

Annual Case Law Update

Hon. James W. Boyd

U.S. Bankruptcy Court (W.D. Mich.); Grand Rapids

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Chapter 13 Trustee's Office; Southfield

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Case Law Update

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I. Hot off the Press

Husky International v. Ritz, 136 S.Ct. 1581 2016 WL 2842452 (2016) – Actual fraud standard under Section 523(a)(2)(A) does not require either fraudulent statements made to induce debt or that debt be extended in first instance based on fraud. Debtor's actions in causing corporation to deplete assets by transferring assets to other entities also controlled by debtor, at time when corporation was unable to pay debts, constituted fraudulent transfers that damaged creditor's ability to obtain repayment from corporation. Actual Fraud is broader than fraudulent representations and involves any conduct that involves moral turpitude or intentional wrong, not limited to conduct that induces creditor to extend debt, and includes acts of concealment and hindrance. While Section 523(a)(2)(A) may then overlap to some extent provisions of Sections 523(a)(4) and (6), each of those sections have additional requirements or elements and cover different, although to some extent overlapping, areas of conduct. Debtor's conduct in engineering transfers from one corporation to another to keep assets away from creditors committed "actual fraud" rendering liability to original creditor excepted from discharge.

Sauer, Inc. v. Lawson, 791 F.3d 214 (1st Cir. 2015), *cert denied*, Case No. 15-113 (2016) – Knowing receipt of fraudulent transfer constitutes "actual fraud" by recipient as to creditor of transferring entity, rendering debt non-dischargeable as to transferor's creditors under Section 523(a)(2).

Hatfield v. Thompson, 2016 WL 4413906 (10th Cir. BAP 2016) – There does not need to be any connection between alleged fraud and the creditor seeking to except debt from discharge as long there is some fraudulent action involving debtor who is the target of the Section 523 action. Debtor had applied for nursing home license representing that he would be actively involved in operations and physically present at least eight hours per month. Based on representations, State extended license to Debtor's Corporation and Corporation opened and operated facility. At some point, a patient died due to inadequate care and the patient's spouse sued both the Corporation and the debtor. On eve of trial, debtor filed for bankruptcy and patient's family brought action to except debt from discharge under Section 523(a)(2) alleging that Debtor obtained license in first instance through actual fraud and the spouse could pierce corporate veil under State standard that permits piercing under legal doctrine of fraud. As long as the debtor obtained money from fraud, action to hold debt non-dischargeable does not need to be form something debtor obtained from the plaintiff or that debt on which action is brought is for something obtained by the debtor by actual fraud. When basis of action is fraud committed by corporation, and plaintiff is able to pierce corporate veil, any debt of the corporation will be subject to denial of discharge if the principal later files for bankruptcy.

II. Cases to Watch

U.S. Bank, NA v. Village at Lakeridge, LLC, 2016 WL 494592 (9th Cir. 2016), *cert pending*, ____ U.S. ____ (2016) – Ninth Circuit held that non-insider does not become "statutory insider" merely by acquiring debt from statutory insider. While insider's vote would not have been sufficient to constitute accepting impaired class, non-insider who acquired claim could vote and have vote considered for purposes of cram down in Chapter 11.

Czyzewski v. Jevic Holding Corp., Case No. 15-649 (U.S. 2016) – Court accepted cert to determine whether court can dismiss Chapter 11 case under "structured dismissal" that would include distribution of property in violation of Section 507 and Absolute Priority Rule. After determining that sale of assets would not generate sufficient cash to pay priority claims and permit confirmation of plan, secured creditor and unsecured creditor committee negotiated dismissal that called for lender to set aside some money for payment to general unsecured creditors, bypassing priority claims.

Johnson v. Midland Funding, LLC, 2016 U.S. App. LEXIS 9478 (11th Cir. 2016), *cert granted*, 135 S.Ct. 1844 (2016) – Provisions of Bankruptcy Code that require creditors to file Proofs of Claim as not in conflict with provisions of FDCPA that prevents efforts by debt collector to collect time barred debts.

Brown v. Ellmann, Case No. 14-48421 (Bankr. E.D. Mi. 2015), *aff'd*, 2016 WL 3055618 (E.D. Mi. 2016), *appeal pending*, 2016 WL ____ (6th Cir. 2016) – 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.

Smith v. Internal Revenue Service, 2016 WL 3749156 (9th Cir. 2016), *cert pending*, Case No. 16-497 (2016) – Tax return filed 7 years after due date and three years after IRS prepared Substitute for Return was not "honest attempt to comply with the tax code". To extent debtor's return showed higher income and higher tax liability than SFR, debt was discharged, but taxes assessed pursuant to SFR were not dischargeable. Cert petition filed by University of Michigan's John Pottow.

Bank of New York v. Watt, 2015 WL 1879680, 2015 U.S. Dist. LEXIS 54041 (D. Ore. 2015), *appeal pending*, Case No. 15-35484 (9th Cir. 2016) – Section 1325 does not permit confirmation of plan over objection of secured creditor where plan proposes to vest title to property in creditor.

Credit One Financial v. Anderson, 553 BR 221 (S.D. N.Y. 2016), *appeal pending*, Case No. 16-2496 (2d Cir. 2016) – Class Action Claim for violation of discharge injunction is not subject to arbitration even where underlying agreement has valid arbitration clause, disagreeing with *Belton v. GE Capital Consumer Lending, Inc.*, 2015 WL 6163083 (S.D.N.Y. 2015).

In re Zair, 2016 U.S. Dist. LEXIS 49032 (E.D.N.Y. 2016), *appeal pending*, Case No. 16-1648 (2d. Cir. 2016) – 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.

III. Automatic Stay

A. Actions Stayed

3.1 Generally

- (1) *Vulpina, LLC v. Dzierzawski*, 2013 WL 5651430 (E.D. Mi. 2013) – Pre-petition action brought by creditor to avoid allegedly fraudulent transfer by debtor under state law becomes property of estate upon commencement of bankruptcy case. Action by creditor against third party stayed.
- (2) *CH Holding Co. v. Miller Parking Co.*, 2013 WL 5423047 (E.D. Mi. 2013) – Causes of action to recover fraudulent transfers by debtor and to impose alter ego liability on debtor's related entities are property of estate that only Trustee has authority to pursue. Upon filing of bankruptcy, creditor sues against debtor and third parties for fraudulent transfers and alter ego are dismissed as plaintiff no longer has standing to pursue claims.
- (3) *In re Benchmark Capital, Inc.*, 2013 WL 1429437 (Bankr. E.D. Tn. 2013) – Automatic stay is automatic and mandatory with the filing of the petition. Stay remains in effect throughout case to provide debtor breathing room from collection efforts and to further reorganization efforts.
- (4) *Search Market Direct Inc. v. Jubber*, 685 F.3d 1160 (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.
- (5) *TW Telecom Holdings, Inc. v. Carolina Internet, Ltd.*, Case No. 11-1068 (10th Cir. 2011) – Automatic stay applies to all appeals of civil cases that were originally brought against the debtor, including appeals in which the debtor is the appellant. Tenth Circuit reversed prior precedent and joined 9 other circuits that conclude that automatic stay prevents prosecution of an appeal regardless of whether the debtor is the appellant or the appellee.
- (6) *Marcinek v. Commissioner, Internal Revenue*, 2011 WL 1295751 (3d Cir. 2011) – Bankruptcy petition operated as automatic stay proceedings instituted by debtor in Tax Court to determine amounts due. Automatic stay prohibits "the commencement or continuation of a proceeding before the United States Tax Court ... concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order of relief." The stay remains in place, absent a Bankruptcy Court order, until the bankruptcy proceedings are terminated. Tax Court judgment in favor of IRS rendered while automatic stay was in force was void ab initio.
- (7) *Drilling & Exploration Co. v. Gunnison Energy Corp.*, 2011 WL 14461 (10th Cir. 2011) – Litigation in which Debtor is the plaintiff is not stayed by bankruptcy filing. Litigation can be dismissed by court for failure to prosecute where Debtor files bankruptcy and then fails to take steps to prosecute case or to comply with court orders and deadlines.
- (8) *Cappuccilli v. Lewis*, Case No. 10-11690 (E.D. Mi. 2010) – Debtor's action against bankruptcy counsel based on alleged pre-petition malpractice is property of estate. Debtor's commencement of state court proceeding against attorney post-petition constituted attempt to exert possession and control over property of estate in violation of Section 362, subjecting debtor to sanctions.
- (9) *Saleh v. Bank of America, N.A.*, Case No. 08-36592 (Bankr. S.D. Ohio 2010) – Automatic stay does not stay actions against third party co-obligors. Automatic stay will not extend to debtor's wholly owned corporation on theory that corporation and debtor are the same entity. Corporation is separate entity not protected by stay in principal's bankruptcy case. Co-debtor stay under Section 1301 is read narrowly and applies only in certain very limited circumstances and does not apply to corporations or other non-individuals or to non-consumer debts.
- (10) *Lewis v. Negri Bossi USA, Inc.* 423 BR 643 (E.D. Mi. 2010) – Automatic stay prohibits actions by creditor to obtain payment of pre-petition obligations. Creditor's refusal to honor pre-petition contract to provide post-petition services to maintain machines constituted violation of stay where creditor's actions would result in diminution of value of property of estate. Automatic stay designed to protect both Debtor from loss of assets and also creditors from diminution of value of estate. Creditor's refusal to honor pre-petition maintenance contract would cause assets to decline in value, to the harm and detriment of other creditors.
- (11) *In re Travel Agent Com'n Antitrust Litigation*, 2009 WL 3151315 (6th Cir. 2009) – Airline's bankruptcy petition operated as automatic stay of travel agencies' appeal of adverse decision in antitrust litigation against airline.
- (12) *Hitachi Simitomo Heavy Industries Const. Crane Co., Ltd. v. Midwest Specialized Transportation, Inc.*, - 2009 WL 2448458 (E.D. Ky. 2009) – Automatic Stay does not stay proceeding where all events that gave rise to the action occurred post-petition.
- (13) *Gilchrist v. Bank of America*, Adv. No. 09-4411 (Bankr. E.D. Mi. 2009) - Adversary proceeding stayed pursuant to Section 362. Adversary proceeding commenced while case was pending under Chapter 13. Case then converted 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. Adversary proceeding stayed unless and until the automatic stay no longer applies.

- (14) *In re Grady*, 2009 WL 3254435 (Bankr. W.D. Mi. 2009) – Property owned by Debtor's wholly owned corporate entity does not constitute property of Debtor's estate. Therefore, those assets are not protected by the Automatic Stay in Debtor's personal bankruptcy case.
- (15) *Bays v. Summit Trucking, LLC*, 2009 WL 1421017 (W.D. Ky. 2009) – Automatic Stay prevents Court for adjudicating any matter pending prior to commencement of bankruptcy case. Court declined to rule on motions for summary judgment including motion filed by Debtor. Any summary judgment entered in favor of Debtor would be void as violating stay.
- (16) *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 course of action would have been to recover proceeds as post-petition transfer pursuant to Section 549.
- (17) *Davison v. Kanipe*, 410 BR 607 (Bankr. E.D. Tn. 2009) – Upon commencement of case, debtor's checking account and all funds in the account become property of estate. Creditor's action in cashing, post-petition, a check received pre-petition and in then retaining proceeds does not violate stay. Section 362(b)(11) does not prevent holder of negotiable instrument from presenting instrument to obtain payment. Holder of instrument can present instrument and obtain payment even with actual knowledge of pending bankruptcy proceeding. Correct cause of action would have been to recover proceeds as post-petition transfer pursuant to Section 549.

3.2 Persons Protected

- (18) *Prescription Supply, Inc. v. Musa*, 2016 WL 5930529 (E.D. Mi. 2016) – Automatic stay applies only to debtors and not to third parties. Rare exception to rule that allows court to extend stay where there is identity between third party Defendant and the debtor such that judgment against third party Defendant would in effect be judgment against the debtor; or if pending litigation against co-defendant would cause irreparable harm to the debtor, the estate, or the reorganization plan. Motion for stay failed to alleged any basis to extend stay. Allegation that stay will impede discovery did not detail how discovery would be impaired when plaintiff was still engaged in full discovery with non-bankruptcy co-defendant. Although entity in which debtors had an interest was defendant, it was not sole defendant as third defendant who was not a debtor was also member of company and could answer for discovery promulgated to company.
- (19) *In re Johnson*, 2016 WL 1719149 (Bankr. S.D. Ohio 2016) – Automatic stay applies only to debtor and not to third parties absent adversary proceeding for injunctive relief brought by third parties. Automatic stay protects not only debtor but also property of estate. Creditor violated automatic stay by pursuing post-confirmation arbitration proceedings. Although creditor acknowledged to arbitrator that debtor was in bankruptcy, creditor nonetheless pursued arbitration to establish creditor's alleged perfected security interest in debtor's interest under employment contract. Creditor pursued arbitration without notice to debtor and submitted both brief and proposed Arbitration Award that stated that creditor's obligation was secured by assignment of employment contracts, including specific findings as to actions allegedly taken by debtor. However, creditor's pursuit of arbitration against third parties including debtor's parents to enforce other obligations and agreements was not stayed and continued prosecution of arbitration proceeding was not stay violation to the extent it sought relief against parents only.
- (20) *Allianz Global Corporate & Specialty v. Advantage Aviation Technologies, Inc.*, 2016 WL 1054473 (E.D. Mi. 2016) – Automatic stay applies only to debtor and not to related corporation. Defendants were separate legal entities, only one of which filed bankruptcy. In unusual circumstances, court may enjoin actions against third parties where parties enjoy identity of interest such that the suit against the non-debtor is essentially a suit against the debtor, or where action will have adverse impact on debtor's ability to reorganize. However, mere status of defendant's surety, guarantor, co-obligor or other with similar legal or factual nexus is not sufficient.
- (21) *Dealers Assurance Company v. Fidelity Bank & Trust*, 2015 WL 500920 (S.D. Ohio 2015) – Automatic stay applies only to debtor and to property of estate. Litigation against bank for mis-management of trust account established by debtor for plaintiff's benefit not stayed as to bank as bank was not debtor and actions against bank were independent of any liability of debtor. Non-Bankruptcy Court lacks authority to extend stay to third parties. However, to extent action seeks recovery against funds in trust account and debtor may claim an interest in those funds, the funds would be property of estate requiring stay of litigation pending clarification from bankruptcy trustee as to debtor's claimed interest, if any, in those funds.
- (22) *Yellow Express, LLC v. Dingley*, Case No. 13-1261 (9th Cir. BAP 2014) – Automatic stay does not extend to wholly owned LLC of debtor. While debtor's ownership interest in LLC is property of estate, LLC did not itself file for bankruptcy protection.
- (23) *In re Philpott*, 509 BR 134 (Bankr. S.D. Ohio 2014) – Automatic stay does not protect third parties who may also be liable with debtor. Nonbankruptcy court action to recover from other shareholders of corporation for violation of Fair Labor Standards Act not stayed or affected by debtor's bankruptcy stay, even if debtor was also shareholder and could otherwise have been subject to FLSA action jointly and severally.
- (24) *Fadel v. DCB United, LLC*, Case no. 12-1061 (9th Cir. BAP 2013) – Debtor's Chapter 13 filing did not stop foreclosure sale against home

that was owned solely by debtor's non-filing spouse. Purchaser at sale could proceed with unlawful detainer action in effort to obtain possession of property.

- (25) *Beacon Navigation GmbH v. Suzuki Motor Corp.*, 2013 WL 2193902 (E.D. Mi. 2013) – Automatic stay protects only debtor and not related third party. Bankruptcy stay that resulted when debtor filed bankruptcy does not protect corporate parent or related corporation.
- (26) *Al-Shara v. Wal-Mart Stores, Inc.*, 2012 WL 1119339 (E.D. Mi. 2012) – Extension of stay to non-debtor co-defendant is rare exception to rule that non-debtor entities are not covered by stay. Court will extend stay to non-debtor if (1) there is such identity between the third party defendant and the debtor that a judgment against the third party defendant is in effect a judgment against the debtor; or (2) where pending litigation would cause irreparable harm to debtor, the estate or the reorganization plan. The presence of an indemnification agreement between the third party defendant and the debtor, without more, is not sufficient to warrant extending the stay. Court declined to extend stay to Wal-Mart in action by Plaintiff for sale of defective product. Suit originally filed against Wal-Mart and manufacturer. Manufacturer filed for bankruptcy protection. Claims against Wal-Mart were independent of claims against manufacturer, as claims were based on Wal-Mart's sale of a defective product without any independent risk assessment, knowledge of alleged defect, and independent input into alleged modification into the product. Where third party defendant's liability is or may be premised on independent basis such as third party's own breach of duty, automatic stay will not be extended. Although Wal-Mart may have claims against debtor arising out of litigation by plaintiff, there was no evidence that those claims would irreparably prejudice debtor's ability to reorganize. Fact that refusing to extend stay may require Wal-Mart to defend similar actions in multiple courts is not basis to extend stay.
- (27) *Meoli v. Huntington National Bank*, Case No. 07-80037 (Bankr. W.D. Mi. 2012) – Although defendant-bank was not the debtor, the automatic stay would be extended to prevent actions by third parties against bank where Trustee brought action against bank to recover allegedly fraudulent transfers and third-parties were suing bank for unjust enrichment for same transactions. Allowing both actions to proceed could result in double liability for bank to the extent the Trustee is successful.
- (28) *In re Pearl Management Corp.*, Case No. 11-47422 (Bankr. E.D. Mi. 2011) – State Court Receiver appointed to take control of corporate property would be stayed by bankruptcy filing. Receiver is stayed from taking or attempting to take any action to exercise dominion or control over property of estate. Stay would also prevent any action by Receiver against Debtor's attorney or debtor's principals to the extent of any action taken in their capacities as members, principals, employees, officials, managers or agents acting on behalf of the corporation. However, stay does not prevent Receiver from seeking recovery from principals for actions taken in their individual capacities and from their individual assets, subject to further hearing to consider whether Court should enter injunction that would include principals.
- (29) *Verdi v. Domino Logistics Co.*, 2011 WL 607133 (N.D. Ohio 2011) – Automatic stay applies only to actions against debtor. Stay does not operate as stay against separate legal entities such as corporate affiliates, partners in partnerships, or other co-defendants. Court can extend stay to third party only in unusual circumstances, usually where the non-bankrupt party is so closely related to debtor or stay would contribute to reorganization efforts. Non-debtor principal of debtor corporation would not be protected by stay merely because party's efforts to defend suit would interfere with duties to debtor estate, where party failed to demonstrate that allowing action to proceed against non-debtor would irreparably harm reorganization efforts.

3.3 Co-debtor Stay

- (30) *Fadel v. DCB United, LLC*, Case no. 12-1061 (9th Cir. BAP 2013) – Co-debtor stay does not apply to party who is not co-debtor. Debtor did not have any interest in residence or any liability on note where property was solely name of non-filing spouse and only non-filing spouse was on note. As debtor was neither owner of residence nor obligated on note, debtor was not “co-debtor” in connection with mortgage on home and spouse was not protected by co-debtor stay.
- (31) *In re Juliao*, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Section 1301 extends protections of automatic stay to co-debtor on any consumer debt. Section 1301 is designed to protect the debtor for indirect coercion to pay debts that would otherwise be dischargeable.

3.4 Property of Estate

- (32) *In re Williams*, 2016 WL 4065938 (Bankr. N.D. Ohio 2016) – Real property owned by debtor at time of commencement of case is property of Chapter 13 estate. Creditor violated stay by scheduling property for tax sale post-petition without receiving relief from stay.
- (33) *Smith v. Prokos*, 2016 WL 3619799 (Bankr. N.D. Ohio 2016) – Party did not violate stay by filing criminal complaint to recover possession of an automobile allegedly wrongfully in possession of debtor. Stay applies only to actions against debtor or property of estate. Vehicle was not property of estate as debtor's name did not appear on Title to vehicle. Ohio law precludes court from recognizing any interest in a motor vehicle unless interest is either noted on the certificate of title or admitted to by the parties in the pleadings. Alleged “equitable interest” in vehicle which debtor allegedly obtained by providing services to party in exchange for ownership of vehicle was not sufficient where there was no evidence of any express trust and vehicle at all times was titled in party's, not debtor's name's debtor did not have interest in vehicle, any actions taken by party to recover possession could not violate stay.
- (34) *In re Johnson*, 2016 WL 1719149 (Bankr. S.D. Ohio 2016) – Automatic stay protects not only debtor but also property of estate. Creditor violate automatic stay by pursuing post-confirmation arbitration proceedings. Although creditor acknowledged to arbitrator that debtor was in bankruptcy, creditor nonetheless pursued arbitration to establish creditor's alleged perfected security interest in debtor's interest under employment contract. Creditor pursued arbitration without notice to debtor and submitted both brief and proposed Arbitration Award that stated that creditor's obligation was secured by assignment of employment contracts, including specific findings as to actions allegedly taken by debtor.

- (35) *Manning v. JPMorgan Chase Bank*, 2015 WL E.D. Tn. 2015) – Stay does not apply to or prevent foreclosure of property in which debtor has no interest. Lender did not violate stay by instituting foreclosure proceedings where title to property was solely in wife's name where husband filed bankruptcy. Husband and wife judicially estopped from asserting that husband had interest in property sufficient to stay foreclosure sale where Husband's bankruptcy schedules affirmatively stated that Husband did not own any interest in any real property and did not have any equitable or future interest, life estate or power exercisable for the benefit of any third party. Court accepted this representation and acted in reliance on it when Court confirmed Husband's Chapter 13 Plan, Parties were stopped from now asserting that husband held some undisclosed interest such that foreclosure process did not involve property of estate and was not stayed.
- (36) *Dealers Assurance Company v. Fidelity Bank & Trust*, 2015 WL 500920 (S.D. Ohio 2015) – Automatic stay applies only to debtor and to property of estate. Litigation against bank for mis-management of trust account established by debtor for plaintiff's benefit not stayed as to bank as bank was not debtor and actions against bank were independent of any liability of debtor. Non-Bankruptcy Court lacks authority to extend stay to third parties. However, to extent action seeks recovery against funds in trust account and debtor may claim an interest in those funds, the funds would be property of estate requiring stay of litigation pending clarification from bankruptcy trustee as to debtor's claimed interest, if any, in those funds.
- (37) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Automatic stay terminated as to property upon confirmation of Chapter 11 plan where plan provided for re-vesting of property in debtor. Later reopening of Chapter 11 case did not modify or alter validity of confirmation order, such that debtor's property remained beyond the scope of the stay. Court would not enter order declaring that stay was not in effect as such an order was unnecessary in light of confirmed plan.
- (38) *Banks v. Kam's Auto Sales*, 2014 WL 6320539 (Bankr. M.D. Ga. 2014) – Automobile purchased by debtor after filing Chapter 13 petition is property of the estate under Section 1306. Auto finance company that financed automobile post-petition violated stay by repossessing vehicle after default. Even if creditor could have prevailed on stay lift motion had one been filed, creditor did not have authority to repossess property of estate in absence of court order. Plan provided that property of estate would remain vested in estate and creditor's lack of notice of bankruptcy case did not alter this conclusion.
- (39) *In re Hyland*, 2013 WL 5979746 (Bankr. E.D. Tn. 2013) – Motor vehicle leased in name of debtor's wholly owned corporation is not property of estate in debtor's individual case. Lessor did not violate stay by repossessing truck prior to commencement of case nor by refusing to return truck to debtor following debtor's individual filing. Although corporation had been administratively dissolved, that does not convey title to corporate assets to sole shareholder. Corporation remains owner of assets for purposes of liquidation and payment to creditors.
- (40) *In re Lady Bug Corp.*, 2013 WL 5707775 (Bankr. E.D. Tn. 2013) – Automatic stay does not prevent actions against property that is not property of estate. Property of estate does not include property held by trustee where trustee holds bare legal title for benefit of third parties. Judgment creditor who obtained judgment liens against property prior to acquisition of property by trust could pursue foreclosure of judgment liens as action was not against property of estate and was not attempt to collect debt against debtor as debtor had no liability on the underlying obligation or the judgment itself.

3.5 Collection Efforts

- (41) *Southwest Airlines Co. v. Tidewater Finance Co.*, Case No. 15-70960 (N.D. Ga. 2016) – Creditor did not violate stay by pursuing pre-petition garnishment against garnishee where prior to commencement of case, garnishee failed to respond to garnishment and Court entered judgment against garnishee for full amount of debt. Action against garnishee to enforce judgment was not action against property of estate or against debtor, but was action to enforce judgment against non-debtor garnishee on obligation that, as a result of the judgment was independent of any liability of debtor and was direct liability of garnishee to garnishor. Continuation of proceedings had no impact on and did not directly or indirectly implicate debtor or property of estate and so was beyond scope of stay.
- (42) *In re Phillips*, 2015 WL 4256641 (Bankr. E.D. Tn. 2015) – Creditor violated stay by contacting debtor and relatives of debtor 22 times post-petition before ceasing efforts.

3.6 Causes of Action

- (43) *Camhzn Master, LLC v. U.S. Coal Co.*, 2016 WL 2764717 (Bankr. E.D. Ky. 2016) – Causes of action that can be asserted by debtor and causes of action that arise under Bankruptcy Code are property of estate and only trustee or DIP can assert those claims. However, if cause of action belongs solely to estate's creditors, trustee has no standing to bring action. Estate's right to bring avoidance action may bar otherwise valid creditor actions, particularly if actions seek relief based on injuries commonly suffered by debtor, estate or estate's creditors. In determining whether cause of action belongs to debtor, court uses three part test: (1) if debtor could have raised state court claims at commencement of case, cause of action is property of estate; (2) if cause of action does not explicitly or implicitly allege harm to debtor, then cause of action could not be brought by debtor and is not property estate; and (3) if both debtor and creditor could allege cause of action against same defendant, and recovery by one would preclude recovery by other, then claims are not independent and are property of estate. Causes of action against Officers and directors of debtor for breach of fiduciary duties and fraudulent transfer are property of estate and may be brought only by trustee. Cause of action for tortious interference against subsequent corporation that was also owned by or in which debtor's management had interests raised issue of breach of fiduciary duty where complaint alleged multiple actions by debtor's management that amounted to breaches of contractual and fiduciary duties owed to debtor. Competing claims of debtor and plaintiff would share common injury as both alleged that debtor's management engaged in transactions that cause financial damage to debtor.
- (44) *In re Walker v. RDR Real Estate*, 2016 WL 123932 (6th Cir. 2016) – Automatic stay precluded unsuccessful party from prosecuting post-trial motions until stay is lifted. Court did not err in denying Motions without prejudice to re-file when stay was re-imposed, but court erred in setting new deadline for date before stay was lifted. Under Section 108, where the time for filing the Motions had not expired as of the

petition date, moving party had right to re-file Motions within 30 days of being notified of lifting of stay. Court order that purported to set deadline as one day before stay modification order became effective failed to properly account for extension afforded by Section 108. Order denying Motions as untimely, when filed one day after deadline but within 30 day window allowed by Section 108, was abuse of discretion.

- (45) *In re Neirzwicki Holdings, LLC*, 2015 WL 9590322 (Bankr. E.D. Ky. 2015) – Action against debtor to enjoin nuisance based on debtor’s operation of nightclub is stayed under Section 362.
- (46) *In re Nicole Gas Production, Ltd.*, 2014 WL 4855005 (Bankr. S.D. Ohio 2014) – Principal of corporate debtor violated stay by filing complaint against third party that asserted cause of action belonging to debtor. Cause of action for alleged breach of contract and violation of Ohio Corrupt Practices Act in dealings with debtor belonged to debtor’s estate. Principal’s filing of complaint sought to exercise possession and control over cause of action.
- (47) *Stieg v. Hanson*, 2014 WL 1664275 (Bankr. S.D. Ohio 2014) – Under Ohio law, action for “concealment” is brought by person with interest in probate estate against another person suspected of concealing estate assets. Although cause of action is “quasi-criminal” in nature because action involves determination of guilt and imposition of a penalty, stay still applies to prohibit prosecution of civil action as action becomes substitute for civil action to recover money judgment. To extent relief sought is entry and enforcement of order requiring debtor to appear for examination, propound answers to interrogatories, and account for and surrender assets and records of probate estate, matter is criminal in nature and is not stayed. However, action is not excepted from stay to extent relief sought is entry of money judgment against debtor.

3.7 Abandoned Property

- (48) *In re Pyburn*, 2014 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.
- (49) *Gasprom, Inc. v. Fateh*, Case No. 12-10772 (9th Cir. BAP 2013) – Chapter 7 Trustee’s abandonment of property of estate does not lift stay to allow secured creditor to pursue foreclosure. Abandonment reverts title to property to debtor. Section 362(a)(5) extends stay protection to property of debtor, which includes property that reverts to debtor following abandonment.

3.8 Utilities

- (50) *In re Grisham*, 2103 WL 427935 (Bankr. D. Hawaii 2013) – Condominium association is not “utility” for purposes of Section 366. Utility billed association for all electrical usage and association recovered costs through assessments. Debtor’s failure to pay condo assessments did not allow association, under Section 366, to disconnect electrical service. Association violated automatic stay.
- (51) *Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Section 366 precludes utility from terminating or reusing to provide service to debtor solely based on debt that was owed prior to commencement of case. Utility can alter or discontinue service unless debtor or trustee, within 20 days of petition, furnished adequate assurance of future payment in the form of a deposit or other security. Debtor does not have private right of action against Utility for terminating utility service allegedly in violation of Section 366. Further, Section 366 did not prevent termination of service post-discharge where debtor failed to provide adequate assurances of future payment at any time during bankruptcy proceeding.

3.9 Bare Possessory Interests

- (52) *Smith v. Prokos*, 2016 WL 3619799 (Bankr. N.D. Ohio 2016) – Party did not violate stay by filing criminal complaint to recover possession of an automobile allegedly wrongfully in possession of debtor. Stay applies only to actions against debtor or property of estate. Vehicle was not property of estate as debtor’s name did not appear on Title to vehicle. Ohio law precludes court from recognizing any interest in a motor vehicle unless interest is either noted on the certificate of title or admitted to by the parties in the pleadings. Alleged “equitable interest” in vehicle which debtor allegedly obtained by providing services to party in exchange for ownership of vehicle was not sufficient where there was no evidence of any express trust and vehicle at all times was titled in party’s, not debtor’s name’s debtor did not have interest in vehicle, any actions taken by party to recover possession could not violate stay.
- (53) *Eden Place, LLC v. Perl*, 811 F.3d 1120 (9th Cir. 2016) – Foreclosure proceedings ended all legal or equitable interest of debtor in property. Purchaser at foreclosure sale does not violate stay by pursuing post-petition eviction proceedings. Property was not property of estate where entry of judgment and writ of possession dispossessed debtor of all interest in property. Fact that debtor remained in physical possession has no bearing on whether debtor had cognizable possessory interest in the property.
- (54) *Farmers Bank & Trust v. Wells*, 2015 WL 5120759 (Bankr. E.D. Ark. 2015) – Debtor’s continued possession of property after foreclosure sale and transfer of title constituted sufficient interest, even without accompanying legal interest, to give rise to automatic stay preventing purchaser from pursuing eviction.
- (55) *In re Wolfe*, 2015 WL 4734425 (Bankr. S.D. Ohio 2015) – Debtors who had neither legal nor equitable title to property had protected interest created by possession of property coupled with payment of taxes and making improvements to property.
- (56) *In re Salov*, 510 BR 720 (Bankr. S.D. N.Y. 2014) – Creditor violated stay by issuing writ of eviction after commencement of case. Creditor completed foreclosure process and purchased property at valid pre-petition foreclosure sale. After debtor filed Chapter 13, creditor attempted to evict debtor. While debtor had no ownership after foreclosure sale and no ability to prevent issuance of deed even post-petition, property of estate includes all rights and interests including bare possessory rights and interests. Mere possessory interest even absent any legal

interest is protected by automatic stay.

- (57) *Escobedo v. Davis*, ___ WL ___ (Bankr. D.N. Mex. 2014) – Creditor sanctioned for attempt to enforce pre-petition eviction order in violation of automatic stay.
- (58) *In re Comer*, 2014 WL 917485 (Bankr. E.D. Tn. 2014) – After foreclosure sale and transfer of title pre-petition, debtor had bare possessory right. However, bare possessory right is also protected by stay and creditor cannot pursue action to dispossess debtor absent relief from stay. Where foreclosure sale completed and title transferred pre-petition, court would modify stay to permit lender to complete action for possession.

3.10 Evictions

- (59) *In re Humbert*, 2016 WL 4508186 (Bankr. N.D. Ohio 2016) – Landlord violates stay by contacting debtor and demanding payment of pre-petition rent and by commencing post-petition eviction action without seeking relief from stay. Court can award damages where actions were taken in violation of stay; violation of stay was willful; and violation caused actual damages. Willful does not require specific intent but does require that creditor have knowledge of stay when actions are taken. Creditor instituted eviction proceedings before receiving notice of commencement of bankruptcy case and commencement of eviction would not be willful. Landlord stopped eviction proceedings up on being advised of bankruptcy case although landlord has not yet dismissed eviction action. Coeditor can violate stay by failing to take actions that cause existing violation of stay to cease. Upon learning of bankruptcy, landlord should either have sought retroactive relief from stay or dismissed eviction action. Debtor awarded attorney fees for services rendered after date on which landlord first learned of bankruptcy case and excluding fees for responding to landlord's motion for stay relief when ultimately filed. Debtor not entitled to non-economic damages as debtor did not present evidence sufficient to support a finding of emotional distress damages. Debtor not entitled to punitive damages as landlord's conduct was not egregious, vindictive or intentionally malicious. Creditor's conduct was not intentionally malicious or egregious and punitive damages were not necessary to deter future violations by landlord. Although landlord can possession from debtor, landlord must dismiss suit filed in violation of stay and file new action. Landlord cannot recover economic damages as debtor received discharge in bankruptcy.
- (60) *In re Wilson*, 2016 WL 3303325 (Bankr. E.D. Tn. 2016) – Commencement of bankruptcy stops any effort to evict debtor from leased property. Leasehold interest is property of estate protected from termination and repossession, regardless of whether landlord knew of filing at time of efforts to evict. Landlord's knowledge or lack of knowledge at time he filed eviction action and obtained order of possession and causing sheriff to dispossess debtor is irrelevant to whether actions violated stay. Violation of stay itself does not warrant damages unless violation was "willful".

3.11 Evictions – Section 362(l)

- (61) *Wilson v. Desert Realty, Inc.*, Case No. 14-1589 (9th Cir. BAP 2016) – Section 362(b)(22) excepts from automatic stay continuation of action to enforce eviction where landlord obtained prior to commencement of case a judgment of possession. Section 362(l) allows debtors to remain in possession if (a) non-bankruptcy law provides "some circumstance" where debtor would be permitted to cure monetary default; and (b) debtor deposits with clerk of court any rent coming due during the 30 days after filing the petition. If debtor fails to either file required certification or fails to deposit funds, stay shall not apply and landlord and continue proceeding without receive relief from stay. Section 362(l) did not apply where debtor's initial petition did not contain certification required by Section 362(l). One day later, debtor filed an amended petition that checked the certification and same day debtor tendered to clerk \$700 representing "debtor's share" of the rent coming due within the next 30 days. Debtor's certification was fatally defective where Certification stated that debtor had deposited with clerk all rent due for next 30 days but debtor actually only deposits \$700 versus total rent of \$2500.
- (62) *In re Maggiore*, 2016 WL 1238852 (Bankr. N.D. Ohio 2016) – Section 362(b)(22) excepts from scope of stay an eviction proceeding where landlord obtained before date of filing a judgment for possession. Section 362(l) allows debtor to obtain stay by filing certification with petition that state law allows debtor to cure defaults; and to pay the full rent that will come due in the 30 days after the petition is filed. Debtor did not comply where From 101A filed with the petition did not contain any certification and both boxes were left blank. Debtor also failed to make any deposit with the petition. Debtor's filing the day after the petition of a correct From 101A did not cure the defect as Section 362(l) required certification to be filed with the petition and there is no authority in the Code to allow the certification to be filed one day later. Further, debtor also failed to tender one month's rent where documents showed that rent was \$1,000 per month but debtor tendered only \$500. Landlord's completion of eviction on same day as petition was filed did not violate stay and debtor thereafter lacked any right of possession. Debtor's second attempt to file correct certification 5 days later was not effective to allow debtor to retain possession and debtor had already been dispossessed and there was nothing to "retain".
- (63) *In re Jackson*, 2013 WL 3956994 (Bankr. D. Colo. 2013) – Section 362(l) stays any attempt to evict a tenant from a residential leasehold only where state law allows tenant to cure default after issuance of state court judgment for possession. Stay under Section 362(l) did not apply to protect debtor from post-petition eviction where creditor obtained judgment of possession pre-petition and state law did not allow for tenant to cure default post-judgment.

3.12 Actions by Debtor

- (64) *Simmons v. BAC Home Loan Servicing, LLC*, 2014 WL 3844788 (M.D. Tn. 2014) – Court retains authority to dismiss complaint filed pre-petition against debtor. While stay would prevent action being taken against debtor, stay does not preclude court for dismissing complaint brought against debtor.
- (65) *Left Fork Mining Co. v. Hooker*, 2014 WL 1159948 (E.D. Ky. 2014) – Automatic stay does not apply to pre-petition litigation commenced

by debtor. Stay stops actions filed against debtor but not where plaintiff has filed for bankruptcy as case does not constitute judicial proceeding against the debtor.

- (66) *Downey v. FNMA*, 2013 WL 3456984 (E.D. Mi. 2013) – Action brought by debtor against mortgage company is not stayed by Section 362. Automatic stay does not apply to affirmative claims brought by debtor-plaintiff. Action was not brought by lender against debtor and action was not one by lender to obtain property of estate where foreclosure sale occurred and debtor failed to redeem, vesting FNMA with full title to the property free and clear of any claims of estate. Case would proceed in District Court to consider FNMA's Motion to Dismiss.
- (67) *Wolgast v. Richards*, 463 BR 445 (E.D. Mi. 2012) – Debtor's Motion in non-bankruptcy forum for sanctions against opposing party pursuant to Rule 11 stayed by debtor's subsequent bankruptcy filing. Rule 11 Motion was response to opposing party's Motion for Attorney Fees and Costs. Stay prevented opposing party from prosecuting Motion for Fees, requiring stay of Debtor's responsive Rule 11 Motion. deferring a decision on the Rule 11 motion until the automatic stay had been lifted was particularly appropriate, as the motion was, substantively, simply a means to challenge the merits of officer's motion for costs.

3.13 Appellate Proceedings

- (68) *In re Birmingham Cosmetic Surgery, PLLC*, Case No. 14-58784 (Bankr. E.D. Mi. 2015) – Debtor's appeal of pre-petition judgment is stayed by bankruptcy filing.
- (69) *TW Telecom Holdings, Inc. v. Carolina Internet, Ltd.*, 661 F.3d 495 (10th Cir. 2011) – Automatic stay stops all appeals in proceedings that were originally brought against the debtor, regardless of whether debtor is appellant or appellee. Whether action would be subject to stay is determined at outset of litigation, not on the particular stage of the proceeding at the time the bankruptcy is commenced.

3.14 Foreign Property

- (70) *In re Dietrich*, Case No. 08-68294 (Bankr. E.D. Mi. 2011), *aff'd* 2012 WL 1854250 (E.D. Mi. 2012) – Automatic stay applies to property of the Debtor located in Canada. Property of the estate and the automatic stay are not limited geographically to property located within United States, Debtor and Debtor's ex-spouse violated automatic stay by recording liens against Canadian property by purporting to amend pre-petition final judgment of divorce to convey to ex-spouse an interest in the Canadian property.

3.15 Foreign Bankruptcy Proceedings

- (71) *Zobel v. Contech Enterprises*, 2016 WL 1237384 (S.D. Ohio 2016) – Comity is voluntary act where courts in one country voluntarily allows legislative, executive or judicial actions of another country in country extending comity. Court will extended comity to foreign bankruptcy proceedings where (1) foreign bankruptcy court shares US policy of equal distribution of asset; and (2) foreign law mandates the issuance or authorization of stay. Comity does not require that foreign law be identical to US law, but requires that foreign law not be repugnant. Canadian bankruptcy proceedings have procedures similar to those of Code and stay imposed by Canadian bankruptcy act is similar to stay imposed under Section 362. There is no indication that Canadian bankruptcy proceeding are inconsistent with American notations of due process or that extending comity would be prejudicial to US citizens. Based on comity, Court would enter stay of litigation in US District Court pending resolution of the Canadian bankruptcy proceeding instituted by defendant.

3.16 Levy Against Trustee

- (72) *In re Allen*, 2015 WL 877425 (Bankr. W.D. Tn. 2015) – IRS levy issued to Chapter 13 Trustee attempting to intercept disbursements to creditor violated automatic stay and was void. Undisbursed funds held by Trustee are property of estate protected by Section 362(a)(3). Levy is act to obtain possession or control of property of estate. Levy also results in substantial administrative burden on Trustee, as Trustee is required to search *all* active Chapter 13 cases for ones in which taxpayer was a creditor, (ii) that had filed a proof of claim, (iii) which had not already been paid in full, and (iv) for which there were sufficient funds on hand to make a payment. Burden imposed by the levy has the effect of forcing the Trustee into conducting a fishing expedition on the IRS' behalf. Levy also creates potential personal liability of the Trustee in Trustee is determined to have disbursed in violation of levy. Court would not create judicial exception to automatic stay merely because levy, if enforced, may not have any actual adverse effect on any party other than taxpayer whose funds are being levied.
- (73) *In re Spencer*, 2015 WL 632319 (Bankr. W.D. Tn. 2015) – IRS levy issued to Chapter 13 Trustee attempting to intercept disbursements to creditor violated automatic stay and was void. Undisbursed funds held by Trustee are property of estate protected by Section 362(a)(3). Levy is act to obtain possession or control of property of estate. Levy also results in substantial administrative burden on Trustee, as Trustee is required to search *all* active Chapter 13 cases for ones in which taxpayer was a creditor, (ii) that had filed a proof of claim, (iii) which had not already been paid in full, and (iv) for which there were sufficient funds on hand to make a payment. Burden imposed by the levy has the effect of forcing the Trustee into conducting a fishing expedition on the IRS' behalf. Levy also creates potential personal liability of the Trustee in Trustee is determined to have disbursed in violation of levy. Court would not create judicial exception to automatic stay merely because levy, if enforced, may not have any actual adverse effect on any party other than taxpayer whose funds are being levied.
- (74) *In re Mathis*, 2015 WL 628260 (Bankr. W.D. Tn. 2015) – IRS levy issued to Chapter 13 Trustee attempting to intercept disbursements to creditor violated automatic stay and was void. Undisbursed funds held by Trustee are property of estate protected by Section 362(a)(3). Levy is act to obtain possession or control of property of estate. Levy also results in substantial administrative burden on Trustee, as Trustee is required to search *all* active Chapter 13 cases for ones in which taxpayer was a creditor, (ii) that had filed a proof of claim, (iii) which had not already been paid in full, and (iv) for which there were sufficient funds on hand to make a payment. Burden imposed by the levy has the effect of forcing the Trustee into conducting a fishing expedition on the IRS' behalf. Levy also creates potential personal liability of the Trustee in Trustee is determined to have disbursed in violation of levy. Court would not create judicial exception to automatic stay merely

because levy, if enforced, may not have any actual adverse effect on any party other than taxpayer whose funds are being levied.

- (75) *In re Dupree*, 2015 WL 628254 (Bankr. W.D. Mi. 2015) – IRS levy issued to Chapter 13 Trustee attempting to intercept disbursements to creditor violated automatic stay and was void. Undisbursed funds held by Trustee are property of estate protected by Section 362(a)(3). Levy is act to obtain possession or control of property of estate. Levy also results in substantial administrative burden on Trustee, as Trustee is required to search *all* active Chapter 13 cases for ones in which taxpayer was a creditor, (ii) that had filed a proof of claim, (iii) which had not already been paid in full, and (iv) for which there were sufficient funds on hand to make a payment. Burden imposed by the levy has the effect of forcing the Trustee into conducting a fishing expedition on the IRS' behalf. Levy also creates potential personal liability of the Trustee in Trustee is determined to have disbursed in violation of levy. Court would not create judicial exception to automatic stay merely because levy, if enforced, may not have any actual adverse effect on any party other than taxpayer whose funds are being levied.
- (76) *In re Smith*, 2015 WL 628261 (Bankr. W.D. Tn. 2015) – IRS levy issued to Chapter 13 Trustee attempting to intercept disbursements to creditor violated automatic stay and was void. Undisbursed funds held by Trustee are property of estate protected by Section 362(a)(3). Levy is act to obtain possession or control of property of estate. Levy also results in substantial administrative burden on Trustee, as Trustee is required to search *all* active Chapter 13 cases for ones in which taxpayer was a creditor, (ii) that had filed a proof of claim, (iii) which had not already been paid in full, and (iv) for which there were sufficient funds on hand to make a payment. Burden imposed by the levy has the effect of forcing the Trustee into conducting a fishing expedition on the IRS' behalf. Levy also creates potential personal liability of the Trustee in Trustee is determined to have disbursed in violation of levy. Court would not create judicial exception to automatic stay merely because levy, if enforced, may not have any actual adverse effect on any party other than taxpayer whose funds are being levied.
- (77) *In re McGuire*, 2015 WL 628284 (Bankr. W.D. Tn. 2015) – IRS levy issued to Chapter 13 Trustee attempting to intercept disbursements to creditor violated automatic stay and was void. Undisbursed funds held by Trustee are property of estate protected by Section 362(a)(3). Levy is act to obtain possession or control of property of estate. Levy also results in substantial administrative burden on Trustee, as Trustee is required to search *all* active Chapter 13 cases for ones in which taxpayer was a creditor, (ii) that had filed a proof of claim, (iii) which had not already been paid in full, and (iv) for which there were sufficient funds on hand to make a payment. Burden imposed by the levy has the effect of forcing the Trustee into conducting a fishing expedition on the IRS' behalf. Levy also creates potential personal liability of the Trustee in Trustee is determined to have disbursed in violation of levy. Court would not create judicial exception to automatic stay merely because levy, if enforced, may not have any actual adverse effect on any party other than taxpayer whose funds are being levied.
- (78) *In re Hill*, 2015 WL 628335 (Bankr. W.D. Tn. 2015) – IRS levy issued to Chapter 13 Trustee attempting to intercept disbursements to creditor violated automatic stay and was void. Undisbursed funds held by Trustee are property of estate protected by Section 362(a)(3). Levy is act to obtain possession or control of property of estate. Levy also results in substantial administrative burden on Trustee, as Trustee is required to search *all* active Chapter 13 cases for ones in which taxpayer was a creditor, (ii) that had filed a proof of claim, (iii) which had not already been paid in full, and (iv) for which there were sufficient funds on hand to make a payment. Burden imposed by the levy has the effect of forcing the Trustee into conducting a fishing expedition on the IRS' behalf. Levy also creates potential personal liability of the Trustee in Trustee is determined to have disbursed in violation of levy. Court would not create judicial exception to automatic stay merely because levy, if enforced, may not have any actual adverse effect on any party other than taxpayer whose funds are being levied.
- (79) *In re Sheppard*, 2015 WL 628254 (Bankr. W.D. Mi. 2015) – IRS levy issued to Chapter 13 Trustee attempting to intercept disbursements to creditor violated automatic stay and was void. Undisbursed funds held by Trustee are property of estate protected by Section 362(a)(3). Levy is act to obtain possession or control of property of estate. Levy also results in substantial administrative burden on Trustee, as Trustee is required to search *all* active Chapter 13 cases for ones in which taxpayer was a creditor, (ii) that had filed a proof of claim, (iii) which had not already been paid in full, and (iv) for which there were sufficient funds on hand to make a payment. Burden imposed by the levy has the effect of forcing the Trustee into conducting a fishing expedition on the IRS' behalf. Levy also creates potential personal liability of the Trustee in Trustee is determined to have disbursed in violation of levy. Court would not create judicial exception to automatic stay merely because levy, if enforced, may not have any actual adverse effect on any party other than taxpayer whose funds are being levied.
- (80) *In re Brown*, 2015 WL 628258 (Bankr. W.D. Tn. 2015) – IRS levy issued to Chapter 13 Trustee attempting to intercept disbursements to creditor violated automatic stay and was void. Undisbursed funds held by Trustee are property of estate protected by Section 362(a)(3). Levy is act to obtain possession or control of property of estate. Levy also results in substantial administrative burden on Trustee, as Trustee is required to search *all* active Chapter 13 cases for ones in which taxpayer was a creditor, (ii) that had filed a proof of claim, (iii) which had not already been paid in full, and (iv) for which there were sufficient funds on hand to make a payment. Burden imposed by the levy has the effect of forcing the Trustee into conducting a fishing expedition on the IRS' behalf. Levy also creates potential personal liability of the Trustee in Trustee is determined to have disbursed in violation of levy. Court would not create judicial exception to automatic stay merely because levy, if enforced, may not have any actual adverse effect on any party other than taxpayer whose funds are being levied.
- (81) *In re Baker*, 2015 WL 628257 (Bankr. W.D. Tn. 2015) – IRS levy issued to Chapter 13 Trustee attempting to intercept disbursements to creditor violated automatic stay and was void. Undisbursed funds held by Trustee are property of estate protected by Section 362(a)(3). Levy is act to obtain possession or control of property of estate. Levy also results in substantial administrative burden on Trustee, as Trustee is required to search *all* active Chapter 13 cases for ones in which taxpayer was a creditor, (ii) that had filed a proof of claim, (iii) which had not already been paid in full, and (iv) for which there were sufficient funds on hand to make a payment. Burden imposed by the levy has the effect of forcing the Trustee into conducting a fishing expedition on the IRS' behalf. Levy also creates potential personal liability of the Trustee in Trustee is determined to have disbursed in violation of levy. Court would not create judicial exception to automatic stay merely because levy, if enforced, may not have any actual adverse effect on any party other than taxpayer whose funds are being levied.
- (82) *In re Montgomery*, 2015 WL 628253 (Bankr. W.D. Tn. 2015) – IRS levy issued to Chapter 13 Trustee attempting to intercept disbursements to creditor violated automatic stay and was void. Undisbursed funds held by Trustee are property of estate protected by Section 362(a)(3).

Levy is act to obtain possession or control of property of estate. Levy also results in substantial administrative burden on Trustee, as Trustee is required to search *all* active Chapter 13 cases for ones in which taxpayer was a creditor, (ii) that had filed a proof of claim, (iii) which had not already been paid in full, and (iv) for which there were sufficient funds on hand to make a payment. Burden imposed by the levy has the effect of forcing the Trustee into conducting a fishing expedition on the IRS' behalf. Levy also creates potential personal liability of the Trustee in Trustee is determined to have disbursed in violation of levy. Court would not create judicial exception to automatic stay merely because levy, if enforced, may not have any actual adverse effect on any party other than taxpayer whose funds are being levied.

- (83) *In re Elrod*, 2015 WL 220941 (Bankr. W.D. Tn. 2015) – IRS levy issued to Chapter 13 Trustee attempting to intercept disbursements to creditor violated automatic stay and was void. Undisbursed funds held by Trustee are property of estate protected by Section 362(a)(3). Levy is act to obtain possession or control of property of estate. Levy also results in substantial administrative burden on Trustee, as Trustee is required to search *all* active Chapter 13 cases for ones in which taxpayer was a creditor, (ii) that had filed a proof of claim, (iii) which had not already been paid in full, and (iv) for which there were sufficient funds on hand to make a payment. Burden imposed by the levy has the effect of forcing the Trustee into conducting a fishing expedition on the IRS' behalf. Levy also creates potential personal liability of the Trustee in Trustee is determined to have disbursed in violation of levy. Court would not create judicial exception to automatic stay merely because levy, if enforced, may not have any actual adverse effect on any party other than taxpayer whose funds are being levied.

B. Exceptions

3.17 Police Power

- (84) *Branch v. 30th District Court*, 2015 WL 515391 (Bankr. E.D. Mi. 2015) – State court does not violate stay by continuing criminal prosecution commenced before bankruptcy filing. Prior to filing, debtor received tickets for running a red light; driving on suspended license; and no proof of insurance. Debtor failed to appear as required and court issued bench warrant for his arrest. 11 USC Section 523(a)(7) excepts from discharge any fines, penalties or forfeitures payable to and for the benefit of a governmental unit that is not compensation for any actual pecuniary loss. Traffic tickets issued pre-petition are all for fines and penalties for the benefit of the governmental unit and are not compensation for actual pecuniary loss. Section 362(b)(1) excepts from scope of stay the commencement or continuation of criminal proceedings. Section 362(b)(1) applies to all criminal proceedings regardless of motive or any bad faith of prosecutor. Actions in post-petition issuance of bench warrant, refusing to cancel warrant when advised of bankruptcy filing, and reporting to secretary of state resulting in further suspension of license all fall within scope of Section 362(b)(1).
- (85) *Stieg v. Hanson*, 2014 WL 1664275 (Bankr. S.D. Ohio 2014) – Automatic stay does not stay criminal action or proceeding. Under Ohio law, action for “concealment” is brought by person with interest in probate estate against another person suspected of concealing estate assets. Although cause of action is “quasi-criminal” in nature because action involves determination of guilt and imposition of a penalty, stay still applies to prohibit prosecution of civil action as action becomes substitute for civil action to recover money judgment. To extent relief sought is entry and enforcement of order requiring debtor to appear for examination, propound answers to interrogatories, and account for and surrender assets and records of probate estate, matter I criminal in nature and is not stayed. However, action is not excepted from stay to extent relief sought is entry of money judgment against debtor.
- (86) *Dunn v. Advantage Windows, Inc.*, 2013 WL 1091737 (Bankr. E.D. Tn. 2013) – Section 362(b)(1) excludes from the automatic stay enforcement of criminal statutes. Section 362(b)(1) does not contain exception based on alleged motivation of creditor in filing criminal complaint. Although court was troubled by risk of abuse, where creditor did not pursue a criminal complaint for almost a year after filing a civil action and did so only after action against debtor’s wife was dismissed based on her early discharge in her own Chapter , suggesting that the creditor launched his criminal action after its civil efforts were stayed in effort to obtain payment.
- (87) *U.S. v. Osborne*, 2012 WL 5385863 (N.D. Ohio 2012) – Bankruptcy court does not have exclusive jurisdiction to determine whether governmental action falls within police power exception to automatic stay. Debtor filed for bankruptcy in Pennsylvania. United States filed suit in Ohio to enforce provisions of Clean Water Act. Ohio District Court had concurrent jurisdiction to determine whether Clean Water Act was within scope of police power exception. District Court not required to abstain from determining scope of police power exception in favor of Bankruptcy Court.
- (88) *California v. Villalobos*, 453 BR 404 (D. Nv. 2011) – Police power exception is not limited to actions which are urgently needed for protection of public safety or health and there is no requirement for ongoing future harm for action to fall within police power exception to stay. Presence of civil penalties, disgorgement and restitution does not convert governmental unit’s police power into a pecuniary action. Actions will fit within police power exception where government’s action relates primarily to protection of government’s pecuniary interest in debtor’s property, or matters of safety and welfare; or where actions are taken to effectuate public policy versus adjudication of private rights. Criminal prosecution based on alleged violations of state securities laws and alleged fraud and unlicensed activities related to investments by California Public Employee Retirement Fund. Claims were designed to protect safety and welfare of state, and to enforce state licensing laws and Unfair and Deceptive Trade Practice statutes. Actions were also within scope of public purpose. Although party allegedly defrauded was private party (CALPERS), enforcement of laws governing securities fraud, unlicensed activities, and unfair trade practices are directed at addressing public harm. Although remedies included restitution, civil penalties and disgorgement in addition to injunctive relief, those remedies did not undercut conclusion that actions by state were intended to protect safety and welfare of state and protect citizens from unlawful activities, sufficient to bring action within scope of police powers.
- (89) *In re D’Mello*, 473 BR 207 (Bankr. E.D. Mi. 2012) – Automatic stay did not prevent Township, in exercise of police and regulatory power, from requiring debtor to abate what had been determined by state court to be “serious public nuisance”, at least to extent abatement could be achieved by debtor without spending money. Stay did not preclude enforcement against debtor, through incarceration for contempt if necessary, but not through enforcement of any money judgment, of debtor’s obligation to remove “all mail boxes, signs, dish satellites ... and

landscape edging,” to remove “all blight, garbage, rubbish, tires, furniture, appliances, toys” and the like, and to take other actions that he could personally, physically do without spending money.

- (90) *U.S. v. Erpenbeck*, 682 F.3d 472 (6th Cir. 2012) – Section 362(b)(1) excludes from the stay the commencement or continuation of a criminal action or proceeding against the debtor. Criminal forfeiture proceedings are part of a criminal action or proceeding against the debtor, and fall within the government’s police and regulatory powers. Criminal forfeiture is an aspect of punishment imposed following conviction of a substantive criminal offense. Further, forfeiture proceedings are similar to criminal restitution hearings which are also exempt from the bankruptcy stay pursuant to Section 362(b)(1). Forfeiture actions are also exempt from the automatic stay pursuant to Section 362(b)(4) because they involve the enforcement of the government’s police and regulatory powers. Bankruptcy stay does not divest the Court of jurisdiction over forfeiture proceedings concerning debtor’s property.
- (91) *In re Storozhenko*, 459 BR 697 (Bankr. E.D. Mi. 2011) – Post-petition proceeding brought in state court by state court receiver to hold debtor in contempt for violating orders entered in state court divorce proceeding were criminal proceedings within exception to automatic stay, to the extent receiver sought payment of fine to court or imprisonment for fixed term. However, to the extent contempt proceedings sought to recover restitution plus receiver costs and expenses, proceedings were civil in nature and precluded by automatic stay.
- (92) *S.E.C. v. Bluestein*, 2011 WL 4043125 (E.D. Mi. 2011) – Involuntary petition filed against debtor does not stay proceedings by SEC to enjoin debtor from continuing Ponzi Scheme or to recover profits and civil penalties. Although Court may not enforce disgorgement order while Bankruptcy is pending, stay does not prevent litigation to determine amount of disgorgement.
- (93) *In re T.S.P. Co., Inc.*, 2011 WL 1431473 (Bankr. E.D. Ky. 2011) – Where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay. OSHA process is created to protect workers from the hazards of an unsafe work environment. State administrative agency proceeding to determine damages for the violation of such safety laws is not prevented by the automatic stay. Automatic stay does not prevent the hearing officer from determining whether the evidence supports the Debtor’s citations or determining damages for violation of law. Any judgment which the State may obtain, however, is collectible only in the bankruptcy proceedings.
- (94) *In re Cochran*, 2010 WL 4875919 (Bankr. M.D. Ala. 2010) - State may proceed with criminal action against debtor under § 362(b)(1) exception to automatic stay. State may treat the Debtor as it would any other criminal defendant.
- (95) *Equal Employment Opportunity Commission v. Noble Metal Processing*, 2009 WL 1868002 (E.D. Mi. 2009) – Action by EEOC to enjoin violations of Title VII and ADEA with request for reinstatement of victims of alleged discrimination and adaption of affirmative action plan in Title VII case coupled with claim for back pay constitutes exercise of EEOC’s police or regulatory power which is not subject to the automatic stay until monetary claims are reduced to judgment.
- (96) *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 stayed pursuant to Section 362. Action by governmental unit to enforce state Securities Act is not adjudication of private right but is effectuation of public policy and does not seek to recover or enforce money judgment. Action solely to determine whether Debtor’s conduct violated Securities act is exempted from automatic stay. However, extent to which any judgment may be subject to automatic stay is to be determined only after judgment is entered, and may be determined by Kentucky Court adjudicating underlying action.
- (97) *In re Hann*, 2009 WL 2872813 (E.D. Mi. 2009) - 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. State had right to enforce police and regulatory power which includes a state forfeiture action under Section 362(b)(4). Therefore, State’s continuation of forfeiture proceedings did not violate automatic stay. State’s exercise of its police powers furthers important state policy against criminal conduct. State would not be required to return forfeited assets under section 542(a). Finally, State enforcement of police power does not violate discharge injunction as State action is not one to collect or recovery debt but rather is enforcement of State criminal law.

3.18 Police Power – Suspension of Driver’s License

- (98) *Craig v. Gibbons*, 2016 WL 74650 (Bankr. M.D. Tn. 2016) – Suspension of driver’s license, or refusal to reinstate suspended license after bankruptcy filing, are not stay violations. License is privilege, and not property of the estate, such that suspension or failure to reinstate is not exercise of control of property of estate. Notification by local court clerk to State of unpaid fines is at most ministerial act as state law requires court clerk to notify state when an offender has litigation taxes, court costs and fines that remain unpaid after one year from disposition of the offense. Further, reporting was continuation of criminal proceeding which is excepted from stay.

3.19 Police Power – Bad Checks

- (99) *Nash v. Clark County*, 464 BR 874 (9th Cir. BAP 2012) – Criminal prosecution arising out of “bad markers” for gambling debt did not violate discharge injunction or automatic stay. Although underlying debts themselves had been discharged, that did not preclude state from pursuing criminal proceedings based on debtor’s presentment of bad checks. Creditor’s contact with prosecutor post-discharge did not violate injunction where contact was initiated by prosecutor in connection with investigation of possible criminal charges. Bankruptcy courts should not invalidate results of state criminal proceedings. Fact that state criminal proceedings may result in restitution does not alter fact that state’s decision to enforce criminal statutes must be respected by bankruptcy courts. Criminal prosecution is, by definition, on behalf of all citizens of the state and discretion to bring charges lies solely with the government, not to any complaining witness. Strong

public policy advised against any interference by the bankruptcy court in the decisions of the state prosecutors to pursue criminal charges, and those proceedings will not be sanctionable as alleged violation of either automatic stay or discharge injunction.

- (100) *Michalski v. Coulson*, Case No. 10-3654 (6th Cir. 2011) – County Prosecutor did not violate stay by commencing criminal proceedings against debtor based on bad checks after entry of the discharge. Automatic stay is dissolved by operation of law upon entry of discharge and any action taken against debtor after discharge cannot violate stay as matter of law. Further, even if prosecution had been commenced prior to discharge, prosecution was designed to enforce criminal statute and not merely to collect debts. Evidence indicated that debtor offered to make checks good in exchange for dismissal of charges and County rejected that offer, indicating that County’s interest in matter was not merely proceeding instituted primarily to collect debt.
- (101) *In re Fidler*, 442 BR 763 (Bankr. D. No. 2010) – Bankruptcy court cannot enjoin prosecution of action for writing bad checks where debts themselves were discharged in bankruptcy. However, court can sanction complaining witnesses to extent that they are attempting “end run” around discharge by attempting to collect debts as restitution. Bankruptcy Court will not disrupt sovereign determination by state Prosecutor to bring charges simply because the Bankruptcy Court believes that there is economic motive behind statute or prosecution.

3.20 Police Power – Parking Tickets

- (102) *Valle v. Montgomery County*, 456 BR 228 (Bankr. D. Md. 2011) – Actions taken to enforce parking tickets are in the nature of criminal violations and not as compensation for actual pecuniary loss. Local regulations did not mandate that parking code violations were civil in nature and county could pursue charges under police power exception to automatic stay. County’s imposition and pursuit of penalty for non-payment of fines was continuation of criminal proceedings within exception to stay.

3.21 Police Power – Court Disciplinary Proceedings

- (103) *In re Chaban*, 2015 WL 5026079 (E.D. Mi. 2015) – State court imposition of sanctions against attorney after attorney filed for bankruptcy are within scope of police power exception to automatic stay. Whether court action is with police powers exception depends on whether the sanctions relate primarily to the protection of the state’s pecuniary interest as opposed to public health and welfare; and whether proceeding is effectuating public policy or adjudicating private rights. Sanctions imposed by state court for frivolous and vexatious appeals were designed to effectuate public policy by discouraging frivolous litigation and conserving judicial resources. Sanctions were payable to opposing party to compensate for costs of defending and as a punitive measure. Sanctions payable to third party are not for the government’s own pecuniary interest. Sanctions were done to punish offender and protect integrity of courts and judicial process as opposed to adjudicating private rights.
- (104) *In re McGee*, 2014 WL 5488266 (Bankr. E.D. Ky. 2014) – Bankruptcy Court is governmental unit such that court’s proceedings to impose sanctions on debtor’s counsel are not stayed once counsel filed his own Chapter 13 proceeding. Sanctions including permanent bar from practice, civil penalties, refunds of amounts paid to counsel by clients for the previous year, and a potential waiver of the civil penalties were all designed to effectuate public policy and not to protect private rights and are within police power exception to automatic stay.

3.22 Police Power – Qui Tam Actions

- (105) *In re McOuat*, Case No. 15-5150 (Bankr. E.D.N.C. 2016) – Complaint under Federal False Claims Act is encompassed by Government’s Police and Regulatory power and is not stayed by bankruptcy filing. Government did not violate stay by continuing prosecution notwithstanding actual notice of bankruptcy filing. Government can seek entry of final judgment as long as judgment does not create advantage of government over other creditors and does not seek to exercise control over property of estate.
- (106) *U.S. v. Institute of Cardiovascular Excellence*, Case No. 11-406 (M.D. Fl. 2016) – Automatic Stay does not apply to Qui Tam suits under Federal False claims act where United States is plaintiff or has intervened and taken over prosecution of action. Exception in Section 362(b)(4) applies when government is seeking compensation for fraud as public health and safety is protected even when government is seeking only money damages.

3.23 Police Power – Fraud Actions

- (107) *In re McOuat*, Case No. 15-5150 (Bankr. E.D.N.C. 2016) – Federal Government claim against debtor for common law fraud encompassed by Government’s Police and Regulatory power and is not stayed by bankruptcy filing. Government did not violate stay by continuing prosecution notwithstanding actual notice of bankruptcy filing. Government can seek entry of final judgment as long as judgment does not create advantage of government over other creditors and does not seek to exercise control over property of estate.

3.24 Criminal Restitution

- (108) *US v. Partida*, 2015 WL 3398362 (9th Cir. BAP 2015) – Federal Mandatory Victims Restitution Act (MRVA) supersedes automatic stay. Government can enforce pre-petition criminal restitution order entered as part of criminal conviction. Government can enforce judgment imposing criminal restitution against all property of the debtor without violating automatic stay.
- (109) *US v. Robinson*, 2014 WL 4116476 (6th Cir. 2014) – Automatic stay does not prevent US from collecting criminal restitution from debtor or from property of estate. While Section 362(b)(1) excepts only criminal proceedings against debtor, the criminal restitution statute, 18 USC Section 3613 allows US to collect criminal restitution “notwithstanding any other federal law”. Section 3613 does not draw distinction between property of estate and debtor. US can proceed under Section 3613 to collect restitution from debtor or from property of estate without interference from and without violating stay.
- (110) *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.

- (111) *U.S. v. Robinson*, 2013 WL 2950598 (W.D. Tn. 2012) – Automatic stay does not prevent government from commencing or continuing criminal action against debtor from sentencing the debtor even if criminal monetary penalties result, from determining or modifying the amount of restitution to be paid to victims and formulating a court-imposed payment schedule, or upon default of criminal restitution by debtor, from revoking probation or term of supervised release, modifying terms or conditions of probation or supervised release, resentencing debtor, holding debtor in contempt of court, entering restraining order or injunction, accepting performance bond, entering or adjusting a payment schedule, or taking any other action necessary to obtain compliance with its restitution order. 18 USC Section 3613(a) allows government to enforce restitution order against all property and rights to property of the person ordered to pay restitution. United States can enforce restitution order against debtor and also against property of the estate without violating automatic stay. Provision of Section 3613 that provides “notwithstanding any other Federal law” supersedes Section 362. Government did not violate automatic stay when it sought to levy on debtor's IRA and two automobiles that were otherwise property of estate.

3.25 Civil Contempt

- (112) *Leonard v. RDLG, LLC*, 2015 WL 1534520 (E.D. Tn. 2015) – Automatic stay does not preclude continuation of civil contempt proceedings against debtor for failure to abide by rules of Court in non-bankruptcy forum litigation. District Court entered sanctions against debtor for failure to comply with court rules, and directed that if sanctions were not paid, Court would impose additional sanction of striking pleadings and entering judgment. Contempt proceeding serves both the pecuniary interest of the state and the public policy of the court by punishing debtor for his conduct and to protect integrity and authority of court.
- (113) *Yellow Express, LLC v. Dingley*, Case no. 13-1261 (9th Cir. BAP 2014) – Automatic stay does not preclude continuation of civil contempt proceedings in state court where contempt proceedings are intended to coerce compliance with prior court order and do not involve determination or collection of underlying obligation or represent ploy by creditor to harass debtor. State court order awarded sanctions in against debtor for failure to comply with discovery requests. Stay does not prevent post-petition civil contempt action where debtor failed to make payments as ordered in sanctions order.

3.26 Setoff

- (114) *In re Flannery*, Case No. 16-46511 (Bankr. E.D. Mi. 2016) – Section 553 preserves state law right to setoff a debt owed by one party against a debt owed to the same party. Whatever setoff rights creditor had prior to bankruptcy remain post-bankruptcy. However, Automatic Stay prevents creditor from exercising right absent relief from the stay for cause including a lack of adequate protection. Fact that creditor has right of setoff is not, standing alone, “cause” where there was on pre-petition default. Fact that plan proposes to pay creditor less than full claim over life of plan is not cause to lift stay although it may be ground to object to confirmation. Debtor's obligation to Credit Union had balance of \$1500 and was secured by automobile valued at \$5,000 plus funds in bank account. Creditor was more than adequately protected given substantial equity cushion in vehicle itself. Filing of bankruptcy is not event of default as default would not have occurred pre-petition which is element of exercise of setoff right. Statutory right of credit union to freeze account if borrower defaults does not constitute cause as debtor had not defaulted and was not delinquent at time of commencement of case.
- (115) *In re Buttrill*, 2016 WL 1314494 (Bankr. E.D. Tn. 2016) – Section 553 preserves creditor's right to setoff pre-petition obligation wed to debtor against pre-petition obligation owed to creditor. Federal Governmental agencies have right of setoff under 26 USC Section 6402, which allows the Treasury department to intercept federal tax overpayments to satisfy liabilities owed to governmental agencies. Debtor owed Army and Air Force Exchange Services for purchase of goods on credit; and debtors had tax overpayment which matured on December 31, 2014, the year immediately preceding the filing of the case. However, preservation of right of setoff does not allow party to exercise that right absent relief from stay. Section 362(a) precludes any effort to obtain property of estate which would include tax overpayment in which debtor had contingent interest as of the preceding December 31. The IRS violated stay by not only freezing debtor's tax refund but in offsetting that against debtor owed to creditor. However, debtors failed to produce evidence of damages from offset as there was no real dispute that IRS was lawfully entitled to offset, although IRS did not act promptly in seeking stay relief to exercise offset. Right of offset is not defeated by claimed exemption in tax refund. Recognizing conflict in case law, Court held that debtor's contingent interest in possible tax refund was subject to and did not defeat right of setoff that was expressly preserved in Code. Exemption would apply only if there were amounts remaining after satisfaction of offset debts.
- (116) *Brook v. Chase Bank, USA*, 2014 WL 1910842 (11th Cir. 2014) – Section 553, which preserves right of setoff of mutual debts, is permissive and not mandatory. Bankruptcy Court can decline to setoff debts in exercise of its discretion. Bankruptcy court did not abuse discretion in refusing creditor's request to offset statutory damages for creditor's violation of consumer protection statute against amount of creditor's now-discharged claim in bankruptcy. Consumer protection statute was designed to deter bad collection practices to protect the public. Court would not allow creditor to offset claims as doing so would allow creditor to take illegal action without consequence, s only consequence would be to reduce creditor's claim in a no asset bankruptcy case.
- (117) *Sexton v. Internal Revenue Service*, 2014 WL 1329260 (Bankr. W.D. Va. 2014) – IRS violated stay when it set off post-petition tax refund for apply to pre-petition debt to USDA following pre-petition foreclosure of debtor's home. Court concluded that debtor's interest in 2012 tax refund vested on December 31, 2012, and was property of estate when debtor filed for relief in February, 2013. Section 523(a)(7) specifically stays set off actions other than set offs against an income tax liability If Debtor did not acquire an interest in the tax refund until the IRS determined post-petition that a refund was due, then Section 362(b)(26) would be superfluous as the IRS determination of an offset

would prevent the “refund” from ever coming into existence.

