found the lost documents to be relevant to claim or defense. If warranted, court can use discretion to fashion an appropriate penalty limited only by goals of fairness and punishing wrongdoers. Party knew of obligation to preserve evidence when advised by corporate general counsel of likely litigation and two other parties knew of obligation when litigation actually commenced. Each party thereafter destroyed documents under circumstances that indicated intent to conceal evidence or otherwise acted with culpable state of mind. Documents were relevant to issues in litigation including notes of telephone conversations that could have included discussions of efforts to seize and divert lucrative opportunities. Sanctions warranted included instruction to jury to assume that documents would have exposed facts unfavorable to the party destroying the documents but did not warrant dismissal where there was no evidence of bad faith

AA. Pre-trial Disclosures

12.189 Generally

- (5483) *Norris v. First Federal Savings & Loan of Lorain*, 2012 WL 1565602 (Bankr. N.D. Ohio 2012) – Rule 26 requires that party must provide a computation of damages claimed by the disclosing party. Plaintiff failed to make a sufficient disclosure where complaint sought \$5,000 in damages and supplemental discovery responses indicated damages of \$4,500 but failed to include the computation of those damages as required by Rule 26.

12.190 Failure to Make

- (5484) *Tribble v. Michigan Protein, Inc.*, Case No. 12-80339 (Bankr. W.D. Mi. 2013) – Rule 26 requires party to disclose names and contact information of each person likely to have discoverable information that the disclosing party may use to support claims or defenses, and must make that disclosure even without request by opposing party. Plaintiff did not disclose witnesses either in Rule 26 disclosure or in responses to interrogatories, or in any other manner until Plaintiff filed affidavits of witnesses in response to Motion for Summary Judgment filed more than a month after discovery cutoff. Rule 37 states that party who fails to disclose information or witnesses is precluded from using information or witness in connection with motion or trial unless the court finds that failure to disclose was harmless or substantially justified. Plaintiff knew of likelihood that he would need omitted witnesses to make prima facie case, and opposing party was prejudiced by failure to disclose as failure deprived defendant of opportunity to offer best possible articulation of summary judgment argument. However, sanction of witness preclusion would be too harsh where case had not yet been set for hearing and court could obviate harm by reopening discovery as to the two omitted witnesses. Court would consider at later date possible monetary sanctions to extent defendant could demonstrate expenses and costs that would not have been incurred had disclosures been made in timely manner.
- (5485) *In re McInerney*, Case No. 11-58953 (Bankr. E.D. Mi. 2012) – Debtor failed to produce witness or exhibit lists or produce exhibits in advance of hearing on confirmation of plan. In fashioning remedy, Court must consider whether party's failure to comply with discovery rules is due to willfulness, bad faith or fault; whether the adversary was prejudiced; whether the party was warned that failure to comply could lead to dispositive relief such as dismissal; and whether less drastic sanctions were imposed or considered before entering sanctions in from of dispositive order. Court could fashion effective remedy by adjourning confirmation hearing with express warning that failure to serve witness list, exhibit list or exhibit copies by new deadline could result in additional sanctions including dismissal or conversion of case.

BB. Summary Judgment

12.191 Timing of Motion

- (5486) *Swanigam v. Northwest Airlines, Inc.*, 2010 WL 2465387 (W.D. Tn. 2010) - Motion styled as Motion to Dismiss under Rule 12 may be treated as Motion for Summary Judgment at discretion of Court.
- (5487) *Ferguson Enterprises, Inc., v. Hardy*, Case No. 10-80085 (Bankr. W.D. Mi. 2010) – Federal Rule 56 no longer requires Plaintiff to wait before filing Motion for Summary Judgment. However, Court retains considerable control over the timing of Motions and can deny a Motion where the opposing party has not been afforded a meaningful opportunity for discovery and entry of a judgment at that early stage may be hasty and ill-considered. Motion filed less than three weeks after filing of adversary complaint was premature and would be denied without prejudice to re-filing at a later date.
- (5488) *Sher v. Dunbar*, Case No. DT 09-06496 (Bankr. W.D. Mi. 2010) – Motion to Dismiss adversary proceeding which reached beyond the four corners of complaint and relied on motion papers and transcripts of proceedings on a prior motion would be treated as a Motion for Summary Judgment under Federal Rule 56.
- (5489) *Fox Brothers Company v. Slaney*, Adv. No. 08-4378 (Bankr. E.D. Mi. 2008) – Motion for Summary Judgment filed after deadline for filing dispositive motions in the Adversary Proceeding Scheduling Order denied as untimely.
- (5490) *Allard v. Flannigan*, Adv. No. 08-4348 (Bankr. E.D. Mi. 2008) - Motion for Summary Judgment erroneously filed in main case (instead of adversary proceeding) on last day for filing dispositive motions would be treated as timely filed. Motion to Strike Motion for Summary Judgment as Untimely denied.
- (5491) *SCS General Contractors, Inc. v. Wells Fargo Bank*, Case Nos. 08-8096 and 08-8097 (6th Cir. BAP 2009) – Court should not consider or

grant summary judgment where the non-moving party has not been afforded a sufficient opportunity for discovery. Court must inquire as to (1) when the appellant learned of the issue that is the subject of the desired discovery; (2) whether the discovery would have changed the ruling below; (3) how long the discovery period lasted; (4) whether the appellant was dilatory in its discovery efforts; and (5) whether the appellee was responsive to discovery requests. The Bankruptcy Court did not abuse its discretion in denying Creditor's request for additional time to respond to the Motion where Creditor did not propound any discovery until nine months after the adversary proceeding was initiated and Creditor failed to demonstrate how the information it sought was material to the motion for summary judgment or how it would change the outcome of the ruling below.

12.192 In Favor of Non-Moving Party

- (5492) *Bowers v. Rogers*, 2012 WL 3929813 (Bankr. S.D. Ohio 2012) – Court can grant summary judgment to non-movant if court provides other party with notice and reasonable opportunity to respond. Court should not grant summary judgment sua sponte. Bankruptcy court erred in granting summary judgment to non-moving party with no prior notice or opportunity of other party to respond, and where there appeared to be number of issues regarding claim for conversion and extent of damages. Question of law remained as to whether real property could even be the subject of conversion.
- (5493) *Cornwell Quality Tools Company v. Paavo*, Case No. 11-10831 (E.D. Mi. 2011) – Court can *sua sponte* grant summary judgment to party who has not filed Motion when done in response to Motion filed by other party. Moving party had full notice and opportunity to argue why summary judgment should be granted in its favor and suffered no prejudice from Court's conclusion, based on merits presented by both parties, that summary judgment in favor of non-moving party was warranted.
- (5494) *McTevia & Assoc. LLC v. United States Debt Recovery III, L.P.*, 446 BR 808 (E.D. Mi. 2011) – Where one party moved for summary judgment, Court could not enter summary judgment in favor of opposing party absent a timely filed cross-motion. Party against whom summary judgment is to be entered is entitled to notice and opportunity to come forward with evidence in response to motion.

12.193 Burden of Proof

- (5495) *D.T. McCall & Sons v. Martelle*, 2012 WL 1833906 (Bankr. E.D. Tn. 2012) – Although Local Rules require non-moving party to respond to motion for summary judgment, Court must still consider merits of motion even in the absence of a response.
- (5496) *POH Assisted Living, LLC v. Sunrise Assisted Living Management, Inc.*, Case No. 10-6097 (Bankr. E.D. Mi. 2010) – Party seeking summary judgment must prove that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Summary Judgment denied where each party filed affidavits that were conflicting as to material issues, leaving court unable to conclude that party was entitled to judgment.
- (5497) *Rogan v. Citimortgage, Inc.*, 2010 WL 2926050 (Bankr. E.D. Ky. 2010) - Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Only disputes over facts which might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.
- (5498) *Swanigan v. Northwest Airlines, Inc.*, 2010 WL 2465387 (W.D. Tn. 2010) - Motion styled as Motion to Dismiss under Rule 12 may be treated as Motion for Summary Judgment at discretion of Court. Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Hearsay evidence may not be considered on a motion for summary judgment, but evidence need not be in a form that would be admissible at trial. The evidence and justifiable inferences based on facts must be viewed in a light most favorable to the nonmoving party. Summary judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Once a properly supported motion for summary judgment has been made, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must be by affidavits or as otherwise provided in this rule-set out specific facts showing a genuine issue for trial. A genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. To avoid summary judgment, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts.
- (5499) *Russell v. U.S.*, 2010 WL 2545182 (Bankr. N.D. Ohio 2010) - Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. All inferences must be viewed in the light most favorable to the party opposing the motion. Party moving for summary judgment always bears initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any which it believes demonstrate the absence of a genuine issue of material fact. Where the moving party has met its initial burden, the adverse party may not rest upon the mere allegations or denials of his pleading but must set forth specific facts showing that there is a genuine issue for trial. A genuine issue for trial exists if the evidence is such that a reasonable fact finder could find in favor of the nonmoving party.
- (5500) *Himmelspach v. Hunter*, Case No. 09-2053 (Bankr. E.D. Mi. 2010) – Summary Judgment is proper where pleadings, discovery and disclosure materials and affidavits show there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. Court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Summary Judgment is appropriate where party fails to establish an essential element of that party's case and on which that party bears the burden of proof at trial. Moving party must inform the court of the basis

of the motion and identify those portions of the record that establish the absence of a material fact. Once movant does that, non-moving party must come forward with specific facts showing a genuine issue of material fact. While all inferences will be drawn in favor of non-moving party, non-moving party must present sufficient evidence to support a jury finding in his favor; a mere scintilla of evidence is not sufficient.

- (5501) *All Points Capital Corp. v. City of Cheyboygan*, Case No. 09-2007 (Bankr. E.D. Mi. 2010) – Summary Judgment is proper where pleadings, discovery and disclosure materials and affidavits show there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. The moving party bears the burden to demonstrate the absence of a genuine issue of material fact as to an essential element of non-moving party's case which may be met by pointing out that non-moving party, having had sufficient time for discovery, has no evidence to support an essential element of the case. Once movant's burden is met, burden shifts to non-moving party to set forth specific facts showing a genuine triable issue. Non-moving party must present affirmative evidence to defeat a properly supported motion and cannot merely hope that the trier of fact will disbelieve the movant's denial of a material fact. Trial Court does not have the duty to search the entire record to determine whether material fact exists or not. Cases involving state of mind are not necessarily inappropriate for summary judgment.
- (5502) *State of Michigan v. Turner*, Case No. 09-5413 (Bankr. E.D. Mi. 2010) – Party seeking summary judgment where pleadings, discovery and disclosure materials and affidavits show there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. The moving party bears the burden of proof, and the Court must construe evidence and draw all reasonable inferences in favor of non-moving party. Once movant's burden is met, burden shifts to non-moving party to set forth specific facts showing a genuine triable issue. A "genuine" issue is one where a reasonable jury could return a verdict for the non-moving party.
- (5503) *Hagan v. Goldstein*, 2010 WL 2755742 (Bankr. W.D. Mi. 2010) – Defendant who was alleged hospitalized when the Motion for Summary Judgment was filed and claimed that hospitalization left her unable to respond to the Motion for Summary Judgment has burden to file affidavit or submit other proof to explain why Defendant is unable to respond. Defendant cannot simply ignore the Motion, let Judgment be entered, and then seek reconsideration based on hospitalization that was known, but not brought to the Court's attention, prior to entry of the judgment.
- (5504) *Double v. Cole*, Case 08-3371 (Bankr. N.D. Ohio 2009) – A party will prevail on a motion for summary judgment when the pleadings, depositions, answers to interrogatories, and admission on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The moving party must demonstrate all the elements of the cause of action and the Court is directed to view all the facts in a light most favorable to the party opposing the motion. Determinations concerning a debtor's culpable state of mind are usually not appropriate on motions for summary judgment as it deprives the trier-of-fact of the opportunity to assess the debtor's credibility. Summary judgment may be appropriate where purely legal issues are involved.
- (5505) *Unencumbered Asset Trust v. Hampton-Stein (In re National Century Financial Enterprises, Inc.)*, 426 B.R. 282 (Bankr. S.D. Ohio 2009) - Summary judgment is appropriate where pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Court views the evidence, all facts, and any inferences drawn therefrom, in the light most favorable to the nonmoving party. Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. Entry of summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Court may also enter interlocutory summary judgment on liability alone, even if there is a genuine issue on the amount of damages. Party opposing Summary Judgment may not rely merely on allegations or denials in pleading but must set out specific facts showing a genuine issue for trial. If party opposing Motion alleges specific reasons why it cannot present facts essential to justify its opposition, the court may (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order. The party must show that postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.
- (5506) *Ferguson Enterprises, Inc., v. Hardy*, Case No. 10-80085 (Bankr. W.D. Mi. 2010) – Federal Rule 56 no longer requires Plaintiff to wait before filing Motion for Summary Judgment. Normally, when a moving party, through affidavits or other admissible evidence, establishes a lack of genuine issue of material fact, the non-moving party must present competent evidence to establish the existence of an issue. However, where the Motion is filed at the earliest stage of litigation and the opposing party has not been afforded a meaningful opportunity for discovery the Court can deny the Motion if the non-moving party can demonstrate some reason to believe that discovery would establish the existence of material facts in dispute. Motion filed less than three weeks after filing of adversary complaint was premature and would be denied without prejudice to re-filing at a later date.
- (5507) *Nehasil v. Grenier*, Case No. 09-14011 (E.D. Mi. 2010) *aff'd* Case No. 10-2242 (6th Cir. 2012) – Summary judgment is proper where pleadings, discovery and disclosure materials and affidavits show there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. Court must construe evidence and draw all reasonable inferences in favor of non-moving party.
- (5508) *Murawski v. Campbell*, Case No. 08-3178 (Bankr. E.D. Mi. 2010) - The central inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. Moving party must inform the Court of the basis of its motion and identify those portions of the record that establish the absence of a material issue of fact. Once the movant fulfills this responsibility, the non-moving party must come forward with specific facts showing that there is a genuine issue for

trial. This requires the non-moving party to do more than simply show that there is some metaphysical doubt as to the material facts. A dispute about a material fact is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. To demonstrate a genuine issue, the non-moving party must present sufficient evidence upon which a jury could reasonably find for the non-movant; a scintilla of evidence is insufficient. A material fact is one that would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties, and would necessarily affect the application of an appropriate principle of law to the rights and obligations of the parties. The court must believe the non-movant's evidence and draw “all justifiable inferences” in her favor.

- (5509) *Dalvit v. United Airlines, Inc.*, Case No. 08-1283 (10th Cir. 2009) – Summary judgment is appropriate if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Court must examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’ Affidavits submitted in support of Motion for Summary Judgment must be limited to information what would be admissible at trial. Affidavits that are replete with inadmissible hearsay and speculation, were cumulative and contained conclusory, unsubstantiated statements would be stricken. If portions of an affidavit are otherwise admissible, Court will disregard inadmissible portions and consider balance of affidavit.
- (5510) *Tomlin v. Cronover*, 2009 WL 2843370 (Bankr. E.D. Tn. 2009) – The motion for summary judgment requires the court to view the evidence in the light most favorable to the debtor. The court can grant summary judgment only if it determines that there is no genuine issue as to any material fact, and based on the undisputed facts, the law entitles the plaintiffs to judgment in their favor. The movants have the burden of proving there is no genuine issue of material fact to be decided by a trial.
- (5511) *Clark v. Walt Disney Co.*, 664 F. Supp. 2d 861 (S.D. Ohio 2009) – Summary judgment should be cautiously invoked, and only where the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. It must be quite clear what the truth is and that no genuine issue remains for trial. Summary Judgment is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. The court's duty is to determine only whether sufficient evidence has been presented to make the issue of fact a proper question for the jury. Moving party bears the initial burden of showing that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law. All the evidence and facts, as well as inferences to be drawn from the underlying facts, must be considered in the light most favorable to the party opposing the motion. Any “unexplained gaps” in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. A “material” fact is one that “would establish or refute one of essential elements of a cause of action or defense asserted by the parties, and would necessarily affect the application of the appropriate principle of law to the rights and obligations of the parties. An issue of material fact is “genuine” when “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Once the moving party meets its burden, and adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. The nonmoving party must demonstrate that there is a genuine issue for trial. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.
- (5512) *Lewis v. Negri Bossi USA, Inc.* 423 BR 643 (E.D. Mi. 2010) - Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The movant has an initial burden of showing the absence of a genuine issue of material fact. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. The court must accept as true the non-movant's evidence and draw “all justifiable inferences” in the non-movant's favor. The central inquiry is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”
- (5513) *Kerr v. Hurd*, 2009 WL 2824556 (S.D. Ohio 2009) – Party seeking Summary Judgment must demonstrate that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law based on the pleadings, depositions, answers to interrogatories, admissions on file and affidavits. The existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment – the requirement is that there be no *genuine* issue of *material* fact. A fact is “material” if its resolution affects the outcome of the lawsuit. An issue is “genuine” if a reasonable jury could return a verdict for the nonmoving party. All inferences to be drawn from the underlying facts must be viewed in a light most favorable to the nonmoving party. The Judge must not weigh the evidence or determine the truth of the matter, but must determine only whether there is a genuine issue for trial. Summary Judgment is not warranted where underlying contract is ambiguous as to how compensation is to be determined and parole evidence will be necessary for resolution of dispute.
- (5514) *Swope v. Scott*, 2009 WL 2877080 (Bankr. N.D. Ohio 2009) – Discharge will be revoked pursuant to Section 727(a)(3) where Debtor fails to obey a lawful order of the court, other than an order to respond to a material question or to testify. Court ordered Debtor to account for tax refund that Debtor improperly retained by paying Trustee \$1,535.78 per month for 10 months. Debtor allegedly paid only \$100.00. However, Trustee failed to accompany Motion for Summary Judgment with any affidavit or other evidence to support allegations. Motion for Summary Judgment denied without prejudice.

12.194 Failure to Respond to Motion

- (5515) *Rugiero v. Flagstar Bank, FSB*, 2013 WL 1316910 (E.D. Mi. 2013), *rehearing denied*, 2013 WL 3849930 (E.D. Mi. 2013) – Party who fails to respond to well supported motion for summary judgment waives right to object to entry of judgment. Failure to respond, standing alone, is sufficient for entry of judgment in favor of moving party.

12.195 Affidavits – Requirements

- (5516) *Smoky Mountain Title, Inc. v. Tennessee State Bank*, 2012 WL 122539 (Bankr. E.D. Tn. 2012) – Affidavit in support of or opposition to summary judgment must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify. Affidavit that does not satisfy these requirements may be stricken by the court.
- (5517) *Kaylor v. Holsinger*, 437 BR 260 (Bankr. S.D. Ohio 2010) - Affidavits used to support or oppose a motion for summary judgment must meet three requisite elements. The affidavit must (1) be made on personal knowledge, (2) set out facts that would be admissible in evidence, and (3) show that the affiant is competent to testify on the matters stated. Personal knowledge must be the basis for any facts or statements contained in the affidavit and may be inferred from the content of the affidavit, if no express basis for the knowledge is given. However, any statements based only on information communicated to the affiant or on a personal belief of the affiant, even if sincerely held, are not considered personal knowledge. Any statement not made solely on personal observations, experience, or factual knowledge is not admissible in an affidavit. Party may not attempt to create a genuine issue of material fact after a motion for summary judgment has been filed by submitting an affidavit which contradicts earlier deposition testimony. Factors the court should employ to determine the existence of a sham factual issue include: whether the affiant was cross-examined during the earlier testimony, whether the affidavit was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain. Portions of an affidavit that explain or reveal information that was not fully explored during earlier testimony are not directly contradictory to the earlier testimony. Affidavit does not contain any new information discovered after the deposition testimony was given, it merely explains or explores the effect of Defendants' verbal communication on the Plaintiff more fully than the deposition testimony.

12.196 Affidavits – Motion to Strike

- (5518) *Smoky Mountain Title, Inc. v. Tennessee State Bank*, 2012 WL 122539 (Bankr. E.D. Tn. 2012) – Affidavit in support of or opposition to summary judgment must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify. Affidavit that does not satisfy these requirements may be stricken by the court.
- (5519) *Kaylor v. Holsinger*, 2010 WL 3789832 (Bankr. S.D. Ohio 2010) - Affidavits must (1) be made on personal knowledge, (2) set out facts that would be admissible in evidence, and (3) show that the affiant is competent to testify on the matters stated. Affidavit that does not meet the requirements is subject to a motion to strike the affidavit. Movant seeking to strike affidavit must specify which statements are inadmissible and set forth specific reasons for the inadmissibility. If portions of an affidavit are sufficient, court will not strike entire affidavit, but will strike only the non-conforming portions and will consider only the admissible portions of the affidavit in ruling on the underlying matter. Statements that are speculative and unreliable are inadmissible. Redundancy is not an applicable reason to strike an affidavit that do not contain speculation or impermissible legal conclusions. Opinions or inferences that are unsupported by personal knowledge or observation of the Plaintiff and cannot be rationally based on any perception of the Plaintiff and Plaintiff's own inferences and conclusions regarding circumstantial evidence are in fact legal conclusions that go impermissibly beyond attempting to offer a clear understanding of the witness' testimony or assist with the determination of a fact in issue, and instead attempt to determine the legal issues of this case. Portions of the Plaintiff's Affidavit which constitute speculation not rationally based on the perception of the Plaintiff or legal conclusions not helpful to a clear understanding or factual determination may be stricken.

12.197 Presentation of Record

- (5520) *In re Kabbara*, 2010 WL 3430497 (Bankr. N.D. Ohio 2010) - Motion to Supplement Motion for Summary Judgment granted to allow presentation of newly discovered evidence. Although supplementing record would cause delay, there was no evidence that delay or expense would be undue and there was no evidence that the need to supplement the record was the result of bad faith or other misconduct. Supplementing record would further Court's desire to decide case on merits.

12.198 Particular Cases – Summary Judgment Granted

- (5521) *Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6th Cir. BAP 2009) – Bankruptcy Court properly granted summary judgment where record on appeal overwhelmingly supported Court's conclusion that defendant breached Purchase Agreement. Defendant paid only \$58,000 for assets for which he was contractually obligated to pay \$559,000. Purchase agreement did not allow defendant any right of set off against the purchase price.
- (5522) *SCS General Contractors, Inc. v. Wells Fargo Bank*, Case Nos. 08-8096 and 08-8097 (6th Cir. BAP 2009) – Creditor filed Adversary Proceeding alleging that Creditor had pre-petition equitable liens against Debtor's real estate that were superior to Bank's Mortgage claims based on construction and repair services that Creditor claimed benefitted both Debtor as tenant and the Owners of the property. Validity and priority of equitable liens are determined by State law. Mississippi law provided an equitable lien can be created by express contractual language that grants a contractor a lien; or where necessary to prevent "unjust enrichment". However, as a general rule the rights of a materialman to assert a lien are limited to those set forth in the Mechanics Lien statute. Mississippi law afforded "abundance of protection for mechanics and materialmen" but also require the person seeking the benefits of those protections to comply with the statute, failing which their remedies are no better than any other creditor. Where a materialman or a mechanic such as Creditor fails to take steps to perfect a lien, the claims are subordinate to those who take for consideration and without notice. When Debtor filed for relief under Chapter 11, Debtor assumed position of hypothetical bona fide purchaser for value against whom an equitable lien cannot

be enforced. As Creditor held neither an express contractual or properly perfected statutory lien nor an enforceable equitable lien, Creditor's rights were subordinate to the perfected lien interests of the Lender.

12.199 Particular Cases – Summary Judgment Denied

- (5523) *All Points Capital Corp. v. City of Cheyboygan*, Case No. 09-2007 (Bankr. E.D. Mi. 2010) – Summary Judgment denied where agreements between the parties on which the claims were based were ambiguous and Court could not determine which party drafted the agreement or whether agreement was joint product of both parties based on extensive negotiations. Court could also not determine whether underlying agreement was assignable or whether such an assignment, if available, would violate public policy; and whether party now objecting to the assignment knew of the assignment at the time of execution and failed to object, thereby ratifying the assignment.
- (5524) *In re Te-kon Travel Court, Inc.*, Case No. 04-01848 (Bankr. W.D. Mi. 2009) – Lender's Motion for Summary Judgment denied where record demonstrated genuine issue of material fact concerning Lender's breach of Joint Plan of Reorganization. Plan called for Debtor to give deeds to Lender to hold in escrow pending Debtor's effort to refinance property. Lender inadvertently released deeds from escrow and caused deeds to be recorded prematurely. Lender argues that premature recording did not cause harm to Debtor. Debtor countered with affidavits that Debtor had lined up bridge financing that would allow Debtor to sell property and repay loans to Lender, but premature recording of the deeds caused lender to pull out of the transaction. Genuine factual issues existed regarding Lender's actions and effect of those actions on Debtor, as well as Debtor's defenses of estoppel and excuse for non-performance.
- (5525) *Kerr v. Hurd*, 2009 WL 2824556 (S.D. Ohio 2009) – Summary Judgment is not warranted where underlying contract is ambiguous as to how compensation is to be determined and parole evidence will be necessary for resolution of dispute.
- (5526) *Attard v. American Home Mortgage Services, Inc.*, Adv. No. 08-5064 (Bankr. E.D. Mi. 2009) – Plaintiff not entitled to Summary Judgment invalidating foreclosure sale where record before Court did not establish beyond genuine issue of material fact that the Wayne County Sheriff did not appoint a specific person to conduct a foreclosure sale or that the specific written appointment was signed by someone other than the Sheriff himself.

CC. Judgment on the Pleadings

12.200 Time for Filing

- (5527) *Oak Street Funding, LLC v. Blair*, 2012 WL 4506913 (Bankr. E.D. Tn. 2012) – Motion for Judgment on Pleadings can be filed only after close of pleadings. Motion to Dismiss Complaint is not a responsive pleading and does not close pleadings. Motion for Judgment on Pleadings filed before Answer is premature.

DD. Report and Recommendations

12.201 Objections

- (5528) *Armstrong v. Commissioner of Social Security*, 2015 WL 1476398 (E.D. Mi. 2015) – Party's failure to file objections to Magistrate's Report and Recommendations within time permitted waives any right to further appeal and releases Court from duty to independently review matters.

EE. Jury Trial

12.202 Actions Subject to Jury Trial

- (5529) *McKinstry v. Sergeant*, 2012 WL 3731304 (E.D. Ky. 2012) – Action brought against liquidating trustee of corporate debtor against officers and directors could have historically been brought as action at law for negligence or for breach of fiduciary duty in equity; and remedy includes concurrent equitable and legal relief in the form of money damages. Action to recover money damages within 7th amendment protection of right to jury trial. Filing bankruptcy does not constitute a blanket waiver by debtor of right to jury trial. Debtor waives jury trial on claims where resolution is part of the process of disallowance of claims. Claims that are not involved in the claim resolution process, such as claims by debtor against former officers and directors, are not removed from right to jury trial.
- (5530) *Parker v. Barkan & Robon, Ltd.*, 2011 WL 3667638 (Bankr. N.D. Ohio 2011) – Seventh Amendment guarantees right to jury trial in suits at common law, which includes not only common-law causes of action but also statutory causes of action that are analogous to common law actions ordinarily decided by English Law Courts of the late 18th century. Further, remedy sought must be legal, not equitable, in nature. If these factors support a right to jury trial, court must then determine whether Congress has assigned jurisdiction for the claim to a relevant non-Article III court that does not use a jury as a fact finder. Actions under Bankruptcy Code, and in particular actions to recover fraudulent transfers and to avoid a mortgage under Section 549 are inherently equitable and are not subject to jury trial.
- (5531) *In re ImagePoint, Inc.*, 2011 WL 1500124 (Bankr. E.D. Tn. 2011) – Supreme Court established three-part analysis to determine if the right to a jury trial exists in the bankruptcy context: (1) compare the statutory action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity; and (2) examine the remedy sought and determine whether it is legal or equitable in nature. If these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, Court must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as fact finder. a party may waive its right to a jury trial. Process of allowance and disallowance of claims is triable in equitable action triggered by a creditor's filing a proof of claim. Once a creditor files a proof of claim, he consents to the bankruptcy court's equity jurisdiction and waives any right to a jury trial. Proof of claim filed by creditor waives right of successor in interest to jury trial, as

successor is invested with same rights and assumes same burdens as original creditor. However, action of subsidiary corporation in obtaining cash collateral order in bankruptcy does not waive parent corporation's right to jury trial absent substantive grounds to pierce corporate veil.

- (5532) *Mattingly v. Piccinini*, 424 BR 767 (Bankr. E.D. Mi. 2010) - Determinations of dischargeability are equitable in nature and a creditor seeking such a determination is not entitled to a jury trial. However, plaintiff in an adversary proceeding that seeks a money judgment is entitled to a jury trial if the cause of action is of a type brought in the courts of England prior to the merger of the courts of law and equity and whether the remedy sought is legal or equitable in nature. Creditor who files a proof of claim subjects his otherwise legal claims to the bankruptcy court's equitable power, negating any right to a jury trial. Further, joinder of action to determine dischargeability into liquidate the amount of a money judgment converts the entire action to the equitable jurisdiction of the court because it is impossible to separate the determination of dischargeability from the determination of the amount of the debt. Creditor who filed to proofs of claim and who then instituted proceedings to determine amount and dischargeability of debts waived the right to jury trial as to the issue of amount of damages.

12.203 Waiver of Right to Jury Trial

- (5533) *PNC Bank, NA v. Land Contracts Unlimited, Inc.*, 2015 WL 5877817 (E.D. Mi. 2015) – Contractual term that waives right to jury trial is enforceable absent proof that waiver was not knowing or voluntary. Borrower failed to overcome presumption of validity where waiver was in bold lettering and was clear and unambiguous and applied to any action, proceeding or counterclaim brought by any party against any other party.
- (5534) *McKinstry v. Sergeant*, 2012 WL 3731304 (E.D. Ky. 2012) – Filing bankruptcy does not constitute a blanket waiver by debtor of right to jury trial. Debtor waives jury trial on claims where resolution is part of the process of disallowance of claims. Claims that are not involved in the claim resolution process, such as claims by debtor against former officers and directors, are not removed from right to jury trial. Earlier "Engagement Letter" waived party's right to jury trial. However, later settlement agreement that resolved certain questions and stated that it superseded all prior agreements did not contain waiver of right to jury trial. In light of strong presumption against waiver of right to jury trial, later settlement agreement that superseded the prior agreement that it, itself, did not contain waiver of jury trial, did not support finding that party had waived jury trial on remaining issues.
- (5535) *Official Committee of Unsecured Creditors v. Energy Coal Resources, Inc.*, 472 BR 731 (E.D. Ky. 2012) – Creditor who files proof of claim in bankruptcy case waives right to jury trial in proceedings to recover fraudulent transfers or preferences.

FF. Motion for New Trial or Amendment of Judgment – Rule 9023

12.204 Grounds

- (5536) *In re Houser*, 2015 WL 359073 (Bankr. E.D. Tn. 2015) – Court has authority to reconsider order to avoid liens pursuant to Section 522 if order fails to accurately reflect relief awarded. Court would deny reconsideration where request was to add sentence that provided that liens were released where court order specifically stated that liens were avoided. Additional language requested by plaintiff would add nothing to the relief already granted. However, court would grant rehearing to extent necessary to correct erroneous reference to amount of claim being avoided, where order inadvertently stated that the amount of the lien was \$3,200 where lien was actually \$21,592.00. Error significantly changed extent to which lien was avoided and resulted from clerical error under Rule 80(a).
- (5537) *Auday v. Wet Seal Retail, Inc.*, 2012 WL 124080 (E.D. Tn. 2012) – Federal Rule of Civil Procedure 59, incorporates through Rule 9023, does not list specific grounds for relief. Court may alter or amend under Rule 59 if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. Motion must be based on controlling authority that was overlooked or presents evidence or argument that could not have previously been submitted.
- (5538) *Kahn v. Regions Bank*, 2011 WL 6179941 (Bankr. E.D. Tn. 2011) – Courts have established four grounds for a motion to alter or amend a judgment: (1) an intervening change in the controlling law; (2) newly discovered evidence; (3) to correct clear legal error; and (4) to prevent manifest injustice. Motion under Rule 59 is not intended to provide the parties an opportunity to relitigate previously-decided matters or present the case under new theories. Burden of demonstrating the existence of a manifest error of fact or law rests with the party seeking reconsideration. A manifest error is one that is direct, obvious and observable. Debtor's arguments concerning standing to object to claim in Chapter 7 proceeding were fully considered at the time of the prior hearing and Motion failed to demonstrate any clear error of law or fact in concluding that debtor in insolvent Chapter 7 lacks standing to object to claims.
- (5539) *King v. Spivey*, 2010 WL 5154397 (Bankr. E.D. Tn. 2010) – Rule 59 is not intended to provide parties opportunity to re-litigate issues or present case under new theories. Alleged errors in interpretation or construction of disputed factual issues are not basis for Rule 59 relief.
- (5540) *In re Solomon*, 2010 WL 3369146 (Bankr. W.D. Mi. 2010) – Rule 59 allows alteration or amendment of a judgment only where there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. Motions for reconsideration are not an opportunity to re-argue a case and should not be used by the parties to raise arguments which could, and should, have been made before judgment issued. Debtor's case was properly dismissed when Debtor failed to obtain prepetition credit counseling prior to the filing of his bankruptcy case, as required by 11 U.S.C. Section 109(h)(1). Debtor was not exempt from prepetition credit counseling based on incarceration. Incarceration is not incapacity, disability or active duty in the military and is not a disability as required by Section 109(h)(4).
- (5541) *Shares v. Sage Financial, Ltd.*, 2010 WL 283410 (Bankr. S.D. Ohio 2010) - Motion to alter or amend the judgment is brought pursuant to Rule 59 which is made applicable to bankruptcy cases pursuant to Bankruptcy Rule 9023. Courts have established four grounds for

a motion to alter or amend a judgment: (1) an intervening change in the controlling law; (2) newly discovered evidence; (3) to correct clear legal error; and (4) to prevent manifest injustice. Motion denied where Plaintiff failed to demonstrate any error in prior Judgment.

12.205 Time for Filing

- (5542) *Links v. U.S.*, 2010 WL 3452426 (Bankr. N.D. Ohio 2010) – Debtor’s Motion seeking to overturn order based on alleged improper application of law is a Motion under Rule 59(e) that must be brought within 28 days of entry of judgment. Debtor’s failure to file Motion for almost one year after entry of judgment precluded relief under Rule 9023 and Rule 59.

GG. Motion for Relief From Judgment or Order – Rule 9024

12.206 Grounds Generally

- (5543) *Auday v. Wet Seal Retail, Inc.*, 2012 WL 124080 (E.D. Tn. 2012) – Rule 60 lists grounds for relief from judgment, which are very similar to those used under Rule 59. Rule 60 allows court to correct manifest errors of law and fact and to review newly discovered evidence or to review prior decision where there has been a change in controlling law.

12.207 Grounds – Fraud, Misrepresentation or Misconduct

- (5544) *King v. Spivey*, 2010 WL 5154397 (Bankr. E.D. Tn. 2010) – Rule 60(b)(1) allows court to grant relief from judgment (1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order. Moving party must demonstrate (1) that the party seeking relief is lacks culpability due to mistake, inadvertence, surprise, or excusable neglect; (2) the party opposing relief will not be prejudiced; and (3) the party seeking relief has a meritorious claim. Alleged errors of counsel in failing to follow the court’s local rules and the Pretrial Order concerning the pre-marking and pre-filing of trial exhibits, untimely offering into evidence exhibits the Defendant required to be successful at trial, and failing to properly prepare for trial by not interviewing witnesses, taking the Plaintiffs’ depositions, calling witnesses for trial, preparing the Defendant and his wife for trial examination, and preparing for cross-examination of the Plaintiffs, not sufficient for relief under Rule 60. Attorney’s actions or inactions in preparing for trial were not excusable.

- (5545) *Ohio Truck & Trailer, Inc. v. Level Propane Gases, Inc.*, 422 BR 93 (6th Cir. BAP 2010) – Burden in independent action attacking finality of a final judgment is narrower in scope than would be required for a timely motion under Rule 60(b)(3). Fraud on the court is (1) conduct, (2) on the part of an officer of the Court, (3) directed to the “judicial machinery” itself, (4) that was intentionally false or undertaken with either willful blindness to, or reckless disregard for, the truth; (5) that was either in the nature of a positive averment or a concealment under circumstances that gave rise to duty to disclose; and (6) that deceived the Court. E-mails between parties to Chapter 11 proceeding did not contain communications of any officer of the court and were not directed to the court itself. Instead, e-mails evidenced at best agreement by employees of debtor to oust Corporate Officer. “Grand allegations” a conspiracy that did not involve court or attorneys could not constitute “fraud on the court” sufficient to support action to overturn prior Court orders.

- (5546) *Followell v. Mills*, 2009 WL 723132 (6th Cir. 2009) - Judgment obtained by fraud may be set aside by Court where enforcement of the Judgment would be manifestly unconscionable. Party attacking judgment must prove by clear and convincing evidence (1) conduct, (2) on the part of an officer of the Court, (3) directed to the “judicial machinery” itself, (4) that was intentionally false or undertaken with either willful blindness to, or reckless disregard for, the truth; (5) that was either in the nature of a positive averment or a concealment under circumstances that gave rise to duty to disclose; and (6) that deceived the Court. Conduct must prevent Court from impartially adjudicating the case presented. Allegedly fraudulently obtained judgment failed would not be set aside where moving party failed to prove that the creditor obtained entry of Judgment using knowingly any false representations or representations made with reckless disregard for truth; and failed to prove how the Court rendering the judgment was misled or deceived.

12.208 Grounds – Mistake, Inadvertence or Surprise

- (5547) *In re Houser*, 2015 WL 359073 (Bankr. E.D. Tn. 2015) – Court has authority to reconsider order to avoid liens pursuant to Section 522 if order fails to accurately reflect relief awarded. Court would deny reconsideration where request was to add sentence that provided that liens were released where court order specifically stated that liens were avoided. Additional language requested by plaintiff would add nothing to the relief already granted. However, court would grant rehearing to extent necessary to correct erroneous reference to amount of claim being avoided, where order inadvertently stated that the amount of the lien was \$3,200 where lien was actually \$21,592.00. Error significantly changed extent to which lien was avoided and resulted from clerical error under Rule 80(a).

- (5548) *Southern Heritage Bank v. Hart*, 2012 WL 3263912 (Bankr. E.D. Tn. 2012) – Court’s failure to include in Final Judgment in adversary proceeding a Judgment for the amount found to be non-dischargeable was mistake that would be corrected under Rule 60. Final Judgment liquidated amount owed and entered judgment stating that amount was not dischargeable, but erroneously did not include judgment awarding Plaintiff those amounts.

- (5549) *In re McKenzie*, 2010 WL 3386012 (Bankr. E.D. Tn. 2010) – In deciding whether relief is warranted under Rule 60, court will review the culpability of the party seeking relief; whether the party opposing relief will be prejudiced; and whether the party seeking relief has a meritorious defense or claim. A party demonstrates a lack of culpability by demonstrating mistake, inadvertence, supplies or excusable neglect. Debtor’s alleged medical condition is not an excuse for failing to object to motion to approve sale and debtor’s medical records where debtor was actively participating in bankruptcy case and debtor’s medical records indicated that debtor had sufficient mental capacity at time of order approving sale. Disagreement concerning value of property to be sold is not a mistake for purposes of rule 60. Evidence indicated that there may have been a mistake in Sale Order concerning exact property being purchased. However, court could

fashion effective relief by clarifying sale order where buyer and the Trustee agreed on property to be conveyed without need to set aside sale order.

- (5550) *In re Lebbos*, Case No. 09-58805 (Bankr. E.D. Mi. 2009) – Chapter 7 Trustee’s lack of legal representation at the time of service of Motion for Relief from Stay does not constitute basis for setting aside Order Granting Relief from Automatic Stay. Trustee’s failure to timely investigate basis for, and respond to, Motion for Lease is not excusable to collect. The fact that the trustee was not represented by counsel is of no particular significance if for no other reason than the fact that the trustee himself as an attorney. Although the motion itself may have contained a misstatement of fact or an incorrect legal conclusion regarding the location of the underlying property, absent some sort of fraud on the Court, these defects are properly dealt with by way of timely objections or responses to the Motion.

12.209 Grounds – Excusable Neglect

- (5551) *Credit Union One v. Maddox*, Case No. 15-4786 (Bankr. E.D. Mi. 2015) – Motion to Reopen Adversary Proceeding is motion under Rule 60. Motion failed to state basis to reopen adversary under Rule 60(b)(1) where motion did not demonstrate that dismissal resulted from excusable neglect. Factors to consider include danger of prejudice to other party; length of delay and impact on judicial proceedings; reason for the delay; whether the delay was within control of late party; and whether late party acted in good faith. Court dismissed adversary proceeding to except debt from discharge where plaintiff failed to appear either at a hearing on creditor’s motion for 2004 exam or for the Initial Scheduling Conference in the adversary. Creditor demonstrated that reinstatement would cause minimal prejudice and that there was no impact on judicial proceedings as motion was brought within 10 days of dismissal, which does not indicate delay in filing motion. There was no allegation of bad faith in creditor’s failure to attend hearings or in prosecution of Motion to Reopen Adversary Proceeding. However, creditor was culpable in causing dismissal, where failure to attend multiple hearings was allegedly the result of employee turnover at attorney’s office and failure of attorney’s staff member to properly calendar hearings. Court had issued scheduling order well before assistant’s absence in September and law firm knew that there was problem with calendaring system where attorney had failed to attend hearing on rule 2004 motion 10 days prior to scheduling conference and court had entered order denying creditor’s motion at that time which should have prompted law firm to review file to determine if there were additional hearings scheduled. Law firm also should have known of scheduling conference because law firm had prepared Rule 26(f) report 11 days prior to the scheduling conference. Culpable conduct of law firm outweighs lack of prejudice or bad faith. Although counsel’s action was neglect, it was not excusable for purposes of Rule 60 relief.
- (5552) *Fujitrans USA v. Barko Enterprises, Inc.*, 2013 WL 793056 (S.D. Ohio 2013) - Rule 59 requires clear error of law, newly discovered evidence; intervening change in controlling law; or need to prevent manifest injustice. Rule 60 allows court to grant relief for excusable neglect which includes failure to comply with deadline that is attributable to neglect. Rule 60 requires court to consider danger of prejudice to non-moving party; length of delay and potential impact on judicial proceedings; reason for the delay including whether it was within reasonable control of movant; and whether movant acted in good faith. Appellant failed to demonstrate any basis for relief. Basis alleged by Appellant at best described over-crowded work schedule without any allegation of extraordinary circumstances. Appellant had three extensions of time and was clearly warned that no additional extensions would be entertained and that failure to timely file a brief may result in dismissal.
- (5553) *In re Rutherford*, 427 BR 656 (Bankr. S.D. Ohio 2010) – Court would deem complaint timely filed although Complaint was filed in main case and not as separate adversary and creditor failed to pay the requisite filing fee. Creditor’s attorney was obviously unfamiliar with administrative procedures for electronic case filing (ECF) in the Southern District of Ohio would be afforded opportunity to re-docket non-dischargeability complaint in separate adversary proceeding and to pay required filing fee, so that creditor’s non-dischargeability claims could be decided on merits.
- (5554) *In re Reiman*, 2010 WL 2802675 (Bankr. E.D. Mi. 2010) – Relief under Rule 60 is available only when the moving party shows that the underlying order is the result of: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. Rule 60(b) is circumscribed by public policy favoring finality of judgments and termination of litigation. After abandonment, the lender conducted a foreclosure sale, at which the foreclosure bid was significantly less than what the Trustee believed the value to be. Trustee sought to revoke abandonment and sell the property, redeem the mortgage, and return the surplus profit to the unsecured creditors. Court concluded that no basis existed to revoke abandonment of a properly administered and investigated asset in a fully administered case where the Trustee’s request was based solely on the fact that the property was more valuable than originally believed. The Code’s strong interest in finality is respected in all cases and applies to abandonment of assets.
- (5555) *In re Lebbos*, Case No. 09-58805-wsd (Bankr. E.D. Mi. 2009) – Chapter 7 Trustee’s lack of legal representation at the time of service of Motion for Relief from Stay does not constitute basis for setting aside Order Granting Relief from Automatic Stay. Trustee’s failure to timely investigate basis for, and respond to, Motion for Lease is not excusable to collect. Failure to recognize potential misstatement of fact or incorrect legal conclusion does not amount to “excusable but collect” and should have been out with by way of timely objection or response to motion.

12.210 Newly Discovered Evidence

- (5556) *Burrage v. Homecomings Financial Network*, 2011 WL 6000794 (6th Cir. BAP 2011) – Debtor’s Motion for Reconsideration failed to

demonstrate “newly discovered evidence”. The additional evidence that Debtor wanted to introduce, consisting of a phone bill and an affidavit from an alleged witness, were both fully known to Debtor prior to date of initial hearing. “Newly Discovered Evidence” is limited to those items that were not known, and could not reasonably have been discoverable, prior to date of initial hearing.

12.211 Void Judgment

- (5557) *Rowe v. Pechiney World Trade, Inc.*, 2010 WL 2745976 (Bankr. W.D. Ky. 2010) – Personal jurisdiction and due process objections can be waived by a party's failure to timely act. Thus, even if the service of process was deficient, and the Court lacked personal jurisdiction, the judgment would be merely voidable, not void, and could be set aside upon timely application to the court. Motion under Rule 60(b)(4) must be made within a reasonable time. Motion filed pursuant to Rule 60(b)(4) is untimely where a significant amount of time has passed between the filing of the motion and the date the judgment was entered. “Reasonable time” depends on the facts of a given case including the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling equitable relief. Defendant's Motion for Relief From Judgment denied where Defendant waited more than 5 years after entry of judgment and more than 22 months after Defendant admittedly became aware of judgment to file Motion. Defendant chose to sit on its rights rather than file motion in timely manner. If the judgment is vacated, it would have been extremely difficult for the Trustee to rebuild this case at this time under these circumstances. Defendant's action inaction unnecessarily caused a substantial increase in legal expenses by the Trustee. Equities did not favor Defendant when it deliberately chose to not act and waited almost two years to seek to vacate the default judgment resulting in substantial legal maneuvering and expense. Defendant provided no sufficient explanation for its delay in filing the present motion.

12.212 Satisfaction, Release or Discharge

12.213 Other Grounds

- (5558) *In re Duckett*, 2010 WL 3941910 (Bankr. N.D. Ohio 2010) – “Residual clause” in Rule 60(b)(6) permits the court to grant relief based on extraordinary circumstances not addressed by the first five numbered clauses of Rule 60(b). Order Granting Relief From Automatic Stay vacated. Debtor's Chapter 13 plan provided for direct payments to the mortgage company. Debtor fell behind and the Court entered an order that debtor would make all future payments timely and would include additional amount necessary to “cure” the post-petition delinquency; and that if debtor failed to make the payments, creditor would receive stay relief on filing of Affidavit of Default. Creditor later submitted Affidavit and court lifted stay. Debtor filed motion for relief under Rule 60. Court found sufficient basis to set aside order where Debtor provided uncontested and credible evidence, including documents, showing that she tendered her regular monthly payment plus the additional \$38 as required by the court's November 29 order. Debtor received notice, without further explanation, that one payment had been declined by her creditor. Debtor continued to make the required monthly payments until she was unable to make one monthly payment apparently Debtor's loan was transferred to different loan servicing agents but Debtor was not provided with notice of those transfers. Debtor made or attempted to make by tendering funds to the entity she believed was the correct servicing agent all required payments, and payments were not accepted in June 2008 and February 2009 through no fault of Debtor. Court's understanding of the facts now differs materially from those understood at the time of its July 8, 2010, order terminating the automatic stay on the basis of the servicing agent's affidavit of default warranting vacation of the to accomplish justice.

12.214 Time for Bringing Motion

- (5559) *Ohio Truck & Trailer, Inc. v. Level Propane Gases, Inc.*, 422 BR 93 (6th Cir. BAP 2010) – Motion for relief from judgment under Rule 60(d) is governed by Rule 60(b) time limits. Motion to set aside orders based on “fraud on the court” untimely where the alleged fraudulent conduct has been known for up to two years, Court Appointed Examiner had completed investigation early on in case, and Party had filed at least five prior attempts to overturn various orders based on alleged fraud. Party's latest motion was just another, belated attempt to relitigate same issues.

HH. Enforcement of Judgment

12.215 Taxable Costs

- (5560) *El Camino Resources, Ltd. v. Huntington National Bank*, 2012 WL 4808741 (W.D. Mi. 2012) – Federal Rule of Civil Procedure 54(d)(1) provides that costs should be allowed to the prevailing party absent a statute, rule or court order otherwise. Award of costs is presumed and court's discretion to deviate is limited, such that party opposing award must show circumstances that warrant denial of costs. Items of taxable costs are enumerated in 28 USC Sections 1911- 1929. To be recoverable, items must be necessarily incurred and reasonable in amount. Expert witness fees are allowable as costs even if not expressly provided for in 28 USC Section 1920. Copy costs are recoverable for copies necessarily made in course of case and including costs to electronically scan and image documents. However, expense paid to outside electronic document vendor for services in connection with electronic discovery are recoverable only to extent of costs attributable to scanning paper documents for digital production, converting data, creating the electronic production, converting certain documents to TIFF format, printing redactions, and printing exhibits for use at deposition. Party is entitled to reimbursement for expenses for private process servers as long as rate does not exceed rate charged by US Marshalls. Depositions and court transcripts are taxable if necessary rather than merely for the convenience of the parties.

12.216 Pre-Judgment Interest Rate

- (5561) *Meoli v. Huntington National Bank*, 2015 WL 5690953 (W.D. Mi. 2015) – Prejudgment interest in action to avoid transfer under Section 548 is federal post-judgment rate set forth in 28 USC Section 1961.

12.217 Rate of Interest on Judgment

- (5562) *Fountain Leasing, LLC v. Kloeber*, 2015 WL 1191484 (E.D. Tn. 2015) – Prejudgment interest is calculated at applicable state law rate. Post-judgment interest is calculated at federal judgment rate.
- (5563) *FCS Advisors, Inc. v. Fair Finance Company, Inc.*, Case No. 09-2609 (2d Cir. 2010) - In diversity cases, post-judgment interest should ordinarily be calculated in accordance with the federal rate provided for under 28 U.S.C. § 1961(a). Although parties may agree to a different rate by contract, absent clear, unambiguous and unequivocal language expressing an intent that a particular interest rate apply to judgments or judgment debts, a general choice-of-law provision does not alter the application of the federal rate to the calculation of post-judgment interest.

12.218 Executions

- (5564) *Meoli v. Christian*, 2015 WL 1869452 (Bankr. W.D. Mi. 2015) – Bankruptcy Court has authority to issue writs of execution authorizing but not directing state officials or other appointees to execute court’s writs, *disagreeing with In re Valdivia*.
- (5565) *Trustees for the Bricklayers and Allied Craftworkers’ Pension Fund v. Yacks*, Case No. 04-88984 (Bankr. W.D. Mi. 2015) – Only US Marshal may execute on Federal Judgment. Federal Court lacks jurisdiction to authorize or direct State Law Enforcement officers to execute on judgments.
- (5566) *Hauk v. Valdivia*, Case No. 14-14429 (E.D. Mi. 2015) - Only US Marshal may execute on Federal Judgment. Federal Court lacks jurisdiction to authorize or direct State Law Enforcement officers to execute on judgments. Bankruptcy Court altered Judgment Holder’s Request for Writ of Execution to limit scope to Federal Marshall and striking any reference to State Court officers authorized to execute to collect judgment.

12.219 Garnishment

- (5567) *In re Williamson*, Case No. 15-40035 (Bankr. E.D. Mi. 2015) – Bankruptcy court lacked jurisdiction to enter writ of garnishment where Bankruptcy Court did not enter money judgment. Court’s Order determining debt to be excepted from discharge merely reflected that state court divorce judgment was not dischargeable.
- (5568) *Evangel Builders & Construction Managers, LLC v. Upfall*, Case No. 06-5026 (Bankr. E.D. Mi. 2010) – Bankruptcy Court judgment that declared debt non-dischargeable under Section 523(a)(6) was not enforceable money judgment. Judgment only declared that a prior state court judgment was non- dischargeable and did not enter any money judgment on which garnishment could issue.

12.220 Statute of Limitations

- (5569) *McGuffin v. Baumhaft*, 2010 WL 2574200 (E.D. Mi. 2010) - Federal Court judgment can be registered in the District Court of any district and enforced as a judgment of that Court. Judgment must be registered within statute of limitations for jurisdiction where judgment rendered. Once registered, prescriptive period for enforcement runs from date of registration, and not date of original entry of judgment. South Carolina Federal Court Judgment registered in Michigan 8 years after entry was entered within 10 year statute of limitations period in South Carolina. Plaintiff did not exceed statute of limitations where collection activity occurred more than 10 years after entry of the Judgment but within the Michigan limitations period measured from date of registration.

12.221 Renewal of Judgment

- (5570) *In re Szymanski*, Case No. 10-22054 (Bankr. E.D. Mi. 2015) – Neither Michigan law nor Bankruptcy law toll time for re-recording judgment lien. Lien recorded in 2009 expired in 2014 where judgment holder did not renew recording.
- (5571) *Trustees for the Bricklayers and Allied Craftworkers’ Pension Fund v. Yacks*, Case No. 04-88984 (Bankr. W.D. Mi. 2015) – Federal Courts follow State Court procedures in renewing Federal Court judgment before expiration of Michigan’s 10 year limitation period on collection of judgment. Absent timely renewal, judgment lapses and becomes unenforceable 10 years after entry. Motion is timely as long as motion filed before expiration of judgment. Court can renew judgment on motion without a hearing as renewal is mere continuant of original judgment and is not opportunity to revisit the court’s decision on the merits.
- (5572) *Lampe v. Kash*, 2014 WL 1232418 (S.D. Ohio 2014) – Under Ohio law, only grounds to avoid revival of judgment is proof that judgment has been paid or satisfied, or is barred by statute of limitations. Judgment becomes dormant 5 years after entry, and action to revive must be brought within 10 years of date on which judgment first became dormant. Judgment creditor’s failure to take steps to collect judgment before it became dormant and delay in seeking to revive judgment are not grounds to deny request to revive.
- (5573) *Alexander v. Comdata Corp.*, 2014 WL 993322 *report and recommendation accepted* 2014 WL 1775590 (M.D. Tn. 2014) – Bankruptcy court properly renewed judgment that resulted from adversary proceeding concluded ten years earlier. Renewal of judgment did not amount to double recovery as amount of renewed judgment would be reduced by amount of any criminal restitution payments made by debtor since date of original judgment. Defendant’s allegations that original judgment was “wrong” were raised far too late as those issues should have been raised in initial proceedings that gave rise to initial judgment. Alleged defects in underlying judgment that is long final and non-appealable are not a basis to deny renewal of judgment.

XIII. Appeals

A. Parties

13.1 Standing to Appeal

- (5574) *Simon v. Miller*, 2015 WL 4459368 (Bankr. E.D. Mi. 2015) – Party lacks standing to appeal order unless party is directly and pecuniarily affected by order. Creditor can appeal order allowing or disallowing claim if order impacts distribution to creditor. Party cannot appeal allowance or disallowance where party did not have direct claim against debtor. Outcome of claim would, at most, tangentially impact rights of party where allowance of claim may produce distributions to third parties that would then reduce potential claims by third parties against party seeking to appeal.
- (5575) *Herrmann v. Corcoran*, Case No. 14-13688 (E.D. Mi. 2015) – Party who did not file proof of claim lacks standing to appeal distributions by Trustee to creditors.
- (5576) *In re O&S Trucking, Inc.*, Case No. 14-6036 (8th Cir. 2015) – Standing to appeal requires that appellant be person aggrieved by order being appealed. Party cannot appeal from judgment in its favor merely for purpose of obtaining review of finding she deems erroneous where findings are not necessary to support the decree. Debtor lacks standing to appeal confirmation of Debtor’s Chapter 11 plan. If debtor wants to preserve right of appeal, debtor must present plan, and after confirmation is denied promulgate a different plan, object to that plan, and appeal the confirmation order.
- (5577) *Land & Mining Company, Ltd. V. Hooker*, 2014 WL 7399050 (6th Cir. 2014) – Chapter 7 trustee holds exclusive right to assert debtor’s position on appeal. Parties to pending appeal must file motion for substitution to insert Chapter 7 trustee as party to appeal.
- (5578) *LorCon LLC #1 v. Heyl*, 2014 WL 5354040 (8th Cir. 2014) – Appellate standing requires that party be directly and adversely affected pecuniarily by outcome of appeal. Principal of LLC lacked standing to appeal decision of Bankruptcy Court that obligation owed by debtor to LLC was dischargeable. LLC was not party to appeal. Further, appellant was not an attorney and could not represent interest of LLC in appeal even if LLC remained party.
- (5579) *Williss v. U.S.*, Case No. 13-6159 (10th Cir. 2014) – Debtor lacked standing to appeal dismissal of personal injury action where debtor filed bankruptcy after date on which injury occurred and cause of action became property of estate. Only the Chapter 7 Trustee has standing to pursue recovery of cause of action that accrued prior to commencement of case where cause of action has not been abandoned.
- (5580) *In re Brown*, Case No. 13-8037 (6th Cir. BAP 2014) – Standing requires that person be aggrieved by the bankruptcy court order, limiting standing to those who are directly and adversely affected pecuniarily or where order diminishes a person’s property, increases his burdens, or impairs his rights. Insolvent debtor does not have standing to appeal order granting relief from stay, as any property interest would be that solely of estate and not debtor. Property remained property of estate and had not been abandoned either by abandonment or by closing of case. Even if appeal were successful, it would not produce any surplus proceeds beyond those necessary to pay claims and would not generate any income or proceeds for debtor.
- (5581) *In re Meridian Venture Partners, LLC*, Case No. 13-8021 (6th Cir. BAP 2013) – Appellate standing requires that appellant be “person aggrieved” meaning that outcome of appeal will impact appellants pecuniary interest. Appellant lacked standing where connection to debtor was solely as attorney for debtor and managing agent, but appellant admittedly was not an owner or any equity interest, where the only equity holder in the debtor was a trust. To extent dismissal order may have been erroneous, only the debtor was aggrieved party. Role of appellant as attorney, managing agent or beneficiary of trust that was the owner of the debtor did not result in injury to appellant. Debtor was lawfully formed LLC that had existence independent of the interests of the equity holders, such that equity holders, while they may have been indirectly affected by dismissal, had at most an indirect interest in the appeal insufficient to convey standing.
- (5582) *Kahn v. Regions Bank*, 2013 WL 5942052 (6th Cir. 2013) – Standing to appeal requires that party seeking to appeal have a pecuniary interest in outcome of appeal. Debtor lacked pecuniary interest in appeal overruling an objection to claim where estate was insolvent such that regardless of whether objection to claim was sustained, debtor would not receive any distributions from estate.
- (5583) *In re Alvarado*, 2013 WL 1809061 (N.D. Ca. 2013) – Debtor’s counsel has standing to appeal dismissal of debtor’s case where dismissal order also required disgorgement of fees. Disgorgement of fees made debtor’s counsel a “person aggrieved” for purposes of Article III standing.
- (5584) *Dietrich v. Nathan*, 2013 WL 3188922 (E.D. Mi. 2013) – Debtor in insolvent Chapter 7 estate lacks standing to appeal orders allowing compensation to trustee, attorney for trustee, or accountant for trustee. Debtor lacks any financial interest in outcome of appeal as reduction or elimination of fee awards would not produce any distribution to debtor. Orders in question would neither produce assets in excess of liabilities entitling debtor to distribution of surplus; nor affect debtor’s discharge.
- (5585) *McIntosh v. LaBarge*, Case No. 12-6070 (8th Cir. BAP 2013) – Order denying confirmation of Chapter 13 plan is non-final, non-appealable order. However, Order confirming plan over objection of Debtor is final and appealable. Debtor filed a plan and court denied confirmation. Debtor amended plan to leave out provision that Court found objectionable. Debtor then objected to debtor’s own plan which was then confirmed over debtor’s objection. Confirmation order was final and debtor had standing to seek appeal.
- (5586) *Gentile v. DiGiacomo*, Case no. 12-071 (1st Cir. BAP 2013) – Debtor lacks standing to appeal order approving sale of property under Section 363 where debtors could not demonstrate that denial of motion would produce funds in excess of that necessary to pay creditors in full and produce additional funds for payment to debtors. Where estate is not sufficient to pay claims in full whether or not the sale is approved, debtors lack pecuniary interest in outcome of sale motion. Dissenting opinion asserted that where liens exceeded value of property to be sold, there was no conceivable benefit to the estate and trustee lacked any sound business reason for proposed sale, such that debtors should be allowed to argue that property should be abandoned rather than sold.

- (5587) *Lunan v. Jones*, 2013 WL 1693983 (6th Cir. 2013) – Only person aggrieved by the order has standing to appeal. The person must have a financial stake in the outcome and must be directly and pecuniarily affected by the order to be appealed. Chapter 7 debtor will rarely have standing to appeal asset sales because estate will rarely have sufficient funds to return assets or proceeds to debtor. If debtor can prove that successful appeal would result in assets in excess of liabilities, thus generating distribution to debtor, then debtor is personally aggrieved. Debtor lacked standing where estate was insolvent and appeal would not produce distribution. Debtor's claim that trustee improperly took property belonging to debtor's husband did not give debtor standing as injured party, if any, would be husband.
- (5588) *Staker v. Jubber*, Case No. 12-091 (10th Cir. BAP 2013) – Debtor lacked standing to appeal settlement of claims entered into by Chapter 7 trustee. Upon filing of case, Trustee became the sole representative of the estate with power to assert, enforce or settle claims. Any judgments that debtor obtained pre-petition also became property of estate, vesting in the Trustee the full right to administer and, if appropriate, settle and vacate those judgments.
- (5589) *Mentag v. GMAC Mortgage, LLC*, 2013 WL 489181 (E.D. Mi. 2013) – Debtor has standing to appeal order lifting stay even where property is sold at foreclosure sale during pendency of appeal. Debtor had standing when appeal filed and debtor retained personal state in the outcome of the appeal sufficient to convey standing for appeal.
- (5590) *Leavitt v. Alexander*, Case No. 11-1114 (9th Cir BAP 2012) – Appellant who prevailed at lower court on one theory of law but was unsuccessful on another theory lacks standing to request appellate review of issue on which Appellant prevailed. Debtor claimed exemption under two separate theories. Bankruptcy Court sustained the Trustee's objection based on one theory but overruled it on another and Trustee appealed both rulings. BAP ruled on the issue on which Trustee had lost at the lower court but dismissed appeal of issue on which Trustee had succeeded, as Trustee lacked standing to appeal issue on which Trustee was the prevailing party at the lower court.
- (5591) *In re Baer*, 2012 WL 2368698 (6th Cir. BAP 2012) – Appellate standing is limited to persons with a financial stake in the bankruptcy court's order. Appellant must establish both an injury in fact and that the interest to be protected is one that the Bankruptcy Code seeks to protect. Debtor has standing to appeal decision regarding alleged violation of automatic stay under Section 362. Debtor had standing to appeal decision of Bankruptcy court that creditor's post-petition repossession of vehicle did not constitute violation of automatic stay.
- (5592) *Hock v. Stevenson*, 2011 WL 2173837 (E.D. Mi. 2011) – Buyer at foreclosure sale lacks standing to appeal Order Revoking Abandonment. Reopening case and revoking abandonment does not alter the rights or status of the buyer. The only change is that the trustee, rather than the debtor, would be the person redeeming the property. That trustee may be more likely to redeem than the debtor would have been does not change the legal rights or status of the buyer.
- (5593) *Aja v. Emigrant Funding Corp.*, 2011 WL 167034 (1st Cir. 2011) – Chapter 7 debtor lacks standing to appeal order granting relief from automatic stay. Debtor acknowledged that there was no equity in property. Successful appeal would not affect her discharge and estate was insolvent so there would be no money left to pay Debtor after payment to creditors.
- (5594) *Phillips v. Weissert*, Case No. 09-8032 (6th Cir. BAP 2010) - Court has jurisdiction to independently determining standing even when issue is not raised by either party. Plaintiff who prevailed in lower court lacked standing to bring appeal for other plaintiff in the action.
- (5595) *Moses v. Howard University Hospital* – Case No. 08-7087 (D.C. Cir. 2010) – A trustee, as the representative of the bankruptcy estate, is the real party in interest, and is the only party with standing to prosecute causes of action belonging to the estate once the bankruptcy petition has been filed. An outstanding legal claim that is abandoned by the trustee reverts back to the original debtor-plaintiff. When Trustee abandoned interest in State Court litigation, Debtor reacquired standing to prosecute appeal of adverse State court Judgment.
- (5596) *Ohio Truck & Trailer, Inc. v. Level Propane Gases, Inc.*, 422 BR 93 (6th Cir. BAP 2010) – Appellate standing is more limited than Article III standing or “federal” standing. Party has appellate standing only if the party is directly and adversely affected pecuniarily by the order. Known as “person aggrieved” doctrine, standing limited to one with a direct financial stake in the Bankruptcy Court's order. Creditor whose Proof of Claim has been disallowed is not a creditor and so is not a person aggrieved by orders of Bankruptcy Court.
- (5597) *Wilhelm v. Ulrich* – Case No. 09-8043 (6th Cir. BAP 2010) – Appellate standing is more limited than Article III standing or federal standing generally. Appellate standing requires appellant to be directly and adversely affected pecuniarily by the order. Known as “person aggrieved” doctrine, standing limited to one with a direct financial stake in the Bankruptcy Court's order. Party who has not filed a Proof of Claim and who entered into a settlement agreement with Debtor that released all claims Party had against debtor lacked any pecuniary interest in the Order confirming Debtor's Chapter 11 Plan and, therefore, lacked standing to appeal that Order.
- (5598) *Maxus Capital Group, LLC, v. Uhrich*, Case No. 09-8047 (6th Cir. BAP 2010) – Appellate standing is more limited than Article III standing or federal standing generally. Appellate standing requires appellant to be directly and adversely affected pecuniarily by the order. Known as “person aggrieved” doctrine, standing limited to one with a direct financial stake in the Bankruptcy Court's order. Party who has filed a Proof of Claim that has not been disallowed has sufficient pecuniary interest in the Order confirming Debtor's Chapter 11 Plan and, therefore, has standing to appeal that Order.
- (5599) *Stark v. Moran*, 566 F.3d 676 (6th Cir. 2009) – One co-shareholder of Corporation lacks standing to contest bankruptcy sale of stock on the other co-shareholder of Corporation. Order permitting the sale of stock of other co-shareholder does not “directly and adversely affect pecuniary interest” of the non-Debtor co-shareholder. Bankruptcy Trustee's sale of stock back to Debtor did not harm any interest and co-shareholders shares or co-shareholders interest in the underlying Corporation. Further, Co. shareholder lack standing to appeal sale of stock back to Debtor on any “competing bidder” theory where stock was sold back to Debtor for a sum sufficient to

pay off creditors in full. Co-shareholder in closely held corporation did not have interests aligned with those of bankruptcy estate's creditors where no creditors were left unsatisfied as a result of the sale and any allegations of impropriety, even if true, could not increase any creditor's recovery.

- (5600) *Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc.*, 555 F.3d 231 (6th Cir. 2009) - Doctrine of "appellate standing" which is applicable only in Bankruptcy appellate matters, limited persons who can pursue an appeal to those directly and adversely affected pecuniarily. Persons such as shareholders or creditors of corporation lack standing to appeal decisions dealing with assets of corporation. However, where party at secondary level of appeal unquestionably had standing to participate in the appeal at the District Court level, that party has standing to appear in the appeal at the Circuit Court.
- (5601) *LPP Mortgage, Ltd. v. Brinley*, 547 F.3d 643 (6th Cir. 2008) – To have standing, party must show (1) party has suffered injury that is actual or imminent, not conjectural or hypothetical and is concrete and particularized; (2) injury is fairly traceable to the challenged actions of the defendant; and (3) is likely rather than merely speculative that the injury will be redressed by a favorable decision. Unsecured creditor has economic interest in having unencumbered equity in property as a result the avoidance of judgment means preserved for benefit of bankruptcy estate.
- (5602) *Moran v. LTV Steel Company, Inc.*, 560 F.3d 449 (6th Cir. 2009) - To have appellate standing, party must be directly and adversely affected pecuniarily by the order. Appellate standing requires direct financial stake in the order such that it diminishes Appellant's property, increases burdens, or impairs rights. Possibility of future litigation is not enough to support appellate standing. Bankruptcy Court appointed Committee of Administrative Claimants to represent interests of administrative creditors. Company's former CEO did not have standing to appeal the Court's Standing Order where only interest of CEO was to prevent Committee from filing suit against CEO.
- (5603) *Ford Motor Credit Co. v. Morton*, 410 BR 556 (6th Cir. BAP 2009) – Party has standing to appeal only if party has been “directly and adversely affected pecuniarily by the order”. A party may appeal in order only if the order diminishes their property, increases their burdens or impairs their rights. Creditor has standing to appeal order disapproving proposed reaffirmation agreement. Order denying reaffirmation agreement sufficiently affects creditor's assets and detrimentally affects creditor's rights.
- (5604) *Baud v. Carroll*, Case No. 09-10673 (E.D. Mi. 2009) – Debtor has standing to appeal Order Confirming Plan in Chapter 13 proceeding where Debtor involuntarily altered the provisions of the plan to conform to the Court's ruling. Debtor is an “aggrieved party” with standing to appeal.

13.2 *In Forma Pauperis*

- (5605) *Byers v. Byers*, 2015 WL 3917281 (S.D. Ohio 2015) – Request to proceed *in forma pauperis* denied without prejudice where debtor failed to file affidavit demonstrating inability to pay filing fees. While party is not required to be absolutely destitute or to contribute the last dollar the party has or can get, party is required to demonstrate that because of poverty party cannot both pay the fee and maintain basic necessities.
- (5606) *McDermott v. Taylor*, Case No. 14-4124 (Bankr. E.D. Mi. 2015) – Court can waive filing fee on appeal only where appeal is taken in good faith. Good faith is objective standard and requires that appeal not be frivolous or that appeal presents substantial question of law or fact. Appeal based on argument that “there is no lawful currency in the United States” is frivolous and lacks good faith.
- (5607) *In re Byers*, 2014 WL 5302971 (Bankr. S.D. Ohio 2014) – Court can waive payment of filing fee for appeal where appellant files affidavit that describes all assets of the person and states that the person is unable to pay the filing fee. Courts will consider factors such as accuracy of information provided by movant and discrepancies in that information; collateral resources such as family or friends who may be called on to provide assistance; and movant's expenses including whether any of them could be redirected to pay the filing fee. Party with assets sufficient to serve as resource for payment of fees not entitled to waiver. Movant's affidavit was materially misleading as it stated that movant was paying various expenses that movant was not, in fact, paying. Further movant had means to pay filing fee where movant recently received substantial insurance proceeds from a car accident; movant spends money on golf outings and dining out; her budget for food and clothing are higher than normally found for one person; and movant had substantial assets including a boat and trailer and “highly valuable” household goods including furniture and antiques that movant had given to her children. Although movant was currently employed and working 12-20 hours per week at \$10 per hour, there was no reason why she could not obtain more gainful employment where she had 14 years of education and possessed, at least, a realtor license. Appeal would also appear frivolous where movant sought to appeal from order dismissing adversary complaint objecting to discharge yet movant never caused the complaint or the summons to be served on debtor or debtor's counsel.
- (5608) *In re Jackson*, 2014 WL 3579294 (Bankr. W.D. Mi. 2014) – Court has authority under Judicial Conference Rules to waive filing fees for appeals where appellant establishes income is less than 150% of the official poverty line and that appellant otherwise lacks assets from which filing fee can be paid. Court could not waive \$5.00 fee for the notice of appeal as that fee is imposed by statute and court lacks authority to waive fees imposed by statute versus those imposed by the Judicial Conference.
- (5609) *In re McClendon*, 2014 WL 1646957 (Bankr. E.D. Mi. 2014) – To obtain leave to file appeal without payment of filing fee, proposed appellant must demonstrate that request is filed in good faith, meaning that appeal is not frivolous or that it presents a substantial question. Order denying debtor's motion to waive filing fee to start bankruptcy case proper and not subject to good faith dispute where debtor's own schedules showed that debtor had more than \$7,300 in non-exempt assets in form of tax refund that could be used to pay filing fee, yet debtor did not pay filing fee notwithstanding multiple opportunities provided to do so.

- (5610) *Rowan v. Southwest Tennessee Community College*, 2013 WL 3242486 (W.D. Tn. 2013) – 28 USC Section 1915(a)(3) provides that appeal may not be taken *in forma pauperis* if the trial court certifies in writing that the appeal is not taken in good faith. Appeal that is frivolous is not taken in good faith. Where trial court certified that appeal was not taken in good faith, Appellant must pay filing fee within 30 days of filing notice of appeal.
- (5611) *Constant v. Nadolski*, 2012 WL 353878 (E.D. Mi. 2012) – 28 USC Section 1915(a)(1) allows any court to waive payment of filing fees or security if the litigant submits an affidavit demonstrating that the litigant is unable to pay the fees or provide security. Although appealing creditor did not file “affidavit” he did submit letter declaring under penalty of perjury that his income was \$785 per month and he had less than \$60 in the bank.
- (5612) *Michigan First Credit Union v. Smith*, 2013 WL 5770286 (Bankr. E.D. Mi. 2013) – Court may allow debtor to appeal without paying filing fee only where court finds that appeal is taken in good faith, including that appeal is not frivolous or presents a substantial question. Motion denied where motion did not present any good faith basis for appeal where appeal would be frivolous and present no substantial question.
- (5613) *In re Morris*, 2010 WL 4809107 (Bankr. M.D. Tn. 2010) – Court may waive the filing fee for an appeal if the party submits an affidavit that he is unable to pay the fee or give security therefore. An appeal may not be taken in *forma pauperis* if the trial court certifies in writing that it is not taken in good faith, lacks merit or is frivolous. Failure to timely file Notice of Appeal resulted in appellate court lacking jurisdiction over appeal resulting in appeal being frivolous and lacking merit. Motion to proceed *in forma pauperis* denied.
- (5614) *Lewis v. McClatchey*, 2009 WL 1607773 (S.D. Ohio 2009) – Motion for leave to appeal *in forma pauperis* and request to obtain transcripts at government expense denied where any appeal would be frivolous.
- (5615) *In re Hall*, Case No. 08-51096 (5th Cir. 2009) – Motion for leave to proceed *in forma pauperis* denied where debtor failed to make sufficient evidentiary record to support request. Debtor filed bankruptcy petition and sought leave of the court to excuse the filing fee. Bankruptcy Court denied motion as financial documents filed by Debtor were insufficient to determine whether debtor was eligible for *in forma pauperis* relief. On appeal, debtor submitted the same insufficient financial documents to the appellate court. As documents were still insufficient, court dismissed appeal.

13.3 Waiver of Right to Appeal

- (5616) *Weik & Associates v. Carroll*, Case No. 08-12964 (E.D. Mi. 2008) – Party waived right to appeal Order awarding attorney fees where party agreed to entry of the Order being appealed. Bankruptcy Court expressed general guidelines about what time expenditures may be justifiable and under what circumstances additional justification may be appropriate. The Court then asked the parties to develop guidelines and “see if you can agree upon what my ruling would be if it had to be presented to me and submit an order and be guided accordingly in the future.” Thereafter, the law firm and the trustee submitted a stipulated Order to the Court awarding fees and costs in a specific amount. Appellate Court concluded that the Bankruptcy Court’s expression of opinion was designed to guide the parties in discussions to potentially resolve the pending issues and did not constitute ruling on those issues. Appellant entered into a Consent Order determining the amount of those fees. “Where the parties have agreed to entry of an order or judgment without any reservation relevant to the issue sought to be appealed, one party may not later seek to upset the judgment, unless lack of ‘actual consent’ or a failure of subject matter jurisdiction is alleged”.

13.4 Cross-Appeal

- (5617) *Leavitt v. Alexander*, Case No. 11-1114 (9th Cir BAP 2012) – Rule 8002 requires notice of cross appeal to be filed within 14 days of filing of Notice of Appeal. Appellee who fails to file Notice of Cross-Appeal waives right to raise issues not raised by Appellant. Absence of Notice of Cross Appeal precludes any attempt by Appellee to “enlarge his own rights” by obtaining relief that was not awarded by lower court. “Supplemental Statement of Issues” filed by Appellee does not substitute for Cross-Notice of Appeal. Party may file Cross-Statement of issues only if appellee has also filed a notice of cross-appeal. Debtor claimed asset as exempt under two separate theories. Bankruptcy Court disallowed one basis but overruled Trustee on other basis and determined asset to be exempt. Trustee appealed Court order allowing exemption, but debtor did not file Cross-appeal. Debtor precluded from asserting error in Court’s disallowance of one of the claimed bases for the exemption.

13.5 Certification of Direct Appeal to Circuit Court

- (5618) *In re Adkins*, 2014 WL 4446271 (Bankr. N.D. Tx. 2014) – Bankruptcy court could certify matter for direct appeal to circuit court where issue is question of law on which there is no controlling decision by the circuit court or the Supreme Court; the matter is one of great public importance; the issue is one where there are conflicting decisions; or circumstances exist such that immediate appeal will materially advance progress of case. If any of the four conditions are met, 28 USC Section 158 requires certification. Issue of whether adversary defendant violated stay by bringing third party action against a debtor in a related case in the same court as that in which the third-party defendant’s own bankruptcy case is filed is violation of stay is issue on which there is no controlling decision. Case raised substantial questions as to whether actions taken within bankruptcy case can themselves be stay violations.

B. Appellate Jurisdiction

13.6 Generally

- (5619) *American Express Bank v. Askenaizer*, 418 BR 495 (1st Cir. BAP 2009) – Appellate Courts have jurisdiction over final judgments, orders and decrees; and with leave of court from certain interlocutory orders.

13.7 Exceptions

- (5620) *Dalvit v. United Airlines, Inc.*, Case No. 08-1283 (10th Cir. 2009) – Appellate Court can consider merits of claim even in the absence of subject matter jurisdiction where consideration of merits results in affirmation of lower court holding. Court may rule on the merits that appellant loses where merits of the claims have already been decided by lower court in action where that court did have jurisdiction.

13.8 Content of Notice of Appeal

- (5621) *Armstrong v. Internal Revenue Service*, Case No. 11-1554 (9th Cir. BAP 2013) – Notice of appeal that did not indicate that order of dismissal was being appealed did not preserve issue of dismissal for appeal. Although notice of appeal attached copy of Order dismissing case, failure to identify that order in the notice was fatal to the appeal, and attaching the order did not “cure” the deficiency.
- (5622) *Bowden v. American Home Mortgage Servicing, Inc.*, 2013 WL 195672 (6th Cir. 2013) – Court lacks jurisdiction to review orders not identified in the Notice of Appeal. Although Debtor appealed Order dismissing adversary complaint, Debtor did not appeal order denying rehearing. Motion for rehearing relied on information wholly absent from original request for leave to amend and thus presented a new claim. Failure to identify order denying rehearing precluded Court from reviewing that order or the allegations in the Motion for Rehearing.
- (5623) *Dietrich v. Tiernan*, Case No. 11-1848 (6th Cir. 2012) – Court lacked jurisdiction over appeal of order entered in main bankruptcy case where Notice of Appeal filed in the adversary case. Main case and adversary proceedings are distinct for purposes of appeal. They have separate docket numbers, separate issues, and separate parties.
- (5624) *Matthews v. Educational Credit Management Corp.*, 2011 WL 197835 (E.D. Ky. 2011), *aff’d* Case No. 11-6218 (6th Cir. 2013) – Form of notice of appeal is jurisdictional. Form must (1) conform substantially to the appropriate Official Form, (2) contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys, and (3) be accompanied by the prescribed fee. Notice of appeal must designate the judgment, order, or part thereof being appealed. Imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court. Courts will liberally permit notices of appeal technically at variance with the letter of a procedural rule but that amount to the functional equivalent of what the rule requires. *Pro se* appellant’s Notice of Appeal was not perfect, but did comply with requirements of Federal Rule of Bankruptcy Procedure 8001. Plaintiff’s failure to designate in Notice of Appeal any of the Bankruptcy Court’s orders on various motions challenging Defendant’s standing did not preclude those issues from appeal – appeal of final judgment is sufficient to preserve for review all of the Bankruptcy Court’s prior non-final rulings and orders, including those on Plaintiff’s previous challenges to Defendant’s standing.

13.9 Certification for Direct Appeal

- (5625) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – 28 USC Section 158 allows for Bankruptcy Court to certify appeal directly to Circuit Court where the judgment or order involves a question of law as to which there are no controlling decisions of the Supreme Court or the circuit courts of appeals; or where the appeal involves matter of public interest. Motion denied where motion failed to allege any basis for direct appeal.

13.10 Jurisdiction of Lower Court Pending Appeal

- (5626) *In re Licking River Mining, LLC*, 2015 WL 5001009 (Bankr. E.D. Ky. 2015) – In general, filing notice of appeal divests lower court of jurisdiction over aspects of case involved in appeal. Purpose is to avoid two courts adjudicating same issue at same time. Bankruptcy court lacks jurisdiction to vacate or modify an order which is the subject of a pending appeal and cannot reconsider that issue even in the context of another Order. Bankruptcy court retains jurisdiction to enforce, implement, and otherwise treat as valid judgments and orders that are the subject of pending appeals, as long as that enforcement and implementation does not require re-deciding issues that are on appeal. Court previously determined that carve out for Chapter 11 professional fees allowed fees to be paid from both pre-petition and post-petition collateral of lender and lender appealed. During pendency of appeal, Court determined amount of fees and ordered fees to be paid from the carve out collateral. Bankruptcy court retained jurisdiction to award fees and direct payment from carve out as order was mere implementation of prior order and did not require court to re-determine any issue that was pending at the appellate court.

C. Time for Filing Appeal

13.11 Filing Before Order Entered

- (5627) *Miller v. Deutsche Bank National Trust Co.*, 2014 WL 4251612 (10th Cir. 2014) – Where notice of appeal is filed while Motion for Rehearing is pending, appeal is held in abeyance until Motion for Rehearing is decided. If appellant fails to file new or amended notice of appeal following order on reconsideration, appellate court lacks jurisdiction to review order on reconsideration and is limited to issues arising out of initial final judgment.
- (5628) *Moses v. Howard University Hospital* – Case No. 08-7087 (D.C. Cir. 2010) – Notice of appeal filed during pendency of timely filed Rule 59 Motion is timely and becomes effective upon entry of an order disposing of the Rule 59 Motion.
- (5629) *Mentag v. GMAC Mortgage, LLC*, 430 B.R. 439 (E.D. Mi. 2010) – Notice of appeal filed after entry of Order Lifting Stay but before Order became effective not premature. Time for filing Notice of Appeal runs from date on which Order is docketed with the Clerk, not the date on which the Order becomes effective.
- (5630) *Moran v. LTV Steel Company, Inc.*, 560 F.3d 449 (6th Cir. 2009) – Notice of appeal filed after Court issues oral ruling but before entry of

judgment or order being appealed is premature. Under Federal Rule of Bankruptcy Procedure, 8002(a), Notice of Appeal will be deemed filed as of the entry of the judgment or order. District Court erroneously dismissed appeal of Bankruptcy Court Order as premature.

13.12 “Separate Document” Rule

- (5631) *Potter v. Barton*, Case No. 14-80091 (Bankr. W.D. Mi. 2014) – Federal Rule of Civil Procedure 58, incorporated by reference in Rule 7058, requires that any final judgment be set out in separate document. Judgment is deemed entered when separate document is entered on the court docket. Time to file notice of appeal is 14 days if separate document is entered. If no separate document is entered on the docket, then the time to appeal is 150 days from court’s ruling.

13.13 Deadline for Notice of Appeal

- (5632) *Underwood v. Selent*, Case no. 15-10155 (E.D. Mi. 2015) – Appeal dismissed where debtor failed to timely file Notice of Appeal and Bankruptcy Court denied Motion to Extend Time to file Notice of Appeal as motion failed to demonstrate excusable neglect. District Court lacked jurisdiction over appeal.
- (5633) *Montedonico v. Blasingame*, 2015 WL 249495 (6th Cir. BAP 2015) – Federal Rule of Civil Procedure 58, incorporated by reference in Bankruptcy Rule 7058, requires entry of a separate judgment in adversary proceeding or other contested matter, other than specific matters listed in the rule. To qualify under Rule 58, document apart from the memorandum or opinion must be entered which does not cite legal authority or any other language beyond the award of the judgment itself. Thirty page Order that explained legal reasoning and factual basis for award of sanctions, and later shorter orders that imposed sanctions and contained procedural history for basis of award did not meet requirements of “separate document”. Where court did not enter separate order, order becomes final and appealable 150 days from entry of the order in the court docket. Deadline for filing notice of appeal 14 days after running of time, or 164 days total from entry of order that is not “separate document”. Notice of appeal filed 45 days after entry of later orders that were not “separate documents” was timely.
- (5634) *Hamid v. Deutsche Bank National Trust Co.*, 2014 WL 2937798 (4th Cir. 2014) – Timely filing of notice of appeal is jurisdictional. Where debtor failed to file notice of appeal by deadline, Court correctly dismissed appeal.
- (5635) *Williams v. Wayne County Treasurer*, Case No. 14-11844 (E.D. Mi. 2014) – Valuation order under Section 506 is a final order that is immediately appealable. However, where valuation is made in connection with plan confirmation process, appeal can also be taken after entry of order confirming or denying confirmation, even where that order is entered more than 14 days after entry of the valuation order.
- (5636) *In re Visteon Corp.*, 2014 WL 4244022 (3d Cir. 2014) – Party must file notice of appeal within time permitted. Court will not relieve party of consequences of decision not to appeal even if decision later proves to be improvident and court will not later set aside unappealed judgment because the judgment may have been wrong or rested on legal grounds subsequently overruled. Only exception is judgment that where the court lacked subject matter jurisdiction or where court acted inconsistent with due process of law.
- (5637) *Nielsen v. Iowa Student Loan Liquidity Corp.*, Case no. 13-2518 (8th Cir. 2014) – Rule 7058, which incorporates Rule 58 in adversary proceedings, requires entry of separate written judgment. Written order is not deemed entered until separate judgment is entered. Where written judgment is required but not filed, order becomes final and appealable 150 days after entry of the order. Notice of appeal filed 16 days after entry of Order was timely where Court did not enter separate final judgment and Notice of Appeal was filed within 150 days of entry of Order.
- (5638) *Armstrong v. Internal Revenue Service*, Case No. 11-1554 (9th Cir. BAP 2013) – Rule 8002 requires Notice of Appeal to be filed within 14 days of entry of the order being appealed. Failure to timely file notice of appeal deprives appellate court of jurisdiction. Court Order dismissing Debtor’s Chapter 7 case entered July 28, notice of appeal filed September 1, 45 days later, was untimely.
- (5639) *Bosch v. First National Bank*, Case No. 12-20135 (5th Cir. 2012) – Rule 8002 requires notice of appeal to be filed within 14 days of entry of order. Failure to timely file notice deprives appellate court of jurisdiction. Appellant did not file Notice of Appeal within 14 days of entry of Order Modifying Stay or Order Confirming Plan, requiring dismissal.
- (5640) *Hills v. McDermott*, Case No. 12-13697 (E.D. Mi. 2012) – Notice of appeal must be filed within 14 days of entry or order being appealed if order is final. Court’s Order imposing sanctions is final order.
- (5641) *Lim v. DiMercurio*, 2012 WL 4513795 (E.D. Mi. 2012) – Notice of appeal must be filed within 14 days of date on which order being appealed becomes final. Time when order becomes final depends on (1) the extent order leaves the Bankruptcy Court nothing to do but to execute the order; (2) the extent to which delay in obtaining review would prevent the aggrieved party from obtaining effective relief; and (3) the extent to which a later reversal on that issue would require recommencement of the entire proceeding. Although denial of motion is normally not a final order, when denial has effect of terminating some element of litigation, order can be final. Order Denying Trustee’s Motion to Defer Deadline for filing action under Section 727 was final when entered. Motion was filed before deadline expired but denied after deadline expired. Thus, order terminated any right of trustee to object to discharge. Order left nothing further for Court to do other than issue discharge. Delay in obtaining review would prevent appellant from obtaining effective relief as complaint to object to discharge would be time-barred. Reversal would require reversal of entire proceeding, setting aside discharge order. Notice of Appeal not filed when Order was entered but only after entry of discharge was untimely. Appeal dismissed.
- (5642) *Baker v. Lyon*, 2011 WL 3515181 (E.D. Ky. 2011) – Notice of Appeal must be filed within 14 days of entry of Final Judgment. Judgment was final where it concluded all issues between the parties. Reservation of jurisdiction to consider awards of attorney fees and

pre-judgment interest did not alter finality of judgment, as reservation of attorney fees does not impact resolution of substantive claims that underlie judgment.

- (5643) *In re Caterbone*, 2011 WL 1226462 (3d Cir. 2011) – Pursuant to 28 U.S.C. § 158(c)(2) and the Federal Rules of Bankruptcy Procedure, an untimely filing such as the one at issue here deprives subsequent reviewing courts including both the District Court and Circuit Court of jurisdiction over appeal. Notice of appeal filed with District Court after expiration of time under Rule 8002 *sua sponte* dismissed as untimely causing District Court to lack subject matter jurisdiction. Where District Court never acquired jurisdiction of appeal, Circuit Court similarly would lack jurisdiction over appeal of dismissal by District Court.
- (5644) *In re Morris*, 2010 WL 4809107 (Bankr. M.D. Tn. 2010) – Notice of Appeal must be filed within 14 days of order being appealed. Notice of Appeal filed 21 days after entry of order was untimely and appellate court therefore lacked jurisdiction.
- (5645) *In re Jacobowitz*, Case No. 10-1369 (3d Cir. 2010) – Notice of Appeal must be filed within 14 days of order being appealed. Appellate court lacked jurisdiction to consider appeal where Notice of Appeal not filed until 30 days after entry of order sought to be reviewed.
- (5646) *Mashburn v. Scrivner*, 2010 WL 1220730 (10th Cir. 2010) - Appeal of partial final judgment revoking discharge premature where Trustee had filed Motion to Alter or Amend Judgment as to second count which sought turnover of property from debtors. Timely Motion to Alter or Amend Judgment under Rule 59 operates to suspend finality of entire Judgment, even if Motion only directed to one part of the Judgment.
- (5647) *Ultimate Appliance CC v. The Company*, 601 F.3d 414 (6th Cir. 2010) – Federal Rule of Appellate Procedure 4 requires Notice of Appeal to be filed within 30 days of entry of the Judgment or Order appealed. Party may move for extension up to 30 days after the expiration of the initial time. Rule 4 is jurisdictional. Appellate Courts lack jurisdiction and must dismiss appeal where Notice not filed within initial 30 days and did not seek an extension until 32 days after expiration of the initial 30 day time limit. District Court properly denied Appellant's untimely Motion for Extension of Time to file Notice of Appeal.
- (5648) *Woosley v. Woosley*, 2009 WL 3064791 (Bankr. M.D. Tn. 2009) – Rule 9021 requires a separate document for every judgment entered in an adversary proceeding. Where a separate document is not entered, the time for taking the appeal did not run. A party may waive the “separate document” rule to allow an appeal to go forward, but such a waiver cannot be used to defeat appellate jurisdiction.
- (5649) *Lassiter v. Grove-Merritt*, 406 BR 778 (S.D. Ohio 2009) – Notice of Appeal must be filed within 10 days of entry of order appealed. Notice of appeal filed 12 days after entry of order was untimely and appellant failed to establish excusable neglect to extend the time for filing an appeal. Accordingly, District Court lacked jurisdiction over appeal and appeal must be dismissed.
- (5650) *Hann v. Michigan*, 2009 WL 2496666 (E.D. Mi. 2009) – Notice of Appeal must be filed within 10 days of entry of order appealed. A Motion for Rehearing filed within 10 days of rendition of order under Federal Rule of Bankruptcy Procedure 9023 extends the time for filing a Notice of Appeal until 10 days after entry of an Order on that Motion. An untimely Motion for Rehearing does not extend the time for filing a Notice of Appeal. Debtor's Motion for Rehearing filed 14 days after entry of the order and Notice of Appeal filed 15 days from rendition of order left Appellate Court with no jurisdiction. Debtor's appeal dismissed as jurisdictionally barred.
- (5651) *Sunde v. Wells Fargo Home Mortgage*, 2009 WL 2447490 (E.D. Mi. 2009) - Notice of Appeal must be filed within 10 days of entry of order appealed. Motion to Amend Order filed two months after rendition of order does not extend time for filing notice of appeal of underlying Order. A timely motion to amend pursuant to Rule 9023 extends the time for appeal until 10 days after entry of the order disposing of that motion. Appellant's Notice of Appeal and Motion for Leave to Appeal filed more than two months after entry of Order being appealed were untimely. Appeal dismissed for lack of jurisdiction.
- (5652) *K & B Capital, LLC v. Official Unsecured Creditors' Committee*, 2009 WL 1747834 (6th Cir. 2009) –Court lacked appellate jurisdiction over Order denying Rule 60 motion to vacate a Rule 60 Order entered two years previously. Any appeal from the prior rule 60 Order would have to have been brought within the appropriate time from entry of an Order and not by a collateral attack in the form of a second Rule 60 motion.
- (5653) *Doucet v. Drydock Coal Co.*, 2009 WL 1687775 (6th Cir. BAP 2009) – Order denying Motion to Dismiss for lack of jurisdiction is not appealable. Appeal of order denying Motion to Dismiss was timely when filed within 10 days of entry of Final Judgment, at which time Order became final.

13.14 Effect of Motion for New Trial or Amendment of Judgment

- (5654) *Armstrong v. Internal Revenue Service*, Case No. 11-1554 (9th Cir. BAP 2013) – Timely filed Motion for Rehearing extends time to file Notice of Appeal until 14 days after entry of order. However, untimely filed motion does not extend deadline. Motion for Rehearing filed September 14 was not timely where Order dismissing case had been entered in mid-July. Appeal of dismissal order dismissed for lack of jurisdiction.
- (5655) *Overstreet v. Joint Facilities Management, LLC*, Case No. 11-51141 (5th Cir. 2012) – Untimely Motion to alter or amend judgment under Rule 59 does not extend time for filing notice of appeal of the underlying order. However, where lower court ruled on untimely filed Rule 59 motion, appellate court has jurisdiction to review whether Order denying Rule 59 Motion was abuse of discretion.
- (5656) *Haney v. Educational Credit Management Corp.*, 2012 WL 3683533 (E.D. Ky. 2012) – Untimely motion to alter or amend judgment under Rule 9023 does not extend time to file notice of appeal.
- (5657) *Sunde v. Wells Fargo Home Mortgage*, 2009 WL 2447490 (E.D. Mi. 2009) - Notice of Appeal must be filed within 10 days of entry

of order appealed. Motion to Amend Order filed two months after rendition of order does not extend time for filing notice of appeal of underlying Order. A timely motion to amend pursuant to Rule 9023 extends the time for appeal until 10 days after entry of the order disposing of that motion. Appellant's Notice of Appeal and Motion for Leave to Appeal filed more than two months after entry of Order being appealed were untimely. Appeal dismissed for lack of jurisdiction.

13.15 Motion for Leave to File Untimely Notice of Appeal

- (5658) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Rule 8002 requires motion to extend time to file appeal be filed within 14 days after entry of order; or an additional 21 days if party shows excusable neglect. Appellant filed Motion 26 days after entry of order and appellant failed to demonstrate any excusable neglect in failing to file either the Notice of Appeal or the Motion to Extend within the initial 14 day period.
- (5659) *Hobbs v. County of Summit*, 2014 WL 3735149 (N.D. Ohio 2014) – Court can extend deadline for filing notice of appeal under Federal Rule of Appellate Procedure 4 if the appellant files a motion to extend time within 30 days after expiration of initial deadline and shows excusable neglect or good cause. Appellant showed good cause where appellant missed initial filing deadline by one day based on erroneous information provided by the Court as to the last day to file the notice. Appellant acted diligently in immediately filing Motion to Extend upon being advised that initial date provided by court was incorrect and notice was untimely. It is not “unreasonable” neglect to rely on court orders and representations, and is excusable where reliance on court’s clear statements resulted in missing deadline by one day. Granting motion would not prejudice other parties to action as issues are purely ones of law, such that there is no danger that witnesses may be unavailable or evidence lost if Appellant prevails in the now-delayed appeal.
- (5660) *Hansjurgens v. Bailey*, Case no. 11-00202 (11th Cir. 2013) – Rule 8002 allows court to accept untimely filed notice of appeal where failure to file timely notice is due to excusable neglect. Pro se debtor did not establish excusable neglect where debtor claimed that former attorney told debtor that time for taking appeal was 30 days rather than 14 days. Excusable neglect is equitable concept that considers risk of prejudice to debtor; length of delay and potential impact on proceedings; reason for delay including whether delay was within reasonable control of moving party; and whether movant acted in good faith. Error based on misunderstanding of law is insufficient basis for excusing late filed notice of appeal.
- (5661) *Hills v. McDermott*, Case No. 12-13697 (E.D. Mi. 2012) – Motion to extend time for filing notice of appeal must be filed before time for filing notice of appeal has expired or may be filed within 21 days after expiration of the deadline for excusable neglect. Appellant offered no explanation why notice of appeal not timely filed and appellant failed to pay the required filing fee. Appeal dismissed.
- (5662) *Schaffner v. U.S. Trustee*, 2012 WL 2683320 (E.D. Ky. 2012) – Court can extend time to file Notice of Appeal on Motion filed within 14 days of rendition of order to be appealed. Court can extend time to file Notice of Appeal even if Motion is filed more than 14 days after rendition of order if delay is the result of “excusable neglect”. Excusable neglect is elastic concept not limited strictly to omissions caused by circumstances beyond the control of the movant. An extension may be granted even when “the failure to comply with a filing deadline is attributable to negligence. The determination whether neglect is “excusable” is an equitable one, taking account of all relevant circumstances including danger of prejudice to the non-movant; the length of the delay; the reason for the delay including whether it was in the reasonable control of the movant; and whether the movant acted in good faith. Motion demonstrated excusable neglect sufficient to extend time to file Notice of Appeal. Appellant, an attorney representing himself, was ill on the date of the hearing and oral decision of the bankruptcy court. He had moved for a continuance of the hearing, but the motion was denied. He was confined to bed rest the next day. His medical records show that he had been and was taking a potpourri of prescribed medications. Granting the motion would have involved virtually no delay in the proceeding. Appellant would be severely prejudiced by being denied his right to appeal as underlying decision disbarred attorney and, if disbarred in the bankruptcy court, he would also be disbarred in all United States District Courts and the United States Courts of Appeals and, perhaps, in the state courts. Appellant did not act in bad faith where delay was not in his control, considering his medical condition.
- (5663) *Gruber v. Kaplan*, Case No. 11-4022 (3d Cir. 2012) – Debtor’s Motion to Extend Time to file Notice of Appeal denied. Factors to be considered are danger of prejudice to non-movant; length of delay and potential impact on judicial proceedings; reason for the delay including whether it was in the reasonable control of the movant; and whether movant acted in good faith. Party who fails to follow clear dictates of court rule will rarely be given relief. Although delay presented little risk of prejudice and was not unreasonably long and there was no evidence of bad faith, Motion nonetheless denied as failure to timely file notice of appeal was within control of debtor. Debtor contended that debtor did not receive a copy of the judgment to be appealed, but debtor knew that judgment would be forthcoming and had a duty to monitor the court file. Further, debtor was in court when Bankruptcy Judge orally announced ruling and could have filed notice of appeal at that point without waiting for judgment to enter. Debtor knew that opposing party had submitted order to court for entry and debtor consented to entry of that judgment.
- (5664) *In re Edward*, Case No. 99-51514 (Bankr. E.D. Mi. 2008) – Bankruptcy Court can extend time for filing Notice of Appeal on Motion filed (1) before expiration of time for filing Notice of Appeal or (2) within 20 days after expiration of time for filing Notice of Appeal upon showing of excusable neglect. Motion for Leave to file untimely Notice of Appeal did not support finding of excusable neglect where Notice of Appeal not timely filed due to misunderstanding by counsel of time for filing appeal. Counsel's erroneous belief that deadline to file Notice of Appeal was 21 days does not constitute excusable neglect.

13.16 Deadline – Direct Appeal to Circuit Court

- (5665) *In re Schwartz*, Case No. 15-1416 (7th Cir. 2015) – Deadline for taking appeal of bankruptcy order to district court is 21 days. However, Rule 8002 has no time limit for direct appeal to the Circuit Court under 28 USC Section 158 provided that all parties certify that the case

satisfied one of the three conditions for direct appeal.

D. Appealable Orders

13.17 Finality of Order

- (5666) *Shaagun v. Landmark Fence Co., Inc.*, Case No. 13-55509 (9th Cir. 2015) – District Court Opinion remanding matter to Bankruptcy Court for further findings of fact is not “final Order” and so is not immediately appealable. While both parties urged court to decide appeal, there is no authority for proposition that parties can by consent confer jurisdiction on court to hear case. Where appeal is one from district court in its capacity as appellate court, Circuit court has jurisdiction only if district court’s order is, itself, final.
- (5667) *Buchwald Capital Advisors, Ltd. v. Papas*, Case No. 14-14271 (E.D. Mi. 2015) – Order denying motion for summary judgment is not final judgment and so is not appealable as a matter of right. Final order is one that ends judicial labor. While Bankruptcy Court orders may be appealable if the order ends some discrete issue, that does not apply to order denying summary judgment that does not resolve any discrete issue or end any phase of the litigation.
- (5668) *Montedonico v. Blasingame*, Case No. 14-8046 (6th Cir. BAP 2015) – Final order from which appeal can be taken as matter of right is one that ends the litigation on the merits and leaves the court with nothing to do but execute the judgment. Orders limited to liability where assessment of damages remains pending are non-final, non-appealable orders. Order awarding sanctions that required counsel to attend continuing legal education program but left for another day the imposition of sanctions was non-final order. When court entered later order awarding monetary sanctions, the later order and the initial order became “final” and appealable.
- (5669) *Schwab v. Oscar*, 517 BR 72 (6th Cir. BAP 2014) – Order Denying Rule 60 Motion for Relief From Judgment is final, appealable order.
- (5670) *Williams v. Wayne County Treasurer*, Case No. 14-11844 (E.D. Mi. 2014) – Valuation order under Section 506 is a final order that is immediately appealable. However, where valuation is made in connection with plan confirmation process, appeal can also be taken after entry of order confirming or denying confirmation, even where that order is entered more than 14 days after entry of the valuation order.
- (5671) *Knaub v. Rollison*, 2014 WL 1853020 (10th Cir. 2014) – Bankruptcy Appellate Panel decision affirming bankruptcy court finding of non-dischargeability but reversing award of damages and remanding for further proceedings using correct legal standard was not final order and was not subject to appeal. BAP held that bankruptcy court used incorrect legal standard for calculating damages and remanded case to bankruptcy court to take further testimony and receive additional evidence under correct standard. Remand was for further substantive proceedings and not for mere ministerial task. Remand did not involve mere ministerial task of recalculating or re-computing based on evidence already presented, but required bankruptcy court to conduct new de novo proceedings and make additional findings of fact.
- (5672) *Mitchell v. Weinman*, Case no. 13-1013 (10th Cir. 2014) – Order denying Motion to Intervene is final, appealable order if order prevents applicant from becoming party to action. Appeal of order denying Motion must be filed timely. Appeal not filed until conclusion of underlying matter was untimely would be dismissed.
- (5673) *In re Ivens Properties, Inc.*, 2014 WL 349479 (Bankr. E.D. Tn. 2014) – Order conditionally granting stay relief is final order for purposes of appeal. Where neither party filed appeal, order became final, non-appealable and non-modifiable.
- (5674) *Sapere Wealth Management LLC v. MF Global Holdings, Ltd.*, Case No. 12-4254 (2d Cir. 2013) – Only orders that are final are appealable as matter of right. Order is final if it concludes any further judicial activity. Order denying joint administration was not appealable order where order specifically stated it was without prejudice to movant’s right to assert priority rights to distributions from the various Chapter 11 estates. Order clearly contemplated further judicial involvement as movant retained full authority to make all substantive claims that formed basis of movant’s request for consolidation in the first instance.
- (5675) *Huntington National Bank v. Richardson*, 2013 WL 4417515 (6th Cir. 2013) – Order denying motion for substantive consolidation is non-final, non-appealable order. While order granting substantive consolidation may be appealable because of impact on future case administration, order denying substantive consolidation has minimal impact and parties to administration of case can protect interests using standard rules and normal case administration.
- (5676) *Lindsey v. Pinnacle National Bank*, 2013 WL 4055273 (6th Cir. 2013) – Order denying confirmation of Chapter 11 plan is non-final, non-appealable order. Party seeking to appeal non-final order must either obtain district court certification of finality as to some claims or parties under Rule 54; or must seek permissive interlocutory review.
- (5677) *Heavrin v. Schilling*, 2013 WL 3166175 (W.D. Ky. 2013) – Order extending deadlines to object to discharge is non-final, non-appealable order.
- (5678) *McIntosh v. LaBarge*, Case NO. 12-6070 (8th Cir. BAP 2013) – Order denying confirmation of Chapter 13 plan is non-final, non-appealable order. However, Order confirming plan over objection of Debtor is final and appealable. Debtor filed a plan and court denied confirmation. Debtor amended plan to leave out provision that Court found objectionable. Debtor then objected to debtor’s own plan which was then confirmed over debtor’s objection. Confirmation order was final and debtor had standing to seek appeal.
- (5679) *Lim v. DiMercuro*, 2012 WL 4513795 (E.D. Mi. 2012) – Notice of appeal must be filed within 14 days of date on which order being appealed becomes final. Time when order becomes final depends on (1) the extent order leaves the Bankruptcy Court nothing to do but to execute the order; (2) the extent to which delay in obtaining review would prevent the aggrieved party from obtaining effective relief; and (3) the extent to which a later reversal on that issue would require recommencement of the entire proceeding. Order Denying Trustee’s Motion to Defer Deadline for filing action under Section 727 was final when entered. Order left nothing further for Court to do other than

issue discharge. Delay in obtaining review would prevent appellant from obtaining effective relief as complaint to object to discharge would be time-barred. Reversal would require reversal of entire proceeding, setting aside discharge order. Notice of Appeal not filed when Order was entered but only after entry of discharge was untimely. Appeal dismissed.

- (5680) *McDow v. Dudley*, Case No. 09-336 (4th Cir. 2011) – Bankruptcy Court's order denying a Chapter 7 motion to dismiss as abusive pursuant to 11 U.S.C. §707(b) is a final order appealable to the district court. Orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the bankruptcy case. Denial of a §707(b) motion does dispose of a discrete dispute, since it conclusively resolves the issue of whether the case is an abusive filing. Practical limitations also required immediate appeal. If the case continues with the liquidation and distribution of a debtor's assets, then those resources that could otherwise be used to pay creditors would be exhausted. Congress intended the question of abuse to be a threshold matter, since such a motion to dismiss cannot be filed at any other time during the bankruptcy case.
- (5681) *Baker v. Lyon*, 2011 WL 3515181 (E.D. Ky. 2011) – Judgment was final where it concluded all issues between the parties. Reservation of jurisdiction to consider awards of attorney fees and pre-judgment interest did not alter finality of judgment, as reservation of attorney fees does not impact resolution of substantive claims that underlie judgment.
- (5682) *In re USA Baby, Inc.*, 2011 WL 2076342 (7th Cir. 2011) – Order denying Equity Holder's Motion to pursue pre-petition claims that trustee was allegedly failing to pursue was final order for appellate purposes.
- (5683) *In re McKenzie*, 2011 WL 2670208 (E.D. Tn. 2011) – Order appointing counsel for the Trustee is non- final, non-appealable order. Order did not award compensation to counsel and did not end any litigation on the merits. Appellant failed to demonstrate need for immediate appeal to warrant interlocutory appeal.
- (5684) *BAC Home Loans Servicing v. Duong*, 2011 WL 1706615 (N.D. Ohio 2011) – Order to Show Cause that does not impose sanctions is not final, appealable order. Alleged creditor filed objection to confirmation and then sought to withdraw objection as alleged creditor was not actually a creditor in the case. Court entered Order to Show Cause why creditor should not be sanctioned and entered subsequent Order directing creditor to file an affidavit showing that creditor has taken steps to ensure that accurate information regarding identity of lenders and servicers is properly provided; and to educate employees as to these issues. Upon review of that report, Court would consider further actions or hearing. Although Order imposing sanctions, including non-monetary sanctions, can be an appealable final order, Court in this case did not impose a sanction or end the show cause hearing. Order only focused on steps creditor had taken or would take to prevent future errors and was in response to creditor's offer to provide a satisfactory explanation to the Court. Court did not impose a fine, make any ruling, or even reprimand creditor.
- (5685) *Cappuccilli v. Lewis*, 2010 WL 2870668 (E.D. Mi. 2010) - Order holding party in contempt but not imposing sanctions does not become final and appealable order until entry of order imposing sanctions. Order of Contempt entered February 18 did not impose sanctions. April 12 Order that imposed sanctions was final appealable order. Notice of Appeal timely filed April 26 properly appealed both initial finding of contempt and imposition of sanctions.
- (5686) *French v. Shapiro*, 2011 WL 1357754 (E.D. Mi. 2011) – Order dismissing adversary proceeding without prejudice to re-filing is not a final, appealable order.
- (5687) *In re Fleurant*, Case No. 09-4376 (3d Cir. 2011) - Order converting case from 13 to 7 is final and appealable. Court lacked jurisdiction over appeal of conversion order where debtor waited until court ultimately dismissed Chapter 7 case to file appeal. Appeal of final order must be filed within time permitted in Rule 8002(a).
- (5688) *BAC Home Loans Servicing, L.P. v. McDermott*, 2011 WL 1257209 (N.D. Ohio 2011) – Order Granting Motion for Rule 2004 Examination, like discovery orders in general, is not final, as order is not the end of any litigation, but more likely is the beginning of further proceedings.
- (5689) *In re Donovan*, 2011 WL 1257965 (N.D. Ohio 2011) – Order Granting Motion for Rule 2004 Examination, like discovery orders in general, is not final, as order is not the end of any litigation, but more likely is the beginning of further proceedings.
- (5690) *In re Gray*, 447 BR 524 (E.D. Mi. 2011) – Order is final for bankruptcy appellate purposes when the order finally disposes of discrete disputes within the larger case. A “discrete dispute” is one that is essentially separable from the main case and disposition would be final as a standalone suit outside of the bankruptcy case. Order that merely resolves “discrete issue” within a case is not appealable. Order Granting Motion for Rule 2004 Examination, like discovery orders in general, is not final, as order is not the end of any litigation, but more likely is the beginning of further proceedings.
- (5691) *Baker v. Simpson*, 2010 WL 2977329 (2d Cir. 2010) – Order denying Motion for Permissive Abstention is not a final order and is not appealable. Circuit Court lacks jurisdiction to consider appeal of district court's decision.
- (5692) *American Express Bank v. Askenazer*, 418 BR 495 (1st Cir. BAP 2009) – Appellate Courts have jurisdiction over final judgments, orders and decrees; and with leave of court from certain interlocutory orders. Decision is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. Interlocutory order decides some intervening matter but requires further steps to be taken in order to enable the court to adjudicate cause on the merits.
- (5693) *Official Committee of Unsecured Creditors v. Anderson Senior Living Property, LLC*, Case No 09-8041 (6th Cir. BAP 2010) – Appellate Court has discretion to allow appeal of interlocutory order on Motion or based on a timely notice of appeal. Court will grant discretionary review where order involves controlling issue of law as to which there is substantial ground for difference of opinion and

immediate appeal may materially advance ultimate termination of litigation. Order denying retention of advisor does not meet standard for interlocutory appeal.

- (5694) *Mentag v. GMAC Mortgage, LLC*, Case No. 09-15012 (E.D. Mi. 2010) – Order Lifting Stay is “final order” for purposes of appellate jurisdiction.
- (5695) *State of New Jersey v. Fuld*, Case No. 09-2891 (3d Cir. 2010) – Appellate Court has jurisdiction to hear appeals of “final decisions”, which are decisions that ended the litigation on the merits and leave nothing for the court to do but execute the judgment; or one by which the court disassociates itself from a case. Appellate Court may also have jurisdiction under “collateral order doctrine” for that small class of orders that finally determined claims of rights separable from, and collateral to, other rights asserted in the action through the rights are too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. Collateral Order Doctrine applies to decisions that do not in the litigation but nonetheless should be considered “final” for appellate purposes. Collateral Order Doctrine requires that order conclusively determine disputed question; resolve an important issue completely separate from the merits of the action; and be effectively unreviewable on appeal from a final judgment. Order denying three-man of action removed from state court to federal court conclusively determines the disputed question as to where the action will proceed and resolves an important issue completely separate from the merits of the action. However, an erroneous order denying a motion to remand can be adequately addressed on direct appeal from a final judgment. Appeal of order denying motion to remand dismissed for lack of jurisdiction.
- (5696) *Hughes v. Jamestown Square, LLC.*, Case No. 09-11676 (11th Cir. 2009) – Court has appellate jurisdiction pursuant to 28 USC Section 158 only over final judgments, orders and decrees. “Final Order” is one that ends litigation on the merits and leaves nothing for the court to do but execute the judgment. Order dismissing Involuntary Petition without prejudice is not appealable order as dismissal did not end litigation on the merits.
- (5697) *K & B Capital, LLC v. Official Unsecured Creditors’ Committee*, 2009 WL 1747834 (6th Cir. 2009) – Appeal dismissed as the orders being appealed were not final orders and, therefore, the appellate Court lacked jurisdiction.
- (5698) *Sparks v. HSBC Auto Finance*, 2008 WL 4694795 (6th Cir. 2008) – Appellate Court lacks jurisdiction to consider appeal of non-final order. Order is final only if Order terminates judicial labor and leaves only ministerial tasks to be performed.
- (5699) *CIT Small Business Lending Corp. v. Kendrick*, 558 F.3d 482 (6th Cir. 2009) – “[A] decision by the district Court on appeal remanding the bankruptcy Court’s decision for further proceedings in a bankruptcy Court is not final, and so is not appealable to this Court, unless the further proceedings contemplated are of a purely ministerial character.”
- (5700) *Doucet v. Drydock Coal Co.*, 2009 WL 1687775 (6th Cir. BAP 2009) – Order denying Motion to Dismiss for lack of jurisdiction is not appealable. Order is final and appealable only when case is finally concluded and there are no matters pending before the Court. Appeal of order denying Motion to Dismiss was timely when filed within 10 days of entry of Final Judgment at which time Order became final.

13.18 “Collateral Order” Doctrine

- (5701) *In re Gray*, 447 BR 524 (E.D. Mi. 2011) – Collateral Order doctrine allows appeal of that small class of decisions that finally determine a right separable from and collateral to rights asserted in the action and which are too important to be denied review but too independent to defer appellate consideration until whole case is concluded. Order must (1) conclusively determine the disputed question; (2) resolve an important question completely separate from the merits of the action; (3) be effectively unreviewable on appeal from a final judgment. Discovery orders are generally not reviewable under collateral order doctrine because discovery order such as Rule 2004 Exam Order does not conclusively determine any disputed question or claim of right.

13.19 Interlocutory Appeal

- (5702) *Marketgraphics Research Group, Inc., v. Berge*, 2015 WL 738052 (M.D. Tn. 2015) – Court can hear interlocutory appeal where appeal involves controlling issue of law; there is substantial grounds for difference of opinion; and immediate appeal will materially advance ultimate termination of litigation. Whether state court judgment established that debt was willful and malicious for purposes of res judicata is controlling question of law that could materially affect the outcome of the case. However, contention that bankruptcy court erred in finding a genuine issue of fact for trial is not legal question that can be entertained on interlocutory basis. Question presents substantial grounds for difference of opinion if the issue is difficult and of first impression; a difference of opinion exists within the controlling circuit; or circuits are split on the issue. Appeal that raised issue of whether conduct was willful and malicious raised issues of factual sufficiency and did not dispute applicable law or appropriate legal standards or requirements. Issues were better addressed on final appeal after conclusion of litigation.
- (5703) *Shaagun v. Landmark Fence Co., Inc.*, Case No. 13-55509 (9th Cir. 2015) – District Court Opinion remanding matter to Bankruptcy Court for further findings of fact is not “final Order” and so is not immediately appealable. While both parties urged court to decide appeal, there is no authority for proposition that parties can by consent confer jurisdiction on court to hear case. Where appeal is one from district court in its capacity as appellate court, Circuit court has jurisdiction only if district court’s order is, itself, final. Court will entertain interlocutory appeal based on four factors: the need to avoid piecemeal litigation; judicial efficiency; the systemic interest in preserving the bankruptcy court’s role as the finder of fact; and (4) whether delaying review would cause either party irreparable harm.
- (5704) *Mason v. Gentry*, Case No. 15-11531 (E.D. Mi. 2015) – Denial of Motion for Summary Judgment is non-final, non-appealable order. Court can authorize appeal if order involves controlling question of law, a substantial ground for difference of opinion exists regarding correctness of decision, and immediate appeal may materially advance ultimate termination of litigation. Appellant failed to provide

transcript of lower court hearing leaving reviewing court unable to determine if leave to appeal should be granted.

- (5705) *GATX Corporation v. Addington*, 2015 WL 4887101 (E.D. Ky. 2015) – Order dismissing all claims against 2 defendants was not final or appealable where additional causes of action remained against other defendants that could obviate need for appeal of dismissal order. Relationship between the adjudicated and unadjudicated claims; possibility that the need for review might or might not be mooted by future developments in the district court; possibility that the reviewing court might be obliged to consider the same issue a second time; presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; and miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like, weighed against immediate appeal. Suit against dismissed defendants sought to impose liability for fraudulent transfer on non-transferees. After dismissal, issue remaining was whether transfer was fraudulent as to the direct transferee, which did not implicate the same issue regarding non-transferee liability so there was no danger of the court being asked to decide the issue twice. Which supported certification of appeal. There were no counterclaims by dismissed defendants against plaintiff, which also supported certification. Appellant had already suffered serious delay as it has been three years since dismissal order none of which were appellant's fault, which strongly supports certification. However, issue to be appealed bore strong factual and legal relationship to remaining claims, as the issue remaining was whether underlying transfer was fraudulent in first instance, and a judgment against plaintiff on that basis would eliminate any possible liability of the dismissed defendants which weighed strongly against certification. Need for appellate review would be eliminated if court concludes that underlying transfer was not fraudulent, which also weighs against certification. Given strong factual and legal relationship between dismissed defendants and the remaining claims and the potential for what could prove to be an advisory opinion, court denied certification.
- (5706) *Mason v. Wyman*, 2015 WL 4617502 (E.D. Mi. 2015) – Denial of Motion for Summary Judgment is non-final, non-appealable order. Court can authorize appeal if order involves controlling question of law, a substantial ground for difference of opinion exists regarding correctness of decision, and immediate appeal may materially advance ultimate termination of litigation. Appellant failed to provide transcript of lower court hearing leaving reviewing court unable to determine if leave to appeal should be granted.
- (5707) *Fernanders v. Wells Fargo Dealer Services*, 2015 WL 4430224 (E.D. Mi. 2015) – In evaluating request for interlocutory appeal, court will consider whether the order implicates a question of law on which there is no controlling authority; matter involves one of public importance; order raises legal question requiring resolution of conflicting decisions; or immediate appeal will materially advance the case. Appeal of order denying sanctions against creditor for alleged violation of stay did not present any question of law on which there was no controlling authority as law regarding stay is clear. Motion for sanctions lacked evidentiary support as motion was response to creditor's request for relief from stay which was granted by Bankruptcy Court. Grant of leave to appeal would only unnecessarily delay bankruptcy case and would unnecessarily duplicate proceedings.
- (5708) *Schwab Industries, Inc. v. Huntington National Bank*, 2015 WL 2412317 (N.D. Ohio 2015) – Bankruptcy Court Order denying Motion to Withdraw Reference and to Remand to State Court is non-final non-appealable order. Court would not authorize interlocutory appeal. Interlocutory appeal appropriate only where case presents controlling question of law as to which there is a substantial ground for difference of opinion such that immediate appeal may materially advance the ultimate termination of litigation. Question of law is controlling if it materially affects outcome of case, but factual determinations and determination with court discretion are not controlling questions of law. Bankruptcy Court Order denying Motion to Withdraw Reference did not present any controlling question of law. Although court jurisdiction is controlling issue of law, whether Bankruptcy Court has "related to" jurisdiction is inherently factual question regarding relationship between action and bankruptcy case. Appeal also would not materially advance case as only issue was whether action would proceed in Bankruptcy Court or State Court, neither of which would "terminate" the action.
- (5709) *Bullard v. Blue Hills Bank*, ____ U.S. ____, ____ S.Ct. ____ (2015) – Order denying confirmation of Chapter 13 Plan is interlocutory appeal that is not appealable as a matter of right as long as debtor has opportunity to propose another plan. Any appeal would be subject to rules governing interlocutory appeal requiring motion for leave to appeal to district court or motion for certification directly to circuit court.
- (5710) *MarketGraphics Research Group, Inc. v. Berge*, 2015 WL 1731219 (M.D. Tn. 2015) – District Court can allow interlocutory appeal by certifying that the judgment involves a question of law on which there is no controlling decision of the Supreme Court or Circuit Court of appeals, or that the matter involves an issue of public importance; the judgment or order involves question of law requiring resolution of conflicting decisions; or immediate appeal would materially advance progress of case. If any of these circumstances exists, District Court is required to certify the case to the Circuit Court for immediate appeal. Denial of summary judgment met standard as resolution of issue regarding res judicata effect of state court judgment on finding of malice would materially advance the ultimate resolution of the litigation.
- (5711) *Rhiel v. Central Mortgage Co.*, 2014 WL 8276561 (Bankr. S.D. Ohio 2014) – Bankruptcy Court can direct entry of final judgment as to one or more, but fewer than all, counts where doing so would allow for immediate appeal of discrete issue. Factors to consider relationship between adjudicated and unadjudicated claims; possibility that review may be mooted by further developments in bankruptcy court; possibility that reviewing court may have to consider issue a second time; presence or absence of claim that could result in set-off against order sought to be appealed; and other considerations such as delay, economic and solvency considerations, shortening of time of trial, frivolity of competing claims, expense. Order denying Trustee's motion to sell interest free and clear of claims of non-debtor was expressly relevant to, and in fact was a condition of, the remaining counts for damages against mortgage holder. There were no claims pending that could result in second appeal of order denying motion for sale, and there was no possibility of any later order allowing set-off against trustee related to property. Appeal of final judgment would remove impediment resulting from uncertainty as to whether trustee could sell property free and clear and would also free non-debtor to cure mortgage arrears and resume mortgage payments.
- (5712) *Buchwald Capital Advisors, Ltd. v. Papas*, Case No. 14-14271 (E.D. Mi. 2015) – Court would decline to exercise discretion to allow

appeal of order denying summary judgment. Interlocutory appeals are not favored and discretion to hear interlocutory appeal should be used sparingly. Court may consider interlocutory appeal where order involves controlling question of law, substantial grounds exist for difference of opinion on correctness of decision, and immediate appeal may materially advance the termination of litigation. Defendants failed to establish cause for appeal of order denying summary judgment. Defendants failed to demonstrate any real dispute about standards to be used or that lower court used incorrect standard. Defendant's disagreement with lower court decision is not grounds to find substantial difference of opinion where defendants did not cite any legal precedent that was not considered by lower court.

- (5713) *Phillips v. Gilman*, 2014 WL 2211710 (9th Cir. 2014) – Order Denying Motion to Strike Affirmative Defenses is non-final, non-appealable order.
- (5714) *Council on Occupational Education v. Keats*, 2014 WL 4376037 (6th Cir. 2014) – Circuit Court ordinarily lacks jurisdiction to consider interlocutory appeal. Bankruptcy Court entered partial findings of fact and district court entertained interlocutory appeal, but remanded for further proceedings based on district court opinion. District court decision did not terminate any aspect of the case or bring any aspect of case to conclusion. Circuit Court can consider interlocutory appeal only where the district court certifies the matter for further appeal on request of party filed pursuant to Rule 54; or party seeks permissive interlocutory appeal under 28 USC Section 1292. Party did not file request for certification with district court and did not file application for permissive interlocutory appeal with Circuit Court pursuant to Section 1292. Thus, Circuit Court lacked jurisdiction.
- (5715) *Richardson v. Checker Acquisition Corporation*, 2014 WL 1117858 (W.D. Mi. 2014) – Order concerning whether potential liability for withdrawal from multi-employer retirement plan is properly considered in determining insolvency is non-final, interlocutory order, as order does not terminate any stage of the litigation. Court will allow interlocutory appeal where question involved is one of law; question is controlling on outcome of litigation; there is substantial grounds for disagreement regarding correctness of order to be appealed; and immediate appeal would materially advance ultimate termination of litigation. Interlocutory appeals are not favored and should be granted only sparingly and in exceptional cases. While issue presented is one of law and is novel and one of first impression in Sixth circuit, resolution would not immediately terminate litigation as bankruptcy case will continue regardless of outcome of decision, as issue was only one of multiple grounds for actions against defendants for alleged fraudulent transfers, and even if appellate court reversed bankruptcy court, plaintiff would still proceed to trial on the first count and second count of the complaint. While reversal may spare the parties one aspect of a trial, that does not amount to the appeal bringing the litigation to a close.
- (5716) *MidFirst Bank v. Johnston*, 2014 WL 694943 (N.D. Ohio 2014) – Orders resolving discovery disputes are interlocutory orders that are not immediately appealable. In considering Motion for Leave to Appeal, Appellate Court will consider whether the appeal presents (1) a question of law; (2) that is controlling; (3) as to which there is substantial ground for difference of opinion; and (4) an immediate appeal of which would materially advance the ultimate termination of the litigation. A question of law for purposes of a Motion for Interlocutory Appeal is one that is a pure question of law, not just an issue of fact that is free from dispute. Discovery orders that required lender to turnover 1) policies and procedures of appellants related to servicing mortgages; (2) deposition of a non-party; and (3) compensation information involved issues of mixed law and fact as order depended on the facts unique to the case. The appeal did not present any controlling question of law, as reversal of the order would not terminate the action or materially affect the outcome of the litigation. Questions of fact vested in the discretion of the trial court are not controlling issues of law. Appeal did not present issue on which there was substantial ground for difference of opinion as most of the issues presented were not new or novel and there was substantial established body of law on discovery under Rule 26. Disagreement with correctness of order by one party does not elevate issue to substantial ground for difference of opinion. Appeal materially advances termination of litigation if outcome relieves parties of significant burden of proof and alters the course of the litigation and, at the very least, simplifies the remaining issues. Appeal of discovery order does not materially advance litigation as all issues remain and outcome of appeal would have minimal, if any, impact on future proceedings.
- (5717) *DeGirolamo v. McIntosh Oil Co.*, 2013 WL 6840362 (N.D. Ohio 2013) – Partial summary judgment that does not dispose of all claims against one defendant is not final, appealable order. Court will consider interlocutory appeal under 28 USC Section 1292(b) only when the order involves a controlling issue of law; there are substantial grounds for differences of opinion; and an immediate appeal would materially advance ultimate termination of litigation. Order granting partial summary judgment based on “forward contracts” safe harbor defense to action to recover fraudulent and preferential transfers presented appeal of controlling issue of law, the effect of the safe harbor. There was no evidence of substantial grounds for differences of opinion where defendant in adversary proceeding cited a number of cases supporting Bankruptcy Court holding and Plaintiff failed to cite even a single case to support his position. Further, given issues remaining in Bankruptcy Court, allowing immediate appeal would merely delay, not advance, resolution of litigation where only one, narrow factual issue remained to be decided. Remand for trial would occur regardless of how appellate court resolved pending issues. Court resources would be better served by allowing Bankruptcy Court to complete litigation and have one consolidated appeal rather than multiple, piecemeal appeals.
- (5718) *Heitmanis v. Rayes*, 2013 WL 5719240 (E.D. Mi. 2013) – Whether district court may permit an appeal on a certified interlocutory order depends on whether (1) the order involves a controlling question of law, (2) a substantial ground for difference of opinion exists regarding the correctness of the decision, and (3) an immediate appeal may materially advance the ultimate termination of the litigation; and should be granted only sparingly. Question is controlling if there question is abstract question of law and not merely an issue of fact on which there is a substantial ground for difference of opinion and resolving the issue will materially affect outcome of litigation. Motion for leave to appeal denied where order involved mixed issues of law and fact, there was no showing that debt would be excluded from discharge under Section 523(a)(7) and there was no need for immediate appeal where claims based on Sections 523(a)(4) and (6) remained pending.
- (5719) *In re Noblit*, 2013 WL 4017283 (E.D. Tn. 2013) – Order granting partial summary judgment is not final order for purposes of appeal. Court will grant leave for interlocutory appeal only when appeal raises question of law on controlling issue and a substantial ground for

difference of opinion, and where appeal would materially advance the ultimate conclusion of the litigation. Bankruptcy Court's partial summary judgment on issue of equitable tolling did not rise to level of interlocutory appeal, even if appellant prevailed, as issue can be adequately addressed on final appeal.

- (5720) *Heavrin v. Schilling*, 2013 WL 3166175 (W.D. Ky. 2013) – Court would not grant leave for interlocutory appeal of order extending time to object to discharge. Extending deadline does not involve controlling question of law as to whether there is substantial ground for difference of opinion and immediate appeal would not materially advance resolution of case.
- (5721) *In re Nettles*, 2013 WL 1748453 (E.D. Mi. 2013) – Order awarding interim fees is not appealable final order. Interim fees are subject to further review and adjustment when considering final fee application. Only order on final fee application is final and appealable. Debtor failed to demonstrate any basis for interlocutory appeal. Attorney expressly stated that he would be filing additional, final application. Issue on appeal is not one of controlling law, but involves Bankruptcy Court's exercise of discretion in determining fees. Immediate appeal would have no impact on case administration as debtor was in the middle of a confirmed Chapter 13 case and outcome of appeal would not in any way impact on the status of the case. Denying leave to appeal would not waste judicial resources, as Court can reconsider interim fees in connection with final application. Denying leave to appeal would further efficient administration of case as it is likely that debtor would appeal interim order and appeal again from any further or final fee application orders.
- (5722) *In re Graves*, 2012 WL 5509476 (E.D. Mi. 2012) – 28 USC Section 158(a)(3) allows appellate court discretion to hear appeal of interlocutory order where order on appeal involves controlling question of law as to which there is substantial ground for difference of opinion; an immediate appeal may materially advance the ultimate termination of litigation; and denying leave to appeal would result in wasted litigation and expense. Court order denying Motion to Dismiss Adversary Complaint failed to meet standard for interlocutory appeal. Motion to Dismiss claimed that Bankruptcy court lacked jurisdiction to hear actions to recover fraudulent transfers based on *Stern*. Court concluded that even if *Stern* precluded entry of Final Judgment by Bankruptcy Court, that did not deprive Bankruptcy Court of authority to hear matter up to entry of final judgment. As such, there was no material difference of opinion as to controlling law on jurisdiction of bankruptcy court. Immediate appeal would also not advance resolution of adversaries and would not avoid waste of judicial resources. Regardless of whether action proceeds in bankruptcy court or district court, it will proceed, and dismissing and requiring plaintiff to start over in another forum would be inefficient.
- (5723) *GATX Corp. v. Addington*, 2012 WL 4886942 (E.D. Ky. 2012) – Federal Rule of Civil Procedure 54 allows court to enter final judgment against fewer than all parties or on fewer than all claims where the Final Judgment would involve one or more but fewer than all claims; and whether there is a just reason for delay in entering the Judgment. Order that dismissed with prejudice claims against 2 defendants while leaving remaining claims against other defendants pending meets first requirement. To determine whether reason for delay exists, court will consider (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. However, there was “just reasons” for delaying entry of the Final Judgment and any appeal. Unadjudicated claims bore strong legal and factual basis to adjudicated claims. Claims arose out of same alleged fraudulent transfers and were brought against three alleged transferees. Dismissal order went to two of the transferees, but same cause of action, on same factual predicate remained as to third transferee. Need for appellate review could be obviated by outcome of action against remaining defendant, if court concluded that not fraudulent transfer occurred. Although nature of specific issue on appeal did not involve remaining defendant, such that there was no risk that the appellate court could have to decide the same issue again, and the parties seeking to appeal had not filed counterclaims, mere delay in opportunity to appeal did not warrant immediate entry of final judgment under circumstances of case.
- (5724) *Bowers v. Banks*, 2012 WL 4739100 (Bankr. E.D. Tn. 2012) – Generally, order granting absolute or qualified immunity is not immediately appealable absent a Rule 54 certification. Rule 54 certification requires two findings: the order must expressly direct entry of final judgment as to one or more but fewer than all of the claims or parties; and there must be no just reason to delay appellate review. Certification is vested in sound discretion of court issuing order. Court should consider (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counter-claim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like. Court would certify appeal where relationship between concluded and pending claims as claims remained against counsel for Trustee for services performed while counsel was counsel for Debtor. Further proceedings will not moot the need for the appeal as the outcome of the remaining claims will not affect the liability of defendant for claims as to which immunity applied. Certification could avoid duplicate appeals and certification may allow District Court to more efficiently review issues given that District Court is already considering same issues in related appeals. Instant issue was one piece of highly complex and interwoven set of adversary proceedings and motions, many of which were also on appeal, such that by certifying appeal court may be able to consolidate appeals and further judicial efficiency.
- (5725) *Anderson v. Banks*, 2012 WL 4739100 (Bankr. E.D. Tn. 2012) – Generally, order granting absolute or qualified immunity is not immediately appealable absent a Rule 54 certification. Rule 54 certification requires two findings: the order must expressly direct entry of final judgment as to one or more but fewer than all of the claims or parties; and there must be no just reason to delay appellate review. Certification is vested in sound discretion of court issuing order. Court should consider (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of

a claim or counter-claim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like. Court would certify appeal where relationship between concluded and pending claims as claims remained against counsel for Trustee for services performed while counsel was counsel for Debtor. Further proceedings will not moot the need for the appeal as the outcome of the remaining claims will not affect the liability of defendant for claims as to which immunity applied. Certification could avoid duplicate appeals and certification may allow District Court to more efficiently review issues given that District Court is already considering same issues in related appeals. Instant issue was one piece of highly complex and interwoven set of adversary proceedings and motions, many of which were also on appeal, such that by certifying appeal court may be able to consolidate appeals and further judicial efficiency.

- (5726) *Bellanti v. Land Escape Outdoor Maintenance, LLC*, 2012 WL 3237933 (E.D. Mi. 2012) – Order granting relief under Rule 60 from Order Dismissing Adversary Proceeding is appealable interlocutory order. Although order vacating dismissal undoubtedly contemplates further judicial involvement and does not terminate judicial labor, concept of finality for purposes of appeal is considered in more pragmatic and less technical way than most other contexts. Even if considered a non-final order, Rule 8003 allows court to grant leave to appeal if a notice of appeal was timely filed. Appellant moved at oral argument for leave to appeal and appellee did not object to request.
- (5727) *McKinstry v. Sergeant*, 2012 WL 3731304 (E.D. Ky. 2012) – Appeal allowed from interlocutory order only where the appeal presents a controlling issue of law where there exists substantial grounds for difference of opinion, where immediate resolution may materially advance ultimate conclusion of litigation. A substantial ground for disagreement includes a difference of opinion between district courts within the circuit, a circuit split where the controlling circuit court has not ruled, precedent that does not substantially guide the Court’s decision, or a novel and difficult question of first impression. Party seeking to appeal must request certification from court issuing opinion. If the court certifies the case to the appellate court, then the appellate court can elect to accept or reject certification in its discretion. Request for certification must normally be made within 10 days of entry of order. However, Rules do not prohibit court from certifying order after the ten day period expires. In that case, the lower court must merely amend the prior order or add the request for certification. Request for certification made 28 days after entry was not unreasonable delay and non-moving party could not demonstrate any prejudice from delay. Court would deny request for certification of ruling on Plaintiff’s entitlement to jury trial where there was no substantial question. Action brought against liquidating trustee of corporate debtor against officers and directors could have historically been brought as action at law for negligence or for breach of fiduciary duty in equity; and remedy includes concurrent equitable and legal relief in the form of money damages. Action to recover money damages within 7th amendment protection of right to jury trial. Filing bankruptcy does not constitute a blanket waiver by debtor of right to jury trial. Debtor waives jury trial on claims where resolution is part of the process of disallowance of claims. Claims that are not involved in the claim resolution process, such as claims by debtor against former officers and directors, are not removed from right to jury trial.
- (5728) *Gold v. Bandman*, 2012 WL 2160968 (E.D. Mi. 2012) – Order denying Motion to dismiss based on improper venue is not final, appealable order. Although Appellant did not file separate Motion for Leave to appeal, under Rule 8003 appellate court can treat notice of appeal itself as request for leave to appeal. District Court’s issuance of a scheduling order is ministerial task and does not constitute order authorizing interlocutory appeal. Appellant failed to demonstrate any substantial grounds to overturn Bankruptcy Court Order. Bankruptcy Court’s conclusion that 28 USC Section 1409(b) does not apply to avoidance actions because those arise under Title 11 with venue being appropriate in district where case is pending; rather than action arising in or related to Title 11 where venue is appropriate only in the district court where the defendant resides. Although there was split of authority on the issue at the Bankruptcy Court level, the majority of decisions were consistent with that reached by Bankruptcy Court. Further, immediate appeal would not materially advance the litigation but would only delay litigation and increase costs without reaching ultimate issue as to whether Trustee could recover allegedly fraudulent transfers.
- (5729) *Chrysler Group, LLC v. South Holland Dodge, Inc.*, 2012 WL 1903884 (E.D. Mi. 2012) – 28 USC Section 1292 allows court to certify non-final order for interlocutory appeal where the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Court then has discretion to certify or not certify the order for appeal and is not required to certify even if standards of Section 1292 are otherwise met. Section 1292 is to be used sparingly and only in exceptional cases. Under Sixth Circuit law, ‘substantial grounds for difference of opinion’ exist only when there is conflicting authority on an issue. Although question to be appealed involving enforceability of contractual provision for arbitration was controlling question of law, appellant did not identify a single decision by any court that reached a conclusion contrary to the conclusion in the Order sought to be appealed, precluding finding of “substantial ground for difference of opinion”. Further, although the issues were issues of first impression, the issues were not difficult and turned on provisions of the Federal Arbitration Act and claims of pre-emption of the Act. Immediate appeal also would not materially advance outcome of litigation, where case had already been pending for several years and Court had ability to enter expedited scheduling order to allow action to conclude in short order.
- (5730) *Official Committee of Unsecured Creditors v. City of Pritchard, Alabama*, 2011 WL 2383984 (S.D. Al. 2011) – Order authorizing compensation to creditors committee in Chapter 9 proceeding not subject to interlocutory appeal. Although the issue presented a question of controlling law for which there was a substantial difference of opinion based on conflict between various sections of the bankruptcy Code, Resolution of appeal would not necessarily advance the ultimate termination of the Chapter 9 proceeding.
- (5731) *Mecca-Tech, Inc. v. Lange*, 2011 WL 3847122 (W.D. Mi. 2011) – Order denying Motion for Summary Judgment is non-final Order. Court will authorize interlocutory appeal only where (1) question is one of law; (2) resolution of question is dispositive of underlying action; (3) there is a substantial ground for difference of opinion respecting correctness of decision; and (4) immediate appeal would materially advance ultimate termination of litigation. Bankruptcy Judge’s conclusion that matters within scope of request for admissions may be beyond the permitted scope of Rule 7036 was not strict question of law. Bankruptcy Court’s refusal to follow prior

District Court decision on same issue of law was not subject to interlocutory appeal. Although binding nature of District Court decision is question of law on which there is substantial split of authority, outcome would not necessarily be controlling because, if Court determines that District Court decisions are not binding authority, interlocutory appeal would do nothing to bring matter to resolution.

- (5732) *Murawski v. Campbell*, 2011 WL 768644 (E.D. Mi. 2011) – Court may permit an interlocutory appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion exists regarding the correctness of the decision; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. Motion to appeal denial of summary judgment on one count of multi-count complaint did not demonstrate substantial difference of opinion regarding correctness of underlying decision and appeal at this stage would not materially advance resolution of litigation where there were 2 remaining counts that still needed to be adjudicated.
- (5733) *IRS v. Hayes*, 2011 WL 2490945 (E.D. Mi. 2011) – Order denying Motion to Dismiss Adversary Complaint is not final, appealable order. District court may hear an interlocutory appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion exists regarding the correctness of the decision; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. Interlocutory appeal denied where immediate appeal would not materially advance ultimate termination of litigation and would instead prolong litigation. Debtor's tax liability, if any, ultimately would have to be determined either by the Bankruptcy Court or the District Court even if the adversary proceeding is dismissed. Judicial economy is furthered by allowing adversary to proceed.
- (5734) *BAC Home Loans Servicing v. Cuong*, 2011 WL 1706615 (N.D. Ohio 2011) – Court would not entertain interlocutory appeal of order that falls within the inherent case management powers of Bankruptcy Court. Creditor filed pleadings that incorrectly named the creditor holding the claim, which has potential to jeopardize bankruptcy case. Bankruptcy Court wanted to assure itself of accuracy of future filings by requiring creditor to take steps to ensure that accurate information regarding identity of lenders and servicers is properly provided; and to educate employees as to these issues.
- (5735) *BAC Home Loans Servicing, L.P. v. McDermott*, 2011 WL 1257209 (N.D. Ohio 2011) – Court can grant discretionary review of interlocutory order where (1) question is one of law; (2) question of law is controlling; (3) there is substantial difference of opinion respecting the correctness of the order; and immediate appeal would materially advance ultimate termination of the litigation. Interlocutory appeals are to be sparing granted and only in the exceptional case. Order Granting Motion for Rule 2004 Exam is not reviewable interlocutory order. Questions presented are not pure questions of law and granting immediate review would not materially advance termination of litigation.
- (5736) *In re Donovan*, 2011 WL 1257965 (N.D. Ohio 2011) – Court can grant discretionary review of interlocutory order where (1) question is one of law; (2) question of law is controlling; (3) there is substantial difference of opinion respecting the correctness of the order; and immediate appeal would materially advance ultimate termination of the litigation. Interlocutory appeals are to be sparing granted and only in the exceptional case. Order Granting Motion for Rule 2004 Exam is not reviewable interlocutory order. Questions presented are not pure questions of law and granting immediate review would not materially advance termination of litigation.
- (5737) *In re Gray*, 447 BR 524 (E.D. Mi. 2011) – Court can grant discretionary review of interlocutory order where (1) question is one of law; (2) question of law is controlling; (3) there is substantial difference of opinion respecting the correctness of the order; and immediate appeal would materially advance ultimate termination of the litigation. Interlocutory appeals are to be sparing granted and only in the exceptional case. Order Granting Motion for Rule 2004 Exam is not reviewable interlocutory order. Questions presented are not pure questions of law and granting immediate review would not materially advance termination of litigation.
- (5738) *Probuild Company, LLC. V. Doria*, Case No. 10-11914 (E.D. Mi. 2010) – Interlocutory appeals are permitted only when (1) the order involves a controlling issue of law; (2) there is a substantial ground for difference of opinion; and (3) immediate appeal may materially advance termination of litigation. Substantial ground for difference of opinion requires showing that the issue is of first impression and involves more than just a strong disagreement between the parties. Adversary Defendant's request for interlocutory appeal of Order denying Motion to Dismiss Adversary based on alleged untimely filing of complaint denied where 60-day deadline to file adversary fell on weekend or legal holiday and adversary was filed on first business day thereafter.
- (5739) *Lewis v. Negri Bossi USA, Inc.*, Case Nos. 09-13148 and 09-13149 (E.D. Mi. 2009) – In deciding whether to exercise jurisdiction over appeal of interlocutory order, courts typically consider (1) whether the appeal involves a question of law; (2) whether the resolution of that question controls the outcome of the case; (3) whether there exist substantial grounds for differences of opinion about the question; and (4) whether an immediate appeal would materially advance the ultimate termination of the litigation. Lower Court granted partial summary judgment and, based on that summary judgment, enjoined Defendant from certain action. Defendant has appealed the injunction as a matter of right and seeks to appeal the partial summary judgment on which the injunction is based. Reversal of the summary judgment would mandate vacating the injunction. Simultaneous appeals will materially advance the ultimate termination of the litigation and immediate appeal of the summary judgment is appropriate because the appeal presents controlling questions of law.
- (5740) *In re Carmona*, 2009 WL 2058587 (E.D. Mi. 2009) – District Court has jurisdiction to hear bankruptcy appeals of interlocutory orders and decrees. District Court authorized under 28 USC Section 158(a)(3) and 28 USC Section 1292(b) to accept appeal of interlocutory order where order involves a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation.
- (5741) *Woosley v. Woosley*, 2009 WL 3064791 (Bankr. M.D. Tn. 2009) – In considering whether to certify an interlocutory appeal the Bankruptcy Court must consider whether this is a final judgment as to an individual claim in a multiple claim case, and whether there is

no just reason for delay. Where multiple claims share a common factual background or arise out of a single transaction, they should be considered a single claim even though different theories of liability may have been asserted and neither claim will be final until both have been decided. To determine whether there is “just reason” for delaying the appeal, the Court must consider (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. A complaint that sought to declare a debt to be non-dischargeable under Section 523(a)(5), (a)(15) and (a)(2)(A), although involving the same damages, require proof of distinct elements, as does that portion of the Complaint that seeks to deny a discharge under Section 727. Allowing an interlocutory appeal of the Court’s Order finding the debt to be non-dischargeable is in the best interest of judicial economy where the Plaintiff won on summary judgment, and a trial on the remaining issues would require potentially unnecessary litigation and expense that will neither increase nor decrease the amount of the Plaintiff’s claim. If the Summary Judgment is affirmed on appeal, the other issues will become moot and no further litigation will be necessary. If this Court’s Summary Judgment is reversed on appeal, the Court will be able to hold one trial that would address all of the Plaintiff’s claims then remaining.

13.20 Default Judgment

- (5742) *Sharma v. Salcido*, Case No. 12-1302 (9th Cir. BAP 2013) – Party is not required to seek relief from default judgment under Rule 60 prior to appealing where appellant participated in the action prior to entry of default or where appeal raises new factual issues. Given Appellant’s extensive participation at the trial level, remanding case to trial court would not produce any additional information and would just return case to appellate court in same posture as it currently sat.

13.21 Particular Orders Appealable – Order Denying Confirmation

- (5743) *Mort Ranta v. Gorman*, 2013 WL 3286252 (4th Cir. 2013) – Order denying confirmation of Chapter 13 plan is final, appealable order, even where Chapter 13 case is not dismissed.

13.22 Particular Orders Appealable – Order Confirming Plan

- (5744) *McIntosh v. LaBarge*, Case No. 12-6070 (8th Cir. BAP 2013) – Order denying confirmation of Chapter 13 plan is non-final, non-appealable order. However, Order confirming plan over objection of Debtor is final and appealable. Debtor filed a plan and court denied confirmation. Debtor amended plan to leave out provision that Court found objectionable. Debtor then objected to debtor’s own plan which was then confirmed over debtor’s objection. Confirmation order was final and debtor had standing to seek appeal.
- (5745) *Bosch v. First National Bank*, Case No. 12-20135 (5th Cir. 2012) – Order Confirming Plan is final, appealable order. To be “final” for appellate purposes, Order must only constitute a final determination of the rights of the parties to secure the relief they seek, or dispose of a discrete dispute within the larger bankruptcy case.