- (118) *Lewis v. United Joint Venture*, 691 F.3d 835 (6th Cir. 2012) – Setoff exists between two parties, each of whom under an independent contract owes a definite amount to the other, to setoff their respective debts by way of mutual deduction. Requirement of “mutuality of obligation” means debts must be to and from the same persons and in the same capacity. Although debts may have arisen from same scheme, judgment against debtor was for individual and judgment held by debtor was against other co-conspirators. Lack of mutuality prohibits effort to set off.
- (119) *In re Scales*, 476 BR 512 (Bankr. N.D. Ohio 2012) – Filing of bankruptcy has no effect on mechanical intercept process for tax refunds to offset prior tax liabilities. Debtor’s right to receive refund is contingent on IRS determination of amount of tax refund, if any, that is due. Once IRS applies the netting provision of 26 USC Section 6402(d), any contingent interest that the debtor had in the refund was terminated to the extent of the prior tax liabilities. Fact that refund is attributable to earned income credit rather than true “overpayment” did not alter IRS right to intercept refunds to offset prior liabilities.
- (120) *In re DeGroot*, Case No. 05-12996 (Bankr. W.D. Mi. 2012) – Debtor’s ex-spouse who was indebted to debtor on petition date entitled to setoff amounts owed to debtor against unpaid child support as of petition date. Right of setoff does not depend on any perfected security interest or lien but arises as a matter of law.
- (121) *In re Stiles*, 2012 Bankr. LEXIS 3266 (Bankr. N.D. Ga. 2012) - IRS setoff of refund was excepted from stay.
- (122) *US Department of Agriculture v. Riley*, 485 BR 361 (W.D. Ky. 2012) – Post-petition setoff by governmental agency against debtor’s tax refund did not violate stay. To establish a valid right of setoff in bankruptcy, creditor must establish four conditions: (1) creditor’s claim must arise before the commencement of the case, (2) creditor must have a debt to debtor that arose before the commencement of the case, (3) the claim and debt must be mutual, and (4) the claim must be valid and enforceable. Governmental agencies have statutory right to setoff against tax refunds and direct the Secretary of Treasury to reduce a debtor’s “tax overpayment” by past-due amounts owed to other agencies before determining whether taxpayer is entitled to refund. Taxpayer “overpayment” of taxes does not create entitlement to refund. An overpayment of taxes is any payment made by taxpayer that is over and above tax liability, whereas a refund is amount that Internal Revenue Service is obligated to pay taxpayer after IRS has exercised its statutory right to offset. Debtor’s interest in a refund is contingent upon the statutory determination of what portion of tax overpayment remains for debtor to receive as a refund. Where unpaid governmental debt exceeds entire tax overpayment, there is no money left over to become property of debtor-taxpayer’s estate, and thus nothing for debtor-taxpayer to claim as exempt. Given that amount of Chapter 7 debtor-taxpayers’ obligation to federal agency, for deficiency balance remaining after mortgage loan foreclosure, exceeded amount of debtors’ overpayment of federal income tax, debtors never became entitled to tax refund, and thus had no refund that became estate property and could be claimed as exempt.
- (123) *Lake Trust Credit Union v. Houston*, 2012 WL 4490890 (E.D. Mi. 2012) – Reversing lower court ruling, Court concluded that joint account in credit union, bearing name of debtor and debtor’s mother, is a “multi-party account” under Michigan Credit Union Act on which credit union holds perfected lien and rights of setoff regardless of identity of party making deposits. MCUA imposes lien on any deposit account from which a member may withdraw funds without the consent of another person and for any obligation owed to the credit union by that member. Credit Union that holds claim against one of the parties is not required to establish that the obligor is the owner of some or all of the funds in the account. Non-debtor third party cannot avoid credit union right to setoff or enforce lien against entire account by presenting evidence that non-debtor made all deposits and withdrawals from account. While presumptions of ownership may be relevant in disputes between members or between members and creditors, these presumptions do not apply to credit union which is not a “creditor” within meaning of statute creating presumption.
- (124) *In re Houston*, Case No. 11-60934 (Bankr. E.D. Mi. 2011) – Michigan Compiled Laws create rebuttable presumption that funds in multi-party account can be withdrawn by any one of the parties. Credit Union that holds claim against one of the parties must establish that the obligor is the owner of some or all of the funds in the account. Joint party will be the owner of the funds in the account in an amount that is proportionate to the net contributions by that party. Non-debtor third party filed affidavit stating that all of the funds in the account were hers. Credit Union provided opportunity to submit evidence to Court to establish amount of funds in account that Credit Union alleges belonged to debtor.
- (125) *In re Hess*, 2011 WL 3701798 (Bankr. E.D. Mi. 2011) – The right to set off is preserved where (1) there are mutual, pre-petition obligations owing between the debtor and the creditor and (2) a right to setoff the obligations exists under non-bankruptcy law. Michigan Compiled Laws Section 490.361(4) provides a credit union with a lien on “any share of a member” in deposit account or “any deposit account from which a member may withdraw funds without consent of another person”. Credit Union could not set off against account in name of debtor and debtor’s mother where evidence indicated that mother was member of credit union but Credit Union failed to produce evidence that debtor was member. Section 490.64 allows set off when any party to a multi-party account is indebted to the credit union. Debtor had interest in mother’s account even though mother had account in her name and intended to add debtor for estate planning purposes. Account documents signed by mother and debtor expressly added debtor as a joint account holder and demonstrated intention to change ownership from mother to mother and debtor. Account constituted “multi-party” account within scope of Section 490.64 permitting Credit Union to setoff for debt owed by debtor.
- (126) *Gould v. United States*, 603 F.3d 1100 (9th Cir. 2010) – IRS not required to request stay relief before exercising right of set off post-petition tax refund for pre-petition liability. Section 362(b)(26) effective October 17, 2005, permits IRS to setoff without seeking stay relief.
- (127) *National Bank of Woodbury*, Case No. 09-8049 (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. Although Bank has ability to freeze account and preserve right of setoff,

nothing requires Bank to exercise that right and failure to do so does not jeopardize the Bank's security interest. 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.

3.27 Recoupment

- (128) *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.
- (129) *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.

3.28 Injunctive Relief

- (130) *Innerwood & Co. LLC v. Privett*, 2016 WL 4697662 (S.D. Ohio 2016) – Whether enforcement of injunction against debtor for violation of non-compete agreement is stayed depends on whether injunction amounts to "claim". The right to equitable relief, such as the right to an injunction to enforce a non-compete agreement, constitutes a claim only if it is alternative to right to payment or if compliance with equitable order will require debtor to pay of money. Right to equitable relief might be dischargeable "claim" if breached non-compete agreement could be reduced to money damages. Debtor's payment of legal fees to defend action to enforce an injunction is not the type of expense that constitutes a "requirement that debtor pay money" to satisfy injunction. Bankruptcy Court must determine (1) whether debtor is required to expend money to comply with obligations under the non-compete agreements or the preliminary injunction order and (2) whether debtor is subject to money damages for breach of the non-compete agreements or the preliminary injunction order.
- (131) *In re Trish Enterprises, LLC*, Case No. 12-21729 (Bankr. E.D. Mi. 2012) – Court would lift automatic stay to allow state court injunctive proceedings to continue. Actions of non-debtor were clear violations of covenants not to compete. Although debtor was not the alleged tortfeasor, the non-debtor was a principal of the debtor and used the debtor-corporate entity the conduct business which was the basis of the alleged violation. Debtor's alleged tortious use of property warrants relief from stay to allow state court to adjudicate possible injunction or other equitable relief.
- (132) *Dominic's Restaurant of Dayton, Inc. v. Mantia*, 2012 WL 2580741 (6th Cir. 2012) – The automatic stay protects interests in a debtor's property, not tortious uses of that property by the debtor. The automatic stay does not preclude post-petition suits to enjoin unlawful conduct. Automatic stay does not free debtor of contempt orders and the injunctions upon which the contempt was based. Congress did not intend automatic stay to strip court of power to enforce orders or to allow party to blatantly violate court orders and then seek shelter in the bankruptcy court, rendering prior court orders meaningless. Debtor's bankruptcy petition did not prevent non-bankruptcy court from using contempt power to compel debtor to comply with court order that debtor cease infringing on Plaintiff's trademarks and service marks. Debtor who continued to infringe after entry of restraining order subject to contempt action and sanctions.

3.29 Possessory Security Interests

- (133) *Okke v. Okke*, 513 BR 896 (Bankr. W.D. Mi. 2013) – Creditor holding property pursuant to possessory security interest does not violate stay by retaining possession. Court can order creditor to turnover property subject to appropriate protections of creditor's interest, but absent a turnover order, creditor cannot be held to have violated stay.
- (134) *In re Vega*, 2013 WL 3157516 (Bankr. E.D. Mi. 2013) – Creditor holding property pursuant to possessory security interest does not violate stay by retaining property post-petition. Creditor, an auto repair facility, has a statutory possessory security interest in any vehicle in its possession until the costs of the repairs are paid in full. If creditor releases possession of the vehicle, creditor loses that security interest and becomes an unsecured creditor. Section 362(b)(3) allows a creditor to take any action necessary to perfect or maintain perfection of any interest in property to the extent a trustee's avoiding powers under Section 546 are subject to that perfection. Trustee's avoiding powers are subject to any security interest that was properly perfected as of petition date, which would include possessory security interests. As such, creditor has full right to take steps to maintain that perfection. For possessory security interests, perfection is maintained solely by possession. Creditor did not violate stay where creditor retained possession to continue perfection of properly perfected security interest as of date of commencement of case.

3.30 Post-petition Debts

- (135) *In re Spencer*, 2014 WL 1599869 (Bankr. N.D. Ohio 2014) – Automatic stay does not prevent collection efforts on post-petition debts as long as efforts do not include actions against property of estate. 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.

3.31 Post-Petition Perfection of Lien

- (136) *Branch Banking & Trust Co. v. Construction Supervision Services*, 2014 WL ____ (4th Cir. 2014) – Subcontractor's mechanic lien dated back to date on which subcontractor provided materials and supplies, giving subcontractor interest in funds received by contractor in payment for

job. Subcontractor accomplished post-petition perfection within time permitted in Section 546(b) and 547(e)(2)(A).

- (137) *Johnson v. Williams*, 490 BR 236 (Bankr. W.D. Ky. 2013) – Discharge in Chapter 7 discharges only in personam liability and does not affect validity of lien. Creditor did not violate injunction by perfecting previously unperfected mortgage after entry of discharge in Chapter 7 case. Lien was valid and unavoidable in subsequent Chapter 7 proceeding where there was no basis to avoid as preferential or fraudulent.
- (138) *In re Michigan Biodiesel, LLC*, 2012 WL 1941648 (Bankr. W.D. Mi. 2012) – Creditor violated automatic stay by filing, post-petition, a “correction statement” that sought to assert lien against property of estate. After filing, creditor attempted to record continuation statement but inadvertently recorded a termination statement. Within minutes, creditor realized the error and filed a “correction statement” indicating that the termination statement was error. Correction statement constituted attempt to perfect a lien against property of the estate post-petition.
- (139) *In re Jackson*, 403 B.R. 95 (Bankr. D. Idaho 2009) – Assets acquired by a Chapter 13 debtor after confirmation of a plan but before the case is closed, dismissed, or converted become property of the bankruptcy estate. Where plan provided for property to vest in debtors at confirmation, property ceased to be property of estate. Therefore, post-petition creditor who recorded judgment against debtor’s residence did not violate stay, as creditor’s actions were not attempt to collect pre-petition obligation and did not interfere with property of the estate.
- (140) *Soto-Rios v. Banco Popular de Puerto Rico*, Case No. 10-2270 (1st Cir. 2011) - Mortgagee and purported secured creditor held an “interest in property” as that term is used in both 11 U.S.C. Section 362(b)(3) and 11 U.S.C. Section 546(b)(1)(A) even though the mortgage deeds executed by the debtors 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. Mortgagee’s actions in perfecting its mortgages during the post-petition period would be excepted from the automatic stay by virtue of 11 U.S.C. Section 362(b)(3).
- (141) *Sovereign Bank v. Hepner*, 2010 WL 2816472 (10th Cir. 2010) – Creditor did not violate stay by perfecting pre-petition security interest post-perfection. Automatic stay does not prohibit perfection of security interest in property to the extent that trustee’s rights and powers were subject to such perfection. Under Colorado law, creditor has 20 days from delivery of automobile to buyer to perfect lien on title superior to any lien creditor including the trustee in his status as hypothetical lien creditor. Debtor’s bankruptcy filing within that 20 day window does not permit trustee to avoid Bank’s security interest which was properly perfected post-petition but within 20 day safe harbor.

3.32 Domestic Support Obligations

- (142) *In re Packer*, 2016 WL 5928899 (Bankr. W.D. Mi. 2016) – State court order directing debtor to pay ex-spouse \$25,000 to reimburse attorney fees was in nature of support. State Court considered income disparities between parties and attorney fees expended, concluded that ex-wife’s attorney fees were direct result of activities of debtor. Even state court ordered support will not be DSO to extent amount awarded is unreasonable. Debtor presented no evidence that amount awarded was unreasonable. Bankruptcy Court will not sit as “super-divorce” court and second guess determination of state court that ex-wife had established sufficient basis for attorney fees as DSO.
- (143) *Jordahl v. Dyal*, Case No. 15-21052 (Bankr. S.D. Ga. 2016) – Automatic stay prevents action to hold debtor in contempt after debtor files for Chapter 13 protection and before plan is confirmed. Section 362(b)(2)(C) excepts from stay any garnishment against debtor’s income that was issued before commencement of case, but contempt proceeding does not seek withholding of income on on-going basis but seeks immediate payment in full.
- (144) *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.
- (145) *In re DeSouza*, Case No. 12-091 (1st Cir. BAP 2013) – State Court orders awarding alimony did not violate automatic stay. However, contempt order entered by state court when debtor failed to pay did violate stay. State court contemplated that ongoing alimony payments would come from debtor’s future rental income and future earnings, all of which are property of estate. Section 362 specifically allows for the use of a judicial or administrative order directing payment from property of the estate. However, order that awarded alimony did not constitute a garnishment or other order that directed payment by a third party source. As such, collection efforts through the contempt process constituted actions to obtain possession of property of estate in violation of Section 362.
- (146) *In re Murphy*, 473 BR 197 (Bankr. E.D. Mi. 2011) – Provision of final divorce judgment that required debtor to pay \$2,500 of ex-wife’s attorney fees directly to ex-wife’s attorney was not domestic support obligation. Obligation was not payable to spouse, former spouse, or child of debtor, and ex-wife, having herself been discharged of any obligation to attorney in her own prior Chapter 7 case, could not held liable, or otherwise adversely affected, if debtor failed to pay attorney. Obligation payable to third parties, such as fee to professional who provided services to benefit the spouse or child, may constitute DSO only if former spouse is also obligated for such fees. Post-petition conduct of attorney in seeking to enforce debtor’s obligation for fees was not excepted from automatic stay as action to collect domestic support obligation from property not included in bankruptcy estate.
- (147) *Rugiero v. Dinardo*, Case No. 11-11549 (E.D. Mi. 2011) – Enforcement of domestic support order is within exception to automatic stay. State Court has authority to determine, post-petition, whether the debt is in the nature of support and is non-dischargeable within Section

523(a)(5) even in proceedings conducted post-petition. Bankruptcy Court has concurrent jurisdiction, not exclusive jurisdiction, over issue of dischargeability of domestic support order as within scope of exception to stay.

- (148) *In re Palmieri*, 2011 WL 6812336 (Bankr. E.D. Mi. 2011) – Ex-spouse did not violate stay by filing Motion in state court for award of spousal support after debtor filed Chapter 13 proceeding. Section 362(b)(2)(A)(ii) excepts from the automatic stay any action to establish or modify a domestic support order. Spouse’s State court proceeding sought to modify a prior Order that denied support but required debtor to maintain payments on marital homestead. Debtor stopped making those payments pre-petition and Debtor’s Chapter 13 plan proposed to surrender the homestead. Debtor’s obligation to pay the mortgage constituted a debt owed to a former spouse that was established by an order of a Court of record. Although final judgment of divorce stated that neither party was awarded support, label used by state court will not control determination. Requirement that debtor make payments on the marital residence constituted support where divorce judgment reserved the right to award future support until date on which the spouse died or remarried; and debtor’s obligation to pay for the mortgage would terminate at such time as the house was sold or the mortgage paid off. Term limit on obligation to pay is evidence of support rather than property settlement. Fact that payments are not made to ex-spouse but are instead paid to third party does not defeat status as “support” where payment is one that would necessarily support ex-spouse and ex-spouse would have to make that payment if the debtor did not. Obligation to pay mortgage is particularly one of support even in the absence of a “hold harmless” clause. Ex-spouse’s state court action to modify divorce judgment for purposes of obtaining relief based on debtor’s failure to make mortgage payments fell within exception to automatic stay.

3.33 Administrative Freeze – Financial Accounts

- (149) *Mwangi v. Wells Fargo Bank, NA*, 764 F.3d 1168 (9th Cir. 2014) – Debtor could not bring action against bank for administrative freeze of account. Although debtor claimed funds as exempt, claimed exemption did not become effective until 30 days after debtor filed Schedule C and during interim debtor had no right to use or control the funds as the funds were property of estate. Upon expiration of 30 days, “in kind” exemption for funds resulted in funds being removed from estate and reverted in debtor, at which point stay ceased to apply to funds. Bank did not violate stay as to Trustee because Bank promptly advised Trustee of existence of accounts and implementation of freeze and Trustee did not make request for turnover of property such that Bank did not improperly exercise control over property of estate. After expiration of time to object to exemptions, Bank returned funds to Debtor and did not retain funds or any interest in funds.
- (150) *Turner v. First Community Credit Union*, 2011 WL 2798907 (Bankr. S.D. Tx. 2011) – Bank freeze of debtor’s account violated stay when bank did not promptly seek relief from stay to pursue setoff. Freeze may be maintained only for so long as is necessary to have a hearing on appropriate relief. Bank’s freeze for over one year constituted exercise of control over property in violation of Section 362. However, debtor failed to establish any damages as a result of violation.

3.34 Administrative Freeze - State Actions

- (151) *Bererhout v. City of Malden*, 2011 WL 2119007 (Bankr. D. Mass. 2011) – City violated automatic stay by refusing to release administrative hold on debtor’s automobile title, preventing debtors from renewing the registration and vehicle license. City imposed freeze pre-petition based on unpaid parking tickets and fines. Although City received proper notice of bankruptcy filing, City failed to release freeze. City’s actions amounted to effort to obtain possession or of to exercise control over property of the estate and to collect, assess or recover a claim that arose pre-petition. Sanctions entered in the form of attorney fees and expenses incurred in enforcing automatic stay and prosecuting motion for contempt.

3.35 Final Judgment in Dischargeability Proceedings

- (152) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Automatic stay terminated as to creditor’s right to pursue debtor and property of debtor that is not property of estate upon entry of Order Confirming Plan that excepted debt from discharge. Later reopening of Chapter 11 case did not modify or alter validity of confirmation order, such that debtor’s property remained beyond the scope of the stay. Court would not enter order declaring that stay was not in effect as such an order was unnecessary in light of confirmed plan.
- (153) *In re Dietrich*, Case No. 11-13905 (E.D. Mi. 2012) – Final Judgment denying debtor a discharge terminates stay as to actions against any action other than an action against property of estate. Ex-spouse violated stay by attempting to obtain possession and control over property located in Canada. Although stay had terminated as to actions against debtor by virtue of denial of discharge, property itself remained property of estate protected by stay.
- (154) *In re Storozhenko*, 2011 WL 4346691 (Bankr. E.D. Mi. 2011) – Automatic stay does not cease to come into existence and is not lifted merely by allegation that debt is not dischargeable under Section 523. All collection activities are stayed unless and until final judgment entered determining debt to be excepted from discharge.
- (155) *In re Kabisch*, Case No. 10-61626 (Bankr. E.D. Mi. 2011) - Entry of Final Judgment determining debts to be non-dischargeable under Section 523 terminates the stay based on Section 362(c)(2)(C) as to actions to collect that judgment, except that the stay remains in effect as to property of the estate. Motion for Relief From Stay denied as unnecessary.

3.36 Post-Petition Assignment of Mortgage

- (156) *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.
- (157) *Carpenter v. Mid-Island Mortgage Corp.*, 2015 WL 4756642 (E.D. Mi. 2015) – Post-petition assignment of mortgage and recording of that

assignment are not violations of stay as mortgage being assigned is not property of the estate and does not amount to effort to perfect legal title in property. Mortgage is asset of creditor, not borrower, and transfer by creditor does not in any way implicate property of the debtor or of the estate.

- (158) *Sigmon v. Cornerstone Home Lending*, 2014 WL 948490 (Bankr. W.D. N. C. 2014) – Post-petition assignment of mortgage does not violate stay, as mortgage is not property of estate and transfer of mortgage neither transfers estate property nor constituted action to obtain, use or possess property of estate.

3.37 Debtor as Witness

- (159) *Innerwood & Co. LLC v. Privett*, 2016 WL 4697662 (S.D. Ohio 2016) – Automatic stay does not apply to litigation between two non-debtor third parties. Automatic stay does not prevent taking discovery from debtor in proceedings against third party defendants. Underlying action was not action to recover from debtor and debtor was not party to that action. Requests for discovery from debtor did not fall within scope of automatic stay. Stay relief unnecessary to allow discovery to proceed. Even if stay relief is required, cause exists as state court proceedings have already been substantially delayed because parties have been unable to depose debtor, and allowing discovery would have no adverse impact on bankruptcy case and debtor's attendance at a deposition would not impose any burden other than time and expense borne by all deponents in civil cases.

3.38 Estoppel Against Enforcement of Stay

- (160) *In re DeGroot*, Case No. 05-12996 (Bankr. W.D. Mi. 2012) – Trustee's failure to respond to correspondence from counsel does not excuse actions of debtor and creditor that violated stay. At time of bankruptcy filing, Debtor had receivable from debtor's ex-wife. Receivable became property of estate at filing and became the Trustee's to enforce. After commencement of case, debtor and ex-wife informed Trustee of negotiations to resolve claim of debtor against ex-wife by reducing amount owed by amounts of unpaid child support owed by debtor. Trustee's failure to respond did not grant authority to debtor to release receivable. Only Trustee, as representative of estate, had authority to deal with receivable. Trustee was entitled to rely on automatic stay to protect assets of estate from modification or diminishment by actions of creditors or debtor. Although Trustee was not blameless, debtor and ex-wife must bear consequences of unauthorized deadlines with property of estate.

C. Relief From Stay

3.39 Service of Motion

- (161) *Sazegar v. Jadidolahi*, Case No. 14-1188 (9th Cir. BAP 2015) – Motion for relief from stay mailed to debtor at the address listed in bankruptcy petition was good and proper service on debtor even where creditor had actual knowledge that debtor did not actually reside at that address. Rule 7004 provides for service by mail on debtor at address listed in petition unless debtor has filed proper notice of change of address with court. Debtor listed property as his residence on petition and never updated his address with the court.

3.40 Filing Fee

- (162) *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.
- (163) *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.

3.41 Purpose of Stay Relief

- (164) *Jackson v. US Bank National Association*, 2016 WL 1211278 (Bankr. W.D. Mi. 2016) – Purpose of court lifting stay to permit state court foreclosure action to proceed is to surrender jurisdiction over property to state court, thereby permitting debtor and creditor to address competing claims under state law in state courts. Relief warranted where property clearly lacked equity and property was not necessary to effective reorganization in Chapter 7 proceeding.

3.42 Grounds Generally

- (165) *In re Webb*, 2016 WL 4742234 (Bankr. W.D. Ky. 2016) – Section 362(d) allows the Court to grant relief from the stay (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or (2) with respect to a stay of an act against property if (A) the debtor does not have an equity in the property; and (B) the property is not necessary to an effective reorganization. Debtor admitted that debtor had no equity in property, valuing the property at \$82,000 with secured claims of \$112,000. Debtor was in Chapter 7 so the property was not necessary to an effective reorganization. Debtor's dispute with alleged contract vendee warranted relief from stay to allow parties to litigate matters in state court. Absent stay relief Debtor could sell or otherwise transfer the Property to a third party foreclosing

vendee's alleged interest in the Property.

- (166) *In re Martin*, Case No. 15-8030 (6th Cir. BAP 2015) – Whether to lift stay to allow pre-petition litigation to continue in non-bankruptcy forum depends on judicial economy, trial readiness, resolution of preliminary bankruptcy issues, creditor's chance of success on merits, and cost of defense or other potential burden on bankruptcy estate and other creditors. Stay lifted where fraud issues in state court action involved parties who were not party to bankruptcy proceeding; and plaintiff's jury demand and lack of consent to bankruptcy court to conduct jury trial. Fact that state court action raised allegations similar to those raised in companion adversary proceeding objecting to dischargeability of debt did not preclude lifting stay. Allowing matter to proceed in state court would not cause judicial inefficiency as findings of fact in state court would have preclusive effect in adversary proceeding, eliminating the need for two separate trials, leaving to bankruptcy court only duty to determine whether facts as found warrant excepting debt from discharge. State court matter was further along and resolution was based entirely on state law issues. Allowing matter to proceed in state court would not unfairly burden estate or other creditors.
- (167) *In re Brown*, 2015 WL 4944704 (Bankr. N.D. Ohio 2015) – Secured creditor or other party claiming interest in property must carry initial burden to show amount of debt owed to moving party; that movant holds perfected security interest; and that the moving party has a right or relief under either Section 362(ad)(1) or (2). Secured creditor must also prove validity of security interest in property at issue.
- (168) *Mauriello v. Great American E and S Insurance Co.*, 2014 WL 321921 (6th Cir. 2014) – Party seeking to recover from debtor's insurance company cannot bring action directly against insurer. Party should seek relief from stay to pursue action against debtor, making it clear that any recovery from debtor would be limited to recovery of available insurance proceeds.
- (169) *In re Porter*, 2013 WL 3992444 (Bankr. E.D. Ky. 2013) – Cause existed for relief from stay to allow state court fraud action against debtor to continue to trial. In the context of a request to continue a non-bankruptcy judicial action, courts have identified a variety of factors to be balanced to determine "cause": (1) judicial economy; (2) trial readiness; (3) the resolution of preliminary bankruptcy issues; (4) the creditor's chance of success on the merits; (5) the cost of the defense or other potential burden to the bankruptcy estate; and (6) the impact of the litigation on other creditors. State court action had been pending for two years and was ready for trial. Judicial economy and trial readiness favor stay relief as Fraud Action was to proceed to trial the next business day after the bankruptcy filing. There are third party defendants, not currently subject to bankruptcy Court's jurisdiction, who allegedly were involved in connection with the transaction which is the subject of the litigation. There were no preliminary bankruptcy issues to be determined and the potential cost of the defense, given the trial readiness of the state court, clearly favored the state court forum. Significant prejudice could result to other creditors of the estate if litigation begins anew in bankruptcy court. The outcome of the litigation could significantly affect the Debtor's Chapter 13 plan as debt ranged from \$0 to \$10 million. State court, while not a "specialized tribunal" clearly has more expertise than this Court in interpreting state law which controls outcome. Stay lifted for purposes of trial but no appeal or enforcement action could be undertaken absent further relief from the Bankruptcy Court.
- (170) *In re Schultz*, Case No. 11-0045 (Bankr. W.D. Mi. 2011) – Automatic stay terminates upon entry of discharge. Motion for relief from stay filed after discharge granted denied as moot.
- (171) *Jim's Maintenance & Sons, Inc. v. Target Corporation*, 2011 WL 1206782 (1^{0th} Cir. 2011) – Bankruptcy Court has discretion to lift stay for cause to permit litigation pending in non-bankruptcy forum to continue. Stay relief appropriate to allow a creditor to establish its claims against a debtor in other forums, particularly in forums where the bankruptcy debtor is already a named party defendant or where the bankrupt debtor has instituted an action against the creditor, and to protect the creditor's right of offset against debts the bankrupt debtor claims the creditor owes the bankrupt debtor.
- (172) *In re Martin-MacLin*, Case No. 06-45989 (Bankr. E.D. Mi. 2010) – Debtor not entitled to discharge where Debtor received discharge in Chapter 7 case filed within 4 years prior to the date of the Order for Relief in the second case. Determination that Debtor is not entitled to discharge required termination of automatic stay under Section 362 as to any act other than an act against property of the estate.
- (173) *In re Spencer Construction, LLC*, 2009 WL 3245794 (Bankr. M.D. Tn. 2009) – Creditor granted stay relief with respect to two motor vehicles in which creditor held properly perfected security interest. Borrower purchased vehicles and then "contributed" the vehicles to Borrower's closely held corporation. That corporation then entered into a "lease option" contract with Spencer, whereby Spencer would lease the trucks for three years with a purchase option at the end of the lease term. Court concluded that stay relief was proper because creditor held properly perfected security agreements in trucks and transfers of trucks first by Borrower and then again by the closely held corporation were without consent of creditor in violation of terms of loan agreements. Spencer (the debtor) is not the owner of the trucks – the Borrower is the owner, subject to the perfected security interest. Cause exists to warrant modification of stay to allow creditor to repossess trucks from debtor.
- (174) *In re Greektown Holdings, LLC*, Case No. 08-53104 (Bankr. E.D. Mi. 2009) – Court granted partial relief from stay to allow City of Detroit to serve Notices of Default under Development Agreement. Court balanced the adverse impact that serving the Notices could have by causing negative publicity at a critical stage of the Chapter 11 proceeding and the triggering of cure periods that could be inimical to the confirmation process; with the possible benefit to the Debtor to find out specifically aware of any claimed defects with sufficient time to address those issues even with the running of the contractual cure period. Court ordered stay to be modified effective 60 days after the date of the order unless the Debtor voluntarily agrees to accept notice at an earlier date.

3.43 Effect of Confirmed Plan

- (175) *State of Florida Department of Revenue v. Gonzalez*, Case No. 15-14804 (11th Cir. 2016) - Exception to automatic stay under section 362(b)(2)(C) for withholding for payment of a domestic support obligation does not trump binding effect of confirmed chapter 13 plan per section 1327(a). Chapter 13 plan proposed to pay arrearage in full through Trustee with ongoing payments made directly by debtor. DOR

filed claim for \$2400 in arrearages and plan was confirmed. Accordingly, creditor was prohibited from intercepting debtor's post-confirmation expense reimbursement payment for application to domestic support obligation. Creditor's post-confirmation collection activity constituted contempt of court for violation of confirmed plan warranting imposition of sanctions including attorney fees.

- (176) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Automatic stay terminated as to property upon confirmation of Chapter 11 plan where plan provided for re-vesting of property in debtor. Later reopening of Chapter 11 case did not modify or alter validity of confirmation order, such that debtor's property remained beyond the scope of the stay. Court would not enter order declaring that stay was not in effect as such an order was unnecessary in light of confirmed plan.
- (177) *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.

3.44 Failure to Respond to Motion

- (178) *Lira v. Bayview Loan Servicing, LLC*, Case no. 13-1086 (9th Cir. BAP 2014) – Court is not required to hold hearing and can grant relief by default where debtor fails to file response within notice time permitted, even if response is filed prior to entry of order.

3.45 Failure to Conduct or Conclude Hearing

- (179) *In re McKenzie*, 2012 WL 4742708 (E.D. Tn. 2012) – Section 362(e) provides that thirty days after request for relief from stay, the stay is terminated unless the court, after notice and hearing, orders the stay continued in effect pending conclusion of, or as a result of, final hearing and determination. In case under Chapter 7, 11 or 13 involving an individual, the stay terminates 60 days after the request unless the court makes a final determination or extends the time either by agreement of parties or for cause shown. Section 362(e) does not require court in individual Chapter 11 case to conduct preliminary hearing or to make findings in order to extend the time beyond 60 days. Court had discretion to extend time where Trustee established need to resolve issues regarding retention of counsel in order to properly respond to motion, particularly where delays were at least partially caused by the moving party.

3.46 Cause - Section 362(d)(1)

- (180) *In re Parsons*, 2016 WL 5173231 (Bankr. N.D. Ohio 2016) – Creditor did not demonstrate cause for relief from stay where plan did not propose to pay mortgage but instead to strip lien and treat creditor as unsecured. Debtor raised prima facie issues regarding validity of mortgage and until priority was determined, debtor was escrowing funds for payment to whoever becomes entitled to funds.
- (181) *In re Buttrill*, 2016 WL 1314494 (Bankr. E.D. Tn. 2016) – Court can grant relief from or annul stay for cause. Annulling stay validates action that occurred while creditor was unaware of stay and is appropriate where debtor engaged in bad faith conduct such that creditor had no knowledge of bankruptcy. Annulment not warranted where IRS had full knowledge of bankruptcy case for at least two months before exercising right of setoff against pre-petition tax refund. While creditor would have been entitled to relief from stay had it been timely requested, failure to act promptly prevents stay from being annulled. Creditor who establishes right of setoff has established prima facie showing of cause for relief. Creditor had right to setoff against pre-petition tax refund, and amount of debt owed to creditor exceeded amount of refund establishing lack of equity, and debtors in chapter 7 had no reorganization purpose, such that stay relief was warranted. Debtor's claim that property was exempt did not defeat creditor's right of setoff as Code preserves right of offset even as to otherwise exempt assets. Creditor's alleged improper exercise of right to setoff by not only freezing funds but also applying funds post-petition to account violated stay but did not deprive creditor of right to offset refund. IRS' delay of several months before notifying court or debtor was more than technical violation of stay but violation of stay, without more, is not basis to deny right of setoff.
- (182) *In re Martin*, Case No. 15-8030 (6th Cir. BAP 2015) – Whether to lift stay to allow pre-petition litigation to continue in non-bankruptcy forum depends on judicial economy, trial readiness, resolution of preliminary bankruptcy issues, creditor's chance of success on merits, and cost of defense or other potential burden on bankruptcy estate and other creditors. Stay lifted where fraud issues in state court action involved parties who were not party to bankruptcy proceeding; and plaintiff's jury demand and lack of consent to bankruptcy court to conduct jury trial. Fact that state court action raised allegations similar to those raised in companion adversary proceeding objecting to dischargeability of debt did not preclude lifting stay. Allowing matter to proceed in state court would not cause judicial inefficiency as findings of fact in state court would have preclusive effect in adversary proceeding, eliminating the need for two separate trials, leaving to bankruptcy court only duty to determine whether facts as found warrant excepting debt from discharge. State court matter was further along and resolution was based entirely on state law issues. Allowing matter to proceed in state court would not unfairly burden estate or other creditors.
- (183) *In re Neirzwicki Holdings, LLC*, 2015 WL 9590322 (Bankr. E.D. Ky. 2015) – Whether cause exists to lift stay to allow pre-petition litigation against debtor to continue is determined by judicial economy, readiness of case for trial at state court, resolution of preliminary bankruptcy matters, creditor's chance of success on merits, and cost of defense and other potential burden to estate and impact on other creditors. Plaintiff in pre-petition litigation to enjoin debtor's operation of nightclub as alleged noise nuisance failed to demonstrate cause to lift stay for state court action to continue. Debtor was a single asset real estate entity with expedited timetable for reorganizing and had placed property for sale. It was not likely that state court could set the matter for trial before the reorganization process or sale process completed in bankruptcy court. The issues presented were complex and likelihood of success was not easily determined as evidence regarding severity of noise was mixed and evidence indicated that debtor had materially altered the operations to decrease noise emanating from premises.

Issues involved questions of local zoning, commercial regulations and state nuisance laws raising serious questions of plaintiff's ability to prevail. Continuing state court litigation had potential for serious damage to debtor's reorganization as debtor would need to spend large amount of time and resources to defend state court action. However, court conditioned continued stay on debtor's compliance with all state court orders entered prior to the petition date regarding use of common area sidewalks, prompt removal of trash and debris left by nightclub patrons, continued intervention by nightclub staff to prevent patrons from congregating or loitering on adjacent sidewalks, refrain from any coordinated activity with food trust or food cart vendors to arrange sales to nightclub patrons, and continued efforts to mitigate potential noise from nightclub.

- (184) *In re Shefa, LLC*, 2015 WL 248496 (Bankr. E.D. Mi. 2015), *aff'd*, 2015 WL 4477911 (E.D. Mi. 2015) – Cause exists for relief from stay where debtor's Chapter 11 case had been pending for nearly a year; debtor had no ongoing business at any point during case; debtor had not paid property taxes on property during pendency of case; property's condition continued to deteriorate during pendency of case; taxing authority lacked any protection for its interest in property during pendency of case; an court denied confirmation of plan. Court found no error in bankruptcy court's denial of confirmation, such that court also found no error in lifting stay.
- (185) *In re Hill*, 2015 WL 5575499 (Bankr. E.D. Tn. 2015) – Court correctly lifted stay based on agreed order resolving Motion that required debtor to make payments to creditor in a timely manner, failing which the stay would be lifted. 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. Redemptionist's 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.
- (186) *In re Ausmus*, 2015 WL 5000095 (Bankr. W.D. Ky. 2015) – Creditor's motion for relief to allow creditor to liquidate claim in state court denied. Creditor did not bring adversary to contest either debtor's discharge or the dischargeability of the debt before the deadline and debtor obtained a discharge. As such, returning to state court to liquidate claim would serve no purpose and so cannot constitute cause.
- (187) *In re Brown*, 2015 WL 4944704 (Bankr. N.D. Ohio 2015) – Secured creditor or other party claiming interest in property must carry initial burden to show amount of debt owed to moving party; that movant holds perfected security interest; and that the moving party has a right or relief under either Section 362(ad)(1) or (2). Secured creditor must also prove validity of security interest in property at issue. Cause exists where Chapter 13 debtor, pre-confirmation, has failed to comply with obligation under proposed plan and debtor failed to make adequate protection payments to creditor. Debtor made only on lump sum payment to the Trustee which left debtor far short of payments coming due since first payment due date. Debtor's failure to make payments caused hardship for land contract vendor who needed to receive timely payments to cover pre-existing first mortgage. Debtor did not offer satisfactory explanation for failure to make payments stating that he was commissioned employee and would make payments when he could afford to do so. Relief under Section 362 may consist of terminating, annulling, modify or conditioning stay. Court would condition continued stay where debtor presented certified funds in an amount to bring plan payments current. There was no evidence that property was declining in value and creditor was holding \$2,500 in "suspense" for reasons that were not explained and could have been used for underlying mortgage payments which would have eliminated hardship. If debtor failed to make future payments, trustee could serve notice and debtor would have 15 days to cure the default or creditor would be entitled to immediate relief from stay.
- (188) *White v. McDermott*, 2015 WL 4612349 (E.D. Mi. 2015) – Cause exists for relief from stay 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.
- (189) *In re Birmingham Cosmetic Surgery, PLLC*, Case No. 14-58784 (Bankr. E.D. Mi. 2015) – Debtor's malpractice insurance policy is property of estate as policy is contractual relationship between debtor and the insurer. Court would not lift stay to allow injured party to receive proceeds of insurance policy where insurer had appealed the judgment where insurer complied with state law requirements for stay pending appeal. Even if Bankruptcy Court lifted stay, injured party could not demand payment of insurance pending outcome of appeal, rendering request for stay relief moot.
- (190) *In re Frasier*, Case No. 14-6074 (Bankr. W.D. Mi. 2015) – Material default in Chapter 13 plan payments is cause for relief from stay. Debtor's failure to make plan payments interrupted disbursements to mortgage creditor holding non-modifiable claim under Section 1322(b)(5) that requires debtor to remain current in post-petition mortgage payments. Although lender has equity cushion in property, that does not excuse obligation to "maintain" current mortgage payments. Although interruption in payments was due to no fault of debtor, and debtor hoped to catch up payments in the near future, that did not excuse failure to maintain payments to mortgage company.
- (191) *In re River Glen Partnership*, 2015 WL 588696 (Bankr. E.D. Tn. 2015) – Cause for stay relief is fact intensive inquiry on case by case basis.

Debtor's failure to make post-petition mortgage payments, without more, is not sufficient to establish cause where failure to make mortgage payments resulted from state court litigation concerning ownership of property; and from economic disruption that resulted from state wide quarantine on horse shows that forced cancellation of events. Debtor's later attempts to bring mortgage current were hampered by fact that original lender no longer held the loan and assignee of loan would not respond to inquiries to resolve issues. There was no evidence of mismanagement by debtor and creditor did not lack adequate protection as debtor had substantial equity cushion on property.

- (192) *In re Moore*, 2014 WL 4855011 (Bankr. W.D. Mi. 2014) – Cause exists to lift stay and allow lender to proceed with foreclosure where loan ballooned and became fully due and payable pre-petition and debtor's Chapter 13 plan did not propose to pay loan in full in plan term. Plan effectively proposed merely to "push back" balloon date by allowing debtor to continue to make ongoing mortgage payments during which debtor would attempt to refinance. Plan impermissibly modified loan terms by extending balloon without paying loan in full and Plan did not appear feasible where all parties agreed that debt exceeded value of property and debtor could not present any credible evidence of any opportunity to refinance upside-down property.
- (193) *In re Mason*, 2014 WL 3887944 (Bankr. E.D. Ky. 2014) – In determining whether cause exists to modify stay to permit continuation of non-bankruptcy litigation against the debtor, court will consider judicial economy; trial readiness; whether there are preliminary bankruptcy issues to be resolved; creditor's chances of success on merits; cost of defense or potential burden on estate; and impact of litigation on other creditors. Actions brought by creditors are related to bankruptcy case as they directly impact case administration, thus allowing bankruptcy court to exercise jurisdiction. However, bankruptcy court could not exercise jurisdiction if action is one for personal injury or wrongful death. Action alleging violation of civil rights is "personal injury action" where action is one for intentional discrimination and sexual harassment. While action that merely alleged breach of employment contract or failure to pay overtime would not be personal injury litigation, action in this case involves intentional conduct that violates constitutionally protected rights to be free from physical harm. Personal injury claim is not limited to personal injury in the context of bodily injury but includes "any invasion of a personal right, including mental suffering, false imprisonment, defamation and malicious prosecution. Court lifted stay to allow state court action to proceed where bankruptcy court lacked jurisdiction to adjudicate claims based on personal injury; action included non-debtor defendants; discovery had already commenced and the matter has been set for jury trial. There were no other bankruptcy issues and outcome of litigation would not impact other creditors as no other creditors filed claims
- (194) *Junk v. Citimortgage, Inc.*, 2014 WL 2985937 (Bankr. S.D. Ohio 2014) – Cause for purposes of stay relief to allow litigation to proceed in another forum depends on variety of factors such as judicial economy, trial readiness, relationship between dispute and ultimate bankruptcy issues, creditor's chance of success on merits' cost of defense or other potential burden on estate, and impact on other creditors. Court would grant relief and allow state court litigation concerning validity of note and mortgage to proceed where state court had already conducted multiple hearings and entered multiple orders and had otherwise invested significant time and judicial recourses, and judicial economy would be served by allowing state court to continue. Some of the holdings of state court were already on appeal and allowing appeals to proceed would also further judicial economy. All of the issues presented were state law issues and litigation would have no effect on bankruptcy case where Chapter 11 debtors already stated that they would not proceed to file a plan until outcome of litigation was known. Although state court action was not quite ready for trial, it was closer to ready for trial than would have been the case in bankruptcy court where proceedings would have had to restart from the beginning. Cost of defense in state court not different than costs of proceeding in bankruptcy court and any geographic issues were caused by debtor's unilateral decision to move from one state to another after litigation had been filed.
- (195) *In re Denman*, 2014 WL 3687246 (Bankr. W.D. Tn. 2014) – Motion for relief from stay for cause denied where creditor sought stay relief to enforce *ipso facto* clause in LLC membership agreement. *Ipso facto* clause unenforceable under Section 541(c)(1)(B). Motion presented no cause for relief to enforce otherwise unenforceable provision of agreement.
- (196) *In re Thompson*, 2014 WL 1330110 (Bankr. S.D. Ga. 2014) – Secured creditor who does not file proof of claim will not receive distributions under plan, establishing lack of adequate protection for security interest and cause to lift stay where debtor had no equity in the collateral.
- (197) *Stieg v. Hanson*, 2014 WL 1664275 (Bankr. S.D. Ohio 2014) – Court lacks discretion to allow late filed claim in Chapter 13 proceeding. Where creditor did not have notice of proceeding in time to file claim, court would lift automatic stay for cause and allow creditor to proceed to liquidate claim in state court, which would be non-dischargeable claim under Section 1328(a)(2) and Section 523(a)(3).
- (198) *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.
- (199) *Hopkins v. Federal Home Loan Corporation*, Case no. 13-14757 (E.D. Mi. 2014) – Cause existed to lift stay where foreclosure process had been completed and redemption expired two years prior to filing Chapter 13 Case. Bankruptcy court properly exercised discretion in concluding that state courts had already considered and rejected debtor's challenges to foreclosure process, and that creditor had a "colorable claim" to the property.
- (200) *In re Medlar*, 2013 WL 6152325 (Bankr. N.D. Ohio 2013) – Request for relief from stay evidenced cause for granting relief where debtor purchased condominium that was already in foreclosure, such that debtor took title subject to foreclosure action; and foreclosure action had been completed pre-petition with foreclosure judgment having already been entered and property sold, subject only to right of redemption. Debtor's Chapter 13 plan did not propose any payments to foreclosing creditor and did not propose to redeem property. Any issues concerning redemption could be better handled in state court. 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.

- (201) *In re Hyland*, 2013 WL 5979746 (Bankr. E.D. Tn. 2013) – Section 362 allows court lift stay where there is insufficient equity in the collateral to adequately protect the creditor. Creditor must establish prima facie case that debtor owes debt to creditor, that creditor possesses a valid security interest, and that the collateral securing the debt is declining in value while debtor has failed to provide adequate protection. Creditor's interest was not adequately protected where collateral, consisting of horses, was not and had never been insured. Stay modified to provide that debtor would provide proof of adequate insurance within 14 days of stay would terminate. To extent creditor successfully liquidated collateral and the funds receive exceed that necessary to satisfy secured claim, excess proceeds would be remitted to the Chapter 13 trustee.
- (202) *In re Gardstein*, 2013 WL 3306095 (Bankr. E.D. Ky. 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.
- (203) *In re Tam*, 2012 WL 3555416 (Bankr. W.D. Mi. 2012) – Bank evidenced cause for relief from stay. Debtor and her husband and others filed multiple removal notices and bankruptcy petitions in three separate federal courts to thwart foreclosure process after debtor and others were unsuccessful in state court foreclosure proceedings.
- (204) *McSwain v. Williams*, 2012 WL 2974914 (Bankr. W.D. Tn. 2012) – Section 362(d)(1) provides that court shall grant relief from the stay for cause. "Cause" is not defined in the Bankruptcy Code. In the context of a motion to modify the automatic stay to allow pending litigation in a non-bankruptcy forum to proceed to finality courts should consider judicial economy, trial readiness, the resolution of preliminary bankruptcy issues, the creditor's chance of success on the merits, the cost of defense or other potential burden to the bankruptcy estate, the impact of the litigation on other creditors, and a general balancing of the hardships test. Additional factors include whether relief would result in a partial or complete resolution of the issues, whether litigation in another forum would prejudice the interests of other creditors, whether the expertise of a state court is needed in resolving a question of state law, whether the estate can be protected by a requirement that creditors seek enforcement through the bankruptcy court, and whether the other proceeding involves the debtor as a fiduciary. Chancery Court lawsuit had been pending for more than three years before the Debtor's bankruptcy case was filed, the Chancery Court and its appointed Special Master were familiar with the state law claims, the Special Master had filed a report, and the Chancery Court had entered an interlocutory default judgment against the Debtor. Allowing Chancery Court to hear this case to finality would reduce the duplication of evidence. Comity and respect for state law in matters involving both the bankruptcy and state courts dictated that the automatic stay be modified to permit the state court to proceed with the case to finality. Hardship to the Debtor if the automatic stay is modified to permit the pending lawsuit to go forward and the hardship to the Movants if the automatic stay is not modified were equally burdensome. Risk that Debtor may be unsuccessful in Chancery Court, which could collaterally estop Debtor in Section 523 not sufficient reason to preclude state court action. Debtor's contentions regarding long history of chronic major depression and anxiety disorders may be made to the Chancery Court. The impact of the litigation on other creditors may be lessened by requiring that the enforcement and satisfaction of any judgment be through the bankruptcy court to be dealt with along with the claims of other creditors. The Chancery Court lawsuit involves state law issues and involves the Debtor as a fiduciary. Debtor had been represented for over a year in bankruptcy case by able counsel who can adequately represent debtor and to assert defenses and assert numerous errors that Debtor argues exist within the Special Master's Report. Motion for Relief from Automatic Stay is granted to permit them to proceed against Debtor in the pending Chancery Court lawsuit; however, enforcement or satisfaction of any judgment against the Debtor will be stayed until further order of bankruptcy court.
- (205) *In re Ferrette*, 2011 WL 940409 (E.D. Mi. 2011) – Bankruptcy petition filed after foreclosure sale does not invalidate sale or extend redemption period and bankruptcy courts lack general equitable power to extend redemption period. Once redemption period has expired, purchaser at sale (or its successor) is entitled to relief from stay to pursue eviction proceedings.
- (206) *In re Ramsey*, 2011 WL 2680575 (Bankr. N.D. Ohio 2011) – To determine whether cause exists to allow litigation involving a debtor to proceed in a non-bankruptcy forum, this court must "balance the potential prejudice to the debtor, to the bankruptcy estate, and to the other creditors against the hardship to the moving party if the party is not allowed to proceed. Relevant factors include: (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; (12) the impact of the stay on the parties and the balance of harms; (13) whether the litigation involves other parties over which the bankruptcy court lacks jurisdiction; (14) whether the creditor has a probability of success on the merits; and (15) whether the interests of the debtor and the estate will be better served by resolution of threshold bankruptcy issues before addressing the forum issue. Court would lift stay to permit state court action to proceed where state court matter had been pending for more than one year prior to commencement of case and state court had substantial familiarity with the case and had entered default judgment against a co-defendant.
- (207) *Jim's Maintenance & Sons, Inc. v. Target Corporation*, 2011 WL 1206782 (10th Cir. 2011) – Bankruptcy Court has discretion to lift stay for cause to permit litigation pending in non-bankruptcy forum to continue. Stay relief appropriate to allow a creditor to establish its claims against a debtor in other forums, particularly in forums where the bankruptcy debtor is already a named party defendant or where the bankrupt debtor has instituted an action against the creditor, and to protect the creditor's right of offset against debts the bankrupt debtor claims the creditor owes the bankrupt debtor.

- (208) *Aja v. Emigrant Funding Corp.*, 2011 WL 167034 (1st Cir. 2011) – Court correctly lifted stay for cause. Case was debtor’s fourth filing under Chapter 11, with each of three prior cases dismissed without a confirmed plan. Debtor conceded lack of equity in property, and financial information at hearing indicated that debtor lacked any viable plan of reorganization.
- (209) *In re Clements Manufacturing Liquidation Company*, Case No. 09-65895 (Bankr. E.D. Mi. 2010) – factors to consider in granting relief from automatic stay for cause include whether relief would result in partial or complete resolution of disputes; lack of connection with or interference in the bankruptcy estate; whether the proceeding involves the debtor as a fiduciary; whether a specialized tribunal with necessary expertise exists; whether debtor’s insurer has assumed full responsibility for defense; whether action primarily involves third parties; whether litigation in another forum with prejudice interest of other creditors; whether judgment arising from other action would be subject to equitable subordination; whether movant’s success would result in a judicial lien avoidable by the debtor; interest of judicial economy and expeditious resolution; whether parties are ready for trial in other proceeding; and the impact of the stay on the parties and the balance of the harms. Court would grant limited stay relief to permit creditor to file a third-party complaint against debtor and chapter 7 trustee to the extent that the claims are similar to counterclaims previously filed by creditor in state court action and to thereafter file a Notice of Motion to transfer entire adversary proceeding to state court. However, if notice of removal is not timely filed, stay would remain in effect as to all state court litigation.
- (210) *In re Hanlin*, 2010 WL 4008474 (Bankr. N.D. Ohio 2010) – Identified considerations for determining whether a debtor is needy include whether a debtor has an ability to repay his debtors out of future earnings include whether the debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expense can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities. Rent scheduled at \$550 per month was not unreasonable. Debtor’s high transportation budget of \$450 per month supported where debtor had lengthy drive to work and also had to travel long distances for necessities such as groceries and to visit mother who was confined to nursing home. Debtor’s expense for storage space was not unreasonable where debtor was required to store furniture after his divorce and relocation into a rented residence. Debtor’s smoking expense of \$150 not unreasonable. Charity of \$100 per month not unreasonable particularly where employer encouraged these contributions. Amount debtor could pay in Chapter 13 would be minimal and does not raise specter of abuse.
- (211) *In re Hermoyian*, 2010 WL 3359684 (Bankr. E.D. Mi. 2010) – Relief from stay for “cause” granted where Debtor was party to pending arbitration involving multiple parties. Allowing arbitration to proceed would further judicial economy by allowing arbitrator to determine whether there was debt owed by debtor to creditor. If so, the Court would then consider whether the debt was non-dischargeable. Arbitration will be completed sooner than Court would be able to conduct trial, and expense of arbitration, standing alone, is not sufficient to deny Motion where expenses and location are those that the parties initially agreed to.
- (212) *In re Semeniyuk*, Case No. 10-44396 (Bankr. E.D. Mi. 2010) - Citing *Hermoyian*, Court granted relief from stay where Debtor was party to pending arbitration involving multiple parties. Allowing arbitration to proceed would further judicial economy by allowing arbitrator to determine whether there was debt owed by debtor to creditor. If so, the Court would then consider whether the debt was non-dischargeable. Arbitration will be completed sooner than Court would be able to conduct trial, and expense of arbitration, standing alone, is not sufficient to deny Motion where expenses and location are those that the parties initially agreed to.
- (213) *In re Mayer*, Case No. 09-60536 (Bankr. E.D. Mi. 2010) – Relief from stay for “cause” is discretionary relief to be determined by the Court on a case-by-case basis. Court should focus on hardships imposed on the parties with an eye towards the overall goals of the bankruptcy code. Court denied creditor’s request for relief from stay to allow creditor to return to state court and determine whether State Court Judgment of Divorce imposed constructive trust on certain assets for payment of attorney fees owed to Debtor’s State Court counsel. Bankruptcy Court was equally able to address relevant state law issues, and outcome of state law issues would inevitably lead to further litigation in the Bankruptcy Court over issues such as preferences which are uniquely justiciable only in the Bankruptcy Court. Judicial economy and the expeditious and economical resolution of the litigation favored denial of Motion.
- (214) *Dunn v. Rund*, Case No. 09-1176 (6th Cir. BAP 2010) – Section 362(d)(1) allows for stay to be lifted for cause. Lack of adequate protection is explicitly stated as cause, but that reference is only illustrative, not exclusive. “Cause” for relief from stay is determined on a case by case basis. Failure to make post-petition mortgage payments constitutes cause for relief from stay in Chapter 7 proceeding. Debtor’s statements at the hearing on the Motion that she had been laid off from work and had no ability to make the post-petition payments constituted further cause for relief.
- (215) *Mentag v. GMAC Mortgage, LLC.*, 430 BR 439 (Bankr. E.D. Mi. 2009) – Creditor lacks adequate protection in Chapter 7 proceeding where Debtor has no equity cushion and has not made a mortgage payment in over one year. Debtor’s vague statements that he intended to seek a loan modification and that he hoped to keep the house if it made economic and practical sense to do so and that debtor was considering moving out of state for employment reasons were not sufficient to establish that debtor had increased his income or had the ability to pay the ongoing mortgage payment and where debtor had failed to pursue any loan modification.

3.47 Cause – Serial Filings

- (216) *Behrens v. US Bank, NA*, Case No. 13-6032 (8th Cir. BAP 2013) – Court properly granted motion to lift stay without conducting hearing on the motion where case was debtor’s 4th bankruptcy case and debtor’s wife had also filed an individual case, for a total of 5 cases between them, all filed to thwart efforts to foreclose mortgage on home. Debtors had not made mortgage payment since February, 2009, and creditor’s efforts to foreclose had been stayed and recommenced multiple times due to bankruptcy filings. Wife’s prior case and all three of debtor’s prior cases were dismissed without either wife or debtor receiving a discharge and without debtor confirming a plan in either of his two prior chapter 13 cases. Section 362(d)(4) expressly allows court to grant stay relief in favor of secured creditor where filing is part of scheme to

hinder or delay creditors and involves more than one bankruptcy filing.

3.48 Cause – Default in Chapter 13 Payments

- (217) *CitiMortgage v. Borm*, 2014 WL 1303158 (8th Cir. BAP 2014) – Debtor’s failure to make 15 of 22 mortgage payments coming due following confirmation of Chapter 13 plan constituted cause for relief from stay where plan required debtors to make regular mortgage payments “outside the plan”.

3.49 Cause – Lack of Adequate Protection

- (218) *In re Morton*, 2015 WL 4396719 (Bankr. E.D. Tn. 2015) – Secured creditor retains the right to “adequate protection” of its collateral, which means it is entitled to have the value of its collateral maintained at all times, and it can obtain relief from the automatic stay and take back its collateral at any time if that interest is not adequately protected or for other cause. Adequate protection consists of payments, additional or replacement liens, or any other relief that affords the creditor “the indubitable equivalent” of its interest in the secured property. Court must balance all relevant factors in a particular case, including value of collateral, whether the collateral is likely to depreciate over time, debtor’s prospects for a successful reorganization and the debtor’s performance under the plan, balancing of hardships between the parties and whether the creditor’s property interest is being unduly jeopardized. To obtain relief, creditor must show a decline or a real threat of decline in the value of the collateral at issue; only upon a showing does the burden shift to the debtor to prove that the collateral at issue is not, in fact, declining in value; or demonstrate that the debtor has completely failed, or substantially failed to make post-petition payments. Creditor demonstrated lack of adequate protection where debtor was failing to collect rent from its largest tenant, impairing creditor’s cash collateral and artificially reducing cash available for payment of adequate protection to benefit tenant. Debtor has fiduciary duty to maximize rents received. Debtor also failed to comply with cash collateral order by failing to timely file monthly operating reports.
- (219) *In re Shivshankar Partnership, LLP*, 517 BR 812 (Bankr. E.D. Tn. 2014) – Adequate protection can include periodic payments, additional or replacement liens, or other relief that provides the ‘indubitable equivalent’ of the creditor’s position and may be accomplished through the existence of an equity cushion, or “ ‘value in the property, above the amount owed to the secured creditors that will shield creditor’s interest from loss due to a decrease in the property’s value during the time the automatic stay remains in effect. While an equity cushion is generally considered prima facie evidence of adequate protection, the absence of an equity cushion does not establish a lack of adequate protection or entitlement to stay relief. Where value of collateral is not decreasing, undersecured creditor may not lack adequate protection as the value of the creditor’s interest as of the petition date is not being diminished. However, stay relief is warranted where debtor is not making court required payments pursuant to Cash Collateral Order and is instead using cash collateral for day to day operating and other expenses without the consent of the creditor. However, stay relief conditioned on debtor’s failure to obtain confirmation of pending plan or reorganization by date certain, failing which the stay will lift automatically, and debtor must make cash collateral payments and make monthly interest-only payments during confirmation process.

3.50 Cause – Appellate Proceedings

- (220) *In re Birmingham Cosmetic Surgery, PLLC*, 2015 WL 1404296 (Bankr. E.D. Mi. 2015) – Cause existed under Section 362(d)(1) to lift stay for purposes of allowing debtor to continue appeal of adverse pre-petition judgment. Judgment awarded creditor \$1.35 million leaving creditor as the largest unsecured creditor in case. Factors to consider include whether relief from stay would result in partial or complete resolution of issues; whether there is connection with or interference in bankruptcy estate; whether a specialized tribunal with the necessary expertise exists to hear cause of action; whether debtor’s insurer has assumed responsibility for defense; whether litigation in another forum would prejudice other creditors; interests of judicial economy; and impact of stay on parties and balance of harm. Allowing appeal to proceed would provide final resolution of creditor’s claim. Appeal will not delay bankruptcy case as bankruptcy proceeding and appellate proceeding can proceed concurrently. Michigan Court of Appeals was tribunal experienced in resolution of medical malpractice appeals. Debtor’s insurer has assumed full costs of defense including all costs of appeal. Unsecured creditors would not be harmed, even if plan confirmed during pendency of appeal, distributions could begin to remaining unsecured creditors until appeal is resolved.

3.51 Lack of Equity - Section 362(d)(2)(A)

- (221) *In re Webb*, 2016 WL 4742234 (Bankr. W.D. Ky. 2016) – Section 362(d) allows the Court to grant relief from the stay (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or (2) with respect to a stay of an act against property if (A) the debtor does not have an equity in the property; and (B) the property is not necessary to an effective reorganization. Debtor admitted that debtor had no equity in property, valuing the property at \$82,000 with secured claims of \$112,000. Debtor was in Chapter 7 so the property was not necessary to an effective reorganization. Debtor’s dispute with alleged contract vendee warranted relief from stay to allow parties to litigate matters in state court. Absent stay relief Debtor could sell or otherwise transfer the Property to a third party foreclosing vendee’s alleged interest in the Property.
- (222) *In re Shefa, LLC*, 2015 WL 248496 (Bankr. E.D. Mi. 2015), *aff’d*, 2015 WL 4477911 (E.D. Mi. 2015) – Stay relief warranted where debtor had no equity in property, as amount owed on unpaid property taxes far exceeded value of property, and court had already denied confirmation of plan, leading to conclusion that property was not necessary to effective reorganization.
- (223) *In re Wolfe*, 2015 WL 4734425 (Bankr. S.D. Ohio 2015) – Creditor demonstrated lack of equity sufficient to support stay relief. Debtors held neither legal nor equitable title to property, as debtors found property abandoned and “moved in”. Debtors had interest in property sufficient to stay foreclosure where debtors had actual possession and debtors had, for the past 8 years, paid taxes and made improvements to property. Although lender never recorded underlying mortgage and had lost both the note and the mortgage, the State Court in pre-bankruptcy litigation determined that lender held equitable lien on property. Debtors given opportunity to provide loan commitment in amount sufficient to pay lender in full, failing which stay would be lifted.

- (224) *Junk v. Citimortgage, Inc.*, 2014 WL 2985937 (Bankr. S.D. Ohio 2014) – Section 362(d)(2) requires that moving party demonstrate that debtor has no equity in property. Where determination of equity depends on validity or invalidity of mortgage itself, court would not grant relief from stay to continue state court litigation over validity of mortgage, to avoid any res judicata implication that court found mortgage to be valid and enforceable.
- (225) *In re Hyland*, 2013 WL 5979746 (Bankr. E.D. Tn. 2013) – Section 362 allows court lift stay where there is insufficient equity in the collateral to adequately protect the creditor. Creditor failed to present prima facie case where creditor failed to produce any evidence of value of the collateral.
- (226) *In re McKenzie*, 2012 WL 4742708 (E.D. Tn. 2012) – To prove lack of equity, creditor must prove validity of security interest and amount of debt. Stipulation between parties that “to the extent the court determines [creditor] has a valid security interest in any property of the debtor, the parties stipulate that the debtor does not have any equity in such property” did not establish lack of equity where creditor did not present evidence that it held valid security interest.
- (227) *In re Tam*, 2012 WL 3555416 (Bankr. W.D. Mi. 2012) – Evidence indicated lack of equity in property. Bank had secured claim for \$2,411,000 and bank’s appraiser testified that value was \$2.4 million. Debtor’s appraisal showed higher value but was more than four years old. Further, property had actually been sold at state court foreclosure sale, although sale had not yet been confirmed by state court, for amount less than \$2.4 million. Debtor’s appraisal was not sufficient to overcome evidentiary value of current appraisal and actual sale price.
- (228) *In re Barnes*, Case No. 11-3072 (Bankr. W.D. Mi. 2011) – State Equalized Value is not reliable evidence of value. Debtor’s schedules, which indicated that debtors lacked equity in the property, constituted admissions of debtors. Debtors could not counter those admissions by offering evidence that SEV times 2 resulted in a value that exceeded the amount of the secured claims.
- (229) *Mentag v. GMAC Mortgage, LLC.*, 430 BR 439 (Bankr. E.D. Mi. 2009) – State Equalized Value is not reliable or credible evidence of value. Debtor’s Schedule A is admissible on issue of value, although it is not decisive. Court must then deduct sale and related closing expenses in the event of a theoretical sale, including commissions of 6% plus taxes and other items necessary for the seller to pay at closing.

3.52 Necessity for Effective Reorganization - Section 362(d)(2)(B)

- (230) *In re Parsons*, 2016 WL 5173231 (Bankr. N.D. Ohio 2016) – Creditor did not demonstrate cause for relief from stay where debtor lacked equity in property but property was debtor’s home, and was clearly necessary if Debtor’s Chapter 13 Plan were to have any chance of confirmation and completion.
- (231) *In re Webb*, 2016 WL 4742234 (Bankr. W.D. Ky. 2016) – Section 362(d) allows the Court to grant relief from the stay (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or (2) with respect to a stay of an act against property if (A) the debtor does not have an equity in the property; and (B) the property is not necessary to an effective reorganization. Debtor admitted that debtor had no equity in property, valuing the property at \$82,000 with secured claims of \$112,000. Debtor was in Chapter 7 so the property was not necessary to an effective reorganization. Debtor’s dispute with alleged contract vendee warranted relief from stay to allow parties to litigate matters in state court. Absent stay relief Debtor could sell or otherwise transfer the Property to a third party foreclosing vendee’s alleged interest in the Property.
- (232) *In re Shefa, LLC*, 2015 WL 248496 (Bankr. E.D. Mi. 2015), *aff’d*, 2015 WL 4477911 (E.D. Mi. 2015) – Necessary to effective reorganization requires proof that property is necessary for reorganization that is in prospect and has a reasonable likelihood of success in reasonable time. Stay relief warranted where debtor had no equity in property, as amount owed on unpaid property taxes far exceeded value of property, and court had already denied confirmation of plan, leading to conclusion that property was not necessary to effective reorganization.
- (233) *In re Morton*, 2015 WL 4396719 (Bankr. E.D. Tn. 2015) – When creditor demonstrates lack of equity, burden shifts to debtor to prove that it is attempting to reorganize within a reasonable time, that reorganization is feasible, and that the property is necessary to that reorganization. Burden is lower in early stages of case where there appears a realistic chance of reorganizing but debtor has not had time to put together a complete plan. Debtor demonstrated that property was necessary where property, a shopping center, was debtor’s primary asset; debtor offered evidence at trial of their prospects for funding a plan, testifying that any plan will be funded through post-petition income derived from the Property; the management fee he receives from S.R. Morton Properties, which involves two warehouse facilities; the benefits he receives from the Veterans Administration; income derived from JBF; and real estate commissions derived from his real estate license. Both warehouses have long-term tenants who are current, that the Property has thirteen outside tenants, and that JBF is currently producing higher revenues than at this time in 2014, has a number of extra events already scheduled, and is on target to earn more in 2015 than in 2014 with an approximate anticipated profit of \$75,000.00. Although debtor had not yet filed a plan, debtor has taken a number of steps demonstrating that debtor is moving in the direction of a plan that could be confirmed.
- (234) *In re Shivshankar Partnership, LLP*, 517 BR 812 (Bankr. E.D. Tn. 2014) – Once creditor establishes lack of equity in property, debtor must prove that the property is not necessary for an effective reorganization. Effective reorganization requires that it is attempting to reorganize in a reasonable time, that reorganization is feasible, and that the specific property in question is necessary for that reorganization. Property is necessary where property, a hotel, is debtor’s sole asset, is operating, and is generating actual revenue. Debtor presented testimony to establish changes that have made hotel more efficient and reduced costs and also upgrades and improvements undertaken during case. Debtor is an ongoing business with actual revenue, and is entitled to an opportunity to go through the confirmation process. Economic problems experienced for the last several years must be considered, and the market is stabilizing. Hotel has been in need of updating, the expenses have been too high, and the revenues have been too low, all of which has contributed to the problems and the need for reorganization but debtor has taken positive steps to increase its cash flow and to make repairs and updates to the hotel property, these expenditures were

necessary to retain the Choice Hotels International, Inc. franchise. Revenues for July and August 2014 above those for the same months in 2013, and fall is a busy season for the hotel industry in the area. Debtor has also filed a disclosure statement that was determined by the court to be adequate and has begun the balloting process for its Amended Plan of Reorganization and was proceeding toward a confirmation hearing in the near future.

- (235) *In re Tam*, 2012 WL 3555416 (Bankr. W.D. Mi. 2012) – Debtor failed to demonstrate that property was necessary for effective reorganization. Debtor offered no information or forecast regarding any plan she has for reorganization, beyond emotional plea to get properties back from State Court Receiver. Proof that parcels are necessary to an effective reorganization requires that the property is essential for an effective reorganization that is in prospect. Debtor's own schedules indicated that Debtor's household has disposable income of \$290.00 per month evidencing a lack of to finance the administration of this case or to reorganize an estate.
- (236) *In re Foxland Harbor Marina, LLC*, 2010 WL 2521084 (Bankr. M.D. Tn. 2010) – Creditor seeking relief from stay bears burden of proof on lack of equity, while debtor bears burden on all other issues. Establishing that property is “necessary to an effective reorganization” requires not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect. There must be a reasonable possibility of a successful reorganization with a reasonable time. Properties were necessary to effective reorganization where properties were Debtors’ sole assets, and were to be used as an integrated development. Parcels are crucial lynchpins that bind the overall development together. Debtors have proposed a joint plan of reorganization that contemplates use of acreage as a marina and ferry point between related developments. Debtor has applied to the U.S. Army Corp of Engineers for a license to operate a marina on the property which is pending. Once granted, FHM will begin construction on Phase I (of IV) of the marina and the previously undeveloped land will become operational and income-producing. The debtor contends that the inclusion of the FHM plan to develop the marina is an important part of the overall joint operation of the reorganized debtor. Debtor demonstrated that the property is vital to the reorganization of this debtor, and that confirmation of the joint plan is a reasonable likelihood that can occur within a reasonable time.
- (237) *Spring Creek Airpark, Inc. v. Roswell Holding, LLC*, 2010 WL 2573745 (W.D. Ky. 2010) - Relief from stay is vested in discretion of Bankruptcy Court. Court did not err in lifting stay where only evidence indicated that Debtor was negotiating with a lender in effort to discharge its outstanding indebtedness, but with no evidence of status of negotiations or that would be successful or allow debtor to reorganize.

3.53 Insurance Claims

- (238) *In re Licking River Mining, LLC*, 2016 WL 3251890 (Bankr. E.D. Ky. 2016) – Liability insurance policies owned by the debtor are property of the estate. Whether the proceeds of that policy are property of estate depends on facts of each case and specific language in the policy itself. When a debtor's liability insurance policy provides direct coverage to the debtor the proceeds are property of the estate, because the proceeds are payable to the debtor. Further when the liability insurance policy only provides direct coverage to the directors and officers the proceeds are not property of the estate. However, when there is coverage for the directors and officers and the debtor, the proceeds will be property of the estate if depletion of the proceeds would have an adverse effect on the estate to the extent the policy actually protects the estate's other assets from diminution. Lastly, when the liability policy provides the debtor with indemnification coverage but indemnification either has not occurred, is hypothetical, or speculative, the proceeds are not property of the bankruptcy estate. Policy at issue provided (a) direct coverage to Directors and Officers; (b) indemnification coverage to Debtor; and (c) entity coverage to Debtor. Policy proceeds are property of estate only to extend the indemnification and entity coverages protect other assets of estate. Or protect estate from adverse effect of payment of Directors & Officers Defense costs. Fact that payment to Directors & Officers may impact Trustee's suit against insurer to recover from policy is of no effect as only question is whether payment would adversely affect trustee's rights to be protected by policy. Fact that payment of attorney fees to Directors & Officers may reduce insurer's total policy limits does not convert proceeds into property of estate. However, where debtor had previously paid attorney fees to defend Directors & Officers, debtor is entitled to indemnification claim against policy to extent that policy would then reimburse Directors & Officers. Stay relief granted to allow insurer to pay portion of claimed defense costs and to allow Directors & Officers to submit more complete information on specific amount that Directors & Officers intend to claim against insurer. Stay lifted to allow payment by insurer of \$1 million in defense costs without prejudice to Directors & Officers submitting additional information on amounts claimed.

3.54 Leases – Section 365(p)(1)

- (239) *In re Caster*, 2010 WL 4272582 (Bankr. N.D. Ohio 2010) – Rejection or failure to assume lease of personal property within time allowed results in lease property no longer being property of estate and automatic stay as to the property terminates automatically.

3.55 Expiration of Right of Redemption

- (240) *Title Max v. Northington*, Case No. 16-172 (Bankr. M.D. Ga. 2016) – Debtor has right to redeem pawn transaction over life of Chapter 13 case as long as petition is filed before expiration of the statutory period of redemption. Unlike foreclosure sales, where redemption is not extended beyond 60 days per Section 108, in pawn transaction until expiration of redemption debtor retains full title and ownership of pawned asset. Fact that redemption would expire post-petition does not deprive debtor of ownership interest or prevent debtor from redeeming property through Chapter 13 plan.
- (241) *Koch v. Federal National Mortgage Association*, 2015 WL 4430315 (E.D. Mi. 2015) – Pre-petition expiration of right of redemption deprives debtor of any interest or equity in property. Stay relief appropriate where redemption expired as debtor lacked interest in property was, by definition, not necessary to effective reorganization.
- (242) *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.

- (243) *In re Howard*, 507 BR 398 (Bankr. N.D. Ga. 2014) – Debtor lacks ability to redeem pawned goods when redemption period expired pre-petition. Upon expiration of redemption period property became property of pawnbroker free and clear of claims of debtor. Plan cannot provide for disposition of property that is not property of the estate.
- (244) *In re Hopkins*, 2014 WL 922773 (E.D. Mi. 2014) – Once foreclosure sale occurs, debtor’s only right is to redeem within statutory redemption period. Debtor cannot, post foreclosure sale, propose to cure and reinstate mortgage. Although debtor can contest foreclosure proceedings after expiration of redemption, actions are limited to allegations of fraud or irregularity in foreclosure process itself. Court correctly lifted automatic stay where foreclosure proceedings had been concluded prior to commencement of case and court concluded that any issues of foreclosure had been resolved in state court which had already entered final judgment quieting title in favor of lender, with reconsideration denied and judgment affirmed on appeal.
- (245) *In re Comer*, 2014 WL 917485 (Bankr. E.D. Tn. 2014) – FNMA entitled to relief from stay to obtain possession of property where FNMA completed foreclosure process and debtor was divested of title to property prior to commencement of Chapter 13 case. Title to the property transferred, and debtor was divested of any interest, when the Trustee executed the deed in favor of the successful purchaser, although deed may not have been recorded until later. There was no allegation of fraud in connection with sale, and as of petition date the only act to be completed was the ministerial act of recording the Trustee’s deed. Because home was never property of estate, confirmed Chapter 13 plan could not reinstate the mortgage or set aside the transfer. Debtor cannot use Section 1322 to cure defaults on property that debtor no longer owns, and confirmed plan cannot revive terminated interest, reinstate the mortgage or strip the bank of its ownership rights. Cause existed to lift stay to allow bank to proceed with eviction proceedings.
- (246) *Lemaire v. Fannie Mae*, 2012 WL 3841295 (E.D. Mi. 2012) – Property did not become property of estate where right of redemption post-foreclosure expired prior to commencement of case. Where redemption did not expire until after petition, redemption is extended for the longer of the statutory 6 month redemption or 60 days post-petition, whichever is longer. When debtor failed to redeem within 60 days post-petition, property ceased to be property of estate. Cause existed for stay relief as debtor no longer had any legal interest in the property; and based on lack of equity and property was not necessary to effective reorganization. If redemption had not expired and property remained property of estate, Bankruptcy Court could hear challenges to validity and scope of lien including counterclaims raised by debtor that would affect validity and amount of debt. However, Court properly exercised discretion not to entertain contests to validity of foreclosure process as redemption had expired. Bankruptcy Court properly granted relief from stay to purchaser without prejudice to debtor’s right to assert in state court any alleged invalidity of the foreclosure process.

3.56 Family Law Proceedings

- (247) *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. 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.
- (248) *In re Ripberger*, 2014 WL 5474057 (Bankr. E.D. Ky. 2014) – Court would not lift stay for purposes of asking state court to clarify divorce judgment where divorce judgment was clear and unequivocal in awarding title to property to creditor-s ex-husband. State court judgment of divorce that awarded marital residence to debtor and ordered debtor to pay former spouse money to compensate for spouse’s equity in property unconditionally transferred equitable title to debtor. When debtor later filed bankruptcy, debtor properly listed himself as the sole owner of the property and listed his ex-wife as an unsecured creditor. Ex-wife did not have any further interest in property as judgment unconditionally transferred property and did not amount to an “option” for debtor to purchase ex-wife’s interest.
- (249) *In re Hane*, Case No. 09-53697 (Bankr. E.D. Mi. 2010) – Court does not have authority or jurisdiction to approve a domestic property settlement agreement in Chapter 13 case where the plan has been confirmed. Upon confirmation, all property re-vested in debtor so property settlement does not involve property of estate. Court does not believe relief from automatic stay is necessary. Debtor may submit supplemental authority and seek relief limited to relief from automatic stay if debtor believes that is necessary.

3.57 Single Asset Real Estate – Section 362(d)(3)

- (250) *In re River Glen Land Partnership*, 2015 WL 588696 (Bankr. E.D. Tn. 2015) – Section 362(d)(3) provides for relief from automatic stay in single asset real estate case where debtor fails to timely file a plan that has a reasonable possibility of being confirmed. Standard is broad and requires court to consider how proposed plan stacks up against confirmation requirements. Debtor need not prove that the plan will be confirmed, and court is not required to hold mini-confirmation hearing. However, debtor must show that plan delineates a credible path to reorganization in a reasonable time.
- (251) *In re Ivens Properties, Inc.*, 2013 WL 5934654 (Bankr. E.D. Tn. 2013) – Section 362(d)(3) requires the court to lift stay in single asset case unless debtor takes certain actions within 90 days of commencement of case. However, court is not required to completely and absolutely lift stay, but can grant relief short of full stay relief. Where debtor demonstrated that property had ample equity above debt owed to secured creditor, court would grant relief by leaving stay in place but requiring debtor to file chapter 11 plan within 90 days and obtaining confirmation of plan by date certain, or stay would lit automatically and without further order of court.
- (252) *In re Buttermilk Towne Center, LLC*, 2010 WL 5185870 (6th Cir. BAP 2010) – Proposed replacement lien in future rents is not “adequate

protection” for debtor to use cash collateral consisting of current rents and income. Giving lender a lien in future rents in which lender already holds perfected security interest does not add value to the creditor’s collateral and so cannot offset potential diminution in that collateral if debtor is permitted to use the cash collateral. Adequate protection requires the pledging of new or additional assets, not merely re-pledging those assets that are already pledged to the lender.

- (253) *In re Foxland Harbor Marina, LLC*, 2010 WL 2521084 (Bankr. M.D. Tn. 2010) – Section 362(d)(3) requires lifting of the stay on request by creditor in single asset real estate case unless within 90 days from Order for Relief Debtor has filed plan or reorganization that has reasonable possibility of being confirmed with a reasonable time; or debtor is making monthly payments to creditors holding claims secured by real estate. Court has discretion to extend 90 day window upon motion filed before expiration of initial 90 days and for good cause shown. Although Debtor did not file plan within 90 days, Court would deny Motion for Relief conditioned on Debtor filing a plan by a date certain, failing which Creditor is entitled to immediate relief from stay. Debtor had made significant progress toward filing a plan and Court would rather allow debtor’s plan to proceed to confirmation than to potentially short circuit an otherwise viable Chapter 11 plan.

3.58 *In Rem Relief*

- (254) *In re Lee*, 467 BR 906 (6th Cir. BAP 2012) – Court can lift automatic stay and provide that automatic stay will not come into effect for specific property in the event of any subsequent filing by debtor or anyone in contractual privity with debtor. Debtor’s multiple bankruptcy filings over 4 years, all of which were dismissed, evidenced continued intent to thwart foreclosure process. Lender had not received any payment in more than 4 years. Debtor’s filings showed that debtor’s circumstances had not changed between bankruptcy petitions. Debtor’s “hopes” that her income would increase did not demonstrate any realistic ability to improve financial condition, particularly where debtor’s hopes were based on a business that had not been started and for which debtor lacked a license, equipment, a location, or customers. However, Court could not enjoin debtor from listing debt in any future case, as that would conceivably prevent debtor from listing any deficiency balance and establishing a *de facto* non-dischargeable debt.
- (255) *In re Wesson*, Case No. 10-49061 (Bankr. E.D. Mi. 2010) – *In rem* relief is appropriate to prevent an abuse of process. *In rem* relief proper where Debtor was mere tenant in property with no ownership interest; property had been sold at foreclosure sale and the redemption period had already expired, further divorcing Debtor from any claim to title or lawful possession; Debtor had already filed new case in effort to circumvent rulings of Court; Debtor’s sole purpose in filing multiple bankruptcy cases was to force the creditor to sell the property to her and her co-occupants; and there was substantial risk of filings by other occupants of the property that would further improperly delay secured creditor.

3.59 *Burden of Proof*

- (256) *In re Brown*, 2015 WL 4944704 (Bankr. N.D. Ohio 2015) – Secured creditor or other party claiming interest in property must carry initial burden to show amount of debt owed to moving party; that movant holds perfected security interest; and that the moving party has a right or relief under either Section 362(ad)(1) or (2). Secured creditor must also prove validity of security interest in property at issue. Cause exists where Chapter 13 debtor, pre-confirmation, has failed to comply with obligation under proposed plan and debtor failed to make adequate protection payments to creditor. Debtor made only on lump sum payment to the Trustee which left debtor far short of payments coming due since first payment due date. Debtor’s failure to make payments caused hardship for land contract vendor who needed to receive timely payments to cover pre-existing first mortgage. Debtor did not offer satisfactory explanation for failure to make payments stating that he was commissioned employee and would make payments when he could afford to do so. Relief under Section 362 may consist of terminating, annulling, modify or conditioning stay. Court would condition continued stay where debtor presented certified funds in an amount to bring plan payments current. There was no evidence that property was declining in value and creditor was holding \$2,500 in “suspense” for reasons that were not explained and could have been used for underlying mortgage payments which would have eliminated hardship. If debtor failed to make future payments, trustee could serve notice and debtor would have 15 days to cure the default or creditor would be entitled to immediate relief from stay.
- (257) *Mentag v. GMAC Mortgage, LLC.*, 430 BR 439 (Bankr. E.D. Mi. 2009) – Party seeking relief from stay bears burden of proof on the issue of Debtor’s equity in the property.

3.60 *Mootness*

- (258) *In re Philpott*, 509 BR 134 (Bankr. S.D. Ohio 2014) – Section 362 applies until the time a discharge is granted or denied. Once discharge is entered, automatic stay is no longer in effect and Section 524 discharge injunction replaces stay. Motion for relief from stay to prosecute adversary proceeding to determine dischargeability of debt denied as moot. Creditor entitled to pursue non-dischargeability action notwithstanding discharge injunction.
- (259) *In re Caffey*, 2013 WL 3199816 (Bankr. N.D. Ohio 2013) – Stay terminated automatically where debtor did not file statement of intentions indicating that debtor intended to reaffirm or redeem vehicle. Upon termination of stay, Motion for Stay Relief became moot.
- (260) *In re Ulrich*, 2011 WL 3663716 (Bankr. N.D. Ohio 2011) – Once a debtor’s discharge is entered, the stay is no longer in effect. Once the debtor is granted a discharge, the permanent injunction of Section 524 replaces the automatic stay of Section 362 and prevents creditors from ever collecting a discharged debt. Motion for relief filed post-discharge denied as moot.
- (261) *In re Schultz*, Case No. 11-0045 (Bankr. W.D. Mi. 2011) – Automatic stay terminates upon entry of discharge. Motion for relief from stay filed after discharge granted denied as moot.
- (262) *In re Wesson*, Case No. 10-49061 (Bankr. E.D. Mi. 2010) – Voluntary Dismissal of case after Motion for Relief filed renders Motion

moot. Automatic stay terminated as a matter of law upon dismissal. However, Court still retains jurisdiction to consider *in rem* relief.

- (263) *Trainor v. Kowalske*, 2009 WL 1708031 (E.D. Mi. 2009) – Motion for Relief From Stay rendered moot when Debtor received discharge during pendency of motion. Denial of Stay Relief was without prejudice to creditor’s right to file motion to determine whether discharge injunction would preclude creditor from pursuing action against Debtor solely for purpose of liquidating claim against Debtor’s “errors and omissions” insurance.
- (264) *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.

3.61 Standing to Obtain Relief From Stay

- (265) *Moore v. Bayview Loan Servicing, LLC*, 2014 WL 2211726 (9th Cir. 2014) – Creditor demonstrated standing to seek stay relief by demonstrating “colorable claim” to property at issue.
- (266) *Junk v. Citimortgage, Inc.*, 2014 WL 2985937 (Bankr. S.D. Ohio 2014) – Creditor had sufficient interest in mortgage and note to warrant relief from stay for cause to proceed in state court to determine and ultimately enforce note and mortgage. Creditor needs only to demonstrate colorable or plausible claim, defined as one that rises above speculation. Record indicated that if note and mortgage were valid under state law, creditor had full right to enforce documents. Thus creditor had colorable or plausible claim to and interest in the note and mortgage for purposes of stay relief.
- (267) *Steinberg v. Bank of America*, Case no. 12-082 (10th Cir. BAP 2013) – Bank seeking relief from stay to proceed with foreclosure must demonstrate that it has a right to enforce the note. Court erred in granting stay relief without requiring lender to prove that it has possession of original note or that it was otherwise a “holder” of the note.
- (268) *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.
- (269) *Fuentes v. HSBC Bank*, 2011 WL 3300933 (9th Cir. BAP 2011) – Confirmed plan did not bar contest to creditor’s standing to request relief from stay. Although creditor took assignment of note and mortgage from MERS, there was no documentation to establish that MERS ever held the note or that MERS had right or power to assign note. Documents established that MERS was nominee for the mortgagee but did not convey to MERS an interest in the note itself; there was no independent evidence that payee of note ever assigned note to MERS; and debtors were neither obligated to make payments to MERS nor did debtors ever actually pay MERS. MERS did not have any economic interest in either the note or mortgage and therefore lacked constitutional and prudential standing to seek stay relief.
- (270) *Thomas v. Federal National Mortgage Association*, Case No. 11-037 (10th Cir. BAP 2012) – Creditor lacked standing to seek relief from stay where promissory note had been endorsed in blank and moving party failed to produce note or prove that it had possession of note.
- (271) *Weisband v. First Horizon Home Loans*, 2011 WL 3303453 (9th Cir. BAP 2011) - Lender had "constitutional standing" to seek relief from automatic stay. Lender's predecessor was the original lender on the note and beneficiary under deed of trust. Current lender was survivor of merger of prior lender and a third-party bank. Current lender was sufficiently able to trace ownership of note and deed of trust to establish lender as the current holder of the note entitled to relief from stay.
- (272) *Veal v. American Home Mortgage Servicing Inc.*, 450 BR 897 (9th Cir. BAP 2011) - Lender lack standing to seek stay relief because documents failed to show colorable claim that lender had interested underlying note, either as a holder or as an "other person entitled to enforce the note". To establish "colorable claim" lender had to show some interest in the note. None of the exhibits attached to Motion for Relief from Automatic Stay established lender as the holder or person entitled to enforce the note. Absent evidence of a colorable claim to the property, lender lacked standing to seek relief from stay.
- (273) *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.
- (274) *In re Rice*, Case No. 11-8032 (6th Cir. BAP 2011) – “Party in interest” for purposes of requesting relief from stay is expandable concept based on factual context. Party in interest is generally held to be one who has an actual pecuniary interest in the case, anyone who has a practical state in the outcome, and anyone who would be significantly impacted by the outcome. Party who has right to enforce obligation is party in interest. Secured creditor has standing to seek stay relief as long as the creditor shows it has an interest in the note and that it has been injured by the debtor’s default. Assignment of secured claim is valid and enforceable by assignee even if assignment is not recorded or noted on certificate of title. Assignee of properly perfected lien on automobile is party in interest and holder of claim even where assignment is not noted on certificate of title.
- (275) *In re Ferrell*, Case No. 10-55771 (Bankr. E.D. Mi. 2010) - Motion denied where Motion failed to attach Statement of Corporate Ownership and corrected Motion not filed within additional time provided by Court Order to correct deficiency.

- (276) *In re Stuart*, Case No. 10-59403 (Bankr. E.D. Mi. 2010) - Motion denied Motion failed to attach Statement of Corporate Ownership and corrected Motion not filed within additional time provided by Court Order to correct deficiency.
- (277) *In re Myers*, Case No. 06-41065 (Bankr. E.D. Mi. 2010) - Motion denied where Statement of Corporate Ownership was internally inconsistent. 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.
- (278) *Dunn v. Rund*, Case No. 09-1176 (6th Cir. BAP 2010) – Conversion of case from Chapter 13 to Chapter 7 while Motion for Relief pending does not deprive moving party of entitlement to stay relief or mandate any delay in proceedings. Section 362(d)(1) applies with equal force in Chapter 13 and Chapter 7.
- (279) *Mentag v. GMAC Mortgage, LLC*, Case No. 09-15012 (E.D. Mi. 200) – Record failed to indicate whether creditor held promissory note on which claim was based. Debtor executed note to GMAC Mortgage and mortgage in favor of MERS as “nominee” for GMAC. Subsequent documents indicated that GMAC sold the mortgage and loan to an entity named RAMP, through GMAC as servicer, sold the loan to JP Morgan Chase. GMAC remained as servicer for the loans now apparently held by Chase. Debtor filed for relief under Chapter 7, and GMAC purportedly as servicer for MERS sought relief from the automatic stay. Mortgage expressly named MERS as mortgagee and vested in MERS the power of sale. Michigan law regarding foreclosure requires that the party foreclosing the mortgage is either the owner of the indebtedness or is the servicing agent for the mortgage. As MERS is the named mortgagee, GMAC lacks standing to pursue relief from the automatic stay unless GMAC also has an interest in the mortgage or the note. GMAC’s status solely as servicer for a note and mortgage that are owned by some combination of MERS, RAMP and Chase did not support standing for GMAC to either exercise the power of sale or to seek relief from the automatic stay. Documents were also unclear as to whether RAMP or Chase or MERS held any interest in the loan documents as the transfer agreement from RAMP to Chase did not attach any schedules of the loans transferred and so it could not be determined which entity actually owned either the note or the mortgage.
- (280) *In re Davidge*, Case No. 09-76812 (Bankr. E.D. Mi. 2010) – Creditor’s Motion for Relief From Stay accompanied by incomplete Statement of Corporate Ownership. Creditor failed to file Amended Statement within time specified by Court, requiring denial of Motion without prejudice.
- (281) *In re White*, Case No. 10-44789 (Bankr. E.D. Mi. 2010) – Creditor’s Motion for Relief From Stay accompanied by incomplete Statement of Corporate Ownership. Creditor failed to file Amended Statement within time specified by Court, requiring denial of Motion without prejudice.
- (282) *In re Jones*, Case No. 10-40323 (Bankr. E.D. Mi. 2010) – Creditor’s Motion for Relief From Stay accompanied by incomplete Statement of Corporate Ownership. Statement failed to check any box regarding whether any entities directly or indirectly owned more than 10% of any class of corporation’s equity interest. Creditor failed to file Amended Statement within time specified by Court, requiring denial of Motion without prejudice.
- (283) *In re Lee*, Case No. 10-41774 (Bankr. E.D. Mi. 2010) - Creditor’s Motion for Relief From Stay accompanied by incomplete Statement of Corporate Ownership. Statement failed to check any box regarding whether any entities directly or indirectly owned more than 10% of any class of corporation’s equity interest. Creditor failed to file Amended Statement within time specified by Court, requiring denial of Motion without prejudice.
- (284) *In re Kegler*, Case No. 10-54465 (Bankr. E.D. Mi. 2010) – Motion for Relief From Stay denied where creditor failed to file required Statement of Corporate Ownership and corrected Motion not filed within additional time provided by Court Order to correct deficiency.
- (285) *In re Birmingham*, Case No. 10-48959 (Bankr. E.D. Mi. 2010) - Motion for Relief From Stay denied where creditor failed to file required Statement of Corporate Ownership.
- (286) *In re Halan*, Case No. 10-46518 (Bankr. E.D. Mi. 2010) - Motion for Relief From Stay denied where creditor failed to file corrected Statement of Corporate Ownership.

3.62 Conditional Relief

- (287) *In re Brown*, 2015 WL 4944704 (Bankr. N.D. Ohio 2015) – Secured creditor or other party claiming interest in property must carry initial burden to show amount of debt owed to moving party; that movant holds perfected security interest; and that the moving party has a right or relief under either Section 362(ad)(1) or (2). Secured creditor must also prove validity of security interest in property at issue. Cause exists where Chapter 13 debtor, pre-confirmation, has failed to comply with obligation under proposed plan and debtor failed to make adequate protection payments to creditor. Debtor made only on lump sum payment to the Trustee which left debtor far short of payments coming due since first payment due date. Debtor’s failure to make payments caused hardship for land contract vendor who needed to receive timely payments to cover pre-existing first mortgage. Debtor did not offer satisfactory explanation for failure to make payments stating that he was commissioned employee and would make payments when he could afford to do so. Relief under Section 362 may consist of terminating, annulling, modify or conditioning stay. Court would condition continued stay where debtor presented certified funds in an amount to bring plan payments current. There was no evidence that property was declining in value and creditor was holding \$2,500 in “suspense” for reasons that were not explained and could have been used for underlying mortgage payments which would have eliminated hardship. If debtor failed to make future payments, trustee could serve notice and debtor would have 15 days to cure the default or creditor would be entitled to immediate relief from stay.
- (288) *In re Ivens Properties, Inc.*, 2014 WL 349479 (Bankr. E.D. Tn. 2014) – Section 362(d)(3) allows Court to grant conditional relief from automatic stay. Court in single asset real estate case conditionally extended stay based on substantial equity in property, conditioned on

debtor proposing and obtaining confirmation of plan within 90 days.

3.63 Retroactive Relief

- (289) *Baxter v. Sarmadi*, 2015 WL 1839396 (6th Cir. 2015) – Court has equitable discretion to annul stay retroactively and to give effect to foreclosure sale that occurred post-petition. Post-petition foreclosure was voidable, not void. Exceptional circumstances to annul stay include where debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the debtor is able to raise the stay as a defense or to use unfairly as a shield to avoid unfavorable result. Bankruptcy court correctly annulled stay where debtor's chapter 13 plan did not provide for payment of creditor's secured claim; property lacked insurance although property was leased to third party; and debtor's lack of good faith in filing case; coupled with debtor's failure to timely provide notice of bankruptcy to creditor who, in good faith, exercised rights held under mortgage and note. Debtor failed to timely make plan payments prior to confirmation of plan and failed to timely provide documents to Chapter 13 Trustee; and testified equivocally regarding debtor's address, whether property was insured, stated that tenants refused to pay rent, debtor's estimates of properties values were substantially higher than listed in schedules, and debtor denied knowing that he had to make plan payments. Lack of insurance and lack of income, coupled with value in schedules that was less than debt indicating that debtor lacked equity, supported annulment of stay.
- (290) *In re Benchmark Capital, Inc.*, 2013 WL 1429437 (Bankr. E.D. Tn. 2013) – Automatic Stay comes into effect immediately upon commencement of case without requirement for notice. Section 362 allows court to annul stay for cause. Creditor failed to demonstrate any basis for retroactive relief to annul stay where creditor conducted foreclosure sale of assets post-petition but without knowledge of petition. Stay can be annulled only in presence of extraordinary circumstances which include debtor's bad faith, creditor's lack of knowledge of pendency of stay, and unfair prejudice to creditor. Creditor's lack of notice alone is not basis to retroactively annul stay. There is no indication that debtor intentionally withheld notice or that debtor was attempting to use stay in unfair manner. Record also did not indicate any unfair prejudice to creditor. Creditor retains its status as lien holder and can seek court permission to reinstitute foreclosure proceedings. There was no evidence that creditor had incurred improvement costs or that he was forced to forego improvements to property.

3.64 Denial – Bad Faith of Lender

- (291) *In re Davis*, 2014 WL 1310298 (Bankr. E.D. N.C. 2014) – Lender's Motion for Relief From Stay denied where lender had also offered loan modification. Lender's Motion was filed just four days after lender sent letter to debtor asking them to apply for a loan modification, indicating that lender never intended in good faith to consider loan modification. Lender's actions both before and after filing of Motion indicated bad faith where offers of assistance were worded in such a way as to give debtors hope and debtors were cooperating with lender in loan modification process. Lender's "unclean hands" prevented lender from obtaining equitable relief in form of stay lift.

3.65 Marshaling of Assets

- (292) *In re Shepler*, 2014 WL 3700806 (Bankr. N.D. Ohio 2014) – Marshaling of assets is equitable doctrine to prevent injustice to junior lienholder. Where senior lienholder has two sources of repayment, senior party cannot collect against property in which junior lender has security interest if senior lender can obtain payment from other assets not encumbered by junior lender. However, marshaling applies only to protect junior lender and may not be invoked by debtor in effort to force lender to foreclose on collateral designated by debtor. Court lifted stay in Chapter 7 case on truck and trailer where debt exceeded \$23,000 and assets had total value of \$5,000.00.

3.66 Procedural Requirements

- (293) *In re TMT, Inc.*, 2013 WL 1154532 (Bankr. N.D. Ohio 2013) – To extent creditor alleged in stay relief motion that possessory lien was invalid or contested amount owed, action to contest validity, priority or extent of lien must be brought as adversary proceeding.
- (294) *In re Cisne*, Case No. 09-11491 (Bankr. W.D. Mi. 2010) – Court denied approval of Stipulation for Stay Relief signed only by Debtor and Secured Creditor. Rule 4001 requires any request for stay relief to be served on twenty largest creditors with notice and opportunity to object. Rule 4001(d)(4) allows relief by stipulation only if parties are served with notice of the proposed agreement and provided an opportunity to object. Stipulation between Secured Creditor and Debtor had not been sent to 20 largest creditors and creditors had no notice of proposed terms. Although it was unlikely that any creditor would object, Court would not circumvent notice and opportunity to object provided in Rule 4001.

3.67 Procedural Requirements – Withdrawal of Motion

- (295) *In re Mocella*, 2015 WL 6755615 (Bankr. N.D. Ohio 2015) – Request to withdraw motion is equivalent to motion to dismiss under Rule 9014 and Rule 7041. Movant can withdraw Motion without court order before opposing files a response, or by stipulation signed by all parties; or by order of court on terms that court considers proper. Party cannot simply withdraw motion after opposing party has filed a response without the stipulation of that party. Request to withdraw failed to state any basis for request, as request alleged only that lender had offered a loan modification and lender seeks to withdraw motion for relief from stay to allow implementation of that modification. Request was silent about whether borrower had responded to proposed modification and did not address core issue raised in request for stay relief, which was whether debtors were in compliance with loan requirements. Lender's unilateral proposal to modify loan which was not communicated to borrowers or counsel was not cause to support withdrawal of motion. Request was also untimely as it was made day before hearing, which did not allow opposing party opportunity to consider request while at same time preparing for evidentiary hearing the following day. Absent some indication that underlying issues had been resolved, such that withdrawal of the current motion would not be followed by another motion seeking same relief, lender failed to demonstrate good cause to permit withdrawal.

3.68 Termination – Dismissal and Reinstatement of Case

- (296) *Underwood v. Selent*, Case No. 14-4966 (Bankr. E.D. Mi. 2015) – Automatic stay terminated as to property upon confirmation of Chapter 11 plan where plan provided for re-vesting of property in debtor; and terminated as to the creditor when debt was determined to be excepted from discharge. Later reopening of Chapter 11 case did not modify or alter validity of confirmation order or otherwise re-impose stay. Court would not enter order declaring that stay was not in effect as such an order was unnecessary in light of confirmed plan.
- (297) *In re Jackson*, 452 BR 818 (Bankr. D. Kan. 2011) – Automatic stay terminates at dismissal of case. Motion to reconsider dismissal order does not reinstate stay. Foreclosure sale occurring between case dismissal and reinstatement did not violate stay and was valid sale.

3.69 Termination – Failure to Reaffirm or Redeem

- (298) *In re Caffey*, 2013 WL 3199816 (Bankr. N.D. Ohio 2013) – Automatic stay lifts automatically if fails to file statement of intentions to either redeem or reaffirm before earlier of 341 meeting or 30 days after petition date. Fact that debtor schedule debt as unsecured or that debtor may not have realized that debt was secured did not change result. Section 521(a)(2) does not require that debt be scheduled as secured, only that the debt be scheduled and be secured. Allowing debtor to schedule secured debts on Schedule F and avoid Section 521 would enable debtors to manipulate schedules contrary to both letter and spirit of code. Failure to schedule debt, or listing debt on incorrect schedule, does not change the character of the debt itself.
- (299) *In re Vantrump*, Case No. 11-55021 (Bankr. E.D. Mi. 2011) – Failure to enter into a reaffirmation agreement or to surrender vehicle within 45 days after 341 meeting lifts stay and specifically allows creditor to enforce *ipso facto* clause. Debtor's Motion for Entry of Order prohibiting Enforcement of *Ipso Facto* Clause denied as relief is prohibited by Section 521(d).
- (300) *In re Richardson*, Case No. 11-31806 (Bankr. E.D. Mi. 2011) – Section 362(h) terminates automatic stay as to personal property that secures an unexpired lease or a claim where debtor fails to timely file a statement of intention as required by Section 521 and fails to take timely action specified in the statement of intention. Debtor neither filed a statement of intention nor took any steps to reaffirm the debt resulting in termination of stay 45 days after commencement of case. Fact that creditor filed secured proof of claim does not alter debtor's obligation under Section 362. Section 521(a)(6) does not trump Section 362(h). Section 521(a)(6) does not impose or extend stay that would otherwise expire under Section 362(h). Section 521(a)(6) requires that debtor who desires to retain possession of personal property where a creditor asserts a purchase money security interest must within 45 days of the first meeting of creditors either redeem or reaffirm. Debtor neither reaffirmed nor redeemed within 45 days, resulting in debtor's loss of any right to possess the collateral. Further, Section 521(a)(6) applies only where the creditor has an allowed claim "for the purchase price". Creditor filed a proof of claim for \$15,000 balance owed on car with purchase price of \$31,000.00. As claim was for substantially less than "the purchase price" debtor could not use Section 521(a)(6) to maintain possession.
- (301) *In re Reed*, 2011 WL 6328677 (Bankr. E.D. Mi. 2011) – Section 362(h) terminates automatic stay as to personal property subject to purchase money security interest where debtor fails to file statement of intentions indicating intention to surrender, redeem or reaffirm for property secured by purchase money security interest and debtor fails to execute reaffirmation agreement or redeem. Section 362 did not operate to lift stay where implicated where debtor failed to file the statement of intention but did sign and file a reaffirmation agreement even if reaffirmation agreement rejected by Court. Section 362 states requirement in conjunctive, such that failure to complete one portion did not implicate Section 362(h) where other requirement has been fulfilled.
- (302) *In re Baer*, 2011 WL 3667511 (Bankr. E.D. Ky. 2011) – Motion to Redeem Collateral filed within time allowed under Section 362(h)(1) prevents automatic termination of stay under Section 362(h). Debtor's subsequent default under Order for Redemption, which allowed Debtor 45 days to redeem or surrender collateral, did not modify stay. When Debtor defaulted under Order for Redemption, Creditor's repossession of the vehicle constituted willful violation of automatic stay. Creditor's erroneous assumption that failure to redeem operated as relief from stay did not change conclusion that creditor acted willfully. Willful does not require proof of specific intent to violate stay, but only proof of intentional act at a time when creditor was aware of the bankruptcy filing.
- (303) *In re Baer*, 2011 WL 1832490 (Bankr. E.D. Ky. 2011) – Sections 362(h)(1) and 521(a)(2), require Debtor to (1) file a statement of intention indicating an intent to surrender, reaffirm, or redeem and (2) to perform this intention within at least thirty days after the date set for the first meeting of creditors. If Debtor fails to do either of these within the time frame required, the stay automatically terminates. Stay would have terminated where debtor filed statement of intentions to reaffirm but did not execute or file a reaffirmation agreement as required. However, where debtor timely amended Statement of Intentions to indicate that the debtor would redeem the property and timely filed Motion to Redeem within time permitted, automatic stay would not terminate. Estate had not been closed and Trustee had not abandoned collateral. Creditor violated stay by repossessing vehicle.

3.70 Post-petition Default on Residential Mortgage

- (304) *In re Long*, 2011 WL 2881243 (Bankr. W.D. Mi. 2011) – "Cause existed to lift automatic stay to allow home mortgage lender to exercise its rights in property following debtors' post-confirmation default in payments that had to be made to lender under their cure-and-maintenance plan, given debtors' inability, over mortgage lender's objection, to modify plan to deal with these post-confirmation defaults. Debtor cannot force creditor to accept modified plan to cure post-petition defaults on home mortgage loan under cure-and-maintain plan.

3.71 Closing of Case Without Discharge

- (305) *Redd v. JPMorgan Chase, NA*, Adv. No. 10-7106 (Bankr. E.D. Mi. 2012) – Automatic stay terminated when case was closed without discharge based on debtor's failure to file certificate of financial management course. Later reinstatement of case for purposes of filing certificate and subsequently discharge does not invalidate collection efforts during period that case was closed.

3.72 Setoff

- (306) *In re Buttrill*, 2016 WL 1314494 (Bankr. E.D. Tn. 2016) – Court can grant relief from or annul stay for cause. Annulling stay validates action that occurred while creditor was unaware of stay and is appropriate where debtor engaged in bad faith conduct such that creditor had no knowledge of bankruptcy. Annulment not warranted where IRS had full knowledge of bankruptcy case for at least two months before exercising right of setoff against pre-petition tax refund. While creditor would have been entitled to relief from stay had it been timely requested, failure to act promptly prevents stay from being annulled. Creditor who establishes right of setoff has established prima facie showing of cause for relief. Creditor had right to setoff against pre-petition tax refund, and amount of debt owed to creditor exceeded amount of refund establishing lack of equity., and debtors in chapter 7 had no reorganization purpose, such that stay relief was warranted. Debtor's claim that property was exempt did not defeat creditor's right to setoff as Code preserves right of offset even as to otherwise exempt assets. Creditor's alleged improper exercise of right to setoff by not only freezing funds but also applying funds post-petition to account violated stay but did not deprive creditor of right to offset refund. IRS' delay of several months before notifying court or debtor was more than technical violation of stay but violation of stay, without more, is not basis to deny right of setoff.
- (307) *Harchar v. IRS*, 2012 WL 3968162 (6th Cir. 2012) – IRS did not violate terms of debtor's confirmed plan or automatic stay by suspending electronic processing of debtor's tax refunds and switching to manual processing. Although IRS switch may have slowed refund process, IRS had right to consider its rights and responsibilities before issuing refunds. IRS did not in any way attempt to modify plan or to recover debt owed in manner inconsistent with confirmed plan. IRS had right to implement administrative freeze on refund while seeking stay relief to exercise setoff of post-petition tax refunds against pre-petition tax claims. Short term freeze that did not delay refund for time far beyond when refund normally would have been paid is not act to obtain possession or control of property of estate. IRS issued refund immediately after it became clear that IRS' request for setoff would be denied.

3.73 Relief From Co-Debtor Stay

- (308) *In re Grace*, 2015 WL 912532 (Bankr. N.D. Ohio 2015) – Section 362 allows for relief from co-debtor stay if the co-debtor received the consideration for the claim; debtor's plan does not propose to pay claim; or creditor's interest would be irreparably harmed by continuation of stay. Debtor's confirmed plan provided for payment of only 24% of the claim, such that stay relief was warranted. Fact that co-debtor has dementia, has no income, and is uncollectable is not ground to deny motion.
- (309) *In re Hart*, 2013 WL 5969665 (Bankr. M.D. Ga. 2013) – Secured creditor entitled to relief from co-debtor stay where confirmed plan proposed to pay secured claim at interest rate below contract rate. Contract called for 24 percent interest, while plan provided for 5 percent. Creditor entitled to stay relief to pursue co-debtor for interest differential. Fact that co-debtor does not have possession of collateral or lacks any ability to make payments are not grounds to deny stay relief.

3.74 Adequate Protection Payments

- (310) *In re Alliance Well Service, LLC*, Case No. 16-10078 (Bankr. D.N. Mex. 2016) – When court orders adequate protection payments pursuant to Section 361, Courts have chosen three alternative start dates for payments: the petition date; the date on which creditor files the motion; or the date on which creditor, but for stay, would have been able to exercise non-bankruptcy rights. Majority of cases use date of filing of Motion for Adequate Protection. Using Petition date can result in large back-payments and using date on which creditor could have started non-bankruptcy collections is too speculative. Using Motion date is also consistent with requirement that creditor act diligently to protect its interests.

3.75 Attorney Fees - Prosecuting or Defending Motion

- (311) *Green Tree Servicing, LLC v. Giusto*, Case No. 15-2105 (N.D.Ca. 2016) – Contract provision that allows prevailing party in dispute over obligation to recover attorney fees does not apply to motion for relief from stay. Statute that made attorney fee clauses reciprocal applies only in "an action on a contract". Debtor not entitled to recover attorney fees incurred in defense of Motion for Relief as Motion is not "an action" but is merely a "motion" which did not trigger contractual fee provision.

3.76 GMAC Bankruptcy

- (312) *Sollars v. GMAC Mortgage, LLC*, 2013 WL 5340890 (E.D. Mi. 2013) – Under Stipulated Order entered in Chapter 11 case of GMAC, stay is lifted to permit non-debtor parties in foreclosure and eviction proceedings to assert and prosecute defenses, claims and counter-claims that relate exclusively to the property that is the subject of the loan owned or serviced by GMAC (or one of the related Chapter 11 entities) for purposes of defending, unwinding or otherwise enjoining or precluding foreclosure process including eviction proceeding. Claims that seek relief that would not terminate or preclude prosecution or completion of foreclosure or eviction remain subject to automatic stay. Plaintiff's complaint sought to set aside sheriff sale, to stay any further eviction action, to rescind underlying mortgage or to reform or modify note and mortgage, and requesting damages and attorney fees. District court would consider all matters other than awarding of damages and attorney fees, including potentially dispositive motions filed by either side as to matters related to the foreclosure and rescission.

D. Annulment of Stay

3.77 Grounds

- (313) *In re Buttrill*, 2016 WL 1314494 (Bankr. E.D. Tn. 2016) – Court can grant relief from or annul stay for cause. Annulling stay validates action that occurred while creditor was unaware of stay and is appropriate where debtor engaged in bad faith conduct such that creditor had no knowledge of bankruptcy. Annulment not warranted where IRS had full knowledge of bankruptcy case for at least two months before exercising right of setoff against pre-petition tax refund. While creditor would have been entitled to relief from stay had it been timely

requested, failure to act promptly prevents stay from being annulled. Creditor who establishes right of setoff has established prima facie showing of cause for relief. Creditor had right to setoff against pre-petition tax refund, and amount of debt owed to creditor exceeded amount of refund establishing lack of equity., and debtors in chapter 7 had no reorganization purpose, such that stay relief was warranted. Debtor's claim that property was exempt did not defeat creditor's right of setoff as Code preserves right of offset even as to otherwise exempt assets. Creditor's alleged improper exercise of right to setoff by not only freezing funds but also applying funds post-petition to account violated stay but did not deprive creditor of right to offset refund. IRS' delay of several months before notifying court or debtor was more than technical violation of stay but violation of stay, without more, is not basis to deny right of setoff.

- (314) *Baxter v. Sarmadi*, 2015 WL 1839396 (6th Cir. 2015) – Court has equitable discretion to annul stay retroactively and to give effect to foreclosure sale that occurred post-petition. Post-petition foreclosure was voidable, not void. Exceptional circumstances to annul stay include where debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the debtor is able to raise the stay as a defense or to use unfairly as a shield to avoid unfavorable result. Bankruptcy court correctly annulled stay where debtor's chapter 13 plan did not provide for payment of creditor's secured claim; property lacked insurance although property was leased to third party; and debtor's lack of good faith in filing case; coupled with debtor's failure to timely provide notice of bankruptcy to creditor who, in good faith, exercised rights held under mortgage and note. Debtor failed to timely make plan payments prior to confirmation of plan and failed to timely provide documents to Chapter 13 Trustee; and testified equivocally regarding debtor's address, whether property was insured, stated that tenants refused to pay rent, debtor's estimates of properties values were substantially higher than listed in schedules, and debtor denied knowing that he had to make plan payments. Lack of insurance and lack of income, coupled with value in schedules that was less than debt indicating that debtor lacked equity, supported annulment of stay.
- (315) *Sazegar v. Jadidolahi*, Case No. 14-1188 (9th Cir. BAP 2015) – Section 362(d) allows court to retroactively annul stay on case by case basis and balancing equities. Court will consider whether creditor knew of bankruptcy filing when violating the stay. And whether the debtor's conduct was unreasonable, inequitable or prejudicial to the creditor. Debtor conveyed deed to property to creditor but filed Chapter 13 case the following day, and creditor, without notice, recorded the deed 10 days later. Annulment proper where debtor lacked good faith in filing Chapter 13 case as debtor never took any steps to prosecute the case as debtor did not file schedules, statement of financial affairs or plan and failed to appear for the 341 meeting; creditor matrix did not list creditor and creditor was unaware of filing when creditor recorded deed; debtor did not advise state court of bankruptcy filing notwithstanding pendency of litigation between debtor and creditor; and court ultimately dismissed case for failure of debtor to appear or prosecute. Debtor waited almost three years before attempting to assert that creditor recorded deed in violation of stay,.
- (316) *Gasprom, Inc. v. Fateh*, Case No. 12-1567 (9th Cir. BAP 2013) – Bankruptcy court erred in *sua sponte* annulling stay where no party had requested that relief either in pleadings or in arguments in court. Only matter before court was debtor's motion for contempt against creditor for violation of automatic stay. Court can annul stay retroactively based on balancing of equities, but parties must be provided notice and opportunity to develop record so that court can properly evaluate multiple factors for annulment.
- (317) *In re Benchmark Capital, Inc.*, 2013 WL 1429437 (Bankr. E.D. Tn. 2013) – Automatic Stay comes into effect immediately upon commencement of case without requirement for notice. Section 362 allows court to annul stay for cause. Creditor failed to demonstrate any basis for retroactive relief to annul stay where creditor conducted foreclosure sale of assets post-petition but without knowledge of petition. Stay can be annulled only in presence of extraordinary circumstances which include debtor's bad faith, creditor's lack of knowledge of pendency of stay, and unfair prejudice to creditor. Creditor's lack of notice alone is not basis to retroactively annul stay. There is no indication that debtor intentionally withheld notice or that debtor was attempting to use stay in unfair manner. Record also did not indicate any unfair prejudice to creditor. Creditor retains its status as lien holder and can seek court permission to reinstitute foreclosure proceedings. There was no evidence that creditor had incurred improvement costs or that he was forced to forego improvements to property.
- (318) *In re Bazzi*, Case No. 12-60627 (Bankr. E.D. Mi. 2012) – Court has authority to annul stay for cause, such as where debtor is attempting to use stay as sword rather than shield. Court would annul stay retroactively to petition date. Debtor was incarcerated for violating state court probation order for alleged failure to pay restitution. Restitution Order, entered more than 2 years prior to commencement, required debtor to pay to the court a restitution award based on conviction for seven counts of fraud and false pretenses and uttering a bad check with intent to defraud. No dispute that restitution, as paid, would pass through court to the injured party for its ultimate benefit. Criminal restitution judgment based on fraud would be non-dischargeable under Section 523(a)(2)(A) and it is "inevitable" that the debt will be held non-dischargeable at which point the automatic stay would not preclude incarceration of debtor. Under circumstances, there was no legitimate bankruptcy related reason to invoke stay to "spring" debtor from jail, where any release would be only temporary and would delay the inevitable. Stay would remain in place only to extent of property of the estate.
- (319) *In re Michigan Biodiesel, LLC*, 2012 WL 1941648 (Bankr. W.D. Mi. 2012) – Action taken in violation of stay is voidable and not void ab initio. After debtor filed bankruptcy, creditor attempted to record continuation statement but inadvertently recorded a termination statement. Within minutes, creditor realized the error and filed a "correction statement" indicating that the termination statement was error. Court would retroactively annul stay for purposes of ratifying correction statement where correction did not adversely affect any creditor or the trustee, as the status of a claim as secured is determined as of the petition date and the lien was indisputably perfected as of the petition date. Further, automatic stay does not prevent action to continue perfection by filing a continuation statement which relates back to the original perfection date as long as the secured claim has continuously been perfected. Correction statement was not intended to affect the estate but was intended to insure that the security interest, which was valid as of the petition date, remained in force and effect.

3.78 Standing to Request

- (320) *In re Grason*, 2013 WL 412916 (Bankr. C.D. Il. 2013) – Individual who bought property at sale conducted minutes after debtor filed for bankruptcy protection lacked standing to request Court to annul stay and validate sale. Purchaser was not a creditor of the estate or the debtor.

Foreclosure sale that occurred after filing of case was void. As such purchaser did not acquire either any interest in the property or any claim against debtor.

3.79 Effect of Annulment

E. Violations of Automatic Stay

3.80 Notice of Filing

- (321) *In re Stewart*, 2013 WL 5592899 (Bankr. E.D. Mi. 2013) – To recover damages for violation of stay, debtor must prove that creditor had knowledge of bankruptcy case and acted deliberately which resulted in violation. Creditor has notice of case if creditor had some actual knowledge or had sufficient facts that would cause reasonably prudent person to make inquiry. Formal notice is not required. Communications between debtor’s counsel and creditor’s counsel were more than sufficient to establish actual notice.
- (322) *Bankers Healthcare Group, Inc. v. Bilfield*, 2013 WL 2897035 (Bankr. N.D. Ohio 2013) – Creditor had actual notice of bankruptcy filing. Debtor called creditor to inform creditor of filing and advised of case number. Creditor also received notice of commencement from court. Notice from court addressed to creditor’s Florida address was sufficient where creditor acknowledged that Florida address was correct address for service of process. Fact that processing of notice was delayed because creditor’s Florida office had to forward it to creditor’s New York office for processing did not defeat or limit effectiveness of stay.
- (323) *In re Purdy*, 2013 WL 2355542 (Bankr. W.D. Ky. 2013) – Creditor did not willfully violate stay when Creditor repossessed collateral day after filing of case where creditor did not have notice of case. However, creditor violated stay when creditor refused to return collateral for at least three weeks after creditor became aware of the filing.
- (324) *In re Wentworth*, Case No. 12-20779 (Bankr. E.D. Mi. 2012) – Creditor cannot be sanctioned for violation of stay unless creditor has received notice pursuant to Section 342(g)(2). Section 342 provides that notice shall not be effective unless notice is brought to the attention of the creditor. If the creditor has designated a person or subdivision to be responsible for receiving notices and establishes reasonable procedures so that notices received by the creditor are delivered to the designated person or subdivision, then a notice provided to the creditor other than in accordance with this section shall not be considered “received” until the notice is received by the designated person. Under Section 342(c)(2)(A), if the creditor within 90 days pre-petition supplies debtor with at least 2 communications with an address at which the creditor requests to receive correspondence, then any notice required shall be sent to that address and shall include the account number. Debtors failed to provide account statements that may have disclosed another address for creditor. Debtor obtained the creditor’s address from a credit report, but address did not match address used by creditor on its webpage or any address designated by creditor for receipt of notice. Debtor used an address that was not the correct address as designated in Section 342. Therefore, although creditor’s actions may have violated stay, debtor could not recover sanctions as creditor had not been given “effective” notice.

3.81 Effect of Violation

- (325) *In re Grason*, 2013 WL 412916 (Bankr. C.D. Il. 2013) – Foreclosure sale conducted minutes after petition was filed was void and did not convey to purchaser any interest in property.
- (326) *Kline v. Deutsche Bank National Trust Co.*, Case no. 11-088 (10th Cir. BAP 2012) – *Rooker-Feldman* precluded Bankruptcy Court from reviewing State Court determination of efficacy of foreclosure complaint served in violation of stay. Debtor argued to state court that service was improper and that plaintiff should be required to re-serve complaint. State court disagreed and entered foreclosure judgment. Bankruptcy court would not act as “super appellate” court to review State court determination as to validity of service of state court complaint in state court action.
- (327) *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.
- (328) *In re Michigan Biodiesel, LLC*, 2012 WL 1941648 (Bankr. W.D. Mi. 2012) – Action taken in violation of stay is voidable and not void ab initio. After debtor filed bankruptcy, creditor attempted to record continuation statement but inadvertently recorded a termination statement. Within minutes, creditor realized the error and filed a “correction statement” indicating that the termination statement was error. Court would retroactively annul stay for purposes of ratifying correction statement where correction did not adversely affect any creditor or the trustee, as the status of a claim as secured is determined as of the petition date and the lien was indisputably perfected as of the petition date. Further, automatic stay does not prevent action to continue perfection by filing a continuation statement which relates back to the original perfection date as long as the secured claim has continuously been perfected. Correction statement was not intended to affect the estate but was intended to insure that the security interest, which was valid as of the petition date, remained in force and effect.

3.82 Violations – Continued Collection Efforts

- (329) *U.S. v. Hunsaker*, Case No. 16-0386 (D. Ore. 2016) – 11 USC Section 106(a)(1) waiver of Sovereign immunity for claims under Section 362(k) did not unequivocally waive sovereign immunity for claims of emotional distress. Section 362(k) allows individual to recover actual damages including costs, attorney fees and punitive damages in appropriate cases, but does not specifically include “emotional distress” as “actual damage” for which immunity is waived. IRS willfully violated stay by continuing to make demands for payments of back taxes and threats to levy on bank accounts where IRS had actual notice of bankruptcy filing. IRS can be held liable to actual damages but not for “emotional distress” allegedly suffered as result of IRS conduct.

- (330) *In re Gomez*, 2015 WL 4638477 (Bankr. N.D. Ohio 2015) – Party seeking sanctions under Section 362(k) must prove, by a preponderance of the evidence, opposing party violated stay, that the violation was committed willfully, and that party was injured by the violation. A willful violation occurs when the creditor knew of the stay and violated the stay by an intentional act. It does not require proof of a specific intent to violate the stay, rather, it requires that the acts which violate the stay be intentional. Where the creditor received actual notice of the automatic stay, courts will presume that the violation was deliberate. Creditor is not only required to refrain from certain activity, but may be required to take affirmative action to prevent further violations. Creditor violated stay by repeatedly sending e-mails demanding payment after case was filed. Fact that e-mails were auto-generated did not alter conclusion as creditor had affirmative duty to ensure that e-mails ceased.
- (331) *In re Paschal*, 2014 WL 5771558 (Bankr. W.D. Ky. 2014) – Creditor willfully violated stay when creditor, with notice of filing, continued with automatic withdrawals from debtor's bank account, and then refused to return the money on request of debtor's counsel. Sanctions included attorney fees of \$1189.50 plus punitive damages of \$1200, representing three times the amount wrongfully withdrawn from the account.
- (332) *In re Polson*, 2014 WL 5363893 (Bankr. W.D. Ky. 2014) – Creditor violated stay where, with full knowledge of filing, creditor contacted debtor at least four times by telephone and in writing on three others.
- (333) *Iskric v. Commonwealth Financial Systems, Inc.*, 2013 WL 4011126 (Bankr. M.D. Pa. 2013) – Creditor violated the stay and discharge injunction by failing to vacate civil contempt order resulting in debtor's arrest post-discharge. Creditor obtained judgment against debtor and was pursuing collection. Debtor failed to cooperate in discovery leading to issuance of civil contempt warrant and issuance of bench warrant. After debtor obtained discharge of debt, creditor failed to take action to withdraw the warrant or cancel the contempt citation, and debtor was arrested on outstanding bench warrant. Creditor's actions were deemed willful violations of stay, resulting in damages award to debtor of \$60,000 in punitive damages.
- (334) *In re Stewart*, 2013 WL 5592899 (Bankr. E.D. Mi. 2013) – Creditor violates stay when creditor takes action to collect a pre-petition debt. Creditor violated stay when creditor seized personal property left in leased premises and repeatedly stated that creditor intended to retain equipment in lieu of bank rent.
- (335) *Bankers Healthcare Group, Inc. v. Bilfield*, 2013 WL 2897035 (Bankr. N.D. Ohio 2013) – Creditor violates stay by filing collection action against debtors 6 days after commencement of case, and by continuing efforts even after bankruptcy counsel contacted creditor to request that action cease. Creditor failed to take steps to stop process server from serving summons and complaint and process server showed up at debtor's place of business and became disruptive, throwing papers at debtor in front of clients.
- (336) *In re Malloch*, Case No. 11-53655 (Bankr. E.D. Mi. 2011) – Creditor knowingly violated automatic stay by sending demand letter to debtor 60 days after commencement of case and 30 days after creditor was provided with Notice of Commencement and copies of Debtor's schedules.
- (337) *In re Brown*, 2012 WL 3908029 (Bankr. E.D. Pa. 2012) – Creditor willfully violated stay by failing to halt collection efforts that began pre-petition. Creditor obtained judgment and commenced execution and garnishment. Debtors filed bankruptcy and advised creditor, but creditor did not cause cessation of collection efforts by sheriff and garnishment. Courts have placed upon the creditor, rather than the debtor, the duty to take affirmative action to prevent post-petition collection efforts by notifying relevant third parties that the bankruptcy stay is in place and that the prepetition status quo must remain.
- (338) *In re Tremblay*, Case No. 11-52918 (Bankr. E.D. Mi. 2012) – Creditor's post-petition garnishment constituted willful violation of stay warranting sanctions in the form of costs and attorney fees.
- (339) *In re Thorpe*, 2011 WL 5909403 (Bankr. E.D.N.C. 2011) – Lender willfully violates stay by sending contractor to change locks at debtor's home before stay relief hearing.
- (340) *Grine v. Chambers*, 2010 WL 3910144 (Bankr. N.D. Ohio 2010) – Creditor violated stay by sending account statement with full knowledge of bankruptcy filing. Creditor intentionally sent statement, although did so in inadvertent violation of the stay.
- (341) *Heers v. Gibson Realty, Inc.*, 2010 WL 3491169 (Bankr. W.D. Ky. 2010) – Employer violated stay by retaining portion of real estate commission earned post-petition to pay pre-petition obligation for rent and other office expenses. Commission was not earned until sale actually closed, which occurred post-petition, even though contract for sale was signed pre-petition.

3.83 Violations – Commencement or Continuation of Foreclosure Proceedings

- (342) *In re Williams*, 2016 WL 4065938 (Bankr. N.D. Ohio 2016) – Real property owned by debtor at time of commencement of case is property of Chapter 13 estate. Creditor who had previously purchased Tax Certificates for unpaid property taxes violated stay by scheduling property for tax sale post-petition without receiving relief from stay.
- (343) *In re Salov*, 510 BR 720 (Bankr. S.D. N.Y. 2014) – Creditor violated stay by issuing writ of eviction after commencement of case. Creditor completed foreclosure process and purchased property at valid pre-petition foreclosure sale. After debtor filed Chapter 13, creditor attempted to evict debtor. While debtor had no ownership after foreclosure sale and no ability to prevent issuance of deed even post-petition, property of estate includes all rights and interests including bare possessory rights and interests. Mere possessory interest even absent any legal interest is protected by automatic stay.
- (344) *In re Gallo*, 2012 WL 3930320 (Bankr. M.D.N.C. 2012) – Creditor willfully violated stay by commencing foreclosure proceedings notwithstanding notice of bankruptcy case. Foreclosure was halted when debtor's attorney advised Deed Trustee of bankruptcy. Several

months later, creditor began sending demand letters to debtor and stating that the matter had been referred to an attorney for initiation of foreclosure proceedings. Although creditor stopped collection efforts for a second time, 6 months later creditor resumed collection efforts and stated that debtor was “at risk” of losing his home in foreclosure. Even after being advised by Chapter 13 Trustee of pendency of case, 6 months later creditor again notified debtor that a foreclosure sale was set. Debtor filed Motion for Sanctions and creditor responded with yet another Notice of Foreclosure Sale. Creditor did not dispute that it took actions, but blamed actions on “spelling error” as creditor’s computer listed Debtor’s first name as “Jeffrey” while Debtor’s name was actually “Jeffery”. Even though creditor had misspelled debtor’s name, creditor had multiple instances of actual notice of filing, including communication from Chapter 13 Trustee, yet failed to correct the misspelling. Creditor’s own internal error does not save them from willful violate of stay.

- (345) *In re Webb*, 2012 WL 3638005 (Bankr. N.D. Ohio 2012) – Secured creditor violated stay by scheduling foreclosure sale at time when bankruptcy case was open and discharge had not entered. Creditor had previously scheduled sale and been sanctioned, yet inexplicably re-set the sale yet again, also in violate of stay.
- (346) *Tyson v. Hunt*, 450 B.R. 754 (Bankr. W.D. Tn. 2011) – Post-petition foreclosure sale violates automatic stay and is void, even if at time sale occurred seller and buyer lacked notice of the bankruptcy petition. Section 549(c) safe-harbor does not protect the buyer as Section 549(c) protects only against actions to avoid transfers. Post-petition foreclosure sale is not attempt to recover property under Section 549 but is an entirely void transfer in violation of Section 362.
- (347) *In re Makdisi*, Case No. 10-44413 (Bankr. E.D. Mi. 2010) – Lender violated stay by conducting foreclosure sale after commencement of case and further violated stay by refusing to set aside the foreclosure sale. Subsequent dismissal of case prior to confirmation of Chapter 13 Plan does not obviate violations that occurred while case was pending. Debtor’s reinstatement of the case following dismissal vested jurisdiction in Bankruptcy Court to enter sanctions against creditor for actions taken before dismissal.

3.84 Violations – Commencement of Continuation of Other Actions

- (348) *In re Humbert*, 2016 WL 4508186 (Bankr. N.D. Ohio 2016) – Landlord violates stay by contacting debtor and demanding payment of pre-petition rent and by commencing post-petition eviction action without seeking relief from stay. Court can award damages where actions were taken in violation of stay; violation of stay was willful; and violation caused actual damages. Willful does not require specific intent but does require that creditor have knowledge of stay when actions are taken. Creditor instituted eviction proceedings before receiving notice of commencement of bankruptcy case and commencement of eviction would not be willful. Landlord stopped eviction proceedings up on being advised of bankruptcy case although landlord has not yet dismissed eviction action. Coeditor can violate stay by failing to take actions that cause existing violation of stay to cease. Upon learning of bankruptcy, landlord should either have sought retroactive relief form stay or dismissed eviction action. Debtor awarded attorney fees for services rendered after date on which landlord first learned of bankruptcy case and excluding fees for responding to landlord’s motion for stay relief when ultimately filed. Debtor not entitled to non-economic damages as debtor did not present evidence sufficient to support a finding of emotional distress damages. Debtor not entitled to punitive damages as landlord’s conduct was not egregious, vindictive or intentionally malicious. Creditor’s conduct was not intentionally malicious or egregious and punitive damages were not necessary to deter future violations by landlord. Although landlord can possession from debtor, landlord must dismiss suit filed in violation of stay and file new action. Landlord cannot recover economic damages as debtor received discharge in bankruptcy.
- (349) *In re Wilson*, 2016 WL 3303325 (Bankr. E.D. Tn. 2016) – Commencement of bankruptcy stops any effort to evict debtor from leased property. Leasehold interest is property of estate protected from termination and repossession, regardless of whether landlord knew of filing at time of efforts to evict. Landlord’s knowledge or lack of knowledge at time he filed eviction action and obtained order of possession and causing sheriff to dispossess debtor is irrelevant to whether actions violated stay. Violation of stay itself does not warrant damages unless violation was “willful”.
- (350) *In re Johnson*, 2016 WL 1719149 (Bankr. S.D. Ohio 2016) – Automatic stay protects not only debtor but also property of estate. Creditor violate automatic stay by pursuing post-confirmation arbitration proceedings. Although creditor acknowledged to arbitrator that debtor was in bankruptcy, creditor nonetheless pursued arbitration to establish creditor’s alleged perfected security interest in debtor’s interest under employment contract. Creditor pursued arbitration without notice to debtor and submitted both brief and proposed Arbitration Award that stated that creditor’s obligation was secured by assignment of employment contracts, including specific findings as to actions allegedly taken by debtor.
- (351) *Mitchell v. Anderson*, 2016 WL 367038, 545 BR 209 (Bankr. N.D. Ohio 2016) – Defendant violated automatic stay by maintaining prosecution of one state court action and filing three additional state court actions notwithstanding actual notice of bankruptcy filing. Filings were willful as defendant had actual knowledge at time cases commenced.
- (352) *In re Dietrich*, Case No. 08-68294 (Bankr. E.D. Mi. 2011) – Debtor and Debtor’s ex-spouse violated automatic stay by recording liens against property of estate post-petition and by purporting to amend pre-petition final judgment of divorce to convey to ex-spouse an interest in the property. Debtor also violated stay by continuing litigation that belonged to the Trustee as an asset of the estate and opposing the dismissal of that litigation after Trustee settled with the opposing party.
- (353) *Borders v. King*, 2011 WL 3352468 (Bankr. E.D. Ky. 2011) – Automatic stay prohibits creditors from asserting fraudulent transfer actions under Section 544 and 548. 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.
- (354) *Clay v. Credit Acceptance Corp.*, 2011 WL 1808828 (Bankr. E.D. Ky. 2011) – Although creditor cannot violate stay based on pre-petition

conduct, creditor can violate stay by failing to stop actions that were begun prior to petition. Conduct will subject creditor to sanctions if (1) actions were taken in violation of stay; (2) violation was willful; and (3) violation causes actual damages. Creditor filed state court complaint and sent paperwork to process server for service. One day later, before service had been effectuated, debtor filed bankruptcy and immediately advised creditor of the filing. Creditor did not attempt to withdraw summons or to advise process server to refrain from serving complaint, and process server subsequently did serve papers on debtor. Creditor violated stay by failing to make efforts to prevent service of the complaint after receiving notice of the filing.

- (355) *Church Mutual Insurance Co. v. American Home Assurance Co.*, 2011 WL 1838720 (2d Cir. 2011) – Final Judgment against debtor rendered after filing for relief under Chapter 11 was void as violation of automatic stay. Debtor’s insurance company, as the party that would have to pay the claim, had standing to contest validity of judgment entered in violation of stay.
- (356) *Russell v. Caffey*, Case No. 08-00450 (11th Cir. 2010) - Personal notice of bankruptcy is not required for violation of stay if notice is delivered to attorneys or other representatives. Debtor’s ex-spouse violated stay by obtaining arrest warrant for failure to pay support and failed to take any action to vacate warrant notwithstanding imputed and later actual notice of bankruptcy filing. Party had affirmative duty to move to vacate state court contempt order and arrest order.
- (357) *In re Kasubowski*, Case No. 09-20128 (Bankr. E.D. Mi. 2010) – Creditor’s obtaining and serving a writ of garnishment post-petition and refusal to return to Debtor or the Chapter 13 Trustee funds received by Creditor on that writ violated automatic stay.

3.85 Violations – Seizure of or Failure to Return Property

- (358) *In re Docherty*, 2016 WL 675835 (Bankr. N.D. Ohio 2016) – Creditor violated stay by repossessing debtor’s automobile one day post-petition. Creditor then retained possession and refused to return automobile for 17 days notwithstanding actual notice of bankruptcy filing received after initial repossession. Creditor’s initial repossession was not willful violation as creditor did not have notice of filing when vehicle repossessed. However, creditor had affirmative duty to return vehicle to debtor promptly upon being notified of bankruptcy filing. Creditor’s actions in refusing to return vehicle constituted willful violation of stay warranting sanctions. Creditor also violated stay by removing and destroying the license plates for the vehicle. Debtor’s down payment on new vehicle was not recoverable as debtor’s petition indicated that debtor intended to surrender vehicle so cost to acquire new vehicle was unrelated to stay violation. However, debtor was required to obtain new vehicle approximately 45 days earlier than would have been required had the car been timely returned, allowing debtor to recover damages equal to 45 days’ worth of payments on new vehicle. Debtor entitled to recover 2 days lost wages, one day where she missed work for lack of transportation and one day to attend hearing on Motion for Sanctions and costs for replacement license plates. Recovery of attorney fees limited where debtor and counsel failed to take steps to mitigate harm. Although debtor texted creditor of bankruptcy filing, debtor’s attorney never made any effort to contact creditors to demand return of car or advise that motion for sanctions would be filed. Attorney not entitled to payment for 40 hours of work where a single phone call likely would have produced the return of the vehicle. Punitive damages not warranted where creditor conduct, while willful, was not egregious, vindictive, or intentionally malicious. Creditor was not openly defiant and did not take actions that were clearly threatening or coercive.
- (359) *Banks v. Kam’s Auto Sales*, 2014 WL 6320539 (Bankr. M.D. Ga. 2014) – Automobile purchased by debtor after filing Chapter 13 petition is property of the estate under Section 1306. Auto finance company that financed automobile post-petition violated stay by repossessing vehicle after default. Even if creditor could have prevailed on stay lift motion had one been filed, creditor did not have authority to repossess property of estate in absence of court order. Plan provided that property of estate would remain vested in estate and creditor’s lack of notice of bankruptcy case did not alter this conclusion. Sanctions are appropriate for willful violation of stay, which requires that creditor know of bankruptcy and act in manner that violates stay. Creditor’s “good faith” belief that stay did not apply, or lack of any intent to violate stay, is not defense where conduct does violate stay.
- (360) *Caffey v. Jag Autocare, LLC*, 2014 WL 3888318 (Bankr. N.D. Ohio 2014) – Creditor’s post-petition retention of automobile that had been properly repossessed pre-petition violated stay as creditor’s refusal to turnover vehicle constituted exercise of control over property of estate. Violation was willful as creditor admitted to knowledge of bankruptcy filing and creditor intentionally retained vehicle in violation of stay. However, debtor lacked standing to maintain action for damages. In Chapter 7, duty to turnover vehicle ran to Trustee, not debtor. Although debtor was allegedly damaged by loss of use of vehicle, damages were not attributable to violation of stay as debtor had no right to use or possess the vehicle while it was property of estate. Unlike Chapter 11, where debtor serves as debtor-in-possession, or Chapter 13 where debtor is imbued with certain rights of trustee and is imbued with right to possess estate property, debtor in Chapter 7 has no right to possess estate property and cannot be harmed by loss of use of estate property.
- (361) *Okke v. Okke*, 2014 WL 3578599 (Bankr. W.D. Mi. 2014) – Debtor’s ex-spouse willfully violated stay warranting sanctions. Ex-spouse had been repeatedly advised that debtor had filed bankruptcy yet ex-spouse retained possession of property of the estate and refused to surrender property to the debtor. Ex-spouse then sold the property and retained the proceeds. Ex-spouse had no right or title in the property as the property had been awarded to debtor in pre-petition judgment of divorce. Evidence supported award of damages of \$500.00 plus attorney fee of \$9,000 based on ex-spouse’s willful flouting of the stay throughout the proceedings.
- (362) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Creditor does not violate stay by retaining property that creditor lawfully acquired from debtor prior to commencement of case. Debtor had no right to or interest in the property, and creditor’s retention did not constitute exercise of dominion or control over property of the estate.
- (363) *In re Stewart*, 2013 WL 5592899 (Bankr. E.D. Mi. 2013) – Section 362(a)(3) makes it a violation to exercise control over property of estate. While merely holding property that the creditor was legally able to seize pre-petition may not be guilty of deliberate violation, creditor who had no pre-petition right to possession or control of property could not retain property and claim “merely passive retention”. Creditor’s

retention of property of estate and refusal to return property on demand of debtor constituted exercise of control over property of estate. Creditor's good faith belief that it had right to possess property is not defense to damages.