13.23 Particular Orders Appealable – Order Granting Stay Relief

- (5746) *Bosch v. Frost National Bank*, Fed. Appx. 463 (5th Cir. 2012) – Order Modifying Stay is final, appealable order. To be “final” for appellate purposes, Order must only constitute a final determination of the rights of the parties to secure the relief they seek, or dispose of a discrete dispute within the larger bankruptcy case.
- (5747) *In re Gundrum*, 2014 WL 1664280 (Bankr. S.D. Ohio 2014) – In Sixth Circuit, it is well settled that lifting of stay by bankruptcy court is final order for appellate review.
- (5748) *Mentag v. GMAC Mortgage, LLC*, Case No. 09-15012 (E.D. Mi. 2010) – Order Lifting Stay is “final order” for purposes of appellate jurisdiction.

13.24 Particular Orders Appealable – Order Dismissing Adversary Proceeding

- (5749) *Rogan v. Litton Loan Servicing, LP*, 2011 WL 4445651 (6th Cir. BAP 2011) – Bankruptcy court order dismissing an adversary complaint for failure to state claim upon which relief may be granted, or on motion for judgment on the pleadings, is a “final,” appealable order.

13.25 Particular Orders Appealable – Claims Resolutions

- (5750) *Miller v. Lim*, 2014 WL 1922634 (E.D. Mi. 2014) – Order that approves settlement that disposes of claims by largest creditors is final appealable order.
- (5751) *American Express Bank v. Askenazer*, 418 BR 495 (1st Cir. BAP 2009) – Order allowing or disallowing Claim is final order for purposes of appeal. Order denying trustee’s request for fees is also a final order for purposes of appeal.

13.26 Particular Orders Appealable – Sanctions

- (5752) *Budzynski v. United States*, 2012 WL 1392343 (E.D. Mi. 2012) – Order imposing sanctions under Rule 9011 is final, appealable order. Order concludes the judicial proceedings as to the Rule 9011 Motion.
- (5753) *Cappuccilli v. Lewis*, 2010 WL 2870668 (E.D. Mi. 2010) - Order holding party in contempt but not imposing sanctions does not become

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final and appealable order until entry of order imposing sanctions. Order of Contempt entered February 18 did not impose sanctions. April 12 Order that imposed sanctions was final appealable order. Notice of Appeal timely filed April 26 properly appealed both initial finding of contempt and imposition of sanctions.

13.27 Particular Orders Not Appealable – Sanctions

- (5754) *Fernanders v. Wells Fargo Dealer Services*, 2015 WL 4430224 (E.D. Mi. 2015) – Order denying debtor’s motion for sanctions for alleged misrepresentation by creditor of value of collateral for purposes of obtaining stay relief was non-final, non-appealable order. Order did not end any portion of case on merits.

13.28 Order Reversing Prior Order

- (5755) *Buckeye Retirement Co. v. Swegan*, 555 F.3d 510 (6th Cir. 2009) – Bankruptcy Appellate Panel’s reversal of summary judgment in favor of Debtor in action to deny a discharge under section 727 is not a final, appealable order. BAP’s decision to remand for further proceedings is not “final” and, therefore, the Sixth Circuit lacks appellate jurisdiction. Reversal of a summary judgment contemplates further fact-finding by the bankruptcy Court.
- (5756) *Settembre v. Fidelity & Guaranty Life Insurance Co.*, 552 F.3d 438 (6th Cir. 2009) –United States District Court’s reversal of summary judgment in creditors adversary proceeding objecting to Debtors discharge under section 727(a)(3) is not “final”. “[A] decision by the district Court on appeal remanding the bankruptcy Court’s decision for further proceedings in a bankruptcy Court is not final, and so is not appealable to this Court, unless the further proceedings contemplated her on a purely ministerial character.” Proceedings to determine Debtors entitlement to a discharge are not ministerial, but instead concern the merits of the claim.
- (5757) *Kraus Anderson Capital, Inc. v. Bradley*, 2014 WL 6919580 (6th Cir. 2014) – BAP Order reversing Bankruptcy Court finding that debt is not excepted from discharge is not reviewable as it is non-final. BAP concluded that debts were excepted from discharge and remanded case to bankruptcy court “for a determination of the amount of damages that Lender suffered ... and for entry of judgment in favor of Lender.” Order remanding case required bankruptcy court to undertake substantive actions after remand beyond actions that would be purely ministerial in nature, such that order is not final or appealable.
- (5758) *Clear Sky Properties, LLC v. Roussell*, 769 F.3d 574 (8th Cir. 2014) – District Court Order reversing bankruptcy court’s determination of dischargeability of state court damage award is not appealable where District Court remanded case for further proceedings on whether attorney fees awarded were non-dischargeable. Bankruptcy court concluded that attorney fees were dischargeable as based on contract. District Court reversed, noting that attorney fees incurred in connection with debt determined to be non-dischargeable may themselves be non-dischargeable and remanded for further proceedings to allow Bankruptcy Court to determine whether attorney fees fell within provision of contract sufficient to make fees non-dischargeable. Further proceedings were not merely ministerial but involved substantive issues of law and fact and required additional hearings, such that District Court Order is non-final and non-appealable.
- (5759) *Ernst v. Michigan Educational Credit Union*, 2014 WL 1246368 (E.D. Mi. 2014) – Order vacating prior order disallowing claim is not final, reviewable order. Order was not “final” as order merely reinstated claim subject to debtor’s right to raise objections to allowance, and did not actually allow the claim.
- (5760) *Chambers v. Sweet*, Case No. 12-14111 (E.D. Mi. 2013) – Order denying Motion to Dismiss is non-final order. Court will allow appeal of non-final order only where order involves controlling question of law; a substantial ground for difference of opinion exists regarding correctness of decision; and immediate appeal may materially advance ultimate termination of litigation. Denial of Motion to Dismiss based on alleged lack of subject matter jurisdiction by bankruptcy court already resolved by prior order withdrawing reference for purposes of trial but allowing matter to remain at bankruptcy court for pre-trial proceedings. District Court will conduct ultimate trial and has subject matter jurisdiction for purposes of entering final judgment.
- (5761) *CIT Small Business Lending Corp. v. Kendrick*, 558 F.3d 482 (6th Cir. 2009) – Bankruptcy Appellate Panel’s reversal of summary judgment in favor of defendant in a preference action is not a final, appealable order. Determination of whether the elements of a preference action were met is not “final” order as Order does not terminate judicial actions. “[A] decision by the district Court on appeal remanding the bankruptcy Court’s decision for further proceedings in a bankruptcy Court is not final, and so is not appealable to this Court, unless the further proceedings contemplated are of a purely ministerial character. ... Proceedings to prove the elements of a preference action are not ministerial, but instead concern the merits of the claim.”

13.29 Particular Orders Not Appealable – Order Denying Motion to Dismiss

- (5762) *In re Graves*, 2012 WL 5509476 (E.D. Mi. 2012) – Order denying Motion to Dismiss Adversary Complaint is not final, appealable order. Although “final” in bankruptcy cases is construed with a view toward functionality, such that the order must finally dispose of a discrete dispute within the larger case, an Order denying a Motion to Dismiss does not dispose of any issue and does not terminate any judicial labor.
- (5763) *Gold v. Bandman*, 2012 WL 2160968 (E.D. Mi. 2012) – Order denying Motion to dismiss based on improper venue is not final, appealable order.

13.30 Particular Orders Not Appealable – Order Denying Motion to Withdraw Reference

- (5764) *Schwab Industries, Inc. v. Huntington National Bank*, 2015 WL 2412317 (N.D. Ohio 2015) – Bankruptcy Court Order denying Motion to Withdraw Reference and to Remand to State Court is non-final non-appealable order. Court would not authorize interlocutory appeal.

Interlocutory appeal appropriate only where case presents controlling question of law as to which there is a substantial ground for difference of opinion such that immediate appeal may materially advance the ultimate termination of litigation. Question of law is controlling if it materially affects outcome of case, but factual determinations and determination with court discretion are not controlling questions of law. Bankruptcy Court Order denying Motion to Withdraw Reference did not present any controlling question of law. Although court jurisdiction is controlling issue of law, whether Bankruptcy Court has “related to” jurisdiction is inherently factual question regarding relationship between action and bankruptcy case. Appeal also would not materially advance case as only issue was whether action would proceed in Bankruptcy Court or State Court, neither of which would “terminate” the action.

- (5765) *Smith v. Bluegrass Mortgage Services, Inc.*, Case No. 10-5785 (6th Cir. 2012) – District Court Order denying Motion to Withdraw Reference is non-final, non-appealable order.

13.31 Particular Orders Not Appealable – Order Setting Aside Default

- (5766) *Rogan v. Litton Loan Servicing, LP*, 2011 WL 4445651 (6th Cir. BAP 2011) – Bankruptcy court order granting motion to set aside default judgment is interlocutory order, reviewable after entry of final judgment in underlying adversary proceeding.

13.32 Particular Orders Not Appealable – Order Determining Liability Only

- (5767) *LaBoy v. Doral Mortgage Corp.*, 2011 WL 2119316 (1st Cir. 2011) – Summary Judgment which determined liability but did not reach issue of damages is not final judgment for appeal purposes.
- (5768) *Cappuccilli v. Lewis*, 2010 WL 2870668 (E.D. Mi. 2010) - Order holding party in contempt but not imposing sanctions does not become final and appealable order until entry of order imposing sanctions. Order of Contempt entered February 18 did not impose sanctions. April 12 Order that imposed sanctions was final appealable order. Notice of Appeal timely filed April 26 properly appealed both initial finding of contempt and imposition of sanctions.
- (5769) *French v. Shapiro*, Case No. 10-11333 (E.D. Mi. 2011) – Order adjudicating party to be in civil contempt for violation of Court’s stay orders is not final order for purposes of appeal. Order holding non-party in contempt is final order for purposes of appeal. Order of civil contempt entered as part of ongoing adversary proceeding would not be appealable until final disposition of adversary proceeding as a whole.
- (5770) *Mashburn v. Scrivner*, 2010 WL 1220730 (10th Cir. 2010) - Appeal of partial final judgment revoking discharge is not appealable where Trustee had filed Motion to Alter or Amend Judgment as to second count which sought turnover of property from debtors. Appeal was premature as Judgment which Debtor sought to appeal was not yet final. Timely Motion to Alter or Amend Judgment under Rule 59 operates to suspend finality of entire Judgment, even if Motion only directed to one part of the Judgment.

13.33 Particular Orders Not Appealable – Order Denying Confirmation of Plan

- (5771) *Bullard v. Blue Hills Bank*, ____ U.S. ____, ____ S.Ct. ____ (2015) – Order denying confirmation of Chapter 13 Plan is interlocutory appeal that is not appealable as a matter of right as long as debtor has opportunity to propose another plan. Any appeal would be subject to rules governing interlocutory appeal requiring motion for leave to appeal to district court or motion for certification directly to circuit court.
- (5772) *Bullard v. Hyde Park Savings Bank*, 2014 WL 1910868 (1st Cir. 2014) – Order denying confirmation of Chapter 13 plan is non-final, non-appealable order as long as debtor has opportunity to file amended plan. Order that denied confirmation and allowed 30 days to file amended plan was not final determination of any issues in the case.
- (5773) *Sparks v. HSBC Auto Finance*, 2008 WL 4694795 (6th Cir. 2008) – Order denying confirmation of Chapter 13 plan without also dismissing the case is not a final, appealed the order. Appellate Court lacks jurisdiction to review order that denies confirmation and orders Debtor to file amended plan.

13.34 Particular Orders Not Appealable – Partial Default Judgment

- (5774) *Pichler v. Mason*, Case No. 14-13451 (E.D. Mi. 2015) – Default judgment is not final or appealable where appellant timely filed motion in lower court to set aside judgment and judgment resolved only part, not all, of the matters in the adversary proceeding.

13.35 Particular Orders Not Appealable – Other Orders

- (5775) *Mason v. Gentry*, Case No. 15-11531 (E.D. Mi. 2015) – Order denying motion for summary judgment is non-final, non-appealable order.
- (5776) *In re Gilbert*, Case No. 15-11738 (E.D. Mi. 2015) – Bankruptcy Court Order conditionally dissolving order to show cause was non-final and non-appealable where bankruptcy case was still pending, although deadline by which debtor was to pay filing fee or case would be dismissed had passed. Order did not end any particular phase of bankruptcy case as order was, by its terms, conditional. Dispute regarding payment of fees was not finally resolved where case had not been dismissed and debtor could still pay filing fee and court could not predict how debtor would proceed.
- (5777) *Official Committee of Unsecured Creditors v. Anderson Senior Living Property, LLC*, Case No 09-8041 (6th Cir. BAP 2010) – Order denying Committee’s application to retain financial advisor is not final order for purposes of direct appeal. Court will grant discretionary review where order involves controlling issue of law as to which there is substantial ground for difference of opinion and immediate appeal may materially advance ultimate termination of litigation. Order denying retention of advisor does not meet standard for

interlocutory appeal.

- (5778) *K & B Capital, LLC v. Official Unsecured Creditors' Committee*, 2009 WL 1747834 (6th Cir. 2009) – Order substituting counsel for Committee of Unsecured Creditors over objection of one member of creditor's committee is not a "final order" over which the Court would have appellate jurisdiction. Order partially determining damages which expressly contemplated further hearings to determine whether certain of the damages awarded would ultimately be refunded to the creditor is not a final order as the order expressly contemplates further proceedings on the issue of damages. Order denying motion to withdraw a reference and have proceeding adjudicated in District Court is a non-final, non-appealable order.
- (5779) *Doucet v. Drydock Coal Co.*, 2009 WL 1687775 (6th Cir. BAP 2009) – Order denying Motion to Dismiss for lack of jurisdiction is not appealable. Order is final and appealable only when case is finally concluded and there are no matters pending before the Court. Order denying Motion to Dismiss by definition contemplates further judicial involvement.
- (5780) *Black Diamond Mining Co., LLC., v. Official Committee of Unsecured Creditors*, 400 BR 207 (6th Cir. BAP 2009) – Order denying Application for Retention of Counsel is non-final, non-appealable order.

E. Stay Pending Appeal

13.36 Jurisdiction to Enter Stay

- (5781) *In re Pertuset*, 2013 WL 7991693 (Bankr. S.D. Ohio 2013) – Rule 8005 provides that Motion for Stay Pending Appeal is to normally be brought in bankruptcy court although moving party can request stay directly from appellate court if movant can show why the relief was not obtained from the bankruptcy court in the first instance.
- (5782) *In re McInerney*, 2013 WL 1497297 (Bankr. E.D. Mi. 2013) – Rule 8005 allows bankruptcy court to suspend or order the continuation of proceedings in bankruptcy case or make any other appropriate order so as to protect the rights of the parties.
- (5783) *Global Technovations, Inc. v. Onkyo USA Corp.*, Case No. 03-5078 (Bankr. E.D. Mi. 2011) – Bankruptcy Court lacks authority to issue stay pending appeal of matter to 6th Circuit Court of Appeals. Stay of matter appealed to Sixth Circuit can be entered only by District Court that issued decision being appealed.
- (5784) *In re Scarborough*, 2010 WL 2893626 (3d Cir. 2010) – Court lacks jurisdiction to consider stay pending appeal where court does not have jurisdiction over appeal itself. Debtor appealed Bankruptcy Court decision to dismiss case. Debtor sought stay from Bankruptcy Court which denied Motion. Debtor then sought stay from District Court where appeal was pending, which also denied Motion. Debtor then requested stay from Third Circuit Court. Court dismissed Motion as Circuit Court did not have jurisdiction to rule in appeal pending before District Court.

13.37 Elements of Stay

- (5785) *In re Mauro*, 2015 WL 5304109 (E.D. Mi. 2015) – Bankruptcy Court correctly denied motion for stay where appellant failed to demonstrate any reasonable likelihood of success on merits. Provision of Member Agreement of LLC regarding transfer of debtor's membership interest did not apply where provision applied where member sought to retire, withdraw or leave. Trustee in bankruptcy acquired debtor's interest by stepping into shoes of debtor not involving retirement, withdrawal or leaving. Where Trustee then proposed sale of member interest, neither of remaining members attempted to exercise right of first refusal or to make any effort to determine whether debtor's bankruptcy filing, standing alone, triggered any rights under Membership Agreement.
- (5786) *New Products Corp. v. Tibble*, 2015 WL 5049474 (Bankr. W.D. Mi. 2015) – Stay pending appeal requires moving party to establish (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay, (3) the prospect that others will be harmed if the court grants the stay, and (4) the public interest in granting the stay. Appellant failed to demonstrate any likelihood of success on appeal of order shifting discovery costs to party requesting discovery pursuant to Rule 45. Movant also failed to demonstrate any irreparable harm. Order required to pay non-party costs of production. If order is reversed, Movant would be entitled to recover any funds paid to third party, an international banking giant that would easily be able to answer. Third party had already suffered great harm as a result of the breadth of the subpoenas and granting stay would only perpetuate that harm, and granting stay was not consistent with public interests.
- (5787) *Nurses' Registry and Home Health Corp. v. Burwell*, 2015 WL 4254002 (Bankr. E.D. Ky. 2015) – In deciding whether to grant a stay pending appeal, courts must consider four factors: (1) the likelihood that the party moving for stay will prevail on merits of appeal; (2) the likelihood that moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if court grants stay; and (4) the public interest in grant of stay. Federal government not entitled to stay of order enjoining government from suspending Medicare payments and permitting debtor to use cash collateral where government failed to demonstrate any likelihood of success on merits of appeal on government's contention that Bankruptcy court lacked jurisdiction over unexhausted Medicare Act dispute. Court is not required to defer to exhaustion of agency remedies where delay would mean that there would be no meaningful opportunity for judicial review. Had court waited for Medicare process to play out while Medicare continued to suspend payments, debtor would have become defunct and debtor never would have had opportunity to argue for turnover. Government also failed to demonstrate likelihood of success on merits of turnover action based on government's claim that section 542 cannot be used to compel turnover of disputed property. Section 542 requires any entity in possession of property that debtor can use, sell or lease to turnover property to the debtor, and nothing in Section 542 excludes "disputed" property. Any stay would irreparably harm not only the debtor but also the third parties to whom debtor provides medical services which are compensated through Medicare. Stay would cause debtor's business to fail immediately and would result in 1348 Medicare patients being immediately left with no medical care or other services provided by caregivers. Any harm to debtor

and third parties far outweighed any potential harm to government which, at worst, would be out the amount of money that it could not later recover if government prevailed in underlying False Claim action. Public interest also would not be served by stay as doing so would not only jeopardize health of patients but would also cause debtor to close with attendant loss of more than 200 jobs.

- (5788) *Taylor v. McDermott*, 2015 WL 4041355 (E.D. Mi. 2015) – Grant of stay pending appeal depends on (1) likelihood that party seeking stay will prevail on appeal; (2) likelihood that moving party will be irreparably harmed if no stay is imposed; (3) prospect that others will be injured if a stay is imposed; and (4) public interest in granting stay. Appellant contended that she had properly tendered payment as ordered by court by delivering to opposing party a piece of paper that purported to be “legal tender” issued by appellant as a “private bank” and contending that there was no such thing as “lawful money”. Appellant presented no chance of success on merits of appeal. Court did not err in imposing sanctions against appellant for failure to comply with court order.
- (5789) *In re Brown*, Case No. 14-48421 (Bankr. E.D. Mi. 2015) – Party seeking stay pending appeal must first apply to Bankruptcy Court and must show that appellant has likelihood of prevailing on merits; that moving party will be irreparably harmed absent stay; degree to which others may be harmed if a stay is granted; and that stay is consistent with public interest. Debtor lacked equity in property to which exemption could apply where value of property was substantially less than amount of secured claims. Fact that Chapter 7 Trustee later proposed to short-sell property with “carve out” of some of the proceeds for the benefit of the estate did not allow debtor to claim exemption in carve out as carve out did not exist on date of petition. Debtor’s appeal of order disallowing amended exemption in proceeds did not evidence any likelihood of success on merits given debtor’s admitted lack of equity in property. Carve out does not transform into equity simply because it is paid to the estate, where the secured lenders were entitled to receipt of all proceeds of sale but agreed to carve out for trustee’s sale. Debtor also failed to prove inadequate remedy, as monetary damages do not rise to irreparable harm. Grant of stay would harm both the estate and the second mortgage holder as first mortgage holder would likely foreclose and eliminate any payment to either the second mortgage or the estate.
- (5790) *McDermott v. Taylor*, Case No. 14-4124 (Bankr. E.D. Mi. 2015) – Court must consider likelihood that party seeking stay will prevail on appeal; likelihood that moving party will suffer irreparable harm if a stay is denied; prospect that others will be harmed if stay is imposed; and whether stay is consistent with public interest. Movant must show more than mere likelihood of prevailing on merits, and irreparable harm is that which is substantial, certain and immediate and is more than just money, time or energy necessary if stay is denied or that is theoretical or speculative. Appellant’s argument is premised on position that there is no lawful currency of the United States, a position that is frivolous and presents zero chance of success on appeal. Appellant’s argument that absent a stay, appellant will have to pay debtor \$2,000 is not irreparable harm but is merely the payment of money for which adequate remedies exist. Granting stay would further prejudice debtor who has already been waiting for payment for five months. Sanctions order was entered to protect public interest, and granting stay of that order pending appeal would be adverse to public interest.
- (5791) *In re Michigan Produce Haulers, Inc.*, 2015 WL 1275387 (Bankr. W.D. Mi. 2015) – Stay pending appeal under Rule 807 requires evidence that party seeking stay has likelihood of prevailing on appeal; that moving party will be irreparably harmed if a stay is not imposed; that imposing a stay will not unduly harm others; and that public interest supports imposing stay. Motion for stay pending appeal denied. Appeal was of Order of Court extending exclusivity for debtor to file plan. Debtor filed plan within initial exclusivity period and court extended only exclusivity for purposes of having confirmation hearing. Debtor requested extension within time permitted under Section 1112. Fact that debtor may seek to modify proposed plan to address objections does not cause modifications to be new plan filed outside exclusivity period. Movant failed to prove a likelihood of success. Creditor also could not prove irreparable harm, which is certain and immediate, not speculative or theoretical, such that harm has occurred in past and will occur again if no stay is imposed. Creditor’s argument that debtor’s plan could be confirmed without creditor having the opportunity to file competing plan was speculative and theoretical where court has not even begun to consider confirmation of plan and confirmation was far from foregone conclusion. Granting stay was unlikely to adversely affect third parties as stay would expire under extended exclusivity in less than 60 days, so granting of stay would not result in material harm as granting stay would cause exclusivity to end now rather than in 60 days. Public interest supports debtor’s right to file plan and to have that plan considered for confirmation as long as debtor acts in reasonable manner and reasonably diligently. Denying stay more consistent with public policy as doing so gives debtor opportunity to present and confirm plan.
- (5792) *Kentucky Employees Retirement Systems, v. Seven Counties Services, Inc.*, 2015 WL 474311 (W.D. Ky. 2015) – Motion for stay pending appeal is balancing test consists of four factors: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Appellant failed to demonstrate any likelihood of success on merits of appeal of order confirming plan where appeal raised question as to whether agreement between KERS and debtor was executory and subject to rejection where agreement was within scope of statutory framework and imposed significant duties on both parties. Appellant also failed to show irreparable harm, determined by the substantiality of the injury alleged; the likelihood of its occurrence; and adequacy of proof. Harm must be both certain and immediate, not speculative or theoretical. Where only injury is monetary loss, injury is not irreparable. Possibility that debtor will argue that confirmed plan is equitably moot not real or present where there has been no indication by debtor that intends to argue that and debtor has, in fact, acknowledged that equitable mootness would not apply in this case. Debtor would be harmed by stay as debtor would lose ability to retain employees and obtain necessary credit to fund operations that fund plan. Public interest also did not weigh in favor of stay, where appellant argued only a broad public interest in having statutes enforced, and evidence indicated that staying order would impede debtor’s ability to provide services to more than 30,000 individuals with disabilities.
- (5793) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Court has authority to enter stay pending appeal when there is likelihood that party seeking stay will prevail on appeal; that moving party will be irreparably harmed if no stay is entered; whether others will be harmed if a stay is entered; and whether there is public interest in granting stay. Appellant failed to meet burden where (a) order

being appealed was non-final, non-appealable interlocutory order; appellant did not file motion for leave to seek interlocutory appellate relief; and notice of appeal was filed after deadline for doing. District Court was almost certain to dismiss appeal precluding any finding by appellant of any likelihood of success.

- (5794) *Spirit SPE Portfolio 2007-1, LLC v. Paxos*, 2014 WL 5306666 (Bankr. N.D. Ohio 2014) – In evaluating motion for stay pending appeal, court must consider (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Motion for stay is moot where, during pendency of motion, Appellate Court dismissed appeal, as moving party could no longer show any likelihood of success on merits.
- (5795) *Williams v. Wayne County Treasurer*, Case No. 14-11844 (E.D. Mi. 2014) – Stay pending appeal requires court to consider likelihood of success on merits; whether stay will prevent irreparable harm to the party seeking the stay; whether the injunction would harm others; and whether the public interest would be served. Where appellate court already determined that debtor could not prevail in merits of appeal of Bankruptcy Court valuation order, request for stay pending appeal of that order would be denied.
- (5796) *Goldstein, Bershad & Fried v. Ruskin*, 2014 WL 3565651 (E.D. Mi. 2014) – Party seeking stay pending appeal must show (1) likelihood of success on merits; (2) party may suffer irreparable harm absent a stay; (3) other interested parties will not suffer substantial harm if a stay is imposed; and (4) no harm would be done to the public interests if a stay is imposed. Likelihood of success does not require overwhelming probability of success but must be more than “mere possibility”. Appellant failed to show any likelihood of prevailing on appeal of order denying compensation to counsel given discretion afforded to bankruptcy court and bankruptcy court’s conclusion that the underlying petition itself was “extremely problematic”. Appellant also failed to show irreparable harm where only possible injury would be that Chapter 13 trustee will disburse funds on hand. Money damages, standing alone are not irreparable harm. Further, Trustee has already been instructed by bankruptcy court to hold funds pending further order of that court and there was no reason to believe trustee would violate this order.
- (5797) *Village Green I, LP v. Federal National Mortgage Assn*, 2014 WL 2589444 (W.D. Tn. 2014) – Motion for stay pending appeal requires balancing likelihood that party seeking stay will prevail on appeal; likelihood that moving party would be irreparably harmed absent a stay; prospect that others will be harmed if court grants stay; and public interest in granting stay. Irreparable harm requires court to evaluate substance of injury, likelihood of its occurrence, and adequacy of proof provided. Mere injuries in terms of money, time and energy are not enough, and possibility of adequate compensation or other corrective relief weighs against irreparable harm. Debtor demonstrated that order lifting stay and dismissing Chapter 11 case would cause irreparable harm, as only asset of debtor was apartment complex that had been noticed for foreclosure and loss of debtor’s single asset would deny debtor any meaningful opportunity for appellate review, and injury was certain and immediate given impending foreclosure sale. Creditor would not suffer any meaningful injury from delay as stay would only maintain status quo and Court can condition stay on terms including requirement that debtor continue to pay lender the principal and interest payments due under the note, so that the only impact of stay would be to delay foreclosure sale. Appeal presented real and unsettled questions about good faith and artificial impairment that were not previously addressed by Circuit court. Public interest did not weigh in favor of or against stay. Given uncertain issues involved, and importance of reorganizing when possible, public interest may be better served with orderly administration of Chapter 11 case.
- (5798) *Silagy v. Protz*, 2014 WL 1652426 (Bankr. N.D. Ohio 2014) – Movant must demonstrate likelihood of success on appeal; irreparable harm is stay is denied; that stay would not have disproportionate impact on other parties; and whether stay is in public interest. Likelihood of success on merits requires that court be convinced that court’s prior decision was erroneous and that appeal will result in different outcome. Court’s prior opinion explaining reasoning for decision did not evidence any reason to believe that prior decision was incorrect or that appellant had any meaningful chance on appeal. Movant could not demonstrate irreparable harm. Order required creditor to turn over to estate the debtor’s interest in retirement accounts. If decision is stayed, funds will be paid to debtor and subject to dissipation, while allowing order to remain in effect will preserve funds for estate if order is affirmed. Granting of stay would impose substantial risk on estate that funds may never be recoverable, while denying stay will only delay payment to debtor, such that debtor will not suffer irreparable harm if stay is denied and imposition of stay would cause substantial harm to the estate and creditors. Stay also not consistent with public interest, as public has interest in timely enforcement of court orders and in seeing that funds are paid to estate to pay creditors. Stay would only delay these important public policies. Motion for stay denied unless debtor posts Supersedeas bond representing value of debtor’s interest in retirement plan.
- (5799) *Baker v. Residential Funding Company, LLC*, 2014 WL 1600358 (E.D. Mi. 2014) – Stay of proceedings pending appeal requires movant to show that there is a likelihood of success on the merits of the appeal; that the moving party will suffer irreparable harm absent a stay; that the stay would not harm others; and that a stay is in the public interest. Court denied request for stay of order approving compromise. Approval of compromise is in discretion of court and appeared to be fair and equitable as there was substantial risk absent a settlement, the action would be decided adverse to the estate; and that even if the appeal were successful, the amount of the debt far exceeded value of property such that there was no benefit to estate. Settlement allowed estate to recover \$20,000 from mortgage holder and avoided litigation, with attendant costs, that most likely would have been unsuccessful. Party seeking stay could not demonstrate anything more than a “mere possibility” of success on appeal, far less than the “likelihood” required for stay.
- (5800) *In re Medlar*, 2014 WL 504782 (Bankr. N.D. Ohio 2014) – Factors to be considered in evaluating stay pending appeal are (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; likelihood that the party seeking the stay will be irreparably harmed absent a stay; the prospect that the other parties to the proceeding will be harmed if the court grants the stay; and the public interest in granting the stay. Motion for stay pending appeal of order lifting stay denied where it was unlikely that debtor could prevail on appeal. Bankruptcy court lifted stay to allow parties to litigate title to property in state court based on cause, including (1) Ohio

law governed parties' rights as to the property; (2) the Condominium Association already has a state court foreclosure judgment; and (3) the debtor's challenges to the foreclosure judgment are outside of the court's jurisdiction and are best addressed by the state court.

- (5801) *Michigan First Credit Union v. Smith*, 2013 WL 6139720 (Bankr. E.D. Mi. 2013) – Rule 8005 allows Bankruptcy Court to grant or deny stay pending appeal based on likelihood of appellant's success on merits of appeal; likelihood that moving party will be irreparably harmed if stay is not granted; prospect that others will be harmed if stay is granted; and public interest in granting stay. Probability of success required is proportionate to harm that moving will suffer if stay is denied. In determining harm, court will look to substantiality of injury alleged, likelihood of its occurrence, and adequacy of proof provided. Injury must be irreparable, not merely an injury in terms of money, time and energy necessarily expended if the stay is denied. Stay denied where it was very unlikely that district court would reverse; only injury alleged by movant is that without stay, plaintiff may attempt to execute on judgment, which does not constitute irreparable harm; stay would disproportionately harm plaintiff where plaintiff would be further delayed in collecting judgment that had already been long delayed by Chapter 7 filing and adversary proceedings; and the public interest did not support a debtor using the bankruptcy process to unduly delay creditors from collecting on non-dischargeable judgments.
- (5802) *Glassman, Edwards, Wyatt, Tuttle and Cox, P.C. v. Wade*, 2013 WL 5944091 (Bankr. W.D. Tn. 2013) – Court can enter stay pending appeal only if there is a valid appeal pending. Appeal of Order denying abstention and remand is non-final appeal over which appellate court lacks jurisdiction unless appellant seeks leave to appeal and leave is granted by the appellate court. As district court had not yet acted on request for interlocutory appeal, there was no valid appeal pending on which further proceedings could be stayed. Appellant must also prove likelihood that the party seeking the stay will prevail on the merits of the appeal; likelihood that the moving party will be irreparably harmed absent a stay; prospect that others will be harmed if the court grants the stay; and public interest will be advanced by granting the stay. Mere possibility of success is not sufficient. Appellant did not demonstrate likelihood of success on merits where actions based on Sections 523 and 727 were "overwhelmingly" core proceedings that are not subject to mandatory or discretionary abstention that there was virtually no chance that district court would reverse. Appellant could not demonstrate irreparable harm if stay is denied, as merits of case will have to be determined at some point in some court, and litigation against appellant would not end even if appellant prevails on appeal, as the only change will be the forum in which the matter is adjudicated. Stay may adversely affect Chapter 7 Trustee's ability to administer estate or do review and object to claims. Appeal presented no significant public interest as appeal was forum dispute.
- (5803) *In re Pertuset*, 2013 WL 7991693 (Bankr. S.D. Ohio 2013) – Stay pending appeal requires consideration of likelihood of success on merits of appeal; likelihood that moving party would be irreparably injured if the stay is not granted; prospect that others will be harmed if stay is granted; and public interest in granting or denying stay. Likelihood of success does not require high probability of success but must show, at a minimum, serious questions going to the merits of the case and more than just an assertion of expectation of success. Motion for stay did not evidence likelihood of success on merits where Motion merely reasserted same legal arguments that were considered by court in the first instance. Irreparable harm must be certain and immediate. Generally, resumption of collection activities alone is not irreparable harm. Debtor demonstrated risk of irreparable harm if order dismissing Chapter 12 case is not stayed, as debtors face imminent foreclosure of farm and repossession of farm equipment, where several creditors held judgments against debtors and there was a pending foreclosure action. Risk of loss of farm is beyond normal risk faced in collection activities, where money can be returned to debtor if dismissal were overturned. Stay would cause harm to creditors who would be further delayed in efforts to collect debts or to enforce judgments entered prior to commencement of bankruptcy case. Creditors have already faced substantial delay in receiving payment and debtor did not propose collateral or other surety bond to protect against harm resulting from additional delay. While court acknowledged that public policy did not favor dispossessing debtors from their assets, Court noted that debtors' conduct in Chapter 12 proceeding evidenced intent to delay and hinder creditors rather than a good faith effort to reorganize and provide fair repayment. Debtors were afforded two opportunities to promulgate confirmable plan and failed to do so. Public policy did not support stay under these circumstances.
- (5804) *In re McInerney*, 2013 WL 1497297 (Bankr. E.D. Mi. 2013) – Determination as to whether to enter stay pending appeal requires consideration of (1) likelihood that party seeking stay will prevail on appeal; (2) likelihood that moving party will be irreparably harmed absent stay; (3) harm that may be suffered by others if court grants stay; and (4) public interest in granting stay. Factors are not prerequisites but are interrelated considerations that must be balanced. Degree of likelihood of success is inversely proportional to amount of irreparable injury that moving party would suffer without the stay – the greater the harm, the lower the burden of showing likelihood of success. Debtor not likely to prevail on appeal of order converting case where Notice of Appeal designated only the Order Denying Reconsideration and did not designate the Order of Conversion as an order on appeal. Even if Appellate Court construed Notice of Appeal as including both the Dismissal Order and the Order Denying Rehearing, the standard on appeal is abuse of discretion, which is very high burden that Debtor was not likely to achieve given bankruptcy court's detailed order converting the case in the first instance. Debtor failed to demonstrate any irreparable harm if no stay is implemented. Debtor's only argument was that if the case proceeds in Chapter 7, the trustee may compromise claims for less than their true value. Debtor's arguments were mere speculation, particularly where Debtor had lost at state court on the alleged claim prior to commencement of bankruptcy case, and there was no indication that the Chapter 7 Trustee would compromise the claim in any way. Stay denied.
- (5805) *Asaro v. McClarty*, 2012 WL 4903488 (E.D. Mi. 2012) – Whether to issue stay pending appeal depends on: 1) whether applicant has demonstrated a likelihood of success on the merits; 2) whether applicant will be irreparably injured absent a stay; 3) whether issuance of stay will substantially injure other interested parties; and 4) whether public interest would be served by issuing stay. Bankruptcy Court entered order compelling debtors to cooperate with the Trustee in the sale and disposition of property of the estate. On appeal, debtors failed to demonstrate any likely success on merits, as court did not order sale of property. Debtors did not demonstrate any irreparable injury would result as trustee has not sold, nor attempted to sell, property or assets. Other parties could be injured by delay if trustee is

unable to expeditiously market property as delay creates risk of foreclosure or devaluation of property. Public interest would not be served if debtors were able to continue to refuse to cooperate with or assist trustee.

- (5806) *In re Holstine*, 458 BR 392 (Bankr. E.D. MI. 2011) – Stay pending appeal requires demonstration of strong showing of likelihood of success on appeal; irreparable harm if proceedings are not stayed; whether issuance of stay would cause substantial harm to others including appellee; and whether public interest would be served by stay. Appellant did not demonstrate likelihood of success on merits of appeal from order overruling objection to exemption for workers compensation payments. Workers Compensation award that debtor had received and deposited into bank account was traceable to payment in compensation for loss of future earnings that is exempt to extent reasonably necessary for support of debtor and dependents. Section 522(d)(1)(E) is not limited to tort recoveries and does not exclude other sources of replacement income such as workers compensation. Appellant also failed to demonstrate irreparable harm. If Appellant prevails on appeal, debtor will be required to pay money to appellant. Monetary harm is not irreparable injury, even if delay would allow debtor to dissipate funds and render debtor unable to answer to any judgment.
- (5807) *In re Rahim*, 2011 WL 833804 (E.D. MI. 2011) – Motion for stay of dismissal of Chapter 7 case denied. Debtor failed to demonstrate any likelihood of success on merits where Bankruptcy Court dismissed case as abuse where debtors had income of \$39,000 per month and claimed expenses of \$39,000 per month including 3 homes, 3 luxury automobiles, and expensive private school tuition. Debtors also failed to demonstrate irreparable harm. Possible future collection activities by creditors are not “irreparable” harm. Creditors would suffer substantial harm from further delays in enforcing claims. Public interest would not be furthered where underlying bankruptcy case substantially challenged the integrity of the bankruptcy process.
- (5808) *In re Seidel*, 443 BR 411 (Bankr. S.D. Ohio 2011) – When considering a motion for a stay pending appeal, Court must consider (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Attorney failed to demonstrate basis for stay of order that required Attorney to disgorge to the Debtor’s credit card issuer the fees and costs which he received through credit card charge, (2) suspended the “no look fee” for Chapter 13 cases filed by Attorney, (3) required Attorney to complete six hours of bankruptcy ethics instruction satisfactory to the Court, (4) required Attorney to submit to the Court a list of all bankruptcy clients from the last five years who paid attorney’s fees or costs using a credit card, and (5) directed the United States Trustee to investigate Attorney’s practice to determine whether further action should be taken. Motion for stay denied where attorney failed to demonstrate any of required elements.
- (5809) *Hock v. Stevenson*, 2011 WL 2173837 (E.D. MI. 2011) – Motion for Stay Pending Appeal denied where appellant, Buyer at foreclosure sale, lacked standing to appeal Order Revoking Abandonment. Reopening case and revoking abandonment does not alter the rights or status of the buyer. Appellant could not demonstrate any likelihood of success where Appellant did not even have standing to prosecute the appeal.
- (5810) *In re Forum Health*, 2011 WL 1680417 (Bankr. N.D. Ohio 2011) – In deciding whether to grant stay pending appeal from earlier order of bankruptcy court allowing debtors to voluntarily dismiss their Chapter 11 cases, court would consider the following: (1) likelihood that the party seeking stay would prevail on merits of appeal, (2) likelihood that moving party would be irreparably harmed absent a stay, (3) prospect that others would be harmed if stay were granted, and (4) the public interest in granting a stay; however, these factors were not prerequisites that had to be met, but interrelated considerations that had to be balanced together. Court denied stay where creditors could not prove harm would result if stay was denied and granting stay would have effect of forcing not-for-profit debtor to remain in case involuntarily in violation s letter and spirit of Bankruptcy Code which exempts non-profit corporations from involuntary petitions.
- (5811) *In re Greene*, 2011 WL 1500120 (Bankr. E.D. TN. 2011) – Request for Stay is based upon the same factors traditionally considered concerning preliminary injunctions: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Creditor could not demonstrate likelihood of success in appeal that voided lien where lien was never properly recorded prior to commencement of bankruptcy case. Creditor also failed to prove irreparable harm where debtor has not sought permission to sell property. If judgment is reversed on appeal, property will still be subject to Bankruptcy Court jurisdiction for purposes of preserving creditor’s alleged mortgage interest.
- (5812) *In re Mains*, 451 BR 428 (Bankr. W.D. MI. 2011) – Stay of proceedings pending appeal is to be determined based on what best protects interests of all parties. Debtor seeking to stay dismissal of Chapter 13 case pending appeal must show strong or substantial likelihood of success; that debtor will suffer irreparable harm if the proceedings are not stayed; whether the stay would substantially injure other parties; and where the public interest lies. Debtors failed to demonstrate substantial likelihood of success. Although issue of whether debtors must include Social Security income for funding of plan has not been conclusively determined in Sixth Circuit, substantial body of case law exists to hold that good faith requires debtors to contribute Social Security notwithstanding exclusion from CMI calculation.
- (5813) *In re Amir*, 2010 WL 3522474 (Bankr. N.D. Ohio 2010) – Debtor’s Motion for Stay of BAP decision pending appeal to Sixth Circuit must be presented to BAP for consideration. Bankruptcy court lacks authority to stay BAP opinion pending appeal. To extent Debtor’s Motion seeks to stay Bankruptcy Court Order that gave rise to BAP decision and to subsequent appeal to Sixth Circuit, Motion denied where Appellant failed to demonstrate any likelihood of success on merits. Appellant failed to timely file objections to claims. Debtor’s belated amended objections failed to proffer evidence or a legal basis to defeat *prima facie* validity of a claim under Rule 3001(f). All of the grounds alleged by Debtor were presented to, and rejected by, the BAP in its August 5, 2010. Absence of a stay of a decision disallowing objections to claims will not irreparably harm the debtor where appeal will be decided before any funds are ever distributed to creditors. Public interest would be better served by having case go forward without a stay.

- (5814) *In re Grass*, 2010 WL 3553273 (Bankr. S.D. Ohio 2010) – When considering a motion for a stay pending appeal, Court must consider (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Bank that admitted it had violated automatic stay did not present any likelihood of success on merits of appeal of Order imposing sanctions for stay violation. Denial of stay posed no risk to Bank where property could not be sold without notice to creditors and approval of court, which would afford Bank opportunity to be heard on issue. Granting of stay would adversely affect debtor and remaining creditor body as stay would prevent confirmation of debtor's Chapter 13 Plan and would delay commencement of payments to creditors.
- (5815) *In re Davis*, Case No. 10-40065 (Bankr. E.D. Mi. 2010) – Rule 8005 allows court to stay order pending appeal if appellant has a strong or substantial likelihood of success on appeal and appellant would suffer irreparable harm if the stay is not granted, and where other parties would not suffer substantial injury from stay. Debtor's Motion denied where Motion failed to offer any explanation as to why Debtor did not respond to Creditor's Motion for Relief From Stay, thereby admitting essential elements of request for relief. Debtor's appeal was predicated on argument that sheriff sale was not conducted by a person duly appointed to conduct sales, but Debtor failed to produce any support for this allegation. Debtor would not be prejudiced as effect of order is only to grant stay relief, and Debtor is free to assert any defenses he has in the State Court proceeding. Granting stay would merely enable Debtor to continue to unnecessarily delay Creditor and increase litigation expenses.
- (5816) *Syllabi v. US Bank, N.A.*, 2010 WL 2817187 (Bankr. N.D. Ohio 2010) Factors for Court to consider in evaluating Motion for Stay Pending Appeal are (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. The movant bears the burden of proof, providing specific facts and affidavit supporting assertions that these factors exist. Defendant's conclusory statement that "it has substantive issues of merit to present on appeal regarding the specific acknowledgment at issue in this adversary proceeding" falls short of demonstrating Defendant is likely to succeed on the appeal. Defendant's failure to show that it is likely to succeed on the appeal is not fatal because the balancing of the factors could still tip in Defendant's favor. Defendant's argument concerning irreparable harm focus on the loss of rights as a secured creditor, more specifically its inability to drive the foreclosure process fails to demonstrate harm that is both certain and immediate, rather than speculative or theoretical. If Trustee sells the property while the appeal is pending, Defendant's lien will attach to the proceeds. Only upon final disposition of the appeal will the proceeds be distributed, thereby protecting Defendant's secured status. Defendant's arguments focused on speculation and conjecture, not specific and irreparable harm. The stay could hinder other creditors because there will be no immediate distribution regardless of whether the stay is approved. Delaying the sale could mean a decline in value, either through market forces or deterioration. Any expenses incurred in maintaining or securing the property would be funded by the estate, depleting resources. Motion for Stay denied.
- (5817) *Spring Creek Airport, Inc. v. Roswell Holding, LLC*, 2010 WL 2573745 (W.D. Ky. 2010) - A motion for a stay of the judgment, order, or decree of a bankruptcy judgment ordinarily be presented to the bankruptcy judge in the first instance. Only after the bankruptcy court has failed to grant the stay or has failed to grant it on terms acceptable to the appellant that the appellant may seek relief in the district court in accordance with the provisions of Rule 8005. Court must consider the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction - (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. A movant seeking a stay pending review will have greater difficulty in demonstrating a likelihood of success on the merits and must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal. Movant need not establish a high probability of success on the merits but must movant show serious questions going to the merits. Appellant not entitled to stay of Order Granting Relief From Stay. Decision to lift stay is committed to the discretion of the Court, and will be overturned only upon a showing of abuse of discretion.
- (5818) *Countrywide Home Loans, Inc. v. McDermott*, 2009 WL 3259131 (N.D. Ohio 2009) – Appellate Court has authority to stay enforcement of a judgment to preserve the rights of the parties during the pendency of the appeal and to ensure that the Appellate Court can responsibly fulfill its role in the judicial process. A stay is an exercise of judicial discretion and not a matter of right. Court must consider: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Bankruptcy Court sanctioned creditor who filed Proof of Claim and Objection to Confirmation in Chapter 13 Case notwithstanding that Creditor had satisfied loan more than 18 months prior to the Petition Date. Bankruptcy Court Order required Creditor to submit a four-page Worksheet, created by the bankruptcy judge, whenever Creditor submits a proof of claim in any case before that judge; and to file the same Worksheet as a supplement to all proofs of claim Creditor had filed in previous cases pending on that judge's docket. Creditor made "compelling arguments" that the bankruptcy judge exceeded her authority under any statute and/or federal or local bankruptcy rule to require Creditor to use a Worksheet that arguably amounts to an improper judicial amendment/revision of Official Bankruptcy Form 10. If a stay is not granted and Creditor ultimately prevails on its appeal, irreparable harm will have been suffered by Creditor as Creditor will have been required to implement a new protocol tailored specifically for cases pending before a single bankruptcy judge at considerable cost. Stay will be of relatively short duration as District Court "is committed to resolving the bankruptcy appeal as soon as possible after the briefing is complete".
- (5819) *Indiana State Police Pension Trust v. Chrysler, LLC*, 129 S.Ct. 2275 (2009) – Supreme Court would not stay Order approving sale of assets pending appeal. In determining whether to grant a stay, Court considers whether the applicant has demonstrated (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair

prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay. In a close case Court will also balance the equities and assess the relative harms to the parties as well as the interests of the public at large. “A stay is not a matter of right, even if irreparable injury might otherwise result.” Party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.

- (5820) *In re Noble International, Ltd.*, 2009 WL 1607704 (E.D. Mi. 2009) – In determining whether to grant a stay in a bankruptcy appeal, the Court must balance four factors: (i) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (ii) the likelihood that the moving party will be irreparably harmed absent a stay; (iii) the prospect that others will be harmed if the Court grants the stay; and (iv) the public interest in granting the stay. Court has authority to impose a limited stay until Court can conduct a more thorough review of the Bankruptcy Court’s actions where Court is waiting on transcript of bankruptcy proceedings. Debtor did not face high likelihood of harm in the event a stay is granted for a limited time.

13.38 Scope of Stay

- (5821) *In re Noble International, Ltd.*, 2009 WL 1607704 (E.D. Mi. 2009) – Court has authority to impose a limited stay until Court can conduct a more thorough review of the Bankruptcy Court’s actions where Court is waiting on transcript of bankruptcy proceedings. Debtor did not face high likelihood of harm in the event a stay is granted for a limited time. Stay limited to actual closing of the sale and parties are free to take all steps and perform due diligence and conduct any necessary discovery in effort to prepare for closing.

13.39 Effect of Failure to Obtain Stay – Generally

- (5822) *Glassman, Edwards, Wyatt, Tuttle and Cox, P.C. v. Wade*, 2013 WL 5944091 (Bankr. W.D. Tn. 2013) – General rule that properly filed notice of appeal deprives trial court of jurisdiction to proceed further does not apply in bankruptcy matters. Filing notice of appeal does not divest lower court of jurisdiction over proceedings unless issue on appeal is so closely related to remaining matters that adjudication of remaining matters would effectively divest appellate court of ability to enter effective relief. Appeal of order denying abstention and denying remand disposition was not so closely related to merits of remaining matters that proceedings in bankruptcy court would be stayed.

13.40 Effect of Failure to Obtain Stay – Mootness

- (5823) *Pefffinders, LLC v. Sherman*, Case No. 13-10120 (5th Cir. 2015) – Court had authority to order sale of domain name notwithstanding debtor’s contention that domain name was owned by separate company but failed to produce any evidence to support proposition. Proposed sale was negotiated in good faith and at arm’s length, and proposed purchaser had no affiliation with debtor. Debtor failed to obtain stay of sale prior to consummation rendering appeal moot. Section 363(m) prevents appellate court from granting effective relief in challenge to sale of assets under Section 363 where the sale is to a good faith purchaser, regardless of whether purchaser had notice of appeal at time sale closed. Debtor did not contest purchaser’s status as good faith purchaser before bankruptcy court and would not be permitted to raise issue on appeal. Bankruptcy court made express finding that purchaser was good faith purchaser entitled to protections of Section 363(m).
- (5824) *Rev Op Group v. ML Manager, LLC*, 2014 WL 5859300 (9th Cir. 2014) – Party can move to dismiss appeal as equitably moot where a great change in the status quo occurred after the district court rendered the orders appealed from, even if that party did not seek to dismiss the appeal as moot at the district court level. Appeal is constitutionally moot when there is no longer case or controversy to be resolved. Appeal from plan confirmation is not constitutionally moot even after plan is substantially consummated because court could still reverse confirmation order. Appeal is equitably moot where there remains a live case or controversy but change of circumstances makes review of merits inequitable. While failure to obtain a stay is not itself a fatal defect, failure to obtain stay coupled with substantial consummation such that court could not fashion effective relief without “knocking the props out from under the plan”.
- (5825) *Wells Fargo Bank v. Mariposa Road Self-Storage Associates, LLC*, 2014 WL 5139140 (9th Cir. 2014) – Appeal is not moot where appellate court could fashion effective relief. Appeal of order confirming Plan of Reorganization is not moot merely because debtor is performing under confirmed plan where appeal could result in debtor being ordered to pay additional money under the plan as it reads or through a modification. Possibility of resolution through money damages is sufficient to present live case or controversy.
- (5826) *Kahn v. Aurora Loan Services, LLC*, 2014 WL 3529445 (E.D. Mi. 2014) – Appeal becomes moot when issues presented are no longer live or events occur during pendency of appeal that make it impossible for court to grant effective relief. Where debtor appeals order allowing sale of assets or lifting stay to permit lender to complete foreclosure process and debtor does not obtain stay, then upon completion of sale process court lacks ability to grant relief and appeal of order becomes moot. Appeal moot where debtor did not seek stay of court order allowing issuance of writ of possession, creditor served writ and obtained possession and bankruptcy case had been dismissed and closed.
- (5827) *Prentice v. GMAC Mortgage Client Branded Solutions*, 2014 WL 961364 (E.D. Mi. 2014) – Appeal of Order Lifting Stay to allow lender to proceed with eviction rendered moot when eviction completed during pendency of appeal. Court can adjudicate only actual, ongoing cases or controversies and cannot decide issues that, because of intervening events, are no longer susceptible to effective relief.
- (5828) *R.T.R. Bldg. Co., Inc. v. The Privatebank*, 2014 WL 824209 (E.D. Mi. 2014) – Case is moot where the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. Where the appellate fails to obtain a stay of an order that permits a sale of the debtor’s assets, the subsequent sale renders the appeal moot. Debtor’s appeal of order lifting stay and order dismissing case rendered moot when lender subsequently foreclosed and sold property at foreclosure sale. At that point, bankruptcy court lost ability to enter effective relief as to property, rendering appeal moot. Appeal of dismissal order also moot as, following foreclosure sale, debtor had no assets and had no ability to reorganize.

- (5829) *Karam, Inc. v. BW Holdings, LLC*, 2013 WL 3243540 (W.D. Ky. 2013) – Appeal of order granting relief from stay rendered moot when property later sold at foreclosure sale. Court lacked any effective relief once property had been sold, as reversal of order granting relief from stay would not reverse sale or bring property back into bankruptcy estate.
- (5830) *ML-CFC 2006-3 Seasons, LLC, v. Seasons Partners, LLC*, Case No. 11-16999 (9th Cir. 2013) – Appeal dismissed as equitably moot where creditor did not obtain stay of order confirming Chapter 11 plan where plan has been substantially consummated and modification of plan would negatively impact interest of parties not before the court, including interests of investor who infused \$2.5 million into venture in reliance on confirmed plan.
- (5831) *In re Sinta*, 2013 WL 1946185 (E.D. Mi. 2013) – Appeal challenging court’s order lifting stay became moot when underlying bankruptcy case was dismissed. Even if Court erred in lifting stay, there was no active bankruptcy case in which court could impose stay.
- (5832) *Northcutt v. Leasure*, 2013 WL 2458709 (W.D. Ky. 2013) – Appeal of Court order authorizing sale of assets under Section 363 dismissed as moot where appellant did not request or receive stay of sale order prior to closing. Appellant’s assertion that property was not property of estate and that sale violated party’s fifth amendment rights was not appealable where party failed to obtain stay. Section 363(m) applies to any attempt to appeal a sale order regardless of legal basis for the challenge to the sale order.
- (5833) *Clearview Energy, LLC v. Mammoth Resources Partners, Inc.*, 2013 WL 1411220 (W.D. Ky. 2013) – Appeal of Court order authorizing sale of assets under Section 363 dismissed as moot where appellant did not request or receive stay of sale order prior to closing. Appellant’s assertion that property was not property of estate and that Court lacked ability to approve sale did not constitute basis to appeal Bankruptcy Court’s contrary ruling without obtaining stay of sale order. Section 363(m) applies to any sale authorized under Section 363 without regard to whether authorization itself was correct or incorrect.
- (5834) *Staker v. Jubber*, Case No. 12-091 (10th Cir. BAP 2013) – Appeal of orders dismissing adversary proceedings dismissed as moot where intervening events rendered Appellate court incapable of rendering effective order. An appeal is moot where the issues presented are no longer live such that the reviewing court is incapable of rendering effective relief or restoring parties to their original positions. Prior to commencement of bankruptcy case, debtor sued various parties to quiet title to two parcels of real estate. Actions were pending when debtor filed chapter 7. Trustee entered into settlements with defendants that required defendants to pay money to the Trustee, and Trustee released any claims estate had against defendants. Court entered order approving settlement and no party appealed. Thereafter, the Court dismissed the quiet title actions based on the settlement and debtor appealed. Court lacked ability to enter meaningful relief even if dismissals had been improper, as reversing dismissal orders would not create any right of debtor to any further relief. The settlement had become final and, even if the adversary cases were reinstated, court lacked ability to grant debtor any affirmative relief, as estate released all claims.
- (5835) *Search Market Direct Inc. v. Jubber*, Case no. 10-4190 (10th Cir. 2012) – Debtor’s ownership of Internet Domain Name became property of estate upon filing of Chapter 7 petition. Debtor’s purported post-petition sale of Domain Name constituted violation of stay as sale constituted attempt to obtain possession and control of property of estate. Sale of property in violation of stay is void and without effect. Subsequent sale of Domain Name by Trustee pursuant to Section 363 not subject to attack if order allowing sale is not stayed pending appeal as long as later sale was to buyer acting in good faith. Entity may purchase property in good faith even if the entity knows that an appeal of the sale authorization is pending. Subsequent sale did not render appeal moot where purchaser expressly took title subject to claims and defenses of prior purchaser and pending a ruling on the adversary proceeding in which the prior purchaser’s rights were to be determined. Order allowing the sale also stated that order was not final until the rights of the estate in the Domain name were determined in the adversary proceeding.
- (5836) *In re Timco, LLC*, 469 BR 688 (E.D. Mi. 2012) – Debtor’s appeal of order remanding removed action to state court and modifying stay to allow party to seek order confirming arbitration award rendered moot when debtor did not obtain stay of order and state court confirmed award while appeal was pending. Appeal becomes constitutionally moot when subsequent events result in either appellant receiving the relief sought when it is factually impossible to receive the relief sought. The order being appealed was to determine whether it was proper to remand case to state court and to allow state court to enter judgment. State court subsequently entered judgment. Appeal could not now grant relief that would prevent entry of that state court order. State court order became final and non-appealable at a time when the automatic stay remained lifted for that purpose. Nothing the bankruptcy or appellate courts could now do could change that result.
- (5837) *Coleman v. ANMP*, 2011 WL 1979855 (9th Cir. 2011) – Appeal of confirmation of plan of reorganization of Chapter 11 plan that called for sale of debtor’s business rendered moot by Section 363 where appellant did not obtain stay of proposed sale pending appeal.
- (5838) *Asset Based Resource Group, LLC v. United States Trustee*, Case No. 09-2860 (8th Cir. 2010) – Sale free and clear of liens with liens to attach to proceeds is a sale under Section 363(b) to which Section 363(m) applies. When sale closed without stay pending appeal, appeal must be dismissed as moot where effect of order reversing the order approving the sale would affect the validity of the underlying sale itself. Challenge to portion of order that permitted sale free and clear of liens, if reversed on appeal, would effectively unwind the sale. Appeal dismissed as moot.
- (5839) *In re Hake*, Case No. 08-8039 (6th Cir. BAP 2008) – Bankruptcy Court Order to Show Cause why *pro hac vice* status should not be revoked did not become moot merely because Counsel agreed to voluntarily withdraw his *pro hac vice* admission. “A disciplinary action and consequent disqualification may expose counsel to further sanctions by the bar and portends adverse effects upon counsel’s career and public image. The effects of disqualification will linger long after the closing of the case. The controversy thus remains live and demands consideration. ... [T]he ‘brand of disqualification’ on grounds of dishonesty and bad faith could well hang over his name and career for years to come.” Filing of Motion to Withdraw as Counsel did not moot Court’s Show Cause Order regarding whether counsel had engaged in argumentative, disrespectful, and antagonistic conduct toward bankruptcy Court.

- (5840) *City of Akron v. Akron Thermal, LP*, 2009 WL 1707907 (N.D. Ohio 2009) – In determining whether a bankruptcy appeal is equitably moot, Court must weigh: (1) whether a stay has been obtained; (2) whether the plan has been “substantially consummated”; and (3) whether the relief requested would affect either the rights of parties not before the Court or the success of the plan. Concept of “equitable mootness” is designed to protect parties relying upon the successful confirmation of a bankruptcy plan from a drastic change after appeal and is designed to protect parties settled expectations and the ability of a Debtor to emerge from bankruptcy. Equitable mootness will not prevent appeal of portions of Confirmation Order where outcome of appeal would not require abandonment of plan or substantially upset the plan of reorganization. Thus, appeal could proceed to determine amounts owed under assumed lease where outcome would not result in termination of lease and Court could fashion relief that would not disrupt confirmed plan. Issues dealing with whether plan should have been confirmed in the first instance and whether plan complied with Section 1129 were equitably moot where outcome of appeal would be to overturn confirmation order and eviscerate the plan.
- (5841) *Official Committees of Unsecured Creditors v. Anderson Senior Living Property, LLC*, 2009 WL 1617860 (6th Cir. 2009) – Committee’s appeal of a Court Order granting Debtor authority to sell property held as tenants in common is moot and must be dismissed where the Court Order was not stayed and the sale has closed. The requirement under section 363 (m) at a party seeking to appeal any sale of assets must obtain a stay in order to prevent the sale order from becoming moot does not create an exception where the appealing party is one co-owner of the property being sold. Section 363(m) applies whenever a party fails to obtain a stay from an order permitting the sale of the Debtor’s assets.
- (5842) *Official Committees of Unsecured Creditors v. Anderson Senior Living Property, LLC*, Case No. 09-5817 (6th Cir. BAP 2010) – Committee’s appeal of a Court Order granting Debtor authority to sell property held as tenants in common is moot and must be dismissed where the Court Order was not stayed and the sale has closed. The requirement under section 363(m) at a party seeking to appeal any sale of assets must obtain a stay in order to prevent the sale order from becoming moot does not create an exception where the appealing party is one co-owner of the property being sold. Section 363(m) whenever a party fails to obtain a stay from an order permitting the sale of the Debtor’s assets.
- (5843) *In re Nashville Sr. Living, LLC*, 407 B.R. 222 (6th Cir. BAP 2009). Unstayed order approving sale to good faith buyer mooted appeal from portion of order allowing sale of non-debtor’s interest.

13.41 Effect of Stay

- (5844) *Allstate Insurance Company v. Harris*, Adv. No. 09-6215 (Bankr. E.D. Mi. 2012) – Defendant’s counterclaim filed after entry of order staying further proceedings pending interlocutory appeal would be dismissed, without prejudice to defendant to defendant either filing counterclaim after appeal is resolved or, if defendant believes there is some urgency to file such as a statute of limitations or other time-bar problem, defendant can file motion asking court to make exception to scope of stay pending appeal.
- (5845) *Allstate Insurance Company v. Harris*, Adv. No. 09-6215 (Bankr. E.D. Mi. 2012) – Defendant did not violate stay pending interlocutory appeal by filing answer to complaint. Stay order specifically required defendant to file answer within 14 days of service of amended complaint. Court would add to that deadline additional three days pursuant to Rule 9006 which extended deadline to June 18, the date on which the answer was filed.
- (5846) *Burrage v. Homecomings Financial Network, Inc.*, 2011 WL 6000794 (Bankr. N.D. Ohio 2011) – Stay pending appeal relieves appellee of obligation to comply with order being appealed. Appellant who obtained stay pending appeal cannot simultaneously complain that appellant failed to perform as required by the order being appealed.

13.42 Stay of Other Proceedings

- (5847) *McDermott v. Junk*, 2015 WL 4380770 (Bankr. S.D. Ohio 2015) – Rule 8007 allows court to stay proceedings other than matters involved on appeal where party demonstrates likelihood of success on appeal; party would be irreparably harmed absent a stay; party against who stay sought would not suffer extraordinary harm; and stay is consistent with public interest. Debtor’s appeal of order converting case from Chapter 11 to Chapter 7 did not warrant stay of adversary proceeding commenced by UST to deny discharge under Section 727. Debtors presented no evidence of any likelihood of success where appeal was based on denial of extension of time to find new counsel. Court provided ample time and by the time debtors’ counsel had withdrawn, counsel had not been paid in some time and debtors had substantial advance notice of counsel’s request to withdraw. Court issued show cause order when prior counsel withdrew, setting hearing for 78 days later, giving debtors more than ample time to secure new counsel. Conversion more than warranted where debtors had negative income during Chapter 11; debtors’ Chapter 11 Operating Reports mischaracterized certain funds received during Chapter 11; and debtors failed to maintain insurance or to pay property taxes on primary asset.

13.43 Supersedeas Bond

- (5848) *Silagy v. Protz*, 2014 WL 1652426 (Bankr. N.D. Ohio 2014) – Motion for stay of court order that directed turnover to estate of value of debtor’s interest in former spouse’s retirement account denied unless debtor posts Supersedeas bond representing value of debtor’s interest in retirement plan.
- (5849) *Newton v. Bank of America*, 2011 WL 2112410 (Bankr. E.D. Tn. 2011) – Federal Rule of Bankruptcy Procedure 7062 allows for an appellant to obtain a stay by posting a Supersedeas bond only where the matter involves a money judgment. Where the judgment is non-monetary, Rule 62 does not apply. Court order allowing Trustee to sell property free and clear of holder of unrecorded lien was not “money judgment”. Further, proposed bond of \$10,000 could not possibly cover the actual damages from the loss of a sale for \$170,000.00.

F. Appeal Costs

13.44 Filing Fee - In Forma Pauperis

- (5850) *Cory v. Bennett*, 2015 WL 5105178 (W.D. Ky. 2015) – 28 USC Section 1915 allows an appeal to proceed without payment of fees where appellant demonstrates indigence. Court can deny *in forma pauperis* status where appeal is frivolous on its face. However, court should not deny status where appeal was a “longshot”, where appellant presented arguments that were clear and logical and contained citations to authorities. While appeal may not have been particularly persuasive, dismissal based on *in forma pauperis* status is not warranted.

13.45 Appeal Bond

- (5851) *In re Countrywide Financial Corp. Customer Data Security Breach Litigation*, 2010 WL 5147222 (W.D. Ky. 2010) – Federal Rule of Appellate Procedure 7 permits court to condition right to appeal on posting of bond to ensure payment of costs on appeal if appellee prevails. In determining necessity and amount of bond, court must consider (1) the appellant's financial ability to post a bond, (2) the risk that the appellant would not pay appellee's costs if the appeal loses, (3) the merits of the appeal, and (4) whether the appellant has shown any bad faith or vexatious conduct.

13.46 Taxable Costs

- (5852) *In re Countrywide Financial Corp. Customer Data Security Breach Litigation*, 2010 WL 5147222 (W.D. Ky. 2010) – Prevailing party to appeal may recover taxable costs as specified in 28 USC Section 1920 and Federal Rule of Appellate Procedure 39, including (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a Supersedeas bond or other bond to preserve rights pending appeal; (4) the fee for filing the notice of appeal; (5) marshal and clerk fees; (6) court reporter fees; (7) printing and witness fees; (8) copying fees; (9) docket fees; and (10) compensation of court appointed experts and interpreters. Attorney fees are taxable as costs only if provided for in underlying statutes or contracts on which cause of action is based.

13.47 Attorney Fees

- (5853) *Wallace v. Rosales*, Case No. 13-1518 (9th Cir. BAP 2014) – Bankruptcy Court has jurisdiction to award attorney fees to debtor for proceedings in bankruptcy court to remedy violation of discharge injunction. However, Bankruptcy Court lacks jurisdiction to award attorney fees for debtor's successful defense of the contempt award on appeal. Under Federal Rule of Appellate Procedure 38, only the appellate court has jurisdiction to award attorney fees for services in the appeal.

13.48 Sanctions – Frivolous Appeal

- (5854) *Weary v. Poteat*, 2014 WL 2208955 (E.D. Tn. 2014) – Bankruptcy Rule 8020 is materially identical to Rule 38 which allows sanctions for appeals that are raised for improper purpose such as harassment or delay, or when the appeal consists of baseless or improperly raised arguments or are otherwise wholly without merit or any reasonable expectation of altering lower court judgment. Appellant's failure to file initial brief within time set in briefing schedule does not demonstrate that appeal is frivolous or that appeal was taken to harass or delay appellee. Absent briefs being filed, court could not determine that appeal was wholly without merit or lacked an reasonable expectancy of altering lower court order.
- (5855) *Smith v. Silverman*, 2011 WL 1901040 (2d Cir. 2011) – Appellate court had authority to impose sanctions for frivolous appeal. Bankruptcy Court and District Court both warned appellant that conduct in litigation and appeal were borderline sanctionable, yet appellant pressed same issue on further appeal to Circuit Court. Sanctions equal to double costs plus additional damages where appellant pursued patently frivolous appeal and forced appellee to defend vexatious litigation.
- (5856) *In re Messina*, 2011 WL 2006903 (7th Cir. 2011) – Federal Rule of Appellate Procedure 38 allows Court to award sanctions against appellant who brings frivolous appeal. Debtor's third appeal of same issue, having lost two prior appeals of the same issue, is patently frivolous. Sanctions included award of double attorney fees and costs incurred by appellee.
- (5857) *WMS Motor Sales, Ltd. v. Reese*, 2011 WL 1882383 (6th Cir. BAP 2011), *aff'd* 2012 WL 2149752 (6th Cir. 2012) – Court would impose sanctions against attorney who filed frivolous appeal. Appeal from Order denying dischargeability was not timely filed and appeal was dismissed. Attorney then appealed that dismissal. Court held that the appeal of dismissal was frivolous as there was no basis in the law to allow an untimely filed notice of appeal. Further, appellee wrote letter to court advising that appellee had never authorized attorney to file appeal. Bankruptcy Court properly entered sanctions against attorney for frivolous appeal in the amount of attorney fees expended by appellee in dealing with frivolous appeal. Sections warranted where appeal is wholly without merit; there was no reasonable expectation of altering lower court order; or where appeal is result of “sheer obstinacy”.

G. Dismissal

13.49 Voluntary Dismissal

13.50 Mootness

- (5858) *Mwangi v. Wells Fargo Bank*, 2014 WL 5334683 (9th Cir. 2014) – Appeal of order denying sanctions for alleged violation of stay dismissed as moot where court determines that creditor did not violate stay.
- (5859) *Dates v. HSBC Bank*, 2014 WL 4377778 (S.D. Ohio 2014) – Appeal of order resolving objection to proof of claim rendered moot when

underlying Chapter 13 case dismissed. Resolution of issues regarding claim could no longer have any effect on rights and liabilities of parties or alter or affect relationship between parties.

- (5860) *Dates v. HSBC Bank*, 2014 WL 4377783 (S.D. Ohio 2014) – Appeal of order lifting stay in Chapter 13 case rendered moot when underlying Chapter 13 case was dismissed. Resolution of issues regarding stay relief could no longer have any effect on rights and liabilities of parties or alter or affect relationship between parties.
- (5861) *Gaskin v. Barstow*, Case no. 12-0694 (9th Cir. BAP 2014) – Appeal of creditor’s motion to sell property rendered moot when discharge entered and property was abandoned back to debtor. At that point, issue became one solely between debtor and creditor and did not involve property of estate. Appellate court lacked ability to grant any effectual relief as property was no longer property of the estate and there is no statutory authority for a bankruptcy court to administer or sell property that is not property of the estate.
- (5862) *In re Marroquin*, Case No. 12-1451 (9th Cir. BAP 2013) – Court dismissed appeal of order denying debtor leave to file Chapter 13 Petition where debtor advised court that debtor no longer sought to file bankruptcy. Given debtor’s decision, there was no longer live controversy as to validity or enforceability of earlier court order barring debtor from filing for 20 years, or court’s conclusion that debtor failed to show cause for court to allow filing notwithstanding bar.
- (5863) *Armstrong v. Internal Revenue Service*, Case No. 11-1554 (9th Cir. BAP 2013) – Appellate court lacks jurisdiction when intervening events result in inability of court to enter effective relief. Debtor’s appeal of dismissal of first adversary proceeding rendered moot when debtor filed second adversary proceeding seeking same relief against same defendant and the second adversary was dismissed for failure to state a claim under Rule 12. Even if court reversed order dismissing first adversary proceeding, the bankruptcy court had already concluded in second adversary that plaintiff failed to present any colorable claim and that dismissal order has become final and non-appellable.
- (5864) *Timco, LLC v. T and M Sales Agency, Inc.*, 2013 WL 150105 (6th Cir. 2013) - Matter is moot for appellate purposes when events occurring while appeal is pending render it impossible for court to grant effective relief. Appeal of Order Lifting Automatic Stay to allow state court to confirm arbitration award rendered moot once State Court entered its order. Once State Court confirmed award, order lifting stay became academic, as even if order lifting stay was reversed on appeal, that would not set aside order confirming arbitration award itself. Once stay was lifted, State Court had authority to act. Later determination that stay relief may have been inappropriate does not retract that authority or invalidate what occurred in state court during time when stay had been lifted.
- (5865) *CSX Transportation, Inc. v. Denardo*, 2013 WL 1213067 (E.D. Mi. 2013) – Plaintiff’s claims to recover fraudulent transfers are not moot merely because any recovery would belong to debtor’s estate and would be distributed to corporate creditors. Although Plaintiff would not receive transfers of funds directly from Defendants, a creditor under State law has standing to pursue recovery of distributions by LLC to members at a time when the LLC is insolvent. Corporate members would be ordered to refund money to Bankruptcy Estate of LLC for distributions to creditors including Plaintiff.
- (5866) *Siolon v. Allard*, 2011 WL 2160267 (E.D. Mi. 2011) – Settlement of issue pending on appeal deprives court of “case or controversy” requiring dismissal of the appeal as moot.
- (5867) *Alvarez v. Smith*, Case No. 08-351, ___U.S. ___(2009) – United States Constitution permits Federal Courts to decide legal questions only in the context of an actual case or controversy. If at any point during the pendency of the case the “actual controversy” ceases to exist, the Court must dismiss the case. Action becomes moot for appellate purposes when appellate court can no longer fashion effective relief. In action between individuals and State regarding seized property, action became moot when State returned property to individuals and there were no pending claims for damages. When action becomes moot as a result of the passage of time or “happenstance”, appellate court should dismiss case as moot and also vacate the order being appealed, in order to avoid prejudicing any party in the event of future litigation. When case becomes moot as a result of a settlement between the parties, appellate court will not ordinarily vacate lower court order as the settlement constitutes a waiver by the losing party of their legal remedies.
- (5868) *B-Line, LLC v. Wingerter*, 594 F.3d 931 (6th Cir. 2010) – Lower Court conclusion that creditor violated Rule 9011 is not rendered moot for appellate purposes where Lower Court has elected not to impose sanctions. Mootness results when subsequent events render court unable to grant effective relief. The Lower Court’s conclusion that creditor’s conduct violated Rule 9011 not rendered moot merely because no sanctions are imposed. Finding that creditor violated Rule 9011 has serious and significant consequences for the Creditor including potentially subjecting Creditor to future sanctions and would have necessitated complete restructuring of Creditor’s business operations.

13.51 Equitable Mootness

- (5869) *Taubitz v. City of Detroit*, Case no. 14-14917 (Bankr. E.D. Mi. 2015) – Equitable mootness doctrine prevents a party from overturning an order of the Bankruptcy Court—most often a confirmation order—if the requested relief would unravel complex and interwoven restructuring agreements or would require the undoing of transactions that are extremely difficult to retract. Equitable mootness applies in Chapter 9 context and is not limited to Chapter 11 proceedings. Equitable mootness doctrine uses a three-part test: (1) whether a stay has been obtained; (2) whether the plan has been substantially consummated; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. Where appellant does not obtain stay, debtor will normally implement plan, such that failure to obtain stay is grounds to find appeal equitably moot, although lack of stay alone is not necessarily fatal. Plan is substantially consummated if (A) there has been transfers of all or substantially all of the property proposed by the plan to be transferred; (B) debtor or by the successor to the debtor under the plan of has assumed responsibility for the business or of the management of all or substantially all of the property dealt with by the plan; and (c) distribution under the plan have commenced. City had substantially consummated plan based on extensive activities in connection with confirmed plan. Relief requested by appellant, while ostensibly limited, would leave the

plan in tatters and would result in chaos in the bankruptcy process and would adversely affect countless third parties who have relied on plan by extending credit, settling claims, relinquishing collateral, and transferred or acquired property in reliance on confirmation order.

- (5870) *Davis v. City of Detroit*, Case No. 14-14920 (E.D. Mi. 2015) – Equitable mootness doctrine prevents a party from overturning an order of the Bankruptcy Court—most often a confirmation order—if the requested relief would unravel complex and interwoven restructuring agreements or would require the undoing of transactions that are extremely difficult to retract. Equitable mootness applies in Chapter 9 context and is not limited to Chapter 11 proceedings. Equitable mootness doctrine uses a three-part test: (1) whether a stay has been obtained; (2) whether the plan has been substantially consummated; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. Where appellant does not obtain stay, debtor will normally implement plan, such that failure to obtain stay is grounds to find appeal equitably moot, although lack of stay alone is not necessarily fatal. Plan is substantially consummated if (A) there has been transfers of all or substantially all of the property proposed by the plan to be transferred; (B) debtor or by the successor to the debtor under the plan of has assumed responsibility for the business or of the management of all or substantially all of the property dealt with by the plan; and (c) distribution under the plan have commenced. City had substantially consummated plan based on extensive activities in connection with confirmed plan. Relief requested by appellant, while ostensibly limited, would leave the plan in tatters and would result in chaos in the bankruptcy process and would adversely affect countless third parties who have relied on plan by extending credit, settling claims, relinquishing collateral, and transferred or acquired property in reliance on confirmation order.
- (5871) *Brown v. City of Detroit*, Case No. 14-14919 (E.D. Mi. 2015) – Equitable mootness doctrine prevents a party from overturning an order of the Bankruptcy Court—most often a confirmation order—if the requested relief would unravel complex and interwoven restructuring agreements or would require the undoing of transactions that are extremely difficult to retract. Equitable mootness applies in Chapter 9 context and is not limited to Chapter 11 proceedings. Equitable mootness doctrine uses a three-part test: (1) whether a stay has been obtained; (2) whether the plan has been substantially consummated; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. Where appellant does not obtain stay, debtor will normally implement plan, such that failure to obtain stay is grounds to find appeal equitably moot, although lack of stay alone is not necessarily fatal. Plan is substantially consummated if (A) there has been transfers of all or substantially all of the property proposed by the plan to be transferred; (B) debtor or by the successor to the debtor under the plan of has assumed responsibility for the business or of the management of all or substantially all of the property dealt with by the plan; and (c) distribution under the plan have commenced. City had substantially consummated plan based on extensive activities in connection with confirmed plan. Relief requested by appellant, while ostensibly limited, would leave the plan in tatters and would result in chaos in the bankruptcy process and would adversely affect countless third parties who have relied on plan by extending credit, settling claims, relinquishing collateral, and transferred or acquired property in reliance on confirmation order.
- (5872) *Darrah v. City of Detroit*, 2015 WL 5697779 (E.D. Mi. 2015) – Equitable mootness doctrine prevents a party from overturning an order of the Bankruptcy Court—most often a confirmation order—if the requested relief would unravel complex and interwoven restructuring agreements or would require the undoing of transactions that are extremely difficult to retract. Equitable mootness applies in Chapter 9 context and is not limited to Chapter 11 proceedings. Equitable mootness doctrine uses a three-part test: (1) whether a stay has been obtained; (2) whether the plan has been substantially consummated; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. Where appellant does not obtain stay, debtor will normally implement plan, such that failure to obtain stay is grounds to find appeal equitably moot, although lack of stay alone is not necessarily fatal. Plan is substantially consummated if (A) there has been transfers of all or substantially all of the property proposed by the plan to be transferred; (B) debtor or by the successor to the debtor under the plan of has assumed responsibility for the business or of the management of all or substantially all of the property dealt with by the plan; and (c) distribution under the plan have commenced. City had substantially consummated plan based on extensive activities in connection with confirmed plan. Relief requested by appellant, while ostensibly limited, would leave the plan in tatters and would result in chaos in the bankruptcy process and would adversely affect countless third parties who have relied on plan by extending credit, settling claims, relinquishing collateral, and transferred or acquired property in reliance on confirmation order.
- (5873) *Ochadeleus v. City of Detroit*, 2015 WL 5697702 (E.D. Mi. 2015) – Equitable mootness doctrine prevents a party from overturning an order of the Bankruptcy Court—most often a confirmation order—if the requested relief would unravel complex and interwoven restructuring agreements or would require the undoing of transactions that are extremely difficult to retract. Equitable mootness applies in Chapter 9 context and is not limited to Chapter 11 proceedings. Equitable mootness doctrine uses a three-part test: (1) whether a stay has been obtained; (2) whether the plan has been substantially consummated; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. Where appellant does not obtain stay, debtor will normally implement plan, such that failure to obtain stay is grounds to find appeal equitably moot, although lack of stay alone is not necessarily fatal. Plan is substantially consummated if (A) there has been transfers of all or substantially all of the property proposed by the plan to be transferred; (B) debtor or by the successor to the debtor under the plan of has assumed responsibility for the business or of the management of all or substantially all of the property dealt with by the plan; and (c) distribution under the plan have commenced. City had substantially consummated plan based on extensive activities in connection with confirmed plan. Relief requested by appellant, while ostensibly limited, would leave the plan in tatters and would result in chaos in the bankruptcy process and would adversely affect countless third parties who have relied on plan by extending credit, settling claims, relinquishing collateral, and transferred or acquired property in reliance on confirmation order.
- (5874) *Bank of New York v. Sheeley*, 2014 WL 1233094 (S.D. Ohio 2014) – Equitable mootness is equitable doctrine involving balance of equitable and prudential factors. Bankruptcy case is equitably moot, even if not technically moot, where plan of reorganization is substantially consummated such that it is no longer prudent to upset the plan. Court will consider whether stay was obtained; whether plan has been substantially consummated; and whether the relief requested would affect either the rights of parties not before the court or the success of the plan. Appeal from judgment in adversary proceeding that denied Bank's right to reform mortgage was not equitably moot as there were no third parties that would be impacted by the outcome of the appeal.

13.52 On Motion by Party

- (5875) *Spirit SPE Portfolio 2007-1, LLC, v. Paxos*, 2014 WL 5091740 (N.D. Ohio 2014) – Court can dismiss appeal for failure to prosecute appeal where appellant fails to timely file briefs or otherwise comply with rules and time limits imposed by Court. Court should not dismiss appeal based on late filing of brief absent showing of bad faith, negligence or indifference, where appellant has demonstrated a persistent neglect of or indifference to procedural rules. Dismissal warranted where appellant missed at least two (and arguably more) deadlines by failing to timely file a brief and failing to timely file a response to Appellee’s Motion to Dismiss. Considered together, appellant’s actions evidenced a pattern of neglect and indifference. Appellant’s neglect or indifference was further demonstrated by consideration of record before bankruptcy court, where court detailed multiple instances of failure to comply with discovery deadlines or to file responses to motions to point that bankruptcy court ultimately entered judgment for appellee based on failure to respond to discovery including requests for admissions. Public policy favoring disposition on merits is not excuse for party’s failure to adhere to rules of court.
- (5876) *Richard v. Spradlin*, 2013 WL 1571059 (E.D. Ky. 2013), *aff’d* 2014 WL 3452292 (6th Cir. 2014) - Court Rule 8010 is intended to give the court and opposing parties notice of the aspects of the court decision that the appeal targets. Court would not dismiss cross appeal based on failure of brief to comply with rules regarding format, where brief lacked table of contents, statement of jurisdiction, state of issues, or statement of the case. Court would grant defendant’s motion for leave to amend brief to correct deficiencies. Plaintiff failed to identify any element of prejudice that resulted from omissions and based on plaintiff’s response brief, plaintiff was able to discern all of the relevant materials.
- (5877) *Spring Creek Airpark, Inc., v. Roswell Holding, LLC*, 2010 WL 2573745 (W.D. Ky. 2010) - Appellant’s designation of record included entire bankruptcy court record and failed to timely file statement of issues on appeal. Blanket designation of the bankruptcy court record is improper. Purpose of designation is to afford the reviewing court a complete understanding of the case. Designation that provides for all documents filed in the Bankruptcy case amounts to no designation at all. District Court has discretion to dismiss appeal where appellant fails to comply with non-jurisdictional rules and requirements. Dismissal of an appeal, however, is rarely an appropriate action. Power to dismiss should not be exercised unless omission arose from negligence or indifference of appellant - where good faith is shown, the court may direct that the omission be corrected by a supplemental transcript or remand the cause for a finding on controverted fact questions. Usual practice is to direct that the omission be corrected.
- (5878) *Stevenson v. Siciliano, Mychalowych, Van Dusen and Feul, P.C.*, 2010 WL 2671311 (E.D. Mi. 2010) - Rule 8006 requires appellant to file with the Clerk of the Appellate Court a designation of record and statement of issues on appeal within 14 days of filing Notice of appeal. Time limits under Rule 8006 are not jurisdictional. Dismissal of bankruptcy appeal is unjustified where the appellant filed a timely notice of appeal but an untimely designation of record and statement of issues absent evidence of bad faith, negligence or indifference. Case would not be dismissed where designation of record and statement of issues were timely but inadvertently filed with the Bankruptcy Court and error was corrected and designation and statement re-filed in District Court only 2 days later. Delay was minimal, resulted in no prejudice to any party, and was result of good faith error rather than bad faith or negligence.
- (5879) *Cappuccilli v. Lewis*, 2010 WL 2870668 (E.D. Mi. 2010) - Delay in filing Designation of items to be included in the record not basis for dismissal of appeal. Rule 8006 requires designation to be filed within 14 days of the filing of the Notice of Appeal. Party incorrectly calculated time to run from date Clerk of Bankruptcy Court issued Notice of Requirement to File Designation and filed Designation 4 days after the time had expired under Rule 8006 but within 14 days of Bankruptcy Notice. Rule 8001 provides that any action other than timely filing a notice of appeal is not jurisdictional. Failure to timely comply with any other requirement may be a basis for dismissal but does not automatically require dismissal. Court should not dismiss appeal for technical non-compliance unless non-compliance results from negligence or indifference. Delay did not result from negligence or indifference but rather from a reading of the Bankruptcy Court Notice that appeared to require the Designating within 14 days of issuance of that Notice.

13.53 Dismissal by Court *Sua Sponte*

- (5880) *Pichler v. Mason*, Case No. 14-13451 (E.D. Mi. 2015) – Appellant’s actions indicated intent to abandon appeal where appellant failed to file initial brief notwithstanding multiple orders from court to file brief; and where appellant continued to file motions in the lower court seeking additional relief.
- (5881) *Dietrich v. Wyndham Worldwide Corp.*, Case No. 11-4039 (3d Cir. 2013) – District Court properly dismissed appeal where appellant did not file brief for 10 months after filing notice of appeal, and had failed to comply with either long-established deadlines or orders of the district court, and otherwise acted in bad faith.
- (5882) *Lunan v. Jones*, 2013 WL 1693985 (6th Cir. 2013) – Appeal dismissed where appellant repeatedly failed to provide transcript of hearing that produced order that was the subject of the appeal.
- (5883) *Fujitrans USA v. Barko Enterprises, Inc.*, 2013 WL 793056 (S.D. Ohio 2013) – Court dismissed appeal where appellant failed to file initial brief notwithstanding multiple extensions of time. Court Order granting final extension set deadline and expressly stated that court would not entertain any further extensions.
- (5884) *Bosch v. First National Bank*, Case No. 12-20135 (5th Cir. 2012) – District Court had discretion to dismiss appeal where appellant failed to file a designation of items to be included in record on appeal within 14 days of filing of notice of appeal as required by Rule 8006. Court should not lightly dismiss appeal for failure to comply with Rule 8006, but dismissal was warranted where appellant failed to file designation, failed to provide copies of the orders being appealed, and failed to order the transcript of the hearing. Total failure to produce record for appeal warranted dismissal.

- (5885) *Hancock v. McDermott*, 2011 WL 1878240 (6th Cir. 2011) – District Court correctly summarily affirmed lower court’s decision without consideration of merits. Appellant engaged in a clear pattern of delay and contumacious conduct and a lesser sanction would be insufficient. Appellant did not file any brief in the district court until more than 7 months after filing the notice of appeal; the brief as filed completely disregarded both the district court filing requirements and the bankruptcy rules including being more than 100 pages in length notwithstanding rule limiting initial briefs to 50 pages; appellant ignored district court’s first order to show cause and responded to second order to show cause with disrespectful remarks and unacceptable explanations for delays; and district court had acted with considerable leniency, giving appellant the opportunity to make proper filings. Summary affirmance by district court was not motivated by failure of technical compliance, but rather by pattern of flagrant non-compliance.
- (5886) *In re Nora*, 2011 WL 1395566 (7th Cir. 2011) – Court properly dismissed appeal where appellant failed to file brief after extended delays and repeated extensions of time. Appeal can be dismissed where court finds that appellant is willfully failing to prosecute appeal. Court must balance seriousness of misconduct, potential for prejudice, and possible merits of action. Debtor’s failure to file initial brief even after multiple extensions coupled with debtor’s statement that her physical condition may prevent her from ever filing a brief essentially requested indefinite extension of time. Debtor also failed to explain why her physical condition prevented her from submitting a brief when debtor was simultaneously actively litigating in bankruptcy court and had filed numerous substantive motions in the Bankruptcy case.
- (5887) *French v. Shapiro*, Case No. 10-11333 (E.D. Mi. 2011) – Appeal of Order Dismissing Adversary proceeding without prejudice to refile upon termination of stay imposed by Bankruptcy Court dismissed as moot. Bankruptcy Court subsequently lifted the stay to permit plaintiff to re-file adversary proceeding. Appellate Court could not provide any meaningful relief where Appellate court could only confirm that plaintiff had the right to file the complaint, as plaintiff is now free from any prohibition against re-filing.
- (5888) *In re Wathen*, 2011 WL 9042 (9th Cir. 2011) – Bankruptcy appeals became moot when Bankruptcy Court dismissed underlying bankruptcy case for reasons unrelated to issues on appeal. Appeal dismissed for lack of jurisdiction.
- (5889) *In re Hann*, 2009 WL 2872813 (E.D. Mi. 2009) - Court has inherent authority to dismiss appeal sua sponte for lack of subject matter jurisdiction or where the allegations are totally implausible, attenuated, a substantial, frivolous, or devoid of merit.
- (5890) *Hamel v. Lalliss*, 2010 WL 1141489 (9th Cir. 2010) - Appellant’s failure to provide transcripts of lower court proceedings rendered it impossible to understand basis of bankruptcy court order, precluding effective review.

13.54 Reconsideration of Dismissal

- (5891) *Armstrong v. Internal Revenue Service*, Case No. 11-1554 (9th Cir. BAP 2013) – Timely filed Motion for Rehearing extends time to file Notice of Appeal until 14 days after entry of order. However, untimely filed motion does not extend deadline. Motion for Rehearing filed September 14 was not timely where Order dismissing case had been entered in mid-July. Appeal of dismissal order dismissed for lack of jurisdiction.
- (5892) *Render v. Render*, Adv. No. 11-3414 (Bankr. E.D. Mi. 2012) – Reconsideration of order of dismissal warranted where dismissal order was entered in error. Although court dismissed adversary complaint, court intended to reserve jurisdiction to consider Plaintiff’s Motion for Leave to Amend.
- (5893) *Lewis v. McClatchey*, 2009 WL 1607773 (S.D. Ohio 2009) – Rule 60 permits Appellate Court to grant relief from Order dismissing appeal where dismissal is based on fraud, misrepresentation or misconduct by opposing party; or where Court lacked jurisdiction over the subject matter or over the parties or if it acted in a manner inconsistent with due process. Unintelligible allegations of alleged fraudulent conduct by purchaser of property from bankruptcy trustee constitute mere disagreements with Court’s analysis of purchaser’s Motion to Dismiss and do not demonstrate fraud by any opposing party. Motion for Reconsideration failed to allege any viable theory under which the Appellate Court would have lacked jurisdiction over the subject matter or the parties and Movant failed to demonstrate any alleged inconsistency with due process.

13.55 Vacatur

- (5894) *U.S. v. Marcola*, 2012 WL 995289 (E.D. Mi. 2012) – When a bankruptcy case becomes moot pending appellate adjudication, the District Court can reverse or vacate the judgment. Vacatur clears the path for future re-litigation by eliminating a judgment the loser was stopped from opposing on direct review. Vacatur is appropriate when mootness occurs through circumstances not attributable to the parties or the unilateral action of the party who prevailed in the lower court. Mootness by reason of settlement does not justify vacatur of judgment under review absent equitable or exceptional circumstances. In the typical case in which settlement results in dismissal of the appeal, the parties have settled the dispute involved in the appeal. However, in this case the appeal was rendered moot by dismissal of the underlying case, without compromise of the issue presented on appeal. The pendency of bankruptcy case while the appeal was pending harmed the United States in a different way than the adverse Order appealed to this Court and that was not cured by the dismissal of the underlying case. Vacatur would allow for re-litigation of the issue and avoid the absurd result of maintaining the disputed Order’s declaratory ruling while preventing the United States from prosecuting the appeal of the adverse Order because the underlying bankruptcy case was dismissed.

H. Issues on Appeal

13.56 Consideration by Lower Court

- (5895) *In re Shefa, LLC*, 2015 WL 248496 (Bankr. E.D. Mi. 2015), *aff’d*, 2015 WL 4477911 (E.D. Mi. 2015) – Good faith is factual question

dependent on multiple factors. Appellate court would not consider on appeal factual decisions not decided by bankruptcy court. Bankruptcy Court did not consider good faith of debtor where court already concluded that proposed plan was not feasible.

- (5896) *Van Duzer v. US Bank, NA*, 2014 WL 4416304 (5th Cir. 2014) – Party waives issues on appeal at Circuit Court where party did not raise issues during appeal to district court.
- (5897) *Lifstedt v. Kendall*, 2014 WL 1706148 (10th Cir. 2014) – Circuit Court will not consider issues on appeal that were not raised at BAP. Failure to raise issues at first appeal is deemed waiver of issues in subsequent appeal to Circuit Court.
- (5898) *Thomas v. Aquil*, 2013 WL 781643 (6th Cir. 2013) – Issues not raised at Bankruptcy Court or in District Court are waived and will not be considered on appeal.
- (5899) *Lemaire v. Fannie Mae*, 2012 WL 3841295 (E.D. Mi. 2012) – Court will not consider issues not raised in bankruptcy court. Debtor did not assert constitutional claims at bankruptcy court in response to Motion for Relief from stay and would not be considered by District Court in appellate capacity.
- (5900) *In re Estate of Gray*, 2011 WL 3946729 (E.D. Mi. 2011) - Court will not consider issues not raised in bankruptcy court. Debtor did not assert constitutional claims at bankruptcy court in response to Motion for Relief from stay and would not be considered by District Court in appellate capacity.
- (5901) *In re Mayer*, 41 BR 702 (E.D. Mi. 2011) – Ordinarily an appellate court does not give consideration to issues not raised in the Bankruptcy Court. Further, raising an issue at the Court below does not mean that all arguments related to that issue are preserved. Court may deviate from general rule in exceptional case, if declining to review issues for the first time on appeal would produce a plain miscarriage of justice, or if appeal presents a particular circumstance warranting departure; or if doing so would serve an overarching purpose other than simply reaching the correct result in this case. Court should address an issue presented with sufficient clarity and requiring no factual development if doing so would promote the finality of litigation in this case. Court permitted Debtor to raise additional issues regarding constructive trust where the challenged issues (1) are purely legal, (2) require no further factual development, and (3) have been fully briefed by the parties in their respective appellate pleadings; and a resolution of the contested issue would likely promote finality in the litigation.
- (5902) *Ershowsky v. Freedman*, 2011 WL 2078644 (11th Cir. 2011) – Issues not presented to District Court on appeal from Bankruptcy Court Order are waived for purposes of further appeal. Appellate Court will only consider issues raised at lower court. Only exceptions are (1) whether the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; (2) whether the appellant had an opportunity to raise the objection in the trial court; (3) whether the interest of substantial justice is at stake; (4) whether the proper resolution is beyond any doubt; and (5) whether the issue presents significant questions of general impact or great public concern.
- (5903) *B.O.C. Law Group, P.C. v. Carroll*, 2011 WL 2148603 (E.D. Mi. 2011) – Appellee may, without taking cross appeal, urge affirmance on any basis appearing in record even if the argument is based on matters overlooked or ignored by the lower court. Party's failure to advance at the lower court an argument raised by the lower court *sua sponte* does not amount to waiver of that issue on appeal.
- (5904) *Gold v. Deloitte & Touche, LLP*, Case No. 0814567 (E.D. Mi. 2009) –Appellate Court ordinarily will not consider issues which were not raised and litigated below. Trustee did not raise argument that doctrine of “adverse domination” operated to toll applicable statute of limitations before lower Court. Although appellate Court can consider purely legal issues which were not raised at the lower Court, doctrine of “adverse domination” requires substantial factual inquiry.

13.57 Specification of Issues – Generally

- (5905) *Key Bank v. Hartmann*, 2013 WL 1312013 (E.D. Ky. 2013) – Issues raised for first time in reply brief on appeal are not properly before the Court.
- (5906) *Thomas v. Aquil*, 2013 WL 781643 (6th Cir. 2013) – Issues raised at District Court but not on appeal are considered abandoned and are not reviewable. Passing reference to Chapter 13 Plan unaccompanied by any argument considered waived, as issues adverted to in perfunctory manner unaccompanied by some effort at developed argument are deemed waived.
- (5907) *Leavitt v. Alexander*, Case No. 11-1114 (9th Cir BAP 2012) – Appellant's failure to specify issues in Statement of Issues on Appeal waives right to appeal issue. Court lacks jurisdiction to consider issues not stated in Statement of Issues even where parties have otherwise fully briefed issues.

13.58 Specification of Issues – Failure to File

- (5908) *In re Chaban*, Case No. 15-13383 (E.D. Mi. 2015) – Rule 8009 requires appellant to file designation of items to be included in record and statement of issues to be presented within 124 days after appeal is docketed. Court can dismiss appeal where party fails to meet deadlines based on bad faith, negligence or indifference. Dismissal warranted where instant appeal was appellant's fourth appeal in less than one year, creating presumption that appellant was familiar with deadlines. Untimeliness reflected vexatious nature of the entire proceeding and overall indifference to judiciary rules, time and resources.
- (5909) *Pikeville Energy Group, LLC v. Spradlin*, 2013 WL 1718801 (E.D. Ky. 2013) – Bankruptcy Court erroneously denied Motion to File Specification of Issues two days after deadline where delay was caused by death of appellate counsel's father. Delay was not prejudicial and balancing of equities indicated that the moving party was not acting in bad faith. Bankruptcy Court's reference to a consistent lack of

good faith in the prosecution of the adversary itself, without more, did not indicate that defendant acted in bad faith in failing to timely file the Specification of Issues in this appeal. While the party was not entirely blameless and acknowledged that the failure to file the specifications resulted from appellate counsel's failure to follow up, excusable neglect does not require freedom from all fault, but only that to the extent party is at fault, facts and circumstances indicate that party can be excused for non-compliance.

13.59 Waiver of Issues – Generally

- (5910) *Van Duzer v. US Bank, NA*, 2014 WL 4416304 (5th Cir. 2014) – Party waives issues on appeal where party's brief does not address those issues. Party waives issues on appeal at Circuit Court where party did not raise issues during appeal to district court.
- (5911) *US Trustee v. Bane*, 2014 WL 1378313 (4th Cir. 2014) – Party waives issue on appeal when party's initial brief fails to address issue.
- (5912) *Connery v. Norsworthy*, 2014 WL 1651957 (5th Cir. 2014) – Party who fails to address issue in briefs will be deemed to have abandoned issue.

I. Briefs

13.60 Deadline for Filing

- (5913) *Weary v. Poteat*, 2014 WL 2208955 (E.D. Tn. 2014) – Briefs are due by date set out in initial briefing order unless deadline is extended on Motion filed under Rule 9006.

13.61 Extension of Time to File

- (5914) *Richard v. Spradlin*, 2013 WL 1571059 (E.D. Ky. 2013), *aff'd* 2014 WL 3452292 (6th Cir. 2014) – Court properly denied request to extend time to file brief on appeal where District Court concluded that court lacked jurisdiction over cross-claims that were subject of appeal. Once court concluded it lacked jurisdiction, any issues regarding briefing were rendered moot, including whether District Court properly dismissed case for failure to timely file briefs.
- (5915) *Weary v. Poteat*, 2014 WL 2208955 (E.D. Tn. 2014) – Motion for extension of time under Rule 9006 must either be requested before deadline; or can be requested after expiration only on showing that failure to act was due to excusable neglect. Excusable neglect standard is ultimately equitable one, taking into account relevant circumstances that caused omission, danger of prejudice to opposing party, length of delay and impact on judicial proceedings, reason for delay, whether delay was within control of movant, and whether movant acted in good faith. Delay of less than two months in filing initial brief on appeal was excusable. Appellee would not be prejudiced as appellee has right to file answer brief on appeal. Appellant discovered error and brought it to court's attention by filing motion for extension before appellee had taken any affirmative action. Appeal was in early stages and granting motion would not have any meaningful adverse effect on judicial proceedings. Although cause of error – counsel's mis-calendaring of deadline – was entirely within control of appellant and counsel, considering other factors made this a less important fact.

13.62 Content

- (5916) *In re Freemont Hospitality Group, LLC*, Case No. 14-8053 (6th Cir. 2015) – Briefs must fairly address issues raised in orders being appealed. Brief that did not include any argument or references to record on appeal that were in any way related to orders being appealed, and that failed to include a statement of issues presented or a standard of review, or any contentions and citations to authorities, that related to issues presented warranted dismissal of appeal.

13.63 Limitations on Length

- (5917) *Vining v. Comerica Bank*, Case No. 03-4950 (Bankr. E.D. Mi. 2015) – Scheduling Order limited page length of briefs. Party's brief exceeded 50 page limit where brief ostensibly contained 50 pages, but added 15 page, single spaced "Summary of Evidence" that contained additional facts and argument and should be counted as part of the brief. Second party attempted to circumvent limit by including multiple documents as "exhibits", omitting a statement of facts, and incorporating various pleadings by reference. Third party's brief also exceeded 50 page limit where brief itself was 49 pages but separate Motion for Summary Judgment that contained facts, substantive legal arguments, and citations added another 23 pages for a total of 72 pages. Briefs stricken with leave to file amended briefs that comply with court imposed page limitations.

J. Record on Appeal

13.64 Time for Filing

- (5918) *In re Chaban*, Case No. 15-13383 (E.D. Mi. 2015) – Rule 8009 requires appellant to file designation of items to be included in record and statement of issues to be presented within 124 days after appeal is docketed. Court can dismiss appeal where party fails to meet deadlines based on bad faith, negligence or indifference. Dismissal warranted where instant appeal was appellant's fourth appeal in less than one year, creating presumption that appellant was familiar with deadlines. Untimeliness reflected vexatious nature of the entire proceeding and overall indifference to judiciary rules, time and resources.
- (5919) *Byers v. Byers*, 2015 WL 3917281 (S.D. Ohio 2015) – Statement of Issues and Designation of Record are ordinarily due 14 days after filing notice of appeal. Court would grant extension of time where Motion was filed on last day on which Designation could be timely filed, where appellant was pro se and appellee would not suffer any prejudice as a result of a short extension.

13.65 Disputes – Jurisdiction to Resolve

- (5920) *In re McKenzie*, 2013 WL 5309008 (Bankr. E.D. Tn. 2013) – Bankruptcy court has jurisdiction to resolve disputes regarding contents of record on appeal of order issued by bankruptcy court.

13.66 Disputes – Generally

- (5921) *In re McKenzie*, 2013 WL 5309008 (Bankr. E.D. Tn. 2013) – Court struck portions of designated record that addressed issues not presented in connection with matter to be resolved or where items were not introduced into evidence at hearing where inclusion would not improve the understanding of the appellate court but would confuse the appeal with an issue that had already been resolved by the Circuit Court in prior appeals. Designation of record should be liberally construed to allow anything that has a connection to the issue on appeal, but this does not require or allow inclusion in record of everything in the bankruptcy case itself.

13.67 Failure to Provide

- (5922) *In re Freemont Hospitality Group, LLC*, Case No. 14-8053 (6th Cir. 2015) – Appellant has duty to provide Appellate Court with record adequate to allow court to consider issues on appeal. Items designated in record were entirely unrelated to the orders that were appealed pursuant to the notice of appeal, and failed to include any relevant order or judgment, any opinion, findings of fact or conclusions of law, any relevant pleadings or any transcripts. Defects in record left appellate court unable to determine that bankruptcy court's findings were erroneous, such that bankruptcy court's presumption that it acted properly compelled affirmance of decision.

13.68 Redaction of Transcript

- (5923) *In re Immanuel, LLC*, 2011 WL 1522335 (Bankr. W.D. Mi. 2011) – Court's Administrative Order allows party to request that electronic transcript redact personally identifiable information within scope of Rule 9037. Party's request to redact information that does not constitute personally identifiable information denied without prejudice to party filing Motion for Protective Order if party believes grounds exist.

K. Standards of Review

13.69 De Novo Review

- (5924) *Waldman v. Stone*, 2015 WL 1245361 (6th Cir. 2015) – *De novo* review of Bankruptcy Court's proposed Findings of Fact and Conclusions of Law does not require District Court to take additional evidence on issues as to which objections have been filed. While rule 9033 allows District Court to take additional evidence, Court is not required to do so. *De novo* review requires district court to review proposed findings and conclusions without affording Bankruptcy court any deference or presumption of correctness. District Court applied correct standard where court expressly stated that it did not afford Bankruptcy court findings and conclusions any presumption of validity.

13.70 Question of Law

13.71 Question of Fact

- (5925) *Brock v. Hammonds*, 2011 WL 2646549 (6th Cir. BAP 2011) - The bankruptcy court's findings of fact are reviewed under the clearly erroneous standard, and its conclusions of law are reviewed de novo. Under the clearly erroneous standard, the Panel must give deference to the bankruptcy court as the finder of fact. If the court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.

XIV. Avoidable Transfers

A. Trustee Strong Arm Powers

14.1 Section 544 Generally

- (5926) *Buchwald Capital Advisors, LLC, v. Papas*, 2014 WL 4187371 (Bankr. E.D. Mi. 2014) – Section 544(b)(1) allows trustee to avoid any transfer of an interest of the debtor in property to extent that transfer is voidable under applicable law. Action brought under State Uniform Fraudulent Transfer Act must fulfill all state law requirements for such a cause of action.

14.2 Trustee as Judicial Lien Creditor

- (5927) *In re Lozar*, 2014 WL 910352 (Bankr. N.D. Ohio 2014) – Lender's lien was satisfied and lender's interest subordinate to claims of Trustee where lender, prior to commencement of case, received check from debtor and released lien, noted discharge of lien on title, and returned title to borrower. After check bounced, lender made no effort to reinstate lien on title or to recover certificate of title from debtor. As of date of commencement of bankruptcy case, record title was in debtor with no perfected security interest. Trustee, as holder of rights as judicial lien creditor, held interest superior to unrecorded lien.
- (5928) *Higgason v. Richardson*, 2013 WL 5349036 (Bankr. E.D. Ky. 2013) – Trustee entitled to summary judgment avoiding lien on Mobile Home where creditor failed to note lien on certificate of title as required by state law.
- (5929) *Higgason v. Vanderbilt Mortgage & Finance, Inc.*, Case no. 12-5763 (6th Cir. 2013) – To perfect lien in manufactured home that is not affixed to realty, title lien statement is submitted to the county clerk of the county of the debtor's residence which will then note the security interest on the certificate of title by entering the information into State computer system and produce a certificate of title. Lien

not properly perfected where title lien statement was filed in county other than the one in which debtor resided. Trustee avoided lien under Section 544. Court cannot ignore plain language of statute to reach result which party contends “must have been intended” by legislature.

- (5930) *Rogan v. Vanderbilt Mortgage & Finance, Inc.*, 2013 WL 19909497 (Bankr. E.D. Ky. 2013) – Trustee has powers of hypothetical judicial lien creditor. Scope of those powers in particular whether Trustee has interest superior to or subordinate to other liens or interests is determined by state law. Trustee could not avoid properly executed note and recorded mortgage based on later assignment of mortgage but lack of negotiation of note. Although there may be question as to lienholder’s ability to enforce lien where lienholder does not also hold note, that is not basis to avoid mortgage under Section 544.
- (5931) *Kellner v. Fifth Third Bank*, 2013 WL 1785481 (Bankr. S.D. Ohio 2013) – Properly recorded lis pendens prevents trustee from avoiding line using power of hypothetical bona fide purchaser as lis pendens constitutes constructive notice of adverse claims. Similarly, properly recorded lis pendens prevents hypothetical judgment lien creditor from obtaining rights superior to party recording lis pendens. Thus, while lender never recorded mortgage, Trustee could not avoid mortgage as judgment lien creditor where lender recorded lis pendens prior to commencement of bankruptcy case.
- (5932) *In re Vickers*, 2013 WL 1619814 (Bankr. E.D. Ky. 2013) – Trustee as hypothetical judicial lien creditor can avoid unrecorded and unperfected security interests. Lender’s mortgage was properly perfected and was not avoidable where mortgage had been properly recorded by original lender and successor creditor held promissory note endorsed to it in blank. When the note was endorsed in blank and delivered to lender, lender became holder entitled to enforce terms of note. Fact that endorsement is signed with an unintelligible signature does not defeat validity of the endorsement itself. Bank was holder of note and mortgage for at least 2 years pre-petition. Although instrument was endorsed to Bank of New York Mellon, and creditor was now Bank of New York but note was not re-endorsed to Bank of New York, evidence indicated that Bank of New York was the same entity where documents filed with state indicated that Bank of New York Mellon had changed name to Bank of New York. Record was sufficiently clear to establish identity of lender holding the note and mortgage. Any alleged defect in the endorsement as in violation of the trust agreement between lender and the trust beneficiaries did not have any relevance to validity of endorsement as against borrower, even if the endorsement may have been violation of trust agreement, as neither borrower nor Bankruptcy Trustee were parties to the lender’s trust instrument.
- (5933) *In re DeGroot*, Case No. 05-12996 (Bankr. W.D. Mi. 2012) – Trustee’s status as hypothetical judgment lien holder has interest superior to statutory lien held by debtor’s ex-wife for unpaid child support. Trustee can collect entire receivable owed to debtor from ex-wife free and clear of any statutory lien in receivable held by ex-wife to secure payment of future child support.
- (5934) *Rogan v. CitiMortgage, Inc.*, 2012 WL 1806302 (Bankr. E.D. Ky. 2012) – Mortgage signed by wife who signed her name and also signed husband’s name not defective or avoidable where wife signed pursuant to power of attorney that was properly recorded. Although power of attorney presented by wife at signing was defective, husband signed new, complete power of attorney three days later. Husband’s later power of attorney constituted ratification of prior signature by wife on his behalf. Ratification occurs when person purporting to act as agent is without actual authority but, when principal discovers the act subsequently ratifies or adopts the actions. Ratification dates back to the occurrence of the actual event and principal is bound to the same extent as if the act had been properly performed in the first instance.
- (5935) *Baker v. General Electric Credit Union*, 2012 WL 86778 (Bankr. E.D. Ky. 2012) – Title Certificate that incorrectly named different lender did not operate to perfect lien of correct creditor. Clerk of County Court inadvertently listed lender as “Nissan Motor Acceptance Corporation”. Kentucky law requires lender’s name and address to be listed on the Certificate of Title to perfect lien. Lender, General Electric Credit Union, was not named on Certificate of Title and, therefore, lien was unperfected and could be avoided by Trustee.
- (5936) *US Bank, NA v. Barbee*, 2011 WL 6141648 (6th Cir. BAP 2011) – Property interests are created and defined by state law. In Kentucky, manufactured home is personality for which certificate of title is issued in which lien may be perfected solely by notation on certificate of title. State law does allow for conversion of mobile home into fixture by filing an affidavit of conversion, or by creditor obtaining pre-petition state court judgment converting mobile home to improvement to real property, on which lien would be mortgage recorded in appropriate public records. Debtors did not file affidavit and creditor did not avail itself of option to seek state court declaration, leaving mobile home “personalty” for purposes of perfection. Lien not recorded on certificate of title could be avoided as unperfected security interest under Section 544.
- (5937) *Gold v. Pasternak*, Adv. No. 11-5504 (Bankr. E.D. Mi. 2011) – Trustee could avoid under strong arm powers a security interest that is not properly perfected. Financing statement must be filed to perfect security interest in inventory. Financing statement must be filed in the name of the debtor. Financing Statement filed under name of Corporation’s “registered trade name” is not filed under Corporate name and is not sufficient under Michigan law. Registration by Corporation of Assumed Name does not make Assumed name the Corporate Name.
- (5938) *Rogan v. Litton Loan Servicing, LP*, 2011 WL 4445651 (6th Cir. BAP 2011) – Section 544(a)(1) allows the Trustee to avoid a security interest that is not perfected or is improperly perfected before the bankruptcy petition is filed. Under Kentucky law, a mortgage may not be enforced absent proof of a valid and enforceable debt. Mortgagee who holds mortgage but is not the holder of the underlying note holds unperfected security interest that can be avoided by Trustee. Trustee’s complaint alleging that second mortgage holder did not hold note was sufficient to state cause of action, and could be defeated only by affirmative evidence that as of the date of the petition, the mortgage holder was also the holder of the underlying debt. Section 544 cannot be used to attack alleged post-petition transfers of the mortgage and note, as Section 544 applies only to the facts as they exist on the date of filing. Post-petition transfers may be contested, if at all, only as objections to a Proof of Claim.
- (5939) *Vanderbilt Mortgage and Finance, Inc. v. Westenhoefer*, 2011 WL 4356358 (E.D. Ky. 2011), *aff’d*, 2013 WL 2301940 (6th Cir. 2013) – To perfect lien in manufactured home that is not affixed to realty, title lien statement is submitted to the county clerk of the county of the

debtor's residence which will then note the security interest on the certificate of title by entering the information into State computer system and produce a certificate of title. Lien not properly perfected where title lien statement was filed in county other than the one in which debtor resided. Trustee avoided lien under Section 544. Court cannot ignore plain language of statute to reach result which party contends "must have been intended" by legislature.

- (5940) *Higgason v. Vanderbilt Mortgage and Finance, Inc.*, 2011 WL 4433620 (Bankr. E.D. Ky. 2011), *aff'd* 471 BR 876 (6th Cir. 2013) – To perfect lien in manufactured home that is not affixed to realty, title lien statement is submitted to the county clerk of the county of the debtor's residence which will then note the security interest on the certificate of title by entering the information into State computer system and produce a certificate of title. Lien not properly perfected where lien was not noted on certificate of title prior to commencement of case. Further, even if lien had been noted, lien was not properly perfected where title lien statement was filed in county other than the one in which debtor resided. Trustee avoided lien under Section 544.
- (5941) *Lim v. Anton*, Case No. 10-41460 (Bankr. E.D. Mi. 2011) – Trustee could avoid sale of boat where certificate of title was not signed by the seller and the buyer never filed the Bill of Sale with the Coast Guard. Vessel was registered with Coast Guard. Ship Mortgage Act requires any transfer of an interest in a registered vessel to be recorded with the Coast Guard to be perfected. Buyer's attempt to record the transfer with the Coast Guard post-petition would not perfect transfer as recording did not occur within any "safe harbor" period for perfection.
- (5942) *Westenhoefer v. Vanderbilt Mortgage & Finance, Inc.*, 2011 WL 1984061 (Bankr. E.D. Ky. 2011) – Lender's recording of lien on mobile home with the county clerk in a county other than the county in which the debtor resided failed to comply with State law regarding perfection, leaving lien unperfected and subject to avoidance under Section 544 and Section 550.
- (5943) *Palmer v. Vanderbilt Mortgage and Finance, Inc.*, 2010 WL 5421148 (Bankr. E.D. Ky. 2010) – Lender's recording of lien on mobile home with the county clerk in a county other than the county in which the debtor resided failed to comply with State law regarding perfection, leaving lien unperfected and subject to avoidance under Section 544 and Section 550.
- (5944) *Degirrolamo v. Suntrust Mortgage, Inc.*, 2010 WL 3489059 (Bankr. N.D. Ohio 2010) – "Mere defect" in execution of mortgage results in the mortgage company holding an equitable lien against the property which cannot be avoided by judicial lien creditor. Therefore, Trustee cannot avoid mortgage under Section 544(a)(1).
- (5945) *Rogan v. Mila, Inc.*, 2010 WL 3168094 (Bankr. E.D. Ky. 2010) – Trustee attacked validity and enforceability of mortgage where Note was payable to Mila, Inc., but Mortgage defined the mortgagee as MERS. Split between payee of note and named mortgagee did not render mortgage subject to avoidance by hypothetical judicial lien creditor where mortgage was properly recorded prior to the commencement of the bankruptcy case and provided record perfection of the mortgage as a matter of law.
- (5946) *Sovereign Bank v. Hepner*, 2010 WL 2816472 (10th Cir. 2010) – State law controls priority of obligations and determines whether trustee status as lien creditor is superior to unrecorded interest. Under Colorado law, creditor has 20 days from delivery of automobile to buyer to perfect lien on title superior to any lien creditor attaching the collateral in the meantime. Debtor's bankruptcy filing within that 20 day window would not permit trustee to avoid Bank's security interest which was properly perfected post-petition but within 20 day safe harbor.
- (5947) *Stockton Mortgage Corporation v. Schlarman*, 2010 WL 2667390 (Bankr. E.D. Ky. 2010) – Trustee has power under Section 544 to avoid any transfer of property that would be voidable against a creditor holding a judicial lien. Mortgage against property owned by Debtor and co-owner that defined "Borrower" only as the co-owner did not constitute a grant of the mortgage against Debtor's interest in the property. Under Kentucky law, party must be named in the body of the mortgage for the mortgage to be effective as to third parties. Signature by Wife as "Borrower" does not constitute identification of the Wife as a grantor in the body of the mortgage itself. Debtor's interest in the Property is not encumbered by the Mortgage executed by only Northcutt because the Debtor and Northcutt held the property as joint tenants, and one party could not encumber the Property as a single, indivisible estate. Accordingly, the Trustee holds superior title to the extent of that interest.
- (5948) *Johnson v. BAC Home Loans Servicing, L.P.*, 2010 WL 2667393 (Bankr. E.D. Ky. 2010), *aff'd*, 2011 WL 3608095 (6th Cir. 2011) – Trustee has power under Section 544 to avoid any transfer of property that would be voidable against a creditor holding a judicial lien. Mortgage against property owned by husband and wife that defined "Borrower" only as the Husband did not constitute a grant of the mortgage against Wife's interest in the property. Signature by Wife as "Borrower" does not constitute identification of the Wife as a grantor in the body of the mortgage itself. Accordingly, Mortgage failed to provide records notice of any claim against Wife's interest in the property, rendering the mortgage avoidable pursuant to Section 544.
- (5949) *Rogan v. Citimortgage, Inc.*, 2010 WL 2926050 (Bankr. E.D. Ky. 2010) – Mortgage that named MERS as mortgagee not subject to attack by judicial lien creditor where mortgage defined MERS as "nominee" for Lender and granted MERS the power of sale and enforcement. MERS later assignment of mortgage to Citimortgage was valid where assignment appeared regular on face and MERS passed corporate resolution ratifying signature on assignment. Attached promissory note included blank endorsement converting note into bearer instrument, and transfer of note operated to transfer security interest attached to note by operation of Kentucky law. Citimortgage held original note endorsed in blank, giving Citimortgage right to enforce mortgage.
- (5950) *Limor v. First National Bank of Woodbury*, 2010 WL 2509176 (6th Cir. BAP 2010) – Bank that held perfected security interest forfeits right of setoff or status as perfected secured creditor when Bank honored check presented by Debtor four days after the filing of the bankruptcy petition, but does not forfeit properly perfected pre-petition security interest. Trustee's ability to defeat security interest under Section 544 is determined by facts as they existed on the date of the petition. Subsequent acts by Creditor could not release or

adversely affect status of security interest or Trustee's ability to avoid interest under Section 544. Creditor's security interest should not be prejudiced by post-petition delivery to the Trustee of money or property of the estate. However, turnover or release of funds does waive ability to setoff pursuant to Section 553 as of moment of petition not subject to attack by judicial lien creditor. Subsequent turnover of the funds to the Trustee does not alter the Bank's secured position.

- (5951) *Drown v. Wells Fargo Bank, N.A.*, 424 BR 315 (Bankr. S.D. Ohio 2010), *aff'd* 2011 WL 1188434 (S.D. Ohio 2011) – Section 544(a)(1) grants each of the Trustees "the status of a hypothetical lien creditor who is deemed to have perfected his interest as of the date of the filing of the bankruptcy petition and also grants the Trustees the power to avoid transfers of property that could be avoided by a judicial lien creditor. Bankruptcy trustee cannot avoid a properly recorded mortgage even if the deed conveying title to the underlying property to the debtor was itself incorrectly executed. Although property transferred by a "defective deed" may not be sufficient to convey legal title, that defective deed is sufficient to transfer equitable title that is sufficient to support mortgage. Where the mortgage itself was properly recorded pre-petition, Trustee could not rely on defect in underlying conveyance to Debtor as basis to avoid perfected mortgage.
- (5952) *French v. Luyben*, 2009 WL 2169217 (Bankr. N.D. Ohio 2009) – Judgment lien in personal property is deemed perfected when property is seized in execution of judgment. Where seizure of motorcycle did not occur until after bankruptcy petition had been filed, judgment creditor which held as of the moment of the filing only an unsatisfied execution held unperfected security interest as of the date of the filing which was subject to avoidance under section 544(a)(1).

14.3 Trustee as Holder of Unsatisfied Execution

- (5953) *In re Thompson*, Case no. 13-6389 (Bankr. W.D. Mi. 2014) – Under Michigan law, lien in vehicle is perfected when lienholder delivers to Secretary of State properly completed RD-108. Although SOS erroneously identified incorrect creditor on certificate of title as lien holder, correct lienholder had delivered to SOS the properly completed RD-108 prior to commencement of case, creating in lienholder valid, perfected and unavoidable lien, although certificate of title was not amended to show correct lienholder until after commencement of case.
- (5954) *Rogan v. Litton Loan Servicing, LP*, 2011 WL

14.4 Trustee as Bona Fide Purchaser

- (5955) *Hazelwood v. Fifth Third Bank*, 2014 WL 3534054 (Bankr. W.D. Ky. 2014) – Debtor can exercise derivative standing under Section 544 to contest validity of unrecorded mortgage. Although confirmed plan treated mortgage creditor as fully secured and would have precluded any attempt by debtor to treat debt as unsecured, debtor later modified plan to make lien retention subject to avoidance powers under Section 544 and lender did not object to that modification. Request to modify plan specifically referenced intent to bring action against lender. Lender is bound by terms of plan as modified including provision allowing debtor to contest validity of mortgage.
- (5956) *Kellner v. First Ohio Banc & Lending, Inc.*, 2014 WL 1200320 (Bankr. S.D. Ohio 2014) – Trustee cannot use strong arm powers to avoid liens or interest of which trustee has constructive notice in chain of title. Trustee lacked constructive notice of mortgage where legal description in mortgage was wholly inaccurate and because mortgages are indexed by description, was completely outside chain of title. Lender with avoided mortgage was unsecured creditor and could file unsecured claim for debt.
- (5957) *Bank of New York v. Sheeley*, 2014 WL 1233094 (S.D. Ohio 2014) – Trustee takes title to real property free and clear of liens to same extent as bona fide purchaser under state law. Under Ohio law, bona fide purchaser who acquires title for consideration and without notice of existing equity takes free and clear of that equity. Bona fide purchaser is bound by encumbrance only if he has actual or constructive notice of the interest. Constructive notice is defined as knowledge of circumstances which ought to have excited apprehension and inquiry in the mind of a prudent and reasonable person. Bankruptcy Trustee will be deemed to have knowledge of any instruments executed by the current owner that are properly recorded, and assumes that the trustee would have searched relevant title indexed and records and examined the deeds in the chain of title. Mortgage that contained street address and also contained more specific but conflicting legal description did not provide constructive notice to defeat status of bona fide purchaser.
- (5958) *In re First Mortgage Fund, Inc.*, 2013 WL 4807164 (E.D. Mi. 2013) – Trustee's strong arm power as bona fide purchaser allowed trustee to avoid alleged unrecorded assignment of lender's rights under mortgage. Public record showed mortgage issued to Debtor but did not reflect any assignment of that mortgage, leaving lender as the record owner of the mortgage. Debtor's later foreclosure of mortgage, while potentially a breach of assignment documents, was not void as lender, as of date of foreclosure, held record title to mortgage and had standing to foreclose mortgage. Debtor was the record owner of the property by virtue of sheriff's deed on date of bankruptcy filing, such that Trustee acquired title free and clear of any unrecorded interest of assignee.
- (5959) *Gold v. JPMorgan Chase Bank, NA*, 2013 WL 3270346 (Bankr. E.D. Mi. 2013) – Where security interest has not been perfected prior to commencement of case, the "transfer" of the debtor's interest for purposes of preferential transfers is the date immediately prior to commencement of case. Mortgage were properly recorded at time of transactions, well before the preference period. Alleged defects in notary clauses, which failed to include printed or typed name of notary, did not state date on which commission expires, and did not indicate county in which notary was acting, did not cause recording to be fatally defective for purposes of perfection of mortgages. However, Michigan Compiled Laws Section 566.201(4) provides that any instrument received and recorded by a register of deeds is conclusively presumed to comply with recording requirements. Defect in attestation does not affect validity of underlying transfer and does not impact presumption that recorded mortgage is valid.
- (5960) *Kreitzer v. Household Realty Corp.*, 489 WL 6998 (Bankr. S.D. Ohio 2013) – Neither Trustee nor debtor can avoid properly recorded mortgage based on allegedly defective assignment of mortgage. Second assignment of mortgage that allegedly lacked attestation by notary public did not defeat effect of recorded mortgage as providing constructive notice of lien that precludes avoidance under Section

544.

- (5961) *Goddard v. Heldt*, Case No. 12-6027 (10th Cir. 2013) – Trustee could not use BFP status to defeat resulting trust held by debtor’s mother in property where mother was in open and notorious possession of property at time case filed. Years before debtor filed bankruptcy, mother transferred property into debtor’s name. Mother purchased the property and made all payments on the property, paid all taxes and insurance, and lived in the property. Transfer was done as estate planning device. Court ruled that property was subject to a resulting trust in favor of mother. Trustee argued that resulting trust was avoidable as an unrecorded interest subject to Trustee’s power as BFP. Mother’s open and unambiguous possession of property was sufficient under State law to give constructive notice of Mother’s interest, thereby defeating Trustee’s status as BFP.
- (5962) *Field v. Ocwen Loan Servicing, LLC*, 2012 WL 7991235 (Bankr. S.D. Ohio 2012) – Trustee cannot avoid properly recorded mortgage using trustee’s strong-arm power as bona fide purchaser. Reasonably prudent purchaser would have concluded that mortgage, which described mortgage property using street address that both parcels shared, and giving the parcel number for the larger tract and legal description of additional strip, was intended to cover both parcels. Mortgage provided constructive notice of existence and scope of mortgage.
- (5963) *Kellner v. Fifth Third Bank*, 2013 WL 1785481 (Bankr. S.D. Ohio 2013) – Properly recorded lis pendens prevents trustee from avoiding lien using power of hypothetical bona fide purchaser as lis pendens constitutes constructive notice of adverse claims. Trustee could not avoid unrecorded mortgage where lender recorded lis pendens prior to commencement of bankruptcy case.
- (5964) *Rhiel v. Central Mortgage Company*, 469 BR 778 (Bankr. S.D. Ohio 2012) – Under Ohio law, trustee has constructive notice of any instrument that is recorded by the current owner of the land and that are properly recorded. Recorded mortgage that is not properly executed, even if found in the public records, does not provide constructive notice and will not control over rights of subsequent purchaser. Mortgage bearing blank certificate of acknowledgement did not substantially comply with Ohio law for purposes of recording. Defect rendered mortgage of no effect for purposes of notice, and later assignment of mortgage to subsequent mortgagee did not cure defect. Filing action to foreclose does not constitute notice as nothing is recorded in the public records. Properly recorded Certificate of Judgment (as opposed to the Final Judgment itself) would provide constructive notice. Lender also failed to record lis pendens prior to bankruptcy filing. Properly recorded lis pendens also operates as constructive notice that would have been sufficient to defeat trustee’s status as BFP.
- (5965) *Rogan v. CitiMortgage, Inc.*, 2012 WL 1806302 (Bankr. E.D. Ky. 2012) – Mortgage signed by wife who signed her name and also signed husband’s name not defective or avoidable where wife signed pursuant to power of attorney that was properly recorded. Although power of attorney presented by wife at signing was defective, husband signed new, complete power of attorney three days later. Husband’s later power of attorney constituted ratification of prior signature by wife on his behalf. Ratification occurs when person purporting to act as agent is without actual authority but, when principal discovers the act subsequently ratifies or adopts the actions. Ratification dates back to the occurrence of the actual event and principal is bound to the same extent as if the act had been properly performed in the first instance.
- (5966) *Bank of America v. Greene*, 2012 WL 124278 (E.D. Tn. 2012) – Deed of Trust properly recorded but then inadvertently deleted from records by error of register of deeds did not provide constructive notice for purposes of defeating Trustee’s status as BFP. As a result of the error of the register of deeds, the deed of trust would not have been discoverable by a search of the public records. Striking notice from records is akin to mis-filing in the records, which prevents the instrument from being enforceable against subsequent BFP.
- (5967) *Smoky Mountain Title, Inc. v. Tennessee State Bank*, 2012 WL 122539 (Bankr. E.D. Tn. 2012) – Trustee as hypothetical bona fide purchaser for value takes title clear of unrecorded liens and interests. BFP status does not override constructive notice provisions of state recording statutes. Trustee did not have actual or constructive notice of mortgage where sequence of recording removed mortgage from debtor’s chain of title. Debtor’s principal purchased property and executed mortgage to lender. Principal then quit-claimed deed to corporation owned by principal. County clerk recorded documents in incorrect order, such that the deed to the principal and the quit-claim deed to the company were recorded before mortgage given by principal. Mortgage did not appear in debtor’s chain of title and mortgage, at time of recording, appeared to be made by a person who was, at that time, a stranger to title. Inquiry notice can also defeat BFP status if party did not have actual or constructive notice but nonetheless had sufficient facts and information from which actual knowledge can be inferred, even if the facts and information do not disclose the full state of facts and circumstances. Where information known to person would be sufficient cause person of ordinary prudence to make further inquiry, law presumes that party made inquiry and determined true state of facts. Although mortgage sell outside of chain of title for purposes of constructive notice, the deed to the principal and the quit-claim from the principal to the debtor both referenced the mortgage itself. These documents, of which the trustee had constructive notice, contained sufficient information to place trustee on inquiry notice of the existence of the mortgage, sufficient to defeat trustee status as BFP.
- (5968) *Rogan v. Fifth Third Mortgage Company*, 452 BR 591 (6th Cir. BAP 2011) – Bona fide purchaser of real property is put on constructive notice of a prior interest in property by the presence of a recorded deed or mortgage acknowledged according to law. Mortgage must name or sufficiently identify mortgagor in the body of the mortgage and must be signed at the end of the document by the party to be charged with it. Mortgage signed by non-borrower wife to secure debt of husband sufficiently identified wife as mortgagor. Although mortgage defined “borrower” solely as husband, wife signed both the mortgage and the Second Home Rider incorporated into the mortgage and the Second Home Rider identified wife as “borrower”. Viewing documents as a whole sufficiently identified wife as a mortgagor for purposes of recording and validity of mortgage, defeating Trustee’s attempt to avoid mortgage.
- (5969) *Tibble v. Wells Fargo Bank, N.A.*, 2001 WL 3583278 (Bankr. W.D. Mi. 2011) – Mortgage containing incorrect legal description does not provide record notice to defeat Trustee’s standing as bona fide purchaser. Mortgage incorrectly referenced Lot 6 when debtor actually owned Lot 5. Nothing in mortgage would put hypothetical purchaser on notice that mortgage that unequivocally stated “Lot 6”

was actually intended as mortgage on Lot 5.

- (5970) *Ransier v. Countrywide Home Loans, Inc.*, 2010 WL 4057769 (Bankr. S.D. Ohio 2010) – Trustee, as hypothetical bona fide purchaser, avoid transfers to extent that the transfer would not be binding against a bona fide purchaser as a matter of state law.

14.5 Trustee as Unsecured Creditor

- (5971) *Still v. Hopkins*, 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Trustee’s power to bring state court action under Section 544 depends on existence of actual unsecured creditor who could have brought action as of the commencement of the bankruptcy case. Complaint is not required to identify any specific unsecured creditor to state cause of action, but can allege generally that there is a category of unsecured creditors that could assert the claim. Complaint that alleged that debtor has “unsecured debt in excess of \$42,330.39” was sufficient to state cause of action under Section 544.
- (5972) *Lingham Rawlings, LLC v. Gaudiano*, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Trustee has power under Section 544 to assert any claims that unsecured creditor could assert under state law. To bring action under state fraudulent transfer statute, Trustee must prove that there is at least one creditor holding a allowable unsecured claim; and that the transfer is voidable under state law.
- (5973) *Bash v. Somerset CPAs, PC*, 2012 WL 3202774 (Bankr. N.D. Ohio 2012) – Complaint stated cause of action to recover proceeds that were improperly diverted to other entities controlled by debtor’s insider for no value. Complaint alleged that debtor obtained funds from third parties that debtor was supposed to invest, but instead debtor entered into series of worthless loans with debtor’s parent and other related companies. Complaint alleged sufficient facts to demonstrate that debtor was nothing more than a ponzi scheme that wrongfully diverted funds for benefit of insiders at expense of investors. Complaint sought to collapse series of transactions that began by debtor transferring funds to parent corporation which then passed funds to various related third party entities. Complaint specifically alleged that the Transfers were part of a single, integrated transaction that, taken together, diminished the value of debtor’s estate. Complaint further alleged that the Transfers were made by debtor for less than fair consideration or were made by debtor with actual fraudulent intent and that defendant knew or should have known of debtor’s scheme. Complaint contained detailed factual allegations that specifically identify fraudulent conduct which, if taken as true, would establish the “actual intent to hinder, delay, or defraud” element of an actual fraudulent transfer claim. The complaint also contains detailed factual allegations as to the transfers at issue being made for less than reasonably equivalent value as well as debtor’s insolvency. The complaint also contained detailed factual allegations that specifically identify each of the Transfers that the trustee seeks to avoid, including an identification of the recipient, amount and dates of those transfers.
- (5974) *Onkyo USA Corp. v. Global Technovations, Inc.*, 2011 WL 1299356 (E.D. Mi. 2011), *aff’d* 2012 WL 4017386 (6th Cir. 2012) – Under Section 544(b), Trustee can avoid any transfer of property of debtor that is avoidable by an unsecured creditor who held a claim. Trustee can file action under Florida state fraudulent transfer statute as long as there was at least one actual unsecured creditor who could have pursued recovery under Florida law.

14.6 Standing – Debtor

- (5975) *Atkins v. Gelt Properties, LLC*, 2015 WL 846696 (Bankr. E.D. Pa. 2015) – Chapter 13 Debtor is not “debtor in possession” and so lacks standing to attempt to avoid mortgage using trustee’s strong arm powers under Section 544(a)(3).
- (5976) *In re Neville*, Case No. 14-57535 (Bankr. E.D. Mi. 2015) – Failure to record security interest does not defeat validity of security interest as between debtor and creditor. Security agreement is valid when (1) value has been given; (2) debtor has rights in collateral; and (3) debtor has authenticated a security agreement that provides a description of the collateral. Recording is only necessary to perfect lien as against third parties. Debtor lacks standing to avoid security interest in Chapter 7 under Section 544, which limits Section 544 to the Trustee and limits debtor’s rights to those under Section 522(f)(1), g, and h. Section 522(f)(1) allows debtor to avoid judicial lien or non-purchase money security interest to extent it impairs exemptions. Lien was not judicial lien and lien was given as purchase money security interest where loan was for purpose of allowing debtor to purchase automobile and debtor used the money for that purpose. Section 522(g) allows a debtor to exempt assets that are recovered by the trustee but does not present an independent basis for the debtor to recover the asset. Section 522(g) would not apply even if trustee avoided lien as Section 522(g) does not apply to voluntary transfers, and debtor voluntarily gave lien on automobile. Section 522(h) allows a debtor to exercise the trustee’s rights under Section 544 to the extent that the debtor would have been able to exempt the property under Section 522(g) if the trustee has pursued recovery, but debtor would not have been able to assert exemption in automobile even if trustee has avoided lien because transfer by debtor was voluntary. Lien passes through Chapter 7 unavoids and enforceable where trustee does not pursue avoidance.
- (5977) *Hazelwood v. Fifth Third Bank*, 2014 WL 3534054 (Bankr. W.D. Ky. 2014) – Debtor can exercise derivative standing under Section 544 where court approved post-confirmation plan modification to grant that standing and debtor also filed separate motion for derivative standing. While procedure of approving standing via a plan modification may have been improper, creditor had notice of modification and failed to object and is bound by results.
- (5978) *Weyandt v. Federal Home Loan Mortgage Corp.*, 2013 WL 6052130 (3d Cir. 2013) – Assuming that “derivative standing” is possible, debtor lacks standing to pursue lien avoidance under Section 544 here trustee’s decision not to pursue avoidance was based on conclusion that there was no equity in property over and above senior, non-avoidable mortgage. Trustee did not violate any duty in declining to prosecute avoidance where action, even if successful would not produce any benefit to estate, precluding debtor for asserting right to derivative standing.
- (5979) *Smith v. US Bank, NA*, 2014 WL 1404722 (Bankr. W.D. Ky. 2014) – Chapter 13 debtor can bring action under Section 544 only if they first obtain permission from court to initiate action. Court noted split of authority on whether debtor can exercise Section 544 powers as

section 544 specifically delegates those powers to the Trustee. Court concluded that parties other than the trustee can exercise those powers only by obtaining court permission to proceed in trustee's stead. Motion must be filed in main case and granted before debtor has authority to institute action. Motion must state that debtor desires to pursue action; that debtor has asked Chapter 13 Trustee to pursue recovery; that trustee has declined to pursue recovery; and that claims are "colorable".

- (5980) *Mitrano v. US*, 2011 WL 4459102 (Bankr. E.D. Va. 2011) – Debtor lacks standing to pursue avoidance action under Section 544. Powers of debtors are listed in Section 1303. Avoidance powers are not included in powers listed.
- (5981) *US Bank, NA v. Barbee*, 2011 WL 6141648 (6th Cir. BAP 2011) – Debtor has derivative standing to pursue avoidance action where bank allegedly failed to perfect lien on title of mobile home.
- (5982) *Countrywide Home Loans v. Dickson*, 427 BR 399 (6th Cir. BAP 2010), *aff'd* 2011 WL 3768684 (6th Cir. 2011) – Debtor has direct and derivative standing to pursue action under Section 522(h) and Sections 544 and 547 where the creditor obtained the judgment lien during the preference period. Court has equitable power to allow Debtor to pursue avoidance actions where the Trustee fails or refuses to do so. Chapter 13 Trustee typically lacks resources to pursue avoidance action and lacks ability to sell assets to fund a war chest for litigation.
- (5983) *Lewis v. Mortgage Electronic Registration Systems, Inc.*, Case No. 07-6381 (Bankr. E.D. Mi. 2010) - Debtor lacks standing to avoid a lien under section 544, adopting majority view that Chapter 13 debtor lacks standing to assert trustee's avoidance powers except to extent explicitly permitted by Bankruptcy Code.

14.7 Standing – Third Parties

- (5984) *Northedge v. Beckett*, Case No. 13-80089 (Bankr. W.D. Mi. 2013) – Ex-spouse cannot use Section 522(f) to defeat lien granted to former spouse where the lien is granted under a divorce decree that extinguishes all interest the parties had in the property and which does not exceed the value of the property.
- (5985) *Borders v. King*, 2011 WL 3352468 (Bankr. E.D. Ky. 2011) – Creditors have no standing to prosecute a fraudulent transfer action in their own right and for their own benefit during a bankruptcy even if they would have had standing to do so outside of bankruptcy. The Trustee has the exclusive right to bring an action for fraudulent conveyance pursuant to 11 U.S.C. § 548 and/or § 544 during the pendency of bankruptcy proceedings.

14.8 Defenses – Earmarking

- (5986) *American Home Mortgage Investment Corp. v. Lim*, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547. Earmarking doctrine does not apply to a party who fails to record the mortgage within the 30 day safe harbor provision of section 547(e)(2)(A).
- (5987) *Chase Manhattan Mortgage Corp. v. Shapiro*, 530 F.3d 458 (6th Cir. 2008) – Earmarking doctrine requires agreement between a new creditor and the Debtor for payment of a specific antecedent debt; the agreement must be performed according to its terms; and the transaction cannot diminish Debtor's estate. Creditor that refinanced a pre-existing mortgage was not a "new creditor" and, therefore, transaction could not be protected by earmarking doctrine. Further, refinancing is not a unitary transaction but consists of two transfers by Debtor, one of which is the transfer of proceeds which could be protected by the earmarking doctrine and the second being the granting of a new mortgage which is beyond the scope of the earmarking doctrine. Earmarking doctrine will not apply to any security interest which is not perfected within the grace period set forth in section 547(e). Refinancing transaction completed approximately 6 months prior to bankruptcy filing but not recorded until 77 days prior to the commencement of the bankruptcy case and 72 days after lender had distributed the funds was avoidable preferential transfer under section 547.

14.9 Defenses – Reasonably Equivalent Value

- (5988) *Sweet v. Rumbold*, Case No 14-3076 (Bankr. E.D. Mi. 2015) – Salary of corporate officer paid by related company can constitute reasonably equivalent value to corporation making payment where, although that corporation did not pay salary to officer, the corporations were closely related. Defendant worked for corporations for a number of years, worked in the same capacity and the same number of hours, and was paid the same time each month for work performed. Factual issues remained concerning timing and method of payment and whether payments were intended to be substantially contemporaneous or were in fact substantially contemporaneous that precluded summary judgment.
- (5989) *Sweet v. Rumbold & Family, LLC*, Case No 14-3085 (Bankr. E.D. Mi. 2015) – Loan to one corporation but repaid by second, related corporation, is not *per se* without reasonably equivalent value. Although corporation that repaid loan had no legal obligation or liability to do so, both corporations were related and maintained consolidated balance sheets, such that repayment by one conferred at least an indirect benefit on the entity making the payment. Indirect benefit can constitute reasonably equivalent value.
- (5990) *Tibble v. Farmers Grain Express, Inc.*, 510 WL 792 (Bankr. W.D. Mi. 2014) – Subsequent transferee of avoidable transfer is not required or necessary party in avoidance action brought by Trustee. Trustee is not required to again prove avoidability of transfer where trustee has previously challenged initial transfer and prevailed in that action. Subsequent transferee retains right to contest avoidability based on transferee's alleged receipt of property in good faith and for value and without knowledge of avoidability of transfer.
- (5991) *Onkyo USA Corp. v. Global Technovations, Inc.*, 2011 WL 1299356 (E.D. Mi. 2011) *aff'd* 2012 WL 4017386 (6th Cir. 2012) – Florida statute on fraudulent transfers does not define reasonably equivalent value. Courts generally consider many factors, including the good faith of the parties, the disparity between the fair value of the property and what the debtor actually received, and whether the transaction

was at arm's length. Debtor who paid \$13 million to acquire assets worth only \$6.9 million did not receive "reasonably equivalent value" for stock acquisition.

- (5992) *Solomon v. Felsner*, 2008 WL 3562465 (6th Cir. 2008) – Trustee contested transfer of property pursuant to Florida State Fraudulent Transfer Statute. Applying Florida State Law pursuant to section 544(b)(1), transfer of property by Debtor to former housemate and father of former housemate was contemporaneous transaction in exchange for reasonably equivalent value and was not avoidable. Debtor's fiancé sold home in Michigan and moved to Florida with Debtor. Debtor applied for mortgage and fiancé "gifted" to Debtor money for down payment. Eight days later, Debtor closed on sale of property and immediately quit- claimed property to fiancé and Debtor jointly. Quit claim deed was not recorded for over one year. More than 90 days after quit claim deed finally recorded, Debtor filed for Chapter 7. Court held that Quit Claim Deed was not avoidable transfer. Transaction was a part of a single, integrated transaction and money paid by fiancé to Debtor was "consideration for [Debtor's] subsequent execution of the quitclaim deed". Evidence also failed to demonstrate that transfer rendered Debtor insolvent or likely to incur debts beyond Debtor's ability to pay, as required by Florida law.

14.10 Defenses – Stockholder Distributions

- (5993) *Official Committee of Unsecured Creditors v. American United Life Insurance Company*, Case No. 12-4720 (2d Cir. 2013) – Payments by debtor to holders of private placement notes issued by one of debtor's affiliates were not recoverable as preferences, and payments constituted transfers made in connection with a securities contract within meaning of Section 546(e).
- (5994) *Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Trustee's action to avoid preferential transfer under Section 544 is subject to defenses available under applicable state law. Fraudulent transfer based on payments by Corporations will be governed by Michigan Business Corporation Act and not Michigan Fraudulent Transfer Act if the payment constitutes "distribution" under MBCA. "Distribution" is a payment made to or for the benefit of shareholders that is made in respect to the corporate shares. Transfers made to or for the benefit of persons who are not shareholders cannot be "distributions" under MBCA. Payments will be "in respect to corporation's shares" if the distributions are made "in recognition of share ownership". Transfers to Chief Executive Officer and to Directors because of their status as officers and directors are not transfers "in recognition of share ownership" and so are not governed by MBCA.
- (5995) *QSI Holdings, Inc., v. Alford*, 2009 WL 1905237 (6th Cir. 2009) – Payments made to shareholder in connection with leveraged buyout of Debtors stock and privately held corporation were not avoidable. Shareholder payments qualified as "settlement payment" for purposes of Section 546(e), which generally bars trustees avoidance of prepetition margin and settlement payments made by two commodity broker, forward contract merchant, stockbroker, financial institution, financial disciplined or securities clearing agency. Transaction had characteristics of common leveraged buyout involving merger of nearly equal companies, nothing in statute indicating congressional intent to restrict statutes protection to publicly traded securities, and there was no reason to conclude that unwinding settlement would have less of an impact on financial markets than a settlement involving publicly traded securities. Role played by bank and leveraged buyout of privately held securities satisfied requirement that payment be made to financial institution where bank collected shares of corporate Debtors stock from individual shareholders, transfer those securities to the acquiring company, and distributed consideration to individual shareholders.

14.11 Defenses – Constructive Notice

- (5996) *Watson v. Cartee*, 2015 WL 728578 (M.D. Tn. 2015) – Defect in acknowledgement of mortgage does not invalidate mortgage if the mortgage has been accepted by register of deeds for recording. While register had discretion to reject mortgage with defect in acknowledgement, register is not required to reject mortgage and can accept and record it. Upon recording, mortgage is deemed to be validly registered in compliance with all statutory requirements and all parties are on constructive notice of the instrument.
- (5997) *Rogan v. JPMorgan Chase Bank*, 2015 WL 222144 (Bankr. E.D. Ky. 2015) – Mortgage signed under power of attorney that allowed attorney-in-fact to "contract and to bargain, to sell" the property was sufficient to constitute constructive notice. Recorded mortgages that were facially compliant with recording statutes constituted sufficient notice to defeat action under Section 544(a)(1). Mortgage met all requirements of state law for recording (lender's address, note and maturity dates, preparer's statement, and acknowledgement of signature by notary public; and power of attorney was recorded along with mortgage. Mortgage was correctly recorded in proper county. While POA did not specifically grant authority to sign mortgage, debtor's unquestioned intent was to grant that authority as evidenced by nature of transaction and fact that transaction preceded bankruptcy by more than 8 years during which debtor paid mortgage, dealt with property as if it was properly encumbered, and otherwise took no steps to contest validity of mortgage or POA. While trustee may have action to contest validity of POA itself, recorded mortgage provides sufficient constructive notice to prevent avoidance under Section 544.
- (5998) *Rogan v. U.S. Bank*, 2014 WL 4629379 (Bankr. E.D. Ky. 2014) – Filing of a document that is not recordable under state law does not provide constructive notice for purposes of Section 544. Mortgage that was defective as matter of state law as it did not include date of execution of underlying promissory note but was nonetheless filed in the proper public record was not "recordable" and so did not provide notice to Trustee of mortgage, allowing Trustee to avoid mortgage a bona fide purchaser for value.
- (5999) *Higgason v. Cantrell*, 2013 WL 4777172 (Bankr. E.D. Ky. 2013) – Lien that is not properly perfected under state law does not provide constructive notice for purposes of trustee's strong arm power. Lien on mobile home may be perfected only by notation on the certificate of title. Mortgage recorded against land on which mobile home resided, which included both land and mobile home, was not perfected as to mobile home by recording in public records only. Mobile home becomes part of the real property only if the mobile home is permanently affixed and the owner surrenders the certificate of title. Where debtor had permanently affixed mobile home but had not surrendered certificate of title, recording of lien in public records is not proper perfection.

- (6000) *Jahn v. FirstBank*, 2013 WL 5347452 (Bankr. E.D. Tn. 2013) – Generally any description is sufficient if the identity of the premises can be established, or if the description furnishes the means of identification, of the property covered by the mortgage reasonable certainty, and without the exercise of arbitrary discretion, which can include a description can be made certain within the terms of the instrument; or is sufficient to allow a surveyor to locate the land establish its boundaries; or by which a party familiar with the locality is able to identify the premises intended to be conveyed with reasonable certainty. Court will declare a deed void for uncertainty of description only where, after resorting to oral proof or after relying upon other extrinsic or external proof or evidence, that which was intended by the instrument remains a mere matter of conjecture, or where the description cannot be made applicable to but one definite tract. Deed of trust that contained a mistaken reference to a lot number rather than a condominium unit number was not defective. Deed of trust included correct street address and the Deed of trust referred to the unit deed that correctly identified the property. Deed of trust necessarily referred to some existing tract of land, and its terms can be applied to one tract only.
- (6001) *Higgason v. Porter*, 2013 WL 4715685 (Bankr. E.D. Ky. 2013) – Land Contract Vendee acquires equitable interest in property, while legal title remains in seller. Seller holds security interest in underlying property pursuant to the Land Contract. Security interest is not avoidable by Trustee under strong arm powers where neither Vendor nor Vendee recorded deed, as public records would reflect Vendor as record title holder, providing constructive notice of possible interest that is adverse to interest of Debtor as Vendee.
- (6002) *Northedge v. Beckett*, Case No. 13-80089 (Bankr. W.D. Mi. 2013) – Recorded quit claim deed that referenced lien created by judgment of divorce constituted constructive notice of existence of lien sufficient to prevent assertion of BFP status. Fact that JOD itself was not recorded or that there was not a separate mortgage recorded did not defeat fact that person reviewing record would find deed that conspicuously referenced lien.
- (6003) *Gold v. JPMorgan Chase Bank, NA*, Case No. 13-4286 (Bankr. E.D. Mi. 2013) – Where security interest has not been perfected prior to commencement of case, the “transfer” of the debtor’s interest for purposes of preferential transfers is the date immediately prior to commencement of case. Mortgages were properly recorded at time of transactions, well before the preference period. Alleged defects in notary clauses, which failed to include printed or typed name of notary, did not state date on which commission expires, and did not indicate county in which notary was acting, did not cause recording to be fatally defective for purposes of perfection of mortgages. Michigan Compiled Laws Section 566.201(4) provides that any instrument received and recorded by a register of deeds is conclusively presumed to comply with recording requirements. Defect in attestation does not affect validity of underlying transfer and does not impact presumption that recorded mortgage is valid.
- (6004) *Kreitzer v. Household Realty Corp.*, 489 WL 6998 (Bankr. S.D. Ohio 2013) – Neither Trustee nor debtor can avoid properly recorded mortgage based on allegedly defective assignment of mortgage. Second assignment of mortgage that allegedly lacked attestation by notary public did not defeat effect of recorded mortgage as providing constructive notice of lien that precludes avoidance under Section 544.
- (6005) *Field v. Ocwen Loan Servicing, LLC*, 2012 WL 7991235 (Bankr. S.D. Ohio 2012) – Trustee cannot avoid properly recorded mortgage using trustee’s strong-arm power as bona fide purchaser. Reasonably prudent purchaser would have concluded that mortgage, which described mortgage property using street address that both parcels shared, and giving the parcel number for the larger tract and legal description of additional strip, was intended to cover both parcels. Mortgage provided constructive notice of existence and scope of mortgage.
- (6006) *Burks v. Deutsche Bank National Trust Co.*, 2012 WL 7991234 (Bankr. S.D. Ohio 2012) – Chapter 13 Trustee could avoid mortgage where mortgage was not executed in accordance with state law. Mortgage lacked notary clause, which was required by state law for mortgage to be recorded. As such, mortgage was not entitled to be recorded. Fact that mortgage was recorded did not constitute constructive notice in light of defect in execution.
- (6007) *Nelson v. Countrywide Home Loans, Inc.*, 2012 WL 7991237 (Bankr. S.D. Ohio 2012) – Mortgage signed by debtor-wife on property solely owned by debtor-husband validly encumbered wife’s dower interest in property notwithstanding that wife did not also sign the promissory note. Mortgage given to secure obligation of third party is valid as lien against property, but does not create in creditor any right to pursue signor for deficiency. Obligation is limited to potential foreclosure of collateral.
- (6008) *Kellner v. City of Kettering*, 2013 WL 618537 (S.D. Ohio 2013) – Recorded mortgage not per se defective for purposes of constructive notice merely because of typographical error in notary clause. Although improperly executed mortgage is not entitled to be recorded and, if recorded, is treated as not being recorded, defect in acknowledgement is not fatal where error appears on face of mortgage and mortgage itself supplies the means of making the correction. Mortgage clearly identified debtor as the mortgagor. However, notary clause contained an incorrect name as “the above-named mortgagor”. The person named in the notary block was not named anywhere in the mortgage and had no connection to the property, the mortgage, or the debtor. Viewing the document as a whole, there was no doubt that debtor, rather than person named in acknowledgement, signed Mortgage and personally appeared before notary to acknowledge the signing of the mortgage. Mortgage substantially complied with statutory requirements and is valid and enforceable. Error was so obvious that no third party purchaser could legitimately claim to be misled as to who acknowledged execution of the Mortgage.
- (6009) *Rogan v. Farmers Home Administration*, 2012 WL 3228989 (Bankr. E.D. Ky. 2012) – Mortgage in name of partnership as mortgagor, signed by general partner with authority to do so pursuant to partnership agreement, is properly executed for purposes of notice to defeat status of Trustee as bona fide purchaser. Entity was properly listed as mortgagor and it was not necessary or appropriate for mortgage to list general partner as mortgagor. Although signature did not expressly state that person signing did so in capacity as general partner, law presumes that documents signed by agent are done with intent to bind principal and are acts of the principal. Alleged defects in notary acknowledgement did not defeat notice where statute provided that a document that is recorded is valid for purposes of providing notice

even if the document is not acknowledged at all. Any technical defect in the acknowledgement would not prevent recorded mortgage from defeating status as BFP.

- (6010) *Field v. Wells Fargo Home Mortgage*, 474 BR 521 (Bankr. S.D. Ohio 2012) – Constructive notice defeats status as bona fide purchaser for value. Under Ohio law, if a lien is not noted on the title, then the purchaser is not bound by the lien. Mortgages noted on title may provide constructive notice of liens, if the legal descriptions in the mortgages sufficiently describe the property. Address shown in mortgage was address for the property in question, but legal description was for separate and distinct parcel. Extrinsic evidence supported finding that mortgage was intended to encumber property at issue and was sufficient to defeat Trustee's status as bona fide purchaser. Inconsistency in description of property did not render execution of mortgage invalid, where Ohio law does not require a legal description in the mortgage. Accurate non-legal description is all that is required and the mortgage at issue contained the accurate street address.
- (6011) *Rhiel v. Central Mortgage Company*, 469 BR 778 (Bankr. S.D. Ohio 2012) – Under Ohio law, trustee has constructive notice of any instrument that is recorded by the current owner of the land and that are properly recorded. Recorded mortgage that is not properly executed, even if found in the public records, does not provide constructive notice and will not control over rights of subsequent purchaser. Mortgage bearing blank certificate of acknowledgement did not substantially comply with Ohio law for purposes of recording. Defect rendered mortgage of no effect for purposes of notice, and later assignment of mortgage to subsequent mortgagee did not cure defect. Filing action to foreclose does not constitute notice as nothing is recorded in the public records. Properly recorded Certificate of Judgment (as opposed to the Final Judgment itself) would provide constructive notice. Lender also failed to record its pendens prior to bankruptcy filing. Properly recorded lis pendens also operates as constructive notice that would have been sufficient to defeat trustee's status as BFP.
- (6012) *Mostoller v. Dover Mortgage Company*, 2012 WL 1565125 (Bankr. E.D. Tn. 2012) – Complaint failed to allege any basis to avoid mortgage. Although creditor may have failed to provide documents to Trustee to show perfection of mortgage, review of public records unambiguously established that there was a properly perfected lien and Plaintiff failed to plead any facts to support avoidance of lien. *Rogan v. CitiMortgage, Inc.*, 2012 WL 1806302 (Bankr. E.D. Ky. 2012) – Even if Mortgage signed by wife who signed her name and also
- (6013) signed husband's name was defective, trustee not entitled to avoid lien where mortgage was recorded substantially prior to commencement of bankruptcy case and state law provided that if a mortgage is not properly acknowledged or proved but is recorded, the recording constitutes constructive notice to all parties of the recorded instrument.
- (6014) *Richardson v. Deutsche Bank National Trust Co.*, 2012 WL 1941846 (Bankr. W.D. MI. 2012) – Recording of affidavit of lost mortgage with copy of mortgage attached is sufficient to provide constructive notice of lien, precluding trustee from acquiring status as bona fide purchaser; expressly disagreeing with *Turner-Lewis v. Public Service Credit Union*, 406 BR 288 (Bankr. E.D. MI. 2009). Purpose of recording is to put subsequent purchasers on notice, to raise a "red flag" alerting them to a claimed interest in property. Recorded affidavit of lost mortgage provides construction notice and controls over subsequent purchaser.
- (6015) *Rogan v. Wachovia Mortgage Corp.*, 2012 WL 1813120 (Bankr. E.D. Ky. 2012) – Notice of its Pendens filed prior to commencement of bankruptcy case provided constructive notice to Trustee of claimed interest of lender, precluding status of Trustee as bona fide purchaser for value.
- (6016) *Terlecky v. National City Mortgage Co.*, 2012 WL 3838767 (Bankr. S.D. Ohio 2012) – Promissory Note and Mortgage must be construed together to determine intent of parties. Although Mortgage defined only the husband as the "borrower", wife signed in a second blank over the word "borrower" and also signed the mortgage, leaving only reasonable interpretation that wife was also "borrower". However, ambiguity remained sufficient to avoid summary judgment. Court would schedule evidentiary hearing to determine intent of parties.
- (6017) *Rhiel v. BAC Home Loans Servicing, LP*, 448 BR 914 (Bankr. S.D. Ohio), *aff'd* 458 BR 391 (6th Cir. BAP 2011) – Mortgage sufficiently described debtor-wife as "borrower" for purposes of creating a valid security interest in her half ownership of property. Although the Mortgage defined "Borrower" only as Husband, the signature page of the Mortgage included signatures of both Husband and Wife with "borrower" preprinted under each; both Husband and Wife initialed each page of Mortgage; and Notary block included references to both Husband and Wife. Further, Adjustable Rate Rider attached to the Mortgage defined Borrower as both Husband and Wife. Documents would be construed together to give effect to the intentions of the parties at the time the mortgage transaction was executed.
- (6018) *Rogan v. Fifth Third Mortgage Company*, 452 BR 591 (6th Cir. BAP 2011) – Bona fide purchaser of real property is put on constructive notice of a prior interest in property by the presence of a recorded deed or mortgage acknowledged according to law. Mortgage must name or sufficiently identify mortgagor in the body of the mortgage and must be signed at the end of the document by the party to be charged with it. Mortgage signed by non-borrower wife to secure debt of husband sufficiently identified wife as mortgagor. Although mortgage defined "borrower" solely as husband, wife signed both the mortgage and the Second Home Rider incorporated into the mortgage and the Second Home Rider identified wife as "borrower". Viewing documents as a whole sufficiently identified wife as a mortgagor for purposes of recording and validity of mortgage, defeating Trustee's attempt to avoid mortgage.
- (6019) *Rogan v. American General Home Equity, Inc.*, 451 BR 421 (6th Cir. BAP 2011) – Inclusion of property description in attachment to mortgage after signatures of borrowers rather than body of mortgage itself and before signatures did not render mortgage invalid, where body of mortgage stated "Exhibit A Legal Description" and mortgage attached legal description denominated "Exhibit A". Statutory requirement that borrower sign mortgage at or near end of document did not abrogate doctrine of incorporation by reference.
- (6020) *Fifth Third Bank v. JPMorgan Chase Bank, N.A.*, 2011 WL 30770 (W.D. Ky. 2011) – Defect in notary clause did not render mortgage invalid or unenforceable. Under Kentucky statute in effect at time of recording, mortgage recorded is deemed to provide constructive notice regardless of defects in execution.

- (6021) *Wells v. CF Bancorp*, Case No. 10-73332 (Bankr. E.D. Mi. 2011) – Recording copy of mortgage with affidavit of lost instrument is not sufficient to perfect mortgage under Michigan law. Michigan law requires recording of the original mortgage bearing original signature of mortgagors. Trustee could avoid mortgage where only copy of mortgage was recorded, leaving mortgage effectively unrecorded.
- (6022) *Hardesty v. CitiFinancial, Inc.*, 2011 WL 693235 (6th Cir. 2011) – Mortgage execution was not defective so as to be avoidable under Trustee's power as bona fide purchaser where mortgage certification stated that the mortgage was "executed before me" rather than "acknowledged before me". Ohio law requires that notary clause state that the mortgage was "acknowledged before me" or the "substantial equivalent". Acknowledgement requires that person signing appear before the person taking the acknowledgement; that the person acknowledge that he signed the document; that the person signed the document for the purpose stated in the document; and that the person taking the acknowledgement had satisfactory proof of identification of the person signing. In this case, there was no dispute that debtor signed the mortgage in the presence of the notary who also signed and that debtor presented satisfactory identification. Additional language in the signature block stated that debtor examined and read the mortgage and signed of his own free act and deed, satisfying requirement that the document be signed for the purpose stated. Notary clause that referenced "executed" rather than "acknowledged" not so deficient as to allow Trustee to avoid mortgage as bona fide purchaser.
- (6023) *Drown v. Kondaur Capital Corp.*, 2010 WL 4057814 (Bankr. S.D. Ohio 2010) – Mortgage recorded with defective acknowledgement provides no notice at all of the underlying obligation. Under Ohio law, mortgage must be signed by the mortgagor; the signing must be acknowledged before the notary public; the notary public must certify that acknowledgement; and the notary public must sign his or her name to the certificate of acknowledgement. The person whose signature is being acknowledged must also produce identification at the time of execution. Acknowledgement was not fatally defective where the acknowledgement did not include the name of the debtor but inserted the word "mortgagor" in the two places that called for identification of the party signing, where the mortgage elsewhere defined the debtor by name as the mortgagor. Failure of the notary public to circle the appropriate pronoun (his-her-their) alone did not result in a failure to substantially comply with Ohio law. The harm caused by the failure to circle the appropriate pronoun in this case is minimized because Debtor was the sole mortgagor and the failure to circle the appropriate pronoun would not mislead a subsequent purchaser as to who is acknowledging the Mortgage. Further, lender filed action to foreclose mortgage and obtained judgment of foreclosure prior to commencement of bankruptcy case. Filing state court action gave rise to *lis pendens* sufficient to place subsequent purchasers on notice and defeat bona fide purchaser status. Even if the mortgage had been defective and of no effect when it was recorded, the *lis pendens* standing alone serves as sufficient notice.
- (6024) *Ransier v. Countrywide Home Loans, Inc.*, 2010 WL 4057769 (Bankr. S.D. Ohio 2010) – Under Ohio law, a mortgage must be properly executed for the recording to be effective. Recording a defective mortgage provides no notice as a matter of law. However, *lis pendens* that arises when mortgage creditor files action to foreclose does give rise to constructive notice sufficient to defeat status of subsequent purchaser as "bona fide purchaser". Although the mortgage was incorrectly executed, when Lender filed state court action pre-petition to reform the mortgage and then to foreclose the mortgage and had obtained Final Judgment reforming the mortgage and ordering the property sold at foreclosure sale, that suit gave rise to a *lis pendens* that defeats the Trustee's status as bona fide purchaser and renders mortgage unavoidable by Trustee.
- (6025) *Helbling v. Cleary*, Case No. 09-1285 (Bankr. N.D. Ohio 2010) – Mortgage that was defective where notary block failed to recite the manes of the parties whose signatures that were being acknowledged did not constitute constructive notice of the existence of the mortgage for purposes of defeating Trustee's status as Bona Fide Purchaser. However, Bank's mortgage foreclosure complaint filed before commencement of Bankruptcy Case constitutes statutory notice of the pendency of the action and prevents any third party from acquiring an interest superior to that of the Plaintiff, preventing Trustee from acquiring status as Bona Fide Purchaser.
- (6026) *Degirrolamo v. Suntrust Mortgage, Inc.*, 2010 WL 3489059 (Bankr. N.D. Ohio 2010) – Under Ohio law, filing of complaint operates as *lis pendens* preventing any interest from being acquired that would be superior to Plaintiff's title. Bank filed foreclosure proceeding prior to commencement of bankruptcy case. Resulting *lis pendens* prevented Trustee from acquiring status as bona fide purchaser for value.
- (6027) *Menninger v. Mortgage Electronic Registration Systems, Inc.*, Case No. 09-1097 (Bankr. W.D. Ohio 2010) - To comply with Ohio law, mortgage must be signed by the mortgagor; (2) the signing of the mortgage must be acknowledged before a notary public; (3) the notary public must certify the acknowledgment; and (4) the notary public must subscribe his name to the certificate of acknowledgment. Mortgage invalid as to debtor-wife where mortgage identified only debtor husband as the "borrower". Even though debtor-wife signed the mortgage, there was no predicate language in the mortgage itself to include debtor-wife as mortgagor.
- (6028) *Felner v. Monticello Banking Co.*, Case No. 09-1050 (Bankr. W.D. Ky. 2010) - Trustee is not a bona fide purchaser if he has notice of facts which would cause a reasonably prudent person to make a further investigation to ascertain if there is an adverse interest in the property. A bona fide purchaser of real property is put on constructive notice of a prior interest in the property by the presence of a recorded deed or mortgage, acknowledged according to law. Debtor's mortgage given to secure loan to closely held corporation valid and enforceable where Debtor signed personal guaranty of the obligation. That Debtor did not personally sign the note does not control where Debtor did sign the guaranty of the Note. Mortgage was properly executed and recorded. Trustee's complaint to avoid lien dismissed.
- (6029) *Stubbins v. Espenschied*, Case No. 08-2266 (Bankr. S.D. Ohio 2010) - Mortgage that was not properly perfected did not provide constructive notice sufficient to defeat Trustee's status as bona fide purchaser. Notary Acknowledgement did not name the party allegedly signing the mortgage as required by state law. Recording of defective mortgage does not constitute "notice" even if mortgage is otherwise properly executed by Debtor and recorded in the Public Records.
- (6030) *Stockton Mortgage Corporation v. Schlarmann*, 2010 WL 2667390 (Bankr. E.D. Ky. 2010) – Trustee's position as bona fide purchaser as

of the petition date defeats any attempt by mortgage company to reform mortgage which had been effectively executed. Property was owned jointly by debtor and a co-owner. However, mortgage was executed only by the co-owner. Although Debtor had repeatedly represented prior to the filing of the bankruptcy case that the debtor had contributed substantial sums to the acquisition and maintenance of the property, mortgage company could not rely on these allegations to defeat superior interest of Trustee as bona fide purchaser as of the date of the petition.

- (6031) *Johnson v. BAC Home Loans Servicing, L.P.*, 2010 WL 2667393 (Bankr. E.D. Ky. 2010) – Trustee has power under Section 544 to avoid any transfer of property that would be voidable by a bona fide purchaser for value. Mortgage against property owned by husband and wife that defined “Borrower” only as the Husband did not constitute a grant of the mortgage against Wife’s interest in the property. Signature by Wife as “Borrower” does not constitute identification of the Wife as a grantor in the body of the mortgage itself. Accordingly, Mortgage failed to provide records notice of any claim against Wife’s interest in the property, rendering the mortgage avoidable pursuant to Section 544.
- (6032) *Richardson v. Wells Fargo Home Mortgage, Inc.*, 421 BR 426 (Bankr. W.D. Mi. 2009) *aff’d*, 2010 WL 3370071 (W.D. Mi. 2010) – Mortgage that failed to reference property lot number or plat number as required by Michigan law left mortgage invalid even though it contained property’s street address. Recording of a defective mortgage does not provide constructive notice as a matter of law so as to defeat the interests of a bona fide purchaser. Michigan law requires all recorded sales, conveyances or mortgages, contain the caption of the Plat and Lot Number on all property located within a platted subdivision.
- (6033) *Helbling v. Oberattis*, Case No. 09-16122 (Bankr. N.D. Ohio 2010) – Defective certificate of acknowledgement in mortgage prevents mortgage from providing constructive notice. Trustee entitled to avoid mortgage as bona fide purchaser.
- (6034) *Miller v. LaSalle Bank N.A.*, 595 F.3d 782 (7th Cir. 2010) – Mortgage with technically defective acknowledgement that failed to identify individuals who appeared before the notary and executed the mortgage would nonetheless constitute “constructive” notice based on 2007 State Law that provided that recorded mortgage would be sufficient for notice purposes notwithstanding certain technical defects. State law amendment applied to all mortgages recorded in Indiana, regardless of whether the mortgage was recorded before or after the adoption of the 2007 law, as the law indicated an intent to operate retroactively to all mortgages of record, regardless of recording date.
- (6035) *Drown v. National City Bank*, 420 BR 414 (6th Cir. BAP 2009), *aff’d*, 2011 WL 2899366 (6th Cir. 2011) – Mortgage was not defective for purposes of Section 544(a)(3) where notary block indicated that mortgage had been signed by both husband and wife, when the mortgage in fact had been signed by wife on her own behalf and also by wife on behalf of husband pursuant to valid power of attorney.
- (6036) *Rogan v. New South Federal Savings Bank*, 2009 Fed. App. 001 (6th Cir. BAP 2009) – Mortgage not invalid where notary’s bond was not signed by clerk as required. Nothing on the face of the mortgage indicated that the notary who witnessed the execution of the mortgage may have had a defect in the appointing paperwork. Requiring a borrower or lender to independently verify the credentials of the notary would serve no purpose and would only undermine reliability of public records. Further, alleged defect in paperwork was technical non-compliance – notary had been administered proper oath but the clerk failed to sign the appointing paperwork to confirm that oath. Kentucky state law allows a facially valid acknowledgement to be attached only for fraud or mistake by the notary. Later enacted Kentucky law which provided that instruments otherwise properly recorded would be valid for notice purposes even if not properly acknowledged or proved also supported validity of mortgage.
- (6037) *Drown v. Wells Fargo Bank, N.A.*, 424 BR 315 (Bankr. S.D. Ohio 2010) – Under Section 544(a)(3), a trustee has the status of a bona fide purchaser of real property from the debtor that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case. The legal fiction created by Section 544(a) assumes a transfer from the debtor to a bona fide purchaser on the date of filing. The trustee is then clothed with whatever legal rights the bona fide purchaser would possess. Trustee has constructive notice of properly executed and recorded real-estate instruments only, not of improperly executed or unrecorded ones. Strong-arm power does not clothe a trustee with protective mantle of a bona fide purchaser if there was no way, under the applicable state law, that anyone could attain the status of a bona fide purchaser and does not immunize a trustee who has constructive knowledge of a prior mortgage. The Mortgagees will withstand the attacks from the Trustees if the mortgages are perfected. Whether a mortgage is properly perfected is an issue of State law. Under Ohio law, properly recorded mortgage constitutes perfected interest in property of the debtor even if the deed conveying title to the underlying property to the debtor was itself incorrectly executed. Although property transferred by a “defective deed” may not be sufficient to convey legal title, that defective deed is sufficient to transfer equitable title that is sufficient to support mortgage. Where the mortgage itself was properly recorded pre-petition, Trustee could not rely on defect in underlying conveyance to Debtor as basis to avoid perfected mortgage.
- (6038) *Burden v. CIT Group/Consumer Finance, Inc.*, 2009 WL 723197 (6th Cir. 2009) - Certificate of Acknowledgement on mortgage failed to comply with Kentucky law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Accordingly, Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors. Immediately below the mortgage’s signature block appears the certificate of acknowledgment, which stated: “The foregoing instrument was acknowledged before me this 08 day of MAY, 2001” . The acknowledgement was insufficient as a matter of law because it did not identify the people who allegedly signed the mortgage itself, even though those signatures appeared immediately prior to the acknowledgement.
- (6039) *Lewis v. Public Service Credit Union*, 406 BR 288 (Bankr. E.D. Mi 2009) – Recording an affidavit of lost mortgage and a copy of the original mortgage does not constitute perfection as a matter of Michigan law. Michigan law requires that the mortgage be received by the register of deeds, that the mortgage meet the technical requirements for recording, and in the recording fee be paid when the mortgages

left for recording. A mortgage which does not satisfy these requirements is ineffectual for bankruptcy purposes. An affidavit of lost mortgage cannot serve as a substitute for a properly recorded mortgage. Therefore, trustee's status as a hypothetical judgment leading creditor under section 544 is superior to the creditors status as the holder of an unrecorded mortgage; and the mortgage is deemed to have been perfected immediately before the filing of the bankruptcy proceeding rendering the mortgage avoidable under section 547.

- (6040) *DeGironlamo v. Countrywide Home Loans, Inc.*, 2009 WL 2169049 (Bankr. N.D. Ohio 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Accordingly, Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors. Certificate of Acknowledgment was blank in the field that should contain the name of the person whose signature is being acknowledged. Further, even if improperly executed mortgage gave rise to an equitable lien in favor of the lender, that unrecorded equitable interest is insufficient to negate the avoiding powers of the trustee under section 544(a)(3).
- (6041) *Daneman v. National City Mortgage Co.*, 2009 WL 2179128 (Bankr. S.D. Ohio 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors regardless of any actual knowledge Trustee may have. Certificate of Acknowledgment was blank in the field that should contain the name of the person whose signature is being acknowledged. Failure to identify person signing the mortgage does not "substantially comply" with statutory requirements for recording a mortgage as mortgage failed to contain any indication that Debtor acknowledged the instrument before the notary.
- (6042) *Rieser v. Fifth Third Mortgage Company*, 2009 WL 1910967 (Bankr. E.D. Mi. 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors regardless of any actual knowledge Trustee may have. Mortgage apparently signed by husband and wife but Certificate of Acknowledgement referenced only the Wife's name and notary block did not use plural pronouns or language. Trustee could avoid Mortgage as to Husband's one-half interest. Mortgage effective only as to wife's one-half interest in the property.
- (6043) *Shapiro v. Merchants Bonding Company*, Adv. No. 07-4083 (Bankr. E.D. Mi. 2008) – Claim of Lien that is not properly recorded provides neither actual or constructive notice of the lien and, therefore, cannot prevail over subsequently recorded mortgage. The Indemnity Agreement executed by the Debtor provided that the Agreement count if recorded, would constitute a consensual lien upon any and all real estate owned by Debtors. Lender recorded a claim of lien but failed to attach a copy of the indemnity agreement. Failure to attach indemnity agreement constituted failure to comply with the contractual requirements for obtaining lien. Therefore, recording claim of lien without attaching Indemnity Agreement did not create a lien as a matter of law. Failure to comply with contractual requirements to obtaining lien could produce neither actual nor constructive notice of any alleged lien. Therefore, creditor's claim was unsecured and subsequently recorded mortgage constituted first lien against the property.
- (6044) *In re Wahl*, 407 B.R. 883 (Bankr. S.D. Ohio 2009). Mortgage was invalid under Ohio law and could be avoided by Chapter 7 trustee using the "strong-arm" powers.
- (6045) *In re Cornelius*, 408 B.R. 704 (Bankr. S.D. Ohio 2009). Mortgage was defectively acknowledged (because debtor/mortgagor's name was not on the acknowledgement) and avoidable in Chapter 7 trustee's strong-arm proceeding.
- (6046) *Argent Mortgage Co., LLC v. Drown*, 578 F.3d 487 (6th Cir. 2009) – Trustee cannot set aside a mortgage where, under state law, recorded mortgage was sufficient to give constructive notice of the mortgage to third parties. Under Ohio law, recorded mortgage that contained street address of residential property but not legal description was sufficient to give constructive notice of the mortgage. The mortgage documents, while not containing a formal legal description, indicated that they related to a specific street address. Nothing in the documents indicated that the mortgage company sought a lien on anything less than the full property and the description included a tax identification number that applied to the entire property. Therefore, be recorded mortgage provided sufficient notice such that the trustee could not avoid the mortgage using the trustee's strong-arm powers under section 544.
- (6047) *Kohut v. New Century Mortgage Corp.*, Case No. 07-13256 (E.D. Mi. 2008) – Mortgage is deemed "recorded" under Michigan law which establishes the date on which creditors and security interest was perfected at the moment when the person who seeks the benefit of the recording laws completes all legal requirements for recording the instrument by delivering the mortgage to the register of deeds in a form that meets the technical requirements of Michigan compiled laws section 565.201 and in the recording fee is paid when the mortgage is left for record. A delay by county officials in performing statutory duty of assigning an official record book and page does not defeat or delay the effective date of the recording.

14.12 Defenses – Equitable Subrogation

- (6048) *Ocwen Loan Servicing, LLC v. Summit Bank, NA*, Case No. 13-1615 (8th Cir. 2014) – Equitable subordination allows later recorded mortgage to assume priority over earlier recorded mortgage where lender advances money to pay off encumbrance on realty at request of landowner with understanding that advance will be secured by lien of same priority as was held by prior lender, but only if new lender is not culpable or error is result of inexcusable neglect; and only where remedy can be done without working hardship or injustice to innocent parties. Initial lender held first mortgage on debtor's property. When debtor refinance with Ocwen, mortgage contained incorrect legal

description of property adjacent to the debtor's, and not the property encumbered by the prior first mortgage. Although the error was repeatedly called to Ocwen's attention, Ocwen did nothing to fix the problem. Some time later, debtor obtained new mortgage loan from second lender. Debtor informed second lender that Ocwen's mortgage was intended to cover debtor's property but that Ocwen never fixed the legal description. Second lender extended new mortgage and recorded lien against correct property, creating first lien of record. Ocwen later asserted that it held first mortgage by virtue of equitable subordination. Error was result of lender's own negligence in failing to ensure correct legal description and failing to correct legal description when error was pointed out. Liens now asserted to be superior were not in existence when prior loan was refinanced such that their interests were not "elevated" inadvertently when the prior mortgage was paid off. To allow Ocwen to insert itself as first mortgage holder would work hardship on later mortgagees. Although later lenders may have been aware of error, Ocwen was primarily responsible for mistake in first instance and in failing to correct mistake when advised, such that Ocwen was cause of problem in first instance.

- (6049) *Chase Manhattan Bank, USA, NA v. Taxel*, 594 F.3d 1073 (9th Cir. 2010) – Unrecorded mortgage arising out of refinance transaction is avoidable by Trustee under Section 544(a)(3). Debtor refinanced mortgage with same lender. Lender recorded satisfaction of prior mortgage but failed to record new mortgage. Debtor's listing of the unrecorded mortgage in the Bankruptcy Schedules does not provide notice to Trustee sufficient to defeat status as bona fide purchaser. Trustee's status is determined as of moment petition is filed. Schedules filed later, even if filed immediately after the petition, do not alter that status. State law required mortgage to be recorded to constitute constructive notice and unrecorded mortgage is void as against any subsequent purchaser in good faith. Equitable subrogation would not render mortgage unavoidable, as the prior lien was satisfied and revival would work prejudice to creditors and the estate and the Trustee as bona fide purchaser. Further, applicable state law provides that bona fide purchasers have priority even over a creditor holding a claim by equitable subordination.

14.13 Lien Strip of Subordinate Lien

- (6050) *Burks v. Deutsche Bank National Trust Co.*, 2012 WL 7991234 (Bankr. S.D. Ohio 2012) – Fact that debtor previously stripped off second mortgage on basis that first mortgage debt exceeded value of property was not defense to Trustee's later action to avoid first mortgage under Trustee's strong-arm powers. Although junior mortgage was stripped based on assumption that senior mortgage was valid, at confirmation Trustee and senior lender agreed that confirmation would not affect trustee's right to prosecute strong-arm claim.

14.14 Defenses - Statute of Limitations

- (6051) *MERV Properties, LLC v. Friedlander*, 2015 WL 2105884 (Bankr. E.D. Ky. 2015) – Action against depository institution by depositor for alleged failure to enforce two signature requirement on checks is governed by UCC Article 4. Bank can honor any instrument presented in accordance with the agreement between customer and bank. Lender improperly honored checks signed by one individual in violation of depositor agreement. However, depositor must bring action within one year after bank makes statement available to depositor. Bank makes statement "available" when bank mails statement to depositor at address on record with the bank, even if depositor no longer resides at or receives mail at that address. Further, depositor must make specific allegations to bank – mere generalized statement that depositor is suspicious or that embezzlement may have occurred is not sufficient to place bank on notice for purposes of statute of limitations. Discovery rule can be used to extend statute of limitations only where defendant intentionally prevented plaintiff from discovering cause of action. Where plaintiff had information sufficient to allow plaintiff to discover alleged wrongdoing with reasonable diligence, there was no basis to extend statute.
- (6052) *Bank of New York v. Sheeley*, 2014 WL 1233094 (S.D. Ohio 2014) – Trustee is not precluded from asserting strong arm powers as affirmative defense after statute of limitations has otherwise expired. Trustee could assert strong arm power as bona fide purchaser to defeat lender's action to reform mortgage that contained fatally defective legal description.
- (6053) *In re McKenzie*, 2012 WL 4742708 (E.D. Tn. 2012) – Section 544 imposes 2 year statute of limitations. Trustee did not bring action to avoid security interest within 2 years. However, Trustee is not precluded from using avoidance power as affirmative defense to action for relief from stay, as long as Trustee does not seek any further relief beyond defense to stay lift. a trustee, when acting defensively pursuant to § 502(d), can use his avoidance powers even after the statute of limitations has expired.
- (6054) *Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Statute of Limitations applicable to action under Section 544 to avoid fraudulent transfer is defined by state law. Under Michigan law an action for fraudulent transfer accrues when the transfer occurs regardless of when the damage results. Transfers made within 6 year statute of limitations but made pursuant to contractual agreements made more than 6 years prior to the commencement of the case are not barred by statute of limitations. Each payment of money by a Debtor was a separate "transfer" whether or not the payment was made under a pre-existing contract, and whether or not such contract was "divisible" or not.

14.15 Defenses – Equitable Defenses

- (6055) *Drown v. Dollar Bank, FSB*, 437 BR 253 (Bankr. S.D. Ohio 2010) – Trustee in action under Section 544 is not subject to equitable defenses that lender may have had to any action brought by debtor outside of bankruptcy. Lender could not assert defenses of estoppel by deed, equitable subordination, or "equitable restoration" in defense to action by Trustee. Trustee, as hypothetical bona fide purchaser, takes title free and clear of equitable defenses.

14.16 Defenses – Solvency

14.17 Parties Liable – Transferees

(6056) *Tibble v. Farmers Grain Express, Inc.*, 510 WL 792 (Bankr. W.D. Mi. 2014) – Subsequent transferee of avoidable transfer is not required or necessary party in avoidance action brought by Trustee. Trustee is not required to again prove avoidability of transfer where trustee has previously challenged initial transfer and prevailed in that action. Subsequent transferee retains right to contest avoidability based on transferee's alleged receipt of property in good faith and for value and without knowledge of avoidability of transfer.

(6057) *Hoskins v. Citigroup, Inc.*, 2014 WL 3466049 (9th Cir. 2014) – “Transferee” for purposes of liability under Section 550 is one who has legal title to funds and the ability to use them as the recipient sees fit. Bank was not transferee of fraudulently misappropriated funds merely because funds were deposited into account at bank, where there was no evidence that bank had control or dominion over funds in accounts.

14.18 Parties Liable – “Mere Conduit”

(6058) *Menotte v. U.S.*, Case No. 12-16489 (11th Cir. 2014) – Party who receives funds as “mere conduit” is not “transferee” for purposes of liability under Section 550. “Mere conduit” is one who receives and holds funds solely for benefit of third party, and recipient does not assert any right or title in or to the funds or property transferred. Party is “mere conduit” if party shows that they did not have control over asset and merely served as conduit for assets that were under the actual control of debtor-transferor; and the recipient acted in good faith. Test ultimately is based on equitable concepts that require flexible, pragmatic approach based on entirety of transaction. Trustee for bankruptcy corporation cannot recover payments made by corporation to IRS for payment of income tax liability of corporate principal. Principal of corporation paid taxes on “pass through” income from S-Corp by having corporation send checks to the IRS using funds in company operating account. At end of tax year, corporation did not make profit, requiring IRS to issue refund to principal for overpaid taxes. Principal did not deposit funds into corporate account but retained those funds in his personal account. After company filed for Chapter 7, Trustee sued IRS to recover payments made by corporation for principal's personal tax liabilities as constructively fraudulent. Court concluded that IRS was not “transferee” for purposes of Section 550. Although the IRS received the payments, it did so as a “mere conduit”, holding the funds until the principal's tax liability could be determined. IRS did not have, and never had, any right to the money as the principal never actually owed taxes for the year in question. As the IRS did not actually retain any of the funds (in light of the tax refund issued to principal for overpayment of taxes), the IRS did not actually “receive” any payment and did not constitute a “transferee”. The transfer, to the extent there was one resulting from the tax payments, was a transfer by the corporation to the principal, as the principal ultimately received the money from the IRS.

B. Fraudulent Transfers

14.19 Bankruptcy Court Jurisdiction

(6059) *Galaz v. Galaz*, 765 F.3d 426 (5th Cir. 2014) – Bankruptcy Court has jurisdiction to rule on Fraudulent transfer action brought under Section 548. Court has jurisdiction where matter is “related to” bankruptcy, such that outcome could conceivably have any effect on case administration, including one that could alter debtor's rights, liabilities, options or freedom of action. Courts have no jurisdiction over actions that have no effect on debtor or administration of estate. Although recovery is ultimately based on state law, recovery would impact estate as it could result in recovery for benefit of creditors. However, Court lacked jurisdiction over third party complaint or counterclaims asserted in response where litigation was solely between non-debtors and outcome of litigation would affect only the parties involved and would not in any way impact debtor or estate. Bankruptcy Court should have dismissed counterclaims and third party claims as lacking jurisdiction.

14.20 Fraudulent Transfer Versus Preference

(6060) *Sweet v. AIS Construction Equipment Corp.*, Case No. 14-3074 (Bankr. E.D. Mi. 2015) – Transfer cannot be both a preferential transfer and a fraudulent transfer. Plaintiff required to amend complaint to state cause of action on which plaintiff intended to proceed at trial.

14.21 State Uniform Fraudulent Transfer Act

(6061) *Whittaker v. Groves Venture, LLC*, 2015 WL 5781111 (Bankr. S.D. Ohio 2015) – Section 544 allows Chapter 7 Trustee to utilize state fraudulent transfer statute if there is an existing creditor who could have avoided transfer had bankruptcy not been commenced. Complaint failed to state cause of action for alleged fraudulent transfer of assets by LLC where complaint did not allege facts plausibly suggesting that LLC had an creditors. While complaint need not specifically identify any particular creditor, complaint must at least contain something more than a “threadbare recital” and conclusory statements that some creditor may exist. No creditor filed proof of claim and Trustee failed to file claims on behalf of any creditor. Conjecture that IRS, State or local governments may have tax claims insufficient where none of these entities filed claims.

(6062) *Sweet v. Chambers*, 2015 WL 5728844 (E.D. Mi. 2015) – Trustee has authority under Section 544 “strong arm” provisions to step into shoes of creditors in order to nullify transfers voidable under State Fraudulent Transfer law. Michigan version of UFTA avoids transfer of property made with either actual intent to hinder, delay or defraud creditors; or was made for less than reasonably equivalent value where debtor (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (ii) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due. Statute defines “badges of fraud” for determining actual intent to include but are not limited to (a) The transfer or obligation was to an insider. (b) The debtor retained possession or control of the property transferred after the transfer. (c) The transfer or obligation was disclosed or concealed. (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit. (e) The transfer was substantially all of the debtor's assets. (f) The debtor absconded. (g) The debtor removed or concealed assets. (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred. (i) The debtor was insolvent or became

insolvent shortly after the transfer was made or the obligation was incurred. (j) The transfer occurred shortly before or shortly after a substantial debt was incurred. (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. Reasonably equivalent value draws from the bankruptcy definition. Debtor's spouse is "insider" for purposes of State law.

- (6063) *Brown v. Raygoza*, 2015 WL 3404505 (Bankr. E.D. Ky. 2015) – Kentucky version of UFTA requires proof of existence of at least one actual pre-petition unsecured creditor who could have brought action to recover transfer. Trustee presented sufficient evidence of actual creditor, consisting of IRS for taxes for 2001 based on debtor's failure to file tax return.
- (6064) *Kohut v. Wayne County Treasurer*, 2015 WL 1598083 (Bankr. E.D. Mi. 2015) – Trustee has authority under Section 544 to bring fraudulent transfer action under Michigan state law. Uniform Fraudulent Transfer Act has 6 year statute to limitations but requires trustee to prove existence of actual pre-petition creditor who could have brought action under Michigan law had bankruptcy not occurred. Although Sovereign Immunity would have precluded any state court action against Wayne County to recover tax payments made after debtor was insolvent, Trustee not prohibited from bringing action as Section 106 abrogated sovereign immunity for purposes of Section 544. Although no actual state court creditor could bring action, that did not preclude Trustee from bringing action where Trustee could otherwise prove existence of actual unsecured creditor and other elements of fraudulent transfer.
- (6065) *Meoli v. Cooper*, 521 BR 613 (Bankr. W.D. Mi. 2014) – Section 544 allows Trustee to exercise state court remedies to avoid fraudulent transfers. Michigan adoption of UFTA requires the existence of an actual creditor who could bring action to avoid transfer. Where trustee could not identify any actual "triggering creditor", trustee's complaint failed to state cause of action.
- (6066) *Spradlin v. Beads & Steeds Inns, LLC*, 2014 WL 4199637 (Bankr. E.D. Ky. 2014) – State uniform transfer act is incorporated through Section 544. Action must comply with all state court requirements. Action to recover fraudulent transfer dismissed where property transferred was not debtor's but was property of wholly owned LLC. There is no state court basis to "reverse pierce" the corporate veil and allow assets of LLC to be considered property of debtor.
- (6067) *Buchwald Capital Advisors, LLC, v. Papas*, 2014 WL 4187371 (Bankr. E.D. Mi. 2014) – Section 544(b)(1) allows trustee to avoid any transfer of an interest of the debtor in property to extent that transfer is voidable under applicable law. Action brought under State Uniform Fraudulent Transfer Act must fulfill all state law requirements for such a cause of action. Michigan UFTA requires that as to a plaintiff who was an actual creditor at the time of the transfer, the transfer be made with actual intent to hinder, delay or defraud creditors; or that transfer is without reasonably equivalent value and either debtor was engaged in or was about to engage in business or transaction for which remaining assets were unreasonably small; or that debtor intended to incur or reasonably believed he would incur debts beyond ability to repay. If the creditor was not an actual creditor at the time of the transfer, then plaintiff must prove that debtor did not receive reasonably equivalent value and that debtor was insolvent at time of transfer or became insolvent as a result of the transfer; or that the transfer was to an insider and that debtor was insolvent or became insolvent as a result of the transfer and that the insider had reasonable cause to believe debtor was insolvent.

14.22 Standing

- (6068) *MERV Properties, LLC v. Friedlander*, 2015 WL 2105884 (Bankr. E.D. Ky. 2015) – Only actual creditor of person could bring action against person for fraudulently transferring property or assets. Claims on which plaintiff alleged would create claims were dismissed by court, leaving no potential debtor-creditor relationship between parties mandating dismissal of fraudulent transfer action.
- (6069) *In re Dzierzawski*, Case No. 13-47986 (Bankr. E.D. Mi. 2014) – Creditor seeking derivative standing to pursue fraudulent transfer must demonstrate that creditor has alleged a colorable claim that would benefit estate based on cost-benefit analysis; creditor has made demand on trustee to pursue action; demand has been refused; and refusal is unjustified in light of statutory obligations and duties of trustee. Motion does not require proof of motive or reason for inaction and meets burden by pleadings facts sufficient to demonstrate existence of unpursued claim. Creditor demonstrated colorable claim by alleging facts that, if proven, would support recovery of fraudulent transfer. Defendant's statement that the complaint will be vigorously defended and that defendant believes cause of action will not be successful does not defeat prima facie appearance of colorable possibility of success. Cost-benefit analysis supported derivative standing where recovery would produce substantial value for the estate and recovery of valuable property that could be liquidated for benefit of estate, and creditor agreed to bear costs of litigation subject to creditor's right to seek administrative expense claim if action is successful, such that estate has no exposure for attorney fees and costs. Trustee's refusal to prosecute action was unjustified as estate lacked sufficient funds to prosecute action.
- (6070) *Larson v. Foster*, Case No. 1406007 (8th Cir. BAP 2014) – Individual creditor lacks standing to pursue recovery of alleged fraudulent transfer under Section 548. Section 548 allows the trustee to bring cause of action, but does not extent standing to individual creditors. Court can allow creditor to exercise derivative standing where creditor demonstrates that trustee is unable or unwilling to pursue action, if creditor has petitioned trustee to pursue recovery and trustee refused; claim is colorable; permission is sought from bankruptcy court before adversary proceeding is filed; and trustee unjustifiably refused to prosecute claim. Claim was colorable where allegations of complaint stated cause of action under Section 548. Although creditor did not seek court permission before filing adversary, court would entertain request on retroactive basis where doing so would not prejudice any party. However, evidence indicated that trustee had not refused to prosecute action but had merely asked for additional information. Trustee neither refused to prosecute nor did so in unjustifiable manner, precluding grant of derivative standing.

14.23 Actual Fraud

- (6071) *Kentucky Petroleum Operating, Ltd. V. Golden*, 2015 WL 927258 (E.D. Ky. 2015) – Where party contesting transfer as fraudulent presents evidence of "badges of fraud", burden shifts to defendant to show that transfers were made in good faith. Plaintiff established

badge of fraud where debtor, after entry of arbitration award but before entry of judgment confirming award, executed security agreements to related companies encumbering all of debtor's assets. Transfer effected by security agreement came during pendency of litigation sufficient to raise presumption and shift burden. Defendant can rebut presumption by showing of good faith. Defendants failed to do so. Defendants' allegation that they did not consider plaintiff to be a creditor of debtor at time of transfer irrelevant to whether plaintiff was creditor and defendants' mental state would not alter that status. Defendants presented no evidence that they lacked intent to defraud. Even if security agreements were given to secure pre-existing debt and therefore were for adequate consideration, that does not mean that transfers were in good faith where there was no evidence that security agreements were issued for any purpose other than to effectively transfer assets from debtor to related entities at expense of judgment creditor.

- (6072) *The First State Bank and Trust Company v., Mason*, 2015 WL 430315 (Bankr. E.D. Tn. 2015) – Factors giving rise to presumption of fraudulent intent include (1) The transfer or obligation was to an insider; (2) The debtor retained possession or control of the property transferred after the transfer; (3) The transfer or obligation was disclosed or concealed; (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (5) The transfer was of substantially all the debtor's assets; (6) The debtor absconded; (7) The debtor removed or concealed assets; (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. Less than one year prior to filing, debtors sold their business to their son. After filing, bank contested sale as fraudulent. First badge of fraud was present as sale was to debtors' son, considered insider for fraudulent transfer purposes. There was no evidence that debtors maintained any control over the transferred assets as evidence was uncontroverted that after acquiring business, son operated business with no involvement from parents. Debtors knew that they were in financial distress when property sold, as debtors' primary business (unrelated to the business sold) filed bankruptcy only 6 weeks after sale to son. Transfer was not substantially all of debtors' assets. While sale encompassed all assets of the particular business sold, evidence was that debtors had significant business interests other than the business sold. However, business sold accounted for more of debtors income than all other businesses combined and was the most profitable and stable of the businesses. Insolvency is presumed if the sum of the transferor's assets after the transfer is less than the total amount of debtors' debts, including contingent and unliquidated liabilities including those as guarantor. Financial statement supported insolvency where balance sheet valued assets at a total of \$4.3 million and listed debts aggregating \$8 million. Further, there was no material change in debtors' assets after the sale through the date of the bankruptcy filing, and schedules in bankruptcy showed debts far in excess of assets. Question then became whether son paid reasonable equivalent value, defined as receiving value that is roughly the value of what he receives and is based on common sense and market realities. Bank established lack of reasonably equivalent value for sale of larger parcel where sale agreement stated price of \$750,000 where debtors' own financial statements valued property at no less than \$910,000; and bank alleged that value of property was at least \$785,000.00. Purchase price of smaller parcel also lacked reasonably equivalency where buyer paid \$305,000 but debtors' financial statements valued property at no less than \$390,000.00. However, taken as a whole, evidence did not support finding of actual intent. Undisputed evidence indicated that for years prior to the sale the buyer had been running the business, which had been started at his request as a teenager. The values attributed to the assets in the Sale Agreement were based on their book value and the transfer was not done in secret, with the secured creditors of the business being informed and the buyer affirmatively assuming the business' secured liabilities. From all respects, it appears that the parties sought to handle the transfer legally and above-board. While the sellers were undeniably experiencing financial difficulties at the time of the transfer, it was not their only income-producing company. Their main business continued for more than one year until converting to chapter 7; and sellers themselves did not file for bankruptcy relief until more than a year after the sale.
- (6073) *Schussel v. Werfel*, 758 F.3d 82 (1st Cir. 2014) – Under Uniform Fraudulent Transfer Act, transfer made with actual intent to hinder, delay or defraud creditors can be avoided by either an actual creditor at the time of the transfer or any creditor whose claim arose later.
- (6074) *Tabor v. Lineback*, Adv. No. 12-5154 (Bankr. W.D. Tn. 2013), *aff'd*, 515 BR 532 (6th Cir. BAP 2014) – Actual fraud requires proof that transfer of debtor's property occurred within two years of petition date and that transfer was made with actual intent to hinder, delay or defraud creditors. Fraud is determined by badges of fraud such as whether transferor is in precarious financial condition; whether transferor knew there was or soon would be large judgment rendered against him; adequacy of consideration for transfer; secrecy or haste of transaction; any family or friendship relationship between transferor and transferee; whether transfer included all of substantially all of transferor's non-exempt assets; whether transferor retained life estate or other interest in property; transferor's ability to produce evidence to rebut suspicious transfer; lack of any innocent purpose or use for the transfer. Presence of one or more badges creates presumption of fraudulent intent. Debtor's transfer of property to mother triggered several badges, including (1) debtor knew of his precarious financial condition and knew that debts exceeded assets at time of transfer and that property was in danger of foreclosure; (2) debtor received inadequate consideration where quit claim deed from debtor to mother expressed \$0 – love and affection as consideration; (3) while mom gave debtor money to purchase property in first instance, that was 8 years prior to transfer from debtor to mother which could not constitute consideration for transfer; (4) debtor and mother had family relationship; (5) transfer was of virtually all of debtor's property including the non-exempt value of the property transferred; and (6) there was no innocent purpose for the transfer, as it appears that the only reason for the transfer was to keep property out of hands of creditors.
- (6075) *Wiand v. Lee*, 2014 WL 2446084 (11th Cir. 2014) – Payments made in furtherance of Ponzi scheme are actually fraudulent without need to resort to badges of fraud. State Uniform Fraudulent Transfer Act allowed receiver to recover payments to investors paid within the relevant time period.
- (6076) *Dymarkowski v. Wurst*, 2014 WL 2506147 (Bankr. N.D. Ohio 2014) – Actual fraud for purposes of Section 548(a)(1)(A) requires proof of debtor's actual intent to hinder, delay or defraud creditors. Granting of line to secure antecedent debt, without more, is not evidence of

actual fraud.

- (6077) *Newton v. McKay*, 2014 WL 1612356 (Bankr. E.D. Tn. 2014) – “Badges of fraud” are circumstances so frequently attending fraudulent transfers that an inference of fraud arises, and include inadequacy of consideration, secure or hurried transactions, or use of fictitious parties; close relationship between parties, transfer for little or no consideration, transferor’s continued relations with property such as ongoing mortgage, tax and insurance payments on real property, and whether each party was aware of transferor’s financial difficulty. Transfer of real property from debtor to mother as ordered in divorce decree between debtor and ex-husband constituted transfer to person in close personal relationship to debtor and for which debtor received no consideration, and was done at a time when debtor was suffering financial distress. Defendant successfully rebutted presumption of fraud. Debtor had originally purchased property with funds advanced by mother and at all times the property was considered to belong to mother for investment. It was not until debtor divorced spouse that mother realized property was not in her name and asked for it to be returned to her. Parties were not sophisticated business people well versed in purchase and sale of real estate. Property was initially titled in debtor’s name only because debtor, not mother, attended foreclosure sale at which property was purchased and seller would issue deed only in name of person who physically placed successful bid. Absent any evidence of collusion or fraudulent intent, transfer was not avoidable as actually fraudulent.
- (6078) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Actual fraud for purposes of Section 548 focuses on intent of the debtor, not intent of the creditor. While Chapter 7 trustee presented evidence that may have supported finding of fraudulent intent by creditor, Trustee did not present any evidence of any fraudulent intent of debtor. Further, fraudulent transfer must be of property of the debtor. Debtor had no interest in assets where pre-petition state court judgment determined that debtor had no interest in the assets allegedly transferred and assets belonged solely to the creditor.
- (6079) *Silgay v. Morris*, 2013 WL 5705630 (Bankr. N.D. Ohio 2013) – Actual fraud requires proof that debtor made transfer with actual, subjective intent to hinder, delay or defraud creditors. Marital settlement agreement that conveyed to ex-spouse virtually all of the marital assets including substantial equity in marital home raised presumption of actual fraud, where transfer was made while debtor was subject to present and threatened future litigation including possible criminal sanctions; debtor was insolvent or became insolvent as a result of transfer, as transfer left debtor with virtually no assets, while pending and threatened litigation raised claims for hundreds of thousands of dollars; transfer was made without reasonably equivalent value; and transfer was virtually all of debtor’s assets, where debtor transferred 95% of assets to ex-spouse; and debtor obtained a waiver of future child support, effectively accelerating unmatured future obligation and allowing debtor to pay that at expense of current creditors.
- (6080) *DWR International, Inc. v. Job*, 2013 WL 1438035 (S.D. Ohio 2013) – Transfer can be avoided under Uniform Fraudulent Transfer Statute if made either with actual intent to hinder, delay or defraud creditors; or if made for lack of reasonably equivalent value. Actual fraud can be demonstrated through circumstantial evidence, such as (1) Whether the transfer or obligation was to an insider; (2) Whether the debtor retained possession or control of the property transferred after the transfer; (3) Whether the transfer or obligation was disclosed or concealed; (4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit; (5) Whether the transfer was of substantially all of the assets of the debtor; (6) Whether the debtor absconded; (7) Whether the debtor removed or concealed assets; (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred; (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor. Complaint sufficiently alleged fraud under *Twombly* standard where complaint alleged that the Plaintiff had sued the defendant prior to the date on which the defendant transferred assets to insider; that defendant transferred assets and money aggregating over \$1.6 million with knowledge of the pending litigation; defendant did not receive any value in exchange for the transfer; and that defendant was insolvent at the time of the transfer. Specific factual allegations supported at least 5 “badges of fraud” sufficient to state cause of action under *Twombly* standard.
- (6081) *Degirrolamo v. McIntosh Oil Co.*, 2012 WL 2603429 (Bankr. N.D. Ohio 2012) – Complaint alleging actual fraud must state with particularity the circumstances constitute fraud. Intent and knowledge can be pled generally as long as complaint alleges facts that show motive and opportunity to commit fraud or strong circumstantial evidence of conscious misbehavior or recklessness. Complaint contained sufficient factual allegations of “badges of fraud” including that business transactions between Debtor and Defendant were not customary and that Defendant knew it was purchasing items at deeply discounted prices.
- (6082) *Steed v. Hawkins*, 2012 WL 1156406 (Bankr. E.D. Tn. 2012) – Trustee can recover any transfers made where Debtor had actual intent to hinder, delay or defraud creditors. Defendant liable for recovery of grossly inflated salary and extravagant payments and gifts received from debtor. Debtor operated a ponzi scheme, and used portion of proceeds to pay defendant extravagant salary. Debtor knew at the time that debtor would be unable to repay investors and that the Debtor would eventually collapse. Debtor’s knowledge that future investors would not receive payments was sufficient to establish actual intent to defraud those investors.
- (6083) *Newton v. Sims*, 2011 WL 6000852 (Bankr. E.D. Tn. 2011) – Actual fraud turns on “badges of fraud” including secrecy of transaction, inadequate consideration, close relationship between parties, transferor’s continued relationship with the transferred property, and transferee’s knowledge of transferor’s financial difficulties. Prior finding in action under Section 727 that debtor did not act with actual intent to defraud collaterally stopped Trustee from arguing actual fraud in action under Section 548.
- (6084) *U.S. v. Krause*, 2011 WL 1206178 (10th Cir. 2011) – Debtor’s transfer of property to children’s trusts was fraudulent transfer. Using “badges of fraud” (1) a relationship between the grantor and grantee; (2) the grantee’s knowledge of litigation against the grantor; (3) insolvency of the grantor; (4) a belief on the grantee’s part that the contract was the grantor’s last asset subject to execution; (5) inadequacy of consideration; and (6) consummation of the transaction contrary to normal business procedures, Court found that

transfer was to debtor's wife who then transferred them to trust for no consideration and after debtor knew that IRS had commenced audit and had already disallowed certain deductions. Trustee was debtor's brother and debtor retained operational control over assets in trusts including using assets in trusts to pay debtor's personal expenses.

- (6085) *Steed v. Morgan*, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 548(a)(1)(A) permits the trustee to avoid any transfer made within two years preceding the date of the filing of the petition with actual intent to hinder, delay or defraud creditors. Debtor ran ponzi scheme in which debtor obtained money from investors with promises to invest the money into the foreign exchange market and produce significant returns. Debtor in fact invested only a small fraction of the invested money and used the balance to sustain the ponzi as well as to support Debtor's extravagant lifestyle. Defendant was romantically involved with Debtor and received weekly paychecks of \$1000 although Defendant did not work; and also received checks and cash from the Debtor totaling over \$250,000.00; plus a 2008 Volkswagen Toureg priced at over \$82,000.00, a diamond engagement and wedding ring worth \$11,000.00; and furniture worth at least \$10,000.00; plus one final check for \$225,000 representing the last of the funds in Debtor's business account. Defendant's testimony that she had "forgotten" about these funds or the deposit into a bank account in Georgia (that Defendant also had forgotten about) was not credible. Proof was overwhelming that Debtor operated illegal ponzi scheme with full knowledge that company would eventually run out of money. Knowledge that future investors would not be paid is sufficient to establish actual intent to defraud those creditors.
- (6086) *Slone v. Lassiter*, 406 BR 778 (Bankr. S.D. Ohio 2009) – Transfer of real property made with "intent to hinder, delay or defraud creditors" Debtor had been contemplating bankruptcy for a number of months and believed that transfer of property to "paramour" was only way to keep property out of hands of Debtor's creditors. Debtor received no consideration for transfer as Debtor neither received any proceeds nor was Debtor relieved of any debt.
- (6087) *Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Adversary proceeding based on actual fraud must be plead with specificity pursuant to Federal Rule of Civil Procedure 9. when a plaintiff's intentional fraudulent transfer claim is premised on a Debtor's actual intent "to defraud," plaintiff must plead the "circumstances constituting fraud" with particularity including (1) the date of the transfer; (2) the amount of the transfer (or if the transfer was of property other than money, the property that was transferred and its value); (3) the name of the transferor; (4) the name of the initial transferee; and (5) the consideration paid.

14.24 Constructive Fraud

- (6088) *Paris v. Walker*, 2015 WL 2197969 (Bankr. E.D. Tn. 2015) – Constructive fraudulent transfer is transfer made for less than reasonably equivalent value and is intended to avoid transfers that unfairly or improperly deplete debtor's assets or dilute claims. Constructively fraudulent transfers have no intent element – sole issue is whether the debtor received less than reasonably equivalent value, determined by comparing value of property transferred by debtor to value of what debtor received.
- (6089) *The First State Bank and Trust Company v. Mason*, 2015 WL 430315 (Bankr. E.D. Tn. 2015) – Factors giving rise to presumption of fraudulent intent include (1) The transfer or obligation was to an insider; (2) The debtor retained possession or control of the property transferred after the transfer; (3) The transfer or obligation was disclosed or concealed; (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (5) The transfer was of substantially all the debtor's assets; (6) The debtor absconded; (7) The debtor removed or concealed assets; (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. Less than one year prior to filing, debtors sold their business to their son. After filing, bank contested sale as fraudulent. First badge of fraud was present as sale was to debtors' son, considered in insider for fraudulent transfer purposes. There was no evidence that debtors maintained any control over the transferred assets as evidence was uncontroverted that after acquiring business, son operated business with no involvement from parents. Debtors knew that they were in financial distress when property sold, as debtors' primary business (unrelated to the business sold) filed bankruptcy only 6 weeks after sale to son. Transfer was not substantially all of debtors' assets. While sale encompassed all assets of the particular business sold, evidence was that debtors had significant business interests other than the business sold. However, business sold accounted for more of debtors income than all other businesses combined and was the most profitable and stable of the businesses. Insolvency is presumed if the sum of the transferor's assets after the transfer is less than the total amount of debtors' debts, including contingent and unliquidated liabilities including those as guarantor. Financial statement supported insolvency where balance sheet valued assets at a total of \$4.3 million and listed debts aggregating \$8 million. Further, there was no material change in debtors' assets after the sale through the date of the bankruptcy filing, and schedules in bankruptcy showed debts far in excess of assets. Question then became whether son paid reasonable equivalent value, defined as receiving value that is roughly the value of what he receives and is based on common sense and market realities. Bank established lack of reasonably equivalent value for sale of larger parcel where sale agreement stated price of \$750,000 where debtors' own financial statements valued property at no less than \$910,000; and bank alleged that value of property was at least \$785,000.00. Purchase price of smaller parcel also lacked reasonably equivalency where buyer paid \$305,000 but debtors' financial statements valued property at no less than \$390,000.00. Taken as whole, evidence indicated that sale was constructively fraudulent as made for less than reasonably equivalent value. Value of assets sold exceeded price paid by at least \$59,000.
- (6090) *Tabor v. Lineback*, Adv. No. 12-5154 (Bankr. W.D. Tn. 2013), *aff'd*, Case No. 14-8011 (6th Cir. BAP 2014) – Transfer is constructively fraudulent where debtor transfers interest in property less than 2 years prior to petition date for less than reasonably equivalent and either was insolvent or became insolvent as a result of the transfer.

- (6091) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Fraudulent transfer must be of property of the debtor. Debtor had no interest in assets where pre-petition state court judgment determined that debtor had no interest in the assets allegedly transferred and assets belonged solely to the creditor. To extent debtor transferred Accounts Receivable to creditor, creditor held properly perfected security interest in those assets. When creditor acquired accounts, the transfer was as a matter of law for reasonably equivalent value as transfer reduced balance owed on pre-petition liability.
- (6092) *Geltzer v. Xaverian High School*, 2013 WL 6283582 (Bankr. E.D.M.Y. 2013) – Private school tuition payments for debtor’s minor children are not constructively fraudulent. Debtor received indirect benefit equal to amount of payments as debtor was obligated to provide education for children and debtors receive benefits in form of education for children.
- (6093) *McClarty v. University Liggett School*, 2013 WL 4786861 (Bankr. E.D. Mi. 2013) – Pre-petition payments for debtor’s minor children to attend private school is not constructively fraudulent. Debtor has a statutory obligation to provide schooling for children. As such, debtor received reasonably equivalent value for tuition payments. Case distinguished from *Gold v. Marquette University*, as *Gold* involved payment of college tuition for adult child, which debtor had no legal obligation to pay and for which debtor did not receive any reasonably equivalent value in the form of discharge of a legal duty.
- (6094) *Porter v. Mahmoud*, Case No. 12-80066 (Bankr. W.D. Mi. 2013) – Debtor’s pre-petition payments to law firm as payment for services rendered to debtor’s closely held corporations were constructively fraudulent. Payment of obligations owed by third parties, where debtor is not also responsible for payment, do not amount to reasonably equivalent value.
- (6095) *Lingham Rawlings, LLC v. Gaudiano*, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Section 548(a)(1)(B) carries no element of intent. Whether transfer is fraudulent is based solely on comparison of value of property transferred with the value received by the debtor in exchange; and whether debtor was insolvent at time of transfer.
- (6096) *Degiralomo v. McIntosh Oil Co.*, 2012 WL 2603429 (Bankr. N.D. Ohio 2012) – Fraudulent transfers based on constructive intent requires that transfers be made when Debtor is insolvent. Complaint that alleged only that Debtor made transfers while Debtor was having cash flow shortage coupled with allegation of deepening insolvency as result of transactions suggested that Debtor was insolvent to start, but was not sufficient to provide factual notice of alleged insolvency. Debtor would be permitted to amend to better plead this issue. State law on constructive fraud required that the transfers occur after a claim of a creditor arose. Complaint that alleged only that Debtor purchases fuel from Marathon for resale did not establish that Marathon was creditor of Debtor at time of transfers.
- (6097) *Steed v. Hawkins*, 2012 WL 1156406 (Bankr. E.D. Tn. 2012) – Trustee can avoid any transfer that is made for less than reasonably equivalent value where the debtor was insolvent or rendered insolvent as a result of the transfer. Debtor’s compensation paid to primary employee substantially exceeded the reasonable value of services provided. Defendant received payments for compensation and bonuses of approximately \$500,000 while reasonable salary for services rendered during defendant’s 10 month employment would have been no more than \$68,000.
- (6098) *Newton v. Sims*, 2011 WL 6000852 (Bankr. E.D. Tn. 2011) – Constructive fraud requires proof that transfer was made for less than reasonably equivalent value. “Value” includes property or satisfaction of an antecedent debt”. Court will compare value of property transferred to value of what the debtor received, but will not require dollar-for-dollar equivalent. As long as unsecured creditors are no worse off because the debtor, and consequently the estate, received an amount reasonably equivalent to what it paid, no fraudulent transfer occurred. Debtor did not receive any value from transfer of money to debtor’s son. Debtor sold her home and paid \$150,000 of the proceeds to debtor’s son. Debtor’s son then purchased a new condominium unit in his name alone, using the \$150,000 contributed by debtor plus \$50,000 of son’s money. Condo was titled in name of son alone and debtor held no interest in that unit. Son’s promise that debtor could live in the unit during debtor’s lifetime was not “value” in the form of property or satisfaction of debt and did not provide any benefit to creditors who were harmed as a result of the transfer.
- (6099) *Gold v. Marquette University*, 2011 WL 1344732 (Bankr. E.D. Mi. 2011) – “Constructively fraudulent transfer” requires transfer of interest of debtor in property. If debtor’s sole interest in property is that of trustee under express trust, then the property transferred is not property of the debtor but is the property of the beneficiary and the transfer cannot be fraudulent. An express trust can be written or oral as long as evidence establishes that title to the property was held by the debtor as trustee. Debtor who received proceeds of son’s student loan may have been holding funds as trustee. Although there was no written trust agreement, evidence was conflicting on whether oral trust existed where testimony was that money was held by parent for purposes of paying tuition expense but the debtor was actually a co-borrower on the loan and the loan check was payable to both debtor and son jointly and was deposited into the household bank account of debtor and spouse and co-mingled with other household funds rather than being segregated; and not an account in which son had any interest. Court unable to resolve on summary judgment status of loan proceeds as “trust corpus”. Creditor could not rely on constructive trust if no express trust existed, as bankruptcy court recognized constructive trust only as remedy which does not exist until imposed by a court, and no such trust had been imposed on these funds prior to commencement of the case.
- (6100) *Russell v. Little*, 2010 WL 4959948 (Bankr. E.D. Tn. 2010) – Under Section 548(b)(1)(B), a trustee may avoid any transfer made by the debtor within two years of filing for bankruptcy if the debtor received less than a reasonably equivalent value in exchange for such transfer and: (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor’s ability to pay as such debts matured; or (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business. Actions for Fraud must be plead with specificity. Complaint that failed to specifically plead that the debtor was insolvent failed to state

cause of action and would be dismissed with leave to amend.

- (6101) *Smith v. SIPI, LLC.*, 2010 WL 2899118 (7th Cir. 2010) – State Tax Deed sale did not vest title in purchaser until recordation of tax deed after expiration of statutory redemption period, at which point the deed becomes effective against bona fide purchaser as a matter of state law. Section 548(d)(1) applies only when the transfer become effective against a bona fide purchaser more than two years prior to the commencement of the bankruptcy case. Bankruptcy petition filed less than two years after recording of deed rendered transfer avoidable as a fraudulent transfer.
- (6102) *Steed v. Morgan*, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 548(a)(1)(B) permits the trustee to avoid any transfer made within two years preceding the date of the filing of the petition where the debtor received less than reasonably equivalent value and was insolvent at the time of the transfer. Debtor ran ponzi scheme in which debtor obtained money from investors with promises to invest the money into the foreign exchange market and produce significant returns. Debtor in fact invested only a small fraction of the invested money and used the balance to sustain the ponzi as well as to support Debtor's extravagant lifestyle. Defendant was romantically involved with Debtor and received weekly paychecks of \$1000 although Defendant did not work and did not provide any services to debtor's company that provided any economic benefit that was reasonably equivalent to the transfers from debtor. Even if defendant provided services to warrant the salary, she did not provide any services to warrant the additional assets and property transferred by Debtor which included checks and cash from the Debtor totaling over \$250,000.00; plus a 2008 Volkswagen Toureg priced at over \$82,000.00; a diamond engagement and wedding ring worth \$11,000.00; and furniture worth at least \$10,000.00; plus one final check for \$225,000 representing the last of the funds in Debtor's business account. Defendant's testimony that she had "forgotten" about these funds or the deposit into a bank account in Georgia (that Defendant also had forgotten about) was not credible. Proof was overwhelming that Debtor operated illegal ponzi scheme with full knowledge that company would eventually run out of money. Knowledge that future investors would not be paid is sufficient to establish actual intent to defraud those creditors.
- (6103) *Valley City Steel, LLC v. Liverpool Coil Processing Inc.*, 2009 WL 2017787 (6th Cir. 2009) – Plaintiff in constructive fraudulent transfer action must present affirmative proof of the value of the property transferred in order to support allegations that property was transferred for less than reasonably equivalent value. Where plaintiff is unable to establish value of property transferred, defendant is entitled to judgment as a matter of law.
- (6104) *Collins & Aikman Corp. v. Valeo*, Adv. 07-5587 (Bankr. E.D. Mi. 2009) - Motion for Summary Judgment denied where evidence presented raises questions of whether Debtor received any value in exchange for the transfers or whether that value, if any, was "reasonably equivalent".
- (6105) *Slone v. Lassiter*, 406 BR 778 (Bankr. S.D. Ohio 2009) – Transfer of real property not constructively fraudulent. Transferee, Debtor's live-in "Paramour" constituted "insider"; Debtor retained possession of property after transfer had occurred; transfer made while the property was involved in litigation; and Debtor was insolvent at time of transfer. Debtor received reasonably equivalent value for transfer by allowing paramour to refinance property and relieving Debtor of obligation for underlying debt. Debtor relinquished \$11,000 in equity in exchange for being relieved of over \$135,000 in debt.
- (6106) *Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Adversary proceeding based on constructive fraud is not required to be plead with specificity. Complaint needs only to state short and plain statement of the claim sufficient to provide Defendant with reasonable notice of plaintiff's claim and the grounds upon which it rests. Federal Rule 9 does not apply to action for constructive fraud because transferee is not accused of an act of fraud or deception; conduct and mental state of the transferee is irrelevant.

14.25 Transfer of Property of Debtor

- (6107) *Gold v. Demeter*, 2015 WL 6437654 (Bankr. E.D. Mi. 2015) – To be fraudulent, transfer must involve property of debtor at time of transfer. Debtor's removal of name from bank accounts that were owned by debtor and mother was not fraudulent transfer where debtor did not have legal interest in accounts when debtor removed name. Bank accounts jointly owned by debtor and third party are presumptively owned in proportionate shares. However, presumption is rebuttable by evidence indicating that debtor was not intended to have present interest. Fact that debtor could, at any time, access funds for personal expenses is not conclusive where debtor did not, in fact, access funds. Evidence rebutted presumption that debtor had ownership interest in funds in accounts titled in debtor's name and mother's name where evidence was uncontroverted that all of the funds in the accounts came from mother's social security, , life insurance received by mother when her husband died, funds transferred from an account formerly in the names of mother and husband, sale of building owned by debtor's husband and had been used by him in business, and collection of money owed to husband or his business when he died. Mother added debtor's name to accounts some years earlier for estate planning and to ensure that if mother became unable to manage her affairs, daughter would have access to funds for mom's benefit. Treasure bonds jointly owned by debtor and third party are presumptively by both parties. However, where equitable interests exist, court can impose constructive or resulting trust on bonds and proceeds. Requirements of Code of Federal Regulations that states that registration of bonds is conclusive of ownership is not controlling and does not apply to proceeds after bonds are liquidated. Funds used to purchase bonds were provided exclusively by mother from her separate funds and not from any funds or property of debtor. After mom liquidated bonds, she placed funds in her bank account. Treasury regulations do not undercut conclusion that debtor did not own any of the funds used to purchase bonds and so bonds were sole property of mom notwithstanding named ownership on face of bonds themselves. As transfers did not implicate any property in which debtor had interest, debtor's removal of name from accounts was not fraudulent as matter of law.
- (6108) *Meoli v. Huntington National Bank*, 2015 WL 5690953 (W.D. Mi. 2015) – Deposit of money into bank account constitutes "transfer" of funds to bank. Ban's right to use funds deposited provides sufficient control by bank over funds to amount to transfer for purposes of Section 548.

- (6109) *Paris v. Walker*, 2015 WL 2197969 (Bankr. E.D. Tn. 2015) – Constructive fraudulent transfer is transfer made for less than reasonably equivalent value and is intended to avoid transfers that unfairly or improperly deplete debtor’s assets or dilute claims. Evidence established transfer of property where funds used to purchase property came from debtor’s personal account but title to property was taken in debtor’s daughter’s name.
- (6110) *Spradlin v. Beads & Steeds Inns, LLC*, 2014 WL 4199637 (Bankr. E.D. Ky. 2014) – Action to recover fraudulent transfer dismissed where property transferred was not debtor’s but was property of wholly owned LLC. There is no state law basis to allow debtor to “reverse pierce” the corporate veil and allow assets of LLC to be considered property of debtor.
- (6111) *Tabor v. Lineback*, Adv. No. 12-5154 (Bankr. W.D. Tn. 2013), *affd.*, Case No. 14-8011 (6th Cir. BAP 2014) – Fraudulent transfer must be a transfer of the debtor’s interest in property. Debtor has an interest in property if the property would have become property of the estate had it not been transferred. If debtor held bare legal title to property, transfer would not be transfer of debtor’s interest as property interest would not have become property of estate in first instance. Debtor will hold bare legal title either where property is held in an express trust or where property is held in constructive trust in favor of another; or perhaps where property is subject to resulting trust. Express trust requires a trustee who holds property for benefit of another; a beneficiary to whom trustee owes equitable duties; and identifiable trust property. Parties must intend to create trust. Evidence did not support express trust where mother gave debtor money to buy house but debtor was intended to be owner of house and to use and reside in house and to make payments on house and debtor in fact made payments for 4 years until becoming disabled. There was no evidence of any express agreement that debtor would hold property for benefit of mother or that debtor would hold property as anything other than debtor’s own property. Constructive trust requires that person acquired property with equitable duty to convey it to another, such that retention of property would unjustly enrich the party holding the property. Evidence did not indicate that debtor acquired property in unjust or inequitable manner where mother gave debtor money to buy property in debtor’s own name, debtor in fact bought the property and made payments on the property, and lived in and used the property as debtor’s residence. Without deciding whether property held as resulting trust would similarly be excluded court concluded that property was not held in resulting trust. Resulting trust is an equitable remedy that requires clear and convincing evidence that one person became invested with legal title but was equitably obligated to hold title for another, although no intention to create a trust has been expressly or inferentially expressed and there being no fraud or constructive fraud involved. Evidence failed to support finding of resulting trust where only evidence was recorded deeds and mortgages showing debtor was the owner of the property and neither debtor nor mother testified at the hearing. Only evidence was that debtor held title in his own name and used and occupied the property as his personal residence and made the mortgage payments until he became disabled, none of which supported imposition of resulting trust.
- (6112) *Still v. Nelson Bowers II Exit 20 Auto Mall, LLC*, 2014 WL 693446 (Bankr. E.D. Tn. 2014) – To be avoidable fraudulent transfer, property transferred must have been property of the debtor. Sale of assets by LLC is not transfer of property of Debtor who was 50% owner of LLC and, therefore, could not be avoidable as a matter of law.
- (6113) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Fraudulent transfer must be of property of the debtor. Debtor had no interest in assets where pre-petition state court judgment determined that debtor had no interest in the assets allegedly transferred and assets belonged solely to the creditor.
- (6114) *Murk’s Village Markets, Inc. v. Bank of America, NA*, Case No. 13-80141 (Bankr. W.D. Mi. 2013) – Fraudulent transfer action requires a transfer of property of the debtor or of the debtor’s interest in property. Property transferred was not property of debtor. Debtor embezzled funds from employer and used those funds to pay debtor’s creditors. However, the checks to the creditors were issued directly from corporate accounts and payable directly to the creditor. Debtor never had the funds and never had an interest in the funds, as the funds passed directly from employer to creditor. As such, payments to creditors using funds embezzled from employer were not avoidable as fraudulent transfers. Embezzler does not acquire any title to or interest in embezzled funds as a matter of state law.
- (6115) *The White Family Companies, Inc. v. Slone*, 2013 WL 3925820 (6th Cir. 2013) – Fraudulent transfer action requires that property transferred have been property of the debtor at the time of the transfer. Property held in trust by a debtor, where debtor holds only bare legal title, is not property of debtor. Debtor, a title company, acted as intermediary between private lender and borrower, where lender would deposit funds into Debtor’s trust account which Debtor would then forward to borrower upon execution of appropriate loan documents. Borrower would repay loans by depositing funds into Debtor’s trust account and Debtor would forward payment to the lender, less Debtor’s fees. After a series of transactions between lender and borrower worked as designed, lender made another loan to borrower using the same process. Borrower then repaid the loan by giving Debtor a check for the amount owed, which Debtor deposited into its trust account. The Debtor’s bank gave debtor immediate “provisional credit” for the deposit and Debtor forwarded funds to the lender without waiting for check from borrowers to clear. When the borrower’s check bounced, the Bank reversed the provisional credit, creating a substantial negative balance in the trust account and forcing Debtor out of business. The Court found that the money paid to the lender was property of the debtor. Although the money had been deposited into the trust account, the check that had been entrusted to the debtor bounced, which prevented the creation of any trust relationship between Debtor and borrower with respect to those funds. Instead, the provisional credit amounted to a loan by the Bank to the Debtor when the deposited check bounced, and the funds in the trust account were the proceeds of this “loan” and belonged to the Debtor. Debtor’s forwarding of those funds to the lender constituted a constructively fraudulent transfer of property of the estate.
- (6116) *White Family Companies, Inc. v. Dayton Title Agency, Inc.*, 468 BR 258 (S.D. Ohio 2012) – Funds that had been deposited in debtor/real estate title agency’s interest on lawyers trust account (IOLTA) to complete loan closings, were held in express trust, and did not constitute funds in which debtor had interest. Fact that debtor/real estate title agency may have commingled, with funds that it held on its customers behalf in client trust account, funds that it had earned in connection with closings on other loan transactions in no way affected the fact that funds which could not be traced to such earnings were trust funds in which agency had no beneficial interest. Any transfer of funds from

that account could not be avoided as fraudulent transfers as transfers did not involve a transfer of debtor's interest in property.

- (6117) *Stathopoulos v. Alford*, Case No. 11-12353 (11th Cir. 2012) – To be avoidable, property transferred must have been property of the debtor at the time of the transfer. Mere deposit of money into debtor's account with no express restriction on use of funds did not establish debtor's control over funds sufficient to make later transfer one of property of the debtor. Third-party corporation agreed to lend money to corporation in which debtor had an interest. Third-party deposited funds into debtor's account and, on the same date, accompanied debtor to the bank to purchase cashier's check payable to third party construction company as down payment on a purchase of property that debtor planned to later acquire from corporation. At no time did debtor receive anything of value in connection with the wire transfer into the account or the cashier's check out of the account. Although there is presumption that any funds under the control of the debtor are debtor's property, presumption can be rebutted where evidence shows that funds merely passed through debtor's hands but were never in fact debtor's property. In determining whether debtor had control over funds, Court will look at source of funds, which party benefitted from the transaction, and whether debtor had the power to designate who will receive funds and to actually distribute funds. Evidence indicated that funds were in debtor's account for only a few hours. Debtor did not have authority to designate who would receive funds or to disburse funds because funds were specifically designated under terms of agreement between debtor and Corporation. Corporation that provided the money was not in any way indebted to debtor. All of the funds were provided by third-party corporation and were paid to separate corporation, with debtor having no interest in either.

14.26 Time of Transfer

- (6118) *Gold v. Demeter*, 2015 WL 6437654 (Bankr. E.D. Mi. 2015) – Debtor's abandonment of claim to deceased father's estate under intestacy laws occurred when father died and debtor's mother took and retained entire estate. While debtor may have had right to intestate share, debtor abandoned that interest by not taking any steps to obtain interest. Father died 23 years earlier, so any "transfer" of debtor's intestate interest to mother occurred well outside any applicable time parameter under Section 548.

14.27 Payments Under Employment Contracts

- (6119) *Jahn v. Char*, 2012 WL 1641653 (Bankr. E.D. Tn. 2012) – Payments made pursuant to an employment contract entered into fewer than 2 years prior to commencement of case are avoidable. Payments made under employment agreement made more than 2 years prior to commencement are not avoidable even if payments themselves were made fewer than 2 years prior. Obligation to pay arose when employment agreement was entered into, subject only to occurrence of condition in employment agreement that triggered payment. Execution of separate "Severance Agreement" at termination of employment did not create new or distinct severance obligation where Severance Agreement merely restated terms of original Employment Agreement regarding amount and timing of severance payments.

14.28 Transfer of Property of Estate

14.29 Particular Transfers Avoidable

- (6120) *Sikirica v. Wettach*, 2013 WL 1289149 (Bankr. W.D. Pa. 2013) – Debtor's deposit of paychecks into joint account with spouse, made after debtor had been sued, were partially fraudulent to extent of the amount deposited that was not thereafter used to pay household or personal expenses of debtor.
- (6121) *In re Neal*, 478 BR 261 (6th Cir. BAP 2012) – Bankruptcy Court could revisit property distribution in domestic relations case to determine if allocation of assets is fraudulent transfer. Where one party received assets of value grossly disproportionate to value of assets received by other, transfer is avoidable under Section 548.
- (6122) *Janvey v. Democratic Senatorial Campaign Committee, Inc.*, Case No. 11-10704 (5th Cir. 2012) – Receiver could recover from various Democratic and Republican campaign committees as fraudulent transfers under state UFTA campaign contributions. Federal Campaign Finance laws do not preempt fraudulent transfer statutes. (Interestingly, there is no indication in the opinion that the campaign committees contended that the contributor received "reasonably equivalent value").
- (6123) *Sweet v. Chambers*, Adv. No. 11-3071 (Bankr. E.D. Mi. 2012) – Complaint alleged cause of action under Sections 548 and 550. Complaint alleged that debtor was conspiring with defendants by having promissory notes prepared from defendants to debtors with the intent of reassigning those notes to debtor's wife for no consideration.
- (6124) *Steed v. Morgan*, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 548(a)(1)(A) and 548(a)(1)(B) permitted the trustee to avoid transfers to Debtor's "significant other". Debtor ran ponzi scheme in which debtor obtained money from investors with promises to invest the money into the foreign exchange market and produce significant returns. Debtor in fact invested only a small fraction of the invested money and used the balance to sustain the ponzi as well as to support Debtor's extravagant lifestyle. Defendant was romantically involved with Debtor and received weekly paychecks of \$1000 although Defendant did not work and did not provide any services to debtor's company that provided any economic benefit that was reasonably equivalent to the transfers from debtor. Even if defendant provided services to warrant the salary, she did not provide any services to warrant the additional assets and property transferred by Debtor which included checks and cash from the Debtor totaling over \$250,000.00; plus a 2008 Volkswagen Toureg priced at over \$82,000.00; a diamond engagement and wedding ring worth \$11,000.00; and furniture worth at least \$10,000.00; plus one final check for \$225,000 representing the last of the funds in Debtor's business account. Defendant's testimony that she had "forgotten" about these funds or the deposit into a bank account in Georgia (that Defendant also had forgotten about) was not credible. Proof was overwhelming that Debtor operated illegal ponzi scheme with full knowledge that company would eventually run out of money. Knowledge that future investors would not be paid is sufficient to establish actual intent to defraud those creditors.

- (6125) *Lewis v. Public Service Credit Union*, 406 BR 288 (Bankr. E.D. Mi 2009) – Recording an affidavit of lost mortgage and a copy of the original mortgage does not constitute perfection as a matter of Michigan law. Michigan law requires that the mortgage be received by the register of deeds, that the mortgage meet the technical requirements for recording, and in the recording fee be paid when the mortgages left for recording. A mortgage which does not satisfy these requirements is ineffectual for bankruptcy purposes. An affidavit of lost mortgage cannot serve as a substitute for a properly recorded mortgage. Therefore, trustee's status as a hypothetical judgment leading creditor under section 544 is superior to the creditors status as the holder of an unrecorded mortgage; and the mortgage is deemed to have been perfected immediately before the filing of the bankruptcy proceeding rendering the mortgage avoidable under section 547.
- (6126) *Bash v. Sun Trust Banks, Inc.*, 2008 WL 3271090 (6th Cir. 2008) – Debtor's use of money in an account jointly owned by Debtor and third-party corporation to acquire essentially worthless stock warrants constituted transfer of Debtor's interest in property sufficient to sustain a cause of action for state law fraudulent conveyance. Debtor's ostensible ownership interest in the account was sufficient to grant Debtor a property interest in the account resulting in the funds transferred being "property of the estate" notwithstanding creditor's argument that the funds actually belonged entirely to the co-account holder.
- (6127) *American Home Mortgage Investment Corp. v. Lim*, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547.
- (6128) *Brennan v. Slone*, 2008 WL 4569946 (6th Cir. 2008) - Transfers of inventory from Debtor's closely held corporation to Debtor's significant other with intention that significant other sell the inventory and keep the proceeds are avoidable fraudulent transfers where corporation is found to be alter ego of Debtor. Corporation was Debtor's alter ego where Debtor frequently commingled his funds with corporation's and treated corporation's debts as Debtor's individual debts. Debtor put corporation's cash into Debtor's accounts and paid corporation expenses from personal accounts. Debtor paid his own expenses from the commingled funds. Debtor had a difficult time remembering to distinguish between himself and his corporation during testimony.
- (6129) *Slone v. Lassiter*, 406 BR 778 (Bankr. S.D. Ohio 2009) – Debtor's transfer to "paramour" of one-half interest in Debtor's real property was avoidable fraudulent transfer where Debtor had been contemplating bankruptcy for a number of months and believed that transfer was only way to keep property out of hands of Debtor's creditors. Debtor received no consideration for transfer as Debtor neither received any proceeds nor was Debtor relieved of any further debt. Debtor's contention that she received free housing did not constitute reasonably equivalent value in exchange for the transfer.

14.30 Particular Transfer Avoidable – Perfection of Security Interest

- (6130) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Perfection of security interest against debtor's property constitutes transfer of property of estate as of date of perfection. Debtor's grant of security interest to defendant lacked reasonably equivalent value where debt secured was one owed by debtor's principal for which debtor was not otherwise liable, such that debtor received no consideration for grant.

14.31 Particular Transfer Avoidable – Tax Sales

- (6131) *Smith v. SIPI*, 501 BR 843 (N.D. Ill. 2013) – Debtor can avoid tax sale of home where tax sale produced less than reasonably equivalent value. Property purchased for \$5,000 valued at \$100,000. Sale price was not reasonably equivalent to value given up by debtors. Presumption of BFP v. Resolution Trust does not apply to tax sales. Purchaser at tax sale responsible for property or value of property as of date of sale.

14.32 Particular Transfers Not Avoidable

- (6132) *Borders v. King*, 2011 WL 3352468 (Bankr. E.D. Ky. 2011) – Creditors have no standing to prosecute a fraudulent transfer action in their own right and for their own benefit during a bankruptcy even if they would have had standing to do so outside of bankruptcy. The Trustee has the exclusive right to bring an action for fraudulent conveyance pursuant to 11 U.S.C. § 548 and/or § 544 during the pendency of bankruptcy proceedings.
- (6133) *Kohut v. Rigney*, Case No. 07-6287 (Bankr. E.D. Mi. 2011) –Divorce judgment in 1998 conveyed ex- husband's property interest in marital homestead to ex-wife. Husband delivered quit claim deed to ex-wife contemporaneously with divorce decree, but Wife failed to record that deed until January, 2007. Delay in recording deed did not leave ex-husband with property interest as that interest ceased to exist by virtue of the divorce decree. Husband's bankruptcy filing within 90 days of date on which deed was recorded did not result in deed being fraudulent or preferential, because recording of deed did not operate to transfer title or divest debtor of interest in property.
- (6134) *Slone v. Lassiter*, 406 BR 778 (Bankr. S.D. Ohio 2009) – Debtor quit-claimed one-half interest in real property to "paramour" in order to allow paramour to refinance property and pay off prior mortgage that was in foreclosure was not fraudulent transfer. Debtor received reasonably equivalent value for transfer by allowing paramour to refinance property and relieve Debtor of obligation for underlying debt. Debtor relinquished \$11,000 in equity in exchange for being relieved of over \$135,000 in debt.

14.33 Reasonably Equivalent Value

- (6135) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Perfection of security interest against debtor's property constitutes transfer of property of estate as of date of perfection. Debtor's grant of security interest to defendant lacked reasonably equivalent value where debt secured was one owed by debtor's principal for which debtor was not otherwise liable, such that debtor received no consideration for grant.

- (6136) *Sweet v. Chambers*, 2015 WL 5728844 (E.D. Mi. 2015) – Trustee must prove either that transfer was made with intent to hinder, delay or defraud creditors; or that transfer was made for less than reasonably equivalent value. “Value” is based on what the debtor received in exchange for transfer as of the date of the transfer by the debtor. Spouse to whom promissory notes were transferred did not establish “value” for transfers allegedly made for estate planning purposes. Spouse’s “promise” of future love and affection was unperformed promise to furnish support which is not value under Section 548(d)(2)(A).
- (6137) *Shapiro v. Kesteloot*, 2015 WL 4040190 (Bankr. E.D. Mi. 2015) – Debtor’s transfer of funds to separated spouse during pendency of divorce was for reasonably equivalent value where funds satisfied spousal support obligations. However, issue of “value” of spousal support obligation and property divisions were factual questions requiring evidentiary hearing. Reasonably equivalent value, which can include satisfaction of antecedent debt, requires court to determine whether debtor received *any* value for transfer, determined by circumstances that existed as of the moment of the transfer; and then whether value received was reasonably equivalent to value of property transferred by debtor.
- (6138) *Brown v. Raygoza*, 2015 WL 3404505 (Bankr. E.D. Ky. 2015) – Transfer is for less than reasonably equivalent value where value of property transferred by debtor is substantially higher than value received by debtor. Transfer of mineral rights by debtor to sister was presumptively for less than reasonably equivalent value where sister paid debtor \$20,000 and deed stated on its face that the value of the rights transferred is \$150,000.00. Further, royalties received by sister supported higher valuation than the \$20,000 paid where sister had pre-existing smaller interest and received royalties of more than \$20,000 per year and the royalties attributable to portion received from debtor exceeded \$17,000 just for 2009.
- (6139) *Paris v. Walker*, 2015 WL 2197969 (Bankr. E.D. Tn. 2015) – Whether value is reasonably equivalent focuses on net effect of transfers on debtor’s estate and funds available to pay unsecured creditors. As long as unsecured creditors are no worse off because the estate received an amount reasonably equivalent to what was transferred, the transfer is not constructively fraudulent. The value does not need to be dollar for dollar to be reasonably equivalent. Debtor’s funds that were admittedly used to purchase property taken in daughter’s name lacked reasonably equivalent value. Factual issues remained as to whether balance of purchase price was from funds which debtors were holding on behalf of or owed to daughter precluding summary judgment on remaining issues.
- (6140) *The First State Bank and Trust Company v., Mason*, 2015 WL 430315 (Bankr. E.D. Tn. 2015) – Reasonable equivalent value is defined as receiving value that is roughly the value of what he receives and is based on common sense and market realities. Bank established lack of reasonably equivalent value for sale of larger parcel where sale agreement stated price of \$750,000 where debtors’ own financial statements valued property at no less than \$910,000; and bank alleged that value of property was at least \$785,000.00. Purchase price of smaller parcel also lacked reasonably equivalency where buyer paid \$305,000 but debtors’ financial statements valued property at no less than \$390,000.00. Purchase price was at least \$59,000 less than value of property establishing lack of reasonably equivalency..
- (6141) *Meoli v. Cooper*, 521 BR 613 (Bankr. W.D. Mi. 2014) – Transfer of property in discharge of obligations under divorce judgment cannot be constructively fraudulent unless underlying obligations themselves are avoidable. If debtor’s obligations under divorce judgment are not avoidable, debtor’s transfers of property in satisfaction of those obligations constitutes reasonably equivalent value on a dollar for dollar basis. Debtor’s obligations incurred in the divorce judgment were for reasonably equivalent value. Court would be reluctant to second guess state court division of assets and liabilities as family law matters are inherently matters for state court. Absent evidence of fraud or collusion, judgment of divorce would be presumed to be fair division of marital assets in settlement of competing claims of the parties. Transfer was for reasonably equivalent value where debtor transferred property to ex-spouse in satisfaction of ex-spouse’s contributions to debtor. Debtor borrowed money against his wife’s pre-marital property and used money to start business. Debtor later failed to make payments and spouse lost property, and her previously existing equity, in foreclosure. Transfers pursuant to divorce agreement were intended to recompense ex-spouse for value of lost equity which constituted a valid marital obligation.
- (6142) *Wells v. THB America*, 2014 WL 5324095 (Bankr. E.D. Mi. 2014) – in order to determine whether the Debtor received reasonably equivalent value for the assets that it transferred in this larger transaction, the Court must consider the value of everything that the Debtor transferred, and the value of every benefit, direct and indirect, that the Debtor received in exchange, not just directly from the transferee, but from any source, as part of the larger transaction. Although direct purchaser paid only \$100,000 for assets, a related entity paid off debtor’s obligation to lender in the amount of \$9.2 million. Viewed as part of the larger transaction, record failed to demonstrate lack of reasonably equivalent value for purposes of summary judgment.
- (6143) *Tabor v. Lineback*, Adv. No. 12-5154 (Bankr. W.D. Tn. 2013), *affid.* Case No. 14-8011 (6th Cir. BAP 2014) – Reasonably equivalent value is question of fact based on whether debtor received value, not whether transferee parted with value, based on the circumstances as they existed t the time of the transfer and whether the parties reasonably believed that transfer would produce benefit to debtor; and whether value received was reasonably equivalent to value of property transferred by debtor. Value must be concrete, definite and quantifiable and can include property or satisfaction or securing of antecedent debtor but does not including unperformed promise to provide support. Value does not have to be dollar for dollar. Transfer of property from debtor to mother lacked reasonably equivalent value where debtor transferred ownership of property worth \$22,000 and deed recited consideration as \$0 – love and affection. Fact that mom provided bulk of money to allow debtor to purchase property in first instance did not amount to consideration for transfer by debtor to mother where there was no consideration paid at time of transfer and there was no evidence that debtor was indebted to mother, it appearing that initial payment was not intended as loan to son.
- (6144) *Lim v. Champion Products*, Case no. 13-4727 (Bankr. E.D. Mi. 2014) – Court just determine whether debtor received value and whether value was reasonably equivalent to the value of the asset transferred by debtor. Value includes satisfaction of debt of the debtor. After business was sold, debtor paid back invoice to supplier of business. Record was not clear as to whether debtor retained obligation to pay

creditor or whether that obligation had been assumed by purchaser of business.

- (6145) *Geltzer v. Xaverian High School*, 2013 WL 6283582 (Bankr. E.D.N.Y. 2013) – Private school tuition payments for debtor’s minor children are not constructively fraudulent. Debtor received indirect benefit equal to amount of payments as debtor was obligated to provide education for children and debtors receive benefits in form of education for children.

14.34 Reasonably Equivalent Value – Lien Securing Pre-Existing Indebtedness

- (6146) *Dymarkowski v. Wurst*, 2014 WL 2506147 (Bankr. N.D. Ohio 2014) – Lien given to secured pre-existing indebtedness cannot be constructively fraudulent. Constructive fraud required lack of reasonably equivalent value. Section 548 defines value to include “securing of pre-existing indebtedness”. As such, grant of lien is, by definition, supported by value and is not constructively fraudulent.
- (6147) *Tavener v. Wells Fargo Bank*, 2014 WL 1044897 (Bankr. E.D. Va. 2014) – Security interest granted to secure pre-existing obligation as part of forbearance agreement not avoidable as constructively fraudulent. Section 548(d)(2)(A) specifically defines value as securing a present or antecedent debt. Antecedent debt stands as value for the granting of the security interest. Where underlying debt is not itself avoidable, security interest is not avoidable as constructively fraudulent.
- (6148) *Higgason v. Staley*, 2014 WL 640986 (Bankr. E.D. Ky. 2014) – Debtor who gave mortgage to secure pre-existing debt did not commit constructively fraudulent transfer as granting of security interest to secure pre-existing debt is done for reasonably equivalent value. Section 548 defines value as “property ... securing present or antecedent debt”. Mortgage secured antecedent debt and constituted “value” as matter of law.
- (6149) *Silgay v. Morris*, 2013 WL 5705630 (Bankr. N.D. Ohio 2013) – Reasonably equivalent value has two separate inquiries: (1) did debtor receive anything that can be properly be considered ‘value,’ and (2) was that value reasonably equivalent to what was transferred. Distribution of assets under voluntary marital separation agreement constitutes a transfer of value where debtor transferred entire interest in marital home that had substantial equity. Ex-spouse’s alleged waiver of right to receive child support did not constitute “value” for fraudulent transfer purposes as value includes money or property or satisfaction an existing debt, but does not include any unperformed promise to furnish support. Further, facts indicated that even if debtor was required to pay support, there was no reason to believe that support would ever be paid as debtor had been convicted of multiple crimes and sentence to lengthy prison term, and debtor’s former employer held criminal restitution judgment against debtor. Any obligation to pay support would have been illusory and does not constitute value.
- (6150) *Suhar v. Bruno*, 2013 WL 5734120 (6th Cir. 2013) – Reasonably equivalent value does not require dollar for dollar equivalent, as long as transaction does not leave debtor’s unsecured creditors worse off because debtor received amount reasonably equivalent to what was paid. Assumption of third party debt by debtor who does not receive value as part of transaction is not for reasonably equivalent value. Assumption by one spouse of disproportionate share of marital and joint debt, unaccompanied by attendant receipt of property, is fraudulent transfer to extent that debt assumed exceeded value of marital property received. Marital debt totaled \$86,000.00, of which each spouse should have been responsible for half, or \$43,000.00. Debtor assumed all of the marital debt without receipt of any corresponding marital assets, amounting to fraudulent transfer by debtor to ex-spouse of amount of spouse’s share of marital debt.
- (6151) *Wojcik v. Hudson Funding, LLC*, 2013 WL 3525708 (N.D. Ohio 2013) – Determining reasonably equivalent value is a question of fact and considerable latitude must be allowed to the trier of facts. Complaint stated cause of action for fraudulent transfer where debtor purchased accounts receivable and resold those to related entities for no profit, while retaining servicing duties in exchange for only 25% of collection amounts, effectively allowing purchasing entity to retain 75% of receivables for doing nothing. Complex business relationships between debtor and purchaser precluded dismissal at early stages of case.
- (6152) *Porter v. Mahmoud*, Case No. 12-80066 (Bankr. W.D. Mi. 2013) – Debtor’s pre-petition payments to law firm as payment for services rendered to debtor’s closely held corporations were constructively fraudulent. Payment of obligations owed by third parties, where debtor is not also responsible for payment, do not amount to reasonably equivalent value.
- (6153) *Mason v. Clark*, 2013 WL 3991857 (Bankr. N.D. Ohio 2013), *reh’g denied*, 2013 WL 5300694 (Bankr. N.D. Ohio 2013) – Debtor and her mother entered into sale of debtor’s interest for reasonably equivalent value where mother paid debtor \$35,000 for property that appraised, at most, for \$30,000. Even if the deed was not recorded at that time, the transfer was for a price that was reasonably equivalent for purposes of Section 548.
- (6154) *Barbacci v. Mikstay*, 2013 WL 3878165 (Bankr. N.D. Ohio 2013) – In determining reasonably equivalent value, court must first determine what value, if any, the debtor received; and then determine whether the value is reasonable. Value can consist of payments or consideration paid to third party rather than the debtor directly, if the consideration lands in the debtor’s hands or produces some economic benefit to the debtor such that the debtor’s economic status and net worth have been preserved. Debtor sold corvette for \$3,000 cash plus purchaser’s agreement to waive unpaid wage claim against Debtor’s wholly owned business. Court was unable to determine from the record whether the value received by the business fell within indirect benefit rule or whether consideration was reasonably equivalent for purposes of summary judgment.
- (6155) *Lingham Rawlings, LLC v. Gaudiano*, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Reasonably equivalent value requires comparison of value that debtor gave up with value received by debtor. Dollar-for-dollar equivalent is not required, but focus is on whether estate was depleted. If transfer does not leave unsecured creditor worse off, debtor received reasonably equivalent value and transfer is not fraudulent. Value includes either property or satisfaction of antecedent debt. Debtor received value of management services performed by defendant. Satisfaction of accrued liability for management services based on employment contract constitutes reasonably equivalent value to extent

of outstanding balance. Loans made by defendant to debtor that were repaid constituted reasonably equivalent value. Balance of funds did not appear to have been repayment of antecedent obligations and would be constructively fraudulent. Where court also found that part of the transfers were preferential, court would use care to ensure that court did not award double recovery for same transfers.

- (6156) *Jahn v. Char*, 2012 WL 1641653 (Bankr. E.D. Tn. 2012) – Payments made pursuant to an employment contract entered into fewer than 2 years prior to commencement of case are avoidable. Obligation to pay arose when employment agreement was entered into, subject only to occurrence of condition in employment agreement that triggered payment. Later payment of severance was in fulfillment of earlier, unavoidable obligation under employment agreement. Payment of pre-existing enforceable obligation constitutes “reasonably equivalent value” rendering payments not avoidable as fraudulent transfers.
- (6157) *Steed v. Hawkins*, 2012 WL 1156406 (Bankr. E.D. Tn. 2012) – Defendant has burden of proof on issue of reasonably equivalent value and good faith. Although defendant produced evidence that she received transfers in good faith as compensation for services rendered, defendant did not produce evidence of actual value of services rendered. Trustee’s expert testified that reasonable value of services rendered would be less than \$70,000, while defendant received total compensation of more than \$500,000.00. Transfers avoided to extent amount transferred exceeded reasonable value of services.
- (6158) *Newton v. Sims*, 2011 WL 6000852 (Bankr. E.D. Tn. 2011) – Constructive fraud requires proof that transfer was made for less than reasonably equivalent value. “Value” includes property or satisfaction of an antecedent debt. Court will compare value of property transferred to value of what the debtor received, but will not require dollar-for-dollar equivalent. As long as unsecured creditors are no worse off because the debtor, and consequently the estate, received an amount reasonably equivalent to what it paid, no fraudulent transfer occurred. Debtor did not receive any value from transfer of money to debtor’s son. Debtor sold her home and paid \$150,000 of the proceeds to debtor’s son. Debtor’s son then purchased a new condominium unit in his name alone, using the \$150,000 contributed by debtor plus \$50,000 of son’s money. Condo was titled in name of son alone and debtor held no interest in that unit. Son’s promise that debtor could live in the unit during debtor’s lifetime was not “value” in the form of property or satisfaction of debt and did not provide any benefit to creditors who were harmed as a result of the transfer.
- (6159) *Southeast Waffles, LLC v. United States Department of Treasury*, 2011 WL 6155719 (6th Cir. BAP 2011) – Prepetition payment of tax penalties to IRS cannot be constructively fraudulent. Payments reduced debtor’s obligation on a dollar-for-dollar basis, providing reasonably equivalent value to support transaction. That payments were applied to penalties and not to tax liability itself did not change conclusion that payment reduced debtor’s total tax liability by the corresponding amount.
- (6160) *Stevenson v. Leonard Turowski & Son Funeral Home*, 2011 WL 3290300 (Bankr. E.D. Mi. 2011) – Transfer is not avoidable if made for reasonably equivalent value. Transfer made to pay off antecedent debt is for reasonable equivalent value to the extent that the debt is satisfied in an amount equal to the amount of the payment.
- (6161) *Walls v. Cocchini*, 2011 WL 2747377 (Bankr. E.D. Tn. 2011) – Transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation. Courts generally compare the value of the property transferred with the value of what the debtor received to ascertain whether there was a reasonably equivalent value, although a dollar-for-dollar equivalent is not required. Investors in Ponzi scheme who receive partial return of invested amounts in 90 days pre-petition are not liable for receipt of preferential transfers. In Ponzi schemes, investors will be liable for preferences only to the extent investor received payments in excess of the principal invested.
- (6162) *Gold v. Marquette University*, Case No. 10-4608 (Bankr. E.D. Mi. 2011) – “Value” flowing to third party can constitute reasonably equivalent value to the debtor if the consideration ultimately ends up in the debtor’s possession or confers an economic benefit on the debtor such that the debtor’s net worth has been preserved. Debtor did not receive “value” in exchange for tuition payments for Son’s college education. Benefit of payments flowed directly to the son and did not confer any economic benefit to the debtor. Although debtor may have felt moral obligation to pay tuition, debtor lacked any legal obligation to do so. Items such as “peace of mind” that son will have college education that and provide opportunities to son that he would not have absent college education is insufficient to constitute economic benefit to debtor.
- (6163) *Weir v. Chadwick*, 2010 WL 3724823 (Bankr. E.D. Tn. 2010) – Action to recover under State Uniform Fraudulent Transfer Act for “constructive fraud” requires proof that debtor, as transferor, did not receive reasonably equivalent value. In determining whether value is reasonably equivalent, focus should be placed upon the consideration received by the debtor rather than the value given by the transferee to determine the net effect of the transfers on the debtor’s estate and the funds available to unsecured creditors. As long as the unsecured creditors are no worse off because the debtor, and consequently the estate, has received an amount reasonably equivalent to what it paid, no fraudulent transfer has occurred. The debtor need not collect a dollar-for-dollar equivalent to receive reasonably equivalent value. Debtor transferred Debtor’s interest in residence to Family Limited Partnership allegedly in exchange for interest in partnership and forgiveness of pre-existing debt owed to other members of partnership. Summary Judgment denied where Court was not able to determine value of debtor’s fractional ownership interest in house that was transferred or the value of the either the partnership interest received or the debts allegedly satisfied.
- (6164) *Solomon v. Felsner*, 2008 WL 3562465 (6th Cir. 2008) – Trustee contested transfer of property pursuant to Florida State Fraudulent Transfer Statute. Applying Florida State Law pursuant to section 544(b)(1), transfer of property by Debtor to former housemate and father of former housemate was contemporaneous transaction in exchange for reasonably equivalent value and was not avoidable. Debtor’s fiancé sold home in Michigan and moved to Florida with Debtor. Debtor applied for mortgage and fiancé “gifted” to Debtor money for down payment. Eight days later, Debtor closed on sale of property and immediately quit-claimed property to fiancé and

Debtor jointly. Quit claim deed was not recorded for over one year. More than 90 days after quit claim deed finally recorded, Debtor filed for Chapter 7. Court held that Quit Claim Deed was not avoidable transfer. Transaction was a part of a single, integrated transaction and money paid by fiancé to Debtor was "consideration for [Debtor's] subsequent execution of the quitclaim deed". Evidence also failed to demonstrate that transfer rendered Debtor insolvent or likely to incur debts beyond Debtor's ability to pay, as required by Florida law.

14.35 Reasonably Equivalent Value – Tax Sale

- (6165) *Smith v. SIPI*, 501 BR 843 (N.D. Ill. 2013) – Debtor can avoid tax sale of home where tax sale produced less than reasonably equivalent value. Property purchased for \$5,000 valued at \$100,000. Sale price was not reasonably equivalent to value given up by debtors. Presumption of BFP v. Resolution Trust does not apply to tax sales. Purchaser at tax sale responsible for property or value of property as of date of sale.
- (6166) *In re Varquez*, 2013 WL 6578925 (Bankr. D.N. J. 2013) – Debtor could challenge pre-petition tax deed sale as fraudulent transfer where sale price of property at tax sale was far below value of property. Tax sale does not create presumption of value as tax sale does not meet requirements of *BFP v. Resolution Trust* for purposes of concluding that sale conclusively determines value of property. At entry of judgment of foreclosure in tax deed, there is no sale, forced or otherwise. There is simply the foreclosure of debtor's equity or redemption and transfer of fee simple interest to the tax sale certificate holder.

14.36 Insolvency

- (6167) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Transfer is constructively fraudulent only if debtor was insolvent as of date of transfer or became insolvent as a result of transfer. Corporation is insolvent if debts exceed all property at fair valuation, using liabilities and the fair market value of assets within reasonable time of transfer. Court can take judicial notice of Debtor's bankruptcy schedules and contents of court docket in adversary proceeding. Although debtor's valuation of assets on Schedules indicated that Debtor was insolvent as of date of bankruptcy filing, Schedule B specifically did not value debtor's principal asset at fair market value but stated that valuation was "book value" defined as cost less depreciation. Appraisal of principal asset was not admissible as appraisal and affidavit in support of appraisal stated only that the person doing the valuation was licensed auctioneer and owner of an auction company but did not set forth any facts to show that he is competent to appraise asset in question, and failed to state the effective date on which the valuation is based or to allow conclusion that stated value reflected value as of date of transfer as appraisal was dated 2 years after date of transfer in question. Plaintiff also failed to show evidence of debtor's debts at time of transfer. Bankruptcy Schedules did not indicate dates on which liabilities were incurred or amount of liabilities as of date of allegedly fraudulent transfer. Debtor's primary debts were also joint and several with other obligors and Plaintiff failed to show either than debtor would be solely responsible or to include the value of the contribution claims that Debtor would have if debtor is called on to answer for joint and several debts. Evidence was insufficient at Summary Judgment stage to support entry of final judgment for plaintiff.
- (6168) *Sweet v. Chambers*, 2015 WL 5728844 (E.D. Mi. 2015) – Trustee raised sufficient evidence of insolvency. In calculating solvency, property that is exempted from estate under Section 522 is not considered in determining whether assets exceed liabilities. Trustee submitted evidence based on the Debtor's statements and submissions during the post-judgment divorce proceedings in state court that he had no earned income and could no longer pay the alimony and attorney fees ordered by the state court; and that the property defendant claims establishes that the Debtor was not insolvent at the time of the transfer may be considered exempt property that cannot be considered in determining whether the Debtor was insolvent at the time of the transfer.
- (6169) *Shapiro v. Kesteloot*, 2015 WL 4040190 (Bankr. E.D. Mi. 2015) – Constructive fraudulent transfer requires that debtor have been insolvent at time of transfer or that transfer rendered debtor insolvent. Debtor was insolvent as defined in 11 USC Section 101(32)(A) where debtor admitted that at the time of the transfer he lacked any source of income, was unable to pay his bills, and surrendered two vehicles to creditors because he could not make the payments to the secured creditors. Debtor's schedules, filed only one month after transfers, listed liabilities far in excess of assets, meeting definition of "insolvent".
- (6170) *Paris v. Walker*, 2015 WL 2197969 (Bankr. E.D. Tn. 2015) – Debtor is insolvent for purposes of constructive fraudulent transfer is sum of debts exceeds value of property at fair value, excluding any property transferred, concealed, or removed with intent to hinder, delay or defraud creditors. General inquiry is whether debtor's assets exceeded liabilities on date transfer took place. Debtor's schedules indicated that even if disputed debt is excluded, debtor had liabilities in excess of \$7 million while schedules indicated, at best, only \$5.6 million in assets.
- (6171) *The First State Bank and Trust Company v. Mason*, 2015 WL 430315 (Bankr. E.D. Tn. 2015) – Insolvency is presumed if the sum of the transferor's assets after the transfer is less than the total amount of debtors' debts, including contingent and unliquidated liabilities including those as guarantor. Financial statement supported insolvency where balance sheet valued assets at a total of \$4.3 million and listed debts aggregating \$8 million. Further, there was no material change in debtors' assets after the sale through the date of the bankruptcy filing, and schedules in bankruptcy showed debts far in excess of assets.
- (6172) *Paris v. SSAB Enterprises, Inc.*, 2014 WL 5595113 (Bankr. E.D. Tn. 2014) –
- (6173) *Lim v. Champion Products*, Case no. 13-4727 (Bankr. E.D. Mi. 2014) – Debtor is insolvent if sum of debts exceeds value of assets, at a fair valuation, exclusive of property transferred with intent to conceal or hinder or delay or defraud; and property that may be exempt. Debtor's schedules amply demonstrated that debtor's liabilities substantially exceeded assets as of date of payment to creditor.
- (6174) *Richardson v. Checker Acquisition Corp.*, 2013 WL 3279791 (Bankr. W.D. Mi. 2013) – Transfer is constructively fraudulent if transfer is for less than reasonably equivalent value and debtor is insolvent at the time of, or becomes insolvent as a result of, the transfer. Insolvency

is based on comparison of fair value of assets and sum of debts. Transfer generally equates to balance sheet approach, although balance sheet usually does not carry assets on current value basis and may not include all liabilities. Only debts that meet definition of “claim” under Section 101(5) are included in calculation. Debtor’s potential liability for withdrawal from multi-employer pension plan is not a claim where debtor had not actually withdrawn from the pension plan as of the date of the petition.

- (6175) *Hebling v. Wagner*, 2013 WL 392450 (Bankr. N.D. Ohio 2013) – Debtor’s bare assertion of solvency at time of transfer is insufficient to defeat action for fraudulent transfer where balance sheet compiled by Trustee indicated that debtor’s liabilities exceeded assets as of the date of the transfer by more than \$29,000.00.
- (6176) *Newton v. Sims*, 2011 WL 6000852 (Bankr. E.D. Tn. 2011) – Constructive fraud requires proof that transfer was made when debtor was insolvent or that debtor became insolvent as a result of the transfer. Insolvent is defined using balance sheet test – whether assets exceeded liabilities excluding value of preferences, fraudulent conveyances and exemptions. Debtor became insolvent as a result of transfer of \$145,000 where, prior to transfer, debtor had assets totaling \$162,000 versus liabilities of \$121,000. After transfer, debtor’s assets dropped to only \$17,000, far less than liabilities which remained at \$121,000. Thus, transfer rendered debtor insolvent and further evidenced that debtor did not receive reasonably equivalent value.

14.37 Defenses – Charitable Giving

- (6177) *Wadsworth v. Word of Live Christina Center*, 2013 WL 6570853 (10th Cir. 2013) – Section 548 excludes from definition of fraudulent transfers any charitable giving up to 15% of debtor’s annual gross income (AGI) where giving is consistent with prior practices of debtor in making charitable contributions. However, if debtor’s contributions exceed 15% of AGI, entire amount contributed is avoidable. Avoidance and recovery is not limited to amount in excess of 15%. Exceeding cap renders entire contribution outside scope of safe-harbor for charitable giving.

14.38 Defense – Securities Settlement Payments

- (6178) *Greede v. FCStone, LLC*, Case No 13-1232 (7th Cir. 2014) – Section 546(e) precludes recovery for allegedly preferential or fraudulent transfers that constitute settlement payments on securities transactions. Debtor operated an investment management firm. Customers would deposit funds into accounts with debtor. Debtor would pool deposited funds and invest funds. Customers did not have ownership of any investment, rather customers had a share of the value of the securities in the pool. Shortly before filing debtor sold \$300 million in investments and deposited those funds into investment pool for debtor’s most favored customers, distributing some of those funds to investors including defendant, and the bankruptcy court later approved distribution of the funds in that account to the investors in that pool, including the defendant in this adversary. Although payments met technical definition of preference, as all payments were on account of antecedent debts, made within 90 days pre-petition, at a time when debtor was insolvent, all payments to investors fell within Section 546(e) protection for securities settlement payments. When customer “redeemed” investment and received payment, it did so in settlement of accounts between customers and debtor, although funds used to pay customer were not necessarily derived from the sale of any particular security or investment. Proceeds were also “in connection with a securities contract” as agreement between debtor and customer called for debtor to invest in securities on behalf of customers, such that debtor’s obligation to customers arose directly out of a “securities contract”.

14.39 Defense – Leveraged Buyout

- (6179) *QSI Holdings Inc. v. Alford*, 571 F.3d 545 (6th Cir. 2009) – Section 546(e) precludes Trustee from recovering from shareholders payments made as part of a leveraged buyout of the Debtor as fraudulent transfers. Section 546(e) is applicable to transfers of both privately traded and publically traded securities and exempts from avoidance “settlement payments” made by or to a “financial institution”. Payment of funds to HSBC as financial intermediary on behalf of the individual stockholders qualified as a payment to a “financial institution” even though the institution was merely the conduit through which the money passed and did not have any ultimate interest in or right to retain the proceeds.

14.40 Defense – Forward Contract Payment

- (6180) *DeGirolamo v. McIntosh Oil Co.*, 2014 WL 739126 (Bankr. N.D. Ohio 2014) – Section 546(e) “safe harbor” for forward contracts does not apply in actions under Section 548(a)(1)(A) for actual intent to hinder, delay or defraud creditors.
- (6181) *DeGirolamo v. McIntosh Oil Co.*, 2013 WL 832407 (Bankr. N.D. Ohio 2013) – Section 546(e) creates safe harbor from avoidable transfers where payment is settlement payment to or for benefit of forward contract merchant or is made in connection with a forward contract that was made prior to commencement of case. Forward contract is any contract for purchase, sale or transfer of a commodity or any similar good, article, service, right or interest which presently or in the future becomes the subject of dealing in the forward contract trade, where the maturity date is no more than two days after date contract is entered into. Diesel fuel is commodity within meaning of forward contract. Maturity date is the date on which the benefit or detriment of the contract will be realized. In connection with contract for sale of diesel fuel, maturity date is date on which fuel is delivered, as that is the date on which any benefit or loss will be realized. Forward contract merchant is one who is engaged in business in whole or part in forward contracts and contract must involve commodity. Party was forward contract merchant where party was not producer or end user of fuel and purchased fuel strictly for resale. Defense requires only that one party or other be merchant. “Settlement payment” is defined broadly, is consideration used to settle contract after maturity date, and does not need to be cash but can be the delivery of the commodity itself. Although Section 546 is not directly applicable to action under Section 548(a)(1) for actual fraud, payment on forward contract is payment “for value” and in good faith for purposes of Section 548(c).

14.41 Defense – Wrongful Conduct of Debtor

(6182) *Kirschner v. KPMG, LLP.*, 590 F.3d 186 (2d Cir. 2009) – State law governs whether of corporate insiders can be computed to Corporation which would result in trustee for debtor corporation lacking standing to recover against third parties for damages to creditors. Corporate insiders engaged in complicated structure which resulted in completion of corporate assets and expense of creditors. After Corporation filed bankruptcy, Liquidating Trustee sought to bring actions against corporate insiders, professionals and advisers for fraud, breach of fiduciary duty and malpractice. District Court concluded that Bankruptcy Trustee lacked standing to seek recovery on behalf of debtor company against third parties for injuries incurred by the misconduct of debtor's controlling managers. "Adverse-interest" exception will prevent imputation of insiders conduct to Corporation only where the corporate officers have "totally abandoned" the corporations interests and the insiders are acting entirely for their own benefit. District court concluded that at first interest exception applies only where insiders intended to benefit only themselves and that corporation was harmed by the scheme, not nearly that corporate management did not intend to benefit the company under circumstances where the company may have received some incidental benefit. The Second Circuit, noting that the controlling issues were once purely of New York State Law, certified the issues to the New York Court of appeals for further proceedings.

(6183) *Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6th Cir. BAP 2009) – Bankruptcy trustee is not in privity with the Debtor. Alleged wrongdoing of the Debtor cannot be imputed to the trustee or serve as a defense against the trustee's fraudulent transfer claim. Affirmative defenses based alleged fraudulent conduct of Debtor, estoppel, waiver and negligence of the Debtor and its employees impermissibly attribute to the Trustee the wrongdoing of the Debtor. Defenses of and satisfaction and set off are not defenses to a fraudulent transfer action. Latches defense stricken where trustee brought avoidance action more than one year after case commenced but within the time permitted under section 546(a).

14.42 Defense – Earmarking

(6184) *Chase Manhattan Mortgage Corp. v. Shapiro*, 530 F.3d 458 (6th Cir. 2008) – Earmarking doctrine requires agreement between a new creditor and the Debtor for payment of a specific antecedent debt; the agreement must be performed according to its terms; and the transaction cannot diminish Debtor's estate. Creditor that refinanced a pre-existing mortgage was not a "new creditor" and, therefore, transaction could not be protected by earmarking doctrine. Further, refinancing is not a unitary transaction but consists of two transfers by Debtor, one of which is the transfer of proceeds which could be protected by the earmarking doctrine and the second being the granting of a new mortgage which is beyond the scope of the earmarking doctrine. Earmarking doctrine will not apply to any security interest which is not perfected within the grace period set forth in section 547(e). Refinancing transaction completed approximately 6 months prior to bankruptcy filing but not recorded until 77 days prior to the commencement of the bankruptcy case and 72 days after lender had distributed the funds was avoidable preferential transfer under section 547.

14.43 Defense – Prepetition Return of Money to Third Party

(6185) *U.S. v. Moyer*, 2010 WL 4053982 (W.D. Mi. 2010) – Internal Revenue Service liable to Chapter 7 Trustee for fraudulent transfer where Limited Liability Company paid principals' personal tax liabilities out of corporate funds, and corporation filed Chapter 7 six months after date of transfer. Where IRS pre-petition refunded to the corporate principal amounts that were deemed "overpayments" of taxes based on principal's amended tax return, Chapter 7 Trustee is not entitled to also recover the amount of those payments. IRS had no discretion regarding the tax refund, and IRS never had dominion and control over the amount of the overpayment. The IRS was a mere conduit for the payment of the refund to principal and IRS was not a transferee at all, much less an initial or mediate transferee, with respect to the amount of the refund.

14.44 Defense – Good Faith and Value

(6186) *Meoli v. Huntington National Bank*, 2015 WL 5690953 (W.D. Mi. 2015) – "Good faith" for purposes of Section 548 and 550 is subjective standard, taking into account creditor's actual mental state at time of transfers. Lender acted in subjective good faith until date on which lender's regional security officer learned there were outstanding judgments against corporate borrower's principal for bank fraud. Good faith cannot be based on amalgamation of knowledge of all of lender's employees and agents but must depend on knowledge and understandings of each person individually.

(6187) *GLC Limited v. Hunter Miller Family, LLC*, 2015 L 4204111 (S.D. Ohio 2015) – Recipient of fraudulent transfer is not liable if transferee takes for value and in good faith, to the extent the transferee gave value. Objective test of good faith determines whether the transferee knew or should have known of the fraudulent purpose of the transfer or the transferor's insolvency, without regard to transferee's actual knowledge. Transfer lacks good faith if trier of fact concludes that circumstances would place reasonable person on inquiry of debtor's fraudulent purpose and diligent inquiry would discover fraudulent purpose. Hybrid objective-subjective test looks at subjective intent of transferee in light of objective facts, and uses what the transferee actually knew that would suggest a fraudulent purpose, and is based on information that the transferee has that would give him a duty to inquire further. Transferee bears burden to prove absence of badges of fraud or red flags when he received the transfer, and that the transferee undertook a diligent inquiry and that the results of the inquiry did not reveal that transferor was insolvent or was engaged in fraudulent activity. Inquiry then turn to whether any reasonable investigation would have disclosed the transferor's insolvency or fraudulent intent. Court adopted hybrid approach to determine whether payments from ponzi scheme to investors were fraudulent.

(6188) *Williams v. Federal Deposit Insurance Corporation*, Case No. 12-20687 (5th Cir. 2014) – Section 548(c) provides defense to otherwise avoidable fraudulent transfer where transferee takes in good faith and for value.

(6189) *DeGirolamo v. McIntosh Oil Co.*, 2014 WL 739126 (Bankr. N.D. Ohio 2014) – Section 548(c) excepts from recovery any transfer that takes place for value and in good faith, to the extent the transferee gave value in exchange for the transfer. Courts use two tests for good

faith, an objective test that considers whether the transferee objectively knew or should have known that the debtor was engaged in fraudulent activity, and transferee is put on inquiry notice and must conduct a sufficient investigation. Inquiry notice requires of transferee knows debtor is involve or that debtor made transfer for improper purpose. Hybrid standard uses three step inquiry: what did the transferee actually know, and was he subjectively aware of badges of fraud or red flags; if transferee was aware of red flags, did transferee make any reasonable investigation; and if the transferee's diligent inquiry did not disclose fraudulent intent, would a reasonable investigation beyond that performed by transferee have disclosed fraudulent intent. Badges of fraud are relevant under either test, and sufficient number of badges may convince court that transferee had actual knowledge of debtor's fraudulent intent. Factual issues of good faith overlap issues giving rise to liability in first instance under "actual fraud" prong of Section 548. Accordingly, those issues should be considered at a single evidentiary hearing rather than being bifurcated for separate trial.

- (6190) *Wren Alexander Investments, LLC v. Internal Revenue Service*, Case no. 12-50376 (5th Cir. 2013) – Recipient of allegedly fraudulent transfer of real property can defend if transferee can prove it is good faith purchaser for value. Transferee could not demonstrate good faith status where transferee was insider of transferor and transferee knew that transferor was insolvent on date of transfer.

14.45 Statute of Limitations

- (6191) *Whittaker v. Groves Venture, LLC*, 2015 WLK 5781111 (Bankr. S.D. Ohio 2015) – Action to avoid fraudulent transfer must be brought within 2 years of commencement of case. Chapter 7 Trustee of LLC could not rely on earlier filing date of LLCs sole member, as filing by member did not constitute an order for relief as to LLC, which is separate legal entity.
- (6192) *Sweet v. Chambers*, 2015 WL 5728844 (E.D. Mi. 2015) – Transfer of promissory notes from debtor to spouse not avoidable under Section 548 where transfer occurred more than two years prior to commencement of case.
- (6193) *Cestone v. First National Cemetery Bank*, 2014 WL _____ (Bankr. M.D. Pa. 2014) – Where trustee brings action under both Section 548 and state fraudulent transfer act through Section 544, Trustee can recover all transfers made within whichever statute of limitations provides greater relief. Section 548 limitations period did not prevent trustee from recovering transfers made up to four years pre-petition where state UFTA provided for 4 year "look back". Only statute of limitations in Section 544 is that action must be brought within 2 years of order for relief or one year from trustee's appointment, whichever is longer.
- (6194) *Crawford v. Teague*, 2014 WL _____ (Bankr. W.D.N.C. 2014) – Where trustee brings action under both Section 548 and state fraudulent transfer act through Section 544, Trustee can recover all transfers made within whichever statute of limitations provides greater relief. Section 548 limitations period did not prevent trustee from recovering transfers made up to four years pre-petition where state UFTA provided for 4 year "look back". Only statute of limitations in Section 544 is that action must be brought within 2 years of order for relief or one year from trustee's appointment, whichever is longer.
- (6195) *Still v. Nelson Bowers II Exit 20 Auto Mall, LLC*, 2014 WL 693446 (Bankr. E.D. Tn. 2014) – Statute of limitations under Sections 546 and 549 are not jurisdictional. Court can conclude that statute of limitations is tolled where equitable tolling is [t]he doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired, and evidence indicates that 1) defendants concealed the conduct that constitutes the cause of action; 2) defendants' concealment prevented plaintiffs from discovering the cause of action within the limitations period; and 3) until discovery, plaintiffs exercised due diligence in trying to find out about the cause of action. Evidence indicated that defendants actively worked to conceal debtor's sale of membership interest in LLC. Defendants did not have any documentation for the sale to indicate whether the sale was of assets of the LLC or Debtor's interest in the LLC. Defendant issued the payment directly to Debtor's daughter, not to the LLC or to the Debtor himself; and was drawn on the personal account of the shareholders of Defendant rather than the corporate account. After the sale, and even after the filing of the bankruptcy case, Debtor continued to list his membership interest as an asset valued at over \$1 million. Defendant caused the LLC to file tax returns 9 months later showing that Debtor was still 50% owner of the LLC. Equitable estoppel arises where plaintiff knows of action but defendant's conduct prevents plaintiff from timely filing suit, and requires affirmative steps or actions on part of defendant. Plaintiff's allegation that he was unaware of cause of action until after statute of limitations expired prevented application of equitable estoppel.
- (6196) *Fitzpatrick v. King of Hearts, Inc.*, 2012 WL 1565129 (Bankr. E.D. Mi. 2012) – Where Trustee brings avoidance action under state law pursuant to Section 544, state statute of limitations applies to state cause of action and limitation contained in Section 547 or 548 apply to federal cause of action. Complaint was timely where complaint was filed more than 2 years after commencement of bankruptcy but within State statute of limitation 5 year period. To the extent complaint contained counts under Section 548, those counts were barred by 2 year statute and would be dismissed.
- (6197) *Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6th Cir. BAP 2009) – Trustee can bring avoidance action within time permitted under Section 546(a) even if that period is longer than normally available under applicable state law.
- (6198) *Slone v. Lassiter*, 406 BR 778 (Bankr. S.D. Ohio 2009) –Quit-claim deed recorded more than 2 years prior to Debtor's Bankruptcy Petition was outside statute of limitations under Section 548. Action could still be prosecuted under Ohio law which had 4 year statute of limitations if the transfer occurred with actual intent to hinder, delay or defraud creditors. Although "paramour" constituted "insider"; Debtor retained possession of property after transfer had occurred; transfer made while the property was involved in litigation; and Debtor was insolvent at time of transfer; Debtor received reasonably equivalent value for transfer by allowing paramour to refinance property and relieving Debtor of obligation for underlying debt. Debtor relinquished \$11,000 in equity in exchange for being relieved of over \$135,000 in debt. However, Debtor's later transfer to paramour of remaining one-half interest was avoidable fraudulent transfer where Debtor had been contemplating bankruptcy for a number of months and believed that transfer was only way to keep property out of

hands of Debtor's creditors. Debtor received no consideration for transfer as Debtor neither received any proceeds nor was Debtor relieved of any further debt. Debtor's contention that she received free housing did not constitute reasonably equivalent value in exchange for the transfer. Trustee can recover from transfer the value of the property transferred as of the date of the transfer.

- (6199) *Gold v. Deloitte & Touche, LLP*, Case No. 0814567 (E.D. Mi. 2009) – Trustee did not raise argument that doctrine of “adverse domination” operated to toll applicable statute of limitations before lower Court. Appellate Court ordinarily will not consider issues which were not raised and litigated below. Although appellate Court does have authority to consider purely legal issues which were not raised at the lower Court, doctrine of “adverse domination” requires substantial factual inquiry. Accordingly, appellate Court would not consider doctrine in affirming dismissal of fraudulent transfer action based on the applicable statute of limitations.

14.46 Damages

- (6200) *In re Keeley and Grabanski Land Partnership*, Case No. 14-6037 (8th Cir. BAP 2015) – Remedy for fraudulent transfer under Section 548 is to allow trustee to recover either property transferred or value of property as of date of transfer under Section 550. Where property transferred consisted of a long term lease at far below market rent, lease itself is avoided and brought back into the estate. Recovery would include avoidance of lease itself plus damages equal to “below market” rent amount (difference between charged rent and market rent) during term from execution to avoidance of lease.
- (6201) *Schussel v. Werfel*, 758 F.3d 82 (1st Cir. 2014) – Uniform Fraudulent Transfer Act allows plaintiff to recover a fraudulent transfer to extent necessary to satisfy its claim, subject to adjustment for the value of the assets as equities may require.
- (6202) *Silgay v. Morris*, 2013 WL 5705630 (Bankr. N.D. Ohio 2013) – Damages for alleged fraudulent transfer of marital home as part of property settlement agreement would be measured by value of property received, less reasonable costs of sale of the one half of the property defendant received in the transfer. Defendant could not reduce transfer by costs of sale of Defendant's one half of the property he already owned prior to the transfer.
- (6203) *Daff v. Wallace*, Case no. 12-1513 (9th Cir. BAP 2013) – When transfer is avoided and property is brought back into estate, Trustee takes same title as debtor would have had as of commencement of the bankruptcy case had the transfer never occurred. Debtor fraudulently transferred residence to her daughter. After the transfer, a judgment creditor properly recorded a judgment lien against all real property owned by debtor. The lien did not attach to the residence as debtor did not own it as of the date of the recording. Debtor thereafter filed for bankruptcy. When the Trustee successfully recovered the property, the Trustee did so subject to the recorded judgment lien. Had the property not been transferred, the judgment lien would have attached to debtor's interest upon recording, and would not have constituted an otherwise avoidable transfer standing alone. Debtor had sufficient equitable interest in property that had been fraudulently transferred that judgment lien could attach to, and that interest predated bankruptcy filing and acquisition of interest by trustee.
- (6204) *Suhar v. Bruno*, 2013 WL 5734120 (6th Cir. 2013) – Reasonably equivalent value does not require dollar for dollar equivalent, as long as transaction does not leave debtor's unsecured creditors worse off because debtor received amount reasonably equivalent to what was paid. Assumption of third party debt by debtor who does not receive value as part of transaction is not for reasonably equivalent value. Assumption by one spouse of disproportionate share of marital and joint debt, unaccompanied by attendant receipt of property, is fraudulent transfer to extent that debt assumed exceeded value of marital property received. Marital debt totaled \$86,000.00, of which each spouse should have been responsible for half, or \$43,000.00. Debtor assumed all of the marital debt without receipt of any corresponding marital assets, amounting to fraudulent transfer by debtor to ex-spouse of amount of spouse's share of marital debt.
- (6205) *Hagan v. Classic Products Corp.*, Case No. 11-80417 (Bankr. W.D. Mi. 2011) – Remedy in action to avoid transfer has two elements, judgment avoiding the transfer and judgment awarding damages. Court would decline to enter default judgment that avoided the transfer but failed to include award of damages, with instructions to submit new proposed Final Judgment containing both types of relief.
- (6206) *Steed v. Morgan*, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Pursuant to Section 550(a), Court can award judgment for the amount of money that is fraudulently transferred. Where the fraudulent transfer consisted of property, Court can enter judgment either for the return of the property itself or for the value of the property. Where the property transferred included an automobile that had subsequently been traded in, a diamond ring that had allegedly been stolen, and furniture that was subsequently sold, Court could not order the return of the property, and so entered money judgment against Defendant for the value of the property at the time of the fraudulent transfer.
- (6207) *Brennan v. Slone*, 2008 WL 4569946 (6th Cir. 2008) - Debtor and "significant other" entitled to "net" transfers of money from significant other to Debtor against funds transferred by Debtor to significant other to determine total amount of funds allegedly fraudulently transferred. Over year preceding filing of case, significant other gave more money to Debtor than Debtor gave to significant other, constituting "reasonably equivalent value" for transfers from Debtor to significant other. Debtor's transfers into significant other's bank account were used to pay Debtor's share of ongoing household expenses. Significant other's use of these funds to pay household expenses constitutes reasonably equivalent value.
- (6208) *Slone v. Lassiter*, 406 BR 778 (Bankr. S.D. Ohio 2009) – Debtor's transfer to paramour of one-half interest in real property was avoidable fraudulent transfer. Trustee can recover from transfer the value of the property transferred as of the date of the transfer.

14.47 Damages – Setoff by Defendant

- (6209) *In re Keeley and Grabanski Land Partnership*, Case No. 14-6037 (8th Cir. BAP 2015) – Under Section 550(e)(1), good faith transferee of avoidable fraudulent transfer is entitled to setoff for the lesser of (a) costs of improvements made after transfer and (b) increase in value as a result of any improvements. Defendant not entitled to setoff where defendant did not perform any improvements. Value of crops on land were not “improvements” but were incidental to use of leased premises. Remedy awarded to plaintiff was difference between market rent

and rent charged. Had defendant paid market rent in first instance, he would have been entitled to keep the proceeds of the crop sales. As damage award places defendant and plaintiff in same positions as they would have had if the lease had been at market rate in first instance, estate could not make further claims against crops or proceeds. To extent trustee recovered property and then sold crops, defendant entitled to offset for value of crops sold. However, defendant entitled to offset for real estate taxes paid during time of occupancy as taxes are expressly defined in Section 550 as an “improvement”.

14.48 Complaint

- (6210) *In re Rathore*, 2012 WL 2131133 (E.D. Mi. 2012) – In action based on Michigan’s version of Uniform Fraudulent Transfer Act, complaint to avoid alleged fraudulent transfer must include as defendant the party allegedly making the transferor. Action brought solely against transferee and that did not also join alleged transferor properly dismissed by State Court for failure to join necessary party.

14.49 Parties Liable – Initial Transferee

- (6211) *Smith v. SIPI*, 501 BR 843 (N.D. Ill. 2013) – Debtor can avoid tax sale of home where tax sale produced less than reasonably equivalent value. Property purchased for \$5,000 valued at \$100,000. Sale price was not reasonably equivalent to value given up by debtors. Presumption of BFP v. Resolution Trust does not apply to tax sales. Purchaser at tax sale responsible for property or value of property as of date of sale.
- (6212) *Higgason v. Staley*, 2014 WL 640986 (Bankr. E.D. Ky. 2014) – Debtor cannot be liable for fraudulent transfer as matter of law. Section 550 imposes liability only on transferee, not transferor.
- (6213) *U.S. v. Moyer*, 2010 WL 4053982 (W.D. Mi. 2010) – Internal Revenue Service liable to Chapter 7 Trustee for fraudulent transfer where Limited Liability Company paid principals’ personal tax liabilities out of corporate funds, and corporation filed Chapter 7 six months after date of transfer. “Initial transferee” requires more than the party be the one to whom the funds were initially paid, and must involve the right of the recipient to exercise dominion over the funds. Corporate officer who caused check to be issued would not be the “initial transferee” where funds were transferred directly from LLC to IRS without actually or constructively passing through hands of corporate officer individually. Fact that check paid corporate officer’s tax liability did not make the payment a constructive distribution to the officer and the subsequent transfer by the officer to the IRS for purposes of making the IRS a mediate, rather than initial, transferee.

14.50 Mediate and Immediate Transferee of Initial Transferee

- (6214) *Smith v. SIPI*, 501 BR 843 (N.D. Ill. 2013) – Debtor can avoid tax sale of home where tax sale produced less than reasonably equivalent value. Property purchased for \$5,000 valued at \$100,000. Sale price was not reasonably equivalent to value given up by debtors. Presumption of BFP v. Resolution Trust does not apply to tax sales. Purchaser at tax sale responsible for property or value of property as of date of sale. However, transferee from initial transferee not liable to bankruptcy trustee where subsequent purchaser took for value and in good faith and without knowledge of allegedly fraudulent transfer. Evidence indicated that subsequent transferee had no knowledge of alleged avoidability of transfer and took title in good faith and for value.
- (6215) *Liquidating Trustee of App Fuels Creditors v. Bowie Resources, LLC*, 2012 WL 1854285 (Bankr. E.D. Ky. 2012) – Section 550 allows recovery of avoidable transfer against initial transferee and against any immediate or mediate transferee from the Initial Transferee. However, transfer is not avoidable against mediate or immediate transferee if transfer was in good faith, for value including satisfaction of present or antecedent debt, and without knowledge of avoidability of transfer; or from any subsequent transferee. Knowledge of the avoidability of the transfer will be inferred where transferee knew facts that would lead reasonable person to believe that transfer was avoidable, but transferee is not required to initiate investigation where there are no such facts. Party to litigation received allegedly avoidable settlement payment and used portion of proceeds to pay party’s attorney. Chapter 11 Liquidating Trustee brought action against attorneys to recover funds alleging that attorneys were immediate transferees of the initial transferee. Evidence did not indicate existence of any facts that should have caused attorneys to question alleged avoidability of settlement payment and attorneys had no actual knowledge that settlement payment may have been avoidable. Good faith of attorneys in receipt of funds operated as complete bar to any action to recover funds from attorneys.

14.51 Parties Liable – “Mere Conduit”

- (6216) *Menotte v. U.S.*, Case No. 12-16489 (11th Cir. 2014) – Party who receives funds as “mere conduit” is not “transferee” for purposes of liability under Section 550. “Mere conduit” is one who receives and holds funds solely for benefit of third party, and recipient does not assert any right or title in or to the funds or property transferred. Party is “mere conduit” if party shows that they did not have control over asset and merely served as conduit for assets that were under the actual control of debtor-transferor; and the recipient acted in good faith. Test ultimately is based on equitable concepts that require flexible, pragmatic approach based on entirety of transaction. Trustee for bankruptcy corporation cannot recover payments made by corporation to IRS for payment of income tax liability of corporate principal. Principal of corporation paid taxes on “pass through” income from S-Corp by having corporation send checks to the IRS using funds in company operating account. At end of tax year, corporation did not make profit, requiring IRS to issue refund to principal for overpaid taxes. Principal did not deposit funds into corporate account but retained those funds in his personal account. After company filed for Chapter 7, Trustee sued IRS to recover payments made by corporation for principal’s personal tax liabilities as constructively fraudulent. Court concluded that IRS was not “transferee” for purposes of Section 550. Although the IRS received the payments, it did so as a “mere conduit”, holding the funds until the principal’s tax liability could be determined. IRS did not have, and never had, any right to the money as the principal never actually owed taxes for the year in question. As the IRS did not actually retain any of the funds (in light of the tax refund issued to principal for overpayment of taxes), the IRS did not actually “receive” any payment and did not constitute a “transferee”.

The transfer, to the extent there was one resulting from the tax payments, was a transfer by the corporation to the principal, as the principal ultimately received the money from the IRS.

14.52 Parties Liable – Non-Transferees

- (6217) *GATX Corp. v. Addington*, 2012 WL 4886942 (E.D. Ky. 2012) – Non-transferee of alleged fraudulent transfer is not liable for violation of fraudulent transfer statutes. Prior to filing bankruptcy, debtor transferred property to an irrevocable trust. After debtor filed, Plaintiff sought to hold trustees of trust personally liable for fraudulent transfer. Trustees in their individual capacity, as non-transferees, cannot be held liable for fraudulent transfers or for aiding and abetting.

14.53 Section 548(c) – Lien of Transferee for Avoided Transfer

- (6218) *Tabor v. Lineback*, Adv. No. 12-5154 (Bankr. W.D. Tn. 2013), *affd*, Case No. 14-8011 (6th Cir. BAP 2014) – Transferee of avoided transfer under Section 547 or Section 548 obtains a lien on the property to extent that transferee gave value to transferor in exchange for the transfer and transferee took property for value and in good faith. Transferee did not establish value where deed recited that conveyance from debtor to mother was for \$0 – love and affection and there was no evidence that mom made any improvements after receiving the transfer that increased or enhanced the value of the property. Mom also failed to demonstrate good faith. Good faith is objective standard measured by whether circumstances would place reasonable person on inquiry of debtor's fraudulent purpose and where diligent inquiry would have uncovered fraudulent purpose. At time of transfer, mom knew that debtor was in financial distress and that transfer involved all of debtor's non-exempt property. Reasonable person with knowledge of these facts would have been suspicious as to possible fraudulent nature of transfer, such that mom was not acting in good faith when she received title to property for no consideration. Fact that mom provided bulk of money to allow debtor to purchase property in first instance did not amount to consideration for transfer by debtor to mother where there was no consideration paid at time of transfer and there was no evidence that debtor was indebted to mother, it appearing that initial payment was not intended as loan to son.

C. Turnover of Property

14.54 Generally

- (6219) *French v. Butler*, 2013 WL 4453039 (Bankr. N.D. Ohio 2013) – Debtor's entitlement to unpaid rent from tenant that accrued pre-petition is property of the estate that Trustee is entitled to collect. Judgment entered against tenant in turnover action for balance owed.

14.55 Parties

14.56 Procedure

- (6220) *In re Armstrong*, 2015 WL 5299461 (Bankr. N.D. Ohio 2015) – Action for turnover of funds garnished in 90 days preceding commencement of case must be brought by adversary proceeding. Debtor's Motion for turnover of funds denied notwithstanding garnishor's failure to respond to motion.
- (6221) *In re Donato*, 2011 WL 6057551 (Bankr. N.D. Ohio 2011) – Avoidance actions must be brought by adversary proceeding. Debtor's Motion for Turnover of Funds Garnished Pre-petition denied even where creditor failed to file answer or otherwise respond.
- (6222) *In re Reynolds*, Case No. 09-79550 (Bankr. E.D. Mi. 2010) – Debtor's Motion for Turnover of funds garnished pre-petition denied. Turnover action must be brought by Adversary Proceeding pursuant to Rule 7001.