- (364) *In re Purdy*, 2013 WL 2355542 (Bankr. W.D. Ky. 2013) – Creditor did not willfully violate stay when Creditor repossessed collateral day after filing of case where creditor did not have notice of case. However, creditor violated stay when creditor refused to return collateral for at least three weeks after creditor became aware of the filing.
- (365) *Weber v. SEFCU*, 2013 WL 1891371 (2d Cir. 2013) – Secured creditor violates stay when creditor fails to promptly turn over to debtor motor vehicle repossessed pre-petition. Vehicle had not been sold and title had not transferred, and vehicle remained property of estate as debtor had continuing equitable interest in vehicle. Creditor's actions were willful and unlawful exercise of dominion and control over property of estate. Creditor cannot hold property until debtor offers what creditor deems to be adequate protection. Creditor must turnover vehicle and if creditor wants adequate protection, it must take affirmative steps to request Court to determine nature and amount.
- (366) *In re Pearl Management Corp.*, Case No. 11-47422 (Bankr. E.D. Mi. 2011) – State Court Receiver appointed to take control of corporate property would be stayed by bankruptcy filing. Receiver is stayed from taking or attempting to take any action to exercise dominion or control over property of estate. An continued hearings in State Court as to Receivership roles or attempts to hold Debtor, its principals or its Bankruptcy Attorneys would be considered violations of Automatic Stay.
- (367) *In re Baer*, 2011 WL 3667511 (Bankr. E.D. Ky. 2011) – Debtor's default under Order for Redemption, which allowed Debtor 45 days to redeem or surrender collateral, did not modify stay. When Debtor defaulted under Order for Redemption, Creditor's repossession of the vehicle constituted willful violation of automatic stay. Creditor's erroneous assumption that failure to redeem operated as relief from stay did not change conclusion that creditor acted willfully. Willful does not require proof of specific intent to violate stay, but only proof of intentional act at a time when creditor was aware of the bankruptcy filing.
- (368) *Henderson v. Auto Barn Atlanta, Inc.* 2011 WL 482827 (Bankr. E.D. Ky. 2011) - Seller of vehicle repeatedly violated automatic stay by threatening and intimidating debtors and thwarting any efforts by the Debtors to title the Vehicle in Kentucky, despite knowledge of the Debtors' bankruptcy. Seller repossessed vehicle once and threatened other repossessions, and vehicle subsequently disappeared from debtors' driveway. Seller threatened debtors in post-petition letters with criminal warrant. Seller admitted taking actions including hiring repossession company with full knowledge of bankruptcy filing.
- (369) *In re Kasubowski*, Case No. 09-20128 (Bankr. E.D. Mi. 2010) – Creditor's obtaining and serving a writ of garnishment post-petition and refusal to return to Debtor or the Chapter 13 Trustee funds received by Creditor on that writ violated automatic stay.
- (370) *In re Markins*, Case No. 10-30820 (Bankr. N.D. Ohio 2010) – Creditor's refusal to remove electronic device that would enable Creditor to remotely disable Debtor's automobile and refusal to return Debtor's vehicle title constituted "well-established" violations of the automatic stay. Creditor's actions were effort to coerce payment of dischargeable pre-petition unsecured debt.
- (371) *In re United Robotics*, Case No. 09-50376 (Bankr. E.D. Mi. 2009) - Pre-petition creditor who held assignment of Debtor's right to receive ongoing lease payments from lease under which Debtor was lessor violated automatic stay when creditor, post-petition, made demand on lessee for payment of lease payments directly to creditor. Assignment agreement did not assign to creditor title to the lease or to future lease payments, but rather assigned future lease payments only to the extent necessary to pay the prepetition debt. Court construed "property of the estate" broadly and held that the assignment of the lease payments did not constitute an assignment of an account receivable and did not vest in creditor unencumbered title to either the lease or to the future stream of lease payments. Thus, creditor's demand that lessee make payments to creditor constituted an attempt to exert possession, custody or control over property of the estate for purposes of collecting a prepetition obligation in violation of section 362.

Note: The District Court stayed pending appeal that portion of the Order that required the creditor to refund to the Debtor lease payments that the creditor had collected. Creditor demonstrated substantial likelihood that it has a perfected, enforceable security interest in the PPG lease payments; creditor demonstrated risk that, if it is required to pay in the funds without being treated as a secured creditor, the funds will be dissipated and it will suffer resultant irreparable harm; there is little likelihood of harm to others should a stay be granted; and public interests are furthered by a brief stay until the bankruptcy Court is able to ensure that creditor will be treated as a secured creditor pending the outcome of this appeal. *In re United Robotics*, Case No. 09-12591 (E.D. Mi. 2009).

3.86 Violations – Exercise of Dominion and Control

- (372) *Moore v. Caliber Home Loans, Inc.*, 2015 WL 5162482 (S.D. Ohio 2015) – Complaint stated cause of action for violation of stay where lender received payments from debtor under confirmed plan but failed to apply payments to debtor's loan account; and lender demanded mortgage payments higher than amount set out in agreed order without explanation or justification. Fact that debtor voluntarily made payments to servicer in first instance did not excuse servicer's obligation to apply payments and servicer's failure to do so amounted to exercise of dominion or control over property of estate.

3.87 Domestic Relations Actions

- (373) *In re Murphy*, 473 BR 197 (Bankr. E.D. Mi. 2011) – Provision of final divorce judgment that required debtor to pay \$2,500 of ex-wife's attorney fees directly to ex-wife's attorney was not domestic support obligation. Obligation was not payable to spouse, former spouse, or child of debtor, and ex-wife, having herself been discharged of any obligation to attorney in her own prior Chapter 7 case, could not held liable, or otherwise adversely affected, if debtor failed to pay attorney. Obligation payable to third parties, such as fee to professional who provided services to benefit the spouse or child, may constitute DSO only if former spouse is also obligated for such fees. Post-petition

conduct of attorney in seeking to enforce debtor's obligation for fees was not excepted from automatic stay as action to collect domestic support obligation from property not included in bankruptcy estate.

- (374) *In re Kallabat*, Case no. 12-53744 (Bankr. E.D. Mi. 2012) – Debtor's estranged spouse violated stay where spouse proceeded with trial in proceeding for dissolution of marriage with actual knowledge of bankruptcy filing. To extent divorce proceeding sought to dissolve marriage, to address child custody and visitation, and to establish domestic support obligations, actions were within exception to automatic stay, and filing of bankruptcy petition would not prevent domestic relations action from proceeding as to those issues. However, spouse's request that the domestic relations court award spouse the marital home free and clear of any interest of debtor violated Section 362(a)(3). Whatever interest debtor had in the marital home as of the date of the petition became property of estate, and request that property be awarded to spouse constituted attempt to gain possession and control of property of estate. Spouse also violated stay by asking domestic relations court to hold debtor solely liable on credit card allegedly fraudulent opened by debtor in the name of spouse. Attempt to impose liability based on pre-petition fraud is based on pre-petition claim that is beyond request for support and violated Section 362(a)(1) and (6). Spouse further violated the stay by submitting a proposed order that incorporated the relief regarding the marital home and other assets and credit cards, and continuing to request that the State court enter that order.
- (375) *Dietrich v. Tiernan*, 2012 WL 1854250 (E.D. Mi. 2012) – Debtor's ex-spouse violated automatic stay by obtaining substantive modifications to terms of parties' divorce judgment during pendency of bankruptcy case.
- (376) *In re Storozhenko*, 459 BR 697 (Bankr. E.D. Mi. 2011) – Post-petition proceeding brought in state court by state court receiver to hold debtor in contempt for violating orders entered in state court divorce proceeding were criminal proceedings within exception to automatic stay, to the extent receiver sought payment of fine to court or imprisonment for fixed term. However, to the extent contempt proceedings sought to recover restitution plus receiver costs and expenses, proceedings were civil in nature and precluded by automatic stay.
- (377) *Russell v. Caffey*, Case No. 08-00450 (11th Cir. 2010) - Personal notice of bankruptcy is not required for violation of stay if notice is delivered to attorneys or other representatives. Debtor's ex-spouse violated stay by obtaining arrest warrant for failure to pay support and failed to take any action to vacate warrant notwithstanding imputed and later actual notice of bankruptcy filing. Party had affirmative duty to move to vacate state court contempt order and arrest order.

3.88 Violations – Taxing Authorities

- (378) *In re Jha*, 461 BR 611 (Bankr. N.D. Ca. 2011) – IRS notice of intent to levy violated stay, but debtor's attorney fees for processing motion for contempt are not compensable. Debtor entitled to attorney fees incurred in having notice of levy lifted and to nominal award of \$20 for "stomach distress medication".

3.89 Violations – Administrative Actions

- (379) *Bererhout v. City of Malden*, 2011 WL 2119007 (Bankr. D. Mass. 2011) – City violated automatic stay by refusing to release administrative hold on debtor's automobile title, preventing debtors from renewing the registration and vehicle license. City imposed freeze pre-petition based on unpaid parking tickets and fines. Although City received proper notice of bankruptcy filing, City failed to release freeze. City's actions amounted to effort to obtain possession or of to exercise control over property of the estate and to collect, assess or recover a claim that arose pre-petition. Sanctions entered in the form of attorney fees and expenses incurred in enforcing automatic stay and prosecuting motion for contempt.

3.90 Violations – Appeals

- (380) *In re Dietrich*, Case No. 11-13905 (E.D. Mi. 2012) – Party's continued filing of pleadings in pending appeal violates automatic stay. Although pleadings did not, themselves, seek affirmative relief, filing of pleadings constituted continuation of judicial proceedings in violation of Section 362(a)(1).

3.91 Violations – Contempt Proceedings

- (381) *Iskric v. Commonwealth Financial Systems, Inc.*, 2013 WL 4011126 (Bankr. M.D. Pa. 2013) – Creditor violated the stay and discharge injunction by failing to vacate civil contempt order resulting in debtor's arrest post-discharge. Creditor obtained judgment against debtor and was pursuing collection. Debtor failed to cooperate in discovery leading to issuance of civil contempt warrant and issuance of bench warrant. After debtor obtained discharge of debt, creditor failed to take action to withdraw the warrant or cancel the contempt citation, and debtor was arrested on outstanding bench warrant. Creditor's actions were deemed willful violations of stay, resulting in damages award to debtor of \$60,000 in punitive damages.
- (382) *In re Storozhenko*, 459 BR 697 (Bankr. E.D. Mi. 2011) – Post-petition proceeding brought in state court by state court receiver to hold debtor in contempt for violating orders entered in state court divorce proceeding were criminal proceedings within exception to automatic stay, to the extent receiver sought payment of fine to court or imprisonment for fixed term. However, to the extent contempt proceedings sought to recover restitution plus receiver costs and expenses, proceedings were civil in nature and precluded by automatic stay.

3.92 Violations – Perfecting or Recording Liens

- (383) *In re Dietrich*, Case No. 08-68294 (Bankr. E.D. Mi. 2011) – Debtor and Debtor's ex-spouse violated automatic stay by recording liens against property of estate post-petition and by purporting to amend pre-petition final judgment of divorce to convey to ex-spouse an interest in the property. Debtor also violated stay by continuing litigation that belonged to the Trustee as an asset of the estate and opposing the dismissal of that litigation after Trustee settled with the opposing party.

- (384) *LaBoy v. Doral Mortgage Corp.*, 2011 WL 2119316 (1st Cir. 2011) – Mortgage company willfully violated automatic stay by recording mortgage post-petition and with knowledge of bankruptcy filing. Violation is “willful” when conduct is intentional and committed with knowledge of the bankruptcy filing.

3.93 Violations – Garnishments

- (385) *In re Manuel*, 2014 WL 7405471 (Bankr. E.D. Mi. 2014) – Creditor violates stay where creditor refuses to release pre-petition garnishment against debtor’s tax refunds and receives those refunds post-petition but refuses to turn over funds to debtor. Regardless of whether garnishment operated to perfect lien against refund, as of date of commencement of case creditor was required to cease all collection proceedings against the debtor. Creditor’s refusal to release garnishment constituted continuing collection efforts against debtor and was unjustified and willful warranting sanctions for violation of stay.

3.94 Violations – Threat of Criminal Proceeding

- (386) *Weary v. Poteat*, 2015 WL 4747883 (E.D. Tn. 2015), *aff’d* 2015 WL 5712191 (6th Cir. 2015) – Creditor does not violate stay by filing police report, speaking with prosecutors or otherwise asking government to commence criminal prosecution, regardless of creditor’s motive for doing so. However, creditor violates stay when creditor threatens to file criminal charges unless debtor pays, or does so in a way that is designed to coerce payment from debtor. After receiving notice of bankruptcy filing, creditor sent letter to debtor’s attorney that stated that creditor would be filing criminal charges and that debtor would incur costs and attorney fees in excess of amount owed to creditor; and later sent letter to debtor’s parents making same demands. Creditor acted willfully and with knowledge of bankruptcy case. Creditor violates stay when creditor takes action that could reasonably be expected to have significant impact on debtor’s decision to repay, and is contrary to what reasonable person would consider fair under circumstances.

3.95 Violations – Automobile “Kill” Switch

- (387) *In re Horace*, 2015 WL 5145576 (Bankr. N.D. Ohio 2015) – Creditor’s failure to disarm “kill” switch in debtor’s automobile upon being notified of bankruptcy is violation of stay where switch repeatedly shut off debtor’s automobile. Creditor’s continued use of kill switch post-petition, at a time when creditor admittedly had actual knowledge of case, violated Section 362(a)(3) as exercising control over property of estate; and Section 362(a)(6) as continued acts to collect a claim that arose pre-petition. Creditor’s failure to disarm switch resulted in switch emitting warning sounds that payment was coming due and served no purpose other than to pressure debtor into making payments. Creditor’s action were willful. Creditor had actual notice of bankruptcy and had ability to terminate use of switch but refuse to do so. Debtor suffered injury by operation of switch, as device beeped post-petition and repeatedly rendered vehicle inoperable causing injury as debtor lacked available transportation and debtor ended up remitting three direct payments to creditor (although obligation was to be paid by the Trustee in debtor’s plan) to restore vehicle to operable condition. However, absent evidence of actual damages, court would not award monetary damages. Debtor’s claim for “stress” standing alone was not sufficient to support damage award where there was no medical evidence presented to support alleged “stress” claim resulting from creditor’s action. Court would order creditor to remove the device at the creditor’s expense. Court also awarded attorney fees to debtor in sum of \$1,076.25 for 6.15 hours of work at \$175 per hour for time dedicated to addressing creditor’s stay violation, as award of attorney fees is in addition to, and not dependent on, award of actual damages.

3.96 Violations - Other Actions

- (388) *In re Dixon*, 2015 WL 1803924 (Bankr. E.D. Mi. 2015) – Evidence indicated that auction sale was concluded and buyer took possession of motorcycle and the auctioneer provided signed bill of sale to buyer prior to commencement of bankruptcy case. However, seller had not executed either an assignment of title or an assignment of certificate of title within meaning of MCL 257.233 prior to commencement of bankruptcy case. As such, title had not transferred and debtor still had legal title to motorcycle as of filing of petition, and later execution or certificate of title violated stay.
- (389) *In re Kelly*, 2014 WL 5449639 (Bankr. N.D. Ohio 2014) – Landlord violates stay by pursuing state court proceeding for eviction post-petition.
- (390) *In re Grisham*, 2013 WL 427935 (Bankr. D. Hawaii 2013) – Condo association violated stay by cutting off utility service to debtor’s unit. Utilities were billed to association as a whole, and association passed along pro-rata costs to unit owners through assessments. Association was not “utility” under Section 366 and association’s actions were expressly intended to force debtor to pay pre-petition and post-petition assessments.

3.97 Violations – Refusal to Comply With Contract

- (391) *Parker v. Smith*, 2014 WL 35913 (Bankr. S.D. Miss. 2014) – Creditor’s passive conduct can constitute willful violation of stay. Debtor purchased Jeep and financed through dealer pre-petition. Although dealer delivered vehicle to debtor, dealer refused to deliver certificate of title to debtor as required by state law. Dealer’s actions in refusing to deliver title constituted passive violation of stay as actions precluded debtor for licensing or insuring vehicle. Creditor’s lack of affirmative action did not protect creditor from damages for willful violation of stay where creditor wielded powerful collection tool and created powerful incentive for debtor to pay creditor.
- (392) *Lewis v. Negri Bossi USA, Inc.* 423 BR 643 (E.D. Mi. 2010) – Automatic stay prohibits actions by creditor to obtain payment of pre-petition obligations. Creditor’s refusal to honor pre-petition contract to provide post-petition services to maintain machines constituted violation of stay where creditor’s actions would result in diminution of value of property of estate. Automatic stay designed to protect both Debtor from loss of assets and also creditors from diminution of value of estate. Creditor’s refusal to honor pre-petition maintenance contract would cause assets to decline in value, to the harm and detriment of other creditors. Act will be violation of stay if it (1) could reasonably be

expected to have a significant impact on debtor's ability to pay; and (2) if a reasonable person would consider the conduct to be unfair under the circumstances. Court found that Creditor's refusal to provide services was solely effort to force payment of pre-petition obligations, even though Creditor never said it was refusing to provide services because of prior non-payment or that Creditor would provide services if it was paid for prior obligations.

- (393) *In re Brainer*, Case No. 07-51319 (Bankr. E.D. Mi. 2009) – Creditor's actions in enforcing provisions of loan agreements do not violate the automatic stay where the creditor's actions do not constitute an effort to collect on the loan. Agreement between Creditor and Debtor provided for "patronage dividend" for any year in which the interest paid by the Debtor exceeded the cost of funds by the creditor. Once Debtor defaulted on the loan (pre-petition), the lender suspended further patronage dividends as any payments made by Debtor were credited to principal in accordance with the loan documents and so there was no interest paid by Debtor that could exceed cost of funds. Enforcement of the loan documents by suspending the patronage dividend did not constitute effort to collect loan and did not violate automatic stay.

3.98 Violations – Post-dated Checks

- (394) *In re Waldo*, Case No. 09-30969 (Bankr. E.D. Tn. 2009) – Attorney who accepted post-dated checks prior to commencement of Chapter 7 case violated stay when Attorney attempted to cash check post-petition. Check constituted payment of otherwise dischargeable debt for unpaid attorney fees in Chapter 7 case. Attorney further violated the stay when Attorney wrote repeated letters to client advising that check had bounced and demanding additional \$50 for "returned check fees". Attorney's actions constituted "willful" violation of stay as attorney acted with full knowledge of debtor's bankruptcy case.
- (395) *Buckeye Check Cashing, Inc., v. Meadows*, 396 BR 485 (6th Cir. BAP 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.

3.99 Violations – Loan Modifications

- (396) *Crow v. Ocwen Loan Servicing, LLC*, 2013 WL 4668558 (Bankr. N.D. Ohio 2013) – Mortgage servicing company willfully violated stay by sending account statements that were inconsistent with Court approved loan modification. Mortgage servicer continued to send erroneous statements even after being advised by debtors and by debtors' counsel of the errors. Servicer's actions were willful within the scope of Section 362(k). Debtors alleged damages for emotional distress are not compensable under Section 362. However, willfulness of creditor's actions supported recovery of attorney fees. Punitive damages were also warranted where servicer continued to send account statements that were totally inconsistent with court's loan modification approval order including statements showing a post-petition deficiency in excess of \$25,000.00 when the loan modification brought the loan current. Despite repeated efforts of debtors and their attorney to rectify the matter, servicer continued to send such account statements for a period of approximately one year and, despite receiving adequate notice, disregarded adversary proceeding. Court awarded attorney fees of \$3,642.40, plus punitive damages of \$11,000.00. Court also ordered servicer to adjust records to reflect loan modification with proper credits for all payments made by debtors under the loan as modified; and to issue a new escrow statement to properly calculate the escrow balance on a going forward basis.

3.100 Violations – Transfer of Claims

- (397) *In re Mocella*, 2016 WL 3611816 (Bankr. N.D. Ohio 2016) – Creditor violates stay when creditor received payments from Chapter 13 Trustee to which creditor is not entitled and fails to return funds to the Trustee. Creditor erroneously filed "Transfer of Claim" asserting that a claim previously filed by another creditor had been transferred to Creditor. Creditor then received payments from the Trustee on the "transferred" claim which Creditor applied to an entirely different, mortgage claim. Even after Creditor realized that Transfer had been filed in error and withdrew the transfer, Creditor did not refund to the Chapter 13 Trustee payments received while the erroneous transfer was in place. The (i) automatic stay applied in this case; (ii) Creditor had actual knowledge of the Debtors' bankruptcy case; and (iii) Creditor's filing of the Claim Transfer was an intentional act amounting to a willful violation of the automatic stay. Creditor's retention of the Claim Payments was an intentional act that constitutes a willful violation of the automatic stay because it was an act to exercise control over property of the estate. While Creditor did not act with nefarious or malevolent intent, intent is not an element of stay violation, as long as creditor knows of bankruptcy and engages in deliberate conduct that happens to violate stay. Sanctions warranted where Creditor's actions were both wrongful and unreasonable. Creditor asserted ownership of claim in which Creditor had no legal or equitable interest of any type and failed to take any action to remedy problem even after discovering improper transfer.

3.101 Violations – Failure to Return Funds

- (398) *In re Mocella*, 2016 WL 3611816 (Bankr. N.D. Ohio 2016) – Creditor violates stay when creditor received payments from Chapter 13 Trustee to which creditor is not entitled and fails to return funds to the Trustee. Creditor erroneously filed "Transfer of Claim" asserting that a claim previously filed by another creditor had been transferred to Creditor. Creditor then received payments from the Trustee on the "transferred" claim which Creditor applied to an entirely different, mortgage claim. Even after Creditor realized that Transfer had been filed in error and withdrew the transfer, Creditor did not refund to the Chapter 13 Trustee payments received while the erroneous transfer was in place. The (i) automatic stay applied in this case; (ii) Creditor had actual knowledge of the Debtors' bankruptcy case; and (iii) Creditor's

filing of the Claim Transfer was an intentional act amounting to a willful violation of the automatic stay. Creditor's retention of the Claim Payments was an intentional act that constitutes a willful violation of the automatic stay because it was an act to exercise control over property of the estate. While Creditor did not act with nefarious or malevolent intent, intent is not an element of stay violation, as long as creditor knows of bankruptcy and engages in deliberate conduct that happens to violate stay. Sanctions warranted where Creditor's actions were both wrongful and unreasonable. Creditor asserted ownership of claim in which Creditor had no legal or equitable interest of any type and failed to take any action to remedy problem even after discovering improper transfer.

3.102 Actions by Debtor

- (399) *In re Dietrich*, Case No. 08-68294 (Bankr. E.D. Mi. 2011) – Debtor and Debtor's ex-spouse violated automatic stay by recording liens against property of estate post-petition and by purporting to amend pre-petition final judgment of divorce to convey to ex-spouse an interest in the property. Debtor also violated stay by continuing litigation that belonged to the Trustee as an asset of the estate and opposing the dismissal of that litigation after Trustee settled with the opposing party.

F. Particular Actions Not Violations

3.103 Inadvertent or Good Faith Actions

- (400) *In re Humbert*, 2016 WL 4508186 (Bankr. N.D. Ohio 2016) – Landlord violates stay by contacting debtor and demanding payment of pre-petition rent and by commencing post-petition eviction action without seeking relief from stay. Court can award damages where actions were taken in violation of stay; violation of stay was willful; and violation caused actual damages. Willful does not require specific intent but does require that creditor have knowledge of stay when actions are taken. Creditor instituted eviction proceedings before receiving notice of commencement of bankruptcy case and commencement of eviction would not be willful. Landlord stopped eviction proceedings up on being advised of bankruptcy case although landlord has not yet dismissed eviction action. Coeditor can violate stay by failing to take actions that cause existing violation of stay to cease. Upon learning of bankruptcy, landlord should either have sought retroactive relief from stay or dismissed eviction action. Debtor awarded attorney fees for services rendered after date on which landlord first learned of bankruptcy case and excluding fees for responding to landlord's motion for stay relief when ultimately filed. Debtor not entitled to non-economic damages as debtor did not present evidence sufficient to support a finding of emotional distress damages. Debtor not entitled to punitive damages as landlord's conduct was not egregious, vindictive or intentionally malicious. Creditor's conduct was not intentionally malicious or egregious and punitive damages were not necessary to deter future violations by landlord. Although landlord can possession from debtor, landlord must dismiss suit filed in violation of stay and file new action. Landlord cannot recover economic damages as debtor received discharge in bankruptcy.
- (401) *Kline v. Deutsche Bank National Trust Co.*, Case no. 11-088 (10th Cir. BAP 2012) – Lender did not willfully violate automatic stay by causing service of amended foreclosure complaint after debtor filed for relief under Chapter 13 where lender was unaware of bankruptcy filing and immediately ceased all actions upon learning of bankruptcy.
- (402) *Mitchell v. Home Echo Club, Inc.*, 2009 WL 1597901 (S.D. Ohio 2009) – Actions taken in violation of automatic stay are generally voidable and not void. Debtor unreasonably withheld notice of the Bankruptcy Petition and resulting Automatic Stay and the creditor would be prejudiced if the Debtor is permitted to raise the stay as a defense. Debtor cannot rely on an alleged violation of the automatic stay to invalidate the underlying action. Debtor's failure to list plaintiff in bankruptcy schedules did not render void creditor's post-petition filing of lawsuit to recover damages from Debtor. Subsequent dismissal of bankruptcy would permit litigation to continue even though complaint had been initially filed during period when automatic stay would otherwise have been in effect.
- (403) *In re Riley*, 472 BR 422 (Bankr. W.D. Ky. 2012) – Glitch in government's computer program, that resulted in withholding of funds that were payable to Chapter 7 debtors as refund of their prepetition overpayment of taxes for possible setoff against debtors' obligation to government on Farmers' Home Administration (FmHA) loan, did not place it in willful violation of automatic stay. Although at some point, government could no longer rely on failure of its computer software to excuse it from liability for violating automatic stay, inadvertent stay violation was merely "technical," and not "willful."

3.104 Satisfaction of Judgments or Claims

- (404) *Caraway v. Klein*, Case No. 12-1263 (9th Cir. BAP 2013) – Creditor does not violate stay by filing post-petition Satisfaction of Judgment in State Court records. Filing of Satisfaction of Judgment did not require resolution of any issues presented in or related to bankruptcy case.

3.105 Setoff

- (405) *Limor v. First National Bank of Woodbury*, 2009 WL 2208582 (Bankr. M.D. Tn. 2009) - Bank which held pledge of checking account to secure debt has right to freeze account at any time, even post-petition, to exercise its right of setoff. Right to setoff is unaffected by Bankruptcy filing pursuant to 11 USC Section 553(a), and freezing of account does not constitute violation of automatic stay. However, right of setoff is lost if Bank, after Debtor files Bankruptcy, allows Debtor to withdraw all money and close the account. Bank loses security interest when it releases the funds unless the transferee acts in collusion with the Debtor in violating the rights of the secured party.

3.106 Actions Against Property Not Property of Estate

- (406) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Creditor does not violate stay by retaining property that creditor lawfully acquired from debtor prior to commencement of case. Debtor had no right to or interest in the property, and creditor's retention did not constitute exercise of dominion or control over property of the estate.

- (407) *In re Lady Bug Corp.*, 2013 WL 5707775 (Bankr. E.D. Tn. 2013) – Automatic stay does not prevent actions against property that is not property of estate. Property of estate does not include property held by trustee where trustee holds bare legal title for benefit of third parties. Judgment creditor who obtained judgment liens against property prior to acquisition of property by trust could pursue foreclosure of judgment liens as action was not against property of estate and was not attempt to collect debt against debtor as debtor had no liability on the underlying obligation or the judgment itself.
- (408) *In re Grady*, 2009 WL 3254435 (Bankr. W.D. Mi. 2009) – Property owned by Debtor’s wholly owned corporate entity does not constitute property of Debtor’s estate. Corporate Creditor’s actions in seizing those assets after Debtor personally filed for bankruptcy protection does not constitute violation of stay, as stay prevents only actions against property of the estate, not property owned by related but non-debtor entities.
- (409) *In re Jackson*, 403 B.R. 95 (Bankr. D. Idaho 2009) – Where plan provided for property to vest in debtors at confirmation, property ceased to be property of estate. Therefore, post-petition creditor who recorded judgment against debtor’s residence did not violate stay, as creditor’s actions were not attempt to collect pre-petition obligation and did not interfere with property of the estate.
- (410) *In re Maib*, 2011 WL 1399073 (Bankr. E.D. Tn. 2011) – Creditor did not violate stay by continuing foreclosure proceedings against property in which debtor held no interest. Property was owned solely by debtor’s spouse. Foreclosure action did not seek judgment against debtor and did not impact property of estate. Stay does not affect actions that collaterally affect the debtor.

3.107 Adjournment or Continuation of Foreclosure Sale

- (411) *Perez v. Deutsche Bank National Trust Co.*, Case No. 16-007 (1st Cir. BAP 2016) – Post-bankruptcy continuances of foreclosure sale do not violate stay. Continuances of sale were not designed to harass debtor or to gain advantage in foreclosure process but were intended to preserve status quo during bankruptcy process. Continuance of foreclosure sale is not “continuation of action” as specified in Section 362 and is in fact a cessation of pending actions
- (412) *Baker v. Harrington*, Case No. 15-2384 (1st Cir. 2016) – Creditor is not required to seek relief from stay before rescheduling previously scheduled foreclosure sale. Counsel’s Motion for Sanctions based on creditor’s failure to “promptly” seek relief from stay before rescheduling foreclosure sale was legally unsupportable, warranting sanctions under Rule 9011.
- (413) *In re Gray*, Case No. 16-47221 (Bankr. E.D. Mi. 2016) - Creditor who scheduled foreclosure sale before petition was filed but prevented from holding sale once petition is filed does not violate stay by adjourning sale from week to week rather than cancelling sale. Adjournment of sale is not effort to collect from debtors or to obtain property of estate, but only to preserve status quo.
- (414) *Henson v. Bank of America*, 2012 WL 3987633 (Bankr. D. Co. 2012) – Bank did not violate automatic stay by failing to take steps to prevent automatic continuation, from week to week, of foreclosure sale. Bank did not take any action to collect debt or to cause foreclosure sale to proceed notwithstanding bankruptcy case and foreclosure sale did not occur. While a creditor who set a course of action in motion may be required to take steps to stop the proceeding where continuation would result in collection of a pre-petition obligation such as a writ of garnishment, creditor was not required to do anything more than advise party who would have conducted sale of filing of bankruptcy. Continuing a foreclosure sale date in the manner provided by state law does not violate the automatic stay where continuing sale does nothing more than preserve the status quo. Lender did not attempt to press forward with foreclosure sale or to institute new foreclosure proceedings.

3.108 Refusal to Extend Additional Credit

- (415) *In re Moss*, 470 BR 505 (Bankr. E.D. Wi. 2012) – Student lender did not violate automatic stay by refusing to extend additional student loans where debtor’s chapter 13 plan proposed only minimal distribution on already outstanding student loans. Refusal to continue to do business is not impermissible interference with fresh start.

3.109 Criminal Proceedings

- (416) *Weary v. Poteat*, 2015 WL 4747883 (E.D. Tn. 2015), *aff’d* 2015 WL 5712191 (6th Cir. 2015) – Creditor does not violate stay by filing police report, speaking with prosecutors or otherwise asking government to commence criminal prosecution, regardless of creditor’s motive for doing so. However, creditor violates stay when creditor threatens to file criminal charges unless debtor pays, or does so in a way that is designed to coerce payment from debtor. After receiving notice of bankruptcy filing, creditor sent letter to debtor’s attorney that stated that creditor would be filing criminal charges and that debtor would incur costs and attorney fees in excess of amount owed to creditor; and later sent letter to debtor’s parents making same demands. Creditor acted willfully and with knowledge of bankruptcy case. Creditor violates stay when creditor takes action that could reasonably be expected to have significant impact on debtor’s decision to repay, and is contrary to what reasonable person would consider fair under circumstances.
- (417) *In re Gherini*, 2014 WL 2567106 (Bankr. E.D.N.C. 2014) – Section 362(b)(1) excepts from the automatic stay criminal proceedings and is clear and must be enforced according to its terms. Continuation of criminal investigation, arrest or prosecution is not stayed even if prosecution includes or requires cooperation of creditors. To extent motive of creditors may be relevant, evidence indicated that creditors contacted prosecutors in effort to prevent future fraudulent activity by debtors, without any hope of actually recovering any damages in the prosecution, indicating that motive was to protect public from future frauds.
- (418) *Collett v. Lee Oil Co., Inc.*, Case No. 13-8033 (6th Cir. BAP 2014) – Section 362(b)(1) excepts from automatic stay the commencement or continuation of criminal proceedings. Prior to commencement of bankruptcy case, defendant filed complaint with local police department; and also contacted its insurance company to file a claim seeking reimbursement and was advised that insurance would pay the claim only if creditor pursued criminal charges. Creditor took no further action. Debtor filed bankruptcy and shortly after the filing the prosecutor

filed a criminal complaint. After filing the complaint, the prosecutor contacted creditor to obtain assistance and information in the prosecution of the complaint. Primary purpose of creditor was not to collect pre-petition debt from debtor, but rather to collect from insurance company. Any actions of creditor in instituting criminal proceedings were undertaken prior to bankruptcy filing, indicating that creditor was not attempting to circumvent bankruptcy protections. Creditor's post-petition actions were taken solely in response to request from prosecutor for assistance and information. Court did not need to determine whether Section 362(b)(1) constituted absolute protection from criminal proceedings regardless of creditor intent, where even using "intent of creditor" test evidence indicated that creditor did not institute criminal proceedings primarily to coerce payment of otherwise discharged debt.

- (419) *In re Ward*, 2013 WL 4051351 (Bankr. D. Mont. 2013) – Automatic stay does not prohibit filing of criminal complaint even where alleged motive for filing complaint was to collect debt. Debtor provided home renovation services to creditor. After project was completed, creditor accused debtor of theft and pursued collection of damages. Debtor filed for Chapter 7 and creditor attended the first meeting of creditors. A few days later, creditor filed criminal complaint against debtor for theft. Code expresses strong policy against any interference by bankruptcy court in decisions of state prosecutors to pursue criminal charges. Creditor did nothing more than make report to proper authorities, and reporting possible crime is not violation of stay.
- (420) *In re Storozhenko*, 459 BR 697 (Bankr. E.D. Mi. 2011) – Post-petition proceeding brought in state court by state court receiver to hold debtor in contempt for violating orders entered in state court divorce proceeding were criminal proceedings within exception to automatic stay, to the extent receiver sought payment of fine to court or imprisonment for fixed term. However, to the extent contempt proceedings sought to recover restitution plus receiver costs and expenses, proceedings were civil in nature and precluded by automatic stay.

3.110 Contempt Proceedings

- (421) *Yellow Express LLC v Dingley*, 514 BR 591 (BAP 9th Cir. 2014) - Creditor's post-petition prosecution of a contempt proceeding in state court was not violation of the stay, where debtor had not complied with state court discovery order.

3.111 Furnishing Information

- (422) *In re Juliao*, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Creditor did not violate stay or co-debtor stay by furnishing information to credit bureaus. Actions were not designed to collect debt from either debtor or co-debtor. Information provided to bureaus included whether the contractually due payments were past due based on internal records of creditor. Debtor was delinquent in payments to Chapter 13 Plan resulting in delays in disbursements by Trustee. Debtor's incorrect understanding that where mortgage payments were made by Trustee, the creditors could not report late payments did not result in violation of stay. Fact that reporting was causing difficulties for co-debtor is not a violation of stay.
- (423) *Kowall v. GMAC Mortgage, LLC*, Case No. 10-3221 (Bankr. E.D. Mi. 2011) – Creditor's conduct will be violation of Section 362(a)(6) if the conduct could reasonably be expected to have a significant impact on debtor's decision to repay obligation and is contrary to what a reasonable person would consider fair under the circumstances. Creditor's reporting of delinquent loan to credit reporting agency prior to commencement of case is not violation of automatic stay. Creditor's reporting of information to credit reporting agency post-petition does not suggest course of conduct designed to induce debtor to pay, where debtor had no contact with creditor or agency until years after alleged reporting occurred. Information reported was accurate as to status of loan and pendency of bankruptcy.
- (424) *Messick v. Ascend Fed. Credit Union*, 424 B.R. 344 (E.D. Tenn. 2010) - Informational letters which credit union mailed to Chapter 13 debtors, advising them that, pursuant to credit union's generally applicable policy of denying services to any member who had caused financial loss to credit union, debtors' accounts would be converted into "share loss" accounts, with certain restrictions on withdrawals and suspension of all credit union services to accounts, unless debtor-wife's name was removed from accounts, did not violate automatic stay as commencement or continuation of proceeding to recover, or as act to collect, assess or recover, on claim that arose prior to commencement of bankruptcy case. Bank employee's truthful response to question posed by debtor-husband that Debtor could reaffirm debt did not establish either coercive action to encourage repayment or any willful intent on credit union's part to collect debt.

3.112 Filing Proof of Claim

- (425) *Turner v. American Express Centurion Bank*, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Creditor's filing of a proof of claim is not a violation of the automatic stay.
- (426) *Poteet v. eCast Settlement Corp.*, 2011 WL 3626696 (Bankr. E.D. Tn. 2011) – Filing a proof of claim in the debtor's bankruptcy case does not violate the automatic stay. Alleged inaccuracy in claim or incompleteness of claim does not convert proof of claim into stay violation. Proper remedy is for debtor to object to claim.

3.113 Internal Recordkeeping

- (427) *Jacks v. Wells Fargo Bank*, 2011 WL 2183979 (11th Cir. 2011) – Creditor's recording of fees and costs on internal records without disclosing those fees and costs on proof of claim does not violate stay. Creditor made no attempt to collect these fees or to add them to the balance due on the mortgage.

3.114 Litigation – Debtor as Plaintiff

- (428) *Brantley v. CitiMortgage*, 2016 WL 6092709 (S.D. Ohio 2016) – Automatic stay did not come into effect when debtor filed Chapter 13 as debtor had two prior bankruptcy cases pending and dismissed in prior year. Defendant not stayed from prosecution of Motion to Dismiss and Motion to Declare Plaintiff a "Vexatious Litigator".

- (429) *Riviera Drilling & Exploration Co. v. Gunnison Energy Corp.*, 2011 W 14461 (10th Cir. 2011) – Litigation in which Debtor is the plaintiff is not stayed by bankruptcy filing. Defendants are not stayed from asserting defenses or seeking to have case dismissed. Court can dismiss case for failure to prosecute where Debtor fails to prosecute, failure produces material prejudice to defendants, Debtor’s actions short circuit judicial process as occurring on eve of trial and Debtor missed other deadlines, and Debtor was responsible for failure of case to proceed by discharging counsel on eve of trial and failing to make sufficient effort to obtain replacement counsel.
- (430) *In re Bryner*, 425 B.R. 601 (10th Cir. BAP 2010) - Automatic stay does not prevent purely defensive action by party that debtor has sued. Parties against whom Chapter 13 debtor had obtained a default judgment prepetition, which debtor attempted to satisfy by obtaining two separate writs of garnishment, one prepetition and the other post-petition, acted in purely defensive manner in moving to set aside default judgment post-petition, such that their conduct did not violate automatic stay.

3.115 Post-Petition Perfection of Lien – Safe Harbor

- (431) *In re Crisp*, 2010 WL 2465446 (Bankr. W.D. Tn. 2010) – Automatic stay does not prevent perfection or continuation of perfected lien to the extent perfection or continuation would not be avoidable under Section 546. Statutory liens such as mechanic liens qualify as liens that are not avoidable under Section 546. Towing Company’s actions in holding vehicle and later selling vehicle at auction without stay lift or notice to court constituted action to enforce statutory lien for towing charges did not violate stay.

3.116 Surrendered Collateral

- (432) *Failla v. Citibank, NA*, Case No. 15-15626 (11th Cir. 2016) – “Surrender” requires that debtor relinquish rights in collateral and take no action inconsistent with that designation. Surrender survives abandonment of property by trustee and duty to surrender collateral continues. Debtors filed Chapter 7 and indicated in statement of intentions that they would surrender their home. There was no dispute that mortgage was valid, that debtors had defaulted on payments, or that value of property was less than balance owed. After trustee abandoned the home, Citibank continued foreclosure and debtors then contested foreclosure action. Creditor sought order from bankruptcy court ordering debtor to stop contesting foreclosure action. Bankruptcy Court entered Order directing debtors to stop contesting foreclosure or risk losing discharge. District Court affirmed and 11th Circuit affirmed.
- (433) *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.
- (434) *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.
- (435) *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.
- (436) *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 or remove property from estate.
- (437) *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.

3.117 Domestic Support Litigation

- (438) *McMaster v. Small*, Case No. 11-40888 (5th Cir. 2012) – Ex-spouse violated stay where ex-spouse attempted to recover pre-petition support award from property of estate and sought to hold debt or in contempt of court for failing to pay pre-petition amounts without limiting collection efforts or determination of “ability to pay” without reference to property of estate.
- (439) *Russell v. Caffey*, Case No. 08-00450 (11th Cir. 2010) - Personal notice of bankruptcy is not required for violation of stay if notice is delivered to attorneys or other representatives. Debtor’s ex-spouse violated stay by obtaining arrest warrant for failure to pay support and failed to take any action to vacate warrant notwithstanding imputed and later actual notice of bankruptcy filing. Party had affirmative duty to move to vacate state court contempt order and arrest order.
- (440) *In re Kallabat*, Case no. 12-53744 (Bankr. E.D. Mi. 2012) – Sanctions are appropriate under Section 362(k) where non-bankrupt party knowingly takes actions in violation of stay. Debtor’s estranged spouse could not be held to have violated stay where all actions that constituted stay violation were taken by spouse’s attorney in State court action for dissolution of marriage. Spouse’s attorney’s request that the domestic relations court award spouse the marital home free and clear of any interest of debtor violated Section 362(a)(3). Attorney also violated stay by asking domestic relations court to hold debtor solely liable on credit card allegedly fraudulent opened by debtor in the name of spouse. Attorney further violated the stay by submitting a proposed order that incorporated the relief regarding the marital

home and other assets and credit cards, and continuing to request that the State court enter that order. Actions taken in violation of stay are avoidable. Bankruptcy Court would declare void rulings made by State court that attempted to adjudicate property interest of debtor or to hold debtor liable for disputed claim. Debtor failed to present evidence of any actual damages, precluding award at this time, but permitted debtor additional time to submit affidavit itemizing damages allegedly suffered as result of stay violations.

3.118 Pre-petition Mortgage Escrow Claims

- (441) *In re Rodriguez*, 2012 WL 589553 (Bankr. D.N.J. 2012) – Following Third Circuit remand, Court concluded that lender violated stay when lender continued efforts post-petition to collect pre-petition escrow shortage. Escrow shortage that exists as of the filing of the petition is a pre-petition claim. Following commencement of case, lender sent letters to debtor increasing the mortgage payment and advising that the payment was necessary to keep the escrow account from falling below zero. Countrywide's act of sending these documents to the Debtors directly violated Section 362(a)(6), which stays any act to collect, assess, or recover a claim against Debtors that arose before the commencement of this case. Lender's actions were willful. Lender knew of bankruptcy filing but proceeded to send letters nonetheless. Debtor suffered actual damages in the form of attorney fees where lender was forced to litigate to protect their rights. Attorney fees are compensable even in absence of other actual damages or compensable harm. Debtors awarded fees in sum of \$85,000.
- (442) *In re Rodriguez*, Case No. 09-2724 (3d Cir. 2010) – Mortgage creditor violated automatic stay in Chapter 13 proceeding by recalculating post-petition escrow payments to include pre-petition escrow shortfalls.

3.119 Voluntary Post-Petition Transfers

- (443) *Sloan v. Anderson*, 2013 WL 9539539 (Bankr. S.D. Ohio 2013), *aff'd* 2014 WL 1978917 (6th Cir. BAP 2014) – Debtor's voluntary transfer post-petition, even of property of estate, is not violation of stay. However, transfer may be avoidable under Section 549. Debtor did not violate stay when debtor hired third party to recover surplus proceeds of post-petition foreclosure sale or when Debtor then allowed recovery company to retain proceeds recovered. However, recovery company and its principal were liable for proceeds received under Section 549.

3.120 Administrative Closing of State Court Proceeding

- (444) *Schang v. Muller, Muller, Richmond, Harms & Myers, P.C.*, 2015 WL 3441178 (E.D. Mi. 2015) – Creditor has no affirmative duty to seek to administratively close state court proceeding on notice of commencement of bankruptcy case. While creditor has affirmative duty to take action in cases where creditor is in possession of property of the debtor or property of the estate to restore that property to the debtor, a failure to administratively close a state court proceeding does not constitute an effort to collect debt or to exercise possession and control over property of estate.

3.121 Tax Forms

- (445) *Bates v. Citimortgage, Inc.*, 2016 U.S. Dist. LEXIS 16247 (D.N.H. 2016) – Creditor does not violate stay by issuing from 1099-A informing debtors that foreclosure sale may have resulted in reportable gain or loss. Creditor is required to provide notice to debtors after foreclosure and is not attempt to collect debt. Checking box on form that states that debtor was personally obligated to pay debt. Statement, even if incorrect, was not effort to impose liability or to seek to impose any tax liability on debtors or to collect anything.

G. Sanctions

3.122 Sanctions – Standing to Request

- (446) *Mwangi v. Wells Fargo Bank*, 2014 WL 5334683 (9th Cir. 2014) – Debtor lacks standing to seek sanctions for alleged stay violation once court determines that creditor did not violate stay.
- (447) *Caffey v. Jag Autocare, LLC*, 2014 WL 3888318 (Bankr. N.D. Ohio 2014) – Creditor's post-petition retention of automobile that had been properly repossessed pre-petition violated stay as creditor's refusal to turnover vehicle constituted exercise of control over property of estate. Violation was willful as creditor admitted to knowledge of bankruptcy filing and creditor intentionally retained vehicle in violation of stay. However, debtor lacked standing to maintain action for damages. In Chapter 7, duty to turnover vehicle ran to Trustee, not debtor. Although debtor was allegedly damaged by loss of use of vehicle, damages were not attributable to violation of stay as debtor had no right to use or possess the vehicle while it was property of estate. Unlike Chapter 11, where debtor serves as debtor-in-possession, or Chapter 13 where debtor is imbued with certain rights of trustee and is imbued with right to possess estate property, debtor in Chapter 7 has no right to possess estate property and cannot be harmed by loss of use of estate property.
- (448) *Bankers Healthcare Group, Inc. v. Bilfield*, 2013 WL 2897035 (Bankr. N.D. Ohio 2013) – Debtor-wife has standing to seek damages for emotional distress even where wife was not liable to creditor who allegedly violated stay. To extent that wife experienced emotional distress that was beyond stress that normally attaches to someone whose family business is failing and who is filing for bankruptcy, and that resulted from creditor's willful violation of stay, wife suffered sufficient injury in fact to support prudential standing even if creditor's conduct was aimed solely at debtor-husband.
- (449) *Cook v. Wells Fargo Bank, NA*, Case no. 12-2100 (10th Cir. 2013) – Failure to follow procedural requirements of Section 554 and Rule 6007 renders abandonment ineffective. Debtor did not reacquire title to pre-conversion actions for alleged violate of Automatic Stay while case was in Chapter 11 and prior to conversion to Chapter 7, where Chapter 7 Trustee did not provide notice and an opportunity for hearing on potential abandonment. Neither Trustee's Notice of Abandonment nor Report of No Distribution provided any opportunity for an objection to the abandonment, where the Notice merely stated that the Trustee "gives notice that he abandons all remaining property of the estate".

There were no provisions for objecting to abandonment, no indication that either the notice or report of no distribution were sent to interested parties, and no hearing to entertain objections. Intent to abandon, without proper notice to creditors, is insufficient to establish abandonment. Debtor had no interest in alleged claim for violation of stay and could not allege any injury that was concrete, particularized, and actual or imminent; or that was fairly traceable to the actions of the creditor; or that were redressable by favorable ruling; as necessary to establish Article III standing.

- (450) *In re Klarchek*, 2013 WL 364301 (Bankr. N.D. Ill. 2013) – Debtor lacks standing to pursue action for damages for violation of stay that occurred prior to conversion of case to Chapter 7. Debtor filed Chapter 11 petition. Debtor then sought damages against lender for allegedly pursuing state court litigation post-petition. While damage action was pending, case converted to Chapter 7. Upon conversion, action belonged to Chapter 7 Trustee and only Trustee had standing to pursue. Debtor’s Motion for Sanctions dismissed for lack of standing.

3.123 Sanctions Generally

- (451) *Pereira v. 397 Realty, LLC*, Case No. 16-1665 (E.D. N.Y. 2016) – Conduct that violates stay does not rise to level of contempt without intent to violate stay. Creditor held judgment lien that was about to expire. Creditor renewed lien under state law and then set property for foreclosure sale. However, Clerk of Court failed to enter Extension Order in the Public Records as required. When creditor later inquired as to why Order had not been recorded. Clerk of Court realized its error and recorded Order. Bankruptcy Trustee sought sanctions alleging that creditor, post-petition, had taken an act to create or perfect a lien post-petition in violation of Section 362(a)(4). Creditor must take an act that has its purposes as the creating of the line, and creditor must intent or at last reasonably anticipate bringing about consequences of action. Fact that creditor takes actions that give rise to a lien as collateral result of act is not sufficient. Creditor did not intend to create lien when creditor contacted clerk to merely ask what happened to the Extension Order without any demand that the Clerk take action to fix the error, and Clerk, on its initiative, recorded the Extension Order without prompting by creditor.
- (452) *In re Williams*, 2016 WL 4065938 (Bankr. N.D. Ohio 2016) – Sanctions for violation of stay are appropriate where stay violation is “willful”. Act is willful when creditor knew of stay and took intentional act that violates stay. Sanctions do not require proof of specific intent to violate stay, only of intentional act that is violation. Debtor entitled to actual damages for willful violation of stay. However, punitive damages are appropriate only where creditor’s conduct was particularly egregious, vindictive, or intentionally malicious, or was done in bad faith or reckless disregard of law. Real property owned by debtor at time of commencement of case is property of Chapter 13 estate. Creditor who had previously purchased Tax Certificates for unpaid property taxes violated stay by scheduling property for tax sale post-petition without receiving relief from stay. Award of actual damages in amount of attorney fees incurred by debtor in addressing stay violation warranted. Court reserved issue of punitive damages provided that creditor paid the attorney fees as ordered.
- (453) *In re Wilson*, 2016 WL 3303325 (Bankr. E.D. Tn. 2016) – Commencement of bankruptcy stops any effort to evict debtor from leased property. Leasehold interest is property of estate protected from termination and repossession, regardless of whether landlord knew of filing at time of efforts to evict. Landlord’s knowledge or lack of knowledge at time he filed eviction action and obtained order of possession and causing sheriff to dispossess debtor is irrelevant to whether actions violated stay. Violation of stay itself does not warrant damages unless violation was “willful”. Violation is “willful” if person carried out action with notice of bankruptcy case. Specific intent or awareness by creditor that conduct violates stay is not required, and it is sufficient that creditor knows of bankruptcy and engages in deliberate conduct that happens to violate stay. Good faith and reliance on another are not valid defenses, even if creditor relied on advice of counsel. Once Creditor has actual notice of case, burden is on creditor to reverse any action that may have been taken in violation of stay. Once established, Section 362 carries strict liability leaving only issue of damages. Landlord had actual knowledge of filing. Although landlord was not on schedules or matrix, debtors advised landlord on multiple occasions that they had filed bankruptcy, they were current in rent and lease had not expired yet landlord proceeded to file eviction action, obtain judgment of possession and cause sheriff to dispossess debtors.
- (454) *In re Johnson*, 2016 WL 1719149 (Bankr. S.D. Ohio 2016) – Court has authority to enforce automatic stay by levying sanctions where creditor deliberately carries out prohibited actions with knowledge of bankruptcy filing. Specific intent or awareness by creditor that conduct violates the stay is not required, where creditor knows of the bankruptcy and engages in deliberate conduct that violates the stay. Where creditor has actual notice of the bankruptcy Court will presume violation was deliberate or intentional, creating strict liability, with only remaining issue being damages. Creditor violated stay after receiving notice of bankruptcy filing, creditor pursued arbitration proceeding to establish creditor’s position as secured creditor and to enforce security agreement. While creditor may have believed that pursuit of arbitration was not stay violation creditor had ample notice that arbitration was stayed by notice not only from debtor’s counsel but from arbitration association. Sanctions included voiding of arbitration agreement, attorney fees and punitive damages.
- (455) *In re Docherty*, 2016 WL 675835 (Bankr. N.D. Ohio 2016) – Creditor violated stay by repossessing debtor’s automobile one day post-petition. Creditor then retained possession and refused to return automobile for 17 days notwithstanding actual notice of bankruptcy filing received after initial repossession. Creditor’s initial repossession was not willful violation as creditor did not have notice of filing when vehicle repossessed. However, creditor had affirmative duty to return vehicle to debtor promptly upon being notified of bankruptcy filing. Creditor’s actions in refusing to return vehicle constituted willful violation of stay warranting sanctions. Creditor also violated stay by removing and destroying the license plates for the vehicle. Debtor’s down payment on new vehicle was not recoverable as debtor’s petition indicated that debtor intended to surrender vehicle so cost to acquire new vehicle was unrelated to stay violation. However, debtor was required to obtain new vehicle approximately 45 days earlier than would have been required had the car been timely returned, allowing debtor to recover damages equal to 45 days’ worth of payments on new vehicle. Debtor entitled to recover 2 days lost wages, one day where she missed work for lack of transportation and one day to attend hearing on Motion for Sanctions and costs for replacement license plates. Recovery of attorney fees limited where debtor and counsel failed to take steps to mitigate harm. Although debtor texted creditor of bankruptcy filing, debtor’s attorney never made any effort to contact creditors to demand return of car or advise that motion for sanctions would be filed. Attorney not entitled to payment for 40 hours of work where a single phone call likely would have produced the return of

the vehicle. Punitive damages not warranted where creditor conduct, while willful, was not egregious, vindictive, or intentionally malicious. Creditor was not openly defiant and did not take actions that were clearly threatening or coercive.

- (456) *Mitchell v. Anderson*, 2016 WL 367038, 545 BR 209 (Bankr. N.D. Ohio 2016) – Party seeking damages for alleged violation of stay must prove (1) the action taken was in violation of the automatic stay; (2) the violation was willful; and (3) the violation caused actual damages. Debtor must prove that creditor knew of automatic stay and that actions were intentional. Debtor has obligation to mitigate damages prior to seeking court intervention. Debtor established that creditor willfully violated stay when creditor, with actual knowledge of filing, continued to prosecute pending state court action and filed three additional state court actions. However, debtor failed to present credible evidence of actual damages beyond costs of notifying state court of pending bankruptcy cases. Any additional attorney fees incurred by debtor in defending those cases after commencement of the bankruptcy case could have been avoided had debtor timely notified state court of bankruptcy petition. Any additional damages were neither reasonable nor necessary. Debtor failed to produce evidence, such as receipts, for other elements of damages, precluding court from awarding those sums.
- (457) *In re Gomez*, 2015 WL 4638477 (Bankr. N.D. Ohio 2015) – Party seeking sanctions under Section 362(k) must prove, by a preponderance of the evidence, opposing party violated stay, that the violation was committed willfully, and that party was injured by the violation. A willful violation occurs when the creditor knew of the stay and violated the stay by an intentional act. It does not require proof of a specific intent to violate the stay, rather, it requires that the acts which violate the stay be intentional. Where the creditor received actual notice of the automatic stay, courts will presume that the violation was deliberate. Creditor is not only required to refrain from certain activity, but may be required to take affirmative action to prevent further violations. Creditor violated stay by repeatedly sending e-mails demanding payment after case was filed. Fact that e-mails were auto-generated did not alter conclusion as creditor had affirmative duty to ensure that e-mails ceased. Court was unable to determine whether violation was willful as record was not clear when creditor had actual notice of bankruptcy case. Although BNC indicated that notice had been sent to creditor, creditor's affidavit attesting that creditor did not receive notice created factual issue. Oral notice can be sufficient where it would cause reasonably prudent person to make further inquiry. Debtor allegedly responded both verbally and by e-mail but merely disputed that debt was owed, and did not mention that debtor had filed for bankruptcy. Once creditor received a demand letter from debtor's counsel that referenced bankruptcy filing, if creditor ceased communications at that point, any prior communications would not be willful, although any communications after that date would be willful.
- (458) *In re Samb*, Case No. 14-40552 (Bankr. E.D. Mi. 2015) – Section 362(k) allows court to award damages for willful violation of stay. Willful violation of stay does not require proof of specific intent to violate stay but does require intentional act by party who is aware of the stay. Movant must prove damages by preponderance of evidence, and that damages were proximately caused by stay violation. Court can award punitive damages in appropriate circumstances, where conduct is egregious and award of actual damages is insufficient to deter deliberate and repeated violations. Motion established violation of stay where creditor send bill to debtor after filing of case, but motion failed to demonstrate or even allude to any possible injury precluding award of actual damages. Motion also failed to demonstrate level of willfulness required for punitive damages where only allegation was that creditor sent one statement to debtor. Motion did not demonstrate repeated violations or even that debtor contacted creditor and requested that creditor stop sending bills. Further, absent evidence of willfulness, court would not award debtor's attorney fees incurred in filing the motion.
- (459) *Carter v. First National Bank*, 2014 WL 6093496 (8th Cir. 2014) – Section 362(k) allows court to enter sanctions against party who willfully violates stay, including actual damages, costs and attorney fees. Action is "willful" if action is deliberate and taken with knowledge that a bankruptcy petition has been filed. Bank did not knowingly violate stay where bank was unaware of bankruptcy filing when it initially filed action for replevin.
- (460) *In re Kelly*, 2014 WL 5449639 (Bankr. N.D. Ohio 2014) – Section 362(k) allows award of damages for "willful" violation of stay. Action is "willful" if creditor, with knowledge of bankruptcy filing, takes action inconsistent with stay. Creditor does not need to intend to violate stay; it is sufficient that creditor takes deliberate action that happens to violate stay. Actions taken after creditor has knowledge of bankruptcy are presumed to be in bad faith, and formal notice of filing is not necessary if creditor has sufficient informal or oral notice that would place reasonable person on inquiry notice. Landlord willfully violated stay where debtor orally advised landlord of commencement of bankruptcy case but landlord pursued action to evict debtor and recover possession.
- (461) *In re Nicole Gas Production, Ltd.*, 2014 WL 4855005 (Bankr. S.D. Ohio 2014) – Violation of automatic stay remedied by motion for contempt. Alleged good faith of violating party is not defense to contempt but may mitigate damages. Debtor's principal violated stay by filing complaint against third party that asserted causes of action belonging to debtor and debtor's estate. Principal did so fully aware of filing of bankruptcy case and full knowledge of all of the facts and circumstances and lacked any good faith belief that principal had independent cause of action. Principal intentionally and willfully attempted to assert control over property of estate warranting imposition of sanctions.
- (462) *Bankers Healthcare Group, Inc. v. Bilfield*, 2013 WL 2897035 (Bankr. N.D. Ohio 2013) – Creditor violates stay by filing collection action against debtors 6 days after commencement of case, and by continuing efforts even after bankruptcy counsel contacted creditor to request that action cease. Creditor failed to take steps to stop process server from serving summons and complaint and process server showed up at debtor's place of business and became disruptive, throwing papers at debtor in front of clients. Actions were willful violations of stay where creditor had actual notice of bankruptcy filing for at least one week and in many instances as much as a month yet continued activities. Damages include actual damages that are reasonably incurred as a proximate cause of stay violation, plus costs and attorney fees. Economic damages included lost income that resulted from debtor's reduction in patient scheduling for one month following process server's contact at office, and lost revenue from two patients who witnessed altercation and never came back to the debtor for future services. Debtor also entitled to costs incurred in attending hearings and in copy costs that were necessary for hearings on contempt. Damages for emotional distress are damages that can be recovered where debtor proves independent economic damages. However, while creditor's conduct may

have aggravated debtor's pre-existing medical condition, evidence was insufficient to establish that debtor's health issues were caused by process server rather than some independent health condition.

- (463) *In re Grisham*, 2013 WL 427935 (Bankr. D. Hawaii 2013) – Condo association violated stay by cutting off utility services after commencement of case. Sanctions awarded of \$8,940 including loss of rental income, attorney fees and emotional distress.
- (464) *In re Galutan*, Case No. 12-31837 (Bankr. E.D. Il. 2012) – Creditor violated stay by telephoning debtor once or twice every day, although debtor and debtor's counsel repeatedly advised creditor of bankruptcy filing. Creditor acknowledged bankruptcy filing but contended that filing did not prohibit actions to collect debt and that "petition" was merely an "application" for bankruptcy that did not prevent collection efforts. Creditor also sent repeated written demand letters after petition date. Creditor was served with Motion for sanctions but did not respond and did not appear for the hearing on the Motion. Creditor's conduct amounted to knowing and intentional violation of stay. Sanctions included actual damages for attorney fees in enforcing the stay, plus punitive damages of \$15,000, plus an additional \$500 per day for each day on which creditor continued harassment after entry of the Order.
- (465) *In re Brown*, 2012 WL 3908029 (Bankr. E.D. Pa. 2012) – Willful violation does not require that creditor intend to violate stay. Action is willful violation when creditor violates stay with knowledge that petition has been filed. Willful merely requires intentional acts that violate stay. Evidence was undisputed that creditor, with full knowledge of stay, failed to halt to pre-petition collection efforts, resulting in post-petition levy and garnishment. That creditor and counsel believed that action did not violate stay, actions were nonetheless intentional and taken with knowledge of filing. Debtor proved that when debtor's tenant was served with the garnishment, tenant vacated premises, causing actual damages equal to lost rent less amount of security deposit; plus attorney fees incurred in connection with preparation, filing and service of Motion and attendance at the hearing and post-hearing submission. However, court would not impose punitive damages as actions, while willful, did not evidence egregious conduct in failing to prevent post-petition continuation of collection efforts based on good faith, but erroneous, belief that actions did not violate stay.
- (466) *In re Gallo*, 2012 WL 3930320 (Bankr. M.D.N.C. 2012) – Creditor willfully violated stay by commencing foreclosure proceedings notwithstanding notice of bankruptcy case and by repeatedly commencing or continuing collection efforts after having actual notice of filing including letter from Chapter 13 Trustee. Section 362(k) provides for award of actual damages including costs and attorney fees incurred as a result of willful violation of stay. While award is mandatory upon finding of willfulness, Debtor must support amount of any actual damages. Debtor demonstrated attorney fees in excess of \$5,000 as a result of creditor's conduct. Section 362(k) also allows award of punitive damages where creditor has demonstrated egregious, vindictive or intentional misconduct. Creditor's repeated acts in violation of stay, when creditor had actual knowledge of pendency of case, warranted punitive damages in the amount of \$10,000.00.
- (467) *In re Webb*, 2012 WL 3638005 (Bankr. N.D. Ohio 2012) – Secured creditor and counsel violated stay by scheduling foreclosure sale at time when bankruptcy case was open and discharge had not entered. Creditor had previously scheduled sale and been sanctioned, yet inexplicably re-set the sale yet again, also in violation of stay. Counsel's alleged reliance on advice from clerk for state court magistrate did not excuse violation where counsel did not independently verify status of bankruptcy case or automatic stay and where attorney has extensive experience and knew he could review court dockets at no charge. Sanctions included \$5500 in fees through filing of the Motion with leave to file supplement for additional fees incurred through hearing.
- (468) *McMaster v. Small*, Case No. 11-40888 (5th Cir. 2012) – *Pro se* debtor entitled to attorney fees in prosecuting Motion for Sanctions for violation of stay. Fees were sought for attorneys handling domestic support action, and were necessitated by ex-spouse's attempts, in violation of stay, to collect support from property of estate and to have debtor held in contempt by state court for failing to pay.
- (469) *In re Thorpe*, 2011 WL 5909403 (Bankr. E.D.N.C. 2011) – Lender willfully violates stay by sending contractor to change locks at debtor's home before stay relief hearing. Debtors awarded attorney fees of \$1500 and punitive damages of \$5,000. Actions of lender would cause person of ordinary susceptibility to suffer significant emotional distress when faced with loss of home. Debtors suffered real emotional distress where husband was recuperating from recent surgery and wife had history of anxiety disorders.
- (470) *In re Jha*, 461 BR 611 (Bankr. N.D. Ca. 2011) – IRS notice of intent to levy violated stay, but debtor's attorney fees for processing motion for contempt are not compensable. Debtor entitled to attorney fees incurred in having 9 notice of levy lifted and to nominal award of \$20 for "stomach distress medication".
- (471) *Florida Department of Revenue v. Diaz*, 647 WL 1073 (11th Cir. 2011) – Debtor not entitled to damages for alleged violation of stay 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.
- (472) *Schwartz-Tallard v. America's Servicing Company*, Case No. 11-1429 (9th Cir. BAP 2012), *affd*, 2014 WL 4251571 (9th Cir. 2014) – Debtor who successfully defends appeal of order determining that creditor violated stay entitled to attorney fees for defense of appeal. Creditor post-petition sold property at foreclosure sale. Debtor filed motion for sanctions under Section 362(k). Bankruptcy court determined that ASC violated stay, and ASC appealed. Bankruptcy Court Order was affirmed on appeal, and debtor sought award of attorney fees incurred in defending the appeal. Court stated that while fees are not awardable in connection with the debtor's prosecution of its Motion for Sanctions, once debtor prevailed and creditor appealed, debtor's incurrence of attorney fees for the appeal was no longer a voluntary process. Appellate attorney fees were incurred to ensure continuity of stay and to protect the damage award for the initial stay violation, such that appellate attorney fees constitute actual damages for purposes of Section 362(k).
- (473) *In re Baer*, 2012 WL 2368698 (6th Cir. BAP 2012) – Section 362(k) authorizes award of actual damages, including attorney fees and costs, for willful violation of the automatic stay. Party must prove by preponderance of evidence that damages were proximately caused by and reasonably incurred as a result of violation of stay, and must be able to demonstrate amount of damages with reasonable certainty. Punitive

damages may also be awarded where creditor's conduct was egregious, vindictive, or intentionally malicious. If creditor acted in good faith belief that the stay had terminated under Section 362(h), the recovery is limited to actual damages. Debtor's request for sanctions denied where debtor failed to request or to produce evidence of any actual damages. Punitive damages denied where debtor failed to produce evidence of malice or ill will and creditor acted in good faith, if erroneous, belief that debtor's failure to sign reaffirmation agreement within time permitted operated to lift stay without further order of court. Without ruling on whether a pro se debtor can recover attorney fees, Court noted that debtor did not present any evidence of reasonable fees including reasonable hourly rates, number of hours reasonably spent, or nature of the work done. If fees are appropriate under Section 362, the amount must be reasonable, based on customary compensation charged by comparably skilled practitioners, and fee must bear a reasonable relationship to the amount in controversy.

- (474) *Dietrich v. Tiernan*, 2012 WL 1854250 (E.D. Mi. 2012) – Section 362 authorizes sanctions in favor of any person injured by a willful violation of stay. Debtor constitutes a person who was injured by ex-spouse's actions in divorce proceedings in violation of stay, giving debtor standing to seek relief.
- (475) *Cook v. Wells Fargo Bank*, Case No. 11-082 (10th Cir. BAP 2012) – Creditor's actions in attempting to foreclose lien against property of estate did not give rise to action by debtors. Property involved was estate property. Creditor did not pursue recovery from debtors personally and did not seek to recover any assets owned by debtors. Any relief requested was limited to property owned by estate. Claim for damages for stay violation, if any, was exclusively estate property. Debtors lacked standing to pursue claim, as debtor could not demonstrate that actions of creditor resulted in any actual or threatened injury in fact to debtors or property of the debtors. Fact that debtor claimed exemption in underlying asset did not confer standing. Claim of exemption does not remove asset from estate until the exemption is allowed or by operation of law if no timely objection is filed. Creditor timely objected to claimed exemption and claimed exemption had not been determined as of date of alleged stay violation. As property remained property of estate, debtor lacked standing to pursue alleged stay violation. Purported abandonment by Chapter 7 Trustee of property allegedly involved in stay violation did not vest in debtors the claim for violation of stay where abandonment was pending but had not been approved by the court or properly noticed to creditors.
- (476) *In re Storozhenko*, 459 BR 697 (Bankr. E.D. Mi. 2011) – Post-petition proceeding brought in state court by state court receiver to hold debtor in contempt for violating orders entered in state court divorce proceeding were criminal proceedings within exception to automatic stay, to the extent receiver sought payment of fine to court or imprisonment for fixed term. However, to the extent contempt proceedings sought to recover restitution plus receiver costs and expenses, proceedings were civil in nature and precluded by automatic stay. Conduct was willful allowing Debtor to recover any actual damages and attorney fees and costs. However, punitive damages were not appropriate where conduct was not egregious and where there was no evidence that receiver acted with knowledge that conduct violated stay or acted with reckless disregard. Court would not enjoin future conduct where receiver now had clear understanding of allowable conduct.
- (477) *In re Malloch*, Case No. 11-53655 (Bankr. E.D. Mi. 2011) – Creditor knowingly violated automatic stay by sending demand letter to debtor 60 days after commencement of case and 30 days after creditor was provided with Notice of Commencement and copies of Debtor's schedules. Court would enjoin creditor from any further efforts to collect pre-petition balance owed. Court unable to award damages absent any evidence by debtor that debtor incurred any actual damages. Punitive damages not appropriate where Motion did not allege any facts that would rise to the level of "particularly egregious" or that creditor acted with actual knowledge that he was violating stay or that he did so with reckless disregard for stay.
- (478) *In re Storozhenko*, Case No. 11-57443 (Bankr. E.D. Mi. 2011) – Court can award fees as sanction for stay violation. Request for fees should contain itemization sufficient to permit the court to evaluate the necessity of services provided, the reasonableness of the time spent, and the reasonableness of the fee charged. Requested hourly rate of \$400 per hour was unreasonably high given lack of complexity or unusual nature of the matters involved. Court would reduce hourly rate to \$240 which is reasonable rate for services performed. Time spent on matters that were done as part of general representation of debtor is not compensable in stay violation action and included time spent attempting to settle underlying actions; and filing a response to a Motion for Reconsideration which could not have been filed unless Court ordered response to be filed, which it did not.
- (479) *In re Dietrich*, Case No. 08-68294 (Bankr. E.D. Mi. 2011) – Standing to complain of violations of Automatic Stay is not limited to the Debtor. Creditors have standing to pursue stay violations to the extent the violation is against property of the estate as the creditors, not the Debtor, have the pecuniary interest that is affected. Stay violations were willful where debtor and ex-spouse carried out the prohibited acts with full knowledge of the bankruptcy case. Sanctions awarded to injured creditor of \$34,812 representing reasonable attorney fees and costs resulting from conduct of debtor and ex-spouse, plus punitive damages of \$10,000.00.
- (480) *In re Baer*, 2011 WL 3667511 (Bankr. E.D. Ky. 2011), *aff'd* 2012 WL 2368698 (6th Cir. BAP 2012) – Debtor entitled to actual damages incurred as result of creditor's repossession of vehicle in violation of stay. Plaintiff failed to quantify any actual expense or damage claim from alleged need to obtain alternative transportation, precluding award of actual damages. Burden is on debtor to prove existence and amount of any actual damage claim. Punitive damages not warranted where creditor violated stay but there was no evidence that conduct was egregious, vindictive or intentionally malicious, and was the result of creditor's mistaken belief that stay terminated when debtor failed to comply with Order for Redemption.
- (481) *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.

- (482) *Tyson v. Hunt*, 2011 WL 2222193 (Bankr. W.D. Tn. 2011) – Once Court determines that creditor has willfully violated stay, debtor has a fundamental right to present evidence on damages. Section 362(h) provides that damages shall be awarded for any willful stay violation. Bankruptcy Court erred in concluding that willful violation occurred but then denied damages to debtor.
- (483) *In re Livingston*, 2011 WL 2694557 (Bankr. W.D. Mi. 2011) – Actions taken during prior, now dismissed bankruptcy case could not form basis for sanctions for alleged violation of automatic stay in subsequent case. Further, debtor would lack standing to pursue any claim for stay violation in prior case as that claim would constitute property of the estate in the subsequent case and only the Trustee would have standing to pursue that claim.
- (484) *Tyson v. Hunt*, 2011 WL 2222193 (Bankr. W.D. Tn. 2011) – Post-petition foreclosure sale, recording of deed resulting from foreclosure sale, and refusal to set aside deed upon being apprised of bankruptcy filing constitute separate violations of automatic stay. A specific intent to violate the stay is not required, or even an awareness by the creditor that conduct violates the stay. Where there is actual notice of bankruptcy, Court will presume that the violation was deliberate or intentional creating strict liability. If defendant acted in bad faith or with malice, court can also award punitive damages. Party's deliberate refusal to cooperate in voiding the sale and reconveying property to the Debtor at any time after this date were willful and constitute a violation of the automatic stay warranting award of actual damages. Violation was not egregious, vindictive or intentionally malicious or motivated by reckless disregard of the federal bankruptcy laws, but were instead the result of a very mistaken understanding of how those laws work. As a result, the Court finds that an award of punitive damages is not appropriate in this case.
- (485) *Clay v. Credit Acceptance Corp.*, 2011 WL 2312334 (Bankr. E.D. Ky. 2011) – Once a willful violation is established, an award of damages is mandatory under § 362(k)(1), so long as there is a resulting injury. Sanctions can include reasonable attorney fees in an amount that bears a reasonable relationship to the amount in controversy. Debtor must also mitigate, and attorney fees incurred after a reasonable offer of settlement has been made by the party to be sanctioned will not be included and must be borne by debtor. Request for attorney fees which are double the amount in controversy is far outside the bounds of reasonableness. Debtor failed to mitigate damages. Initial telephone contact between debtor's attorney and creditor's attorney did not occur until more than one month after service of the state court complaint. Matter would have been easily resolvable with a phone call, without the need to engage in lengthy and expensive litigation.
- (486) *Henderson v. Auto Barn Atlanta, Inc.* 2011 WL 1838777 (Bankr. E.D. Ky. 2011) – Court previously determined that lender's actions in threatening and intimidating debtors; thwarting any efforts by the Debtors to title the Vehicle in Kentucky, despite knowledge of the Debtors' bankruptcy; repossessing vehicle; threatening other repossessions; sending letters threatening debtors with criminal prosecution; and hiring repossession company; all with full knowledge of bankruptcy filing, violated automatic stay. Sanctions require finding both of violation of stay and that violation was willful. Creditor did not willfully violate stay where creditor neither requested nor authorized repossession company to repossess vehicle. Remaining creditor actions were willful and warranted award of actual damages plus costs and attorney fees. Attorney fees are to be determined using "lodestar" method which requires multiplication of the reasonable number of hours billed by a reasonable billing rate. The court then considers other factors that may be relevant to adjust the award up or down to achieve a reasonable result such as (1) the time and labor required by a given case; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Court awarded actual damages, fees and costs totaling \$40,047.50. Repeated violations also warranted imposition of punitive damages of \$25,000, taking into account (1) the nature of the creditor's conduct; (2) the nature and extent of harm to the debtor; (3) the creditor's ability to pay; (4) the level of sophistication of the creditor; (5) the creditor's motives; and (6) the lack of any provocation by the debtor.
- (487) *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.
- (488) *In re Makdisi*, Case No. 10-44413 (Bankr. E.D. Mi. 2010) – Lender violated stay by conducting foreclosure sale after commencement of case and further violated stay by refusing to set aside the foreclosure sale. Sanctions included compensation for Debtor's lost wages for days spent attempting to resolve issues with lender plus attorney fees for services of counsel in attempting to resolve issues.
- (489) *Grine v. Chambers*, 2010 WL 3910144 (Bankr. N.D. Ohio 2010) – Creditor violated stay by sending account statement with full knowledge of bankruptcy filing. Creditor who purportedly settled damage claim but wrote on check "extortion money" did not have valid accord and satisfaction where creditor did not believe that debtor had any valid claim, preventing a meeting of the minds on issue of settlement. To extent parties may have had settlement, creditor failed to perform where creditor wrote on check "extortion money" rendering check unacceptable tender of payment, as negotiation of check would constitute implicit admission that money was product of extortion rather than settlement of legitimate claim. Debtor-wife would not be entitled to sanctions where billing statement was issued only for Debtor-husband. Sanctions would not include alleged loss of work or travel expenses for Debtor-wife in preparing for and attending the hearing on the Motion for Sanctions. Attorney's fees for prosecuting a damages action under Section 362(k) may be compensable as actual damages under the statute under certain circumstances: the attorney's fees and costs claimed as damages, whether pre-litigation or post-litigation, must have been proximately caused by and reasonably incurred as a result of the violation of the automatic stay; and must be proven with reasonable certainty and may not be speculative – rejecting 9th Circuit holding in *Stenberg v. Johnston*, 595 F.3d 937 (9th Cir. 2009)

that attorney fees are not recoverable in litigation for stay violation. If litigation is unnecessary to afford a complete remedy to a debtor, then the fees for commencing and prosecuting an action will not be compensable. Attorneys' fees may be awarded under Section 362(k) even if no other amounts are awarded as actual damages. Award must be reasonable, determined using "lodestar" method. The fees incurred in this case in sending Defendant the demand letter, then discussing the issue and negotiating a settlement with Defendant, are for the type of actions that this and other courts anticipate and expect that counsel will take on behalf of debtors in the situation faced by Plaintiffs. When that compromise fell through, not due in the court's view to the fault of Mack, the evidence shows that he afforded Defendant a final opportunity to settle without litigation. Plaintiffs were, therefore, entitled to have their attorney address Defendant's violation of the stay and Debtor-husband is entitled to be compensated for the reasonable attorney's fees and costs in doing so, both before filing the complaint initiating this adversary proceeding and afterward. Attorney's requested hourly rate of \$250 was not reasonable when viewed in light of prevailing rate in the relevant market-i.e., the rate that is customarily paid in the community to attorneys of reasonably comparable skill, experience, and reputation. The relevant market is "the venue of the court of record," rather than the "geographical area wherein [counsel] maintains his office and/or normally practices. Hourly rate reduced to \$200 per hour where hourly rates in area generally ranged between \$125 and \$225 per hour and services were straightforward and routine. Court would reduce time by hours that did not relate to claims or that were excessive under the circumstances. Fee request of \$1,972 reduced to \$565.

- (490) *Heers v. Gibson Realty, Inc.*, 2010 WL 3491169 (Bankr. W.D. Ky. 2010) – Employer violated stay by retaining portion of real estate commission earned post-petition to pay pre-petition obligation for rent and other office expenses and refused to pay Debtor notwithstanding actual notice of the bankruptcy filing and repeated requests by Debtor's counsel for turnover of the funds. Employer's actions constituted willful violation of automatic stay. Judgment entered against Employer for \$7,512 representing funds wrongfully withheld plus \$14,887 for Debtor's attorney fees and costs.
- (491) *In re Kasubowski*, Case No. 09-20128 (Bankr. E.D. Mi. 2010) – Sanctions are appropriate where Creditor served writ of garnishment post-petition and refused to return to Debtor or the Chapter 13 Trustee funds received by Creditor on that writ. Creditor offered no plausible explanation of why Creditor did not return funds to the Debtor or Trustee or seek Bankruptcy Court intervention if Creditor believed there to be a dispute as to lawful ownership of the funds. Creditor's actions were willful where creditor refused to return money for 10 months notwithstanding demands by Debtor and the Trustee. Debtor entitled to recover actual damages consisting of attorney fees and, upon tendering of proper evidence, overdraft fees that were caused by garnishment.
- (492) *Williams v. Franklin Towers Homeowners Association*, 2010 WL 2780972 (9th Cir. 2010) – Debtor not entitled to sanctions for creditor acts in violation of stay where stay was later retroactively annulled.
- (493) *Lewis v. Negri Bossi USA, Inc.* 423 BR 643 (E.D. Mi. 2010) – Court properly entered mandatory injunctive relief against Creditor who violated stay by refusing to honor pre-petition contract to provide services to maintain machines. Court concluded that substantial irreparable harm would befall debtor if the machines were not maintained sufficient to warrant injunctive relief requiring Creditor to continue to maintain machines while estate attempted to liquidate the machines for the benefit of creditors.
- (494) *In re Waldo*, Case No. 09-30969 (Bankr. E.D. Tn. 2009) – Attorney "willfully" violated automatic stay by depositing post-petition checks for payment or unpaid attorney fees in Chapter 7 case liable for sanctions for violation of Section 362. Attorney required to disgorge all fees received both pre-petition and post-petition in connection with Chapter 7 filing and to return to debtors all remaining post-dated checks still in attorney's possession.
- (495) *In re Hickey*, Case No. 07-23041 (Bankr. E.D. Mich. 2009) (unreported decision) - Appropriate sanctions for violation of automatic stay include attorney fees incurred on behalf of the Debtor and directly related to the violation are recoverable. Attorney fees for unrelated services or services in connection with non- Debtor entities are not recoverable. Attorney fees must also be reasonable when viewed from both a case specific basis and "a larger, universal perspective". Where the creditor's actions were particularly aggressive and the Debtor recovered substantial actual damages, an award of substantial attorney fees was also warranted to both compensate the Debtor and to send a message to creditors and Debtors for future cases.

3.124 Sanctions – Absence of Actual Damages

- (496) *In re Horace*, 2015 WL 5145576 (Bankr. N.D. Ohio 2015) – Creditor's failure to disarm "kill" switch in debtor's automobile upon being notified of bankruptcy is violation of stay where switch repeatedly shut off debtor's automobile. Creditor's continued use of kill switch post-petition, at a time when creditor admittedly had actual knowledge of case, violated Section 362(a)(3) as exercising control over property of estate; and Section 362(a)(6) as continued acts to collect a claim that arose pre-petition. Creditor's failure to disarm switch resulted in switch emitting warning sounds that payment was coming due and served no purpose other than to pressure debtor into making payments. Creditor's action were willful. Creditor had actual notice of bankruptcy and had ability to terminate use of switch but refuse to do so. Debtor suffered injury by operation of switch, as device beeped post-petition and repeatedly rendered vehicle inoperable causing injury as debtor lacked available transportation and debtor ended up remitting three direct payments to creditor (although obligation was to be paid by the Trustee in debtor's plan) to restore vehicle to operable condition. However, absent evidence of actual damages, court would not award monetary damages. Debtor's claim for "stress" standing alone was not sufficient to support damage award where there was no medical evidence presented to support alleged "stress" claim resulting from creditor's action. Court would order creditor to remove the device at the creditor's expense. Court also awarded attorney fees to debtor in sum of \$1,076.25 for 6.15 hours of work at \$175 per hour for time dedicated to addressing creditor's stay violation, as award of attorney fees is in addition to, and not dependent on, award of actual damages.
- (497) *In re Phillips*, 2015 WL 4256641 (Bankr. E.D. Tn. 2015) – Debtor's failure to produce evidence of any actual damages, coupled with debtor's failure to make any effort to mitigate damages, precluded award of sanctions. Debtor testified that actual damages consisted of mileage and parking but failed to introduce evidence of either amount.

3.125 Sanctions – Duty to Mitigate

- (498) *In re Mocella*, 2016 WL 3611816 (Bankr. N.D. Ohio 2016) – Sanctions are appropriate under Section 362(k) if debtor is injured by willful violation of stay. Creditor violated stay when Creditor filed a Transfer of Claim where Creditor did not have assignment of or any right to payment on a claim and received payments from Chapter 13 Trustee but failed to return funds to the Trustee. While Debtor has duty to mitigate damages, Debtor has no obligation to contact creditor prior to filing Motion for Sanctions. Creditor's return of funds to Chapter 13 Trustee 11 months after the initial erroneous transfer did not "moot" Debtor's Motion for Sanctions.
- (499) *In re Docherty*, 2016 WL 675835 (Bankr. N.D. Ohio 2016) – Creditor violated stay by repossessing debtor's automobile one day post-petition. Creditor then retained possession and refused to return automobile for 17 days notwithstanding actual notice of bankruptcy filing received after initial repossession. Creditor's initial repossession was not willful violation as creditor did not have notice of filing when vehicle repossessed. However, creditor had affirmative duty to return vehicle to debtor promptly upon being notified of bankruptcy filing. Creditor's actions in refusing to return vehicle constituted willful violation of stay warranting sanctions. Creditor also violated stay by removing and destroying the license plates for the vehicle. Debtor's down payment on new vehicle was not recoverable as debtor's petition indicated that debtor intended to surrender vehicle so cost to acquire new vehicle was unrelated to stay violation. However, debtor was required to obtain new vehicle approximately 45 days earlier than would have been required had the car been timely returned, allowing debtor to recover damages equal to 45 days' worth of payments on new vehicle. Debtor entitled to recover 2 days lost wages, one day where she missed work for lack of transportation and one day to attend hearing on Motion for Sanctions and costs for replacement license plates. Recovery of attorney fees limited where debtor and counsel failed to take steps to mitigate harm. Although debtor texted creditor of bankruptcy filing, debtor's attorney never made any effort to contact creditors to demand return of car or advise that motion for sanctions would be filed. Attorney not entitled to payment for 40 hours of work where a single phone call likely would have produced the return of the vehicle. Punitive damages not warranted where creditor conduct, while willful, was not egregious, vindictive, or intentionally malicious. Creditor was not openly defiant and did not take actions that were clearly threatening or coercive.
- (500) *Mitchell v. Anderson*, 2016 WL 367038, 545 BR 209 (Bankr. N.D. Ohio 2016) – Party seeking damages for alleged violation of stay must prove (1) the action taken was in violation of the automatic stay; (2) the violation was willful; and (3) the violation caused actual damages. Debtor must prove that creditor knew of automatic stay and that actions were intentional. Debtor has obligation to mitigate damages prior to seeking court intervention. Debtor established that creditor willfully violated stay when creditor, with actual knowledge of filing, continued to prosecute pending state court action and filed three additional state court actions. However, debtor failed to present credible evidence of actual damages beyond costs of notifying state court of pending bankruptcy cases. Any additional attorney fees incurred by debtor in defending those cases after commencement of the bankruptcy case could have been avoided had debtor timely notified state court of bankruptcy petition. Any additional damages were neither reasonable nor necessary.
- (501) *In re Phillips*, 2015 WL 4256641 (Bankr. E.D. Tn. 2015) – Debtor has duty to mitigate damages before seeking sanctions for alleged violation of stay. Creditor violated stay by contacting debtor and relatives of debtor 22 times post-petition before ceasing efforts. However, at no time did debtor advise creditor of bankruptcy filing until debtor filed motion for sanctions, at which point creditor immediately ceased collection efforts. Debtor's counsel intentionally mailed creditor a blank sheet of paper by certified mail to confirm that address was correct on prior notices, but did make any effort in that mailing or in response to a phone call from creditor (in response to the blank sheet of paper) to advise creditor of bankruptcy. Sanctions must be proximately caused by violation of stay. If litigation is unnecessary to afford debtor a complete remedy, then fees for commencing and prosecuting action are not compensable.
- (502) *Schang v. Muller, Muller, Richmond, Harms & Myers, P.C.*, 2015 WL 3441178 (E.D. Mi. 2015) – Debtor has duty to mitigate harm before seeking sanctions for creditor's violation of stay. Three days after debtor filed for bankruptcy protection, creditor (without knowledge of case) sent collection letter. Debtor and Debtor's counsel made no effort to contact creditor or creditor's counsel to advise of bankruptcy filing. One month later, creditor issued second collection letter and debtor sought sanctions. Debtor could have taken minimal steps after receiving first letter that likely would have prevented second letter. Debtor's failure to take simple steps that would have caused creditor to cease collection efforts constituted failure to mitigate. Request for sanctions denied.

3.126 Sanctions – Inadvertent or Technical Violations

- (503) *In re Dixon*, 2015 WL 1803924 (Bankr. E.D. 2015) – Evidence indicated that auction sale was concluded and buyer took possession of motorcycle and the auctioneer provided signed bill of sale to buyer prior to commencement of bankruptcy case. However, seller had not executed either an application for title or an assignment of certificate of title within meaning of MCL 257.233 prior to commencement of bankruptcy case. As such, title had not transferred and debtor still had legal title to motorcycle as of filing of petition, and later execution or certificate of title violated stay. However, violation was inadvertent where neither debtor nor anyone else made auctioneer aware of bankruptcy filing before auctioneer signed application for title, and application was signed mere hours after the petition had been filed. While application for title may have been violation, stay violation is voidable, not void. Court would not void sale where debtor unreasonably withheld notice of the filing and creditor would be prejudiced if transfer of title was set aside.

3.127 Emotional Distress

- (504) *U.S. v. Hunsaker*, Case No. 16-0386 (D. Ore. 2016) – 11 USC Section 106(a)(1) waiver of Sovereign immunity for claims under Section 362(k) did not unequivocally waive sovereign immunity for claims of emotional distress. Section 362(k) allows individual to recover actual damages including costs, attorney fees and punitive damages in appropriate cases, but does not specifically include "emotional distress" as "actual damage" for which immunity is waived. IRS willfully violated stay by continuing to make demands for payments of back taxes and threats to levy on bank accounts where IRS had actual notice of bankruptcy filing. IRS can be held liable to actual damages but not for "emotional distress" allegedly suffered as result of IRS conduct.

- (505) *In re Humbert*, 2016 WL 4508186 (Bankr. N.D. Ohio 2016) – Landlord violates stay by contacting debtor and demanding payment of pre-petition rent and by commencing post-petition eviction action without seeking relief from stay. Debtor not entitled to non-economic damages as debtor did not present evidence sufficient to support a finding of emotional distress damages.
- (506) *Mitchell v. Anderson*, 2016 WL 367038, 545 BR 209 (Bankr. N.D. Ohio 2016) – Debtor not entitled to damages for emotional distress where debtor failed to present sufficient evidence that defendant’s actions produced anything more than fleeting and inconsequential distress.
- (507) *In re Horace*, 2015 WL 5145576 (Bankr. N.D. Ohio 2015) – Creditor’s failure to disarm “kill” switch in debtor’s automobile upon being notified of bankruptcy is violation of stay where switch repeatedly shut off debtor’s automobile. Creditor’s continued use of kill switch post-petition, at a time when creditor admittedly had actual knowledge of case, violated Section 362(a)(3) as exercising control over property of estate; and Section 362(a)(6) as continued acts to collect a claim that arose pre-petition. Creditor’s failure to disarm switch resulted in switch emitting warning sounds that payment was coming due and served no purpose other than to pressure debtor into making payments. Creditor’s action were willful. Creditor had actual notice of bankruptcy and had ability to terminate use of switch but refuse to do so. Debtor suffered injury by operation of switch, as device beeped post-petition and repeatedly rendered vehicle inoperable causing injury as debtor lacked available transportation and debtor ended up remitting three direct payments to creditor (although obligation was to be paid by the Trustee in debtor’s plan) to restore vehicle to operable condition. However, absent evidence of actual damages, court would not award monetary damages. Debtor’s claim for “stress” standing alone was not sufficient to support damage award where there was no medical evidence presented to support alleged “stress” claim resulting from creditor’s action. Court would order creditor to remove the device at the creditor’s expense. Court also awarded attorney fees to debtor in sum of \$1,076.25 for 6.15 hours of work at \$175 per hour for time dedicated to addressing creditor’s stay violation, as award of attorney fees is in addition to, and not dependent on, award of actual damages.
- (508) *In re Kelly*, 2014 WL 5449639 (Bankr. N.D. Ohio 2014) – Section 362(k) allows damages for emotional distress only when debtor presents corroborative evidence of such damages, usually in the form of medical testimony. Debtor’s uncorroborated testimony that she suffered physical distress including elevated blood pressure was not sufficient to support award of damages for emotional distress.
- (509) *Snowden v. Check Into Cash of Washington, Inc.*, 2014 WL 4776477 (9th Cir. 2014) – Debtor entitled to recover damages for emotional distress where creditor willfully violates stay and debtor proves significant harm that is caused by the stay violation. Debtor established significant emotional distress where debtor testified that she panicked when creditor withdrew money from her account, that she feared other creditors would do the same thing, that she was overwhelmed, that withdrawal left her embarrassed that she could not provide shoes or a haircut for her daughter, that she felt she was going nuts and could not concentrate and was agitated and felt miserable, and that she was sick to her stomach and broke down crying.
- (510) *Lodge v. Kondaur Capital Corp.*, 2014 WL 1813298 (11th Cir. 2014) – Debtors may recover damages for emotional distress for violation of stay if debtors establish that creditor’s actions constitute willful violation of stay and caused significant harm. Erroneous publication of notice of foreclosure sale did not warrant damages for emotional distress where creditor realized error on same day and contacted publisher to stop further publication. Notice was published only once and debtors were unaware of publication until they started receiving letters from attorneys referencing publication and offering assistance. Debtors did not meet evidentiary basis where debtors were unaware of violation until weeks after it occurred and creditor had taken steps to correct the error; evidence only indicated that debtors were “stressed out” and had difficulties communicating amounted to little more than “fleeting sense” of distress; debtors’ alleged distress was uncorroborated by any third party such as medical professional; and there was lack of causal connection between creditor’s actions and alleged injuries.

3.128 Sanctions – Actual Damages

- (511) *In re Snorden*, 2016 WL 6518515 (Bankr. W.D. Mi. 2016) – Failure to pay judgment awarding damages for willful violation of stay is not, itself, a violation of stay. Award of damages constitutes money judgment, enforcement of which is through normal collection proceedings. Creditor did not continue garnishment proceedings or take any other action that would constitute independent stay violation. There was no basis to award debtor additional damages merely because creditor failed to pay amount awarded by prior judgment.
- (512) *In re Mocella*, 2016 WL 3611816 (Bankr. N.D. Ohio 2016) – Sanctions are appropriate under Section 362(k) if debtor is injured by willful violation of stay. Creditor violated stay when Creditor filed a Transfer of Claim where Creditor did not have assignment of or any right to payment on a claim and received payments from Chapter 13 Trustee but failed to return funds to the Trustee. Creditor’s return of funds to Chapter 13 Trustee 11 months after the initial erroneous transfer did not “moot” Debtor’s Motion for Sanctions. Creditor’s actions in wrongfully filing transfer and receiving payments, and the belated return of those payments to the Trustee, caused actual harm to Debtors as Debtor-Husband suffered medical complications and loss of use a vehicle. But for Creditor’s erroneous transfer of claim, Debtor’s prior vehicle would have been paid off and he would have been able to trade it in and obtain a new vehicle as his Chapter 13 Plan would have been completed. Instead, Debtor had to continue to drive old, unreliable vehicle that broke down on two occasions affecting Debtor’s ability to work. However, Debtor presented evidence of only \$5.00 in actual damages for extra trip to car dealership in effort to purchase new vehicle.
- (513) *In re Wilson*, 2016 WL 3303325 (Bankr. E.D. Tn. 2016) – Landlord had actual knowledge of filing and proceeded with eviction in violation of stay. Although landlord was not on schedules or matrix, debtors advised landlord on multiple occasions that they had filed bankruptcy, they were current in rent and lease had not expired yet landlord proceeded to file eviction action, obtain judgment of possession and cause sheriff to dispossess debtors. Debtors entitled to actual damages including cost of 38 nights in hotel where debtors testified that they had made numerous and repeated efforts to locate new residence but landlords would not deal with them because of pending bankruptcy and amount requested amounted to less than \$50 per night; \$750 for food for 25 days as debtors had to eat out while living in hotel; \$500 paid to moving and storage company when landlord forced debtors to vacate premises plus \$537 for U-Haul rental; \$275 for cost of replacing

automobile key that landlord took in effort to force debtors to vacate; travel expenses incurred by husband who was working out of state and had to travel home twice, once when landlord showed up with sheriff to forcibly remove debtors and once to attend hearing on motion for sanctions; 9 day's lost wages to account for days lost at work to travel home for eviction and hearing as well as week taken immediately following eviction to search for new residence; \$200 for jewelry box broken by landlord when he broke into house; \$350 for a computer and \$400 for a weight bench that debtors were unable to remove on short notice and which was never returned to debtors; and \$650 security deposit which landlord refused to return after wrongful eviction; totaling \$8,014.59.

3.129 Sanctions – Punitive Damages

- (514) *In re Humbert*, 2016 WL 4508186 (Bankr. N.D. Ohio 2016) – Landlord violates stay by contacting debtor and demanding payment of pre-petition rent and by commencing post-petition eviction action without seeking relief from stay. Court can award damages where actions were taken in violation of stay; violation of stay was willful; and violation caused actual damages. Willful does not require specific intent but does require that creditor have knowledge of stay when actions are taken. Creditor instituted eviction proceedings before receiving notice of commencement of bankruptcy case and commencement of eviction would not be willful. Debtor not entitled to punitive damages as landlord's conduct was not egregious, vindictive or intentionally malicious. Creditor's conduct was not intentionally malicious or egregious and punitive damages were not necessary to deter future violations by landlord. Although landlord can possession from debtor, landlord must dismiss suit filed in violation of stay and file new action. Landlord cannot recover economic damages as debtor received discharge in bankruptcy.
- (515) *National Medical Imaging, LLC v. DVI Receivables XIV, LLC*, Case No. 15-147 (E.D. Pa. 2016) – Request for punitive damages triggers right to jury trial where defendant warranting withdrawal of reference.
- (516) *Central Mississippi Credit Union v. Vaughn*, Case No. 15-0932 (M.D. Al. 2016) – While punitive damages are available for egregious conduct, amount of punitive damages cannot be disproportionate to actual damages. Creditor improperly garnished \$666 from Chapter 13 debtor's wages sanctioned \$1,500 in actual damages plus \$50,000 punitive damages. Amount of punitive damages was so grossly disproportionate as to violate Due Process clause of Fourteenth Amendment. Court's later award of an additional \$290,000 in attorney fees did not solve problem of disproportion with actual damages.
- (517) *In re Williams*, 2016 WL 4065938 (Bankr. N.D. Ohio 2016) – Sanctions for violation of stay are appropriate where stay violation is "willful". Act is willful when creditor knew of stay and took intentional act that violates stay. Sanctions do not require proof of specific intent to violate stay, only of intentional act that is violation. Debtor entitled to actual damages for willful violation of stay. However, punitive damages are appropriate only where creditor's conduct was particularly egregious, vindictive, or intentionally malicious, or was done in bad faith or reckless disregard of law. Real property owned by debtor at time of commencement of case is property of Chapter 13 estate. Creditor who had previously purchased Tax Certificates for unpaid property taxes violated stay by scheduling property for tax sale post-petition without receiving relief from stay. Award of actual damages in amount of attorney fees incurred by debtor in addressing stay violation warranted. Court reserved issue of punitive damages provided that creditor paid the attorney fees as ordered.
- (518) *In re Mocella*, 2016 WL 3611816 (Bankr. N.D. Ohio 2016) – Section 362(k) allows court to award punitive damages where creditor's conduct evidences malicious intent or reckless indifference. Punitive damages warranted where Creditor filed a Transfer of Claim where Creditor did not have assignment of or any right to payment on a claim and received payments from Chapter 13 Trustee but failed to return funds to the Trustee. Transfer was at best reckless indifference as claim allegedly transferred did not in any way relate to any obligation of Debtor to Creditor and even cursory review of claim "transferred" would have indicated that Creditor did not have claim and had no right to payment on claim. Creditor displayed "unabashed arrogance" in asserting that Transfer did not cause any damage merely because payments were "mistakenly credited" to Debtor's Mortgage account but failed to indicate how the misapplication of payments could or did benefit debtors. Creditor's conduct reflected a cavalier attitude that anything Creditor characterizes as "incorrect" or mere "error" should be overlooked and Creditor should be excused without regard to lack of care or oversight. Punitive damages can be awarded in absence of actual damages and are appropriate even where creditor had taken steps to correct its violation if violation itself was willful or grossly reckless. While corrective action can mitigate amount of punitive damages, it does not eliminate appropriateness where punitive damages would further goal of discouraging wrongful conduct. Bankruptcy court will: (i) the nature of the creditor's conduct; (ii) the nature and extent of harm to the debtor; (iii) the creditor's ability to pay damages; (iv) the level of sophistication of the creditor; (v) the creditor's motive; and (vi) any provocation by the debtor. Creditor is a sophisticated mortgage lender that has the ability to pay a punitive damages award. Debtors did nothing wrong and took no action to provoke Creditor's conduct. Creditor (i) filed the Claim Transfer without regard to the fact that it was not the transferee of Claim 2 or any other claim in the Debtors' bankruptcy case; and (ii) had absolutely no interest in Claim 2 or entitlement to the Claim Payments. Creditor then insisted that, although it made a "mistake" in filing the Claim Transfer, its conduct was entirely reasonable yet Creditor took no steps to change its policies or procedures to ensure that this kind of "mistake" does not happen in the future and admitted that Creditor had not changed any procedures and would take same action today in making bankruptcy claim transfers relating to bulk transfers of loans. Punitive damages of \$100 per day for each day between filing of erroneous transfer and return of fund to Trustee, totaling \$33,700.00, was an appropriate amount to discourage Creditor from making these "mistakes" in the future.
- (519) *In re Wilson*, 2016 WL 3303325 (Bankr. E.D. Tn. 2016) – Commencement of bankruptcy stops any effort to evict debtor from leased property. Violation is "willful" if person carried out action with notice of bankruptcy case. Specific intent or awareness by creditor that conduct violates stay is not required, and it is sufficient that creditor knows of bankruptcy and engages in deliberate conduct that happens to violate stay. Punitive damages are warranted where conduct is particularly egregious, vindictive, or intentionally malicious or where there is strong showing that creditor acted in bad faith or took actions in reckless disregard of Stay or in arrogant defiance of Code. Intent is to punish and deter, and is within discretion of Court. Landlord acted in willful violation of stay where landlord had actual knowledge of case and proceeded to file and prosecute eviction proceedings, obtain order of eviction, and forcibly remove debtors from premises. Punitive

damages warranted where there was no evidence that landlord had a contractual basis to evict the debtors who were current in rent and lease had not expired and had no legal right to terminate the lease. Landlord wanted debtors out of the house so that he could move in his daughter and son-in-law in willful disregard of the debtors' contractual rights. Landlord's tactics to evict debtors were particularly egregious personally going to the home on multiple occasions, twice going into the home uninvited and engaging in conduct that led to police reports being filed. Landlord's second entry into the house was particularly outrageous, since he entered the home by breaking the door lock and then verbally abusing debtor-wife her through the bathroom door. Landlord continued with his efforts to evict debtors, even in the face of warnings from the debtors' attorney that his actions were contrary to law and the automatic stay and demanding that landlord immediately terminate all of your collection activities and contact with debtors. Landlord proceeded to obtain a writ of possession to forcibly remove debtors from their home and waited almost a month and a half after first being told that debtors had filed for bankruptcy relief, before consulting an attorney. Landlord's actions were particularly egregious because of their timing, evicting debtors on December 11, less than two weeks before Christmas, after debtors already had their tree up in preparation for Christmas, and on the same day of their older son's 16th birthday party. Landlord did not act in good faith as he claimed. Landlord's only effort to mitigate harm was to agree to order setting aside eviction order, but that was well after debtors had been forced to vacate. At no time did he offer to allow debtors to return to the premises. Landlord's attitude at the hearing clearly indicated that he did not regret his actions often smirking at debtors, clearly contemptuous of them and damages they had sustained. Amount of punitive damages should be gauged by the gravity of the offense and set at a level sufficient to insure that it will punish and deter and must be sufficient to sting the pocketbook of the wrongdoer. Award of \$5,000 for punitive damages is appropriate.

- (520) *In re Docherty*, 2016 WL 675835 (Bankr. N.D. Ohio 2016) – Creditor violated stay by repossessing debtor's automobile one day post-petition. Creditor then retained possession and refused to return automobile for 17 days notwithstanding actual notice of bankruptcy filing received after initial repossession. Creditor's initial repossession was not willful violation as creditor did not have notice of filing when vehicle repossessed. However, creditor had affirmative duty to return vehicle to debtor promptly upon being notified of bankruptcy filing. Creditor's actions in refusing to return vehicle constituted willful violation of stay warranting sanctions. Creditor also violated stay by removing and destroying the license plates for the vehicle. Debtor's down payment on new vehicle was not recoverable as debtor's petition indicated that debtor intended to surrender vehicle so cost to acquire new vehicle was unrelated to stay violation. However, debtor was required to obtain new vehicle approximately 45 days earlier than would have been required had the car been timely returned, allowing debtor to recover damages equal to 45 days' worth of payments on new vehicle. Debtor entitled to recover 2 days lost wages, one day where she missed work for lack of transportation and one day to attend hearing on Motion for Sanctions and costs for replacement license plates. Recovery of attorney fees limited where debtor and counsel failed to take steps to mitigate harm. Although debtor texted creditor of bankruptcy filing, debtor's attorney never made any effort to contact creditors to demand return of car or advise that motion for sanctions would be filed. Attorney not entitled to payment for 40 hours of work where a single phone call likely would have produced the return of the vehicle. Punitive damages not warranted where creditor conduct, while willful, was not egregious, vindictive, or intentionally malicious. Creditor was not openly defiant and did not take actions that were clearly threatening or coercive.
- (521) *Mitchell v. Anderson*, 2016 WL 367038, 545 BR 209 (Bankr. N.D. Ohio 2016) – Punitive damages are available where creditor acts egregiously, vindictively or with intentional malice and where actual damages are insufficient to deter further violations. Court denied request for punitive damages where creditor violated stay by filing state court proceedings but state court had already sanctioned creditor in those actions under state vexatious litigation statute.
- (522) *In re Phillips*, 2015 WL 4256641 (Bankr. E.D. Tn. 2015) – Punitive damages are appropriate only where evidence indicates some sort of nefarious or malevolent conduct. Debtor did not establish that creditor acted with requisite intent as debtor made no effort to mitigate damages or to advise creditor of bankruptcy filing even though debtor spoke to creditor on two occasions and counsel mailed blank sheet of paper to creditor by certified mail to verify address.
- (523) *Banks v. Kam's Auto Sales*, 2014 WL 6320539 (Bankr. M.D. Ga. 2014) – Automobile purchased by debtor after filing Chapter 13 petition is property of the estate under Section 1306. Auto finance company that financed automobile post-petition violated stay by repossessing vehicle after default and refused to return vehicle on demand. Punitive damages are warranted where creditor acts maliciously or in bad faith, determined by nature of creditor conduct, nature and extent of harm to debtor, creditor's ability to pay sanctions, creditor's motives, and provocation by debtor. Court declined to award punitive damages where creditor conduct was willful, actions were taken in reliance on counsel; and debtor's failure to appear for hearings left court unable to find that debtor suffered any damages. Further, while debtor did not provoke conduct that violated stay, debtor did purchase automobile post-petition with direct representation to creditor that debtor was not in bankruptcy.
- (524) *In re Paschal*, 2014 WL 5771558 (Bankr. W.D. Ky. 2014) – Creditor willfully violated stay when creditor, with notice of filing, continued with automatic withdrawals from debtor's bank account, and then refused to return the money on request of debtor's counsel. Sanctions included attorney fees of \$1189.50 plus punitive damages of \$1200, representing three times the amount wrongfully withdrawn from the account.
- (525) *In re Polson*, 2014 WL 5363893 (Bankr. W.D. Ky. 2014) – Creditor violated stay where, with full knowledge of filing, creditor contacted debtor at least four times by telephone and in writing on three others. Under Section 362(k)(1) where creditor willfully violates stay, court can award attorney fees and punitive damages. Punitive damages of \$250 per violation for each of 7 contacts by creditor warranted.
- (526) *Snowden v. Check Into Cash of Washington, Inc.*, 2014 WL 4776477 (9th Cir. 2014) – Lender willfully violated stay by debiting debtor's bank account for repayment of pre-petition loan notwithstanding that creditor had actual notice of bankruptcy filing.
- (527) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Chapter 7 Trustee cannot recover punitive damages for alleged violation of Stay. Section 362(k) allows imposition of punitive damages only if an "individual" is injured by the violation. Chapter 7 Trustee

is not “individual”.

- (528) *Iskric v. Commonwealth Financial Systems, Inc.*, 2013 WL 4011126 (Bankr. M.D. Pa. 2013) – Creditor violated the stay and discharge injunction by failing to vacate civil contempt order resulting in debtor’s arrest post-discharge. Creditor obtained judgment against debtor and was pursuing collection. Debtor failed to cooperate in discovery leading to issuance of civil contempt warrant and issuance of bench warrant. After debtor obtained discharge of debt, creditor failed to take action to withdraw the warrant or cancel the contempt citation, and debtor was arrested on outstanding bench warrant. Creditor’s actions were deemed willful violations of stay, resulting in damages award to debtor of \$60,000 in punitive damages.
- (529) *Bankers Healthcare Group, Inc. v. Bilfield*, 2013 WL 2897035 (Bankr. N.D. Ohio 2013) – Party injured by violation of stay can recover punitive damages if creditor’s conduct was egregious, vindictive or intentionally malicious. Overt wrongful intent is not required, but debtor must show that creditor acted in bad faith or otherwise undertook actions in reckless disregard of law. Creditor had no effective bankruptcy procedure in place to stop filing of lawsuits or to instruct process server to cease efforts to serve papers that had been filed. Creditor’s only “bankruptcy procedure” was to move debtor’s name from one computer to another, and to re-locate the paper file from one cabinet to another. Creditor’s procedures were “woefully inadequate” to ensure that creditor ceased collection efforts. Even after receiving actual notice, creditor’s general counsel took no steps to stop filing of lawsuits or efforts by process server. Creditor contended that it did not affirmatively do anything to violate stay, it merely did not tell process server to stop. Creditor had affirmative duty to call off the process server, not to merely stand by and allow process that creditor started to unfold in violation of stay. Court awarded punitive damages totaling \$10,500 for three separate actions that violated stay.

3.130 Sanctions - Parties Liable

- (530) *U.S. v. Hunsaker*, Case No. 16-0386 (D. Ore. 2016) – 11 USC Section 106(a)(1) waiver of Sovereign immunity for claims under Section 362(k) did not unequivocally waive sovereign immunity for claims of emotional distress. Section 362(k) allows individual to recover actual damages including costs, attorney fees and punitive damages in appropriate cases, but does not specifically include “emotional distress” as “actual damage” for which immunity is waived. IRS willfully violated stay by continuing to made demands for payments of back taxes and threats to levy on bank accounts where IRS had actual notice of bankruptcy filing. IRS can be held liable to actual damages but not for “emotional distress” allegedly suffered as result of IRS conduct.
- (531) *McCrary v. City of Flint*, Case No. 08-3097 (Bankr. E.D. Mi. 2011) – City of Flint did not violate automatic stay when actions were filed against co-debtor during pendency of Chapter 13 case. Any actions in the hearing of that action and the rendition of a judgment that allegedly violated Section 1301 were actions taken by the Judges of the 68th District Court. The Michigan Constitution and statutes make the Courts governmental agencies that are independent of the City and over which the City has no control or authority. Further, actions taken by District Judges would be within the scope of judicial immunity precluding action against Court and individual judges.

3.131 Sanctions – Attorney Fees

- (532) *In re Mocella*, 2016 WL 3611816 (Bankr. N.D. Ohio 2016) – Sanctions are appropriate under Section 362(k) if debtor is injured by willful violation of stay. Creditor violated stay when Creditor filed a Transfer of Claim where Creditor did not have assignment of or any right to payment on a claim and received payments from Chapter 13 Trustee but failed to return funds to the Trustee. Creditor’s return of funds to Chapter 13 Trustee 11 months after the initial erroneous transfer did not “moot” Debtor’s Motion for Sanctions. Although Debtor presented evidence of only nominal actual damages, Court could award reasonable attorney fees incurred in seeking redress for violation even where actions did not produce any actual damages. Court awarded attorney fees of \$17,750.00.
- (533) *In re Wilson*, 2016 WL 3303325 (Bankr. E.D. Tn. 2016) –Landlord had actual knowledge of filing and proceeded with eviction in violation of stay. Although landlord was not on schedules or matrix, debtors advised landlord on multiple occasions that they had filed bankruptcy, they were current in rent and lease had not expired yet landlord proceeded to file eviction action, obtain judgment of possession and cause sheriff to dispossess debtors. Debtors entitled to recover attorney fees of \$5,833.27 for letters sent to landlord advising of stay and communications with state court including motion to set aside eviction order, and attendance at hearing on motion for sanctions.
- (534) *Mitchell v. Anderson*, 2016 WL 367038, 545 BR 209 (Bankr. N.D. Ohio 2016) – Section 362(k) authorizes award of attorney fees reasonably incurred to remedy stay violation including fees incurred in prosecution of damage action that Section 362(k) authorizes. Pro se debtor who allegedly contracted with attorneys for legal research and consulting not entitled to recovery of those fees as those attorneys never filed fee applications in Bankruptcy Court. Where attorney does not actually appear in court, it is particularly appropriate to insist on timely disclosure of fee agreements to avoid “ghost writing” situations.
- (535) *America’s Servicing Co. v. Schwartz-Tallard*, Case No. 12-60052 (9th Cir. 2015) – Sanctions for violation of stay include attorney fees incurred in prosecution of action for damages for stay relief. Court rejected prior decisions that limited to fees necessary to end the stay violation but not to prosecute action for violation of stay. *En banc* Court reversed prior panel decision in *In re Schwartz-Tallard*, 2014 WL 1465698 (9th Cir. 2014) (Attorney fees incurred by debtor in pursuing damages for stay relief are not compensable); rejecting *Snowden* (see below).
- (536) *In re Paschal*, 2014 WL 5771558 (Bankr. W.D. Ky. 2014) – Creditor willfully violated stay when creditor, with notice of filing, continued with automatic withdrawals from debtor’s bank account, and then refused to return the money on request of debtor’s counsel. Sanctions included attorney fees of \$1189.50 plus punitive damages of \$1200, representing three times the amount wrongfully withdrawn from the account.
- (537) *In re Polson*, 2014 WL 5363893 (Bankr. W.D. Ky. 2014) – Creditor violated stay where, with full knowledge of filing, creditor contacted

debtor at least four times by telephone and in writing on three others. Under Section 362(k)(1) where creditor willfully violates stay, court can award attorney fees and punitive damages.

- (538) *Okke v. Okke*, 2014 WL 3578599 (Bankr. W.D. Mi. 2014) – Debtor’s ex-spouse willfully violated stay warranting sanctions. Ex-spouse had been repeatedly advised that debtor had filed bankruptcy yet ex-spouse retained possession of property of the estate and refused to surrender property to the debtor. Ex-spouse then sold the property and retained the proceeds. Ex-spouse had no right or title in the property as the property had been awarded to debtor in pre-petition judgment of divorce. Evidence supported award of damages of \$500.00 plus attorney fee of \$9,000 based on ex-spouse’s willful flouting of the stay throughout the proceedings.
- (539) *Snowden v. Check Into Cash of Washington, Inc.*, 2014 WL 4776477 (9th Cir. 2014) – Attorney fees incurred by debtor in pursuing action for violation of automatic stay are recoverable under Section 362(k). Right to attorney fees ceases as to any attorney fees incurred after stay violation is rectified. Where creditor wrongfully withdrew money from debtor’s account post-petition and never restored those funds, stay violation was ongoing and debtor’s right to attorney fees continued.

3.132 Sanctions – Appellate Attorney Fees

- (540) *Weary v. Poteat*, 2015 WL 4747883 (E.D. Tn. 2015), *affd*, 2015 WL 10096183 (E.D. Tn. 2015) – Debtor is entitled to recover attorney fees incurred in defending appeal of automatic stay violation. Fee request should first be filed with appellate court to determine entitlement to fees. Matter then should be remanded to Bankruptcy Court to determine amount.

3.133 Void and Voidable

- (541) *In re Johnson*, 2016 WL 1719149 (Bankr. S.D. Ohio 2016) – Actions taken in violation of stay are void unless debtor unreasonably withheld notice of filing and creditor would be prejudiced or where debtor is attempting to use stay to avoid unfavorable result. Arbitration decision entered post-petition was void where creditor and arbitrator had full notice of bankruptcy filing and pursued arbitration in disregard of stay. Debtor did not delay in disclosing filing to creditor and creditor was not prejudiced by voiding arbitration order entered post-petition; and there was no evidence that debtor was attempting to use stay as shield to avoid unfavorable result.
- (542) *Baxter v. Sarmadi*, 2015 WL 1839396 (6th Cir. 2015) – Court has equitable discretion to annul stay retroactively and to give effect to foreclosure sale that occurred post-petition. Post-petition foreclosure was voidable, not void. Exceptional circumstances to annul stay include where debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the debtor is able to raise the stay as a defense or to use unfairly as a shield to avoid unfavorable result. Bankruptcy court correctly annulled stay where debtor’s chapter 13 plan did not provide for payment of creditor’s secured claim; property lacked insurance although property was leased to third party; and debtor’s lack of good faith in filing case; coupled with debtor’s failure to timely provide notice of bankruptcy to creditor who, in good faith, exercised rights held under mortgage and note. Debtor failed to timely make plan payments prior to confirmation of plan and failed to timely provide documents to Chapter 13 Trustee; and testified equivocally regarding debtor’s address, whether property was insured, stated that tenants refused to pay rent, debtor’s estimates of properties values were substantially higher than listed in schedules, and debtor denied knowing that he had to make plan payments. Lack of insurance and lack of income, coupled with value in schedules that was less than debt indicating that debtor lacked equity, supported annulment of stay.
- (543) *In re Dixon*, 2015 WL 1803924 (Bankr. E.D. 2015) – Evidence indicated that auction sale was concluded and buyer took possession of motorcycle and the auctioneer provided signed bill of sale to buyer prior to commencement of bankruptcy case. However, seller had not executed either an application for title or an assignment of certificate of title within meaning of MCL 257.233 prior to commencement of bankruptcy case. As such, title had not transferred and debtor still had legal title to motorcycle as of filing of petition, and later execution or certificate of title violated stay. However, violation was inadvertent where neither debtor nor anyone else made auctioneer aware of bankruptcy filing before auctioneer signed application for title, and application was signed mere hours after the petition had been filed. While application for title may have been violation, stay violation is voidable, not void. Court would not void sale where debtor unreasonably withheld notice of the filing and creditor would be prejudiced if transfer of title was set aside.
- (544) *Richardson v. The Koch Law Firm, PC*, 768 F.3d 732 (7th Cir. 2014) – Judgment entered after commencement of case is invalid even where neither creditor nor court was apprised of commencement of bankruptcy case.
- (545) *In re Kelly*, 2014 WL 5449639 (Bankr. N.D. Ohio 2014) – Judgment of eviction is void where entered in violation of stay. Debtor announced at beginning of eviction hearing that debtor had filed bankruptcy but landlord persisted in action and court entered order of possession notwithstanding actual knowledge of filing.
- (546) *In re Kallabat*, Case no. 12-53744 (Bankr. E.D. Mi. 2012) – Sanctions are appropriate under Section 362(k) where non-bankrupt party knowingly takes actions in violation of stay. Debtor’s estranged spouse could not be held to have violated stay where all actions that constituted stay violation were taken by spouse’s attorney in State court action for dissolution of marriage. Spouse’s attorney’s request that the domestic relations court award spouse the marital home free and clear of any interest of debtor violated Section 362(a)(3). Attorney also violated stay by asking domestic relations court to hold debtor solely liable on credit card allegedly fraudulent opened by debtor in the name of spouse. Attorney further violated the stay by submitting a proposed order that incorporated the relief regarding the marital home and other assets and credit cards, and continuing to request that the State court enter that order. Actions taken in violation of stay are voidable. Bankruptcy Court would declare void rulings made by State court that attempted to adjudicate property interest of debtor or to hold debtor liable for disputed claim. Debtor failed to present evidence of any actual damages, precluding award at this time, but permitted debtor additional time to submit affidavit itemizing damages allegedly suffered as result of stay violations.

3.134 Procedural Requirements

- (547) *In re Ballard*, 502 BR 311 (Bankr. S.D. Ohio 2013) – Action for damages for alleged violation of stay can be brought either by adversary proceeding or by motion in a contested matter.

H. Extension of Automatic Stay

3.135 When Necessary

- (548) *In re Premier Pest Management, Inc.*, Case no. 15-54531 (Bankr. E.D. Mi. 2015) – Section 362(c)(3) applies only when debtor is an individual. An entity is not an “individual”. Motion to Extend Stay denied as unnecessary.
- (549) *Rogers v. McDermott*, Case No. 14-13769 (E.D. Mi. 2015) – Motion to Extend Stay denied as moot where automatic stay already existed in case.
- (550) *In re Lanphear Tool Works, Inc.*, 2012 WL 3686777 (Bankr. W.D. Mi. 2012) – Motion for Extension of Stay under Section 362(c)(3) filed by corporate debtor denied as unnecessary. Section 362(c)(3)(A) applies only to a debtor who is an individual.
- (551) *In re Davis*, Case No. 11-40907 (Bankr. E.D. Mi. 2011) – Motion to Extend Stay denied as unnecessary. Debtor’s prior case was not dismissed by Court, but had been closed by court without discharge.
- (552) *In re Rankin*, Case No. 10-68863 (Bankr. E.D. Mi. 2010) - Motion to Extend Stay denied as unnecessary where Debtor did not have any pending case within the past year that was dismissed. Prior case was filed as Chapter 13 and converted to Chapter 7 and resulted in discharge rather than dismissal.
- (553) *In re Hunt*, Case No. 10-51577 (Bankr. E.D. Mi. 2010) – Motion to Extend Stay denied as unnecessary where Debtor did not have any pending case within the past year that was dismissed.
- (554) *In re Williams*, Case No. 09-51871 (Bankr. E.D. Mi. 2009) - Motion to Extend Stay denied as unnecessary where Debtor's prior case concluded with a discharge. Section 362(c)(3) applies only when Debtor has had a case dismissed within preceding year. Automatic stay continues in effect without further action by Court.

3.136 Timing of Motion and Hearing

- (555) *In re Martens*, Case No. 15-50521 (Bankr. E.D. Mi. 2015) – Motion to extend stay filed 28 days after petition filed denied as untimely. Late filing prevents court from holding hearing within 30 days of petition as required by Section 362(c)(3).
- (556) *In re Yatooma*, Case No. 12-59348 (Bankr. E.D. Mi. 2012) – Motion must be filed within 7 days of petition in order to permit adequate time for hearing to be noticed and conducted before expiration of 30 days. Motion denied where motion was not filed until 25 days after petition, leaving insufficient time for court to properly notice and conduct hearing.
- (557) *In re Lanphear Tool Works, Inc.*, 2012 WL 3686777 (Bankr. W.D. Mi. 2012) – Motion for Extension of Stay under Section 362(c)(3) filed by corporate debtor denied as untimely. Section 362(c) provides that stay terminates on 30th day unless extended by order of court. Motion filed on the 30th day following the petition did not provide sufficient time for notice and a hearing completed before expiration of the 30-day period.
- (558) *In re Relitz*, Case No. 11-42847 (Bankr. E.D. Mi. 2011) – Motion denied where Debtor failed to file Motion to Extend Stay until 29 days after petition filed. Section 362(c)(3) requires hearing to be concluded within 30 days of filing. Motion filed only one day before expiration of 30 day period did not provide sufficient time for Motion to be heard prior to expiration of 30 day period, requiring denial of Motion.
- (559) *In re Hardeman*, Case No. 10-65477 (Bankr. E.D. Mi. 2010) – Motion denied where Debtor failed to request a hearing on motion within time necessary to comply with 30 day requirement of Section 362(c)(3)(B). Petition filed August 12, Motion to Extend Stay filed August 26, but no hearing was set prior to September 13 resulting in automatic expiration of stay.
- (560) *In re Robinson*, 427 BR 412 (Bankr. W.D. Mi. 2010) – Automatic stay terminates with respect to debtor and property of the debtor for debtor has had prior case pending within the one year preceding the commencement of the current case and the debtor failed to file a motion to continue the automatic stay within 30 days as required by section 362(c)(3).
- (561) *In re Spencer*, Case No. 10-48817 (Bankr. E.D. Mi. 2010) – Debtor failed to file Motion to Extend within 7 days of commencement of case and failed to contact Courtroom Deputy to obtain hearing date until 30th day after commencement of the case, leaving insufficient time to hold a hearing within the 30 day deadline. Motion to Extend Stay denied.
- (562) *In re Dittman*, Case No. 09-60009 (Bankr. E.D. Mi. 2009) - Extension of Stay requires hearing to be completed within 30 days of Petition date. Court lacks authority to extend stay if hearing is not completed within 30 days of commencement of case.

3.137 Grounds for Denial

- (563) *In re Riedy*, 2014 WL 4814513 (Bankr. W.D. Mi. 2014) – Section 362 creates presumption that second case is filed in bad faith, which debtor can overcome by showing good faith by clear and convincing evidence. Good faith depends on totality of circumstances including (i) the timing of the petition, (ii) how the debt arose, (iii) the debtor's motive, (iv) how the debtor's actions affected creditors, (v) why the debtor's case was dismissed, (vi) the likelihood that the debtor will have steady income throughout the case and will be able to fund a plan, and (vii) whether any party objects to the motion. Analysis should particularly focus on why the prior chapter 13 plan failed, and how debtor’s financial condition has changed so that the current plan can be successful. Debtor’s prior case failed because debtor, a self-employed

bar owner, suffered health issues that prevented him from working and during prior case the business lost its liquor license. Debtor's health has recovered and he is back to work full time, and the business regained its liquor license and debtor expanded catering arm of business to generate sufficient income to make plan payments. There was no evidence of bad faith in timing of second case where debtor only recently regained health and returned to work and debtor had to find new counsel as prior counsel was not available. Debt owed to objecting creditor was note and mortgage on business premises, but debtor did not address debts other than note and mortgage, including extensive tax liabilities and financial conditions that pre-dated first filing indicating that business issues were not caused by health or license issues but resulted from other factors and there was no evidence that debtor had addressed those factors, weighing against extension of stay. Debtor's motive in filing and cause of dismissal in last case evidenced good faith as financial conditions that caused prior dismissal and supported current filing resulted solely from debtor's business downturn and subsequent recovery and did not implicate any fraudulent or nefarious conduct, and failure to make payment in prior case was not attempt to manipulate the system but resulted from debtor's business issues that left him unable to make payments; and debtor attempted to make payments to Bank after case was dismissed indicating intent to pay obligations, but Bank rejected payments. Extension of stay would adversely affect Bank as secured creditor and Bank acted in good faith in pursuing foreclosure after first case was dismissed and there was no evidence of any wrongdoing by creditor, which weighs against extension of stay as it will do in almost all cases. Debtor's ability to fund plan, most important factor, supported extension of stay where debtor's business had stabilized and debtor appeared able to make payments, and debtor testified that he would sell his house if necessary to fund the plan. Debtor established ACH payment system with Trustee to ensure payments are made and debtor had already made two full plan payments as of date of hearing. Although debtor did not file plan or schedules in advance of the hearing making it difficult for court to evaluate potential success, debtor's clear and convincing testimony "narrowly" satisfied burden with respect to ability to fund plan. Absent any contrary evidence from Bank, court concluded that extension of stay was warranted.

- (564) *In re Skoglund*, 2014 WL 1089865 (Bankr. W.D. Mi. 2014) – Debtor with two prior cases in just over a year, one of which resulted in discharge in Chapter 7, not entitled to extension of stay. Debtor failed to appear for the hearing although counsel did. Debtor did not present any evidence to rebut presumption that case was filed in bad faith and did not offer any evidence to meet clear and convincing standard. However, expiration of stay affects only actions against debtor and does not vacate stay as to property of estate. Credit Union holding liens on vehicles stayed from repossessing vehicles as long as vehicles remained property of estate.
- (565) *In re Yatooma*, Case No. 12-59348 (Bankr. E.D. Mi. 2012) – Motion must be served on all creditors as required by Rule 4001-5(a). Only certificate of service filed indicated that motion was served through Court's ECF system which means that only parties who received notice were those on ECF.
- (566) *In re Leverette*, Case No. 10-71000 (Bankr. E.D. Mi. 2010) - Motion to Extend Stay denied without prejudice where Debtor had two separate bankruptcy proceedings pending in the prior 12 months. There is no automatic stay to extend under the circumstances of this case. Debtor must file a Motion to Impose a stay under Section 362(c)(4)(B).
- (567) *In re Conlin*, Case No. 10-64036 – Motion denied where Motion filed too late to comply with 30-day hearing completion deadline in Section 362(c)(3)(B). Debtor filed petition on July 29 but did not file Motion to Extend until August 31, 2 days after deadline had already expired and stay had expired automatically.
- (568) *In re Frazier*, Case No. 10-59045 (Bankr. E.D. Mi. 2010) - Automatic stay did not come into effect where Debtor had two prior cases in preceding year. Motion to Extend Stay under Section 362(c)(3) does not apply. Motion denied without prejudice to Debtor filing Motion to Impose Stay under Section 362(d)(4).
- (569) *In re Harris*, Case No. 10-46451 (Bankr. E.D. Mi. 2010) – Motion to Extend Stay denied in Debtor's Third case within one year. Section 362(c)(4) provides that where there are two or more prior cases within the preceding year, there is no stay in effect. Party must file Motion to Impose Automatic Stay. Motion to Extend Stay denied where there was no stay in effect that could be extended.
- (570) *In re Brock*, Case No. 08-69720 (Bankr. E.D. Mi. 2009) - Motion to Extend Automatic Stay denied where counsel failed to attend hearing. Counsel calendared hearing for Thursday, December 26 when Thursday was, in fact, December 25 and the hearing was scheduled for December 22.

3.138 Grounds for Extension

- (571) *In re Wilson-Fields*, 2015 WL 1294137 (Bankr. W.D. Mi. 2015) – Section 109 provides that stay terminated in second filed case unless court finds later case filed in good faith. Prior case was not dismissed after confirmation of plan or for failure to file documents or provide court ordered adequate protection; debtor had only one case pending in prior year; and there was no request for stay relief pending when prior case dismissed; thus, there is no presumption of bad faith and good faith can be shown by preponderance of evidence rather than "clear and convincing evidence" as would be required if presumption of bad faith arose. Debtor credibly demonstrated that debtor's financial condition changed as she had 12 properties in prior case that were either vacant or occupied by tenants who were not paying rent and debtor now has tenants in 5 of those properties; and debtor's spouse has returned to work and can finish what work remains to place remaining units in habitable condition. Debtor has minimal unsecured debt (\$11,000) and proposes a 100% dividend to those creditors. Debtor's student loans are on an income contingent plan with payments of \$5.00 per month which is affordable. Mere fact that case is second in one year and fourth overall, with none of the prior cases producing a confirmed plan, is not sufficient to demonstrate a lack of good faith, even if all cases were filed on eve of foreclosure, as preventing foreclosure is common reason to file Chapter 13.

3.139 Effect of Expiration of Stay

- (572) *Jennings v. Bodrick*, 2016 WL 6127802 (E.D. Ohio 2016) – Where debtor has had prior bankruptcy case dismissed within one year preceding filing of current case, debtor must request extension of automatic stay or stay expires automatically after 30 days. Once stay expired, creditor

free to pursue litigation against debtor as if bankruptcy case never occurred. However, Court would hold non-bankruptcy proceeding abeyance at request of parties where there were parallel proceedings in bankruptcy court to except debt from discharge based on fraud. While bankruptcy court was not being asked to liquidate debt but only to determine that to extent debt exists it would be excepted from discharge there is judicial efficiency in waiting for bankruptcy court to rule as determination by bankruptcy court that debt is dischargeable renders moot the issue of damages in non-bankruptcy forum.

- (573) *In re Roach*, Case No. 16-10574 (Bankr. M.D. Al. 2016) – Expiration of Automatic Stay terminates stay as to actions against debtor but does not terminate stay as to actions against property of estate. “Majority view” is that expiration of stay is limited to actions against debtor, and secured creditor cannot effect *in rem* remedies by repossessing or disposing of collateral post-petition merely because stay expires under Section 362(c)(3).
- (574) *Vitalich v. Bank of New York*, Case No. 16-0420 (N.D. Ca. 2016) – Adopting “minority position”, District Court affirmed Bankruptcy Court ruling that expiration of stay terminates stay as to both actions against debtor and as to property of estate. Limiting effect to actions against debtor only would be inconsistent with deterrence goal in regard to serial filings.
- (575) *In re Wilson-Fields*, Case No. 15-0863 (Bankr. W.D. Mi. 2015) – Denial of Motion to Extend Stay does not permit creditor to foreclose on property of estate. Stay expires as to actions against the debtor only. If case had been third case in prior year where stay never came into effect, creditors could proceed with foreclosure, but not on second filed case where stay is not extended.
- (576) *In re Skoglund*, 2014 WL 1089865 (Bankr. W.D. Mi. 2014) – Debtor with two prior cases in just over a year, one of which resulted in discharge in Chapter 7, not entitled to extension of stay. Debtor failed to appear for the hearing although counsel did. Debtor did not present any evidence to rebut presumption that case was filed in bad faith and did not offer any evidence to meet clear and convincing standard. However, expiration of stay affects only actions against debtor and does not vacate stay as to property of estate. Credit Union holding liens on vehicles stayed from repossessing vehicles as long as vehicles remained property of estate.
- (577) *Reswick v. Reswick*, 446 BR 362 (9th Cir. BAP 2011) – Stay expires in total 30 days after filing of second case within one year. Expiration is not limited to actions against property of estate. Wage garnishment did not violate stay because stay expired 30 days after second case filing within a year pursuant to Section 362(c)(3)(A).
- (578) *In re Magni*, 2010 WL 5069553 (Bankr. D. Neb. 2010) - The stay would terminate only as to actions against the debtor or property of the debtor that is not property of the bankruptcy estate but continues to apply to actions against property of the estate.
- (579) *In re Robinson*, Case No. 09-13005 (Bankr. W.D. Mi. 2010) – Automatic stay terminated where debtor failed to file a motion to continue the automatic stay within 30 days as required by section 362(c)(3). Stay terminates under Section 362(c)(3) as to the debtor and as to property of the debtor, but not as to property of the estate.

3.140 “Re-imposition” of Expired Stay

- (580) *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 and 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.
- (581) *Antal v. Carroll*, 2011 WL 5008345 (E.D. Mi. 2011) – Debtor’s Plan could not be confirmed where plan proposed to have property of estate remain vested in the estate until completion of plan, where vesting provision was designed to obtain benefit of stay and avoid consequence of debtor’s failure to timely file Motion to Extend Stay. Allowing debtor to effectively obtain second “stay” lacked good faith. Although Code expressly allows plan to re-vest property in the Trustee and the estate, this did not exclude conduct from considerations of good faith.

I. Imposition of Automatic Stay

3.141 When Necessary

- (582) *In re Skoglund*, 2014 WL 1089865 (Bankr. W.D. Mi. 2014) – Imposition of stay not applicable where although debtor had two pending case sin prior year, only one case was dismissed and second case resulted in discharge. Section 362(c)(4) applies only where debtor had two prior cased dismissed within prior year.
- (583) *In re Frazier*, Case No. 10-59045 (Bankr. E.D. Mi. 2010) - Automatic stay did not come into effect where Debtor had two prior cases in preceding year. Motion to Extend Stay under Section 362(c)(3) does not apply. Motion denied without prejudice to Debtor filing Motion to Impose Stay under Section 362(d)(4).
- (584) *In re Harris*, Case No. 10-46451 (Bankr. E.D. Mi. 2010) – Motion to Extend Stay denied in Debtor’s Third case within one year. Section 362(c)(4) provides that where there are two or more prior cases within the preceding year, there is no stay in effect. Party must file Motion to Impose Automatic Stay. Motion to Extend Stay denied where there was no stay in effect that could be extended.

3.142 Timing of Motion and Hearing

- (585) *In re Figueroa*, Case No. 12-56797 (Bankr. E.D. Mi. 2012) – Motion to Impose Stay must be filed within 30 days of commencement of case. Motion that was filed 37 days after petition denied as untimely.

3.143 Grounds for Denial

- (586) *In re Gatlin*, 2014 WL 628024 (Bankr. E.D. N.C. 2014) – Stay would not be imposed in third case as to mortgage holder where foreclosure was completed after petition filed but before stay imposed. However, stay would be imposed as to all other creditors where debtor had to file criminal charges against spouse for writing bad checks.
- (587) *In re Skoglund*, 2014 WL 1089865 (Bankr. W.D. Mi. 2014) – Court denied motion to impose stay where debtor did not attend hearing and did not provide testimony to rebut presumption of a lack of good faith. However, where debtors' two automobiles remained property of estate, lack of stay under Section 362(c) did not operate to exclude automobiles from stay, where stay terminated only as to action against debtor and does not terminate stay as to property of estate.

3.144 Grounds for Imposition

3.145 Order Confirming No Stay in Effect

- (588) *Morris v. Paine*, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – 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 Section 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 an 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.

3.146 Effect of Failure to Impose Stay

- (589) *Brantley v. CitiMortgage*, 2016 WL 6092709 (S.D. Ohio 2016) – Automatic stay did not come into effect when debtor filed Chapter 13 as debtor had two prior bankruptcy cases pending and dismissed in prior year. Defendant not stayed from prosecution of Motion to Dismiss and Motion to Declare Plaintiff a “Vexatious Litigator”.
- (590) *In re Skoglund*, 2014 WL 1089865 (Bankr. W.D. Mi. 2014) – Court denied motion to impose stay where debtor did not attend hearing and did not provide testimony to rebut presumption of a lack of good faith. However, where debtors' two automobiles remained property of estate, lack of stay under Section 362(c) did not operate to exclude automobiles from stay, where stay terminated only as to action against debtor and does not terminate stay as to property of estate.
- (591) *In re Bates*, 446 BR 301 (8th Cir BAP 2011) – Where debtor has had two or more cases pending in year preceding commencement of current case, stay does not go into effect as to debtor or as to property of estate. Section 362(c)(4) does not limit its scope only to actions against the debtor while nonetheless protecting property of estate. In third case filed within one year, the lack of a stay is absolute. Creditors are free to pursue actions and recovery as if bankruptcy case free of any restrictions under Section 362.

3.147 Re-imposing Stay After Grant of Stay Relief

- (592) *In re Bryan*, 2013 WL 5336112 (Bankr. N.D. Ohio 2013) – Motion to re-impose stay after Court entered order lifting stay is Motion to set aside Order pursuant to Rule 60. Once the stay has been lifted, court requires changed or extenuating circumstances to justify setting aside order. Motion failed to warrant reinstatement of stay. Debtors had some, but not all, funds necessary to bring mortgage current. Debtors were three months behind when the stay was lifted, and debtors demonstrated continuing inability to make ongoing mortgage payments.

J. Serial Filing – Small Business

3.148 Non-Applicability of Stay

- (593) *Karam, Inc. v. BW Loan Holdings, LLC*, 2013 WL 3243540 (W.D. Ky. 2013) – Under Section 362(n), the automatic stay does not come into effect in small business case where debtor or predecessor in title to debtor's assets had case dismissed within two years preceding commencement of new case.

K. Reinstatement of Automatic Stay

3.149 Generally

- (594) *In re Player*, 2015 WL 5885348 (Bankr. W.D. Ohio 2015) – Reinstatement of Stay does not “undo” any action that occurred while stay was lifted. Where lender obtained relief from stay and completed foreclosure proceedings, Debtor's request to reinstate stay, if granted, would have no effect on validity of foreclosure sale or enforceability of sale after expiration of redemption period.
- (595) *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.

3.150 Procedure

- (596) *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). Court would not reimpose stay under Section 105 where doing so would be contrary to provisions of Code and there was no evidence of any wrongdoing by lender. Unsuccessful litigation strategy of Debtor’s counsel and Creditor’s unwillingness to accept Debtor’s proposed plan rather than pursuing foreclosure, do not constitute unusual and compelling circumstances or an egregious fact situation. Court would not use “All Writs” power to reimpose stay where debtor did not demonstrate any clear and indisputable right to relief or that any drastic or extraordinary circumstances existed to support issuance of writ.
- (597) *In re Robinson*, Case No. 09-13005 (Bankr. W.D. Mi. 2010) – Motion to “reinstate” the automatic stay seeks to enjoin creditor from repossessing the Car. Motion that seeks injunctive relief, other than injunctive relief expressly provided for in a reorganization plan, it is procedurally improper. Debtor seeking injunctive relief must do so through an adversary proceeding, and establish the elements of a case for injunctive relief.

L. Jurisdiction

3.151 State Court Authority

- (598) *Southwest Airlines Co. v. Tidewater Finance Co.*, Case No. 15-70960 (N.D. Ga. 2016) – State court has concurrent jurisdiction to determine applicability of stay but Bankruptcy Court has exclusive jurisdiction to grant relief from stay and state court actions taken in violation of stay are void. *Rooker-Feldman* doctrine does not prevent Federal court from reviewing State Court determination that stay did not apply. Stay is one of the most fundamental protections in Bankruptcy Code warranting Federal Court’s exercise of jurisdiction. Bankruptcy court is not bound by state court ruling on applicability of stay and can determine that actions of creditor violate stay even after State Court determined that stay did not apply, agreeing with Third and Ninth Circuits and disagreeing with Sixth Circuit BAP and bankruptcy courts in New York and Florida.

IV. Attorneys

A. Debt Relief Agency

4.1 Generally

4.2 Attorneys as Debt Relief Agency

- (349) *U.S. v. Milavetz, Gallop & Milavetz, P.A.*, 130 S.Ct. 1324 (2010) - Attorneys who provide bankruptcy assistance to assisted persons are debt relief agencies under the BAPCPA. Bankruptcy assistance includes several services commonly performed by attorneys, including providing advice, counsel, and document preparation. Congress indicated no intent to exclude attorneys. The controlling question is likewise the impelling reason for advising an assisted person to incur more debt was the prospect of filing for bankruptcy, generally consisting of advice to “load up” on debt with the expectation of obtaining its discharge. Section 528’s disclosure requirements are directed at misleading commercial speech and impose only a disclosure requirement rather than an affirmative limitation on speech and are intended to combat the problem of inherently misleading commercial advertisements, and they entail only an accurate statement of the advertiser’s legal status and the character of the assistance provided. Section 528 does not prevent debt relief agencies from conveying any additional information through their advertisements.

4.3 Duties of Attorney as DRA

- (350) *French v. Johnson Law Group*, 2012 WL 3292854 (Bankr. N.D. Ohio 2012) – Section 526 sets forth certain restrictions on the conduct of debt relief agencies and provides a remedy for assisted persons where the debt relief agency “intentionally or negligently” failed to comply with its provisions or the provisions in Section 527, which addresses disclosures that a debt relief agency must make, and Section 528, which addresses both the contract that a debt relief agency is required to execute with the assisted person and its advertisement of bankruptcy assistance services. Sections 526, 527, and 528 by their express terms apply only to “debt relief agencies,” defined as “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110....” A “bankruptcy petition preparer” is defined as “a person, other than an attorney for the debtor ... who prepares for compensation a document for filing.” Thus, the restrictions set forth in Section 526 apply only to a person who for compensation provides bankruptcy assistance or prepares a document for filing in the bankruptcy case. Complaint that alleged only that Defendant was a business purporting to offer debt relief and debt settlement services, without more, did not evidence that Defendant was Debt Relief Agency. Plaintiff did not allege that defendants prepared a petition for debtor and debtor was specifically told by defendants to seek other counsel if debtor wanted information on filing for bankruptcy.
- (351) *In re Santiago*, 2011 WL 4056700 (D.P.R. 2011) – Attorney, as “debt relief agency” must meet face to face with client prior to filing case and at every critical stage of the proceeding. Attorney had “personally trained and daily supervised paralegal” meet with clients and prepare all documents, although attorney did review documents before case filed. However, that procedure did not meet requirements under Section 526 through 528.