D. Preferences

14.57 Standing to Bring Action

- (6223) *McLane v. Bostater*, 2015 WL 273570 (Bankr. N.D. Ohio 2015) – Debtor has standing to bring action to recover preferential transfer under Section 522(h) where the debtor exempted or could have exempted the property if the trustee had avoided the transfer; the transfer is avoidable by the trustee under Section 547; and the trustee has not attempted to avoid the transfer. Debtor claimed garnished funds as exempt with no objection; trustee could have pursued recovery but did not do so, instead filing a report of no assets; and the pre-petition garnishment met all of the requirements of Section 547.
- (6224) *Lingham Rawlings, LLC v. Gaudiano*, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Section 1107 grants to DIP power to prosecute adversary to avoid transfers under Section 547.
- (6225) *Johnston v. City of Middletown*, 484 BR 698 (Bankr. S.D. Ohio 2013) – Debtor in no-asset Chapter 7 lacks standing to bring preferential transfer action. Section 522(h) grants standing to Chapter 7 debtor only to extent property could have been exempted. Debtor did not claim exemption in allegedly preferential transfer. Otherwise, Section 547 expressly limits application to the Trustee and not to the debtor. Trustee's no asset report did not give debtor ability to pursue action that trustee chose not to pursue.
- (6226) *Jahn v. Carley Jewels, LLC*, 2010 WL 4607660 (Bankr. E.D. Tn. 2010) – Trustee's Notice of Abandonment does not defeat standing of Trustee to pursue preferential transfer. Abandonment affects only property of the estate. The property that was the subject of the preferential transfer was not property of the estate as of the date of commencement of the case. Trustee can pursue either recovery of the items or the value of the items unaffected by the general abandonment of property of the estate.
- (6227) *Jahn v. Joeb Enterprises, LLC*, 2010 WL 4607614 (Bankr. E.D. Tn. 2010) – Trustee's Notice of Abandonment does not defeat standing of Trustee to pursue preferential transfer. Abandonment affects only property of the estate. The property that was the subject of the

preferential transfer was not property of the estate as of the date of commencement of the case. Trustee can pursue either recovery of the items or the value of the items unaffected by the general abandonment of property of the estate.

- (6228) *In re Reep*, 2010 WL 2933644 (Bankr. N.D. Ohio 2010) – Debtor has standing to obtain refund of money recovered by Trustee as alleged preferential transfer. Prior to filing, Debtor borrowed money from her Mother to pay student loan creditor. After petition was filed, Trustee made demand on student loan creditor for refund of apparently preferential transfer and student loan creditor returned the funds. Debtor then brought action against Trustee asserting that the transfer to the student loan creditor was not preferential under the Earmarking Doctrine. Court first concluded that transfer was protected by Earmarking Doctrine and so was not avoidable. Court then held that Debtor had standing to recover from the Trustee the funds that were returned to him in error by the creditor.

14.58 Preference Versus Fraudulent Transfer

- (6229) *Sweet v. AIS Construction Equipment Corp.*, Case No. 14-3074 (Bankr. E.D. Mi. 2015) – Transfer cannot be both a preferential transfer and a fraudulent transfer. Plaintiff required to amend complaint to state cause of action on which plaintiff intended to proceed at trial.

14.59 Procedure

- (6230) *In re Minneweather*, Case No. 15-48402 (Bankr. E. D. Mi. 2015) – Motion to avoid preferential transfer under Section 547 denied without prejudice. Action under Section 547 must be brought by adversary proceeding.
- (6231) *In re Berry*, Case No. 09-43489 (Bankr. E.D. Mi. 2009) - Motion to Avoid Preferential Transfer denied without prejudice. Action to avoid preferential transfer pursuant to Section 547 must be by adversary proceeding pursuant to Federal Rules of Bankruptcy Procedure 7001(2).
- (6232) *Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Complaint to avoid preferential transfers is not required to itemize each allegedly preferential transfer and can allege just a summary or total of the alleged preferences. Complaint needs only to state short and plan statement of the claim sufficient to provide Defendant with reasonable notice of plaintiff's claim and the grounds upon which it rests.

14.60 Transfers to “Insiders”

- (6233) *Graham v. Huntington National Bank*, 521 BR 259 (Bankr. N. D. Ohio 2014) – To constitute insider for purposes of preferential transfers, party must have controlling interest in debtor or exercise sufficient authority over debtor as to unquestionably dictate corporate policy and disposition of assets. Superior bargaining power in contractual relationship is not sufficient. Courts examine whether the creditor had more ability to assert control than the other creditors, whether the creditor made management decisions for the debtor, directed work performance, and directed payment of the debtor's expenses. Party must have day-to-day control, not merely monitoring or exertion of influence regarding financial transactions in which creditor has direct stake. Ability to deposit and to transfer checks that is incidental to debtor-creditor relationship does not render the bank an insider. Requirement that debtor to submit frequent reports on receivables, invoices, and operations, coupled with right to receive payments on receivables and endorse checks does not render bank insider where bank has no control of the day-to-day decision making of the debtor. Bank was not insider where bank lacked any day-to-day control and instead entered into relatively routine lending relationship with debtor. Fact that lender chose state court receiver and assertions that bank was exerting pressure on debtor to pay loans is not sufficient indicia of control where there was no evidence that receiver was under control of bank.
- (6234) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – For purposes of Section 547, an “insider” is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm’s length. Close relationship generally allows insider to know more about the debtor's financial affairs than the debtor's other creditors, and to influence or control, at least in part, the debtor's actions; and to know that a debtor is contemplating bankruptcy to allow insider to step ahead of other creditors by demanding payment and then influencing the timing of the debtor's bankruptcy petition to avoid the ninety-day preference period. Whether party is insider depends on facts and circumstances of particular transaction and case. To be held as insider based on “actual control” of debtor, party must have ability to unqualifiedly dictate corporate policy, dispose of corporate assets, or legal right of ability to exercise actual control. Pre-petition settlement agreement that allowed creditor to name CEO of debtor and that precluded removal of CEO without creditor’s consent did not place creditor in “actual control”. Nothing in settlement agreement gave creditor right to control either actions of debtor or actions of CEO, and CEO was not employee or agent of creditor. Creditor was not “insider” of debtor and an preference period would be limited to 90 days pre-petition.
- (6235) *Jahn v. Char*, 2012 WL 1641653 (Bankr. E.D. Tn. 2012) – Section 547 “lookback” extends to one year where transferee was “insider”. transferee must constitute an insider at the time the transfer was made, and that it is not enough that the transferee be an insider at the time the transfer was arranged. Although recipient was “insider” of corporation at time of execution of Employment Agreement that gave rise to severance payments, recipient had terminated relationship with corporation prior to receipt of severance payment. Therefore, recipient no longer constituted “insider” for purposes of Section 547. Payments under Employment Agreement made outside of 90 days but within one year constituted payments made beyond “lookback” and were not avoidable.
- (6236) *Gold v. Rubin*, 2011 WL 3734912 (Bankr. E.D. Mi. 2011) – Defendant’s status as second cousin of Debtor’s corporate president does not make defendant an insider for purposes of Section 547. Section 101(45) defines “relative” as related within third degree as determined by common law. Under Michigan law, one determines degree of relation by starting at either of the persons claiming relationship, counting up to the common ancestor, and then down to the other person, with each step being one “degree”. Common relative was great-grandparent, resulting in three degrees of separation up and another three degrees down.

14.61 Parties Liable – Initial Transferee

- (6237) *Fitzpatrick v. Allsup, Inc.*, 2014 WL 294322 (Bankr. E.D. Tn. 2014) – To be liable for preferential transfer, transfer must be made to creditor on account of antecedent debt. Transfer to third party who whom debtor was not indebted, for purposes of third party forwarding funds to creditor on debtor's behalf, was not preferential as to the third party. Defendant served as Debtor's agent in applying for Social Security Disability. Debtor had been receiving disability payments from insurer and was contractually obligated to reimburse insurer if Debtor received retroactive SSD benefits. Agreement between Debtor and Defendant provided that Debtor authorized Defendant to transfer funds from Debtor's SSD award to insurer if Debtor received disability benefits. Debtor received retroactive payment, and Defendant forwarded those funds to disability carrier. At time Defendant "received" the SSD funds that Defendant then paid to the disability carrier, Defendant was not creditor of Debtor as Debtor as Defendant has, as part of retention agreement waived any right to payment from Debtor for services rendered. Defendant, who acted merely as conduit for payment to disability carrier, could not have received a preferential transfer as matter of law.
- (6238) *In re Foley*, 2010 WL 3905987 (Bankr. E.D. Ky. 2010) – Garnishor of debtor's income pre-petition liable for amount garnished where garnishment constituted preferential transfer. Because garnishor was also debtor's sister, garnishor liable for all funds garnished within one year pre-petition.
- (6239) *Wells Fargo Home Mortgage, Inc. v. Lindquist*, 592 F.3d 838 (6th Cir. 2010) – Trustee can recover preferential transfer from initial transferee or from any intermediate or mediate transferee of the initial transferee. Creditor could not avoid liability for avoided mortgage merely because creditor had assigned the mortgage to a third party. Although the third party may also be liable, Trustee is permitted to choose the defendant.

14.62 Mediate and Immediate Transferee of Initial Transferee

- (6240) *Liquidating Trustee of App Fuels Creditors v. Bowie Resources, LLC*, 2012 WL 1854285 (Bankr. E.D. Ky. 2012) – Section 550 allows recovery of avoidable transfer against initial transferee and against any immediate or mediate transferee from the Initial Transferee. However, transfer is not avoidable against mediate or immediate transferee if transfer was in good faith, for value including satisfaction of present or antecedent debt, and without knowledge of avoidability of transfer; or from any subsequent transferee. Knowledge of the avoidability of the transfer will be inferred where transferee knew facts that would lead reasonable person to believe that transfer was avoidable, but transferee is not required to initiate investigation where there are no such facts. Party to litigation received allegedly avoidable settlement payment and used portion of proceeds to pay party's attorney. Chapter 11 Liquidating Trustee brought action against attorneys to recover funds alleging that attorneys were immediate transferees of the initial transferee. Evidence did not indicate existence of any facts that should have caused attorneys to question alleged avoidability of settlement payment and attorneys had no actual knowledge that settlement payment may have been avoidable. Good faith of attorneys in receipt of funds operated as complete bar to any action to recover funds from attorneys.
- (6241) *Stevenson v. Genna*, Case No. 09-5490 (Bankr. E.D. Mi. 2010), *aff'd* Case No. 10-11353 (E.D. Mi. 2010) – Section 550 allows the Trustee to recover an avoidable transfer from the initial transferee or any immediate or mediate transferee but prohibits recovery from an immediate or mediate who takes for value, including satisfaction of a present or antecedent debt, in good faith and without knowledge of the avoidability of the transfer. Knowledge of possible bankruptcy filing, without more, is not "knowledge of the avoidability of the transfer". Law firm was not "initial transferee" of proceeds recovered on a writ of garnishment where the Law firm received funds on behalf of client and deposited the funds in the Firm Trust Account pending further order of the State Court. State Court then ordered that a portion of the funds be paid to the Law firm and the balance to the Plaintiff, resulting in Law firm being an "immediate transferee". Funds are not recoverable from Immediate transferee where initial transferee gave funds to immediate transferee in good faith and without intent to hide or shield funds from recovery by Trustee and the transfer is otherwise not tainted by fraud; or if the Law firm had been unequivocally advised that Debtor was filing bankruptcy, rather than merely considering filing and at a time when the parties were engaged in good faith settlement negotiations. Law firm received money for payment of attorney fees owed and apparently received money in good faith. Transfer of funds to Law firm not avoidable under Section 547 and Section 550.

14.63 Parties Liable – "Mere Conduit"

- (6242) *Menotte v. U.S.*, Case No. 12-16489 (11th Cir. 2014) – Party who receives funds as "mere conduit" is not "transferee" for purposes of liability under Section 550. "Mere conduit" is one who receives and holds funds solely for benefit of third party, and recipient does not assert any right or title in or to the funds or property transferred. Party is "mere conduit" if party shows that they did not have control over asset and merely served as conduit for assets that were under the actual control of debtor-transferor; and the recipient acted in good faith. Test ultimately is based on equitable concepts that require flexible, pragmatic approach based on entirety of transaction. Trustee for bankruptcy corporation cannot recover payments made by corporation to IRS for payment of income tax liability of corporate principal. Principal of corporation paid taxes on "pass through" income from S-Corp by having corporation send checks to the IRS using funds in company operating account. At end of tax year, corporation did not make profit, requiring IRS to issue refund to principal for overpaid taxes. Principal did not deposit funds into corporate account but retained those funds in his personal account. After company filed for Chapter 7, Trustee sued IRS to recover payments made by corporation for principal's personal tax liabilities as constructively fraudulent. Court concluded that IRS was not "transferee" for purposes of Section 550. Although the IRS received the payments, it did so as a "mere conduit", holding the funds until the principal's tax liability could be determined. IRS did not have, and never had, any right to the money as the principal never actually owed taxes for the year in question. As the IRS did not actually retain any of the funds (in light of the tax refund issued to principal for overpayment of taxes), the IRS did not actually "receive" any payment and did not constitute a "transferee". The transfer, to the extent there was one resulting from the tax payments, was a transfer by the corporation to the principal, as the principal

ultimately received the money from the IRS.

14.64 Damages

- (6243) *Sheppard v. Speck*, 2014 WL 6611661 (Bankr. E.D. Mi. 2014) – Recovery of preferential transfer is amount of money received by creditor. Funds withheld from debtor’s income but retained by employer to cover administrative expenses of implementing garnishment are not recoverable from creditor as funds were not paid to or for the benefit of the creditor.
- (6244) *Still v. Grant, Konvalinka & Harrison, PC*, 2014 WL 1025025 (Bankr. E.D. Tn. 2014) – Section 550 allows trustee to recover property transferred in violation of Section 547. Where pledge of collateral was given to secure previously unsecured loan, pledge itself was avoidable and estate would hold title to pledged property free and clear of claims of creditor.

14.65 Elements – Generally

- (6245) *Still v. Grant, Konvalinka & Harrison, PC*, 2014 WL 1025025 (Bankr. E.D. Tn. 2014) – Section 548(a)(1)(B) does not involve any element of intent. The transfer is avoidable as a preference if the transfer was of property of the debtor made within 2 years of commencement of the case for less than reasonably equivalent value and debtor was or became insolvent as a result of the transfer.
- (6246) *Fitzpatrick v. Allsup, Inc.*, 2014 WL 294322 (Bankr. E.D. Tn. 2014) – To be liable for preferential transfer, transfer must be made to creditor on account of antecedent debt. Transfer to third party who whom debtor was not indebted, for purposes of third party forwarding funds to creditor on debtor’s behalf, was not preferential as to the third party. Defendant served as Debtor’s agent in applying for Social Security Disability. Debtor had been receiving disability payments from insurer and was contractually obligated to reimburse insurer if Debtor received retroactive SSD benefits. Agreement between Debtor and Defendant provided that Debtor authorized Defendant to transfer funds from Debtor’s SSD award to insurer if Debtor received disability benefits. Debtor received retroactive payment, and Defendant forwarded those funds to disability carrier. At time Defendant “received” the SSD funds that Defendant then paid to the disability carrier, Defendant was not creditor of Debtor as Debtor as Defendant has, as part of retention agreement waived any right to payment from Debtor for services rendered. Defendant, who acted merely as conduit for payment to disability carrier, could not have received a preferential transfer as matter of law.
- (6247) *DiGirolamo v. Double M Ltd*, 2103 WL 4541237 (Bankr N.D. Ohio 2013) – Complaint stated cause of action where complaint identifies specific transfer of \$200,000.00 by debtor, sufficiently established that the transferee was a creditor, and alleged that the transfer was on account of an antecedent debt. Complaint specifically alleged that transferee was attorney who previously provided services to debtor and that payment was on account of prior legal bills. Trustee alleged with specificity that the transfer occurred within 90 days preceding commencement of the Case, such that debtor was presumptively insolvent; and that transfer enabled transferee to receive more than any expected return based on estate assets liquidated to date or expected to be recovered. Fact that transfers may have run through Debtor’s closely held LLC did not insulate ultimate transferee as transfers benefitted the debtor who was indebted to the transferee.
- (6248) *Gold v. Lippincott-Ace Electric Co.*, 2012 WL 4468530 (Bankr. N.D. Ohio 2012) – Transfer is preferential if there is transfer of debtor’s interest in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made (A) on or within 90 days before the date of the filing of the petition; (5) that enables such creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title. Defendant has been supplier of equipment to debtor and accrued large debt. Within 30 days prior to commencement of bankruptcy, Debtor made 2 large payments to defendant. There was no doubt that debtor made payments or that payments were on account of antecedent debt. Because transfers were within 90 days of filing, debtor was presumptively insolvent and defendant offered no evidence to rebut this presumption. However, Plaintiff failed to demonstrate that defendant received more than defendant would have had the transfer not been made and the creditor had been paid through debtor’s bankruptcy. Bankruptcy case was in its infancy and there was possibility that amount that would ultimately be distributed to creditors would exceed amount actually paid to defendant.
- (6249) *Swope v. Grove*, 2012 WL 4435117 (Bankr. N.D. Ohio 2012) – Section 547(b) allows Trustee to avoid any transfer of property of debtor to creditor on account of antecedent debt while debtor was insolvent, and within 90 days of petition it transferee is not an insider, and where transfer allows creditor to receive more than the creditor would have received in Chapter 7 had the transfer not happened. Debtor owed Defendant a debt pursuant to an agreement settling Defendant’s sexual harassment lawsuit and the payment was on account of an antecedent debt. The transfers of money in debtor’s checking account constituted transfers of an interest of Debtor in property. Defendant received more than she would have received had the transfers not been made and she received her pro rata share of the property of the estate under Chapter 7. Defendant received full payment of Defendant’s claims against Debtor while creditors in Debtor’s Chapter 7 case will not receive full payment and had the transfers not been made, Defendant’s pro rata share of the bankruptcy estate would have been far less than the total amount paid by Debtor in settlement of Defendant’s claims against it. However, record did not show that transfer occurred within 90 days of petition or that debtor was insolvent as of the date of the transfer. Settlement statement that showed date on which defendant received her money from her attorney’s trust account did not establish the date on which the checks written by Debtor cleared his bank. A transfer for preference purposes occurs when the check clears the drawee bank. Absent evidence that the Debtor’s checks cleared the bank within the relevant 90 day window, Trustee failed to meet burden of proof on all elements of action.
- (6250) *Degirolamo v. McIntosh Oil Co.*, 2012 WL 2603429 (Bankr. N.D. Ohio 2012) – Under Ohio state law, preference action requires “(1) a sale, conveyance, transfer, mortgage, or assignment made by a debtor; (2) in contemplation of insolvency; (3) with a design to prefer; and (4) the receiving party knew of the insolvency and intent to prefer. Complaint sufficiently alleged insolvency by alleging that at the time Debtor made the transfers, it lacked the ability to meet its financial obligations. Complaint sufficiently alleged “design to prefer” by

alleging that sales of fuel at below market prices resulted in Debtor's inability to pay suppliers, leading to involuntary petition.

- (6251) *Guinn v. Lester*, 2012 WL 71013 (Bankr. E.D. Tn. 2012) – Lookback period is one year for transfers to insiders. Debtor's payments to father for pre-existing loans subject to one year lookback period. However, insolvency is presumed only for the 90 days preceding the petition, even for transfers to insiders. For transfers made more than 90 days before the petition, Trustee bears burden of proving that debtor was, in fact, insolvent on the date of each transfer. Reference to debtor's schedules is unavailing as those reflect only debtor's financial picture on date of petition and not on dates of transfers.
- (6252) *Lange v. Mutual of Omaha Bank*, Case No. 11-6062 (8th Cir. BAP 2012) – Lender's security interest terminates automatically when loan is paid in full. Lender cannot use previously recorded financing statement to secure later advance but must record new financing statement. Further, Termination Statement to a UCC financing statement filed by a third-party was authorized and effective in terminating a lender's security interest in the debtor's personal property where the debtor refinance the loan through a new lender and prior lender authorized new lender to file termination of "all liens" on the debtor's property. Mutual's loan was paid and the refinancing lender terminated all of Mutual's outstanding financing statements. Although old lender contended that the new lender was authorized to terminate liens only on property described on a list of items of collateral attached to its release letter, nothing in the text of the authorization letter conveyed such a limitation and an officer of prior lender testified that the authorization letter mistakenly gave the new lender authority to release all of its liens. Lien was unperfected and subject to avoidance.
- (6253) *Soto-Rios v. Banco Popular de Puerto Rico*, Case No. 10-2270 (1st Cir. 2011) – Mortgage not avoidable as preference even where mortgage deeds were not recorded as of the date of the debtors' bankruptcy filing due to backlog at the Puerto Rico Registry. Puerto Rico's civil code provides that the act of presentment of a mortgage for recording is sufficient to put third-parties on notice of the existence of the mortgage. Puerto Rico's statutory "relation back" doctrine provides that the point a mortgage is presented to the Registry determines the priority of the mortgage over liens recorded in the intervening period between presentment and recording. Strong-arm powers could not be used to avoid the un-recorded mortgages where a bona-fide purchaser of the debtors' property would take the property subject to the mortgagee's interest in the debtors' property. Debtors could not avoid the mortgages as preferential transfers since the mortgages were presented for recording well outside of the 90 day preference period of 11 U.S.C. sec. 547(b).
- (6254) *Parker v. Lewis*, 2011 WL 5869610 (Bankr. N.D. Ohio 2011) – Transfer made within one year of case to debtor's father was avoidable as preference. Transfer was in payment of prior loan that debtor used to purchase automobile. Although debtor and father signed promissory note and security agreement, parties never noted the lien on the certificate of title. As against bankruptcy estate, father would have been unsecured creditor. Pre-petition payment allowed father to recover more than father would have recovered had the transfer not been made.
- (6255) *Simon v. JPMorgan Chase Bank*, 2011 WL 3701828 (Bankr. E.D. Mi. 2011) – In Michigan, perfection of interest in real property occurs upon recording. Notice of Lis Pendens recorded within 90 days of commencement of case avoidable as preference where lender failed to record mortgage.
- (6256) *Kohut v. Rigney*, 2011 WL 2693662 (E.D. Mi. 2011) – Divorce judgment rendered in 1998 operated to transfer title to assets to ex-wife. Ex-wife's recording of deed in 2007 was not a transfer because, as of the date of recording of the ex-wife was not a creditor of debtor. Under Michigan law, a divorce award of real property has the same effect as a quit claim deed, passing all the estate which the grantor could lawfully convey by a deed of bargain and sale. When the divorce judgment awarded ex-wife the Michigan property, and the Debtor signed a quit claim deed, the Debtor effectively transferred all of his interest in the property to ex-wife. Failure to record the deed created an unnecessary cloud on title, but did not change the character of the transaction between the parties. As of date of divorce judgment and quit claim deed, ex-wife ceased to have any claims against debtor, so recording of deed could not have been preferential.
- (6257) *Antioch Company Litigation Trust v. Morgan*, 2011 WL 1670952 (Bankr. S.D. Ohio 2011) – Complaint to recover preferential transfers failed to state cause of action where complaint failed to allege date on which transfer occurred.
- (6258) *Minefee v. Perchka-Marion*, 2011 WL 66104 (Bankr. W.D. Ky. 2011) – Section 547 creates rebuttable presumption that debtor was insolvent during 90 days prior to commencement of case. Plaintiff did not overcome presumption of insolvency by affidavit alleging that Debtor spend significant sums of money on illegal drugs.
- (6259) *Gocha v. Cooper*, Case No. 09-80349 (Bankr. W.D. Mi. 2010) – Transfer will be avoidable under Section 547 only if transfer is payment for antecedent debt. Agreement for payment entered into prior to bankruptcy filing constitutes "claim" and holders of claim are "creditors" for purpose of bankruptcy case. Debtors borrowed money from parents to construct improvements to their house, with the provision that when debtors sold the house, they would repay the loans. Debtors later defaulted on mortgage and withdrew money from 401-k loan to repay loan from parents. Although property was never sold, at the time of the repayment, parents had enforceable right to payment even if that right was contingent on future events. Debtors' repayment of that obligation within 90 days prepetition constituted payment of an antecedent debt which could be recovered under Section 547.
- (6260) *Jahn v. Carley Jewels, LLC*, 2010 WL 4607660 (Bankr. E.D. Tn. 2010) – "Consignment" transaction vests title to the property in the consignee subject to a security interest in favor of the consignor. The return of consigned property by the consignee to the consignor is considered a transfer of property of the consignee for purposes of Section 547.
- (6261) *Jahn v. Joeb Enterprises, LLC*, 2010 WL 4607614 (Bankr. E.D. Tn. 2010) – "Consignment" transaction vests title to the property in the consignee subject to a security interest in favor of the consignor. The return of consigned property by the consignee to the consignor is considered a transfer of property of the consignee for purposes of Section 547.

- (6262) *In re Foley*, 2010 WL 3905987 (Bankr. E.D. Ky. 2010) – Funds garnished by debtor’s sister during year preceding bankruptcy filing were recoverable where there was no dispute that debtor was, at all times, unable to pay debts as they came due and had liabilities in excess of assets, and garnishment permitted creditor to recover more than creditor would have received in Chapter 7 as Chapter 7 estate was administratively insolvent.
- (6263) *Helbling v. Cleary*, Case No. 09-1285 (Bankr. N.D. Ohio 2010) – Transfer occurs for purposes of preferential transfers when the secured creditor properly perfects security interest. Filing of suit to foreclose mortgage constituted lis pendens which perfects the on the date foreclosure proceedings were commenced, which was within 90 days of commencement of case.
- (6264) *In re Miller*, 428 BR 437 (Bankr. N.D. Ohio 2010) – Transfer occurs for purposes of preferential transfers when the secured creditor properly perfects security interest. If estate has sufficient assets to pay unsecured creditors in full, no preferential transfer occurs by perfection of secured claim as creditor will not receive more than creditor would have received had the lien not been perfected and the case had been liquidated under Chapter 7. Debtor’s financial statements are not dispositive but are admissible evidence as statements against interest. Summary judgment denied where financial information left genuine issue of material fact as to debtor’s solvency on date of transfer.
- (6265) *In re Williams*, Case No. 10-53685 (Bankr. E.D. Mi. 2010) – For purposes of Section 547, a writ of garnishment constitutes a transfer that is perfected when the writ is served on the garnishee, not when the money is turned over by the garnishee to the garnishor.
- (6266) *Browning v. Dyno Nobel, Inc.*, 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 547 allows the trustee to avoid a transfer of an interest of the debtor in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made (A) on or within 90 days before the date of the filing of the petition; or (B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables the creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title. Payment for goods on a “cash on delivery” basis is not payment for antecedent debt.
- (6267) *Boyd v. Petrie*, 430 BR 453 (Bankr. W.D. Mi. 2010) – To prevail on a preference avoidance claim, the Bankruptcy Trustee must establish a transfer of an interest of the Debtor in property; (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made (A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title. Debtor and his then-wife borrowed money from Wife’s parents and gave a mortgage encumbering the Debtor’s and Wife’s residence. Debtor later transferred the Property to a Trust established by the Parents to satisfy the Mortgage Note in full. Shortly thereafter, the Debtor and Ms. Petrie were divorced and the Debtor filed a voluntary Chapter 7 bankruptcy petition. The transfer to a Trust controlled by the creditor constituted a transfer to or for the benefit of a creditor. Although the “Trust” would not be an insider as defined in Section 101, transfer to Trust would be deemed transfer to an insider for purpose of one-year look-back where the parties all acted as if the Parents were the actual creditor; Wife’s Mother handled all details of loan although wife was not a trustee of the Trust; and the circumstances surrounding the transaction from start to finish indicated that the loan was from the Parents to their daughter and the Debtor out of family concern, rather than for business or estate planning reasons. Court can find “insider” status even absent a relationship where the Transfer was not an “arms length” situation, given the familial ties between the Parents, their daughter, and their grandchildren-ties that survived the divorce. Status of property as tenancy by the entireties which, under Michigan law would not be an “asset” for fraudulent conveyance purposes (except with respect to joint creditors) is an interest in the property for purposes of preferential transfers. The transfer allowed Parents to recover more than Parents would have received in a Chapter 7 where Parents never recorded the mortgage and so the mortgage could have been avoided by a Chapter 7 Trustee.
- (6268) *American Home Mortgage Investment Corp. v. Lim*, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547.
- (6269) *Himmelsbach v. Hunter*, Case No. 09-2053 (Bankr. E.D. Mi. 2010) – In action under Section 547(b), Plaintiff must prove (1) transfer; (2) of debtor’s interest in property; (3) to or for the benefit of a creditor; (4) on account of an antecedent debt; (5) made while the debtor was insolvent; (5) made within 90 days of the petition date or within one year if the transferee was an insider; (6) that enables the creditor to receive more than the creditor would have received in a chapter 7 liquidation.
- (6270) *Wells Fargo Home Mortgage, Inc. v. Lindquist*, 592 F.3d 838 (6th Cir. 2010) – “Transfer” of property pursuant to unrecorded mortgage is deemed to “occur” as the moment prior to filing. Post-petition attempt to belatedly record mortgage does not alter status of mortgage as unperfected as of the moment of filing.
- (6271) *Countrywide Home Loans v. Dickson*, 427 BR 399 (6th Cir. BAP 2010), *aff’d* 2011 WL 3768684 (6th Cir. 2011) – Lender’s lien against Manufactured Home would be avoided as preferential where Lender did not record the lien on the title to the Manufactured Home either by filing an affidavit of conversion of the Manufactured Home to real property or by recording the lien on the certificate of title. “Perfection” did not occur as a matter of public record until the State Court entered its Judgment imposing lien on Manufactured Home, which occurred less than 90 days prior to the commencement of the case. The lis pendens did not operate to perfect the transfer as a lis pendens does not create or perfect a lien under Kentucky State Law. The “transfer” would have the effect of allowing lender to recover 100% of the claim in a Chapter 13 case that provided for less than 100% of their allowed claims.

- (6272) *Shapiro v. Art Leather, Inc.*, Adv. No. 03-5070 (Bankr. E.D. Mi. 2008) – To determine whether creditor received more than the creditor would have received in a Chapter 7, Court must construct “hypothetical Chapter 7 case” to determine what the creditor would have received in liquidation. For unsecured creditors, unless the estate is sufficient to pay 100%, any unsecured creditor who received payments during preference period will receive more than the creditor would have received in the hypothetical Chapter 7. To determine whether creditors would have received 100% in a hypothetical Chapter 7 case, Court must consider liquidation value of assets in estate when case was filed plus value of allegedly preferential transfers. Court must then determine amount of claims which would include claims of allegedly preferential transferee had the transfer not been made. Court must also deduct administrative expenses incurred in the Chapter 7 as well as any post-petition debt incurred.
- (6273) *Kohut v. New Century Mortgage Corp.*, Case No. 07-13256 (E.D. Mi. 2008) – Mortgage is deemed “recorded” under Michigan law which establishes the date on which creditors and security interest was perfected at the moment when the person who seeks the benefit of the recording laws completes all legal requirements for recording the instrument by delivering the mortgage to the register of deeds in a form that meets the technical requirements of Michigan compiled laws section 565.201 and in the recording fee is paid when the mortgage is left for record. A delay by county officials in performing statutory duty of assigning an official record book and page does not defeat or delay the effective date of the recording for purposes of determining whether the mortgage was recorded within 90 days of the commencement of the bankruptcy case.

14.66 Elements – Transfer of Property

- (6274) *Ute Mesa Lot 1, LLC, v. First-Citizens Bank & Trust Co.*, Case No. 12-1134 (10th Cir. 2013) – Under Colorado law, recording *lis pendens* is not a “transfer of property” that could be avoided as preference. *Lis pendens* does not transfer interest in property, but merely provides notice to third parties that litigation is pending. While *lis pendens* may effectively render property unmarketable until litigation is resolved, rendering title unmarketable is not the equivalent of a “transfer of an interest” in that property.
- (6275) *Mason v. Clark*, 2013 WL 3991857 (Bankr. N.D. Ohio 2013), *reh’g denied*, 2013 WL 5300694 (Bankr. N.D. Ohio 2013) – Delay in recording deed caused transfer of property to occur as of date of recording. Debtor sold property to mother years prior to commencement of case but mother did not record deed until shortly before filing. Court rejected debtor’s argument that debtor held property in trust for mother based on lack of recording of deed where there was no express trust ever created or intended. Debtor could not assert resulting trust as there was no evidence that at time of sale, the parties intended to create a trust but failed to actually do so. Debtor also could not assert a constructive trust as constructive trusts are used to prevent fraud or unjust enrichment, and facts of transaction did not reflect either fraudulent conduct by debtor or that debtor would be unjustly enriched; and there has not been any state court determination of a constructive trust and Bankruptcy Court will not impose constructive trust in the first instance as doing so disrupts goal of ratable distribution.
- (6276) *Burden v. Richardson*, 2013 WL 2370720 (Bankr. E.D. Ky. 2013) – Clear and convincing evidence indicated that real property was owned by debtor in trust for mother. Debtor purchased property in own name, using funds provided by mother for down payment and financing balance. Mother made all mortgage payments and three years after closing, mother made large lump sum payment to pay off mortgage.
- (6277) *Lingham Rawlings, LLC v. Gaudiano*, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Section 547 allows Trustee or DIP to recover property or value of property transferred. “Transfer” is any direct or indirect, absolute or conditional, voluntary or involuntary, action or method of disposing of or parting with property or an interest in property. Checks written by corporation within 90 days of commencement of bankruptcy case were “transfers” made for purposes of repaying prior debt.

14.67 Elements – Perfection of Security Interest

- (6278) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Perfection of security interest in assets of debtor constitutes transfer as of date of perfection. Where creditor was previously unsecured or held unperfected security interest, perfection is preferential transfer if other requirements of preference are met.
- (6279) *Graham v. Huntington National Bank*, 2014 WL 5573440 (Bankr. N.D. Ohio 2014) – If creditor is fully secured as of date of transfer, then transfer cannot be preferential as creditor will not have done better than creditor would have done in Chapter 7. If, however, security interest attached for previously unsecured loan within preference period, attachment of lien itself is preferential transfer subject to avoidance.
- (6280) *Mason v. Ocwen Loan Servicing, LLC*, 2013 WL 4052905 (Bankr. E.D. Ohio 2013) – Lien against property that is not perfected as of petition date is deemed to constitute transfer immediately before the date of the petition. Unrecorded lien became perfected by recording of *lis pendens* at commencement of foreclosure action and entry of foreclosure judgment as part of litigation. When foreclosure judgment was subsequently vacated, *lis pendens* lost effect of perfection and mortgage remained unperfected when debtor later filed for bankruptcy. Whether mortgage would otherwise appear in chain of title did not defeat preferential nature of transfer as actual notice or lack of actual notice of the mortgage is not element of preference litigation.
- (6281) *Gold v. JPMorgan Chase Bank, NA*, Case No. 13-4286 (Bankr. E.D. Mi. 2013) – Where security interest has not been perfected prior to commencement of case, the “transfer” of the debtor’s interest for purposes of preferential transfers is the date immediately prior to commencement of case. Mortgage were properly recorded at time of transactions, well before the preference period. Alleged defects in notary clauses, which failed to include printed or typed name of notary, did not state date on which commission expires, and did not indicate county in which notary was acting, did not cause recording to be fatally defective for purposes of perfection of mortgages. However, Michigan Compiled Laws Section 566.201(4) provides that any instrument received and recorded by a register of deeds is conclusively presumed to comply with recording requirements. Defect in attestation does not affect validity of underlying transfer and

does not impact presumption that recorded mortgage is valid.

14.68 Elements – Lack of Reasonably Equivalent Value

- (6282) *Still v. Grant, Konvalinka & Harrison, PC*, 2014 WL 1025025 (Bankr. E.D. Tn. 2014) – Whether transfer was for reasonably equivalent value focuses on whether debtor received any value and, if so, whether value received was reasonably equivalent to property interests transferred. Time for determining reasonableness of value is date of transfer. Value does not need to be dollar for dollar and courts generally look to net effect of transfer to determine whether transfer resulted in unsecured creditors being worse off. Debtor did not receive any value when debtor gave security for loans that had already been extended to closely held entities. Pledge did not modify terms of loans and did not indicate that any antecedent debt was satisfied by the pledge. The record indicated that the liabilities for which the pledge was given were antecedent debts, and there did not appear to be any future value given or promised to debtor in exchange for pledge.

14.69 Elements – To or For Benefit of Creditor

- (6283) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – To be avoidable as preferential, transfer must be to or for benefit of creditor of the debtor. Perfection of security interest against property of debtor was not to or for benefit of creditor where debtor granted security interest to secured debtor's principal's debt to third party to whom debtor was not directly indebted and there was no evidence that debtor was indebted to principal as of date of transfer.

14.70 Elements - Antecedent Debt

- (6284) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Antecedent debt is one that existed prior to date of transfer. Perfection of security interest against property of debtor was not on account of antecedent debt of debtor where debtor granted security interest to secured debtor's principal's debt to third party to whom debtor was not directly indebted and there was no evidence that debtor was indebted to principal as of date of transfer.
- (6285) *McLane v. Bostater*, 2015 WL 273570 (Bankr. N.D. Ohio 2015) – Debtor has standing to bring action to recover preferential transfer under Section 522(h) where the debtor exempted or could have exempted the property if the trustee had avoided the transfer; the transfer is avoidable by the trustee under Section 547; and the trustee has not attempted to avoid the transfer. Debtor claimed garnished funds as exempt with no objection; trustee could have pursued recovery but did not do so, instead filing a report of no assets; and the pre-petition garnishment met all of the requirements of Section 547. Creditor could not avoid recovery by alleging that debts were result of willful and malicious conduct where creditor did not file action to except debt from discharge and discharge had been entered.
- (6286) *Newton v. McKay*, 2014 WL 1612356 (Bankr. E.D. Tn. 2014) – Evidence failed to evidence any pre-existing debt between mother and debtor. Debtor acquired house on behalf of her parents using funds entirely supplied by mother. Property was titled in debtor's name only because debtor purchased at foreclosure sale and seller refused to issue deed in name other than the person who physically placed successful bid. The property had been leased by mother to third party and all rentals were paid to mother. When property sold, all of the proceeds were paid to mother. At all times, while property was nominally titled in debtor's name, property actually belonged to mother. Thus, when mother received title to property and then sold property and retained proceeds, the transfer was not inconsideration of debt owed by debtor because debtor never owed mother any money. There was no agreement that debtor would repay mother or that debtor was anything other than title on behalf of mother.
- (6287) *The Flower Factory, Inc. v. Magic Creations, Inc.*, 2014 WL 271651 (Bankr. N.D. Ohio 2014) – Payment is on account of "antecedent debt" where debt was incurred before the payment in question. Debtor's payment of invoice 30 days after issuance and creation of obligation to pay was antecedent debt, even if paid before the due date.
- (6288) *Porter v. Mahmoud*, Case No. 12-80066 (Bankr. W.D. Mi. 2013) – Debtor's pre-petition payments to law firm as payment for services rendered for debtor prior to commencement of case were preferential transfers. Debtor's argument that payments were retainer for future services did not avoid conclusion that payments were preferential where law firm admitted that it did not hold the payment in trust but applied it to debtor's pre-existing balance.
- (6289) *Suhar v. Agree Auto Services, Inc.*, 2013 WL 3993867 (Bankr. N.D. Ohio 2013) – Debtor made preferential transfer when debtor purchased new automobile within 90 days of commencement of case by trading in car that was worth less than the existing balance owed on that car and agreeing to include the deficiency on the prior car in the financing of the new car. Debtor purchased a new car at a price of \$6,488 plus the deficiency on the prior car of \$4842.15, for a total "purchase price" of the new car of \$11,970.00, with a down payment of \$3,518.50 and the balance financed. Payment on deficiency was payment on account of antecedent debt that allowed creditor to receive more than creditor would have received in Chapter 7 proceeding.
- (6290) *Pryor v. New York State, Department of Taxation and Finance*, 2013 WL 1856459 (Bankr. E.D.N.Y. 2013) – Payment of income taxes is not preferential if payment is made by date on which payment can last be made without penalty. Taxes are considered due on the last date on which payment can be made, so payment of taxes before that date are not on account antecedent debt. Debtor who obtained extension of time to file return had until extended due date to pay taxes in timely manner.
- (6291) *Lingham Rawlings, LLC v. Gaudiano*, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Transfer is made on account of antecedent debt where payments are made in connection with a debt that precedes the allegedly preferential transfer. Debt is incurred on the first date on which debtor becomes legally obligated to repay. Corporation's payment to principal of sums in repayment of loans and in payment of deferred compensation were payments on account of antecedent debt.

14.71 Elements – Insolvency

- (6292) *Baumgartner-Novak v. Race Engines Plus, LLC*, 2015 WL 5924669 (Bankr. N.D. Ohio 2015) – Debtor is presumed insolvent where transfer occurs within 90 days of commencement of case. Perfection of security interest against property of debtor constitutes transfer as of date of perfection. Where lien was perfected within 90 days, presumption of insolvency arises.
- (6293) *Paris v. Walker*, 2015 WL 5576391 (Bankr. E.D. Tn. 2015) – Rule 59 Motion can be granted only where there was clear error of law, newly discovered evidence, intervening change in controlling law, or need to prevent manifest injustice. Motion is not opportunity to reargue case or to raise arguments that could have been, but were not, raised before judgment issued. Trustee carried burden of proof on insolvency of debtor based on Trustee's affidavit that "As Chapter 7 Trustee, I am familiar with the value of the Debtors' assets and the extent of their liabilities in May and June, 2013. Based on a review of their records, the petition and my knowledge of the net values of their properties, the Debtors were balance sheet insolvent by at least \$10,000,000 on May 17, 2013. This condition did not change materially from then to the petition date." Trustee supported allegations with debtor's schedules which showed liabilities well in excess of assets, and debtor's schedule C which showed that debtor had no non-exempt assets. While schedules and statement of financial affairs may not be controlling as those do not account for changes in financial affairs between date of allegedly preferential transfer and date of filing, trustee's affidavit indicated that trustee considered financial affairs and events in addition to schedules and SOFA. Debtor's responsive affidavit that indicated that one of debtor's creditors had potential \$6 million recovery from third party that would reduce debtor's total debts, even if true, would not alter conclusion that even if \$6 million claim is eliminated, debtor is still \$4 million insolvent.
- (6294) *Dymarkowski v. Wurst*, 2014 WL 2506147 (Bankr. N.D. Ohio 2014) – Insolvency for purposes of preferential transfers is "balance sheet" insolvency where liabilities exceed assets. Insolvency is presumed only where transfer is made within 90 days preceding commencement of case. While transfer to insider extends "look back" for one year, it does not carry presumption of insolvency. Complaint that alleged that transfer occurred on January 5, 2012, and that petition was filed on April 30, 2012, did not give rise to presumption of insolvency and request for summary judgment did not include any evidence of insolvency.
- (6295) *Lingham Rawlings, LLC v. Gaudiano*, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Code defines insolvent in terms of partnership where sum of entities debts exceeds all of entities property, exclusive of any property that has been transferred, concealed, or removed with intent to hinder, delay or defraud creditors, or property that may be claimed as exempt. Insolvency is based on balance sheet, based on fair market value of assets that could be obtained if sold in prudent manner within a reasonable time to pay debts. Debtor is presumed insolvent on and during the 90 days preceding commencement of the case. Defendant failed to prove solvency where creditor relied solely on debtor's books and records, which were maintained on historic basis and did not necessarily reflect true current fair value of assets. Financial statements of corporate debtor did not support finding of solvency where financial statements admittedly failed to include \$200 million in bond debt that corporate debtor had guaranteed to corporate parent.

14.72 Elements – Timing of Transfer

- (6296) *South v. Asset Systems, Inc.*, 2015 WL 1213362 (Bankr. W.D. Wash. 2015) – Garnishment takes effect for preference purposes when writ is served. Writ served on bank 91 days prior to commencement of bankruptcy case but funds actually turned over to creditor only 30 days prior to commencement of case. Because writ became effective on service, garnishment technically occurred 91 days prior to commencement of bankruptcy case placing payment outside the time for an avoidable preferential transfer.
- (6297) *Flooring Systems, Inc. v. Chow*, 2014 WL 4251114 (5th Cir. 2014) – Transfer of funds pursuant state court appointment of receiver occurs when bank received notice of receivership appointment at which time receiver's interest in property vested. Transfer is not effective when receivership order is entered because entry of order, without notice to holder of funds, is of no effect.
- (6298) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Transfer of assets pursuant to pre-petition settlement agreement occurred more than 90 days prior to commencement of case. Settlement Agreement that transferred property dated more than 9 months pre-petition. To extent that settlement agreement may have been unclear as to title to assets, any dispute was resolved when State Court entered Judgment declaring that all assets belonged to creditor and debtor did not have any interest in assets, in judgment dated more than 90 days pre-petition.
- (6299) *Melaragno v. CitiMortgage, Inc.*, 2013 WL 3991971 (Bankr. W.D. Pa. 2013) – Recording of *lis pendens* as part of quiet title action constituted perfection of previously unrecorded mortgage. *Lis pendens* was recorded more than 90 days pre-petition, removing "transfer" from scope of preference statute, although actual quiet title judgment was entered less than 90 days before filing.

14.73 Elements – Timing of Transfer – "Insider"

- (6300) *Graham v. Huntington National Bank*, 2014 WL 5573440 (Bankr. N.D. Ohio 2014) – Generally, control exercised by secured creditor does not transform creditor into "insider". To be "insider" party must have a controlling interest in debtor or must exercise such authority as to dictate corporate policy and disposition of assets. Allegedly superior bargaining position between alleged insider and debtor in contractual relationship is not sufficient to constitute "insider". Courts examine whether the creditor had more ability to assert control than the other creditors, whether the creditor made management decisions for the debtor, directed work performance, and directed payment of the debtor's expense or exercised day-to-day control, rather than some monitoring or exertion of influence regarding financial transactions in which the creditor has a direct stake. Even if the bank requires the debtor to submit frequent reports on receivables, invoices, and operations, receives all payments on the receivables, has the power to endorse checks, and obtain concessions from the debtor, the bank is not thereby an insider because there is no control of the day-to-day decision making of the debtor. A close relationship with an officer or director of the bank is also insufficient to render the bank an insider. Bank was not "insider" where there was no evidence of any joint enterprise, interlocking directorates, or joint ownership. Bank made standard commercial loan to debtor without involving itself in day to day operations of debtor. Fact that bank selected the state court receiver and worked with proposed receiver on terms of receivership order

insufficient to hold bank as “insider”, nor do communications between bank and receiver concerning conduct of receivership. Record was devoid of any evidence that bank, as of date of alleged transfer, exercised any control over receiver or debtor beyond normal involvement in protecting security interest and liquidation of debtor’s assets.

- (6301) *Graham v. Huntington National Bank*, 2013 WL 5492533 (Bankr. N.D. Ohio 2013) – Payment may be preferential only if payment is made within 90 days of bankruptcy filing or within one year if creditor at time of transfer was insider. Transfer made 9 months prior to petition date could be preferential only if made to insider. Prior to commencement of bankruptcy, creditor caused the appointment of a state court receiver. That receiver then transferred money to the creditor. Trustee’s complaint sufficiently alleged that creditor controlled receiver and had ability to direct actions of receiver as to make creditor an insider of the debtor. Complaint specifically alleged that (1) throughout the course of the receivership, receiver and counsel conferred regularly with creditor; (2) receiver was under the direction and control of creditor throughout the receivership; (3) creditor directed receiver to pay creditor the net proceeds of the settlement with the Common Pleas Defendants; (4) receiver caused debtor to pay creditor as directed; (5) creditor is an insider of debtor as a result of its control over receiver; (6) receiver made transfer to creditor without the authority of state court that appointed receiver; and (7) payment to creditor was in payment for an unsecured obligation. Insider includes person in control of debtor such that insider can exercise sufficient authority over debtor as to dictate corporate policy and control disposition of corporate assets. While causing appointment of receiver, standing alone, would not make creditor an insider, complaint alleged sufficient facts to raise issue of whether receiver was so under control of creditor as to effectively allow creditor, through receiver, to dictate corporate policy including disposition of assets and payment of creditors.

14.74 Elements – Allow Creditor to Recover More Than Hypothetical Chapter 7

- (6302) *Graham v. Huntington National Bank*, 2014 WL 5573440 (Bankr. N.D. Ohio 2014) – If creditor is fully secured as of date of transfer, then transfer cannot be preferential as creditor will not have done better than creditor would have done in Chapter 7. If, however, security interest attached for previously unsecured loan within preference period, attachment of lien itself is preferential transfer subject to avoidance.
- (6303) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Payment to creditor who is fully secured is not preference as payment does not allow creditor to receive more than creditor would have received in Chapter 7 proceeding. Creditor did not receive preference by obtaining assignment of Accounts Receivable in which creditor held perfected security interest and value of accounts receivable was less than total owed to creditor, such that liquidation of accounts receivable would not produce a recovery in excess of what creditor would have received in Chapter 7.
- (6304) *Lingham Rawlings, LLC v. Gaudiano*, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Transfer is preferential only where transfer allows creditor to recover more than creditor would have received had transfer not been made and debtor had been liquidated on Chapter 7. Unless estate is sufficient to pay 100% to all unsecured creditors, any payment to unsecured creditor by definition allows creditor to recover more than would have been recovered in Chapter 7. Court finding that debtor was insolvent at time of transfer demonstrates that debtor would not have paid 100% to unsecured creditors, establishing that payment to insider unsecured creditor allowed that creditor to receive more than creditor would otherwise have received.

14.75 Setoff as Preference

- (6305) *Morris v. U.S. Dept. of Agriculture*, 2013 WL 3146925 (Bankr. W.D. Ky. 2013) – Under Section 553, setoff is avoidable as a preference only to the extent the creditor improved its position within the 90-day period immediately preceding the commencement of the bankruptcy case. Improvement of position test is three step process. Court must first determine what the creditor’s insufficiency was at the time the setoff occurred, measured by the extent to which the claim against the debtor exceeds the amount of the mutual debt owed to the debtor. The Court must then determine the creditor’s insufficiency on the 90th day preceding commencement of the case or, if no insufficiency existed on the 90th day, then the amount of the insufficiency on the first date on which an insufficiency existed. The Court must then compare the two figure and if the insufficiency as of the date of setoff was less than the insufficiency as of the 90th day preceding the petition (or the insufficiency that first existed, whichever is applicable). The extent to which the deficiency was less on the date of the setoff than it was on the 90th day is the measure of the preference. Debtor owed USDA on the 90th day pre-petition \$27,238.17. On January 1, debtor became entitled to a tax refund of \$8,357.00, which is also the date on which the mutual debt first arose, leaving an “insufficiency” of \$18,607.72 (after crediting the mutual debts). The offset against the tax refund occurred on February 17, after debtor filed her tax return and the IRS determined the amount of the overpayment, and sent that overpayment to the Department of Agriculture. As of February 17, the amount of the insufficiency (after applying the offset and other payments and credits) was \$18,088.53. Thus the difference between the insufficiency as of the date of first mutual debts and the date of the offset was \$18,607.72 - \$18,088.53 = \$519.19. This was the amount of the avoidable preference that the USDA would be required to return to debtor as an avoidable preference.
- (6306) *US Department of Agriculture v. Riley*, 485 BR 361 (W.D. Ky. 2012) – Where creditor exercises right of setoff prior to commencement of case, court must determine whether setoff allowed creditor to improve position. Court first determines “insufficiency” as of date of setoff – that is, amount by which debt owed to creditor exceeded debt owed by creditor to debtor. Court then determines the “insufficiency” as of the date that is 90 days pre-petition or, if there was no insufficiency on the 90th day, the insufficiency determined on the first day on which there was an insufficient. To extent first calculated insufficiency is greater than second calculated insufficiency, creditor has improved its position and is liable for the preference. Creditor did not receive preference when creditor setoff against debtor’s tax refund. Creditor did not mutual debt on 90th day pre-petition as that date was prior to December 31 of the tax year for which the refund was to be paid. On January 1, right of setoff arose. On that date, creditor was owed \$8,000; and debtor’s overpayment was determined to be \$5,000, leaving an “insufficiency” of \$3,000.00. Once creditor exercised right of setoff, creditor was still owed (the remaining “insufficiency”) was still \$3,000.00. Thus, creditor did not improve its position by exercising statutory right of setoff or improve its position at expense of other

creditors.

14.76 Defenses – *De Minimis Transfers*

- (6307) *In re Brown*, Case no. 15-44526 (Bankr. E.D. Mi. 2015) – Debtor could not recover garnished funds where amount paid to creditor totaled less than \$600.00. Creditor received garnishment payments totaling \$534.99 prior to debtor filing bankruptcy. One day after petition filed, creditor received a check for \$175.08. Creditor returned the check uncashed to the garnishee. Check received post-petition and not cashed is not a transfer as check was never honored and creditor never received funds. “Transfer” when payment is made by ordinary check occurs when the check is honored, and not before.
- (6308) *Pierce v. Collection Associates, Inc.*, 2015 WL 1003613 (8th Cir. 2015) – Debtor could not recover garnished funds where amount paid to creditor totaled less than \$600.00. Although garnishment caused employer to withhold \$858.98 in wages, when debtor filed for bankruptcy employer was holding \$296.20 that had not been paid to creditor and was ultimately paid to debtor. As creditor received less than \$600 creditor could not be compelled to disgorge proceeds.
- (6309) *In re Jacobs*, 2014 WL 8186753 (E.D. Mi. 2014) – Creditor not required to refund to debtor \$500 garnished from salary within 90 days prepetition. Section 547(c)(8) excepts from preference any transfer that aggregates less than \$600.00.
- (6310) *Sheppard v. Speck*, 2014 WL 6611661 (Bankr. E.D. Mi. 2014) – Whether preferential transfer is within *de minimis* exception depends on amount withheld from debtor’s income, not amount paid to creditor. Transfer avoidable where amount withheld from income was \$676.98 but employer retained \$80.00 for service fee and paid only \$596.98 to creditor. Total withheld exceeded \$600 rendering *de minimis* exception inapplicable.
- (6311) *In re Nelson*, 419 BR 338 (Bankr. W.D. Ky. 2009) – Section 547(c)(8) provides that a preference may not be avoided if the aggregate value of all property that constitutes or is affected by such transfer is less than \$600. Judgment entered against defendant in favor of four separate plaintiffs, apportioning recovery between four plaintiffs. Writ of garnishment served on defendant employer produced a total of \$862 in garnished funds distributed pro rata to the creditors. No individual creditor received more than \$600. Section 547(c)(8) limitation applies based on amount received by each creditor, not by aggregate amount paid to all creditors. Where no creditor received more than \$600, trustee could not recover alleged preferential transfers.

14.77 Defenses – Safe Harbor – 547(c)(3)

- (6312) *Brock v. Branch Banking and Trust Co.*, 2010 WL 2629704 (6th Cir. 2010) – Lender could not rely on a 20 day “safe harbor” provided by section 547(c)(3) where the Lien was not recorded on the motor vehicle certificate of title until more than 20 days after the financing transaction occurred. Although lender forwarded documents to the Kentucky clerk’s office nine days after the financing transaction occurred, two-week delay by clerk in uploading Lien for recordation with the Kentucky Transportation Cabinet resulted in perfection occurring more than 20 days after the financing transaction. As a matter of Kentucky law, perfection does not happen until physical notation is made on the title. Perfection is not accomplished as and when the required paperwork and fees are submitted to the clerk.

14.78 Defenses – Not Primarily Consumer Debts – 547(c)(9)

- (6313) *Jones v. Citizens Bank*, Adv. No. 11-2168 (Bankr. E.D. Mi. 2012) – Transfer otherwise avoidable under Section 547 is not avoidable if debtor has debts that are not primarily consumer debts, and aggregate value of property transferred or affected by transfer is less than \$5,850.00. Vehicle was repossessed and sold at auction in sale that produced active competitive bidding with a successful bid of \$4,000.00. Even if auction price was a little below market, there was no evidence that successful bid was more than \$1,850 less than actual value. Although debtor valued vehicle at \$6,800 because of its excellent condition, there was nothing in the record to support that valuation. Testimony of owners is viewed with skepticism. And debtor’s own testimony established that vehicle depreciated at a rate of \$1,000 per year, which would produce value of approximately \$5,000.00. Court did not use auction price, but factored in other items that could possibly have affected value, but nothing in the record would have supported value greater than \$5,850.00.

14.79 Defenses – Earmarking

- (6314) *Cage v. Hardy Rawls Enterprises, LLC*, Case No. 11-20534 (5th Cir. 2012) – Payments were outside earmarking defense. Debtor operated car sales business. Debtor would sell car through “seller financing”. Debtor would then pool the contracts and sell those to an investor. Debtor was supposed to collect the payments from the buyers and remit the proceeds to the investor. Evidence indicated that debtor did not do so. Instead, Debtor would continue to pay investor even if the purchaser defaulted, using debtor’s own funds in comingled account. If debtor repossessed and sold car, debtor kept the proceeds and would continue to make monthly payments to investor. Virtually all funds received by debtor, whether from sales, floor plan lenders, or investors, were comingled in single account and used interchangeably for business expenses. Evidence did not indicate that particular funds received by debtor from any particular source were “earmarked” or were in any way used other than as debtor’s own property. Lump sum payments to investor within 90 days of filing were avoidable preferences.
- (6315) *In re Reep*, 2010 WL 2933644 (Bankr. N.D. Ohio 2010) – Earmarking is an equitable doctrine created to except transfers borrowed from but directed by a third party to a creditor, for the benefit of the debtor, to be excluded as transfers of interests in a debtor’s property. Payment of property belonging to a third party to a particular creditor, even if it flows through the debtor, is not property of the debtor/estate. Debtor’s mother gave debtor money to pay off student loan. Immediately after depositing the funds into Debtor’s checking account, Debtor paid the student loans as agreed with Mother. Money property was that of a third-party and the transfer was directed

by the third-party, Debtor's mother. Debtor's mother provided the funds specifically to pay Debtor's obligation to Nelnet and the funds were actually used for that purpose. The borrowed funds have been specifically earmarked by the lender for payment to a designated creditor, resulting in no transfer of property of the debtor even if the funds pass through the debtor's hands getting to the selected creditor. Earmarking doctrine rendered the transfer to student loan creditor to not be a transfer of an interest of the debtor.

- (6316) *MBNA America Bank v. Meoli*, 561 F.3d 633 (6th Cir. 2009) - Chapter 7 Trustee could recover payments using so-called "convenience checks" as preferential transfers. "Earmarking doctrine" did not except the transfers from the operation of Section 547. Debtor had absolute control over convenience checks and was free to sue those checks as she chose. Debtor's decision to use those checks to pay one creditor constituted exercise of complete control over the funds in question. "Earmarking" applies only where the borrowed funds used to discharge the debt are specifically earmarked by the lender for payment to a designated creditor. Here, the funds were not restricted by Lender to be paid solely to MBNA to be credited against Debtor's credit card debt. The checks could have been used to transfer balances, pay bills, make a purchase, or get extra cash. In such an instance, the Debtor possessed sufficient control over the funds to determine where they would go once the credit was accessed.
- (6317) *Yoppolo v. MBNA America Bank*, 560 F.3d 562 (6th Cir. 2008) – Bank-to-bank transfer of funds constituted avoidable preference. "Earmarking doctrine" did not except the transfers from the operation of Section 547. Debtor had absolute control over convenience checks and was free to use those checks as she chose. Debtor's decision to use those checks to pay one creditor constituted exercise of complete control over the funds in question. Debtor controlled disposition of the funds and determined to use those funds to pay first lender. Issuer of convenience check did not direct or require that the funds be paid to first lender, rendering earmarking doctrine is inapplicable.
- (6318) *In re Wells*, 382 BR 355 (6th Cir. BAP 2008) - Bank-to-bank transfer of funds constituted avoidable preference. Transfer ordered by Debtor using "convenience check" drawn on second lender to pay loan owed to first lender constituted transfer of interest of Debtor even though Debtor was never in physical control of money transferred. "Earmarking doctrine" did not except the transfers from the operation of Section 547. Debtor had absolute control over convenience checks and was free to use those checks as she chose. Debtor's decision to use those checks to pay one creditor constituted exercise of complete control over the funds in question.
- (6319) *American Home Mortgage Investment Corp. v. Lim*, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547. Fact that mortgage was given as part of the refinancing of an existing mortgage did not protect mortgage from avoidance under "earmarking" doctrine. Earmarking doctrine does not apply to a party who fails to record the mortgage within the 30 day safe harbor provision of section 547(e)(2)(A).
- (6320) *Chase Manhattan Mortgage Corp. v. Shapiro*, 530 F.3d 458 (6th Cir. 2008) –Earmarking doctrine requires agreement between a new creditor and the Debtor for payment of a specific antecedent debt; the agreement must be performed according to its terms; and the transaction cannot diminish Debtor's estate. Creditor that refinanced a pre-existing mortgage was not a "new creditor" and, therefore, transaction could not be protected by earmarking doctrine. Further, refinancing is not a unitary transaction but consists of two transfers by Debtor, one of which is the transfer of proceeds which could be protected by the earmarking doctrine and the second being the granting of a new mortgage which is beyond the scope of the earmarking doctrine. Earmarking doctrine will not apply to any security interest which is not perfected within the grace period set forth in section 547(e). refinancing transaction completed approximately 6 months prior to bankruptcy filing but not recorded until 77 days prior to the commencement of the bankruptcy case and 72 days after lender had distribute the funds was avoidable preferential transfer under section 547.

14.80 Defenses – Administrative Expenses

- (6321) *Shapiro v. Meridian Automotive Systems, Inc.*, Adv. No. 08-4495 (Bankr. E.D. Mi. 2008) – Potentially preferential transfers made to a Chapter 11 Debtor during pendency of Chapter 11 case and prior to confirmation of Chapter 11 plan constituted administrative expenses of Chapter 11 estate. Transferor's failure to file an administrative claim in the Chapter 11 prior to the administrative claim bar date precluded a later action in the transferor's Chapter 7 bankruptcy proceeding to recover those transfers. Although administrative expense claims are generally limited to matters which directly and substantially benefit the estate, Courts have broadly interpreted Administrative expense claims to include claims based on tort including alleged preferential transfers. Liability on a preferential transfer claim is an ordinary cost of doing business, just as are product liability claims and claims for personal injury and, therefore, qualify as administrative expense claims which are waived if not asserted in the Chapter 11 proceeding.

14.81 Defenses – Payments for Fines and Penalties

- (6322) *In re Silverman*, 2010 WL 3169415 (9th Cir. 2010) - The plain language of Section 547(b) does not except criminal restitution payments. Allowing the Trustee to recover the restitution payment to State Fund will not interfere with California's state criminal proceedings. Criminal restitution payments are non- dischargeable. Therefore, the Trustee's recovery of the restitution payment will not eliminate Debtor's obligation to pay the restitution money post-bankruptcy. Recovery of the preference does not compromise or dilute the Debtor's state sentence. Excepting non-dischargeable debts like criminal restitution payments from Section 547(b) would allow a debtor to pay off this non-dischargeable debt during the preference period and leave other creditors with nothing, would, motivating debtors to pay off these non-dischargeable debts during the preference period, leaving all other debts to be extinguished in bankruptcy. An economically rational debtor would likely prefer this outcome over one where the debtor is left with non- dischargeable debts post-bankruptcy.

14.82 Defenses – Contemporaneous Exchange of Value

- (6323) *Suhar v. Agree Auto Services, Inc.*, 2013 WL 3993867 (Bankr. N.D. Ohio 2013) – Debtor made preferential transfer when debtor purchased new automobile within 90 days of commencement of case by trading in car that was worth less than the existing balance owed

on that car and agreeing to include the deficiency on the prior car in the financing of the new car. To be contemporaneous, both debtor and creditor must intend that the transfer be contemporaneous exchange; exchange must, in fact, be contemporaneous; and exchange must be for new value. Payment of deficiency on prior car was not contemporaneous exchange for new value, where purchase price of new vehicle was \$6,931.34 but total price including deficiency balance was more than \$11,000.00. Value received by debtor was limited to value of new vehicle. Any additional sums paid were paid on account of antecedent debt for which debtor did not receive any new value and which served to diminish the Chapter 7 estate.

- (6324) *Browning v. Dyno Nobel, Inc.*, 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 547 allows the trustee to avoid a transfer for or on account of an antecedent debt owed by the debtor before such transfer was made. Payment for goods on a “cash on delivery” basis is not payment for antecedent debt.

14.83 Defenses – New Value

- (6325) *In re LGI Energy Solutions, Inc.*, Case No. 12-3899 (8th Cir. 2014) – New value can be in form of services provided by recipient of allegedly fraudulent transfer to third party to whom debtor is also indebted. Debtor was a utility payment processing company. Utilities would provide services to debtor’s customers and send invoices to debtor. Debtor would accumulate invoices and send a single invoice to its customer who would then pay debtor the amount invoiced. Debtor would, in turn, pay the utility bills of the customers, allowing customers to continue to receive services. Trustee sued customers as the beneficiaries of the preferential transfers. Future utility services after the date of payments constituted new value for transfers, although new value was not provided to debtor but to third parties. Preferential transfers by debtor to utility companies were for benefit of customers who contracted with debtor for that service. New value provided to third party avoided inequitable result of third party customers having to pay twice while unfairly enriching estate.
- (6326) *In re Graves*, 2012 WL 4026811 (Bankr. M.D.N.C. 2012) – Attorney required to disgorge fees received as payment for prior services rendered where payment occurred within preference period. Debtor owed attorney money for prior services rendered in non-bankruptcy matters. Within 90 days of filing case, debtor paid that invoice, which allowed attorney to receive full payment while creditors in Chapter 7 estate will receive no distributions. “Subsequent new value” defense to preference-avoidance claim: (1) creditor must have received a transfer that is otherwise voidable as preference; (2) creditor, after receiving this preferential transfer, must have advanced new value to debtor on an unsecured basis; and (3) debtor must not have fully compensated creditor for this new value as of date that bankruptcy petition is filed. Attorney failed to demonstrate new value exception based on services rendered post-petition and where attorney elected to receive “no look” fee in Chapter 13 case, which included payment for all services. Creditor cannot rely on new value defense where creditor later receives full payment for the later extension of credit in a transaction that is not, itself, avoidable.
- (6327) *In re Appalachian Oil Co., Inc.*, 2012 WL 4754675 (Bankr. E.D. Tn. 2012) – “New Value” defense protects otherwise avoidable transfer where the creditor extended new value in exchange for payment. To extent new value is extended, the preference is repaid to the estate. Creditor must establish that following payment by the debtor, (1) the creditor gave new value to the debtor; (2) the new value was unsecured, and (3) the debtor, after receiving the new value, did not thereafter make an unavoidable transfer to the creditor. New value can consist of money, services or new credit. Retailer sold lottery tickets for Virginia Lottery with payment to be made by EFT transfers. After EFT payment bounced, debtor wire transferred payment to Lottery Commission. Following payment, Virginia allowed debtor to continue to sell lottery tickets. However, “new value” exception as not available as Debtor had made other payments to Lottery Commission after date of wire transfer that were, themselves, not avoidable. New value cannot be used if subsequent credit extended by creditor is later repaid with non-avoidable transfer, as doing so would result in debtor receiving “double credit”, once for the prior payment and a second time for the later payment. If a debtor has repaid the new value, and the trustee is unable to avoid that payment because of another exception, the new value has not replenished the debtor’s estate.

14.84 Defenses – Liquidation Amount in Chapter 7

- (6328) *Parker v. Lewis*, 2011 WL 5869610 (Bankr. N.D. Ohio 2011) – Transfer made within one year of case to debtor’s father was avoidable as preference. Transfer was in payment of prior loan that debtor used to purchase automobile. Although debtor and father signed promissory note and security agreement, parties never noted the lien on the certificate of title. As against bankruptcy estate, father would have been unsecured creditor. Pre-petition payment allowed father to recover more than father would have recovered had the transfer not been made. Debtor’s subsequent reaffirmation of obligation to father does not change fact that as of petition date, claim was unperfected secured claim that would not be recognized in Chapter 7.
- (6329) *In re Miller*, 428 BR 437 (Bankr. N.D. Ohio 2010) – Transfer occurs for purposes of preferential transfers when the secured creditor properly perfects security interest. If estate has sufficient assets to pay unsecured creditors in full, no preferential transfer occurs by perfection of secured claim as creditor will not receive more than creditor would have received had the lien not been perfected and the case had been liquidated under Chapter 7. Debtor’s financial statements are not dispositive but are admissible evidence as statements against interest.
- (6330) *Shapiro v. Art Leather, Inc.*, Adv. No. 03-5070 (Bankr. E.D. Mi. 2008) – To determine whether creditor received more than the creditor would have received in a Chapter 7, Court must construct “hypothetical Chapter 7 case” to determine what the creditor would have received in liquidation. For unsecured creditors, unless the estate is sufficient to pay 100%, any unsecured creditor who received payments during preference period will receive more than the creditor would have received in the hypothetical Chapter 7. To determine whether creditors would have received 100% in a hypothetical Chapter 7 case, Court must consider liquidation value of assets in estate when case was filed plus value of allegedly preferential transfers. Court must then determine amount of claims which would include claims of allegedly preferential transferee had the transfer not been made. Court must also deduct administrative expenses incurred in the Chapter 7 as well as any post-petition debt incurred.

14.85 Defenses – Ordinary Course of Business

- (6331) *Sweet v. Rumbold*, Case No 14-3076 (Bankr. E.D. Mi. 2015) – Salary of corporate officer paid by related company can constitute ordinary course of business of corporation making payment where the corporations were closely related and routinely paid salary for the principal. Factual issues remained concerning timing and method of payment that precluded summary judgment.
- (6332) *The Flower Factory, Inc. v. Magic Creations, Inc.*, 2014 WL 271651 (Bankr. N.D. Ohio 2014) – Payment is in the ordinary course of business where the payment is in the ordinary course of business of the debtor and transferee; or made according to ordinary business terms. Payment is on account of ‘antecedent debt’ where debt was incurred before the payment in question. Court must examine history of transactions between parties including timing of payments, amount at issue and circumstances of transaction. Payments were not in ordinary course where debtor was historically “slow” to pay, averaging more than 107 days while terms were “net 30”. Payment at issue was made substantially shorter than normal, with two-thirds of the balance paid within 35 days and the entire balance paid in 54 days, or roughly half the time of the normal payments, indicating that these payments were not “ordinary”. Payments were also abnormally large when compared to historic payments. Defendant failed to produce evidence of normal terms in the industry. Defendant provided only anecdotal statements about payments in the industry, with no specifics. Statements were made in a vacuum with no effort to connect payments to specific industry or to establish that debtor operated on same terms as retailers such as Wal Mart.
- (6333) *Mason v. Clark*, 2013 WL 3991857 (Bankr. N.D. Ohio 2013), *reh’g denied*, 2013 WL 5300694 (Bankr. N.D. Ohio 2013) – Sale of property by debtor to mother was not in ordinary course of business where neither debtor nor mom in the ordinary course of business bought or sold real estate; and the six year delay in recording deed after date of sale was not on ordinary business terms.
- (6334) *Lingham Rawlings, LLC v. Gaudiano*, 2013 WL 1352320 (Bankr. E.D. Tn. 2013) – Transfer is in ordinary course of business where transfer is made in ordinary course of business of debtor and transferee; or is made on ordinary business terms. After BAPCPA, tests are administered in the disjunctive – transfer is in ordinary course if either test is met. Whether transfer is ordinary course based on business transactions between debtor and transferee is subjective determination, while determination as to whether transfer is made on ordinary business terms is objective standard based on normal commercial practices in the industry in general. Subjective analysis considers length of time involved in the preference period transaction; whether amount of form of payment differed from previous transactions; whether transaction involved any unusual collection or payment activity; and circumstances under which transfer was made. Payments were not in ordinary course between debtor and transferee where transferee had previously infused money into debtor without knowledge of debtor’s principal and debtor’s principal never authorized any repayments to be made on any alleged cash infusions. Although infusion in and repayments from debtor may have been in defendant’s ordinary course, these transfers could not have been in ordinary course of debtor’s business because debtor’s management was unaware that transfers were occurring. In addition, any prior advances and repayments had been relatively small, far less than \$61,000 involved in the instant transfer.
- (6335) *In re Appalachian Oil Co., Inc.*, 2012 WL 4754675 (Bankr. E.D. Tn. 2012) – Otherwise preferential transfer may not be avoided to extent the debt was in the ordinary course of business of the debtor and creditor; and is made either in the ordinary course of business or financial affairs of debtor or made according to ordinary business terms. Goal is to protect recurring, customary credit transactions which are incurred and paid in the ordinary course of business of the debtor and the transferee. Analysis must examine the payment from the debtor’s perspective. Wire transfers from debtor to Virginia Lottery Commission to pay for lottery tickets were within ordinary business terms. Debtor originally made payment to Lottery commission by EFT transfers but, after debtor had experienced financial difficulties and Tennessee Lottery Commission terminated relationship with debtor, debtor changed to payments by wire transfers. In doing so, debtor went out of its way to ensure that Virginia Lottery was paid immediately to avoid cut-off in ability to sell tickets with stated intention of going back to normal ticket payment processing when finances stabilized. Wire transfers were outside parties’ ordinary course of business dealings. Wire transfers were unusually activities and resulted in payment being made a day earlier than past dealings. Change was more than mere change in method by which payments were made and reflected change in debtor’s past practice because of current financial conditions. As for payment according to ordinary business terms, Court does not have to find industry standard for payments. Rather, court should determine whether transaction is so unusual as to render it an aberration in the relevant industry. Regulations from other state lotteries indicated that payment by wire transfer is acceptable, or even mandated, method of payment. Virginia regulations provided for payment by wire transfer after a check or draft is dishonored, and regulations allowed Virginia Lottery to designate any other form of payment beyond EFT.
- (6336) *Cage v. Hardy Rawls Enterprises, LLC*, Case No. 11-20534 (5th Cir. 2012) – Payments were outside earmarking defense. Debtor operated car sales business. Debtor would sell car through “seller financing”. Debtor would then pool the contracts and sell those to an investor. Debtor was supposed to collect the payments from the buyers and remit the proceeds to the investor. Evidence indicated that debtor did not do so. Instead, Debtor would continue to pay investor even if the purchaser defaulted, using debtor’s own funds in comingled account. If debtor repossessed and sold car, debtor kept the proceeds and would continue to make monthly payments to investor. Virtually all funds received by debtor, whether from sales, floor plan lenders, or investors, were comingled in single account and used interchangeably for business expenses. There was no evidence that this method of transacting business was either in the ordinary course of the motor vehicle financing arena nor that this particular method was within normal course of business between debtor and investor, particularly where method of dealing with funds was directly contrary to requirements of contract between debtor and investor. Lump sum payments to investor within 90 days of filing were avoidable preferences.
- (6337) *Davis v. Barcom, Inc.*, 2012 SL 37547 (Bankr. E.D. Tn. 2012) – Ordinary Course of Business defense designed to protect customary credit transactions incurred and paid in ordinary course of business of debtor and transferee. Court must consider history of the parties’ dealings, timing, amount at issue, and circumstances of transaction. Court will normally refer to contractual terms compared to dates of transfers, but defendant can rebut presumption with evidence that late payments were in the normal course of business between the

parties. Invoices required payment within 60 days of issuance. Parties had only one transaction prior to transfers at issue, and that was more than 25 months prior to commencement of the case, precluding any finding of “history of late payments”. Payments made more than 91 days and as many as 109 days after invoice were not in the ordinary course of business between parties.

- (6338) *Parker v. Lewis*, 2011 WL 5869610 (Bankr. N.D. Ohio 2011) – Ordinary Course of Business is a transaction incurred and paid in the ordinary course of business of the debtor and the transferee and focuses on transfers that are routine and not atypical. Father’s loan of money to debtor/daughter to purchase car and later repayment of that loan by debtor were not ordinary course. Father did not regularly loan money to daughter. Father obtained money by cash advance on his credit card and debtor repaid part of loan from proceeds of a bonus, neither of which were “ordinary course of business” for the parties. Family relationship does not necessarily defeat “ordinary course of business” but does raise burden of proof to show that loan was actually ordinary course of business and not just a moral obligation.
- (6339) *Stevenson v. Leonard Turowski & Son Funeral Home*, 2011 WL 3290300 (Bankr. E.D. Mi. 2011) – Transfer is not avoidable if (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or (B) made according to ordinary business terms. In determining “ordinary course of business”, court should consider timing, the amount and manner a transaction was paid and the circumstances under which the transfer was made. Transaction can be in the ordinary course of financial affairs even if it is the first such transaction undertaken by the customer if the transaction would not be out of the ordinary for a person in the borrower’s position. Debtor’s use of life insurance proceeds to pay for deceased husband’s funeral expenses was “ordinary course of business”. Family member incurring debt in connection with funeral expenses is “perfectly normal” and it is the ordinary course of business of the funeral home to provide funeral services.

14.86 Defenses – Short Term Loans or Equity Contributions

- (6340) *Sweet v. Rumbold*, Case No 14-3076 (Bankr. E.D. Mi. 2015) – Whether payments by debtor to shareholder were repayments of short term loans consistent with ordinary course of business depended on whether advances by shareholder in first instance were intended as short term loans or were intended as equity contributions. If advances were short term loans, then repayment was in ordinary course of business. If advances were capital contributions, then repayment is not in ordinary course. Whether advance is short term loan or equity contribution depends on whether there is a written note or instrument of indebtedness and, if so, the name used in the document; presence or absence of a fixed maturity date and payment schedule; presence or absence of fixed rate of interest and schedule of interest payments; whether advance are to be repaid solely based on success of business, which indicated equity, or whether repayment is required independent of business success; whether the corporation was adequately capitalized at time of advances; the relationship between the creditor and the entity and whether the advance was made in proportion to ownership interests; whether the creditor received any security for the advances; the corporation’s ability to obtain outside financing; whether the advances were subordinated to claims of outside creditors; extent to which advances were used to acquire capital assets, which indicated equity, or to pay ongoing business obligations, more consistent with debt; and whether the borrower instituted a sinking fund for repayment. Questions presented inherent factual issues precluding summary judgment.
- (6341) *Sweet v. Rumbold & Family, LLC*, Case No 14-3085 (Bankr. E.D. Mi. 2015) – Whether payments by debtor to shareholder were repayments of short term loans consistent with ordinary course of business depended on whether advances by shareholder in first instance were intended as short term loans or were intended as equity contributions. If advances were short term loans, then repayment was in ordinary course of business. If advances were capital contributions, then repayment is not in ordinary course. Whether advance is short term loan or equity contribution depends on whether there is a written note or instrument of indebtedness and, if so, the name used in the document; presence or absence of a fixed maturity date and payment schedule; presence or absence of fixed rate of interest and schedule of interest payments; whether advance are to be repaid solely based on success of business, which indicated equity, or whether repayment is required independent of business success; whether the corporation was adequately capitalized at time of advances; the relationship between the creditor and the entity and whether the advance was made in proportion to ownership interests; whether the creditor received any security for the advances; the corporation’s ability to obtain outside financing; whether the advances were subordinated to claims of outside creditors; extent to which advances were used to acquire capital assets, which indicated equity, or to pay ongoing business obligations, more consistent with debt; and whether the borrower instituted a sinking fund for repayment. Questions presented inherent factual issues precluding summary judgment.

14.87 Defenses – Constructive Notice

- (6342) *Simon v. JPMorgan Chase Bank*, 2011 WL 3701828 (Bankr. E.D. Mi. 2011) – Recorded Claim of Interest was not sufficient to provide constructive notice of unrecorded mortgage. Claim of Interest is not within statutory definition of documents that can be recorded to create constructive notice. Perfection of mortgage requires recording of original mortgage bearing original signatures. Recording of another document that references or reflects mortgage does not constitute notice.

14.88 Particular Transfers – Avoidable

- (6343) *McLane v. Bostater*, 2015 WL 273570 (Bankr. N.D. Ohio 2015) – Debtor has standing to bring action to recover preferential transfer under Section 522(h) where the debtor exempted or could have exempted the property if the trustee had avoided the transfer; the transfer is avoidable by the trustee under Section 547; and the trustee has not attempted to avoid the transfer. Debtor’ claimed garnished funds as exempt with no objection; trustee could have pursued recovery but did not do so, instead filing a report of no assets; and the pre-petition garnishment met all of the requirements of Section 547. Creditor could not avoid recovery by alleging that debts were result of willful and malicious conduct where creditor did not file action to except debt from discharge and discharge had been entered

- (6344) *Parker v. Lewis*, 2011 WL 5869610 (Bankr. N.D. Ohio 2011) – Transfer made within one year of case to debtor’s father was avoidable as preference. Transfer was in payment of prior loan that debtor used to purchase automobile. Although debtor and father signed promissory note and security agreement, parties never noted the lien on the certificate of title. As against bankruptcy estate, father would have been unsecured creditor. Pre-petition payment allowed father to recover more than father would have recovered had the transfer not been made.
- (6345) *Brock v. Branch Banking and Trust Co.*, Case No. 08-5088 (6th Cir. 2010) – Purchase Money Security Interest avoidable under section 547 where the security interest is not properly perfected until more than 20 days after the security interest attached. Lender could not rely on a 20 day “safe harbor” provided by section 547(c)(3) where the security interest was not recorded on the motor vehicle certificate of title until more than 20 days after the financing transaction occurred. Although lender forwarded documents to the Kentucky clerk’s office nine days after the financing transaction occurred, two-week delay by clerk in uploading security interest for recordation with the Kentucky Transportation Cabinet resulted in perfection occurring more than 20 days after the financing transaction. As a matter of Kentucky law, perfection does not happen until physical notation is made on the title. Perfection is not accomplished as or when the required paperwork and fees are submitted to the clerk.
- (6346) *MBNA America Bank v. Meoli*, 561 F.3d 633 (6th Cir. 2009) - Chapter 7 Trustee could recover payments using so-called “convenience checks” as preferential transfers.
- (6347) *Yoppolo v. MBNA America Bank*, 560 F.3d 562 (6th Cir. 2008) – Bank-to-bank transfer of funds constituted avoidable preference. Transfer ordered by Debtor using “convenience check” drawn on second lender to pay loan owed to first lender constituted transfer of interest of Debtor even though Debtor was never in physical control of money transferred. Economic substance of transaction was same as if the bank handed Debtor the currency which Debtor then used to pay the debt.
- (6348) *In re Wells*, 382 BR 355 (6th Cir. BAP 2008) - Bank-to-bank transfer of funds constituted avoidable preference. Transfer ordered by Debtor using “convenience check” drawn on second lender to pay loan owed to first lender constituted transfer of interest of Debtor even though Debtor was never in physical control of money transferred.
- (6349) *In re Ohio Business Machines, Inc.*, 2008 WL 3271090 (6th Cir. 2008) – Debtors use of money in an account jointly owned by Debtor and third-party corporation to acquire essentially worthless stock warrants constituted transfer of Debtor’s interest in property sufficient to sustain a cause of action for preferential transfers. state law fraudulent conveyance. Debtor’s ostensible ownership interest in the account was sufficient to grant Debtor a property interest in the account resulting in the funds transferred being “property of the estate” notwithstanding creditor’s argument that the funds actually belonged entirely to the co-account holder.
- (6350) *Rieser v. Fifth Third Mortgage Company*, 2009 WL 1910967 (Bankr. E.D. Mi. 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Mortgage apparently signed by husband and wife but Certificate of Acknowledgement referenced only the Wife’s name and notary block did not use plural pronouns or language. Trustee could avoid Mortgage as to Husband’s one-half interest. Therefore, mortgage as to husband’s undivided one-half interest deemed to have occurred immediately prior to the commencement of the case, rendering mortgage an avoidable preferential transfer.

14.89 Particular Transfers – Not Avoidable

- (6351) *Kohut v. Rigney*, Case No. 07-6287 (Bankr. E.D. Mi. 2011) –Divorce judgment in 1998 conveyed ex- husband’s property interest in marital homestead to ex-wife. Husband delivered quit claim deed to ex-wife contemporaneously with divorce decree, but Wife failed to record that deed until January, 2007. Delay in recording deed did not leave ex-husband with property interest as that interest ceased to exist by virtue of the divorce decree. Husband’s bankruptcy filing within 90 days of date on which deed was recorded did not result in deed being fraudulent or preferential, because recording of deed did not operate to transfer title or divest debtor of interest in property.
- (6352) *In re Williams*, Case No. 10-53685 (Bankr. E.D. Mi. 2010) – For purposes of Section 547, a writ of garnishment constitutes a transfer that is perfected when the writ is served on the garnishee, not when the money is turned over by the garnishee to the garnishor. Post-petition turnover of Debtor’s State Tax Refund to creditor not avoidable where the writ of garnishment was served on the State more than 90 days pre-petition.
- (6353) *Himmelspach v. Hunter*, Case No. 09-2053 (Bankr. E.D. Mi. 2010) – In action under Section 547(b), Plaintiff must prove (1) transfer; (2) of debtor’s interest in property; (3) to or for the benefit of a creditor; (4) on account of an antecedent debt; (5) made while the debtor was insolvent; (5) made within 90 days of the petition date or within one year if the transferee was an insider; (6) that enables the creditor to receive more than the creditor would have received in a chapter 7 liquidation. Trustee could not avoid fixing of security interest where UCC-1 failed to contain debtor’s full legal name but had a sufficient description to allow one searching the public records to locate the UCC-1 Financing Statement. Although Section 440.9503 requires financing statement to contain the name of the debtor, Section 440.9506 also excuses minor error or omissions that do not make the financing statement seriously misleading. Search of public records using Debtor’s exact name would not disclose financing statement, but search based only on Debtor’s last name or last name and first initial would disclose financing statement. Financing Statement that identified the debtor as “Jon Wardin” instead of Debtor’s legal name, “Jonathan P. Wardin” was not sufficiently misleading that a party conducting a reasonable search would not locate the Financing Statement. As the creditor held valid security interest, any payments to the creditor up to the value of the collateral could not be preferential as a matter of law, as the transfers did not permit the creditor to receive more than the creditor would have received in a hypothetical Chapter 7 case.
- (6354) *Fitzpatrick v. Toyota Motor Credit Corp.*, 2009 WL 2971762 (Bankr. E.D. Tn. 2009) – A secured claim is deemed perfected according

to and at the time dictated by State law. Under Tennessee law, a lien in a motor vehicle is perfected when by delivery to the department or the county clerk of the existing certificate of title, if any, title extension form, or manufacturer's statement of origin and an application for a certificate of title containing the name and address of the holder of a security interest or lien with vehicle description and the required fee. The security interest is perfected as of the date of delivery to the county clerk or the department. When the security interest is perfected, it constitutes notice of all liens and encumbrances against the vehicle described in the security interest to creditors of the owner, to subsequent purchasers and encumbrances. Constructive notice dates from the time of first delivery of the request for the notation of the lien or encumbrance upon the certificate of title by either the department or the county clerk acting as agent for the department, as shown by its endorsements of the date of delivery on the document. The Creditor properly delivered the necessary documents to the appropriate governmental agency. The failure of the governmental agency to note the lien on the certificate of title did not prevent the security interest from being perfected. Further, the later request by the Creditor for a Duplicate Certificate of Title that reflected the lien did not delay perfection of the lien until the date of issuance of the Duplicate Title. Where the original documents were delivered to the appropriate governmental agency well prior to the preference period, the issuance of the Duplicate Title less than 90 days prior to commencement of the Bankruptcy case did not constitute a preferential transfer, as the Duplicate Title did not accomplish either a transfer of title or perfection of a security interest.

- (6355) *St. James, Inc. v. Cananwill, Inc.*, Adv. No. 07-6329 (Bankr. E.D. Mi. 2009) – Transfer of Debtor's right to a refund of unearned premiums paid for Debtor's insurance policies were subject to creditor's security interest. Creditor's receipt of those premiums could not constitute preferential transfer. Creditor provided financing to Debtor for payment of insurance premiums. Security Agreement executed by Debtor and creditor expressly assigned to creditor the right to receive any unearned premiums or other amounts with respect to the policies assigned as security. Creditor's right to receive unearned premiums is vested at the time the policies are funded by the creditor. Creditor's right to receive refunds does not constitute an attempt to assign a mere contingent or future right to unearned insurance premiums. Premium Finance Agreement was governed by M.C.L. Sections 500.1501 – 500.1514 which expressly authorize and permit the creation of a perfect security interests in the right to receive unearned premiums.
- (6356) *Kohut v. New Century Mortgage Corp.*, Case No. 07-13256 (E.D. Mi. 2008) – Mortgage is deemed "recorded" under Michigan law which establishes the date on which creditors and security interest was perfected at the moment when the person who seeks the benefit of the recording laws completes all legal requirements for recording the instrument by delivering the mortgage to the register of deeds in a form that meets the technical requirements of Michigan compiled laws section 565.201 and in the recording fee is paid when the mortgage is left for record. A delay by county officials in performing statutory duty of assigning an official record book and page does not defeat or delay the effective date of the recording for purposes of determining whether the mortgage was recorded within 90 days of the commencement of the bankruptcy case.
- (6357) *Shapiro v. Meridian Automotive Systems, Inc.*, Adv. No. 08-4495 (Bankr. E.D. Mi. 2008) – Potentially preferential transfers made to a Chapter 11 Debtor during pendency of Chapter 11 case and prior to confirmation of Chapter 11 plan constituted administrative expenses of Chapter 11 estate. Transferor's failure to file an administrative claim in the Chapter 11 prior to the administrative claim bar date precluded a later action in the transferor's Chapter 7 bankruptcy proceeding to recover those transfers. Although administrative expense claims are generally limited to matters which directly and substantially benefit the estate, Courts have broadly interpreted Administrative expense claims to include claims based on tort including alleged preferential transfers. Liability on a preferential transfer claim is an ordinary cost of doing business, just as are product liability claims and claims for personal injury and, therefore, qualify as administrative expense claims which are waived if not asserted in the Chapter 11 proceeding.

14.90 Claim Following Avoidance of Transfer

- (6358) *In re Book*, 2015 WL 6153695 (Bankr. N.D. Ohio 2015) – Section 502(h) allows party against whom trustee prevailed in action to avoid transfer to file a claim against estate. Damages are measured by amount of loss to creditor as result of avoidance. Prior to commencement of case, co-owner purchased debtor's one half interest in property for \$35,000 but did not record deed. Co-owner recorded deed 6 years later and only one month before debtor filed bankruptcy. Transfer was effective as to the estate on date deed was recorded, transfer was made as result of payment by co-owner years earlier that resulted in liability of debtor until deed transferred, and co-owner did not pay any consideration at time of transfer, allowing transfer to be avoided as preference. Co-owner settled with Trustee by purchasing debtor's one-half interest for \$30,000, and then file claim for \$35,000 the amount originally paid by co-owner. Court concluded that creditor's damages were measured by the amount paid as a result of the preference, which was \$30,000.00.

E. Post-Petition Transfers – Section 549

14.91 Elements

- (6359) *Joseph and David Johnsman Ltd. v. Egbert*, 2015 WL 4873014 (Bankr. N.D. Ohio 2015) – Section 549 allows the court to avoid a transfer of property of the estate that occurs after commencement of case and is not authorized by the Court or the Code. Avoidance requires (i) that property of the bankruptcy estate must have been transferred; (ii) the transfer must have occurred after commencement of the case; and (iii) the transfer must not have been otherwise authorized by the court or the Bankruptcy Code. Sale in ordinary course of business does not need court approval, but sale outside ordinary course is subject to approval under Section 363. Debtor, a farming partnership, sale of a large part of its equipment and cows, was outside ordinary course and debtor did not seek court approval for sale.
- (6360) *Mostoller v. Bowens*, 2014 WL 2198135 (Bankr. E.D. Tn. 2014) – Section 549 allows avoidance and recovery of transfer of property of estate that occurs after commencement of case and is not authorized by court. Recovery can be either the property transferred or the value of the property transferred, and can be recovered from the initial transferee or any immediate or mediate transferee. Trustee must prove that transfer occurred; that transfer was of property of estate; that transfer occurred after commencement of case; and that transfer

was not authorized. Fact that transfer was not authorized is presumed. Motion for summary judgment denied where record was not clear whether transfer occurred prior to or subsequent to commencement of case and where it was not clear whether assets transferred were property of corporate debtor or were property of second entity that was also owned by debtor's principal.

- (6361) *Sloan v. Anderson*, 2013 WL 9539539 (Bankr. S.D. Ohio 2013), *aff'd* 2014 WL 1978917 (6th Cir. BAP 2014) – Surplus proceeds remaining from post-petition foreclosure sale of debtor's non-exempt property are property of estate. Debtor's retention of third party to recover surplus proceeds without disclosing existence of proceeds to trustee, and with the third party retaining those proceeds and ultimately paying those proceeds (less the third party fees) constituted avoidable post-petition transfer of property of estate.
- (6362) *Gold v. Nova World International, LLC*, 2013 WL 1340201 (Bankr. E.D. Mi. 2013) – Section 549 allows a trustee to avoid any transfer of property of the estate that occurs after commencement of the case and that is not authorized under Section 303(f) or Section 542(c) or otherwise authorized by the court. Debtor made avoidable transfers of estate property post-petition by paying invoices for services rendered by defendant post-petition, although defendant fully performed and sent invoices pre-petition. In involuntary case, trustee cannot avoid any transfer made after commencement but before the entry of the order for relief to the extent the transfer was payment for services rendered by the defendant after commencement of the case but before entry of the order for relief. Defendant did not prove that defendant performed any services after commencement of case. Although invoices were issued after commencement but before entry of order for relief, evidence indicated that defendant had completed all services prior to commencement of case.
- (6363) *Ray v. Irving*, 2012 WL 2317767 (Bankr. E.D. Tn. 2012) – Under Section 549(a), the trustee may avoid a transfer of property of the estate that occurs after the commencement of the case; and that is not authorized under the Code or by the court. There are three requirements for avoidance under Section 549(a): (1) a transfer of property of the estate; (2) that occurred after the commencement of the case; and (3) that was not authorized by any provision of the Bankruptcy Code or by the court.
- (6364) *In re Wengerd*, 2010 WL 3257835 (Bankr. N.D. Ohio 2010) – Trustee ordinarily can avoid transfer of property of the estate that occurs after commencement of the case and that was not authorized by Order of Court.
- (6365) *Browning v. Dyno Nobel, Inc.*, 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 549 allows the trustee to avoid a transfer of property of the estate (1) that occurs after the commencement of the case; and (2)(A) that is authorized only under section 303(f) or 542(c) or (B) that is not authorized under this title or by the court. Defendant's lack of notice of the filing at the time of the transfer does not apply as Section 549 excludes only good faith purchasers of real estate and does not protect sellers of goods. Payments for good sold to debtor after the filing of the case for goods purchased on a "cash on delivery" basis were avoidable transfers under Section 549.
- (6366) *Steed v. Morgan*, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 549 permits the Court to recover any transfer of property of the estate that occurs post-petition. After Debtor filed for relief, Debtor transferred \$225,000 to Debtor's "significant other" which she used to purchase a house. Judgment entered against "significant other" for \$225,000 transferred post-petition.
- (6367) *Buckeye Check Cashing, Inc., v. Meadows*, 396 BR 485 (6th Cir. 2008) - Property of estate consists of all legal or equitable interests of the Debtor in property as of the commencement of the case, including all money in Debtor's checking account as of the moment of commencement. Creditor's post-petition presentment of Debtor's check (received pre-petition) did not violate Automatic Stay pursuant to 11 USC Section 362(b)(11). Creditor did not violate the automatic stay when the creditor refused to return to the Debtor the proceeds received as a result of the post-petition presentment. When the creditor lawfully presented the check and received the proceeds, the proceeds ceased to be property of estate. Therefore, creditor's refusal to return the funds did not constitute an attempt by creditor to assert dominion or control over property of estate. Correct cause of action would have been to recover proceeds as post-petition transfer pursuant to Section 549.

14.92 Jurisdiction

- (6368) *Icenhower v. Diaz-Barba*, 2014 WL 3978491 (9th Cir. 2014) – United States Bankruptcy Court has exclusive jurisdiction over property of estate regardless of where located. Court could exercise jurisdiction over property in Mexico that debtor transferred post-petition in violation of Section 549.

14.93 Defenses

- (6369) *Richardson v. McCollins*, Case no. 08-3766 (Bankr. W.D. Mi. 2013) – Defense under Section 549(b) did not apply as transfer by debtor was voluntary. Exception under Section 549(c) that protects certain good faith purchasers did not apply where deed reflected total consideration of \$1.00 which was far less than fair value. To extent transfer was also done in satisfaction of antecedent debts, satisfaction of antecedent debts does not constitute present equivalent value under Section 549(c).
- (6370) *Ray v. Irving*, 2012 WL 2317767 (Bankr. E.D. Tn. 2012) – Defendant can assert as defense a right of set off to the extent of counterclaims brought by defendants against Trustee or Estate. Defendants' argument is essentially a defense to the avoidance claim, that the transfers of tobacco by the Debtor to Joseph Irving may not be avoided because the Trustee authorized the Debtor to sell tobacco on behalf of the estate. If the Defendants are correct that the Trustee authorized the Debtor to conduct sales on behalf of the bankruptcy estate, then the Trustee cannot prevail on his avoidance claim since the transfers must be unauthorized to be subject to avoidance. If on the other hand the Debtor had no authority to act on behalf of the estate, then the transfers are avoidable, assuming that the tobacco sold was property of the estate and there is no other basis for authorization. Thus, the transfers were either authorized contracts on behalf of the estate or they were not. This court knows of no authority—and none has been cited—for the proposition that an action by a trustee to avoid an unauthorized transfer by the debtor constitutes a breach of a contract that the debtor had no authority to enter into. Consequently, the defendant's breach of contract counterclaim must be dismissed except to the extent that it is a denial that the transfers were unauthorized.

Alleged negligence of Trustee in failure to supervise, monitor, or otherwise limit the Debtor's authority, and the Trustee's failure to monitor payments made by buyers for purchased is not defense to action under Section 549. Trustee is not seeking recovery against the Defendants for losses caused by the Debtor or sustained by the bankruptcy estate. Section 549 allows the trustee to avoid specified post-petition transfers, whether or not they deplete the estate. Fraud by the debtor and good faith on the part of the transferee are irrelevant to the application of this section. Defense based on Tennessee Consumer Protection Act requires proof that (1) that the defendant engaged in an unfair or deceptive act or practice declared unlawful by the TCPA and (2) that the defendant's conduct caused an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated. Trustee is not bound by actions of Debtor. Debtor's conduct cannot constitute unfair and deceptive trade practice by Trustee.

- (6371) *Barbacci v. Wengerd*, 2010 WL 3257835 (Bankr. N.D. Ohio 2010) – Section 549(c) prevents avoidance of post-petition transfer of real property where the transferee is a good faith purchaser without knowledge of the commencement of the case; the transfer is for fair equivalent value; and the Trustee had not recorded a copy of the bankruptcy petition with the county recorder of deeds. Bankruptcy Petition is not a “complaint” for purposes of Ohio statute that provides that a complaint acts as a *lis pendens* for purposes of placing parties on record notice. Even if a complaint in an Adversary Proceeding would comply with Ohio law and constitute a *lis pendens*, the transfer happened before any adversary proceedings were filed.
- (6372) *Browning v. Dyno Nobel, Inc.*, 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Defendant's lack of notice of the filing at the time of the transfer does not apply as Section 549 excludes only good faith purchasers of real estate and does not protect sellers of goods.

14.94 Defenses – Statute of Limitations

- (6373) *Manty v. Bougie*, 2014 WL 2025124 (Bankr. D. Mn. 2014) – Statute of limitations under Section 549 equitably tolled where debtor failed to list either property or mortgage on property in schedules. Mortgage was not recorded until after debtor received discharge, although debtor owned property and had signed mortgage some time prior to filing for relief. Debtor's failure to disclose property equitably tolled statute until trustee discovered property allowing trustee to avoid mortgage recorded post-petition and sell the debtor's interest in the property free and clear of the lien.
- (6374) *Sloan v. Anderson*, 2013 WL 9539539 (Bankr. S.D. Ohio 2013), *aff'd* 2014 WL 1978917 (6th Cir. BAP 2014) – Statute of Limitations under Section 549 is the earlier of two years from the date of the transfer to be avoided or the closing of the case. Although case closed before adversary filed, statute of limitations would be equitably tolled and complaint would be considered timely where debtor failed to schedule property or to disclose that foreclosure sale conducted post petition after grant of stay relief generated substantial surplus proceeds. Proceeds were themselves property of estate but were not disclosed to Trustee prior to closing of case. Equitable tolling applies when, through either active or passive concealment, the trustee does not learn critical facts necessary to timely file avoidance action. While equitable tolling generally focuses on conduct of the defendant, equitable tolling can also apply where it was the actions of the debtor, not the defendant, that caused delay in discovery by trustee.

14.95 Defenses - Involuntary Petitions

- (6375) *Gold v. Nova World International, LLC*, 2013 WL 1340201 (Bankr. E.D. Mi. 2013) – Section 549 allows a trustee to avoid any transfer of property of the estate that occurs after commencement of the case and that is not authorized under Section 303(f) or Section 542(c) or otherwise authorized by the court. Debtor made avoidable transfers of estate property post-petition by paying invoices for services rendered by defendant post-petition, although defendant fully performed and sent invoices pre-petition. In involuntary case, trustee cannot avoid any transfer made after commencement but before the entry of the order for relief to the extent the transfer was payment for services rendered by the defendant after commencement of the case but before entry of the order for relief. Defendant did not prove that defendant performed any services after commencement of case. Although invoices were issued after commencement but before entry of order for relief, evidence indicated that defendant had completed all services prior to commencement of case.

14.96 Particular Transfers Avoidable

- (6376) *Richardson v. McCollins*, Case no. 08-3766 (Bankr. W.D. Mi. 2013) – Evidence indicated that property had been transferred by debtor to defendant after debtor filed for relief under Chapter 11. Debtor scheduled property in Schedule A at outset of case and paid taxes and upkeep and other expenses on the property post-petition. Further, evidence indicated that debtor did not deliver the deed to the defendant until post-petition. Transfer of property by deed is not effective until deed is delivered by transferor and accepted by transferee, regardless of stated date on deed itself. Defense under Section 549(b) did not apply as transfer by debtor was voluntary. Exception under Section 549(c) that protects certain good faith purchasers did not apply where deed reflected total consideration of \$1.00 which was far less than fair value. To extent transfer was also done in satisfaction of antecedent debts, satisfaction of antecedent debts does not constitute present equivalent value under Section 549(c).
- (6377) *Ray v. Irving*, 2012 WL 2317767 (Bankr. E.D. Tn. 2012) – Amended complaint stated cause of action. Complain described in sufficient detail transfers to the Defendants that took place after the Debtor's bankruptcy case was filed, and which are alleged to be unauthorized transfers of property of the estate. Amended complaint alleged facts indicating that the Defendants received the transferred property directly from the Debtor and suggesting that they had dominion over the property such that they are initial transferees within the contemplation of Section 550. Complaint alleged that after commencement of Chapter 11 proceeding and before appointment of Trustee, debtor allowed insiders to sell crops belonging to the debtor and to retain the proceeds of the sales without paying the proceeds to the debtor. Insider's actions in selling assets and retaining proceeds constituted action to obtain possession and control of property of estate in violation of Code.
- (6378) *Browning v. Dyno Nobel, Inc.*, 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 549 allows the trustee to avoid a transfer of property

of the estate (1) that occurs after the commencement of the case; and (2)(A) that is authorized only under section 303(f) or 542(c) or (B) that is not authorized under this title or by the court. Defendant's lack of notice of the filing at the time of the transfer does not apply as Section 549 excludes only good faith purchasers of real estate and does not protect sellers of goods. Payments for good sold to debtor after the filing of the case for goods purchased on a "cash on delivery" basis were avoidable transfers under Section 549.

- (6379) *Steed v. Morgan*, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 549 permits the Court to recover any transfer of property of the estate that occurs post-petition. After Debtor filed for relief, Debtor transferred \$225,000 to Debtor's "significant other" which she used to purchase a house. Judgment entered against "significant other" for \$225,000 transferred post-petition.

14.97 Particular Transfers Not Avoidable

- (6380) *Rushton v. Bank of Utah*, Case no. 11-098 (10th Cir. BAP 2012) – Action to recover property transferred post-petition in violation of automatic stay dismissed where recovery would not produce any net benefit to the estate. At time of petition, bank had number of loans to debtor secured by pledge of Certificate of Deposit. Post-petition, and in violation of stay, Bank set off against CDs in partial payment of loan. Trustee brought action against Bank to recover amount of CD, alleging that bank's setoff was improper post-petition transfer. Court held that if the transfer is set aside, the parties must be restored to their prior positions, which would leave the bank with a security interest in the certificate of deposit that was not sufficient to pay the loan in full. Restoration of the CD to the estate would not leave estate with any equity or interest in the CD as the amount of the loans exceeded the value of the CD.
- (6381) *In re Fleming*, 424 BR 795 (Bankr. W.D. Mi. 2010) – Trustee cannot recover property from the debtor pursuant to Section 549 where the debtor has already transferred that property to a third party. Section 550, which provides the remedy for post-petition transfers, allows recovery only from the transferee. Nothing in Section 550 implies that the transferor who no longer owns or holds the property can nonetheless be required to turn that property over to the Trustee.

14.98 Persons Liable – Debtors

- (6382) *Sloan v. Anderson*, 2013 WL 9539539 (Bankr. S.D. Ohio 2013), *aff'd* 2014 WL 1978917 (6th Cir. BAP 2014) – Debtors were not liable for post-petition avoidable transfer of proceeds of property of estate where evidence indicated that debtors did not receive any of the proceeds. All of the proceeds were paid to third party hired to recover funds and then paid to third party and later disbursed to principal of third party.

14.99 Persons Liable - Transferees

- (6383) *Sweet v. Chambers*, 2015 WL 5728844 (E.D. Mi. 2015) – Section 550 allows trustee to recover property transferred or value of property transferred in trustee's discretion.
- (6384) *Icenhower v. Diaz-Barba*, 22014 WL 3978491 (9th Cir. 2014) – Section 549 prohibits recovery from purchaser of real estate in good faith and without notice of the commencement of the case and for present fair equivalent value. Bankruptcy Code, not law of location of property, controls determination of good faith. Purchaser did not act in good faith where although seller of Villa was corporation, purchase price was reduced to account for debt that corporate principal owed buyer; purchaser was on notice of bankruptcy and of possibility of litigation to avoid transfer of Villa from debtor to Corporate seller; Villa was corporation's sole asset; sale was not authorized by shareholder resolution; and buyer paid most of the consideration to entities other than seller including entity associated with buyers.
- (6385) *Sloan v. Anderson*, 2013 WL 9539539 (Bankr. S.D. Ohio 2013), *aff'd* 2014 WL 1978917 (6th Cir. BAP 2014) – Surplus proceeds remaining from post-petition foreclosure sale of debtor's non-exempt property are property of estate. Third party that recovered and then retained proceeds liable as transferee of post-petition transfer. Principal of third party recovery company also liable for proceeds transferred by recovery company to principal individually as "mediate transferee".
- (6386) *Ray v. Irving*, 2012 WL 2317767 (Bankr. E.D. Tn. 2012) – To the extent a transfer is avoidable under Section 549, the trustee may recover the property, or the value of the property, from the initial transferee of such transfer or the entity for whose benefit such transfer was made; or any immediate or mediate transferee of such initial transferee. An "initial transferee" is generally the party who receives a transfer of property directly from the debtor and has dominion or control over the property.

F. Reformation of Loan Documents

14.100 Standing

- (6387) *DeGirolamo v. U.S. Bank*, 2009 WL 2827949 (Bankr. N.D. Ohio 2009) – As a matter of State law, one who does not hold the Mortgage is not entitled to bring an action to reform the Mortgage. Acquisition of the Mortgage after commencement of an action to reform the mortgage cannot cure a lack of standing in the first instance. In Bankruptcy, however, where the Trustee brought the action, the Defendant can bring as a defense a request for reformation of the mortgage to clarify the ownership and extent of the lien. Standing in Bankruptcy Court is not limited by State Court, and Bankruptcy Court will construe standing as appropriate to adjudicate merits of claims before it.

14.101 Requirements

- (6388) *Moretti v. Bank of New York Mellon*, 2015 WL 1036450 (6th Cir. 2015) – Reformation of contract based on innocent misrepresentation requires proof of (1) a representation in a transaction between two parties; (2) that is false; (3) that actually deceives the other party; (4) that the other party relied on; (5) that the other party suffered damage from; and (6) the party making the misrepresentation benefitted from

it. Although debtor may have been a bit confused about terms of loan as modified, there was no evidence of any false representation regarding loan modification agreement.

- (6389) *Chrysler Group, Ltd. v. Eagle Auto-Mall Corp.*, 2015 WL 4887593 (E.D. Mi. 2015) – Deliberately prepared and executed agreement is strongly presumed to reflect true intention of parties, especially between counseled businessmen. Reformation requires high order of evidence that agreement does not reflect agreement actually made by contracting parties.
- (6390) *Junk v. Citimortgage, Inc.*, 2014 WL 2985937 (Bankr. S.D. Ohio 2014) – Mortgage can be reformed only if reformation would not adversely affect rights of third parties such as bona fide purchasers and judgment lien holders. Under Section 544, debtors hold rights and powers of BFP and hypothetical judgment lien creditor. Bankruptcy court would grant stay relief to allow creditor to pursue reformation leaving to state court issue of whether reformation would adversely affect bona fide purchaser for value.
- (6391) *Bank of New York v. Sheeley*, 2014 WL 1233094 (S.D. Ohio 2014) – Mortgage with incorrect legal description cannot reform mortgage to correct description if doing so would adversely affect rights of third parties who parted with value and without notice of the error. Lender cannot reform mortgage where doing so would adversely affect trustee's right to avoid mortgage under strong arm powers as bona fide purchaser under section 544.
- (6392) *JP Morgan Chase Bank, NA v. Winget*, 901 F.Supp.2d 955 (E.D. Mi. 2012), *reversed*, 2015 WL 728060 (6th Cir. 2015) – Reformation of contract due to mutual mistake is equitable remedy. Michigan law allows court to reform contract if the written instrument fails to express the intention of the parties because of mutual mistake. Mutual mistake is an erroneous belief shared by and relied on by both parties involving a material fact that affects the substance of the transaction and is in existence at the time the contract is executed. Reformation can also be awarded where one party was acting under mistake and other party knew of mistake but conceals the truth. Reformation not warranted where contract was clear and unambiguous and negotiated by sophisticated and well-represented parties in arms-length transaction. Contract is ambiguous only where language is reasonably susceptible to more than one interpretation, not merely because one party disputed meaning of contractual term.
- (6393) *Smoky Mountain Title, Inc. v. Tennessee State Bank*, 2012 WL 122539 (Bankr. E.D. Tn. 2012) – Court of equity can reform instrument or deed where it fails to reflect true intention of parties., where error resulted from mutual mistake or where one party's mistake was induced by fraud of other party. Plaintiff failed to allege any defects or mistakes in the deed or mortgage themselves, but only in the process by which those documents were recorded. Reformation cannot be used to correct recording errors.
- (6394) *DeGirolamo v. U.S. Bank*, 2009 WL 2827949 (Bankr. N.D. Ohio 2009) – Reformation of a mortgage is governed by State law where the property is located. Ohio law permits reformation of a mortgage where there is an error, omission or other defect by reason of inadvertence of an officer, party, person or "body corporate". The mortgage can be reformed to give effect to the true, manifest intention of the parties. The fact that the error was made by the party now seeking reformation does not defeat the ability of the Court to reform the instrument.

14.102 Statute of Limitations

- (6395) *Hensley v. Associates First Capital Corp.*, 2013 WL 4505908 (E.D. Ky. 2013), *aff'd*, 2014 WL 4251567 (6th Cir. 2014) – Under Kentucky law, action to reform mortgage must be brought within 5 years of discovery of error or, in any event, within 10 years of execution of allegedly erroneous document. Document executed in March, 2000, action for reformation filed October, 2010, more than 10 years after execution. Even if action first raised in amended complaint could date back to initial complaint, which was filed less than 10 year after execution, plaintiff failed to demonstrate that error was not and could not have been discovered before initial 5 year limitation period expired.

14.103 Laches

- (6396) *DeGirolamo v. U.S. Bank*, 2009 WL 2827949 (Bankr. N.D. Ohio 2009) - Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. The elements of a laches defense are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for such delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party. Although more than two years passed from the execution of the mortgage to the institution in State Court to reform the mortgage, there was no evidence as to when the creditor actually discovered the error or any other evidence of undue delay. Further, the Trustee cannot demonstrate any prejudice resulting from the delay as Trustee would have been required to deal with the issue whether the Creditor had brought the action earlier or later. Absent evidence of undue delay and prejudice, Creditor's claim for reformation was not barred by laches.

G. Effect of Avoidance

14.104 Preservation for Benefit of Estate

- (6397) *Tribble v. Wells Fargo Bank, N.A.*, Case No. 10-80005 (Bankr. W.D. Mi. 2011) – Mortgage containing incorrect legal description does not provide record notice to defeat Trustee's standing as bona fide purchaser. Mortgage incorrectly referenced Lot 6 when debtor actually owned Lot 5. Nothing in mortgage would put hypothetical purchaser on notice that mortgage that unequivocally stated "Lot 6" was actually intended as mortgage on Lot 5. Avoided mortgage is preserved for benefit of estate.
- (6398) *Smith v. U.S. Bank*, 2010 WL 3277795 (Bankr. E.D. Ky. 2010) – Avoidance of unrecorded security interest in mobile home did not vest mobile home in debtor free and clear of avoided lien. Avoided lien is preserved for the benefit of the estate and the estate has full power and authority to enforce the lien.

- (6399) *In re Neal*, 424 BR 235 (Bankr. E.D. Mi. 2010) – Unrecorded Mortgage avoided by Chapter 7 Trustee under Section 544 does not affect relative priority of lien. Avoidance only transfers ownership of the mortgage from the mortgagee to the Trustee, who has full authority to then enforce the mortgage. Trustee can either foreclose the mortgage or, alternatively, exercise power to sell property of the estate. The mortgage as avoided preserves its status vis-à-vis debtors' claimed exemptions. Where the mortgage is superior to the exemptions, the Trustee is entitled to full satisfaction of the mortgage before remitting to the Debtors the value of the exemptions.

14.105 Damages

- (6400) *Rodriguez v. Daimler Chrysler Financial Americas, LLC*, Case No. 09-1332 (10th Cir. 2010) – Section 551 permits Trustee to avoid security interest and preserve interest for benefit of estate. Section 550 permits the Trustee to recover either the property transferred or the value of the property transferred. Although Section 550 and section 551 are not mutually exclusive, Court will not award relief under Section 550 where avoidance of lien under Section 551 is adequate to make the estate whole. Relief under Section 550 is appropriate where avoidance of lien does not produce recovery for estate, such as where underlying property has been destroyed or sold. Lender whose lien was avoided could not also be charged with value of the lien itself as doing so would amount to a double recovery for the estate.

14.106 Good Faith Purchaser – Section 550 Lien

- (6401) *Joseph and David Johnsman Ltd. v. Egbert*, 2015 WL 4873014 (Bankr. N.D. Ohio 2015) – Good faith purchaser for value can assert lien against avoided transfer to extent that purchaser incurred costs to improve the property after the date of the transfer.
- (6402) *Icenhower v. Diaz-Barba*, 22014 WL 3978491 (9th Cir. 2014) – Section 549 prohibits recovery from purchaser of real estate in good faith and without notice of the commencement of the case and for present fair equivalent value. Bankruptcy Code, not law of location of property, controls determination of good faith. Purchaser did not act in good faith where although seller of Villa was corporation, purchase price was reduced to account for debt that corporate principal owed buyer; purchaser was on notice of bankruptcy and of possibility of litigation to avoid transfer of Villa from debtor to Corporate seller; Villa was corporation's sole asset; sale was not authorized by shareholder resolution; and buyer paid most of the consideration to entities other than seller including entity associated with buyers.

XV. Collateral Attack – Final Orders

A. Parties Bound

15.1 Successor Trustee

- (6403) *Solomon v. Duncan*, 2009 WL 1421115 (6th Cir. 2009) – Chapter 7 Bankruptcy Trustee cannot use Rule 60 to collaterally attack a Chapter 11 sale order that had become final before Trustee was appointed. While in Chapter 11, Debtors sought permission to sell assets to satisfy creditors. One condition of sale was a release of all claims against co-founder of Debtor which was agreed to by the unsecured creditors committee. Court approved sale which included release of cofounder. After subsequent conversion of case, chapter 7 Trustee sought to bring action against cofounder alleging that he owed the estate over \$1 million. Court concluded that the release in the Sale Order barred the Chapter 7 Trustee's claims. Chapter 7 Trustee failed to set forth any basis to set aside the sale order under Rule 60 as all parties in interest were present at the hearing on the sale order and had the opportunity to object to the release on the record and an opportunity to be heard at the hearing to consider the sale order and no party filed an appeal of that order. Arm's-length negotiation and agreement between well represented parties does not constitute unusual or extreme situation where principles of equity mandate relief. The Chapter 7 Trustee is bound by the res judicata nature of the Sale Order entered prior to appointment of the Trustee.

B. Particular Orders

15.2 Confirmation Order

- (6404) *Travelers Indemnity Co. v. Bailey*, 129 S.Ct. 2195 (2009) – Debtor's confirmed Chapter 11 Plan included release of Debtor's insurers and precluded any subsequent actions against the insurance companies including any actions based on the conduct of the insurers themselves. Where Court's Order confirming Debtors Chapter 11 Plan was not timely appealed and the order became final, terms were binding on all parties even if the Confirmation Order included provisions that, had an objection been raised to confirmation, would have prevented confirmation. An order which became final is no less preclusive in effect merely because the attack on the order is based on the Court's alleged lack of underlying subject matter jurisdiction – "[e]ven subject-matter jurisdiction ... may not be attacked collaterally." Confirmation Order which included provision had long become final and could not be collaterally attacked.
- (6405) *Storey v. Pees*, Case No. 07-8049 (6th Cir. BAP 2008) – Trustee's Motion to Modify confirmed plan based on pre-confirmation miscalculation of plan length would be denied. Under section 1327, a confirmation order is res judicata and not subject to collateral attack. Section 1329 permits the plan to be modified for one of four specific reasons. Section 1329 sets no standard as to when a post confirmation modification is permitted. Section 1327 precludes modification of a confirmed plan under section 1329 to address issues that were or could have been decided at the time the plan was originally confirmed. Modification under section 1329 is limited to matters that arise post confirmation and is based on the premise that, during the life of the plan, circumstances may change, and parties should have the ability to modify the plan accordingly. Trustee would not be permitted to modify plan to address an issue that could have been decided that confirmation had the trustee or an unsecured creditor with an allowed claim objected.

15.3 Sale Orders

- (6406) *Solomon v. Duncan*, 2009 WL 1421115 (6th Cir. 2009) – Chapter 7 Bankruptcy Trustee cannot use rule 60 to collaterally attack a Chapter 11 sale order that had become final before Trustee was appointed. While in Chapter 11, Debtors sought permission to sell assets to satisfy creditors. One condition of sale was a release of all claims against co-founder of Debtor which was agreed to by the unsecured creditors committee. Court approved sale which included release of cofounder. After subsequent conversion of case, chapter 7 Trustee sought to bring action against cofounder alleging that he owed the estate over \$1 million. Court concluded that the release in the Sale Order barred the Chapter 7 Trustee’s claims. Chapter 7 Trustee failed to set forth any basis to set aside the sale order under Rule 60 as all parties in interest were present at the hearing on the sale order and had the opportunity to object to the release on the record and an opportunity to be heard at the hearing to consider the sale order and no party filed an appeal of that order. Arm’s-length negotiation and agreement between well represented parties does not constitute unusual or extreme situation where principles of equity mandate relief. The Chapter 7 Trustee is bound by the res judicata nature of the Sale Order entered prior to appointment of the Trustee.
- (6407) *Lewis v. McClatchey*, 2009 WL 1372945 (Bankr. S.D. Ohio 2009) - Proper procedure for contesting validity of Bankruptcy Court order approving sale of property is by appeal of that order within 10 days of entry. Court lacked jurisdiction over sale once sale order became final without any timely appeal and could not be collaterally attacked in adversary proceeding.
- (6408) *Winget v. JP Morgan Chase Bank*, 537 F.3d 565 (6th Cir. 2008) – Claim is barred by res judicata if (1) a final decision on the merits has been reached by a Court of competent jurisdiction; (2) a subsequent action is brought between the same parties or their privies; (3) the issue in the subsequent action was or should have been actually litigated in the prior action; and (4) the current cause of action is identical to the cause of action in the prior case. Creditor precluded by doctrine of res judicata from challenging a bankruptcy sale in the bankruptcy Court had previously entered an order approving the proposed sale and that order had become final and non-appealable. A bankruptcy Court order authorizing sale of part of the estate constitutes a final judgment on the merits for res judicata purposes.

15.4 Criminal Convictions

- (6409) *Behrens v. U.S.*, 2014 WL 4942308 (8th Cir. BAP 2014) – Debtor cannot use bankruptcy proceeding to collaterally attack validity of criminal conviction. After being convicted and sentenced to prison and restitution, debtor filed chapter 7 and filed adversary contending that government’s prosecution that lead to conviction violated Federal Court Receivership Order that stayed litigation; and that continued efforts to collect restitution violated Section 362. Adversary complaint did nothing more than mount collateral attack on conviction warranting dismissal.

XVI. Closed Cases

A. Reopening and Reinstatement

16.1 Reopening or Reinstatement of Dismissed Case

- (6410) *In re Simo*, Case No. 14-54373 (Bankr. E.D. Mi. 2015) – Reopening of case to add unscheduled creditor unnecessary where Trustee filed report of no distribution. Because case was “no asset” case, unscheduled debt is discharged to same extent it would have been discharged if properly scheduled. Court lacked any ability to grant additional relief if case is reopened.
- (6411) *In re Crew*, Case No. 15-43067 (Bankr. E.D. Mi. 2015) – Reinstatement denied where motion did not allege any palpable defect by which court was misled in entering order of dismissal. Debtor was not eligible under Section 109 where debtor did not receive re-petition credit counseling until 2 days after case filed.
- (6412) *Smith v. Silverman*, 2011 WL 1901040 (2d Cir. 2011) – Court would not reinstate dismissed case to permit debtor to file action against chapter 7 trustee and trustee’s attorney for failure to pursue assets. Underlying claims were entirely without merit, such that reopening case would be futile effort. Chapter 7 trustee is immune from suit for personal liability for acts taken as a matter of business judgment in acting in accordance with statutory or other duty or complying with orders of Court. Trustee’s decision not to pursue actions were well within scope of business judgment.

16.2 Reopening Case

- (6413) *In re Saputo*, Case No. 10-51920 (Bankr. E.D. Mi. 2015) – Motion to reopen case to add omitted creditor denied where Chapter 7 was “no asset” case in which no claims bar date was established. Reopening case would serve no useful purpose and underlying debt has already been discharged.
- (6414) *Farrell v. US Bank, NA*, Case No. 15-10559 (E.D. Mi. 2015) – Decision to reopen closed case is committed to sound discretion of bankruptcy court. Debtor’s motion to reopen case to allow debtor to seek damages against lenders for evicting debtor after foreclosure. Debtor had previously filed actions in both state and federal court seeking relief from foreclosure proceedings, all of which were decided adverse to debtor. There did not appear to be any further relief that bankruptcy court could afford where issues were previously fully and finally litigated in other forums.
- (6415) *In re Duckett*, 2015 WL 5002522 (Bankr. N.D. Ohio 2015) – Section 350 allows court to reopen case to administer assets, accord relief to debtor, or for other cause. Reopening case is ministerial act that has no independent legal significance and determines nothing with respect to merits. However, where court cannot grant any effective relief if case is reopened, court will deny request to reopen. Court lacked authority to afford debtor relief where, after conclusion of bankruptcy case, mortgage holder commenced foreclosure proceedings, obtained state court judgment and sold property, and State Court also denied debtor’s Motion to Dismiss Fraudulent Foreclosure as issues regarding lender’s standing to foreclose had already been raised and decided in state court. Debtor sought to reopen bankruptcy case to again contest mortgage holder’s standing to foreclose. *Rooper-Feldman* precludes losing party in state court from asking federal court to

review correctness of decision. Debtor lost in state court and was complaining of injuries caused by state court judgments entered before debtor sought relief in federal court, and debtor was essentially asking federal court to determine whether state court had correctly determined standing to foreclose.

- (6416) *In re Merlo*, Case No. 14-54368 (Bankr. E.D. Mi. 2015) – Court will not reopen case where court cannot afford relief. Motion to reopen for purposes of entering into reaffirmation agreement denied where court lacked authority to approve reaffirmation. Section 524 requires reaffirmation agreement to be executed within 60 days of date first set for 341 meeting, and to be filed with the court prior to entry of a discharge. Court cannot extend deadline on request first filed after deadline has already expired.
- (6417) *In re Smith*, 2015 WL 3455356 (Bankr. N.D. Ohio 2015) – Court will not reopen case where court cannot afford any relief even if case is reopened. Reaffirmation agreements must be filed no later than 60 days after date first set for 341 meeting. Where deadline passed without debtor or creditor filing reaffirmation agreement, court lacked authority to approve reaffirmation even if case reopened. Rule 4004 allows court to extend deadline but only on motion to extend filed before expiration of initial deadline and in any event requires reaffirmation agreements to be “made” before entry of the discharge. Reaffirmation agreement is made when agreement is signed by both debtor and creditor. Parties did not sign reaffirmation agreement before discharge precluding entry of an order approving the reaffirmation. Court also would not vacate discharge to permit making and filing of untimely reaffirmation notwithstanding equities of situation and potential hardship faced by debtor as there is no basis in the Code to vacate a discharge on request of the debtor or for purposes of executing a reaffirmation agreement.
- (6418) *In re Grunas*, Case No. 14-53813 (Bankr. E.D. Mi. 2015) – Court would deny motion to reopen case where court could not afford debtor effective relief even if case reopened. Debtor sought to reopen case to redeem vehicle. Deadline to redeem is, at most, 45 days after commencement of case. Debtor did not meet deadline and court lacked authority under Section 521 to extend time where debtor did not file motion to extend until after deadline had already expired.
- (6419) *In re Shear*, 2015 WL 1246046 (Bankr. N.D. Ohio 2015) – Court would re-open case to allow debtor to file certificate of post-petition financial management class. Time between closing of case and request to re-open was not unduly long and debtor timely took the financial management course.
- (6420) *In re Quinn*, 2015 WL 535533 (Bankr. N.D. Ohio 2015) – Section 350 allows court to reopen case to administer assets, to accord relief to the debtor or for other cause. Grant or denial of request is in sound discretion of court. Debtor request to enforce discharge injunction is common basis to reopen case. Reopening case does not itself grant relief but provides procedural platform for merits of issue to be resolved. Motion stated at least colorable basis for relief from violation of discharge injunction. While creditor disputes debtor’s assertions, court would not resolve disputed facts or resolve merits in ruling on reopening case.
- (6421) *In re Plusfunds Group, Inc.*, 2015 WL 249790 (2d Cir. 2015) – Motion to reopen case is vested in discretion of bankruptcy court. However, court should set forth reasons for granting or denying motion. Action remanded to bankruptcy court to determine whether any party would suffer prejudice if case is reopened.
- (6422) *In re Reis Borough Building, LLC*, 2014 WL 5529604 (Bankr. W.D. Mi. 2014) – Court would not reopen case to enforce a stipulation between debtor and creditor where the stipulation was signed before dismissal but not approved by Court as of date of dismissal. Court would be reluctant to exercise post-dismissal jurisdiction particularly where parties have adequate remedies in state court.
- (6423) *In re Oglesby*, 2014 WL 5113587 (Bankr. N.D. Ohio 2014) – Section 350 allows case to be reopened to administer assets, to accord relief to debtor, or for other cause. Debtor does not have absolute right to reopen case and court can use equitable powers to determine whether to reopen case taking into account the substantive issues involved rather than just technical considerations. Court will not reopen case where court cannot afford relief to moving party; or where reopening case would unduly prejudice affected creditor. Court reopened case to allow debtor to file motion to avoid judicial liens impairing exemptions. While debtor was fully aware of judicial lien during pendency of case and had full knowledge of ability to avoid lien, debtor failed to do so before case closed. Debtor then delayed until after creditor expended significant effort and expense to foreclose judicial lien in state court, which amounted to unreasonable delay where motion to avoid lien could have been filed while case was opened or at much earlier date than when motion actually filed. However, prejudice to creditor could be avoided by conditioning reopening of case on debtor’s payment of creditor’s attorney fees incurred after closing of debtor’s case in state court efforts to foreclose lien. This condition eliminates prejudice to creditor and affords debtor opportunity to attempt to strip lien where that remedy, if available, could have been achieved before case closed, such that creditor’s substantive right to contest merits were unaffected.
- (6424) *In re Millan*, 2014 WL ____ (Bankr. D.P.R. 2014) – Debtor’s failure to obtain credit counseling or to obtain waiver mandated dismissal of case. Debtor’s Motion to set aside dismissal denied as Motion did not demonstrate any basis for relief under Rule 60 to strike first case as case was validly commenced although it was then dismissed for failure to obtain credit counseling or waiver.
- (6425) *In re Wilson*, Case No. 13-41923 (Bankr. E.D. Mi. 2014) – Court normally will not re-open case to address dischargeability of omitted creditor. However, where creditor arguably asserted a claim that could fall within scope of Section 523(a)(6), court would reopen case at request of debtor for purposes of allowing debtor or creditor to file adversary to determine whether debt is excepted from discharge.
- (6426) *In re Steward*, 2014 WL 1356558 (Bankr. W.D. Mi. 2014) – Court can reopen case at request of debtors to add omitted creditors where reopening provides opportunity for further relief by court. While unsecured claims are normally discharged in no-asset Chapter 7, discharge does not affect debt of unsecured creditor where debt falls within scope of Section 523(a)(2), (4), or (6). Debtor can reopen case to add unsecured creditor for purposes of having bankruptcy court, rather than state court, rule on dischargeability of debt under Section 523(a)(2), (4) or (6). Complexities of jurisdictional overlaps and nature of controversy being within court’s (at least) concurrent

jurisdiction constitutes cause under Section 350 to reopen the case.

- (6427) *In re Caswell*, 2014 WL 1364835 (Bankr. W.D. Mi. 2014) – Motion to Set Aside Final Decree denied as there is no basis to set aside a final decree. Party can seek to reopen case if motion demonstrates basis to reopen under Rule 9024, but naked allegation that case was closed “erroneously” does not demonstrate intake, inadvertence, surprise or excusable neglect. Further, Chapter 7 Trustee lacks standing to seek to reopen case. When case was closed, Trustee was discharged and no longer represented any interest in the case. While UST may have standing to reopen case, Chapter 7 trustee lacks any financial or pecuniary interest in case other than, perhaps, the hope that if the case is re-opened, the UST will re-appoint the Trustee in the reopened case.
- (6428) *In re Stahl*, 2014 WL 1329551 (Bankr. N.D. Ohio 2014) – Case may be reopened to administer assets. Decision to re-open case is committed to sound discretion of bankruptcy court. Case will be reopened only where there is some additional relief that can be afforded by court. Case reopened at request of Chapter 7 Trustee to administer undisclosed personal injury action. Debtor’s schedules stated that debtor did not have any liquidated or unliquidated claims of any nature. Trustee’s report of no distribution and order closing case did not work abandonment of undisclosed asset. Case reopened to allow Chapter 7 Trustee to capture proceeds of litigation settlement.
- (6429) *In re Pool*, 2014 WL 1024029 (Bankr. N.D. Ohio 2014) – Court has discretion to reopen case as reopening case is ministerial act that has no independent legal significance. However, court will not reopen case to add omitted creditor where there is no potential relief available to the moving party. Court would not reopen Chapter 7 that was closed as no asset case, as doing so would not afford debtor any relief. Creditors were advised not to file claims and court never set claims bar date. Debt was not of the type described in Section 523(a)(2), (4) or (6) and so was discharged regardless of whether creditor was scheduled or not. Although debtor also sought to reopen case to seek sanctions for violation of discharge injunction, Motion did not identify creditor against whom sanctions would be sought or the nature of any conduct that debtor contended was a violation. Absent some factual allegations of the nature of the debt, the nature of the actions of creditor, and the identity of creditor, court could not determine whether there existed any basis to reopen case.
- (6430) *In re McKinnie*, 2013 WL 6154206 (Bankr. E.D. Mi. 2013) – Court will not reopen case where re-opening would not serve useful purpose. Debtor’s request to re-open case to seek sanctions against Sallie Mae for post-discharge collection of student loans would not produce any benefit as debtor never filed adversary to have debts declared dischargeable. Student loans pass through bankruptcy unaffected unless debtor brings adversary proceeding under Section 523(a)(8). Court would grant motion of debtor seeks to reopen case for purpose of filing Section 523 action to discharge debts as undue hardship.
- (6431) *Underhill v. Huntington National Bank*, 2014 WL 4435977 (6th Cir. 2014) – Post-petition claim of wholly owned subsidiary that arose post-petition was not property of estate, such that settlement proceeds ultimately paid to Debtor were not property of estate and did not have to be surrendered to trustee. Although conduct leading to litigation started pre-petition conduct did not cause any harm or damage to debtor or debtor’s corporation until months after the petition was filed, at a time when the corporation’s suppliers actually cut off supplies to corporation at the behest of a competitor. Action against competitor did not ripen into cause of action until supplier acted on that information as, until that point, conduct of competitor caused no harm or damage such that debtor an corporation could not have maintained any cause of action against competitor.
- (6432) *In re Trombley*, 2013 WL 4417425 (E.D. Mi. 2013) – Section 350 allows court to reopen case to administer assets, to accord relief to the debtor, or for other cause. Court correctly denied motion to reopen where request to reopen was for purposes of rearguing matters that were already adequately addressed in prior order that had not been appealed. Party cannot use reopening of case to collaterally attack otherwise final and non-appealable orders.
- (6433) *In re Hoffman*, 2013 WL 3155591 (Bankr. N.D. Ohio 2013) - Court would not re-open case for purposes of filing reaffirmation agreement. Rules required reaffirmation agreements to be executed before entry of discharge. Evidence indicated that reaffirmation agreement was not executed until after Debtor filed motion to reopen. As Court lacked ability to enter any order approving the reaffirmation agreement and lacked any ability to grant any effective relief, Motion to Reopen would be denied.
- (6434) *In re Newell*, 2013 WL 3049296 (Bankr. N.D. Ohio 2013) - Court would not re-open case for purposes of filing reaffirmation agreement. Rules required reaffirmation agreements to be executed before entry of discharge. Evidence indicated that reaffirmation agreement was not executed until after Debtor filed motion to reopen. As Court lacked ability to enter any order approving the reaffirmation agreement and lacked any ability to grant any effective relief, Motion to Reopen would be denied.
- (6435) *In re Parthemore*, 2013 WL 3049291 (Bankr. N.D. Ohio 2013) – Court would not re-open case for purposes of filing reaffirmation agreement. Rules required reaffirmation agreements to be executed before entry of discharge. Evidence indicated that reaffirmation agreement was not executed until after Debtor filed motion to reopen. As Court lacked ability to enter any order approving the reaffirmation agreement and lacked any ability to grant any effective relief, Motion to Reopen would be denied.
- (6436) *In re Sadoski*, 2013 WL 2481532 (Bankr. N.D. Ohio 2013) – Court would not re-open case for purposes of filing reaffirmation agreement. Rules required reaffirmation agreements to be executed before entry of discharge. Evidence indicated that reaffirmation agreement was not executed until after Debtor filed motion to reopen. As Court lacked ability to enter any order approving the reaffirmation agreement and lacked any ability to grant any effective relief, Motion to Reopen would be denied.
- (6437) *In re Owsley*, 2013 WL 2352604 (Bankr. E.D. Tn. 2013) – Section 350 allows court to reopen case to administer assets, to accord relief to the debtor, or for other cause. Reopening case grants no relief. Court should only reopen case where moving party demonstrates compelling reason to do so. The longer the time between closing and the motion to reopen, the more compelling the reason must be. Court should not reopen case where court cannot grant effective relief to moving party. Pre-BAPCPA version of Section 523(a)(5) allowed for discharge of domestic support obligations only where the debt, while denominated as child support, was in fact not such; or where the debt

had been assigned to an entity other than a governmental entity Debtor's pre-petition child support obligation had been assigned to the state for purposes of recovering amounts advanced to former spouse constituted obligation assigned to governmental unit that was not dischargeable. Treatment of obligation as unsecured in confirmed plan did not make debt dischargeable at end of Plan. Personal liability for unpaid child support is unaffected by discharge in Chapter 13 case. Nothing in the plan purported to determine dischargeability of debt. Plan merely addressed how debt would be paid during term of plan. Court would not reopen case for purposes of allowing debtor to bring contempt action against State where debt had not been discharged and State actions were, therefore, not violation of discharge injunction. Reopening would be futile act as debtor was not entitled to any relief.

- (6438) *In re Wright*, Case No. 12-47606 (Bankr. E.D. Mi. 2012) – Motion to Reopen Case to allow filing of reaffirmation agreement denied as court lacked ability to grant meaningful relief. Reaffirmation Agreement must be made before discharge. Reaffirmation agreement indicated it was signed by parties well after entry of discharge. As such, reaffirmation agreement was unenforceable as a matter of law.
- (6439) *In re Collum*, 2012 WL 2921491 (Bankr. N.D. Ohio 2012) – Court would re-open case closed without a discharge to permit debtor to file certificate regarding post-petition financial management course, contingent on debtor's payment of fee to re-open case.
- (6440) *Smyth v. Edamerica, Inc.*, Case No. 11-8035 (6th Cir. BAP 2012) – Section 350 allows court to reopen case to grant relief to debtor. Court will not reopen case where court lacks ability to grant additional relief or where reopening would be pointless. Debtor's Motion to Reopen Chapter 7 Case to declare student loans to be discharged denied as court could not grant effective relief. Fact that debtor listed student loans on Schedule F and received discharge does not discharge student loans where debtor did not file adversary proceeding and did not otherwise request finding of undue hardship. Debtor's reliance on *Espinosa* misplaced, as *Espinosa* was Chapter 13 case that turned on confirmation of plan, neither of which occurred in this Chapter 7 case.
- (6441) *In re Cooper*, 2012 WL 1605950 (Bankr. N.D. Ohio 2012) – Section 350 allows Court to reopen case to afford relief to debtor or for other "cause". Case would be reopened to allow debtor to complete financial management education course and file certificate, at which point debtor would be entitled to discharge. However, to extent debtor sought to reopen case to add omitted creditor, case was closed as no asset case. Therefore, the court could not grant any additional relief and motion, to that extent, denied as unnecessary.
- (6442) *In re Mausolf*, Case No. 11-58499 (Bankr. E.D. MI. 2012) – Motion to Reopen Bankruptcy Case to File Reaffirmation Agreement denied. Section 542 requires reaffirmation agreement to be signed before entry of discharge. Reaffirmation Agreement debtor sought to file was signed by debtor more than 3 months after entry of the discharge and signed by creditor 4 months after entry of discharge could not constitute enforceable reaffirmation agreement. Therefore, there was no reason to reopen the case.
- (6443) *Republic Bank & Trust Co. v. Hutchinson*, 444 BR 728 (W.D. Ky. 2011) – Court has jurisdiction to reopen closed Chapter 7 case to administer previously undisclosed asset. Creditor has standing to request reopening if creditor can prove existence of unadministered asset.
- (6444) *In re Hopkins*, 2011 WL 1542079 (Bankr. E.D. Tn. 2011) – Court clerk erroneously closed case prior to filing of final report or discharge of trustee. Case would be reopened to allow Trustee to continue to liquidate assets and pursue recoveries for unsecured creditors.
- (6445) *In re Price*, Case No. 10-44070 (Bankr. E.D. Mi. 2010) - Chapter 7 case reopened, discharge vacated, and case dismissed where Debtor failed to pay filing fees in two prior Chapter 7 cases notwithstanding Court's Order to pay those fees within specified time.
- (6446) *In re R & D Contracting, LLC*, Case No. 02-43540 (Bankr. E.D. Mi. 2008) - Court clerk closed case prematurely while there was a pending fee application. Court reopened case for purposes of adjudicating fee application.
- (6447) *In re Staten*, Case No. 08-60408 (Bankr. E.D. Mi. 2009) - Motion to Reopen Closed Case under Section 350(b) to file Financial Management Course Certificate denied where Debtor was not eligible to be a Debtor under Section 109(h)(1) as Debtor failed to obtain pre-petition credit counseling until 3 days after case commenced.

16.3 Reopening Adversary Proceeding

- (6448) *Credit Union One v. Maddox*, Case No. 15-4786 (Bankr. E.D. Mi. 2015) – Motion to Reopen Adversary Proceeding is motion under Rule 60. Motion failed to state basis to reopen adversary under Rule 60(b)(1) where motion did not demonstrate that dismissal resulted from excusable neglect. Factors to consider include danger of prejudice to other party; length of delay and impact on judicial proceedings; reason for the delay; whether the delay was within control of late party; and whether late party acted in good faith. Court dismissed adversary proceeding to except debt from discharge where plaintiff failed to appear either at a hearing on creditor's motion for 2004 exam or for the Initial Scheduling Conference in the adversary. Creditor demonstrated that reinstatement would cause minimal prejudice and that there was no impact on judicial proceedings as motion was brought within 10 days of dismissal, which does not indicate delay in filing motion. There was no allegation of bad faith in creditor's failure to attend hearings or in prosecution of Motion to Reopen Adversary Proceeding. However, creditor was culpable in causing dismissal, where failure to attend multiple hearings was allegedly the result of employee turnover at attorney's office and failure of attorney's staff member to properly calendar hearings. Court had issued scheduling order well before assistant's absence in September and law firm knew that there was problem with calendaring system where attorney had failed to attend hearing on rule 2004 motion 10 days prior to scheduling conference and court had entered order denying creditor's motion at that time which should have prompted law firm to review file to determine if there were additional hearings scheduled. Law firm also should have known of scheduling conference because law firm had prepared Rule 26(f) report 11 days prior to the scheduling conference. Culpable conduct of law firm outweighs lack of prejudice or bad faith. Although counsel's action was neglect, it was not excusable for purposes of Rule 60 relief.

16.4 Filing Fee

- (6449) *In re Gibbs*, 2015 WL 1915522 (Bankr. N.D. Ohio 2015) – Court denied motion to waive fee to reopen case to allow debtor to take post-petition financial management class and file Form 23. Miscellaneous Fee Schedule adopted by Judicial Conference requires filing fee to reopen case when case has been closed without discharge, with limited exceptions not applicable in this case. 28 USC Section 1930 allows court to waive filing fees, but fee to reopen case is not “filing fee” as the fee is not “payable to the clerk upon the commencement of a case under chapter 7”. Court otherwise has discretion to waive filing fee “under appropriate circumstances”. Where debtor seeks to reopen after failing to file certification of completing of course in personal financial management, debtor must provide specific facts to explain why he did not file the certification within the time permitted, such as medical or personal reasons that prevented debtor from attending course; or inability to find agency to provide certificate. Debtor must then explain why the problem was not addressed in a timely manner by filing pleading prior to expiration of deadline in Rule 1007. Although debtor testified that debtor had minimal income, debtor failed to provide any explanation for his failure to take financial management class before case closed. Case filed in November, 2007 and closed in March, 2008. Debtor claimed that his failure to take financial management class was due to accident in South Carolina that critically injured his brothers, but debtor’s testimony was that the accident occurred in the Summer of 2007, months before bankruptcy case ever filed.
- (6450) *In re Shear*, 2015 WL 1246046 (Bankr. N.D. Ohio 2015) – Court would not waive filing fee to reopen case where debtor had gross income of \$3,190 per month which allowed debtor to pay fee. Debtor’s statement that he lacked ability to pay was based in part on daughter’s tuition expense which was daughter’s expense, without which debtor had wherewithal to pay filing fee in full..
- (6451) *In re Godlove*, 2014 WL 2525855 (Bankr. N.D. Ohio 2014) – Court can waive filing fee to reopen case where based on alleged violation of discharge injunction. Motion stated that debtor sought to reopen case to file adversary proceeding to seek relief from creditor who violated discharge injunction.
- (6452) *In re Brady*, 2012 WL 3870441 (Bankr. N.D. Ohio 2012) – Reopening fee must be paid when reopening case, unless waived by court. Court can waive fee to permit complaint under Rule 4007; or when debtor alleges violation of discharge injunction; or when reopening is necessary to correct administrative error. Debtor’s request to reopen case to deal with judicial liens recorded immediately before filing is not an action to deal with the discharge but is merely attempt to remedy debtor’s pre-petition oversight for failing to avoid the liens during the case. Debtor did not allege that creditor did anything that would constitute violation of discharge injunction.
- (6453) *In re Russ*, Case No. 12-44482 (Bankr. E.D. Mi. 2012) – Motion to Reopen Case to allow filing of reaffirmation agreement denied where reopening case would serve no purpose. Under Section 524(c)(1), reaffirmation agreement must be made before granting of discharge under Section 727. Record indicted that reaffirmation agreement was not signed by both debtor and creditor prior to entry of discharge. Therefore, Court could not approve reaffirmation agreement even if case were re-opened.
- (6454) *In re Kissinger*, 2011 WL 2632856 (Bankr. W.D. Mi. 2011) – Court could not waive filing fee to reopen case to allow debtor to file Certificate of Financial Management Class. Guidelines promulgated by Judicial Conference specifically prohibit waiving filing fee to reopen a case where the court declined to enter a discharge because debtor failed to certify completion of financial management program. Court would give debtor additional time to pay the filing fee and have case reopened.
- (6455) *In re Gibson*, Case No. 10-63612 (Bankr. E.D. Mi. 2010) - Debtor's Motion to pay filing fee to reopen case in installments denied as unnecessary. Case will not be reopened unless and until debtor pays the filing fee and Court will not consider any other motions filed in the case until case is re-opened. Order permitting debtor to pay filing fee in installments would be of no effect.
- (6456) *In re Baumler*, 2010 WL 3585412 (Bankr. N.D. Ohio 2010) – Waiver of filing fees is specifically addressed by 28 U.S.C. Section 1930(f). Subsection (f)(1) does not apply to fee to reopen case as that fee is not a fee “payable to the clerk upon the commencement of a case under chapter 7”. Subsection (f)(2) grants a bankruptcy court authority to waive other filing fees for in forma pauperis debtors. Court would not grant a waiver where reopening was necessary to deal with a judgment lien that was recorded prior to the bankruptcy filing and could have been addressed before the case closed. Debtors failed to produce evidence that debtors would meet the standards for proceeding in forma pauperis where one year passed since the case was filed and Debtors' financial situation has most likely changed.
- (6457) *In re Arini*, Case No. 04-74744 (Bankr. E.D. Mi. 2010) – Request to waive filing fee to reopen case denied. Motion failed to state any legal basis on which Court could waive filing fee in connection with a Motion to Reopen Case.
- (6458) *In re Scales*, Case No. 09-58926 (Bankr. E.D. Mi. 2010) – Court lacked authority to waive filing fee to re- open case where Court did not waive initial filing fee and debtor paid that fee.
- (6459) *In re Kinsey*, Case No. 09-34245 (Bankr. N.D. Ohio 2009) – Motion to Waive Filing Fee to Re-open Case for purposes of filing post-petition Certification regarding post-petition financial management course denied. Party seeking substantive relief required to pay filing fee before case can be re-opened. Judicial Conference generally prohibits waiver of the filing fees due upon filing a motion to reopen a case except where reopening is necessary either to correct an administrative error by the clerk or the court itself or to commence an action relating to discharge. Court can waive the filing fee if a debtor qualifies for in forma pauperis status under 28 U.S.C. § 1930(f) and an application completed on the appropriate Official Form is filed and granted. Debtors do not qualify for IFP status where debtor has income significantly greater than 150% of the income official poverty line as defined by the Office of Management and Budget for a household of the debtor's size.
- (6460) *In re Matthews*, Case No. 09-51127 (Bankr. E.D. Mi. 2009) - Court lacks authority to waive filing fee in connection with Motion to Reopen Case.

- (6461) *In re Isquith*, Case No. 08-66945 (Bankr. E.D. Mi. 2009) - Debtor who seeks to reopen case for purpose of filing Certificate of Financial Management Course must pay filing fee before case can be reopened.

XVII. Post-Petition Financial Management Education

A. Requirement

17.1 Generally

- (6462) *In re Denger*, 2009 WL 2824872 (Bankr. N.D. Ohio 2009) - After filing for bankruptcy relief, an individual debtor seeking to obtain a discharge under Chapter 7 of the Bankruptcy Code is required to complete an instructional course concerning personal financial management and must file with the Court a statement regarding completion of the course. A debtor who does not file with the court the requisite statement is subject to having their case administratively closed without the entry of a discharge.

17.2 Waiver of Requirement

- (6463) *In re Johnson*, Case No 09-65523 (Bankr. E.D. Mi. 2015) – Motion to Allow Debtor to be excused from financial management class denied where there was no evidence that motion was filed by anyone authorized to act on behalf of debtor. Debtor died during pendency of chapter 13 case and plan was completed by his co-debtor/spouse. Motion on behalf of deceased debtor must be filed by personal representative appointed by the probate court. There was no evidence that party filing motion was either the personal representative or the attorney for the personal representative.
- (6464) *In re Fogel*, 507 BR 734 (Bankr. D. Colo. 2014) – Post-petition financial management class cannot be taken by anyone other than debtor. Debtor passed away during chapter 13 case. Although debtor (and the estate) completed all payments under the plan, debtor could not take financial management course and there is no authority in code for class to be taken by debtor’s widow as personal representative of the estate. Motion to waive financial management class denied and case dismissed.
- (6465) *In re Graham*, Case No. 09-59610 (Bankr. E.D. Mi. 2012) – Court would excuse deceased debtor from financial management requirement. Section 109(h)(4) allows excusal where debtor is “disabled”. Death is “ultimate disability”.
- (6466) *White v. Glennville Bank*, 2011 WL 3426166 (Bankr. S.D. Ga. 2011) – Debtor who died before completing post-petition debtor education program not entitled to discharge. There is no “death” exception to Section 1328(g)(1).
- (6467) *In re DiMarco*, Case No. 08-46204 (Bankr. E.D. Mi. 2011) – Motion to Excuse Debtor From Compliance with Instructional Course Concerning Personal Financial Management Course based on death of debtor denied without prejudice as filed by a person without standing. Motion was filed by attorney. At death of debtor, attorney’s authority to act terminated. Motion must be signed by personal representative of the debtor’s estate, as the only person with authority to act on behalf of the debtor.
- (6468) *In re Denger*, 2009 WL 2824872 (Bankr. N.D. Ohio 2009) – Debtor’s completion of a Financial Management Court can be waived only if (1) the United States Trustee determines for a particular judicial district that a waiver of the course is appropriate; or (2) if the debtor is incapacitated by mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; or is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing; or (3) is on active military duty in a military combat zone. Debtor’s incarceration in a correctional facility does not constitute any of the three grounds for waiver. If Debtor cannot complete the Financial Management course while incarcerated, Debtor can, after being released, move the Court to reopen the case to file the statement regarding the financial management course, at which time Debtor could receive the discharge.

17.3 Attendance by Person Other Than Debtor

- (6469) *In re Ebert*, 2011 WL 5908944 (Bankr. N.D. Ohio 2011) – Duty to attend post-petition financial management class is non-delegable duty. Purpose of course is to help debtor avoid financial difficulties in the future. Allowing third party to attend in lieu of debtor defeats that purpose. Debtor-husband could not attend financial management course on behalf of debtor-wife by acting under “power of attorney”. Wife’s failure to attend financial management course leaves her ineligible for discharge.

B. Failure to Obtain

17.4 Closing Case Without Discharge

- (6470) *In re Ebert*, 2011 WL 5908944 (Bankr. N.D. Ohio 2011) – Wife’s failure to attend financial management course leaves her ineligible for discharge.
- (6471) *In re Amos*, 08-54842 (Bankr. E.D. Mi. 2009) - Case closed without discharge due to Debtor's failure to file required Certification of Completion of Post-petition Instructional Course Concerning Financial Management. Court would grant relief and enter the discharge upon Debtor filing Motion to Reopen Case and paying \$260 filing fee.
- (6472) *In re Staten*, Case No. 08-60408 (Bankr. E.D. Mi. 2009) - Motion to Reopen Closed Case under Section 350(b) to file Financial Management Course Certificate denied where Debtor was not eligible to be a Debtor under Section 109(h)(1) as Debtor failed to obtain pre-petition credit counseling until 3 days after case commenced.
- (6473) *In re Denger*, 2009 WL 2824872 (Bankr. N.D. Ohio 2009) - After filing for bankruptcy relief, an individual debtor seeking to obtain a discharge under Chapter 7 of the Bankruptcy Code is required to complete an instructional course concerning personal financial

management and must file with the Court a statement regarding completion of the course. A debtor who does not file with the court the requisite statement is subject to having their case administratively closed without the entry of a discharge.

17.5 Reopening Closed Case

- (6474) *In re Millan*, 2014 WL ____ (Bankr. D.P.R. 2014) – Debtor’s failure to obtain credit counseling or to obtain waiver mandated dismissal of case. Debtor’s Motion to set aside dismissal denied as Motion did not demonstrate any basis for relief under Rule 60 to strike first case as case was validly commenced although it was then dismissed for failure to obtain credit counseling or waiver.
- (6475) *In re Collum*, 2012 WL 2921491 (Bankr. N.D. Ohio 2012) – Court would re-open case closed without a discharge to permit debtor to file certificate regarding post-petition financial management course, contingent on debtor’s payment of fee to re-open case.
- (6476) *In re Cooper*, 2012 WL 1605950 (Bankr. N.D. Ohio 2012) – Section 350 allows Court to reopen case to afford relief to debtor or for other “cause”. Case would be reopened to allow debtor to complete financial management education course and file certificate, at which point debtor would be entitled to discharge.

XVIII. Judicial and Trustee Immunity

A. Judicial Immunity

18.1 Generally

- (6477) *In re Chaban*, 2015 WL 5026079 (E.D. Mi. 2015) – State court judge enjoys judicial immunity for judicial acts unless judge’s actions are not made in judicial capacity or when judicial action is taken in complete absence of all jurisdiction. State court judge who imposed sanctions against debtor after debtor filed bankruptcy acted within judicial capacity. Judge did not lack all jurisdiction in entering sanctions. Acts may be in excess of jurisdiction but not entirely without jurisdiction and so are protected by judicial immunity. Imposition of sanctions was not violation of stay, but even if state court had acted in violation of stay, actions would have been merely in excess of jurisdiction and not entirely without jurisdiction and so are protected by immunity. State court judge had proper jurisdiction over all state court proceedings that culminated in imposition of sanctions and imposition of stay did not divest court entirely of any jurisdiction over action whatsoever.
- (6478) *Kilgore-Wilson v. Delk*, 2014 WL 4929252 (W.D. Tn. 2014) – Bankruptcy Judge and chambers staff are entitled to absolute immunity for actions taken in course of duties. Only exceptions are where conduct occurs when person is not acting as judge, or when conduct alleged, although judicial in nature, is taken in complete absence of all subject matter jurisdiction. Complaint against judge based on orders entered in separate bankruptcy case dismissed.
- (6479) *J. Edward Kloian Foundation v. Findling*, 2013 WL 6859143 (E.D. Mi. 2013) – Judge performing judicial function is absolutely immune for suit, even if judge acts erroneously, maliciously or in excess of authority. Judicial immunity can be overcome only where actions are not taken within judicial capacity, or actions are taken in complete absence of all jurisdiction. Complaint sought damages based on alleged erroneous rulings was squarely within scope of judicial immunity.
- (6480) *Garza v. Isgur*, 2012 WL 3696480 (S.D. Ohio 2012), *report and recommendation after objection*, 2012 WL 4107895 (S.D. Ohio 2012) - Complaint against Bankruptcy Judge for actions taken in course of adversary proceeding dismissed based on judicial immunity.

B. Trustee Immunity

18.2 Generally

- (6481) *Kilgore-Wilson v. Delk*, 2014 WL 4929252, *order adopted*, 2014 WL 4929256 (W.D. Tn. 2014) – Chapter 13 Trustee’s staff attorney entitled to absolute immunity for actions taken in course of Chapter 13 case.
- (6482) *In re McKenzie*, 2013 WL 4046289 (E.D. Tn. 2013) – Party seeking to institute litigation against bankruptcy trustee in non-bankruptcy forum must apply to the appointing court for leave to file suit. Complaint filed in State Court alleging that Trustee acted outside scope of authority did not obviate need for bankruptcy court permission to file suit. Creditor compounded error by failing to dismiss State Court Action after bankruptcy court denied permission to prosecute that action. Creditor’s actions in commencing action and actions in failing to dismiss constituted contempt of the bankruptcy court for which sanctions were appropriate. Further, trustee has quasi-judicial immunity for any actions taken in course and scope of role as trustee, and trustee has the right to raise that defense without seeking prior relief from the bankruptcy court on the issue of course and scope. Trustee’s action against defendants to recover money, while unsuccessful, was undoubtedly undertaken as representative of and on behalf of estate for purposes of immunity.
- (6483) *Lunan v. Jones*, 489 BR 711 (Bankr. E.D. Tn. 2013) – Chapter 7 trustee is entitled to broad immunity for suits when acting within scope of authority and pursuant to court order. All actions taken by trustee were pursuant to bankruptcy court orders, and Trustee is provided absolute immunity in carrying out the terms of court orders. Further, under *Barton* doctrine, Bankruptcy court must give prior approval before party can sue Chapter 7 Trustee in non-bankruptcy forum for actions taken by Trustee in official capacity and within trustee’s authority as officer of court. State court complaint clearly fell within *Barton* standard as contesting Trustee’s actions in seizing and selling assets pursuant to orders of court and within official capacity and authority as officer of court and consistent with primary duty of Chapter 7 trustee to collect and reduce to money property of the estate.
- (6484) *Anderson v. Banks*, 2012 WL 3637910 (Bankr. E.D. Tn. 2012) – Trustee has a duty to investigate the financial affairs of the Debtor and to take action to recover assets for the benefit of the estate. The pursuit of the claims to recover property that is allegedly property of the

estate and for damages for malpractice against Debtor's prior counsel constitute actions taken within the scope of the Trustee's duties. Although the Trustee was unsuccessful, because the prosecution of the lawsuit was within the scope of his duties, the Trustee is entitled to immunity. Where Trustee is immune from action, counsel for the Trustee is also immune. However, actions taken by attorneys as counsel for debtor are not entitled to immunity. Where attorneys for debtor subsequently become attorneys for Trustee following appointment of trustee, attorneys are entitled to immunity only for actions taken in capacity as attorney for Trustee. Court must evaluate each allegedly wrongful action to determine scope of authority when action taken to determine whether counsel is immune.

- (6485) *Anderson v. Banks*, 2012 WL 1851007 (Bankr. E.D. Tn. 2012) – Trustee has a duty to investigate the financial affairs of the Debtor and to take action to recover assets for the benefit of the estate. The pursuit of the claims to recover property that is allegedly property of the estate and for damages for malpractice against Debtor's prior counsel constitute actions taken within the scope of the Trustee's duties. Although the Trustee was unsuccessful, because the prosecution of the lawsuit was within the scope of his duties, the Trustee is entitled to immunity. Where Trustee is immune from action, counsel for the Trustee is also immune. Trustee is not entitled to immunity because his actions were *ultra vires*. Standing to raise the *ultra vires* exception to the *Barton* doctrine requires the aggrieved party to be the owner of the property tortiously taken and requires a physical taking. Complaint against Trustee and counsel based on Trustee's pursuit of actions to recover property would be dismissed based on Trustee immunity notwithstanding that underlying actions were decided adverse to Trustee.
- (6486) *Bowers v. Banks*, 2012 WL 3597389 (Bankr. E.D. Tn. 2012) – Trustee has a duty to investigate the financial affairs of the Debtor and to take action to recover assets for the benefit of the estate. The pursuit of the claims to recover property that is allegedly property of the estate and for damages for malpractice against Debtor's prior counsel constitute actions taken within the scope of the Trustee's duties. Although the Trustee was unsuccessful, because the prosecution of the lawsuit was within the scope of his duties, the Trustee is entitled to immunity. Where Trustee is immune from action, counsel for the Trustee is also immune.
- (6487) *Bowers v. Banks*, 2012 WL 1717857 (Bankr. E.D. Tn. 2012) – Trustee has a duty to investigate the financial affairs of the Debtor and to take action to recover assets for the benefit of the estate. The pursuit of the claims to recover property that is allegedly property of the estate and for damages for malpractice against Debtor's prior counsel constitute actions taken within the scope of the Trustee's duties. Although the Trustee was unsuccessful, because the prosecution of the lawsuit was within the scope of his duties, the Trustee is entitled to immunity. Where Trustee is immune from action, counsel for the Trustee is also immune. Trustee is not entitled to immunity because his actions were *ultra vires*. Standing to raise the *ultra vires* exception to the *Barton* doctrine requires the aggrieved party to be the owner of the property tortiously taken and requires a physical taking. Complaint against Trustee and counsel based on Trustee's pursuit of actions to recover property would be dismissed based on Trustee immunity notwithstanding that underlying actions were decided adverse to Trustee.
- (6488) *Smith v. Silverman*, 2011 WL 1901040 (2d Cir. 2011) – Court would not reinstate dismissed case to permit debtor to file action against chapter 7 trustee and trustee's attorney for failure to pursue assets. Underlying claims were entirely without merit, such that reopening case would be futile effort. Chapter 7 trustee is immune from suit for personal liability for acts taken as a matter of business judgment in acting in accordance with statutory or other duty or complying with orders of Court. Trustee's decision not to pursue actions were well within scope of business judgment.
- (6489) *Warren Investments, Inc. v. General Casualty of Wisconsin*, Case No. 10-7092 (Bankr. E.D. Mi. 2011) *aff'd*, 2011 WL 3319864 (E.D. Mi. 2011) – Chapter 7 Trustee is liable in personal capacity only for willful and deliberate acts. Proposed Amended Complaint that sought to allege gross negligence of trustee did not state cause of action for willful and deliberate act and would be dismissed.

18.3 Limitations

- (6490) *In re Vistacare Group, LLC*, 678 F.3d 218 (3d Cir. 2012) – Party seeking to file action in non-bankruptcy forum against bankruptcy trustee for acts done in official capacity must first obtain leave of bankruptcy court under *Barton* doctrine. A judgment against a trustee would be satisfied out of trust property without regard to rights of other creditors, leaving the party bringing suit the ability to obtain an advantage over other claimants. Although *Barton* has not been expressly codified, 28 USC Section 959 allows suits against trustees for actions in carrying on business connected to trust property. By implication, any action against a trustee other than for actions in carrying on business require prior court approval. Court approval warranted where Plaintiff demonstrated that the claims to be brought were "not without foundation". Plaintiff alleged that Trustee's sale of undeveloped lots violated Land Use Restrictions and caused damage to Plaintiff who also owned lots in development. Once plaintiff demonstrates colorable basis for suit, bankruptcy court is not required to consider Trustee's possible defenses to action and may defer consideration of those defenses to the non-bankruptcy court.
- (6491) *Dash v. Winnecour*, 2011 WL 6019222 (W.D. Pa. 2011) – Action by former debtor alleging trustee failed to timely make payments on mortgage was improperly field in District Court. Action was integrally related to bankruptcy case administration and fell within core jurisdiction of bankruptcy court. Action could be pursued only in bankruptcy court which appointed trustee absent consent of appointing court to action in another forum.
- (6492) *Grant, Konvalinka & Harrison, P.C. v. Still*, 471 BR 884 (E.D. Tn. 2012), *aff'd* 2013 WL 2274006 (6th Cir. 2013) - *Barton* doctrine precludes actions against Trustee absent prior approval by the Bankruptcy Court in which Trustee served. Trustee's prosecution of state court action for legal malpractice, although admittedly a non-core proceeding, was one within the trustee's duty to collect and reduce to money the property of the estate and to investigate financial affairs of the debtor. Further, as actions were taken within scope of Trustee's duties, issues of Trustee immunity compel resolution of issues in Bankruptcy Court. Policy concerns also favor resolution in Bankruptcy forum. Court must be concerned about discouraging a trustee from pursuing his statutory obligations to investigate the financial affairs of a debtor and collect assets of the estate in an expeditious manner. Subjecting a trustee to multiple state court lawsuits relating to his actions taken pursuant to his statutory duties might well inhibit a trustee from forcefully seeking to protect creditors by vigorously pursuing possible claims of the estate. Motion to permit action to proceed in non-bankruptcy forum denied.

- (6493) *Grant, Konvalinka & Harrison, P.C. v. Banks*, 2011 WL 3439081 (Bankr. E.D. Tn. 2011) – *Barton* doctrine precludes actions against Trustee absent prior approval by the Bankruptcy Court in which Trustee served. Limited exception applies only to actions taken by Trustee in carrying on business connected with property of the estate, but does not apply to actions taken while administering the estate or in preserving, holding or liquidating assets. In determining whether to permit action to be prosecuted in non-bankruptcy forum, bankruptcy court should consider: 1. Whether the acts or transactions relate to the carrying on of the business connected with the property of the bankruptcy estate. If the proceeding is under 28 U.S.C. Section 959(a) as one for damages while carrying on business connected with property of estate, then no court approval is necessary. However, the moving party may request this initial review by the bankruptcy court. 2. If approval from the appointing court appears necessary, do the claims pertain to actions of the trustee while administering the estate? By asking this question, the court may determine whether the proceeding is a core proceeding or a proceeding which is related to a case or proceeding under Title 11. 3. Do the claims involve the individual acting within the scope of his or her authority under the statute or orders of the bankruptcy court, so that the trustee is entitled to quasi-judicial or derived judicial immunity? 4. Are the movants or proposed plaintiffs seeking to surcharge the trustee; that is, seeking a judgment against the trustee personally? 5. Do the claims involve the trustee's breaching her fiduciary duty either through negligent or willful misconduct? Trustee's prosecution of state court action for legal malpractice, although admittedly a non-core proceeding, was one within the trustee's duty to collect and reduce to money the property of the estate and to investigate financial affairs of the debtor. Further, as actions were taken within scope of Trustee's duties, issues of Trustee immunity compel resolution of issues in Bankruptcy Court. Policy concerns also favor resolution in Bankruptcy forum. Court must be concerned about discouraging a trustee from pursuing his statutory obligations to investigate the financial affairs of a debtor and collect assets of the estate in an expeditious manner. Subjecting a trustee to multiple state court lawsuits relating to his actions taken pursuant to his statutory duties might well inhibit a trustee from forcefully seeking to protect creditors by vigorously pursuing possible claims of the estate. Motion to permit action to proceed in non-bankruptcy forum denied.
- (6494) *Grant, Konvalinka & Harrison, P.C. v. Banks*, 2011 WL 3585622 (Bankr. E.D. Tn. 2011) *aff'd* 2013 WL 2274006 – Immunity protects Trustee and staff and attorneys for Trustee from suit for actions taken within scope of duties of Trustee. Actions will be presumed within scope of Trustee duties. Court cannot impose liability on the Trustee for carrying out his duties in good faith and based on his business judgment. Trustee can be held personally liable for actions outside the scope of his authority as trustee such as seizing property that is not property of the estate; or breached a fiduciary duty owed to some claimant such as failure to collect estate property or failure to preserve it. Trustee sued to recover property from third party. Court concluded that property was not property of estate and dismissed action. Creditor sued Trustee for malicious prosecution. Immunity required dismissal of case as Trustee's actions, although unsuccessful, were within scope of Trustee's duties to marshal assets even if in hindsight the Trustee's action was unsuccessful and legally incorrect. Case did not involve rogue trustee who actually seized assets that were not property of estate. Strong policy reasons protect a trustee from liability for exercising his judgment in how to maximize the assets available for creditor or how to collect possible assets of the estate.
- (6495) *Cappuccilli v. Lewis*, Case No. 10-11690 (E.D. Mi. 2010) – Creditor violated *Barton* doctrine by filing suit in state court against Chapter 7 Trustee's attorney without prior approval of Bankruptcy Court.
- (6496) *Unencumbered Asset Trust v. Hampton-Stein*, 2009 WL 2015395 (Bankr. S.D. Ohio 2009) – Supreme Court's decision in *Barton v. Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881) (the "Barton Doctrine") requires leave of the bankruptcy Court before instituting an action in a non-bankruptcy forum against a trustee, for acts done in the trustee's official capacity and within the trustee's authority as an officer of the Court. Barton Doctrine encompasses acts by counsel or others performing as functional equivalent of trustee or where they act at the direction of the trustee for the purpose of administering the estate or protecting its assets. Action seeking to hold agents of Liquidating Trust liable for actions taken in official capacities as the Court-approved trustee of the Chapter 11 Debtor's liquidating trust are entitled to protection under the Barton Doctrine. Counsel for trustee is also Court appointed officer who represents the estate is also protected by Barton Doctrine.
- (6497) *Unencumbered Asset Trust v. Hampton-Stein (In re National Century Financial Enterprises, Inc.)*, 426 B.R. 282 (Bankr. S.D. Ohio 2009) – Party may not commence state action against bankruptcy court appointed trustee without prior consent of Bankruptcy Court under the Barton Doctrine. Court will presume that court appointed trustee is acting within the scope of authority unless the party bringing the action processes information rebutting that presumption at the time of commencement of the state court action. Where state court plaintiff needed additional discovery concerning scope of authority of the court appointed trustee, state court plaintiff must either file action Enid the Court that appointed the trustee or obtain permission from that court to commence the action elsewhere. Failure to do so will result in entry of a permanent injunction against plaintiff pursuing the action in any court other than the court that appointed the trustee in the first instance. Party who commences action in state court in violation of Barton Doctrine can be held liable for damages incurred by other parties to action as a result of having to defend a state court action. Further, court that appointed trustee can enter permanent injunction against prosecution of action in any form other than appointing court where state court action seeks to hold Trustee liable for actions taken after commencement of bankruptcy case.
- (6498) *In re Amir*, 2009 WL 1748701 (Bankr. N.D. Ohio 2009) – Creditor's State Court action against Trustee to determine title to property which is alleged to be property of estate barred under Barton doctrine. Trustee cannot be sued without leave of Bankruptcy Court for actions taken in administration and liquidation of estate. Party who continues to pursue litigation after being advised that actions are prohibited liable for sanctions including attorney fees.
- (6499) *In re National Century Financial Enterprises, Inc.*, 407 B.R. 895 (Bankr. S.D. Ohio 2009). Preliminary injunction against prosecution of adversary defendant's state court action against Chapter 11 trustee and debtor's counsel was warranted, as they showed a strong likelihood that *Barton doctrine* was violated.

XIX. Bankruptcy Crimes

A. Fraud

19.1 Generally

- (6500) *U.S. v. Johns*, Case No. 11-3299 (7th Cir. 2012) – Conviction for bankruptcy fraud upheld. Debtor made material false statements to Chapter 13 Trustee with regard to second mortgage and also took action to intentionally defeat purpose of bankruptcy code. Alleged mortgage purported to secure a debt that did not exist in favor of party who never even met the debtor. Debtor's representations that the mortgage was valid and enforceable was materially false. Although statements did not adversely affect creditors, as creditors received 100% dividends in Chapter 13 case, actions nonetheless sought to defeat the purposes of the code by ignoring and usurping Trustee's exclusive power to administer estate. Case remanded for consideration as to whether fraud produced any actual injury to any third party to support Lower Court's enhancement at sentencing.
- (6501) *U.S. v. Moser*, Case No. 10-3288 (10th Cir. 2011) – Conviction for bankruptcy fraud upheld on appeal. Evidence established that Debtor failed to disclose assets in Chapter 7 proceeding or in Chapter 13 proceeding instituted following discharge in Chapter 7. In Chapter 7, Defendant failed to disclose a sub-lease agreement and an option to purchase real property (valued at \$1.5 million) to the chapter 7 trustee, and Debtor claimed on his SOFA a transfer of property (coins and stamps) worth \$125,000, even though the property was later returned to him because it was, in reality, only pledged collateral, not a transfer. In later Chapter 13, Defendant did not initially disclose his interest in the coins or stamps, but later amended his SOFA to include a transfer of the coins and stamps valued at \$10,000. Defendant convicted on multiple counts of failing to disclose assets in schedules and at multiple Section 341 meetings. Although each failure to disclose was based on same assets, each non-disclosure was separate violation and subject to conviction on multiple counts.
- (6502) *U.S. v. Spurning*, Case No. 10-31128 (5th Cir. 2011) – Debtors, husband and wife, convicted of several counts of bankruptcy crimes, including concealment of bankruptcy assets, false oaths in bankruptcy filings and, for Husband only, bankruptcy fraud. Court rejected Wife's argument that she could not be held criminally liable for Husband's concealment. There was more than enough evidence for a reasonable jury to find that Wife ratified her Husband's acts and omissions, because she never objected her Husband's statements at the 341 meeting and clearly knew about, and even benefited from, the concealed assets. Husband's conviction for fraudulently answering Trustee's question reversed because the trustee's question was sufficiently ambiguous to allow a reasonable jury to find Husband's answer to be true. Wife's testimony during trial that she understood the answer to be false at the time and yet did not offer to correct the false statement supported conviction. Husband's attempt, although unsuccessful, to conceal fraudulent scheme allowed conviction for bankruptcy fraud. "Just because he failed [to conceal his scheme] does not mean he did not try."
- (6503) *U.S. v. James*, 2010 WL 4513799 (S.D. Ohio 2010), *aff'd* 2012 WL 3608612 (6th Cir. 2012) – False statements in bankruptcy petition constitutes violation of 18 USC Section 152. Defendant's argument that false statements in petition cannot constitute false statements in a bankruptcy case as there is no case in existence until the petition is filed, and that only post-petition statements can constitute bankruptcy fraud, rejected by Court. Signing Bankruptcy Petition constitutes verification under oath that the statements are true and correct.
- (6504) *U.S. v. Hyatt*, Case No. 08-12610 (11th Cir. 2010) – Debtors' repeated bankruptcy filings did not match information disclosed on debtors' tax returns. Debtors convicted of (1) conspiring fraudulently to conceal information from a bankruptcy court; (2) committing bankruptcy fraud; and (3) making false statements during the course of the six bankruptcies. Jury rejected defense that falsehoods were mistakes; that they lacked criminal scienter; that they had wrongly "guesstimated" their income; or their attorneys had made scrivener's errors. Omissions included failing to disclose tens-of-thousands of gambling winnings.
- (6505) *U.S. v. Boulware*, Case No. 09-5125 (4th Cir. 2010) – Debtor's failure to disclose at least 9 prior bankruptcy filings including at least one that resulted in bar to refiling constituted knowingly and fraudulently making a false declaration, certification, verification, and statement under penalty of perjury in violation of 18 U.S.C.A. § 152(3).
- (6506) *U.S. v. Hayat*, Case No. 09-10296 (5th Cir. 2010) – Debtor's failure to disclose unexpired lease in bankruptcy schedules constituted bankruptcy fraud sufficient to enhance criminal sanctions in related conviction for bank fraud and wire fraud.
- (6507) *U.S. v. Diekemper*, Case No. 09-2081 (7th Cir. 2010) – Debtor and spouse engaged in 4 year scheme to conceal assets from bankruptcy court, including undervaluing property by \$2.5 million, hiding farm equipment on friends' properties, titling and selling vehicles and equipment in others' names, using the mail service to effectuate these transfers, failing to disclose financial information to the bankruptcy trustee, fraudulently obtaining agricultural subsidies from the USDA, and urging others to lie under oath during his bankruptcy proceedings.

19.2 Failure to Disclose Names

- (6508) *U.S. v. Marston*, Case No. 11-2100 (1st Cir. 2012) – Debtor's failure to disclose two different names under which debtor had obtained credit cards constituted fraud. Debtor stole the identities of two acquaintances and obtained credit cards in those two names. Debtor did not disclose either of those names in the petition where debtor is required to list all names used in the prior 6 years. Debtor "used" the names to obtain credit. Debtor's failure to disclose those names constituted bankruptcy fraud.

19.3 Failure to Disclose Assets

- (6509) *U.S. v. Kurlemann*, 708 F.3d 722 (6th Cir. 2013) – Real estate option contract is legal interest in property that must be disclosed and that becomes property of estate. Debtor's failure to disclose option contract committed bankruptcy fraud by failing to disclose material assets.

- (6510) *US v. Carver*, Case No. 12-3026 (6th Cir. 2012) – Conviction for concealing assets in bankruptcy in violation of 18 USC Section 152(1) requires proof that bankruptcy proceeding existed; defendant concealed interest in property from trustee or creditors; concealed interests belonged to the estate; and defendant acted knowingly and fraudulently. Conviction for making false oath in violation of 18 USC Section 152(2) requires proof that there was bankruptcy proceeding; defendant made or caused to be made a false declaration of statement under penalty of perjury; declaration related to some material matter; declaration was false; and defendant made declaration knowingly and fraudulently. Evidence indicated that debtor owned extensive wine collection that defendant failed to disclose in schedules. Debtor testified at the Section 341 meeting that he had sold the collection and no longer had any of the wine inventory. However, after commencement of case, debtor caused a third party to sell a part of the wine collection and remit more than \$195,000 in proceeds to third parties including more than \$119,000 to debtor's future wife.

19.4 Failure to List Creditors

- (6511) *US v. Marston*, Case No. 11-2100 (1st Cir. 2012) – Schedules require debtor to list all creditors and claims including contingent and unliquidated claim. Debtor fraudulently failed to disclose credit card issuers on cards obtained fraudulently by debtor using stolen identities of acquaintances. Debtor's statement that she thought that fraudulent use of credit card created liability of person whose identity was stolen but did not create liability of debtor to the card issuer was unavailing. Upon fraudulent use of cards, debtor incurred some legal liability to the issuer, whether in fraud, contract or restitution. However, Government did not prove amounts owed to creditors, if any, without which government could prove that omitted card issuers were actual creditors.

19.5 Alteration or Destruction of Documents

- (6512) *U.S. v. Johnson*, 2012 WL 2564437 (S.D. Ohio 2012) –

19.6 Sanctions

- (6513) *U.S. v. Hyatt*, Case No. 08-12610 (11th Cir. 2010) – Debtors convicted of (1) conspiring fraudulently to conceal information from a bankruptcy court; (2) committing bankruptcy fraud; and (3) making false statements during the course of the six bankruptcies. Wife sentenced to 12 months and Husband to 60 months in prison and ordered \$4,020,243.22 in restitution.
- (6514) *U.S. v. Boulware*, Case No. 09-5125 (4th Cir. 2010) – Debtor's failure to disclose at least 9 prior bankruptcy filings including at least one that resulted in bar to refiling sentenced to 15 to 21 months in jail.
- (6515) *U.S. v. Diekemper*, Case No. 09-2081 (7th Cir. 2010) – Debtor who engaged in 4 year scheme to conceal assets from bankruptcy court, including undervaluing property by \$2.5 million, hiding farm equipment on friends' properties, titling and selling vehicles and equipment in others' names, using the mail service to effectuate these transfers, failing to disclose financial information to the bankruptcy trustee, fraudulently obtaining agricultural subsidies from the USDA, and urging others to lie under oath during his bankruptcy proceedings, sentenced to 10 years in prison and ordered not to have contact with spouse for 24 months as condition of spouse's probation.
- (6516) *United States v. Mason*, 2008 WL 4280123 (6th Cir. 2008) - Defendant sentenced to 42 months in prison for bankruptcy fraud.
- (6517) *United States v. Johnson*, 2009 WL 1707484 (N.D. Ohio 2009) - Defendant sentenced to three years of probation, six months of location monitoring, payment of restitution in the amount of \$14,745.05, and other terms and conditions, as a result of her plea of guilty to one count of concealing assets in bankruptcy.

19.7 Statute of Limitations

- (6518) *U.S. v. Curtis*, 2014 WL 3444947 (5th Cir. 2014) – Statute of limitations on charge of bankruptcy fraud for concealment of assets begins to run on day after entry of discharge and not day of discharge itself.

19.8 Advice of Counsel Defense

- (6519) *United States v. Bruner*, 2015 WL 4567843 (6th Cir. 2015) – Advice of counsel defense requires that defendant alleged to have performed a criminal act argues that she did so on her lawyer's advice, and therefore lacked the requisite mens rea element of the offense. Defendant must offer evidence of (1) full disclosure of all pertinent facts to counsel, and (2) good faith reliance on counsel's advice. Defendant who fully disclosed all pertinent facts to counsel, and relied in good faith on counsel's advice, is entitled to a reliance jury instruction. Instruction should not be given if it lacks evidentiary support or is based upon mere suspicion or speculation. Instruction not warranted where even assuming counsel incorrectly advised debtor regarding trust and Social Security income, Debtor also failed to disclose other income and assets including over \$223,000 in cash found in debtor's residence, two other homes, and several vehicles. Evidence also indicated that debtor did not fully disclose all pertinent facts regarding the trusts to attorney. Attorney testified that debtor asked him only a general question about a trust held exclusively by debtor's mother and sister and counsel replied that as a general principle of law, property held in an irrevocable trust for the benefit of someone other than the debtor would not be deemed property of her bankruptcy estate. Debtor provided nothing more than a general, incomplete question that elicited only a general, incomplete response”

XX. Personally Identifiable Information

A. Generally

20.1 Statutory Requirements

(6520) *Lentz v. Bureau of Medical Economics*, 405 BR 893 (Bankr. N.D. Ohio 2009) –Gramm-Leach-Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, imposes on financial institutions an affirmative and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those customers' nonpublic personal information.

(6521) *French v. American General Financial Services*, 401 B.R. 295 (Bankr. E.D. Tn. 2009) – Gramm-Leach- Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, imposes on financial institutions an affirmative and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those customers' nonpublic personal information. The E-Government Act of 2002, 44 USC Section 3501 *et. seq.* directs adoption of rules by Courts to protect privacy.

B. Information Considered “Personally Identifiable”

20.2 Account Numbers

(6522) *In re Chubb*, 426 BR 695 (Bankr. E.D. Mi. 2010) – Utility company account number constituted “personally identifiable information” that must be redacted in proof of claim. Claim filed with full account number would be stricken and restricted from public view without prejudice to creditor filing an amended proof of claim that omitted personally identifiable information.

C. Remedies

20.3 Disclosure in Proof of Claim

(6523) *Holloway v. Community Bank*, 2011 WL 4500042 (E.D. Tn. 2011) – Creditor’s inclusion in proof of claim of social security number constituted improper disclosure of personally identifiable information as defined in Section 101(41A). However, Section 107(c) does not authorize private cause of action for disclosure and filing of claim, standing alone, does not constitute actionable invasion of privacy absent evidence of intent to convey information to public at large.

(6524) *Lentz v. Bureau of Medical Economics*, 405 BR 893 (Bankr. N.D. Ohio 2009) – Disclosure of “personally identifiable information” is not a basis to disallow a proof of claim under Section 502. Section 502 specifies the grounds on which a claim can be disallowed. Procedural violations alone are not one of the bases on which a proof of claim can be disallowed.

(6525) *French v. American General Financial Services*, 401 B.R. 295 (Bankr. E.D. Tn. 2009) – Disclosure of “personally identifiable information” is not a basis to disallow a proof of claim under Section 502. Section 502 specifies the grounds on which a claim can be disallowed. Procedural violations alone are not one of the bases on which a proof of claim can be disallowed.

(6526) *Bailey v. Salyersville National Bank*, 2009 WL 936956 (Bankr. E.D. Ky. 2009) – Debtor does not have a private cause of action against creditor who files documents with Court containing “personally identifiable information”. Gramm Leach-Bliley Financial Modernization Act, 15 U.S.C. §6801 *et. seq.* does not provide for private cause of action and Debtor failed to produce any evidence showing that bank intended any harm to Debtor or the Debtor has suffered any harm by the creditor’s filings.

20.4 Injunctive Relief

(6527) *In re Bankston*, 2015 WL 6126440 (Bankr. E.D. Tn. 2015) – Neither Section 107 nor Rule 9037 creates private right of action for disclosure of personally identifiable information. Section 107 and Rule 9037 deal with records of the court, not records maintained by or behavior of parties who may appear before the court. National Data Center erroneously reported debtor’s full social security number which was then disclosed to subscriber to NDC. Request for injunctive relief to require NDC to remove information and to not re-publish information was directed solely to conduct of NDC and not the court.

20.5 Damages

(6528) *Mallard v. Wynn-Singer & Associates*, 2014 WL 988779 (Bankr. E.D. Ky. 2014) – There is no private right of action for alleged violations of local rules implementing the E-Government Act. Section 105 does not authorize court to create remedy where statute that is allegedly violated does not, itself, create a remedy. Creditor that allegedly improperly disclosed personal medical information in attachment to proof of claim not liable for damages under either local rules or E-Government Act of 2002. Debtor could not maintain state law action for public disclosure of private facts where evidence was uncontroverted that no member of the public ever accessed or reviewed the proof of claim. Absent evidence that the private information was “publicized”, state law claim failed.

(6529) *Lentz v. Bureau of Medical Economics*, 405 BR 893 (Bankr. N.D. Ohio 2009) – Gramm-Leach-Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, does not provide private right of action and Court will not imply one in light of clear provisions of Act. Bankruptcy Code Section 105 does not authorize Court to create private right of action unless a private right of action otherwise exists in connection with another section of the Code.

(6530) *French v. American General Financial Services*, 401 B.R. 295 (Bankr. E.D. Tn. 2009) – Debtor does not have private right of action against creditor who files proof of claim which includes “personally identifiable information” as defined in 11 USC Section 101(41A). Section 107 of the Bankruptcy Code, entitled “Public access to papers”; Federal Rule of Bankruptcy Procedure 9037 which requires “personally identifiable information” be redacted from papers filed with the Court; the Gramm-Leach-Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, which imposes on financial institutions an affirmative and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those customers' nonpublic personal information; and the E-Government Act of 2002, 44 USC Section 3501 *et. seq.* which directs adoption of rules by Courts to protect privacy; do not individually or collectively create a private cause of action for disclosure of “personally identifiable information”.

- (6531) *Bailey v. Salyersville National Bank*, 2009 WL 936956 (Bankr. E.D. Ky. 2009) – Debtor does not have a private cause of action against creditor who files documents with Court containing “personally identifiable information”. Gramm-Leach-Bliley Financial Modernization Act, 15 U.S.C. §6801 *et. seq.* does not provide for private cause of action and Debtor failed to produce any evidence showing that bank intended any harm to Debtor or the Debtor has suffered any harm by the creditor’s filings.

20.6 Contempt

- (6532) *In re Robinson*, 2013 WL 1313564 (Bankr. N.D. Ohio 2013) – Bankruptcy Court has jurisdiction to enforce court orders through contempt, where order requires defendant to take specific action but defendant fails to do so. However, Judgment in question was standard judgment in non-dischargeability action that awarded damages and declared amount to be non-dischargeable. Contempt is not available as a remedy for mere failure to pay money as ordered in Final Judgment.
- (6533) *In re Moohaven Dairy, LLC*, Case No. 10-24239 (Bankr. E.D. Mi. 2011) – Contempt requires proof by clear and convincing evidence that alleged contemnor had knowledge of the order allegedly violated; that alleged contemnor did in fact violate the order; and that the order violated was specific and definite. Once evidence of contempt is introduced, alleged contemnor can defend by categorical and detailed, that he took all reasonable steps to comply, and that he is not responsible for any inability to pay. Denial of application for retention of counsel strips counsel of any authority to appear for or on behalf of debtor. Counsel’s continued activity purportedly on behalf of Debtor constituted contempt for which sanctions are available.
- (6534) *French v. American General Financial Services*, 401 B.R. 295 (Bankr. E.D. Tn. 2009) – Court will not use civil contempt power to punish disclosure of personally identifiable information absent clear and convincing evidence that the offending party “violated a definite and specific order of the Court requiring [them] to perform or refrain from performing a particular act or acts with knowledge of the Court’s order”. Contempt action may lie under Section 105 if Debtor can prove that creditor filed a proof of claim disclosing “personally identifiable information” willfully or in deliberate disregard of Federal Rule of Bankruptcy Procedure 9037.
- (6535) *Bailey v. Salyersville National Bank*, 2009 WL 936956 (Bankr. E.D. Ky. 2009) – Debtor does not have a private cause of action against creditor who files documents with Court containing “personally identifiable information”. Gramm-Leach-Bliley Financial Modernization Act, 15 U.S.C. §6801 *et. seq.* does not provide for private cause of action and Debtor failed to produce any evidence showing that bank intended any harm to Debtor or the Debtor has suffered any harm by the creditor’s filings.

20.7 Redaction from Transcript

- (6536) *In re Immanuel, LLC*, Case No. 10-11585 (Bankr. W.D. Mi. 2011) – Court’s Administrative Order allows party to request that electronic transcript redact personally identifiable information within scope of Rule 9037. Party’s request to redact information that does not constitute personally identifiable information denied without prejudice to party filing Motion for Protective Order if party believes grounds exist.

XXI. Real Estate Settlement Procedures Act

A. Generally

21.1 Statutory Authority

- (6537) *Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – RESPA action is based on 12 USC Section 2605(e) and 24 CFR 3500.21. Mortgage servicer is required to respond to requests for information. Action for payment or acceptance of referral fees without disclosure is subject to one year statute of limitations.

21.2 Construction With Bankruptcy Code

- (6538) *Conley v. Central Mortgage Co.*, 2009 WL 2498022 (Bankr. E.D. Mi. 2009) – Real Estate Settlement Procedures Act and Bankruptcy Code do not irreconcilably conflict. Chapter 13 Debtors not precluded by Bankruptcy Code or Rules from sending Qualified Written Request to mortgage loan service even if confirmation of Debtors’ Chapter 13 Plan was in dispute at time QWR was sent. RESPA requires any servicer of a federally related mortgage loan to respond to a Qualified Written Request for information by a borrower concerning the servicing of the loan. Although Debtor can obtain the same information through the Bankruptcy Code under the supervision of the Bankruptcy Court, Debtor may use the procedures afforded in RESPA. The Court cannot arbitrarily enforce the Bankruptcy Code in preference to RESPA.

21.3 Statute of Limitations

- (6539) *Johnston v. MidFirst Bank*, 2015 WL 5175147 (N.D. Ohio 2015) – RESPA has three year statute of limitations. Plaintiff’s adversary proceeding commenced in February, 2010, was time barred as to any letter or other cause of action that arose prior to February, 2007. Counts of complaint based on lender’s alleged failure to acknowledge or respond to QWRS sent more than three years prior to commencement of adversary complaint were time barred.

B. Qualified Written Request

21.4 Defined

- (6540) *Bennett v. Bank of America*, 2015 WL 5063271 (E.D. Ky. 2015) – Qualified Written Request ordinarily must come from the borrower or an agent for the borrower. “Agent” is one that acts for or in the place of another by authority from him as a representative, emissary, or

official of a government a business representative; or a person authorized by another to act for him. State Attorney General is “agent” of borrower for purposes of issuing QWR where borrower reached out to AG for assistance in obtaining information about loan modification and AG send letters to act on behalf of borrower by contacting lender and servicer.

- (6541) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – Qualified Written Request must include sufficient information to allow lender to identify loan and statement of reasons for belief that account is in error or otherwise provides sufficient detail to the servicer regarding other information requested by borrower. If letter does not constitute QWR, lender is under no duty to respond. Letter was not QWR where letter merely made vague allegations that borrower was victim of predatory lending and essentially requested all documents relating to the loan including mortgage and deed, assignments, escrow analyses, tax information, servicing agreements, copies of every cancelled check, money order or other payment, and many other documents; and did not seek information that related to servicing of the loan such as the monthly payment amount or any other payment under the terms of the loan
- (6542) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Qualified Written Request must be in writing and contain sufficient information to allow the lender or services not identify the name and account of the borrower and must include a statement of the reasons for the borrower’s belief that the account is in error or provide sufficient detail to the lender or servicer regarding the information sought by the borrower. To state cause of action under RESPA, complaint must show plaintiff sent correspondence that qualified as QWR and that servicer failed to respond timely, and that plaintiff suffered damages as a result. Where servicer has established and published address to which QWR is to be sent, plaintiff must have used that address. Where plaintiff admittedly mailed correspondence to addresses other than that specified by lender, correspondence did not constitute QWR for purposes of RESPA liability. Lender’s alleged failure to respond was not RESPA violation. Further, request must be made by borrower or borrower’s agent. Letter from State Department of Finance sent to servicer following borrower’s complaint to State was not request from borrower or borrower’s agent where there was no evidence of any agency relationship between State and borrower. Request that did not ask for information about the loan, but challenged validity of loan itself or that surround circumstances of loan origination, is not QWR. Letter that requested copies of loan documents is not QWR as request did not relate to loan servicing.
- (6543) *Ginn v. CitiMortgage, Inc.*, 365 BR 84 (Bankr. D.S.C. 2012) – Qualified Written Request is defined as written correspondence from a borrower that identifies the borrower and account at issue, and includes a statement of the reason for the belief of the borrower that the account is in error or provides sufficient detail to the servicer regarding other information sought by borrower. “Servicing” is defined as receiving any scheduled periodic payments from borrower and making of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan. Borrower’s request for copy of pooling and servicing agreement is not a request for information related to the servicing of the loan and is beyond scope of QWR.
- (6544) *Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – On receipt of inquiry for information related to a mortgage loan, the servicer must acknowledge request within 20 days and must respond within 60 days of receipt. Qualified Written Request includes a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.
- (6545) *Conley v. Central Mortgage Co.*, 2009 WL 2498022 (Bankr. E.D. Mi. 2009) – A QWR is any written correspondence, other than a notice on a payment coupon or payment media, and includes or enables the servicer to identify the name and account of the borrower and includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provide sufficient detail to the service or regarding other information sought by the borrower.

21.5 Address for Mailing Qualified Written Request

- (6546) *Johnston v. MidFirst Bank*, 2015 WL 5175147 (N.D. Ohio 2015) – Where servicer has established and published address to which QWR is to be sent, plaintiff must have used that address. Where plaintiff admittedly mailed correspondence to addresses other than that specified by lender, correspondence did not constitute QWR for purposes of RESPA liability. Lender’s alleged failure to respond was not RESPA violation.
- (6547) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Where servicer has established and published address to which QWR is to be sent, plaintiff must have used that address. Where plaintiff admittedly mailed correspondence to addresses other than that specified by lender, correspondence did not constitute QWR for purposes of RESPA liability. Lender’s alleged failure to respond was not RESPA violation. Further, request must be made by borrower or borrower’s agent. Letter from State Department of Finance sent to servicer following borrower’s complaint to State was not request from borrower or borrower’s agent where there was no evidence of any agency relationship between State and borrower. Request that did not ask for information about the loan, but challenged validity of loan itself or that surround circumstances of loan origination, is not QWR. Letter that requested copies of loan documents is not QWR as request did not relate to loan servicing.

21.6 Servicer’s Duty to Respond

- (6548) *Moore v. Caliber Home Loans, Inc.*, 2015 WL 5162482 (S.D. Ohio 2015) – Servicer must provide written response acknowledging receipt of QWR within 5 days of receipt unless action is taken within that period. Within 30 days of receipt of QWR, servicer must either make appropriate corrections to account including creditor of late charges or penalties, and transmit to the borrower written notice of the correction; provide a statement of the reasons why the servicer believes the account is correct including the name and telephone number of an individual or office or department of the servicer who can provide assistance; or provide written notification that the information is

unavailable and cannot be obtained by the servicer, including a phone number for a person, office or department who can provide assistance. Complaint stated cause of action by asserting that plaintiff made QWR, that defendant never acknowledged receipt of QWR, and defendant never responded to QWR, although defendant did dismiss foreclosure action.

- (6549) *Bennett v. Bank of America*, 2015 WL 5063271 (E.D. Ky. 2015) – Servicer under RESPA must respond either with information requested by borrower or with explanation as to why information is not available or cannot be provided. Servicer violated RESPA requirement when borrower inquired about status of loss mitigation application and servicer and servicer inaccurately responded that borrower had been offered a trial loan modification when servicer had not offered modification but did offer a forbearance agreement. Complaint stated cause of action by alleging that servicer provided inaccurate or incomplete information and servicer failed to perform adequate investigation to obtain requested information. Servicer also inaccurately stated that borrower had been considered for two possible loss mitigation programs, one with a loan modification and one with a forbearance agreement, but servicer had provided only forbearance option and never offered loan modification.
- (6550) *Jacques v. JPMorgan Chase Bank*, 2015 WL 58646 (W.D. Mi. 2015) – Entity that is not servicer of loan at time QWR is issued is not required to respond and cannot be sanctioned either for failure to acknowledge QWR or to respond to QWR. Chase had previously serviced borrower's first mortgage. Some years earlier, borrower refinanced and paid off prior mortgage and new mortgage, through different lender, was serviced by different company. Chase had no contact with loan or borrower for a number of years and borrower had previously acknowledged in bankruptcy filings that other entity, not Chase, was servicer. Chase had no obligation to respond to QWR as Chase was not acting as servicer at time QWR issued and borrowers knew that Chase was not servicer.
- (6551) *Patrick v. Citimortgage, Inc.*, 2014 WL 7339828 (Bankr. N.D. Ohio 2014) – QWR is written correspondence that (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower. On receipt of QWR, lender or mortgage servicer must provide a written response acknowledging receipt within 5 days and respond within 30 days indicating the appropriate corrections have been made, after investigation servicer believes that no error has occurred and provide contact information, or after investigation explain why servicer does not have sufficient information to make a determination and to provide contact information. HUD Rule found in 24 CFR Section 3500.21(e) allows a mortgage service to establish a separate and exclusive office and address for receipt and handling of QWRs. If servicer has established an address, inquiry must be sent to that address to qualify as QWR. Servicer sufficiently informed borrower of address by including specific language in each monthly mortgage statement specifying address to which QWR must be sent. Debtor's letter, addressed to address other than that specified, is not QWR and servicer's alleged failure to timely respond is not actionable.
- (6552) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Lender or servicer must respond to QWR within 30 days of receipt. Where letters sent to servicer did not meet requirements for QWR, servicer had no duty to respond.
- (6553) *Tann v. Chase Home Finance, LLC*, 2011 WL 3799841 (E.D. Mi. 2011) – RESPA authorizes a borrower of a federally related mortgage loan to submit a qualified written request (QWR) to a lender seeking correction of an account believed to be in error or requesting specific information pertaining to the servicing of a loan. Lender must acknowledge the borrower's request within twenty days and substantively respond to the inquiry within sixty days by providing the information requested or an explanation why the information is unavailable; or the lender may make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction.
- (6554) *Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – Mortgage servicer is required to respond to requests for information. Loan servicing is defined as receiving scheduled periodic payments from borrower pursuant to terms of a loan and making payments in principal and interest payments received from borrower. Loan servicer must acknowledge request within 20 days and must respond within 60 days of receipt. Servicer must make any appropriate corrections in the account and advise borrower of corrections and provide borrower with a written explanation or clarification that includes a statement of the reasons that the servicer believes the account is correct and provides the name and telephone number for borrower to contact.
- (6555) *Conley v. Central Mortgage Co.*, 2009 WL 2498022 (Bankr. E.D. Mi. 2009) – RESPA requires any servicer of a federally related mortgage loan to respond to a Qualified Written Request for information by a borrower concerning the servicing of the loan. A servicer must provide a written response acknowledging receipt of the QWR within 20 days. Servicer has 60 days to conduct an investigation and either make appropriate corrections and notify the borrower of those corrections; or provide a written statement of the reasons the service or believes the account is correct; or provide a written statement indicating reasons why that information is not available.

21.7 Damages

- (6556) *Moore v. Caliber Home Loans, Inc.*, 2015 WL 5162482 (S.D. Ohio 2015) – Section 2605(f) provides that in the event of a violation of RESPA, aggrieved party is entitled to actual damages, additional damages not to exceed \$2,000 in the case of a pattern or practice of non-compliance. Plaintiff must show damages and establish connection to alleged violation. Plaintiff's complaint alleged actual damages resulting from misapplication of payments, dismissal of foreclosure without prejudice, and out of pocket costs of representation in attempting to resolve issues. Recovery is cumulative, to extent that servicer breaches RESPA on multiple occasions and allows court to award damages for each such failure. However, where all damages related to single QWR, that constitutes only single violation even if violation leads to multiple types of damages.
- (6557) *Jester v. CitiMortgage*, 2015 WL 631964 (N.D. Ohio 2015) – Action under RESPA requires more than establishing a violation. Borrower must also suffer actual, demonstrable damages that result from specific violation of RESPA. Allegation that plaintiff "suffered damages"

or that plaintiff “became concerned that” payments were not properly accounted for were insufficient to demonstrate any actual damages allegedly resulting from RESPA violation.

- (6558) *McKey v. JPMorgan Chase Bank*, 2014 WL 5529672 (S.D. Ohio 2014) – Where lender fails to timely respond to Qualified Written Request, borrower is entitled to actual damages and, if the creditor is engaged in pattern or practice of non-compliance, an additional amount not to exceed \$2,000.00. Complaint sufficiently stated cause of action by alleging that creditor failed to correct or investigate missing or misapplied payments causing plaintiff to pay interest on a higher principal balance; that borrower had been denied refinancing and employment because of creditor’s erroneous reports to credit bureaus; and that borrower incurred attorney fees and costs in attempting to enforce QWR.

- (6559) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Plaintiff can recover emotional damages for violation of RESPA where plaintiff proves causal link between servicer’s activities and actual, demonstrable emotional turmoil.

C. Notice of Assignment, Sale or Transfer of Servicing

21.8 Duty to Notify Borrower

- (6560) *Ginn v. CitiMortgage, Inc.*, 365 BR 84 (Bankr. D.S.C. 2012) – Qualified Written Request is defined as written correspondence from a borrower that identifies the borrower and account at issue, and includes a statement of the reason for the belief of the borrower that the account is in error or provides sufficient detail to the servicer regarding other information sought by borrower. “Servicing” is defined as receiving any scheduled periodic payments from a borrower and making of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan. Borrower’s request for copy of pooling and servicing agreement is not a request for information related to the servicing of the loan and is beyond scope of QWR.

- (6561) *Boone v. JPMorgan Chase Bank*, Case No. 11-10891 (11th Cir. 2011) – RESPA requires notification to the borrower in writing of any assignment, sale or transfer of the servicing of a loan, to be provided within 15 days of the date of the transfer. Complaint dismissed where it alleged no facts that would show violation of this requirement and where it appeared from complaint that Chase was the original lender and servicer.

D. Remedies

21.9 Parties Liable

- (6562) *Cacevic v. Federal Home Loan Mortgage Corp.*, 2014 WL 4897380 (E.D. Mi. 2014) – Action for violation of RESPA in loan origination cannot be brought against party who was not party to origination of loan. Action against FNMA as successor to loan originator dismissed.

21.10 Pleading Requirements

- (6563) *Jester v. Citimortgage*, 2014 WL 3547183 (N.D. Ohio 2014) – Party not entitled to recover under RESPA absent evidence of actual damages. Pleading must state with specificity nature of violation and must demonstrate actual damages as a result. However, complaint need not specifically identify every element of damages as long as allegations are sufficient to demonstrate some damages. While complaint may have been “inartful” it did allege pattern of activity in violation of TILA that caused plaintiffs to “suffer[] damages” including failure to credit improperly charged late fees and penalties. Reasonable inference from allegations is that because lender failed to correct or investigate misapplied payments, plaintiff paid interest on higher principal balance that should have been the case.

- (6564) *Hood v. Chase Manhattan Mortgage Corp.*, 2013 WL 1629306 (E.D. Mi. 2013) – Limitations period under RESPA is either one year (relating to kickbacks, unearned fees and title insurance) or three years (mortgage servicing). Both limitations periods run from date of the occurrence, which is generally the date of closing of the loan.

- (6565) *Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – Complaint that failed to allege actual damages and failed to allege pattern or practice dismissed.

- (6566) *Lessl v. CitiMortgage, Inc.*, 2011 WL 4351673 (E.D. Mi. 2011) – Owner’s written request for escrow statement constituted Qualified Written Request under RESPA. Lender must acknowledge request within 20 days and respond substantively within 60 days. Complaint dismissed where owner alleged violation of RESPA but did not allege any actual damages from the violation.

21.11 Actual Damages

- (6567) *In re Garza*, 2012 WL 4738651 (Bankr. S.D. Tx. 2012) – Creditor who fails to provide annual RESPA reconciliation waives any right to recover the resulting deficiency. Analogizing to Rule 3002.1, court ruled that creditor’s failure to provide notice of payment changes in years 2008, 2009 and 2010 precluded creditor from recovering shortfall in payments that resulted. However, creditor’s failure to comply could not provide basis for sanctions against creditor as rule did not apply in 2008, 2009 or 2010 and creditor had no reason to know at that time that Rule would later be adopted that would require notices.

- (6568) *Ginn v. CitiMortgage, Inc.*, 365 BR 84 (Bankr. D.S.C. 2012) – Even if lender violated RESPA by failing to identify the holder of original note, plaintiff did not allege any actual or statutory damages as a result of violation, requiring dismissal of complaint.

- (6569) *Tann v. Chase Home Finance, LLC*, 2011 WL 3799841 (E.D. Mi. 2011) – Damages flowing from a RESPA violation are limited to a borrower’s actual damages plus additional damages up to \$1000 if the borrower shows the lender engaged in a pattern and practice of committing violations. Complaint that alleged only that Plaintiff sent QWR to lender and that Plaintiff thereafter called lender

multiple times did not demonstrate factual basis for violation of RESPA. Further, allegations of complaint demonstrated that lender acknowledged receipt of letter within 20 days, and sent the plaintiff a substantive response letter within the 60-day response time allowed by the statute that included most of the information requested, as well as an explanation regarding why some information was not included and contact information if the plaintiff had any further concerns. Dispute over status of mortgage, standing alone, is not violation of RESPA.

21.12 Exemplary Damages

- (6570) *Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – On receipt of inquiry for information related to a mortgage loan, the servicer must acknowledge request within 20 days and must respond within 60 days of receipt. RESPA applies only to loan servicers. Action against lender for failure to respond to QWR fails to state cause of action and must be dismissed. Remedy against servicer who fails to comply include actual damages plus “any additional damages” not to exceed \$1,000 pursuant to Section 2605(e) if the borrower can prove pattern or practice of non-compliance. Complaint that failed to allege actual damages and failed to allege pattern or practice dismissed.

XXII. Mortgage Issues

A. Validity

21.1 Tenants in Common

- (6571) *Douglass v. First Merit Bank*, 2015 WL 5813365 (Bankr. E.D. Mi. 2015) – Where property is titled in joint owners who are not spouses and deed does not specify joint tenant with right of survivorship, the estate conveyed is tenancy in common. Any tenant in common can validly mortgage the tenant’s interest. Lack of signature of other tenant in common does not invalidate mortgage. Mortgage is valid only as to ownership interest of tenant who signed mortgage.

21.2 Dower

- (6572) *Douglass v. First Merit Bank*, 2015 WL 5813365 (Bankr. E.D. Mi. 2015) – Wife holds dower interest in property owned by husband where wife is not also on deed. Dower attaches at marriage and applies to land that husband brings to marriage as well as land that husband acquires during course of marriage. If mortgage is signed before marriage, dower interest is subject to mortgage. If mortgage is signed after marriage, mortgage is subject to dower rights. Lack of wife’s signature on mortgage does not render mortgage defective. Dower right is inchoate right that does not vest until death of husband. Dower interest is limited to right to redeem mortgage upon foreclosure.

21.3 Homestead

- (6573) *Douglass v. First Merit Bank*, 2015 WL 5813365 (Bankr. E.D. Mi. 2015) – Mortgage on homestead does not have to be signed by both spouses where title to property is solely in one spouse’s name. Husband could validly mortgage property he owned individually without signature of spouse. To be homestead, property must be owned and occupied by person asserting homestead status. As wife was not on title, wife was not owner of property and could not assert homestead status to invalidate mortgage.

B. Foreclosures

22.4 Standing to Foreclose

- (6574) *Garner v. Select Portfolio Servicing, Inc.*, 2015 WL 5634449 (E.D. Mi. 2015) – Under Michigan law, loan servicer has standing to foreclose even without ownership interest in note or mortgage.
- (6575) *Yaldo v. Homeward Residential, Inc.*, 2015 WL 4636627 (6th Cir. 2015) – Fact that lender transferred servicing to third party does not deprive lender of right to foreclose.
- (6576) *Johnson v. Broker Solutions, Inc.*, 2015 WL 4469276 (M.D. Tn. 2015) – Securitization of loan does not deprive holder of note and mortgage of standing to foreclose. Securitization is separate agreement between holder of note and mortgage and the underlying investors. It is not necessary that underlying investors bring suit.
- (6577) *Wilson v. Regions Bank*, 2015 WL 4276262 (M.D. Tn. 2015) – Securitization of loan does not deprive holder of note and mortgage of standing to foreclose. Securitization is separate agreement between holder of note and mortgage and the underlying investors. It is not necessary that underlying investors bring suit.
- (6578) *MSCI 2007-IQ16 Granville Retail, LLC v. UHA Corporation, LLC*, 2015 WL 542176 (S.D. Ohio 2015) – A party in interest who does not hold an interest in the note or mortgage at the time that it files foreclosure action lacks standing that is fatal to court jurisdiction and cannot be cured after commencement of action. Plaintiff sufficiently demonstrated standing where plaintiff’s complaint alleged that plaintiff was “successor by assignment” from original lender and there was no evidence that, at the time the action was filed, the plaintiff did not hold an interest in the note and mortgage.
- (6579) *BAC Home Loans Servicing, LP v. Groves*, 2014 WL 5511048 (5th Cir. 2014) – Borrowers conceded that lender had standing to foreclose by entering into agreed final judgment that established facts necessary for standing. Borrowers could not later contest standing under Rule 60 merely because borrowers no longer want to be bound by agreed judgment.
- (6580) *Frazer v. Deutsche Bank National Trust Co.*, 2014 WL 5335419 (9th Cir. 2014) – Party in physical possession of promissory note endorsed

in blank has standing to pursue foreclosure and enforce the mortgage.

- (6581) *Jestes v. Saxon Mortgage Services, inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Endorsement of note from initial payee to Saxon which allegedly violated Freddie Mac guidelines did not render endorsement ineffective or result in not being void or unenforceable. Promissory note was in all respects a negotiable instrument within scope of UCC and was fully transferrable and negotiable. Party holding note is entitled to foreclose. Assignment of note carried with it assignment of deed of trust even absent separate assignment of deed of trust.
- (6582) *Goss v. ABN Amro Mortgage Group*, 2013 WL 6698041 (6th Cir. 2013) – Foreclosure action can be brought by the mortgagee of record, any party who owns the indebtedness, and any parties who act as servicing agents. Foreclosure was proper where ABN was record owner, CitiMortgage was servicer, and attorney acted on behalf of servicer.
- (6583) *Deutsche Bank National Trust Co. v. Tibbs*, 2014 WL 280365 (M.D. Tn. 2014) – Under Article 3, party seeking to enforce note must be “holder”. Holder does not need to be the owner of the note, but must be party entitled to enforce the note as defined in Article 3.
- (6584) *Harris v. FDIC*, 2013 WL 6049002 (E.D. Mi. 2013) – Federal Institutions Reform, Recovery and Enforcement Act (FIRREA) gives FDIC broad discretion to deal with assets of failed banks. FDIC must provide notice to creditors of failed institution of right to bring claims against institution and a deadline by which those claims must be brought or will be foreclosed. Plaintiff never filed claim against failed institution and was precluded from alleging any such claims as defense to foreclosure by successor institution.
- (6585) *Donaldson v. US Bank, NA*, 2013 WL 4744805 (E.D. Mi. 2013) – Based on Michigan Compiled Laws 600.3204(1)(d), foreclosing party must either be an owner of or have an interest in the indebtedness, or be a loan servicer. Where Bank was indisputably loan servicer, standing to foreclose did not depend on whether underlying instrument had ever been assigned to Bank.
- (6586) *In re First Mortgage Fund, Inc.*, 2013 WL 4807164 (E.D. Mi. 2013) – Trustee’s strong arm power as bona fide purchaser allowed trustee to avoid alleged unrecorded assignment of lender’s rights under mortgage. Public record showed mortgage issued to Debtor but did not reflect any assignment of that mortgage, leaving lender as the record owner of the mortgage. Debtor’s later foreclosure of mortgage, while potentially a breach of assignment documents, was not void as lender, as of date of foreclosure, held record title to mortgage and had standing to foreclose mortgage. Debtor was the record owner of the property by virtue of sheriff’s deed on date of bankruptcy filing, such that Trustee acquired title free and clear of any unrecorded interest of assignee.
- (6587) *Kreitzer v. Household Realty Corp.*, 489 WL 6998 (Bankr. S.D. Ohio 2013) – Neither Trustee nor debtor can avoid properly recorded mortgage based on allegedly defective assignment of mortgage. Second assignment of mortgage that allegedly lacked attestation by notary public did not defeat effect of recorded mortgage as providing constructive notice of lien that precludes avoidance under Section 544. Allegedly defective assignment does not render mortgage invalid. Assignment of mortgage does not transfer any interest in underlying real property, such that assignment does not need to be recorded to be effective.
- (6588) *Nachar v. PNC Bank, NA*, 901 F.Supp.2d 1012 (N.D. Ohio 2012) – Lender retains right to foreclose mortgage after underlying note is discharged in bankruptcy, but cannot pursue borrower personally.
- (6589) *Akinwusi v. Federal Home Loan Mortg. Corp.*, 2013 WL 1282018 (E.D. Mi. 2013) – Assignment of mortgage without note has no impact on validity of mortgage, particularly where there is no evidence that mortgagor faces double liability.
- (6590) *Hargrow v. Wells Fargo Bank, NA*, Case No. 12-709 (6th Cir. 2012) – Mortgagee has standing to pursue foreclosure even if note has been assigned to separate holder. Mortgage identified MHA Financial as the lender to whom the note was payable, but MERS as the mortgagee. Note was later assigned to Ohio Savings Bank and mortgage to Wells Fargo. Wells Fargo commenced foreclosure proceedings although it was not the holder of the note. Holder of Mortgage is deemed to hold interest in the indebtedness even if note is payable to third party. Mortgage can be assigned without corresponding assignment of the underlying debt. Mortgage granted to MERS the power of sale, and mortgage was properly assigned to Wells Fargo with the assignment being properly recorded.
- (6591) *Commonwealth Property Advocates, LLC, v. Mortgage Electronic Registration Systems, Inc.*, Case No. 10-4182 (10th Cir. 2011) – Securitization of a note does not require the holder of the underlying trust deed and its nominees to obtain authorization from every investor holding an interest in the securitized note prior to commencing foreclosure. The deeds of trust at issue expressly gave MERS the authority to foreclose on behalf of the original lender and its successors. This express authority is as the “further agreement” of the investors to the commencement of foreclosure proceedings.

22.5 Refusal to Foreclose

- (504) *Canning v. Beneficial Maine, Inc.*, 462 BR 258 (1st Cir. BAP 2011) , *aff’d* Case No. 12-9002 (1st Cir 2013) – Creditor does not violate stay or discharge injunction by refusing to release lien or foreclose against property. Surrender under Section 521 requires that debtor make collateral available to secured creditor but does not obligate secured creditor to accept possession of collateral unless refusal to accept collateral is subterfuge to coerce payment by the debtor of the discharged debt. Lender was not demanding that debtors pay debt in full to obtain release of lien and offered to release lien through settlement or short sale, which provided ability of debtor to sell property and indicated intent by creditor to recover no more than value of collateral.
- (505) *Brown v. Branch Banking & Trust Co.*, 477 BR 915 (Bankr. S.D. Ga. 2012) – Surrender of collateral does not obligate creditor to take affirmative action to transfer title or to foreclose. Creditor does not violate stay by failing to take any action to either foreclose or transfer title after confirmation of Plan.
- (6592) *In re Arsenault*, 456 BR 627 (Bankr. S.D. Ga. 2011) – Creditor cannot be compelled to accept title to property that is surrendered in plan. Creditor does not violate stay by, post confirmation, refusing to accept title to property or to record deed or other conveyance of title.

Although debtor is no longer required to make payments and debtor cannot take action to impede creditor's completion of foreclosure process, creditor is under no obligation to either pursue foreclosure or to accept the conveyance. *In re Fristoe*, 2012 WL 4483891 (Bankr. D. Utah 2012) – Lender cannot be forced to foreclose or to accept deed in lieu of foreclosure. Broad equitable powers under Section 105 do not include power to sanction creditor for failure to timely foreclosure or to order the Trustee to sell property free and clear of liens. To force lender to foreclose would require lender to violate stay as property had not been abandoned by Chapter 7 Trustee and no party had requested relief from stay to proceed with foreclosure. There was no basis to force sale under Section 363 where none of the conditions under Section 363 applied. Fact that debtor is now stuck with post-petition condominium fees on property debtor no longer wants or occupies is issue for Congressional action, not something that the court can ignore or “work around”.

22.6 “Securitization”

- (6593) *Johnson v. Broker Solutions, Inc.*, 2015 WL 4469276 (M.D. Tn. 2015) – Securitization of loan does not deprive holder of note and mortgage of standing to foreclose. Securitization is separate agreement between holder of note and mortgage and the underlying investors. It is not necessary that underlying investors bring suit. Deed of Trust that listed MERS as nominee for lender is not invalid and MERS has proper role in loan administration when designated as nominee and beneficiary.
- (6594) *Wilson v. Regions Bank*, 2015 WL 4276262 (M.D. Tn. 2015) – Securitization of loan does not deprive holder of note and mortgage of standing to foreclose. Securitization is separate agreement between holder of note and mortgage and the underlying investors. It is not necessary that underlying investors bring suit.
- (6595) *Dauenhauer v. Bank of New York Mellon*, Case No. 13-5810 (6th Cir. 2014) – Loan transaction that named MERS as nominee for Bank, with later securitization of loan, did not render loan or mortgage invalid or assignment defective, or deprive Bank of standing to foreclose. Naming of MERS allows MERS to act as agent on behalf of any valid note holder, including assigning the deed of trust and enforcing the note. Securitization, by which third parties acquire interest in note by paying lender, did not discharge obligation under note or result in the note being deemed paid in full. Under Tennessee law, deed of trust follows note automatically, such that assignment of note transfers to assignee full right to enforce the deed of trust unless the assignment of the note expressly states to the contrary. Securitization does not render note or mortgage unenforceable or alter borrower's obligation to repay loan. Borrower lacks standing to allege that assignment of note and mortgage violated Pooling and Servicing Agreement as borrower is not party to that agreement.

22.7 State Law Requirements

- (6596) *Gibson v. Mortgage Electronic Registration Systems*, 2014 WL 2091258 (W.D. Tn. 2014) – Creditor complied with deed of trust when creditor issued written notice of sale pursuant to deed of trust, and written notice provided that the trustee could adjourn the sale from time to time by oral announcement at the scheduled sale location and date. Deed of trust required only that initial notice be in writing and did not require each adjourned sale to be noticed in writing. Creditor's alleged oral statements that sale would be cancelled and not rescheduled was not breach of deed of trust where deed of trust did not contain any such obligation and creditor's actions strictly complied with notice requirements.
- (6597) *Smith v. Vista Hills Partners, LLC*, 2014 WL 1779377 (Bankr. S.D. Ohio 2014) – Court cannot enter default judgment where record shows that defendant was not properly served with complaint as required by Rule 7004. Court also will deny request for default judgment where well pled allegations of complaint fail to state claim on which relief can be granted. Adversary complaint that sought to strip second mortgage on theory that first mortgage had foreclosed out second mortgage failed to state cause of action where complaint indicated that court had entered foreclosure judgment but no sale had occurred. Liens are extinguished only when foreclosure sale is complete and confirmed. Until that point, the second mortgage holder has an interest in the property subject to the eventual foreclosure sale.
- (6598) *Chambers v. HSBC Bank USA*, 2014 WL 1405276 (E.D. Mi. 2014) – Failure to comply with state statutes regarding foreclosure by advertisement did not render foreclosure void, but merely voidable, such that plaintiff must prove that plaintiff would have been in a better position to preserve his interest in the property absent defendant's non-compliance with statute. Plaintiff must show that defect prevented plaintiff from preserving his interest in the property. Where there was no dispute that plaintiff had defaulted on mortgage and plaintiff lacked any ability to redeem or pay off the loan, any alleged violation of state statutes caused no prejudice as plaintiff lacked any viable means of saving property had lender complied with state statute.
- (6599) *Goss v. ABN Amro Mortgage Group*, 2013 WL 6698041 (6th Cir. 2013) – Borrower could not maintain action for alleged violation of state foreclosure procedures, where borrower alleged that he requested loss mitigation mediation but did not contact a housing counselor to obtain that mediation as required by statute. Lender could foreclose by advertisement without mediation where borrower did not comply with statutory condition to lender's obligation to mediate.
- (6600) *Etts v. Deutsche Bank National Trust Co.*, 2014 WL 645358 (E.D. Mi. 2014) – Borrower can contest validity of foreclosure proceeding only if borrower can demonstrate prejudice that results from defect. Defective procedure renders sale process voidable, not void. Prejudice required is such that, but for alleged defect, borrowers would have been in a better position to preserve their interests in the property. Plaintiffs did not allege that they would have been able to redeem the property, that they would have been able to make monthly payments, or otherwise prevent foreclosure but for allegedly defective assignment of mortgage and subsequent foreclosure by assignee.
- (6601) *Hargrow v. Wells Fargo Bank, NA*, Case No. 12-709 (6th Cir. 2012) – Under Michigan law, failure to comply with statutory requirements for foreclosure by sale results in the sale being voidable. Holder of Mortgage is deemed to hold interest in the indebtedness even if note is payable to third party. Chain of title must reflect any assignments of the mortgage. However, chain of title does not have to reflect any record of actual holder of note.

- (6602) *McRary v. Jarrard*, 2011 WL 3566279 (E.D. Mi. 2011) – Michigan law permits non-judicial foreclosure only if lender has not instituted proceedings at law to enforce the underlying obligation. Lender violated statute when lender initiated non-judicial foreclosure process after debtor had filed adversary proceeding to determine validity of debt and lender asserted affirmative defense of “set off”. Asserting defense of set off constituted attempt by lender to recover on note triggering prohibition against non-judicial foreclosure.
- (6603) *Attard v. American Home Mortgage Services, Inc.*, Adv. No. 08-5064 (Bankr. E.D. Mi. 2009) – Plaintiff not entitled to Summary Judgment invalidating foreclosure sale where record before Court did not establish beyond genuine issue of material fact that the Wayne County Sheriff did not appoint a specific person to conduct a foreclosure sale or that the specific written appointment was signed by someone other than the Sheriff himself.
- (6604) *In re Finley*, Case No. 09-44480 (Bankr. E.D. Mi. 2010) – Sheriff’s foreclosure sale may not be set aside absent fraud, accident or mutual mistake. Creditors attempt to circumvent sheriff’s sale by filing “Affidavit Expunging Sheriff’s Deed” was of no effect as the affidavit failed to contain any allegations of fraud, accident or mutual mistake. Mortgage ores alleged “mistake” in credit getting the full amount of the note is not “fraud” or a “mistake” sufficient to warrant setting aside the foreclosure sale where the foreclosure sale otherwise complied with all statutory requirements.

22.8 Chain of Title – MCL 600.3204

- (6605) *Kassem v. Ocwen Loan Servicing, LLC*, 2015 WL 5559906 (E.D. Mi. 2015) – Section 600.3204 provides that if party foreclosing by publication is not the original mortgagee, party must establish record chain of title evidencing assignment of mortgage to party seeking to foreclose. Chain of title recorded in county records established required assignments to give lender standing to foreclose. Borrowers lacked standing to contest validity of assignments recorded in public record absent showing that defects would prejudice borrowers in efforts to retain property. Allegations of robo-signing and other alleged defects were intrinsic to assignments and did not prejudice borrowers in any way. Mere fact that borrowers may not know who owns loan is not sufficient to establish prejudice because borrowers did not allege that any party other than lender had interest in note or that some third party was attempting to also hold them liable for note.

22.9 Timing of Sale – MCL 600.3220

- (6606) *Kassem v. Ocwen Loan Servicing, LLC*, 2015 WL 5559906 (E.D. Mi. 2015) – Section 600.3220 allows adjournment of foreclosure sale for longer than one week if sheriff, at request of party in whose name the notice of sale is published, posts a notice of adjournment at the place where the sale is scheduled, and the notice of adjournment is published in the newspaper where the original notice was published each week during the adjournment period. Bare allegation that lender failed to post the notice at the place of sale failed to state cause of action where complaint failed to plead any facts indicating how borrowers knew or had reason to believe that notice had not been published. Borrowers established only that notice of adjournment was not posted at property, but as place of sale was not the situs of the property there was no requirement to post notice at the property. Notice does not need to contain name of lender foreclosing, but only of party requesting adjournment. Trott & Trott requested adjournment and notice correctly listed T & T as party requesting adjournment. Where lender adjourned sale for 6 weeks, lender was not required to re-post notice each week, only to publish each week.

22.10 Posting Notice of Sale – MCL 600.3208

- (6607) *Kassem v. Ocwen Loan Servicing, LLC*, 2015 WL 5559906 (E.D. Mi. 2015) – Section 600.3208 requires posting of notice of sale on property within 15 days of first publication. Borrower’s complaint failed to state cause of action where complaint alleged only in conclusory terms that notice had not been posted but failed to state the time frame in which the notice was allegedly not posted. Further, failure to post at property would not warrant unwinding of sale unless borrower could show they were somehow prejudiced. Borrowers made no plausible allegations that if sale had been posted on front door of house, they would have been in a better position to halt foreclosure process.

22.11 Perfection of Mortgage

- (6608) *Young v. Chase Home Finance, LLC*, 2015 WL 178355 (Bankr. S.D. Ohio 2015) – Debtor cannot bring action to avoid mortgage based on improper recording of mortgage in wrong county. Although incorrect recording may give rise to action by Trustee to avoid mortgage under Section 544, improper recording of mortgage has no effect on validity or enforceability between mortgagor and mortgagee.

22.12 Redemption

- (6609) *Dettore v. JEM Real Estate Preferred Fund I, LLC*, Case No. 15-45642 (Bankr. E.D. Mi. 2015) – Motion for expedited hearing on request for preliminary injunction denied where automatic 60 day extension of redemption that came into effect under Section 108 when debtor filed bankruptcy before expiration of redemption allowed ample time for court to schedule hearing on request for preliminary injunction in normal course before expiration of 60 day extension.
- (6610) *Federal National Mortgage Corp. v. Royal Manor Apartments LLC*, 2014 WL 3735336 (E.D. Mi. 2014), *aff’d in part and rev’d in part*, 2015 WL 3505238 (6th Cir. 2015) – Lender allowed to recover late fees to extent that fees are reasonably calculated to compensate lender for expenses incurred as a result of missed installment payments. Lender also entitled to late payment fee on entire amount of balloon payment when payment not made by date required. Interest for purposes of redemption is calculated from date of sale at the rate specified in the mortgage. While mortgage did not state interest rate, it did incorporate note which provided for interest at 5.74%. However, lender not entitled to higher default rate of interest post-foreclosure and default rate applies only to payments past due, and upon foreclosure borrower no longer has obligation to make payments under note and mortgage and, therefore, those payments cannot be in “default”.
- (6611) *Etts v. Deutsche Bank National Trust Co.*, 2014 WL 645358 (E.D. Mi. 2014) – Once redemption expires, owner can contest validity of

foreclosure sale only on a clear showing of fraud or irregularity. Standard for extension of expiration is stringent and statutory foreclosures will be set aside only for very good reasons, and require misconduct related to foreclosure process itself. Alleged defect in assignment of mortgage does not constitute fraud or irregularity in process unless defect is such that it renders assignment absolutely invalid or ineffective or void. Borrower did not allege any risk of being required to pay twice or that borrower faced any demands from anyone other than foreclosing lender.

- (6612) *Yates v. U.S. Bank, N.A.*, 912 F.Supp.2d 478 (E.D. Mi. 2012) – Mortgagors have standing to bring an action challenging loan servicer's determination that they were ineligible for a permanent modification of their loan under federal Home Affordable Modification Program (HAMP), even though redemption period following foreclosure of their home had expired. Under Michigan law, after foreclosure proceeding, mortgagor can hold over and contest validity of foreclosure process in connection with summary proceedings for possession, or mortgagor can hold over and bring separate action challenging servicer's denial of a loan modification.
- (6613) *Akinwusi v. Federal Home Loan Mortg. Corp.*, 2013 WL 1282018 (E.D. Mi. 2013) – Once redemption expires on foreclosure, prior owner loses all right, title and interest in the property and loses standing to file action contesting foreclosure process. Only exception is where owner demonstrate an equitable extension of the period to redeem by clear showing of fraud or irregularity by foreclosing party. To prevail on a fraud claim in Michigan, plaintiff is required to prove: (1) defendant made a material representation; (2) that was false; (3) that party knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) made it with intention that plaintiff would rely on it; (5) plaintiff acted in reliance upon it; and (6) plaintiff thereby suffered injury. Federal Rule 9 requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." To satisfy this standard, a claimant must "(1) specify the statements the plaintiff contents were fraudulent; (2) identify the speaker; (3) state where and when the statements were made; and (4) explain why the statements were fraudulent." Plaintiff's complaint alleged only that agents of FHLMC indicated that plaintiff could redeem at any time up to eviction. Plaintiff failed to alleged that statement was false as plaintiff could have redeemed up to point where redemption expired and perhaps could have done so even after redemption, and there was no evidence that plaintiff tried to redeem but was rejected by FHLMC.
- (6614) *McRary v. Jarrard*, 2011 WL 3566279 (E.D. Mi. 2011) – Redemption price is determined by successful bid price plus per diem interest calculated on the bid amount. Interest is not calculated based on full loan balance as borrower can redeem merely by paying bid amount plus interest on that bid.

22.13 Expungement of Sale

- (6615) *Connolly v. Deutsche Bank National Trust Company*, 2014 WL 4435962 (6th Cir. 2014) – Affidavit expunging foreclosure sale recorded by mortgage holder rehabilitates mortgage and sufficiently apprises parties that mortgage has not been discharged and remains in force and effect. Expungement affidavit effectively voids sheriff sale.
- (6616) *In re Finley*, Case No. 09-44480 (Bankr. E.D. Mi. 2010) – Sheriff's foreclosure sale may not be set aside absent fraud, accident or mutual mistake. Creditors attempt to circumvent sheriff's sale by filing "Affidavit Expunging Sheriff's Deed" was of no effect as the affidavit failed to contain any allegations of fraud, accident or mutual mistake. Mortgage ores alleged "mistake" in credit getting the full amount of the note is not "fraud" or a "mistake" sufficient to warrant setting aside the foreclosure sale where the foreclosure sale otherwise complied with all statutory requirements.

22.14 Assignment of Mortgage – Validity

- (6617) *Garner v. Select Portfolio Servicing, Inc.*, 2015 WL 5634449 (E.D. Mi. 2015) – Borrower's contention that trust to which loan had allegedly been transferred had in fact been dissolved prior to transfer, such that transfer to trust was invalid and trust servicer lacked standing to foreclose not factually supported. Although public registration of trust with SEC terminated prior to taking assignment, there was no indication that trust itself ceased to exist, only that it ceased to be a publically traded trust.
- (6618) *Jernigan v. Household Finance Corporation II*, 2015 WL 4481992 (Bankr. W.D. Ky. 2015) – Lender validly transferred note and mortgage to assignee after filing Proof of Claim in bankruptcy case. Lender held both note and mortgage and executed valid allonge to the assignee endorsed in blank and delivered to assignee.
- (6619) *Fialka v. US Bank*, 2014 WL 5361988 (E.D. Mi. 2014) – Splitting of note and mortgage does not render mortgage unenforceable. Mortgage servicer to whom mortgage had been assigned without assignment of note had standing to pursue foreclosure as servicer had interest in the indebtedness.
- (6620) *Spadafore v. Aurora Loan Servicing, LLC*, 564 Fed. Appx. 168 (6th Cir. 2014) - Splitting of note and mortgage does not render mortgage unenforceable.
- (6621) *Dye v. Wells Fargo Home Mortgage*, 2014 WL 1908285 (E.D. Mi. 2014) - Splitting of note and mortgage does not render mortgage unenforceable.
- (6622) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – Assignment of mortgage that did not also assign note did not render mortgage assignment invalid or deprive assignee of standing to foreclose. Separation of note and mortgage does not nullify the mortgage assignment.
- (6623) *Gibson v. Mortgage Electronic Registration Systems*, 2014 WL 2091258 (W.D. Tn. 2014) – Under Tennessee law, assignment of note carries with it automatic transfer of deed of trust. Party to whom note was endorsed had standing to foreclose notwithstanding the lack of a separate assignment of deed of trust.

- (6624) *Conlin v. Mortgage Electronic Registration Systems, Inc.*, 714 F.3d 355 (6th Cir. 2013) –
- (6625) *Higgins v. BAC Home Loans Servicing, LP*, 2014 WL 1333069 (E.D. Ky. 2014) – Under Kentucky law, assignment of a note transfers to the assignee all interests in the mortgage including the rights of the mortgagee. Kentucky law requires that all assignments of mortgage be recorded. If the assignment of the mortgage is attendant to the assignment of the note rather than in a separate instrument, the assignee must record the assigned note. Statute is designed to ensure that public records maintain accurate record of mortgages and note holders on mortgage properties. Kentucky statute provides for private right of action by anyone who is damaged by failure to record, with minimum of \$500.00. Property owners whose property is encumbered are within scope of statutory protection and have right of action for damages.
- (6626) *In re Hopkins*, 2014 WL 922773 (E.D. Mi. 2014) – Allegedly defective assignment of mortgage could not be contested after foreclosure sale and issuance of sheriff deed. Only claims recognizable after redemption are limited to actions based on fraud or irregularity in foreclosure process itself. There was no connection between allegedly defective assignment and foreclosure process that would support post-redemption action.
- (6627) *Eitls v. Deutsche Bank National Trust Co.*, 2014 WL 645358 (E.D. Mi. 2014) – Once redemption expires, owner can contest validity of foreclosure sale only on a clear showing of fraud or irregularity. Standard for extension of expiration is stringent and statutory foreclosures will be set aside only for very good reasons, and require misconduct related to foreclosure process itself. Alleged defect in assignment of mortgage does not constitute fraud or irregularity in process unless defect is such that it renders assignment absolutely invalid or ineffective or void. Borrower did not allege any risk of being required to pay twice or that borrower faced any demands from anyone other than foreclosing lender.
- (6628) *Harris v. FDIC*, 2013 WL 6049002 (E.D. Mi. 2013) – Property owner lacks standing to contest validity of assignment of mortgage and note. Borrower is not a party to assignments and lacks standing to attack them.
- (6629) *Bridge v. Ocwen Federal Bank*, 2013 WL 4784292 (N.D. Ohio 2013) – Debtor could not contest right to foreclose based on alleged defect in assignment between original lender and assignee. Assignee had and presented original, endorsed note. Debtor could not allege any credible risk that debtor would be required to “double pay”. Assignor admitted fact of assignment and did not assert any challenge to the assignment. Record disclosed no confusion concerning promissory note.
- (6630) *Rogan v. Vanderbilt Mortgage & Finance, Inc.*, 2013 WL 1909497 (Bankr. E.D. Ky. 2013) – Assignee of mortgage who did not also obtain endorsement or transfer of note lacks standing to enforce either note or mortgage under Kentucky law. Assignee is not “holder” of note as defined in Uniform Commercial Code and could not be recognized as transferee absent evidence of proper endorsement or transfer. Assignment of mortgage does not automatically transfer note and note does not automatically file the mortgage upon transfer. Without proper transfer of the note, holder of mortgage is not legally able to enforce the mortgage. Trustee would be able to sell property free and clear of mortgage.
- (6631) *Kreitzer v. Household Realty Corp.*, 489 WL 6998 (Bankr. S.D. Ohio 2013) – Assignment of mortgage is not conveyance of any interest in property. Assignment that was allegedly defective as not executed in accordance with state law regarding mortgages or transfers of interest in property was valid and enforceable by assignee.

22.15 Assignment of Mortgage – Standing to Contest

- (6632) *Kassem v. Ocwen Loan Servicing, LLC*, 2015 WL 5559906 (E.D. Mi. 2015) – Section 600.3204 provides that if party foreclosing by publication is not the original mortgagee, party must establish record chain of title evidencing assignment of mortgage to party seeking to foreclose. Chain of title recorded in county records established required assignments to give lender standing to foreclose. Borrowers lacked standing to contest validity of assignments recorded in public record absent showing that defects would prejudice borrowers in efforts to retain property. Allegations of robo-signing and other alleged defects were intrinsic to assignments and did not prejudice borrowers in any way. Mere fact that borrowers may not know who owns loan is not sufficient to establish prejudice because borrowers did not allege that any party other than lender had interest in note or that some third party was attempting to also hold them liable for note.
- (6633) *Johnson v. Broker Solutions, Inc.*, 2015 WL 4469276 (M.D. Tn. 2015) – Borrower lacks standing to contest whether assignment of note and mortgage violated Pooling and Servicing Agreement.
- (6634) *Wilson v. Regions Bank*, 2015 WL 4276262 (M.D. Tn. 2015) – Borrower lacks standing to contest whether assignment of note and mortgage violated Pooling and Servicing Agreement as borrower was not party to PSA.
- (6635) *McHugh v. Bank of America*, 2015 WL 3475520 (Bankr. N.D. Ohio 2015) – Borrower lacks standing to contest assignment of mortgage that allegedly violated Pooling and Servicing Agreement, as debtor was not party to PSA and had no right, either directly or as intended third party beneficiary, to enforce PSA. Borrower can contest assignment only based on allegations of fraudulent assignment that, if proven, would render assignment void in first instance such that lender would not have held title at time of commencement of case. Alleged violation of PSA did not render assignment void, although it may have given rise to causes of action between assignor and assignee, neither of which was the debtor.
- (6636) *Fialka v. US Bank*, 2014 WL 5361988 (E.D. Mi. 2014) – Borrower lacks standing to contest foreclosure based on alleged flaw in assignment documents. Alleged irregularity would be strictly matter between assignor and assignee where alleged defect in assignment did not expose borrower to double liability. Borrower did not allege any risk of double liability and did not present any evidence that anyone other than mortgage holder had attempted to collect debt or could attempt to do so. Further, alleged lack of recorded chain of title in assignment is not basis to set aside assignment, particularly where recorded chain of title established that US Bank, as assignee, held mortgage.

- (6637) *Brown v. Florida Coastal Partners*, 2014 WL 5107706 (S.D. Ohio 2014) – Non-party property owner has standing to contest validity of assignment where property owner alleged that assignment was fraudulent. Property owner cannot contest assignment based solely on technical defects that would prevent assignment from being properly recorded or from establishing chain of title. Complaint that alleged that assignments had been fraudulently backdated and so assignee did not hold title at time of purported foreclosure challenged validity of the assignment and not merely “technical defects” in otherwise valid assignments.
- (6638) *Slorp v. Lerner, Sampson & Rothfuss*, 2014 WL 4800100 (6th Cir. 2014) – Non-party homeowner has standing to contest validity of assignment to establish assignee’s lack of title. However, non-party homeowner may not contest validity of assignment based solely on technical defects in otherwise valid assignment.
- (6639) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – Borrower lacks standing to contest assignment under Pooling and Servicing Agreement as borrower is not party to that agreement. Assignee holds power to foreclose notwithstanding allegation that assignment violated PSA.
- (6640) *Van Duzer v. US Bank, NA*, 2014 WL 4416304 (5th Cir. 2014) – Borrower lacks standing to contest alleged assignment of mortgage from loan originator to MERS. MERS, as assignee, holds power to foreclose upon default.
- (6641) *Davies v. Deutsche Bank National Trust Co.*, 2014 WL 1152800 (9th Cir. 2014) – Borrower lacks standing to contest assignment of mortgage based on alleged violation of Pooling and Servicing Agreement. Debtor did not allege that underlying mortgage was invalid or contest that debtor owes the debt.
- (6642) *Floyd v. Bank of America*, 2014 WL 3732591 (N.D. Ohio 2014) – Borrower is not party to assignment of mortgage and note and lacks standing to contest validity of assignment. Debtor lacked standing to claim that assignment violated underlying trust agreement by which original lender held and later assigned mortgage.
- (6643) *Jestes v. Saxon Mortgage Services, inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Mortgagor is not party to assignment of note or mortgage and lacks standing to challenge assignment. Only exception is where plaintiff asserts a genuine claim that he may be subject to double liability. Otherwise, assignment of note and mortgage do not alter borrower’s rights and duties.
- (6644) *Conlin v. Mortgage Electronic Registration Systems, Inc.*, 714 F.3d 355 (6th Cir. 2013) - After expiration of redemption, former owner can contest foreclosure only for fraud or irregularity in foreclosure process itself. Alleged invalidity of assignment of mortgage was not defect as to foreclosure process itself and could not support post-redemption action.
- (6645) *Chambers v. HSBC Bank USA*, 2014 WL 1405276 (E.D. Mi. 2014) – Action commenced after expiration of redemption must be dismissed where complaint did not allege fraud as to foreclosure process itself, and Plaintiff did not allege any prejudice if there were any errors in the foreclosure process. Once foreclosure process is complete and redemption expires, attach must make clear showing of fraud or irregularity in foreclosure process and must cause prejudice. Plaintiff lacked standing to contest foreclosure based on allegedly defective assignments because plaintiff was not party to the assignments and even if assignments were defective, plaintiff suffered no prejudice where it was uncontested that plaintiff signed mortgage on property and had defaulted in payments.
- (6646) *Dauenhauer v. Bank of New York Mellon*, Case No. 13-5810 (6th Cir. 2014) – Borrower lacks standing to allege that assignment of note and mortgage violated Pooling and Servicing Agreement as borrower is not party to that agreement.
- (6647) *Sigmon v. Cornerstone Home Lending*, 2014 WL 948490 (Bankr. W.D. N. C. 2014) – Litigant who is not party to assignment lacks standing to contest validity of assignment. While assignments may have been incorrect or in violation of inter-lender agreements, borrower lacked standing to contest assignee’s right to enforce mortgage.
- (6648) *Hopkins v. Federal Home Loan Corporation*, Case no. 13-14757 (E.D. Mi. 2014) – Debtor lacks standing to contest foreclosure process based on allegedly unrecorded assignment of mortgage. Post-redemption, debtor may challenge foreclosure sale only based on fraud or irregularity in sale itself. Alleged failure to record mortgage had no connection to foreclosure process or any claim of prejudice.
- (6649) *DAGS II, LLC v. Huntington National Bank*, 2013 WL 6884242 (W.D. Mi. 2013) – Mortgagor lacks standing to contest terms of assignment of mortgage as mortgagor is not a party to the assignment. Questions concerning scope and extent of assignment, and in particular whether assignment included all of the debt owed to Huntington or only a portion of that debt could be litigated only between Huntington and purported assignee.
- (6650) *Robinson v. Select Portfolio Servicing, Inc.*, 522 Fed. Appx. 309 (6th Cir. 2013) – Person who is not party to alleged assignment of note and mortgage lacks standing to contest validity of assignment.
- (6651) *Richardson v. Deutsche Bank National Trust Co.*, 2012 WL 1941846 (Bankr. W.D. MI. 2012) – Trustee lacks standing to contest validity of assignment of mortgage.
- (6652) *Kreitzer v. Household Realty Corp.*, 489 WL 6998 (Bankr. S.D. Ohio 2013) – Debtor lacks standing to contest allegedly defective assignment of mortgage. Assignment is private contract between assignor and assignee to which debtor is not party.
- (6653) *Mentag v. GMAC Mortgage, LLC*, 2013 WL 489181 (E.D. Mi. 2013) – Debtor lacks standing to contest validity of alleged assignment of mortgage or to raise alleged defect in assignment in response to request for relief from stay. A litigant who is not a party to an assignment lacks standing to challenge the validity of the assignment. Creditor constituted “holder” of note for purposes of standing to seek relief from stay. Under Michigan law, a “holder” is one in possession of an unsigned note that is made out to it; or one in possession of a signed note. Creditor was the holder when the motion was filed and creditor was in physical possession of note.

- (6654) *Ogle v. BAC Home Loans Servicing, LP*, Case no. 11-05540 (S.D. Ohio 2012) – Debtor lacked standing to contest foreclosure based on alleged defective assignments of mortgage. Borrower’s repayment obligations under the loan documents remains unaffected and unaltered by validity or invalidity of assignment, and there was no dispute as between assignor and assignee as to validity of assignment.
- (6655) *Bank of New York Mellon Trust Co. v. Unger*, 2012 WL 1567192 (Ohio App. 2012) – Borrower lacked standing to contest validity of assignments or to invalidate mortgage based on alleged invalidity of assignment. Assignments did not in any way alter borrower’s obligations under the note and mortgage. Any alleged defect in the assignments did not cause any harm to borrower as alleged defect did not expose them to any greater harm or loss beyond scope of mortgage and note.

22.16 Contest of Mortgage Foreclosure Post-Redemption

- (6656) *Thabata v. Bank of America*, 2015 WL 4899421 (6th Cir. 2015) – A mortgagor's failure to avail themselves of the statutory right of redemption following a sheriff's sale extinguishes all of their rights in and to the property. Filing suit does not toll the redemption period. Foreclosure sale may be voided where the mortgagor shows fraud or irregularity resulting in prejudice such that borrower would have been in a better position to preserve their interest in the property absent the foreclosing party's noncompliance with Michigan's foreclosure statute. Lender did not violate MCL 600.3205a by failing to provide calculations used to deny mortgage modification where lender was required to provide calculations only if borrower met with housing counselor or lender to negotiate modification under Section 600.3205b, and borrower never contacted a counselor or otherwise requested to negotiate modification.
- (6657) *Ross v. Wells Fargo Bank, NA*, 2014 WL 5390659 (W.D. Mi. 2014) – Once redemption expires, party contesting foreclosure sale must prove fraud or irregularity in the foreclosure process itself. Alleged securitization of loan does not render loan unenforceable or render foreclosure sale void. Splitting of note and mortgage does not invalidate foreclosure sale.
- (6658) *Rubin v. Fannie Mae*, Case No. 13-1010 (6th Cir. 2014) – Once redemption expires, prior owner can contest only by showing that foreclosure sale itself was fraudulent or irregular. Alleged irregularities in mortgage modification process is not basis to set aside subsequent sale.
- (6659) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Borrower has standing to contest foreclosure process post-redemption. Borrower is the person most directly impacted by foreclosure process sufficient to support constitutional and prudential standing. Borrower must prove fraud in the foreclosure process itself in order to prevail, but high burden of proof is not issue of standing but of recovery on merits.
- (6660) *Conlin v. Mortgage Electronic Registration Systems, Inc.*, 714 F.3d 355 (6th Cir. 2013) - After expiration of redemption, former owner can contest foreclosure only for fraud or irregularity in foreclosure process itself. Alleged invalidity of assignment of mortgage was not defect as to foreclosure process itself and could not support post-redemption action.
- (6661) *Chambers v. HSBC Bank USA*, 2014 WL 1405276 (E.D. Mi. 2014) – Action commenced after expiration of redemption must be dismissed where complaint did not allege fraud as to foreclosure process itself, and Plaintiff did not allege any prejudice if there were any errors in the foreclosure process. Once foreclosure process is complete and redemption expires, attach must make clear showing of fraud or irregularity in foreclosure process and must cause prejudice.
- (6662) *Hopkins v. Federal Home Loan Corporation*, Case no. 13-14757 (E.D. Mi. 2014) – Property owner’s right to challenge foreclosure sale after expiration of redemption is limited to allegations of fraud or irregularity in foreclosure process itself.
- (6663) *Crehan v. Maiden Lane, LLC*, 2014 WL 467568 (W.D. Mi. 2014) – Plaintiff lacked standing to maintain quiet title action after foreclosure based on alleged impropriety in foreclosure process. Michigan law requires that Plaintiff in quiet title action be able to demonstrate title superior to contested interests. Plaintiff could not contest validity of mortgage and could not establish title superior to mortgage interest.
- (6664) *Baker v. Bank of America*, 2013 WL 5945055 (E.D. Mi. 2013) – Expiration of redemption terminates all right, title and interest of prior owner and vests the property in the purchaser at the sale. Former owner cannot make any claims with respect to the foreclosed property after expiration of redemption. Court can extend redemption only on clear showing of fraud or irregularity in the foreclosure. Mere accident or mistake, or possible injustice, is not sufficient to tamper with foreclosure process.
- (6665) *Mullins v. FNMA*, 2013 WL 5707798 (E.D. Mi. 2013) – Legal title to foreclosed property vests in the purchaser if the property is not redeemed within allowable time. Court can equitably extend redemption, and accordingly extend the prior owner’s right to contest foreclosure sale, on clear showing of fraud or irregularity. Misconduct must relate to foreclosure process itself and not collateral matter. Owner lacked standing to contest foreclosure where owner alleged only that lender stated that loan modification had been approved but did not provide paperwork evidencing any modification.
- (6666) *Carr v. JPMorgan Chase Bank*, 2013 WL 5450291 (E.D. Mi. 2013) – Once redemption expires, former owner’s rights are terminated and party cannot contest foreclosure sale except by showing fraud or irregularity in sale proceedings themselves, and not simply based on any other conduct of the defendant. Complaint to contest foreclosure was filed after redemption expired and did not allege any irregularity in the foreclosure process. Allegations regarding multiple attempted loan modifications do not address validity or effect of sale and do not form basis to contest sale.
- (6667) *Connolly v. Deutsche Bank National Trust Co.*, 2013 WL 4084742 (E.D. Mi. 2013), *aff’d*, 2014 WL 4435962 (6th Cir. 2014) – Under Michigan law, upon expiration of redemption, all right, title and interest in the property vests in the purchaser at the sale. Former owner can maintain action to challenge foreclosure process only if plaintiff makes a clear showing of fraud or irregularity in the process itself, and the action must be brought promptly and without delay, which can be even after expiration of the redemption period.

- (6668) *Mourad v. Homeward Residential, Inc.*, 2013 WL 870205 (6th Cir. 2013) – Under Michigan law, property owners are generally not permitted to assert claims related to a foreclosed property after redemption expires. However, defense is not lack of standing, as homeowner has both Article III and Statutory standing. Expiration of redemption can affect outcome of case on merits.
- (6669) *Smith v. First Indiana Bank*, 2013 WL 3946015 (E.D. Mi. 2013) – Homeowner has standing to bring action contesting validity of foreclosure sale where action is brought within statutory redemption period and does not lose that standing upon expiration of redemption. Homeowner is the last legal owner of the property and has a continuing right to lawful ownership and possession based on defects in the foreclosure process.

22.17 Standing to Contest – Robosigning

- (6670) *Ross v. Wells Fargo Bank, NA*, 2014 WL 5390659 (W.D. Mi. 2014) – Borrower cannot contest foreclosure based on alleged robo-signing of assignment documents. Borrower is not party to the assignments and cannot contest the validity where alleged issues of robo-signing would not render assignment absolutely invalid or void, such as non-assignability of mortgage, assignee's lack of title, or a prior revocation of the assignment.
- (6671) *Conlin v. Mortgage Electronic Registration Systems, Inc.*, 714 F.3d 355 (6th Cir. 2013) - After expiration of redemption, former owner can contest foreclosure only for fraud or irregularity in foreclosure process itself. Alleged “robo-signing” of assignment of mortgage was not defect as to foreclosure process itself and could not support post-redemption action.
- (6672) *Sigmon v. Cornerstone Home Lending*, 2014 WL 948490 (Bankr. W.D. N. C. 2014) – Borrower lacks standing to challenge assignments based on so-called “robo-signing”. Allegations concerning robo-signing of documents do not contest validity of underlying debt.

22.18 Foreclosure Fraud – “Excessive” Bid

- (6673) *Rubin v. Fannie Mae*, Case No. 13-1010 (6th Cir. 2014) – Once redemption expires, prior owner can contest only by showing that foreclosure sale itself was fraudulent or irregular. Alleged excessive bid is not type of fraud sufficient to set aside foreclosure process. While Section 600.3228 requires fairness and good faith, nothing in Section 600.3228 require a “fair market value” bid.
- (6674) *Hopkins v. Federal Home Loan Corporation*, Case no. 13-14757 (E.D. Mi. 2014) – Mortgage holder can bid any amount desired. MCL Section 600.3228 does not create cause of action for allegedly “excessive” bid even where lender's bid allegedly exceeds actual value of property.
- (6675) *Washington v. BAC Home Loans Servicing*, 2013 WL 5476023 (E.D. Mi. 2013) – Owner has no cause of action against lender based on allegedly “excessive” bid. Lender has right to bid whatever amount lender desires. Fact that bid exceeded fair market value of collateral is not actionable.

22.19 Foreclosure Fraud Generally

- (6676) *Yaldo v. Homeward Residential, Inc.*, 2015 WL 4636627 (6th Cir. 2015) – Borrower's challenge to foreclosure based on fraud requires proof that “fraud” prejudiced borrower's ability to preserve interest in property. Borrower's complaint failed to allege fraud based on an assertion that plaintiff assigned the balance of the indebtedness to another lender after the foreclosure, as assertion did not demonstrate any irregularity in process. Borrower also failed to allege prejudice as plaintiff failed to allege any effort to redeem and only “prejudice” alleged arose based on lender's allegedly wrongful failure to cancel the note an reporting borrower in default to the credit reporting agencies.
- (6677) *Roller v. Federal National Mortgage Assn*, 2015 WL 3823848 (E.D. Mi. 2015) – After expiration of redemption, borrower can contest foreclosure only on clear showing of fraud or irregularity in foreclosure process itself, where irregularity prejudiced borrower as borrower would have been in a better position to preserve its interest in the property absent noncompliance. Borrower's action failed to allege any fraud or irregularity based solely on lender's failure to provide itemized statement underlying denial of decision to modify loan, and failed to allege that failure to produce itemization in any way caused borrowers to be unable to redeem or otherwise avoid foreclosure.
- (6678) *Baker v. Residential Funding Company, LLC*, 2014 WL 3767843 (E.D. Mi. 2014) – Foreclosure defects are not void but are voidable and require showing that defects resulted in prejudice to debtors. Alleged fraud or irregularity in assignment did not prejudice debtors who did not content that defect precluded them from making payments or from redeeming property after sale.
- (6679) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Borrower must prove fraud in the foreclosure process itself in order to prevail in action filed after expiration of redemption. Lender's alleged failure to finalize mortgage modification or to accept modified payments is not type of “fraud or irregularity” that warrants setting aside foreclosure sale, as defects, if any, do not go to foreclosure process itself. Remedy for failure to complete loan modification, if any, is to require lender to halt foreclosure by advertisement and use judicial foreclosure process. Once foreclosure sale occurred, there is no foreclosure action for the court to enjoin or convert to a judicial foreclosure process.
- (6680) *In re Hopkins*, 2014 WL 922773 (E.D. Mi. 2014) – Lender's credit bid at foreclosure sale in excess of total amount of debt is not actionable. There is no requirement that lender enter only “fair bid” based on value of property and lender has right to bid amount in excess of value. Debtor reaps benefit of higher bid as bid in excess of loan amount extinguishes any possible deficiency claim.
- (6681) *Connolly v. Deutsche Bank National Trust Co.*, 2013 WL 4084742 (E.D. Mi. 2013), *affd.* 2014 WL 4435962 (6th Cir. 2014) – Based on Michigan Supreme Court decision in *Kim v. JPMorgan Chase Bank, NA*, 825 N.W.2d 329 (2012), failure to comply with statutory requirements for foreclosure by advertisement renders sale voidable, not void ab initio. To set aside the sale, plaintiff must prove that

failure to comply with statute caused prejudice, by showing that plaintiff would have been in a better position to preserve their interest in the property but for defendant's non-compliance. Prejudice requires that plaintiffs were misled into believing that not sale had been held; plaintiff acted promptly after becoming aware of the facts on which they base the complaint; that plaintiffs made an effort to redeem the property during the redemption period; whether plaintiffs were represented by counsel during the foreclosure process; and whether the defendant relied on the apparently validity of the sale by taking steps to protect its interest in the property. Affidavit of expungement of earlier sale is sufficient to expunge prior sheriff deed and to restore property and mortgage to full force and effect.

- (6682) *Pugh v. Bank of America*, 2013 WL 3349649 (W.D. Tn. 2013) – Under Tennessee law, substitute trustees or loan servicers have authority to pursue foreclosure proceedings as agents for secured creditors. Deed of trust in question specifically allowed lender to appoint substitute trustee or successor trustee who would then have all powers and duties of trustee including power to sell property. Tennessee law did not preclude appointment as successor trustee of out-of-state entity. Notice of sale was sufficient where notice identified successor trustee as having been appointed as substitute trustee, it identified the loan documents, and it stated that the sale would be held on specific date and time and at specific location.
- (6683) *Hermiz v. FHLMC*, 2013 WL 3353928 (E.D. Mi. 2013) – Owner cannot contest validity of foreclosure sale after expiration of redemption unless owner can make clear showing of fraud, or irregularity in foreclosure process itself. Fraud requires representations made by the mortgagee to the owner that were material, false, and made either with knowledge of falsity or with reckless disregard for truth, such that owner relied on representations and suffered harm. Owner did not demonstrate fraud where lender's representative allegedly told owner that foreclosure sale was scheduled for one week later than it was, where lender had previously posted the property for sale for four weeks and published notice in newspaper, all of which stated the correct date for the sale and provided sufficient warning to owner of actual date of sale.
- (6684) *Rugiero v. Flagstar Bank, FSB*, 2013 WL 1316910 (E.D. Mi. 2013), *rehearing denied*, 2013 WL 3849930 (E.D. Mi. 2013) – Owner of property is precluded from challenging foreclosure once redemption has expired. Upon expiration of redemption, title vests absolutely in the purchaser at the sale and there is no basis for a court to alter that outcome. To extent owner has any remedy, that is limited to either contesting sale before redemption expires, or holding over after redemption and contesting foreclosure sale as part of summary proceedings for possession. Only exception is where mortgagor makes strong showing of fraud or irregularity. Fraud requires false statements by lender. Defect under Section 600.3205 requires proof that failure to comply with statutory foreclosure laws resulted in prejudice to owner, such that owner would have been in better position to preserve interest in property had lender not failed to comply with statute. Allegation that debtor does not recall receiving notice of foreclosure sale does not rise to level of either fraud or prejudice. Debtor did not present any facts that would entitle him to render the foreclosure sale voidable. Debtor admittedly was aware that a foreclosure sale of his home was going to occur and he was not misled into believing that one might not occur and, there is no evidence that he made any effort convert the summary proceedings to a judicial foreclosure or to redeem the property after the foreclosure sale, but prior to expiration of the redemption period. Debtor had the advice of counsel, at least during the summary eviction proceedings, such that there was no basis for the Federal Court to disturb foreclosure process.
- (6685) *Wheeler v. Federal National Mortgage Assn.*, 2013 WL 2200398 (E.D. Mi. 2013), *report and recommendation adopted*, 2013 WL 3456966 (E.D. Mi. 2013) – Failure to redeem property within six month period following foreclosure sale divests former owner of all rights to the property. Former owner can maintain action contesting foreclosure after expiration of redemption only if owner files action before expiration of redemption and makes a clear showing of irregularity or fraud by defendant. Plaintiff failed to demonstrate basis for equitable extension of redemption where plaintiff did not establish that sale did not comply with Michigan foreclosure statutes, or that any alleged irregularity prejudiced owner by adversely affecting owner's ability preserve interest in property. Owner did not show that but for lender's alleged wrongful actions or irregularities in the sale, debtor would have been able to redeem property or otherwise prevent loss of property through foreclosure process.
- (6686) *Brown v. Orlans Associates, PC*, 2013 WL 1506016 (E.D. Mi. 2013) – Complaint failed to state cause of action for foreclosure fraud against law firm representing lender. Complaint must (1) specify the statements that plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent. General allegation that law firm used fraudulent affidavit in foreclosure process failed to state cause of action.
- (6687) *Young v. Fannie Mae*, 2013 WL 12842332 (N.D. Ohio 2013) – Tenant in property lacks standing to contest validity of foreclosure sale.
- (6688) *Akinwusi v. Federal Home Loan Mortg. Corp.*, 2013 WL 1282018 (E.D. Mi. 2013) – Once redemption expires on foreclosure, prior owner loses all right, title and interest in the property and loses standing to file action contesting foreclosure process. Only exception is where owner demonstrate an equitable extension of the period to redeem by clear showing of fraud or irregularity by foreclosing party. To prevail on a fraud claim in Michigan, plaintiff is required to prove: (1) defendant made a material representation; (2) that was false; (3) that party knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) made it with intention that plaintiff would rely on it; (5) plaintiff acted in reliance upon it; and (6) plaintiff thereby suffered injury. Federal Rule 9 requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." To satisfy this standard, a claimant must "(1) specify the statements the plaintiff contends were fraudulent; (2) identify the speaker; (3) state where and when the statements were made; and (4) explain why the statements were fraudulent." Plaintiff's complaint alleged only that agents of FHLMC indicated that plaintiff could redeem at any time up to eviction. Plaintiff failed to alleged that statement was false as plaintiff could have redeemed up to point where redemption expired and perhaps could have done so even after redemption, and there was no evidence that plaintiff tried to redeem but was rejected by FHLMC.
- (6689) *Assasepa v. JPMorgan Chase Bank*, 2012 WL 88162 (S.D. Ohio 2012) – Complaint failed to state cause of action for fraudulent foreclosure. Although complaint alleged violations of TILA and RESPA and alleged that documents were "robo-signed", plaintiffs did not

dispute that they defaulted on their mortgage, that they were current with their mortgage payments, or that the documents allegedly “robo-signed” contained false information. Rather, the complaint includes allegations that plaintiffs were aware of their default and sought to determine the amount owed *after* the foreclosure had taken place. Plaintiff’s conclusory assertions that “robo-signing” occurred are insufficient to establish a claim for fraud.

22.20 Forgery of Mortgage

- (6690) *Bazinski v. JPMorgan Chase Bank*, 2014 WL 1405253 (E.D. Mi. 2014), *aff’d*, 2015 WL 1003036 (6th Cir. 2015) – Once foreclosure sale has occurred and redemption expired, former owner can seek relief only for irregularities in the foreclosure process itself that caused or will cause prejudice to former owner. Plaintiff failed to state cause of action based on allegation that Plaintiff never signed the mortgage or that her signature was forged by her former husband because Plaintiff did not bring action or contest foreclosure before sale occurred or redemption expired. No aspect of foreclosure complaint went to foreclosure process itself, as Plaintiff did not contend that her signature was forged on any documents relating to the foreclosure process itself.

22.21 Standing to Contest – Notice of Foreclosure Sale

- (6691) *Bryce v. CitiMortgage, Inc.*, Case no. 14-2048 (Bankr. E.D. Mi. 2015) – Foreclosure sale creates presumption that valid notice was provided and former owner bears burden of showing that sale should be set aside. Plaintiff’s blanket statement denying notice and insisting that it is not her signature on return receipt card is insufficient to overturn otherwise valid foreclosure sale. Further, all other documents presented to court, including return receipt card, communications prior to and after the foreclosure sale. The proof of service and affidavit showing mailing of the notice of foreclosure, the proof of publication, the affidavit of posting, and the Sheriff’s deed supported finding that property owner received all statutorily required notices.

22.22 Standing to Contest – Other Grounds

- (6692) *Hopkins v. Federal Home Loan Corporation*, Case no. 13-14757 (E.D. Mi. 2014) – Property owner’s right to challenge foreclosure sale after expiration of redemption is limited to allegations of fraud or irregularity in foreclosure process itself.
- (6693) *Goss v. ABN Amro Mortgage Group*, 2013 WL 6698041 (6th Cir. 2013) – Borrower could not maintain action to quiet title after redemption. Per state law, expiration of redemption vests all right, title and interest in lender. Absent proof that foreclosure sale itself was tainted by fraud, accident or mistake in the foreclosure itself, owner no longer had interest that was superior to that of lender.
- (6694) *Etts v. Deutsche Bank National Trust Co.*, 2014 WL 645358 (E.D. Mi. 2014) – Expiration of redemption does not deprive owner of standing. Article III standing requires injury that is concrete and particularized, and is fairly traceable to the challenged action. There is no dispute that property owner suffers concrete and particular injury if foreclosure sale was improper. State law also confers standing as statute allows foreclosure only upon compliance with the state statute. However, after redemption expires, owner may contest foreclosure upon showing that foreclosure sale was result of fraud or irregularity by the lender. Standard for extension of expiration is stringent and statutory foreclosures will be set aside only for very good reasons, and require misconduct related to foreclosure process itself.
- (6695) *Crehan v. Maiden Lane, LLC*, 2014 WL 467568 (W.D. Mi. 2014) – Plaintiff lacked standing to maintain quiet title action after foreclosure based on alleged impropriety in foreclosure process. Michigan law requires that Plaintiff in quiet title action be able to demonstrate title superior to contested interests. Plaintiff could not contest validity of mortgage and could not establish title superior to mortgage interest.

22.23 Deficiency Claims

- (6696) *In re Black*, 2014 WL 690159 (Bankr. E.D. Mi. 2014) – Lender may have violated Michigan statutory prohibition against deficiency judgments were lender purchased property at foreclosure sale with a credit bid equal to full amount of the indebtedness, as lender is deemed to have received the amount of the credit bid, leaving no portion of the obligation outstanding. However, creditor’s actions in attempting to collect deficiency judgment from second parcel of collateral, while possibly violating Michigan law, did not constitute violation of discharge injunction.

22.24 Discharge or Release of Mortgage at Final Payment – MCL §§ 565.41 and 565.44

- (6697) *Sutter v. Saxon Mortgage Services, Inc.*, Case no. 06-3150 (Bankr. E.D. Mi. 2015) – Sections 565.41 and 565.44 award owner damages where lender refuses or neglects to discharge mortgage or to execute and acknowledge certificate of discharge or release, and allows award of actual damages plus \$1,000.00. Statutes did not apply where court determined that mortgage was void *ab initio*.

XXIII. Fair Debt Collection Practices Act

A. Generally

23.1 “Debt Collector” Defined

- (6698) *Garner v. Select Portfolio Servicing, Inc.*, 2015 WL 5634449 (E.D. Mi. 2015) – Debt collector for purposes of FDCPA does not include any person collecting in his own name, or which was acquired by creditor at time when loan was not in default. Debt was not in default when loan was assigned such that lender and mortgage servicer were not within scope of FDCPA.
- (6699) *Adams v. Mortgage Electronic Registration Systems, Inc.*, 2012 WL 95332 (E.D. Mi. 2011) – FDCPA applies only to third party debt collector. Creditor collecting debt owed to it as lender cannot violate FDCPA as a matter of law.
- (6700) *Brister v. American Home Mortgage Servicing, Inc.*, Case no. 11-13574 (11th Cir. 2012) – Status of individual or entity as “debt collector”

is determinative of liability under FDCPA. Fact that communications related to enforcement of security interest does not automatically remove party from status as “debt collector” under Section 1692e where communications were not limited to seeking to enforce security agreement but included demands for payment on the promissory note itself. Even if collector intended communications solely to advise of foreclosure, communications also demanded payment of underlying debt for purposes of Section 1692e. Mortgage servicer could be liable for violation of FDCPA where servicer maintained “relentless assault of harassing phone calls and home inspections” in effort to collect mortgage debt. Servicer called borrowers multiple times on a daily basis and continued to call even after having been advised that borrowers were represented by attorney. Servicer used offensive and abusive language and made false statements that home was set for foreclosure sale. Servicer began sending “inspectors” to the home every day or every other day, including Thanksgiving and Christmas day. Case remanded for further proceedings as to whether servicer’s principal purpose was collection of debtor or that servicer regularly collected or attempted to collect debts as required for determination as to whether servicer was “debt collector”.

- (6701) *Washington v. Roosen, Varchetti & Oliver, PLLC*, 894 F. Supp. 2d 1015 (W.D. Mi. 2012) – FDCPA applies to attorneys who regularly engage in consumer debt collection activity, even where activity is limited to state court litigation. Mere filing of complaint without possession of all documents necessary to prove claim is not deceptive practice. However, FDCPA does apply to statements and allegations contained in state court pleadings and is not limited to out-of-court communications. Plaintiff asserting a claim under the Fair Debt Collection Practices Act (FDCPA) for a debt collector’s false or misleading statements in connection with the collection of a debt must establish that: (1) the plaintiff is a consumer, as defined by the FDCPA; (2) the debt arises out of a transaction primarily for personal, family, or household purposes; (3) the defendant is a debt collector, as that phrase is defined by the FDCPA; and (4) the defendant violated one of the prohibitions listed in the FDCPA with respect to false or misleading statements. Whether statements in state court pleadings are mis-leading is based on whether “least sophisticated consumer” would be misled. Even if statements would be misleading to least sophisticated consumer, statements must also be materially false or misleading, such that it would tend to cause confusion. Plaintiff’s allegations in complaint that claim was based on written instrument that was not attached but which was in possession of Defendant may have been false, as Plaintiff was in possession of copies of written agreements. However, allegations were not materially false as Defendant was also in possession of documents. Further, failure to attach documents to a complaint is not fatal, as Plaintiff would have had opportunity to correct the deficiency by attaching the written instruments. However, Plaintiff’s allegations that debtors had sought lines of credit with no intention of repaying amounts borrowed and thereby had engaged in fraud, stated a claim under Fair Debt Collection Practices Act (FDCPA) for false or misleading statements in connection with the collection of a debt where plaintiff had no evidence of fraud and “least sophisticated consumer” may be confused or misled into believing that action was something other than effort to collect outstanding obligations.
- (6702) *Bennett v. Bank of America*, 2015 WL 5063271 (E.D. Ky. 2015) – FDCPA prevents debt collector from using false, deceptive or misleading representations or means in connection with collection of debt. Loan servicer did not violate FDCPA by providing borrower with proposed forbearance agreement where nothing in forbearance agreement contained misrepresentations or misleading representations. Forbearance agreement was not representation that other loss mitigation options were not available, it only presented terms of this specific loss mitigation option. Additional communications between lender and State Attorney General acting at the request of borrower were not communications within scope of FDCPA, as FDCPA governs only communications for the purpose of inducing payment and response to AG was ministerial response to borrower’s inquiry that made no attempt to induce payment. Monthly mortgage statements do not violate FDCPA where mortgage statement did not contain any false statement or misrepresentation.
- (6703) *Hart v. Wood*, 2015 WL 4276272 (W.D. Tn. 2015) – Complaint failed to allege that defendant was “debt collector” within scope of FDCPA where party was acting exclusively as trustee for purposes of initiating non-judicial foreclosure. Party is not “debt collector” if party is acting solely for purpose of enforcing security interest.
- (6704) *Rine v. Ocwen Loan Servicing, LLC*, 2011 WL 1327358 (W.D. Mi. 2011) – FDCPA distinguishes between “debt collectors” and “creditors.” Creditor is broadly defined as one who offers or extends credit creating a debt or to whom a debt is owed, while debt collector is one who attempts to collect debts owed or due or asserted to be owed or due another. Entity that acquires a current, non-defaulted debt to continue servicing it is creditor. Entity that acquires the debt for collection is debt collector. FDCPA looks at the status of the debt at the time it is acquired by the would-be collector to differentiate parties which ought to be treated as debt collectors from those which ought to be treated as creditors. Defendant is not removed from scope of FDCPA merely by calling itself a mortgage servicer. Complaint sufficiently alleged that loan was in default when acquired by Ocwen to cause Ocwen to be “debt collector” for purposes of FDCPA.
- (6705) *Greer v. Gateley*, 2010 WL 4817993 (Bankr. M.D. Tn. 2010) – FDCPA applies only to those who meet the statutory definition of “debt collector”, which turns on whether the person “regularly” attempts to collect debts. Business that principally focuses on enforcement security interests but who does not otherwise regularly attempt to collect debts is exempt from FDCPA except for Section 1692f(6) which prohibits taking or threatening to take property where there is no lawful right to possession or whether there is no intention to take property. Deed of Trust holder was not debt collector as only role was to enforce security agreement after default and there were no allegations that Deed of Trust holder took or threatened to take any action that would violate 1962f(6).
- (6706) *Geary v. Green Tree Servicing, LLC*, 2015 WL 1286347 (S.D. Ohio 2015) – “Debt collector” includes any non-originating debt holder that either acquired a debt in default or has treated the debt as if it was in default as of the date of acquisition, even if that treatment is incorrect as a result of clerical mistake, other error or intention. Plaintiff alleged that defendant acquired debt after debt had been paid off, but defendant then attempted to collect debt as if it was in default. Defendant claimed that it could not be a debt collector because debt, according to plaintiff, was paid off when defendant acquired servicing so debt could not have been “in default” which is trigger for FDCPA. Defendant was “debt collector” even if loan was paid in full as of date of transfer of servicing as defendant treated the loan as if it were in default. Letter from defendant to plaintiff advising of change of servicing was “initial communication” where letter did not state

that the only purpose was to advise of a change of servicing or that it was otherwise for information only, and letter contained total amount due and a due date and included a payment coupon, clearly intended to induce plaintiff to make payments to defendant. However, letter that included names of both original creditor and defendant in the letterhead was not misleading or confusing, even using the least sophisticated consumer standard, where letter clearly identified both parties and their relationship and informed plaintiff that right to collect loan payments was transferred from predecessor to defendant.

- (6707) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – FDCPA applies only to debt collectors and not to actual creditor. Loan servicer is considered “creditor” for purposes of FDCPA. Servicer who acquires rights at time when loan is not in default is not “debt collector” within scope of FDCPA.
- (6708) *McCord v. Resurgent Mortgage Servicing*, 2014 WL 4109622 (W.D. Ky. 2014) – In general, FDCPA does not apply to person attempting to collect debt in its own name or where the entity seeking to collect acquired the debt at a time when the debt was not in default. If mortgage lender was the originator of the loan, lender could not be held liable under FDCPA. Court denied motion to dismiss where originating lender was Countrywide, not B of A, and complaint did not clearly allege that B of A was successor to Countrywide. However, if B of A could prove it was successor to Countrywide as loan originator, B of A could not be liable as successor to originator by merger is deemed to be the originator and not a party who “acquired” the loan, regardless of whether loan was in default as of date of merger or not. Complaint alleged cause of action against loan servicer where complaint alleged that servicer made repeated communications with borrower that it would accept payments on loan when servicer had already accelerated loan and intended to pursue foreclosure. Further, statements were made in effort to coerce payments amounting to effort to collect on otherwise previously discharged debt. While security interest did survive bankruptcy and lender had right to foreclose, demands by servicer were not limited to efforts to realize on collateral but instead asked for money and implied that payment was required in effort to collect debt.
- (6709) *Jester v. Citimortgage*, 2014 WL 3547183 (N.D. Ohio 2014) – Creditor who originates debt is not a debt collector within scope of FDCPA. Lender that is successor by merger with original lender remains the “lender” and is not subject to FDCPA. Limitations period runs for one year from date of violation without regard to when plaintiff learned of violation. Action for alleged misapplication of payments in Chapter 13 that discharged in March, 2012, was untimely when filed in September, 2013, more than one year later. Court can extend statute for “equitable tolling” if 1) defendants concealed the conduct that constitutes the cause of action; 2) defendants’ concealment prevented plaintiffs from discovering the cause of action within the limitation period; and 3) until discovery of the cause of action, plaintiffs exercised due diligence in trying to find out about the cause of action. Allegations must contain specific statements of dates and times when fraud, mistake, concealment or misrepresentation was discovered and must demonstrate that discovery would not have been possible through ordinary diligence as a result of extraordinary circumstances. Allegations that plaintiffs repeatedly requested mortgage statements that were not provided is not sufficient statement of fraud. Failure to respond to Qualified Written Request under RESPA is not evidence of fraud. Even if actions were intended to conceal, plaintiffs could have discovered alleged deficiencies through reasonable efforts.

23.2 Debt Collector – Mortgage Servicer

- (6710) *Moore v. Caliber Home Loans, Inc.*, 2015 WL 5162482 (S.D. Ohio 2015) – 15 USC Section 1692a(6) defines “debt collector” as any person who uses instrumentality of interstate commerce of the mails in any business, the principal purpose of which is the collection of debt, or one who regularly collects or attempts to collect, directly or indirectly, debtor owed or due or asserted to be owed. Section 1692a(6)(F), “debt collector” does not include any person collecting or attempting to collect any debt owed or due or asserted to be owed or due to the extent the debt was not in default at the time it was obtained by the person. However, Section 1692a does not exclude from “debt collector” any person who acquired the loan when it was in default at time of acquisition or if the servicing company treated it as such, regardless of actual status. Complaint was sufficient to state cause of action against successor servicer where prior servicer had filed Motion for Relief From Stay asserting that debtors were in default and successor servicer later acquired servicing rights.
- (6711) *Rine v. Ocwen Loan Servicing, LLC*, 2011 WL 1327358 (W.D. Mi. 2011) – FDCPA distinguishes between “debt collectors” and “creditors.” Creditor is broadly defined as one who offers or extends credit creating a debt or to whom a debt is owed, while debt collector is one who attempts to collect debts owed or due or asserted to be owed or due another. Entity that acquires a current, non-defaulted debt to continue servicing it is creditor. Entity that acquires the debt for collection is debt collector. FDCPA looks at the status of the debt at the time it is acquired by the would-be collector to differentiate parties which ought to be treated as debt collectors from those which ought to be treated as creditors. Defendant is not removed from scope of FDCPA merely by calling itself a mortgage servicer. Complaint sufficiently alleged that loan was in default when acquired by Ocwen to cause Ocwen to be “debt collector” for purposes of FDCPA.
- (6712) *McKay v. JPMorgan Chase Bank*, 2014 WL 5529672 (S.D. Ohio 2014) – FDCPA applies only to “debt collectors” defined as one who has collection of debts as either its principal business purpose or who regularly engages in debt collection. FDCPA does not apply to the party to whom the debt is owed but is limited to parties collecting debts owed to others. Creditors and mortgage servicers who acquire the loan are excluded from “debt collectors” if loan was not in default and the creditor or servicer did not treat the debt as if it was in default at the time of acquisition. Complaint that failed to allege that loan was in default when acquired by defendant and failed to assert any facts to demonstrate that defendant treated loan as if it were in default when acquired failed to state cause of action as matter of law.
- (6713) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – FDCPA applies only to debt collectors and not to actual creditor. Loan servicer is considered “creditor” for purposes of FDCPA. Servicer who acquires rights at time when loan is not in default is not “debt collector” within scope of FDCPA.
- (6714) *Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – Letter to mortgage servicer cannot

form basis of action under FDCPA against lender. Further, FDCPA does not apply to actions against lender collecting debts in its own name or to third parties collecting debts that was not in default when obtained by the collector, but applies only to persons collecting debts owed to another that are first acquired by collector post-default. Mortgage servicer that assumed servicing when mortgage was not in default could not be liable under FDCPA for subsequent alleged violations.

- (6715) *Tann v. Chase Home Finance, LLC*, 2011 WL 3799841 (E.D. Mi. 2011) – FDCPA does not apply to actions of creditor collecting debt owed to it. Mortgage Servicing Company is not “debt collector” if debt was current at time Servicer acquired the servicing rights.
- (6716) *Williams v. Federal National Mortgage Ass’n*, 2013 WL 5445883 (E.D. MI. 2013) – Assignee of mortgage loan is not subject to FDCPA where loan was not in default at time of assignment. Assignee constitutes “creditor” and not “debt collector” and is not within provisions of FDCPA.
- (6717) *Rostorfer v. Transland Financial Services, Inc.*, 2013 WL 4710397 (Bankr. S.D. Ohio 2013) – FDCPA does not apply to any entity collecting a debt if the debt was not in default as of the date on which the person obtained the debt. Mortgage servicer not subject to FDCPA acquired servicing rights at a time when the debt was not in default.
- (6718) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Entity that did not originate loan but acquired ownership at later date will be “debt collector” if loan was in default at the time entity acquired its interest. Servicer admitted that loan was in default for at least 8 months prior to date on which servicer acquired loan. As such, servicer was “debt collector” within scope of FDCPA. FDCPA has one year statute of limitations. Regardless of whether statute of limitations runs from occurrence or from “discovery” of occurrence, complaint filed more than 18 months after servicer mailed untimely debt validation letter was beyond statute. “Discovery” requires knowledge of facts that would give rise to action, not to knowledge of legal basis of action. Debtor had knowledge of receipt of validation letter which constituted discovery. Fact that debtor did not know that late sending of letter was actionable did not delay running of statute. Damage claim under FDCPA limited to actual damages. There is no basis under FDCPA for recovery of punitive damages.

23.3 Relationship to Bankruptcy Code – Pre-Emption

- (6719) *Marshall v. PNC Bank*, 2012 WL 4471580 (Bankr. S.D. Ohio 2012) – Fair Debt Collection Practices Act claim is not precluded by Bankruptcy Code. Although neither Section 105 nor Section 524 create private right of action for violation of discharge injunction, that does not implicitly repeal FDCPA statutory cause of action. While violations of FDCPA may also be violations of discharge injunction, that fact does not mean that FDCPA is superseded by Code. Repeal by implication is rare and must be used only when there is an irreconcilable conflict between the statutes. However, Court lacks jurisdiction over FDCPA claims that arose entirely post-discharge. Action under FDCPA does not arise in or under the Code and is not related to the case. Fact that Debtor's FDCPA Claim and claim for violation of the discharge injunction share a common factual nexus is not sufficient to establish jurisdiction. Debtor's FDCPA Claim could not have any conceivable effect on the Debtor's bankruptcy estate as claims arising from post-petition actions are not property of the estate and proceeds cannot be used to improve payments to creditors. Any recovery on the FDCPA Claim will inure solely to the benefit of the Debtor.
- (6720) *Simon v. FIA Card Services, NA*, 2013 WL 5508868 (3d Cir. 2013) – Bankruptcy Code does not pre-empt FDCPA claim where alleged violations of FDCPA occurred during pendency of bankruptcy case. Creditor sent letter to debtor's counsel stating that FIA was considering challenge to dischargeability of claims and offered debtor opportunity to settle by agreeing to except debt from discharge and also included notice of Rule 2004 Examination. Notice of Rule 2004 exam was quashed by Court for failure to comply with Rule 9016 and Rule 45 by scheduling examination in New York although bankruptcy was filed in New Jersey. Creditor's actions were actionable under both Bankruptcy Code and FDCPA, and Code did not pre-empt separate action based on FDCPA merely because violation occurred within scope of bankruptcy case.

23.4 Statute of Limitations

- (6721) *DePizzo v. Bank of New York Mellon*, 2015 WL 5675098 (N.D. Ohio 2015) – Statute of Limitations on FDCPA action is one year from alleged violation. Where violation is alleged institution of litigation that is deceptive, abusive or otherwise unfair, limitations period begins to run on date of commencement of suit, not on later date on which complaint is served on defendant.
- (6722) *Johnston v. MidFirst Bank*, 2015 WL 5175147 (N.D. Ohio 2015) – Limitations period under FDCPA is one year from the alleged violation. Complaint was time barred when alleged misrepresentation occurred in 2008 but plaintiff did not bring an action until 2011. Statute of limitations was not extended by plaintiff's Chapter 13 petition as limitations period had already expired prior to commencement of bankruptcy case. Section 108 suspends a limitation period if the period has not expired pre-petition but does not create new limitation period where limitation period has previously expired. “Continuing violation” doctrine does not apply to FDCPA claims where alleged violation occurred when lender commenced foreclosure proceedings and those proceedings had not been concluded. Pleadings and other communications in connection with the foreclosure do not start new statute of limitations.
- (6723) *Fillinger v. Sampson*, Case no. 14-4097 (6th Cir. 2015) – Fair Debt Collection Practices Act has one year statute of limitations. Without addressing whether equitable tolling was available under FDCPA, Court held that Plaintiff failed to prove fraudulent concealment as required if court is to equitably toll statute. Equitable tolling requires that defendant concealed underlying conduct; plaintiff was prevented from discovering cause of action by that concealment; and plaintiff exercised due diligence to discover cause of action. Plaintiff's complaint failed to allege with particularity any facts that would support finding that defendant concealed true identity of creditor, where plaintiff never made inquiry. Mere silence of party is not sufficient – concealment requires some trick or contrivance intended to exclude suspicion and prevent inquiry.

- (6724) *Mooneyham v. GLA Collection Co., Inc.*, 2015 WL 3607647 (W.D. Ky. 2015) – Consumers are not charged with constructive knowledge or erroneous information in credit reports. Court can equitably toll statute of limitations even in absence of any wrongful or other effort by defendant to prevent plaintiff from using. Tolling applies when plaintiff knows of cause of action such that statute of limitations begins to run, but plaintiff is unable to obtain information necessary to determine whether injury is due to wrongful conduct and, if so, whether defendant committed the wrongful conduct. Equitable tolling applies only in compelling circumstances based on lack of actual or constructive notice of filing requirement, diligence in pursuing one's rights, absence of prejudice to defendant, and plaintiff's reasonableness in remaining ignorant of legal requirements. Plaintiff lacked either actual or constructive notice of errors in credit report and acted diligently when the errors were discovered. Although defendant would be prejudiced by 4 year delay between erroneous report to credit bureau and institution of litigation, purpose of FDCPA to ensure consumer protection outweighs this prejudice.
- (6725) *Goodson v. Bank of America, NA*, 2015 WL 364045 (6th Cir. 2015) – Statute of limitations under FDCPA is one year from date of violation. Borrower knew that collection letter dated 2010 mis-identified the actual creditor, such that statute of limitations began to run on date of receipt. Borrower's action, commenced more than one year later, barred by statute of limitations. Further, letters were not "in connection with" an attempt to collect debt where letters designed to inform borrower of a change in servicer, not to induce payments, taking into account the nature of the relationship between the parties, the fact that the letters did not expressly demand payment or state a balance due, the letters were sent in response to an inquiry by the borrower, the statements were not part of a strategy to make payment more likely, the communication was from the mortgage servicer and not a "debt collector", and the letters did not threaten any consequence if the debt was not paid.
- (6726) *Smith v. Lerner, Sampson & Rothfuss*, 2015 WL 1809311 (N.D. Ohio 2015) – Statute of Limitations on FDCPA action is one year from alleged violation. Where violation is alleged institution of litigation that is deceptive, abusive or otherwise unfair, limitations period begins to run on date of commencement of suit.
- (6727) *Simmons v. BAC Home Loan Servicing, LLP*, 2014 WL 3844788 (M.D. Tn. 2014) – FDCPA has one year statute of limitations. Action brought in 2014 arising out of loan origination in 2010 and alleged wrongful foreclosure in 2012 barred as untimely. Although state law provided for three year limitations period for any action that involves real property, FDCPA is federal statute and limitations period is governed by federal, not state, law.
- (6728) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – FDCPA has one year statute of limitations. Regardless of whether statute of limitations runs from occurrence or from "discovery" of occurrence, complaint filed more than 18 months after servicer mailed untimely debt validation letter was beyond statute. "Discovery" requires knowledge of facts that would give rise to action, not to knowledge of legal basis of action. Debtor had knowledge of receipt of validation letter which constituted discovery. Fact that debtor did not know that late sending of letter was actionable did not delay running of statute. Damage claim under FDCPA limited to actual damages. There is no basis under FDCPA for recovery of punitive damages.
- (6729) *Riddle v. Portfolio Recovery Associated, Inc.*, 2014 WL 1252610 (E.D. Ky. 2014) – FDCPA statute of limitations requires that suit be brought within one year of date on which violation occurred. Complaint filed 13 months after creditor allegedly violated FDCPA dismissed.
- (6730) *Cline v. Mortgage Electronic Registration Systems, Inc.*, 2013 WL 6687257 (S.D. Ohio 2013) – Fair Debt Collection Practices Act has one year statute of limitations. Where alleged violation occurred in 2009, complaint filed in 2013 was untimely.

23.5 Statute of Limitations – Equitable Tolling

- (6731) *Johnston v. MidFirst Bank*, 2015 WL 5175147 (N.D. Ohio 2015) – Equitable tolling requires proof that defendant concealed conduct that constitutes cause of action, that concealment prevented plaintiff from discovering cause of action within limitation period, and plaintiff exercised due diligence in trying to find out about cause of action. Equitable tolling not available where alleged violation of FDCPA was representation in foreclosure action that lender had possession of original note when lender did not have possession but had affidavit of lost instrument signed by predecessor-in-interest. Thus, lender has legal right to foreclosure on loan such that neither statement in complaint nor statement in affidavit in support of summary judgment were false or misleading.
- (6732) *Fillinger v. Sampson*, Case no. 14-4097 (6th Cir. 2015) – Fair Debt Collection Practices Act has one year statute of limitations. Without addressing whether equitable tolling was available under FDCPA, Court held that Plaintiff failed to prove fraudulent concealment as required if court is to equitably toll statute. Equitable tolling requires that defendant concealed underlying conduct; plaintiff was prevented from discovering cause of action by that concealment; and plaintiff exercised due diligence to discover cause of action. Plaintiff's complaint failed to allege with particularity any facts that would support finding that defendant concealed true identity of creditor, where plaintiff never made inquiry. Mere silence of party is not sufficient – concealment requires some trick or contrivance intended to exclude suspicion and prevent inquiry.

23.6 "Communication" Defined

- (6733) *Brown v. Van Ru Credit Corp.*, 2015 WL 6220521 (6th Cir. 2015) – "Communication" for purposes of FDCPA is one that conveys information regarding a debt directly or indirectly to any person through any medium. Voicemail left by debt collector to debtor's payroll department that stated only collector's name, phone number and reference number was little more than a request for someone to return the call and did not imply existence of debt and was not "communication" within FDCPA.

23.7 "Consumer Debts"

- (6734) *Floyd v. Bank of America*, 2014 WL 3732591 (N.D. Ohio) – FDCPA does not apply to commercial transactions. Mortgages taken out by

borrowers secured by rental and income properties are not consumer transactions and are beyond scope of FDCPA. Further, to extent that FDCPA complaint alleged that creditor lacked standing because of allegedly defective assignments of mortgages, lender had original note and mortgage endorsed in blank as of date of foreclosure action, foreclosing any argument that lender was attempting to collect debt not owed to it.

- (6735) *Anarion Investments, LLC, Carrington Mortgage Services*, 2014 WL 3556026 (M.D. Tn. 2014) – FDCPA protections are limited to “consumers”. Corporation, LLC or other business entity cannot maintain cause of action for alleged violation. Entity lacks standing to maintain action – dismissal for failure to state cause of action proper.
- (6736) *Thomas v. Daneshgari*, 2014 WL 584890 (E.D. Mi. 2014) – FDCPA does not apply to collection of business or commercial debts. Obligations arising out of disputed purchase of business are not included in FDCPA protections. FDCPA applies only to third parties who regularly collect or attempt to collect debtors owed to another person. Creditor’s actions in collection debts owed to it are excluded from FDCPA protections.

23.8 “Person” Defined

- (6737) *Dunham v. Portfolio Recovery Associates, LLC*, Case No. 11-1553 (8th Cir. 2011) – Non-obligor erroneously targeted by collector is “consumer” protected by FDCPA. However, collector discharged obligation under FDCPA by providing verification of debt when requested that showed different last four digits of social security number, and was intended for person other than the recipient. Further, recipient took no action for more than one year at which time he filed suit. Request for sanctions denied.
- (6738) *Anarion Investments, LLC v. Carrington Mortgage Services, LLC*, 2015 WL 4503588 (6th Cir. 2015) – FDCPA provides that any debt collector who violates the FDCPA is liable to any person injured by the failure. “Person” for purposes of FDCPA remedy provision includes corporations and other artificial entities.

23.9 “Consumer Debts” Defined

- (6739) *Taylor v. Javitch, Block & Rathbone, LLC*, 2012 WL 2375494 (N.D. Ohio 2012) – FDCPA applies only to “consumer transactions”. Claim by insurance company against negligent party for reimbursement of money paid to insured is not a consumer transaction. Debtor negligently entrusted a motor vehicle to a third party who caused an accident. The injured party recovered from its insurer under its uninsured motorist policy. The insurance company then sued the debtor of subrogation. There was no contractual relationship between debtor and the insurance company. Insurance company’s claim was entirely based on a tort theory. A tort is not a consumer transaction. Absent some contractual basis for the claim, the claim falls outside the FDCPA.
- (6740) *Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, Case No 11-1954 (6th Cir. 2012) – Condo association assessments were “debts” under FDCPA where debtor purchased unit for personal use and resided in until for 13 years before deciding to lease unit to third party. Under FDCPA, obligation constitutes “debt” if the obligation arises out of a transaction which was primarily for persona, family or household purposes. Obligation to pay condo assessments arises when unit is purchased as that was the point in time when debtor became bound by condo documents including obligation to pay assessments. At that point, debtor intended to use, and in fact did use, the unit as his residence, undeniable a personal use. Later use of unit as rental did not change fact that when the transaction giving rise to the debt occurred, it was for personal use. Test is not based on use at the time of the alleged FDCPA violation. attorney wrote two letters advising debtor of unpaid assessments. In response to both letters, debtor sent letters asking for verification of debt, but attorneys never provided verification in violation of FDCPA.
- (6741) *Loschiavo v. Bank of America, N.A.*, 2015 WL 3742491 (N.D. Ohio 2015) – FDCPA applies only to consumer debts and does not apply to mortgage on property owned by plaintiff and used as rental property as of time of acquisition of mortgage.

23.10 Bankruptcy Court Jurisdiction

- (6742) *Fambres v. Nuvelt National Auto Finance, LLC*, 2011 WL 2133538 (Bankr. E.D. Ky. 2011) – Bankruptcy court lacks jurisdiction over Adversary complaint seeking damages for violating FDCPA. All actions occurred post-petition and are not property of the estate and outcome cannot affect administration of estate. FDCPA action arises under non-bankruptcy law and neither “arises in” nor “arises under” bankruptcy code, and in light of lack of impact on estate or administration of case, is not “related to” bankruptcy case.
- (6743) *Marshall v. PNC Bank*, 2012 WL 4471580 (Bankr. S.D. Ohio 2012) – Court lacks jurisdiction over FDCPA claims that arose entirely post-discharge. Action under FDCPA does not arise in or under the Code and is not related to the case. Fact that Debtor’s FDCPA Claim and claim for violation of the discharge injunction share a common factual nexus is not sufficient to establish jurisdiction. Debtor’s FDCPA Claim could not have any conceivable effect on the Debtor’s bankruptcy estate as claims arising from post-petition actions are not property of the estate and proceeds cannot be used to improve payments to creditors. Any recovery on the FDCPA Claim will inure solely to the benefit of the Debtor.

23.11 Complaint – Generally

- (6744) *Currier v. First Resolution Investment Corp.*, 2013 WL 3364364 (E.D. Ky. 2013) – To establish a *prima facie* case for a violation of the FDCPA, plaintiff must prove: (1) that plaintiff is a natural person who is harmed by violations of the FDCPA, or is a “consumer” for purposes of a cause of action; (2) the “debt” arises out of a transaction entered primarily for personal, family, or household purposes; (3) defendant is a “debt collector” within the meaning of 15 U.S.C. § 1692a(6); and (4) defendant has violated, by act or omission, a provision of the FDCPA. FDCPA prohibits use of unfair or unconscionable means to collect. Statute provides non-exhaustive list of actions that may be unfair or unconscionable, but list is not exclusive. Alleged violation of state law, without more, is not violation of FDCPA. Creditor’s

recording of judgment prior to expiration of time to request rehearing in violation of Kentucky law, is not violation of FDCPA. Method of collection of judgment, if done pursuant to state law, cannot be violation of FDCPA. Creditor did not make threat to take action merely by recording judgment in public records where action was effort to collect judgment that had already been entered. While procedural correctness of action may be debated, that does not transform recording into violation of FDCPA.