4.4 Sanctions

- (352) *Taylor v. McDermott*, 2015 WL 4041355 (E.D. Mi. 2015), *aff’d*, Case No. 15-1909 (6th Cir. 2016) – Bankruptcy Court correctly imposed sanctions against BPP where court had previously ordered BPP to disgorge fees to debtor and BPP failed to comply. So called “bill of

exchange” created by BPP was not legal tender and any allegation that delivery of “bill of exchange” was frivolous.

- (353) *Bisges v. Gargula*, 2014 WL 5335735 (8th Cir. 2014) – Section 526 prohibits any DRA from counseling any person to make statement in document filed in case that is untrue or misleading or that upon exercise of reasonable care should have been known to DRA as untrue or misleading. Immediately prior to filing debtor wrote check to mother to repay loan. Attorney advised debtor not to send check but if she did, make sure the money could not be traced and stick to that story. SOFA checked box indicating no payments to creditors within one year preceding case although attorney knew of payment to mother only weeks before. Schedule F failed to list mother for balance of loan that remained owing after application of check. Section 526 is violated when DRA counsels person to make false statement regardless of whether person actually makes false statement. Attorney violated 526 when he counseled debtor not to disclose certain information even if that information had been ultimately disclosed. Attorney also violated Section 526 by failing to disclose in Schedule B debtor’s ownership of horses where debtor told attorney of horses but attorney responded that she did not need to list them because “no one list horses” in violation of Section 704(b)(4). Attorney also violated Section 707(b)(4) by filing amended petition and amended schedules without debtor reviewing and signing those documents. Sanctions included disgorgement of \$1,411 in fees and referral to district court for further disciplinary proceedings.
- (354) *Findling v. Rapoport*, Adv. No. 11-6933 (Bankr. E.D. Mi. 2014) – Bankruptcy Court can order disgorgement of fees to extent fees are excessive, or to extent of penalties against “debt relief agency” for failure to comply with debt relief requirements. Attorney who fails to comply is liable to the assisted person. Further, court has inherent authority to oversee fees including consideration of requirements of Sections 526-28. Counsel failed to comply with debt relief requirements by failing to provide mandatory written disclosures or to keep copies of those disclosures; failed to execute written retainer agreement; and overall failed to comply with any debt relief requirements. Court can void agreement between debtor and attorney where contract does not comply with requirements, for example by omitting required language, failure of the disclosures to be conspicuous or clearly written, or services to be provided were not adequately defined; or court can assess actual damages, attorney fees and costs where conduct amounts to intentional or negligent failure to comply with any provision of Sections 526-28. Failure to obtain written agreement was intentional omission warranting imposition of sanctions, where it would be illogical to “void” a non-existent agreement. Attorney’s conduct was at least negligent where attorney was experienced attorney with lengthy legal career and attorney did not offer any defense of inactions. Plaintiff in adversary proceeding was not entitled to award of attorney fees or costs in pursuing disgorgement as Section 526-28 provide remedies solely to represented party and plaintiff was not debtor nor otherwise represented by attorney. Attorney required to disgorge fees to debtor.

B. Necessity for

4.5 Corporations

- (355) *LorCon LLC #1 v. Heyl*, 2014 WL 5354040 (8th Cir. 2014) –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.
- (356) *First Chicago Bank & Trust v. Leibowitz*, Case No. 11-2172 (7th Cir. 2011) – Prohibition against *pro se* corporate filings is not jurisdictional. Even though a *pro se* corporate filing is defective, it can be cured by an amended petition signed by an attorney pursuant to Rule 1009(a) of the Federal Rules of Bankruptcy Procedure. The amended petition may “relate back” to the original petition date pursuant to the equitable powers of the Court where the original defect was harmless. Subject-matter jurisdiction is intended to limit access to a federal tribunal in classes of cases that the Constitution or legislation declares off limits to the federal courts, it is not intended to punish litigants for errors or omissions made in the context of cases that are within jurisdictional limits (except for untimely notices of appeal). The “relation back” concept of Rule 15(c) of the Federal Rules of Civil Procedure, applicable to adversary proceeding complaints pursuant to Rule 7015 of the Bankruptcy Rules and applicable to involuntary petitions pursuant to Rule 1018 of the Bankruptcy Rules, may also be applied to voluntary petitions even though there is no express statute so requiring this result.
- (357) *In re Richardson*, Case No. 10-65958 (Bankr. E.D. Mi. 2010) – Motion for Relief From Stay filed by Corporation stricken where Motion not signed by attorney. Corporate officer or other individual who is not an attorney may not represent a corporation in federal court.
- (358) *Carl Development v. Rickard*, Case No. 10-4216 (Bankr. E.D. Mi. 2010) – Adversary complaint filed by “co-owner” of corporate plaintiff dismissed as party purporting to sign complaint was not an attorney. A legal entity such as a corporation must be represented by an attorney.
- (359) *In re Kay Bee Properties, LLC.*, Case No. 09-52889 (Bankr. E.D. Mi. 2010) - Objections and Request for Hearing not signed by attorney stricken. Corporation cannot appear in court other than through an attorney.
- (360) *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.
- (361) *In re Executive Business Corporation*, Case No. 08-62865 (Bankr. E.D. Mi. 2008) - Corporation cannot file Petition without attorney. Petition not signed by attorney - case must be dismissed.
- (362) *In re Beel Automotive, LLC.*, Case No. 09-63468 (Bankr. E.D. Mi. 2009) - Chapter 7 case dismissed where Voluntary Petition filed by individual who is not an attorney. A Limited Liability Corporation is governed by same rules as are applicable to corporations and partnerships, and may not file bankruptcy petition except through an attorney.

4.6 Individuals

- (363) *Enoch- Combs v. Steinour*, 2016 WL 2990934 (N.D. Ohio 2016) – Individual who is not attorney may represent himself and that person

must personally sign complaint to invoke jurisdiction. Person who is not attorney cannot represent another individual. Complaint signed by one individual that purported to bring action on behalf of another individual did not effectively invoke court jurisdiction over non-signing party and was ineffective to bring claims of non-signing party before court.

- (364) *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.

- (365) *In re Poydras*, Case No. 11-40365 (Bankr. E.D. Mi. 2011) – Individual who is not attorney cannot represent debtor or appear at hearings.

4.7 Partnerships

4.8 Conservatorship

- (366) *Bowers v. Banks*, 2013 WL 1091634 (Bankr. E.D. Tn. 2013) – Conservator for financial affairs of individual is not authorized to represent Ward in Adversary proceedings. Pleadings filed by conservator in adversary proceeding stricken and default judgment entered.

4.9 Trusts

- (367) *In re Thomas Kuttkuhn Family Trust*, Case No. 11-69390 (Bankr. E.D. Mi. 2011) – Trustee of Trust is not authorized to represent Trust in Federal Court. Bankruptcy Petition signed only by Trustee, and not by an attorney, dismissed.

4.10 Decedent’s Estates

- (368) *Estate of Gower v. Parker*, 2016 WL 5763973 (Bankr. W.D. Ky. 2016) – Questions of representation are governed by federal, not state law. Federal law allows estate that has no creditors to be represented by all beneficiaries jointly *pro se*. All beneficiaries signed the complaint and there was no contest that estate involved any other beneficiaries or that estate had any creditors. Only parties affected by non-attorney representation were parties themselves.

C. *Pro Bono* Appointment

4.11 Parties Entitled to Appointment

- (369) *Rogers v. McDermott*, Case No. 14-13769 (E.D. Mi. 2015) – Debtor not entitled to appointment of attorney *pro bono* where there is no purpose served as debtor is indisputably not eligible for discharge and case was filed in bad faith and without any legitimate purpose.

- (370) *In re Sinta*, 2013 WL 1946185 (E.D. Mi. 2013) – Court can appoint counsel only in criminal cases. Debtor not entitled to appointed counsel in bankruptcy case in connection with defense of Motion for Relief From Stay.

- (371) *Cuter v. Seror*, Case No. 09-60014 (9th Cir. 2011) – Party to adversary proceeding over disputed funds is not entitled to use the disputed funds to underwrite the representation. Defendant in adversary proceeding not entitle to appointed counsel.

- (372) *Barlow v. McGee*, 2010 WL 3831387 (Bankr. W.D. Mi. 2010) – Defendant has no right to the appointment of counsel in a civil proceeding including adversary proceedings in bankruptcy.

- (373) *In re Wilson*, Case No. 05-54408 (Bankr. E.D. Mi. 2009) - Court's ability to appoint *pro bono* counsel is limited to providing legal services to Debtors involved in adversary proceedings related to discharge and non-dischargeability of certain Debtor, and to the indigent former spouse of the Debtor regarding dischargeability of the judgment of divorce. Creditors do not qualify for participation in Court's *pro bono* program. Court lacks authority to appoint an attorney to represent a creditor on *pro bono* basis.

4.12 Limitations on Appointment

4.13 Termination of *Pro Bono* Appointment

D. Attorney Fees

4.14 Generally

- (374) *In re Davis*, Case No. 15-45016 (Bankr. E.D. Mi. 2016) – Section 330(a) authorizes award of reasonable compensation for actual, necessary services rendered by attorney, based on benefit and necessity of services and other factors set out in Section 330. Court must use lodestar approach by multiplying reasonable hourly rate times number of hours reasonably expended, with court to then exercise discretion to consider other relevant factors such as novelty and difficulty of issues presented, specific skills of counsel,, results obtained, and whether fee award is commensurate with fees for similar professional services in non-bankruptcy cases in the local area. Burden of proof is on professional and cannot be taken lightly as every dollar of legal fees results in one dollar less being available for distribution to creditors or other use by debtor.

- (375) *In re North America, LLC*, Case NO. 01-57090 (Bankr. E.D. Mi. 2012) – Attorney for Trustee entitled to compensation for services that produced substantial economic benefit and efforts have been complex, extensive and demanding. Attorney helped trustee perform substantial duties necessary to administer chapter 7 estate. No party with a financial stake has objected and largest unsecured creditor filed detailed statement in support.

- (376) *In re Baer*, 2012 WL 2368698 (6th Cir. BAP 2012) – Section 362(k) authorizes award of actual damages, including attorney fees and costs, for willful violation of the automatic stay. If fees are appropriate under Section 362, the amount must be reasonable, based on customary

compensation charged by comparably skilled practitioners, and fee must bear a reasonable relationship to the amount in controversy.

- (377) *In re McLean Wine Co., Inc.*, 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – Awards of fees are governed by 11 U.S.C. § 330. Bankruptcy court can award, after notice and hearing, reasonable compensation for actual, necessary services rendered and reimbursement for actual, necessary expenses. Court must consider nature, extent, and value of the services and to consider all relevant factors such as hours spent, the rates charged, and the necessity and benefit of the services at the time rendered. Bankruptcy court is precluded from awarding compensation duplicative services, services that were not reasonably likely to benefit the debtor's estate, or services that were not necessary to the administration of the estate.
- (378) *In re Anthony*, 447 BR 827 (Bankr. N.D. Ohio 2011) – Attorney who had previously submitted to State Bar an Application for Retirement or Resignation would be limited in compensation to amount set for non-attorney Bankruptcy Petition Preparer.
- (379) *In re Amburgey*, 446 BR 825 (Bankr. N.D. Ohio 2011) – Any attorney representing a debtor in a bankruptcy case is required to file a statement of compensation paid or agreed to be paid. A court, either on a motion of a party in interest or on its own initiative, may then review the fee statement. Based then upon this review, if it is determined that the attorney's compensation exceeds the reasonable value of the services rendered, the court may order the disgorgement of the amount of the attorney's fee found to be unreasonable. Reasonableness is assessed with regard to particular circumstances of specific case. Attorney who had previously submitted to State Bar an Application for Retirement or Resignation would be limited in compensation to amount set for non-attorney Bankruptcy Petition Preparer.
- (380) *In re Flemming*, 444 BR 844 (Bankr. N.D. Ohio 2011) – Experienced counsel's fee application seeking more than \$10,000 to confirm "garden-variety" Chapter 13 was excessive. Most of the tasks are included in the "no look" fee of \$3,000, and various time entries indicated expenditures of time that were excessive. Compensation reduced to \$5,800.00.
- (381) *In re Minor*, 2011 WL 2728406 (Bankr. N.D. Ohio 2011) – Court awarded fee that exceeded standard "no look" fee by "only" \$112.50. Court believed that debtor's counsel did "at least some additional work: to warrant slight deviation from "no look".
- (382) *In re Ross*, 2011 WL 2708349 (Bankr. N.D. Ohio 2011) – Court awarded fee in excess of District's established "no look" amount where application indicated the attorney performed services beyond those normally and routinely performed. Debtors failed to advise counsel of motor vehicle owned by debtors but used by debtors' son who resided in Las Vegas. Case required additional work in connection with this vehicle.
- (383) *In re Smith*, 2011 WL 2293261 (Bankr. N.D. Ohio 2011) – Compensation under Sections 327 and 330 must be driven by reasonableness. Lodestar multiplication of reasonable hourly rate times reasonable number of hours creates presumptive reasonable compensation, subject to adjustment. Counsel entitled to compensation for asserting unclear or debatable proposition of law, but not entitled to compensation for arguing against settled law. Court cannot award reimbursement of expenses without itemized statement of expenses.
- (384) *In re Criscenti*, Case No. 10-50133 (Bankr. E.D. Mi. 2010) - Application for Compensation denied without prejudice. Counsel failed to supplement the Application as required by Court Order.
- (385) *In re Taylor*, Case No. 09-72690 (Bankr. E.D. Mi. 2010) – Counsel has independent duty to determine whether Chapter 13 filing is appropriate course of action. Debtor had no financial issues other than IRS levy. Counsel recommended that Debtor file Chapter 13 proceeding without exploring whether non-bankruptcy remedies may be available, such as an abatement of collection activities by the IRS, possible negotiation of resolution of tax issues outside of bankruptcy, or requesting payment plan directly with IRS. Where Debtor faced pressure from only one creditor, Counsel must determine if more appropriate approaches to issues exist. If counsel cannot obtain answers to those questions, it may be appropriate to refer the matter to others to do so, or to ask Debtor to make the inquiry himself. Although Chapter 13 filing was not inappropriate per se, possible alternative and less expensive avenues should have been pursued first. Application for fees reduced from \$1,781.50 to \$900.00.
- (386) *In re Waldo*, Case No. 09-30969 (Bankr. E.D. Tn. 2009) - Bankruptcy Code calls upon courts to review and determine the reasonableness of the compensation paid or agreed to be paid a debtor's attorney and compensation may be reduced if found unreasonable. The reasonableness of fees is within the court's discretion, to be determined based upon "the nature, the extent, and the value of such services," in conjunction with "the surrounding facts and circumstances, including the customary fee in comparable cases.
- (387) *In re Sapienza*, 2009 WL 3153084 (E.D. Mi. 2009) – Bankruptcy Court properly considered (1) nature of the case including lack of unique services; (2) the need to balance the interest in paying attorneys against making sure that Debtors and creditors receive full value that they can receive in a Chapter 13 proceeding; (3) the ability of attorneys to factor distance to the Court into their fee estimates; and (4) the resulting fee award, even with compensation reduced for travel time, still exceeded both the "typical" flat fee of \$3000 and the elevated flat fee of \$3500 for a Chapter 13 cases featuring special circumstances. The Bankruptcy Court did not err in limiting travel time to attend first meeting of creditors or confirmation hearing to one hour. Bankruptcy Court did not adopt "rote or arbitrary application of a per se rule" concerning travel time but rather factored travel time into analysis to determine overall fee award. Counsel is not *per se* entitled to full compensation for travel time at full hourly rate in each and every case. Court must consider particular facts of the case and remains free to reach different results as warranted by the facts of particular case.
- (388) *In re CMC Telecom, Inc.*, Case No. 07-56001 (Bankr. E.D. Mi. 2009) – Court has duty to review fee applications regardless of whether an objection has been filed, to protect assets of estate for benefit of creditors. The Bankruptcy Court has responsibility to avoid waste of estate assets and prevent overreaching by attorneys. Fees must be (1) reasonable; (2) incurred for services that were actually rendered; and (3) incurred for services that were necessary. Attorneys must exercise billing judgment to ensure that an appropriate fees charged given the nature of the service, rather than presuming that a fee is reasonable simply by multiplying the rate charged by the individual who provided

the service by the time spent.

- (389) *Coventry Commons, LLC v. Kwag*, Adv. No. 07-3002 (Bankr. E.D. Mi. 2008) - Adversary Defendant who needed interpreter for trial required to reimburse Plaintiff for attorney fees and costs for appearing for Adversary Trial where Defendant failed to arrange for appearance of proper interpreter. Award of attorney fees for time spent in preparing for trial that could not be held and for costs for expert witness fees for appearance at trial proper where costs were rendered unnecessary or "wasted".
- (390) *Boyd v. Engman*, 404 BR 467 (Bankr. W.D. Mi. 2009) - Section 330(a) allows "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses." The lodestar method requires the Court to determine a "lodestar amount" by calculating the attorney's reasonable hourly rate by the number of hours reasonably expended. Court must determine what portion of the claimed attorney's fees correspond to "hours reasonably expended." Attorney's time must relate to a service that is reasonably likely to benefit the estate or necessary to the administration of the bankruptcy case. Hourly rate must be reasonable in light of complexity and importance of the task; skill and experience of the attorney; the prevailing market rate for like services; the total time expended; the results obtained; and any other factor the Court finds relevant. Services performed in connection with Motion to Approve Settlement are compensable even if Trustee can settle claims without Court permission. Counsel is entitled to compensation for services rendered in preparing and defending fee application. Counsel entitled to compensation for services that are not "legal services". Although Trustee could also have performed services, counsel is entitled to compensation unless it was wrong as a matter of law for the Trustee to delegate the task. Counsel entitled to compensation for non-legal services in connection with disposition of property including telephone conversations with various parties regarding disposition of property; correspondence with potential purchasers of the property; and examination and review of documents relating to the liens claimed against the property. Counsel should not be denied compensation for reviewing documents that ultimately prove inconsequential. Whether services are of benefit to the estate must be determined as of the date on which the services were performed, not when the Court reviews the application.
- (391) *In re Sherkerjian*, Case No. 07-55859 (Bankr. E.D. Mi. 2009) – Attorney ordered to disgorge funds where Counsel filed multiple inconsistent statements of compensation and filed multiple inconsistent fee applications. Although Counsel received prepetition retainer, Counsel did not hold those fees in escrow pending approval of compensation by Court. Counsel's actions manifested "blatant attempt to avoid obtaining Court approval" for fees as required by 11 U.S.C. § 330.
- (392) *In re Scarlett Hotels, LLC.*, 392 BR 698 (6th Cir. BAP 2008) – Holder of oversecured claim entitled to reimbursement for fees and costs that are necessary to the collection and protection of creditor's claim. There is no formula or set rule by which the value of legal services may be appraised, and the amount which would represent reasonable compensation determined. The reasonableness is to be determined upon a consideration of all the facts and circumstances presented in the record, primarily the amount involved and available, the nature of the responsibility assumed by the attorney, the character and extent of the services. Opinion testimony by lawyers of experience and reputation is admissible as expert testimony on these issues. The final allowance is peculiarly within the discretion of the Court and represents an exercise of judicial discretion founded upon the knowledge of the Court making allowance for the real value of the service is performed. The Bankruptcy Court is not required to address in detail each line item of the fee application but must make findings, in such detail and exactness as the nature of the case permits, of facts on which an ultimate conclusion can rationally be predicated and give the Appellate Court a clear understanding of the basis of the Bankruptcy Court's decision. Bankruptcy Court did not err in concluding that charges for four different lawyers all working on an objection to confirmation or time spent litigating cash collateral matters in a later phase of the case were unreasonable.
- (393) *In re Russell*, 2009 WL 2849085 (E.D. Mi. 2009) – Bankruptcy Court has inherent authority to revisit prior fee award during pendency of case. Court must determine the benefit and necessity of counsel's services. Counsel will not be compensated for services that were not reasonably likely to benefit the Debtor's estate. Services were beneficial where a potential non-dischargeable debt of over \$22,000 was reduced to \$11,000, only \$3000 of which was designated as a priority unsecured claim in Debtors Chapter 13 plan. Although Chapter 13 Plan was ultimately unsuccessful, case did forestall foreclosure action and permit Debtors to remain in their home for a significant additional period of time, thereby producing a benefit to the Debtors warranting an award of compensation. Debtors' objection to fees because Chapter 13 Plan prepared by counsel was, in Debtors' view, not confirmable failed to take into account the fact that the plan was confirmed, although the plan ultimately failed to be feasible. An unsuccessful outcome, without more, is not a basis to deny counsel compensation, although this fact must be taken into consideration in ascertaining the value of the legal services.

4.15 Choice of Laws

- (394) *In re Simoukdalay*, 2016 WL 4613346 (Bankr. E.D. Tn. 2016) –Amount of fee award is governed by federal, not state law, although basis of award is state law contract or statute.

4.16 Duty of Court

- (395) *In re D&H Machine Service, Inc.*, 2016 WL 4733099 (Bankr. E.D. Tn. 2016) – Court has independent duty to review fee applications even in absence of objections filed by any party in interest.

4.17 Standing to Oppose Retention

- (396) *In re Parirokh*, Case No. 11-5409 (Bankr. W.D. Mi. 2013) – Prospective defendant in adversary proceeding lacks standing to contest debtor's application for retention of counsel. Defendant has no right to veto or impact choice of counsel by plaintiff, particularly where defendant is not a creditor and lacks any connection with case other than as defendant in prospective adversary action.

4.18 Standing to Object to Fee Application

- (397) *In re Sowell*, 2015 WL 4718588 (Bankr. D. Mn. 2015) – Chapter 13 Trustee retains standing to object to fee application filed after conversion of case where attorney sought to have fees paid by Chapter 13 Trustee. Section 1302 imposes on Trustee various duties including duty under Section 704(a)(2) to be accountable for property received, and Section 704(a)(7) to furnish information concerning estate and administration as requested by party in interest.

4.19 Conversion from Chapter 7 to Chapter 13

- (398) *In re Genatossio*, 538 BR 615 (Bankr. D. Mass. 2015) – Attorney who represented debtor in chapter 7 that later converts to Chapter 13 is entitled to compensation from estate for services rendered during Chapter 7. While Section 330(a)(1) does not allow award of fees following Supreme Court decision in *Lamie*, Section 330(a)(4) which is specifically applicable in Chapter 13 allows compensation for services rendered “in connection with the bankruptcy case” and does not distinguish between pre-conversion and post-conversion services in the case.
- (399) *In re Holbrook*, 2008 WL 2437735 (Bankr. E.D. Tn. 2008) – Attorney who represented debtor in Chapter 7 that later converted to Chapter 13 is not entitled to compensation from estate for services rendered pre-confirmation. United States Supreme Court ruled in *Lamie* that only counsel retained by Chapter 7 Trustee is entitled to compensation from estate for services rendered during Chapter 7. As debtor’s counsel was never retained to represent trustee, counsel cannot claim compensation for services rendered during Chapter 7 phase of case.
- (400) *Miller v. Ruskin*, Case No. 08-11384 (E.D. Mi. 2008) – Attorney who represented debtor in Chapter 7 that later converted to Chapter 13 is not entitled to compensation from estate for services rendered pre-confirmation. United States Supreme Court ruled in *Lamie* that only counsel retained by Chapter 7 Trustee is entitled to compensation from estate for services rendered during Chapter 7. As debtor’s counsel was never retained to represent trustee, counsel cannot claim compensation for services rendered during Chapter 7 phase of case.

4.20 Chapter 13 – “No Look” Fees

- (401) *Sikes v. Crager*, Case No. 11-30982 (5th Cir. 2012) – “No look” fee is not an entitlement, but is an amount that the court can award absent objection. Trustee who objected to the “no look” fee on the basis of simplicity of the case did not bear the burden of proving reasonableness, as the party seeking fees always bears that burden, even if seeking the “no look” fee where an objection has been lodged. However, fees were reasonable under circumstances. Even if case had otherwise been simplistic, Trustee’s objections based on lack of good faith added sufficient complexity to warrant award of full “no look” fee.

4.21 Fee Agreement

- (402) *In re Alexander*, 2014 WL 5849165 (Bankr. N.D. Ohio 2014) – 11 USC section 101(3) and section 528 require that counsel obtain a written contract with debtor that clearly and conspicuously explains the services to be provided and the charges for those services. Failure to abide by the material requirements of Section 527 or 528 voids the agreement and prevents enforcement in any court. However, failure to obtain fee agreement does not necessarily mean that all fees must be disgorged, as Section 526 voids further enforcement but does not require reimbursement of fees already paid.
- (403) *In re Alexander*, 2014 WL 5449653 (Bankr. E.D. Tn. 2014) – Attorney not entitled to additional compensation for objections to proofs of claim filed post-confirmation, where fee agreement and Rule 2016 disclosure stated that counsel’s “flat fee” of \$2,500 included filing and prosecution of objections to proofs of claim that are not anticipated to be contested. Attorney filed objections to two proofs of claim as past the statute of limitations. Creditors did not respond and objections were sustained by default. Objections were included in the previously approved and paid fee and attorney was not entitled to additional compensation for those services.
- (404) *In re Morgan*, 2014 WL 5449491 (Bankr. E.D. Tn. 2014) – Attorney not entitled to additional compensation for objections to proofs of claim filed post-confirmation, where fee agreement and Rule 2016 disclosure stated that counsel’s “flat fee” of \$2,500 included filing and prosecution of objections to proofs of claim that are not anticipated to be contested. Attorney filed objections to two proofs of claim as past the statute of limitations. Creditors did not respond and objections were sustained by default. Objections were included in the previously approved and paid fee and attorney was not entitled to additional compensation for those services.
- (405) *In re Michel*, 2014 WL 1647009 (Bankr. E.D. Mi. 2014) – Fee agreement entered into pre-petition that provided for payment of fees post-petition discharged in Chapter 7. Pre-petition attorney fees are dischargeable debts not excluded pursuant to Section 523. Post-petition performance of services does not convert pre-petition fee agreement into post-petition non-dischargeable obligation. Claim is pre-petition if it is based on pre-petition relationship between creditor and debtor such that creditor could “fairly contemplate” a claim against the estate at the time the petition was filed. Fee agreement called for flat fee of \$900 for services rendered in bankruptcy case, with \$450 paid pre-petition. Any attempt to collect balance of fees after filing case barred by Section 362 and Section 524. Fees received by counsel post-petition ordered disgorged. Subject to debtor’s right to voluntarily pay attorney after debtor is advised that debtor has no legal obligation to do so.
- (406) *In re Abdel Hak*, 2012 WL 5874317 (Bankr. E.D. Mi. 2012) – Fee agreement entered into pre-petition that provided for payment of fees post-petition discharged in Chapter 7. Pre-petition attorney fees are dischargeable debts not excluded pursuant to Section 523. Post-petition performance of services does not convert pre-petition fee agreement into post-petition non-dischargeable obligation.
- (407) *In re Waldo*, 417 BR 854 (Bankr. E.D. Tn. 2009) – Fee agreement entered into pre-petition that provided for payment of fees post-petition discharged in Chapter 7. Pre-petition attorney fees are dischargeable debts not excluded pursuant to Section 523. Post-petition performance of services does not convert pre-petition fee agreement into post-petition non-dischargeable obligation. Claim is pre-petition if it is based on pre-petition relationship between creditor and debtor such that creditor could “fairly contemplate” a claim against the estate at the time the petition was filed. Attorney’s negotiation of post-dated check received prior to commencement of case pursuant to terms of pre-petition fee agreement constituted attempt to collect discharged debt in violation of Section 362 and 524.

- (408) *In re Ortiz*, 2013 WL 447890 (Bankr. S.D.N.Y. 2013) – Attorney for consumer debtor must act as debtor’s attorney for all normal, ordinary and fundamental aspects of case. Retainer agreement that purported to limit counsel’s obligations to attend only one 341 meeting, even if not conclude, and limited post-petition services to no more than one hour, violated ethical obligations.
- (409) *In re Slabbinick*, 2012 WL 5386677 (Bankr. E.D. Mi. 2012) – Unbundling services into pre- and post-petition services does not per se violate Michigan ethical limitations or result in post-petition fee agreement being avoidable under Section 329. Section 329 does not apply to post-petition fee agreements. Attorney had a fee agreement for pre-petition services that specified exactly what services would be provided and the fee for those services, and specified that attorney would not perform any services post-petition without a new fee agreement. Pre-petition fee agreement made it clear that debtors were not required to hire attorneys for post-petition services and that attorney’s agreement to perform pre-petition services was not conditional on agreement to perform post-petition services. Michigan Ethical Rules allow fee agreement to limit services to be performed as long as client consents with adequate consultation. Unbundling must not undermine attorney’s ability to provide competent representation, defined as the ability to assist debtor in obtaining discharge and retention of exempt property. Some requirements can be performed prior to commencement of case, such as preparation of documents. However, Section 523(a)(4) also requires debtor to cooperate with the trustee and to surrender property of the estate to the trustee, both of which are necessarily post-petition requirements. Section 343 requires debtor to testify at meeting pursuant to Section 341, Section 727 imposes multiple requirements relating to debtor’s conduct and duties in order to obtain discharge, again which are by definition post-petition services. Alternative to split representation may be hiring of petition preparer or *pro se* filing, either of which provides worse representation that debtors will have even if services are unbundled. While ethical rules require competent representation, rules do not require that attorney represent debtor in all matters necessary to obtain objectives, and debtor will be better service to have at least some assistance prior to petition than if debtor is entirely unrepresented. Debtors states that they believed Attorney adequately advised and counseled debtors concerning limitations of representation and potential consequences if debtors choose to proceed without an attorney and that they understood that they would be required to obtain counsel subsequent to filing and that attorneys adequately advised them of legal options as it relates to bankruptcy case. However, debtors belief that consultation was adequate is not sufficient. Attorneys must also prove that the consultation was, in fact adequate to constitute “informed consent” on such items as consequences of failing to file documents; consequences of dismissal and serial filings; consequences of failure to attend 341 meeting; that failure to cooperate with trustee could result in loss of discharge. Court afforded attorney opportunity to provide additional affidavits concerning consultation to allow court to determine whether debtors acted with “informed consent”.
- (410) *In re Gourlay*, 2012 WL 4791034 (Bankr. E.D. Mi. 2012)), *aff’d*, 496 BR 857 (E.D. Mi. 2013) - Attorney in Chapter 7 proceeding cannot require debtor to pay balance of fees post-petition. To extent fee agreement purported to required debtor to make payments post-petition, fee agreement is void. even though the fee arrangement is described as a “flat fee,” the Debtor’s promise to pay \$900.00 of the flat fee post-petition is a pre-petition debt that is dischargeable. The United States Court of Appeals for the Sixth Circuit previously held that a debtor’s pre-petition agreement to pay attorney fees is a dischargeable debt. Although Section 329 requires attorney to file statement of compensation paid or to be paid for services rendered in contemplation of or in connection with the bankruptcy case, that provision does not create some exception to the discharge provisions of Section 727. Rule 1006 which allows for payment of filing fees in installments does not, by implication, except debt from discharge. Debtor’s pre-petition promise to pay fees post-petition is a prepetition debt. Attorney was stayed by the filing of the Debtor’s petition from taking any steps to collect this debt from the Debtor under Section 362(a). Any act to collect this prepetition debt—even just asking the Debtor to pay it—violates the automatic stay that went into effect when the Debtor filed for relief under Chapter 7. As the Debtor has already received his discharge, any act to collect the debt is prohibited by the discharge injunction of Section 524(a). Although debtor is not prohibited from making voluntary payments, retainer agreement creates a false impression that debtor is required to make payments, raising issue of whether payments would be truly “voluntary”.
- (411) *In re Juliao*, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Counsel not entitled to compensation for services in connection with co-debtor stay where agreement was that compensation, if any, would come from sanctions awarded against creditor, but claims against creditor were ultimately decided adverse to debtor and co-debtor.
- (412) *Sikes v. Mushenski*, 2011 WL 2173661 (W.D. La. 2011) – Disclosure of Compensation of Attorney for Debtor(s) is binding contract between counsel and the Debtor. Disclosure indicated that counsel agreed to accept \$4,000.00 for his services but also indicated that the \$4,000 “does not include the following service[s]: Representation of the debtor in any dischargeability action, judicial lien avoidance, relief from stay actions, other adversary proceedings, or other non-routine matters.” There were no dischargeability actions, no judicial lien avoidance, no relief from stay actions, and no other adversary proceedings. Record contained no evidence of “unusual circumstances” to support attorney’s fees charged above the \$4,000.00 amount. Court found no indication of what matters were routine as opposed to non-routine.
- (413) *B.O.C. Law Group, P.C. v. Carroll*, 2011 WL 2148603 (E.D. Mi. 2011) – Section 528(a)(1) requires attorney to execute written fee agreement within five days of providing any bankruptcy assistance services. Section 528 does not void fee agreement where agreement was properly executed more than 5 days after first debt relief services were performed or form basis to entirely deny fees. Case remanded for determination of entitlement to fees for services performed prior to date of execution of written fee agreement.
- (414) *In re Humphries*, 2010 WL 5101036 (Bankr. E.D. Mi. 2010), *reversed sub nom. B.O.C. Law Group, P.C. v. Carroll*, 2011 WL 1519165 (E.D. Mi. 2011) – Section 528(a)(1) requires attorney to execute written fee agreement within five days of providing any bankruptcy assistance services. Section 528 does not void fee agreement where agreement was properly executed more than 5 days after first debt relief services were performed or form basis to entirely deny fees. Case remanded for determination of entitlement to fees for services performed prior to date of execution of written fee agreement.
- (415) *In re Kinsman*, Case No. 10-57364 (Bankr. E.D. Mi. 2011) – Counsel’s failure to execute written fee agreement within 5 days of

providing bankruptcy assistance services as required Section 528(a)(1) is not precluded from receiving compensation. Section 526 provides that any contract that does not comply with the material provisions of Sections 526, 527 and 528 is void and may not be enforced by any person. Section 528(a)(1) requirement of written fee agreement within five days is not material provision.

- (416) *In re Clark*, Case No. 08-53620 (Bankr. E.D. Mi. 2009) – Fee Agreement that contains ambiguous terms will be construed against counsel who prepared Agreement. Fee Agreement provided for “base” fee for certain services and identified additional services that are excluded from base fee. However, services performed included items that were neither expressly included in nor excluded from base fee. Base fee excluded any services after the first confirmation hearing. Therefore, the base fee would control amounts charged for drafting plan but excluded fees for drafting amendments where those were not prepared until after first confirmation hearing. Base fee included attendance at Section 341 meeting so separate compensation for those services was not warranted. Claims administration was neither included nor excluded in fee application – therefore, those services are included in base fee and will not be separately compensated. Fee application preparation was neither included nor excluded in base fee and will not be separately compensated.
- (417) *In re Waldo*, Case No. 09-30969 (Bankr. E.D. Tn. 2009) – Although Code permits attorney to receive “reasonable fee”, an attorney is not entitled to a fee in excess of what the client has agreed to pay. Fee agreement did not provide “carve out” from “flat fee” for services related to amendments, representation in adversary proceedings, negotiation of reaffirmation agreements, redemptions, judicial lien avoidances, motions for relief from the automatic stay, letters, emails, and communications with creditors – services not expressly “carved out” are covered by the flat fee regardless of when the services are provided or the amount of time expended.

4.22 Rule 2016 Disclosure

- (418) *In re Acevedo*, 2015 WL 3373030 (Bankr. W.D. Mi. 2015) – Attorney must file amended 2016 statement if attorney comes into possession of property or funds of debtor that are to be used to pay attorney fees, even if source of funds is exempt assets or other income that is not property of the estate. Fact that funds are held in attorney trust account and not applied to fees does not excuse obligation to amend 2016 statement to disclose fees. Amended 2016 statement allows the Court, the US Trustee and the case trustee to consider possible disgorgement under Section 329.
- (419) *In re Alexander*, 2014 WL 5449653 (Bankr. E.D. Tn. 2014) – Attorney not entitled to additional compensation for objections to proofs of claim filed post-confirmation, where fee agreement and Rule 2016 disclosure stated that counsel’s “flat fee” of \$2,500 included filing and prosecution of objections to proofs of claim that are not anticipated to be contested. Attorney filed objections to two proofs of claim as past the statute of limitations. Creditors did not respond and objections were sustained by default. Objections were included in the previously approved and paid fee and attorney was not entitled to additional compensation for those services.
- (420) *In re Morgan*, 2014 WL 5449491 (Bankr. E.D. Tn. 2014) – Attorney not entitled to additional compensation for objections to proofs of claim filed post-confirmation, where fee agreement and Rule 2016 disclosure stated that counsel’s “flat fee” of \$2,500 included filing and prosecution of objections to proofs of claim that are not anticipated to be contested. Attorney filed objections to two proofs of claim as past the statute of limitations. Creditors did not respond and objections were sustained by default. Objections were included in the previously approved and paid fee and attorney was not entitled to additional compensation for those services.
- (421) *In re Ivans Properties, Inc.*, 2014 WL 2761143 (Bankr. E.D. Tn. 2014) – Rules require counsel to file Rule 2016 statement if counsel seeks to be compensated for services to the estate. Rule 2016 is mandatory, not permissive, and includes all pre-petition and post-petition arrangements and all payments must be completely disclosed if they have not previously been disclosed. Failure to comply warrants sanctions, which may include denial of compensation and disgorgement. Sanctions must be commensurate with the egregiousness of the conduct, and a mere technical reach will not justify denial of all fees, although willful disregard of obligations to disclose calls for denial of fees. Court found that failure to file 2016 was inadvertent, which is not sufficient to fully excuse non-compliance. However given quality of legal services under circumstances that were not initiated under the best of circumstances (debtor’s prior counsel took ill in the middle of the Chapter 11, requiring new counsel to take over on an emergency basis), court concluded that 10% reduction in fees was sufficient sanction for failure to file the 2016 disclosure.
- (422) *In re Hyland*, 2014 WL 269883 (Bankr. E.D. Tn. 2014) – Attorney’s compensation is limited to that stated in Rule 2016 disclosure. Counsel’s disclosure of compensation stated that counsel agreed to accept \$3,000 for services rendered or to be rendered on behalf of debtor in Chapter 13 proceeding. After case was dismissed, counsel filed application for \$6,855.00 in fees. Attorney can charge “base fee” or choose to file fee application. Counsel’s disclosure elected the “base fee” precluding counsel from seeking additional fees by application.
- (423) *In re Carter*, Case no. 12-5200 (Bankr. W.D. Mi. 2013) – Attorney must file supplemental statement for any fees received directly from a debtor. Counsel’s initial 2016b statement listed \$3,000 in fees to be paid by Chapter 13 trustee and did not reference any payments directly by debtor. Nonetheless, attorney received 4 separate payments directly from debtor totaling \$1,100.00. Attorney could retain fees paid up to amount disclosed in 2016b because those fees were properly disclosed in 2016b statement, but must disgorge all fees received directly from debtor and would be denied any request for additional compensation in Chapter 13 case.
- (424) *In re LaCourse*, Case No. 11-9338 (Bankr. W.D. Mi. 2012) – Attorney must file supplemental 2016 statement within 14 days of any payment or agreement not previously disclosed. Original 2016 statement provided for fees of \$700 for services in Chapter 7. Attorney later demanded additional \$200 for “complications” arising from debtor’s self-employment, and demanded another \$80 to add omitted creditors. However, Attorney never filed supplemental 2016 to disclose additional fees or charges. Failure to file amended 2016 warranted disgorgement of fees in excess of original \$700.

4.23 Necessity for Court Approval – Payment Directly by Debtor

- (425) *In re Sorter*, Case No. 08-57829 (Bankr. E.D. Mi. 2015) – Attorney who seeks compensation for services in bankruptcy case must have fees approved by bankruptcy court even if fees are to be paid directly.
- (426) *In re Acevedo*, 2015 WL 3373030 (Bankr. W.D. Mi. 2015) – Fee approval process in Chapter 13 is designed to protect estate from unnecessary, unreasonably high, or excessive fees, which is necessary to contain administrative costs of estate. When attorney or other professional is to be paid from property that is not property of the estate and would not otherwise be available for payment of creditors, attorney is not required to seek or obtain order of court awarding compensation. Debtor could pay attorney directly from proceeds of sale of exempt asset without attorney filing fee application or obtaining court approval. However, attorney must still amend Rule 2016 statement to disclose additional compensation and court has authority to order disgorgement of fees if the fees are found to be excessive.

4.24 Fees Paid by Third Party

- (427) *In re TAJ Graphic Enterprises, LLC*, 2016 WL 2864762 (Bankr. E.D. Mi. 2016) – Rule 2016 does not require an Order allowing compensation when the source of the compensation is other than property of estate. However, Section 330 still requires court approval of the fees regardless of source of payment and court can order disgorgement even of fees paid by third party.

4.25 Counsel for Debtor Not in Possession

- (428) *In re TAJ Graphic Enterprises, LLC*, 2016 WL 2864762 (Bankr. E.D. Mi. 2016) – Counsel for debtor in possession not entitled to compensation from estate after appointment of Chapter 11 Operating Trustee with full powers under Section 1106, effectively displacing debtor in possession unless attorney is separately retained by Chapter 11 Operating Trustee under Section 327.

4.26 Special Counsel for Debtor

- (429) *In re Licking River Mining, LLC*, 2015 WL 5601284 (Bankr. E.D. Ky. 2015) – Section 327(e) sets up three part standard where Trustee seeks to employ counsel who previously represented debtor: employment must be for specified special purpose other than conducting case administration; that counsel does not hold interest adverse to debtor or estate; and that employment must be in best interests of estate. Retention is generally limited to circumstances where estate seeks to take advantage of special knowledge or experience of attorney where that knowledge and experience may substantially benefit estate. Proposed retention for counsel to serve as conflicts counsel with sole responsibility to review and litigate carve-out related issues on behalf of the bankruptcy estates; conduct litigation other than the Committee Litigation; and represent the estates on matters related to the Debtors' coal business, environmental and related matters were properly within scope of special counsel. However, general purpose of assisting Trustee on matters where Trustee needs additional resources is too general and encompasses services within the normal scope of case administration. Retention of counsel has the potential of conserving the estates' resources where counsel served as prepetition counsel to the Debtors and has expertise in their business structures and environmental matters. Trustee is an experienced chapter 7 trustee well able to supervise her counsel and their specific duties, counsel themselves are seasoned professionals who understand the risk of reduced compensation in the event of performing unnecessary services and who have stated in their pleadings and on the record their commitment to avoid duplication of effort and imposition of unnecessary services and fees on the estates, and final fees, contingent or hourly, remain subject to approval by this Court.
- (430) *In re Carter*, 2015 WL 4116676 (Bank. S.D. Ohio 2015) – Cause of action that accrues post-petition in Chapter 13 is property of estate. If debtor desires to retain counsel to pursue action, debtor must seek authority to retain counsel under Section 327. Court can approve counsel *nunc pro tunc* where application would have been approved originally by the Court at or before the time the services were actually commenced; the Court and other interested parties had actual knowledge of the legal services being rendered by the applicant; application seeking an order *nunc pro tunc* is filed as soon as the matter is brought to the attention of the applicant; party for whom the work was performed approves the entry of the *nunc pro tunc* order; applicant has provided notice of the application for the *nunc pro tunc* order to creditors and parties in interest and has provided an opportunity for filing objections; no creditor or party in interest offers reasonable objection to the entry of the *nunc pro tunc* order; if applicant is also seeking compensation, applicant must provide notice of the application for fees to any parties in interest; no party in interest files a sustainable objection must not be filed to the applicants [sic] request for attorney fees; no actual or potential prejudice will inure to the estate or other parties in interest; applicant's failure to seek pre-employment approval is satisfactorily explained; and applicant exhibits no pattern of inattention or negligence in seeking judicial approval of employment. Application approved where proposed counsel did not represent any interest adverse to estate and was disinterested, such that application would have been granted if timely filed; counsel acted reasonably diligently by filing application 60 days after first discovering pendency of bankruptcy proceeding; no party filed an objection either to retention or to the separately filed request for compensation; approval would not prejudice estate; and proposed counsel did not demonstrate any inattention or negligence in seeking court approval of retention in first instance.
- (431) *In re Jones*, 505 BR 229 (Bankr. E.D. Wis. 2014) – Chapter 13 debtor does not need court approval to retain special counsel to pursue state law claim after confirmation of plan. However, special counsel represents chapter 13 debtor in connection with case and must file disclosure of compensation to be paid. Compensation is then subject to approval by bankruptcy court under Section 330, and approved fees constitute administrative expense in Chapter 13 case.

4.27 Fee Sharing

- (432) *In re Todarello*, 2016 WL 4508188 (Bankr. N.D. Ohio 2016) – As general rule, Code prohibits fee sharing. Section 504 creates exception allowing fees to be shared between attorneys in same firm. Opposition to fee sharing is based on desire to protect against incentive to increase fees to offset losses because of shared fees; to reduce influence of professionals outside control of the court; illustrates Congressional intent to preserve integrity of bankruptcy process so that professionals attend to duty as officers of court rather than treat interests in bankruptcy cases as “matter of traffic”; and other concerns from dual representation such as preparation and

supervisor. Ability of parties to fee share is based on nature of affiliation and informal or ad hoc relationships tend to create fee sharing concern. Hiring appearance counsel for 341 meetings and calling attorney who shared office space “of counsel” are situations which create fee sharing concerns. Fee sharing is appropriate only among those who are regular participants in formalized business relationship. Rule 2016 requires disclosure of any fee sharing including details of any agreement to share fees. Contract between attorney and out of state law firm that purported to be “partnership agreement” was sufficient on its face to support finding that attorney was “member” of firm and that fee sharing was permitted, where neither UST nor any other party in interest presented any actual objection to the fee application. UST “objection” did not state basis for any objection and UST did not present any evidence or actual argument, and merely offered comments for court’s consideration.

4.28 Time for Filing Application

- (433) *In re Hirsch*, 2016 WL 2898061 (Bankr. W.D. Mi. 2016) – Neither Section 327 nor Section 330 sets deadline for application for compensation, and court can consider and grant applications for services rendered post-dismissal where the post-dismissal services were related to the bankruptcy case and produced a benefit to debtor or the estate. Prior to dismissal, debtor’s Mortgage company (Ditech) advised the Trustee that the mortgage was overpaid and that Ditech would refund the overpayment to the trustee. Debtor voluntarily dismissed case before Ditech made refund and Ditech initially states that in light of dismissal Ditech would not issue refund. Debtor’s counsel then became involved in attempting to force refund, and those efforts were successful with Ditech refunding the overpayment to the Trustee. Debtors had clear interest in actions as funds that generated overpayment were from debtor’s wages and debtors had clear interest in ensuring that Ditech refunded money and complied with loan modification that produced overpayment in first instance. Services directly benefitted estate as Ditech refunded over \$7,000 to Trustee, and fees requested were reasonable amounting to less than \$800. Services were reasonably necessary to ensure that Ditech complied with loan modification and Orders of court approving modification and directing refund. Counsel’s efforts also resolved matter without judicial intervention which would have driven up costs for all parties. Although the United States Trustee was also involved in efforts to obtain refund, Applicant had primary responsibility to protect debtors’ interests in the overpayment and in loan modification. Applicant filed application at earliest possible time. Applicant could not file application before dismissal as client had requested that case be dismissed immediately, and had counsel chosen to hold dismissal until fee application is filed and adjudicated would have put counsel’s interests ahead of client’s in violation of applicable ethical rules. Court will not unnecessarily create tension between attorney and client where attorney follows client’s instructions and then acts diligently to protect claim for fees. Court withheld determination as to whether fees can be paid from funds returned by Ditech pending determination of effect of dismissal on Trustee’s ability to distribute funds.
- (434) *In re Mears*, 2016 WL 2899459 (Bankr. W.D. Mi. 2016) – Neither Section 327 nor 330 sets deadline by which fee application must be filed. Fee application filed after Trustee filed Notice of Plan Completion was timely and could be considered and granted by court. However, court can deny administrative status if allowing claim would prejudice debtors. Application filed after debtors apparently had paid sufficient sum to complete case could be allowed where Trustee had not yet issued Notice of Plan Completion and case had not run statutory maximum 60 months and could be modified to provide for extended plan term and payment of administrative expenses. Debtors would still have sufficient time to satisfy administrative expense claim and debtors had ability to satisfy claim through payments over time; or debtors could modify the plan to allow administrative expenses to survive discharge and be paid directly by debtors.
- (435) *In re Cripps*, 2016 WL 2899459 (Bankr. W.D. Mi. 2016) – Neither Section 327 nor 330 sets deadline by which fee application must be filed. Fee application filed after Trustee filed Notice of Plan Completion was timely and could be considered and granted by court. However, court would deny administrative status where plan had already run for the statutory maximum 60 months, Trustee had already collected and distributed all payments due under the plan, and there were neither funds available to pay fees nor any feasible way to modify the plan to pay fees as case had already run 60 month statutory limit. Trustee issued letter near time of completion of case advising that the end of the case was near and advising that any requests for administrative expenses needed to be filed immediately, but counsel failed to do so until after issue of Notice of Plan Completion. Plan provided that administrative expenses would be paid by the Trustee which was no longer possible as plan had completed and there were no funds remaining. Section 503 did not excuse tardy request for administrative expenses where counsel was at fault for not filing fee application before issuance of Notice of plan completion and allowing late administrative claim would prejudice debtors by saddling debtors with administrative expenses that should have been paid through plan. Fees awarded under Section 330 but were not afforded administrative expense status so would not be paid by Trustee, and would be discharged upon entry of Discharge in case, such that counsel could not pursue collection post-discharge.
- (436) *In re Marshall*, 2016 WL 402386 (Bankr. W.D. La. 2016) – Upon conversion of case prior to confirmation, all funds on hand with trustee are returned to debtor. Fact that attorney filed fee application and court awarded fees prior to conversion did not change result where case converted before Trustee paid fees as awarded. Court would not rule on fee application prior to confirmation as court could not evaluate whether services were reasonably necessary or produced any benefit to creditors or the debtor in advance of hearing on confirmation of plan.
- (437) *In re Alda*, 2010 WL 4924615 (6th Cir. BAP 2010) – Counsel’s failure to file fee application within deadline established by Court Order and application, when filed, failed to contain all items required by Order, warranted denial of fees in their entirety. Counsel’s alleged “inadvertence” and “oversight” that caused application to be untimely filed did not excuse non-compliance with deadline for filing fee application.
- (438) *In re Whyco Finishing Technologies, LLC*, Case No. 08-69940 (Bankr. E.D. Mi. 2009) – Interim application denied as premature. Court entered Order directing that each professional may file only one final fee application. Interim application is not “final application” as required by Court’s scheduling order. Application denied without prejudice.
- (439) *Peoples Bank of Kentucky v. U.S. Bank*, 2009 WL 2984792 (Bankr. E.D. Ky. 2009) – Plaintiff not entitled to award of attorney fees based

on Partial Summary Judgment that determined liability in favor of Plaintiff but did not resolve issue of damages. Court cannot award attorney fees to prevailing party until all issues have been resolved and there has been a final disposition in the action. Motion to Set Attorney Fees denied as premature.

4.29 Time for Filing Application – Pre-Confirmation

- (440) *In re Kind*, Case No. 15-50036 (Bankr. E.D. Mi. 2016) – Application for compensation in Chapter 13 case filed before confirmation is premature. Application did not allege or demonstrate any good cause for Court to allow fees at time when no chapter 13 plan is confirmed. Application denied without prejudice to counsel filing new application after confirmation, dismissal or conversion.

4.30 Paralegal and Paraprofessional Services

- (441) *In re Bergae*, 2014 WL 1419586 (Bankr. C.D. Ill. 2014) – Paraprofessional services are compensable if services represent shift of services ordinarily performed by lawyer and service is reasonable and necessary. Services are not compensable if performed by general clerical staff advising clients, drafting documents and similar services unless the person performing services has knowledge and experience to perform substantive legal work.
- (442) *In re Brennan*, 2013 WL 4046447 (Bankr. C.D. Ill. 2013) – Services performed by paraprofessional are compensable as long as services are those normally performed by attorney. Services that are clerical or secretarial in nature are not compensable even if performed by experienced paraprofessional.

4.31 Disinterestedness

- (443) *In re Bullitt Utilities, Inc.*, 2016 WL 4991526 (Bankr. W.D. Ky. 2016) – Section 327 requires that attorney to be retained by Chapter 7 Trustee be disinterested. In Chapter 7, attorney is not disqualified by reason of employment or representation of creditor unless there is actual conflict of interest. No actual conflict existed where attorney previously represented two of debtor's creditors and creditors agreed to advance costs of proceedings including advance of 30% of attorney fees, subject to right of repayment from proceeds of litigation. Proposed retention was limited to specific purposes of pursuing surcharge claim against Public Service Commission; suit by debtor against specific creditor to recover avoidable transfers; and to explore actions against debtor's pre-petition officers and directors. Counsel would not be asked to participate in normal case administration and debtor would not be precluded from hiring other counsel to explore claims against the creditors supporting this application. Interests of creditors who were supporting retention were identical to interests of estate in general – to maximize assets available for benefit of creditors. Estate had very limited resources and without support of creditors debtor may not be able to pursue causes of action, and proposed counsel is uniquely positioned to handle action based on prior relationships between creditors and debtor. Attorney agreed to terminate any further representation of creditors themselves. Whether fee arrangement by which creditors would "front" attorney fees created adverse interest, court must be assured: (1) that the arrangement be fully disclosed to the debtor/client and the third party payor; (2) the debtor must give express consent to the arrangement; (3) the third party payor must retain independent counsel and understand that the attorney's duty of undivided loyalty is owed exclusively to the debtor/client; (4) the contractual arrangement concerning fees must be fully disclosed to the court at the outset of the bankruptcy retention; and (5) the debtor's attorney-applicant must demonstrate to the court's satisfaction the absence of facts that would otherwise create non-disinterestedness, actual conflict or impermissible potential for a conflict of interest. Factors in this case supported approval of retention effective as of the date that attorney terminated prior representation of creditors directly.
- (444) *In re D&H Machine Service, Inc.*, 2016 WL 4733099 (Bankr. E.D. Tn. 2016) – Attorney who takes pre-petition retainer, performs services prior to commencement of case, and draws down retainer to pay those fees remains disinterested warranting retention and compensation for services in Chapter 11. Court surveyed competing lines of cases dealing with payment for pre-petition services and concluded that as long as services and payments are properly disclosed, those services and payments are not impediments to retention. However, if counsel fails to disclose pre-petition services provided and the status of fees charged or to be charged, counsel violates the disclosure requirements of Section 329 and Rule 2016. Application for retention was deficient as it did not mention any pre-petition services performed in the thirteen calendar days before the petition was filed totaling \$5,938.00, and Disclosure was not accurate in stating only "N/A" concerning the agreement with Debtor, the retainer or other amount received, and the balance due. Counsel's contention that the exact amount of the fees incurred pre-petition are usually unknown until some period of time after filing the bankruptcy petition or that counsel would be unable to determine the amount of its fees incurred before a case is filed by the fourteenth day following a bankruptcy case filing was "implausible". At the very least, counsel must disclose that pre-petition services were incurred over a specified number of days and that the disclosure will be amended once the pre-petition fees are calculated. Counsel did not disclose pre-petition fees until filing the First Application 108 days after the petition was filed. Court sanctioned counsel's non-disclosure by denying compensation for all undisclosed pre-petition services.
- (445) *In re Licking River Mining, LLC*, 2015 WL 5601284 (Bankr. E.D. Ky. 2015) – Section 101(14) defines "disinterested person" as one who (A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason. Counsel holds an adverse interest if counsel possesses an economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or a predisposition under circumstances that render such a bias against the estate. Proposed counsel for Chapter 7 trustee in converted Chapter 11 was not disqualified based on prior representation of Creditor's Committee while case was pending in Chapter 11, or based on counsel's approved but as of yet unpaid administrative expense claim for fees in the Chapter 11 case. Attorneys were not "creditors" as Section 348 provides that claims under Section 503(b) are not treated as claims that arose pre-petition. Argument that unpaid fees could somehow theoretically affect attorney's judgment was not sufficient to disqualify counsel, particularly where future fees were on contingency basis creating close alliance

of attorney and estate interests. Attorneys did not hold adverse interest based on unpaid fees as there was no indication that unpaid fees would cause attorneys to act any differently than they would without the unpaid fees. Interests are not adverse merely because it is possible to conceive some set of circumstances under which interests may clash. Attorney's pecuniary interest in estate because of unpaid fees does not lessen value of estate, and to some extent every attorney has conflict with client regarding fees. Attorneys are not expected to work for free and fact that fees are owed for prior services does not make continuing performance of services a conflict.

- (446) *In re Parirokh*, Case No. 11-5409 (Bankr. W.D. Mi. 2013) – Prospective counsel for Trustee in proposed adversary action does not hold interest adverse to estate merely because counsel also represents a creditor in case. Adversary proceeding was to enforce trustee's avoiding powers against third party who was not creditor of the estate. Proceeding did not seek relief against or otherwise involve the creditor. To extent trustee is successful in exercising avoiding powers, that would inure to benefit of all creditors including counsel's client. As such, creditor and debtor held consistent interests and there was nothing adverse between creditor or debtor that would preclude retention of creditor's counsel as counsel for trustee. Absent actual or real threat of actual conflict, court would defer to business judgment of trustee in choice of counsel matters.
- (447) *Auday v. Wet Seal Retail, Inc.*, 2013 WL 2457717 (E.D. Tn. 2013) – Trustee's retention of debtor's pre-petition litigation counsel to prosecute action following substitution of Trustee as real party in interest was not ethically prohibited. While Model Rule 1.7 precludes representation of multiple clients who may have inconsistent objectives, Rule 1.7 allows the conflict to be waived and representation to continue. Concurrent representation does raise significant concerns about potential conflicts as attorney will be required to receive and evaluate settlement offers that could produce inconsistent results for the two clients. Dual representation was also complicated as there may, at some point, be claims between debtor and trustee arising out of or in connection with litigation, and trustee will have different rights and obligations regarding confidentiality. Counsel would not be permitted to represent Trustee in light of actual and potential conflicts that could not be waived or, to extent waiver was possible, evidence did not indicate that debtor knowingly and fully waived any conflict.

4.32 Notice

- (448) *In re Duronio*, Case No. 08-55409 (Bankr. E.D. Mi. 2010) – Fee Application failed to attach required 21 day Notice of Opportunity to Object as required by Bankruptcy 2002 and Local Bankruptcy Rule 2016-1 and 9014-1.
- (449) *In re Weddle*, Case No. 08-58255 (Bankr. E.D. Mi. 2010) – Fee Application failed to attach required 21 day Notice of Opportunity to Object. Applicant attempted to file "Corrected" Notice but did so under the incorrect ECF event code and Court entered Order striking the Corrected Notice. Applicant failed to take any other steps to try to correct the notice problem, resulting in denial of application without prejudice.

4.33 Content of Application

- (450) *In re Hensel*, Case No. 10-58001 (Bankr. E.D. Mi. 2011) – Local rule requires every fee application to provide a narrative summary explaining services performed and how the services benefitted the estate and, if the application seeks approval of more than \$3,500, to specifically identify the circumstances of the case that make the amount requested reasonable. Statements that are merely summary of services provided may satisfy the first requirement of a summary of services performed, but does not satisfy the separate and additional requirement to specifically identify circumstances of the case that make amount reasonable. Explanation must indicate what it was about this particular case that required more work than a typical Chapter 13 case. Paragraph that includes many items of work that occur in every Chapter 13 case did not meet requirement of rule. Court should not have to sift through lengthy summaries to separate ordinary from non-ordinary. Burden is on counsel to provide information on "non-ordinary services", in a separate, clearly identifiable section.
- (451) *In re Tack*, Case No. 09-41251 (Bankr. E.D. Mi. 2010) – Counsel not entitled to "bonus" as compensation for time expended but not recorded on timesheets and not included in itemized time records attached to application.
- (452) *In re NM Holdings Company, LLC*, Case No. 03-48939 (Bankr. E.D. Mi. 2010) – Fee application that failed to provide itemized time records required by Local Bankruptcy Rule 2016-1(a)(15) required supplementing. Local Rule 2016-1(a)(15) requires itemized time records even where fee sought is on contingency fee basis.
- (453) *American Express Bank v. Askenaizer*, 418 BR 495 (1st Cir. BAP 2009) – Trustee who failed to include request for Attorney Fees in objection to claim and only perfunctorily raised request in reply to Creditor's Response to Objection failed to properly raise issue before bankruptcy Court.
- (454) *In re Kub*, Case No. 09-52512 (Bankr. E.D. Mi. 2010) – Application that failed to provide the narrative summary required by Local Bankruptcy Rule 2016-1(a)(3) denied without prejudice where Applicant failed to file a supplement to its fee application to cure the deficiencies.
- (455) *In re Bilewicz*, Case No. 09-64800 (Bankr. E.D. Mi. 2010) – Application that failed to provide the narrative summary required by Local Bankruptcy Rule 2016-1(a)(3) denied without prejudice where Applicant failed to file a supplement to its fee application To cure the deficiencies.
- (456) *In re Russell*, 2009 WL 2849085 (E.D. Mi. 2009) – Bankruptcy Court properly reduced counsel's application by \$500 where counsel's application failed to comply with Local Bankruptcy Rule 2016-2 and the relevant Federal Rules of Bankruptcy Procedure.

4.34 Burden of Proof

- (457) *In re Davis*, Case No. 15-45016 (Bankr. E.D. Mi. 2016) – Burden of proof is on professional and cannot be taken lightly as every dollar of

legal fees results in one dollar less being available for distribution to creditors or other use by debtor.

- (458) *In re Wietrzykowski*, 2015 WL 5965578 (Bankr. N.D. Ohio 2015) – Standard for approval is reasonable compensation for services and reimbursement for actual, necessary expenses. Special counsel’s charge for “Bankruptcy Coordination Fee” of \$500 was not explained and there was no basis for award of that amount. Amount appeared to be arbitrary “plug” figure apparently for counsel’s benefit as overhead to ensure it had client authority to proceed with settlement and get paid fees if it turns out that settlement violated bankruptcy code.
- (459) *In re Smith*, 2015 WL 5340146 (Bankr. E.D. Mi. 2015) – The burden of proof is on the professional requesting compensation for his or her services from the bankruptcy estate. Every dollar expended on legal fees results in a dollar less that is available for distribution to the creditors or use by debtor. Regardless whether objections are raised to the application seeking compensation from the bankruptcy estate, the Court has a duty to independently examine the reasonableness of the requested fees and may “award compensation that is less than the amount of compensation requested.
- (460) *In re McLean Wine Co., Inc.*, 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – Burden of proof as to entitlement to and reasonableness of a fee request is upon the moving party. Bankruptcy court is afforded broad discretion in determining attorney’s fees but must expressly discuss the amounts that are not supported by the application and provide a reasoning to support the court’s decision. Bankruptcy court may award compensation that is less than the amount of compensation requested even absent an objection to the application.
- (461) *In re Gaylord Hardware, LLC.*, Case No. 09-24018 (Bankr. E.D. Mi. 2010) – Burden of proof is on professional requesting compensation. Time records must contain description of services that is sufficient to substantiate time claimed.
- (462) *In re Waldo*, Case No. 09-30969 (Bankr. E.D. Tn. 2009) – Attorney claiming fees bears burden to prove that fees requested are reasonable.
- (463) *In re CMC Telecom, Inc.*, Case No. 07-56001 (Bankr. E.D. Mi. 2009) – Burden of proof is upon the applicant to justify the requested fees. This burden is not to be taken lightly, especially given that every dollar expended on legal fees results in a dollar less than is available for distribution to creditors or used by Debtor. Bankruptcy Court must indicate amounts that are not supported by the Applicant and provide reasoning to support the Court’s decision.
- (464) *In re Scarlett Hotels, LLC.*, 392 BR 698 (6th Cir. BAP 2008) – Over-secured creditor seeking attorney’s fees pursuant to Section 506 bears burden of proof on all issues. Party opposing fee application does not bear burden to prove that requested fees were unreasonable.
- (465) *In re Russell*, 2009 WL 2849085 (E.D. Mi. 2009) – Party that appeals award of attorney fees bears burden of proof that Bankruptcy Court abused its discretion. A broad assertion that none of counsel’s services produced benefit to Debtor or the estate is not sufficient to demonstrate how Bankruptcy Court might have clearly erred or abused its discretion and does not identify any particular service or services which allegedly did not benefit Debtor or which were unnecessary for the administration of the case.

4.35 Lodestar

- (466) *In re Johnson*, Case No. 14-31719 (Bankr. E.D. Mi. 2016) – Lodestar begins by multiplying reasonable hourly rate time reasonable number of hours. Court can then exercise discretion to consider other factors such as novelty or complexity of case, special skills of counsel, result obtained, and whether fees requested are commensurate with fees for similar professional services in non-bankruptcy cases as well as compensation typically deemed adequate for Chapter 13 proceedings. Counsel’s services provided benefited debtor by modifying mortgage to relieve “onerous” monthly payment, and obtained additional relief by negotiating reduction in principal on second mortgage by \$10,000.00. However, benefits did not warrant fee in excess of \$15,000 to confirm a plan. Fact that debtor will discharge roughly \$32,000 in unsecured debt does not constitute benefit warranting higher fee as that relief is normally obtained in Chapter 13 at lower fee. Normal fee to confirm plan is \$3500. Even allowing additional \$2,000 for mortgage modification plus some for extra services, produces fee closer to \$8,000.00. Fact that counsel kept meticulous time records does not warrant \$15,000 fee where total economic benefit was reduction in mortgage and payments totaling \$28,0000 plus discharge of unsecured debt. Fee award of \$10,000 reasonable for services in light of benefit received and normal and customary fees.
- (467) *In re Davis*, Case No. 15-45016 (Bankr. E.D. Mi. 2016) – Section 330(a) authorizes award of reasonable compensation for actual, necessary services rendered by attorney, based on benefit and necessity of services and other factors set out in Section 330. Court must use lodestar approach by multiplying reasonable hourly rate times number of hours reasonably expended, with court to then exercise discretion to consider other relevant factors such as novelty and difficulty of issues presented, specific skills of counsel, results obtained, and whether fee award is commensurate with fees for similar professional services in non-bankruptcy cases in the local area. Number of hours excessive given lack of any unusual novelty or complexity of case, and confirmed plan provided for surrender of residence and only minimal distribution to creditors. While debtor’s circumstances changed during pendency of case causing multiple meetings with debtor to discuss options, at some point continuing to expend time discussing changes and considering different strategies became unreasonable, as evidenced by eight separate hearings on confirmation of plan. Attorney cannot lose sight of fact that debtor is in Chapter 13 and that fees incurred will ultimately be borne by creditors. Number of hour reduced by 10 to account for excessive time expended; clerical services charged at professional rates including service of plans and filing proofs of service; attendance at multiple Section 341 meetings because of failure to comply with basic requirements to provide required financial documentation; three attorneys working file resulted in unnecessary and duplicative services including both senior attorney and junior attorney billing to review a third party payment order; and Senior and junior attorneys both billing to review Section 341 meeting status sheet and to prepare for confirmation hearings although senior attorney did not attend either 341 or confirmation hearing. While fee award may result in case lacking feasibility, that is not basis to further reduce fees where most of the fees result from debtor’s changing financial circumstances and debtor’s failure to timely provide information to law firm. At time services were performed, firm had reasonable belief that services would ultimately benefit debtor and estate.

- (468) *Clark v. Shop24 Global, LLC*, 2016 WL 3639893 (S.D. Ohio 2016) – A reasonable fee is one that is adequate to attract competent counsel yet which avoids producing a windfall. Court will start with the lodestar amount which is the number of hours reasonably worked multiplied by a reasonable hourly rate, and the applicant must document the appropriate hours expended and hourly rates. Court may adjust the lodestar to reflect relevant considerations specific to a case including: 1) the time and labor required; 2) the novelty and difficulty of the legal questions; 3) the skill requisite to perform the legal service properly; 4) preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee was fixed or contingent; 7) the time limitations imposed by the client or circumstances; 8) the amount involved and results obtained; 9) the experience, reputation and ability of the attorney; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. Most critical factor to consider when adjusting the fee is the degree of success obtained. When party achieves only partial success, court should not mechanically reduce attorney fees based on the ratio of successful claims but should examine factors such as the degree of success obtained and the extent the claims are based on common facts and legal theories, and attorney must provide documentation sufficient to allow court to determine with a high degree of certainty that the hours were actually and reasonably expended in the prosecution of the litigation.
- (469) *In re Tierney*, Case No. 14-30795 (Bankr. E.D. Mi. 2015) – Court begins analysis of fee application by multiplying reasonable hourly rate times reasonable number of hours expended. Lodestar is the beginning, not the end, of the process, and Court can adjust lodestar amount to account for novelty or difficulty of issues presented, results obtained, and whether award would be commensurate with fees for similar services in non-bankruptcy cases in the same local area. Court can adjust lodestar up or down to account for other considerations.
- (470) *In re Oglesby*, 2015 WL 5145571 (Bankr. N.D. Ohio 2015) – Reasonableness of fees begins with lodestar analysis, multiplying a reasonable number of hours times a reasonable hourly rate. Hourly rates are generally the prevailing rate in the relevant market, that is the customary rate paid in the community for attorneys of comparable skill, experience and reputation. Services were limited to those incurred after case was discharged and before case was reopened to allow debtor to avoid judicial lien, as those services would not have been necessary had debtor pursued lien avoidance in first instance.
- (471) *In re Smith*, 2015 WL 5340146 (Bankr. E.D. Mi. 2015) – The starting point in the lodestar analysis is to determine a reasonable hourly rate. A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation. The next step in the analysis is to determine the lawyer's reasonable hours. If the court disallows hours, it must explain which hours are disallowed and show why an award of these hours would be improper.
- (472) *Mike Vaughn Custom Sports, Inc. v. Piku*, 2015 WL 4603171 (E.D. Mi. 2015) – Court is not required to achieve auditing perfection in awarding fees and court may take into account overall sense of suit and use estimates in calculating and allocating attorney time. Court is not required to identify and justify each disallowed hour nor explain what hours were permitted for any specific task. Court should provide clear and concise explanation which may, but is not required to, include findings of unnecessary, unreasonable or unproductive time or time spent that was excessive or that a lesser amount of time may have been reasonable.
- (473) *In re Clinksdale*, 2015 WL 196409 (Bankr. W.D. Mi. 2014) – Sixth Circuit has adopted lodestar approach to calculating fees, which requires court to consider reasonable hourly rate for attorney performing services multiplied by reasonable number of hours to perform services. However, evaluation is more nuanced than merely multiplying hours times rate.
- (474) *Spirit SPE Portfolio 2007-LLC v. Paxos*, 2014 WL 2547711 (Bankr. N.D. Ohio 2014) – Lodestar requires court to multiple reasonable hourly rate by reasonable number of hours. Court is not bound by applicant's time records for time expended, but can reduce time expended to reasonable times based on work performed. Counsel is not entitled to compensation for time merely because it was expended, if time expended is excessive.
- (475) *In re Chang*, 2014 WL 800476 (Bankr. W.D. Ky. 2014) – Lodestar requires court to analyze counsel's years of experience and prevailing rates paid to lawyers on similar cases possessing similar experience in the community. Attorney's time records supported the time spent, the total requested was excessive in light of matters that counsel failed to perform, including failure to file operating reports and failure to file a Plan. Court reduced hourly rate from \$175 to \$125.
- (476) *In re Huffman*, 2012 WL 950368 (Bankr. S.D. Ohio 2012) – "Lodestar" presents strong presumption that calculated amount is reasonable, calculating does not end inquiry. Court may consider additional factors and adjust lodestar up or down to achieve reasonable result. Court may consider (1) time and labor required; (2) novelty and difficulty of question; (3) skill requisite to perform the legal service properly; (4) preclusion of other employment by attorney due to acceptance of case; (5) attorney's customary fee; (6) whether fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) amount involved and results obtained; (9) the experience, reputation, and ability of attorney; (10) "undesirability" of case; (11) nature and length of professional relationship with client; and (12) awards in similar cases. Results of case is major factor in determining whether services produce benefit to debtor, creditors or estate. Time expended after court denied confirmation of plan and expressed serious reservations about possibility of promulgating confirmable plan not reasonably likely to produce benefit where amended plans contained same defect as in plan for which court had already denied confirmation. Services produced no benefit but merely burdened estate with unnecessary fees, costs and delays. Court would substantially discount fees where services were performed when there was no discernible benefit to the estate and were expended in preparation of a plan that had no realistic hope of confirmation.
- (477) *B.O.C. Law Group, P.C., v. Carroll*, 2013 WL 5182395 (E.D. Mi. 2013), *on remand*, Case No. 12-56415 (Bankr. E.D. Mi. 2013) – In awarding fees, court must determine reasonable hourly rate and reasonable number of hours expended. Court can consider factors including but not limited to those specified in Section 330; and court must not allow compensation for services that were unnecessary, duplicative, those that were not reasonably likely to benefit the debtor, or those not necessary to administration of case. Court can take into account the standard "no look" fee and take into account normal and customary services. If court intends to reduce fees in award, court must specifically

explain which objections are sustained and how those objections impact the fee award. Court must discuss reasonable hours and reasonably hourly rate and must provide calculation as part of the record for compliance with lodestar. Court's failure to articulate reasons for fee reduction mandated reversal and remand of case for further proceedings. – On remand, fees reduced where debtor was on fixed income and case was relatively simple. Attorneys billing for 11 hours for office conferences was unreasonable regardless of whether time was actually expended. Lodestar allows reasonable hours, not necessarily actual hours, where actual hours are not reasonable. Counsel not entitled to compensation for filing amended plan where amendment was to correct errors that counsel made in first plan that proposed to modify mortgages that could not be modified and cream down vehicles that were within 910 day hanging paragraph. Court would not allow compensation to prepare motion to extend time to file schedules where schedules were prepared and signed by debtor in time to file before expiration of deadline.