23.12 Venue for Action to Collect Debts

- (6745) *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636 (7th Cir. 2014) – FDCPA requires that any suit to collect debt must be brought in judicial district or similar entity where debtor resided or where contract sued upon was signed. Where courts are organized by county but small claims courts are subdivided by township, action must be brought in township in which debtor resides or where contract signed, not merely county in which either occurs. Although jurisdiction may be county wide, subdivision of courts into smaller geographic areas controls proper location for legal proceedings.

B. Allowed and Prohibited Actions

23.13 Initial Communication

- (6746) *Zemckis v. Global Credit & Collection Corp.*, Case No. 11-2334 (7th Cir.2012) – Demand letter’s “insistent language” and “repeated threats of legal action” did not violate FDCPA where letter also contained statutory required notices. Statements that encouraged borrower to “act now” did not purport to establish deadline that was inconsistent with FDCPA requirements for 30 day validation. Statements were little more than “puffery” that were not such that an unsophisticated consumer would be unable to understand right to validation. Statement that creditor would use legal action did not violate FDCPA where lender had the right to institute legal proceedings, and served only to advise borrower of possible ramifications. Validation provisions located on reverse side of letter, while “undesirable”, was not insufficient where face of letter contained bold, capitalized and conspicuous notice to “see reverse side for important consumer information”. Statement advised even unsophisticated borrower where to look for additional information.
- (6747) *Ponce v. BCA Financial Services, Inc.*, 2012 WL 470213 (11th Cir. 2012) – FDCPA requires collector to send written notice to consumer within 5 days after “initial communication”. Initial letter did not constitute “initial communication” where letter was sent to address where debtor had not lived for 8 months. Although creditor is not obligated to ensure delivery, creditor must use a valid and proper address at which the consumer may actually receive it. Collector’s later phone call to consumer’s ex-wife constituted “initial communication” which was not followed up with the requisite written notice, constituting violation of FDCPA.

23.14 Location Information

- (6748) *Ponce v. BCA Financial Services, Inc.*, 2012 WL 470213 (11th Cir. 2012) – Collector also failed to disclose to consumer’s ex-wife that collector was attempting to confirm or collect location information concerning consumer. Collector asked numerous times whether ex-wife had phone number for consumer but never made the required disclosures.

23.15 Enforcement of Security Interest Generally

- (6749) *Brister v. American Home Mortgage Servicing, Inc.*, Case no. 11-13574 (11th Cir. 2012) – Status of individual or entity as “debt collector” is determinative of liability under FDCPA. Fact that communications related to enforcement of security interest does not automatically remove party from status as “debt collector” under Section 1692e where communications were not limited to seeking to enforce security agreement but included demands for payment on the promissory note itself. Even if collector intended communications solely to advise of foreclosure, communications also demanded payment of underlying debt for purposes of Section 1692e.

23.16 Enforcement of Security Interest Post-Bankruptcy

- (6750) *McCord v. Resurgent Mortgage Servicing*, 2014 WL 4109622 (W.D. Ky. 2014) – In general, FDCPA does not apply to person attempting to collect debt in its own name or where the entity seeking to collect acquired the debt at a time when the debt was not in default. If mortgage lender was the originator of the loan, lender could not be held liable under FDCPA. Court denied motion to dismiss where originating lender was Countrywide, not B of A, and complaint did not clearly allege that B of A was successor to Countrywide. However, if B of A could prove it was successor to Countrywide as loan originator, B of A could not be liable as successor to originator by merger is deemed to be the originator and not a party who “acquired” the loan, regardless of whether loan was in default as of date of merger or not. Complaint alleged cause of action against loan servicer where complaint alleged that servicer made repeated communications with borrower that it would accept payments on loan when servicer had already accelerated loan and intended to pursue foreclosure. Further, statements were made in effort to coerce payments amounting to effort to collect on otherwise previously discharged debt. While security interest did survive bankruptcy and lender had right to foreclose, demands by servicer were not limited to efforts to realize on collateral but instead asked for money and implied that payment was required in effort to collect debt.

23.17 Verification of Debt

- (6751) *Boone v. JPMorgan Chase Bank*, Case No. 11-10891 (11th Cir. 2011) – FDCPA provides civil cause of action against any debt collector who fails to comply. FDCPA requires that if a debt is disputed, the collector shall cease collection activities until collector obtains verification of debt. Complaint failed to allege any factual basis for Plaintiff’s conclusory allegation that defendant refused to cease collection activities or engaged in deceptive means to collect debt.
- (6752) *Dunham v. Portfolio Recovery Associates, LLC*, Case No. 11-1553 (8th Cir. 2011) – Non-obligor erroneously targeted by collector is “consumer” protected by FDCPA. However, collector discharged obligation under FDCPA by providing verification of debt when

requested that showed different last four digits of social security number, and was intended for person other than the recipient. Further, recipient took no action for more than one year at which time he filed suit. Request for sanctions denied.

- (6753) *Zemeckis v. Global Credit & Collection Corp.*, Case No. 11-2334 (7th Cir.2012) – Demand letter’s “insistent language” and “repeated threats of legal action” did not violate FDCPA where letter also contained statutory required notices. Statements that encouraged borrower to “act now” did not purport to establish deadline that was inconsistent with FDCPA requirements for 30 day validation. Statements were little more than “puffery” that were not such that an unsophisticated consumer would be unable to understand right to validation. Statement that creditor would use legal action did not violate FDCPA where lender had the right to institute legal proceedings, and served only to advise borrower of possible ramifications. Validation provisions located on reverse side of letter, while “undesirable”, was not insufficient where face of letter contained bold, capitalized and conspicuous notice to “see reverse side for important consumer information”. Statement advised even unsophisticated borrower where to look for additional information.
- (6754) *Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, Case No 11-1954 (6th Cir. 2012) – Condo association assessments were “debts” under FDCPA where debtor purchased unit for personal use and resided in until for 13 years before deciding to lease unit to third party. Attorney wrote two letters advising debtor of unpaid assessments. In response to both letters, debtor sent letters asking for verification of debt, but attorneys never provided verification in violation of FDCPA.

23.18 False or Misleading Statements – Section 1692e

- (6755) *Shoup v. McCurdy & Candler, LLC*, Case no. 10-14619 (11th Cir. 2012) - Law firm’s letter to debtor potentially violated Fair Debt Collection Practices Act where letter incorrectly identified the “creditor” to whom the obligation was owed. The mortgage on debtor’s home was held by America Wholesale Lender. However, attorneys demand letter identified MERS as the creditor. Identification of MERS as the creditor is not harmless error as FDCPA provides for statutory damages even in absence of actual damages.
- (6756) *Kline v. Mortgage Electronic Registration Systems*, 2012 WL 1376995 (S.D. Ohio 2012) – Attorney-to-attorney communications are not per se excluded from FDCPA. Law firm that sent demand letter to debtor’s counsel that contained improper demand for payment of creditor’s attorney fees could constitute unfair and misleading demand even if demand was sent to attorney rather than directly to debtor.
- (6757) *Ponce v. BCA Financial Services, Inc.*, 2012 WL 470213 (11th Cir. 2012) – Collector violated provisions against false, deceptive or misleading communications by stating that consumer’s health insurance carrier “would not go ahead and take care of this now”. Although insurance company had not paid notwithstanding efforts by provider to obtain payment, collector had no particular information to support statement about consumer’s specific insurance in this specific case or whether insurance company may pay or be required to pay bill. Bona Fide Error defense requires collector to prove that violation was unintentional, was a bona fide error, and occurred despite maintenance of procedures reasonable adapted to avoid the violation. Agency’s reference to internal policies with no explanation as to how errors were unintentional or how policies were intended to prevent such errors was not sufficient.
- (6758) *Easterling v. Collecto*, 2012 WL 3734389 (2d Cir. 2012) – Debt collector violated FDCPA by sending letter to debtor post-discharge that stated “ACCOUNT INELIGIBLE FOR BANKRUPTCY DISCHARGE – Your account is NOT eligible for bankruptcy discharge and must be resolved”. Although debtor did not claim that student loan debt was discharged in Chapter 7 and did not file action to determine undue hardship, collector’s statement that the loan was “ineligible” for discharge or that the loan was “not eligible” for discharge was materially misleading. Debt may have been eligible for discharge upon finding of undue hardship, and it was technically possible for debtor to discharge the student loan debt either by re-opening prior bankruptcy or by filing a new bankruptcy. Hypothetical least sophisticated consumer could reasonably interpret letter as representing, incorrectly, that a debtor is completely foreclosed from seeking discharge of student loan debt. Letter was both false and fundamentally misleading in that it suggests that debtor has no possible means of discharging student loans in bankruptcy.
- (6759) *Washington v. Roosen, Varchetti & Oliver, PLLC*, 894 F. Supp. 2d 1015 (W.D. Mi. 2012) – FDCPA applies to statements and allegations contained in state court pleadings and is not limited to out-of-court communications. Plaintiff asserting a claim under the Fair Debt Collection Practices Act (FDCPA) for a debt collector’s false or misleading statements in connection with the collection of a debt must establish that: (1) the plaintiff is a consumer, as defined by the FDCPA; (2) the debt arises out of a transaction primarily for personal, family, or household purposes; (3) the defendant is a debt collector, as that phrase is defined by the FDCPA; and (4) the defendant violated one of the prohibitions listed in the FDCPA with respect to false or misleading statements. Whether statements in state court pleadings are mis-leading is based on whether “least sophisticated consumer” would be misled. Even if statements would be misleading to least sophisticated consumer, statements must also be materially false or misleading, such that it would tend to cause confusion. Plaintiff’s allegations in complaint that claim was based on written instrument that was not attached but which was in possession of Defendant may have been false, as Plaintiff was in possession of copies of written agreements. However, allegations were not materially false as Defendant was also in possession of documents. Further, failure to attach documents to a complaint is not fatal, as Plaintiff would have had opportunity to correct the deficiency by attaching the written instruments. However, Plaintiff’s allegations that debtors had sought lines of credit with no intention of repaying amounts borrowed and thereby had engaged in fraud, stated a claim under Fair Debt Collection Practices Act (FDCPA) for false or misleading statements in connection with the collection of a debt where plaintiff had no evidence of fraud and “least sophisticated consumer” may be confused or misled into believing that action was something other than effort to collect outstanding obligations.
- (6760) *Johnston v. MidFirst Bank*, 2015 WL 5175147 (N.D. Ohio 2015) – Section 1692e prohibits debt collector from using false, deceptive or misleading representation or means in connection with collection of debt.
- (6761) *Carpenter v. Monroe Financial Recovery Group, Inc.*, 2015 WL 4724785 (E.D. Mi. 2015) – Statements made by debt collector are

actionable when the makes a statement that has a tendency to confuse the least sophisticated consumer. However, only material violations of FDCPA will result in liability. In addition to being technically false, the statement must tend to mislead or confuse a reasonable but unsophisticated consumer. Misstatement must be one that could objectively affect least sophisticated consumer. Statement that is not likely to mislead is not material and is not actionable. Statement in complaint that Plaintiff was not in possession of the written instrument on which case was based but that Defendant was in possession of the account documents was not material. Even if statement was false and Defendant was not in possession of account documents, statement would not mislead Defendant as Defendant would know whether or not he was in possession of the account documents. Knowledge does not require technical expertise or legal training and would not mislead even least sophisticated consumer. Complaint also did not violate FDCPA by pleading in the alternative a count for account stated, which is a well established cause of action under Michigan law.

- (6762) *Wilson v. Trott Law, PC*, 2015 WL 4600216 (E.D. Mi. 2015) – FDCPA prevents debt collector from using false, deceptive, or misleading representation or unfair or unconscionable means in connection with collection of debt. Debt collector send demand letter to borrower which included item designated “corporate advances” in which collector lumped charges including property inspection fees, and attorney fees and costs. Although charges themselves were properly recoverable under loan documents, such that letter was neither unfair nor unconscionable, letter used term of art that did not correspond to any term of note or mortgage creating risk of confusion constituting materially misleading statement. Fact that letter was “literally true” does not avoid FDCPA liability where terms used had tendency to create confusion in least sophisticated consumer.
- (6763) *Gillie v. Law Office of Erica Jones, LLC*, 2015 WL 2151755 (6th Cir. 2015) – Private attorney retained by State to collect debts owed to State is not “officer or employee” of State for purposes of exception to FDCPA. Attorney’s use of Office of Attorney General Letterhead for sending notices to obligors created risk of confusion for “least sophisticated consumer” as consumer was unable to determine whether letter was from private attorney or from State and did not identify to whom the debt was allegedly owed, as the letter demanded payment be sent to attorney rather than to State.
- (6764) *Buchanan v. Northland Group, Inc.*, 2015 WL 149528 (6th Cir. 2015) – Even true statement in debt collection letter can violate FDCPA if statement creates misleading impression. Letter offered to resolve debt without disclosing that statute of limitations had run and without advising that partial payment would restart statute of limitations period, and could have been interpreted by least sophisticated consumer as implied statement that debt could be enforced in court. Statute of limitations does not eliminate the debt and the debt remains a “debt” even after statute has run. Creditor could not then enforce debt in court without facing legal defense to collection; however, creditor remains free to let the borrower know what the debt is and to ask for payment. Creditor did not violate FDCPA merely by advising borrower of debt and offering to resolve for lower amount. Further, letter containing settlement offer is not a threat of litigation as not even unsophisticated consumer would reasonably draw such an inference. Complaint contained sufficient evidentiary foundation to create issue of fact as to whether least sophisticated consumer would be misled by letter in question, and lower court erred in dismissing complaint as deficient as matter of law.
- (6765) *Grace v. LVNV Funding, Inc.*, 2014 WL 2167487 (W.D. Ky. 2014) – Collection agency that reported debt at amount that included unlawful interest violated FDCPA. Creditor charged 1.5% per month “service charge” on unpaid account. Court determined that “service charge” was actually disguised interest at rate in excess of statute usury statute. Inclusion of “service charge” in total debt reported to credit bureaus constituted attempt to collect amount not permitted by law; false representation of the character, amount or legal status of debt; and communicating information that is known to be or should be known to be false. Record was unclear as to whether false reporting occurred within one year statute of limitations period. FDCPA would not support action based on so called “serial violation” – original report would not be construed as “continuing” or repeating. Court did not determine whether statute of limitations runs from original reporting or whether “discovery rule” applies, finding that it was not necessary to do so on this record.
- (6766) *Newton v. Portfolio Recovery Associates, LLC*, 2014 WL 340414 (S.D. Ohio 2014) – Courts use “least sophisticated consumer” standard in evaluating FDCPA claims. FDCPA precludes use of false, deceptive or misleading representations or means in effort to collect, including false statements regarding legal status, character or amount of debt. To be actionable, statement must be technically false, and one that would tend to mislead or confuse the reasonable unsophisticated consumer. Further, creditor will not be liable for unintentional and bona fide errors where creditor maintains procedures to avoid errors. Plaintiff failed to establish any misrepresentation where creditor repeatedly stated that creditor was attempting to collect debt owed by Plaintiff’s spouse and Plaintiff generally understood and agreed that creditor was seeking recovery against spouse. Creditor had no duty to disclose that collection may have been barred by statute of limitations where creditor did not pursue legal action to recover debt. Further, nothing in content of conversation was abusive, deceptive or unfair. Plaintiff lacks standing to bring FDCPA action where even least sophisticated consumer in Plaintiff’s position would have understood that collection actions were not directed at Plaintiff.

23.19 Unfair or Unconscionable Means – Section 1692f

- (6767) *McNamee v. Nationstar Mortgage*, 2015 WL 5174776 (S.D. Ohio 2015) – Section 1692f is “backstop” to catch practices that do not fall under other sections of act. Plaintiff cannot bring action under Section 1692f if factual allegations fit more narrowly into another subsection of FDCPA. Same letter was alleged as factual predicate for action under Section 1692e and 1692f, communications that gave rise to false impression that debts were collectable even though debts were discharged, false statements about character, amount and legal status of debts, and threats to communicate creditor information known to be false were all covered by other sections of Section 1692e and so could not form basis of action under Section 1692(f).

23.20 Fraud

- (6768) *Jester v. Citimortgage*, 2014 WL 3547183 (N.D. Ohio 2014) – Creditor who originates debt is not a debt collector within scope of

FDCPA. Lender that is successor by merger with original lender remains the “lender” and is not subject to FDCPA. Limitations period runs for one year from date of violation without regard to when plaintiff learned of violation. Action for alleged misapplication of payments in Chapter 13 that discharged in March, 2012, was untimely when filed in September, 2013, more than one year later. Court can extend statute for “equitable tolling” if 1) defendants concealed the conduct that constitutes the cause of action; 2) defendants’ concealment prevented plaintiffs from discovering the cause of action within the limitation period; and 3) until discovery of the cause of action, plaintiffs exercised due diligence in trying to find out about the cause of action. Allegations must contain specific statements of dates and times when fraud, mistake, concealment or misrepresentation was discovered and must demonstrate that discovery would not have been possible through ordinary diligence as a result of extraordinary circumstances. Allegations that plaintiffs repeatedly requested mortgage statements that were not provided is not sufficient statement of fraud. Failure to respond to Qualified Written Request under RESPA is not evidence of fraud. Even if actions were intended to conceal, plaintiffs could have discovered alleged deficiencies through reasonable efforts.

23.21 Harassment

- (6769) *Zemeckis v. Global Credit & Collection Corp.*, Case No. 11-2334 (7th Cir.2012) – Demand letter’s “insistent language” and “repeated threats of legal action” did not violate FDCPA where letter also contained statutory required notices. Statements that encouraged borrower to “act now” did not purport to establish deadline that was inconsistent with FDCPA requirements for 30 day validation. Statements were little more than “puffery” that were not such that an unsophisticated consumer would be unable to understand right to validation. Statement that creditor would use legal action did not violate FDCPA where lender had the right to institute legal proceedings, and served only to advise borrower of possible ramifications. Validation provisions located on reverse side of letter, while “undesirable”, was not insufficient where face of letter contained bold, capitalized and conspicuous notice to “see reverse side for important consumer information”. Statement advised even unsophisticated borrower where to look for additional information.
- (6770) *Brister v. American Home Mortgage Servicing, Inc.*, Case no. 11-13574 (11th Cir. 2012) – Mortgage servicer could be liable for violation of FDCPA where servicer maintained “relentless assault of harassing phone calls and home inspections” in effort to collect mortgage debt. Servicer called borrowers multiple times on a daily basis and continued to call even after having been advised that borrowers were represented by attorney. Servicer used offensive and abusive language and made false statements that home was set for foreclosure sale. Servicer began sending “inspectors” to the home every day or every other day, including Thanksgiving and Christmas day. Case remanded for further proceedings as to whether servicer’s principal purpose was collection of debtor and whether servicer regularly collected or attempted to collect debts as required for determination as to whether servicer was “debt collector”.
- (6771) *Newton v. Portfolio Recovery Associates, LLC*, 2014 WL 340414 (S.D. Ohio 2014) – Courts use “least sophisticated consumer” standard in evaluating FDCPA claims. Issue is whether there is a reasonable likelihood that an unsophisticated consumer who considers carefully the contents of a communication may nonetheless be misled. FDCPA precludes conduct, the natural consequence of which, is to annoy or harass. Telephone calls will be considered harassment if they are made with excessive frequency, with a series of calls one right after the other. While there is no bright line when a number of calls constitutes harassment, 18 calls over four months, with no two occurring on the same date, are not sufficient to support inference of harassment. Plaintiff did not present any evidence that calls were at inconvenient time or place, or that they were made after plaintiff requested that they stop.

23.22 Disputed Debts

- (6772) *Cruz v. International Collection Corp.*, Case no. 09-17449 (9th Cir. 2012) - Debt Collector under Fair Debt Collection Practices Act is strictly liable for pursuing collection after debtor notified debt collector in writing that debt was disputed. Individual defendant was also liable since he was personally involved in violation by signing at least one of the improper collection letters.

23.23 Filing Proof of Claim

- (6773) *Poteet v. eCast Settlement Corp.*, 2011 WL 3626696 (Bankr. E.D. Tn. 2011) – Proof of claim in Bankruptcy Court cannot constitute abusive debt collection practice proscribed by FDCPA. If claim is incomplete or fails to attach necessary documentation, proper remedy is to object to claim. Adversary proceeding for FDCPA violation dismissed for failure to state cause of action.
- (6774) *Hanson v. Antio, LLC*, 2015 WL 1259409 (Bankr. M.D. Fl. 2015) – Creditor who acquired debt after commencement of case did not violate FDCPA by filing proof of claim. Defendants were precluded by bankruptcy stay from sending notice to debtor of transfer of claim. Defendants cannot violate FDCPA by taking actions, or refraining from taking actions, where mandated by bankruptcy code itself.
- (6775) *Mallard v. Wynn-Singer & Associates*, 2014 WL 988779 (Bankr. E.D. Ky. 2014) – Filing proof of claim that improperly disclosed personal medical information is not violation of FDCPA. FDCPA applies only to actions designed to induce payment by the debtor. Filing a proof of claim is not an attempt to induce payment by the debtor but is, at most, a request to participate in bankruptcy claims allowance process.
- (6776) *Turner v. American Express Centurion Bank*, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Filing of erroneous or inflated proof of claim is not violation of FDCPA. FDCPA is designed to protect defenseless debtors and to give them remedies against abuse by creditors. There is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself.

23.24 Proof of Claim – Time Barred Debts

- (6777) *Broadrick v. LVNV Funding, LLC*, 2015 WL 3855251 (Bankr. M.D. Tn. 2015) – Filing proof of claim on time barred debt is not

automatically violation of FDCPA, but filing claim on stale debt is also not necessarily protected from FDCPA exposure merely because filing occurred in bankruptcy proceeding. FDCPA does not apply when a creditor merely (a) files an accurate proof of claim in a bankruptcy case, (b) when the proof of claim includes all the required information including the timing of the debt, (c) the applicable statute of limitations is one that does not extinguish the right to collect the debt but merely limits the remedies, and (d) no legal impediment to collection or factual circumstances exist that would invoke the FDCPA other than merely the applicability of a statute of limitations. Proof of claim on time-barred debt did not trigger FDCPA liability where parties agreed that claim accurately identified the creditor, the amount of the debt, the date of last transaction, date of last payment, date of charge off, and expiration of limitations period did not extinguish debt but only extinguished any remedy of creditor to force debtor to pay the otherwise valid debt.

- (6778) *Dunaway v. LVNV Funding, LLC*, 2015 WL 2414866 (Bankr. W.D. Mo. 2015) – Filing of proof of claim on “stale” debt is not violation of FDCPA where information in proof of claim was accurate and correctly disclosed required information.
- (6779) *Perkins v. LVNV Funding, LLC*, 2015 WL 4312313 (Bankr. W.D. Mi. 2015) – Filing of proof of claim on “stale” debt is neither a per se violation of FDCPA nor per se permitted by FDCPA. Filing proof of claim is “collection activity” within scope of FDCPA. Proof of claim was not false or misleading where claim correctly identified the debt, listed an amount that was both accurate and far less than the amount listed by Debtor in his bankruptcy schedules, and continued specific information regarding date of charge off, date of last payment, and date of last transaction. Proof of claim did not misrepresent status of debt where debtor’s schedules listed debt as undisputed, non-contingent and liquidated, and listed amount greater than amount set forth in proof of claim. Statute of limitations does not extinguish debt and creditor is fully entitled to continue to advise borrower of amount owed, as long as creditor does not institute litigation or threaten to institute litigation. Proof of claim is not act to harass, oppress or abuse debtor where proof of claim was act endorsed by Bankruptcy Code and did not on its face cause any suffering or embarrassment to debtor. Proof of claim was not unfair or unconscionable where proof of claim contained required disclosures, none of which were alleged to be untruthful, and which complied with the applicable Rules of Bankruptcy Procedure; and debtor scheduled claim and so would not be surprised by filing of claim by creditor. Claim also met verification requirement, as debt was initially scheduled by debtor thereby inviting filing of proof of claim, and proof of claim contained sufficient information to allow debtor to dispute debt.
- (6780) *Gatewood v. CP Medical, LLC*, Case No. 15-6008 (8th Cir. 2015) – Filing of proof of claim on time barred debt that is otherwise accurate on its face and not misleading is not violation of FDCPA. Filing proof of claim is neither litigation nor threat of litigation, and proof of claim is not misleading or inaccurate as there is nothing improper about collecting otherwise time barred debts absent litigation or threat of litigation. Statute of limitations does not eliminate debt, it only limits judicial remedies available.
- (6781) *Broadrick v. LVNV Funding, LLC*, 2015 WL 3855251 (Bankr. M.D. Tn. 2015) – Filing proof of claim on time barred debt is not automatically violation of FDCPA, but filing claim on stale debt is also not necessarily protected from FDCPA exposure merely because filing occurred in bankruptcy proceeding. FDCPA does not apply when a creditor merely (a) files an accurate proof of claim in a bankruptcy case, (b) when the proof of claim includes all the required information including the timing of the debt, (c) the applicable statute of limitations is one that does not extinguish the right to collect the debt but merely limits the remedies, and (d) no legal impediment to collection or factual circumstances exist that would invoke the FDCPA other than merely the applicability of a statute of limitations. Proof of claim on time-barred debt did not trigger FDCPA liability where parties agreed that claim accurately identified the creditor, the amount of the debt, the date of last transaction, date of last payment, date of charge off, and expiration of limitations period did not extinguish debt but only extinguished any remedy of creditor to force debtor to pay the otherwise valid debt.
- (6782) *LaGrone v. LVNV Funding, LLC*, 2015 WL 273373 (Bankr. N.D. Il. 2015) – Filing of proof of claim on time barred debt does not violate FDCPA. FDCPA does not prevent creditor from collecting on time barred debt as long as creditor does not engage in false representations, threats of illegal actions, and deceptive means of collection. Filing proof of claim did not violate any particular proscription of FDCPA.
- (6783) *Johnson v. Midland Funding, LLC*, 2015 WL 1345431 (S.D. Al. 2015) – Creditor’s act in filing proof of claim on debt barred by statute of limitations did not violate FDCPA, rejecting 11th Circuit holding in *Crawford v. LVNV Funding*, as long as expiration of statute of limitations does not, under state law, extinguish creditor’s right to payment. Creditor retained right to payment but lost ability to judicially enforce claim when statute of limitations expired.
- (6784) *Crawford v. LVNV Funding, LLC*, 2014 WL 3361226 (11th Cir. 2014) – Filing proof of claim for debt that is barred by statute of limitations is unfair, unconscionable, deceptive and misleading for purposes of FDCPA. Threat or action to collect time-bared debts violates 15 USC Section 1692e and 1692f. Debtor entitled to statutory damages of \$1,000 per violation plus attorney fees.

23.25 Collection of Time Barred Debts

23.26 Discharge Injunction

- (6785) *Goad v. MCT Group*, 2014 WL 2211690 (9th Cir. 2014) – Debtor cannot bring FDCPA action based on alleged violation of discharge injunction.
- (6786) *Osburn v. Seth L. Goldner, PC*, 2014 WL 466174 (E.D. Mi. 2014) – FDCPA prohibits false, deceptive or misleading collection activities including the false representation of the legal status of a debt. Complaint that alleged that creditor attempted to collect debt after discharge of debt in bankruptcy sufficiently stated cause of action for misrepresenting the legal status of the debt.
- (6787) *Davis v. Weinstein & Riley, P.S.*, 2013 WL 5428740 (N.D. Ohio 2013) – Action under FDCPA can be based on conduct that would amount to violation of discharge injunction. Action is not one to enforce discharge injunction, which would have to be brought as contempt action in bankruptcy court. FDCPA prevents actions to collect debt where collection is barred by applicable law. Discharge

injunction constitutes “applicable law” that is violated, for purposes of FDCPA, when debt collector attempts to collect discharged debt.

23.27 Non-Dischargeable Debts

- (6788) *Bussard v. Shermeta, Adams and Von Allmen*, 2013 WL 3553942 (E.D. Mi. 2013) – Creditor’s efforts to collect student loan debts did not violate FDCPA. Under Section 523(a)(8), discharge of student loans is not self executing, such that unless debtor brings action to determine that student loans are discharged, law presumes that student loan debts have not been discharged and creditor can proceed with collection. Because Plaintiff’s educational debt was not discharged, Defendant did not violate the FDCPA when it contacted Plaintiff and informed him that he was still liable for the debt owed to NCT.
- (6789) *Easterling v. Collecto*, 2012 WL 3734389 (2d Cir. 2012) – Debt collector violated FDCPA by sending letter to debtor post-discharge that stated “ACCOUNT INELIGIBLE FOR BANKRUPTCY DISCHARGE – Your account is NOT eligible for bankruptcy discharge and must be resolved”. Although debtor did not claim that student loan debt was discharged in Chapter 7 and did not file action to determine undue hardship, collector’s statement that the loan was “ineligible” for discharge or that the loan was “not eligible” for discharge was materially misleading. Debt may have been eligible for discharge upon finding of undue hardship, and it was technically possible for debtor to discharge the student loan debt either by re-opening prior bankruptcy or by filing a new bankruptcy. Hypothetical least sophisticated consumer could reasonably interpret letter as representing, incorrectly, that a debtor is completely foreclosed from seeking discharge of student loan debt. Letter was both false and fundamentally misleading in that it suggests that debtor has no possible means of discharging student loans in bankruptcy.

23.28 Adversary Proceedings

- (6790) *Simon v. FIA Card Services, NA*, 732 F.3d 259 (3d Cir. 2014) – Letter sent to debtor’s bankruptcy attorney constituted “communication” for purposes of FDCPA. While letter did not explicitly demand payment, letter was attempt to collect debt where letter noted that debtors had defaulted on the obligation, advise that creditor was contemplating challenge to dischargeability of debtor, scheduled 2004 exam to which debtor was to bring financial information and documents, and offering to settle with stipulation that part of debt was not discharged. Issuance of subpoenas without more is not violation of FDCPA. While letter to attorney is equivalent of letter to debtor, letter does not have to include statutory warning language as doing so may constitute demand for payment which would violate automatic stay. Creditor possibly violated FDCPA by issuing subpoenas to debtors but failing to include statutorily mandated language and for serving subpoenas on debtor’s counsel rather than on debtor personally as required by applicable rules.

23.29 Collection Efforts Not Permitted by Law – Section 1692(f)

- (6791) *Kline v. Mortgage Electronic Registration Systems*, 2012 WL 1376995 (S.D. Ohio 2012) – Attorney-to-attorney communications are not per se excluded from FDCPA. Law firm that sent demand letter to debtor’s counsel that contained improper demand for payment of creditor’s attorney fees could constitute unfair and misleading demand even if demand was sent to attorney rather than directly to debtor.
- (6792) *Stratton v. Portfolio Recovery Associates, LLC*, 2014 WL 5394517 (6th Cir 2014) - When original lender enters into agreement with borrower to waive right to collect interest on debt, later debt buyer is bound by that agreement and cannot charge either statutory or contract interest. Debt buyer who acquired debt after lender waived interest violated Fair Debt Collection Practices Act when debt buyer later attempted to collect debt plus statutory interest as attempting to collect interest when not permitted by law.
- (6793) *Grace v. LVNV Funding, Inc.*, 2014 WL 2167487 (W.D. Ky. 2014) – Collection agency that reported debt at amount that included unlawful interest violated FDCPA. Creditor charged 1.5% per month “service charge” on unpaid account. Court determined that “service charge” was actually disguised interest at rate in excess of statute usury statute. Inclusion of “service charge” in total debt reported to credit bureaus constituted attempt to collect amount not permitted by law; false representation of the character, amount or legal status of debt; and communicating information that is known to be or should be known to be false. Record was unclear as to whether false reporting occurred within one year statute of limitations period. FDCPA would not support action based on so called “serial violation” – original report would not be construed as “continuing” or repeating. Court did not determine whether statute of limitations runs from original reporting or whether “discovery rule” applies, finding that it was not necessary to do so on this record.
- (6794) *Osburn v. Seth L. Goldner, PC*, 2014 WL 466174 (E.D. Mi. 2014) – FDCPA prohibits false, deceptive or misleading collection activities including the false representation of the legal status of a debt. Complaint that alleged that creditor attempted to collect debt after discharge of debt in bankruptcy sufficiently stated cause of action for misrepresenting the legal status of the debt.
- (6795) *Davis v. Weinstein & Riley, P.S.*, 2013 WL 5428740 (N.D. Ohio 2013) – Action under FDCPA can be based on conduct that would amount to violation of discharge injunction. Action is not one to enforce discharge injunction, which would have to be brought as contempt action in bankruptcy court. FDCPA prevents actions to collect debt where collection is barred by applicable law. Discharge injunction constitutes “applicable law” that is violated, for purposes of FDCPA, when debt collector attempts to collect discharged debt.

23.30 Collection Efforts Permitted by State Law

- (6796) *Currier v. First Resolution Investment Corp.*, 2013 WL 3364364 (E.D. Ky. 2013) – To establish a *prima facie* case for a violation of the FDCPA, plaintiff must prove: (1) that plaintiff is a natural person who is harmed by violations of the FDCPA, or is a “consumer” for purposes of a cause of action; (2) the “debt” arises out of a transaction entered primarily for personal, family, or household purposes; (3) defendant is a “debt collector” within the meaning of 15 U.S.C. § 1692a(6); and (4) defendant has violated, by act or omission, a provision of the FDCPA. FDCPA prohibits use of unfair or unconscionable means to collect. Statute provides non-exhaustive list of actions that may be unfair or unconscionable, but list is not exclusive. Alleged violation of state law, without more, is not violation of FDCPA. Creditor’s

recording of judgment prior to expiration of time to request rehearing in violation of Kentucky law, is not violation of FDCPA. Method of collection of judgment, if done pursuant to state law, cannot be violation of FDCPA. Creditor did not make threat to take action merely by recording judgment in public records where action was effort to collect judgment that had already been entered. While procedural correctness of action may be debated, that does not transform recording into violation of FDCPA.

23.31 Garnishment

- (6797) *Nichols v. Roosen, Varchetti & Oliver, PC*, 2015 WL 5936335 (E.D. Mi. 2015) – FDCPA does not require collector to release writ that has expired on its own terms. Debt collector violates FDCPA when collector uses false, deceptive or misleading representation or means of collection. Debt collector did not violate FDCPA where garnishment served by collector on debtor's employer expired over a year when employer resumed garnishing funds from debtor's wages. Collector did not ask or take any steps to cause employer to restart garnishment and promptly refunded payments to debtor when received from employer. Debt collector did not violate FDCPA where collector, on behalf of a different creditor, served writ naming different defendant, on debtor's employer. Employer misread writ and incorrectly withheld funds from debtor. Although writ named person with similar name as debtor, none of the other identifying information was the same or similar to debtor or to the writ previously served on debtor's employer on behalf of debtor's creditor. Collector did not take any action in connection with second writ that could be considered an effort to collect from debtor and Collector has no reason to believe that employer would be confused or misled by second writ which did not refer to Debtor in any way.

23.32 Language, Symbols or Account Numbers on Envelope

- (6798) *Douglass v. Convergent Outsourcing*, 765 F.3d 299 (3d Cir. 2014) – Debt collector violated FDCPA where account number printed on letter itself was visible through window in envelope. FDCPA precludes any language or symbols on any envelope, which includes language or symbols that are visible through the transparent window of an envelope. Exposure of account number raised serious privacy concerns that FDCPA were designed to prevent.

23.33 Credit Reporting

- (6799) *Grace v. LYNV Funding, Inc.*, 2014 WL 2167487 (W.D. Ky. 2014) – Collection agency that reported debt at amount that included unlawful interest violated FDCPA. Creditor charged 1.5% per month "service charge" on unpaid account. Court determined that "service charge" was actually disguised interest at rate in excess of statute usury statute. Inclusion of "service charge" in total debt reported to credit bureaus constituted attempt to collect amount not permitted by law; false representation of the character, amount or legal status of debt; and communicating information that is known to be or should be known to be false. Record was unclear as to whether false reporting occurred within one year statute of limitations period. FDCPA would not support action based on so called "serial violation" – original report would not be construed as "continuing" or repeating. Court did not determine whether statute of limitations runs from original reporting or whether "discovery rule" applies, finding that it was not necessary to do so on this record.

C. Remedies

23.34 Parties Liable

- (6800) *Cruz v. International Collection Corp.*, Case no. 09-17449 (9th Cir. 2012) - Debt Collector under Fair Debt Collection Practices Act is strictly liable for pursuing collection after debtor notified debt collector in writing that debt was disputed. Individual defendant was also liable since he was personally involved in violation by signing at least one of the improper collection letters.

23.35 Statutory Damages

- (6801) *Shoup v. McCurdy & Candler, LLC*, Case no. 10-14619 (11th Cir. 2012) - Law firm's letter to debtor potentially violated Fair Debt Collection Practices Act where letter incorrectly identified the "creditor" to whom the obligation was owed. The mortgage on debtor's home was held by America Wholesale Lender. However, attorneys demand letter identified MERS as the creditor. Identification of MERS as the creditor is not harmless error as FDCPA provides for statutory damages even in absence of actual damages.

23.36 Punitive Damages

- (6802) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – Damage claim under FDCPA limited to actual damages. There is no basis under FDCPA for recovery of punitive damages.

23.37 Attorney Fees

- (6803) *Nance v. Zwicker & Associates, P.C.*, 2015 WL 2195063 (N.D. Ohio 2015) – Individual who prevails in FDCPA action entitled to recover costs of action including reasonable attorney fees. Once prevailing party is known, primary issue becomes reasonableness of fee, defined as one adequate to attract competent counsel but not to produce windfalls to attorneys. Analysis starts at reasonably hourly rate times number of hours reasonable expended. Number of hours requested unreasonable where case was not complicated and legal framework of case was well known to plaintiff's attorney who had brought 2 similar actions in one year before the current case. Plaintiff served discovery requests that were identical on each of the defendants and case settled reasonably early in the proceeding. Number of attorneys was excessive and plaintiff is not entitled to compensation for a number of well qualified attorneys when fewer attorneys could have done the job. Three attorneys resulted in duplicative and unnecessary work and redundancy was inherent in work flow structure. Redundancy also caused multiple inter-office meetings and discussions billed by both participants, or multiple attorneys participating in same phone conference with client and all three attorneys billing that time; or one attorney billing to review work produced by other attorney who also billed. Hourly rates ranging from \$275 to \$375 excessive for simple case and no evidence that attorneys each made distinct contributions

to the outcome of the case. Fees for services that were of no benefit are not compensable. Time spent on Motion to add party was not compensable because motion was denied and nothing learned in the process in any way advanced plaintiff's case. Multiple hours spent over 2 weeks researching issues of statute of limitations and tolling not reasonable where issues were not complex and should have been known to attorneys who bill at substantial rates. Similarly, time spent researching venue not reasonable where case filed in district where plaintiff lived which was "obvious choice" and any research would not have benefitted parties but was done solely to maximize convenience of attorneys. Services also evidenced an element of waste. Early on in case, defendant offered to settle for \$4,000 plus attorney fees, far higher than the statutory maximum recovery of \$1200. Work spent after date of offer of settlement was not compensable as it added no value to settlement or award of case and amounted to little more than performing unreasonable and unnecessary services.

D. Defenses

23.38 Bona Fide Error

- (6804) *Ponce v. BCA Financial Services, Inc.*, 2012 WL 470213 (11th Cir. 2012) – Bona Fide Error defense requires collector to prove that violation was unintentional, was a bona fide error, and occurred despite maintenance of procedures reasonable adapted to avoid the violation. Agency's reference to internal policies with no explanation as to how errors were unintentional or how policies were intended to prevent such errors was not sufficient.

23.39 Substantial Compliance

- (6805) *Wallace v. Diversified Consultants, Inc.*, Case no. 13-2214 (6th Cir. 2014) – Collector does not violate act by sending letter that advised that collector will presume debt valid unless debtor disputes it "within 30 days of receiving notice". While letter departed from language of statute that provides "within 30 days after receiving notice", discrepancy did not change meaning of letter. Collector not required to specifically parrot language of statute, as long as language used conveys the required information. Collector's letter advised debtor that debtor had thirty days to dispute the debt; that the clock would start ticking when the letter was received; and that if the debtor did not act the collector would presume the debt to be valid.

XXIV. Other Causes of Action

A. Generally

24.1 Tortious Interference with Contract

- (6806) *Saab Auto, AB v. General Motors Co.*, 2013 WL 3013677 (E.D. Mi. 2013) – Action for tortious interference with economic expectancy requires (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part of the defendant; (3) intentional interference causing or inducing a termination of the relationship or expectancy; and (4) resultant actual damage. Valid business expectancy requires more than subjective expectation of entering into a business relationship. Contract that is nothing more than agreement to negotiate series of additional agreements is nothing more than a framework subject to multitude of additional agreements and commitments necessary to actually execute a final agreement, all of which would also have been subject to approvals and contingencies of multiple companies and governments. "Intentional interference" prong of action requires proof that defendant's actions were done for improper purpose or motive. Defendant's actions motivated by legitimate business reasons are not improper motive or interference. Statements that are true cannot be basis of tortious interference with business relations claim. GM merely stated its position pursuant to contracts that it had with Plaintiff. Public statements made by GM in reference to legal, bargained for rights were "motivated by legitimated business reasons" and could not be improper interference as a matter of law. Even lawful actions can constitute intentional interference if done with malice and without justification. Actions taken to protect one's own business interests in protecting competitive position and business relationships cannot constitute improper motive. Plaintiff did not allege any fact that would support finding that defendant had motive other than protection of legitimate business relations or with intent to interfere with Plaintiff's business relationships.
- (6807) *Irwin v. Frankenmuth Credit Union*, Case No. 08-20212 (Bankr. E.D. Mi. 2009) – Action for tortuous interference requires actions that are intentionally per se wrongful or are done with malice and without justification, all with purpose of invading a contractual or business relationship of another. Party who acts with legitimate business reason does not improperly interfere with contract or business relationship. Credit Union's requirement that Debtor enter into written contracts with potential customers is not per se wrongful or without justification, where actions were justified and consistent with prudent lending practices. Credit Union's actions were designed to determine if Debtor had the ability to repay loans.

24.2 Innocent or Negligent Misrepresentation

- (6808) *Doering v. JPMorgan Chase Bank*, 2015 WL 5460702 (E.D. Mi. 2015) – Borrower's action for negligent misrepresentation failed to state cause of action. Borrower's allegation that lender promised to reinstate loan when borrower brings account current did not state cause of action where complaint failed to allege that plaintiff paid or tendered amount necessary to reinstate or that lender, upon receipt of those funds, refused to reinstate. To extent plaintiff requested breakdown of reinstatement figures, lender had no legal duty to provide those figures. Plaintiff could not maintain cause of action where lender did not breach duty owed to plaintiff. Further, lender did provide a breakdown but plaintiff was "not satisfied", which is not sufficient to support finding that lender made misrepresentation in advising borrower that lender would provide breakdown. Borrower's dissatisfaction with form of breakdown did not demonstrate any misrepresentation by lender.
- (6809) *LeBlanc v. Bank of America*, 2013 WL 3146829 (W.D. Tn. 2013) – To state claim for negligent misrepresentation, plaintiff must allege that the defendant supplied information to the plaintiff; [2] the information was false; [3] the defendant did not exercise reasonable care in

obtaining or communicating the information[;] and [4] the plaintiffs justifiably relied on the information. Plaintiff's complaint failed to state cause of action against lender for refusal to permanently modify loan where complaint made only general allegations without specifically identifying misrepresentations or identity of person making misrepresentations.

- (6810) *Irwin v. Frankenmuth Credit Union*, Case No. 08-20212 (Bankr. E.D. Mi. 2009) – Debtor borrowed money from third party to repay loan from Credit Union, which resulted in loan being paid in full. Third party then threatened Credit Union with litigation when Credit Union declined to advance additional funds to Debtor, which would have been used by Debtor to generate resources to repay third party. Credit Union settled with third party and attempted to charge the cost of that settlement back against the Debtor's account. Record failed to establish that Debtor in fact owed any money to third party and purported assignment from third party to Credit Union was not valid absent proof of underlying enforceable obligation that could be assigned.

24.3 Punitive Damages

- (6811) *R & L Pricecorp, LLC v. Hall*, 2013 WL 1739658 (Bankr. E.D. Tn. 2013) – Punitive damages warranted based on Debtors willful and malicious damage to rented premises. Debtors rented house in pristine condition, to be occupied by no more than 6 people. When debtors moved out, premises were substantially damaged and photos of damage were shocking to the court. Damage including extensive damage to the carpets, doors, walls, and windows, untreated mold and mildew growth, and broken appliances. More specifically, the house was filthy, wreaked of urine, and contained animal feces on the carpet, stairs, and a wall, there was writing on one of the walls in what appeared to be permanent ink and there were, among other things, missing and broken Levolor blinds, a broken dishwasher, a damaged stove, a damaged kitchen sink and damaged flooring. As many as 8 people lived in the house plus four dogs and one cat. Court awarded actual damages plus punitive damages as evidence indicated that actions of debtors in damaging property were particularly egregious, and held that entire damage award was non-dischargeable.
- (6812) *Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – General rule is that punitive damages are not allowed against a municipality absent express statutory authority.
- (6813) *Irwin v. Frankenmuth Credit Union*, Case No. 08-20212 (Bankr. E.D. Mi. 2009) – Debtor not entitled to punitive damages against creditor where damages emanate from contractual relationship. Punitive damages may be awarded only when the actions that give rise to the claim arise from a tort. Punitive damages also available only for willful or wanton act that demonstrated reckless disregard for Debtor's rights. Credit Union's actions in attempting to collect debt that was seriously past due did not rise to level of punitive damages where Debtor failed to establish that Credit Union ever agreed to extend new loan or terms of any such loan including amount, term or interest rate. Credit Union's ultimate decision not to enter into new loan relationship was not willful or wanton act that demonstrated reckless disregard for Debtor, but only commercially reasonable effort to collect outstanding obligation.

24.4 Conversion

- (6814) *Hagan v. Baird*, 2015 WL 6152959 (Bankr. W.D. Mi. 2015) – Conversion is any distinct act of dominion wrongfully asserted over property of another. Conversion can result from wrongful obtaining of possession of property, or wrongful exercise of dominion over property lawfully in possession of third party that is inconsistent with rights of third party. Debtor lawfully transferred proceeds of asset sale to shareholders who then used funds for personal expenses. Defendant did not convert property in first instance as transfer by debto was voluntary and knowing and done with intent to transfer property to defendant free and clear of any further claims of debtor. Defendant's receipt of funds was not wrongful and so could not constitute conversion. Defendant's later use of funds for personal expenses was not act inconsistent with debtor's rights as debtor, upon transfer of funds, retained no further interest in property with which defendant could have interfered.
- (6815) *Patrick v. Citimortgage, Inc.*, 2014 WL 7339828 (Bankr. N.D. Ohio 2014) – Conversion requires wrongful exercise of dominion over property in exclusion of rights of owner, or withholding possession under claim inconsistent with owner's rights. Lender did not convert borrower's money where lender paid insurance premiums from escrow account as required by terms of mortgage. In debtor-creditor relationship, conversion of money can occur only where owner attempts to recover identical funds, not merely recover money generally. Money paid to lender under loan obligation was fungible and was co-mingled with other loan payments and moved into and out of escrow account as necessary to pay insurance and taxes. Borrower did not request return of same money paid into escrow account, but only requested the refund of the sum of money paid in.
- (6816) *Liggett v. Schwartz*, 2015 WL 4478033 (6th Cir. 2015) – Action based on contractual relationship cannot constitute conversion as matter of law. Divorce decree that awarded wife one-half of retirement account had contract right to recover one-half of the account. Husband's failure to transfer funds amounted to breach of contract and could not constitute conversion as a matter of law.
- (6817) *Chambers v. HSBC Bank USA*, 2014 WL 1405276 (E.D. Mi. 2014) – Michigan conversion statute applies only to personal property. Allegations that defendant converted title to Plaintiff's condominium unit through foreclosure process involved real property and is beyond scope of statute.
- (6818) *Liggett v. Schwartz*, 2014 WL 1028960 (E.D. Mi. 2014) – Ex-wife could not maintain action for conversion or recover treble damages where state court judgment of divorce included findings that Husband had not converted assets and wife could not otherwise prove elements of conversion, particularly where Husband never denied that wife was entitled to 50% of IRA and that obligation to wife was non-dischargeable, and Husband's Chapter 11 Plan proposed to pay the claim in full in monthly installments.
- (6819) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Conversion requires a distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with the other party's rights. Real estate allegedly taken by creditor

could not form basis of action for conversion as real estate is not “personal property”. Personal property could not have been converted as state court judgment entered pre-petition determined that assets were owned by creditor and not debtor, such that debtor had no right to assets as to which creditor could have wrongfully interfered. Remaining assets were voluntarily transferred by debtor to creditor pursuant to a pre-petition settlement of state court action. Creditor could not “convert” assets that debtor transferred to creditor as debtor did not retain any right to those assets and creditor had the full right to exercise control of those assets.

- (6820) *First Tennessee Bank, NA v. Hansen*, 2012 WL 1156409 (Bankr. E.D. Tn. 2012) – Conversion requires proof that party appropriated property of another for party’s own use and benefit; that party intentionally exercised dominion and control over property; and that party did so in defiance of rights of true owner. Bank converted property of debtor after foreclosure by hiring company to remove personal property from residence and destroy that property. Bank repeatedly contacted debtors’ attorney to make arrangements to remove debtors’ personal property from house. Although debtors did not remove property, Bank did not have right to personal property and knew that debtors wanted contact information so they could attempt to retrieve property. Although debtors admitted that they were not able to hire someone to retrieve property and that debtors never had anything more than a “hope” of their ability to retrieve property, debtors never indicated an intent to abandon property. Instead, Bank grew tired of waiting and instructed agent to remove and destroy property. However, debtors failed to produce evidence of value of property destroyed, preventing entry of judgment against Bank.
- (6821) *Boyd v. Direct Capital Corp.*, 2010 WL 4259981 (Bankr. W.D. Mi. 2010) – Security agreement was sufficient as matter of New Hampshire law to create security interest which included motor vehicle. Although Security Agreement did not expressly reference “motor vehicles” the general inclusion of “consumer goods” was sufficient as the vehicle was purchased primarily for personal, family or household use. Creditor’s seizure of the automobile prior to commencement of the bankruptcy case was not conversion as creditor had a lawful right of possession as the holder of a valid security agreement.
- (6822) *Tyree v. Shrum*, 2010 WL 2851011 (Bankr. M.D. Tn. 2010) – Property may be converted in three different ways: 1) A person may personally dispossess another of tangible personal property; or 2) A person may dispossess another of tangible property through the active use of an agent; or 3) Under certain circumstances, a person who played no direct part in dispossessing another of property, may nevertheless be liable for conversion for receiving personal property. Debtor obtained money from third parties and used funds to purchase Certificate of Deposit in Debtor’s own name. Debtor then borrowed money and pledged CD as collateral. After Debtor defaulted, Bank exercised right to offset the default by taking the money out of the CD. Bank did not personally dispossess third parties of funds, as third parties paid funds to Debtor, not Bank. There was no evidence that Debtor was acting as agent for Bank when Debtor obtained funds from third parties. Bank had no knowledge of involvement of third parties and had no knowledge that money deposited to purchase CD was not Debtor’s rightful property. Bank could not be held liable for conversion of funds belonging to third parties.

24.5 Unjust Enrichment

- (6823) *Citizens Corporation v. Meyers*, 2014 WL 3362255 (M.D. Tn. 2014) – Unjust enrichment requires 1) a benefit conferred upon the defendant by the plaintiff; 2) appreciation by the defendant of such benefit; and 3) acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof. The enrichment of the beneficiary must be unjust. If the beneficiary has given any consideration to any person for the benefits received from the plaintiff, there is no injustice in allowing the defendant to retain those benefits without paying the plaintiff. If the beneficiary did not have privity with the transferor under a written contract, the plaintiff must first pursue recovery from person with whom plaintiff had privity before pursuing beneficiary. Defendant was not unjustly enriched by Plaintiff’s pledge of collateral for loan to corporation where Plaintiff was shareholder of corporation and received benefit in form of loan to corporation.
- (6824) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Unjust enrichment requires proof of receipt of a benefit by defendant from plaintiff where it is inequitable for defendant to retain the benefit. Third party could not have benefitted where debtor/plaintiff did not have any interest in the property acquired by Third Party from creditor, as State Court judgment previously determined that property belonged solely to transferring creditor and not to debtor. Absent some transfer of property in which debtor had an interest, transfer could not have unjustly enriched third party at expense of debtor.
- (6825) *Akinwusi v. Federal Home Loan Mortg. Corp.*, 2013 WL 1282018 (E.D. Mi. 2013) – Complaint failed to state cause of action for unjust enrichment. Rights and duties of the parties were governed and controlled by terms of mortgage and note. Action for unjust enrichment will not lie where there is express contractual relationship between parties. Remedy, if any, is for breach of contract.
- (6826) *Shapiro v. Harajli*, 2012 WL 255326 (Bankr. E.D. Mi. 2012) – Unjust enrichment requires proof that the defendant unjustifiably retained money or benefits that, in justice and equity, belonged to another. Defendant’s use of line of credit in the names of both debtor and defendant, and on which debtor and defendant were jointly liable, did not “unjustly enrich” defendant at debtor’s expense. Defendant’s obtaining and retaining the proceeds was not unjust as defendant was fully liable for repayment and saddled defendant with full debt secured by lien on defendant’s own homestead. Further, debtor could not demonstrate any injury as result of defendant’s use of line of credit, as lender never sought or attempted to seek recovery from debtor personally and any liability of debtor to lender was unsecured debt that was discharged in the bankruptcy proceeding. Debtor’s debt to lender was not the cause of debtor’s bankruptcy filing – creditor was not pursuing recovery and debtor had more than \$230,000 of other unsecured debt entirely unrelated to line of credit. Further, hold harmless clause in divorce decree, which required defendant to hold debtor harmless from claims of lender, did not give debtor a right to one-half of the proceeds that defendant drew from the line of credit as extension of credit, itself, was not “harm” within scope of hold harmless clause.

24.6 Legal Malpractice

- (6827) *Schultze v. Chandler*, Case No. 12-15186 (9th Cir. 2014) – Bankruptcy court has jurisdiction to enter final judgment in adversary proceeding brought by member of Unsecured Creditor Committee against Committee counsel for alleged malpractice. Post-petition claim against court appointed professional is core proceeding because attorney’s employment and compensation were approved by Bankruptcy Court and duties pertained solely to administration of estate and cause of action arose out of the performance of those duties. Case dismissed because counsel owed duty to Committee as a whole, and did not owe duty to individual members of Committee.
- (6828) *Kelsey v. Fitzgerald*, Case No. 08-80501 (Bankr. W.D. Mi. 2010) – Legal malpractice claim requires proof of an attorney client relationship, negligence in the legal representation, negligence that was the proximate cause of an injury, and the nature and extent of the injury suffered. Record on Summary Judgment did not clearly evidence existence of attorney-client relationship. Factual issues remained that precluded entry of summary judgment.

24.7 Piercing Corporate Veil

- (6829) *Michigan Department of Environmental Quality v. Asmar*, Case No. 14-3172 (Bankr. E.D. Mi. 2015) – Bankruptcy Court lacks jurisdiction to hold individual principals liable for all legal obligations of the debtor whenever created or to be created, and to find that assets of corporation are, as a matter of law, the property of defendants and that all actions taken by the debtor are actions taken by principals personally, jointly and severally and that corporate bankruptcy should be considered as filed in name of corporate principal. Request for relief exceeded scope of anything that court could lawfully grant, even with parties consent. State court already had jurisdiction over action by MDEQ seeking to impose personal liability against non-debtor principals. Action dismissed without prejudice to MDEQ pursuing relief in state court.
- (6830) *Kentucky Petroleum Operating, Ltd. V. Golden*, 2015 WL 927258 (E.D. Ky. 2015) – Corporate veil will be pierced so as to render one corporation liable for debts of another if one corporation so dominates the relationship as to cause loss of corporate separateness; or circumstances where continued recognition of corporate separateness would sanction fraud or promote injustice. Injustice must be more than creditor’s inability to collect debt but can be found where parent company caused subsidiary to become unable to pay debt; or where there is intentional scheme to funnel assets into liability free entity while leaving debts with asset-free entity. Court will consider (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm’s-length relationships among related entities; and (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders. Corporate veil pierced where entities had same sole shareholder who owned and controlled all aspects of both entities; at least one entity was undercapitalized where capital contributions totaled \$10.00, grossly insufficient to fund any business; entities disregarded corporate formalities and commingled funds, paying each other’s obligations and receiving each other’s revenues; and transaction had effect of circumventing creditors by diverting assets from debtor to other related corporations. Maintaining corporate veil would result in injustice as parent corporation and sole shareholder would cause transfer of assets of related corporation leaving corporation unable to pay liabilities.
- (6831) *Riddle v. Portfolio Recovery Associated, Inc.*, 2014 WL 1252610 (E.D. Ky. 2014) – Parent corporation is not liable for actions of subsidiary unless parent company is mere alter ego of subsidiary. Actions of subsidiary, without more, do not impose liability on parent.
- (6832) *Gurjal v. Kalinowski*, 2012 WL 4736798 (Bankr. E.D. Mi. 2012) – Michigan law permits corporate veil to be pierced if plaintiff can demonstrate either fraud in the use of the corporation or that the injustice sought to be prevented is in some manner related to a misuse of the corporate form short of fraud or irregularity. Plaintiff sued debtor in state court to pierce corporate veil, alleging that debtor as sole member of corporation comingled finances, failed to maintain corporate records, and otherwise used corporate entity as extension of personal financial accounts, had complete identity of interests with corporation to permit piercing of corporate veil to make debtor’s personal assets available to corporate creditors.
- (6833) *Hulsing Hotels Tennessee, Inc. v. Steffner*, 2012 WL 3563978 (Bankr. E.D. Tn. 2012) – As general rule, members of LLC, even single member LLC, are not responsible for debts of or judgments against LLC. Court will disregard corporate entity where entity is just a sham or dummy, or where necessary to accomplish justice, such as where entity lacks funds to pay debts due to some misconduct of officers and directors. Mere preferring of one creditor over another is not basis for piercing corporate veil. Evidence did not indicate that LLC was sham or abused, or that LLC’s inability to pay debts was in any way result of misconduct of debtor. LLC and sister company operated out of same facilities and there were various inter-corporate transfers, but there was nothing inappropriate about sharing bank, attorneys or accountants. Evidence indicated that two entities were formed at different times and for different purposes and operated different businesses. All transfers were properly documented loans or loan repayments, neither of which changed company’s balance sheet. Alleged delay in submitting insurance claims for reimbursement was not act to deny or abuse corporate existence and did not result in any loss of funds by LLC as all claims, once submitted, were paid. There is no indication that the “corporate” formalities were not observed, or that the Debtors abused or used the corporate form of Sleep Quest for an improper purpose. Nor does the evidence establish that Sleep Quest was unable to pay its obligations to its creditors due to misconduct by the Debtors that justifies the imposition of personal liability.
- (6834) *Blight v. Watson*, 468 BR 242 (Bankr. W.D. Ky. 2012) – To pierce corporate veil, creditor must prove that corporation was influenced by owners; that there was such a unity of ownership and interest that separateness ceased to exist; and that recognizing the corporate existence would sanction fraud or promote injustice. Corporation must be mere instrumentality of shareholder, that shareholder used control over corporation to defraud or harm creditor, and that refusing to set aside corporate existence would subject creditor to unjust loss. Corporate veil would not be set aside where debtor, a 50% shareholder of corporation, was not involved in the day-to-day operations and did not maintain corporate books and records. Debtor’s involvement in corporation was limited to unloading supplies

when shipments arrived and occasionally working in the office doing filing as needed. Contract was between creditor and corporation. There was no evidence that debtor treated corporate assets as her own. Fact that debtor was 50% shareholder and was a director of the corporation was not sufficient to disregard corporate existence.

- (6835) *In re Geiger*, 2010 WL 2756760 (Bankr. N.D. Ohio 2010) – Under Ohio law, corporate veil will be pierced where it would be unjust to allow the shareholders to hide behind the fiction of the corporate entity. Party seeking to pierce veil must prove that shareholder used his control over corporation in such a manner as to defraud the third parties. Mere control over a corporation is not in itself a sufficient basis for shareholder liability. Plaintiff must prove “egregious shareholder misdeeds” and “egregious wrongs” and “extreme shareholder misconduct”. Court would not pierce corporate veil where there was no evidence of intent to mislead or defraud creditors, notwithstanding that corporation did not follow virtually any other corporate formalities: there are no officers, no corporate bank accounts, no liability insurance with the corporation as the insured party, no corporate books or minutes of corporate meetings, no business stationery; most of the assets used in the Corporation's business are titled in Debtor's name; all monies from the business are deposited into Debtor's personal account, from which corporate and personal obligations are paid. Debtor receives revenue from operation of the business in his name, as well as invoices for business expenses; and there is minimal separation of Corporate and personal affairs.
- (6836) *Brennan v. Slone*, 2008 WL 4569946 (6th Cir. 2008) - Transfers of inventory from Debtor's closely held corporation to Debtor's significant other with intention that significant other sell the inventory and keep the proceeds are avoidable fraudulent transfers where corporation is found to be alter ego of Debtor. Factors in deciding whether to disregard the corporate fiction under the *alter ego* theory include: (1) grossly inadequate capitalization, (2) failure to observe corporate formalities, (3) insolvency of the Debtor corporation at the time the debt is incurred, (4) shareholders holding themselves out as personally liable for certain corporate obligations, (5) diversion of funds or other property of the company property for personal use, (6) absence of corporate records, and (7) the fact that the corporation was a mere facade for the operations of the dominant shareholder(s). Court correctly concluded that corporation was Debtor's alter ego where Debtor frequently commingled his funds with corporation's and treated corporation's debts as Debtor's individual debts. Debtor put corporation's cash into Debtor's accounts and paid corporation expenses from personal accounts. Debtor paid his own expenses from the commingled funds. Debtor had a difficult time remembering to distinguish between himself and his corporation during testimony.

24.8 Continuation of Debtor

- (6837) *Per-Co, Ltd. v. Great Lakes Factors*, 2008 WL 4791434 (6th Cir. 2008) - Purchaser of assets from Debtor constituted “mere continuation” of Debtor, allowing creditors of Debtor to assert claims against buyer of assets on same priority as those creditors held claims against Debtor. Buyer will be “mere continuation” where buyer acquired all or substantially all of the Debtor's assets; principal of seller is also principal of buyer; assets sold consisted of virtually all assets of Debtor that had value, leaving Debtor with only worthless or virtually worthless assets; new company had same officers, directors and shareholders as seller; buyer engaged in same business operation with same physical plant and product lines; and buyer pays inadequate consideration for purchase of assets.

24.9 Federal Tort Claims Act

- (6838) *Lewis v. McClatchey*, 2009 WL 1372945 (Bankr. S.D. Ohio 2009) - Federally insured bank is not an agency of United States Government and therefore cannot be sued under the Federal Tort Claims Act. FTCA applies only to claims against persons acting on behalf of federal agency.

24.10 Injunctions and Temporary Restraining Orders

- (6839) *Rajapakse v. Wells Fargo Home Mortgage*, 2015 WL 4133179 (W.D. Tn. 2015) – Plaintiff seeking to enjoin foreclosure sale must prove likelihood of success on merits of case; irreparable harm if injunction denied; that injunction would not substantially harm interest of opposing parties; and considerations of public interest. Plaintiff's complaint failed to allege any facts that would meet state statutory requirements to enjoin foreclosure sale.
- (6840) *In re Gardner*, Case No. 15-40823 (Bankr. E.D. Mi. 2015) – Court must consider four factors in determining propriety of injunctive relief: (1) whether party seeking injunction has shown strong likelihood of success on merits; (2) whether moving party would suffer irreparable harm if the injunction is not granted; (3) whether injunction would cause substantial harm to others; and (4) public interest. Debtor's Motion seeking to enjoin lender from taking possession of property denied. Court had previously determined that debtor had no interest in property, meaning debtor had no chance for success in efforts to stop repossession process. Because debtor lacked any interest in property, denial of injunction would not cause any harm to debtor. Grant of injunction would substantially prejudice party seeking to take possession and to enforce state law remedies as to property in which party had immediate right of possession and debtor had no rights in or to the property. Further, court had already granted party relief from automatic stay and request for injunction would be directly contrary to the court's prior rulings. Public interest would not be served by injunctive relief.
- (6841) *Jacques v. JPMorgan Chase Bank*, 2015 WL 58646 (W.D. Mi. 2015) – Court has authority to enjoin party from filing additional lawsuits for same issues where later suits are designed to harass other party. The issue is whether the litigant has a history of vexatious litigation that is likely to continue in the future absent judicial intervention. Factors include: litigant's history of litigation and in particular whether it entails vexatious, harassing, or duplicative lawsuits; litigant's motive in pursuing the litigation; whether litigant is represented by counsel; whether litigant caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and whether other sanctions would be adequate to protect the courts and the other parties. Injunction warranted where plaintiff has filed multiple cases against same defendant for same alleged wrongdoing; each action was entirely without merit; and plaintiff's prior actions indicated a likelihood that plaintiff would continue to do so in the future.
- (6842) *Portfliet v. Wells Fargo Home Mortgage*, 2014 WL 4987810 (W.D. Mi. 2014) – District Court has authority to issue injunction to

prevent prolific litigant from filing pleadings without first obtaining court approval. Injunction must use least restrictive means available to deter the inappropriate behavior. In most cases, proper remedy is to require litigant to obtain court permission before filing suit that involves the same operative facts that have been the basis of the litigiousness. Court would enjoin plaintiff from instituting actions concerning the property in question in Federal Court without first obtaining court permission. However, court would not expand injunction to preclude institution of suits in state court in effort to balance interests in avoiding duplicative litigation with plaintiff's right to access courts.

- (6843) *Farrell v. US Bank, NA*, 2014 WL 2480055 (E.D. Mi. 2014) – Party seeking temporary restraining order must demonstrate a strong likelihood of success on merits; irreparable harm if the injunction is not granted; that issuance of the injunction will not cause substantial harm to others; and that the injunction would serve the public interest. Debtor's request for temporary restraining order to prevent foreclosure of mortgage denied where motion failed to allege any immediate or irreparable harm, as motion did not demonstrate that foreclosure or eviction were imminent and did not produce any eviction notice of court order to support need for immediate relief.
- (6844) *In re Medlar*, 2014 WL 793329 (Bankr. N.D. Ohio 2014) – Party seeking injunction must prove strong likelihood of success on merits of underlying claim; that movant would suffer irreparable injury if the injunction is not granted; that the injunction would not cause substantial harm to others; and that public interest would be served by injunction. Movant failed to demonstrate basis for injunction against condominium association that was pursuing relief in state court. Bankruptcy court had already lifted stay for purposes of allowing state court to rule on merits of dispute. There was no matter pending in the Bankruptcy court regarding condo association's action against debtor (as stay had been lifted) so debtor could not demonstrate any likelihood of success on the merits in bankruptcy court. To extent condo association secured property and changed locks after debtor vacated and left property open to damages, debtor could not demonstrate lack of adequate remedy at law if court ultimately determined that condo association acted improperly. Injunction would not serve public interest where debtor created situation that allowed pipes to freeze and burst, causing substantial damages to other units and condo association was required to shut off water and take steps to prevent further damage and secure property.
- (6845) *Kagel v. Irwin*, Case No. 13-80218 (Bankr. W.D. Mi. 2013) – Court would not enjoin sale of property owned by County Treasurer pursuant to a previously held tax foreclosure sale. Property had been sold at tax sale and statutory redemption period expired. Absent an order setting aside the tax deed sale, debtors held at best a bare right of possession which would remain protected by sale, but had no interest in title to property that would prevent sale by tax deed purchaser. Debtors are not precluded from seeking to set aside tax sale or from filing action for damages, neither of which would be adversely affected by resale of property as long as debtors act promptly. Further, evidence indicated that tax deed holder would be harmed by injunction as property would likely be sold at a later date at a lower price; and public interest was better protected by having finality in tax deed sales.
- (6846) *Adams v. Wilmington Finance/AIG*, 2013 WL 1774639 (E.D. Mi. 2013) – Standard for permanent injunction is same as for a preliminary injunction, except that movant must show actual success on merits, rather than mere likelihood of success. Court also considers whether: (1) movant would suffer irreparable harm absent injunction; (2) remedies available at law, such as monetary damages, are inadequate; (3) balance of hardships between parties favors equitable remedy; and (4) requested injunction would serve public interest. Court has power under All Writs Act, 28 USC Section 1651(a), to enjoin party from filing suit. Pre-filing orders are extreme and should be rarely used, and cannot be used to prevent party from commencing actions in state court unless necessary to protect federal court order or jurisdiction. Court would enter injunction precluding party from commencing any further actions in state court where party's claims have been repeatedly rejected in multiple actions in the Federal Courts. Party's current complaint merely attempts to re-litigate claims already adjudicated and to add unrelated plaintiffs, unrelated defendants, and unrelated claims to complaint.
- (6847) *Edwards v. JP Morgan Chase Bank*, 2013 WL 1632560 (E.D. Mi. 2013) – Injunction is remedy, not cause of action. Count of complaint that sought injunction independent of any substantive cause of action would be dismissed for failure to state claim. Injunctions are extraordinary remedies that will be granted only if required to do justice; there is no adequate remedy at law; and there exists a real and imminent danger of irreparable injury. Court will consider whether movant has shown strong likelihood of success on merits; whether movant will suffer irreparable harm if injunction is not entered; whether issuance of injunction would cause harm to opposing party; and whether injunction is in the public interest. Plaintiff failed to demonstrate basis for injunction to prevent foreclosure where plaintiff failed to allege either that plaintiff had redeemed the property or that plaintiff had otherwise resolved any monetary defaults.
- (6848) *Hutton v. GMAC Mortgage, LLC*, 2012 WL 5252314 (E.D. Mi. 2012) – Injunction is equitable remedy and is not, itself, a cause of action. Complaint seeking injunction without alleging underlying breach or cause of action dismissed.
- (6849) *In re Lundeen*, 442 BR 659 (Bankr. S.D. Ohio 2011) – Anti-injunction act, 28 USC 2283, prohibits Bankruptcy Court from enjoining city or state from commencing or continuing criminal proceeding in state court. Exception that allows court to enter injunction to protect court's exercise of jurisdiction does not apply as case was ready to be closed and continuation of criminal proceeding would not impact progress of case. Section 105 does not provide authority to enter injunction in violation of Anti-injunction act. Injunction pursuant to Section 105 is radical measure to be used only in unusual circumstances where judgment against third party would in effect be judgment against debtor. Criminal proceedings against debtor affected only debtor and would not result in any judgment against any third party.
- (6850) *Homes v. Vilsack*, 2011 WL 1453819 (W.D. Mi. 2011) – Debtor whose house was about to be sold at foreclosure sale demonstrated cause for Temporary Restraining Order.
- (6851) *Turchan Technologies Group, Inc. v. Internal Revenue Service*, Case No. 10-4315 (Bankr. E.D. Mi. 2010) – Party seeking preliminary injunction must demonstrate (i) likelihood of success on merits; (ii) irreparable harm if the injunction is not granted; (iii) probably that granting injunction will not cause irreparable harm to others; and (iv) whether public interest is advanced by injunction. In action seeking

to enjoin IRS from collection of taxes, 26 USC Section 7421(a) requires clear demonstration that there are no circumstances under which the United States will prevail in tax collection efforts and that collection activities will irreparably harm the taxpayer. Debtor not entitled to injunctive relief where debtor admittedly failed to make tax deposits required by Debtor's confirmed Chapter 11 plan. IRS actions in attempting to collect priority tax claims provided for in Chapter 11 plan were proper and appropriate after debtor defaulted and IRS provided notice of default as required by Confirmation Order, and all steps taken by IRS were permitted by the Confirmation Order. Plaintiff's likelihood of success on merits of claims against IRS were "zero", mandating denial of injunctive relief.

- (6852) *Saleh v. Bank of America, N.A.*, 427 BR 415 (Bankr. S.D. Ohio 2010) – Automatic stay does not extend to third party co-obligors. Debtor can request injunction against actions against third party, and Court has authority to grant injunctive relief under Section 105. However, requests for injunctive relief that would effectively extend the stay to a non-debtor are viewed with a great deal of skepticism. Although action against third party, Debtor's wholly owned corporation, would produce adverse consequences, debtor did not demonstrate any reason why the corporation could not file its own bankruptcy. Further, extending the stay via injunction in a Chapter 13 proceeding would contravene the express provisions of Section 1301 which provide for a co-debtor stay in very limited circumstances. Debtor and corporation did not share such an identity of interests that the legal separation could be ignored. Corporation kept separate records and accounts and filed separate tax returns from debtor. Corporation owned assets separate from those owned by debtor including real property adjacent to corporation's principal place of business, accounts, inventory, equipment and a liquor license.
- (6853) *Unencumbered Asset Trust v. Hampton-Stein*, 2009 WL 2015395 (Bankr. S.D. Ohio 2009) - When considering motion for preliminary injunction, Court must balance four factors: (1) whether movant has a strong likelihood of success on the merits, (2) whether movant would suffer irreparable injury without the injunction, (3) whether issuance of the injunction would cause substantial harm to others, and (4) whether the public interest would be served by the issuance of the injunction. Trustee, trustee's principal, and counsel for trust, demonstrated strong likelihood of success on the merits of claim that adversary defendant violated Supreme Court's decision in *Barton v. Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881) (the "Barton Doctrine") doctrine, which required leave of bankruptcy Court to bring state-Court action against bankruptcy trustees or trustee's functional equivalents for acts done in their official capacity and within their authority as Court officers where plaintiffs action sought to hold defendants liable for actions in liquidating Debtors assets which constitute actions within the official capacities and authority as officers of bankruptcy Court. Irreparable injury requires more than possibility of some remote future injury. Defendant demonstrated irreparable injury where litigation in non-bankruptcy forum as Defendants would be distracted from their duties and non-Bankruptcy forum litigation could lead to an order that effectively sets aside the underlying Bankruptcy proceeding and threatens to directly contravene the Confirmation Order and transactions effectuated thereunder. Public interest served where preliminary injunction protects the integrity of the Debtor's bankruptcy estate and the bankruptcy process. Public interest is served by allowing bankruptcy Courts to retain control over the administration of the bankruptcy estates.
- (6854) *Travelers Indemnity Co. v. Bailey*, 129 S.Ct. 2195 (2009) – Debtor's confirmed Chapter 11 Plan included release of Debtor's insurers from any and all claims, demands, allegations, duties, liabilities and obligations which have been or could have been or might be asserted by any person against any of the insurance companies. Scope of provision in Chapter 11 Plan precluded subsequent actions not only against Debtor, but also precluded any subsequent actions against the insurance companies including any actions based on the conduct of the insurers themselves or which are otherwise not derivative of the Debtor's wrongdoing, where Court's Order confirming Debtors Chapter 11 Plan was not timely appealed and the order became final.
- (6855) *In re National Century Financial Enterprises, Inc.*, 407 B.R. 895 (Bankr. S.D. Ohio 2009) - Preliminary injunction against prosecution of adversary defendant's state court action against Chapter 11 trustee and debtor's counsel was warranted, as they showed a strong likelihood that *Barton doctrine* was violated.

24.11 Tax Injunction Act

- (6856) *In re Shefa, LLC*, 2015 WL 248496 (Bankr. E.D. Mi. 2015), *aff'd*, 2015 WL 4477911 (E.D. Mi. 2015) – Tax Injunction Act, 28 USC Section 1341, precludes federal court from enjoining, suspending or restraining assessment, levy or collection of tax under state law where state courts afford plain, speedy and efficient remedy. Tax Injunction Act does not preclude Bankruptcy Court from enforcing provisions of Code that affect collection of taxes. Court can exercise jurisdiction over proceedings that would otherwise violate Tax Injunction Act where necessary to enforcement of bankruptcy code provisions. Section 505 allows bankruptcy court to adjudicate amount or legality of any tax unless the amount was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction. Bankruptcy Court had jurisdiction to disallow amount of taxes claimed to extent claim exceeded value of property as valuation did not enjoin or suspend assessment, levy or collection of taxes or set aside or attach tax valuations.

24.12 Declaratory Relief

- (6857) *Hutton v. GMAC Mortgage, LLC*, 2012 WL 5252314 (E.D. Mi. 2012) – Declaratory Relief is equitable remedy and is not, itself, a cause of action. Complaint seeking injunction without alleging underlying breach or cause of action dismissed.

24.13 Quiet Title

- (6858) *Trombley v. Seterus, Inc.*, 2014 WL 1664823 (E.D. Mi. 2014), *aff'd*, 2015 WL 3620412 (6th Cir. 2015) – Borrower cannot quiet title and avoid consensual mortgage lien if borrower cannot establish agreement to modify loan or any other fact that would give borrower superior title over the lien of the mortgage holder.
- (6859) *Dauenhauer v. Bank of New York Mellon*, Case No. 13-5810 (6th Cir. 2014) – Borrower cannot maintain action to quiet title over claims of mortgage holder where borrower cannot establish that he has satisfied obligation under the note. Quiet title requires that claimant hold title to property free and clear of the cloud on title. Where borrower agreed to repay money, and loan was secured by mortgage, unless

borrower satisfied note, borrower's title was not superior to the claim of the mortgage holder.

24.14 Accounting

- (6860) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Accounting is remedy available only where parties are unsure of amounts at stake and accounts at issue are greatly complicated. Action for accounting requires mutual demands and where the transactions are so complex that ordinary discovery procedures would be inadequate. Accounting is not necessary where discovery is sufficient to determine amounts at issue. Chapter 7 Trustee's demand for accounting for assets of debtor failed to state cause of action where state court judgment previously determined that debtor had no right, title or interest in assets and that assets belonged solely to creditor. There was no reason to appoint special master, expert witness or business appraiser to prepare accounting of assets and valuation of property where debtor's estate had no claim of ownership in property.
- (6861) *Hutton v. GMAC Mortgage, LLC*, 2012 WL 5252314 (E.D. Mi. 2012) – Accounting is equitable remedy and is not, itself, a cause of action, and is available only where plaintiff lacks adequate remedy at law. Complaint that sought damages for fraud stated cause of action that would provide equitable remedy, precluding independent cause of action for accounting. Further, as plaintiff has pending cause of action, information would be equally available through normal discovery procedures. Action for accounting is unnecessary where discovery is sufficient to obtain information.

24.15 Recoupment

- (6862) *The Gladys Ragsdale Trust v. Tostige*, 2015 WL 5449997 (Bankr. E.D. Mi. 2015) – Recoupment requires that debts from debtor to creditor and from creditor to debtor arise from same transaction. Plaintiff did not have right of recoupment based on loan to beneficiary of Trust where beneficiary's right arose from creation of trust agreement itself while debt from beneficiary to trust arose from loan made some years later.
- (6863) *In re Slayton*, 509 BR 90 (Bankr. E.D. Mi. 2014) – Right of recoupment is not discharged in bankruptcy case. Right of recoupment exists where right to recover money from debtor arises out of same transaction as debtor's right to money from creditor. Pension plan's offset of debtor's future pension plan distributions to recover prior, erroneous distributions from same pension plan, constituted right of recoupment. All of the rights of the parties emanated from the pension plan documents themselves. Exercise of right of recoupment while case is pending does not violate stay and continued exercise post-discharge does not violate discharge injunction.
- (6864) *Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – TILA does not support affirmative claim for equitable recoupment, which can be raised only as defense in action commenced by other party.
- (6865) *Thomas v. City of Detroit*, Case No. 10-5909 (Bankr. E.D. Mi. 2010), *aff'd*, 2011 WL 3706669 (E.D. Mi. 2011) – Party owing a debt possesses right of recoupment if that party has a cognizable claim for damages against the party seeking to collect on the debt. Absent any legal obligation owed by the person seeking to collect debt, Debtor had no right of recoupment that could be asserted. Where District Court previously ruled that Debtor had no claims against City, Debtor's alleged claims against City were res judicata and could not assert recoupment as defense to City's Proof of Claim.

24.16 Federal Debt Collection Practices Act

- (6866) *U.S. v. Mannarino*, 2014 WL 2611831 (N.D. Ohio 2014) – Federal Debt Collection Practices Act, 28 USC Section 3001 *et. seq.*, provides exclusive civil procedures for United States to recover a judgment on a debt. Debts include amounts owing to the United States on account of a fee, restitution or other source of indebtedness, and allows garnishment of any property that is in the possession, custody or control of a person other than the debtor in which the debtor has a substantial, non-exempt interest. Debtor must file a response to the garnishee's answer if debtor wants to assert defense to garnishment. However, garnishment is not vehicle to contest validity of underlying debt.

24.17 Telephone Consumer Protection Act

- (6867) *Drew v. Ocwen Loan Servicing, LLC*, Case No. 14-369 (M.D. Fl. 2015) – Creditor violated TCPA when creditor, after debtor obtained discharge of debt, called debtor's cell phone over 600 times in effort to collect debt.
- (6868) *Gulf Coast Collection Bureau v. Mais*, 2014 WL 4802457 (11th Cir. 2014) – When consumer provides cell phone number to a creditor, for example in an application for credit or request for medical care, consumer expressly consents to auto-dialed and pre-recorded calls under TCPA. Collection agency did not violate TCPA where debtor, in seeking treatment in an emergency room, listed his cell phone number on the medical forms, and collection agency thereafter used an auto-dialer to make prerecorded calls about the outstanding balance on the account.

24.18 Truth in Lending Act

- (6869) *Johnson v. Broker Solutions, Inc.*, 2015 WL 4469276 (M.D. Tn. 2015) – Limitations period for rescission under TILA is three years from transaction date. Complaint that alleged TILA violations for transaction that closed in December, 2010, time barred when suit not filed until December, 2014.
- (6870) *Wilson v. Regions Bank*, 2015 WL 4276262 (M.D. Tn. 2015) – Limitations period for rescission under TILA is 3 years from the date of the loan closing or sale of the secured property, whichever occurs first. Complaint that alleged TILA violations when loan acquired in 2007 and when loan modified in 2009 time barred where complaint not filed until 2014.

- (6871) *Jesinoski v. Countrywide Home Loans, Inc.*, ____ S. Ct. ____ (2015) – Truth in Lending Act does not have any formal requirements for notification of exercise of right of rescission. Letter mailed by borrowers to lender was valid notice of rescission. TILA does requires only that borrower “notify” lender, and does not require institution of litigation to constitute “notice”.
- Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – Statute of limitations under TILA is one year from occurrence of the violation. Action based on original note and mortgage untimely where first brought more than one year after closing.
- (6872) *Cacevic v. Federal Home Loan Mortgage Corp.*, 2014 WL 4897380 (E.D. Mi. 2014) – TILA action cannot be brought against party who was not party to loan origination. FNMA, as successor to original lender, not liable for any alleged TILA violations. Further TILA action must be brought within one year of cause of action. Loan obtained in 2008 but TILA action not filed until 2013 required dismissal.
- (6873) *Davies v. Deutsche Bank National Trust Co.*, 2014 WL 1152800 (9th Cir. 2014) – Action under TILA must be brought within one year of alleged violation. TILA requires that borrower be given notice of transfer of servicing within 30 days. Assignment of deed recorded in August, 2009, provided notice to debtor no later than September, 2009, such that action brought in January, 2011, was untimely.
- (6874) *Jester v. Citimortgage*, 2014 WL 3547183 (N.D. Ohio 2014) – Statute of limitations under TILA is one year from occurrence of violation. Action brought in 2013 based on alleged failure to provide required disclosures in 2007 barred.
- (6875) *Lodge v. Konaur Capital Corp.*, 2014 WL 1813298 (1st Cir. 2014) – Party seeking redress under TILA must prove that offending party is “debt collector” as defined in statute. Plaintiff failed to produce evidence to prove that McCalla Raymer, LLC, was “debt collector”.
- (6876) *Pugh v. Bank of America*, 2013 WL 3349649 (W.D. Tn. 2013) – 15 USC Section 1641(g) requires that within 30 days of the date on which a mortgage is sold or transferred, the creditor that is the new owner or assignee must advise the owner in writing of (A) the identity, address, telephone number of the new creditor; (B) the date of transfer; (C) how to reach an agent or party having authority to act on behalf of the new creditor; (D) the location of the place where transfer of ownership of the debt is recorded; and (E) any other relevant information regarding the new creditor. Creditor who fails to provide notification is liable to borrower for actual damages plus statutory damages of double the finance charge but not less than \$400 nor more than \$4000. Complaint is sufficient if it alleges that transfer took place and the owner was not notified. Owner does not need to allege specifics as to when ownership changed, complaint stated cause of action because that information was uniquely in control of lender and plaintiff would have opportunity to obtain specific information through discovery process. Requiring plaintiff to plead more specifically at outset of case would require plaintiff to allege more information than plaintiff would be reasonably expected to have.
- (6877) *LeBlanc v. Bank of America, NA*, 2013 WL 3146829 (W.D. Tn. 2013) – Complaint stated cause of action for violation of Regulation Z where complaint alleged that lender failed to notify borrower of change in ownership of mortgage. Although complaint did not allege any specifics as to when ownership changed, complaint stated cause of action because that information was uniquely in control of lender and plaintiff would have opportunity to obtain specific information through discovery process. Requiring plaintiff to plead more specifically at outset of case would require plaintiff to allege more information than plaintiff would be reasonably expected to have.
- (6878) *Hood v. Chase Manhattan Mortgage Corp.*, 2013 WL 1629306 (E.D. Mi. 2013) – Truth in Lending Act has one year statute of limitations for damage actions and three years for rescission, both of which accrue from date of consummation of the transaction.
- (6879) *Duran v. Mortgage Electronic Registration Systems, Inc.*, 2013 WL 444450 (N.D. Ohio 2013) – TILA has one year statute of limitations for damage actions. Plaintiff signed mortgage in 2007 and brought action in 2012, well beyond statute, requiring dismissal of claim. Limitation period for rescission is 3 days or in some cases up to three years but does not apply to residential transaction by which borrower acquired or initially constructed the debtor’s residence. As plaintiff borrowed the money for purposes of acquiring the residence, plaintiff lacked any right to rescind and could not maintain action based on alleged refusal to rescind. Rescission also requires that plaintiff restore the creditor to the position that the creditor held before the rescinded transaction – that is plaintiff must return to the creditor the principal amount borrowed. Plaintiff’s action did not propose to repay lender but merely requested that plaintiff be awarded title to the property free and clear, which is not a remedy available under TILA.
- (6880) *Gale v. First Franklin Loan Services*, Case No. 09-16498 (9th Cir. 2012) – TILA requires loan servicer who is also assignee of the loan to provide to the borrower, upon written request, the name, address and telephone number of the owner of the obligation. Debtor’s action dismissed because defendant, First Franklin, was not a servicer or an assignee, but was the original creditor itself. Although 2009 amendments to TILA would require all servicers, not just servicer-assignees, to respond to inquiries, change did not help debtor where loan pre-dated amendment to TILA and, in any event, First Franklin was not a servicer.
- (6881) *Assasepa v. JPMorgan Chase Bank*, 2012 WL 88162 (S.D. Ohio 2012) – Complaint failed to state cause of action for violation of Truth in Lending. Complaint made vague allegations but failed to specify any facts that could constitute cause of action under TILA. Complaint did not provide any specifics with regard to the dates of any of the alleged occurrences, much less the dates of the TILA violations. Plaintiff did not identify any document or reference any specific incident from which this Court can determine when the alleged TILA violations occurred. Plaintiff’s “Notice of Right to Rescind” did not allege when the alleged TILA violation occurred. As it is impossible to discern from plaintiffs’ allegations when the alleged TILA violations occurred, the Court cannot determine whether the TILA claim is barred by the statute of limitations.
- (6882) *Boone v. JPMorgan Chase Bank*, Case No. 11-10891 (11th Cir. 2011) – TILA imposes certain disclosure requirements in connection with loan secured by “principal residence” and allows for rescission within 3 days of consummation of transaction or delivery of necessary forms and disclosures, whichever occurs later; provided that the right of rescission expires three years of date of consummation even if disclosures are never provided. TILA action brought 4 years after consummation of transaction dismissed as beyond statute of limitations.

- (6883) *Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – Borrower’s right to rescind is subject to three year statute of limitations from date of execution of promissory note. 15 USC Section 1635 precludes any claim for equitable tolling of the statute of limitations. Balance of claims under TILA are subject to one-year statute of limitations pursuant to 15 USC Section 1640(e), but this statute is subject to equitable tolling. Fraudulent concealment to support equitable tolling requires that 1) defendant concealed the conduct that constitutes the cause of action; 2) defendant’s concealment prevented plaintiff from discovering the cause of action within the limitations period; and 3) until discovery, plaintiffs exercised due diligence in trying to find out about the cause of action. Where the doctrine of fraudulent concealment is applied, the one year period will begin to run when the borrower discovers or had reasonable opportunity to discover the fraud involving the complained of TILA violation. Plaintiff’s failure to plead fraud with particularity precluded court from finding equitable tolling of statute of limitations. TILA does not support affirmative claim for equitable recoupment, which can be raised only as defense in action commenced by other party.
- (6884) *Hill v. Tribeca Lending Corp.*, Case No. 09-2214 (3d Cir. 2010) – Federal Truth in Lending statute, 15 USC Section 1601, does not apply to loan principally for business, not consumer, purposes. Borrower re-financed home to obtain funds to infuse into borrower’s struggling business. Although collateral was borrower’s home, the loan was primarily for business or commercial purposes which is excluded from the requirements of TILA.

24.19 Fair Credit Reporting Act

- (6885) *Winchester v. City of Hopkinsville*, 2015 WL 1117295 (W.D. Ky. 2015) – FCRA requires that party who uses information in credit report when making adverse decision regarding employment must, before taking adverse action, provide a copy of the credit report to the person and advise that person has opportunity to dispute contents of report. “Adverse” employment decision is any denial of employment or other decision for employment purposes that adversely affects current or prospective employee. City failed to comply with FCRA when city based decision not to hire applicant based on information in credit report but did not provide copy of report to applicant. However, failure was harmless error as applicant could not prove that failure to comply caused injury. Applicant executed document acknowledging that City would use his consumer report during hiring process, and that applicant could request the investigative information. Applicant acknowledged City representative discussed credit reports with applicant, line by line, correcting any discrepancies and applicant eventually confirmed two prior bankruptcies as well as ongoing delinquent credit issues that were not disclosed in employment application. Applicant discovered only one alleged error in the background check which would have reduced debts from \$157,000 to approximately \$147,000 and there was no evidence that this relatively slight variance would have redeemed applicant’s application or otherwise altered the City’s decision.
- (6886) *Chldress v. Experian Information Solutions, Inc.* Case No. 14-2864 (7th Cir. 2015) – When credit reporting agency receives documentation that debtor voluntarily dismissed a bankruptcy case prior to discharge, agency must update records to accurately reflect that status. Agency did not violate FCRA when it was advised of dismissal of case and noted credit file as “dismissed” when agency had not been provided documents showing that case had been voluntarily dismissed by debtor. Agency only has duty to use reasonable effort to make sure report is correct. Any bankruptcy case that terminates before conclusion is dismissed and agency does not have duty to investigate to determine if dismissal is result of voluntary request by debtor or for some other cause.
- (6887) *Groff v. Wells Fargo Home Mortgage, Inc.*, 2015 WL 2169811 (E.D. Mi. 2015) – FCRA designed to prevent inaccurate consumer credit information on credit reports. Entity that provides information must, on receiving report of a dispute, investigate and if appropriate correct the information. If furnisher is negligent in breaching duty, borrower is entitled to actual or statutory damages as well as punitive damages. Information is accurate if it reflects the terms of and liability for the account; reflects the consumer’s performance and other conduct with respect to the account; and identifies the correct consumer. Bank does not violate FCRA where, after debtor receives discharge in bankruptcy without reaffirming debt, creditor reports debt as closed, with no balance, and no payments, even if consumer continues to voluntarily make payments on secured debt. Discharge extinguishes liability on note but leaves mortgage intact such that reporting account as closed with a zero balance accurately reflected debtor’s lack of personal liability on note.
- (6888) *Riddle v. Portfolio Recovery Associated, Inc.*, 2014 WL 1252610 (E.D. Ky. 2014) – FCRA does not impose liability on party who accesses consumer credit report with “reason to believe” that the access is permissible. Permissible use includes use of information for collection of account. Creditor had reason to believe that it held two accounts owed by Plaintiff, accounts opened in Plaintiff’s name, date of birth and social security number; and access was for purposes of updating location information which is type of permissible account review. Fact that statute of limitations may have expired on the debt eliminates the remedy, but not the debt, such that creditor’s actions in obtaining information is still connected to the account status of the debt. Utility service accounts are credit transactions within scope of FCRA and permissible use. Credit transaction is the right to purchase property or services and defer payment, and includes utility service contracts. Creditor’s receipt of updated information from credit bureau after creditor received notice that plaintiff disputed debt did not render defendant liable as it appeared that requests were routine and done in good faith and after plaintiff requested information be removed from the credit bureau, the bureau did so. Request to review information, even on closed account, is not violation of FCRA.
- (6889) *Bailey v. Equifax Information Services, LLC*, 2013 WL 3305710 (E.D. Mi. 2013) – FCRA Section 1681(b) requires consumer reporting agencies to use reasonable procedures to ensure maximum accuracy in credit reports. FCRA does not impose strict liability on credit reporting agency for any incorrect information. Plaintiff must prove that the agency reported inaccurate information about the plaintiff; the agency either negligently or willfully failed to follow reasonable procedures to assure maximum accuracy; plaintiff was injured; and agency’s conduct was proximate cause. A credit report is inaccurate if it is patently incorrect or when it is misleading to such an extent that it can be expected to have an adverse impact. Agency reporting of balances on accounts where plaintiff is not borrower but is authorized user is not inaccurate or misleading. Credit report accurately showed plaintiff as authorized user and accurately reflected balance due on account. Plaintiff also failed to demonstrate that any person was misled or that she suffered any adverse action or suffered any harm as a

result. FCRA Section 1681i(a)(1)(A) requires a credit reporting agency to investigate any dispute and either update or delete information as determined by the investigation within 30 days of receipt of notification; and to advise consumer of results of investigation within 5 days after completion of investigation. Plaintiff failed to present any evidence that agency either negligently or willfully failed to investigate. Plaintiff also failed to state action against creditor where plaintiff did not allege that creditor spread any inaccurate information about plaintiff, where evidence indicates that information on credit report accurately reflected plaintiff's status as authorized user and reported the balance due on the account.

- (6890) *Giovanni v. Bank of America, NA*, 2013 WL 1663335 (N.D. Cal. 2013) – Lender does not violate FCRA by reporting late payments while debtor is in bankruptcy. Discharge in bankruptcy does not change underlying fact that during the bankruptcy, debtor's account was delinquent.
- (6891) *Evans v. Mercedes Benz Financial Services, LLC.*, 2011 WL 2936198 (E.D. Mi. 2011) – FCRA contains no provision requiring creditors to report the mere filing of a bankruptcy petition to credit reporting agencies. Creditor did not violate FCRA by continuing to report default on debt prior to entry of discharge.
- (6892) *Kowall v. GMAC Mortgage, LLC*, Case No. 10-3221 (Bankr. E.D. Mi. 2011) – Fair Credit Reporting Act, 15 USC Section 1681b, prevents person from obtaining credit report for improper purpose. Plaintiff must prove that there was a consumer report as defined; defendant obtained or used it; and did so with no statutorily permissible purpose. Complaint that alleged that defendant obtained credit report without proper purpose stated cause of action and would survive Motion to Dismiss.

24.20 Equal Credit Opportunity Act

- (6893) *CB 2010 LLC v. Ithaca Coatings*, 2013 WL 2250168 (E.D. Mi. 2013) – ECOA prohibits creditors from discriminating on the basis of sex or marital status, or on basis of race, color, religion, national origin or age. Statute and regulations enacted under it prohibit creditor from requiring signature of applicant's spouse or other person if the borrower meets the creditor's standards for creditworthiness for the amount and terms of credit requested. Statute is unclear as to whether it applies to commercial loans, although nothing in terms limit it to consumer transactions. Guarantee that waived any defenses given to guarantors other than actual payment and performance waived any claims or defenses under ECOA. Guarantee confirmed that waiver was knowingly and voluntarily made and there was no evidence that waiver was procured by frauds, duress, lack of consideration or mutual mistake.
- (6894) *Simmerman v. Ocwen Financial & Mortgages Services, Inc.*, 463 BR 47 (Bankr. S.D. Ohio 2011) – ECOA applies only to "creditors" involved in the original loan closing. ECOA does not apply to assignees who were not involved in the original loan closing. Defendant who acquired loan from original mortgage company after transaction had closed was not "creditor" to whom the ECOA applied.
- (6895) *Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – ECOA, 15 USC Section 1691(e), prohibits discrimination against any applicant with respect to any credit transaction. ECOA has two year statute of limitations from date of alleged violation. Terms of loan were clearly disclosed when loan closed and any alleged violation occurred at closing. Action brought more than two years after closing barred.

24.21 Servicemembers Civil Relief Act – Adjustment of Loan Terms

- (6896) *Banaszak v. Citimortgage, Inc.*, 2014 WL 4489497 (E.D. Mi. 2014) – Servicemembers Civil Relief Act (SCRA) 50 USC Section 501 et seq, provides that any obligation incurred before entering service may not bear interest at greater than 6% during service and in some cases for a year after discharge; allows service member to apply for relief from collection efforts; prohibits adverse credit reporting based on relief provided for in SCRA; and precludes foreclosure for taxes or other assessments on real property. Complaint failed to state cause of action where creditor retroactively adjusted interest rate to 6% upon being advised that borrower had been activated and borrower never actually paid more than 6%. However, to extent borrower incurred late fees based on the initial imposition of higher interest rate, complaint stated cause of action where borrower alleged that he was not able to make higher payments causing him to become delinquent. Complaint also stated cause of action for failure to lower the interest rate after borrower was activated a second time. Lender made appropriate retroactive changes during first deployment, but there was no evidence that lender made same adjustments after borrower was deployed a second time.

24.22 Servicemembers Civil Relief Act – Injunctive Relief

- (6897) *Banaszak v. Citimortgage, Inc.*, 2014 WL 4489497 (E.D. Mi. 2014) – Servicemembers Civil Relief Act (SCRA) 50 USC Section 501 et seq, precludes foreclosure for taxes or other assessments on real property. Injunctive relief does not preclude foreclosure of mortgage based on payment default as mortgage foreclosure is not foreclosure for taxes or assessments.

24.23 Servicemembers Civil Relief Act – Credit Reporting

- (6898) *Banaszak v. Citimortgage, Inc.*, 2014 WL 4489497 (E.D. Mi. 2014) – Servicemembers Civil Relief Act (SCRA) 50 USC Section 501 et seq, prohibits adverse credit reporting based on relief provided for in SCRA. Complaint failed to state cause of action against lender where complaint did not allege that lender had reported adverse information but only stated that borrower believed that creditor may, at some point in the future, make an adverse credit report. Absent an actual reporting of adverse information, complaint essentially sought order directing creditor to comply with law in the future, which is not a justiciable request for relief.

24.24 Interpleader

- (6899) *Plan Administrator for the Bail & Rice, Inc., Profit Sharing Plan v. Gail & Rice, Inc.*, 2011 WL 110904 (E.D. Mi. 2011) – Federal Rule

of Civil Procedure 22 permits a party to invoke interpleader if the plaintiff may be subject to double or multiple liabilities. Interpleader allows a party to join all other claimants as adverse parties. Court must first determine: (1) whether the stakeholder has properly invoked interpleader, including whether the court has jurisdiction over the suit, (2) whether the stakeholder is actually threatened with double or multiple liability, and (3) whether any equitable concerns prevent the use of interpleader. If so, then the court determines the respective rights of the claimants to the fund or property at stake via normal litigation processes, including pleading, discovery, motions, and trial.

24.25 Michigan Consumer Protection Act

- (6900) *Floyd v. Bank of America*, 2014 WL 3732591 (N.D. Ohio 2014) – Ohio consumer protection act requires that allegedly unfair or deceptive act or practice occur in connection with consumer transaction, defined as transaction primarily for persona, family or household use. Transactions between financial institutions and their customers are excluded from the definition of consumer transactions. Exemption extends to law firms acting on behalf of exempt financial institution. Allegations arising out of foreclosure action brought by exempt federally insured institution and its law firm failed to state cause of action.
- (6901) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Michigan Consumer Protection Act does not apply to transactions that are subject to or regulated by regulatory board or officer acting under authority of the state or the United States. Loan transactions including loan modifications with FNMA are subject to regulatory control by Michigan Office of Financial Services and also by Federal Housing Authority under its regulatory power over national banks (including FNMA), complaint regarding alleged failure to offer or comply with loan modification fails to state cause of action under Michigan’s consumer protection act.
- (6902) *Pugh v. Bank of America*, 2013 WL 3349649 (W.D. Tn. 2013) – Tennessee Consumer Protection Act provides private right of action for person who suffers financial loss as a result of unfair or deceptive acts or practices, Plaintiff must demonstrate that defendant engaged in act or practice that is unfair or deceptive and that plaintiff suffered a loss of money, property or thing of value as a result. Lender’s actions in pursuing foreclosure and debt-collection, even in context of loan modification, are not transactions within scope of TCPA. TCPA does not apply to loan modification activities. Note and Deed of Trust established payment terms and obligations, and lender is under no obligation to offer loan modification or other reductions in payments. Statements regarding loan modifications are related to terms of the loan itself.
- (6903) *LeBlanc v. Bank of America, NA*, 2013 WL 3146829 (W.D. Tn. 2013) – Action under state consumer protection act is held to higher pleading standard and must set forth specific fraudulent or deceptive acts rather than general allegations. Debtor’s general allegations that Bank drafted debtor’s account twice in one month for mortgage payments did not plead with requisite specificity as complaint did not allege any particular date or month in which double payments were drafted or how any double draft would constitute an unfair or deceptive practice. Lender’s alleged failure to cooperate in loan modification process; alleged delay in advising debtor of adverse decision on loan modification request; and alleged refusal to honor promise to modify loan that was later withdrawn by lender; were not unfair and deceptive practices as there is no cause of action under consumer protection act related to loan modifications as those are considered to arise out of the extension of credit which is beyond scope of statute.
- (6904) *McRary v. Jarrard*, 2011 WL 3566279 (E.D. Mi. 2011) – Action violates MCPA, Section 445.901, when action favors party taking action and causes probability of confusion or misunderstanding of legal rights and obligations of other party. Lender violated MCPA by sending notice of non-judicial foreclosure sale after lender had asserted defense of set-off in adversary filed by debtor to determine validity of debt. Lender’s notice incorrectly stated that “no legal or equitable proceedings had been instituted to recover the debt” which caused likelihood of confusion regarding status of action in violation of MCPA.

24.26 Michigan Motor Vehicle Sales Act

- (6905) *Allen-Morris v. Nicholas Financial, Inc.*, 2104 WL 5480825 (E.D. Mi. 2014) – Motor Vehicle Sales Act, MCL 491.118, prohibits motor vehicle seller from imposing finance charges in excess of 25% per year. “Finance Charges” are any fees or expenses that a credit buyer pays that a cash buyer would not pay. If seller imposes higher purchase price on credit buyer than for a cash buyer because the purchaser is using credit, increment is included in finance charge calculation. Plaintiff must demonstrate causal connection between purchase price and extension of credit. Fact that buyer paid more for motor vehicle than “blue book” value did not demonstrate that higher price was caused by credit nature of transaction where plaintiff did not demonstrate that but for the credit aspect of the transaction the purchase price would have been lower.

24.27 Conspiracy

- (6906) *Chambers v. HSBC Bank USA*, 2014 WL 1405276 (E.D. Mi. 2014) – Complaint failed to allege any basis for recovery for alleged conspiracy between lender and lender’s successor in interest related to plaintiff’s mortgage. Mere conclusory allegations that defendants were engaged in some undefined scheme to use mortgage backed securities and to falsify public records to create non-existent chain of title and then concealing plaintiff’s right to obtain loan modification presented no factual basis for an action for conspiracy.
- (6907) *Thill v. Ocwen Loan Servicing, LLC*, 2014 WL 1274080 (E.D. Mi. 2014) – Conspiracy is not “stand alone” cause of action. Conspiracy requires a separate actionable tort. Where complaint fails to state cause of action for separate tort, cause of action for conspiracy necessarily fails to state cause of action.
- (6908) *Wallace v. Midwest Financial and Mortgage Services, Inc.*, 2013 WL 1729587 (6th Cir. 2013) – Complaint did not sufficiently alleged civil conspiracy where complaint alleged that multiple defendants conspired to manufacture fraudulent appraisals designed to dupe customers into obtaining unaffordable loans for which one Defendant and its principals received generous yield spread premiums; but complaint did not allege that any yield spread premium was itself unlawful. Conspiracy requires agreement of two or more people to

commit an independent tort. Complaint did not allege any independent tort.

- (6909) *Brown v. Orlans Associates, PC*, 2013 WL 1506016 (E.D. Mi. 2013) – Action under 42 USC Section 1985 for alleged conspiracy to deprive person of equal protection of law must assert some racial or otherwise class-based invidious discriminatory animus. Action that alleged only that Defendant continued with foreclosure proceedings did not allege any discriminatory animus and would be dismissed. Common law conspiracy requires two or more persons, through concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by unlawful means. Conspiracy requires not only proof of the concerted action, but also of some underlying tort that conspiracy accomplished or attempted. Complaint filed to allege any underlying tort; therefore, complaint could not state cause of action for conspiracy.

24.28 RICO

- (6910) *Smith v. Lerner, Sampson & Rothfuss*, 2015 WL 1809311 (N.D. Ohio 2015) – Borrower's RICO action based on allegedly fraudulent assignment of mortgage barred by res judicata where State Court had previously entered final judgment foreclosing mortgage and indicating that lender was the real party in interest.
- (6911) *Wallace v. Midwest Financial and Mortgage Services, Inc.*, 2013 WL 1729587 (6th Cir. 2013) – RICO provides private cause of action for any person injured by reason of a violation of one of the statute's four criminal provisions, including "racketeering activity," such as mail and wire fraud; or a conspiracy to violate any of the other criminal specified provisions. Plaintiff must show that the predicate acts alleged were both the 'but for' cause and the proximate cause of his injury. Proximate cause requires a direct link between the wrongful conduct and the injury, and that the injury be foreseeable and not speculative. Mail fraud does not require that the injured party be the recipient of the mail in question, only that the mails were used in furtherance of a scheme to defraud. Complaint alleged sufficient cause of action under RICO. Defendants used inflated appraisal to induce Plaintiff into entering into much larger loan with unfavorable terms that were never made clear to plaintiff, as a result of which Plaintiff was unable to keep up with the ever increasing payment amounts resulting in negative amortization and leaving Plaintiff unable to sell the property. Plaintiff alleged a clear link between the wrongful conduct – the false appraisal – and the harm suffered, as the inflated appraisal played a significant role in the negotiations leading up to the loan itself. Loss of the property was foreseeable and was, in fact, almost inevitable. Connection was not speculative or illogical, and the harm was not the result of intervening forces but directly related to the appraisal and the resulting mortgage.

24.29 Intentional Infliction of Emotional Distress

- (6912) *Doering v. JPMorgan Chase Bank*, 2015 WL 5460702 (E.D. Mi. 2015) – Economic loss rule precludes action based on tort where cause of action arises out of contractual relationship and plaintiff alleges only economic damages. Proper cause of action is one for breach of contract. Causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and fraudulent misrepresentation all arose out of loan and mortgage contract and were barred by economic loss rule. Further, complaint failed to allege extreme and outrageous conduct on part of defendant, constituting conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable. Lender's actions in pursuing foreclosure of mortgage consistent with Michigan law is not chargeable with infliction of emotional distress.
- (6913) *Johnson v. Broker Solutions, Inc.*, 2015 WL 4469276 (M.D. Tn. 2015) – Intentional infliction of emotional distress requires that (1) the defendant's conduct was intentional or reckless; (2) the defendant's conduct was so outrageous that it cannot be tolerated by civilized society; and (3) the defendant's conduct resulted in serious mental injury to the plaintiff. While foreclosure process may be embarrassing, that is not conduct so outrageous and extreme in degree as to go beyond all bounds of decency.
- (6914) *Wilson v. Regions Bank*, 2015 WL 4276262 (M.D. Tn. 2015) – Intentional infliction of emotional distress requires that (1) the defendant's conduct was intentional or reckless; (2) the defendant's conduct was so outrageous that it cannot be tolerated by civilized society; and (3) the defendant's conduct resulted in serious mental injury to the plaintiff. While foreclosure process may be embarrassing, that is not conduct so outrageous and extreme in degree as to go beyond all bounds of decency.
- (6915) *Brown v. Orlans Associates, PC*, 2013 WL 1506016 (E.D. Mi. 2013) – Intentional infliction of emotional distress requires (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. Intentional infliction of emotional distress requires conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community, and does not include conduct that is mere insult, indignity, threat, annoyance, petty oppression, or other triviality. Plaintiff's complaint for allegedly wrongful foreclosure fail to demonstrate that Law Firm's conduct was extreme or outrageous.
- (6916) *Jenkins v. JPMorgan Chase Bank, NA*, 2013 WL 1091730 (Bankr. E.D. Tn. 2013) – Intentional infliction of emotional distress requires: (1) intentional or reckless conduct; (2) conduct that is so outrageous that it is not tolerated by civilized society; and (3) conduct results in serious mental injury. Breach of contract is not by itself actionable as outrageous conduct. Plaintiff's action against lender dismissed where basis of action was Lender's refusal to modify mortgage under HAMP. Running of foreclosure notices may have caused embarrassment, but notices were not outrageous or beyond bounds of decency.

24.30 Negligent Infliction of Emotional Distress

- (6917) *Doering v. JPMorgan Chase Bank*, 2015 WL 5460702 (E.D. Mi. 2015) – Economic loss rule precludes action based on tort where cause of action arises out of contractual relationship and plaintiff alleges only economic damages. Proper cause of action is one for breach of contract. Causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and fraudulent misrepresentation all arose out of loan and mortgage contract and were barred by economic loss rule. Further, in Michigan,

negligent infliction of emotional distress requires that plaintiff witness a negligent injury to third party and suffer a mental disturbance as a result. Lender's prosecution of mortgage foreclosure action consistent with Michigan law cannot support action for negligent infliction.

- (6918) *Brown v. Orlans Associates, PC*, 2013 WL 1506016 (E.D. Mi. 2013) – Michigan law recognizes very limited action for negligent infliction of emotional distress. Plaintiff must demonstrate (1) a serious injury is threatened or inflicted on a third person, (2) the nature of the injury is such as to cause severe mental disturbance to Plaintiff, (3) the shock results in actual physical harm, (4) Plaintiff is a member of the third person's immediate family, and (5) Plaintiff is present at the time the third person is injured or suffers shock fairly contemporaneously with that injury. Plaintiff's complaint that alleged only that Plaintiff would suffer distress if Defendant continues with foreclosure proceedings did not demonstrate any physical injury to any third party or that Plaintiff witnessed any actual or imminent injury to third party.

24.31 Constitutional Claims – Generally

- (6919) *Rubin v. Fannie Mae*, Case No. 13-1010 (6th Cir. 2014) – FNMA is not state actor for purposes of fifth amendment. There is no constitutional impediment to FNMA foreclosure by notice rather than through judicial process.
- (6920) *Mik v. Federal Home Loan Mortgage Corp.*, 743 F.3d 149 (6th Cir. 2014) – Freddie Mac is not state actor. Same conclusion has been reached by every district court that has considered issue and also has been reached by the highest Michigan state court to have reached the issue.
- (6921) *In re Hopkins*, 2014 WL 922773 (E.D. Mi. 2014) – FNMA is not “state actor” for purposes of fifth amendment due process claims. Action alleging violation of constitutional right of due process based on non-judicial foreclosure sale dismissed with prejudice.
- (6922) *Williams v. Federal National Mortgage Ass'n*, 2013 WL 5445883 (E.D. MI. 2013) – FNMA is not “state actor” for purposes of fifth amendment due process claims. Action alleging violation of constitutional right of due process based on non-judicial foreclosure sale dismissed with prejudice.
- (6923) *FHLMC v. Shamoon*, 922 F.Supp.2d 641 (E.D. Mi. 2013) – Freddie Mac was not converted into state action when Federal Housing Finance Agency became its conservator, precluding action alleging due process and equal protection violations based on Freddie Mac's purchase or property at foreclosure sale. Freddie Mac was private corporation and FHLMC, as conservator, merely stepped into shoes of Freddie Mac.
- (6924) *Lopez v. Bank of America*, 920 F.Supp.2d 798 (W.D. Mi. 2013) – FNMA is not governmental agency and did not become one when FHFA was appointed conservatory, precluding borrower's claim that FNMA violated 5th Amendment rights by using foreclosure by advertisement.
- (6925) *Hermiz v. FHLMC*, 2013 WL 3353928 (E.D. Mi. 2013) – FNMA is not governmental agency and is not required to use judicial foreclosure process. Michigan's non-judicial foreclosure process is sufficient for due process purposes and FNMA can validly use non-judicial foreclosures.
- (6926) *Kapla v. FNMA*, 485 BR 136 (Bankr. E.D. Mi. 2012), *aff'd* 2014 WL 346019 – Generalized actions alleging violations of constitutional right to due process and equal protection may be brought only against governmental actor. Private party cannot be charged with alleged violation of constitutional rights. Whether private corporation can be considered governmental unit depends on whether the entity was created by Congress; whether the purpose for creating entity was to further federal government objectives; and whether any directors or officers were required to be governmental officials. FNMA is not governmental actor but is private party. Debtor's complaint against FNMA for generalized violations of equal protection and due process dismissed. Although FNMA was created by special legislation and was created to further governmental objectives, FNMA lacked permanent governmental control as legislation establishing FNMA required that entity, while chartered by the federal government, was to be entirely privately owned.

24.32 Slander of Title

- (6927) *Blasingame v. Church Joint Venture, LP*, 2015 WL 4758933 (W.D. Tn. 2015) – Slander of Title requires 1) that plaintiff has an interest in the property, (2) that the defendant published false statements about the title to the property, (3) that the defendant was acting maliciously, and (4) that the false statements proximately caused the plaintiff a pecuniary loss. Lis pendens recorded by defendant which encompassed Plaintiff's property constituted publication of statement but nothing in Lis pendens was false as it correctly identified the Plaintiff as a co-defendant in adversary proceedings pending in the United States Bankruptcy Court in which the purpose of the proceeding was to determine if property transfers to defendant were fraudulent. Later dismissal of adversary complaint did not render statements in Lis pendens false when made. Plaintiff also failed to demonstrate that recording of Lis pendens was done maliciously or with reckless disregard for rights of Plaintiff. Fact that Lis pendens was recorded to create cloud on title is not sufficient to demonstrate malice where, at the time of its recording, there was an adversarial proceeding addressing the issue of whether certain properties, including the Farm, were fraudulently transferred by the co-trustees. Defendants had a good faith belief that the Farm had been fraudulently transferred, and filed a legal proceeding to determine the validity of their claim to the disputed property. Failure to terminate Lis pendens after termination of adversary proceeding Bankruptcy Court did not make recording in first instance “malicious” was not malicious where adversary proceeding was pending on date Lis pendens originally recorded.
- (6928) *Johnson v. Broker Solutions, Inc.*, 2015 WL 4469276 (M.D. Tn. 2015) – Slander of title requires the plaintiff to show (1) that it has an interest in the property, (2) that the defendant published false statements about the title to the property, (3) that the defendant was acting maliciously, and (4) that the false statement proximately caused the plaintiff a pecuniary loss. General allegations that lender published notice of default and notice of sale insufficient where complaint did not attach any documents and did not allege dates, descriptions, quote,

copies or other facts to demonstrate that any published document contained any false statement.

- (6929) *Wilson v. Regions Bank*, 2015 WL 4276262 (M.D. Tn. 2015) – Slander of title requires the plaintiff to show (1) that it has an interest in the property, (2) that the defendant published false statements about the title to the property, (3) that the defendant was acting maliciously, and (4) that the false statement proximately caused the plaintiff a pecuniary loss. General allegations that lender published notice of default and notice of sale insufficient where complaint did not attach any documents and did not allege dates, descriptions, quote, copies or other facts to demonstrate that any published document contained any false statement.

- (6930) *Hermiz v. FHLMC*, 2013 WL 3353928 (E.D. Mi. 2013) – Where redemption has expired, former owner lacks standing to challenge foreclosure sale. As alleged slander of title is predicated on sheriff's deed emanating from the foreclosure sale, former owner lacks standing to bring action as owner did not own property as of date slander allegedly occurred.

B. Mediation

24.33 When Appropriate

- (6931) *In re St. James Incorporated*, Case No. 07-48680 (Bankr. E.D. Mi. 2009) – Creditor's Motion to Appoint Mediator denied where certain parties were unwilling to participate in mediation and because mediation did not appear likely to be fruitful and would not serve a useful purpose.

24.34 Confidentiality

- (6932) *Doe v. Archdiocese of Milwaukee*, 2014 WL 5671155 (7th Cir. 2014) – Statements made during mediation are privileged and not admissible in later proceedings. Statements may be admissible in separate action or proceeding only if action or proceeding is different than the dispute whose settlement was attempted in mediation and even then only if necessary to prevent manifest injustice of sufficient magnitude to outweigh importance of protecting confidentiality of mediation process in general. Dispute was not separate or distinct proceeding where issue was whether plaintiff settled for amount that was too low based on alleged misrepresentations by defendant of amounts paid to others to settle similar disputes and statements concerning defendant's ability to pay. Both mediated dispute and current dispute arose out of same operative facts and sought damages for same alleged conduct.

24.35 Sanctions

- (6933) *Richard v. Spradlin*, 2013 WL 1571059 (E.D. Ky. 2013), *aff'd* 2014 WL 3452292 (6th Cir. 2014) - Court had authority to enter sanctions against party who failed to comply with court's order regarding mediation, where party showed up late and, when he did show up, made demands for procedures that were outside established procedures for mediation. Party's action indicated that party did not and would not engage in meaningful negotiations and party demonstrated bad faith and disrespect for mediation process that was harmful to other parties and caused an unnecessary delay in the orderly resolution of the disputes. Bankruptcy court cited party's failure to prepare for the mediation and failure to participate in the mediation as the bases for sanctions.

C. Expedited hearing

24.36 Procedure

- (6934) *Dettore v. JEM Real Estate Preferred Fund I, LLC*, Case No. 15-45642 (Bankr. E.D. Mi. 2015) – Motion for expedited hearing on request for preliminary injunction denied where automatic 60 day extension of redemption that came into effect under Section 108 when debtor filed bankruptcy before expiration of redemption allowed ample time for court to schedule hearing on request for preliminary injunction in normal course before expiration of 60 day extension.
- (6935) *In re Bowlson*, Case No. 08-44081 (Bankr. E.D. Mi. 2011) – Motion for Expedited Hearing denied where exigency was result of debtor's or counsel's failure to act in timely manner. Debtor failed to demonstrate exigency for Motion to Incur Debt to purchase new vehicle where debtor's lease of her prior vehicle expired more than 2 months prior to filing the instant Motion. Plan confirmed more than 2 years earlier acknowledged that lease being assumed would expire in October, 2010, leaving debtor and counsel with a full two years' knowledge that lease would expire.
- (6936) *In re Miles*, Case No. 09-78811 (Bankr. E.D. Mi. 2010) - Debtor's Motion for Expedited Hearing on Motion to Modify Conditions of Order Imposing Stay denied where Motion was filed too late to hold a hearing. The requested hearing date would give less than two-days notice to creditors and the Trustee and no reason was given why Motion was filed so late where Debtor had known about circumstances motivating the hearing for some time.
- (6937) *In re Elliott*, Case No. 09-50231 – Motion for Expedited Hearing denied without prejudice where Debtor's underlying motion failed to include the statement of concurrence as required by local bankruptcy loan 9014-1(g). Debtor is permitted to renew request for expedited hearing only after filing a supplement to the underlying motion showing compliance with local rule 9014-1.

D. Disqualification or Recusal of Judge

24.37 Grounds

- (6938) *In re Blumensaadt*, 2014 WL 4425823 (Bankr. N.D. Ohio 2014) – 28 USC Section 455 requires judge to disqualify himself if his impartiality may reasonably be questioned or where judge demonstrates personal bias or prejudice concerning a party. Question is whether a reasonable person knowing all of the relevant facts would question judge's impartiality. Standard is objective one. Judge not required to

recuse himself based solely on the subjective view of a party. Fact that judge served as Chapter 13 Trustee in prior case filed by debtor did not provide sufficient basis for recusal where judge had no extrajudicial information other than gained through prior proceedings. Judge's knowledge of first chapter 13 proceeding which was dismissed with 180 day bar, and subsequent filing by debtor's husband in effort to circumvent 180 day bar, were judicial proceedings, knowledge of which was neither unusual nor extrajudicial so as to warrant recusal.

- (6939) *In re Byers*, 509 BR 577 (S.D. Ohio 2014) – Bankruptcy Rule 5004 requires disqualification under 28 USC Section 455 if the judge's impartiality might reasonably be questioned; where the judge has personal bias or prejudice, or personal knowledge of disputed evidentiary facts; or where the judge while in private practice served as lawyer in the matter in controversy or a lawyer with whom the judge previously practiced law served during the association as an attorney in the matter in controversy. Standard is objective one, whether a reasonable person with knowledge of all facts would conclude that the judge's impartiality might reasonably be questioned. Motion must also be made at earliest possible moment after movant becomes aware of possible bias. Even brief delays can result in denial as untimely. Motion filed more than one year after movant discovered alleged bias was untimely. Further, motion alleged only that while in private practice, judge represented bank that was involved in current matter, but not that judge represented bank specifically in that matter. Prior representation of a party to an action is not a basis to recuse judge where representation was unrelated to current proceeding. Movant also failed to prove any bias or that bias stemmed from extrajudicial source that results in judge holding opinion on merits of case based on information other than what judge learned in course of case. Fact that moving party may believe that bias exists is not sufficient for recusal. While debtor had relationship with lender at a time when judge worked for lender, there was no direct or indirect contact between judge and debtor, and judge had never met debtor or any member of debtor's family. Movant also did not present evidence of "pervasive bias". Only information in possession of judge was that developed during court proceedings. Opinions formed by judge on basis of events in current or prior judicial proceedings are not basis for claim of bias. Adverse rulings, including rulings imposing sanctions, do not demonstrate bias.
- (6940) *Dumas v. JPMorgan Chase Bank*, 2013 WL 1703379 (E.D. Mi. 2013) – Magistrate judges must recuse themselves when their impartiality might reasonably be questioned, based on reasonable, objective person, knowing all of the circumstances; and must be based on extrajudicial events, and not from proceedings in the particular case or prior related cases. Party seeking to recuse judge may file affidavit setting forth facts and reasons for belief that judge is not impartial at which point the judicial officer involved must take no further action in the case. Plaintiff's request for recusals denied where plaintiffs based motion on comments and discussions on record during hearing regarding settlement. Judge's expression of displeasure with plaintiff's refusal to consummate settlement agreement or statements indicating that Judge does not think highly of Plaintiff's claims are not extrajudicial statements that support recusal. There was no evidence in the record that the Judge "strong-armed" Plaintiffs into settling, where Plaintiffs were experienced litigants who have participated in a number of lawsuits. Judge's comments may have been "pointed and unvarnished" but did not amount to bias or impartiality.
- (6941) *Morris v. Paine*, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Debtor filed Motion to disqualify all of the Bankruptcy Judges in Tennessee and also the Chapter 13 Trustee and his staff attorney alleging that "they are not judges, they are 'criminals dressed in black, including the officers of the clerks', reigning terror upon the people of this state and are hereby forever disqualified from this and any other case that has to deal with Jimmy Marcell Morris for their failure to be impartial, unbiased and do fair & honest service and case fixing; abandonment of oath & duty in the bankruptcy court". Debtor's complaint in this Chapter 11 case arose out of debtor's prior sequential failed Chapter 13 cases, the most recent of which was dismissed based on debtor's failure to file the credit counseling certificate, failure to submit a plan that was feasible, and failure to file a plan that met liquidation. Debtor's current adversary proceeding joined all of the judges and Chapter 13 Trustee as defendants, alleging that the defendants acted together against him in proceeding over and dismissing his cases, confirming no stay was in effect as to the Smyrna Property, and failing to pursue the alleged violations of the Fair Debt Collection Practices Act. Debtor sought relief under 10 U.S.C. § 333, 11 U.S.C. § 523(a)(6), Federal Rule of Bankruptcy Procedure 7001(6), 18 U.S.C. §§ 1346 and 1918, 42 U.S.C. § 2000d, the Eleventh Amendment to the U.S. Constitution, and fraud.
- (6942) *LaBankoff v. United States Trustee*, Case No. 09-1300 (9th Cir. BAP 2010) – Party asserting judicial bias has an exceptionally heavy burden to overcome a presumption of honesty and integrity in the Judge. Bankruptcy Court comments to *pro se* Chapter 11 Debtor that Debtor had failed to comply with procedural requirements of case and that Court did not believe that Debtor could confirm a plan while entering order giving Debtor 120 days to attempt confirmation were observations were consistent with Court's duty to advise that Debtor's lack of legal knowledge, as demonstrated by his multiple mistakes made thus far in the case, would inevitably lead to expenses and aggravation for all concerned, and that disaster was] looming. Comments signal bankruptcy court's sympathetic concern for Debtor, and its willingness to exercise its discretion by affording Debtor time to propose and confirm a proper plan, or to at least secure competent legal advice. Disqualification based on "extrajudicial sources" is implicated when Court's bias originates outside the courtroom and must result in an opinion on the merits on some basis other than what the judge learned from participating in the case. Nothing in the record indicated that Judge had any personal interest, financial or otherwise, in this case. There is also no indication in the record that the bankruptcy judge's opinions expressed in the transcripts or written documents were based on any information or events other than those originating in the bankruptcy court proceedings. Disqualification for "pervasive bias" is based on events that occur within the proceeding are particularly strong and clearly indicate judge's inability to render fair judgment. Bankruptcy Court was not hostile or antagonistic toward Debtor. Although Court would have been warranted in dismissing case earlier, Judge afforded Debtor one last opportunity to either confirm plan or hire competent counsel. This act of discretion by the bankruptcy court is not consistent with a pattern of deep-seated antagonism against Debtor.
- (6943) *LaBankoff v. GMAC Mortgage, LLC.*, Case No. 09-1294 (9th Cir. BAP 2010) – Record failed to disclose any evidence of bias. Comments made by a court in the course of judicial proceedings are rarely sufficient to establish bias requiring recusal. "Extrajudicial source" rule

is implicated when bias originates outside the courtroom. Bankruptcy judge had no personal interest, financial or otherwise, in this case and there was no indication that the bankruptcy judge's opinions, expressed during hearings or in written memoranda in the case, were based on any information or events originating outside the bankruptcy court proceedings. Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. This pervasive bias arises when a judge's favorable or unfavorable disposition toward a party, although stemming solely from the facts adduced or the events occurring at trial, nonetheless becomes so extreme as to indicate the judge's clear inability to render fair judgment.

- (6944) *U.S. v. Diekemper*, Case No. 09-2081 (7th Cir. 2010) – Defendant in prosecution for bankruptcy fraud failed to raise issue of recusal before trial court. 28 USC Section 455 requires bias concerns to be raised either before the trial judge or promptly thereafter by writ of mandamus upon becoming aware of alleged bias. Judicial bias concern can be raised between trial and sentencing if bias did not become known until trial's cessation. Further, mere fact that trial judge forms negative opinion of litigant during proceeding is not bias for purposes of recusal. Recusal appropriate only where Court voices opinions that display a deep-seated favoritism or antagonism that would make fair judgment impossible. Trial Court's statement that defendant is "manipulative, narcissistic, and twisted," similarly is a reflection of the facts before the district court. This statement further served to explain why the judge imposed the sentence that he did and did not evidence improper bias.
- (6945) *In re Hake*, Case No. 08-8039 (6th Cir. BAP 2008) – Judge can be required to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Judge shall disqualify himself where Judge has personal bias or prejudice concerning a party or personal knowledge of the disputed evidentiary fact. Judicial rulings alone almost never constitute a valid basis for bias or partiality. Opinions formed by the Judge on the basis of facts introduced or events occurring in the course of the proceedings or prior proceedings do not constitute a basis for bias or partiality unless Judge displays a deep-seated favoritism or antagonism that would make fair judgment impossible. Judicial remarks during course of trial that are critical or disapproving of or even hostile to counsel, the parties or their cases ordinarily do not support a bias or partiality challenge unless comments reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. Motion for recusal properly denied where record did not demonstrate that Judge's opinion of counsel was derived from an extrajudicial source or that Judge possessed such a high degree of antagonism as to make fair judgment impossible. Spirited exchanges between Judge and counsel do not rise to level of antagonism necessary to mandate recusal.
- (6946) *Rhiel v. Hook*, 2009 BR 2182602 (Bankr. E.D. Mi. 2009) - Bankruptcy Judge may be disqualified from presiding over particular proceeding or contested matter or, if appropriate, from presiding over the case as a whole. Judge should recuse himself when impartiality might reasonably be questioned or where Judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. Standard for recusal is an objective one: whether a reasonable person with knowledge of all facts would conclude that the Judge's impartiality might reasonably be questioned. Extrajudicial Source Doctrine is invoked when the Judge forms opinions of the litigants based on information learned outside the course of judicial proceedings. Opinions formed by the Judge on the basis of facts introduced or events occurring in the course of the current proceedings, or prior proceedings, do not constitute a basis for bias or partiality. Pervasive Bias Exception requires recusal when Judge forms a favorable or unfavorable opinion so extreme that fair judgment appears impossible. Adverse ruling on evidentiary matter accompanied by comment regarding truthfulness of defendant's testimony does not reflect deep-seated antagonism sufficient to require recusal. Adverse decision on one issue in Bankruptcy case does not demonstrate antagonism or detract from impartiality.
- (6947) *In re Johnson*, 408 B.R. 123 (Bankr. S.D. Ohio 2009). Bankruptcy judge's recusal was not required on "extra judicial source" theory, since an evidentiary hearing before the court is not "extra judicial". And a single comment on the party's previous testimony, in ruling against the party, was not sufficient for recusal based on "pervasive bias" theory.

24.38 Appeal of Order

- (6948) *Friendly Finance Service v. Dorsey*, Case No. 12-30018 (5th Cir. 2012) – Denial of Motion to Disqualify is not appealable final order, is not subject to collateral order doctrine, and is not appealable interlocutory order. Party must wait for entry of final judgment to appeal judge's refusal to recuse.

E. Sealing Court Papers and Records

24.39 Section 107 and Federal Rule 5

- (6949) *In re Johnson*, Case no. 09-66230 (Bankr. E.D. Mi. 2015) – Section 107 allows court to seal records to protect an entity with respect to trade secrets of confidential information; or to protect person from scandalous or defamatory matter. Debtor's Motion to Seal Chapter 7 File failed to state any grounds for court to grant relief.
- (6950) *In re Millan*, 2014 WL ____ (Bankr. D.P.R. 2014) – Debtor's failure to obtain credit counseling or to obtain waiver mandated dismissal of case. Debtor's Motion to set aside dismissal denied as Motion did not demonstrate any basis for relief under Rule 60 to strike first case as case was validly commenced although it was then dismissed for failure to obtain credit counseling or waiver.
- (6951) *Prentice v. Residential Funding, LLC*, 2013 WL 1663868 (E.D. Mi. 2013) – Federal Rule 5 allows court, for cause, to require redactions of information or limit or prohibit non-party's access to documents. Movant must make particular request and a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which would be suffered without one. References in Plaintiff's pleadings to grievances filed by Plaintiff against Defendant's attorneys would be sealed where the grievances have not been investigated or substantiated by Grievance Commission, and information contained in pleadings was potentially inflammatory.

- (6952) *In re Creighton*, 2013 WL 1751297 (Bankr. N.D. Ohio 2013) – Section 107 requires all papers filed in bankruptcy case to be public records but allows the Court to seal pleadings to extent necessary to protect trade secrets or confidential information; or to protect person from scandalous or defamatory matter contained within a paper. Information in court file is scandalous where material in file would cause a reasonable person to alter their opinion of a party based on statements in the pleadings. Statements and information that is true cannot be scandalous or defamatory. Debtor failed to demonstrate that access to bankruptcy documents were cause of harm. Debtor was a public school teacher. Debtor alleged only that debtor had been experiencing incessant ridicule from several students, parents, and even fellow teachers, solely because of her bankruptcy filing. The ridiculers became aware of Mrs. Creighton's previous bankruptcy only because her filings are public records, and thus, readily accessible over a multitude of sources, including the internet. The constant, invasive, and ubiquitous nature of the ridicule has caused debtor severe emotional distress, and threatened her job performance and, ultimately, her ability to earn a living. Debtor's distress was not product of any particular bankruptcy pleading, but as a result of the way people used information about bankruptcy. Even if the court were to order that Debtor's name be redacted from the bankruptcy case, this would relate only to Pacer and not to other sources of information or to the general knowledge that debtor had filed for bankruptcy. Debtor failed to demonstrate any causal connection between any particular document or allegation in the bankruptcy filing and any alleged harm suffered by debtor. While unintended secondary consequence is negative publicity, that is regrettable but is not a basis for sealing a file.

F. Rehearing or Reconsideration

24.40 Motion to Amend Versus Motion for Relief From Judgment

- (6953) *Old Republic Insurance Company v. Hakes*, Case No. 14-3199 (Bankr. E.D. Mi. 2015) – Motion filed within 14 days after entry of Order is governed by Rule 59 and Local Rule 9024-1; and may be granted based on grounds set out in Rule 59 or Rule 60. Motion filed more than 14 days after entry of Order is filed under Rule 60 and Motion must establish basis for relief under that rule.
- (6954) *Armstrong v. Internal Revenue Service*, Case No. 11-1554 (9th Cir. BAP 2013) – Motion filed within 14 days after entry of order is considered Motion to Alter or Amend under Rule 9023 and Federal Rule 59.
- (6955) *Tweedie v. Semeniuk*, 2012 WL 3727308 (Bankr. E.D. Mi. 2012) – Motion filed within 14 days after entry of Order is considered Motion to Alter or Amend under Rule 9023 and Federal Rule 59; while Motion made 14 days or later is considered Motion for Relief From Judgment under Rule 9024 and Federal Rule 60.

24.41 Orders Subject to Relief – Final Orders

- (6956) *Tweedie v. Semeniuk*, 2012 WL 3727308 (Bankr. E.D. Mi. 2012) – Rule 9023 allows court to alter or amend final orders. Partial Summary Judgment, which does not conclude judicial labors and is not a final order, is not subject to alteration under Rule 9023.

24.42 Orders Subject to Relief – Non-Final Orders

- (6957) *Long John Silver's, Inc. v. Nickelson*, 2013 WL 1797442 (W.D. Ky. 2013) – Court has authority to reconsider interlocutory orders under court's common law powers and under Rule 56(b). Court will reconsider interlocutory order as justice requires, based on (1) an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice. Newly discovered evidence is evidence that was unattainable prior to entry of the prior order. Agreements that either pre-existed entry of order or were concocted following entry or order in effort to circumvent unfavorable ruling are not newly discovered evidence, even if those documents would have produced different legal theory for the requested relief. Arguments that merely rehash prior arguments will not support reconsideration.

24.43 Standing to Bring Rule 60 Motion

- (6958) *Schwab v. Oscar*, 517 BR 72 (6th Cir. BAP 2014) – Law of case applies where court makes ruling in case that either is not appealed or that is affirmed on appeal. Bankruptcy Court previously dismissed adversary proceeding holding that plaintiffs lacked standing. Plaintiffs did not appeal that order and order became law of case. Plaintiffs could not later contest that ruling under Rule 60 as holding was law of case. Rule 60 is not intended as substitute for appeal of orders when those orders are entered. Because plaintiff lacked standing to bring action in first instance as determined by earlier court decision, plaintiff also lacked standing to seek relief under Rule 60.

24.44 Waiver of Issues

- (6959) *In re Madison Heights Group, LLC*, 2014 WL 1075809 (Bankr. E.D. Mi. 2014) – Party cannot raise issues for first time in motion for rehearing. Party waives arguments by failing to make them to the court in the first instance. Court can overlook waiver and consider issues for first time in exceptional cases or to avoid plain miscarriage of justice.

24.45 Burden of Proof

- (6960) *Old Republic Insurance Company v. Hakes*, Case No. 14-3199 (Bankr. E.D. Mi. 2015) – Party seeking relief under Rule 59 or Rule 60 must prove that order results from palpable defect and that different disposition must result from a correction of the error. Palpable defect is (1) clear error of law; (2) newly discovered evidence; (3) intervening change in controlling law; or (4) need to prevent manifest injustice. Motion is not opportunity to reargue case and may not be used to raise arguments that were made or should have been made prior to judgment, and cannot be used to raise new issues or arguments not previously raised. Motion failed to allege basis for reconsideration where motion reasserted moving party's version of the underlying facts that the court considered in granting order in first instance. Moving party did not demonstrate any clear error of law beyond mere disagreement with court's conclusion, and did not allege any intervening change in law, availability of new evidence, or prospect of manifest injustice.

- (6961) *Rugiero v. Flagstar Bank, FSB*, 2013 WL 1316910 (E.D. Mi. 2013), *rehearing denied*, 2013 WL 3849930 (E.D. Mi. 2013) – Courts generally will not grant motions for rehearing or reconsideration that merely present same issues ruled upon by court either expressly or by reasonable implication. Movant must demonstrate a palpable defect by which the court and the parties were misled and that correcting the defect will result in a different disposition. Defect is palpable if it is obvious, clear, unmistakable or plain. Motion denied where motion restated same arguments made at initial hearing.
- (6962) *Sandweiss Law Center, PC v. Kozlowski*, 2013 WL 396255 (E.D. Mi. 2013) – A motion for reconsideration will be granted only if the moving party identifies “a palpable defect by which the court and the parties ... were misled” and demonstrates that correcting the defect “will result in a different disposition of the case.” E.D. Mich. L.R. 7.1(h)(3). A “palpable defect” is one that is “obvious, clear, unmistakable, manifest or plain.” Motion that does not identify any defect, but merely reargues matters previously considered, will be summarily denied.
- (6963) *Overstreet v. Joint Facilities Management, LLC*, Case No. 11-51141 (5th Cir. 2012) – District Court did not abuse discretion in denying Rule 59 Motion to Alter or Amend Judgment where Motion did not establish either a manifest error of law or fact; or present newly discovered evidence. Motion merely reasserted arguments and allegations initially presented to court.
- (6964) *Tweedie v. Semeniuk*, 2012 WL 3727308 (Bankr. E.D. Mi. 2012) – Under Rule 9023 and Federal Rule 59, moving party must show clear error of law, newly discovered evidence, an intervening change in the controlling law, or a need to prevent manifest injustice; such that a different disposition of the matter must result from correction of the error. Local Rule 9024-1 requires that the moving party demonstrate a palpable error by which the court and the parties have been misled. A palpable defect is one that is clear, unmistakable, manifest or plain. Mere assertion of error or that order needs to be corrected, or re-argument of matters previously considered by the court, without more, is not sufficient.

24.46 Grounds – Rule 59 and 9023 Generally

- (6965) *Hauk v. Valdiva*, Case No. 14-4573 (Bankr. E.D. Mi. 2015) – Party seeking to set aside default must first establish that default was product of mistake, inadvertence, surprise or excusable neglect. Only if defendant establishes basis for relief under Rule 60 will court consider whether defendant has meritorious defense or whether opposing party would be unduly prejudiced if order is set aside. Fact that defendant may have meritorious defense is not sufficient where defendant has failed to establish that judgment itself was product of mistake, inadvertence or excusable neglect.
- (6966) Court would not set aside judgment even assuming that defendant stated meritorious defense, where defendant could not establish that default was produce of mistake, inadvertence, surprise or excusable neglect.
- (6967) *Paris v. Walker*, 2015 WL 5576391 (Bankr. E.D. Tn. 2015) – Rule 59 Motion can be granted only where there was clear error of law, newly discovered evidence, intervening change in controlling law, or need to prevent manifest injustice. Motion is not opportunity to reargue case or to raise arguments that could have been, but were not, raised before judgment issued. Debtor’s argument, raised for first time in motion for rehearing, that court failed to consider other issues regarding debtor’s schedules did not allege “manifest injustice” where court did not rely exclusively on schedules in reaching conclusion that debtor was insolvent, and even accepting debtor’s bleated statements regarding alleged errors in schedules, debtor was still insolvent.
- (6968) *Sweet v. AIS Construction Equipment Corp.*, Case No. 14-3074 (Bankr. E.D. Mi. 2015) – Motion for reconsideration must be filed within 14 days of entry of order to which it objects and must demonstrate that the Court and the parties have been confused or misled and that a correction of the defect must produce a different result. Motion failed to demonstrate error in court’s grant of partial summary judgment where court ruled on invoices that indicated both or either “ship to” and/or “invoice to”. Ruling did not translate into requirement that court grant summary judgment where invoices indicated neither “ship to” nor “invoice to” leaving question of material fact.
- (6969) *New Products Corp. v. Tibble*, 2015 WL 5049474 (Bankr. W.D. Mi. 2015) – Motion for rehearing must demonstrate clear error of law, newly discovered evidence, intervening change in controlling law, or manifest injustice. Motion is not opportunity to reargue a case or to raise new arguments that could have been raised in first instance. Motion that does not make new arguments but merely adds additional case citations for arguments already raised and rejected does not warrant relief under Rule 59. Motion did not evidence error in awarding discovery sanctions based on allegation that parties requested sanctions under Rules 26, 37 and 45, where court determined sanctions using Rule 45 as the more specific rule regarding discovery sanctions and did not rely on either Rule 26 or 37 which would not apply. Rule 45 does not require absolute precision in determining amount of discovery costs to shift, and court has discretion to shift enough of the costs to the party requesting discovery to leave remaining costs to non-parties “non-significant”.
- (6970) *U.S. v. Cordes*, 2015 WL 4540453 (E.D. Mi. 2015) – Motion for reconsideration must assert that court was misled by palpable defect, the correction of which must produce a different result. An error is palpable if it is obvious, clear, unmistakable, manifest or plain. Motion is not opportunity to re-hash old arguments or proffer new arguments or evidence that could have been presented earlier. US Motion for reconsideration of order staying proceedings based on parallel proceedings in bankruptcy court denied where motion did not allege any defect in underlying order but merely disagreed with correctness of that order and re-argued same factual and policy issues as were argued in proceeding originally.
- (6971) *In re Daher*, 2015 WL 4555394 (Bankr. N.D. Ohio 2015) – Motion filed within 14 days of entry of order is treated as motion to amend or alter order under Rule 59 and Bankruptcy Rule 9023. Rule 59 provides four grounds for relief: (1) clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) to prevent manifest injustice. Rule 59 is not merely to reargue a case or to raise issues or claims that could have been, but were not, raised in earlier proceeding. Motion denied where party failed to raise issue of charging lien in prior proceeding brought by trustee to determine parties’ interests in the funds that were recovered from insurance

company. Right to charging lien, if any, arose when the judgment was entered in the underlying action. Attorney should have asserted charging lien in response to trustee's action, rather than waiting until after determination by court that insurance proceeds were property of estate.

- (6972) *Cook v. Franklin Credit Management Corporation*, 2015 WL 1756815 (Bankr. M.D. Tn. 2015) – Court can grant new trial on some or all issues, and can take additional testimony, amend findings of fact and conclusions of law, and direct entry of new judgment. Granting relief under Rule 59 is vested in sound discretion of Bankruptcy Court. Settlement and release between plaintiff and defendant does not render unenforceable court's prior rulings requiring defendant to correct records, and where defendant failed to do so after having ample opportunity to do so, court properly held defendant in contempt.
- (6973) *Himmelspach v. Carter*, Case No. 11-2151 (Bankr. E.D. Mi. 2015) – Local Rule 9024-1 allows motion for rehearing or reconsideration only where movant demonstrates that court was misled by palpable defect such that a different disposition of the case must result from a correction of that defect. A "palpable defect" is one arising from a clear error of law; newly discovered evidence; an intervening change in controlling law; or a need to prevent manifest injustice. Motion for rehearing of Order Denying Summary Judgment denied where record contained numerous questions of fact. Parties did not demonstrate any "defect" in underlying ruling.
- (6974) *In re Wilcox*, 2014 WL 2574035 (Bankr. W.D. Mi. 2014) – Motion for rehearing or reconsideration is not opportunity to engage in endless conversation between court and parties. Reconsideration is available only where there is clear error of law; newly discovered evidence that could not have been discovered prior to entry of order; intervening changes in controlling law; or to prevent manifest injustice. Motion that alleged only that the Court was "wrong" was not sufficient to warrant reconsideration.
- (6975) *In re Gundrum*, 2014 WL 1664280 (Bankr. S.D. Ohio 2014) – Rule 59, incorporated by reference in Rule 9023 allows a movant to seek a new trial if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice. Motion for a new trial or to alter or amend a judgment must be filed no later than 14 days after entry of judgment. Motion filed more than three weeks after entry of Judgment must be denied as untimely.
- (6976) *Kohut v. Thomas*, 2014 WL 1646979 (Bankr. E.D. Mi. 2014) – Rule 59, incorporate by reference in Rule 9023, requires that moving party demonstrate palpable defect by which the court and parties were misled, such that correction would result in different disposition of case. Motion failed to demonstrate error based on alleged hacking of debtor's counsel's e-mail account where record indicated that notice of hearing was issued to debtor's counsel at two separate addresses, one of which was functioning on date of issuance of notice of hearing. Further, attorney knew before notice of hearing issued that e-mail account had been hacked, placing counsel on notice with duty to monitor docket as attorney knew that plaintiff had filed motion for summary judgment and that notice of hearing would be forthcoming. Movant failed to demonstrate any excusable neglect in counsel's failure to know about or to attend hearing. Neglect is not excusable where it amounts to nothing more than "run of the mill inattentiveness". Further, court issued summary judgment on merits of motion independent of counsel's failure to appear at the hearing, such that even if failure to attend was excusable neglect there was no evidence that correction of the error would have produced different result.
- (6977) *Maas v. Northstar Education Finance, Inc.*, Case No. 12-80384 (Bankr. W.D. Mi. 2013) – Party seeking reconsideration or relief from prior order must demonstrate newly discovered evidence or some change in controlling law, or that prior order results in "manifest injustice". Motion that merely restated issues presented in original hearing and on which debtor had ample opportunity to dispute did not raise new issues but was merely a re-hash of arguments made, or that should have been made, before order entered.
- (6978) *Duran v. Mortgage Electronic Registration Systems, Inc.*, 2013 WL 2251168 (N.D. Ohio 2013) – Motion brought within 28 days of entry of order is motion under Rule 59. To prevail, party must prove a clear error of law; newly discovered evidence; an intervening change in controlling law; or need to prevent manifest injustice. Plaintiff's Motion for reconsideration of order dismissing complaint failed to allege anything other than issues previously raised and rejected.
- (6979) *Armstrong v. Internal Revenue Service*, Case No. 11-1554 (9th Cir. BAP 2013) – Rule 59 motion should not be granted absent highly unusual circumstances, the court is presented with newly discovered evidence, committed clear error, or there is an intervening change in controlling law. Motion must not rehash same arguments made the first time and must not assert new legal theories or facts that could have been asserted at the initial hearing. Motion that merely contended that court failed to set forth specific findings of fact or conclusions of law was insufficient to warrant rehearing. Further, rehearing was properly denied where court announced one legal basis for ruling that was incorrect, but ruling was supported by separate legal basis and was correct, even if the wrong legal basis was stated.
- (6980) *In re Walterhouse*, Case No. 11-32645 (Bankr. E.D. Mi. 2012) – Rule 59 motion must demonstrate error of law, newly discovered evidence, intervening change of controlling law, or need to prevent manifest injustice. Motion is not opportunity to reargue case. Court's order denying motion to dismiss not erroneous. Debtor's testimony that he paid money to parents in various amounts to help parents financially when they needed it did not evidence any wrongful payment of pre-petition debts. Debtor's pre-petition transfer of property to brother was in connection with brother's agreement to provide financial help to parents and did not indicate any intent to defraud. Debtor did not have lavish lifestyle. Although creditor did not agree to certain items in budget, overall budget was not unreasonable. Fact that debtor used money borrowed from creditor to pay other debts did not support dismissal as creditor made loans to debtor without restrictions on use of money and the funds were under debtor's sole control. Debtor did not have ability to repay debts, where debtor's income with Merrill Lynch was highly speculative and not remotely sufficient to pay debts. Evidence did not indicate any attempt to evade debt to creditor. Although debtor at first disputed debt, and thereafter attempted to negotiate a settlement, debtors actions were reactionary and the bankruptcy resulted from debtor's inability to deal with the debt owed to creditor.
- (6981) *In re Johnson*, 2012 WL 3644786 (Bankr. N.D. Ohio 2012) – Motion under Rule 9023 is not merely opportunity to reargue matters previously addressed. Motion requires proof of clear error of law, newly discovered evidence, or intervening change in controlling case

law, or to avoid manifest injustice. Motion failed to demonstrate basis for relief from Order dismissing case for failing to appear at a Show Cause hearing resulting from Debtor's failure to pay filing fees in this case plus two of debtor's 4 prior filings. Debtor failed to demonstrate error in Court's denial of Motion for Continuance of Hearing. Motion for Continuance did not provide sufficient facts to establish that debtor was unable to appear. Motion alleged only that debtor had a doctor's appointment, with no explanation as to when debtor made the appointment or why it could not be changed to a different time or different date. Debtor had history of multiple filings, each of which exhibited a pattern of delay and debtor still had not paid filing fees. Motion did not evidence any manifest error of law, mistake of fact or other material reason that would support rehearing. Motion under Rule 9024 must identify specific section of Rule 60(b) under which the motion is brought and must make factual and legal arguments that would support relief. Motion that merely requests relief under Rule 9024 with no specification of the particular sections of Rule 60(b) and no factual or legal argument denied without hearing.

- (6982) *In re Hardy*, 2011 WL 2112020 (Bankr. N.D. Ohio 2011) – Chapter 7 trustee failed to demonstrate basis for reconsideration under Rule 59 of Court's Order Dismissing Chapter 7 Case. Motions to alter or amend judgment may be granted if there is a clear error of law, newly discovered evidence, an intervening change in the controlling law, or to prevent manifest injustice. A motion for reconsideration is not designed to give a dissatisfied litigant an opportunity to relitigate matters already decided, nor is it a substitute for appeal. Trustee's argument that creditors would fare better in Chapter 7 was considered and rejected in dismissing case in first instance. Trustee failed to produce any new evidence to demonstrate that dismissal was result of clear error or change in controlling law.
- (6983) *Fujitrans USA v. Barko Enterprises, Inc.*, 2013 WL 793056 (S.D. Ohio 2013) – Rule 59 requires clear error of law, newly discovered evidence; intervening change in controlling law; or need to prevent manifest injustice. Rule 60 allows court to grant relief for excusable neglect which includes failure to comply with deadline that is attributable to neglect. Rule 60 requires court to consider danger of prejudice to non-moving party; length of delay and potential impact on judicial proceedings; reason for the delay including whether it was within reasonable control of movant; and whether movant acted in good faith. Appellant failed to demonstrate any basis for relief. Basis alleged by Appellant at best described over-crowded work schedule without any allegation of extraordinary circumstances. Appellant had three extensions of time and was clearly warned that no additional extensions would be entertained and that failure to timely file a brief may result in dismissal.
- (6984) *In re Harvey Goldman & Co.*, Case No. 10-62501 (Bankr. E.D. Mi. 2010) – Local Rule 9024-1 precludes Motion for Rehearing or Reconsideration based on the same issues previously litigated. Motion is not an opportunity to retry the case just because the party does not like the outcome. Motion must demonstrate palpable defect by which the Court was misled and also show that a different disposition of the case must result from a correction thereof. Motion that does nothing more than re-argue the same evidence and testimony as was presented at trial does not warrant relief under Rule 59.

24.47 Clear Error of Law

- (6985) *In re Hill*, 2015 WL 5575499 (Bankr. E.D. Tn. 2015) – Rule 59 allows court to alter or amend judgment where judgment is based on clear error law that needs to be changed to prevent manifest injustice. Order lifting stay was not "clear error" where debtor failed to timely make payments as required by prior Order Conditionally Lifting Stay. Creditor and Chapter 13 Trustee did not wrongfully refuse payment based on debtors tender of "bill of exchange" with instructions on how both parties should take the documents tendered to the United States Treasury for payment in full of the debtors' obligations. "Redemptionist" theory on which debtor propounds that a person has a split personality: a real person and a fictional person called the "strawman." The "strawman" purportedly came into being when the United States went off the gold standard in 1933, and, instead, pledged the strawman of its citizens as collateral for the country's national debt. Redemptionists claim that government has power only over the strawman and not over the live person, who remains free. Individuals can free themselves by filing UCC financing statements, thereby acquiring an interest in their strawman, and government created "exemption account" for each citizen based on social security number. Redemptionists argue that debts are then collateralized by exemption amount, ultimately making US Government liable for satisfaction of individual's debts. Argument is frivolous and a waste of time and judicial resources. Neither lender nor Trustee was required to accept "bill of exchange" as payment.

24.48 Grounds – Rule 60 and 9024 Generally

- (6986) *Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd*, 2015 WL 4966856 (E.D. Mi. 2015) – Under Local Rule, motion for post-judgment relief must demonstrate that the error results from a palpable error by which the parties and the court were misled. A defect is palpable where it is obvious, clear, unmistakable, manifest or plain. Court will not grant relief where motion merely presents same issues already ruled on by court. Motion is not appropriate to raise new issues or new arguments or advance positions that could have been raised earlier but were not. Issues raised by moving party regarding application of Sixth Circuit precedent were raised at earlier hearing and were ruled on by court. Alternative theories of recovery were not raised and so were barred from consideration in motion for reconsideration.
- (6987) *Keeley v. Grider*, 2014 WL 5520955 (6th Cir. 2014) – Rule 60(a) allows court to correct judgment to reflect what was intended when judgment was entered in first instance. Rule 60 cannot be used to alter the substantive rights of the parties in a manner different from that intended. Rule 60 allows court to correct errors, or correct orders that do not reflect court's intent but not to rewrite the past. Creditor brought action to declare judgment non-dischargeable under Section 523. When debtor failed to answer, creditor submitted proposed final default judgment to court that liquidated debt but did not state that debt was not dischargeable, and court entered judgment submitted by creditor. One year later, creditor filed Rule 60 motion to amend judgment to include provision that debt survived discharge. Court denied motion because the default judgment entered by the clerk was not intended to dealer debt non-dischargeable and clerk lacked authority to make such a declaration. To extent error was made, it was fault of creditor's counsel, and Rule 60 is not designed to correct errors of judgment by counsel. Any amendment of judgment at this late date would clearly and certainly alter debtor's substantive rights and lead to result that is very different from that when the judgment was entered by the clerk in the first instance.

- (6988) *In re Lancett*, 2014 WL ____ (Bankr. W.D.N.C. 2014) – Debtor did not demonstrate any basis for court to reconsider order granting debtor’s request for voluntary dismissal. After debtor voluntarily dismissed case, debtor re-filed. Creditor sought to dismiss second case under Section 109 as debtor had re-filed within 180 days after dismissal of a case in which the creditor sought stay relief. After second case was dismissed, debtor requested that court set aside dismissal of first case so debtor could continue in Chapter 13. Rule 60 did not provide any basis to set aside order that debtor requested. While debtor may have made poor choice in dismissing case or may have misunderstood legal consequences of dismissal, that did not rise to level required by Rule 60.
- (6989) *Kohut v. Thomas*, 2014 WL 1646979 (Bankr. E.D. Mi. 2014) – Rule 59, incorporate by reference in Rule 9023, requires that moving party demonstrate palpable defect by which the court and parties were misled, such that correction would result in different disposition of case. Motion failed to demonstrate error based on alleged hacking of debtor’s counsel’s e-mail account where record indicated that notice of hearing was issued to debtor’s counsel at two separate addresses, one of which was functioning on date of issuance of notice of hearing. Further, attorney knew before notice of hearing issued that e-mail account had been hacked, placing counsel on notice with duty to monitor docket as attorney knew that plaintiff had filed motion for summary judgment and that notice of hearing would be forthcoming. Movant failed to demonstrate any excusable neglect in counsel’s failure to know about or to attend hearing. Neglect is not excusable where it amounts to nothing more than “run of the mill inattentiveness”. Further, court issued summary judgment on merits of motion independent of counsel’s failure to appear at the hearing, such that even if failure to attend was excusable neglect there was no evidence that correction of the error would have produced different result.
- (6990) *Duran v. Mortgage Electronic Registration Systems, Inc.*, 2013 WL 2251168 (N.D. Ohio 2013) – Burden for relief under Rule 60 is significantly higher than standard applicable to Rule 59 Motions. While Rule 59 allows relief for any reason previously sufficient for reasons that have been granted in suits in equity, Rule 60 is limited to specified circumstances listed in Rule 60. Motion that fails to identify any particular subsection under which relief is requested and fails to allege any facts that support relief under any subsection but merely seeks to reargue same points previously raised and rejected would be denied.
- (6991) *In re Steinke*, Case No. 12-54633 (Bankr. E.D. Mi. 2012) – Motion to Reopen Case treated as motion for relief from Order Dismissing Case. Motion must establish excusable neglect or other ground for relief under rule 60 and Federal Rule of Bankruptcy Procedure 9024. Motion must also demonstrate that judgment is result of palpable error, the correction of which must result in a different disposition. Dismissal of case was not error and Motion failed to establish any basis for rehearing. Debtor was not eligible for relief under Title 11 where debtor did not receive credit counseling until one day after filing of petition.
- (6992) *In re Johnson*, 2012 WL 3644786 (Bankr. N.D. Ohio 2012) – Motion under Rule 9024 must identify specific section of Rule 60(b) under which the motion is brought and must make factual and legal arguments that would support relief. Motion that merely requests relief under Rule 9024 with no specification of the particular sections of Rule 60(b) and no factual or legal argument denied without hearing.
- (6993) *In re Bing Construction Company*, Case No. 11-57853 (Bankr. E.D. Mi. 2011) – Motion for Reconsideration denied for failure to allege any changed circumstances or error in prior Order. Creditor failed to file affidavits or other response to Debtor’s Motion to Reject Contract as allowed and directed by Order of Court. Court granted Debtor’s Motion. Creditor’s failure to file response within time allowed by Court does not warrant reconsideration of underlying order.
- (6994) *In re Sharfnter*, Case No. 10-68666 (Bankr. E.D. Mi. 2011) – Debtor’s Motion for Reconsideration of Order Dismissing Case failed to demonstrate any palpable defect by which the Court was misled. Debtor’s Petition Cover Sheet was not signed. Court issued Notice of Deficiency, in response to which Debtor filed yet another unsigned Cover Sheet. Court issued another Notice of Deficiency, and Debtor failed to respond and case was dismissed. Six months later, Debtor filed a Motion to Reopen Case, that also was not signed. Court issued another Notice of Deficiency and Debtor did not respond, and Motion to Reopen was stricken. Four months later, Debtor filed yet another Motion to Reopen Case. Motion did not allege any defect given debtor’s repeated failures to address issues raised in Court’s numerous Notices of Deficiency.
- (6995) *Meoli v. Hoffman*, Case No. 09-80269 (Bankr. W.D. Mi. 2011) – Defendants who failed to respond to complaint seeking to deny discharge under Section 707 and allowed default judgment to be entered could not demonstrate basis for relief under Rule 60(b)(6). Rule 60(b)(6) requires party to demonstrate extraordinary or exceptional circumstances not present in any of the other five subsections of Rule 60(b). Defendants failed to offer any explanation for failure to plead or respond in adversary proceeding, precluding relief under Rule 60.
- (6996) *In re Faraj*, Case No. 10-76937 (Bankr. E.D. Mi. 2011) – Debtor’s Motion to Reinstate Chapter 13 Case construed as motion for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Any neglect or mistake that may have resulted in dismissal was caused by Debtor’s counsel and is attributable to Debtor for purposes of Rule 60, and Motion failed to allege any basis to determine that counsel’s errors were “excusable”.
- (6997) *JP Morgan Chase Bank, N.A. v. Taylor*, Case No. 10-5469 (Bankr. E.D. Mi. 2010) - Debtor’s Motion for Reconsideration of Order Granting Plaintiff’s Motion for Summary Judgment construed as motion for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Court was aware of Defendant’s response to Motion for Summary Judgment in granting Motion. Defendant’s Counsel’s pending Motion to Withdraw as counsel was not excuse for failure to timely file response to Plaintiff’s Motion and Motion for Reconsideration failed to offer any explanation as to why response was not timely filed.

- (6998) *In re Stewart*, Case No. 10-52347 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Reinstate Chapter 7 Case construed as motion for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to file Chapter 7 Means Test form until three weeks after the deadline and two weeks after the case was dismissed.
- (6999) *In re Adams*, Case No. 07-59818 (Bankr. E.D. Mi. 2010) - Debtor's Amended Motion to Reopen Case construed as motion to reopen case and for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion not filed within reasonable time as required by Rule 60(c) where Motion filed more than one year after order dismissing case.
- (7000) *In re Evans*, Case No. 10-67920 (Bankr. E.D. Mi. 2010) - Debtor's letter requesting reinstatement of case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to obtain credit counseling prior to commencement of case, rendering debtor ineligible for relief.
- (7001) *In re Grass*, 2010 WL 3553273 (Bankr. S.D. Ohio 2010) – Second Motion for Stay Pending Appeal is treated as Motion for Reconsideration under Rule 9023 and Federal Rule 59. Motion denied where Motion failed to allege any of the established four grounds for a motion to alter or amend a judgment: (1) an intervening change in the controlling law; (2) newly discovered evidence; (3) to correct clear legal error; and (4) to prevent manifest injustice. Motion merely sought to reargue same issues and facts argued in first Motion for Stay Pending Appeal.
- (7002) *In re Price*, Case No. 10-41890 (Bankr. E.D. Mi. 2010) – Debtor's letter requesting reinstatement of case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to timely file numerous documents as outlined in Notice of Deficient Filing within time permitted by Court.
- (7003) *In re Smith*, Case No. 10-42015 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Bankruptcy construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Case dismissed for failure to file matrix or Declaration Under Penalty of Perjury for Debtor Without an Attorney within time permitted by Court.
- (7004) *In re Penland*, Case No. 09-64082 (Bankr. E.D. Mi. 2010) – Debtor's letter requesting reinstatement of case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order.
- (7005) *J.L. Giselson, III, Trust v. Mehlhose*, Case No. 09-6907 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reopen Case, etc., construed as Motion for Reconsideration of Default Judgment, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion failed to allege any facts from which the Court could determine whether there was any excusable neglect in the failure by Debtor or Debtor's attorney in failing to file answer. Further, attorney's failure to file answer is chargeable to Debtor and does not constitute excusable neglect for purposes of setting aside Default Judgment.
- (7006) *In re Turchan Technologies Group, Inc.*, Case No. 09-67671 (Bankr. E.D. Mi. 2010) - Motion for Reconsideration of Order Denying Debtors Motion to Approved Compromise of Claims construed as Motion for Reconsideration, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Creditor lacks standing to seek rehearing of Order on Motion to Approve Compromise as only Debtor has standing to file that Motion and so only Debtor has standing to seek rehearing. Motion to Approve Compromise denied where creditor failed to appear at hearing and Motion for Rehearing failed to offer any justification.
- (7007) *In re McKenzie*, Case No. 10-46513 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Bankruptcy Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Case dismissed where counsel failed to file corrected Rule 2016(b) statement within time permitted by court; and Motion contained several typographical errors including wrong Judge's name in caption and Motion requested the court to reschedule the confirmation hearing although the case was a proceeding under Chapter 7.
- (7008) *In re Leach*, Case No. 10-45468 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reopen Case construed as Motion for reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable

neglect under Federal Rule 60(b) or any other valid ground for relief from order. Case dismissed where counsel failed to file upload matrix or to file schedules, statement of financial affairs, or means test form.

- (7009) *In re Schweitzer*, Case No. 10-65115 (Bankr. E.D. Mi. 2010) – Debtor’s Motion to Reinstate Case construed as Motion for reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Any neglect or mistake by Debtor’s counsel is generally attributable to Debtor for purposes of determining whether the neglect or mistake was excusable. Motion failed to demonstrate excusable neglect where Debtor failed to file Chapter 7 Means Test form.
- (7010) *In re Scales*, Case No. 09-58926 (Bankr. E.D. Mi. 2010) – Motion to Reopen Case denied where Motion was unnecessary. Discharge includes unscheduled creditors in a “no asset” case where the Court does not set a bar date for filing of claims, to the same extent as the claim would have been discharged had the claim been scheduled. Chapter 7 Case was a “no asset” case and obligations owed to omitted creditors would nonetheless be discharged. Re-opening case would produce no benefit to the Debtor that Debtor did not already receive.
- (7011) *In re Bailey*, Case No. 05-41609 (Bankr. N.D. Ohio 2010) - Rule 59 does not contain express grounds for amending a judgment. Generally, a Rule 59(e) motion will only be granted only for: an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or to prevent manifest injustice. Debtor’s Motion that merely restated arguments that were rejected, without any new evidence or change in the law, will be denied.
- (7012) *Ausilio v. US*, 2010 WL 2868821 (E.D. Mi. 2010) - Court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. Movant must demonstrate a palpable defect by which the court and the parties have been misled and also show that correcting the defect will result in a different disposition of the case.
- (7013) *In re Szymanski*, Case No. 10-53553 (Bankr. E.D. Mi. 2010) – Debtor’s Motion for Reconsideration and Reinstatement of Bankruptcy Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Chapter 12 proceeding dismissed as to Debtor-wife where Credit Counseling Certificate indicated that she received credit counseling only after case filed, although Debtor-husband received counseling prior to commencement of case. Each debtor must obtain credit counseling. Failure to do so mandates dismissal under Section 109(h).
- (7014) *In re Hall*, Case No. 10-53494 (Bankr. E.D. Mi. 2010) - Debtor’s Motion for Reconsideration and Reinstatement of Bankruptcy Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor who obtained credit counseling 24 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1).
- (7015) *In re Lyons*, Case No. 07-43671 (Bankr. E.D. Mi. 2009) - Discharge includes all claims owed to scheduled creditors that were owed as of the date of the Petition, not just the specific claims that may have been referenced in the Schedules. Discharge also discharges even unscheduled creditors in a “no asset” case where the Court does not set a bar date for filing of claims, to the same extent as it would have been had the claim been scheduled. Debtor’s Motion to Reopen Case to add creditor denied where Motion was unnecessary. Although Creditor was not included in the schedules, unscheduled debts are discharged in a no asset case to the same extent as if they had been discharged. Re-opening case would produce no benefit to the Debtor that Debtor did not already receive.
- (7016) *In re Harris*, Case No. 10-55770 (Bankr. E.D. Mi. 2010) - Debtor’s Motion to Set Aside Order of Dismissal and to Extend the Time for Filing Documents construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor who obtained credit counseling 34 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1).
- (7017) *In re Alva*, Case No. 10-55780 (Bankr. E.D. Mi. 2010) - Debtor’s Motion to Reinstate Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Any neglect or mistake by Debtor’s counsel is generally attributable to Debtor for purposes of determining whether the neglect or mistake was excusable. Motion failed to demonstrate excusable neglect where numerous documents were not timely filed.
- (7018) *In re Champney*, Case No. 10-57311 (Bankr. E.D. Mi. 2010) - Debtor’s Motion to Reinstate Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtors were not eligible for relief because Debtors failed to obtain credit counseling within 180 days prior to commencement of case. ECF records showed case filed on May 26 at 11:10 a.m. and credit counseling certificate indicated that the briefing occurred on May 26 at 2:55 p.m., almost 4 hours later.
- (7019) *In re Williams*, Case No. 08-41485 (Bankr. E.D. Mi. 2010) - Debtor’s Motion to Reopen Case to add two creditors denied where Motion was unnecessary. Creditors to be added were in the original schedules and were bound by the discharge. Even if creditors had not been

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listed, Chapter 7 Case was a "no asset" case and obligations owed to omitted creditors would nonetheless be discharged. Re-opening case would produce no benefit to the Debtor that Debtor did not already receive.

- (7020) *In re Jenkins*, Case No. 08-59973 (Bankr. E.D. Mi. 2009) - Debtor's Motion to Reopen Case to add two creditors denied where Motion was unnecessary. Creditors to be added were in the original schedules and were bound by the discharge. Even if creditors had not been listed, Chapter 7 Case was a "no asset" case and obligations owed to omitted creditors would nonetheless be discharged. Re-opening case would produce no benefit to the Debtor that Debtor did not already receive.
- (7021) *Allan Falk, P.C. v. Mirch*, Case No. 03-4196 (Bankr. E.D. Mi. 2010) - "Adversary Proceeding Plaintiff's Motion to Entry of an Order Re-Opening This Adversary Proceeding and for Entry of an Order Reinstating This Court's April 8, 2010 Order of Contempt and for Other Relief Directed Against Adversary Proceeding Defendant" denied for failure to demonstrate a palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result for a correction of the error. Motion also failed to establish excusable neglect under Rule 60(b)(1) and Federal Rule of Bankruptcy Procedure 9024. Neglect or error by counsel is attributable to the party for purposes of determining whether neglect or mistake was excusable. Adversary proceeding had been repeatedly closed and reopened because of inactivity by Plaintiff. Motion failed to demonstrate any reason to set aside most recent dismissal.
- (7022) *Hagan v. Goldstein*, 2010 WL 2755742 (Bankr. W.D. Mi. 2010) – Reconsideration of judgments and orders is available only in three limited circumstances: (1) in cases involving newly discovered evidence which could not have been discovered prior to entry of the order under review; (2) in cases involving changes in controlling law; and (3) to prevent manifest injustice. Motions for reconsideration are not an opportunity to re-argue a case and should not be used by the parties to raise arguments which could, and should, have been made before judgment issued. Nor are motions for reconsideration appropriate merely to let the losing party supplement the evidentiary record that was before the court. Defendant's Motion for Reconsideration that merely sought to supplement record with additional bank statements would not warrant relief, particularly where materials, even if considered, would not have altered outcome of Motion for Summary Judgment; and Defendant's alleged hospitalization which Defendant claimed left her unable to respond to the Motion for Summary Judgment was not raised by Defendant or counsel prior to entry of judgment.
- (7023) *In re Dexter*, Case No. 10-42155 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Bankruptcy construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to file creditor matrix and numerous other required documents were blank and failed to contain any required information including the Statistical Summary; Schedules I and J; Statement of Financial Affairs; and Chapter 7 Statement of Current Monthly Income and Means-Test Calculation.
- (7024) *In re Farah*, Case No. 09-59067 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reopen Case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion was also untimely filed. Rule 60(b) requires motion for reconsideration to be brought within a reasonable time. Debtor waited over six months after Court dismissed case to file Motion and failed to present any good excuse or explanation or delay.
- (7025) *In re Wesson*, Case No. 10-49061 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Chapter 7 Bankruptcy construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to file correct statement of social security number and failed to file Credit Counseling Certificate; Statement of Financial Affairs; Statistical Summary; Summary of Schedules; Chapter 7 Means Test; and Chapter 13 Plan, nor did Debtor file a motion for an extension of the April 5, 2010 deadline prior to deadline established in Court's Notice of Deficiency.
- (7026) *In re Sinanovic*, Case No. 10-44217 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Chapter 7 Bankruptcy construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to pay filing fee within time set by Order of Court and neither Debtor nor counsel appeared at hearing on Order to Show Cause.
- (7027) *Persall v. Citibank*, Case No. 09-44381 (Bankr. E.D. Mi. 2009) – Motion to Set Aside Order Dismissing Adversary and Request for Reinstatement construed as Motion for Reconsideration, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion for Reconsideration filed 11 weeks after entry of Order of Dismissal was not filed within a reasonable time as required by Rule 60(c). Plaintiff filed Motion for Default Judgment but failed to submit proposed Order notwithstanding Court Order requiring submission of an Order by specific date. When the Order was submitted, it did not comply with requirements of Court Guideline 12 and Court again requested submission of Order that complied with Court requirements. Plaintiff never submitted another order, resulting in dismissal of adversary.
- (7028) *In re McRoy*, Case No. 10-45477 (Bankr. E.D. Mi. 2010) – Debtor's letter to Court construed as Motion for Reconsideration of Order denying Debtor's Application for waiver of Chapter 7 filing fee, denied where motion failed to demonstrate palpable defect by which the

Court and parties have been misled and that a different disposition of the case must result for a correction thereof. Debtor's budget reflected charitable contributions of more than \$1500 per month and Debtor's income exceeded 150% of poverty line, preventing Court from waiving filing fee.

- (7029) *Orlanski v. American Bank*, Case No. 10-4880 (Bankr. E.D. Mi. 2010) – Plaintiff's Ex Parte Motion to Reopen Adversary Complaint for Purposes of Filing an Amended Proof of Service construed as Motion for reconsideration of Order Dismissing Adversary Proceeding. Motion failed to demonstrate palpable defect by which the Court and parties have been misled and that a different disposition of the case must result for a correction thereof. Allegations also did not establish excusable neglect under Rule 60(b)(1) or Bankruptcy Rule 9024. Dismissal of adversary proceeding was without prejudice, allowing Plaintiff to file a new adversary proceeding.
- (7030) *Visteon Corp. v. Collins & Aikman Corp.*, Case No. 07-13714 (E.D. Mi. 2009) – A party that seeks reconsideration of a Bankruptcy Court ruling must “demonstrate a palpable defect by which the Court and the parties have been misled,” and “show that a different disposition of the case must result from a correction thereof.” To establish a “palpable defect,” the moving party generally must point to “(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice. Court would not grant reconsideration of Order Confirming Chapter 11 Plan where party seeking reconsideration never objected to confirmation in the first instance. Creditor alleged that prior to the confirmation hearing, Debtor “promised” to include certain provisions in the Plan but never actually included those provisions. Creditor failed to object to confirmation or otherwise complain prior to confirmation about any alleged omitted provisions or agreements. Creditor failed to allege any “palpable defect” where Creditor had full notice of the terms of the Plan, a full opportunity to object to the Plan, and a full opportunity to participate at the confirmation hearing, but failed to raise those issues prior to confirmation. Although a court can grant rehearing for “excusable neglect”, excusable neglect does not include the failure to timely file a pleading even where that failure is the result of misplaced reliance on other parties or other strategic miscalculations.
- (7031) *In re Barnett*, Case No. 08-70815 (Bankr. E.D. Mi. 2009) - "Request for Bankruptcy Reinstatement" treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor did not receive credit counseling until 19 days after bankruptcy petition filed in violation of Section 109(h)(1).
- (7032) *Sims v. US Bank Home Mortgage*, Adv. No. 08-5066 (Bankr. E.D. Mi. 2008) - Motion to Reconsider Order Regarding Improper Service of Summons and Complaint treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Service failed to comply with Bankruptcy Rule 7004(b)(3) where Plaintiff mailed summons and complaint to corporation but failed to specify any particular, named individual who is an officer, managing or general agent, or agent authorized to receive service.
- (7033) *In re Haines*, Case No. 09-42613 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy Case treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor failed to file Schedules and other documents within time permitted and had failed to file the missing documents even as late as the date of filing of the Motion to Reinstate.
- (7034) *In re Lasenby*, Case No. 08-47560 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration must demonstrate "palpable defect by which the Court and the parties have been misled, and that a different disposition of the case must result from a correction thereof." Motion failed to demonstrate palpable defect as Motion only alleged that Court did not give affidavit appropriate weight in determining underlying action.
- (7035) *In re Brewster*, Case No. 08-61818 (Bankr. E.D. Mi. 2009) - Motion to Reopen Bankruptcy Case considered as Motion for Rehearing, denied where Debtor was not eligible to be Debtor because Debtor received pre-bankruptcy credit counseling more than 180 days prior to the commencement of the case. Fact that Debtor received counseling after the case was filed did not solve lack of eligibility when the case was initially commenced.
- (7036) *In re Davis*, Case No. 08-69676 (Bankr. E.D. Mi. 2009) - Motion to Reconsider Re-opening Case constituted a Motion for Rehearing. Motion failed to demonstrate a palpable defect by which the Court and the parties were misled or that a different disposition of the case must result from a correction thereof. Allegations in the Motion did not establish excusable neglect or any other valid ground for relief from the order dismissing the case.
- (7037) *In re Hicks*, Case No. 09-41591 (Bankr. E.D. Mi. 2009) (unreported decision) - Motion failed to demonstrate palpable defect but which the Court and parties were misled or that a different disposition of the case must result from a correction thereof. Debtors obtained credit counseling more than 180 days prior to the commencement of the case, leaving Debtors ineligible for relief pursuant to Section 109(h)(1). Debtors obtaining new counseling after the case was commenced does not cure the lack of eligibility at the time case was commenced.
- (7038) *In re Webster*, Case No. 05-85963 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration of Order Dismissing Chapter 13 Case denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction thereof. Motion also failed to establish any substantive basis for relief from the Order under Federal Rule of Civil Procedure 60(b); Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor's failure to file a plan modification or to seek a hardship discharge in the two months between the service of a Notice of Default and the ultimate dismissal of the case without cause for the delay prevents

the Debtor from seeking a hardship discharge post- dismissal.

- (7039) *In re McMahon*, Case No. 07-62863 (Bankr. E.D. Mi. 2008) - Motion for Reconsideration of Order Dismissing Case denied where Motion failed to demonstrate any palpable defect and failed to allege any facts showing that the dismissal order was erroneously entered. Debtor did not allege that he had cured the default in payments in a timely manner as required by the Trustee's Notice of Default.
- (7040) *In re Rahman*, Case No. 09-47242 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy Case treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor did not receive credit counseling until 11 days after bankruptcy petition filed in violation of Section 109(h)(1).
- (7041) *In re Depew*, Case No. 09-56915 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration of Dismissal of Case denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor did not obtain credit counseling until after case filed. Debtor failed to demonstrate any basis for a waiver of credit counseling or authority to obtain post-petition counseling as Debtor failed to comply with Section 109(h)(3) and failed to file a Motion for Approval of Certification of Exigent Circumstances as required by Local Rule 1007-6.
- (7042) *In re Paris*, Case No. 09-56564 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration denied where Motion failed to demonstrate palpable defect or that a different result would occur from a correction. Motion for Reconsideration of Order regarding payment of filing fees in installments moot where case dismissed in interim based on Debtor's failure to pay filing fees. Rehearing also not appropriate where Motion sought only authority to pay the filing fees in installments and did not seek to waive filing fees in their entirety and Debtor failed to pay the filing fees in any event.
- (7043) *In re Parent*, Case No. 09-55888 (Bankr. E.D. Mi. 2009) - Court denied Motion to Vacate Order Dismissing Chapter 7 Case where Motion failed to allege any palpable defect or that a different disposition would occur from a correction; and failed to allege any substantive basis for relief under Federal Rule of Civil Procedure 60(b)(1), Federal rule of Bankruptcy Procedure 9024, or any other substantive basis for relief. Case was dismissed because counsel failed to file required documents within 15 days of the petition date. "Any neglect or mistake by Debtor's counsel, such as that alleged in the Motion, is generally attributable to the Debtor, for purposes of determining whether any such neglect or mistake was excusable..."
- (7044) *In re United Robotics*, Case No. 09-50376 (Bankr. E.D. Mi. 2009) - Court denied Motion for Reconsideration of Order Enforcing Automatic Stay where Motion failed to demonstrate any palpable defect by which the Court and the parties have been misled. Creditor's Motion merely reargued matters previously argued in response to Debtor's Motion for Order Enforcing Automatic Stay and which had been fully considered by Court in entering Order in the first instance. Legal arguments raised in Motion for Reconsideration did not compel the Court to reach a different conclusion as a matter of law.
- (7045) *In re Culbert*, Case No. 09-47894 (Bankr. E.D. Mi. 2009) – Motion to Reinstate Chapter 7 bankruptcy construed as Motion for Reconsideration. Motion denied as motion failed to demonstrate a palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Further, motion failed to establish excusable neglect under Federal Rule of Civil Procedure 60, Federal Rule of Bankruptcy Procedure 9024 or any other valid grounds for relief. Court properly dismissed Debtors case where certificate credit counseling indicated that Debtor did not receive credit counseling until 17 days after bankruptcy petition filed. Therefore, Court properly concluded that Debtor was not eligible for relief under title 11.
- (7046) *In re Rhodes*, Case No. 09-43128 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration denied as motion failed to demonstrate a palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Further, motion failed to establish excusable neglect under Federal Rule of Civil Procedure 60, Federal Rule of Bankruptcy Procedure 9024 or any other valid grounds for relief. Court properly dismissed Debtor's case where certificate credit counseling indicated that Debtor did not receive credit counseling until 17 days after bankruptcy petition filed. Therefore, Court properly concluded that Debtor was not eligible for relief under title 11.
- (7047) *In re Little Rock Baptist Charity Care Center, Inc.*, Case No. 08-69445 (Bankr. E.D. Mi. 2009) – “Request for New Hearing Date for Debtor's Motion for Summary Judgment and Objection to Claim” treated as Motion for Reconsideration of Order Granting Debtor's Motion for Summary Judgment and Sustaining Debtor's Objection to the Claim of Interest of Joseph M. Wright”. Motion failed to demonstrate a palpable defect by which the Court and parties have been misled or that a different disposition of the case must result from a correction thereof. Further, Motion did not allege any excusable neglect under Federal Rule of Civil Procedure 60(b)(1) or Federal Rule of Bankruptcy procedure 9024 or any other valid ground for relief. Debtor and counsel both had actual notice of the hearing date but failed to appear for the hearing and failed to demonstrate any excuse for the failure.
- (7048) *In re Williams*, Case No. 04-40824 Bankr. E.D. Mi. 2008) - Debtor's Motion to Reinstate Chapter 13 Proceeding construed as a Motion for Reconsideration of Order Dismissing Case or, alternatively, a Motion for Relief from the Order Dismissing Case. Motion denied where motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof. Counsel for Debtor was served with the Trustee's Motion to Dismiss but did not file a response. Any neglect or mistake by Debtor's counsel in failing to respond is generally attributable to the Debtor for determining whether excusable neglect exists. Motion also failed to demonstrate any exceptional or extraordinary circumstances to warrant reinstatement as required by Rule 60(b)(6).

- (7049) *In re McGill*, Case No. 04-67742 (Bankr. E.D. Mi. 2008) - Debtor's Motion for Reconsideration of Order Dismissing Case denied as Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof; and Motion failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Order of dismissal was properly entered when Debtor failed to comply with terms of Court Order adjourning a hearing on the Trustee's Motion to Dismiss.
- (7050) *In re Cantor*, Case No. 05-65812 (Bankr. E.D. Mi. 2008) – Motion for Relief From Order, construed as a Motion for Reconsideration of order dismissing case, denied for failure to demonstrate a palpable defect by which the Court and the parties have been misled in any different disposition of the case must result from a correction thereof. Motion further failed to establish excusable neglect as required by Federal Rule of Civil Procedure 60(b), Federal Rule of Bankruptcy Procedure 9024, or any other valid grounds for relief from the order.
- (7051) *In re Bell*, Case No. 08-57409 (Bankr. E.D. Mi. 2009) - "Motion for Relief From The Judgment Dismissing Case Under FRCP 60(b)(1) & (6)", construed as a Motion for Reconsideration of order dismissing case, denied for failure to demonstrate a palpable effect by which the Court and the parties have been misled in any different disposition of the case must result from a correction thereof. Motion further failed to establish excusable neglect as required by Federal Rule of Civil Procedure 60(b), Federal Rule of Bankruptcy Procedure 9024, or any other valid grounds for relief from the order. Debtor failed to be 100% paid in plan payments by agreed deadline. Debtor was also at fault for not scheduling payday lender as creditor in the first instance. But for Debtor's failure to schedule payday lender, lender would not have obtained money from Debtor's bank account as alleged which caused Debtor's inability to make plan payments as agreed.
- (7052) *In re Sandhu*, Case No. 08-57203 (Bankr. E.D. Mi. 2008) - "Motion to Reopen Case and File Certificate of Counseling" denied as motion failed to demonstrate that any purpose would be served by re-opening case. Debtor did not receive credit counseling until 12 days after bankruptcy petition filed in violation of Section 109(h)(1).
- (7053) *In re Hutchinson*, Case No. 08-59442 (Bankr. E.D. Mi. 2008) - Debtor's Motion for Relief from Order Dismissing Chapter 13 Case for Failure to Comply With Order" denied where motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof. Counsel for Debtor was served with the Trustee's Motion to Dismiss but did not file a response. Any neglect or mistake by Debtor's counsel as alleged in Motion is generally attributable to the Debtor for determining whether excusable neglect exists. Motion also failed to demonstrate any exceptional or extraordinary circumstances to warrant reinstatement as required by Rule 60(b)(6).
- (7054) *In re Walker*, Case No. 09-55153 (Bankr. E.D. Mi. 2009) - Debtor's letter treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof. Court denied Motion to waive filing fee where schedules indicated that Debtor had sufficient exempt assets from which to pay the filing fee. Debtor's letter did not dispute this finding. Further, Debtor's schedules also indicated that Debtor has tax refunds totaling over \$4000 all of which are claimed as exempt. Court's earlier determination that Debtor not eligible for fee waiver was correct.
- (7055) *In re Thomas*, Case No. 08-57989 (Bankr. E.D. Mi. 2008) - Debtor's letter treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate any other substantive basis for relief. Court properly dismissed Debtors case where certificate credit counseling indicated that Debtor did not receive credit counseling until 26 days after bankruptcy petition filed. Therefore, Court properly concluded that Debtor was not eligible for relief under title 11.
- (7056) *In re Ayres*, Case No. 08-59822 (Bankr. E.D. Mi. 2008) - Motion to Reinstate Chapter 7 Bankruptcy Petition treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate any other substantive basis for relief. Court properly dismissed Debtors case where Debtor's counsel "for some reason" failed to sign the Statement of Social Security Number as required by ECF Procedure 11(d)(1).
- (7057) *In re Mathson Industries, Inc.*, Case No. 09-42894 (Bankr. E.D. Mi. 2009) – Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect by which the Court or the parties were misled or that a different disposition must result from a correction thereof; and allegations failed to demonstrate any excusable neglect under Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024 or any other valid ground for relief. Trustee served creditor with a copy of the Motion to Approve Sale and provided the required 20 day notice. Creditor filed no objection to the sale motion until it filed the Motion for Reconsideration over one month after the objection deadline passed and 10 days after the order was entered.
- (7058) *Attard v. American Home Mortgage Services, Inc.*, Adv. No. 08-5064 (Bankr. E.D. Mi. 2009) – Motion for Reconsideration denied where Motion failed to demonstrate palpable defect by which the Court and the parties were misled or that a different disposition of the case must result from a correction thereof. Order denying Motion for Summary Judgment correctly entered where record before Court did not establish beyond genuine issue of material fact that the Wayne County Sheriff did not appoint a specific person to conduct a foreclosure sale or that the specific written appointment was signed by someone other than the Sheriff himself.
- (7059) *In re Lyons*, Case No. 08-43750 (Bankr. E.D. Mi. 2009) - Motion to Reopen and Waive Reopening Fee denied where Court had denied prior Motion to Waive Filing Fee and the filing fee still had not been paid.
- (7060) *In re Camacho*, Case No. 08-59975 (Bankr. E.D. Mi. 2008) - Motion to Reinstate Chapter 13 Case constituted Motion for Reconsideration of Order dismissing case. Motion denied where Motion failed to demonstrate any palpable defect by which the Court or the parties were misled or that a different disposition must result from a correction thereof; and allegations failed to demonstrate any

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excusable neglect under Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024 or any other valid ground for relief. Debtor failed to appear for either the status conference or the contested confirmation hearing and failed to provide any proof that Debtor had mailed payments to the Trustee that had not yet posted on the Trustee records. Debtor's Motion to Reinstate did not present any excuse for failure by Debtor that was prejudicial to creditors.

- (7061) *In re Bacevicius*, Case No. 08-66257 (Bankr. E.D. Mi. 2008) - Motion to Reinstate Chapter 7 Bankruptcy Petition treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate any other substantive basis for relief. Debtor did not file a Bankruptcy Petition Cover Sheet until three weeks after case dismissed and never filed a Certificate of Credit Counseling, making it impossible for Court to determine if Debtor was even eligible for relief. Vague allegation that required documents were not timely filed due to a "computer problem" does not constitute grounds to set aside dismissal.
- (7062) *In re Maiuri*, Case No. 08-69430 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Further, Motion was untimely where Motion was not filed until more than 60 days after entry of Order dismissing case and failed to allege any good excuse for delay.
- (7063) *In re Rusch*, Case No. 08-69518 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy Case treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Counsel's failure to address filing deficiencies after being advised that several documents including Means Test form, Schedules, Statement of Financial Affairs and Credit Counseling Certificate had not been filed is not "cause" to reinstate case.
- (7064) *In re Thornton*, Case No. 08-64703 (Bankr. E.D. Mi. 2009) - "Objections to Order Dismissing Debtors' Bankruptcy and Motion to Vacate Order" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Case was dismissed at the time of the confirmation hearing because Debtor failed to appear at the confirmation hearing and failed to give the Chapter 13 Trustee copies of tax returns making it impossible to complete the § 341 meeting of creditors on two different occasions.
- (7065) *Greenhill v. Beneficial Michigan, Inc.*, Adv. No. 08-5668 (Bankr. E.D. Mi. 2009) - "Motion To Reopen Case On The Grounds That The Default Which Caused the Dismissal Has Been Or Can Be Cured" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Plaintiff had three chances to properly serve Defendant with the adversary but failed to do so and has offered no excuse or explanation for failure.
- (7066) *In re Zia*, Case No. 09-55685 (Bankr. E.D. Mi. 2009) - "Emergency Motion for Reconsideration Due to Procedural Defect, to Vacate Order for Relief From the Automatic Stay, and to Reinstate Stay as Default on Which Entry of the Order Was Based Has Been Cured" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Any neglect or mistake by Debtor's counsel is generally attributable to the Debtor, for purposes of determining whether any such neglect or mistake was excusable.
- (7067) *In re Smith*, Case No. 09-40132 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Case treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to file Statement of Social Security Number and Petition did not reflect signatures of either Debtor or Debtor's Attorney resulting in dismissal of case and Debtor failed to correct these deficiencies within time permitted by Court.
- (7068) *In re Johnson*, Case No. 09-43191 (Bankr. E.D. Mi. 2009) - Letter to Court treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to pay filing fee in prior, dismissed case and failed to file a Matrix in this case and failed to cure these defects within time permitted by Court.
- (7069) *In re Rutherford*, Case No. 09-51427 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Case treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to pay filing fee after Court entered Order denying Motion to Waive Filing Fee notwithstanding ample notice and opportunity.
- (7070) *In re Harris*, Case No. 09-60790 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy for Failure to File a Matrix treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil

Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to file Certificate of Budget and Credit Counseling and signed Bankruptcy Petition Cover Sheet within time allowed required dismissal of case.

- (7071) *In re Dittman*, Case No. 09-60009 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration Pursuant to F.R.B.P. 9024 treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Court denied Motion to Extend Automatic Stay and Court now lacks authority to extend stay as hearing cannot be completed within 30 days of commencement of case. Therefore, even if Movant demonstrated grounds for relief, Court could not grant effective relief.
- (7072) *In re Staten*, Case No. 08-60408 (Bankr. E.D. Mi. 2009) - Motion to Reopen Closed Case under Section 350(b) to file Financial Management Course Certificate denied where Debtor was not eligible to be a Debtor under Section 109(h)(1) as Debtor failed to obtain pre-petition credit counseling until 3 days after case commenced.
- (7073) *In re Henderson*, Case No. 09-55303 (Bankr. E.D. Mi. 2009) - Debtor's "Reinstatement Letter" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to file credit counseling certificate and failed to file Schedules D, F, G and H and Debtor's Schedules E, I and J were blank.
- (7074) *In re Brock*, Case No. 08-69720 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration of Order Denying Motion to Extend Automatic Stay denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Counsel's failure to attend the hearing based on alleged "internal office scheduling error" did not demonstrate cause to set aside Order. Counsel calendared hearing for Thursday, December 26 when Thursday was, in fact, December 25 and the hearing was scheduled for December 22.

24.49 Rule 60(b)(4) – Void Judgment

- (7075) *Hauk v. Valdiva*, Case No. 14-4573 (Bankr. E.D. Mi. 2015) – Defendant's mere denial of receipt of complaint was insufficient to warrant setting aside order as void where record established that plaintiff mailed the complaint to defendant and to defendant's counsel by US Mail and there was on dispute that defendant discussed content of adversary complaint before defendant made decision not to answer complaint.
- (7076) *In re Davis*, Case No. 12-33624 (Bankr. E.D. Mi. 2015) – Order Confirming Chapter 13 Plan set aside under Rule 60(b)(4) where creditor did not have notice of the proceedings prior to confirmation of plan. Where creditor lacks notice, confirmation order is void as to that creditor and court abuses discretion by denying motion to set aside. Evidence indicated that debtor transposed digits in creditor's address resulting in creditor no receiving notice of case until well after confirmation order entered.
- (7077) *BAC Home Loans Servicing, LP v. Groves*, 2014 WL 5511048 (5th Cir. 2014) – Borrowers conceded that lender had standing to foreclose by entering into agreed final judgment that established facts necessary for standing. Borrowers could not later contest standing under Rule 60 claiming that judgment was void, merely because borrowers no longer want to be bound by agreed judgment.
- (7078) *Spradlin v. Williams*, 2014 WL 5363743 (Bankr. E.D. Ky. 2014) – Judgment is "void" only if court lacked any arguable basis for jurisdiction or that action was manifest abuse of authority. In general, court has power to determine jurisdiction and determination becomes res judicata if not timely appealed. Judgment would not be set aside as void where trial court determined that actions were arguably "arising in" or "arising under" code, even though Sixth Circuit later determined in related proceeding that court lacked subject matter jurisdiction. Later determination in another proceeding that court lacked jurisdiction did not mean that initial determination that court had jurisdiction was "manifestly incorrect" for purposes of Rule 60(b).
- (7079) *Silagy v. Protz*, 2014 WL 1345302 (Bankr. N.D. Ohio 2014) – Rule 9024, which incorporates Rule 60(b)(4) allows court to provide relief from judgment when judgment is void. Relief is limited to rare instance where judgment is premised on jurisdictional error or amounts to a violation of due process.
- (7080) *Mitchell v. Weinman*, Case no. 13-1013 (10th Cir. 2014) – Elements of involuntary petition are not jurisdictional. Court would not re-open closed involuntary case based on allegations that involuntary petition failed to comply with Section 303(b)(1) and were filed in bad faith. Involuntary proceedings were not "void" for purposes of Rule 60 relief.
- (7081) *In re Gibson & Epps, LLC*, 468 BR 279 (Bankr. E.D. Tn. 2012) – Rule 60(b)(4) authorizes relief from void judgment. Judgment is void only if judgment is one that, from its inception, was a complete nullity and without legal effect. Erroneous judgment is not void judgment. Absence of jurisdiction in the first instance results in judgment being void. However, mere error in exercising judgment does not render judgment void. Agreed Order dismissing case of Chapter 11 Debtor, to the extent it directed debtor to execute quit claim deed as part of settlement with lender, was not void judgment. Although debtor's managing partner failed to advise non-managing partner of bankruptcy filing, execution of settlement agreement or execution of quit claim deed, this did not result in bankruptcy court lacking jurisdiction over case or debtor. Although managing member may have violated Articles of Incorporation, that did not render the petition itself void or render any subsequent proceedings in that case void.
- (7082) *In re Leigh*, 2013 WL 1787964 (Bankr. S.D. Ohio 2013) – Rule 60(b)(4), incorporate by reference through Bankruptcy Rule 9024, requires a court to set aside a judgment where the court finds the judgment to be void. If the judgment is void, then the court lacks the ability to consider equitable or other factors and the court must vacate the judgment. A judgment is void only in the rare instance where it

is premised either on jurisdictional error such that the court lacks jurisdiction over the party or over the subject matter of the dispute; or where a violation of due process deprives party of notice or opportunity to be heard. Rooker-Feldman resulted in Order sustaining objection to claim being void for lack of subject matter jurisdiction. Bankruptcy Court lacks jurisdiction under Rooker-Feldman to reconsider validity of mortgage or amount of debt where mortgage has been foreclosed in judicial proceeding and state court has issued judgment determining status of mortgage and determining amount of debt. Objection to claim in bankruptcy court was effort to look behind state court determinations of validity and amount of lien which is precluded by Rooker-Feldman.

- (7083) *PHH Mortgage Corp. v. Corzin*, 2012 WL 4023440 (N.D. Ohio 2012) – Rule 60(b)(4) motion will succeed only if the lack of subject matter jurisdiction is so glaring as to constitute a total want of jurisdiction or where no arguable basis for jurisdiction existed. Complaint to avoid lien is core proceeding within scope of court jurisdiction. Although complaint did not specifically challenge validity of lien, complaint did ask for sale of property with the court to determine extent and priority of liens, and requiring any party claiming to hold a lien to file a response to the complaint.

24.50 Excusable Neglect

- (7084) *Credit Union One v. Maddox*, Case No. 15-4786 (Bankr. E.D. Mi. 2015) – Motion to Reopen Adversary Proceeding is motion under Rule 60. Motion failed to state basis to reopen adversary under Rule 60(b)(1) where motion did not demonstrate that dismissal resulted from excusable neglect. Factors to consider include danger of prejudice to other party; length of delay and impact on judicial proceedings; reason for the delay; whether the delay was within control of late party; and whether late party acted in good faith. Court dismissed adversary proceeding to except debt from discharge where plaintiff failed to appear either at a hearing on creditor's motion for 2004 exam or for the Initial Scheduling Conference in the adversary. Creditor demonstrated that reinstatement would cause minimal prejudice and that there was no impact on judicial proceedings as motion was brought within 10 days of dismissal, which does not indicate delay in filing motion. There was no allegation of bad faith in creditor's failure to attend hearings or in prosecution of Motion to Reopen Adversary Proceeding. However, creditor was culpable in causing dismissal, where failure to attend multiple hearings was allegedly the result of employee turnover at attorney's office and failure of attorney's staff member to properly calendar hearings. Court had issued scheduling order well before assistant's absence in September and law firm knew that there was problem with calendaring system where attorney had failed to attend hearing on rule 2004 motion 10 days prior to scheduling conference and court had entered order denying creditor's motion at that time which should have prompted law firm to review file to determine if there were additional hearings scheduled. Law firm also should have known of scheduling conference because law firm had prepared Rule 26(f) report 11 days prior to the scheduling conference. Culpable conduct of law firm outweighs lack of prejudice or bad faith. Although counsel's action was neglect, it was not excusable for purposes of Rule 60 relief.
- (7085) *In re Player*, 2015 WL 5885348 (Bankr. W.D. Ohio 2015) – Request to Reinstate Stay is Motion under Rule 60(b). Alleged error of attorney in failing to respond to Motion for Relief did not state basis to reinstate, where alleged error was assumption by Debtor's counsel that confirmation of Chapter 13 Plan would cause Creditor to drop any request to foreclose mortgage. Counsel's "litigation strategy" of relying on Creditor to take or refrain from taking action based on terms of proposed plan is not basis for relief under Rule 60(b)(1).
- (7086) *In re Ausmus*, 2015 WL 5000095 (Bankr. W.D. Ky. 2015) – Rule 4007 requires adversary to except debt from discharge to be filed within 60 days after the date first set for the meeting of creditors. The court can extend the deadline on motion filed before the deadline expires. Creditor did not timely file adversary or seek extension of time to do so. There was no dispute that creditor received notice of the bankruptcy in time to file the required adversary and there was no suggestion that creditor was in any way confused or misled. Court would not use Rule 60 to alleviate consequences of creditor's own failure to act in a timely manner. Motion did not allege that creditor failed to file adversary as result of excusable neglect.
- (7087) *In re Williams*, Case No. 14-21663-DOB (Bankr. E.D. Mi. 2015) – Court denied motion for reconsideration of order that enjoined BPP from performing services anywhere in the Eastern District of Michigan unless acting under supervision of attorney. To set aside order under Rule 60(b)(1), party must demonstrate that order was result of excusable neglect. Neglect is an equitable conclusion based on danger of prejudice to other party; length of delay and potential impact on judicial proceedings; reason for delay; whether delay was within reasonable control; and whether late acting party acted in good faith. Focus ultimately is whether other party will be prejudiced; whether movant has meritorious defense; and whether moving party was culpable in entry of order in first instance. Ordinary negligence, alone, is not excusable. Gross negligence may be, depending on circumstances and whether it would be equitable to set aside order. Record indicated that movant was fully apprised of reasons UST sought to enjoin BPP from acting as petition preparer. Language or consent order signed by BPP was clear and direct. BPP was fully aware of all circumstances before signing consent order and did not allege any newly discovered evidence. While BPP may have felt pressure to sign consent order, that does not constitute excusable neglect or palpable defect.

24.51 Meritorious Defense

- (7088) *Hauk v. Valdiva*, Case No. 14-4573 (Bankr. E.D. Mi. 2015) – Alleged fraud or misrepresentation by plaintiff in underlying transaction may constitute a defense to action but does not amount to fraud in entry of judgment itself. Court would not set aside judgment even assuming that defendant stated meritorious defense, where defendant could not establish that default was produce of mistake, inadvertence, surprise or excusable neglect.
- (7089) *In re Juarez*, Case No. 11-59386 (Bankr. E.D. Mi. 2011) – Motion for Rehearing of Order Awarding Attorney Fees denied. Motion failed to evidence any meritorious defense where Motion for Reconsideration admitted that funds were garnished post-petition in violation of stay and failed to return funds to debtor.

24.52 Rule 60(a) - Clerical Error

- (7090) *Ernst v. Michigan Educational Credit Union*, 2015 WL 1345359 (E.D. Mi. 2015) – Rule 60(a) allows court to correct order where, through inadvertence, the order entered does not accurately reflect the court’s intentions. Error may be corrected where error was mechanical in nature and correction is necessary to reflect court’s intent. Court order on objection to creditor’s proof of claim disallowed secured portion of claim but allowed claim as an unsecured claim. However, written order submitted by counsel and signed by court disallowed claim in its entirety. Court had authority under Rule 60(a) to amend the order to reflect that order was allowed as unsecured, consistent with court’s stated intention.
- (7091) *In re Merkl*, Case No. 06-48377 (Bankr. E.D. Mi. 2008) - Order Granting Relief From Stay vacated pursuant to Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60(a) where order was entered as a result of clerical error. Debtor filed response to Motion for Relief but clerk failed to enter response into docket in timely manner, resulting in Order Granting Relief From Stay by default.
- (7092) *In re Eatmon*, Case No. 07-65731 (Bankr. E.D. Mi. 2008) - Application for Attorney Fees erroneously filed in wrong case and Order erroneously entered in that case. Order contained wrong case number and was signed by Judge not assigned to that case. Order Awarding Attorney Fees vacated pursuant to Federal Rule of Civil Procedure 60(a) and Federal Rule of Bankruptcy Procedure 9024 as entered through clerical error.
- (7093) *Americredit Financial Services, Inc. v. Burgess*, Adv. No. 09-4549 (Bankr. E.D. Mi. 2009) – Order dismissing adversary case entered in error and would be set aside. Clerk inadvertently issued two separate notices of initial scheduling conference. Court’s dismissal for failure of plaintiff to appear for the first of those scheduling conferences was result of error of Court.
- (7094) *In re Vogel*, Case No. 08-60317 (Bankr. E.D. Mi. 2009) - Order granting relief from stay entered after case had been closed without discharge would be vacated. Case had already been closed when Motion for Relief filed but creditor had not filed Motion to Reopen Case. Order Granting Relief entered in error sufficient to warrant relief under Rule 60.

24.53 By Court *Sua Sponte*

- (7095) *In re Smith*, Case No. 08-70461 (Bankr. E.D. Mi. 2009) – Case reopened by Court *sua sponte* and discharge vacated and case dismissed where Debtors had previously filed a petition under Chapter 7 and that prior case was still pending. Discharge in this case would be vacated as Debtors received discharge in the prior, simultaneously pending case.

24.54 Defect in Notice

- (7096) *In re Gainey Corp.*, Case No. 08-9092 (Bankr. W.D. Mi. 2014) – Notice is proper when mailed to address listed on proof of claim. If creditor moves, creditor bears burden of updating address with court pursuant to Rule 202. Creditor’s failure to receive confirmation order did not amount to lack of notice where order was mailed to address on proof of claim. If creditor did not receive copy of order, it was because he did not update his address with the court and is not a basis to set aside an order.
- (7097) *Thornton v. Digenis*, 2014 WL 412652 (W.D. Ky. 2014) – Court correctly set aside “Agreed Order” where moving party was adversely affected by Order and did not have prior notice of or agree to entry of Order. Bankruptcy Court acknowledged error in entering Order where Order did not comply with procedural requirements for relief requested.
- (7098) *In re Hoskins*, Case No. 08-62613 (Bankr. E.D. Mi. 2009) – Order Converting Case to Chapter Thirteen vacated. Debtor filed Notice of Motion but failed to file Certificate of Service evidencing timely notice on all creditors and parties in interest.
- (7099) *In re Miller*, Case No. 06-32425 (Bankr. S.D. Ohio 2010) - Contested matter must be served in the same manner as a summons under Rule 7004. When service is to be made on an “insured depository institution,” Rule 7004(h) requires service by certified mail addressed to an officer of the institution. Debtors’ post- confirmation plan modification was not properly served where certificate of service acknowledging service on FDIC insured depository institution at three somewhat different addresses, only by regular mail and without direct service on any individual, officer or specific department. Order Modifying Plan based on defective service vacated pursuant to Rule 60(b).

24.55 Rule 60 (b)(1) - Mistake, Inadvertence, Surprise or Excusable Neglect

- (7100) *Hauk v. Valdiva*, Case No. 14-4753 (Bankr. E.D. Mi. 2015) – Defendant failed to demonstrate excusable neglect in failing to respond to adversary complaint where defendant was aware of adversary proceeding and made a conscious decision, after consulting with counsel, not to file an adversary. While there was no evidence of neglect by counsel, if there was it would be attributable to defendant for purposes of determining whether mistake was excusable.
- (7101) *In re Tennielle*, Case No. 15-41869 (Bankr. E.D. Mi. 2015) – Change in controlling law after entry of order does not amount to “mistake” under Rule 60(b)(1). Fact that controlling law would now require different conclusion is not evidence that court erred in first instance.
- (7102) *In re Fisher*, 2015 WL 5144526 (Bankr. N.D. Ohio 2015) – “Neglect” is defined as giving little attention to or respect to a matter, or leaving undone or unattended through carelessness. Focus is whether client and attorney actions were “excusable”. Misreading of applicable law or strategic error is not excusable neglect. Failure to timely file objection to Trustee’s Final Report was not excusable neglect where attorney reviewed final report and concluded that there was “nothing to object to” Even if legal analysis was incorrect, that error is not either mistake or excusable neglect.

- (7103) *In re Slayton*, 509 BR 90 (Bankr. E.D. Mi. 2014) – Improper service of process is reason for excusable neglect. Motion demonstrated excusable neglect sufficient to set aside order where record indicated that party seeking relief had not been properly served with motion. Rule 7004 requires service on a corporation by mailing the pleading “to the attention of an office, a managing or general agent, or to any other agent authorized by appointment of by law to receive service of process”. Motion addressed to “Chrysler Benefit Express, ATTN: Bankruptcy Department” did not name any particular officer or agent to whom the motion was addressed; and was not sufficient under state law as Motion was not “delivered” to an officer, managing or general agent, or other agent authorized by appointment or law. General mailing to corporate entity, without specifying person to whom mailing is addressed, is not sufficient under Rule 7004. As such, court lacked personal jurisdiction over named party leaving order fatally defective.
- (7104) *Kohut v. Thomas*, 2014 WL 1646979 (Bankr. E.D. Mi. 2014) – Rule 59, incorporated by reference in Rule 9023, requires that moving party demonstrate palpable defect by which the court and parties were misled, such that correction would result in different disposition of case. Motion failed to demonstrate error based on alleged hacking of debtor’s counsel’s e-mail account where record indicated that notice of hearing was issued to debtor’s counsel at two separate addresses, one of which was functioning on date of issuance of notice of hearing. Further, attorney knew before notice of hearing issued that e-mail account had been hacked, placing counsel on notice with duty to monitor docket as attorney knew that plaintiff had filed motion for summary judgment and that notice of hearing would be forthcoming. Movant failed to demonstrate any excusable neglect in counsel’s failure to know about or to attend hearing. Neglect is not excusable where it amounts to nothing more than “run of the mill inattentiveness”. Further, court issued summary judgment on merits of motion independent of counsel’s failure to appear at the hearing, such that even if failure to attend was excusable neglect there was no evidence that correction of the error would have produced different result.
- (7105) *In re Gundrum*, 2014 WL 1664280 (Bankr. S.D. Ohio 2014) – Rule 60, incorporated by reference in Rule 9024, requires that party seeking relief based on surprise or excusable neglect must prove that moving party was not culpable; that opposing party would not be prejudiced; and that movant has meritorious claim or defense. Attorney’s inaction or strategic error based upon misreading of applicable law is not deemed “excusable” even if it was “excusable” for client to rely on attorney’s advice. Counsel’s misunderstanding of “adequate protection” in context of Chapter 13 and Motion for Stay Relief was not excusable neglect, where court found lack of excusable neglect based on infeasibility of plan and counsel for debtor was not aware that he has burden to show at least prima facie case that Chapter 13 Plan could be confirmed and completed.
- (7106) *In re Baker*, 2014 WL 1393955 (Bankr. N.D. Ohio 2014) – Rule 60(b)(1) allows court to relieve party of final judgment or order for mistake, inadvertence, surprise or excusable neglect. Excusable neglect requires neglect, defined as leaving things undone as a result of lack of attention or carelessness. Test for whether neglect is excusable where underlying order did not involve decision on merits, issue is equitable one taking into account all circumstances including danger of prejudice to debtor, length of delay and potential impact on proceedings, reason for delay, whether reason was within control of moving party, and whether moving party acted in good faith. Where order at issue involves consideration on merits, court will consider whether party seeking relief is culpable, whether party opposing relief would be prejudiced, and whether the party seeking relief has meritorious claim or defense. Only where party seeking relief can demonstrate lack of culpability will court even consider other two factors. Order dismissing adversary proceeding based on erroneous filing in main case rather than opening new adversary was not decision on merits. Attorney’s secretary did not routinely file adversary complaints, leading to mis-filing. Attorney did not monitor case docket which would have indicated deficiency before order was entered and attorney did not bother to contact court until a month after case was filed yet summons had not been issued. Counsel’s failure to monitor docket excusable where attorney did not expect any deficiency notices to be entered and he had no reason to be concerned about delay in issuing summonses as only deadline is requirement for service within 120 days of commencement of adversary. Counsel learned of error and sought relief in timely manner, error had no impact on judicial proceedings as adversary could proceed without adverse impact on main claim and without additional effort than would have been required had adversary been filed correctly in first instance. Fact that debtors confirmed chapter 13 plan was not prejudice as debtor knew of claim as creditor had filed proof of claim, and had filed Rule 60 motion four months before plan was confirmed. While attorney certainly made mistake, there was no suggestion of bad faith. Movant demonstrated excusable neglect to set aside order dismissing adversary and order clerk to docket mis-filed complaint as separate adversary proceeding.
- (7107) *In re Ivens Properties, Inc.*, 2014 WL 667659 (Bankr. E.D. Tn. 2014) – Rule 60(b)(1) is intended to provide relief where the party made an excusable litigation mistake or the attorney in the litigation acted without authority; or when the judge made a substantive mistake of law or fact. Courts consider the culpability of the party and whether the order is the result of neglect that was excusable; whether granting the relief would prejudice other parties; and whether the party holds a meritorious claim or defense. Order imposed deadline by which debtor must file chapter 11 Plan. Debtor missed the deadline and filed a Motion under Rule 60 for relief. Motion evidenced excusable neglect as failure to file plan by deadline resulted from unexpected and extended medical issues that were unforeseen and uncontrollable. Extending deadline to file plan would not prejudice secured creditor where all parties agreed debtor had substantial equity in the property. Debtor acted diligently to find new counsel when it became apparent that prior counsel would be medically unable to continue representation, and new counsel acted diligently in filing motion to extend deadline.
- (7108) *US v. Fullwood*, 2013 WL 1774717 (E.D. Mi. 2013) – Excusable neglect requires that the judgment be obtained based on party’s neglect which is excusable under the circumstances. Defendant’s Motion denied where neglect was the fault of Defendant, based on Defendant’s fault in not responding to properly filed and noticed Motion for Summary Judgment. Defendant’s erroneous assumption that summary judgment would not be entered as long as parties were engaged in settlement negotiations lacked any basis in law and could not support setting aside judgment.
- (7109) *Prentice v. Residential Funding, LLC*, 2013 WL 1663868 (E.D. Mi. 2013) – Motion for reconsideration of Order remanding cases to State court did not state grounds under Rule 60(b)(1). Motion alleged that state courts “have no respect for the statutes or constitution”

and rule “in a rogue fashion”. However, Plaintiff did not present any evidence to support the claim and did not point to any specific mistake of law or clear error of judgment in the Order for Remand.

- (7110) *In re Smith*, 467 BR 122 (Bankr. W.D. Mi. 2012) – Motion to Set Aside Discharge Order for purposes of allowing Debtor to file reaffirmation agreement did not demonstrate mistake or excusable neglect. Debtor’s statement of intentions filed at commencement of case indicated intent to reaffirm mortgage debt. Debtors misunderstanding of deadlines within which to accomplish reaffirmation agreement was not excusable neglect.
- (7111) *In re Gibson & Epps, LLC*, 468 BR 279 (Bankr. E.D. Tn. 2012) – Rule 60(b)(1) allows relief from judgment or order that is the result of mistake, inadvertence, surprise or excusable neglect. Inquiry is essentially equitable one, taking into account all relevant circumstances, including danger of prejudice, length of delay, impact on proceedings, reason or the delay, whether delay was within reasonable control of moving party, and whether moving party acted in good faith. Party seeking relief must demonstrate either (1) that the party made an excusable litigation mistake or that the attorney in the litigation acted without authority; or (2) that the judge made a substantive mistake of law or error of fact in the final judgment or order. Court will consider (1) whether the party seeking relief is culpable; (2) whether opposing party would be prejudiced; and (3) whether party seeking relief has meritorious defense. Party’s conduct is “culpable” where it displays either an intent to thwart judicial proceedings or a reckless disregard for effect of conduct on proceedings. Rule is not designed to relieve counsel of consequences of decisions deliberately made, and clients are generally held accountable for acts and omissions of their attorneys. Motion to set aside order denied. Debtor, through its managing member, entered into settlement agreement that required debtor to transfer property to lender. Movant, a non-managing member, was unaware of bankruptcy filing or settlement until after order entered. Although movant was not culpable, lender would be prejudiced if order was set aside, property was not transferred to lender for less than adequate value, movant failed to demonstrate any meritorious claim, and though managing member lacked authority to unilateral file bankruptcy petition, there was no excusable neglect by managing member in signing quitclaim deed or by debtor’s attorney in preparing and filing bankruptcy petition.

24.56 Newly Discovered Evidence

- (7112) *Energy Conversion Devices Liquidation Trust v. Trina Solar Limited*, 2015 WL 5216579 (E.D. Mi. 2015) – Rule 59 allows court to alter or amend order based on newly discovered evidence. Motion cannot rely on information readily available during prior proceedings or that could have been adduced during pendency of proceedings, and cannot be used to raise new arguments that could have, and should have, been raised before judgment issued. Plaintiff had information available in July, 2014, and Order dismissing complaint was not entered until October, 2014, and included information dating back to 2012. Plaintiff’s failure to include additional count in complaint was not due to lack of information but was result of strategic error in evaluating need to plead additional cause of action in first instance.
- (7113) *Schwab v. Oscar*, 2014 WL 232113 (Bankr. N.D. Ohio 2014), *aff’d*, 517 BR 72 (6th Cir. BAP 2014) – Newly discovered evidence for purposes of Rule 60 relief is evidence that was not available prior to entry of order through reasonable diligence. If Plaintiff was unaware of evidence, but reasonable efforts would have disclosed evidence at earlier date, new evidence will not support Rule 60 relief. Plaintiff’s allegations of newly discovered evidence regarding conflict of interest between debtor’s counsel and debtor, based on counsel’s alleged simultaneous representation of secured creditor, was discoverable, where counsel’s application for retention referenced relationship between counsel and lender, and subsequent e-mails also disclosed relationship. Plaintiff knew or reasonably should have known of alleged conflict far earlier than May, 2013, when court entered Judgment against Plaintiff in action against counsel and lender.
- (7114) *In re Gibson & Epps, LLC*, 468 BR 279 (Bankr. E.D. Tn. 2012) – To set aside order based on newly discovered evidence, movant must demonstrate that it exercised due diligence in obtaining information and that the evidence is material and controlling and clearly would have produced a different result had the information been presented prior to entry of the order. Evidence must not be merely cumulative or impeaching. Although movant, a non-managing member of debtor, was not aware of bankruptcy filing or settlement agreement that called for transfer of property to lender and, had non-managing member known of these events he would not have agreed to these actions, his lack of knowledge was due in part to his own express consent and implied acquiescence for more than a decade during which the managing member was solely responsible for debtor’s operations and management without input or assistance from non-managing member, and managing member was, for all intents and purposes, in full control of business operations of debtor.
- (7115) *In re Grady*, 2009 WL 3254435 (Bankr. W.D. Mi. 2009) – Motion for Rehearing based on newly discovered evidence must demonstrate that (1) the new evidence was not discovered until after judgment and that movant was excusably ignorant of the facts at the time of trial despite due diligence; (2) the evidence discovered must be of a nature that would probably change the outcome of the case; and (3) the evidence must not be merely cumulative or impeaching. Debtor did not exercise due diligence to obtain the “newly discovered” documents where Debtor did not make any formal discovery requests in an effort to obtain the documents prior to the evidentiary hearing and failed to request an adjournment of the evidentiary hearing to allow the documents to be obtained once their existence was disclosed at the hearing. Party’s lack of diligence in conducting discovery insufficient grounds for a new trial.

24.57 Rule 60(b)(3) - Fraud, Misrepresentation or Misconduct

- (7116) *Hauk v. Valdiva*, Case No. 14-4573 (Bankr. E.D. Mi. 2015) – Alleged fraud or misrepresentation by plaintiff in underlying transaction may constitute a defense to action but does not amount to fraud in entry of judgment itself. Court would not set aside judgment even assuming that defendant stated meritorious defense, where defendant could not establish that default was produce of mistake, inadvertence, surprise or excusable neglect.
- (7117) *In re Fisher*, 2015 WL 5144526 (Bankr. N.D. Ohio 2015) – Party seeking to set aside order for fraud, misrepresentation or misconduct by opposing party must prove either an affirmative misstatement (misrepresentation); deliberate omissions when a response is required by law

or when the non-moving party has volunteered information that would be misleading without the omitted material (fraud); or questionable behavior affecting the fairness of litigation other than statements or the failure to make statements (misconduct). Debtor's claim that ex-wife was guilty of misconduct or misrepresentation by filing proof of claim did warrant relief where proof of claim contained no factual misstatements or misrepresentations. Creditor's acceptance of payments from Trustee based on proof of claim to which Debtor never objected was not sufficient to set aside order, although debtor alleged that creditor's right was contingent and required creditor to pay mortgage debt and creditor never paid mortgage debt or otherwise became entitled to reimbursement. At best, debtor's motion alleged that he and creditor had different view regarding debtor's obligation under divorce decree, such that creditor's acceptance of payment cannot be basis for fraud or misconduct. Debtor never objected to proof of claim and Trustee paid claim per the allowed proof of claim.

- (7118) *In re Ausmus*, 2015 WL 5000095 (Bankr. W.D. Ky. 2015) – Rule 4007 requires adversary to except debt from discharge to be filed within 60 days after the date first set for the meeting of creditors. The court can extend the deadline on motion filed before the deadline expires. Creditor did not timely file adversary or seek extension of time to do so. There was no dispute that creditor received notice of the bankruptcy in time to file the required adversary and there was no suggestion that creditor was in any way confused or misled. Court would not use Rule 60 to alleviate consequences of creditor's own failure to act in a timely manner. Creditor did not allege that debtor obtained discharge by fraud or that creditor was somehow fraudulently induced to not file adversary, where creditor's only allegation of fraud was that debtor filed bankruptcy case between entry of state court default and hearing to determine damages, resulting in "general unfairness".
- (7119) *US v. Fullwood*, 2013 WL 1774717 (E.D. Mi. 2013) – Fraud requires knowing misrepresentation of material fact, or concealment of fact when there is a duty to disclose, done to
- (7120) induce another to act to his detriment. Defendant failed to demonstrate that summary judgment was product of fraud by opposing counsel, where Defendant alleged only that she believed that a party should not be permitted to file a summary judgment motion while settlement negotiations are on-going. Party may file summary judgment motion at any time, and Defendant did not point to any representation by Plaintiff that Plaintiff would withhold filing a motion while settlement negotiations are ongoing.
- (7121) *Prentice v. Residential Funding, LLC*, 2013 WL 1663868 (E.D. Mi. 2013) – Fraud requires knowing misrepresentation of material fact, or concealment where disclosure is required, done to induce another to act. Plaintiff must present clear and convincing evidence of questionable behavior that affect fairness of litigation. Plaintiff's Motion for Reconsideration of Order for Remand, alleged that Defendant's attorneys impaired Plaintiff's rights through fraud but failed to allege any substantive evidence that material facts were misrepresented or that the fairness of the proceedings was compromised.
- (7122) *Bellanti v. Land Escape Outdoor Maintenance, LLC*, 2012 WL 3237933 (E.D. Mi. 2012) – Court properly reconsidered order dismissing adversary proceeding as sanction for failure to comply with order compelling discovery. Counsel filed notice of no response without informing court that between date of service of motion and date of certificate, opposing party paid the discovery sanctions. Conduct of counsel created a false impression that creditor had totally failed to comply with prior court order, an impression on which bankruptcy court relied in granting extreme discovery sanction of dismissal. Fraud for purposes of Rule 60 includes deliberate omissions when response is required by law, or when non-moving party has volunteered information that would be misleading without omitted material.
- (7123) *In re Gibson & Epps, LLC*, 468 BR 279 (Bankr. E.D. Tn. 2012) – Rule 60(b)(3) allows court to set aside order that is product of fraud, misrepresentation or misconduct. Actions cannot be unintentional. Moving party must show that adverse party committed deliberate act that adversely affected fairness of proceeding or prevented movant from fully and fairly litigating their case. Even if adverse party acted recklessly or deliberately, motion will be denied where misconduct had no prejudicial effect on movant. Agreed Order approving settlement agreement and transfer of property from debtor to lender would be set aside on basis of debtor's managing member's misrepresentations where managing member, in willful disregard of debtor's Articles of Incorporation, filed bankruptcy petition without consent of non-member and expressly misrepresented to debtor's attorney that non-managing member had knowledge of, and presumably consented to, bankruptcy filing, and in order to further these mis-representations, either intentionally provided a false address for the non-managing member or, at least, acted recklessly by not ensuring that he provided correct address information.

24.58 Rule 60(b)(5) – Reversal of Earlier Judgment

- (7124) *Schaller v. Paulsen*, Case No. 12-80166 (Bankr. W.D. Mi. 2015) – Adversary Judgment predicated on collateral estoppel effect of state court judgment would be vacated under Rule 60(b)(5) where state court judgment was later reversed on appeal. Given extensive litigation that had already occurred in State Court, Bankruptcy Court would hold adversary proceeding in abeyance pending final determination by State Court.

24.59 Fraud on the Court

- (7125) *Samaritan Alliance, LLC v. Commonwealth of Kentucky*, 2014 WL 4101495 (Bankr. E.D. Ky. 2014) – Fraud on the court is conduct on the part of an officer of the court directed to the judicial machinery that is either intentionally false or made with willful blindness to or reckless disregard for the trust, and that amounts to a positive statement to the court or a concealment where one has a duty to disclose and that deceives the court. Because the Motion seeks an exception to general rule of res judicata and is contrary to requirement for judicial finality, doctrine is narrowly applied and only when conduct harms the integrity of the judicial process and results in a grave miscarriage of justice such as bribery of a judge or fabrication of evidence by counsel. Creditor's claim for recoupment did not rise to fraud on court even though creditor knew, at time it made claim, that it has no right to recover as creditor had, in fact, been overpaid. Issues were not matter of private information that could not have been discovered and were based on facts known to both parties including amounts claimed by and amounts paid to each party by the other. The only additional information is that debtor now has

obtained e-mails from creditor in which creditor knew it was overpaid at time claim brought. Court correctly applied law to facts presented and reached conclusion. Fact that claim may ultimately have lacked substance was not “fraud on the court”.

- (7126) *In re Gibson & Epps, LLC*, 468 BR 279 (Bankr. E.D. Tn. 2012) – “Fraud on the Court” is defined as conduct on the part of an officer of the court; that is directed to the judicial machinery itself; that is intentionally false, willfully blind to the truth, or in reckless disregard for the truth; that is a positive averment or concealment when one is under a duty to disclose; and that deceives the court. Agreed Order settling litigation and directing debtor to execute deed-in-lieu would not be set aside as fraud on court as there was no evidence of any intentional or reckless action of any officer of court. Debtor’s attorney reasonably relied on information provided by debtor’s managing member that debtor’s non-managing member knew of and consented to bankruptcy filing, and all actions taken by debtor’s attorney were in exercise of legal judgment, in debtor’s best interests, and in no way deceptive or intentional. Although debtor’s managing member may have misrepresented information, managing member was not attorney or other “office of court”.

24.60 Void Judgment

24.61 Equitable Relief

- (7127) *In re Cislo*, 2012 WL 4325647 (Bankr. E.D. Mi. 2012) – Rule 60(b)(5) allows court to set aside judgment where applying the judgment prospectively is no longer equitable. Court denied Debtor’s Motion for Entry of Judgment which Court construed as Motion for Relief From Judgment Denying Discharge Under Section 727. Denial of Discharge was based on Debtor’s repeated failures to produce documentation to the Trustee, notwithstanding multiple orders and hearing compelling debtor to produce documents and debtor’s multiple failures to produce documents by deadlines established by court, even when given additional time to do so after expiration of deadlines. Court acknowledged debtor’s family difficulties and difficulties with alcohol abuse and incarceration, and lauded debtor’s attempts to put his life back on track, but equities as a whole did not warrant relief from order, particularly where many other debtors facing the same hardships are able to comply with requests of Trustee and Orders of Court.

24.62 “Catchall” Provisions – Rule 60(b)(6)

- (7128) *Hauk v. Valdiva*, Case No. 14-4573 (Bankr. E.D. Mi. 2015) – Motion for relief under “catchall” provision of Rule 60(b)(6) must show that order is product of extraordinary circumstances suggesting that defendant was faultless in delay. Defendant’s failure to respond to adversary complaint, after consulting with counsel, was neither extraordinary circumstance nor event which was over which defendant was faultless.

- (7129) *In re Tennille*, Case No. 15-41869 (Bankr. E.D. Mi. 2015) – Intervening change in controlling law may be grounds for relief under Rule 60(b)(6). Mere change in law alone is not, by itself, extraordinary circumstance. Rule 60 motion also requires evidence of additional special circumstances.

- (7130) *In re Fisher*, 2015 WL 5144526 (Bankr. N.D. Ohio 2015) – Grounds for relief under Rule 60(b)(6) are exclusive of grounds under any other section of Rule 60, and apply only in exceptional circumstances which are not addressed by other provisions of Rule 60. Alleged gross negligence of attorney is not sufficient for relief under Rule 60(b)(6) unless counsel’s conduct was so egregious as to amount to abandonment or intentional misleading of client. Motion alleged only that counsel may have made error in reaching legal conclusion that there was no basis to object to Trustee’s final report, but there was no evidence that counsel either abandoned or intentionally misled client, which was not sufficient for relief under Rule 60(b)(6).

- (7131) *Old Republic Insurance Company v. Hakes*, Case No. 14-3199 (Bankr. E.D. Mi. 2015) – Catch all provision of Rule 60(b)(6) is reserved for extreme and unusual circumstances that do not fit in any of the other five categories of Rule 60, where equity mandates relief coupled with strong showing that extreme and undue hardship will result if relief is not granted. Party may not use Rule 60(b) as substitute for appeal or as technique to avoid consequences of decisions deliberately made yet later revealed to be unwise. Moving party failed to state basis for relief where argument was reassertion of issues and version of events raised in earlier proceedings, and moving party did not demonstrate any exceptional equitable circumstances or that lower court’s original order was clearly erroneous.

- (7132) *In re Ivens Properties, Inc.*, 2014 WL 667659 (Bankr. E.D. Tn. 2014) – Rule 60(b)(6) applies in exceptional or extraordinary circumstances not addressed in the other five enumerated sections which themselves cover almost every conceivable ground for relief. Order imposed deadline by which debtor must file chapter 11 Plan. Debtor missed the deadline and filed a Motion under Rule 60 for relief. Motion evidenced extraordinary circumstances as failure to file plan by deadline resulted from unexpected and extended medical issues that were unforeseen and uncontrollable. Extending deadline to file plan would not prejudice secured creditor where all parties agreed debtor had substantial equity in the property. Debtor acted diligently to find new counsel when it became apparent that prior counsel would be medically unable to continue representation, and new counsel acted diligently in filing motion to extend deadline.

- (7133) *US v. Fullwood*, 2013 WL 1774717 (E.D. Mi. 2013) –

- (7134) *In re Gibson & Epps, LLC*, 468 BR 279 (Bankr. E.D. Tn. 2012) – “Catchall” provision of Rule 60(b)(6) applies only in extraordinary circumstances which are not addressed in any of the 5 preceding sections of Rule 60(b). Relief will be granted only in extreme circumstances where principals of equity mandate relief. Movant’s request to set aside agreed order dismissing bankruptcy and directing debtor to transfer property alleged bases that fell within scope of four other subsections of rule, precluding relief under the catchall provision.

24.63 Failure to File Response

- (7135) *In re Juarez*, Case No. 11-59386 (Bankr. E.D. Mi. 2011) – Motion for Rehearing of Order Awarding Attorney Fees denied. Order

entered after creditor failed to timely file a responsive pleading. Creditor's response only indicated that creditor did not receive the Motion on the date the Motion was filed, but did not establish that the Motion was not received at all. Motion failed to offer any explanation for failure to respond. Motion also failed to evidence any meritorious defense where Motion for Reconsideration admitted that funds were garnished post-petition in violation of stay and failed to return funds to debtor.

24.64 Time for Bringing Motion

- (7136) *Hauk v. Valdiva*, Case No. 14-4573 (Bankr. E.D. Mi. 2015) – Motion was unreasonably late where defendant had knowledge of entry of judgment yet waited 362 days to file motion to set judgment aside.
- (7137) *Spradlin v. Williams*, 2014 WL 5363743 (Bankr. E.D. Ky. 2014) – Rule 60(b)(4) which allows setting aside an order as void must still be brought within reasonable time. Sixth Circuit has generally announced that 3 years is the outside limit for “reasonable” although court can go beyond that if appropriate.
- (7138) *In re Gundrum*, 2014 WL 1664280 (Bankr. S.D. Ohio 2014) – Rule 59, incorporated by reference in Rule 9023 allows a movant to seek a new trial if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice. Motion for a new trial or to alter or amend a judgment must be filed no later than 14 days after entry of judgment. Motion filed more than three weeks after entry of Judgment must be denied as untimely.
- (7139) *Haney v. Educational Credit Management Corp.*, 2012 WL 3683533 (E.D. Ky. 2012) – Motion for Reconsideration constitutes motion to alter or amend judgment that must be filed within 14 days of entry of the order to which the motion is directed. Motion filed 21 days after entry of order must be denied as untimely.
- (7140) *In re Gibson & Epps, LLC*, 468 BR 279 (Bankr. E.D. Tn. 2012) – Motion must be brought within reasonable time following entry of order that is subject of motion. Reasonableness depends on length and circumstances of delay, prejudice to opposing party as a result of delay, and circumstances warranting relief. One year time limit is in addition to, and not in lieu of, requirement that relief be sought in reasonable time, and if reasonable time happens to be less than one year, then movant must seek relief by earlier date. Motion by non-managing member of debtor filed in reasonable time. Although member first sought relief in state court and filed Rule 60 motion only after losing in state court, and motion was brought 16 months after order was entered which could be prejudicial to other party to agreed order who had, by time of motion, been in possession of debtor's property for 14 months, any prejudice was outweighed by fraud perpetrated by debtor's managing member who failed to notify non-managing member of bankruptcy filing, apparently intentionally prevented non-managing member from receiving notices from the court, and failed to notify movant of execution of settlement agreement with lender or execution of quit claim deed transferring property of debtor.
- (7141) *In re Sharfinter*, Case No. 10-68666 (Bankr. E.D. Mi. 2011) – Debtor's Motion for Reconsideration of Order Dismissing Case not filed within reasonable time. Debtor waited until six months after case was dismissed to file a Motion to Reopen Case, that was stricken by the Court as it was not signed. Debtor waited more than four additional months to file second Motion to Reopen Case. Motion to Reopen Case filed 11 months after dismissal is not filed within reasonable time.
- (7142) *Meoli v. Hoffman*, Case No. 09-80269 (Bankr. W.D. Mi. 2011) – Motion for Relief under Rule 60(b)(1) - (3) must be brought within one year of entry order from which relief is sought. Motion under Rule 60(b)(4) – (6) must be brought within reasonable time, not limited to one year.
- (7143) *In re Harvey Goldman & Co.*, Case No. 10-62501 (Bankr. E.D. Mi. 2010) – Local Bankruptcy rule 9024-1 requires any motion for reconsideration to be filed within 14 days of entry of Order. Court lacked authority to extend deadline based on alleged “technical failure” with ECF that prevented filing of document. Court would extend time moving party waited until last minute to file Motion and then was prevented from doing so by ECF shutdown. Although Court had previously announced that ECF filing would be down for approximately 3 hours and yet moving party waited until 10:40 p.m. on last date to file Rule 59 motion and then attempted to do so only during the previously published shut down of ECF, the inaccessibility of the ECF system warranted extension to next business day for filing Motion.
- (7144) *In re Bailey*, Case No. 05-41609 (Bankr. N.D. Ohio 2010) - Motion for Reconsideration was filed within 14 days after entry of the Exemption Order, the Court will consider the Motion for Reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure (incorporated by Rule 9023 of the Federal Rules of Bankruptcy Procedure).

24.65 Conditional Grant of Motion

- (7145) *In re Real America, Inc.*, 2012 WL 1965667 (Bankr. N.D. Ohio 2012) – Rule 60 allows court to condition of grant of rehearing on “just terms”. Court order granting rehearing required debtor to reimburse creditor attorney fees and costs and rectifying monetary prejudice resulting from debtor's default in the terms of the agreed cash collateral order and lender's costs for actions taken in reliance on order granting relief from stay based on debtor's default. Debtor required to pay stated amount by specific date, failing which the order granting stay would be re-imposed and motion for relief from that order would be finally denied.

24.66 Stay Pending Disposition

- (7146) *New Products Corp. v. Tibble*, 2015 WL 5049474 (Bankr. W.D. Mi. 2015) – Court can stay effect of order under Rule 62 pending disposition of Rule 59 motion on “appropriate terms”. Once court denied Rule 59 Motion, request for Stay under Rule 62 is rendered moot.

G. Federal Court Review of State Court Actions

24.67 Limitations – *Rooker-Feldman*

- (7147) *Gardner v. Potestivo & Associates*, Case no. 15-4355 (Bankr. E.D. Mi. 2015) – Rooker-Feldman doctrine precludes Bankruptcy Court from acting as appellate court for decisions rendered by State court. Plaintiff had previously brought same cause of action in lawsuits in both State and Federal Court brought prior to commencement of bankruptcy case. Current Adversary asked Court to effectively determine correctness of those prior decisions in violation of Rooker-Feldman.
- (7148) *In re Duckett*, 2015 WL 5002522 (Bankr. N.D. Ohio 2015) – Section 350 allows court to reopen case to administer assets, accord relief to debtor, or for other cause. Reopening case is ministerial act that has not independent legal significance and determines nothing with respect to merits. However, where court cannot grant any effective relief if case is reopened, court will deny request to reopen. Court lacked authority to afford debtor relief where, after conclusion of bankruptcy case, mortgage holder commenced foreclosure proceedings, obtained state court judgment and sold property, and State Court also denied debtor’s Motion to Dismiss Fraudulent Foreclosure as issues regarding lender’s standing to foreclose had already been raised and decided in state court. Debtor sought to reopen bankruptcy case to again contest mortgage holder’s standing to foreclose. *Rooker-Feldman* precludes losing party in state court from asking federal court to review correctness of decision. Debtor lost in state court and was complaining of injuries caused by state court judgments entered before debtor sought relief in federal court, and debtor was essentially asking federal court to determine whether state court had correctly determined standing to foreclose.
- (7149) *White v. McDermott*, 2015 WL 4612349 (E.D. Mi. 2015) – *Rooker-Feldman* precludes Federal Court review of state court orders where federal court would essentially be acting as appellate court determining correctness of state court ruling. Debtor’s objection to mortgage company proof of claim based on argument that mortgage was invalid barred as State Court had already considered arguments and entered judgment of foreclosure in favor of lender. *Rooker-Feldman* includes issues argued and resolved by state court plus issues that are inextricably intertwined with claims raised in state court. Assertion that mortgage was invalid is nothing more than attempt to relitigate issues decided by state court in foreclosure action. Fact that state court judgment is on appeal when bankruptcy case is filed does not avoid impact of *Rooker-Feldman* as doctrine applies to interlocutory orders and all other orders of state courts. Debtor’s recourse is through state appellate procedures only.
- (7150) *Grant v. Unifund CCR, LLC*, 2014 WL 2444600 (9th Cir. 2014) – Federal Court lacked jurisdiction over suit brought by debtor against collection agency alleging that agency was attempting to collect state court judgment although debtor was allegedly never served with complaint and that agency improperly garnished funds and took other actions to collect state court judgment. Allegations concerning service and validity of judgment were necessarily determined in state court litigation and Federal Courts lack jurisdiction under Rooker-Feldman to act as de facto appellate court. Federal Court could not grant relief to debtor without effectively setting aside state court judgment which would constitute improper exercise of federal jurisdiction. However, Federal Court, having determined that Rooker-Feldman deprived court of jurisdiction, erred in dismissing case with prejudice. Court should have remanded case to state court for further proceedings.
- (7151) *In re Lancett*, 2014 WL ____ (Bankr. W.D.N.C. 2014) – Bankruptcy court lacked jurisdiction to review state court foreclosure order. Debtor essentially asked bankruptcy court to review correctness of state court order in violation of *Rooker-Feldman*.
- (7152) *Bell v. Countrywide Home Loans*, 2014 WL 2618618 (W.D. Ky. 2014) – *Rooker-Feldman* deprives federal courts of jurisdiction over cases brought by state court losers complaining if injuries caused by state court judgments rendered before the district court proceedings commenced, and that invite district court review and rejection of those judgments. Complaint that contested lender’s standing to foreclose mortgages dismissed where prior state court litigation generated final judgment that expressly found that lender had standing, and that judgment was affirmed on appeal. Current action asked district court to sit as quasi-appellate court and enter an order that would circumvent state court final judgment and prior rulings on lender’s standing to maintain action.
- (7153) *Gleason v. GVL Lake properties, LLC*, 2014 WL 1779442 (Bankr. E.D. Ky. 2014) – Federal court lacks jurisdiction to consider correctness of State court orders. After bankruptcy had concluded, member of LLC commenced action in state court against debtor for declaratory relief that upon filing bankruptcy, debtor forfeited interest in LLC. State Court agreed and entered judgment that under state law, debtor lost rights in LLC. Debtor’s subsequent suit in bankruptcy case to regain membership rights sought to reconsider correctness of state court action which is barred by Rooker-Feldman. Suit was brought by state court loser, complaining of injuries caused by state court judgment rendered before district court proceedings commenced and invited district court review and rejection of that judgment.
- (7154) *Silagy v. Protz*, 2014 WL 1345302 (Bankr. N.D. Ohio 2014) – *Rooker-Feldman* protects jurisdictional division of authority between federal and state courts by preventing lower federal court from sitting as appellate court over state decision. Doctrine governs state court losers complaining of injuries caused by state court judgments rendered before the federal court proceedings commenced and that invite district court review and rejection of that judgment. Trustee’s motion for turnover of debtor’s marital interest that was awarded in pre-petition dissolution of marriage action did not attempt to undercut or reverse state court order; instead, turnover sought to enforce state court order by requiring remittance to trustee of property that had already been determined by state court as debtor’s interest in marital property. State court had not valued property awarded to debtor, leaving bankruptcy court with task of valuing debtor’s interest in the asset. Trustee was not seeking to alter or amend state court order or to seek relief that was inconsistent with state court order.
- (7155) *Skyway Investment Corp. v. Tushman*, 2013 WL 5015591 (6th Cir. 2013) – Federal court is precluded from reviewing correctness of state court judgment. Action challenging execution of deed would be dismissed where deed was executed pursuant to state court judgment, and action would necessarily involve determining the propriety of the state court order.
- (7156) *J. Edward Kloian Foundation v. Findling*, 2013 WL 6859143 (E.D. Mi. 2013) - Federal court lacks jurisdiction under Rooker-Feldman to

review orders entered by state courts. Federal courts cannot act as “super-appellate” courts to review correctness of state court orders. If the source of the alleged injury is the state court order, federal courts lack jurisdiction to hear case. Rooker-Feldman precluded federal court from considering whether plaintiff was the alter-ego of its founder, where state court had already entered judgment against founder and entered supplemental order finding that foundation was alter-ego and ordering assets held by foundation to be sold to pay judgment against founder. Federal court complaint sought declaration that foundation was not alter-ego and to enjoin sale of assets previously ordered by state court, and would necessarily have required federal court to consider accuracy of state court determinations.

- (7157) *Cline v. Mortgage Electronic Registration Systems, Inc.*, 2013 WL 6687257 (S.D. Ohio 2013) – Rooker-Feldman precludes federal court from looking behind state court judgment. Rooker-Feldman prevents federal court from reviewing alleged claims of error in state court decision.
- (7158) *In re Medlar*, 2013 WL 6152325 (Bankr. N.D. Ohio 2013) –Bankruptcy court lacked jurisdiction under Rooker-Feldman to look behind foreclosure judgment itself, precluding debtor from alleging any invalidity in the foreclosure or sale process that had already been validated by state court orders.
- (7159) *Dickow v. JPMorgan Chase Bank*, 2013 WL 6051018 (E.D. MI. 2013) – Rooker-Feldman precludes federal court review of issues resolved in state court proceedings. State court judgment awarding possession of property to foreclosing lender including findings that lender had standing to pursue foreclosure and that trial court had jurisdiction to enter judgment of possession. Federal Court complaint alleging invalidity of foreclosure sale based on lack of recorded assignment of mortgage was necessarily decided in state court, and federal court would not reconsider that holding. Federal court is not “super-appellate” court with authority to review or reverse state court judgments.
- (7160) *Kapla v. FNMA*, 485 BR 136 (Bankr. E.D. Mi. 2012), *aff’d* 2014 WL 346019 (E.D. Mi. 2014) – Adversary complaint, to extent it sought to challenge validity of foreclosure sale of property and entry of state court order awarding possession based on deed received from successful purchaser, was prohibited by *Rooker-Feldman*. Counts directly challenged validity of deed and state court judgment and action would require Bankruptcy court to review state court lawsuit and make finding that state court judgment was incorrect on merits.
- (7161) *Wheeler v. Federal National Mortgage Assn.*, 2013 WL 2200398 (E.D. Mi. 2013), *report and recommendation adopted*, 2013 WL 3456966 (E.D. Mi. 2013) – *Rooker-Feldman* precludes Federal Court review of State Court order of eviction. Invalidation of foreclosure sale would directly attack validity of foreclosure, requiring court to reverse state court judgment.
- (7162) *In re Sinta*, 2013 WL 1946185 (E.D. Mi. 2013) – *Rooker-Feldman* precludes Federal Court review of State Court order of eviction. Debtor filed Chapter 13 to prevent eviction following foreclosure sale and expiration of redemption. Bankruptcy Court granted stay relief and debtor appealed. Court refused to stay eviction proceedings as Federal court lacks jurisdiction to review State court eviction order.
- (7163) *In re Leigh*, 2013 WL 1787964 (Bankr. S.D. Ohio 2013) – Rule 60(b)(4), incorporate by reference through Bankruptcy Rule 9024, requires a court to set aside a judgment where the court finds the judgment to be void. If the judgment is void, then the court lacks the ability to consider equitable or other factors and the court must vacate the judgment. A judgment is void only in the rare instance where it is premised either on jurisdictional error such that the court lacks jurisdiction over the party or over the subject matter of the dispute; or where a violation of due process deprives party of notice or opportunity to be heard. Rooker-Feldman resulted in Order sustaining objection to claim being void for lack of subject matter jurisdiction. Bankruptcy Court lacks jurisdiction under Rooker-Feldman to reconsider validity of mortgage or amount of debt where mortgage has been foreclosed in judicial proceeding and state court has issued judgment determining status of mortgage and determining amount of debt. Objection to claim in bankruptcy court was effort to look behind state court determinations of validity and amount of lien which is precluded by Rooker-Feldman.
- (7164) *Kellner v. Fifth Third Bank*, 2013 WL 1785481 (Bankr. S.D. Ohio 2013) – Rooker-Feldman prevents federal court from engaging in what amounts to appellate review of state court proceedings. Rooker-Feldman precludes federal courts other than Supreme Court from considering whether state court judgment was unconstitutional or violated federal law. However, Rooker-Feldman does not prevent federal court from considering matters that are independent of the state court order itself, even if federal claims deny legal conclusion previously reached by state court. Further, doctrine does not apply to third parties not in privity with parties to state court action. Bankruptcy Court not precluded by Rooker-Feldman from considering whether lender had properly perfected lien on property based on prior state court final judgment of foreclosure. Trustee was asserting independent grounds under Section 544 to avoid lien which did not challenge correctness of state court judgment that, as between parties, lien was valid and enforceable. Further, Trustee is not in privity with debtor at state court level.
- (7165) *Young v. Fannie Mae*, 2013 WL 12842332 (N.D. Ohio 2013) – Rooker-Feldman doctrine precludes Federal review of state court decisions even if challenges allege that state court action was unconstitutional. Federal review of state court judgments is limited to Supreme Court. Unsuccessful party in state court case is precluded from seeking what amounts to appellate review of state court order by federal court. Cause of action based on alleged wrongful foreclosure precluded by Rooker-Feldman where state court had entered final judgment foreclosing mortgage.
- (7166) *Sandweiss Law Center, PC v. Kozlowski*, 2013 WL 396255 (E.D. Mi. 2013) – *Rooker-Feldman* precludes Federal Court review of state court orders. Plaintiff’s actions against debtor which alleged only that state court divorce judgment improperly distributed marital assets sought merely to overturn state court judgment in violation of *Rooker-Feldman*.
- (7167) *Rugiero v. Dinardo*, 2012 WL 4800059 (6th Cir. 2012) – *Rooker-Feldman* precludes Federal court review of State court orders and judgments that are rendered prior to commencement of bankruptcy case. However, *Rooker-Feldman* does not preclude Federal Court review of efficacy and validity of State Court actions taken after commencement of bankruptcy case. Federal Court could exercise properly

invoked concurrent jurisdiction to determine whether obligation is non-dischargeable Domestic Support Obligation notwithstanding State Court judgment entered post-petition that declared the obligation to be domestic support.

- (7168) *In re Kaid*, 2012 WL 1929906 (Bankr. E.D. Mi. 2012) – Federal Court is barred by Full Faith and Credit Act, 28 USC 1738, from looking behind or disregarding state court judgment. Where State court had already entered judgment in favor of creditor on guarantee of corporate obligation, Bankruptcy Court precluded from finding that creditor lacked standing to assert claim. Creditor had sold the note and mortgage but retained the guarantee, and then instituted litigation to collect on the guarantee and state court entered judgment. *Rooker-Feldman* precluded Bankruptcy Court from reconsidering whether creditor had standing to enforce the guarantee or whether severance of guarantee from note and mortgage precluded enforcement by original creditor.
- (7169) *Assasepa v. JPMorgan Chase Bank*, 2012 WL 88162 (S.D. Ohio 2012) – *Rooker-Feldman* doctrine stands for the proposition that parties who lose in state court may not seek federal court review of the state-court proceedings. *Rooker-Feldman* does not preclude federal review if the plaintiff presents an independent claim even if predicate of federal claim denies legal conclusion that state court has reached. If the source of the injury is the state court judgment, then *Rooker-Feldman* precludes review. If the source of the injury is some other source, such as the actions of a third party, then plaintiff can maintain an independent cause of action. Plaintiff's complaint alleged violations of federal law including TILA and RESPA throughout the foreclosure process and that lender committed fraud by using "robo-signed" documents. Any injury plaintiff may have suffered is not the result of the foreclosure judgment itself, but of the processes and conduct throughout the loan and foreclosure process. Thus, actions may not be precluded by *Rooker-Feldman*.
- (7170) *Rugiero v. Dinardo*, 2012 WL 4800059 (E.D. Mi. 2011) – *Rooker-Feldman* precludes Bankruptcy Court from reconsidering correctness of state court judgment. State Court had concurrent jurisdiction to determine whether obligation owed to creditor was non-dischargeable domestic support obligation under exception to automatic stay. *Rooker-Feldman* precludes Bankruptcy Court from reconsidering or reviewing that conclusion.
- (7171) *In re Mayer*, 41 BR 702 (E.D. Mi. 2011) – *Rooker-Feldman* is implicated when a plaintiff complains of being injured by a state court decision. *Rooker-Feldman* is not implicated simply because a party attempts to litigate an issue in federal court that has already been litigated in state court. Where a federal plaintiff presents some independent claim, even if that claim denies a legal conclusion that a state court has reached in a case to which he was a party, *Rooker-Feldman* does not prevent Federal Court from asserting jurisdiction. Court will then look to state law to determine whether the defendant prevails under principles of preclusion. Action to avoid alleged preferential transfer of property, created when State Court imposed constructive trust, was not attack on validity of Final Judgment but only sought to determine effect of judgment in light of principals of bankruptcy law. Debtor's attack on provision of Divorce Judgment that purported to impress constructive trust was attack on prohibited by *Rooker-Feldman*. However, where Divorce Judgment was not clear as to whether specific property was subject to constructive trust, Bankruptcy Court can review matter to determine whether Divorce Judgment was sufficient to impose constructive trust.
- (7172) *Edwards v. Thornton*, 2011 WL 134894 (6th Cir. 2011) – Action alleging violation of automatic stay violated *Rooker-Feldman*. Defendant transferred property pursuant to State Court Final Judgment. Court precluded from considering argument that underlying State Court judgment was void as Federal Court lacks subject matter jurisdiction to review validity of State Court judgment. Attack is not one on method used to enforce judgment, but on validity of judgment itself, which is matter which Federal Court cannot collaterally review.
- (7173) *Miller v. Deutsche Bank National Trust Co.*, 2011 WL 1807015 (10th Cir. BAP 2011) – Debtor prohibited from contesting lender's standing to enforce mortgage where issues had previously been addressed by State Court in proceeding to confirm non-judicial foreclosure sale.
- (7174) *Essek v. Vanderbilt Mortgage, Inc.*, 2011 WL 97716 (E.D. Ky. 2011) – *Rooker-Feldman* precludes District Court action for damages resulting from state court foreclosure proceeding.
- (7175) *In re Bunting*, Case No. 07-20864 (Bankr. E.D. Mi. 2010) – *Rooker-Feldman* doctrine prohibits party losing in state court from seeking what in substance would be appellate review of the state court judgment in Federal Court based on the claim that the state court judgment violates the loser's federal rights or claims based on alleged state court errors in construing federal law or constitutional claims. State and federal claims need not be identical as long as the relief requested in federal court would effectively reverse the state court decision or void its ruling. Bankruptcy Court precluded from looking behind state court divorce judgment that resulted from long and extensive trial proceedings and multiple appellate proceedings including determination of amounts owed by debtor to ex-spouse. However, Court is not precluded for reviewing debtor's claim of credits owed and offsets to the judgment amount using standards set under Rule 3001.
- (7176) *Willis v. Chase Home Finance, LLC.*, 2010 WL 3430712 (N.D. Ohio 2010) – *Rooker-Feldman* doctrine prohibits Federal Court from reviewing propriety of state court judgment of foreclosure. Where federal relief can only be predicated upon a conviction that the state court was wrong, action constitutes a prohibited appeal of the state court judgment. *Rooker-Feldman* doctrine precludes a district court's jurisdiction where the claim is a specific grievance that the law was invalidly or unconstitutionally applied in plaintiff's particular case as opposed to a general constitutional challenge to the state law applied in the state action.
- (7177) *In re Perkins*, Case No. 09-32328 (Bankr. E.D. Mi. 2010) - *Rooker-Feldman* does not preclude Bankruptcy Court from reconsidering amount of claim where State Court Judgment was a default judgment and the State Court calculations of damages appears to result from mistake. State Court Judgment contained numerous mathematical errors as restful of Court's failure to calculate "cost to cover" for undelivered goods, failed to credit debtor certain amounts, and failed to account for payments made by debtor.

- (7178) *Jones v. Federal National Mortgage Association*, Case No. 10-1042 (Bankr. N.D. Ohio 2010) - Rooker- Feldman prohibits Federal Court review of the proceedings already conducted by lower tribunal to determine whether it reached its result in accordance with law and applies to interlocutory orders and judgments of lower state courts. If the state court decision is the source of the injury, the doctrine bars jurisdiction in Federal court. If, on the other hand, the plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached then Federal Court has jurisdiction subject to state law determination principles of preclusion. State court denial of Motion to Dismiss based on alleged lack of standing does not preclude Federal Court from considering standing as state court order determined only that complaint stated cause of action and did not constitute final order on issue.
- (7179) *Williams v. Franklin Towers Homeowners Association, Inc.*, Case No. 08-55109 (9th Cir. 2010) - *Rooker-Feldman* prohibits Federal Court appellate review of State Court Order denying Motion to disqualify judge.
- (7180) *Madera v. Ameriquest Mortgage Co.*, 586 F.3d 228 (3d Cir. 2009) – *Rooker-Feldman* doctrine prevents Chapter 13 Debtor’s action to rescind mortgage under TILA where State Court has already issued Judgment of Foreclosure. *Rooker-Feldman* prevents Federal Court for exercising appellate jurisdiction over State Court judgments. Rescission action effectively seeks finding that mortgage was invalid which would negate effect of foreclosure judgment in State Court. In foreclosing mortgage, State Court expressly or implicitly deemed mortgage valid.
- (7181) *Hunt v. LAJ, Inc.*, 2009 WL 2601921 (Bankr. E.D. Tn. 2009) – A State Court Judgment that purports to modify the discharge is void *ab initio*. However, where State Court Judgment is based on a debt that was not discharged, the State Court Judgment is not void and the *Rooker-Feldman* doctrine prevents Federal Court review of the State Court Judgment. Debtor defaulted under the confirmed Chapter 11 Plan and the creditor obtained a judgment in State Court. Debtor sought injunction in Bankruptcy Court claiming that Creditor was attempting to recover the entire claim and not just that portion of the claim that Debtor was to pay pursuant to the confirmed Chapter 11 Plan. Confirmation of the Plan discharged the pre-petition liability and replaced that with a “new” claim based on the treatment in the confirmed Plan. Creditor’s action to recover amounts owed under the confirmed Plan did not constitute attempt to collect discharged debt, but only debt owed pursuant to the confirmed Plan as to which the discharge injunction did not apply. *Rooker-Feldman* would bar any effort by Debtor to dispute in the Bankruptcy Court the amount properly owed to Creditor pursuant to the confirmed Plan where the action had already been brought in and ruled on by State Court.
- (7182) *Hamilton v. Herr*, 540 F.3d 367 (6th Cir. 2008) - *Rooker-Feldman* doctrine prevents Federal Court from looking behind state Court judgment and acting as “super-appellate Court” for matters within the State Court jurisdiction. However, effect of discharge in bankruptcy is entirely federal matter, and State Court lacks jurisdiction to enforce a claim that has been discharged in Bankruptcy. Therefore, *Rooker-Feldman* does not preclude Bankruptcy Court from entering orders to enforce discharge. “State Courts are allowed to construe the discharge in bankruptcy, but what they are not allowed to do is construe the discharge incorrectly, because an incorrect application of the discharge order would be equivalent to a modification of the discharge order. Similarly, the state-Court judgment in the case at hand would constitute a modification of the discharge in bankruptcy only if the debt was actually discharged pursuant to the bankruptcy Court’s discharge order.” Action remanded to the bankruptcy Court to determine whether the debt was discharged. If the debt was discharged, then the state-Court judgment was a modification of the discharge order and is void *ab initio*. If the debt was not discharged pursuant to the bankruptcy Court’s discharge order, then the state-Court judgment was not a modification of the discharge order and the *Rooker-Feldman* doctrine would bar federal-Court jurisdiction.

24.68 Limitations – Jurisdictional Priority

- (7183) *Silagy v. Protz*, 2014 WL 1345302 (Bankr. N.D. Ohio 2014) – Jurisdictional priority rule provides that when actions involving nearly identical parties and issues have been filed in two different district courts, the court in which the first suit was filed should generally proceed to judgment. Rule applies only to courts of equal rank at the same level of government. Rule did not prevent Federal Court from ruling even if same action had already been filed in state court, as the courts involved separate levels of government.

H. Section 341 – Court Authority

24.69 Generally

- (7184) *In re McFadden*, 477 BR 686 (Bankr. N.D. Ohio 2012) – Court has extremely limited authority with regard to 341 meetings. Meetings under § 341 are within the authority of the United States Trustee. Court cannot preside over or attend 341 meetings by statutory mandate. Meetings are administrative in nature, not adjudicatory. Purpose is to allow creditors and trustee to determine if assets have improperly been disposed of or concealed or if there are grounds for objection to discharge. Creditor’s examination of the debtor is not unfettered. If the debtor believes that the questions are beyond the scope permitted, or unduly repetitious, the debtor may object and even refuse to answer, and chapter 7 panel trustee given time constraints in conducting 341 meetings.

24.70 Excusal of Attendance

- (7185) *In re Emerson*, Case No. 12-0864 (Bankr. W.D. Mi. 2015) – Court lacks authority to excuse debtor’s attendance at Section 341 meeting. Section 343 provides that debtor “shall” attend. Even if court had discretion to do so, court would not excuse attendance where debtor’s inability to attend resulted from debtor’s voluntarily taking mission trip out of country. Events were completely foreseeable and entirely within control of debtor. Debtor’s counsel’s suggestion that case was “no asset” case for which attendance would be needless was not basis to deny trustee right to conduct meeting and investigate debtor’s financial condition.

24.71 Compelling Attendance

- (7186) *In re McMillian*, Case No. 15-40417 (Bankr. E.D. Mi. 2015) – Rule 2005 allows court to enter order compelling debtor to attend Section 341 meeting on motion of any party in interest, supported by an affidavit, alleging that the examination of the debtor is necessary for proper administration of the estate and there is reasonable cause to believe that debtor is about to leave or has left residence or place of business to avoid examination; or that debtor has evaded service of a subpoena or order to attend; or that debtor has willfully disobeyed a subpoena or order to attend. Court may then enter order to the marshal or other officer authorized by law to bring debtor before court without unnecessary delay and if court finds at the hearing that the allegations are true, the court shall cause debtor to be examined forthwith. Court could not grant order to compel where Motion was not accompanied by affidavit. Court also could not grant relief to the extent the Motion sought order for marshal to incarcerate debtor until Section 341 meeting could be held. However, Motion and court record demonstrates sufficient cause to enter order for Debtor to appear at a hearing regarding debtor's failure to attend the 341 meeting and to show cause why the court should not compel attendance at a rescheduled 341 meeting.

I. Discrimination

24.72 Section 525

- (7187) *Ellis v. Dep't of Homeland Security*, 2013 WL 3480259 (Bankr. D. Colo. 2013) – Department of Homeland Security did not violate Section 525 by denying renewal of security clearance where “bad debt” threshold required DHS to determine whether security clearance should be revoked. Debtor can retain clearance by demonstrating that debtor is in Chapter 13 and is performing under Plan. Delay in renewing clearance was not due solely to Chapter 13 filing, but resulted from debtor's failure to timely provide documentation to DHS showing that debtor's was performing under plan.
- (7188) *In re Mead*, 2013 WL 64758 (Bankr. E.D.N.C. 2013) – IRS discriminated against debtor when IRS refused to abide by pre-petition Offer in Compromise. Prior to commencement of bankruptcy, debtor entered into OIC to repay liabilities in the reduced amount of \$4,000, to be paid in four quarterly installments. IRS accepted the offer and debtor made one payment before filing bankruptcy. IRS filed claim in debtor's case for full tax liability and debtor objected. IRS could not disregard OIC merely because debtor filed bankruptcy, as IRS would not revoke OIC under similar circumstances for non-bankrupt taxpayer. Congress prohibited all discriminatory treatment based solely on bankruptcy filing, and that would include any effort by IRS to revoke OIC based on bankruptcy filing.
- (7189) *Myers v. Toojay's Management Corp.*, 640 F.3d 1278 (11th Cir. 2011) – Bankruptcy Code's antidiscrimination provision does not prohibit a private employer from denying employment to an individual on the ground that he is or has been in bankruptcy; although subsection (a) of the provision expressly prohibits a government employer from refusing to hire someone based on a bankruptcy filing, subsection (b), which applies to private employers, is conspicuously different, in that it forbids the private sector from discriminating against those persons who are already employees but says nothing about denying employment because of bankruptcy.
- (7190) *Burnett v. Stewart Title, Inc.*, 2011 WL 754152 (5th Cir. 2011) – Section 525(a) specifically prohibits denial of employment based on bankruptcy only with respect to governmental employers, private employer can refuse to hire solely based on Chapter 13 case.
- (7191) *Rea v. Federated Investors*, 2010 WL 5094250 (3d Cir. 2010) – Antidiscrimination provision of Section 525 does not prohibit private employer from discriminating against prospective employee on basis of prior bankruptcy filing. Although Section 525(a) prohibits a governmental agency from denying employment based on bankruptcy, Section 525(b) which applies to private employers does not contain that provision. Section 525 only prohibits private employers from discriminating against debtors who are already employed.
- (7192) *Davis v. Crumley Backhoe Service*, Case No. 09-16031 (11th Cir. 2010) – Section 525 does not apply to conduct that occurred prior to the commencement of the bankruptcy proceeding. Section 525(b), which prohibits discrimination in employment, applies only to “an individual who is or has been a debtor” and does not apply to an individual who “will be” a debtor at the time of the alleged discrimination. Debtor terminated from employment prior to filing bankruptcy has no cause of action against Employer under Section 525.
- (7193) *In re Richard*, Case No. 07-51319 (Bankr. E.D. Mi. 2009) – Section 525 applies only to governmental units. A governmental unit is generally limited to the United States; States; Commonwealths; Districts; Territories; municipalities; foreign states; or other foreign or domestic government. “Government” does not include any entity that owes its existence to state action such as the granting of a charter or license. Otherwise private entity can be “government” if it carries out some governmental function or if there is a significant entwinement with governmental policies, management and control. Merely receiving public money and being subject to governmental control is not enough. Inquiry is whether the private entity is performing traditional and important governmental functions and whether there is evidence of entwinement with governmental policies, management or control. Lender which is member of Farm Credit Association, an independent agency of the executive branch that serves US agricultural interests, is sufficiently entwined with the US Government policies, management and control qualifies as governmental unit. However, lender's refusal to pay patronage dividend does not seriously affect Debtor's livelihood or the “fresh start”, which is the measure for whether actions constitute discrimination within Section 525. Further, implementation of standard practices and procedures that apply to all customers generally do not constitute discrimination in violation of Section 525 as the decision does not single out the Debtor for adverse treatment based on the discharge.

J. Consolidation

24.73 Authority to Substantively Consolidate Cases

- (7194) *In re Cyberco Holdings, Inc.*, 2010 WL 2720794 (Bankr. W.D. Mi. 2010) – Section 105 is statutory grant of authority to substantively consolidate cases and traces equitable origin to Bankruptcy Act of 1898. Substantive consolidation is the shorthand reference for a “long

recognized” process that allows a court to exercise summary jurisdiction over all of the debtor’s property, and is accomplished thru the application of Section 542 regarding turnover and Section 502(j) regarding treatment of claims as dictated by equities of case. When consolidation is sought, Court should view the effort as actually a process that involves specific Code sections that, when applied, result not in the merger of entities, but rather in nothing more than the realignment of assets and liabilities within the affected group.

- (7195) *Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) – Section 105 is statutory grant of authority for the Court to exercise equitable remedies including substantive consolidation over non-Debtor parties. Bankruptcy Code creates an overriding federal interest in the equitable and efficient distribution of a Debtor’s property among its creditors which is consistent with purpose of substantive consolidation. Chapter 7 Trustee has standing to request Substantive consolidation as an equitable remedy under federal law.
- (7196) *Simon v. ASIMCO Technologies, Inc.*, Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Section 105 is statutory authority on which Court can substantively consolidate cases and includes ability to consolidate non-debtor and debtor entities. However, substantive consolidation is extraordinary remedy to be used sparingly, as doctrine expressly disregards legal separateness of otherwise legally distinct entities.

24.74 Standing to Request Substantive Consolidation

- (7197) *First State Bank of East Detroit v. Welsh*, Case No. 10-4795 (Bankr. E.D. Mi. 2010) – Although Creditor lacked standing to seek substantive consolidation, Trustee’s later intervention in adversary proceeding and joinder in creditor’s request resolved standing issues.
- (7198) *In re Cyberco Holdings, Inc.*, 2010 WL 2720794 (Bankr. W.D. Mi. 2010) – Creditor lacks standing to seek substantive consolidation. Consolidation has its roots in Section 542 regarding turnover of property. Creditors do not have any direct right to seek relief under Section 542, as those powers are reserved to the estate. Even if Court could authorize derivative standing, Court would not do so where there was no evidence that Trustees had avoided pursuing whatever rights their respective estates would have had to take control of property of the estate.
- (7199) *Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) – Chapter 7 Trustee has standing to request Substantive consolidation as an equitable remedy under federal law. Consolidation appropriate in action to recover allegedly fraudulent transfers made by related Debtor entities to multiple recipients, as consolidation will further efficient administration of case.

24.75 Grounds for Substantive Consolidation

- (7200) *Spradlin v. Beads & Steeds Inn, LLC*, 2014 WL 4959143 (Bank. E.D. Ky. 2014) – Trustee’s Complaint to substantively consolidate debtor and debtor’s non-bankruptcy businesses denied. Substantive consolidation is judicially created doctrine that treats separate legal entities as if they were merged into a single entity, pooling the assets and liabilities to produce single pool of assets to satisfy debts of both entities to ensure equitable treatment of creditors. Consolidation is extra ordinary remedy to be used only where there are no other adequate remedies, and court must be particularly careful where entity to be consolidated is not itself a debtor in bankruptcy, and requires proof that the entities pre-petition disregarded separateness so significantly that creditors relied on the breakdown of entity borders and treated them as a single entity; and that post-petition assets and liabilities re so scrambled that separating them is prohibitive and hurts all creditors. Complaint failed to state cause of action for consolidation where complaint alleged only that debtor used entity vehicles for personal use and that debtor used the corporate line of credit for debtor’s personal use. Complaint did not allege that any creditors of either entity treated them as one entity or that the entities disseminated information to creditors that would cause creditors to be misled as to separateness of entities. While there may be some confusion regarding ownership of assets, complaint did not show that assets were so hopelessly intertwined that separation was impossible. Court would not use equitable power to substantively consolidate non-debtor, effectively denying the non-debtor of its substantive due process rights that would be present in involuntary case.
- (7201) *In re James*, 498 BR 813 (Bankr. E.D. Tn. 2013) – Court can consolidate separate estates of husband and wife who filed separate chapter 7 proceedings for the limited purpose of administering entireties owned property for benefit of joint creditors. Consolidation is appropriate where there is substantial identity of assets, liabilities and handling of financial affairs between debtor spouses; and harm would result if consolidation is denied. Parties had substantial identity of financial affairs, where each party listed all creditors of the other party; both filings were caused by the failure of debtor-husband’s business and not for reasons unrelated to financial affairs of other spouse; debtor’s had very little personal property, all of which was exempt; and consolidation would allow for efficient administration of major asset, which was non-exempt equity in debtors’ jointly owned residence for benefit of joint creditors. Cases would be consolidated for sole purpose of administering non-exempt value of residence for benefit of joint creditors.
- (7202) *First State Bank of East Detroit v. Welsh*, Case No. 10-4795 (Bankr. E.D. Mi. 2010) – Complaint failed to state cause of action for substantive consolidation of debtor with non-debtor entities where complaint alleged only in conclusory terms that it was impossible segregate assets and liabilities of debtor and the non-debtor entities. Court would permit Trustee additional time to investigate and amend complaint if Trustee determined further prosecution of adversary complaint appeared warranted.
- (7203) *Simon v. ASIMCO Technologies, Inc.*, Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Substantive consolidation requires a substantial identity between entities to be consolidated and that consolidation avoid some harm or produce some benefit. Benefit must “heavily” outweigh harm that would result from consolidation. Court will substantively consolidate non-debtor entity with debtor only where either: (i) the debtor and the non-debtor entity in their pre-petition conduct disregarded the separateness of their respective entities so significantly as to lead their creditors to treat them as one legal entity; or (ii) that post- petition, the assets and liabilities of the debtor and the non-debtor entity sought to be consolidated are so hopelessly scrambled and commingled that it is impossible to separate them and tell them apart thereby resulting in harm to all creditors. That two companies conduct joint board meetings or use consolidated financial statements is not sufficient to warrant substantive consolidation.

- (7204) *Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Substantive consolidation is employed in cases where the interrelationships of the Debtors are hopelessly obscured and the time and expense necessary to attempt to unscramble them is so substantial as to threaten the realization of any net assets for all of the creditors. Consolidation appropriate in action to recover allegedly fraudulent transfers made by related Debtor entities to multiple recipients, as consolidation will further efficient administration of case.

24.76 Effect of Substantive Consolidation

- (7205) *In re Appalachian Fuels, LLC*, 2013 WL 1694769 (6th Cir. BAP 2013) – Substantive consolidation is employed in cases where the interrelationships of the debtors are hopelessly obscured and the time and expense necessary to attempt to unscramble them is so substantial as to threaten the realization of any net assets for all of the creditors. In any consolidated case, there is implicit in the Court's decision to consolidate the conclusion that the practical necessity of consolidation to protect the possible realization of any recovery for the majority of the unsecured creditors far outweighs the prospective harm to any particular creditor.
- (7206) *In re Cyberco Holdings, Inc.*, 2010 WL 2720794 (Bankr. W.D. Mi. 2010) – When consolidation is sought, Court should view the effort as actually a process that involves specific Code sections that, when applied, result not in the merger of entities, but rather in nothing more than the realignment of assets and liabilities within the affected group.
- (7207) *Simon v. ASIMCO Technologies, Inc.*, Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Substantive consolidation is judicially created doctrine that treats separate legal entities as if they were merged into a single entity, pooling assets and liabilities to produce common fund to satisfy creditors of consolidated entities. A cause of action for substantive consolidation is not the same as a cause of action to pierce a corporate veil, nor is it the same as a cause of action to determine whether, under state corporate law, there is a basis to find that two or more corporations are alter egos of one another.
- (7208) *Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Substantive consolidation treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities and claims of creditors against separate Debtors morph to claims against the consolidated survivor.

24.77 Substantive Consolidation – Non-debtor entities

- (7209) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Substantive consolidation of debtor and non-debtor entities is judicially created doctrine that treats separate legal entities as if they were merged into a single entity, pooling the assets and liabilities of the two entities, so that the assets of the two entities may result in a common fund available to satisfy the debts of both entities. Substantive consolidation is warranted only where it is shown that either: (i) the debtor and the non-debtor entity in their prepetition conduct disregarded the separateness of their respective entities so significantly as to lead their creditors to treat them as one legal entity; or (ii) that post-petition, the assets and liabilities of the debtor and the non-debtor entity sought to be consolidated are so hopelessly scrambled and commingled that it is impossible to separate them and tell them apart thereby resulting in harm to all creditors. Evidence did not indicate that debtor and non-debtor comingled financial affairs or acted in any way to disregard separateness, nor did plaintiff identify even one creditor that was somehow confused about the separateness of debtor and non-debtor because of some conduct of debtor and non-debtor in which they disregarded separateness. There was no co-mingling of assets present. Although debtor listed in schedules certain assets also claimed to be owned by non-debtor, pre-petition state court judgment determined that those assets were owned solely by non-debtor and that debtor had no right, title or interest in or to those assets. Given clear ruling of state court, there was no scrambling or co-mingling of assets post-petition, as debtor had no assets post-petition.

24.78 Procedural (Administrative) Consolidation

- (7210) *Blaisngame v. Church Joint Venture, LP*, 2015 WL 3952793 (W.D. Tn. 2015) – Rule 42 allows court to consolidate separate actions that present common questions of law or fact. Goal is promote expeditious and efficient resolution of actions while providing justice to parties. Court must weigh interests of judicial economy against potential for delay, expense, confusion or prejudice, and must determine whether risks of prejudice or possible confusion are outweighed by danger of inconsistent adjudications, burden on parties, witnesses and judicial resources if matters are not consolidated, length of time to resolve multiple separate trials, and expenses related to single trial versus multiple trials. Motion must contain sufficient factual and legal information to show commonality. Bare allegation that “lis pendens was improperly recorded lies within the context and framework of Alter Ego/Fraud Action” does not explain what legal or factual issues are common or intertwined or any relationship between separate proceedings and fails to address risk of confusion or prejudice if matters are consolidated.
- (7211) *In re Barrington Spring House, LLC*, 2014 WL 1652195 (Bankr. S.D. Ohio 2014) – Court can administratively consolidate cases where joint proceedings would expedite cases. Interconnection of cases can constitute basis to procedurally consolidate cases. However, mere fact that debtor owned and controlled two related bankrupt entities is not sufficient, where each case was different in nature; and different creditors located in different places; one case was under control of Chapter 11 trustee with assets soon to be sold; and creditors of corporate debtors were largely located in the United States, debtor's personal creditors were largely located outside the US and debtor's personal financial affairs were much more complex. Consolidation would unduly complicate matters for creditors and other interested parties, and cases are such that many motions, objection and other filings would be discrete to each case rather than applicable to all three.

K. Duties of Debtor

24.79 Duty to Cooperate with Trustee

- (7212) *In re Nunez*, 2014 WL 4473842 (Bankr. Colo. 2014) – Court would deny debtor’s request to modify plan where debtor did not provide to Trustee updated Schedules I and J, tax returns or current paystubs. Documentation was necessary to allow Trustee to evaluate feasibility of modification that sought to increase debtor’s plan payment and to ensure compliance with requirement that debtor file all tax returns. Further, Section 541 requires debtor to cooperate with Trustee, and duty does not cease upon confirmation of plan.
- (7213) *In re Wengerd*, 2010 WL 4054322 (Bankr. N.D. Ohio 2010) – Section 521(a)(3) imposes continuing duty to cooperate with trustee as necessary to allow trustee to perform duties. Debtor required to provide documents and accounting of debtor’s pre-petition business activities to enable trustee to perform duty to investigate financial affairs of the debtor of whether the information relates to exempt assets, whether the information relates to property of the estate and whether, in the debtors’ opinion, the information is interesting.
- (7214) *In re Neal*, 424 BR 235 (Bankr. E.D. Mi. 2010) – Debtor has a duty to cooperate with the Trustee in the performance of Trustee’s duties. Debtor who occupied house that was property of the estate refused to cooperate with the Trustee in the marketing of the property. Court ordered Debtor to vacate the property immediately to permit Trustee to market and sell the property.

24.80 Schedules and Statements

- (7215) *Swanigan v. Northwest Airlines, Inc.*, 2010 WL 2465387 (W.D. Tn. 2010) - Debtor seeking bankruptcy protection must file a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor’s financial affairs including a legal causes of action. Duty of disclosure is a continuing one, and a debtor is required to disclose all potential causes of action. The importance of this disclosure duty cannot be overemphasized.

24.81 Change of Address

- (7216) *In re Tellis*, Case No. 12-67630 (Bankr. E.D. Mi. 2015) – Motion to Reinstate Stay following entry of Order Lifting Stay is a Motion for Reconsideration of Order under Rule 9023 and 9024. Debtor’s motion failed to state basis for relief where debtor’s only argument was that creditor served the motion on debtor at an incorrect address. Motion was served on debtor at address of record with the Bankruptcy Court. Debtor did not file a notice of change of address with the court. Further, debtor’s counsel received a copy of the motion by ECF. Debtor had ample notice of the Motion and Motion did not otherwise allege any excusable neglect or other valid cause to set aside order.

24.82 Incompetent Debtor - Appointment of “Next Friend”

- (7217) *In re Ross*, Case No. 11-64877 (Bankr. E.D. Mi. 2015) – Court would not appoint “next friend” on behalf of allegedly incompetent debtor based on Durable Power of Attorney for Health Care, as power of attorney did not grant named party authority over debtor’s personal financial affairs, and Motion did not allege that a guardian had been appointed for Debtor.
- (7218) *In re Blascak*, Case No. 12-61973 (Bankr. E.D. Mi. 2012) – Debtor’s Motion to Appoint debtor’s daughter as “next friend to act on all matters to which the Debtor can act” pursuant to Federal Rule of Bankruptcy Procedure 1016 denied where motion does not allege or demonstrate that debtor is incompetent within the meaning of Rule 1016 and does not otherwise state adequate grounds on which relief can be granted.

L. Loan Modifications

24.83 Chapter 7 Proceeding

- (7219) *In re Rutledge*, Case No. 10-61031 (Bankr. E.D. Mi. 2010) – Motion to Approve Loan Modification denied where Motion failed to indicate basis for Court’s subject matter jurisdiction or statutory authority to approved or disapprove a proposed loan modification in a Chapter 7 case and failed to demonstrate basis for approval or denial assuming Court has jurisdiction.
- (7220) *In re Spanski*, Case No. 10-52452 (Bankr. E.D. Mi. 2010) - Motion to Approve Loan Modification denied where Motion failed to indicate basis for Court’s subject matter jurisdiction or statutory authority to approved or disapprove a proposed loan modification in a Chapter 7 case and failed to demonstrate basis for approval or denial assuming Court has jurisdiction.

24.84 Chapter 11 Proceeding

- (7221) *In re Shamoun*, Case No. 10-66172 (Bankr. E.D. Mi. 2011) – Debtor’s Motion for Court to Abstain from Approving or Disapproving Mortgage Modification denied. Any mortgage loan modification would necessarily require modification of Debtor’s Plan under Section 1127(e) which requires Court approval.

24.85 Chapter 13 Proceeding

- (7222) *In re Wofford*, 2011 WL 2200611 (Bankr. W.D. Wis. 2011) – Loan modification agreement negotiated by Chapter 13 debtors and lender whose claim was secured solely by interest in real property that was debtors’ home did not have to be approved by bankruptcy court in order to be effective, and bankruptcy court would not grant lender’s request for advisory opinion on propriety of modification solely to provide comfort to lender.
- (7223) *In re Alva*, Case No. 10-58152 (Bankr. E.D. Mi. 2010) – Motion to approve loan modification is in essence a request for a plan modification as Motion sought to change treatment of Class 2 and Class 4 creditor. Relief must be requested in form of Plan Modification.
- (7224) *In re Kipling*, 2010 WL 2584191 (Bankr. E.D. Ky. 2010) – Motion to approve loan modification is in essence a request for a plan modification. Court would deny Motion where record was incomplete and proposed modification did not appear to advance purposes of

Chapter 13.

24.86 Breach of Contract

- (7225) *Moore v. Caliber Home Loans, Inc.*, 2015 WL 5162482 (S.D. Ohio 2015) – Breach of contract action requires (1) the existence of a valid contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damages or loss to the plaintiff. Agreed order in Chapter 13 defining terms by which a default will be cured and payments maintained operates like a consent decree and effectively new contract between debtor and creditor. Holder of mortgage that cannot be altered under Section 1322(b)(2) retains all contract rights but can exercise those rights only in a manner consistent with the Code, Rules and any Court Orders. Debtor stated cause of action against mortgage servicer by alleging that debtor has made all payments due under the confirmed plan and consent order but the mortgage servicer failed to properly credit those payments and demanded a higher monthly payment than provided for in the plan and agreed order.
- (7226) *Cultice v. Ocwen Loan Servicing, LLC*, 2015 WL 5093863 (Bankr. N.D. Ohio 2015) – Contractual language of trial loan modification does not create binding permanent modification. Trial modification is only one step in process that could lead to permanent modification. Absent a permanent loan modification signed by the lender, there is no binding modification and the terms of the original note and mortgage remain in full force and effect.
- (7227) *Bennett v. Bank of America*, 2015 WL 5063271 (E.D. Ky. 2015) – Lender cannot be held liable for breach of contract by failing to modify loan where borrower had already defaulted on loan, thereby committing first breach. Once borrower breached, lender no longer had any duty of performance and borrower was precluded from bringing action based on unexecuted part of contract. Further, complaint did not allege any particular breach of the loan agreement resulting from lender's failure to negotiate a modification where nothing in the loan agreement required or obligated lender to negotiate any modification.
- (7228) *Moretti v. Bank of New York Mellon*, 2015 WL 1036450 (6th Cir. 2015) – First Breach Rule precludes party who first breaches agreement from maintaining action against other party based on subsequent breach or failure to perform. Debtor did not produce any evidence to support argument that lender breached the loan agreement first where lender sent letter to debtor advising of payment increase based on escrow adjustment that was consistent with the loan documents themselves.
- (7229) *Thabata v. Bank of America*, 2015 WL 4899421 (6th Cir. 2015) – Loan modification must be in writing signed by both parties to be enforceable. Where Trial Period Plan was not signed by both parties, Plan never ripened into enforceable contract. Borrower's alleged substantial performance could not operate to create enforceable agreement where lender had not signed proposed Plan.
- (7230) *MERV Properties, LLC v. Friedlander*, 2015 WL 2105884 (Bankr. E.D. Ky. 2015) – Action against depository institution by depositor for alleged failure to enforce two signature requirement on checks is governed by UCC Article 4. Bank can honor any instrument presented in accordance with the agreement between customer and bank. Lender improperly honored checks signed by one individual in violation of depositor agreement. However, depositor must bring action within one year after bank makes statement available to depositor. Bank makes statement "available" when bank mails statement to depositor at address on record with the bank, even if depositor no longer resides at or receives mail at that address. Further, depositor must make specific allegations to bank – mere generalized statement that depositor is suspicious or that embezzlement may have occurred is not sufficient to place bank on notice for purposes of statute of limitations.
- (7231) *MERV Properties, LLC v. Friedlander*, 2015 WL 2105884 (Bankr. E.D. Ky. 2015) – Kentucky statute of frauds makes any obligation of a member of an LLC to make capital contributions unenforceable unless set forth in writing signed by the member being charged. Signature card signed by principal and by Bank was not contract between principal and other members and would not support action for breach of contract for alleged signing of checks by only principal without second signature. Similarly, deposit agreement between LLC and Bank was not contract between LLC and members and could not support cause of action for breach of contract against members.
- (7232) *Patrick v. Citimortgage, Inc.*, 2014 WL 7339828 (Bankr. N.D. Ohio 2014) – Breach of contract action arising out of loan modification process requires proof of a binding contract, the party seeking relief must fully perform its obligations, the other party failed to fulfill its obligations without legal excuse, and non-breaching party suffered damages as a result. Fully executed permanent loan modification agreement is binding contract and there was no dispute that borrower fully performed under the permanent loan modification. Modification incorporated HAMP guidelines by repeated references to "Home Affordable Modification Agreement" which is a clear reference to HAMP. However, degree to which guidelines were incorporated and whether borrower waived HAMP requirements by signing the permanent loan modification raised questions of fact that could not be resolved on summary judgment where amount of payment allegedly exceeded HAMP calculations.
- (7233) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Complaint alleging that lender breached contract by failing to offer loan modification failed to state cause of action. Complaint was predicated on alleged contract between lender and Michigan Hardest Hit Program. However, plaintiff was not party to that contract nor a sufficiently identified third party beneficiary. Agreement addressed obligations and duties of MHHP and lender as to each other but did not reference any duties or obligations owed to borrowers and only incidentally even referred to borrower in describing duties of MHHP and the loan servicer.
- (7234) *Trombley v. Seterus, Inc.*, 2014 WL 1664823 (E.D. Mi. 2014) *aff'd*, 2015 WL 3620412 (6th Cir. 2015) – Statute of frauds prevents enforcement of any agreement to modify mortgage loan unless agreement is in writing signed by party against whom agreement is to be enforced. Where lender never signed proposed mortgage modification agreement, alleged mortgage modification is not enforceable by borrower. Signature must be of "authorized representative". Electronic signature on cover letter does not satisfy statute of frauds. Electronic signature on cover letter "Sincerely, IBM Lender Business Process Services, Inc." does not meet requirements of statute.
- (7235) *Thill v. Ocwen Loan Servicing, LLC*, 2014 WL 1274080 (E.D. Mi. 2014) – Breach of contract to make loan modification must prove that

there was a contract for a loan modification, that the other party breached, and that the plaintiff suffered damages. Statements by lender that if borrower defaulted, then lender would consider loan modification, did not state cause of action for breach of contract, as neither note nor mortgage nor any other contractual agreement required lender to modify loan. General allegations regarding failure to credit payments made and alleged improper allocation of payments between taxes, insurance, and late fees did not state cause of action where complaint did not identify when payments were made, when or how they were supposed to be credited, what mistakes were made, or why they are considered mistakes under the loan documents.

- (7236) *Goss v. ABN Amro Mortgage Group*, 2013 WL 6698041 (6th Cir. 2013) – Trial loan modification was not offer of or contract to make permanent modification. Trial loan documents were not signed by both lender and borrower. Under Michigan law, offer does not ripen into contract until signed by both parties. Modification agreement signed by debtor but not lender did not constitute binding agreement for loan modification. Further, terms of trial modification stated that trial modification was only an application for a permanent modification and would be considered only if certain documents were provided and modification was signed by both parties. Where lender never signed agreement, there was no contract and so no action for breach of that contract.
- (7237) *Etts v. Deutsche Bank National Trust Co.*, 2014 WL 645358 (E.D. Mi. 2014) – Trial loan modification is not offer of permanent modification where lender committed only to consider a modification at end of trial period.
- (7238) *Williams v. Saxon Mortgage Services, Inc.*, 2014 WL 765055 (E.D. Mi. 2014) – Plaintiff pled valid cause of action for breach of contract where Trial Loan Modification provided that lender would permanently modify the loan if Plaintiff complied with the trial loan modification. Plaintiff's complaint sufficiently alleged that plaintiffs complied in all respects with terms of Trial loan modification yet lender failed to offer permanent loan modification. Breach of contract claim was not "back door" way to circumvent HAMP's prohibition on actions to enforce loan modification under that program, merely because Plaintiff's action included factors that would be relevant to HAMP modification. Action was brought for state law breach of contract and did not attempt to create private right of action under HAMP.
- (7239) *Williams v. Federal National Mortgage Ass'n*, 2013 WL 5445883 (E.D. MI. 2013) – Debtor could not maintain action for breach of agreement to modify loan where debtor admittedly did not make trial modification payments as required and otherwise never complied with conditions of loan modification proposal.
- (7240) *LeBlanc v. Bank of America, NA*, 2013 WL 3146829 (W.D. Tn. 2013) – Trial Loan Modification is not binding contract to enter into permanent loan modification. Trial modification contains conditions that, if met, trigger formation of contract to permanently modify loan. Failure to fulfill conditions excuses lender from any obligation to enter into permanent modification. Plaintiff's complaint did not allege that plaintiff had met all conditions and court would not infer that plaintiff met necessary conditions. Statement that plaintiff was told by defendant that he would receive a modification was not sufficient to sustain cause of action where terms of Trial modification had not been fulfilled and lender had no obligation to proceed with permanent modification.

24.87 Breach of Good Faith and Fair Dealing

- (7241) *Patrick v. Citimortgage, Inc.*, 2014 WL 7338929 (Bankr. N.D. Ohio 2014) – Good faith is an implied covenant of a contract not to take opportunistic advantage of other party and cannot be used to add terms to a contract or to alter terms contained in contract. Lender did not violate duty of good faith by enforcing terms of signed loan modification agreement that contained monthly payment allegedly in excess of HAMP guidelines. To extent lender collected payments in amount specified in contract, lender abided by terms of contract and court would not use duty of good faith to alter borrower's explicit obligation to make payments to lender in the amount specified.
- (7242) *Pugh v. Bank of America*, 2013 WL 3349649 (W.D. Tn. 2013) – Breach of implied covenant of good faith and fair dealing is not independent cause of action. Breach of implied covenant may be element or circumstance in action for breach of contract. Implied covenant does not create new rights or obligations and cannot be used to circumvent or alter terms of the agreement. Bank's failure to offer loan modification is not breach of duty of good faith or fair dealing where Bank was under no duty to offer a loan modification or to assist plaintiff in avoiding foreclosure. Loan documents clearly laid out obligations regarding timely mortgage payments and bank's rights to proceed with foreclosure. Bank's actions that enforced rights afforded under the contract could not lack good faith or breach any duty of fair dealing.
- (7243) *LeBlanc v. Bank of America, NA*, 2013 WL 3146829 (W.D. Tn. 2013) – Breach of implied covenant of good faith and fair dealing is not independent cause of action. Breach of implied covenant may be element or circumstance in action for breach of contract. Where court has already determined that there was no independent, valid contract between parties, plaintiff could not maintain cause of action for breach of implied covenant.

24.88 Negligence

- (7244) *Doering v. JPMorgan Chase Bank*, 2015 WL 5460702 (E.D. Mi. 2015) – Economic loss rule precludes action based on tort where cause of action arises out of contractual relationship and plaintiff alleges only economic damages. Proper cause of action is one for breach of contract. Causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and fraudulent misrepresentation all arose out of loan and mortgage contract and were barred by economic loss rule.
- (7245) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Complaint alleging that lender negligently failed to comply with loan modification dismissed. To extent negligence action was based on lender's failure to honor oral loan modification agreement, claim was barred by statute of frauds. Complaint also failed to allege sufficient facts to establish that defendant owed plaintiff a duty or that defendant breached that duty, and failed to allege any injuries caused by any breach. Lender does not owe duty of care to loan

applicant or to party seeking loan modification. Further complaint failed to allege negligence in failing to approve loan modification when documents attached to complaint stated that property in foreclosure was not eligible for Hardest hit program and that property was in foreclosure at time, such that there was no basis to assert that lender's negligence could have caused any harm.

- (7246) *Mullins v. FNMA*, 2013 WL 5707798 (E.D. Mi. 2013) – Negligence requires a breach of a legal duty. Lender has no legal duty to review borrower for possible loan modification. Lender's duties are defined by the loan agreements. Plaintiff's complaint that alleged that lender had a duty to communicate honestly with her regarding possible loan modification and then breached that duty by failing to provide paperwork to complete modification while initiating foreclosure failed to state cause of action.