- (478) *Carroll v. Reeds, Reeds, Hammerschmidt & Strickrad, PC*, 2013 WL 4084773 (E.D. Mi. 2013) – In awarding fees, bankruptcy court must begin with lodestar, which multiplies reasonable hourly rate times reasonable number of hours expended. While court can then depart from the lodestar, in doing so, court must explain which hours in the fee application are disallowed and why. Court's use of flat reduction in fee application, without designating time expended that was not reasonable, hourly rates that were unreasonable, or any other specific facts on which the court based the adjustment did not comply with Section 327 and Section 330.
- (479) *In re Moore*, 2012 WL 4499054 (Bankr. N.D. Ohio 2012) – Lodestar calculation, based on reasonable hourly rate and reasonable number of hours, starts calculation. Lodestar can be adjusted by (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Hourly rate of \$225 was high for attorney who was "unknown" to court and who did not present any basis for this hourly rate. Time records raised questions about reasonableness. Time records billed to attend hearings on dates on which the court had no record of any hearing being held; and reviewing correspondence from court where record did not indicate that the court sent any correspondence. Time entries reflected too much time devoted to routine tasks such as 12 minutes, \$45, to review the wage order; and 12 minutes to review a notice of appearance filed by attorney for State Department of Taxation. Counsel billed \$700 to review claims, where most of the claims and amounts corresponded to the schedules and not one resulted in any action. Services were of little benefit where plan was substantially underfunded and will not complete within plan term. Case presented no novel or unusual issues which would warrant fee beyond standard "no-look" fee of \$2,000.00.
- (480) *Berliner v. Pappalardo*, Case No. 11-1830 (1st Cir. 2012) - Lodestar requires court to multiply number of hours productively spent by a reasonable hourly rate to calculate a base figure. Court must discount time spent on unnecessary, duplicative or overworked tasks. In evaluating fee application, bankruptcy court is not required to march mechanically through a checklist of the section 330 factors when fashioning a fee award. Court must merely make a fee calculation that takes the section 330 factors fairly into account. The fact that debtors were "above median income" which require preparation of means test, standing alone, does not make case unusually intricate or extraordinary so as to warrant a greater fee. Purported need for extensive communications with the client does not warrant substantial increase in fees. Lawyers have an obligation to keep handholding within reasonable limits in order to control costs. In reducing fees, bankruptcy court is not required to proceed line by line through the fee application or to explain a fee award with excessive precision. Court must provide explanation which is sufficiently detailed to allow a reviewing court to ascertain the lower courts thought process.
- (481) *In re McLean Wine Co., Inc.*, 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – Bankruptcy courts should use the lodestar method in determining reasonable attorney fees. Starting point in the lodestar analysis is to determine a reasonable hourly rate and then to determine the lawyer's reasonable hours. Court has an obligation to ask whether the rate charged for the service is reasonable in light of the complexity and importance of the task. For Applicant's hours to be reasonably expended, time must relate to a service that is reasonably likely to benefit the estate or necessary to the administration of the bankruptcy case. The results obtained is a major factor in determining whether the services at issue bestowed a benefit upon the estate. Great amounts of time and energy with little result require greater scrutiny. When the attorney's efforts fail to produce a significant benefit, the task of proving the reasonableness of the fees is more difficult. Courts objectively consider whether the services rendered were reasonably likely to benefit the estate from the perspective of the time when such services were rendered and determine whether, when viewed under the circumstances in existence at the time, the services were reasonably calculated to benefit the estate. Court should resist the temptation to engage in '20/20 hindsight,' and focus on facts known or which should have been known to the applicant at critical points during the pendency of the case. Attorney's request for compensation of \$28,000 for services rendered in adversary proceeding that, at most, could have returned only \$30,000 to estate were not reasonable. Further, adversary actually ended up with Estate paying the adversary defendant \$5,000, thereby depleting, not enhancing, the estate. Reasonable cost-benefit analysis at some point or points would have indicated that its fees and costs were quickly rising to a level very near the maximum possible recovery. Once it becomes reasonably obvious that the prospective costs of commencing or continuing litigation will exceed any benefit to the estate, the attorney is duty bound to abandon the claim and Applicant should have considered either abandoning the claim or attempting to settle it. In second adversary, Application incurred fees of \$31,000 to recover alleged fraudulent transfer of pickup truck worth, at most, \$4,500.00. Applicant should have exercised critical, independent professional judgment, either initially or at some point during the proceedings, and refrained from pursuing the matter given that a predictable result would realize that, at most, it could recover at most only \$4,500. Applicant cannot justify excessive hours by indicating that Applicant was merely following directions from Debtor or from Creditors. Attorney has independent duty to exercise professional judgment and to not take on actions that are not reasonably likely to benefit parties.
- (482) *In re Juliao*, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Lodestar begins with determination of reasonable hourly rate and reasonable number of hours. Pivotal question is whether services rendered post-confirmation were beneficial to debtor or estate. Court must adjust

lodestar based on benefit or lack of benefit of services. Court is statutorily prohibited from awarding compensation for unnecessarily duplicative services, services that were not reasonably likely to benefit estate, or services not necessary to administration of estate. Court must view services at the time they were rendered, not at the time the application is ruled on; and cannot award compensation for services that at the time they were rendered were not related to a realistically obtainable goal. Counsel is not entitled to compensation simply because counsel was only doing what client wanted it to do. Just because client wants counsel to embark on course of action does not mean attorney is obligated to take action if doing so is inconsistent with lawyer's independent exercise of professional judgment.

- (483) *In re Smith*, 2011 WL 2293261 (Bankr. N.D. Ohio 2011) – Lodestar multiplication of reasonable hourly rate times reasonable number of hours creates presumptive reasonable compensation, subject to adjustment. Counsel entitled to compensation for asserting unclear or debatable proposition of law, but not entitled to compensation for arguing against settled law.
- (484) *Orlow v. Carroll*, 2011 WL 1102821 (E.D. Mi. 2011) – Bankruptcy Court required to use lodestar method to determine fees for debtor's counsel. Court erred in reducing fees to presumptive "no look" amount without analyzing the hours expended by attorneys and paraprofessionals or the hourly rate of those attorneys and paraprofessionals as set forth in Appellant's fee application. The only rationale provided for reducing the fee award was a mistake in the Means Test which should not have made in the first place, should have been corrected more quickly, delayed the proceedings, and increased the attorney's fees. Remanded to Bankruptcy Court for proceedings consistent with lodestar.
- (485) *In re Wheeler*, 2010 WL 4259941 (Bankr. E.D. Mi. 2010) – Lodestar requires court to determine reasonable number of hours for services performed and reasonable hourly rate to be applied to those services. Attorney is not allowed to bill time spent reviewing debtor's documents after a paralegal had already reviewed the documents and billed for that time. Court would also reduce time spent on reviewing and preparing documents where time charged was excessive. Court would also deny compensation for clerical services such as scheduling appointments, calendaring dates and reviewing notices of appearance. Charge of 3.8 hours for adversary to strip a second mortgage lien was excessive where adversary was largely a form, fill-in-the-blank practice. Services necessary to correct errors that should not have been made in the first place are not compensable or in the alternative the time spent making the error in the first instance is not compensable. Although time spent in resolving good faith objections and disagreements over plan provisions will be compensable, time spent on a legal question that was resolved in prior cases years ago is not compensable. Court would also consider overall total of fees and would reduce fees for a straightforward chapter 13 case that did not warrant extraordinary fee.
- (486) *Grine v. Chambers*, 2010 WL 3910144 (Bankr. N.D. Ohio 2010) – Attorney's requested hourly rate of \$250 was not reasonable when viewed in light of prevailing rate in the relevant market-i.e., 'the rate that is customarily paid in the community to attorneys of reasonably comparable skill, experience, and reputation.' The relevant market is "the venue of the court of record," rather than the "geographical area wherein [counsel] maintains his office and/or normally practices. Hourly rate reduced to \$200 per hour where hourly rates in area generally ranged between \$125 and \$225 per hour and services were straightforward and routine. Court would reduce time by hours that did not relate to claims or that were excessive under the circumstances. Fee request of \$1,972 reduced to \$565.
- (487) *In re Lance*, 2010 WL 3430492 (Bankr. N.D. Ohio 2010) – Lodestar calculation is based on reasonable hourly rate multiplied by the number of hours reasonably expended. Lodestar is subject to upward or downward adjustment. Court *sua sponte* reduced requested attorney's fees in chapter 7 proceeding from \$1200 to "presumptively reasonable" \$1100 where debtor had no secured claims; have less than \$5000 in personal property; no reaffirmation agreements would be necessary; debtor was single with one dependent; and was "below-median". Attorney's expenditure of 2.5 hours to draft the bankruptcy petition was excessive given the simplicity of the case, the lack of an hour difficult issues, and the absence of any need for special knowledge or skills. Attorney is not entitled to bill for clerical services.
- (488) *In re Gaylord Hardware, LLC.*, Case No. 09-24018 (Bankr. E.D. Mi. 2010) – Lodestar is calculated by multiplying reasonable hourly rate times reasonable number of hours expended. Compensation is not appropriate merely because the time recorded was actually expended, as billable hours do not necessarily translate into compensable hours. Court would reduce hours spent where the amount spend on the described entries was excessive; hours spent where the description was not sufficient to substantiate the time charged; time entries for services curing deficiencies in counsel's own work; and clerical entries. Hourly rate for associate with less than one year experience of \$235 was excessive and reduced to \$175.00. Counsel not entitled to compensation for services rendered after it became apparent that the Debtor would not be able to perform financially.
- (489) *In re Kasubowski*, Case No. 09-20128 (Bankr. E.D. Mi. 2010) – Court can adjust number of hours expended by attorney in awarding fees. Court would reduce time requested for services that were not expended on matter under consideration or for time that exceeded reasonable amounts. Court reduced research time from 2.8 hours to 1 hour where experienced attorney should not have needed more than one hour to research issues concerning stay violations.
- (490) *In re Budzinski*, 2010 WL 2925088 (Bankr. N.D. Ohio 2010) – 11 U.S.C. Section 329 requires Court to monitor the compensation paid to debtors' attorneys and to reduce that compensation to the extent that it is unreasonable. Lodestar calculation which requires a bankruptcy court to multiply the attorney's reasonable hourly rate by the number of hours reasonably expended. Overall reasonableness of an attorney's fee depends on all relevant considerations, including (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. Counsel not entitled to additional compensation where case would have been an ordinary case if not for problems that debtors' attorney created. Debtors' attorney failed to recognized that the second mortgage could be avoided; debtors' attorney should failed to correctly fill out the chapter 13 means test; debtor's attorney should have resolved the trustee's objection regarding the 2008 tax return more quickly;

and debtors' attorney should have attended the all-important hearing on debtor's objection to proof of claim. Fees not warranted in a case where the debtors' attorney has failed to identify, or attend to, the most obvious issues in the case. Court also considered customary fee is in similar cases that includes services of the sort usually performed by debtors' attorneys in chapter 13 cases including routine objections to claims, responding to routine objections to plan confirmation, and filing amended plans. Any additional time required by this case occurred as a result of poor issue spotting, poor execution and inattention. There were no matters requiring unusual or unexpected work, difficulty or surprise.

- (491) *In re CMC Telecom, Inc.*, Case No. 07-56001 (Bankr. E.D. Mi. 2009) – Lodestar method requires that Court first determine reasonable hourly rate, and then multiply rate times reasonable number of hours expended to perform actual, necessary services. Court must balance competing interests: (1) rewarding the attorney or other professional on a level commensurate with other areas of practice; and (2) need to encourage cost-conscious administration. Lodestar does not require compensation for services performed in drafting Disclosure Statement and Plan of Reorganization where plan was patently unconfirmable, “divorced from reality”, and “futile to propose or pursue the Plan”. Plan “could not succeed from the moment it was proposed”.
- (492) *Weik & Associates v. Carroll*, Case No. 08-12964 (E.D. Mi. 2008) – Section 330 provides for “reasonable compensation for actual, necessary services rendered ... based on the nature, extent, and the value of such services, the time spent on such services, and the cost of comparable services other than any case under this title....” The Lodestar method of determining fees is designed to implement the provisions of Section 330 by multiplying reasonable hourly rate by reasonable number of hours. Lodestar method does not rely on actual hours expended, and the Court should exclude hours that are not reasonably expended or are excessive, redundant or unnecessary. Court must also determine “reasonable hourly rate” according to the prevailing market rates in the relevant community for similar services by lawyers of reasonably comparable skill, experience, and reputation for similar services by lawyers of reasonably comparable skill, experience, and reputation; and experience and skill of the prevailing party's attorney. A fee is “clearly excessive” when a lawyer of ordinary prudence would be left with a definite and firm conviction that the fees in excess of a reasonable fee. The Bankruptcy Court's expression of guidelines and concerns constitutes proper incorporation of the concepts involved in calculating the lodestar.

4.36 Reasonableness

- (493) *In re Simoukdalay*, 2016 WL 4613346 (Bankr. E.D. Tn. 2016) – Amount of fee award is governed by federal, not state law, based on all the facts and circumstances presented by the record, primarily the amount involved and available, the nature of the responsibility assumed by the attorneys, the character and extent of the services which they have performed, not only in the technical litigation itself, but also in matters arising out of and incidental to such litigation, and considering other factors including (1) the nature, extent, length and value of the services rendered; (2) the bankruptcy and non-bankruptcy experience, reputation, and ability of the attorneys; (3) awards in similar cases; (4) the novelty and difficulty (or lack thereof) of the questions presented; (5) the skill requisite to perform the legal services properly; (6) the customary fee; (7) professional time actually spent; (8) amount involved in potential risk; (9) the results of the cases; (10) specialty in which the attorneys may be practicing; (11) fees sought to be applied; (12) distinction between partner and associates time; (13) costs of comparable services; (14) use or lack thereof of paralegals; and (15) duplication of efforts. Fees of \$3500 for services in connection with enforcement of mortgage with principal balance of \$70,000 not unreasonable. Although debtor contended that fees were almost double the customary fee in the area, there was no evidence or implication that the time was not actually spent by the attorneys involved or that the attorneys involved were not worth their hourly rate. Attorneys were knowledgeable attorneys who have appeared before this court in a competent and professional manner. Court reduced the fees where there was duplication or educational charges that a regular bankruptcy practitioner would not have incurred but included fees legal research as attorney who regularly appears before the court should be compensated for making sure he or she is on solid legal ground. Creditor's attorneys were required to reconstruct the accounting in order to file the attachments now required for a mortgage claim allowing parties to reach a consensual resolution on the amount of the principal and interest due under the note.
- (494) *HDV - Greektown, LLC v. City of Detroit*, 2016 WL 4435646 (6th Cir. 2016) – A reasonable fee is one sufficient to induce a capable attorney to undertake the representation of a meritorious case. Lodestar method involves calculating number of hours reasonably expended multiplied by a reasonable hourly rate.” Reasonable hourly rate is based on by prevailing market rates in the relevant community.” Courts should exclude hours that were not reasonably expended. Counsel should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary. Court must provide a clear and concise explanation of its reasons for the fee award. There is no precise rule or formula for making fee determinations but judge must provide reasonably specific explanation for all aspects of a fee determination to allow adequate appellate and avoid widely disparate awards which may be influenced or appear to be influenced by judge's subjective opinion regarding particular attorneys or the importance of the case. District Court failed to adequately explain 60% reduction in fees where Court stated only that counsel took an “indiscriminate approach” to the fee petition including fees for criminal proceedings, the other civil proceedings, and time spent representing other plaintiffs who were not entitled to recover fees. The hours expended on the criminal proceedings were already excluded and District Court did not determine what portion of the remaining fees were attributable to other proceedings or parties. Court's explanation that plaintiffs were extraordinarily profitable companies with access to judicial and political processes far in excess of the normal citizen was not basis to reduce fees. Court was not making determination as to whether reduction was actually warranted, only that Court's failure to provide adequate explanation prevented effective appellate review requiring remand.
- (495) *In re Davis*, Case No. 15-45016 (Bankr. E.D. Mi. 2016) – Section 330(a) authorizes award of reasonable compensation for actual, necessary services rendered by attorney, based on benefit and necessity of services and other factors set out in Section 330. Court must use lodestar approach by multiplying reasonable hourly rate times number of hours reasonably expended, with court to then exercise discretion to consider other relevant factors such as novelty and difficulty of issues presented, specific skills of counsel, results obtained, and whether fee award is commensurate with fees for similar professional services in non-bankruptcy cases in the local area. Number of hours excessive given lack of any unusual novelty or complexity of case, and confirmed plan provided for surrender of residence and only minimal distribution to

creditors. While debtor's circumstances changed during pendency of case causing multiple meetings with debtor to discuss options, at some point continuing to expend time discussing changes and considering different strategies became unreasonable, as evidenced by eight separate hearings on confirmation of plan. Attorney cannot lose sight of fact that debtor ins in Chapter 13 and that fees incurred will ultimately be borne by creditors. Number of hour reduced by 10 to account for excessive time expended; clerical services charged at professional rates including service of plans and filing proofs of service; attendance at multiple Section 341 meetings because of failure to comply with basic requirements to provide required financial documentation; three attorneys working file resulted in unnecessary and duplicative services including both senior attorney and junior attorney billing to review a third party payment order; and Senior and junior attorneys both billing to review Section 341 meeting status sheet and to prepare for confirmation hearings although senior attorney did not attend either 341 or confirmation hearing. While fee award may result in case lacking feasibility, that is not basis to further reduce fees where most of the fees result from debtor's changing financial circumstances and debtor's failure to timely provide information to law firm. At time services were performed, firm had reasonable belief that services would ultimately benefit debtor and estate.

- (496) *In re Marshall*, 2016 WL 402386 (Bankr. W.D. La. 2016) – Upon conversion of case prior to confirmation, all funds on hand with trustee are returned to debtor. Fact that attorney filed fee application and court awarded fees prior to conversion did not change result where case converted before Trustee paid fees as awarded. Court would not rule on fee application prior to confirmation as court could not evaluate whether services were reasonably necessary or produced any benefit to creditors or the debtor in advance of hearing on confirmation of plan.
- (497) *In re Horn*, Case No. 15-52209 (Bankr. E.D. Mi. 2016) – Reasonableness of fees depends on factors including presence or absence of novel issues, complexity of case, and benefit to debtor. Although case appeared relatively straight forward, debtor had multiple corporations and had failed to file tax returns for a number of years, all of which required extended analysis. Services produced benefit by bringing order to tangled and opaque financial situation. While primary creditors were taxing authorities who were not owed much money, at outset of case debtor needed to file tax returns and also needed relief from litigation pending in both Michigan and California. Relationship between fees incurred and amount of claims to be paid is valid in considering fees.
- (498) *In re Oglesby*, 2015 WL 5145571 (Bankr. N.D. Ohio 2015) – Reasonableness of fees begins with lodestar analysis, multiplying a reasonable number of hours times a reasonable hourly rate. Hourly rates are generally the prevailing rate in the relevant market, that is the customary rate paid in the community for attorneys of comparable skill, experience and reputation. Services were limited to those incurred after case was discharged and before case was reopened to allow debtor to avoid judicial lien, as those services would not have been necessary had debtor pursued lien avoidance in first instance.
- (499) *In re Meade*, Case No. 09-34865 (Bankr. E.D. Mi. 2015) – Lodestar presumes use of reasonable number of hours and reasonable hourly rate and allows court to consider typical compensation for attorney in Chapter 13. Where counsel uses processes that are inefficient and cause increase in time expended, counsel is not entitled to compensation for those services. Counsel's use of e-mail to communicate with client was inefficient where e-mails were piecemeal, did not answer all of debtor's questions, and merely required repeated requests for information by debtor before counsel, through multiple e-mails, would provide information requested in first instance. While counsel's math may have been correct when multiplying time spent times hourly rate, services were not performed in reasonable time commensurate with complexity and importance of the matters presented. Instead, counsel undertook course of action that placed additional burdens on debtors, which was unwarranted.
- (500) *In re Bond*, Case No. 14-21792 (Bankr. E.D. Mi. 2015) – Compensation not appropriate to correct legal description in connection with motion to sell where trustee was the cause of the incorrect description in first instance and counsel/trustee will not be compensated to correct own error.
- (501) *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.
- (502) *In re Clinksdale*, 2015 WL 196409 (Bankr. W.D. Mi. 2015) – Under § 330(a), court may award "reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and

necessity of such services to the debtor and the other factors including (A) the time spent on such services; (B) the rates charged for such services; (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title; (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than bankruptcy. Monthly reviews of case files by one attorney with results reviewed by second attorney creates significant risk of duplication of services which is not to be compensated. Further, billing statements did not indicate why monthly reviews were reasonable or what tasks were actually performed, the results of those tasks, or any indication that the status reports were other than information gathering. Counsel routinely performing monthly reviews in all cases failed to take into account reasonableness in any particular case. Counsel failed to distinguish complicated or troubled cases from routine cases involving debtors with stable employment and payments being made in timely manner. Counsel also failed to distinguish between cases where debtor did not have access to trustee records and so may need more information from counsel for those where debtors have access to trustee records and can access those records directly. Counsel bears burden to prove that monthly monitoring is reasonable under facts of particular case.

- (503) *In re Alexander*, 2014 WL 5849165 (Bankr. N.D. Ohio 2014) – Fees must be reasonable in light of services performed. Counsel received a retainer but did not provide written agreement to debtors to explain how fees would be charged or how retainer would be applied leaving ambiguity in amount to be paid. Although counsel stepped into chapter 7 case after prior counsel withdrew and after debtors had been denied a discharge and negotiated a settlement that would have allowed debtors to retain exempt property and obtain discharge, which debtors rejected, and although legal services were worth more than \$1,000 on lodestar basis, court would limit fees to \$500 and order disgorgement of balance.
- (504) *In re Ulrich*, 2014 WL 4385691 (Bankr. E.D. Mi. 2014) – Counsel’s application for attorney fees must be reasonable in light of complexity, importance and nature of the problem, issue or task addressed. Although fee application did not present any particular line item that, standing alone, would be unreasonable or excessive, total fees claimed to confirm plan in chapter 13 that lacked any difficult or complex issues were excessive. Where time entries that individually appear reasonable are added together to produce a fee that is unreasonable, court can adjust fees to provide for reasonable compensation. Court is not required to specifically pick out and explain each hour of time that is disallowed, and court does not need to view each time entry in a vacuum without regard to reasonableness of total number of hours. Court must only set forth the number of hours that the court finds reasonable and multiply that times a reasonable hourly rate to arrive at total compensation.

4.37 Billing Judgment

- (505) *In re McLean Wine Co., Inc.*, 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – Applicants must exercise good faith billing judgment by reducing fees where the total amount of hours billed would be unreasonable in relation to the services performed. Attorney should write-off some of the hours actually expended in an effort to bring the bill in line with the economic value actually produced. The Michigan Rules of Professional Conduct specify taking into account as one of the factors to be used in determining the reasonableness of a fee “the amounts involved and the results obtained.” Amounts awarded would be drastically reduced primarily given amounts involved and results. The net recovery of the two actions was virtually zero. Fees must be limited to reasonable amount that reflects work done up to the point where it should have been clear that these matters should no longer be so zealously pursued and they should be brought to a close in some appropriate manner.
- (506) *In re Taylor*, Case No. 09-72690 (Bankr. E.D. Mi. 2010) – Counsel has independent duty to determine whether Chapter 13 filing is appropriate course of action. Debtor had no financial issues other than IRS levy. Counsel recommended that Debtor file Chapter 13 proceeding without exploring whether non- bankruptcy remedies may be available, such as an abatement of collection activities by the IRS, possible negotiation of resolution of tax issues outside of bankruptcy, or requesting payment plan directly with IRS. Where Debtor faced pressure from only one creditor, Counsel must determine if more appropriate approaches to issues exist. If counsel cannot obtain answers to those questions, it may be appropriate to refer the matter to others to do so, or to ask Debtor to make the inquiry himself. Although Chapter 13 filing was not inappropriate per se, possible alternative and less expensive avenues should have been pursued first. Application for fees reduced from \$1,781.50 to \$900.00.
- (507) *In re CMC Telecom, Inc.*, Case No. 07-56001 (Bankr. E.D. Mi. 2009) – Attorneys must exercise billing judgment to ensure that an appropriate fee is charged given the nature of the service, rather than presuming that a fee is reasonable simply by multiplying the rate charged by the individual who provided the service by the time spent. Counsel’s application failed to demonstrate billing judgment where counsel was well aware of the fact that Debtor was administratively insolvent yet billed an extraordinary number of hours given the size and complexity of the case. Time spent analyzing specific orders was excessive where counsel took no part in negotiating the original order and never raised any objection to the entry of the order. Counsel not entitled to compensation for time spent on non-legal matters in connection with sale of Debtor’s assets where Debtor had retained separate entity to engage in sale of Debtor’s primary assets. Counsel not entitled to compensation for services which duplicate or overlap services performed by other professionals. Counsel not entitled to any compensation for drafting Disclosure Statement and Plan of Reorganization where Plan was “so divorced from reality” that it was “futile to propose or pursue the Plan”. Promulgation of plan constituted pursuit of a strategy “that could not succeed from the moment it was proposed.”

4.38 Time Entries

- (508) *In re Johnson*, Case No. 14-31719 (Bankr. E.D. Mi. 2016) – Lodestar begins by multiplying reasonable hourly rate time reasonable number of hours. Court can then exercise discretion to consider other factors such as novelty or complexity of case, special skills of counsel, result obtained, and whether fees requested are commensurate with fees for similar professional services in non-bankruptcy cases as well as

compensation typically deemed adequate for Chapter 13 proceedings. Counsel's services provided benefited debtor by modifying mortgage to relieve "onerous" monthly payment, and obtained additional relief by negotiating reduction in principal on second mortgage by \$10,000.00. However, benefits did not warrant fee in excess of \$15,000 to confirm a plan. Fact that debtor will discharge roughly \$32,000 in unsecured debt does not constitute benefit warranting higher fee as that relief is normally obtained in Chapter 13 at lower fee. Normal fee to confirm plan is \$3500. Even allowing additional \$2,000 for mortgage modification plus some for extra services, produces fee closer to \$8,000.00. Fact that counsel kept meticulous time records does not warrant \$15,00 fee where total economic benefit was reduction in mortgage and payments totaling \$28,0000 plus discharge of unsecured debt. Fee award of \$10,000 reasonable for services in light of benefit received and normal and customary fees.

- (509) *In re D&H Machine Services, Inc.*, 2016 WL 4733099 (Bankr. E.D. Tn. 2016) – Court will disallow compensation for time entries that "lump" multiple services into single line item. Lumped time entries included Review appellate briefs and preparation for meeting with counsel regarding determination of claim; Review Court Order in Chancery Court regarding potential proceeding and plan draft for reorganization; and Receipt and review of order and memorandum opinion and begin review of law.
- (510) *Clark v. Shop24 Global, LLC*, 2016 WL 3639893 (S.D. Ohio 2016) – Time entries must contain sufficient detail to allow court to determine that hours charged were actually expended in prosecution of litigation. Time entries for two hours of time regarding research and meetings without indication of what the research and meeting were about, and time relating to research on bankruptcy in FLSA cases do not contain sufficient information to allow Court to determine whether services related to issues in case, resulting in denial of fees.
- (511) *Mike Vaughn Custom Sports, Inc. v. Piku*, 2015 WL 4603171 (E.D. Mi. 2015) – Where plaintiff prevails on multiple counts, but fewer than all counts provide for recovery of attorney fees, counsel must allocate time between causes of action and specifically identify those hours that are related to the claim for which attorney fees are recoverable. Party seeking recovery must present documentation in sufficient detail and probative value to allow court to determine with high degree of certainty that the hours were actually and reasonably expended. Court is not required to achieve auditing perfection in awarding fees and court may take into account overall sense of suit and use estimates in calculating and allocating attorney time. Invoices submitted indicated that most, if not all, time was spent on all of the claims in general and that much more time was expended on state law claims that did not provide for recovery of attorney fees than on single federal count that did. Time records were also unreasonably vague, containing numerous entries for telephone conferences, discovery matters and correspondence with experts that did not specify whether they concerned the federal claim and did not provide description of services actually performed or other parties to conversations or other communications or the content of those conversations and communications. One count on which fee award could be based constituted 17% of the total counts in the complaint. Court concluded that award of 15% of total fees represented reasonable award for services attributable to that one count.
- (512) *Bavelis v. Doukas*, 2015 WL 4620031 (Bankr. S.D. Ohio 2015) – 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.
- (513) *Young v. Safe Home Security, Inc.*, 2014 WL 1379111 (Bankr. D. Mass. 2014) – Creditor violated discharge injunction by sending five separate demand letters to debtors although creditor was listed in schedules. Creditor claimed that letters were result of human error and immediately ceased activities upon being contacted by debtor's counsel. Court awarded \$100 for each of the five letters. Court then awarded attorney fees but reduced fees by half as time entries "lumped together" various services preventing court from determining amount of time spent on any particular item or determining whether the time spent was reasonable. Court also found some time entire excessive, including 7.25 hours to draft two page demand letter and 10 hours to draft discovery request that consisted of 6 interrogatories, 13 requests for admission and 20 document requests

4.39 Allocation of Time Between Causes of Action

- (514) *Clark v. Shop24 Global, LLC*, 2016 WL 3639893 (S.D. Ohio 2016) – A reasonable fee is one that is adequate to attract competent counsel yet which avoids producing a windfall. Court will start with the lodestar amount which is the number of hours reasonably worked multiplied by a reasonable hourly rate, and the applicant must document the appropriate hours expended and hourly rates. Court may adjust the lodestar to reflect relevant considerations specific to a case including: 1) the time and labor required; 2) the novelty and difficulty of the legal questions; 3) the skill requisite to perform the legal service properly; 4) preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee was fixed or contingent; 7) the time limitations imposed by the client or circumstances; 8) the amount involved and results obtained; 9) the experience, reputation and ability of the attorney; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. Most critical factor to consider when adjusting the fee is the degree of success obtained. When party achieves only partial success, court should not mechanically reduce attorney fees based on the ratio of successful claims but should examine factors such as the degree of success obtained and the extent the claims are based on common facts and legal theories, and attorney must provide documentation sufficient to allow court to determine with a high degree of certainty that the hours were actually and reasonably expended in the prosecution of the litigation.
- (515) *Mike Vaughn Custom Sports, Inc. v. Piku*, 2015 WL 4603171 (E.D. Mi. 2015) – Where plaintiff prevails on multiple counts, but fewer than all counts provide for recovery of attorney fees, counsel must allocate time between causes of action and specifically identify those hours that are related to the claim for which attorney fees are recoverable. Party seeking recovery must present documentation in sufficient detail and probative value to allow court to determine with high degree of certainty that the hours were actually and reasonably expended. Court is not required to achieve auditing perfection in awarding fees and court may take into account overall sense of suit and use estimates in calculating and allocating attorney time. Court is not required to identify and justify each disallowed hour nor explain what hours were permitted for any specific task. Court should provide clear and concise explanation which may, but is not required to, include findings of unnecessary, unreasonable or unproductive time or time spent that was excessive or that a lesser amount of time may have been reasonable.

Invoices submitted indicated that most, if not all, time was spent on all of the claims in general and that much more time was expended on state law claims that did not provide for recovery of attorney fees than on single federal count that did. Time records were also unreasonably vague, containing numerous entries for telephone conferences, discovery matters and correspondence with experts that did not specify whether they concerned the federal claim and did not provide description of services actually performed or other parties to conversations or other communications or the content of those conversations and communications. One count on which fee award could be based constituted 17% of the total counts in the complaint. Court concluded that award of 15% of total fees represented reasonable award for services attributable to that one count.

4.40 Hourly Rate

- (516) *In re Faughnan*, 2016 WL 6085880 (Bankr. E.D. Mi. 2016) – Hourly rate charged of \$310 was outside typical hourly rate for consumer bankruptcy cases. Michigan Bar survey from 2013 showed upper quartile billing rates for sole practitioners at \$250.00 per hour; average rate for attorneys with 35 years’ experience was \$285.00; and upper quartile for bankruptcy practitioners is \$260.00. Hourly rate of \$310 is unreasonable and reduced to \$275.00. Although Court has approved hourly rates in excess of \$275 for other attorneys, those attorneys use associate attorneys, paralegals and legal assistants who bill at significantly lower rates, while applicant in this case performs all tasks without support staff.
- (517) *Lance Coal Corp. v. Caudill*, 2016 WL 3619829 (6th Cir. 2016) – Hourly rate for purposes of lodestar analysis is prevailing market rate for comparable attorneys performing similar work. Prevailing market rate is rate in jurisdiction where services are performed. Citation to the rates charged by attorneys in Charleston, West Virginia; Houston, Texas; and Washington, DC do not reflect the prevailing market rate in the Sixth Circuit and are irrelevant to calculation of reasonable attorneys’ fees.
- (518) *In re Oglesby*, 2015 WL 5145571 (Bankr. N.D. Ohio 2015) – Reasonableness of fees begins with lodestar analysis, multiplying a reasonable number of hours times a reasonable hourly rate. Hourly rates are generally the prevailing rate in the relevant market, that is the customary rate paid in the community for attorneys of comparable skill, experience and reputation. Services were limited to those incurred after case was discharged and before case was reopened to allow debtor to avoid judicial lien, as those services would not have been necessary had debtor pursued lien avoidance in first instance.
- (519) *In re Smith*, 2015 WL 5340146 (Bankr. E.D. Mi. 2015) – Attorney hourly rate is not appropriate for services that do not require exercise of professional discretion and judgment, even if services are performed by attorney. Reviewing filed stipulation and order extending deadline to file adversary complaint, receipt of order extending time to file answer to complain, receipt of order extending deadline to file answer, and similar services could have been performed by attorney with less experience and at lower hourly rate, or by paraprofessional at even lower rate.
- (520) *Mike Vaughn Custom Sports, Inc. v. Piku*, 2015 WL 4603171 (E.D. Mi. 2015) – For lodestar purposes, reasonable hourly rate is generally determined by reference to prevailing market rate in the relevant community. Court concluded that blended hourly rate of \$302 was reasonable given federal and state causes of action presented and prevailing market rates in the community.
- (521) *In re Clinksdale*, 2015 WL 196409 (Bankr. W.D. Mi. 2014) – Monthly reviews of case files by one attorney with results reviewed by second attorney creates significant risk of duplication of services which is not to be compensated. Further, billing statements did not indicate why monthly reviews were reasonable or what tasks were actually performed, the results of those tasks, or any indication that the status reports were other than information gathering that could be performed by non-attorney. To extent services were compensable, the hourly rate should be no more than paralegal rates, even if services were performed by attorney.
- (522) *In re Chang*, 2014 WL 800476 (Bankr. W.D. Ky. 2014) – Lodestar requires court to analyze counsel’s years of experience and prevailing rates paid to lawyers on similar cases possessing similar experience in the community. Attorney’s time records supported the time spent, the total requested was excessive in light of matters that counsel failed to perform, including failure to file operating reports and failure to file a Plan. Court reduced hourly rate from \$175 to \$125.
- (523) *Williamson v. Recovery, L.P.*, 2013 WL 3222428 (S.D. Ohio 2013) – To arrive at a reasonable hourly rate, courts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record. Movant submitted expert testimony of an experienced attorney who practices in the same area as the Movant’s counsel averring that the billing rates charged by the Plaintiffs’ attorneys are reasonable and are well within the range of rates charged by commercial litigation attorneys of similar experience in the same geographic area. Percentage increases in hourly rates ranging between 3.5% and 5% for the years 2007 through 2011 were reasonable where State Bar publication reported average billing rate increases were 5.1% per year over the same time period.
- (524) *In re Moore*, 2012 WL 4499054 (Bankr. N.D. Ohio 2012) – Hourly rate of \$225 was high for attorney who was “unknown” to court and who did not present any basis for this hourly rate.
- (525) *In re Connolly North America, LLC*, Case NO. 01-57090 (Bankr. E.D. Mi. 2012) – To determine reasonable hourly rate, court must consider customary rates in the venue of the court, taking into account rates for attorneys of reasonably comparable skill, experience and reputation. Chapter 7 Trustee was forced to look to attorneys in Chicago to find necessary experience and ability to investigate claims against, and if necessary, sue prior Trustee and who would also be willing to do so. Court did not have to resolve dispute over which geographic market controlled were rates were reasonable by standards of rates customarily paid in the Detroit market for comparable attorneys.
- (526) *In re Storozhenko*, Case No. 11-57443 (Bankr. E.D. Mi. 2011) – Requested hourly rate of \$400 per hour was unreasonably high given lack of complexity or unusual nature of the matters involved. Court would reduce hourly rate to \$240 which is reasonable rate for services

performed.

- (527) *In re Gaylord Hardware, LLC.*, Case No. 09-24018 (Bankr. E.D. Mi. 2010) – Hourly rate for associate with less than one year experience of \$235 was excessive and reduced to \$175.00.
- (528) *In re Kasubowski*, Case No. 09-20128 (Bankr. E.D. Mi. 2010) – Hourly rate of \$250 warranted for attorney with decades of experience in Chapter 13, and hourly rate was commensurate with degree of knowledge and skill of attorney.
- (529) *In re Tack*, Case No. 09-41251 (Bankr. E.D. Mi. 2010) – Attorney awarded fees at hourly rate of \$350, although this rate is at the “very high end” of hourly rates in the district for counsel to a Chapter 7 Trustee. However, Court denied additional charge for “upcharge/bonus” as counsel was adequately compensated without this additional “bonus”. Counsel not entitled to “bonus” as compensation for time expended but not recorded on timesheets and not included in itemized time records attached to application. Results were not so exceptional as to warrant upward enhancement in light of hourly rate charged.
- (530) *In re Hickey*, Case No. 07-23041 (Bankr. E.D. MI. 2009) - Appropriate hourly rate determined with reference to ability and experience of attorney and rates charged by similar attorneys in the same geographic areas. The hourly rate actually charged by counsel in other actions does not control or limit the hourly rate in any particular case. Attorney who routinely charged only \$200 per hour for state Court litigation awarded \$250 per hour. Attorney had 20 years’ experience in federal and state Court litigation matters and the hourly rate of attorneys in Detroit and Flint routinely range from \$200 to \$350 per hour. High hourly rate also requires “corresponding requirement that attorneys be efficient in performing these services.” Court found that request for 19.8 hours for certain services did not demonstrate the requisite efficiency and reduced the time to 8 hours.
- (531) *In re CMC Telecom, Inc.*, Case No. 07-56001 (Bankr. E.D. Mi. 2009) – Major factor in determining what is a reasonable hourly rate for purposes of the lodestar is the rate charged by comparable attorneys in the local area. Where the case is of a complexity, size or scope sufficient to require participation of counsel from various parts of the country, consideration of hourly rates can also include a comparison of hourly rates on a national basis. High hourly rate carries with it a responsibility to be extremely efficient. Attorneys with substantial expertise can charge a higher hourly rate but will be more efficient than less experienced counsel. Attorneys with substantial experience must exercise billing judgment to assure that an appropriate fee is charged given the nature of the services, rather than presuming that a fee is reasonable simply by multiplying the rate charged by the individual who provided the service by the time spent.

4.41 Hours Expended

- (532) *In re D&H Machine Service, Inc.*, 2016 WL 4733099 (Bankr. E.D. Tn. 2016) – Time charged for certain services was excessive given “formulaic” nature of the documents and service and so was not compensable, including Review Notice from US Bankruptcy Court regarding additional information required statements and schedules; Review Order Directing Filing of Case Management Summary; Draft Certificate of Service of all 1st day Motions to Suntrust registered agent; Draft Amended Application to Employ HDC to include Passive Notice; Review LBR 9013-3 for service issues on Motions; Review Bankruptcy Rule 1007 regarding service on emergency hearing ; Begin draft Case Management Summary; Revise Case Management Summary; Revised case management summary; and Review Statements of Schedules on revised form.
- (533) *In re Davis*, Case No. 15-45016 (Bankr. E.D. Mi. 2016) – Section 330(a) authorizes award of reasonable compensation for actual, necessary services rendered by attorney, based on benefit and necessity of services and other factors set out in Section 330. Court must use lodestar approach by multiplying reasonable hourly rate times number of hours reasonably expended, with court to then exercise discretion to consider other relevant factors such as novelty and difficulty of issues presented, specific skills of counsel, results obtained, and whether fee award is commensurate with fees for similar professional services in non-bankruptcy cases in the local area. Number of hours excessive given lack of any unusual novelty or complexity of case, and confirmed plan provided for surrender of residence and only minimal distribution to creditors. While debtor’s circumstances changed during pendency of case causing multiple meetings with debtor to discuss options, at some point continuing to expend time discussing changes and considering different strategies became unreasonable, as evidenced by eight separate hearings on confirmation of plan. Attorney cannot lose sight of fact that debtor ins in Chapter 13 and that fees incurred will ultimately be borne by creditors. Number of hour reduced by 10 to account for excessive time expended; clerical services charged at professional rates including service of plans and filing proofs of service; attendance at multiple Section 341 meetings because of failure to comply with basic requirements to provide required financial documentation; three attorneys working file resulted in unnecessary and duplicative services including both senior attorney and junior attorney billing to review a third party payment order; and Senior and junior attorneys both billing to review Section 341 meeting status sheet and to prepare for confirmation hearings although senior attorney did not attend either 341 or confirmation hearing. While fee award may result in case lacking feasibility, that is not basis to further reduce fees where most of the fees result from debtor’s changing financial circumstances and debtor’s failure to timely provide information to law firm. At time services were performed, firm had reasonable belief that services would ultimately benefit debtor and estate.
- (534) *Bavelis v. Doukas*, 2015 WL 4620031 (Bankr. S.D. Ohio 2015) – 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. Time expended for intra-office conferences is not *per se* non-compensable where time entries were sufficiently specific to allow court to determine that conferences were necessary and beneficial including names of attorneys participant and detailed specific issues discussed.
- (535) *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.

- (536) *Cook v. Franklin Credit Management Corporation*, 2015 WL 1756815 (Bankr. M.D. Tn. 2015), *aff'd*, 2016 WL 344971 (M.D. Tn. 2016) – Party requesting attorney fees must document entitlement to fees and must offer evidence in support of hours charged with sufficient detail and probative value to enable the court to determine with a high degree of certainty that the hours were actually and reasonably necessarily expended in prosecution of litigation. Where documentation was inadequate, moving party afforded opportunity to amend application but is not permitted to charge either the debtors or the opposing party for time spent "learning the office billing system".
- (537) *Young v. Safe Home Security, Inc.*, 2014 WL 1379111 (Bankr. D. Mass. 2014) – Creditor violated discharge injunction by sending five separate demand letters to debtors although creditor was listed in schedules. Creditor claimed that letters were result of human error and immediately ceased activities upon being contacted by debtor's counsel. Court awarded \$100 for each of the five letters. Court then awarded attorney fees but reduced fees by half as time entries "lumped together" various services preventing court from determining amount of time spent on any particular item or determining whether the time spent was reasonable. Court also found some time entire excessive, including 7.25 hours to draft two page demand letter and 10 hours to draft discovery request that consisted of 6 interrogatories, 13 requests for admission and 20 document requests.
- (538) *Spirit SPE Portfolio 2007-LLC v. Paxos*, 2014 WL 2547711 (Bankr. N.D. Ohio 2014) – Counsel is not entitled to compensation for time expended to extent time expended is unreasonable. Memorandum for which attorney billed 2 hours and legal assistant billed 1.5 hours was not reasonable. Fees to communicate with court personnel and court reporters and updates to internal case file are not appropriate for billing.
- (539) *Williamson v. Recovery, L.P.*, 2013 WL 3222428 (S.D. Ohio 2013) – Block billing is not per se improper, as long as the entries are sufficient in detail to allow court to determine substance of work performed and time expended.
- (540) *In re McKenzie*, 2013 WL 3187299 (Bankr. E.D. Tn. 2013) – Court must determine whether fees reflect a reasonable number of hours actually worked and a reasonable hourly rate. Court will consider time and labor expended; and difficulty of the questions raised; skill required to properly perform the legal services rendered; attorney's opportunity costs in pressing the instant litigation; customary fee for like work; attorney's expectations at the outset of the litigation; time limitations imposed by the client or circumstances; amount in controversy and the results obtained; experience, reputation and ability of the attorney; undesirability of the case within the legal community in which the suit arose; nature and length of the professional relationship between attorney and client; and fees awards in similar cases. Counsel did not charge for time "getting up to speed" on matters handled by prior counsel. Representation involved complex issues of real estate, corporate, commercial and bankruptcy law and involved large potentially avoidable transfers, and actions were hotly litigated and mediated.
- (541) *In re Huffman*, 2012 WL 950368 (Bankr. S.D. Ohio 2012) – "Lodestar" presents strong presumption that calculated amount is reasonable, calculating does not end inquiry. Court may consider additional factors and adjust lodestar up or down to achieve reasonable result. Court may consider (1) time and labor required; (2) novelty and difficulty of question; (3) skill requisite to perform the legal service properly; (4) preclusion of other employment by attorney due to acceptance of case; (5) attorney's customary fee; (6) whether fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) amount involved and results obtained; (9) the experience, reputation, and ability of attorney; (10) "undesirability" of case; (11) nature and length of professional relationship with client; and (12) awards in similar cases. Results of case is major factor in determining whether services produce benefit to debtor, creditors or estate. Time expended after court denied confirmation of plan and expressed serious reservations about possibility of promulgating confirmable plan not reasonably likely to produce benefit where amended plans contained same defect as in plan for which court had already denied confirmation. Services produced no benefit but merely burdened estate with unnecessary fees, costs and delays. Court would substantially discount fees where services were performed when there was no discernible benefit to the estate and were expended in preparation of a plan that had no realistic hope of confirmation.
- (542) *In re Moore*, 2012 WL 4499054 (Bankr. N.D. Ohio 2012) – Time records raised questions about reasonableness. Time records billed to attend hearings on dates on which the court had no record of any hearing being held; and reviewing correspondence from court where record did not indicate that the court sent any correspondence. Time entries reflected too much time devoted to routine tasks such as 12 minutes, \$45, to review the wage order; and 12 minutes to review a notice of appearance filed by attorney for State Department of Taxation. Counsel billed \$700 to review claims, where most of the claims and amounts corresponded to the schedules and not one resulted in any action. Services were of little benefit where plan was substantially underfunded and will not complete within plan term. Case presented no novel or

unusual issues which would warrant fee beyond standard “no-look” fee of \$2,000.00.

- (543) *In re McLean Wine Co., Inc.*, 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – For Applicant's hours to be reasonably expended, time must relate to a service that is reasonably likely to benefit the estate or necessary to the administration of the bankruptcy case. The results obtained is a major factor in determining whether the services at issue bestowed a benefit upon the estate. Great amounts of time and energy with little result require greater scrutiny. When the attorney's efforts fail to produce a significant benefit, the task of proving the reasonableness of the fees is more difficult. Courts objectively consider whether the services rendered were reasonably likely to benefit the estate from the perspective of the time when such services were rendered and determine whether, when viewed under the circumstances in existence at the time, the services were reasonably calculated to benefit the estate. Court should resist the temptation to engage in '20/20 hindsight,' and focus on facts known or which should have been known to the applicant at critical points during the pendency of the case. Attorney's request for compensation of \$28,000 for services rendered in adversary proceeding that, at most, could have returned only \$30,000 to estate were not reasonable. Further, adversary actually ended up with Estate paying the adversary defendant \$5,000, thereby depleting, not enhancing, the estate. Reasonable cost-benefit analysis at some point or points would have indicated that its fees and costs were quickly rising to a level very near the maximum possible recovery. Once it becomes reasonably obvious that the prospective costs of commencing or continuing litigation will exceed any benefit to the estate, the attorney is duty bound to abandon the claim and Applicant should have considered either abandoning the claim or attempting to settle it. In second adversary, Application incurred fees of \$31,000 to recover alleged fraudulent transfer of pickup truck worth, at most, \$4,500.00. Applicant should have exercised critical, independent professional judgment, either initially or at some point during the proceedings, and refrained from pursuing the matter given that a predictable result would realize that, at most, it could recover at most only \$4,500. Applicant cannot justify excessive hours by indicating that Applicant was merely following directions from Debtor or from Creditors. Attorney has independent duty to exercise professional judgment and to not take on actions that are not reasonably likely to benefit parties.
- (544) *In re Juliao*, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Court must determine whether hours charged were reasonably incurred. When the services produce no significant benefit, task of proving reasonableness of fees becomes more difficult. Counsel is not entitled to compensation for hours that were not reasonably expended. Counsel spent too much time seeking sanctions that were inherently questionable for alleged violation of co-debtor stay given lack of showing that creditor took actions that were in any way harassing or coercive. Services rendered to benefit third party, not co-debtor, are not properly awarded. Counsel's compensation is limited to services representing interests of debtor. Services performed for non-debtor wife were not for benefit of debtor and do not constitute administrative fees in debtor's Chapter 13 case, particularly where any reasonably foreseeable benefit would not be for debtor or estate. . Counsel is not entitled to compensation simply because counsel was only doing what client wanted it to do. Just because client wants counsel to embark on course of action does not mean attorney is obligated to take action if doing so is inconsistent with lawyer's independent exercise of professional judgment.

4.42 Clerical Services

- (545) *In re D&H Machine Service, Inc.*, 2016 WL 4733099 (Bankr. E.D. Tn. 2016) – Attorney not entitled to compensation for services that are clerical in nature, including Preparation of First Day Motions; drafting fax cover pages; filing completed schedules and statements; reviewing order of employment; and reviewing notices of appearance.
- (546) *Clark v. Shop24 Global, LLC*, 2016 WL 3639893 (S.D. Ohio 2016) – Although lawyers at small firms may necessarily perform clerical tasks, Purely clerical or secretarial services are not compensable even at a lower, paralegal rate. Some activities such as filing a complaint, filing service requests, and filing return of service forms may be considered legal work sufficient to permit compensation at a non-attorney hourly rate. Clerical duties including scheduling depositions, cancelling depositions, rescheduling depositions, retaining a court reporter, scheduling mediation, or cancelling mediation are clerical and non-compensable even if performed by attorney who lacks secretarial or administrative support staff.
- (547) *In re Smith*, 2015 WL 5340146 (Bankr. E.D. Mi. 2015) – Clerical services are those which do not require rendering of professional judgment, legal analysis, or traditional lawyering services and are not compensable. Services such as review and execution of certificate of no response to broker fee application and submission of proposed order are ministerial.
- (548) *In re Bond*, Case No. 14-21792 (Bankr. E.D. Mi. 2015) – Compensation not appropriate to correct legal description in connection with motion to sell where trustee was the cause of the incorrect description in first instance and counsel/trustee will not be compensated to correct own error. Preparation and filing of CNR and submission of order and services for obtaining certified copy of order allowing sale of property are compensable but not at an attorney hourly rate as service is clerical in nature.
- (549) *In re Clinksdale*, 2015 WL 196409 (Bankr. W.D. Mi. 2015) – Services in connection with uploading certificates of service and certificates of no opposition are clerical and are not compensable.
- (550) *Williamson v. Recovery, L.P.*, 2013 WL 3222428 (S.D. Ohio 2013) – Purely clerical or secretarial tasks are not compensable regardless of whether performed by an attorney or a paralegal. Paralegal services for time spent assisting with document productions in response to discovery requests and in preparing financial compilations relating to damage computations were not clerical in nature and were appropriately performed by paralegal.
- (551) *In re Young*, Case no. 06-6385 (Bankr. W.D. Mi. 2012) – Attorney time spent on clerical services is to be compensated at staff rate and not attorney rate. Court reduced hourly rate for time spent to review and save notices of claim transfers, calendaring follow up dates, and calendaring date for responding to Trustee's Motion.
- (552) *In re Connolly North America, LLC*, Case No. 01-57090 (Bankr. E.D. Mi. 2012) – Attorney time spent to obtain copy of hearing transcript is clerical and is not compensable by attorney at attorney's hourly rate.

- (553) *In re Wheeler*, Case No. 10-54111 (Bankr. E.D. Mi. 2010) – Lodestar requires court to determine reasonable number of hours for services performed and reasonable hourly rate to be applied to those services. Court would also deny compensation for clerical services such as scheduling appointments, calendaring dates and reviewing notices of appearance.
- (554) *In re Gaylord Hardware, LLC.*, Case No. 09-24018 (Bankr. E.D. Mi. 2010) – Compensation is not appropriate for clerical entries.

4.43 Excessive Number of Professionals

- (555) *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.
- (556) *Williamson v. Recovery, L.P.*, 2013 WL 3222428 (S.D. Ohio 2013) – Attorneys are not entitled to recover for duplicate services performed by two separate professionals. However, fact that two attorneys worked together on matter is not per se unreasonable or prohibited where movant can satisfactorily explain why two attorneys worked on same or similar matters.
- (557) *In re Clark*, Case No. 08-53620 (Bankr. E.D. Mi. 2009) – Objection based on alleged excessive number of professionals would be overruled where Application indicated that four attorneys and 9 paraprofessionals worked on file, but that most of time was expended by one counsel and record did not suggest any inefficiency of services.

4.44 Benefit to Debtors or Estate

- (558) *In re Johnson*, Case No. 14-31719 (Bankr. E.D. Mi. 2016) – Lodestar begins by multiplying reasonable hourly rate time reasonable number of hours. Court can then exercise discretion to consider other factors such as novelty or complexity of case, special skills of counsel, result obtained, and whether fees requested are commensurate with fees for similar professional services in non-bankruptcy cases as well as compensation typically deemed adequate for Chapter 13 proceedings. Counsel's services provided benefited debtor by modifying mortgage to relieve "onerous" monthly payment, and obtained additional relief by negotiating reduction in principal on second mortgage by \$10,000.00. However, benefits did not warrant fee in excess of \$15,000 to confirm a plan. Fact that debtor will discharge roughly \$32,000 in unsecured debt does not constitute benefit warranting higher fee as that relief is normally obtained in Chapter 13 at lower fee. Normal fee to confirm plan is \$3500. Even allowing additional \$2,000 for mortgage modification plus some for extra services, produces fee closer to \$8,000.00. Fact that counsel kept meticulous time records does not warrant \$15,00 fee where total economic benefit was reduction in mortgage and payments totaling \$28,000 plus discharge of unsecured debt. Fee award of \$10,000 reasonable for services in light of benefit received and normal and customary fees.
- (559) *In re Raczkowski*, Case No. 14-43727 (Bankr. E.D. Mi. 2016) – In evaluating reasonableness of fee request, court can consider nature of relief granted by court. While dollar-for-dollar benefit can be helpful, it is not controlling. Fees for plan modification that sought to excuse tax refunds and to reduce plan payments were reasonable where request to excuse tax refunds was denied in its entirety but plan payment was reduced by \$14,000 over remaining term of plan, although amount was far less than \$32,000 reduction requested by debtor. While request to excuse tax refunds was "aggressive" it was not necessarily doomed from the start, and court must evaluate reasonableness of fees based on date services were rendered. Partial reduction in fees warranted to account for time spent attempting to excuse tax refunds under circumstances where there was never any likelihood that the relief would be granted.
- (560) *In re Horn*, Case No. 15-52209 (Bankr. E.D. Mi. 2016) – Reasonableness of fees depends on factors including presence or absence of novel issues, complexity of case, and benefit to debtor. Although case appeared relatively straight forward, debtor had multiple corporations and had failed to file tax returns for a number of years, all of which required extended analysis. Services produced benefit by bringing order to tangled and opaque financial situation. While primary creditors were taxing authorities who were not owed much money, at outset of case debtor needed to file tax returns and also needed relief from litigation pending in both Michigan and California. Relationship between fees incurred and amount of claims to be paid is valid in considering fees.
- (561) *In re Meade*, Case No. 09-34865 (Bankr. E.D. Mi. 2015) – Services must have produced, or at time performed been reasonably calculated to produce, benefit to debtors or to estate. After court denied debtors plan modification, counsel failed to communicate with debtors regarding

effect of unbilled fees on case and failed to take any other action such as extending plan term to allow case to complete. By failing to take action, counsel placed clients in terrible position of being responsible for significant fees and cutting of any access to have fees paid by Trustee. Court allowed fees for incurring debt as debtors needed to purchase automobile and allowed fees for preparation of fee application but denied all other fees as neither the debtors nor the estate received any benefit and fees would make already failing case even more deficient and incapable of successful completion.

- (562) *Huepenbecker v. Davidoff*, 2015 WL 4264758 (W.D. Mi. 2015) – Counsel for Trustee is entitled to compensation for services that are reasonably likely to benefit estate or that are necessary to administration of estate. Benefit to estate need not be economic benefit if the services promoted the bankruptcy process. Trustee’s counsel’s requests for proof of insurance where Chapter 12 plan called for property to remain in estate yet plan did not require property to be insured was not unreasonable and was necessary to protect estate from potential loss. Counsel also entitled to compensation related to objection to exemptions and later amendment to exemptions where plan proposed 100% dividend to unsecured creditors, as exemptions could have made difference if case converted, although exemptions did not make any difference in end result in this case. Counsel also objected to confirmation where plan provision called for debtor’s attorney to retain lien on all assets and to be paid directly, and objection was sustained by bankruptcy court, producing benefit and constituting appropriate performance of services.
- (563) *In re Berry*, 2014 WL 4471438 (E.D. Mi. 2014) – Bankruptcy Court acted within discretion in denying attorney fee application in its entirety where services did not produce and were not reasonably calculated to produce any benefit to debtor, creditors or the estate. State court appointed receiver to take control of all assets of corporation in which debtor was sole shareholder. Debtor’s counsel caused the corporation to transfer the primary asset to debtor without consent of receiver and then caused debtor to file Chapter 13. Lodestar calculation first determines the reasonable number of hours expended. Where counsel’s only purpose was to disrupt ongoing state court proceedings and to divest receiver of control of corporate assets through improper transfer, counsel’s services were not reasonable. Counsel did not present any argument as to why transferring property already in receivership without consent and then causing the debtor to file Chapter 13 was a reasonable course of action or had any reasonable chance of success. Counsel took single state court proceeding and turned it into a disrupted state court proceeding, a failed bankruptcy case, and an appeal, all of which were the likely outcomes of counsel’s strategy and with little support in law or common sense.
- (564) *In re McKenzie*, 2013 WL 3187299 (Bankr. E.D. Tn. 2013) – Professionals retained by estate are to receive reasonable compensation for actual, necessary services, but not for services that are unnecessarily duplicative, that were not reasonably likely to benefit estate, or were not necessary to administration of estate. Although court must consider results of professional’s activities, the professional is entitled to compensation for services that appeared to be reasonably necessary when performed even if those efforts later turned out to be largely unproductive. Trustee’s attorney entitled to compensation for efforts to avoid fraudulent transfers where, if successful, efforts would have added substantially to estate. Trustee also pursued other avenues that, if successful, would have produced recovery for estate. Although services ultimately produced no benefit as Trustee did not prevail in litigation, that did not change fact that services were reasonably necessary in pursuing possible recovery.
- (565) *In re Huffman*, 2012 WL 950368 (Bankr. S.D. Ohio 2012) – “Lodestar” presents strong presumption that calculated amount is reasonable, calculating does not end inquiry. Court may consider additional factors and adjust lodestar up or down to achieve reasonable result. Court may consider (1) time and labor required; (2) novelty and difficulty of question; (3) skill requisite to perform the legal service properly; (4) preclusion of other employment by attorney due to acceptance of case; (5) attorney’s customary fee; (6) whether fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) amount involved and results obtained; (9) the experience, reputation, and ability of attorney; (10) “undesirability” of case; (11) nature and length of professional relationship with client; and (12) awards in similar cases. Results of case is major factor in determining whether services produce benefit to debtor, creditors or estate. Time expended after court denied confirmation of plan and expressed serious reservations about possibility of promulgating confirmable plan not reasonably likely to produce benefit where amended plans contained same defect as in plan for which court had already denied confirmation. Services produced no benefit but merely burdened estate with unnecessary fees, costs and delays. Court would substantially discount fees where services were performed when there was no discernible benefit to the estate and were expended in preparation of a plan that had no realistic hope of confirmation.
- (566) *In re Young*, Case no. 06-6385 (Bankr. W.D. Mi. 2012) – Attorney not entitled to compensation for services that were “doomed from the start”. Attorney sought compensation for services in attempting to shorten plan below applicable commitment period and to obtain a premature discharge of debtor. Attorney’s efforts were “farfetched, self-serving, not supported by authority, and ultimately burdensome to the Trustee and the estate he represents.” Court would not require creditors or the debtor to bear cost of attorney’s “quixotic efforts to obtain a discharge prematurely”. Court denied both compensation for time attendant to preparing, filing and prosecuting Discharge Motion and costs to attend hearing on Discharge Motion.
- (567) *James C. Warr & Assoc. v. Ruskin*, 2012 WL 4855180 (E.D. Mi. 2012) – Attorney not entitled to compensation for services that were not reasonably calculated to lead to the benefit of debtor or the estate. 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.
- (568) *In re Moore*, 2012 WL 4499054 (Bankr. N.D. Ohio 2012) – Services were of little benefit where plan was substantially underfunded and

will not complete within plan term. Case presented no novel or unusual issues which would warrant fee beyond standard “no-look” fee of \$2,000.00.

- (569) *In re McLean Wine Co., Inc.*, 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – The results obtained is a major factor in determining whether the services at issue bestowed a benefit upon the estate. Great amounts of time and energy with little result require greater scrutiny. When the attorney’s efforts fail to produce a significant benefit, the task of proving the reasonableness of the fees is more difficult. Courts objectively consider whether the services rendered were reasonably likely to benefit the estate from the perspective of the time when such services were rendered and determine whether, when viewed under the circumstances in existence at the time, the services were reasonably calculated to benefit the estate. Court should resist the temptation to engage in ‘20/20 hindsight,’ and focus on facts known or which should have been known to the applicant at critical points during the pendency of the case.
- (570) *In re Storozhenko*, Case No. 11-57443 (Bankr. E.D. Mi. 2011) – Time spent on matters that were done as part of general representation of debtor is not compensable in stay violation action and included time spent attempting to settle underlying actions; and filing a response to a Motion for Reconsideration which could not have been filed unless Court ordered response to be filed, which it did not.
- (571) *In re Juliao*, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Court is statutorily prohibited from awarding compensation for unnecessarily duplicative services, services that were not reasonably likely to benefit estate, or services not necessary to administration of estate. Court must view services at the time they were rendered, not at the time the application is ruled on; and cannot award compensation for services that at the time they were rendered were not related to a realistically obtainable goal. Services related to debtor’s motion for sanctions for alleged violation of co-debtor stay were not necessary and could not reasonably have benefitted debtor or estate. Alleged violation for co-debtor stay involved co-debtor’s inability to obtain employment or start a new business, neither of which impacted debtor’s plan payments or ability to consummate plan. Instead, claim for violation of co-debtor stay would have produced, at most, a personal benefit to debtor by allowing co-debtor to work fewer hours. Personal benefits derived by debtor do not constitute benefit to estate.
- (572) *In re Nashville Senior Living, LLC*, 2010 WL 4260034 (Bankr. M.D. Tn. 2010) – Services are compensable if, at the time the services were performed, there was a good faith basis to believe the services would produce a benefit. Counsel’s services in an unsuccessful appeal of an Order permitting sale of assets were compensable notwithstanding counsel’s inability to prevail in appeal because counsel had good faith basis for appeal.
- (573) *In re Wheeler*, Case No. 10-54111 (Bankr. E.D. Mi. 2010) – Lodestar requires court to determine reasonable number of hours for services performed and reasonable hourly rate to be applied to those services. Services necessary to correct errors that should not have been made in the first place are not compensable or in the alternative the time spent making the error in the first instance is not compensable. Although time spent in resolving good faith objections and disagreements over plan provisions will be compensable, time spent on a legal question that was resolved in prior cases years ago is not compensable.
- (574) *In re Gaylord Hardware, LLC*, Case No. 09-24018 (Bankr. E.D. Mi. 2010) – Counsel not entitled to compensation for services rendered after it became apparent that the Debtor would not be able to perform financially.
- (575) *In re Clark*, Case No. 08-53620 (Bankr. E.D. Mi. 2009) – Dismissal of case, by itself, does not demonstrate that services were of no benefit, unless attorney was substantial cause of dismissal or unless attorney reasonably should have known that case would be dismissed.

4.45 Fee Application – Time for Preparing

- (576) *In re Connolly North America, LLC*, Case No. 01-57090 (Bankr. E.D. Mi. 2012) – Although court generally will cap attorney fees for preparing application at 5%, under circumstances of this case, which was particularly complex and involved, charge equal to 9% was not unreasonable and was compensable.

4.46 “Fees on Fees”

- (577) *In re Stanton*, Case No. 11-22675 (Bankr. M.D. Fl. 2016) – Time expended to supply additional detail in response to UST objection to fee application asking for more information is compensable. Services are akin to required detail in fee application in first instance which is compensable. Parties were not fighting over about amount of bill but over detail in the description of services rendered.
- (578) *In re Boomerang Tube, Inc.*, Case No. 15-11247 (Bankr. D. Del. 2016) – Attorneys cannot create “work around” of Baker-Botts by inserting indemnification provision in fee agreement. Counsel for unsecured creditor committee attempted to include in fee agreement provision that committee would indemnify firm for any costs and fees incurred in defense of fee application. Provision was plain attempt to evade scope of Baker-Botts and could not be included in proposed retention agreement.
- (579) *In re Energy Conversion Devices, Inc.*, Case No. 12-43166 (Bankr. E.D. Mi. 2015) – Prohibition against fees on fees applies with equal force to counsel for creditor committee appointed under Section 1103(a) as it does to counsel for debtor appointed under Section 327(a). Fees for defense of fee application denied.
- (580) *In re Huepenbecker*, Case No. 12-2269 (Bankr. W.D. Mi. 2015) – Counsel for Chapter 12 Trustee not entitled to compensation for time spent litigating prior fee application. Fees incurred by attorney for Chapter 12 Trustee in appeal of prior fee award are also non-compensable and request for compensation for those services must be denied in their entirety.
- (581) *Baker Botts, LLP v. Asarco, LLC*, 135 S.Ct. 2158 2015 WL 2473336 (2015) – Bankruptcy Code does not allow attorney to recover attorney fees expended in litigating counsel’s prior application. Sections 327 and 330 allow compensation only for actual and necessary services. “Actual and necessary services” are those rendered to assist the administrator of the estate, but neither specifically nor by implication changes “American Rule” to shift costs of adversarial litigation to another party. Fee defense is not service rendered to case administrator but are for

attorney benefit only. Issue is not one of reasonableness where services are not compensable in first instance.

- (582) *Williamson v. Recovery, L.P.*, 2013 WL 3222428 (S.D. Ohio 2013) – In civil contempt action, prevailing party is entitled to attorney fees incurred in bringing the motion. However, absent statutory fee provisions, party is not entitled to fees for preparing and prosecuting the fee application itself.
- (583) *Carroll v. Goldstein, Bershad & Fried*, Case no. 12-13503 (E.D. Mi. 2013) – Counsel can receive additional attorney fees for time expended in defending prior fee application. Amount awarded was reasonable where counsel contacted the objecting party in efforts to resolve objections; and counsel traveled to the courthouse for status conference that ultimately led to a settlement. Fact that counsel settled the underlying objection by agreeing to reduce fees does not mean that counsel was not successful in defending application or that counsel ultimately agreed with merits of objections themselves; rather, record indicated that counsel settled for economic reasons and in effort to avoid further litigation.
- (584) *In re Makris*, Case No. 11-1666, 2012 US App. Lexis 10359 (3d Cir. 2012) – Creditor is not entitled to recover attorney fees incurred in litigating amount of attorney fees. Bank pursued debtor for payment on a personal guarantee including fees associated with the guarantor litigation. Bank sought to recover fees incurred by the bank in determining whether the debtor was liable for the fees incurred in the guarantor. Provision of underlying note that authorized recovery of attorney fees associated with enforcement of note and guarantee did not encompass fees incurred in litigating entitlement and amount of fees themselves.

4.47 “Fees on Fees” – Receiver

- (585) *In re 29 Brooklyn Ave, LLC*, Case No. 12-40279 (Bankr. E.D.N.Y. 2016) – *Baker-Botts* limitation precluding award of fees for litigating fee applications does not apply to receiver fees. Receiver fees are not awarded under Section 330 but under Section 543 and counsel was entitled to reasonable compensation under Sections 503(b)(4) and 503(b)(3)(e).