24.89 Fraud

- (7247) *PNC Bank, NA v. Land Contracts Unlimited, Inc.*, 2015 WL 5877817 (E.D. Mi. 2015) – Fraud requires proof of misrepresentation that is false when made. Promises of future conduct are not fraudulent merely because party later fails to perform, absent proof that party made agreement in bad faith with no intention to perform. Borrower's action for fraud against lender for failure of lender to renew or restructure loan did not state cause of action for fraud where Line of Credit agreement vested in Lender discretion any decision to extend the term or to refinance loan. Any alleged promise by lender was qualified and subject to lender's sole discretion, which did not amount to promise to renegotiate or refinance loan.
- (7248) *Doering v. JPMorgan Chase Bank*, 2015 WL 5460702 (E.D. Mi. 2015) – Economic loss rule precludes action based on tort where cause of action arises out of contractual relationship and plaintiff alleges only economic damages. Proper cause of action is one for breach of contract. Causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, negligence and fraudulent misrepresentation all arose out of loan and mortgage contract and were barred by economic loss rule.
- (7249) *Bennett v. Bank of America*, 2015 WL 5063271 (E.D. Ky. 2015) – Fraud requires proof that (1) the defendant made a material representation to the plaintiffs, (2) the representation was false, (3) the defendant knew that it was false or made it recklessly, (4) the defendant made the misrepresentation to induce the plaintiff to act, (5) the plaintiff relied on it, and (6) suffered injury as a result. Borrower's complaint alleging that lender fraudulent represented that borrower had been offered loan modification did not allege that borrower relied on any misrepresentation or that borrower suffered any harm as a result. Main argument was that borrower did not receive any loan modification but any alleged injury did not result from lender's statements about a loan modification. Borrower was offered forbearance agreement but borrower did not allege that forbearance agreement contained any misrepresentations regarding loan modification options or any other false statements. To extent that servicer made false statements to lender, those statements were not made to borrower and so did not constitute statements of fact to the plaintiff.
- (7250) *Etts v. Deutsche Bank National Trust Co.*, 2015 WL 5026192 (E.D. Mi. 2015) – Complaint did not state cause of action where lender advised borrower in writing that lender would not proceed with foreclosure process while lender evaluated request for loan modification, and proceeded with sale in spite of those representations. Fraud requires statement of existing fact, and statements regarding future promises are contractual and do not amount to fraud unless made in bad faith or with no present intention to perform. Promises to review loan for modification and to not foreclose during review constitute future promises rather than statements of existing fact. Complaint also failed to state cause of action based on statements by lender that investor restrictions precluded further modification or that lender had not received all required documents where plaintiff had sent all requested documents to lender. Although statements were arguably incorrect, plaintiff could not demonstrate any detrimental reliance on those statements, and plaintiff specifically alleged that plaintiff continued to pursue loan modification. However, complaint stated cause of action based on specific promise, in writing on lender's letterhead, that stated that lender would not proceed with foreclosure process while modification request was considered, but then proceeded with foreclosure process nonetheless.
- (7251) *Johnson v. Broker Solutions, Inc.*, 2015 WL 4469276 (M.D. Tn. 2015) - Complaint alleging fraud must plead time, place and content of alleged misrepresentation on which deceived party allegedly relied; the nature of the fraudulent scheme, the fraudulent intent of defendants, and that an injury resulted from the fraud. Plaintiff failed to state cause of action where plaintiff failed to plead basic details about an impending or completed foreclosure; plaintiff did not allege any recorded foreclosure on the property or notice of default on the loan; allegations that plaintiff lost equity in their home and that they were unable to obtain a loan modification was contradicted by the loan modification attached as exhibit to complaint; and made only general allegation that "had the truth been disclosed, Plaintiff[s] would not have entered into the Loans". Given conclusory and contradictory allegations, the complaint did not sufficiently allege an injury or plead the time, place, or content of the alleged misrepresentations.
- (7252) *Wilson v. Regions Bank*, 2015 WL 4276262 (M.D. Tn. 2015) – Complaint alleging fraud must plead time, place and content of alleged misrepresentation on which deceived party allegedly relied; the nature of the fraudulent scheme, the fraudulent intent of defendants, and that an injury resulted from the fraud. Plaintiff failed to state cause of action where plaintiff failed to plead basic details about an impending or completed foreclosure; plaintiff did not allege any recorded foreclosure on the property or notice of default on the loan; allegations that plaintiff lost equity in their home and that they were unable to obtain a loan modification was contradicted by the loan modification attached as exhibit to complaint; and made only general allegation that "had the truth been disclosed, Plaintiff[s] would not have entered into the Loans". Given conclusory and contradictory allegations, the complaint did not sufficiently allege an injury or plead the time, place, or content of the alleged misrepresentations.
- (7253) *MERV Properties, LLC v. Friedlander*, 2015 WL 2105884 (Bankr. E.D. Ky. 2015) – Fraud requires material representation that is false, known when made to be false, made with intent it be relied on, injured party in fact relied, and injury proximately resulted. Conclusory statements that defendant submitted draw requests to bank with intent to receive funds personally were not sufficient as there was no evidence that defendant used funds for improper purpose or used alternate contractors to perform services at lower cost allowing defendant

to pocket the difference between the initial contractor's bid and the actual price paid to lower cost contractor. Further, even if draw requests fraudulently misidentified contractors, those representations were made to lender, plaintiff was neither the recipient of nor aware of draw requests when made.

- (7254) *McCord v. Resurgent Mortgage Servicing*, 2014 WL 4109622 (W.D. Ky. 2014) – Complaint stated cause of action against mortgage servicer where complaint alleged that servicer fraudulently stated that if borrowers resumed payments, lender would allow borrowers to reinstate mortgage when servicer and lender had already commenced foreclosure proceedings and had no intention of allowing borrowers to reinstate. Borrowers then made payments that they were not required to make (as borrowers had already been discharged in bankruptcy) which servicer received but nonetheless continued foreclosure process
- (7255) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Complaint must allege fraud with particularity including time, place and content of alleged misrepresentation on which plaintiff relied; the fraudulent scheme; the fraudulent intent of defendants; and injury resulting from fraud. Action for fraud requires proof that defendant made material representation; that was false; that defendant knew it was false or made the assertion without knowledge of truth and as a positive statement; that statement was made with intent that plaintiff act on it; that plaintiff in fact relied on it; and that fraudulent statement caused injury. Plaintiff failed to meet pleading standards in complaint for fraud regarding alleged loan modification, where complaint alleged only conclusions that defendants represented that plaintiff was approved for a loan modification but that defendant stopped accepting payments notwithstanding plaintiff's compliance with requirements. Complaint contained no allegations concerning who communicated with plaintiff, the substance of any communication, how the communications occurred, or whether plaintiff ever accepted any offer, and stated only that plaintiff relied on statements without any detail on how or when.
- (7256) *Jester v. Citimortgage*, 2014 WL 3547183 (N.D. Ohio 2014) – Fraud complaint must state with specificity and particularity that defendant made a representation or, where there was a duty to disclose, concealment, of a fact; that was material to the transaction; made falsely and with knowledge of the falsity or with utter and reckless disregard for truth; with intent to mislead another into relying on statements; on which the other person justifiably relied; and that was the proximate cause of the harm. Complaint that was sparse on actual factual allegations stated cause of action where minimal allegations in complaint were just enough to put defendant on sufficient notice of alleged misrepresentations to allow defendant to respond to complaint in informed manner.
- (7257) *Thill v. Ocwen Loan Servicing, LLC*, 2014 WL 1274080 (E.D. Mi. 2014) – General allegations that lender told borrower that before lender would consider modification, borrower had to default, coupled with general allegations that lender put borrower through "paperwork hell" did not state cause of action for fraud. Complaint must describe specific statements that plaintiff considers fraudulent; identify the speaker; specify when and where the statements were made; and explain why the statements were fraudulent.
- (7258) *Smith v. First Indiana Bank*, 2013 WL 3946015 (E.D. Mi. 2013) – To maintain action for fraud, complaint must allege that defendant made false statements of fact on which plaintiff relied. Complaint failed to state cause of action for fraud in connection with unsuccessful loan modification where complaint alleged that Defendant offered a loan modification that Plaintiff rejected. There was no evidence that defendant misrepresented the availability of a loan modification and defendant offered a loan modification that plaintiff rejected because of the specific terms of the modification.
- (7259) *Pugh v. Bank of America*, 2013 WL 3349649 (W.D. Tn. 2013) – Elements of a fraud claim are (1) an intentional misrepresentation of material fact; (2) the misrepresentation was made 'knowingly,' 'without belief in its truth,' or 'recklessly without regard to its truth or falsity'; (3) the plaintiff reasonably relied on the misrepresentation and suffered damages; and (4) the misrepresentation relates to an existing or past fact, or a promise of future action without the present intention to carry out the promise. Allegations that lender made inconsistent statements regarding whether plaintiffs were eligible for a loan modification do not rise to level of intentional misstatements. Fact that information is inconsistent or inaccurate, without more, does not speak with sufficient particularity and with a sufficient factual basis to support an inference that the information was conveyed with intent to defraud.
- (7260) *Nachar v. PNC Bank, NA*, 901 F.Supp.2d 1012 (N.D. Ohio 2012) – Trial loan modification is not contract or promise by lender for permanent loan modification. Lender's promise to review request for loan modification does not create any enforceable obligation or basis for claim of promissory estoppel.
- (7261) *Edwards v. JP Morgan Chase Bank, NA*, 2013 WL 1632560 (E.D. Mi. 2013) – Action for fraudulent or negligent misrepresentation requires that Defendant made a material representation, (2) that was false, (3) that Defendant knew was false, or that was made recklessly, without any knowledge of its truth, (4) that Defendant made it with the intention that Plaintiff would act upon it, and (5) the Plaintiff acted in reliance upon it, and (6) suffered damages. Lender did not make fraudulent statements when lender indicated that it would proceed with loan modification and provided documents to Plaintiff, but plaintiff would not agree to terms proposed.
- (7262) *Jenkins v. JPMorgan Chase Bank, NA*, 2013 WL 1091730 (Bankr. E.D. Tn. 2013) – Fraud requires (1) intentional misrepresentation of material fact; (2) knowledge of falsity or made with reckless disregard for truth; (3) reasonable reliance on the representation; and (4) misrepresentation involves a past or existing fact. Promise of future action is not fraudulent unless made with no intent to carry out promise at time promise made. However, inconsistent and contradictory statements by lender could amount to fraud. Lender made contradictory statements regarding a possible loan modification. One line of communication discussed eligibility for a modification, requested more information to continue moving the process forward, stated that the loan had been sent to underwriting for modification, and recognized that the Debtors were in Trial Loan Modification. At the same time, Lender sent multiple demand letters and foreclosure notices that contained no recognition of the Trial Loan Modification. Given contradictory content, one of the lines of communication must have been incorrect and that Lender knew that one of its positions was wrong. The communications suggesting that the Debtors were still being considered for a loan modification may have lulled them into believing that such a modification would happen and may have

encouraged them to continue paying the reduced mortgage amount. Lender's statements may have knowingly or recklessly encouraged the Debtors to continue making the reduced Trial Modification payments even after Lender knew that Debtors would not qualify for a mortgage modification pursuant to HAMP and had referred the loan to foreclosure.

24.90 Tortious Interference with Contractual Relationship

- (7263) *Thill v. Ocwen Loan Servicing, LLC*, 2014 WL 1274080 (E.D. Mi. 2014) – Tortious interference requires a contract, a breach of that contract, and an unjustified instigation of the breach by the defendant. Interference must be intentional doing of a wrongful act or the intentional doing of a lawful act with malice and unjustified in law. Allegations that Federal bailout programs created incentive to cause lenders to foreclose based on speculation and failed to allege any facts such as the existence of a contract to modify a loan or the breach of that contract. Mere speculation is not sufficient to sustain a complaint.

24.91 Michigan Hardest Hit Program

- (7264) *In re Chase*, 2015 WL 55326 (Bankr. W.D. Mi. 2015) – Civil contempt motion requires proof by clear and convincing evidence that alleged contemnor violated a definite and specific order of court requiring to perform or refrain from performing a particular act or acts with knowledge of the court order. Court Order that permitted debtor to apply for Michigan Hardest hit funds did not require debtor's mortgage lender to accept those funds to bring mortgage current. Mortgage company cannot be held in contempt for refusal to accept hardest hit funds where there was no court order that required lender to accept funds.
- (7265) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Alleged wrongful failure of lender to complete mortgage modification is not "fraud" going to heart of foreclosure process for purposes of setting aside a foreclosure sale after expiration of redemption.

24.92 Troubled Asset Relief Program (TARP)

- (7266) *Shirk v. JPMorgan Chase Bank, N.A.*, _____ (Bankr. S.D. Ohio 2010) – Alleged violation of provisions of the Troubled Asset Relief Program (TARP) by financial institution that accepted TARP funds, in purportedly failing to assist mortgage borrowers by making mortgage loans more affordable, did not give rise to private right of action against financial institution by borrowers.

24.93 Homeowners Assistance Mortgage Program (HAMP)

- (7267) *Bennett v. Bank of America*, 2015 WL 5063271 (E.D. Ky. 2015) – HAMP guidelines do not create cause of action against lender who refuses to modify loan.
- (7268) *Etts v. Deutsche Bank National Trust Co.*, 2015 WL 5026192 (E.D. Mi. 2015) – HAMP guidelines did not create cause of action against lender for alleged refusal to consider loan modification where lender was not part of the HAMP program when the loan modification request was submitted. Lender did not violate HAMP directive that lender use reasonable efforts to obtain waiver of investor agreement precluding second modification of loan where borrower had previously modified loan, as borrower did not allege that lender ever promised to undertake such an effort or that the effort would have been successful. Borrower also failed to state cause of action under HAMP based on lender's alleged refusal to consider financial information where borrower did not allege that loan would have been modified had lender considered financial statements, where investor restrictions against second modification rendered financial review a futile act. Further, even had lender reviewed financial information, that review would have confirmed borrower's ineligibility under HAMP. However, complaint stated cause of action based on specific promise, in writing on lender's letterhead, that stated that lender would not proceed with foreclosure process while modification request was considered, but then proceeded with foreclosure process nonetheless.
- (7269) *Patrick v. Citimortgage*, 2015 WL 1883966 (Bankr. N.D. Ohio 2015) – Mortgage payments under HAMP are based on percentage of debtor's income. Where debtor receives non-taxable income, that income is multiplied by 1.25 to approximate corresponding gross taxable income. Debtor's social security income was non-taxable and lender correctly multiplied that amount by 1.25 to determine "gross" income. Payment is then to be as close as possible to 31% of the calculated gross income. The payment is to include principal and interest, prorated taxes, prorated property and flood insurance, prorated homeowners or condominium association fees, and any projected escrow shortfall payment. Payment must be as close to, but not less than, 31% of gross income. Gross income was \$1657,38, of which 31% would be \$513.79, setting floor of payment calculation. Lender's actual calculation of \$519.78, which exceeded 31% by \$5.99, was "as close as possible" to 31%. HAMP also requires pre-modification escrow shortfall to be capitalized and paid over remaining term of loan, but property taxes and insurance that are not due as of effective date must be paid either in one lump sum or amortized over 60 months. Lender's calculated payment included post-modification escrow shortage amortized over 60 months. Monthly payment for private mortgage insurance that pre-existed mortgage modification is not included in payment cap of 31% and remains fully owing and payable in addition to the calculated mortgage payment even though inclusion produces final payment far in excess of 31% target payment.
- (7270) *Patrick v. Citimortgage, Inc.*, 2014 WL 7339828 (Bankr. N.D. Ohio 2014) – HAMP does not create a private right of action but also does not preempt an action for breach of contract.
- (7271) *Jestes v. Saxon Mortgage Services, Inc.*, 2014 WL 1847806 (M.D. Tn. 2014) – HAMP does not contain independent right of action. Negligence in handing request for loan modification is not actionable as lender has no duty to consider loan modification. Consent decree between lender and Federal Reserve obligating lender to properly staff, train and manage employees did not create basis for negligence action as borrower was not party to that decree and consent decrees are not enforceable directly or in collateral proceedings by those not party to it, even if they were intended to be benefitted by the decree.
- (7272) *Corvello v. Wells Fargo Bank*, 728 F.3d 878 (9th Cir. 2013) – Bank participating in HAMP program is contractually obligated to offer

permanent loan modification if debtors successfully complete trial loan modification requirements and submit accurate documentation. Although trial modification specifically stated that loan would not be permanently modified unless and until borrowers received fully executed copy of Modification Agreement, lender could not make validity conditioned solely on action of lender. Trial modification contained clear obligations of parties, and cannot be converted into unfettered discretion of lender whether to mail Modification Agreement where borrowers fully complied and lender had no reason not to send Agreement. Where borrowers allege that they have fulfilled all of their obligations under the TPP, and the loan servicer has failed to offer a permanent modification, the borrowers have valid claims for breach of the TPP agreement.

- (7273) *Starkey v. JPMorgan Chase Bank*, 2013 WL 6669268 (S.D. Ohio 2013) – HAMP does not create private right of action, expressly rejecting *Corvello*.
- (7274) *Young v. Countrywide Home Loans*, 2014 WL 935308 (M.D. Tn. 2014) – HAMP does not create private right of action. Borrower cannot maintain action against lender for refusing to participate in HAMP modification. Further, evidence indicated that borrower's bankruptcy petition, filed after debtor requested a loan modification, rendered it impossible for lender to offer HAMP modification on terms requested by borrower.
- (7275) *Williams v. Saxon Mortgage Services, Inc.*, 2014 WL 765055 (E.D. Mi. 2014) – Plaintiff pled valid cause of action for breach of contract where Trial Loan Modification provided that lender would permanently modify the loan if Plaintiff complied with the trial loan modification. Plaintiff's complaint sufficiently alleged that plaintiffs complied in all respects with terms of Trial loan modification yet lender failed to offer permanent loan modification. Breach of contract claim was not "back door" way to circumvent HAMP's prohibition on actions to enforce loan modification under that program, merely because Plaintiff's action included factors that would be relevant to HAMP modification. Action was brought for state law breach of contract and did not attempt to create private right of action under HAMP.
- (7276) *Smith v. First Indiana Bank*, 2013 WL 3946015 (E.D. Mi. 2013) – HAMP does not provide for a private right of action based on the lender's failure to offer a loan modification that is acceptable to the borrower. Plaintiff also failed to establish any contractual agreement between lender and plaintiff to modify the loan, where lender extended loan modification to Plaintiff but Plaintiff declined to accept the proffered modification.
- (7277) *Yates v. U.S. Bank, N.A.*, 912 F.Supp.2d 478 (E.D. Mi. 2012) – Mortgagors have standing to bring an action challenging loan servicer's determination that they were ineligible for a permanent modification of their loan under federal Home Affordable Modification Program (HAMP), even though redemption period following foreclosure of their home had expired. Under Michigan law, after foreclosure proceeding, mortgagor can hold over and contest validity of foreclosure process in connection with summary proceedings for possession, or mortgagor can hold over and bring separate action challenging servicer's denial of a loan modification.
- (7278) *In re Yarbrough*, 2013 WL 1500583 (Bankr. S.D. Ohio 2013) – While Court may lack jurisdiction to require lender to enter into HAMP loan modification, Court has jurisdiction to enter order compelling Creditor to file a report that details all actions including dates, which have been taken to process Debtor's loan modification requests; to state whether the lender recommended approval of the loan modification; if the lender did not recommend approval, to state the factual, regulatory and legal basis for denial and including copies of all relevant documents; and if the loan modification has been approved the terms of the loan modification offered to the Debtor. Court reserved jurisdiction to enforce terms of Order by contempt.
- (7279) *Citimortgage, Inc. v. Crawford*, 2013 WL 1225387 (S.D. Ohio 2013) – Offer of trial loan modification is not contractual agreement for permanent loan modification. Trial loan modification documents state that the permanent modification becomes effective only when both parties sign final loan modification documents. Lender's acceptance of payments during trial loan period does not waive requirement for completed loan modification process or execution of final documents. HAMP loan modification is not enforceable under concept of promissory estoppel. Estoppel requires a clear and unambiguous promise; reliance on that promise; reliance that was reasonable and foreseeable; and damages caused by that reliance. Trial Loan Modification program did not have clear and unambiguous promise to modify loan where Agreement contained a number of conditions that had to occur before borrower would be considered for permanent loan modification. At best, Trial Loan Modification indicated that lender would consider a loan modification if borrowers fulfilled all obligations and that any modification would not be valid until signed by both parties. Borrowers could not have reasonably relied on any supposed promise where much of the language of the Trial Loan program is conditional.
- (7280) *Jenkins v. JPMorgan Chase Bank, NA*, 2013 WL 1091730 (Bankr. E.D. Tn. 2013) – Offer of Trial Loan Modification under HAMP is not an offer for a permanent loan modification at end of trial period. Lender rejected permanent loan modification as debtors did not qualify for HAMP loan modification as of the end of the trial period. Plaintiff did not allege that Lender's conclusion that debtors were not eligible was incorrect or that creditor otherwise rejected the loan modification on some improper basis. However, Creditor may have breached terms of Trial Loan Modification by continuing to send notices of foreclosure although terms of Trial Loan Modification stated that lender would suspend foreclosure proceedings as long as debtors made the required trial payments. Lender continued the foreclosure process including commencement of foreclosure action prior to advising debtors that debtors were not eligible for a permanent loan modification.
- (7281) *Adams v. Mortgage Electronic Registration Systems, Inc.*, 2012 WL 95332 (E.D. Mi. 2012) – There is no private right of action under HAMP.
- (7282) *Lessl v. CitiMortgage, Inc.*, 2011 WL 4351673 (E.D. Mi. 2011) – Owner had no cause of action under either HAMP or Section 600.3205c where mortgage holder offered owner a loan modification which owner declined. Mortgage holder is not required to reduce principal balance to amount shown in appraisal, particularly where Owner contents that property had significantly higher value. Although loan modification at value somewhat higher than the appraised amount may have been "shrewd", lender was not unreasonable in using a

higher principal value than owner would accept. Further, HAMP discussions did not give rise to cause of action for promissory estoppel or misrepresentation. Statements regarding future conduct cannot form the basis of misrepresentation. Lender's statements that lender would consider matter further were not statements of existing fact but were at best only statements of future actions. Promissory estoppels also fails because lender never made promise that one would reasonable expect to produce action of definite and substantial character, and on which owner actually relied. Lender stated that lender would make good faith review of owner's loan modification request. Lender thereafter made two separate loan modification proposals which were rejected by owner.

- (7283) *In re Pauli*, Case No. 08-64252 (Bankr. E.D. Mi. 2010) – HAMP requires that borrower initially qualify by demonstrating that monthly mortgage payment (including taxes and insurance) ratio is greater than 31% of borrower's monthly gross income. HAMP contemplates an initial "trial" period. If borrower fully complies with trial program, borrower will be offered a permanent modification if the borrower still qualifies. Borrowers initially qualified for HAMP because mortgage payment plus taxes and insurance exceeded 31%. However, by the end of the trial period, Borrower's income had risen and interest rate changes caused mortgage payment to fall so that Borrower no longer met 31% ratio. Lender had right to withdraw HAMP modification and to reinstate mortgage on original terms. Trial period did not vest in Borrower any right to a permanent modification if Borrower no longer met qualification requirements.

24.94 National Mortgage Settlement

- (7284) *Habib v. Bank of America*, 2013 U.S. Dist. Lexis 98168 (E.D. Mi. 2013) – Borrower has no private right of action against lender for conduct that allegedly breached National Mortgage Settlement, as borrower was not party to that settlement and could not establish that borrower constituted third party beneficiary.

24.95 National Housing Act (NHA)

- (7285) *Shirk v. JPMorgan Chase Bank, N.A.*, (Bankr. S.D. Ohio 2010) – National Housing Act and its attending regulations do not expressly or implicitly create private right of action to mortgagors for mortgagee's noncompliance with the NHA or NHA regulations.

24.96 Home Owners Loan Act

- (7286) *Tolliver v. Bank of America*, 464 BR 720 (Bankr. E.D. Ky. 2012) – Home Owners Loan Act ("HOLA") applies only to loans which are held by federally insured depository institutions. Although originating lender was a financially chartered savings and loan, the loan had been subsequently sold and assigned to an entity which is not federally insured, particularly where factual allegations supporting complaint were directed solely to ask of the defendant in adding on allegedly unreasonable additional fees, costs and charges that were unrelated to any act of the originating savings and loan.

24.97 Home Ownership Equity Protection Act (HOEPA)

- (7287) *Cacevic v. Federal Home Loan Mortgage Corp.*, 2014 WL 4897380 (E.D. Mi. 2014) – HOEPA precludes lender from extending loan to consumer without regard to borrower's ability to repay Statute of limitations is one year from loan origination. Complaint filed four years after extension of loan dismissed.
- (7288) *Hood v. Chase Manhattan Mortgage Corp.*, 2013 WL 1629306 (E.D. Mi. 2013) – Home Ownership and Equity Protection Act statute of limitations is three years from the date of the violation which is generally the original loan closing date.
- (7289) *Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – 15 USC Section 1639 prohibits lender from extending credit recklessly and without regard to ability to repay. Statute of limitations runs one year from date of transaction.

24.98 USDA Rural Housing Service

- (7290) *Sheldon v. Vislack*, 2013 WL 4564422 (6th Cir. 2013) – Federal Courts lack jurisdiction to review discretionary decisions by USDA as to whether to offer a loan modification under RHS procedures. Administrative Procedures Act grants discretion to Federal Agencies including USDA, and precludes judicial review of discretionary decisions.

24.99 Michigan Compiled Laws Section 600.3205

- (7291) *Thabata v. Bank of America*, 2015 WL 4899421 (6th Cir. 2015) – A mortgagor's failure to avail themselves of the statutory right of redemption following a sheriff's sale extinguishes all of their rights in and to the property. Filing suit does not toll the redemption period. Foreclosure sale may be voided where the mortgagor shows fraud or irregularity resulting in prejudice such that borrower would have been in a better position to preserve their interest in the property absent the foreclosing party's noncompliance with Michigan's foreclosure statute. Lender did not violate MCL 600.3205a by failing to provide calculations used to deny mortgage modification where lender was required to provide calculations only if borrower met with housing counselor or lender to negotiate modification under Section 600.3205b, and borrower never contacted a counselor or otherwise requested to negotiate modification.
- (7292) *Breadiy v. PNC Mortgage*, Case No. 14-2347 (6th Cir. 2015) – Section 600.3205 does not apply where borrower had been granted loan modification and defaulted under that loan modification within one year of execution. Borrower and lender modified loan in March, 2011, and borrower defaulted in September, 2011, only 6 months later. Lender free to use non-judicial foreclosure process following default and was not required to use judicial foreclosure process.
- (7293) *Roller v. Federal National Mortgage Assn*, 2015 WL 3823848 (E.D. Mi. 2015) – Sole remedy for alleged violation of Section 600.3205 is to convert non-judicial foreclosure into judicial foreclosure. Where borrower did not assert alleged violation until after sale had occurred, there was no remedy available as court could not, post-sale, convert proceedings into judicial foreclosure process.

- (7294) *Ross v. Wells Fargo Bank, NA*, 2014 WL 5390659 (W.D. Mi. 2014) – Alleged failure of lender to comply with Section 600.3204 renders sale voidable, not void. Borrower must show that he would have been in a better position to preserve interest in property absent lender's non-compliance with statute. Borrower's allegation that deficiency in foreclosure process deprived them of opportunity to pursue short sale or deed in lieu did not indicate that lender's actions impeded borrower's ability to redeem mortgage. Borrower's allegation that he contacted lender's counsel to inquire about loan modification procedures was not sufficient where borrower made nothing more than bare allegation that they requested a meeting, unsupported by any additional facts. Even if borrower had properly inquired about modification process, sole remedy is to seek injunction of sale process and require foreclosure by judicial process. Once foreclosure sale has been concluded, it is too late for borrowers to obtain injunction or seek judicial foreclosure.
- (7295) *Haddad v. Randal S. Miller Associates, PC*, 2014 WL 5303001 (6th Cir. 2014) – MCL 600.3204 allows foreclosure by advertisement as long as no legal proceedings to recover the debt have been filed or, if filed, those proceedings have been discontinued. Prior legal action has been "discontinued" where prior action was stayed by bankruptcy filing and case was closed for administrative purposes.
- (7296) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – Non-judicial foreclosure is not invalid where lender does not meet with borrower to discuss mediation where borrower fails to timely provide statutory required documents to lender.
- (7297) *Cacevic v. Federal Home Loan Mortgage Corp.*, 2014 WL 4897380 (E.D. Mi. 2014) – Action under MCL 600.3204 must be brought before expiration of redemption or must allege fraud or irregularity in connection with sale process. Lender's alleged failure to participate in loan modification negotiations did not void non-judicial foreclosure sale. Remedy is limited to requiring lender to use judicial foreclosure process. Once non-judicial foreclosure sale has occurred, there is no basis to set aside the sale absent showing of prejudice as a result of failure to comply with statute such as proof that property would have been redeemed or that borrower had current financial ability to redeem but for alleged wrongful foreclosure. Borrower presented no evidence of any prejudice resulting from non-judicial foreclosure process.
- (7298) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Borrower must prove fraud in the foreclosure process itself in order to prevail in action filed after expiration of redemption. Lender's alleged failure to finalize mortgage modification or to accept modified payments is not type of "fraud or irregularity" that warrants setting aside foreclosure sale, as defects, if any, do not go to foreclosure process itself. Remedy for failure to complete loan modification, if any, is to require lender to halt foreclosure by advertisement and use judicial foreclosure process. Once foreclosure sale occurred, there is no foreclosure action for the court to enjoin or convert to a judicial foreclosure process.
- (7299) *Chambers v. HSBC Bank USA*, 2014 WL 1405276 (E.D. Mi. 2014) – Action commenced after expiration of redemption must be dismissed where complaint did not allege fraud as to foreclosure process itself, and Plaintiff did not allege any prejudice if there were any errors in the foreclosure process. Once foreclosure process is complete and redemption expires, attach must make clear showing of fraud or irregularity in foreclosure process and must cause prejudice. Even assuming that foreclosure process failed to comply with state law, plaintiff could not show prejudice as plaintiff admittedly defaulted on mortgage and lacked any ability to redeem mortgage even if lender had fully complied with state requirements. Inability to participate in loan modification discussions is not sufficient prejudice where there was no allegation that plaintiff had any means by which to enter into a loan modification or that she had any chance that lender would entertain discussions for a loan modification.
- (7300) *Thill v. Ocwen Loan Servicing, LLC*, 2014 WL 1274080 (E.D. Mi. 2014) – Borrower who wants to pursue modification under state statute must contact designated person directly or contact housing counselor within 30 days of receipt of notice of foreclosure. Complaint that did not assert the date on which defendant sent the statutory notice or the date on which Plaintiffs contacted Defendant's designee or a housing counselor failed to state a cause of action. The loan modification statute contains meticulous directions for compliance and without specific allegations the complaint is not sufficient.
- (7301) *In re Hopkins*, 2014 WL 922773 (E.D. Mi. 2014) – Sole remedy for alleged failure of lender to participate in mediation process is to convert foreclosure from advertisement to judicial foreclosure proceedings. Where debtor failed to raise issues prior to completion of foreclosure sale, debtor waived right to contest foreclosure by advertisement process.
- (7302) *Lopez v. Bank of America*, 920 F.Supp.2d 798 (W.D. Mi. 2013) – Borrower was not prejudiced by lender's failure to serve written notice apprising borrower of right to request loan modification meeting, where borrower admittedly defaulted on loan, she received notice of the default, and was aware of the scheduled foreclosure sale.
- (7303) *Connolly v. Deutsche Bank National Trust Co.*, 2013 WL 4084742 (E.D. Mi. 2013), *aff'd*, 2014 WL 4435962 (6th Cir. 2014) – Remedy for failure to comply with statute regarding loan modifications process is not to restore legal title to borrower after non-judicial foreclosure sale has occurred. Remedy is limited to demand that lender use judicial, rather than non-judicial, foreclosure process. Unless the borrower timely files a complaint seeking that relief, nothing in the statute prevents the use of non-judicial foreclosure proceedings.
- (7304) *Smith v. First Indiana Bank*, 2013 WL 3946015 (E.D. Mi. 2013) – Section 600.3205 allows foreclosure by advertisement where lender offers a loan modification and borrower rejects the proffered modification. Statute does not restrict lender's ability to foreclose where borrower rejects the offered modification.
- (7305) *Rugiero v. Flagstar Bank, FSB*, 2013 WL 1316910 (E.D. Mi. 2013) – Cause of action for failure to comply with mediation requirement of Section 600.3205c is conversion of non-judicial foreclosure to judicial foreclosure. Any remedy under Section 600.3205c(8) must be exercised prior to foreclosure sale. Once sale occurs, property owner has no right to conversion of foreclosure proceeding or any other remedy under Section 600.3205c.

- (7306) *Bowden v. American Home Mortgage Servicing, Inc.*, 2013 WL 195672 (6th Cir. 2013) – Section 600.3205(b) required debtor seeking mortgage modification mediation to contact housing counselor within 14 days after a list is provided. Debtor did not contact a counselor within allowed time. Debtor's failure to comply with statutory requirement was fatal to Debtor's cause of action. Although lender did, in fact, enter into discussions about a possible loan modification, those discussions did not waive Debtor's failure to comply with statutory requirements or allow Debtor to maintain action for alleged statutory violations.
- (7307) *Akinwusi v. Federal Home Loan Mortg. Corp.*, 2013 WL 1282018 (E.D. Mi. 2013) – Complaint failed to state cause of action for alleged violation of Section 600.3205c where complaint alleged that debtor requested mediation, creditor sent request for documentation to debtor, but debtor never returned documents. Failure to provide documents would not trigger requirement for mediation process. Further, remedy under Section 600.3205c is to prevent foreclosure by notice and to require judicial foreclosure. Plaintiff's failure to file complaint until after sale occurred, redemption expired, and title had passed left court without authority to set aside sale or to restore title to Plaintiff.

24.100 Statute of Frauds

- (7308) *PNC Bank, NA v. Land Contracts Unlimited, Inc.*, 2015 WL 5877817 (E.D. Mi. 2015) – Michigan Statute of Frauds precludes any action based on promise or commitment to lend, renew, extend, modify or permit delay in repayment or performance of, or any other financial accommodation in connection with any loan or extension of credit unless agreement is in writing and signed by party against whom agreement is to be enforced. Line of Credit agreement that spelled out conditions on which Lender would, at its discretion, extend the term or make other accommodation is not unconditional promise to renew or refinance if borrower meets stated conditions. Borrower could not maintain action against Bank or attempt to rely on Agreement as counterclaim to Bank's action to collect debt.
- (7309) *Doering v. JPMorgan Chase Bank*, 2015 WL 5460702 (E.D. Mi. 2015) – Borrower's action for breach of contract barred by statute of frauds. Borrower's allegation that lender promised to reinstate loan when borrower brings account current did not allege that lender entered into written agreement for reinstatement, where borrower relied only on letters to lender requesting a breakdown of the reinstatement figures and lender's response that it would do so. None of the referenced documents indicated that lender promised to reinstate the loan. Further, even if lender entered into contract to reinstate upon payment of reinstatement amount, borrower never paid nor tendered the amount required to reinstate.
- (7310) *Thabata v. Bank of America*, 2015 WL 4899421 (6th Cir. 2015) – Loan modification must be in writing signed by lender to be enforceable. Where Trial Period Plan was not signed by both parties, Plan never ripened into enforceable contract. Borrower's alleged substantial performance could not operate to create enforceable agreement where lender had not signed proposed Plan.
- (7311) *Ett v. Deutsche Bank National Trust Co.*, 2015 WL 5026192 (E.D. Mi. 2015) – Statute of Frauds precludes action for estoppel based on alleged promises to review loan modification. Statute of Frauds precludes enforcement of any oral agreement that is promise or commitment to renew or modify loan. Promise to consider loan modification is functional equivalent of promise to permit a financial accommodation. However, complaint stated cause of action based on specific promise, in writing on lender's letterhead, that stated that lender would not proceed with foreclosure process while modification request was considered, but then proceeded with foreclosure process nonetheless.
- (7312) *6 Mile & Greenfield, Inc. v. PNC Bank, NA*, 2015 WL 3652766 (E.D. Mi. 2015) – Statute of Frauds precludes any oral attempt to waive a provision in a loan, extension of credit or financial accommodation. Where loan agreement unambiguously provided for late payment fees, any alleged oral waiver is unenforceable. Parole evidence cannot be admitted to create ambiguity where document itself is not ambiguous.
- (7313) *Gibson v. Mortgage Electronic Registration Systems*, 2014 WL 2091258 (W.D. Tn. 2014) – Statute of Frauds does not require written notice of sale of property under deed of trust or with oral adjournment of sale date.
- (7314) *Ross v. Federal National Mortgage Association*, 2014 WL 3597633 (E.D. Mi. 2014) – Statute of Frauds precludes action for alleged breach oral loan modification agreement. Modification is "financial accommodation" within scope of Michigan Compiled Laws Section 566.132(2). Although couched in terms of fraud claim for failure to accept payments under alleged modification, action was at its core an action to enforce the modification which falls within statute.
- (7315) *Goss v. ABN Amro Mortgage Group*, 2013 WL 6698041 (6th Cir. 2013) – Borrower could not maintain action against lender for alleged breach of agreement to modify loan where the lender never signed loan modification. Borrower's action for promissory estoppel against lender was predicated on unsigned loan modification agreement. Under Michigan law, the Statute of Frauds precludes enforcement against any financial institution of any promise or commitment to make, renew, modify or extend loan unless the agreement is in writing and signed by financial institution. Where lender did not sign, statute of frauds precluded action against lender for promissory estoppel. Lender's acceptance of payments on terms of trial loan mod did not waive requirement that loan modification be signed.
- (7316) *Mullins v. FNMA*, 2013 WL 5707798 (E.D. Mi. 2013) – Statute of frauds prevents enforcement of oral promises to modify loan where agreement was not evidenced in writing. State law precludes enforcement of any oral promise to renew, extend, modify or permit delay in repayment or performance of loan unless evidenced by writing signed by the lender. Statute of frauds prevents not only action for alleged breach of promise, but also any action under promissory estoppel.
- (7317) *LeBlanc v. Bank of America, NA*, 2013 WL 3146829 (W.D. Tn. 2013) – Oral promise to modify loan is barred by statute of frauds where state law prohibited enforcement of any oral contract for transfer of interest in land including any alleged contract to make or grant mortgage; and prohibited enforcement of any oral agreement to extend, renew, alter or supplement any agreement or commitment to lend money. Alleged oral modification is commitment to modify agreement or commitment to lend, within scope of statute of frauds. Although partial performance can constitute exception to statute of frauds, partial performance is purely equitable doctrine where plaintiff can show

acts and conduct of the defendant that amount to representation that defendant would stand by agreement and not avail himself of statute of frauds to escape performance and plaintiff relied on that representation in continuing to perform plaintiff's obligations. Complaint did not allege any representations or statements by lender that would constitute waiver of statute of frauds or any inducement to plaintiff to continue to perform based on alleged oral promise.

24.101 Estoppel

- (7318) *Etts v. Deutsche Bank National Trust Co.*, 2015 WL 5026192 (E.D. Mi. 2015) – Statute of Frauds precludes action for estoppel based on alleged promises to review loan modification. Statute of Frauds precludes enforcement of any oral agreement that is promise or commitment to renew or modify loan. Promise to consider loan modification is functional equivalent of promise to permit a financial accommodation. Letters from lender requesting documents for review for possible loan modification did not amount to promise on which the promisor reasonably expected the promisee to rely and that in fact produced reliance or forbearance on part of the promisee. Lender request for information did not state that lender would ignore restrictions on eligibility for loan modification or that plaintiffs were in fact eligible for modification, and plaintiffs did not demonstrate any harm from lender's decision not to review financial information where plaintiffs were not eligible for modification for reasons unrelated to financials, such that review of financials would have been futile act. However, complaint stated cause of action based on specific promise, in writing on lender's letterhead, that stated that lender would not proceed with foreclosure process while modification request was considered, but then proceeded with foreclosure process nonetheless.
- (7319) *Flintkote Co. v. Aviva, PLC*, 769 F.3d 215 (3d Cir. 2014) – Federal Arbitration Act expresses strong federal policy in favor of resolving disputes through arbitration. Arbitration is strictly a matter of contract and where a party has not agreed to arbitrate, the courts have no authority to mandate that he do so. In ruling on Motion to Compel Arbitration, court must consider (1) whether there is a valid agreement to arbitrate between the parties and, if so, (2) whether the merits-based dispute in question falls within the scope of that valid agreement. Party who is non-signatory to an arbitration agreement, may be equitably bound to arbitrate under traditional principles of contract and agency law. Party will be bound where party has directly benefitted from terms of contract and maintains that other provisions of contract should be enforced as to him or otherwise attempts to enforce terms of contract that it likes while attempting to disavow those that party does not like. Party can also be bound where party either intentionally leads another to change position in reliance on party's conduct. Party alleging estoppel must show that party lacked knowledge or means of obtaining knowledge of truth of matters in question; reasonable reliance on conduct of party against whom estoppel is asserted; and party suffered prejudicial change in position in reliance. Party failed to demonstrate reliance where opposing party initially consented to arbitration as part of attempt to mediate dispute but later chose to litigate matter, where party was signatory to underlying contract in which opposing party specifically reserved right to litigate disputes such that party seeking arbitration knew of actual state of facts. Further, there was no reasonable basis to rely on party's statements regarding arbitration where mediation agreement did not contemplate arbitration in lieu of litigation if mediation was unsuccessful.
- (7320) *LeBlanc v. Bank of America, NA*, 2013 WL 3146829 (W.D. Tn. 2013) – Equitable estoppel can remove oral agreement from statute of frauds if plaintiff demonstrates (1) conduct by defendant that amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, by defendant that such conduct shall be acted upon by the other party; and (3) defendant's knowledge, actual or constructive of the real facts. Plaintiff must also establish that plaintiff lacked knowledge or means of knowledge of the truth as to the facts in question; that plaintiff relied on the conduct of the party estopped; and that plaintiff prejudicially changed position based on defendant's conduct. Plaintiff failed to allege equitable estoppel in connection with oral agreement to modify loan where plaintiff failed to plead conduct of defendant with particularity as required in action for fraud, and specifically failed to state when any alleged promises were made, or who specifically made promises.

24.102 Promise to Adjourn Foreclosure Sale

- (7321) *Etts v. Deutsche Bank National Trust Co.*, 2015 WL 5026192 (E.D. Mi. 2015) – Statute of frauds precludes action based on alleged promise to refrain from selling property at foreclosure sale, as promise amounts to request for financial accommodation which must be in writing. Estoppel requires a promise; reasonable expectation of promisor that promise will induce definite and substantial action by promisee; and promisee in fact relies or forbears from taking action under circumstances where promise must be enforced to avoid injustice. Plaintiff's alleged reliance on written statement from lender that lender would refrain from foreclosure as long as borrower complied with terms of workout plan did not support estoppel where workout plan was agreed to two years earlier but never resulted in loan modification, such that lender did comply with promise while modification review was completed and subsequently denied. When plaintiff subsequently requested a second modification, lender specifically advised that foreclosure process would continue while the evaluation process was ongoing and any letter referring to possible suspension of foreclosure process, if any, was not sent until after foreclosure process completed, such that borrower could not have relied on letter in determining how to proceed in foreclosure process. However, complaint stated cause of action based on specific promise, in writing on lender's letterhead, that stated that lender would not proceed with foreclosure process while modification request was considered, but then proceeded with foreclosure process nonetheless.

M. ECF Procedures

24.103 Electronic Filing Required

- (7322) *Bajas v. Wahrman*, Case No. 10-5831 (Bankr. E.D. Mi. 2010) - Defendant's Answer to Adversary Complaint stricken where Defendants filed paper copy of answer without permission to file in traditional paper form.

24.104 Electronic Filing Excused

24.105 Electronic Signature

- (7323) *In re Morton*, 2015 WL 5731859 (Bankr. E.D. Tn. 2015) – Section 105, Rule 9011 and Section 327 work together to allow court to oversee employment and compensation of professionals to protect the estate by: 1) ensuring the trustee or debtor-in-possession is represented by competent, disinterested persons with experience and integrity, and 2) preventing the estate from being drained by unreasonable fees that might otherwise benefit creditors, the debtor, and equity security holders. Overall conduct evidenced a lack of competence. Counsel intentionally misrepresented to court that debtor had signed various documents including the petition, schedules and statement of affairs when counsel filed those documents with the court bearing the electronic signature of debtor. Rule 9011 when read in conjunction with Bankruptcy Rule 1008 specifically prohibits attorneys from signing a debtor's name to the lists, schedules and statement of financial affairs when debtor has not actually signed those documents.
- (7324) *In re Mulholland*, Case No. 14-44055 (Bankr. E.D. Mi. 2015) – Chapter 7 case dismissed where electronic signature on Petition and Petition Cover Sheet did not match the ECF login and debtor failed to correct deficiency within time allowed by court.

24.106 Service by ECF

- (7325) *In re Menden*, 2011 WL 4433621 (Bankr. N.D. Ohio 2011) - Electronic Case Filing system registered user consents to receiving electronic service of papers in lieu of mail service. ECF service of Amended Plan on Creditor's attorney who had filed Notice of Appearance was sufficient service pursuant to Rule 2002(g).

24.107 Service by Mail

- (7326) *Rathinam v. Ashok Spiritual Healing Center*, 2015 WL 4132809 (S.D. Ohio 2015) – Motion filed and served by ECF would not be stricken based on opposing party's alleged failure to receive pleading. Even if party was not ECF participant, party did receive and file response to motion and did not evidence any prejudice based on opposing party's alleged failure to serve motion by mail. However, court did direct that all future pleadings be served on party by mail rather than through ECF procedures.

24.108 Sanctions

- (7327) *In re Morton*, 2015 WL 5731859 (Bankr. E.D. Tn. 2015) – Section 105, Rule 9011 and Section 327 work together to allow court to oversee employment and compensation of professionals to protect the estate by: 1) ensuring the trustee or debtor-in-possession is represented by competent, disinterested persons with experience and integrity, and 2) preventing the estate from being drained by unreasonable fees that might otherwise benefit creditors, the debtor, and equity security holders. Overall conduct evidenced a lack of competence. Counsel intentionally misrepresented to court that debtor had signed various documents including the petition, schedules and statement of affairs when counsel filed those documents with the court bearing the electronic signature of debtor. Rule 9011 when read in conjunction with Bankruptcy Rule 1008 specifically prohibits attorneys from signing a debtor's name to the lists, schedules and statement of financial affairs when debtor has not actually signed those documents.
- (7328) *Schaffner v. US Trustee*, 485 BR 130 (E.D. Ky. 2012) – Attorney disbarred for allowing third party to use attorney's ECF filing information and failure to supervise employee. Attorney hired former client, a convicted felon, to prepare bankruptcy documents. Employee filed using attorney's ECF information, with only cursory supervision. Employee began to accept fees and pocket money and failed to comply with code, resulting in actual and threatened dismissals. Attorney failed to keep accurate records; failed to ensure that clients were provided receipts for payments; and failed to deposit money into trust account. Attorney disregarded interest of clients and effectively trafficked in law license and ability to use electronic case filing. Disbarment was both necessary and appropriate sanction.
- (7329) *In re Landstreet*, Case No. 12-0755 (6th Cir. 2012) – Attorney sanctioned for failing to conduct reasonable investigation. Attorney took over representation when prior attorney was suspended. Attorney never met with the clients, never assured himself that credit counseling had been completed, and did not review bankruptcy documents including Rule 2016 statements before filing. Attorney allowed staff to place his signatures on petitions and use personal log in information without personally confirming that the representations were correct as required by Rule 9011. Attorney compounded problems by failing to amend documents to correct information for 4 months after the errors were first brought to his attention.

N. Habeas Corpus

24.109 Authority to Issue Writ

- (7330) *Barlow v. McGee*, 2010 WL 3831387 (Bankr. W.D. Mi. 2010) – Bankruptcy Court, as Article I Court, has authority to enter Writs of Habeas Corpus to require person having custody over another to produce the other person for judicial proceedings.

24.110 Requirements

- (7331) *Barlow v. McGee*, 2010 WL 3831387 (Bankr. W.D. Mi. 2010) – Bankruptcy Court denied habeas petition where Defendant also filed Motion under Rule 78 to dispense with hearing and rule on the issues on the briefs submitted. Defendant already acknowledged that Court could rule without the need for a hearing, making it unnecessary put the government to the extraordinary burden, risk, and expense of transporting the Defendant for a hearing at which even he does not regard his appearance as necessary; the court would not be taking evidence eliminating any need for the Defendant to appear for purposes of testifying; and the court has afforded the Defendant ample opportunity to obtain counsel to represent him in this civil proceeding. Defendant's incarceration undoubtedly hampers his participation in this proceeding, but this is but one of the many consequences of his criminal activity, part of the liberty he lost upon conviction.

O. Choice of Laws and Forum Selection Clauses

24.111 Choice of Laws – Generally

- (7332) *LeBlanc v. Bank of America, NA*, 2013 WL 3146829 (W.D. Tn. 2013) – Where Federal Court has jurisdiction over portions of action as federal questions, court has supplemental jurisdiction over related state court actions. Federal court exercising supplemental jurisdiction must apply law of forum state to same extent state courts would do so if action was pending there. For diversity jurisdiction cases, federal court applies state law, including choice-of-law provisions. Loan agreements and other contractual relationships between plaintiff and defendant were all executed in Tennessee and Tennessee had most significant relationship with cause of action. As such, Tennessee law could control state law issues.
- (7333) *Saab Auto, AB v. General Motors Co.*, 2013 WL 3013677 (E.D. Mi. 2013) – In diversity action, choice of law is governed by law of forum state. Generally speaking, tort claim filed in Michigan is governed by Michigan law unless there is a rational reason to use law of some other jurisdiction. Where there is no conflict in laws between two different forums, court will not make choice of laws decision and will apply law of forum state. In litigation between US Company and Swedish company, Sweden has interest under Sweden law because Sweden has interest in protecting citizens and Swedish companies. However, Michigan's interests were at least as substantial, as action involves Michigan corporation with contacts throughout the State. Proper balance supported application of Michigan law.

24.112 Binding Effect of State Court Decisions

- (7334) *In re Makowka*, Case No. 13-3469 (3d Cir. 2014) – Federal Court applying purely state law is bound by interpretations given to state law by state's highest court. Where highest court has not interpreted state law, Federal Courts must attempt to predict how state's highest court would rule. Federal court must give "due deference" to decisions if intermediate appellate courts but Federal Court is not bound by those decisions and can reach a contrary result if the Federal Court believes that State Supreme Court would rule otherwise or if Federal Court finds state intermediate appellate decisions to be "flawed".

24.113 Forum Selection Clauses - Enforcement Generally

- (7335) *ImagePoint, Inc. v. BFS Retail & Commercial Operations, LLC*, 2013 WL 2457900 (E.D. Tn. 2013) – 28 USC Section 1404 requires transfer of case where contract between parties contains valid forum selection clause. Although forum selection clauses are not dispositive, forum selection clauses will be enforced unless enforcement is unfair or unreasonable. Where valid forum selection clause exists, burden is on plaintiff to show why clause should not be enforced and action transferred. In determining whether to transfer a case under § 1404(a), in addition to considering the forum-selection clause, the Court must consider (1) the convenience of witnesses; (2) the location of relevant documents and relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of the operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) the forum's familiarity with the governing law; (8) the weight accorded the plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances. Enforcement was not inconvenient where some witnesses were located in Tennessee and others in Illinois, the chosen forum. Operative facts did not control where dispute was between Tennessee company and Illinois Company about work that occurred in various states. Clause included "any litigation" between the parties, which was broad enough to encompass both contract and quantum meruit claims. Although plaintiff has fewer resources than defendant, that is not basis to disregard otherwise valid forum selection clause.

24.114 Foreclosure Proceedings

- (7336) *State Bank of Florence v. Miller*, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6th Cir. BAP 2011) – Evaluating force and effect of mortgage foreclosure action, outcome is determined by law of state in which property is located, notwithstanding separate forum selection clause in Promissory note. Note executed in Wisconsin with Wisconsin law stated as controlling did not control outcome or effect of foreclosure of property located in Michigan.

24.115 Exemption Statutes

- (7337) *Comfort Control Supply Company, Inc. v. Smith*, Case No. 07-80005 (Bankr. W.D. Mi. 2011) – Law of foreign state will control garnishment issued by Michigan Bankruptcy Court where debtor lives in foreign state and funds to be garnished would be exempt under law of foreign state. Post-discharge collection efforts on Consent Judgment holding debt to be non-dischargeable. After the discharge, debtor moved to Colorado but was unable to secure employment and applied for and received unemployment compensation. Creditor obtained Writ of Garnishment from Bankruptcy Court and garnished Debtor's bank accounts. Debtor objected to attempt to garnish funds that were derived from unemployment compensation based on Colorado statute exempting unemployment funds. Colorado has sufficient interest in having its exemption law applied to overcome presumption that Michigan law should apply. Funds received and traceable to unemployment compensation exempt from Michigan garnishment. Funds that were co-mingled and could not be traced to unemployment versus some other source were not exempt.

P. Governmental Sovereign Immunity

24.116 State Law Claims Against State

- (7338) *Kohut v. Wayne County Treasurer*, 2015 WL 1598083 (Bankr. E.D. Mi. 2015) – Trustee has authority under Section 544 to bring fraudulent transfer action under Michigan state law. Uniform Fraudulent Transfer Act has 6 year statute of limitations but requires trustee to prove existence of actual pre-petition creditor who could have brought action under Michigan law had bankruptcy not occurred. Although Sovereign Immunity would have precluded any state court action against Wayne County to recover tax payments

made after debtor was insolvent, Trustee not prohibited from bringing action as Section 106 abrogated sovereign immunity for purposes of Section 544. Although no actual state court creditor could bring action, that did not preclude Trustee from bringing action where Trustee could otherwise prove existence of actual unsecured creditor and other elements of fraudulent transfer.

- (7339) *In re Shelbyville Road Shoppes, LLC*, 2013 WL 646470 (Bankr. W.D. Ky. 2013) – Eleventh Amendment precludes federal courts from adjudicating state law claims against a state in federal court absent clear and unequivocal waiver of immunity by state. State law that provided for actions against state but proscribed single State Court in which action could be brought did not waive sovereign immunity for all purposes and did not allow federal court to assert jurisdiction. Bankruptcy Trustee can bring action only in court specified in state statute. Further, state statute waived immunity only to extent of actions on contracts. Trustee’s action did not seek to recover on the contract but sought to invalidate the contract on basis of fraudulent inducement, which is tort action.

24.117 Governmental Agencies and Subdivisions

- (7340) *Harchar v. IRS*, 2012 WL 3968162 (6th Cir. 2012) – IRS is entitled to sovereign immunity in bankruptcy proceeding. Under 11 USC Section 106, when the government files a proof of claim against the debtor, the debtor may bring a counterclaim against the government if (1) the property that the debtor claims is the property of the estate, and (2) the debtor’s claim arises out of the same transaction or occurrence as the government’s claim. Debtor’s action against IRS based on alleged wrongful seizure of post-petition tax refund to satisfy pre-petition tax claim did not “arise out of the same transaction” as gave rise to IRS claim. IRS claim was based solely on pre-petition taxes and pre-petition conduct. Nothing IRS did or did not do, or that debtor did or did not do, after commencement of the case could affect or be considered part of debtor’s pre-petition tax liability or the claim filed for that liability.
- (7341) *Fugate v. Greeneville Light & Power System*, 2012 WL 3201880 (Bankr. E.D. Tn. 2012) – Sovereign immunity is available only to arms of the state. Federal law determines whether an entity is an arm of the state. Whether a governmental entity is an “arm of the state” entitled to assert Eleventh Amendment sovereign immunity, as distinguished from a “political subdivision,” which is not immune, is governed by four factors: (1) the state’s potential liability for a judgment against the entity; (2) the language employed by state courts and state statutes to describe the entity, as well as the degree of control and veto power which the state has over the entity; (3) whether state or local officials appoint the entity’s board members; and (4) whether the entity’s functions fall under the traditional purview of state or local government. The potential liability of the State for the judgment is the “foremost factor.” Where the programs are designed to serve a specific local community weighs against characterizing it as an arm of the state, rather than a political subdivision. agency is more likely to be characterized a political subdivision than an arm of the state. Municipality owned Electric Company was not “arm of the state” where there was no evidence that the State could be held to answer for a judgment against the Electric Company. Further, Electric Company was designed to serve a specific local community – the Town of Greeneville.

24.118 Entity Entitled to Immunity – Native American Tribe

- (7342) *Buchwald Capital Advisors, LLC v. Papas*, 2015 WL 3632202 (E.D. Mi. 2015) – Section 106 does not clearly, unequivocally and unmistakably express intent to include Indian Tribes among entities as to which sovereign immunity has been waived.
- (7343) *Bucher v. Dakota Finance Corp.*, Case no. 12-6004 (8th Cir. BAP 2012) – Indian Tribes and their subsidiaries are entitled to sovereign immunity. Section 106 of the Bankruptcy Code does not clearly and unequivocally abrogate that immunity. Trustee’s actions to recover payments owed by Tribe to Debtor and action to avoid lien held by Tribe subsidiary dismissed.

24.119 Congressional Abrogation

- (7344) *Buchwald Capital Advisors, LLC v. Papas*, Case No. 14-14103 (E.D. Mi. 2015) – Section 106 does not clearly, unequivocally and unmistakably express intent to include Indian Tribes among entities as to which sovereign immunity has been waived.
- (7345) *Fugate v. Greeneville Light & Power System*, 2012 WL 3201880 (Bankr. E.D. Tn. 2012) – States surrendered their sovereign immunity when they ratified the Bankruptcy Clause in the Constitution. Congress has authority to enact bankruptcy legislation that treats states and state agencies in the same way as other creditors.
- (7346) *In re Platinum Oil Properties, LLC*, 465 BR 621 (Bankr. D.N.M. 2011) – 11 USC Section 106 expressly abrogated sovereign immunity for all governmental units including “foreign or domestic government”. Native American tribe constitutes “other foreign or domestic government”. Tribe is bound by terms of confirmed Chapter 11 plan.

24.120 Waiver

- (7347) *Bowers v. United States*, 2014 WL 7745851 (Bankr. N.D. Ohio 2014) – Section 106 waives sovereign immunity for any governmental unit that files a proof of claim that is property of the estate and arose out of the same transaction or occurrence out of which the claim of the governmental unit arose. Section 106 allows debtor to bring counterclaim against the governmental unit that files a proof of claim if the property claimed by the debtor is property of the estate and the debtor’s claim against the governmental unit arises out of same transaction as claim itself. Debtor’s claim against IRS for money paid to IRS for unpaid taxes met first requirement as debtor was attempting to recover exempt funds that were paid to IRS prepetition and constitute property of the estate. However, Debtor’s claim did not arise out of same transaction as IRS claim. In determining whether claims arise out of same transaction, court will consider (1) whether there is a logical relationship between the two claims; (2) whether the issues of law and fact are largely the same; (3) whether res judicata would bar a subsequent suit on the counterclaim; and (4) whether substantially the same evidence would support both the claim and the counterclaim. The IRS proof of claim is for 2001, 2006, 2007, 2011, and 2012 tax liabilities. While there is a logical relationship between the IRS claim and the debtors’ claim for a refund of exempt amounts improperly levied, the factual issues as to the claims are not the same, each claim

will require different evidence, and any determination on the IRS's claim would not apply to bar the debtors' pursuit of their claim for a refund of exempt funds.

- (7348) *Florida Department of Revenue v. Diaz*, 647 WL 1073 (11th Cir. 2011) – State did not waive sovereign immunity with respect to alleged stay violation where debtor waited 4 years before filing motion, after discharge had already been entered. Stay was no longer necessary to any in rem function of the court and stay had no bearing on adjudication of state's filed proof of claim.
- (7349) *IRS v. Hayes*, 2011 WL 2490945 (E.D. Mi. 2011) – Governmental sovereign immunity has been abrogated with respect to action to determine amount or legality of any tax, and any fine or penalty relating to a tax. Sovereign Immunity is also waived if the governmental unit files a proof of claim for any claim against the governmental unit arising out of the same transaction or occurrence, which includes determination of tax debts where the IRS filed a proof of claim. Bankruptcy Court can adjudicate post-discharge dispute between IRS and debtor concerning amount of admittedly non-discharged tax debt.

24.121 Punitive Damages

- (7350) *In re Shelbyville Road Shoppes, LLC*, 2013 WL 646470 (Bankr. W.D. Ky. 2013) – Bankruptcy Code Section 106 waiver of sovereign immunity limits abrogation to issuance of orders, processes or judgments but expressly excludes punitive damages. Complaint against state alleging fraud and seeking punitive damages barred to the extent of the request for punitive damages.

Q. Michigan Seller Disclosure Act

24.122 Generally

- (7351) *Cole v. Wood*, 458 BR 898 (E.D. Mi. 2011) – Michigan Seller Disclosure Act requires that seller of real estate make disclosure of condition of property including whether seller aware of any settling, flooding, drainage, structural or grading problems; and that a seller disclose any pending litigation that could affect the property or the Seller's right to convey the property. Seller has a duty to disclose the condition or information to the degree indicated by the question on the disclosure form. Court may not impose on a seller a duty to disclose beyond what is plainly required by the statutory disclosure form. Seller had no duty to disclose litigation against prior owner for deficiencies in property where Seller had subsequently repaired those issues and was only seeking to recover the costs of repairs, where there was no evidence that repairs were inadequate or that Seller knew problems would recur.

R. Rule 2004 Examinations

24.123 Parties Entitled to Conduct

- (7352) *In re Moore*, Case No. 08-33980 (Bankr. E.D. Mi. 2015) – Office of United States Trustee has broad authority to participate in bankruptcy case and to conduct Rule 2004 examinations. Lack of pecuniary interest does not deprive US Trustee of standing to conduct examination.
- (7353) *In re Underwood*, 457 BR 635 (Bankr. S.D. Ohio 2011) – United States Trustee is party in interest entitled to conduct Rule 2004 Exam to determine whether creditor violated discharge injunction by failing to adjust mortgage records to reflect that debtor was current.
- (7354) *In re Rapoport*, Case No. 11-45373 (Bankr. E.D. Mi. 2011) – Any party in interest can request an examination under Rule 2004. Party in interest is anyone who has a financial state in the proceedings. Creditor, a state court appointed receiver an plaintiff in pending state court fraudulent conveyance action, had standing to conduct financial investigation in his status as a creditor in the case.
- (7355) *In re Michalski*, 449 BR 273 (Bankr. N.D. Ohio 2011) – United States Trustee has the authority to conduct an examination under Rule 2004, including the ability to compel the production of documents relating to components of Creditor's Proof of Claim in the Debtors' case. UST does not have to articulate a basis to dispute the Proof of Claim before exercising his right to conduct a Rule 2004 examination.
- (7356) *In re Davis*, 452 BR 610 (Bankr. E.D. Mi. 2011) – United States Trustee has the authority to conduct an examination under Rule 2004, including the ability to compel the production of documents. Settlement between Debtor and creditor of Motion for Sanctions based on creditor's alleged violation of automatic stay did not render moot the subject of the UST examination. UST has interest in investigating the policies and actions of creditor regarding the accuracy, preparation and filing of proof of claim.
- (7357) *In re DeShetler*, 2011 WL 2746003 (Bankr. S.D. Ohio 2011) – United States Trustee has the authority to conduct an examination under Rule 2004, including the ability to compel the production of documents.

24.124 Authorization by Court

- (7358) *In re Xunlight Corp.*, 2015 WL 6143086 (Bankr. N.D. Ohio 2015) – Rule 2004 allows court to authorize discovery and issuance of subpoena in court's discretion. Subpoena issued by creditor in case directed to Trustee quashed where creditor did not first file Motion for Rule 2004 exam.

24.125 Scope

- (7359) *In re Moore*, Case No. 08-33980 (Bankr. E.D. Mi. 2015) – Scope of examination under Rule 2004 is very broad, going beyond discovery normally permitted by Rule 26 and venturing into areas that amount to fishing expedition. Only limits are that requesting party just show good cause for the examination, and examination must not be used for purposes of abuse or harassment and must be relevant to basic inquiry. Good cause requires showing that person taking examination demonstrates that examination is reasonably necessary for protection of legitimate interests.

- (7360) *In re Underwood*, 457 BR 635 (Bankr. S.D. Ohio 2011) – Rule 2004 exam should be limited so as to not be more disruptive and costly to the party being examined than the benefit to be achieved by the discovery. On creditor's examination, party seeking to take exam must show good cause, generally requiring evidence that the examination is necessary to establish a claim or that denial of the examination would result in undue hardship or injustice. Examination into lender's alleged failure to adjust mortgage records at conclusion of Chapter 13 proceeding properly requested information about specific debtor's loan history and communications between lender and debtor post-discharge. However, broad request for generally corporate policies regarding processing of payments and transfer of mortgage accounts from various mortgage servicers to this lender were excessive where UST made only vague allegations that information could lead to discovery of policies that are "in violation of the law" but did not specify any particular law or how the bankruptcy court would have jurisdiction to address those issues. Requests crossed line into full scale investigation of a non-debtor's private affairs without any serious attempt to connect them to this specific bankruptcy case.
- (7361) *In re Michalski*, 449 BR 273 (Bankr. N.D. Ohio 2011) – Document requests that covered Creditor's internal policies and procedures represent the highest potential for intrusion into private business affairs and require a higher level of good cause before disclosure will be required. UST did not state sufficient cause for production of generally applicable policies and procedures because the Subpoena was issued in support of the Rule 2004 examination relating only to the Debtors; and did not demonstrate good cause for the production of the agreements between Creditor and third parties engaged in default servicing, property inspection and property preservation.
- (7362) *In re Davis*, 452 BR 610 (Bankr. E.D. Mi. 2011) – Although extremely broad, the scope of Rule 2004 is not unlimited. the Court can limit the scope of the exam where the harm to the party to be examined greatly outweighs those of the examiner such that the examination should be quashed or limited. UST's request for production of documents and for an examination limited to documents, policies and procedures that relate to the Debtor's account is not open-ended examination but instead is carefully tailored to those documents, policies and procedures.
- (7363) *In re DeShetler*, 2011 WL 2746003 (Bankr. S.D. Ohio 2011) – Rule 2004 examination is not permitted for matters not related to the financial condition of a debtor or a debtor's estate. Upon a creditor objection, the examiner must establish "good cause," taking into consideration the totality of the circumstances, including the importance of the information to the examiner and the costs and burdens on the creditor. Section 586 is broad enough to allow the UST to monitor the claims process, including through the investigation of proofs of claim filed by creditors, to assist in his duty of monitoring the progress of cases. Issues, with proofs of claims filed by mortgage lenders, affect the administration of cases. The level of good cause required to be established by the UST will vary depending on the potential intrusiveness involved. UST is entitled to review the original Note and any such documents that establish creditor as the holder of the Note under the Ohio Uniform Commercial Code and the date on which creditor came into possession of the original Note. To the extent that the "contemporaneously-kept transactional mortgage loan history on the Debtors' mortgage loan" is intended by the UST to capture documents in creditor's possession relating to the transfer of the Note or interests in the Note from one entity to another including documents pertaining to the chain of assignment of the mortgage and chain of endorsement of the note which would tend to support claimant's right to make the within claim in Debtor's bankruptcy case are clearly relevant to the UST's inquiry into creditor's legal basis and standing to file the proof of claim. Loan history relating to the payments made by the Debtors, charges made by the lender on the account, and other debits and credits relating to the loan evidenced by the Note and Mortgage are not properly within scope of Rule 2004 where UST is not challenging the amount of the claim filed.

24.126 Location of Examination

- (7364) *In re Davis*, 452 BR 610 (Bankr. E.D. Mi. 2011) – General rule is that depositions of corporate agents and officers should be taken at the principal place of business. Court would limit examination to the extent that the examination would take place in the district of creditor's principal place of business, or telephonically on terms to be agreed upon by the parties.

24.127 Motion for Examination – Mootness

- (7365) *In re Moore*, Case No. 08-33980 (Bankr. E.D. Mi. 2015) – Mootness can operate as jurisdictional bar to request to take examination under Rule 2004. Action is generally considered moot when underlying cause of action is settled. However, if issue is capable of repetition but evades review because challenged actions are too short in duration to be fully litigated prior to cessation or expiration and there is a reasonable expectation that same complaining party will be subjected to same action in further, court can permit examination notwithstanding settlement of action.

24.128 Motion for Examination – Granted

24.129 Motion for Examination – Denied

- (7366) *In re Hale*, Case No. 11-33589 (Bankr. E.D. Mi. 2012) – Chapter 7 Trustee's Motion for Examination pursuant to Rule 2004 denied as unnecessary. Party to whom Rule 2004 Exam was directed was already party in action against Debtor in California to which Trustee, as Trustee, was already a party. Discovery could be fully obtained in the course of the California action and Trustee failed to demonstrate that adequate discovery could not be obtained through requests in California action. Ultimate outcome of litigation would be determined by California action where Court had already lifted the stay to allow California case to continue and staying the parallel adversary proceeding filed in Bankruptcy case. Rule 2004 is designed to allow Trustee to gather preliminary information, but once litigation is undertaken, discovery is governed by rules of court in which case was pending. Rule 2004 could not be used to circumvent applicable discovery rules.

24.130 Federal Writs of Execution

- (7367) *Hauk v. Valdiva*, 2014 WL 5100090 (Bankr. E.D. Mi. 2014) – Bankruptcy court can issue writ of execution arising out of adversary proceeding only directed to US Marshall Service. Plaintiff’s attempt to include in the writ both the US Marshall and State Sheriff or Deputy Sheriff exceeded court’s ability to issue writ. Court struck reference to Sheriff or Deputy Sheriff before signing writ.

XXV. Sanctions

A. Authority to Impose

25.1 28 USC §1927

- (7368) *Himmelspach v. Carter*, Case No. 11-2151 (Bankr. E.D. Mi. 2015) – Section 1927 allows court to award attorney fees where attorney multiplies proceedings unreasonably and vexatiously, by taking a position that the attorney knows or reasonably should know is frivolous or that tactics will needlessly obstruct litigation of non-frivolous matters. Party who initially consented to jurisdiction then withdrew consent, and later again consented, did not engage in sanctionable conduct where issues of court jurisdiction were unsettled and where it was not clear whether party could consent to jurisdiction of court. Court will not sanction party for conduct related to quickly shifting constitutional and fundamental issues such as court jurisdiction, where law is unclear and unsettled.
- (7369) *Cogent Solutions Group, LLC v. Brown*, 2013 WL 6116052 (S.D. Ohio 2013) – Court can award attorney fees as sanction against party who unnecessarily or vexatiously multiplies proceedings unreasonably. Party “vexatiously multiplies” litigation by pursuing claim that is frivolous or where litigation tactics needlessly obstructs litigation of non-frivolous claims; or where attorney engages in some sort of conduct that, from an objective standpoint, fall short of the obligations owed by member of bar to the court and that causes additional expense to other party. While plaintiff’s case may have been weak, evidence did not indicate that action was frivolous; and mutual discovery disputes between parties did not indicate that Plaintiff’s actions during discovery were cause of any vexatious delays.
- (7370) *Hood v. Chase Manhattan Mortgage Corp.*, 2013 WL 1629306 (E.D. Mi. 2013) – Court can sanction any attorney who unreasonably or vexatiously multiplies proceedings in any case. Sanctions do not require finding of bad faith where attorney knows or reasonably should know that litigation tactics will needlessly obstruct litigation process. Attorney sanctioned where attorney made numerous errors in supplemental response to Motion to dismiss, including filing supplemental brief after briefing had closed; requesting leave to amend in improper manner and without first seeking consent of opposing counsel; requesting leave to amend in a motion that was not properly formatted or captioned; and failing to attach proposed amended complaint to request for leave to amend.
- (7371) *Hayes v. Internal Revenue Service*, Case No. 10-6573 (Bankr. E.D. Mi. 2011) – IRS cannot be sanctioned for filings made in District Court.
- (7372) *In re Greater Middle Missionary Baptist Church*, 2011 WL 6349290 (Bankr. E.D. Mi. 2011) – Section 1927 allows court to impose sanctions against attorney who unreasonably and vexatiously multiplies proceedings in case. Sanctions can include excess costs, expenses and attorney fees reasonably incurred in response to the conduct. Section 1927 is intended to deter dilatory practices. Section 1927 requires something less than bad faith but something more than negligence or incompetence. Chapter 11 petition filed under emergency circumstances where attorney did not have sufficient time to fully investigate circumstances and title to property. Counsel was not experienced and accepted at face value client’s version of facts without detailed independent investigation. Once counsel became fully aware of circumstances, counsel convinced client to not oppose motion to dismiss, surrender of property to creditor, and to stipulate to entry of state court judgment of possession. Counsel’s conduct, particularly when coupled with timely corrective action upon discovery of true state of facts, did not rise to level of vexatious that so far exceeded zealous advocacy as to warrant sanctions.
- (7373) *In re Ashford*, 2011 WL 3606687 (Bankr. E.D. Ky. 2011) – Section 1927 is not applicable to actions or representations taken in state court proceedings. Court has no authority to impose sanctions against Trustee for actions taken by Trustee in state court employment litigation. For actions taken in Bankruptcy Court, sanctions under Section 1927 are warranted when an attorney has engaged in some sort of conduct that, from an objective standpoint, falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party. When an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney. Bad faith is not required to support a sanction under Section 1927. Trustee’s erroneous determination that certain assets had not been abandoned by the estate was not unreasonable or lacking in legal basis notwithstanding that the Court later determined Trustee’s position to be incorrect and Trustee thereafter immediately terminated actions which Debtor contended were vexatious.
- (7374) *Followell v. Mills*, 2009 WL 723132 (6th Cir. 2009) - Attorney who multiplies proceedings in any case unreasonably and vexatiously may be sanctioned by the Court. Sanctions are warranted when attorney objectively falls short of the obligations owed by a member of the bar to the Court and which causes additional expense to the opposing party. Sanctions are to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy. Sanctions require a showing of something less than subjective bad faith, but something more than negligence or incompetence. Attorney is sanctionable when he intentionally abuses the judicial process or knowingly disregards the risk that his actions will needlessly multiply proceedings. Attorney has pre-filing duty to make reasonably inquiry. Where documents readily available to counsel would have disclosed strong reasons to doubt merits of claim, counsel should at least have conducted further investigation. Sanctions appropriate where pleading excesses are not result of mere negligence or incompetence but instead reflect reckless lawyering that Courts must be vigilant to admonish, correct, and deter through sanctions.
- (7375) *Maloof v. Level Propane Gasses, Inc.*, 316 Fed. Appx. 373 (6th Cir. 2008) - Bankruptcy court did not abuse its discretion in imposing sanctions on a shareholder in the form of attorney’s fees and costs, when it was the third motion, asking for the same relief.

25.2 Inherent Authority of Court

- (7376) *Armstrong v. Commissioner of Social Security*, 2015 WL 1476398 (E.D. Mi. 2015) – Court does not have inherent authority to impose sanctions against a lawyer for shoddy or unprofessional practice unless counsel [1] advances claims that were meritless, [2] knew or should have known this, and [3] motive for filing the suit was for an improper purpose such as harassment. There are rules and statutes that address such conduct, and the authority to sanction counsel is conditioned on satisfaction of the elements of the various remedial and punitive provisions which did not apply in this case. While counsel's practices were not consistent with counsel's duties, counsel asserted potentially meritorious case and there was no evidence that action was taken in bad faith or for purposes of harassment of defendant. However, Court would turn a blind eye to counsel's conduct in this case, which apparently replicates his activity in many other cases in this district. Instead, Court would refer lawyer to the Chief Judge of the district for the institution of disciplinary proceedings under the applicable local rules. Counsel employed a superficial, cut-and-paste, template approach to fulfilling his professional duty to substantively brief the issues presented for this Court's most serious consideration and determination, as the brief filed in this case is almost identical to the dozens, if not hundreds, of other briefs that he has filed with this Court. Other judges in this district had previously red-flagged counsel's conduct and at least one Magistrate had previously recommended that the Court invoke its inherent powers to fine counsel in an effort to curb his conduct.
- (7377) *Himmelspach v. Carter*, Case No. 11-2151 (Bankr. E.D. Mi. 2015) – Court has inherent authority to award attorney fees where attorney multiplies proceedings unreasonably and vexatiously, by taking a position that the attorney knows or reasonably should know is frivolous or that tactics will needlessly obstruct litigation of non-frivolous matters. Party who initially consented to jurisdiction then withdrew consent, and later again consented, did not engage in sanctionable conduct where issues of court jurisdiction were unsettled and where it was not clear whether party could consent to jurisdiction of court. Court will not sanction party for conduct related to quickly shifting constitutional and fundamental issues such as court jurisdiction, where law is unclear and unsettled.
- (7378) *Jacques v. JPMorgan Chase*, 2015 WL 58646 (W.D. Mi. 2015) – Court has inherent authority to award sanctions where party's conduct amounts to bad faith. Further, action based on RESPA would allow plaintiff to recover attorney fees if plaintiff was successful, indicating that defendant should be able to recover fees if action is not substantially justified. Plaintiff continued to bring multiple actions against Chase under RESPA although plaintiff knew that Chase was not servicer and was not liable to plaintiff as a matter of law.
- (7379) *Leonard v. Piccirilli*, Case No. 13-1330 (9th Cir. BP 2014) – Bankruptcy Court has inherent authority and authority under Section 105 to impose sanctions. Inherent authority includes ability to sanction broad range of conduct while civil contempt is designed to remedy violation of specific order. Court must make specific and explicit finding of bad faith or willful misconduct before imposing sanctions under inherent authority.
- (7380) *Cogent Solutions Group, LLC v. Brown*, 2013 WL 6116052 (S.D. Ohio 2013) – Court can award attorney fees as sanction where party proceeds in bad faith. Bad faith requires that claims advanced were meritless; counsel knew or should have known that claims were meritless; and that suit was filed for improper motive such as harassment. While plaintiff's case may have been weak, evidence did not indicate that action was frivolous; and mutual discovery disputes between parties did not indicate that Plaintiff's actions during discovery were frivolous for purposes of imposing sanctions.
- (7381) *Goldberg v. Goodman*, Case No. 12-1643 (9th Cir. BAP 2013) – Bankruptcy court acted within discretion in sanctioning debtor's counsel including 6 month suspension from filing new bankruptcy cases, and referrals to the United States Attorney, Nevada Secretary of State, Nevada Attorney General, Nevada State Bar and United States Trustee. Attorney knowingly had staff members take pre-petition counseling courses in lieu of debtors and then filed fraudulent certificates stating that debtors had completed the course. Attorney also forged debtor's signatures on tax returns filed with the IRS as well as the IRS Power of Attorney forms. Attorney failed to appear at Section 341 meeting and sent non-lawyer paralegal to represent debtor; attorney had staff members notarize documents without witnessing the signatures, which themselves were forged; and failed to act with diligence in prosecution of debtor's Chapter 13 case. Counsel knowingly filed fraudulent and false documents with the Court and the IRS, and not only violated court rules but continued to violate multiple criminal statutes including those relating to filing of tax returns and other documents. Court has authority under Section 105, Rule 9011 and inherent authority to impose sanctions for conduct that frustrates or impedes the proper administration of estate. Sanctions were not excessive where counsel had previously been sanctioned multiple times for same or similar conduct, where prior disciplinary actions had not stemmed unprofessional conduct. Counsel also acknowledged 15-20 grievances filed against him by former clients for similar conduct. Sanctions should be progressive and where prior sanctions were ineffective, court properly elevated sanctions to include suspension and criminal referral. Court also imposed monetary sanctions for attorney fees incurred by debtor's new counsel in connection with sanctions process.
- (7382) *In re Monteagudo*, Case No. 13-20044 (5th Cir. 2013) – Generally, court's inherent authority to impose sanctions requires some element of bad faith conduct. Bad faith can be inferred where conduct is patent from the record, even without specific findings by the sanctioning court. Bankruptcy Court properly sanctioned attorney for repeated and multiple filings of adversary proceedings under Section 523(a)(2) without pleading any facts or making any effort to plead fraud with specificity as required by Rule 9. Court had previously advised attorney that fraud must be pled with specificity yet attorney continued to routinely file adversaries that disregarded that admonition.
- (7383) *Richard v. Spradlin*, 2013 WL 1571059 (E.D. Ky. 2013), *aff'd* 2014 WL 3452292 (6th Cir. 2014) - Court has authority to enter sanctions even in action where court otherwise lacks subject matter jurisdiction. Sanctions are part of court's ancillary jurisdiction that is independent of jurisdiction over underlying action, and allows court to manage its proceedings. Court had authority to enter sanctions against party who failed to comply with court's order regarding mediation, where party showed up late and, when he did show up, made demands for procedures that were outside established procedures for mediation. Party's action indicated that party did not and would not engage in meaningful negotiations and party demonstrated bad faith and disrespect for mediation process that was harmful to other parties

and caused an unnecessary delay in the orderly resolution of the disputes. Bankruptcy court cited party's failure to prepare for the mediation and failure to participate in the mediation as the bases for sanctions.

- (7384) *In re Mehlhose*, 469 BR 684 (Bankr. E.D. Mi. 2012) – Section 105 and Court's inherent authority to issue sanctions for bad faith or willful misconduct permits court to dismiss case with bar to later re-filing. Court can award attorney fees and costs where the party acted in bad faith, vexatiously, wantonly or for oppressive reasons. Debtors' case dismissed with 2 year bar to re-filing as case filed in bad faith. Almost all of the listed debts had been excepted from discharge in prior bankruptcy case, such that Chapter 7 proceeding could not serve any legitimate purpose and appeared to be continuation of debtor's state and bankruptcy court course of conduct designed solely to hinder, delay and defraud creditors. Debtors' filing under Chapter 7 was a waste of time, and caused undue and unnecessary delay of at least three months and caused the Trust to incur unnecessary expense in filing a motion to dismiss what was then a senseless Chapter 7 case. Debtors lied under oath substantially understating actual income on Schedule I. Given magnitude of difference between stated income and calculated income based on pay stubs, debtors must have known, and in fact did know, that Schedule I was false when debtors signed and certified its accuracy. Had Schedule I been accurate, it would have disclosed substantial income that could have been used to fund Chapter 13 plan. Belated conversion of case to Chapter 13 would not avoid dismissal where petition itself was tainted with fraud and lack of good faith, itself warranting dismissal under Section 1307(c).
- (7385) *In re Burton-Katzman Development Company, Inc.*, Case No. 10-66734 (Bankr. E.D. Mi. 2012) – Chapter 7 proceeding dismissed where schedules showed no assets or liabilities and were, in fact, completely blank; and case was allegedly filed pursuant to a corporate resolution dated 2 years after debtor had filed Certificate of Dissolution with State of Michigan. Petition filed in bad faith effort to stall litigation between City of Dearborn as Plaintiff and Debtor and its principals as defendants. Court imposed sanctions against Debtor and its principals for fees and expenses incurred by City in having case dismissed.
- (7386) *In re MacFarland*, 462 BR 857 (Bankr. S.D. Fl. 2011) – Debtor's counsel suspended from practice of law for 31 days as sanctioned for filing objections to proofs of claim based on lack of supporting documentation, despite fact that debtors had scheduled, as undisputed, debts in amounts that equal or exceed amounts set forth in proof of claim. Failure to attach supporting documentation may rob claim of evidentiary presumption of validity, but where debtor's schedules independently establish prima facie case of debtors liability, there is no legal basis to support and objection to claim based solely on a failure to attach documents.
- (7387) *Wells Fargo Bank, N.A. v. Stewart*, 647 F.3d 553 (5th Cir. 2011) – Court lacked authority to *sua sponte* impose sanctions against creditor that would have required creditor to (1) to audit every proof of claim it has filed in any case pending on or filed after April 13, 2007; (2) to provide a complete loan history on every account and to file that history with the appropriate court; and (3) to amend any proofs of claim already on file to comply correct errors or inaccuracies.
- (7388) *In re Ashford*, 2011 WL 3606687 (Bankr. E.D. Ky. 2011) – Court has inherent authority to impose sanctions when party acts in bad faith, vexatiously, wantonly or for oppressive reasons. Bad faith for purposes of sanctions requires (1) the claims advanced were meritless; (2) counsel knew or should have known the claims were meritless; and (3) the motive for filing the suit was for an improper purpose such as harassment. Mere lack of success is not basis for sanctions. Trustee's opposition to Motion to Enforce Abandonment did not constitute pursuit of meritless claim or action where Trustee had good faith belief that asset had not been properly disclosed and could not have been abandoned; and once Court determined that asset had been abandoned, Trustee immediately terminated any effort to pursue recover of asset.
- (7389) *Dorbeck v. Sykora* 2010 WL 4923215 (E.D. Mi. 2010) – Complaint filed in District Court alleged that Plaintiff held ownership interest in corporation. Plaintiff was also Debtor in Chapter 13. Bankruptcy documents failed to disclose any ownership or other interest in corporation. Court has inherent authority to assess attorney fees where claims advanced were meritless, counsel or the party knew or should have known this, and filing the suit was for an improper purpose. Plaintiff's complaint was devoid of legal or factual merit as it clearly violated concept of judicial estoppel; Plaintiff was well aware at start of proceedings of factual inconsistencies in pleadings filed at District Court versus those filed in Bankruptcy Court; and Plaintiff demonstrated utter disregard for sanctity of judicial process by failing to disclose assets in Bankruptcy court and then filing complaint based entirely on interests that he denied having in Bankruptcy proceeding.
- (7390) *In re Wilson*, 2010 WL 3061741 (Bankr. N.D. Ohio 2010) - Court's contempt powers derive from Bankruptcy Code Section 105(a) and the inherent power of a court to enforce compliance with its lawful orders. Contempt must be shown by clear and convincing evidence that the alleged contemnor violated a definite and specific court order which required the performance or the nonperformance of an act with knowledge of that court order. Willfulness is not an element of civil contempt and intent to disobey the order is irrelevant. However, the alleged contemnor may defend by showing an inability to comply with the order.
- (7391) *In re Denison*, 2010 WL 3061715 (Bankr. N.D. Ohio 2010) - Court's contempt powers derive from Bankruptcy Code Section 105(a) and the inherent power of a court to enforce compliance with its lawful orders. Contempt must be shown by clear and convincing evidence that the alleged contemnor violated a definite and specific court order which required the performance or the nonperformance of an act with knowledge of that court order. Willfulness is not an element of civil contempt and intent to disobey the order is irrelevant. However, the alleged contemnor may defend by showing an inability to comply with the order.
- (7392) *Fokkena v. Countrywide Home Loans, Inc.*, 2008 WL 3932153 (N.D. Ohio 2008) – Bankruptcy Court has inherent power to sanction vexatious conduct presented before the Court. US Trustee's Motion for monetary sanctions for vexatious filing falls within the authority of the Bankruptcy Court. Bankruptcy Court could sanction creditor for filing proof of claim where creditor failed to ensure the accuracy of its filings. Creditor filed proof of claim and objected to confirmation although Debtor did not own the property which was the subject of creditor's mortgage. Bankruptcy Court could impose both monetary sanctions and enter an injunction to prevent

creditor from engaging in “similar conduct”.

- (7393) *In re Steiner*, Case No. 08-33717 (E.D. Mi. 2009) – Debtors’ Chapter 7 Attorney failed list tax refunds based on erroneous belief that tax refunds were not assets of the Bankruptcy estate. After Debtors amended to disclose and exempt the tax refund, the Court set an evidentiary hearing on the issues of good faith, but Debtors’ counsel failed to advise Debtors to attend, requiring an adjournment of that hearing. Court sanctions Debtors’ counsel \$600 to pay to the estate to compensate the Trustee for time spent preparing for the evidentiary hearing that had to be adjourned and an additional \$300.00 for failing to understand that tax refunds are part of the estate and must be scheduled as such thereby causing the Trustee to expend time and effort to recover those tax refunds for the estate.

25.3 Section 105

- (7394) *In re Morton*, 2015 WL 5731859 (Bankr. E.D. Tn. 2015) – Section 105, Rule 9011 and Section 327 work together to allow court to oversee employment and compensation of professionals to protect the estate by: 1) ensuring the trustee or debtor-in-possession is represented by competent, disinterested persons with experience and integrity, and 2) preventing the estate from being drained by unreasonable fees that might otherwise benefit creditors, the debtor, and equity security holders. Court sanctioned attorney where counsel filed Petition, Schedules and SOFA bearing debtor’s electronic signature although debtor had never signed any the original documents. Counsel’s application for retention failed to disclose that Counsel was owed \$150,000 for pre-petition attorney fees, creating conflict and lack of disinterestedness. Counsel’s disclosure of compensation and Statement of Financial Affairs failed to disclose payments by debtor to attorneys of \$2,000 per month for each of the 12 months preceding commencement of the case, and undisclosed payments created yet another conflict between debtor and attorney. Attorneys repeatedly failed to properly file documents via the ECF procedures resulting in multiple deficiency notices. Counsel failed to file required documents including 1) had not timely filed the monthly operating report required for April 2015; (2) a Substantial/Controlling Interest Report as required by Rule 2015.3 and as requested in an email to counsel and again at the meeting of creditors; (3) amended Statement of Financial Affairs and schedules to correct and include information as requested during the meeting of creditors; and (4) information required by the United States Trustee regarding bank account statements as requested at the initial debtor conference, again in two separate emails, and once more at the meeting of creditors. Counsel failed to timely submit Cash Collateral Order, waiting until 5 days after court entered order directing that order be submitted, and by time order was submitted it did not provide sufficient notice of the continued hearing and rendered it impossible for creditors to receive adequate notice. Counsel filed other motions and requested expedited hearings on one day notice. Overall conduct evidenced a lack of competence. Counsel intentionally misrepresented to court that debtor had signed various documents including the petition, schedules and statement of affairs when counsel filed those documents with the court bearing the electronic signature of debtor. Rule 9011 when read in conjunction with Bankruptcy Rule 1008 specifically prohibits attorneys from signing a debtor’s name to the lists, schedules and statement of financial affairs when debtor has not affixed his original signature to those documents.
- (7395) *In re Ausmus*, 2015 WL 5000095 (Bankr. W.D. Ky. 2015) – Section 105 does not provide basis for court to set aside discharge where creditor did not timely file adversary proceeding to object to discharge or to except debt from discharge. Section 105 cannot be used where application would be inconsistent with other provisions of Code or Rules.
- (7396) *Sutter v. Saxon Mortgage Services, Inc.*, Case No. 06-3150 (Bankr. E.D. Mi. 2015) – Section 105 allows court to enter orders to carry out provisions of bankruptcy code. Section 105 could not be used to impose sanctions based solely on State law, and not on any provision of the code.
- (7397) *Himmelsbach v. Carter*, Case No. 11-2151 (Bankr. E.D. Mi. 2015) – Section 105 allows court to award attorney fees where attorney multiplies proceedings unreasonably and vexatiously, by taking a position that the attorney knows or reasonably should know is frivolous or that tactics will needlessly obstruct litigation of non-frivolous matters. Party who initially consented to jurisdiction then withdrew consent, and later again consented, did not engage in sanctionable conduct where issues of court jurisdiction were unsettled and where it was not clear whether party could consent to jurisdiction of court. Court will not sanction party for conduct related to quickly shifting constitutional and fundamental issues such as court jurisdiction, where law is unclear and unsettled.
- (7398) *Law v. Siegel*, 134 S.Ct. 1188 (2014) – Section 105 affords court authority to carry out provisions of Code, but court cannot use section 105 to contravene specific statutory sections. Court attempted to surcharge debtor’s claimed exemption to pay for trustee fees and expenses in pursuing avoidance of fraudulent, non-existent mortgage. Section 522(k) provides that exempt equity is not liable for payment of administrative fees or expenses including trustee’s attorney fees in uncovering an avoiding fraudulent mortgage. Absent objection to exemption, exemption was allowed and there is no statutory authority allowing exempt assets to be invaded for payment of debts or expenses other than specific matters listed in Section 522(o), which does not include administrative expenses of Chapter 7 estate. Court order surcharging exemptions using Section 105 as authority directly contradicted Section 522(k) and would be reversed.
- (7399) *Hahn v. Educational Credit Management Corporation*, Case No. 11-084 (1st Cir BAP 2012) – Section 105 provides court broad authority to exercise equitable powers where necessary or appropriate to implement Order or other Code provisions. However, power must be used cautiously and only if, and to the extent that, the equitable remedy dispensed by the court is necessary to preserve an identifiable right conferred elsewhere in the Code. Sanctions were appropriate where creditor repeatedly called debtor post-discharge in effort to obtain payment, although Bankruptcy Court had determined that debtor had paid non-dischargeable student loans prior to commencement of bankruptcy and debtor was no longer indebted to creditor. Sanctions properly awarded for attorney fees and costs incurred in responding to creditor’s post-discharge collection actions.
- (7400) *Chastain v. Bank of America Home Loans*, 2012 WL 2377476 (Bankr. E.D. Tn. 2012) – Remedy for alleged violation of discharge injunction is motion for contempt. Neither Section 524 nor Section 105 creates private cause of action for violation. Adversary proceeding requesting finding of civil contempt and award of attorney fees and costs dismissed. Proper vehicle for seeking contempt is by motion for

contempt, not by adversary proceeding.

- (7401) *In re Mehlhose*, 469 BR 684 (Bankr. E.D. Mi. 2012) – Section 105 and Court’s inherent authority to issue sanctions for bad faith or willful misconduct permits court to dismiss case with bar to later re-filing. Court can award attorney fees and costs where the party acted in bad faith, vexatiously, wantonly or for oppressive reasons. Debtors’ case dismissed with 2 year bar to re-filing as case filed in bad faith. Almost all of the listed debts had been excepted from discharge in prior bankruptcy case, such that Chapter 7 proceeding could not serve any legitimate purpose and appeared to be continuation of debtor’s state and bankruptcy court course of conduct designed solely to hinder, delay and defraud creditors. Debtors’ filing under Chapter 7 was a waste of time, and caused undue and unnecessary delay of at least three months and caused the Trust to incur unnecessary expense in filing a motion to dismiss what was then a senseless Chapter 7 case. Debtors lied under oath substantially understating actual income on Schedule I. Given magnitude of difference between stated income and calculated income based on pay stubs, debtors must have known, and in fact did know, that Schedule I was false when debtors signed and certified its accuracy. Had Schedule I been accurate, it would have disclosed substantial income that could have been used to fund Chapter 13 plan. Belated conversion of case to Chapter 13 would not avoid dismissal where petition itself was tainted with fraud and lack of good faith, itself warranting dismissal under Section 1307(c).
- (7402) *Turner v. American Express Centurion Bank*, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Debtors do not have a private right of action under section 105 against creditor for filing proofs of claim for time-barred debts. Section 105 does not provide a private right of action for damages for filing a false proof of claim.
- (7403) *In re Lundeen*, 442 BR 659 (Bankr. S.D. Ohio 2011) – Injunction pursuant to Section 105 is radical measure to be used only in unusual circumstances where judgment against third party would in effect be judgment against debtor. Criminal proceedings against debtor affected only debtor and would not result in any judgment against any third party.
- (7404) *Vining v. Comerica Bank*, Case No. 03-4950 (Bankr. E.D. Mi. 2011) – Sanctions for alleged violation of stay are limited to any “individual” injured by a willful violation of Section 362. Sanctions not available where third party refused to surrender original documents belonging to corporate debtor in Chapter 7 proceeding. Even assuming refusal to surrender documents was technical violation of stay, Corporate Chapter 7 debtor is not an “individual”. Any entity allegedly harmed by violation of stay may seek sanctions under Section 105, but sanctions are discretionary. Court would not exercise discretion to award sanctions where Trustee failed to demonstrate any harm or prejudice from delay in turning over documents to Trustee.

25.4 Rule 9011

- (7405) *Penn, LLC v. Prosper Business Development Corp.*, 773 F.3d 764 (6th Cir. 2014) – Motion for sanctions under Rule 11 must be served on opposing party before dismissal of underlying action. Defendant sent Rule 11 safe harbor letter to plaintiff but took no further action for 6 months. Defendants then filed motion to dismiss case which was granted by court. Thereafter, defendants served the Rule 11 Motion. Court denied sanctions, noting that purpose of safe harbor is to allow party to withdraw offending pleading. If moving party fails to move for sanctions until after case dismissed, purposes of rule would be thwarted.
- (7406) *Brown v. Florida Coastal Partners*, 2014 WL 5107706 (S.D. Ohio 2014) – Party who failed to comply with safe harbor provisions of Rule 9011 not entitled to recovery.
- (7407) *Young v. Young*, 2014 WL 944846 (8th Cir. BAP 2014) – Court had inherent authority to sanction attorney for false statements in Chapter 13 Plan and certification regarding domestic support obligations. Although attorney knew that debtor was behind on post-petition support payments, attorney stated in plan that support obligations were “pre-petition” and that debtor would “continue to pay” post-petition obligations. Attorney also filed false certification that debtor was current on post-petition obligations. Attorney knew representations were false when made and lacked either factual or legal support. Court suspended attorney for six months.
- (7408) *Findling v. Rapoport*, Adv. No. 11-6933 (Bankr. E.D. Mi. 2014) – Rule 9011 allows court to impose sanctions against plaintiff’s counsel for false representations or factual contentions during trial that lack evidentiary support or are not supported by existing law or a good faith extension or modification of existing law. Defendant’s motion for sanctions based on Plaintiff’s allegation of improper contact between Defendant and translator denied where alleged misrepresentation was not made in petition, written motion or other paper, but were oral statements made in court. Further, Plaintiff’s allegation were not only reasonable but indisputable showed some effort by defendant to influence or change translator’s testimony. Communication was improper and Plaintiff’s raising of the issue was not improper. Defendant’s Motion appeared more calculated to be another opportunity for defendant to contest court’s conclusion that third party translation would be stricken as inaccurate and unreliable.
- (7409) *J. Edward Kloian Foundation v. Findling*, 2013 WL 6859143 (E.D. Mi. 2013) – Rule 11 sanctions may be imposed where a reasonable inquiry would have disclosed that the pleading is not well grounded in fact; is not warranted by existing law or an extension or modification of existing law; or is interposed for an improper purpose. The reasonable inquiry is not a one-time obligation and the parties have an ongoing obligation to review and re-evaluate pleadings. Party seeking sanctions must serve the motion and opposing party has 21 days to correct or withdraw the challenged paper. Failure to comply with safe harbor provision is fatal to any request for sanctions even if the party against whom sanctions are sought does not raise issue. County was entitled to sanctions where complaint sought damages against state court judge based on alleged errors in rulings, as the judge was entitled to absolute judicial immunity for actions; and action sought to contest validity of state court orders in violation of Rooker-Feldman. Sanctions properly imposed against party’s attorney under Rule 11 including attorney fees incurred in defending the action.
- (7410) *Ettinger & Assoc., LLC v. Miller*, Case No. 12-3151 (3d Cir. 2013) – Safe harbor provision of Rule 9011 requires that party to give 21 days’ notice before filing motion. If safe-harbor notice is given by mail, Rule 9006 requires three additional days. Compliance with safe-

harbor provisions is condition of relief under Rule 9011, and party who fails to comply cannot prevail on 9011 motion. Sanctions motion denied where moving party mailed 9011 notice and then filed motion 23 days later. As party failed to strictly comply with Rule 9011 as extended by Rule 9006, Motion was defective as a matter of law.

- (7411) *Winterton v. Blue Pine Group, Inc.*, Case no. 11-60059 (9th Cir. 2013) – Rule 9011 provides for sanctions for conduct that is baseless and made without reasonable inquiry. Counsel filed and continued to pursue a bankruptcy petition without adequate investigation that it was legitimate, van after he was put on notice that clients lacked authority to file it. Sanctions must be allocated between attorney and client based on culpability, and must be limited to what would be sufficient to deter repetition of the conduct. Sanctions reduced where amount awarded by Bankruptcy Court did not allocate between counsel and client but instead held counsel solely responsible, where error stemmed in part from reliance on debtor and debtor's litigation and corporate counsel. Further, amount awarded exceeded amount which would be sufficient to deter future conduct.
- (7412) *Haines & Krieger, LLC v. National Capital Management, LLC*, Case No. 12-1375 (9th Cir. BAP 2013) – Debtor's objection to proof of claim based on alleged failure to attach documents was frivolous and was properly overruled. Debtor scheduled the obligation as liquidated, non-contingent and undisputed, which provides evidentiary basis for validity of claim. Debtor had no good faith reason to believe that debt was not owed or that there was any other substantive objection to either existence or amount of claim. However, Bankruptcy Court erred in awarding sanctions under Rule 9011 where court failed to state the factual basis for conclusion why Court considered objection meritless under standard of Rule 9011 and where there was no evidence of compliance with safe harbor provisions of Rule 9011.
- (7413) *In re M.P. Construction Company, Inc.*, Case No. 12-1306 (9th Cir. BAP 2013) – Attorney sanctioned for filing petition for corporate debtor where debtor had no assets and filing was done solely to benefit insiders by allowing debtor to transfer license to insider without any effort to answer to judgment creditors. Filing is frivolous if it is baseless in fact and made without reasonable inquiry. Attorney has duty to conduct reasonable investigation. Bankruptcy petition is "pleading" for which sanctions can be awarded. Petition is not within "safe harbor" provision. As such, creditor is not required to issue "safe harbor" letter and to give debtor opportunity to withdraw petition before seeking sanctions.
- (7414) *In re Halcomb*, 2012 WL 3778876 (Bankr. N.D. Ohio 2012) – Motion for 9011 Sanctions fatally defective where allegedly offending pleading was withdrawn two days after party was first presented with 9011 demand.
- (7415) *In re Dahlgren*, Case No. 11-2794 (3d Cir. 2012) – Attorney sanctioned under Rule 9011 for promulgation of Amended Chapter 13 Plan that was substantively identical to original plan, confirmation of which had already been denied. Although initial plan was not confirmed, original plan did not lack good faith basis in law or reasonable argument for modification or extension of law. However, after Bankruptcy Court denied confirmation, holding that the plan was "patently unconfirmable", counsel filed amended plan that was substantively identical. At that point, counsel knew that he provisions were not confirmable and lacked any good faith basis to believe that the plan could be confirmed, warranting sanctions under Rule 9011.
- (7416) *Budzynski v. US*, 2012 WL 3150836 (E.D. Mi. 2012) – Motion for sanctions under Rule 9011 was itself frivolous and subject to sanctions where moving party failed to satisfy 21-day notice requirement before filing Motion. Rule 9011 requires strict compliance with "safe harbor". Further, conduct complained of was issuance by IRS of notice of levy automatically generated by computer where IRS immediately advised counsel that IRS had no intention of levying. Motion for sanctions was not reasonable and lacked any good faith basis.
- (7417) *Huntington National Bank v. Bruinsma*, 475 BR 602 (Bankr. W.D. Mi. 2012) – Court can impose sanctions under Rule 9011 on court's own initiative. Court should enter Order to Show Cause that identifies specific conduct that violates attorney's accountability for his own representations. Attorney sanctioned for representing to court that Michigan recognized common law landlord lien where lease agreement did not grant any lien. Court concluded that Michigan did not have, and has never had, any general common-law lien on tenant's property to secured payments under the main lease. Court can impose monetary sanction for actions that result in waste of court's time. Court did not impose monetary sanctions in this case, noting that "stern warning" should be sufficient to deter future conduct.
- (7418) *In re Lewis*, 2012 WL 1682587 (2012 WL 1682587 (Bankr. N.D. Ohio 2012) – Chapter 13 trustee filed a motion for the imposition of sanctions against Debtor's Attorney alleging that no reasonable basis existed for Attorney to assert in debtor's Chapter 13 plan that there was no arrearage claim by Lender with regard to the East Cleveland property. Attorney was on notice of the arrearage because of Attorney previously represented debtor. Attorney admitted having knowledge of the foreclosure proceedings, but asserted that he relied on information from the debtor's financial advisor, indicating that a representative of Lender had agreed to a loan modification that would add the arrearage to the end of the mortgage. It was not reasonable to rely solely on advisor's representations as to Lender's purported agreement to modify its loan with the debtor. Attorney should have obtained something in writing from Advisor, the debtor, or Lender to verify that a loan modification was at least under active consideration; or Attorney could have noted in the "special provisions" section of the plan that the arrearage would be addressed in a loan modification with Lender; or Attorney could have waited up to 14 days after filing the Chapter 13 case to file the Chapter 13 plan. It was not reasonable, under the circumstances, for Attorney to make the *unqualified* representation in the debtor's Chapter 13 plan that the estimated mortgage arrearage was \$0. Attorney did not fall within the safe harbor provision of Rule 9011 by moving for voluntary dismissal of the debtor's bankruptcy case. Safe harbor requires that the challenged paper, claim, defense, contention, allegation, or denial [be] withdrawn or appropriately corrected. Attorney did not amend the plan or withdraw the plan as required to fit safe harbor as dismissal did not "correct" the challenged paper. Rule 9011 permits a broad array of nonmonetary sanctions, plus monetary sanctions limited to what would be sufficient to deter such conduct in the future. Minimal monetary sanction, coupled with the nonmonetary sanction associated with a written finding of a Rule 9011 violation, is sufficient to deter future violations.

Attorney directed to pay the sum of \$200.00 to the clerk of court . Lack of prior sanctions and no indication that Attorney acted in bad faith would not justify award of attorney's fees to the Chapter 13 trustee.

- (7419) *Boone v. JPMorgan Chase Bank*, Case No. 11-10891 (11th Cir. 2011) – Sanctions under Rule 11 and 28 USC Section 1927 requires proof of unreasonable and vexatious conduct; that multiplies the proceedings; and amount of sanctions must bear financial nexus to proceedings. Rule 11 allows for sanctions for a pleading that is in bad faith for an improper purpose; that has no reasonable factual basis, or ; is based on a legal theory with no reasonable chance of success. Claims must be “objectively frivolous”. Rule 11 does not require showing of subjective bad faith. Plaintiff's complaint did not allege any factual basis support allegation that creditor filed false statements or that any alleged inaccuracies were done with intent to hinder, deceive or harass plaintiff. Creditor filed copy of loan agreement but failed to redact social security number. Creditor immediately realized error and withdrew the exhibit and re-filed a redacted copy.
- (7420) *In re Taylor*, 2011 WL 3692440 (3d Cir. 2011) – Attorney who blindly relied on computerized information without contacting creditor directly or taking any other steps to verify data violated Rule 9011 in filing proof of claim, response to objection to claim and Motion for Stay Relief. Proof of claim contained factual errors; the wrong mortgage was attached, debtors' monthly payment was incorrect and the value of the debtors' home was understated by \$100,000. Computerized data base did not reflect payments received by creditor and attorney lacked ability to contact creditor to investigate debtor's assertions. Attorneys also served requests for admissions for matters that attorneys knew or should have known were false, including request for debtor to admit that debtor had not made payments when debtor had made payments and creditor accepted those payments. While it is “usually reasonable for a lawyer to rely on information provided by a client, especially where that information is superficially plausible and the client provides its own records which appear to confirm the information”, reliance assumes a reasonable attempt at eliciting information from the client. Attorney must exercise independent professional judgment and make reasonable effort to determine what facts are likely to be relevant to a particular court filing and to seek those facts from the client. Attorney cannot settle for only the information that the client that attorney should be provided with. Attorney preparing the court papers did not have information about the debtors' equity in the home, yet the signed documents stated no equity. A minimal inquiry to creditor would have revealed the dispute over the flood insurance and that the debtors were continuing to make payments, yet the papers indicated that the debtors were in default, with no reference to the insurance issue. Attorney preparing the signed documents ignored clear warning signs in the debtors' claim objection and response to the stay motion. “At that point, any reasonable attorney would have sought clarification and further documentation from her client, in order to correct any prior inadvertent misstatements to the court and avoid any further errors.”
- (7421) *Byrd v. Arvest Bank*, Case No. 10-8071 (6th Cir. BAP 2011) – Sanctions under Rule 9011 are based on whether the conduct was reasonable under the circumstances as they existed when the potentially sanctionable conduct occurred. Bankruptcy Petition filed for corporate entity without authorization is sanctionable under Rule 9011. Once Court finds violation of Rule 9011, Court has broad discretion in fashioning sanctions with the twin goals of deterrence of the offending party and compensation to the injured party, and may include reasonable attorney fees taking into account the sanctioned party's ability to pay. Court properly awarded injured secured creditor sanctions of more than \$42,000 against person who signed petition on behalf of limited partnership without authorization.
- (7422) *Turner v. American Express Centurion Bank*, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Motion for sanctions under Rule 9011 may not be filed or presented to the court unless the alleged offending party has been provided with twenty-one days to withdraw or correct the improper pleading. Debtor failed to comply with Rule 9011 in requesting attorney fees for first time as a part of Amended Complaint.
- (7423) *Rankin v. Lavan*, 2011 WL 3701441 (6th Cir. 2011) – Debtor's repeated filings against numerous entities, including request for Grand Jury investigation to charge various parties with violations of Civil Rights and RICO, without evidence and with “a marked absence of coherence”, and Debtor's general litigious behavior which culminated in Bankruptcy Court injunction against Debtors filing any further pleadings warranted imposition of sanctions for abusive conduct.
- (7424) *In re Ashford*, 2011 WL 3606687 (Bankr. E.D. Ky. 2011) – Rule 11 requires the moving party to provide notice to the other party with the other party having 21 days to withdraw the challenged document or argument, before any sanctions can be awarded. Prior notice is “mandatory prerequisite” to sanctions. Debtor's failure to provide notice to the Trustee prior to filing Motion for Sanctions precludes award under Rule 11.
- (7425) *IRS v. Hayes*, 2011 WL 2490945 (E.D. Mi. 2011) – Rule 11 authorizes sanctions for a complaint that is presented for an improper purpose such as harassment or unnecessary delay or expense. Government's complaint in District Court to determine tax debt filed while there was also adversary proceeding in Bankruptcy Court to determine same issue was not done with intent to harass. Government had legitimate interest in filing action in District Court where there was non-debtor co-obligor and government intended to have Bankruptcy Court abstain so that all matters could be adjudicated at one time in one proceeding. Further, movant failed to serve notice of intent to file the Rule 11 motion 21 days in advance as required. Although movant may have believed that any demand would only have been ignored, Rule 11 requirements for notice must be strictly complied with.
- (7426) *Proctor v. Educational Credit Management Corp.*, 2010 WL 4919670 (Bankr. S.D. Ohio 2010) – Plaintiff's conduct in pursuing second complaint against debtor was unreasonable where plaintiff had previously filed identical complaint against same defendant and lost the prior action on Summary Judgment. Sanctions appropriate under Rule 11. Sanctions should be measured by goal of deterrence and must impose the least severe sanction that is likely to deter. Motion to Dismiss clearly identified complaint as offending pleading and plaintiff was repeatedly informed by letter than the complaint needed to be dismissed or sanctions would be sought. Defendant sufficiently identified pleading that Defendant contended should be withdrawn. Sanctions can include all attorney fees incurred after identification of the offending pleading, including fees incurred in discovery, that are naturally incurred as a result of defending the suit. It is not necessary for party to provide an expert witness regarding the reasonableness of its attorneys fees because the court is itself an expert on the

question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value. Plaintiff's history of filing frivolous claims warranted award of defendant's attorney fees in full, as anything less will not provide a sufficient deterrence of future conduct.

- (7427) *Burns v. George Basilikas Trust*, 599 F.3d 673 (D.C. Cir. 2010) - Rule 9011 sanctions were improperly imposed against counsel whose argument was supported by unreported district court case.
- (7428) *Cappuccilli v. Lewis*, 2010 WL 2870668 (E.D. Mi. 2010) - The test for imposing Rule 11 sanctions is "whether the attorney's conduct was reasonable under the circumstances." Trustee's Motion to Dismiss Appeal was not unreasonable where Debtors' designation and statement of issues were not filed on time. Untimely filing has been a basis for dismissal in the past, rendering Trustee's motion for dismissal reasonable under the circumstances.
- (7429) *D.A.N. Joint Venture III, L.P. v. Shekerjian*, Case No. 07-55859 (Bankr. E.D. Mi. 2010) – Court dismissed adversary seeking to deny discharge after concluding that Plaintiff failed to prove that it held assignment promissory notes and, therefore, lacked standing to maintain the action and that promissory notes had been satisfied by Debtor before Plaintiff purported to acquire an interest in the notes. Sanctions under Rule 9011 are appropriate only where the attorney's conduct was unreasonable under the circumstances. A good faith belief in the merits of the action, standing alone, is not sufficient to avoid sanctions. However, where there appeared to be evidentiary support for Plaintiff's claims, Plaintiff's ultimate failure to prevail in the action does not warrant imposition of sanctions. Plaintiff made a reasonable investigation before instituting the proceeding and Plaintiff's complaint and supporting evidence was sufficient to survive pre-trial motions and to proceed to trial.
- (7430) *In re Lundeen*, Case No. 09-51277 (Bankr. S.D. Ohio 2009) – Imposition of sanctions under Rule 9011 is discretionary with the court. Sanctions should only be imposed if it is patently clear that a claim has absolutely no chance of success, and all doubts should be resolved in favor of the signing attorney. Court refused to impose sanctions where it would not have been patently clear to counsel at the time the involuntary petition was filed that the petition had no chance of success. Alleged personal liability was a close question and that the Petitioning Creditors and their counsel had a good faith (albeit wrong) belief that debtor's personal liability was not in bona fide dispute.
- (7431) *Followell v. Mills*, 2009 WL 723132 (6th Cir. 2009) - By signing pleading, Counsel certifies that to the best of counsel's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) pleading is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. The test for imposition of sanctions under rule is whether individual attorney's conduct was reasonable under the circumstances. A good faith belief in merits of case is not necessarily sufficient to avoid sanctions and proof of bad faith is not required for award of sanctions. Attorney has pre-filing duty to make reasonably inquiry. Where documents readily available to counsel would have disclosed strong reasons to doubt merits of claim, counsel should at least have conducted further investigation. Sanctions appropriate where pleading excesses are not result of mere negligence or incompetence but instead reflect reckless lawyering that Courts must be vigilant to admonish, correct, and deter through sanctions.
- (7432) *Maloo v. Level Propane Gasses, Inc.*, 316 Fed. Appx. 373 (6th Cir. 2008). Bankruptcy court did not abuse its discretion in imposing sanctions on a shareholder in the form of attorney's fees and costs, when it was the third motion, asking for the same relief.
- (7433) *Fokkena v. Countrywide Home Loans, Inc.*, 2008 WL 3932153 (N.D. Ohio 2008) – Bankruptcy Court has authority under Rule 9011 to sanction vexatious conduct presented before the Court. US Trustee's Motion for monetary sanctions for vexatious filing falls within the authority of the Bankruptcy Court. Bankruptcy Court could sanction creditor for filing proof of claim where creditor failed to ensure the accuracy of its filings. Creditor filed proof of claim and objected to confirmation although Debtor did not own the property which was the subject of creditor's mortgage. Bankruptcy Court could impose both monetary sanctions and enter an injunction to prevent creditor from engaging in "similar conduct".
- (7434) *Countrywide Home Loans, Inc. v. McDermott*, 426 B.R. 267 (N.D. Ohio 2010) - Rule 9011 allows a court to award sanctions on its own initiative only after entering an order describing the specific conduct that appears to violate the rule and directing an attorney, law firm, or party to show cause why it has not violated the rule. Bankruptcy court's imposition of sanctions without the requisite show cause order resulted in creditor lacking notice that the bankruptcy court, on its own initiative, would be considering sanctions. Creditor's "errors" consisted of the filing of *one* proof of claim and *one* objection to confirmation, neither of which was supported by the actual facts. Record was devoid of evidence of similar errors in any other bankruptcy case. Bankruptcy Court's statement that Creditor's systemic inefficiencies had caused it to file a proof of claim and an objection to confirmation of plan was not supported by the record evidence and it was an abuse of discretion for the bankruptcy court to hold that the mistaken filing of two documents amounted to sanctionable conduct. Although Court may have been frustrated by what the court perceived as a systemic problem in the mortgage servicing industry, evidence in this case did not support sanctions including sweeping directive that Creditor completely change policies and procedures for filing proofs of claim and attach documents not required by the Rules and Code.
- (7435) *In re Depew*, Case No. 09-56915 (Bankr. E.D. Mi. 2009) - Debtor falsely filed Exhibit D attesting to credit counseling when Debtor had not received counseling. Debtor ordered to pay \$200 to clerk of Court as sanction for violation of Rule 9011.
- (7436) *B-Line, LLC v. Wingerter*, 594 F.3d 931 (6th Cir. 2010) – Creditor did not violate Rule 9011 by filing Proofs of Claim without attaching originating documents and in relying on warranties and representations provided by original creditor when purchasing debt

obligations. Under the Creditor's standard Contract, the seller of the debts warrants that the debt is legal, valid and binding and that it has not been disputed by debtor or a Trustee and that no objection to a claim has been lodged. At the time Creditor filed the Proof of Claim, creditor had no reason to believe that the warranties and representations were false of that the debt was not valid and enforceable. Selling creditor had a strong track record – of 1,017 claims sold by this creditor to B-Line, only 2 were ever found to be invalid and only 5 were ever disputed. B-Line also conducted independent review before purchasing accounts, reviewing documents to ensure completeness and consistency, and only then filed a Proof of Claim. Thus, B-Line made a reasonable inquiry into the validity and enforceability of the debt before filing the Proof of Claim, satisfying its obligations under Rule 9011. Although Debtor objected to the Proof of Claim and B-Line ultimately withdrew the claim as it could not find the original loan documents, this does not establish that the claim was filed in bad faith in the first instance.

- (7437) *In re Wingerter*, 2008 Fed App 0014P (6th Cir. BAP 2008) *reversed* 594 F.3d 931 (6th Cir. 2010) – Bankruptcy Court imposed sanctions against debt purchasing company for filing a proof of claim without making any investigation as to the validity or enforceability of the underlying obligation and for filing proof of claim which contain erroneous information and was in complete and fail to attach an itemized statement of the account. Debt purchasing company stated that Asset Purchase Agreement pursuant to which company acquired debt required seller to confirm that the Debtor is in a Chapter 13 proceeding; the debt has not been disputed or discharge; the amount owed is accurate; the statute of limitations in the claim is not expired; and the debt is not fraudulent. Debt purchasing company relied on statements and warranties set forth in Asset Purchase Agreement without conducting any independent investigation of the validity or enforceability of the obligation. Bankruptcy Court concluded that debt purchasing companies procedures for filing proves of claim were not based on a reasonable inquiry, prior to filing, as to whether there is admissible evidence to support the claim. Debt purchasing company, before filing a proof of claim with the bankruptcy Court, must obtain originating documentation or, when such documents and not available, a clear understanding of the nature of the original dealings that support the assertion of a claim against the Debtor. The purchaser should then attached to the proof of claim from the originating documents or an affidavit explaining the non-availability of those documents so the Debtor and other interested parties are given fair notice of the source and particulars of the claim. Bankruptcy Court did not impose monetary sanctions, any expenses incurred by debt purchasing company to be a sufficient sanction.

25.5 Failure to Seek Concurrence

- (7438) *In re Birmingham Cosmetic Surgery, PLLC*, Case No. 14-58784 (Bankr. E.D. Mi. 2015) – Counsel's failure to request concurrence before filing Motion as required by Local Rule 9014-1(g) does not require denial of motion where it appears that concurrence would not have been granted and enforcing the rule would waste judicial time and resources. However, counsel is reminded that failure to comply with local rules in the future may result in sanctions.

25.6 Punitive Damages

- (7439) *Leonard v. Piccirilli*, Case No. 13-1330 (9th Cir. BP 2014) – Bankruptcy Court has inherent authority and authority under Section 105 to impose sanctions. However, Court does not have authority under either inherent authority or contempt to impose significant punitive damages. Party being sanctions must have ability to reduce or avoid find through compliance.
- (7440) *In re John Richards Homes Bldg. Co.*, 2013 WL 6097548 (6th Cir. 2013) – While court had authority to do so under Section 105 and court's inherent authority, punitive sanctions must be limited to those that are necessary or appropriate to deter future conduct, and must be done on prospective basis, not to punish past conduct but to influence future conduct. Punitive damage award of more than \$2 million was serious non-compensatory punitive measure that was beyond authority of court.

25.7 Discharge Injunction

- (7441) *Nichols v. Roosen, Varchetti & Oliver, PC*, 2015 WL 5936335 (E.D. Mi. 2015) – Sixth Circuit does not recognize private cause of action for violation of discharge injunction. Correct remedy is contempt proceeding in court that entered discharge in first instance.
- (7442) *West v. Home Savings & Loan*, 2015 WL 3962569 (Bankr. N.D. Ohio 2015) – There is no private right of action for alleged violation of discharge injunction. Remedy for violation is through contempt proceedings commenced by motion filed in the main bankruptcy case, not through a separate adversary proceeding. However, court would not dismiss adversary complaint where remedy requested was contempt as doing so would elevate form over substance, and defendant is afforded more, not less, due process protection in adversary case. Defendant could not identify any prejudice that would result from action proceeding as adversary proceeding and even if case was dismissed, plaintiff would just file motion for contempt thereby starting proceedings anew. Complaint fairly alleged that defendant was scheduled as creditor, that plaintiff's personal liability was discharged, and that defendant continued efforts to collect past due payments. Plaintiff must prove that alleged contemnor had knowledge of order which he is said to have violated, that contemnor did in fact violate order, that order violated was specific and definite, that conduct was willful. Willful does not require bad faith or wrongful intent, only that the party, with knowledge of the discharge injunction, committed an intentional act that violated injunction.
- (7443) *Donaldson v. US Bank, NA*, 2014 WL 4863080 (E.D. Mi. 2014) – Lender violates discharge injunction by filing proof of claim in second bankruptcy case for debt that was discharged in first case. Remedy is sought through motion for contempt. Complaint alleging violation of discharge injunction dismissed without prejudice to debtor filing motion for contempt.
- (7444) *Kilbourne v. CitiMortgage, Inc.*, 2014 WL 1230307 (Bankr. S.D. Ohio 2014) – Proper remedy for alleged violation of discharge injunction is through motion for contempt. Section 524 does not provide separate private right of action that can be pursued in adversary proceeding. However, court would not dismiss adversary proceeding as doing so would merely elevate form over substance, as adversary proceeding was brought in court that issued discharge and would hear any motion for contempt.

- (7445) *In re Jones*, 2012 WL 5385682 (Bankr. E.D. Ky. 2012) – Lender violated discharge injunction by filing state court foreclosure action that also sought to collect debt as personal liability after discharge in completed Chapter 13 proceeding. Although Discharge injunction does not carry private right of action, Court can enforce injunction through contempt proceedings. Sanctions are warranted where creditor's violation is willful, which requires that creditor have knowledge of discharge and that creditor willfully brought state court action to recover discharged debt. Sanctions awarded for attorney fees incurred as a result of creditor's conduct in sum of \$2047.50.
- (7446) *Marshall v. PNC Bank*, 2012 WL 4471580 (Bankr. S.D. Ohio 2012) – There is no private right of action for alleged violation of discharge injunction. Remedy must be sought by motion for contempt via contested matter, and not in an adversary proceeding. Adversary would be dismissed without prejudice to debtor seeking relief via contested matter.
- (7447) *Holley v. Kresch Oliver, PLLC*, 2012 WL 2777735 (Bankr. E.D. Mi. 2012) – Remedy for violation of discharge injunction is through civil contempt proceeding flowing from Section 105. Damages include \$16,837.50 in attorney fees as reflecting damages incurred by Plaintiff as a result of defendant's violation of discharge injunction. However, Court would not award punitive damages because punitive damages may be awarded only in criminal contempt proceeding and bankruptcy court lacks criminal contempt powers. Further, even if court has authority, court would do so only where conduct is particularly egregious. Defendant's violations did not rise to the level which would constitute particularly egregious.
- (7448) *In re Vanvoert*, Case No. 11-33514 (Bankr. E.D. Mi. 2012) – Creditor admittedly violated both automatic stay and discharge injunction by sending collection letters after creditor had been notified of case filing, both before and after debtor received discharge. Although debtor did not have any actual damages, impact of letters on debtor, an elderly widow, were "substantial". Sanctions awarded for \$500 each for first two violations and \$1500 for third violation which occurred after creditor had actual knowledge of entry of discharge. Court also awarded \$5,890 in fees.
- (7449) *In re Moore*, Case No. 09-2783 (Bankr. W.D. Mi. 2012) – Creditor violated discharge injunction by garnishing debtor's state tax refund post-discharge. Creditor ordered to refund garnished funds to debtor and, if creditor fails to pay by date specified, amount would increase by \$10 per day until paid in full.
- (7450) *In re Martin*, Case No. 11-8052 (6th Cir. BAP 2012) - Creditor willfully violated discharge injunction when he filed a post-discharge state court lawsuit where the parties had not entered into a reaffirmation agreement during the pendency of the debtor's case. Debtor's voluntary post-petition payment did not obligate her to continue making payments to the creditor or somehow waive benefit of discharge of underlying obligation. Parties did not enter into a new contract for payment of the debt because mutual assent and consideration independent of the discharged debt were both lacking. The creditor's mistaken belief that his actions were somehow outside the scope of 524(a)(2) does not remedy a violation of the discharge injunction. Debtor was entitled to an award of actual damages for the violation, including attorneys' fees.
- (7451) *Haney v. Educational Credit Management corp.*, 2011 WL 6000886 (Bankr. E.D. Ky. 2011) – Confirmed Chapter 13 Plan did not result in discharge of student loans where Plan did not have an provision that addressed age or discharge of student loans and discharge order was generic and did not provide for the discharge of the student loans. Absent some express provision in Plan providing for discharge of student loans, determination of dischargeability could be made only through adversary proceeding. Creditor's collection efforts for non-discharged student loan did not violate discharge injunction.
- (7452) *Bridges v. Grange Mutual Casualty Company*, 2011 WL 5837053 (Bankr. W.D. Ky. 2011) – Section 523(a)(9) does not require formal action in Bankruptcy Court to declare debt non-dischargeable. Creditor, as the holder of a claim by subrogation as a result of insurance payouts, did not violate discharge injunction by filing suit in state court after entry of discharge, where complaint alleged that debtor caused injury while operating a motor vehicle while intoxicated.
- (7453) *Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Violation of Discharge Injunction can be remedied through contempt proceedings. Once contempt is established, injured party can recover damages and, if necessary to effectuate purposes of injunction, attorney fees. Proper vehicle for contempt is contested matter under Rule 9014. However, Adversary Complaint for damages for contempt would not be dismissed where adversary proceeding provided more, not less, due process protection for defendant and defendant cannot allege any prejudice because action filed as adversary rather than Motion.
- (7454) *In re Baer*, 2011 WL 3667511 (Bankr. E.D. Ky. 2011), *aff'd* 2012 WL 2368698 (6th Cir. BAP 2012) – There is no private cause of action for violation of the discharge injunction.
- (7455) *Frambes v. Nuvel National Auto Finance, LLC.*, 2011 WL 2133538 (Bankr. E.D. Ky. 2011) – There is no private right of action for alleged violation of discharge injunction. Party allegedly aggrieved can seek sanctions through Motion for Contempt. However, remedy must be sought by Motion rather than by Adversary Proceeding. Adversary dismissed for lack of jurisdiction.
- (7456) *Lassiter v. Moser*, Case No. 09-8067 (6th Cir. BAP 2010) – Creditor's commencement of litigation in state court following entry of discharge violated discharge injunction and subjected creditor to sanctions for contempt. Although the discharge injunction does not, of itself, present a private cause of action for damages, debtor who suffers injury can seek sanctions for contempt. Damages, including attorney fees, are appropriate where creditor instituted suit post-discharge based on events that occurred pre-petition and were discharged.
- (7457) *Pickrel v. Household Realty Corp.*, 2010 WL 2301190 (Bankr. N.D. Ohio 2010) – Properly signed reaffirmation agreement becomes fully enforceable once filed with Court. Creditor action in foreclosing on reaffirmed debt and later suit to collect deficiency did not violate Discharge injunction.

- (7458) *In re Greenspan*, Case No. 07-10774 (Bankr. N.D. Ohio 2010), *aff'd*, 2011 WL 310703 (6th Cir. BAP 2011) – Creditor violated discharge injunction filing two state court lawsuits against debtors in an attempt to collect a discharged debt. Although there is no private right of action for breach of discharge injunction, court can award sanctions for contempt of court. Sanctions awarded in the amount of \$12,510.00 representing attorney fees incurred in defending state court litigation on behalf of debtors. Court denied additional fees incurred in defending non-debtor co-defendants in state court litigation. Extraordinary amount of fees appropriate given creditor's persistence in pursuing the state court litigation, his opposition to the motion to reopen Chapter 7 case, his opposition to the debtors' request for a show cause order, and his position that the dispute be resolved through an evidentiary hearing.
- (7459) *Dalvit v. United Airlines, Inc.*, Case No. 08-1283 (10th Cir. 2009) – Court refused to decide whether discharge injunction is jurisdictional, such that a court lacks jurisdiction to address claims that were subject to the discharge; or merely an affirmative defense that must be plead or is waived. Appellate Court can consider merits of claim even in the absence of subject matter jurisdiction where consideration of merits results in affirmation of lower court holding. Court may rule on the merits that appellant loses where merits of the claims have already been decided by lower court in action where that court did have jurisdiction.

25.8 Contempt – Generally

- (7460) *Rathinam v. Ashok Spiritual Healing Center*, 2015 WL 4132809 (S.D. Ohio 2015) – Party alleging that another party is in contempt of court order must bring request for contempt in court that entered the order allegedly violated. District Court would not consider motion for contempt where order allegedly violated was entered by bankruptcy court in unrelated matter.

25.9 Contempt - Civil

- (7461) *Bavelis v. Doukas*, 2015 WL 4620031 (Bankr. S.D. Ohio 2015) – Sanctions for contempt can include award of attorney fees and costs incurred as a result of contemptuous conduct. Defendant's conduct required filing of two separate motions for orders to show cause and movant was required to engage in extensive litigation to obtain compliance with court orders. Although defendant may have eventually complied with court order, that does not purge defendant's conduct prior to compliance or avoid award of attorney fees and costs incurred up through the date of compliance. Plaintiff demonstrated that number of hours expended in obtaining compliance was reasonable and documentation provided sufficient detail to enable Court to determine with high degree of certainty that time was actually and reasonably spent.
- (7462) *Bavelis v. Doukas*, 519 BR 737 (Bankr. S.D. Ohio 2014) – Court has inherent authority to enforce orders through civil contempt proceedings. Civil contempt is designed to be remedial by coercing compliance with court order and compensating the injured party for losses sustained. Civil contempt requires proof that the party willfully violated a specific provision of a court order. Defendant acted in contempt of court when defendant, with full knowledge of injunction precluding transfers of assets and requiring defendant to provide "unfettered" access to financial books and records, nonetheless assigned a \$2.3 million judgment to a third party with the accompanying right to credit bid at foreclosure sale, and third party purchased property at the foreclosure sale; and defendant refused to provide copies of any documents in response to proper request.
- (7463) *Rathinam v. Ashok Spiritual Healing Center*, 2015 WL 4132809 (S.D. Ohio 2015) – Assuming party violated bankruptcy court order by bringing separate cause of action against non-debtor defendants, party cured contempt by voluntarily withdrawing claim, rendering motion for contempt moot.
- (7464) *In re Hibbits*, Case No. 14-50304 (Bankr. E.D. Mi. 2015) – Court would not enter finding of contempt against debtor for alleged failure to abide by orders of court where Chapter 7 trustee filed "no asset" report, debtor had obtained discharge, and case was ready to be closed. There was no legitimate reason for court to consider contempt motion or to keep the case open any longer than necessary.
- (7465) *Cook v. Franklin Credit Management Corporation*, 2015 WL 1756815 (Bankr. M.D. Tn. 2015) – Court can grant new trial on some or all issues, and can take additional testimony, amend findings of fact and conclusions of law, and direct entry of new judgment. Granting relief under Rule 59 is vested in sound discretion of Bankruptcy Court. Settlement and release between plaintiff and defendant does not render unenforceable court's prior rulings requiring defendant to correct records, and where defendant failed to do so after having ample opportunity to do so, court properly held defendant in contempt. Actual damages for contempt include out of pocket expenses including attorney fees and costs incurred in prosecuting motion for contempt. Court has authority to award mild non-compensatory punitive damages, to extent necessary or appropriate to enforce Code, and only where there is nefarious or malevolent conduct. Punitive damages appropriate where debtor had to bring three separate adversary proceedings to force defendant to comply with court orders, and defendant consistently failed to comply with discovery requests and was sanctioned for failure to abide by discovery rules. Even after court entered order directing creditor to correct records, it took more than one full year to correct records. Defendant's consistent disregard of bankruptcy laws and court orders warranted finding of contempt and imposition of sanctions.
- (7466) *In re Chase*, Case No. 13-1402 (Bankr. W.D. Mi. 2015) – Civil contempt motion requires proof by clear and convincing evidence that alleged contemnor violated a definite and specific order of court requiring to perform or refrain from performing a particular act or acts with knowledge of the court order. Court Order that permitted debtor to apply for Michigan Hardest hit funds did not require debtor's mortgage lender to accept those funds to bring mortgage current. Mortgage company cannot be held in contempt for refusal to accept hardest hit funds where there was no court order that required lender to accept funds.
- (7467) *Southern v. Tate*, 2014 WL 5320570 (Bankr. S.D. Ga. 2014) – Bankruptcy court has power to use contempt to coerce debtor to comply with court orders and can order incarceration pending compliance where debtor has ability to comply, has continued to refuse to do so, and lesser sanctions have failed. Debtor must have ability to purge contempt and obtain release from sanctions. If sanctions are for definite term or cannot be mitigated, sanctions are considered criminal in nature and beyond Bankruptcy Court authority.

- (7468) *Kilbourne v. CitiMortgage, Inc.*, 2014 WL 1230307 (Bankr. S.D. Ohio 2014) – Proper remedy for alleged violation of discharge injunction is through motion for contempt. Section 524 does not provide separate private right of action that can be pursued in adversary proceeding. However, court would not dismiss adversary proceeding as doing so would merely elevate form over substance, as adversary proceeding was brought in court that issued discharge and would hear any motion for contempt.
- (7469) *In re Green*, 2014 WL 1089843 (Bankr. N.D. Ohio 2014) – Court has inherent powers and authority under Section 105 to enforce compliance with court orders. Contempt requires proof that contemnor violated definite and specific order of court which required performance or non-performance of an act, and that the contemnor have knowledge of the order. Willfulness or intent to disobey are not elements of action. Contemnor may defend by showing inability to comply. Lender in contempt for failure to appear pursuant to an order to appear and show cause why it should not be held in contempt of the Order confirming Plan. Lender had knowledge of order to appear and show cause as clerk mailed order to lender through its registered agent and also at lender's principal office, and Post Office did not indicate that mail was undeliverable. Order specifically required lender to appear and explain why, when it was maintaining an insurance escrow for debtor, it also force placed insurance on property.
- (7470) *People's Capital & Leasing Corp v. Power-Tec Mfg. LLC*, 2013 WL 5423056 (E.D. Mi. 2013) – Contempt cannot be used to compel performance of an action that cannot be legally performed. Contempt also cannot be used merely to coerce payment of debt.
- (7471) *In re Brown*, 2013 WL 5493213 (Bankr. E.D. Ky. 2013) – Debtor's failure to turnover assets to Trustee notwithstanding turnover order constituted contempt of court. Debtor hand actual notice of turnover order and admittedly failed to completely comply. Order was specific and definite as to items to be turned over. Court awarded monetary judgment against debtor for \$147,000 representing the value of items not turned over plus attorney fees incurred by Chapter 7 Trustee in attempting to obtain possession of items.
- (7472) *In re Borowski*, 2013 WL 3759794 (Bankr. E.D. Tn. 2013) – Upon finding of civil contempt, fines payable to aggrieved party must be based on actual damages incurred as a result of the contempt or non-compliance. Bankruptcy courts cannot impose punitive damages as punitive damages are available only for criminal contempt and bankruptcy courts lack criminal contempt powers.
- (7473) *Williamson v. Recovery, L.P.*, 2013 WL 3222428 (S.D. Ohio 2013) – Court can use civil contempt power to enforce terms of its orders. Party who brings successful motion for contempt is entitled to recover from contemnor attorney fees incurred in bring the motion. Where party is only partially successful in contempt action, proving fewer than all alleged violations, Court can but is not required to reduce fees accordingly.
- (7474) *In re Damman*, Case No. 09-03185 (Bankr. W.D. Mi. 2012) – Debtor held in contempt of court for failing to cooperate with Chapter 7 Trustee regarding sale of real property that was asset of estate. Although Court had ordered Debtor to cooperate in Trustee's efforts to sell Florida property, Debtor intentionally interfered with Trustee by refusing to allow property to be shown and by refusing to cooperate with broker's efforts to procure buyer. Property was not exempt and was property of estate. Debtor had duty to turn over property to the Trustee for liquidation for benefit of estate.
- (7475) *In re Trinity Communications, LLC*, 2012 WL 2367169 (Bankr. E.D. Tn. 2012) – Court has power to find contempt pursuant to Federal Rule of Civil Procedure 71, made applicable pursuant to Federal Rule of Bankruptcy Procedure 7071, as well as section 105. Court can hold non-parties in contempt if the non-party has actual knowledge of the court order and abets a party in violating that order. Basic proposition is that all orders and judgments of courts must be complied with promptly. Contempt requires a violation of a specific and unambiguous order by a party to whom that order applied. Ambiguities must be resolved in favor of the party charged with contempt. Principal of reorganized debtor was in contempt of court for failing to comply with terms of confirmation order that required submission of additional funds necessary to pay administrative expenses. Confirmation Order was entered in reliance on principal's representations about its commitment to ensure that the Reorganized Debtor could perform its confirmation obligations. Reorganized debtor was also using funds that the Plan required to be paid to creditors for purposes other than as specified in confirmed plan. The Reorganized Debtor has no independent management other than Principal. Reorganized Debtor paid other ongoing expenses since confirmation. Principal exercised its control to cause the Reorganized Debtor to violate its obligations under the Plan.
- (7476) *Burrage v. Homecomings Financial Network, Inc.*, 2011 WL 6000794 (Bankr. N.D. Ohio 2011) - Stay pending appeal relieves appellee of obligation to comply with order being appealed. Appellee cannot be held in contempt for failing to comply with order while appeal is pending.
- (7477) *In re Juliao*, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Violation of co-debtor stay can be remedied through civil contempt. Contempt requires that the alleged contemnor have knowledge of the order; alleged contemnor must have in fact violated order; and order violated must be specific and definite. Co-debtor stay constitutes clear and specific injunction in terms of what is prohibited. Actions of creditor in reporting information to credit bureau, without more, does not constitute violation of co-debtor stay, as reporting was not intended to coerce payment and information provided to bureau was accurate.
- (7478) *In re Moohaven Dairy, LLC*, Case No. 10-24239 (Bankr. E.D. Mi. 2011) – Contempt requires proof by clear and convincing evidence that alleged contemnor had knowledge of the order allegedly violated; that alleged contemnor did in fact violate the order; and that the order violated was specific and definite. Once evidence of contempt is introduced, alleged contemnor can defend by categorical and detailed, that he took all reasonable steps to comply, and that he is not responsible for any inability to pay. Denial of application for retention of counsel strips counsel of any authority to appear for or on behalf of debtor. Counsel's continued activity purportedly on behalf of Debtor constituted contempt for which sanctions are available. Sanctions are to be remedial, to compel compliance with court order or to compensate other party for harm resulting from non-compliance. Sanctions can be monetary or incarceration. Court awarded attorney fees as sanction in amount equal to what creditor had to incur as a direct result of actions of contemnor.

- (7479) *In re Terrell*, Case No. 09-63848 (Bankr. E.D. Mi. 2010) - Petition Preparer who prepared documents and accepted compensation in violation of outstanding permanent injunction ordered to disgorge all compensation received. Court can use contempt power to compel compliance where court finds by clear and convincing evidence that alleged contemnor had knowledge or the order allegedly violated; contemnor must have actually violated that order; and order must have been specific and definite. Once established burden shifts to alleged contemnor to come forward with evidence that he is unable to comply; contemnor took all reasonable steps to comply; and demonstrated that inability to comply was not caused by contemnor. Defense requires a "literally inability" to comply, not just an "unwillingness" to comply. Once found to be in contempt, court can use monetary sanctions to coerce compliance; or can use incarceration until contemnor complies. Court imposed payment plan until amount is paid in full, with provision that if Petition Preparer fails to make a payment, court will enter warrant for arrest without further proceedings.
- (7480) *In re Rose*, 2010 WL 3733858 (Bankr. N.D. Ohio 2010) – Creditor held in contempt of court where creditor refused to cancel lien of record and surrender title to debtor upon tender of court determined redemption amount. Court has broad discretion to award sanctions including damages and attorney fees in contempt action. Court awarded damages measured by lost income of debtor having to attend hearing on contempt motion and attorney fees incurred by debtor in attempt to obtain compliance with court order. Court further ordered creditor to satisfy lien and surrender title without debtor being required to pay previously determined redemption amount and authorized debtor to obtain clean title if creditor continued to refuse to comply. To the extent additional sanctions including attorney fees exceed redemption amount, court would offset the redemption amount against those sanctions to avoid “double recovery” by debtor.
- (7481) *In re Moser*, Case No. 05-38518 (Bankr. S.D. Ohio 2010) – Court has authority to issue contempt sanctions pursuant to Section 105. Purpose of civil contempt is to coerce compliance with a court order and to compensate the complainer for its losses. Moving party must prove by clear and convincing evidence that the respondent violated a court order that was clear and unambiguous and that required responded to perform or refrain from performing a specific act. Court order sealing particular document is not an order to respondent to refrain from publishing, discussing or using the document in court proceedings. Respondent’s reference to the sealed document in an appellate brief did not violate any specific court order precluding dissemination or citation.
- (7482) *In re Wilson*, 2010 WL 3061741 (Bankr. N.D. Ohio 2010) – Petition preparer had been previously prohibited from preparing or assisting in the preparation of bankruptcy petitions pending further order based on Preparer’s improper activities as a petition preparer, its failure to disgorge excessive petition preparer fees to the debtors in that case as required by a previous court order, and its failure to appear at hearing. Preparer nonetheless prepared documents for Debtor and charged fee in excess of presumptively reasonable fee. Preparer failed to appear on Court’s Order to Show Cause why it should not be held in contempt for violation of prior Order. Preparer had knowledge of both orders and failed to comply with them and was given adequate notice and an opportunity to be heard on the contempt issue, yet failed to appear and has not provided any explanation for its failure. A coercive fine is an appropriate remedy for civil contempt. The totality of the circumstances must be considered in determining the amount of the fine, including: the type of actions that led to the issuance of the order, and the consequences of non-compliance with the order; reasons advanced for non-compliance and any good faith issues, even if those factors do not serve as a defense to the contempt charge; whether the contemnor expresses an intention to promptly comply; the amount of time that has elapsed since the order was entered; and the contemnor’s financial circumstances. Petition preparer fined \$1,000.00 per day until Preparer files a request for a hearing to explain its failure to comply.
- (7483) *In re Denison*, 2010 WL 3061715 (Bankr. N.D. Ohio 2010) – Bankruptcy Petition Preparer held in civil contempt for disregard of Court Orders. Court issued first Show Cause for Preparer to explain why Preparer charged more than the presumptively allowable fee. Petition Preparer responded with amended statement of compensation that disclosed a different social security number and different address than was stated in prior statement. Court issued second Show Cause for Preparer to explain why she filed documents listing two different social security numbers, and stated that court would consider whether she should be held in contempt for failure to obey a lawful court order and/or barred from participating as a bankruptcy petition preparer in the Northern District of Ohio and/or be referred to the United States Attorney for such action as he deems appropriate. After Preparer failed to appear, Court concluded that civil contempt finding was appropriate where Preparer was served with and had knowledge of the order and the terms of the order were specific and required her to appear on July 29, 2010. A coercive per diem fine is appropriate to encourage compliance with the court's order. The totality of the circumstances must be considered in determining the amount of the fine, including: the type of actions that led to the issuance of the order, and the consequences of non-compliance with the order; reasons advanced for non-compliance and any good faith issues, even if those factors do not serve as a defense to the contempt charge; whether the contemnor expresses an intention to promptly comply; the amount of time that has elapsed since the order was entered; and the contemnor’s financial circumstances. Petition preparer fined \$10.00 per day until Preparer complies with the order and is barred from participating as a bankruptcy petition preparer in any case absent further order of this court. Finally, the issue of the different social security numbers is referred to the U.S. trustee for such action as he deems appropriate.

25.10 Contempt – Criminal

- (7484) *US v. Hills*, 2013 WL 4832797 (E.D. Mi. 2013), *order denying judgment of acquittal*, 2014 WL 234349 – In order to find Hills guilty of criminal contempt, the Government must prove, beyond a reasonable doubt, the following elements: 1) Hills had notice of the court orders at issue; 2) the court orders at issue are specific, clear, and unequivocal; 3) Hills violated or disobeyed the court orders; and 4) Hills did so willfully. Party charged cannot assert alleged unconstitutionality of order that party allegedly violated as defense to contempt action. Appeal of underlying order is mechanism for contesting underlying order, and party cannot collaterally attack order as alleged defense to contempt action. Criminal contempt statute, 18 USC Section 401(3), is not unconstitutional. Evidence supported finding that defendant willfully disobeyed five separate orders of Bankruptcy Court.
- (7485) *Adell v. John Richards Homes Building Company, LLC*, 2012 WL 3029643 (E.D. Mi. 2012) – Bankruptcy Court lacks authority to

impose criminal sanctions. Court has jurisdiction to award civil sanctions when a party acts in bad faith, vexatiously, wantonly or for oppressive reasons. After debtor suffered judgment, debtor sold all assets, moved to Florida, established residency and file for bankruptcy to take advantage of Florida homestead protections. Court dismissed bankruptcy for bad faith and major creditor sought sanctions. Court properly awarded creditor attorney fees incurred in post-judgment collection actions, which debtor paid. Creditor also requested punitive damages as additional sanctions. Civil sanctions are those designed to coerce future compliance and to compensate opposing party for injuries caused by non-compliance. Criminal sanctions are those that vindicate authority of court. As debtor had already complied by paying the sanctions previously awarded, there was no order as to which compliance could be compelled. Sanctions amounted to fine against debtor as to which debtor lacked any opportunity to reduce or avoid through compliance.

25.11 Show Cause

- (7486) *In re Pelican Industries S-Corp.*, Case No. 12-56463 (Bankr. E.D. Mi. 2015) – There is no procedure under the Rules for a party to move for an order to show cause. Proper remedy for relief based on debtor’s failure to comply with order of court is Motion for Order holding creditor in contempt.
- (7487) *In re Hibbitts*, Case No. 14-50304 (Bankr. E.D. Mi. 2015) – There is no procedure under the Rules for a party to move for an order to show cause. Proper remedy for relief based on debtor’s failure to comply with order of court is Motion for Order holding creditor in contempt.
- (7488) *In re Hunt*, Case No. 11-41803 (Bankr. E.D. Mi. 2015) – There is no procedure under the Rules for a party to move for an order to show cause. Proper remedy for relief based on creditor’s failure to comply with order of court is Motion for Order holding creditor in contempt.
- (7489) *In re Hermiller*, Case No. 10-70825 (Bankr. E.D. Mi. 2010) – There is no procedure under either Federal Rules or Local Rules for a party to move for Order to Show Cause. If party believes the stay has been violated, appropriate action is motion under Section 362(f).
- (7490) *In re Lee-Blue*, Case No. 10-42861 (Bankr. E.D. Mi. 2010) - There is no procedure under either Federal Rules or Local Rules for a party to move for Order to Show Cause. If party believes a court order has been violated, party may file a motion asking the court to hold the allegedly violating party in contempt through the mechanism in Local Rule 9014-1.

25.12 Defense – Bad Faith and Unclean Hands of Moving Party

- (7491) *In re Mabone*, 2012 WL 1918433 (Bankr. E.D. Mi. 2012) – Creditor’s Motion for Sanctions denied based on creditor’s own lack of good faith. Prior to commencement of Chapter 13 case, creditor repossessed debtor’s automobile. When debtor filed bankruptcy, creditor agreed to return the vehicle, but when debtor attempted to retrieve vehicle it would not start, requiring debtor to have vehicle towed. Prior to confirmation of Debtor’s Chapter 13 plan, vehicle was destroyed in an accident. Creditor sought sanctions against debtor and attorneys for allegedly filing case in bad faith; pursuing entry of an order compelling creditor to return the vehicle after the vehicle had already been returned; and that debtor’s schedules were false and intentionally mis-stated income and debts. Court denied creditor’s motion. Reason vehicle would not start when debtor attempted to retrieve it was because creditor had installed a GPS tracking device and a starter interrupt device and, after agreeing to return vehicle, apparently used the devices to prevent the car from starting, requiring debtor to have vehicle towed to repair shot at cost of \$532.00. Creditor’s actions were intentional and deliberate attempt to interfere with property of estate which, itself, was sanctionable as a deliberate and willful violation of stay.

XXVI. Miscellaneous Court Fees

A. NSF Fees

26.1 Waiver

- (7492) Court has authority under Miscellaneous Fee Schedule to waive NSF fees charged where attorney attempted to pay filing fee electronically but due to good faith error transaction could not be processed. Attorney apparently input an incorrect account number on Pay.Gov web site causing rejection of payment by bank and imposition of \$53 fee. Upon being advised of bounced payment, attorney promptly sent a check to pay the fee and sought a waiver of the NSF fees. Waiver warranted where payment was declined due to technical error and not lack of funds in account and attorney promptly paid the fees upon notice of the returned payment.