4.48 Sanctions and Disgorgement

- (586) *Buck v. Caudill*, 2016 WL 3881133 (S.D. Ohio 2016) – Section 329(b) allows the bankruptcy court to review fee arrangements and fees paid to attorneys in bankruptcy cases. If compensation exceeds reasonable value of services, court may cancel agreement, or order return of payment, to the extent excessive.
- (587) *In re Morton*, 2015 WL 5731859 (Bankr. E.D. Tn. 2015) – Attorneys ordered to disgorge \$15,000 retainer received from debtor’s mother and an additional \$6,000 received from debtor in the 90 days preceding commencement of case, and to undergo 10 hours of ethics continuing legal education. 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.
- (588) *In re McGee*, 2014 WL 5488266 (Bankr. E.D. Ky. 2014) – Bankruptcy Court sanctions including permanent bar from practice, civil penalties, refunds of amounts paid to counsel by clients for the previous year, and a potential waiver of the civil penalties were appropriate sanctions where attorney routinely allowed unlicensed, non-attorney staff to counsel clients and file papers without meaningful supervision; and attorney had previously been sanctioned for failure to appear for hearings. Pattern of conduct evidenced gross recklessness and willful misconduct that required stern response.
- (589) *DeLuca v. Cuomo*, Case No. 13-1294 (9th Cir. BAP 2014) – Court has inherent authority to sanction attorneys who fail to meet minimum standards of performance. Attorney sanctioned for failure to provide competent representation where schedules prepared by attorney omitted debtor’s largest unsecured claim. Attorney has duty to carefully investigate affairs of debtor and make certain attorney has all information necessary to prepare full and complete schedules. Attorney cannot shift to debtor all responsibility for ensuring accuracy of schedules where attorney had information available to demonstrate inaccuracies or omissions. Debtor had previously filed two other cases, both dismissed, which listed creditor in schedules. Although attorney knew of at least one prior case, attorney did not check schedules in that case which would have disclosed existence of creditor. Attorney ordered to disgorge \$851 of his fees as sanction.
- (590) *In re Ingram*, 2014 WL 1278160 (Bankr. E.D. Wis. 2014) – Attorney required to disgorge entire fee where bankruptcy schedules were riddled with error, and attorney failed to take any action to recover debtor’s vehicle that had been seized pre-petition which was entire purpose of filing bankruptcy in the first instance.
- (591) *In re Ingle*, 2014 WL 3339597 (Bankr. N.D. Ohio 2014) – Court denied debtor’s request to disgorge fees paid in Chapter 13. Counsel received a total of \$500 for services in Chapter 13 that produced confirmed plan that was nearing successful completion. While attorney-client relationship broke down near end of case, causing counsel to withdraw, the substantial work completed by counsel prior to withdrawal

more than justified retention of fees paid.

- (592) *Findling v. Rapoport*, Adv. No. 11-6933 (Bankr. E.D. Mi. 2014) – Bankruptcy Court can order disgorgement of fees to extent fees are excessive, or to extent of penalties against “debt relief agency” for failure to comply with debt relief requirements. Attorney who fails to comply is liable to the assisted person. Further, court has inherent authority to oversee fees including consideration of requirements of Sections 526-28. Counsel failed to comply with debt relief requirements by failing to provide mandatory written disclosures or to keep copies of those disclosures; failed to execute written retainer agreement; and overall failed to comply with any debt relief requirements. Court can void agreement between debtor and attorney where contract does not comply with requirements, for example by omitting required language, failure of the disclosures to be conspicuous or clearly written, or services to be provided were not adequately defined; or court can assess actual damages, attorney fees and costs where conduct amounts to intentional or negligent failure to comply with any provision of Sections 526-28. Failure to obtain written agreement was intentional omission warranting imposition of sanctions, where it would be illogical to “void” a non-existent agreement. Attorney’s conduct was at least negligent where attorney was experienced attorney with lengthy legal career and attorney did not offer any defense of inactions. Plaintiff in adversary proceeding was not entitled to award of attorney fees or costs in pursuing disgorgement as Section 526-28 provide remedies solely to represented party and plaintiff was not debtor nor otherwise represented by attorney. Attorney required to disgorge fees to debtor.
- (593) *In re Dyer*, Case No. 12-08030 (6th Cir. BAP 2013) – Court erroneously ordered disgorgement of fees where disgorgement was predicated on Order denying confirmation of plan that itself was reversed on appeal. Bankruptcy Court’s mistaken conclusion that debtor’s plan could not be confirmed could not support denial of fees and disgorgement.
- (594) *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.
- (595) *In re Kim*, 2012 WL 3907490 (Bankr. E.D.N.Y. 2012) – Court has authority to review fees received by counsel for services rendered or to be rendered in connection with the case and to order disgorgement of fees determined to be excessive or unreasonable. Counsel’s 2016 statement indicated that counsel received a total fee of \$3,000, and counsel repeated that asserting in “Affidavit of Compliance” filed with court. However, evidence indicated that counsel received total fees of \$4300. Counsel’s explanation that \$4300 was fee for Chapter 13 which debtor initially sought to file did not make fee reasonable where case was ultimately filed as Chapter 7. Failure to accurately disclose fees, constitutes independent basis to deny or reduce fees without regard to consideration of reasonableness. Reasonableness of fee depends on time spent, rates charged, whether the services were necessary to administration of or beneficial to the case at the time the services were rendered, whether the services were performed within a reasonable amount of time commensurate with the complexity, importance and nature of the problem, and whether compensation is reasonable when compared to rates and fees charged by comparable practitioners. Counsel’s failure to accurately disclose all relevant information regarding fees, and failure to correct error notwithstanding multiple opportunities to amend 2016 disclosure warranted reduction and disgorgement of partial fees. Based on time records, Court concluded that \$3000 was reasonable fee and ordered counsel to disgorge excess \$1300.
- (596) *In re Brent*, 458 BR 444 (Bankr. N.D. Ill. 2011) – Attorney sanctioned for false statements in fee applications. Fee application attached Model Retention Agreement that stated that attorney fees would total \$3500.00. Attorney failed to disclose second, separate agreement that provided for additional fees. By filing only standard MRA with court, Attorney falsely represented that the stated \$3500 fee would be the only fee for the duration of the case when undisclosed addendum would permit greater, undisclosed fee. Attorney sanctioned \$10,000 and ordered to complete ethics class at accredited law school.
- (597) *In re Harwell*, 2010 WL 4901787 (Bankr. W.D. Mi. 2010) – Disgorgement of fees warranted where attorney failed to attend first meeting of creditors and instead arranged for attorney who debtor never met to attend, coupled with attorney’s failure to supplement fee disclosure to reveal fees paid to other attorney in violation of rules against fee sharing; 2016b statement failed to disclose that counsel collected a \$150.00 fee for “service fees in conjunction with the due diligence”; 2016b statement was otherwise materially incomplete and inaccurate; and counsel never amended 2016b statement even after being advised by court that it was inadequate and inaccurate. Court ordered disgorgement of \$500.
- (598) *In re Smith*, 2010 WL 3270019 (Bankr. N.D. Ohio 2010) – Court has authority under Section 329 to determine reasonableness of compensation paid to attorney. Court has authority to order disgorgement of fees that are deemed excessive or unreasonable, although Court should not exercise that authority lightly. Services charged by a debtor’s attorney which are of poor quality and/or which do not comply with an attorney’s ethical duties are not reasonable and provide grounds for the disgorgement of fees for purposes of Section 329(b); or where debtor’s counsel does not abide the Bankruptcy Code and Rules and orders of the court. Attorney’s failure to appear at the Hearing set concerning the Dismissal of the Debtors’ case under Section 707(b) did not meet minimal professional standards. Other services performed by Attorney did meet ethical and professional standards. Partial disgorgement of fees is appropriate remedy under the circumstances.
- (599) *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 minimus* 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.

- (600) *In re Henkel*, 408 B.R. 699 (Bankr. N.D. Ohio 2009). Attorney's errors warranted partial disgorgement of fees, where Chapter 7 debtor's attorney listed income and expenses of non-filing spouse instead of debtor.
- (601) *In re Waldo*, Case No. 09-30969 (Bankr. E.D. Tn. 2009) – Attorney who pre-petition received post-dated check as payment for unpaid Chapter 7 attorney fees violated ethical rules regarding conflict of interest. Attorneys failed to advise clients in advance of receiving post-dated check that unpaid balance of attorney fees would be discharged in Chapter 7 proceeding. Attorney failed to advise client to have transaction reviewed by independent counsel. Even if acceptance of post-dated checks for a dischargeable pre-petition fee did not create a per se conflict of interest between attorneys and debtors due to the "credit transaction" between them, there was an appearance of such a conflict since the information concerning potential dischargeability of the fees was not disclosed to the Debtors whereby they could seek additional legal advice, and they did not consent, in writing, to acceptance of this potential conflict.

4.49 Res Judicata

- (602) *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.
- (603) *In re Thomas*, Case No. 09-76877 (Bankr. E.D. MI. 2010) – Fee application by counsel in Chapter 13 proceeding for fees incurred prior to confirmation of plan denied where Order Confirming Plan provided for award of fees and costs. Counsel failed to demonstrate any basis to award fees for services rendered prior to confirmation in an amount that exceeded amount already awarded in Confirmation Order.

4.50 Costs

- (604) *In re Oglesby*, 2015 WL 5145571 (Bankr. N.D. Ohio 2015) – Costs for computer research are compensable only to extent of actual costs of the research. If the attorney has a blanket access fee, rather than a per search fee, the cost of the computer is no different than the costs of the books in the library and treated as overhead. Distinct charges properly documented are compensable. Party failed to provide any breakdown for determining whether costs were properly billed separately or were treated as overhead, leaving court unable to award costs.
- (605) *In re Essex*, Case No. 09-32597 (Bankr. E.D. Mi. 2015) – Section 330 allows reimbursement of actual, necessary expenses. Costs requested for envelopes and mailing labels are not recoverable with scope of Section 330.
- (606) *In re Pracher*, Case No. 11-08748 (Bankr. W.D. Mi. 2014) – Section 330 allows court to award reimbursement for actual, necessary expenses. Expenses that are considered overhead are not compensable and include, but are not limited to, rent, utilities, secretarial time, messenger services, insurance and general office charges that are built into an attorney's hourly rate. Expenses are recoverable only if expenses are "fronted" by attorney for specific client, and reimbursement must be limited to actual expenses without any addition for profit. Expenses for copying and mailing are necessary as the costs were incurred explicitly for debtor's case. Expenses were "actual" in amount of 19 cents per page based on cost of paper plus charge per photocopy for the machine itself. However, photocopy charges were disallowed to extent charge included general expenses for staff for operating the printers, refilling the printers, and other tasks a paid employee would normally perform when using the machine. Similarly, charges disallowed to extent charge represents electricity, storage space for paper, costs of maintaining insurance on machine or floor space on which machine is located. Charges for mailing labels are not compensable as costs of labels falls within normal overhead, similar to envelopes, staples, binders, pens and post-it notes.
- (607) *In re Smith*, 2011 WL 2293261 (Bankr. N.D. Ohio 2011) – Court cannot award reimbursement of expenses without itemized statement of expenses.
- (608) *In re Clark*, Case No. 08-53620 (Bankr. E.D. Mi. 2009) – Counsel's request for award of costs denied where Fee Agreement provided only for reimbursement of costs related to post-confirmation services.

4.51 Travel Time

- (609) *In re Connolly North America, LLC*, Case NO. 01-57090 (Bankr. E.D. Mi. 2012) – Airplane time was compensable where attorneys actually worked while flying. UST objection that attorneys "could not have been working at their optimal performance" was unsupported.

4.52 Overhead

- (610) *In re Connolly North America, LLC*, Case NO. 01-57090 (Bankr. E.D. Mi. 2012) – Out of area attorneys not entitled to compensation for time expended in obtaining admission to practice in this district or for attending ECF training. These items are overhead that are not separately compensable.

4.53 Effect of Discharge

- (611) *In re Cripps*, 2016 WL 2899459 (Bankr. W.D. Mi. 2016) – Neither Section 327 nor 330 sets deadline by which fee application must be filed. Fee application filed after Trustee filed Notice of Plan Completion was timely and could be considered and granted by court. However, court would deny administrative status where plan had already run statutory maximum 60 months, Trustee had already collected and distributed all payments due under the plan, and there were neither funds available to pay fees nor any feasible way to modify the plan to pay fees as case had already run 60 month statutory limit. Trustee issued letter near time of completion of case advising that the end of the case was near and advising that any requests for administrative expenses needed to be filed immediately, but counsel failed to do so until after issue of Notice of Plan Completion. Plan provided that administrative expenses would be paid by the Trustee which was no longer possible as plan had completed and there were no funds remaining. Section 503 did not excuse tardy request for administrative expenses where counsel was at fault for not filing fee application before issuance of Notice of plan completion and allowing late administrative claim would prejudice debtors by saddling debtors with administrative expenses that should have been paid through plan. Fees awarded under Section 330 but were not afforded administrative expense status so would not be paid by Trustee, and would be discharged upon entry of Discharge in case, such that counsel could not pursue collection post-discharge.
- (612) *In re Carey*, Case No. 08-62428 (Bankr. E.D. Mi. 2014) – Counsel cannot file fee application after entry of discharge. Debtors completed Chapter 13 plan and received a discharge. Counsel then filed a fee application for services performed prior to the discharge. Fees are within scope of discharge under Section 1328 and nothing in 1328 would except debtor’s obligation to pay fees from discharge.
- (613) *In re Michel*, 2014 WL 1647009 (Bankr. E.D. Mi. 2014) – Fee agreement entered into pre-petition that provided for payment of fees post-petition discharged in Chapter 7. Pre-petition attorney fees are dischargeable debts not excluded pursuant to Section 523. Post-petition performance of services does not convert pre-petition fee agreement into post-petition non-dischargeable obligation. Claim is pre-petition if it is based on pre-petition relationship between creditor and debtor such that creditor could “fairly contemplate” a claim against the estate at the time the petition was filed. Fee agreement called for flat fee of \$900 for services rendered in bankruptcy case, with \$450 paid pre-petition. Any attempt to collect balance of fees after filing case barred by Section 362 and Section 524. Fees received by counsel post-petition ordered disgorged. Subject to debtor’s right to voluntarily pay attorney after debtor is advised that debtor has no legal obligation to do so.
- (614) *In re Abdel Hak*, 2012 WL 5874317 (Bankr. E.D. Mi. 2012) - Fee agreement entered into pre-petition that provided for payment of fees post-petition discharged in Chapter 7. Pre-petition attorney fees are dischargeable debts not excluded pursuant to Section 523. Post-petition performance of services does not convert pre-petition fee agreement into post-petition non-dischargeable obligation.
- (615) *In re Gourlay*, 483 BR 496 (Bankr. E.D. Mi. 2012), *aff’d*, 496 BR 857 (E.D. Mi. 2013) - Fee agreement entered into pre-petition that provided for payment of fees post-petition discharged in Chapter 7. Pre-petition attorney fees are dischargeable debts not excluded pursuant to Section 523. Post-petition performance of services does not convert pre-petition fee agreement into post-petition non-dischargeable obligation.
- (616) *In re Waldo*, 417 BR 854 (Bankr. E.D. Tn. 2009) – Fee agreement entered into pre-petition that provided for payment of fees post-petition discharged in Chapter 7. Pre-petition attorney fees are dischargeable debts not excluded pursuant to Section 523. Post-petition performance of services does not convert pre-petition fee agreement into post-petition non-dischargeable obligation. Claim is pre-petition if it is based on pre-petition relationship between creditor and debtor such that creditor could “fairly contemplate” a claim against the estate at the time the petition was filed. Attorney’s negotiation of post- dated check received prior to commencement of case pursuant to terms of pre-petition fee agreement constituted attempt to collect discharged debt in violation of Section 362 and 524.

4.54 Post-Petition Services

- (617) *In re Incorvaia*, 2014 WL 4163619 (Bankr. N.D. Ohio 2014) – Attorney for debtor in Chapter 7 not entitled to recover fees for services rendered post-petition from property of estate. In Chapter 7, attorney cannot be compensated from estate unless attorney has been retained by trustee with court approval. Court cannot award fees on *quantum meruit* basis even where attorney’s services produced money for estate. Court cannot supplant specific requirements of Code with general equitable principals.
- (618) *In re Carwile*, 2011 WL 6176201 (Bankr. W.D. Ky. 2011) – Attorney who continued to perform services for debtor post-petition without knowledge of bankruptcy filing not entitled to compensation from bankruptcy estate. Attorney who was never obtained court approval for employment by estate not entitled to recover in quantum meruit.
- (619) *In re Wolff*, 2010 WL 4959949 (Bankr. E.D. Tn. 2010) – Debtor’s attorney who continued to perform services for debtor post-petition not entitled to administrative claim against estate. Attorney hired by Trustee will be compensated as administrative expense, but attorney hired by debtor is not hired by Trustee and does not represent estate.
- (620) *Lamie v. U.S. Trustee*, 540 US 526 (2004) – Attorney for debtor not entitled to compensation from estate for services rendered post-petition or post-conversion from Chapter 11 to Chapter 7. Sections 327 and 330 allow compensation only for professionals employed by Trustee with approval of Bankruptcy Court.

4.55 Bankruptcy Court Review

- (621) *In re Piccinini*, 450 B.R. 677 (Bankr. E.D. Mi. 2011) – Bankruptcy Court has exclusive jurisdiction to consider fee requests and resolve fee disputes in bankruptcy, including propriety of fee agreement between debtor and counsel. Court would stay prosecution of state court action by debtor’s former counsel to collect sums allegedly owed pending resolution by Bankruptcy Court of entitlement and amount of fees.

4.56 Fee Enhancements

- (622) *HDV- Greektown, LLC v. City of Detroit*, 2016 WL 4435646 (6th Cir. 2016) – Fee enhancements may be awarded in rare and exceptional circumstances. Appellant’s claim that enhancement was appropriate because counsel billed at below market rate, where main fee award was calculated at reasonable rate, not actual hourly rate. Enhancement can be based on rare and exceptional circumstance showing superior result or that case was undesirable. However, appellant’s argument that counsel representing adult entertainment business was subject to pressure on ability to obtain other clients was not supported by evidence.
- (623) *In re Trailer Source, Inc.*, 2012 WL 2603244 (Bankr. M.D. Tn. 2012) – Lodestar process requires determination of reasonable number of hours expended times reasonable hourly rate to determine reasonable fees. However, lodestar is not the end of the inquiry, and Court can adjust fees upward or downward according to other considerations. Enhanced fees are reserved only for rare and exceptional cases and, if warranted, should not exceed one-third of the lodestar amount. Attorney entitled to enhancement where efforts produced a settlement that increased the money received by the estate from \$50,000 to \$3 million, substantially in advance of any trial date and while minimizing costs. Attorney took case at substantial risk of non-payment; had case been unsuccessful, there would have been no assets available for payment. But for efforts of attorney, estate would likely have been insolvent instead of producing large recovery for benefit of creditors. Lodestar calculation produced fees that were at the low-end for attorneys with comparable experience in bankruptcy and litigation.
- (624) *In re Arter & Hadden, LLP*, 2011 WL 3422788 (Bankr. N.D. Ohio 2011) – Lodestar process permits court to enhance fees based on factors such as : (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment; (5) the customary fee; (6) whether the fee was fixed or contingent; (7) time limitations imposed; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. However, enhancement is appropriate only where factors underlying enhancement have not already been considered in reaching primary award. Moving party denied enhancement where party failed to present evidence to support enhancement for reasons not already considered by the court.

4.57 Surcharge

- (625) *In re TIC Memphis RI 13, LLC*, 498 BR 831 (Bankr. W.D. Tn. 2013) – Actions of Debtor in Possession and retained professionals in attempting to sell debtor’s real estate, while reasonable, did not produce any benefit to estate where amount of sale was not sufficient to pay secured creditor and did not produce any proceeds for administration by estate. Creditor did not receive any benefit from actions of debtor or professionals that would warrant surcharge of proceeds for payment of professional fees.
- (626) *In re McLean Wine Co., Inc.*, 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – Section 506(c) allows court to surcharge secured creditors for reasonable and necessary costs of preserving, recovering and disposing of property securing claims of creditors. Surcharge under § 506(c) is proper where the claimant establishes that the secured party directly or impliedly consented or caused the expense. Party seeking to surcharge bears burden of proof that (1) the expense must be necessary for the preservation or disposal of the collateral, (2) the amount of the expense must be reasonable, and (3) the secured creditor must benefit from the expense; or alternatively that the secured party directly or impliedly consented or caused the expense. Consent will not be inferred merely from the fact that the secured party cooperated with the debtor or that Creditors encouraged the performance of services, as the debtor and the Applicant ultimately bear responsible for deciding what actions to pursue.

4.58 Contingency Fees

- (627) *In re Tierney*, Case No. 14-30795 (Bankr. E.D. Mi. 2015) – Court approved retention of counsel for trustee on contingency fee basis to prosecute avoidance actions. Actions resulted in recovery to estate of \$102,000.00. Counsel entitled to contingency percentage on amount of recovery. Counsel’s prompt action prevented potential loss of more than \$100,000 to estate and issues presented, involving validity of pre-petition marital settlement agreement, were difficult and it appeared that trustee had significantly weakened position in that litigation, yet action produced substantial benefit to estate. Contingency fee is not “enhancement” as retention was at all times a contingency based fee, and there was no evidence that retention started as hourly rate and “converted” when it appeared a windfall may result. Contingency fee was appropriate as counsel took major risk as, without recovery, there would have been no funds to pay attorney and creditors and parties in interest were fully aware of contingent nature of compensation from outset as Application for Retention clearly spelled out contingency nature of compensation and no party in interest objected at time of approval of retention.

4.59 “End of Case” Issues

- (628) *In re Kulbatsky*, Case No. 13-99164 (Bankr. E.D. Mi. 2016) – Counsel cannot file fee application after entry of discharge. Debtors completed Chapter 13 plan and received a discharge. Counsel then filed a fee application for services performed prior to the discharge. Fees are within scope of discharge under Section 1328 and nothing in 1328 would except debtor’s obligation to pay fees from discharge. Attorney entitled to compensation for services rendered after Trustee files Notice of Final Cure or Notice of Plan Completion. Fees incurred after case has concluded are not “claims provided for under the Plan” as the plan cannot contemplate payment through the plan of claims incurred after plan expiration.
- (629) *In re Mears*, 2016 WL 2899459 (Bankr. W.D. Mi. 2016) – Neither Section 327 nor 330 sets deadline by which fee application must be filed. Fee application filed after Trustee filed Notice of Plan Completion was timely and could be considered and granted by court. However, court can deny administrative status I following claim would prejudice debtors. Application filed after debtors apparently had paid sufficient sum to complete case could be allowed where Trustee had not yet issued Notice of Plan Completion and case had not run statutory maximum 60 months and could be modified to provide for extended plan term and payment of administrative expenses. Debtors

would still have sufficient time to satisfy administrative expense claim and debtors had ability to satisfy claim through payments over time; or debtors could modify the plan to allow administrative expenses to survive discharge and be paid directly by debtors.

- (630) *In re Cripps*, 2016 WL 2899459 (Bankr. W.D. Mi. 2016) – Neither Section 327 nor 330 sets deadline by which fee application must be filed. Fee application filed after Trustee filed Notice of Plan Completion was timely and could be considered and granted by court. However, court would deny administrative status where plan had already run statutory maximum 60 months, Trustee had already collected and distributed all payments due under the plan, and there were neither funds available to pay fees nor any feasible way to modify the plan to pay fees as case had already run 60 month statutory limit. Trustee issued letter near time of completion of case advising that the end of the case was near and advising that any requests for administrative expenses needed to be filed immediately, but counsel failed to do so until after issue of Notice of Plan Completion. Plan provided that administrative expenses would be paid by the Trustee which was no longer possible as plan had completed and there were no funds remaining. Section 503 did not excuse tardy request for administrative expenses where counsel was at fault for not filing fee application before issuance of Notice of plan completion and allowing late administrative claim would prejudice debtors by saddling debtors with administrative expenses that should have been paid through plan. Fees awarded under Section 330 but were not afforded administrative expense status so would not be paid by Trustee, and would be discharged upon entry of Discharge in case, such that counsel could not pursue collection post-discharge.
- (631) *In re Hirsch*, 2016 WL 2898061 (Bankr. W.D. Mi. 2016) – Neither Section 327 nor Section 330 sets deadline for application for compensation, and court can consider and grant applications for services rendered post-dismissal where the post-dismissal services were related to the bankruptcy case and produced a benefit to debtor or the estate. Prior to dismissal, debtor's Mortgage company (Ditech) advised the Trustee that the mortgage was overpaid and that Ditech would refund the overpayment to the trustee. Debtor voluntarily dismissed case before Ditech made refund and Ditech initially states that in light of dismissal Ditech would not issue refund. Debtor's counsel than became involved in attempting to force refund, and those efforts were successful with Ditech refunding the overpayment to the Trustee. Debtors had clear interest in actions as funds that generated overpayment were from debtor's wages and debtors had clear interest in ensuring that Ditech refunded money and complied with loan modification that produced overpayment in first instance. Services directly benefitted estate as Ditech refunded over \$7,000 to Trustee, and fees requested were reasonable amounting to less than \$800. Services were reasonably necessary to ensure that Ditech complied with loan modification and Orders of court approving modification and directing refund. Counsel's efforts also resolved matter without judicial intervention which would have driven up costs for all parties. Although the United States Trustee was also involved in efforts to obtain refund, Applicant had primary responsibility to protect debtors' interests in the overpayment and in loan modification. Applicant filed application at earliest possible time. Applicant could not file application before dismissal as client had requested that case be dismissed immediately, and had counsel chosen to hold dismissal until fee application is filed and adjudicated would have put counsel's interests ahead of client's in violation of applicable ethical rules. Court will not unnecessarily create tension between attorney and client where attorney follows client's instructions and then acts diligently to protect claim for fees. Court withheld determination as to whether fees can be paid from funds returned by Ditech pending determination of effect of dismissal on Trustee's ability to distribute funds.
- (632) *In re Sorter*, Case No. 08-57829 (Bankr. E.D. Mi. 2015) – Attorney who seeks compensation for services in bankruptcy case must have fees approved by bankruptcy court even if fees are to be paid directly. Attorney entitled to compensation for services rendered after Trustee files Notice of Final Cure or Notice of Plan Completion. Fees incurred after case has concluded are not "claims provided for under the Plan" as the plan cannot contemplate payment through the plan of claims incurred after plan expiration. As such, fees incurred after plan has expired for services in connection with case completion are not discharged. However, attorney must still seek court approval for those fees. Attorney cannot wait until after discharge and then invoice debtors directly where Court has not reviewed and approved fees.
- (633) *In re Carey*, Case No. 08-62428 (Bankr. E.D. Mi. 2014) – Counsel cannot file fee application after entry of discharge. Debtors completed Chapter 13 plan and received a discharge. Counsel then filed a fee application for services performed prior to the discharge. Fees are within scope of discharge under Section 1328 and nothing in 1328 would except debtor's obligation to pay fees from discharge.

4.60 Attorney for Chapter 7 Trustee

- (634) *In re Smith*, 2015 WL 5340146 (Bankr. E.D. Mi. 2015) – Attorney for Trustee is not entitled to compensation for services that are part of Trustee's statutory duties. Services in connection with sale of property are generally within duties of Trustee and so are not separately compensable. Services for communication with real estate broker, communications regarding valuation of vehicles, and communications regarding termite inspection report are not compensable as within scope of Trustee duties. Description of services did not indicate performance of any legal work or need for an attorney and nothing in the application indicated why these services had to be performed by attorney rather than trustee. Services in connection with approval of sale including drafting, filing and prosecution of motion to approve sale was legal service properly delegated to attorney. Prosecution of adversary proceeding regarding title to property is also properly delegated to attorney and compensation was appropriate where adversary proceeding was reasonably likely to produce a benefit to estate.
- (635) *In re Dreibelbis*, 2015 WL 3536102 (Bankr. N.D. Ohio 2015) – Attorney for Trustee is not entitled to compensation for services that are part of Trustee's statutory duties. Attorney services to review exemptions negotiations regarding valuations of debtor's property, and obtaining appraisal of debtor's property were within scope of trustee duties and were not compensable. Services in researching scope of "tool of trade" exemption were more appropriate for attorney and were compensable.
- (636) *In re Bond*, Case No. 14-21792 (Bankr. E.D. Mi. 2015) – Where trustee hires him or herself to act as counsel for trustee, court must determine whether services are "professional" in nature and so compensable, or whether services are within scope of duties of trustee for which additional compensation is not warranted. Decision to assume or reject unexpired leases is within trustee duties, but legal matters to bring that to fruition are legal and compensable. Trustee's actions in paying filing fees for motion to sell property was within trustee duties and not separately compensable. Compensation not appropriate to correct legal description in connection with motion to sell where trustee was

the cause of the incorrect description in first instance and counsel/trustee will not be compensated to correct own error. Preparation and filing of CNR and submission of order and services for obtaining certified copy of order allowing sale of property are compensable but not at an attorney hourly rate as service is clerical in nature. Services in connection with adversary proceeding are legal and compensable. Services to consider retention of accountant and preparation of Application to retain, while normally within duties of trustee, were more involved given number of competing interests and tax issues, and amount of time charged was minimal. Compensation disallowed for time spent reviewing proofs of claim and filing routine objections as services are normally performed by trustee, as are services for furnishing information to parties in interest on factual matters.

- (637) *Huepenbecker v. Davidoff*, Case No. 13-747 (W.D. Mi. 2015) – Bankruptcy Trustee has paramount duty to protect the estate and code presumes that trustee will adequately represent the interests of the estate. Trustee, with court approval, may hire an attorney to assist trustee and attorney must act for purposes of administering estate and protect assets.
- (638) *In re McKenzie*, 2011 WL 1549433 (Bankr. E.D. Tn. 2011), *aff'd* 476 BR 515 (E.D. Tn. 2012) - Counsel employed to defend the trustee may be paid from the estate as any other professional in the case. Balancing policy of encouraging trustees to investigate debtors' financial affairs without fear of reprisal with prospect that the estate might be diminished by paying for the defense of a rogue trustee favors policy that encourages trustees to investigate transfers.
- (639) *In re Martin Designs, Inc.*, 2013 WL 1195706 (Bankr. N.D. Ohio 2013) – Chapter 7 Trustee has wide latitude in selecting attorneys to represent trustee. Trustee's retention of new counsel to contest fee application filed by prior, now terminated counsel, was within scope of trustee duties for which employment was appropriate under Section 327. Counsel to be retained was also representing Trustee in other, limited capacities, and new application sought to expand scope of those responsibilities. Prior and ongoing representation of Trustee in certain aspects did not result in counsel having any adverse interest that would disqualify retention for additional matters.
- (640) *In re Hash*, 2012 WL 2161621 (Bankr. W.D. Ky. 2012) – Chapter 7 Trustee's application to retain counsel granted. Section 327(a) allows the trustee, with the court's approval, to employ one or more attorneys. Trustee with the authority to hire professionals without the interference of creditors and should be deprived of his or her choice of professionals in "only the rarest cases. The Trustee clearly believed that attorney's employment is in the best interest of the estate and that he has the expertise, familiarity and skill to proceed with representation of the estate. Attorney to be retained must not hold or represent an interest adverse to the estate, and must be disinterested. "Disinterested person" is defined under Section 101(14) as (a) a person who is not a creditor, equity security holder, or insider; (b) a person who is not and was not, within two years before the date of the filing of the Petition, a director, officer or employee of the debtor; and (c) a person who does not have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or for any other reason. Attorney was "disinterested" within the meaning of the statute. To the that any sums are possibly owed to the attorney due to his past representation of the Debtor, attorney waived any claim at the hearing eliminating any possibility that the attorney could be considered, and disqualified as, a creditor of the estate. Creditor's contention that a conflict "may" arise, if the Debtor claims an exemption and a dispute arises over whether the exemption should be allowed did not demonstrate any actual conflict in existence Court would decline the Trustee's Application on mere possibility that a conflict may arise at some point in the future.
- (641) *In re Alexander*, 469 BR 684 (Bankr. W.D. Ky. 2012) – Chapter 7 Trustee who failed to seek court approval to retain attorney not entitled to *nunc pro tunc* authorization where litigation for which attorney had been retained had already been concluded. Failure to seek court approval to retain attorney for roughly three years after attorney was retained to prosecute avoidance action did not rise to level of "extraordinary circumstances" warranting *nunc pro tunc* approval.
- (642) *In re McLean Wine Co., Inc.*, 2011 WL 6348990 (Bankr. E.D. Mi. 2011) - Trustee's attorney is not entitled to professional compensation for performing the statutory duties imposed on the trustee by 11 U.S.C. § 704. Professional skills of an attorney are required when there is an adversary proceeding or a contested motion that requires the trustee to appear and prosecute or defend, when an attorney is needed for a court appearance, or when other services are needed that require a law license. Preparation of an application for employment of a professional is a duty generally performed by a trustee without the assistance of an attorney. Absent a showing by applicant to the contrary, routine employment applications remain a trustee duty. Courts have denied requests for compensation by a trustee's counsel for time entries relating to routine telephone calls and correspondence with information seekers. Applicant's services to the Trustee for responding to the inquiries from parties in interest and creditors are not compensable.

4.61 Effect of Order Awarding Compensation

- (643) *In re Tennielle*, Case No. 15-41869 (Bankr. E.D. Mi., 2015) – Order awarding compensation does not actually direct trustee to do anything, but merely recites what portion of the awarded fees will be paid by the Debtor, leaving the balance to be paid by Trustee.
- (644) *In re Trombley*, 2013 WL 4417425 (E.D. Mi. 2013) – Order awarding compensation is not the equivalent of a judgment against debtor for payment of fees and does not, standing alone, allow for execution or garnishment. Party holding fee award needs to institute separate collection proceeding to convert award into executable final judgment.

E. *Pro Hac Vice*

4.62 Grant and Withdrawal of Approval

- (645) *In re Hake*, Case No. 08-8039 (6th Cir. BAP 2008) – Granting and revoking admission *pro hac vice* vested in sound discretion of Bankruptcy Court. Court properly revoked *pro hac vice* admission in light of argumentative, disruptive and antagonistic behavior of counsel. Counsel used disrespectful tone of voice toward Court, rolled his eyes at the Court, raised his voice, and made faces while the Court was speaking.

Counsel violated pretrial order in limine by subpoenaing witnesses whom had previously been excluded from testifying and then engaging in “revisionist history” in a series of explanations which Court found “not credible”. Counsel’s antics far exceeded the standard of “zealous advocacy” and exhibited a deliberate disdain for the Bankruptcy Court. Bankruptcy Court acted appropriately and acting to preserve dignity and decorum of the Courtroom.

- (646) *In re Stephenson*, 2009 WL 2169222 (Bankr. N.D. Ohio 2009) – Permission to appear *pro hac vice* is matter committed to sound discretion of the trial Court. Court can revoke or deny permission to participate *pro hac vice* when it appears that granting or continuing *pro hac vice* status would be an unwise use of judicial discretion. Permission to appear *pro hac vice* would not be denied merely because attorney happens to practice in the same county where Bankruptcy Court is located. Although *pro hac vice* status is generally used to permit an out-of-state attorney to practice in the Bankruptcy or District Court, and local rules of Court exhibited “strong preference” that attorneys seek permanent admission to the Bar of the Court, Court would grant permission to appear *pro hac vice* in this case only. If Counsel wishes to appear in another case, Counsel will have to obtain permanent admission to the bar.

F. Withdrawal or Disqualification of Counsel

4.63 Procedure

- (647) *JP Morgan Chase Bank, N.C.A. v. Taylor*, Case No. 10-5469 (Bankr. E.D. Mi. 2010) - Defendant's Counsel's Motion to Withdraw as counsel was not excuse for failure to timely file response to Plaintiff's Motion for Summary Judgment. Unless and until Court grants Motion to withdraw, counsel remains counsel of record in case.
- (648) *Phillips v. Sallie Mae*, Case No. 09-6573 (Bankr. E.D. Mi. 2010) – Motion to Withdraw denied without prejudice where the Notice of the Motion was defective. Notice incorrectly identified the party for whom counsel had appeared and instructed any opposing party to file responses in the incorrect Clerk’s Office.
- (649) *In re Davis*, Case No. 05-57146 (Bankr. E.D. Mi. 2009) - "Notice of Withdrawal of Attorney" not effective to discharge counsel of record. Federal Rule of Bankruptcy Procedure 9014 and Local Rule 9024-1 require counsel to file a Motion to Withdraw with proper notice to Debtor, creditors and all other parties in interest.
- (650) *In re Digital Gas, Inc.*, Case No. 08-54958 (Bankr. E.D. Mi. 2008) – Motion to Withdraw denied without prejudice where Notice of Motion did not comply with form on Court website and where Motion misstated deadline to respond by failing to allow 3 days for mailing on those creditors not receiving notice by ECF. Motion filed October 2 with 15 days’ notice incorrectly stated that last day to object was October 17. Notice deadline should have been October 20 pursuant to Federal Rule of Bankruptcy Procedure 9006(f).

4.64 Mootness

- (651) *In re Andrews*, Case No. 06-49080 (Bankr. E.D. Mi. 2008) - Attorney's Motion to Withdraw denied as moot where case was dismissed after the Motion was filed but before the Motion was ruled upon.

4.65 Standing to Request Withdrawal

- (652) *Miller v. Airborne Express, Inc.*, 2009 WL 1738522 (E.D. Mi. 2009) – *Pro se* Debtor lacked standing to request the Court “withdraw” counsel appointed to represent bankruptcy trustee in adversary proceeding.

4.66 Grounds to Request Withdrawal

- (653) *In re Ingle*, 2014 WL 3339597 (Bankr. N.D. Ohio 2014) – Approval or denial of motion to withdraw is within discretion of court, upon showing of good cause. Court must consider whether withdrawal can be accomplished without material adverse effect on client; whether the client has failed to substantially fulfill obligations to the attorney and has been given reasonable warning that the attorney will withdraw unless the obligation is fulfilled; whether the representation will result in unreasonable financial burden on attorney or has been rendered unreasonably difficult by the client; or other good cause. Motion to withdraw granted where most of the work in bankruptcy case is complete and only significant remaining issue is proposed sale of debtor’s residence that is not tightly interwoven with bankruptcy proceeding. There have been significant disagreement between counsel and debtor including disputes about whether and when documents were provided and conflicting views on procedural and tactical decisions that make continued representation unreasonably difficult. Facts indicated that attorney-client relationship was broken.
- (654) *In re LaCourse*, Case No. 11-9338 (Bankr. W.D. Mi. 2012) – Grounds exist to withdraw where there has been a deterioration of attorney-client relationship. Client’s filing of grievance evidences breakdown. Debtor would not be prejudiced where debtor has already received a discharge and the only things necessary to do are to produce additional documents to the Chapter 7 Trustee and to file amendments, and debtor had the ability to perform those tasks without counsel.
- (655) *In re Toney*, 2012 WL 1854259 (Bankr. N.D. Ohio 2012) – Client filing grievance does not create per se conflict of interest between attorney and client. Court must look at facts of case including nature of grievance to determine what effect, if any, grievance may have on attorney-client relationship. Attorney failed to present any information on nature of grievance and debtor indicated desire that attorney remain counsel of record, indicating that relationship has not been harmed in such a way as to hinder future representation. Representation has continued for 9 years and it is reasonable for attorney to remain rather than requiring debtor to find new counsel and spend time getting up to speed. Debtor’s complaint with attorney stemmed from fact that Chapter 13 had been pending for 9 years. Record indicated that case had been pending because debtors failed to keep current in plan payments and not because of any fault of attorney. Motion to withdraw denied.
- (656) *Burrage v. Homecomings Financial Network, Inc.*, 2010 WL 3239357 (Bankr. N.D. Ohio 2010) – Ohio Rules of Professional Conduct

permit counsel to withdraw where withdrawal will not have material adverse effect on client; client persists in course of action that lawyer reasonably believes is fraudulent or illegal; client has used legal services to perpetrate fraud; client insists on taking action that lawyer considers repugnant or with which lawyer has fundamental disagreement; client substantially fails to fulfill obligation, financial or otherwise, to lawyer; representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; the client gives informed consent to the termination of the representation; the lawyer sells the law practice; or for other good cause. Attorney permitted to withdraw where withdrawal would not have material adverse effect although trial was pending in only one month, where court would also consider adjournment; Debtor repeatedly and inexplicably changed her mind regarding settlement, discovery and trial issues; and debtor refused to meet with attorney stating that attorney's work was "inadequate", evidencing a breakdown in the attorney-client relationship.

4.67 Death or Incapacity of Counsel

- (657) *In re Layman*, 2013 WL 1197271 (Bankr. N.D. Ohio 2013) – Court removed counsel of record after being advised by several clients who appeared at hearings without counsel that counsel was initially disabled and in long term care and was not returning phone calls; and court later was advised that attorney had passed away. Court terminated representation by counsel and allowed clients 30 days within which to retain new counsel.

4.68 Disqualification – Attorneys for Non-Debtor Parties

- (658) *Sweet v. Blue Skies Energy, LLC*, Case No. 14-3156 (Bankr. E.D. Mi. 2015) – Motion to disqualify counsel based on prior representation of opposing party requires reasonable possibility that some specifically identifiable impropriety has occurred. Disqualification requires past attorney-client relationship where the subject matter of the prior representation is substantially related to subject matter of current matter and attorney would have acquired confidential information in course of prior representation. Disqualification not warranted where prior representation was entirely unrelated to current matter. Prior representation involved environmental matters while current litigation involved validity of deed from debtor to third party. Court could not conceive of any confidential information that counsel could have obtained that would even remotely impact matters in current litigation. Disqualification is not warranted where targeted counsel obtained only general knowledge of prior client's workings or manner of operations.
- (659) *Rajapakse v. Wells Fargo Home Mortgage*, 2015 WL 4133179 (W.D. Tn. 2015) – Motion to disqualify counsel is appropriate way for opposing party to bring potential breaches of ethical conduct to attention of court. Court is tasked with upholding highest ethical standards of profession, protecting litigant's interests, and maintaining integrity of judicial process. Plaintiff lacked standing to disqualify defendant's counsel based on allegation that attorneys represented both defendant and themselves. Conflict, if any, would be personal to the defendant and defendant believed that continued representation was in best interest of defendant.
- (660) *Kohut v. Lenaway*, 2014 WL 3569744 (Bankr. E.D. Mi. 2014) – Attorney for debtor cannot represent third parties in action brought by Trustee to recover allegedly fraudulent transfers from debtor to third parties. Attorney is ethically prohibited from representing a party where that representation would be directly adverse to interests of another party. Attorney represented debtor prior to petition and continued to represent debtor in chapter 7 proceedings. Defendants' interest in defending against action by Trustee conflicts with debtor's duties to cooperate with chapter 7 trustee to maximize recovery for estate. Conflict could not be cured by withdrawal as counsel for debtor as ethical rules do not permit attorney to withdraw from representation of first client to take on representation of second client, instead rules require attorney to decline second representation. Further, viewed from debtor's perspective there was no cause to allow attorneys to withdraw. Even if counsel could withdraw, matter was still substantially related to prior representation such that second representation would still be precluded by rule 1.9.
- (661) *Irvin v. Faller*, 2014 WL 3385364 (Bankr. W.D. Ky. 2014) – Ethical limitations did not require disqualification of plaintiff's counsel. Although defendant met with plaintiff's counsel a number of years earlier and allegedly revealed confidential information, defendant failed to demonstrate that he revealed anything in initial meeting that would be significantly harmful to defense of adversary proceeding. Plaintiff's counsel declined to represent defendant at that time and never actually represented defendant in any manner. Adversary proceeding sought to except debt from discharge, where state court had already rendered final judgment awarding compensatory and punitive damages, none of which was involved in the meeting between defendant and counsel.
- (662) *In re Ralph Roberts Realty, Inc.*, Case No. 12-53023 (Bankr. E.D. Mi. 2013) – Creditor counsel disqualified from adversary proceeding where counsel represented the debtor prior to bankruptcy proceeding. Michigan Rule of Professional Conduct 1.9 prohibits an attorney from representing an interest adverse to a former client in the same or substantially related matter. However, counsel would not be disqualified where matters in which counsel previously represented debtor were unrelated to, and neither the same as nor substantially related to, the adversary in question. Further, Rule 1.9 prohibits disclosure or use of confidential information gleaned in the course of the prior representation, but fact that attorney has such information does not preclude the representation of another party, only the use of confidential information in the course of that representation. Debtor did not present any evidence that attorneys had, or were likely to in the future, disclose any confidential information. However, Rule 1.7 prevents an attorney from taking on an interest that is adverse to the interest of another current client. At the time counsel agreed to represent creditors in adversary proceedings against corporate debtor, counsel also represented the principal of the corporate debtor. Any representation of parties adverse to the corporate debtor would be a representation contrary to the interests of the then-client and neither the client nor the debtor agreed to waive the conflict. Later cessation of the attorney-client relationship between counsel and the principal of the corporate debtor did not absolve counsel of the conflict that necessarily resulted from simultaneous representation of creditors of the debtor and the principal of the debtor. Under Rule 1.10, this conflict with a current client required disqualification not only of the specific attorneys representing the individual client, but all members of the firm.

G. Professional Fees

4.69 Generally

- (663) *The Cadle Company II, Inc. v. Fashion Shop of Kentucky, Inc.*, Case No. 08-5633 (6th Cir. 2009) – Court authorizing retention of professional under Section 328 where Court Order approving the retention also sets compensation in retention order is not required to hold later hearing pursuant to Section 330 to approve compensation consistent with terms of retention order. The professional is not required to file detailed time entries describing the services performed or how the services benefited the estate. However, Court does retain authority to approve compensation different from that provided in retention order if the compensation proves to be “improvident” in light of factors and developments that were “not capable of being anticipated” at the time of the retention order. However, where retention order does not pre-approve compensation, professional must file application under Sections 327 and 330 and will be awarded only “reasonable compensation.”

4.70 Limitations

- (664) *Stickel v. SP Acquisition, LLC*, 2008 WL 3153931 (6th Cir. 2008) – Asset Purchase Agreement capped Professional fees at \$1.25 million. Cap applied to total aggregate professional fees including fees charged by liquidating agent for Debtor’s liquidation trust. Nothing in Asset Purchase Agreement indicated that each professional would be entitled to Fees up to \$1.25 million or that professional fees would not be aggregated up to total cap of \$1.25 million.

4.71 Retention of Professionals – Standing to Request

- (665) *In re Davidson*, 2014 WL 4181216 (Bankr. W.D. Ky. 2014) – Chapter 7 debtor lacks standing to seek approval of retention of professionals. Authority to hire professionals on behalf of estate is limited to Trustee.

4.72 Time for Application

- (666) *In re Greektown Holdings, LLC.*, Case No. 08-53104 (Bankr. E.D. Mi. 2010) - Section 327 and Section 1107 require prior court approval before a trustee or debtor in possession retains property appraiser.

4.73 Retention of Professionals – *Nunc Pro Tunc* Approval

- (667) *In re Clinton County Hospital, Inc.*, 2015 WL 5178045 (Bankr. W.D. Ky. 2015) – Retroactive retention of counsel requires proof by clear and convincing evidence that debtor expressly contracted for services, that party for whom work was performed approved the entry of order, that applicant provided notice and opportunity for filing objections, that no creditor offered reasonable objection, that professional satisfied all criteria for employment when services were commenced and remained qualified, that work was performed properly, that no actual or potential prejudice would inure to estate, that applicant's failure to seek pre-employment approval was satisfactorily explained and that applicant exhibited no pattern of inattention or negligence. Application denied where Debtor failed to satisfactorily explain failure to seek pre-employment approval and debtor failed to act in reasonable time by waiting more than 8 months after retention before seeking approval. *Nunc pro tunc* approval undermines the very purpose of 11 U.S.C. § 327 which is designed to ensure that a “screening process” is used to ensure the neutrality of the professional hired to represents an estate's interest. This screening process is most effective when performed at the outset of the bankruptcy case.
- (668) *In re Carter*, 2015 WL 4116676 (Bank. S.D. Ohio 2015) – Cause of action that accrues post-petition in Chapter 13 is property of estate. If debtor desires to retain counsel to pursue action, debtor must seek authority to retain counsel under Section 327. Court can approve counsel *nunc pro tunc* where application would have been approved originally by the Court at or before the time the services were actually commenced; the Court and other interested parties had actual knowledge of the legal services being rendered by the applicant; application seeking an order *nunc pro tunc* is filed as soon as the matter is brought to the attention of the applicant; party for whom the work was performed approves the entry of the *nunc pro tunc* order; applicant has provided notice of the application for the *nunc pro tunc* order to creditors and parties in interest and has provided an opportunity for filing objections; no creditor or party in interest offers reasonable objection to the entry of the *nunc pro tunc* order; if applicant is also seeking compensation, applicant must provide notice of the application for fees to any parties in interest; no party in interest files a sustainable objection must not be filed to the applicants [sic] request for attorney fees; no actual or potential prejudice will inure to the estate or other parties in interest; applicant's failure to seek pre-employment approval is satisfactorily explained; and applicant exhibits no pattern of inattention or negligence in seeking judicial approval of employment. Application approved where proposed counsel did not represent any interest adverse to estate and was disinterested, such that application would have been granted if timely filed; counsel acted reasonably diligently by filing application 60 days after first discovering pendency of bankruptcy proceeding; no party filed an objection either to retention or to the separately filed request for compensation; approval would not prejudice estate; and proposed counsel did not demonstrate any inattention or negligence in seeking court approval of retention in first instance.
- (669) *In re Davidson*, 2014 WL 4181216 (Bankr. W.D. Ky. 2014) – Court will approve *nunc pro tunc* application to retain professional only under extraordinary circumstances. Neither debtor nor trustee sought authorization to retain auctioneer although both had ample time to do so. Rules regarding retention are designed to allow Court opportunity to perform screening process, to verify necessity of appointment, limit estate expenses, and promote efficient administration, all of which are thwarted by *nunc pro tunc* relief.
- (670) *In re McKenzie*, 2013 WL 3335168 (Bankr. E.D. Tn. 2013) – Approval of retention *nunc pro tunc* is within discretion of bankruptcy court upon showing of exceptional circumstances. Accountant had been retained by debtor with court approval. After debtor-in-possession was removed and trustee appointed, accountant did not seek approval to act as accountant for trustee. Court found extraordinary circumstances warranted *nunc pro tunc* approval where trustee expressly contracted with accountant; trustee and creditor’s committee approved of the *nunc pro tunc* relief; all parties received notice of the application and no party objected or offered any reasonable objection to the application;

accountant satisfied all criteria for employment under Section 327; work was performed accurately and to high standards of quality; no party was prejudiced by delay in retention; the failure to seek approval was adequately explained based on earlier order allowing debtor to retain accountant; and the accountant was not inattentive or negligent in failing to obtain approval at an earlier date.

- (671) *In re Alexander*, 2012 WL 1500247 (Bankr. W.D. Ky. 2012) – Chapter 7 Trustee who failed to seek court approval to retain attorney not entitled to *nunc pro tunc* authorization where litigation for which attorney had been retained had already been concluded. Court must strictly construe *nunc pro tunc* requests. Party seeking relief must prove by clear and convincing evidence that the trustee expressly contracted with the professional to perform services; that the party for whom the work was performed consents to *nunc pro tunc* relief; that the application has provided notice of the application to creditor and parties in interest, none of whom offer any reasonable objection to the *nunc pro tunc* relief; the professional satisfies all requirements for retention under Section 327 and remained qualified at all times while performing the services; the work was properly performed, efficiently and to a high standard of quality; no actual or potential prejudice would inure to any other party or to the estate; applicant’s failure to seek pre-employment approval is satisfactorily explained; and failure did not evidence a pattern or inattention or negligence. Trustee’s simple neglect does not rise to the level of exceptional circumstances”. Failure to seek court approval to retain attorney for roughly three years after attorney was retained to prosecute avoidance action did not rise to level of “extraordinary circumstances” warranting *nunc pro tunc* approval.
- (672) *In re Machinery Maintenance Specialists, Inc.*, Case No. 09-42060 (Bankr. E.D. Mi. 2010) – Section 327 requires court approval for debtor’s retention of counsel in Chapter 11 case. In considering whether to grant *nunc pro tunc* approval for retention of professional, Court must consider whether approval would have been granted had request been filed timely, and must also consider “equitable factors” such as whether the applicant or some other person had the responsibility for applying for approval; whether the applicant was under time pressure to begin before approval was obtained; amount of delay before applicant tried to obtain *nunc pro tunc* approval; extent to which compensation to applicant would prejudice third parties; and any other relevant factors as found by the court. *Nunc pro tunc* approval denied where Counsel was solely responsible for filing 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.
- (673) *In re Greektown Holdings, LLC.*, Case No. 08-53104 (Bankr. E.D. Mi. 2010) - Section 327 and Section 1107 require prior court approval before a trustee or debtor in possession retains property appraiser. Bankruptcy Rule 2014 allows *nunc pro tunc* approval only if exceptional circumstances unique to the particular case are present. Applicant must satisfactorily explain failure to receive prior judicial approval and the services must have been beneficial to the bankruptcy estate. Mere negligence is not an exceptional circumstance justifying retroactive retention. Proposed appraiser had extensive experience in Chapter 11 proceedings and was fully aware of need for prior court approval. Although court approval likely would have been granted had application been timely filed, that is not sufficient to warrant *nunc pro tunc* relief. Further, the parties failed to act diligently in seeking approval and waited more than 10 months after appraisals were performed before seeking approval. Failure to obtain prior approval was result of negligence, inattention or inadvertence on the part of a combination of sophisticated parties, and does not rise to level of exceptional circumstance.

4.74 Retention of Professionals – Standard for Approval Generally

- (674) *Official Committee of Unsecured Creditors v. Anderson Senior Living Property, LLC*, Case No 09-8041 (6th Cir. BAP 2010) – Committee’s application to retain financial advisor denied where advisor failed to make proper disclosure as required by Section 1103 and could not tender undivided loyalty and provide untainted advice and assistance to all unsecured creditors.

4.75 Retention of Professionals –Ethical Limitations

4.76 Retention of Professionals – Disinterestedness

- (675) *In re LPN Healthcare Facility, Inc.*, 2013 WL 5312374 (Bankr. S.D. Ohio 2013) – Order approving retention of accountant for debtor would be set aside where application for retention failed to disclose that accountant was also performing services for individuals and entities related to debtor. Other entities and individuals were closely connected and operated as single enterprise providing multiple levels of care to the elderly, with complex financial transactions within the enterprise that resulted in debtor/creditor relationships. Accountant failed to timely or completely disclose relationships while serving as accountant for debtor including preparation of monthly operating reports. Some services may be compensable as administrative expenses, and accountant would be permitted to file separate application, but would be denied compensation for services as professional for estate based on non-disclosures.
- (676) *In re Stamp Farms, LLC*, Case No. 12-10410 (Bankr. W.D. Mi. 2013) – Law firm’s pre-petition relationship with debtor’s current management does not necessarily constitute interest for purposes of disqualification. Firm was not a creditor notwithstanding pre-petition representation. Pre-petition relationship with management was unusual – firm became aware for what it deemed irregularities and questionable accounting, and resigned as counsel. Management persuaded counsel to resume representation and agreed to divorce itself from operations and hire professional manager recommended by counsel. Although law firm and management company had “cozy” relationship and had dealings in matters unrelated to this estate, those issues did not give rise to any adverse interest or conflict of interest with debtor. UST asserted that debtor’s prior management may have claims against firm but mere possibility of claim against counsel is not sufficient to deny debtors’ choice of counsel. If future events demonstrate actual conflict or lack of disinterestedness, parties can raise issue at that time.
- (677) *In re Graves*, 2012 WL 4026811 (Bankr. M.D.N.C. 2012) – Attorney who received avoidable preference was not “disinterested” as bankruptcy estate held claim against attorney. Attorney not disqualified but Court ordered that attorney would not be entitled to receipt of

any fees for services in chapter 13 unless and until attorney repaid estate the amount of the preferential transfer.

- (678) *In re Sattler*, Case No. 10-76383 (Bankr. E.D. Mi. 2011) – Party seeking to retain real estate broker must demonstrate that broker is disinterested and does not have any adverse interest and did not hold a position as director, officer or employee of the debtor within 2 years preceding commencement of the case. Debtor was former employee of proposed Broker and evidence indicated that Broker held or had held an interest in certain property that was averse to a claim to title that was asserted by Debtor and was the subject of pending litigation. Prior relationships between Debtor and Broker could complicate negotiations for sale of property and create at least appearance of “ulterior motive” by both Debtor and Broker. No evidence was presented that this Broker was uniquely qualified to perform the services or that other brokers were not available. Application for employment denied.

H. Bankruptcy Petition Preparer

4.77 Disclosure

- (679) *In re Amstutz*, 427 BR 636 (Bankr. N.D. Ohio 2010) – BPP is required to file accurate disclosure of compensation for services rendered. BPP subject to disgorgement of fees where disclosure stated that BPP received \$125 for services (which was the maximum permitted in the Northern District of Ohio) but receipts produced by debtor indicated BPP had been paid \$455.00. BPP ordered to disgorge all fees received from debtor.

4.78 Allowable Services

- (680) *Taylor v. McDermott*, Case No 15-1909 (6th Cir. 2016) – BPP performed services beyond those allowable under Section 110 by preparing Motion to allow BPP to be paid more than the presumptively reasonable amount of \$100 and causing debtor to sign and file motion as if debtor prepared it. Sanctions included award of monetary compensation in form of refund to debtor of all fees paid to BPP. When BPP failed to comply, court correctly entered second order under Section 110 enjoining BPP from assisting any other potential debtors in preparing bankruptcy documents.
- (681) *In re Hutchinson*, 2013 WL 639051 (Bankr. E.D. Mi. 2013), *affd* Case No. 13-11585 (E.D. Mi. 2014) – BPP is allowed to place information on forms and to put forms in condition for filing. However, BPP is prohibited from virtually all conduct falling into the category of guidance or advice, effectively restricting “petition preparers” to scrivener and typing services. Suggesting bankruptcy as an available remedy for a debtor’s financial problems or providing information on exemptions or other legal issues will invariably violate state laws proscribing unauthorized practice of law and more specific provisions of Code.
- (682) *In re Richards*, 2012 WL 3870446 (Bankr. N.D. Ohio 2012) – BPP is allowed to type information on the official forms that has been provided by and at the direction of the debtor and providing the forms to the debtors for filing with the court. BPP is prohibited from unauthorized practice of law, BPP exceeded lawful bounds by providing debtor a list of documents to provide to BPP; explained credit counseling requirement; provided information to debtor on documents required at the meeting of creditors; analyzed, sorted and compiled information from credit reports; made decisions on what information should be included where on the schedules, statements, and means test, including what should be included on Schedule C; reminded debtor after first meeting of creditors of need to complete financial management class; and provided information and a cover sheet for debtor to file in connection with financial management.
- (683) *In re Amstutz*, 427 BR 636 (Bankr. N.D. Ohio 2010) – A bankruptcy petition preparer may not offer a potential bankruptcy debtor any legal advice, including whether commencing a case under chapter 7, 11, 12, or 13 is appropriate; concerning how to characterize the nature of the debtor’s interests in property or the debtor’s debts; or concerning bankruptcy procedures and rights. BPP committed unauthorized practice of law by counseling debtor that a Chapter 7 proceeding would be “best”; BPP categorized debts as secured or unsecured; BPP determined which property would be exempted and under what law; and BPP drafted Motion to Set Aside Judgment in connection with Order Lifting Automatic Stay. BPP required to disgorge all his fees to the UST for refund to the Debtor.
- (684) *In re Payne*, 2009 WL 2985676 (Bankr. W.D. Ky. 2009) – Petition preparer is permitted to copy the written information furnished by their clients. Preparers may not advise clients as to the various remedies and procedures available. Moreover, preparers may not make inquiries or answer questions as to the completion of certain forms nor advise how to best fill out forms or complete schedules. Preparers may not engage in personal legal assistance, including correcting errors and omissions. Petition preparation does not include running a credit report for a debtor or on a debtor. Preparers do not advise clients on the appropriate statutory citation to support exemptions. At most, petition preparers are scriveners and may type only what they are told by the debtor.

4.79 Compensation

- (685) *In re Richards*, 2012 WL 3870446 (Bankr. N.D. Ohio 2012) – Court *sua sponte* set case for order to show cause where documents indicated that petition preparer had charged \$500, which exceeded allowable maximum of \$125.
- (686) *In re Ach*, 447 BR 830 (Bankr. N.D. Ohio 2011) – Attorney who submitted to State Bar an Application for Retirement or Resignation on same date as bankruptcy petition filed would be limited in compensation to amount set for non-attorney Bankruptcy Petition Preparer.
- (687) *In re Anthony*, 447 BR 827 (Bankr. N.D. Ohio 2011) – Attorney who had previously submitted to State Bar an Application for Retirement or Resignation would be limited in compensation to amount set for non- attorney Bankruptcy Petition Preparer.
- (688) *In re Amburgey*, 446 BR 825 (Bankr. N.D. Ohio 2011) – Attorney who had previously submitted to State Bar an Application for Retirement or Resignation would be limited in compensation to amount set for non- attorney Bankruptcy Petition Preparer.
- (689) *In re Warfield*, Case No. 09-75993 (Bankr. E.D. Mi. 2010) - Petition Preparer who charged \$375 charged fee that was excessive in violation

of Section 110. Court concluded that \$80 would be reasonable, allowing \$20 per hour for typing services.

- (690) *In re Denison*, 2010 WL 3061715 (Bankr. N.D. Ohio 2010) – Court issued Order to Show to address petition preparer charging fees in excess of amount permitted by local court order.
- (691) *In re Rice*, Case No. 10-54792 (Bankr. E.D. Mi. 2010) – Court’s Administrative Order 10-21 sets maximum allowable fee for a non-attorney petition preparer at \$100.00. Any Petition Preparer who seeks compensation of more than \$100 must file a motion with an affidavit stating the facts which support fees greater than \$100. Bankruptcy Petition Preparer who failed to file the required motion ordered to refund fees that exceed the \$100 presumptive maximum allowable fee.
- (692) *In re Scott*, Case No. 10-53676 (Bankr. E.D. Mi. 2010) – Court’s Administrative Order 10-21 sets maximum allowable fee for a non-attorney petition preparer at \$100.00. Any Petition Preparer who seeks compensation of more than \$100 must file a motion with an affidavit stating the facts which support fees greater than \$100. Bankruptcy Petition Preparer who failed to file the required motion ordered to refund fees that exceed the \$100 presumptive maximum allowable fee.
- (693) *In re Payne*, 2009 WL 2985676 (Bankr. W.D. Ky. 2009) – Bankruptcy Petition Preparer entitled to compensation of no more than \$25 per hour and that a routine Petition and supporting documents should take no more than 5 hours to complete.

4.80 Disgorgement

- (694) *In re Gottfried*, 2014 WL 1577217 (Bankr. N.D. Ohio 2014) – Petition preparer ordered to disgorge fees of \$475. Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer stated that debtor paid only \$125 for services, where debtor actually paid \$600.00. BPP also fined \$2,000 and enjoined from acting as BPP where BPP had already been sanctioned in two other cases for the same inaccurate disclosures, for offering legal advice, and for falsely holding himself out as a “paralegal.”
- (695) *In re Amburgey*, 446 BR 825 (Bankr. N.D. Ohio 2011) – Attorney who had previously submitted to State Bar an Application for Retirement or Resignation would be limited in compensation to amount set for non- attorney Bankruptcy Petition Preparer.
- (696) *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.

4.81 Sanctions

- (697) *Taylor v. McDermott*, Case No 15-1909 (6th Cir. 2016) – BPP performed services beyond those allowable under Section 110 by preparing Motion to allow BPP to be paid more than the presumptively reasonable amount of \$100 and causing debtor to sign and file motion as if debtor prepared it. Sanctions included award of monetary compensation in form of refund to debtor of all fees paid to BPP. When BPP failed to comply, court correctly entered second order under Section 110 enjoining BPP from assisting any other potential debtors in preparing bankruptcy documents. Section 110 specifically authorizes UST to bring action to enjoin BPP from engaging in conduct that violates Section 110 or from acting as BPP entirely.
- (698) *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 United States.
- (699) *In re McCrary*, 2013 WL 2947902 (Bankr. E.D. Mi. 2013) – Section 110 is designed to address abuses perpetrated on debtors by non-attorney petition preparers. Preparers can have only limited role as scrivener and typist. “Referral agency” that does not act as preparer but who refers potential debtors to preparers is liable if the referring agency collects money from the debtor, engages in acts that constitute unauthorized practice of law, plays an integral role in allowing another party to violate rules regarding preparers, acted as “point of contact” or liaison between debtor and preparer, exerts control over, or acts in concert with, preparer. “Referral agency” acted as preparer where it accepted \$600 total from debtor and retained a portion of the funds as “referral fee”, remitting remaining funds to preparer, which produced total fee far in excess of \$100 allowable total; “agency” provided debtor with questionnaire incident to bankruptcy filing; gathered financial documents and acted as sole point of contact between debtor and petition preparer; and prepared petition and other documents. Sanctions included \$150 per violation for three separate identifiable violations by “agency”, trebled to a total of \$1,350, payable to UST; plus additional \$2,000 payable to debtor. Sanctions against the “preparer” to whom agency referred debtor included \$500 per violation for three violations, trebled to a total of \$4500 payable to UST; plus \$2,000 payable to debtor.
- (700) *Sullivan v. McDermott*, 2013 WL 639051 (Bankr. E.D. Mi. 2013), *affd*, Case No. 2014 WL 3589488 (E.D. Mi. 2014) – Court can award sanctions of greater of \$2,000 or twice the amount paid by debtor; plus actual damages including reasonable attorney fees and costs. Evidence did not disclose any actual damages and fees paid totaled \$500, leaving maximum monetary penalty of \$2,000. Court can also issue fines against BPP if \$500 per violation of Section 110. Court properly awarded sanctions against BPP individually even where multiple BPPs performed objectionable services. Section 110 authorizes but does not mandate imposition of sanctions on “joint and several” basis.

- (701) *Wiggins v. Housley*, 2012 WL 4364079 (Bankr. N.D. Ca. 2012) – Party who causes or has a hand in preparation of bankruptcy petition is “Bankruptcy Petition Preparer” even if that person is not the one who physically prepared the documents. Defendant was a real estate broker working on possible short sale of Plaintiff’s home. While Plaintiff was out of town, Defendant convinced Plaintiff to let Defendant file bankruptcy for Plaintiff. Defendant, working with a third party, prepared bankruptcy papers in Plaintiff’s name. Defendant then signed Plaintiff’s name to the petition and paid the filing fee out of her own pocket, and filed the case. The Petition improperly represented that Plaintiff had signed it and improperly failed to list all creditors, representing that the only creditor in the case was the mortgage company. Defendant literally controlled the process of preparing the documents, and Defendant was the only person who could have benefitted financially by delaying the foreclosure while Defendant managed a short-sale that would result in Defendant’s receipt of a commission, rendering Defendant liable as a “BPP”. Further, as Defendant’s actions were taken in course and scope of her employment as real estate sales person, the Brokerage house that employed Defendant would be jointly and severally liable for any damages caused by Defendant’s actions. Court has authority to enter judgment against BPP for any actual damages suffered by BPP’s conduct. Although Plaintiff’s credit was already distressed and was not harmed by filing, actions did cause Plaintiff to lose benefit of mortgage modification agreement that had been proposed by mortgage company that would have lowered payments and allowed Plaintiff to stay in home. Mortgage modification had real value as it would have saved Plaintiff \$75,000 in mortgage payments. Court determined that actual value of lost modification to Plaintiff was \$10,000 and awarded damages in that amount.

4.82 Unauthorized Practice of Law

- (702) *In re Hutchinson*, 2013 WL 639051 (Bankr. E.D. Mi. 2013) – Petition prepared engaged in unauthorized practice of law by performing legal services and rendering legal advice. BPP also advised debtors to falsely state that debtor did not have assistance or pay for assistance, both in petition and at 341 meeting. BPP prepared all documents including determination of exemptions, appropriate chapter under which to file, and how to schedule assets.
- (703) *In re Warfield*, Case No. 09-75993 (Bankr. E.D. Mi. 2010) - Petition Preparer engaged in unauthorized practice of law where preparer instructed Debtor to file Chapter 7 petition, preparer completed schedules based on debtor's credit report with minimal input from debtor, debtor did not understand entries on schedules such as "fee simple" used on Schedule A and did not know what an exemption was, and prepared request to defer filing fees although debtor neither requested nor wanted that relief. Preparer advised debtor as to procedure of bankruptcy including obligation to attend 341 meeting and continued to answer questions even after petition had been filed. Section 110 allows court to award sanction in the greater amount of \$2000 or double the amount paid to the preparer.
- (704) *In re Payne*, 2009 WL 2985676 (Bankr. W.D. Ky. 2009) – Non-attorney is not permitted to perform any service requiring legal knowledge or legal advice relating to the rights, duties, obligations, liabilities or business relationships of the person seeking the services. Petition preparer committed unauthorized practice of law by advising Debtor on whether the debt on her real property was secured or unsecured, incorrectly listing that she had no income and classified the Kentucky statutes on all of the Debtor’s claimed exemptions.

I. Ethical Issues

4.83 Duty to Communicate With and Advise Client

- (705) *In re Burnett*, 450 BR 116 (Bankr. E.D. Ark. 2011) – Attorney abdicated decision on whether to file bankruptcy to paralegals without meeting with or advising debtors. Debtors advise by paralegal to file bankruptcy two weeks after foreclosure sale. Attorney’s failure to meet with debtors and advise allowed paralegals to practice law without license.
- (706) *In re Monroe*, 2011 WL 6010280 (Bankr. E.D.N.C. 2011) – Attorney has duty to effectively communicate with client and to provide advice and information to protect debtor’s interests. Attorney sanctioned for failing to properly communicate with debtor concerning stay relief consent order, failed to competently negotiate consent order, and negligently failed to timely modify confirmed plan. Attorney knew that consent order would require debtor to modify plan to reduce plan payments to allow debtor to retain car, but failed to take any actions to modify the plan, resulted in debtor’s default and repossession of car. Attorney ordered to pay sanctions in amount of vehicle repossession charges and creditor attorney fees.
- (707) *In re Santiago*, 2011 WL 4056700 (D.P.R. 2011) – Attorney, as “debt relief agency” must meet face to face with client prior to filing case and at every critical stage of the proceeding. Attorney had “personally trained and daily supervised paralegal” meet with clients and prepare all documents, although attorney did review documents before case filed. However, that procedure did not meet requirements under Section 526 through 528.

4.84 Filing for Improper Purpose

- (708) *In re Bowley*, 2011 WL 4458928 (Bankr. D. Hawaii 2011) – Attorney sanctioned for filing Chapter 13 for improper purpose. Debtor filed for relief under Chapter 13 even though Debtor not eligible for relief under Chapter 13 where schedules indicated claim secured by debtor’s mortgage exceeded \$6 million.

4.85 Communication with Clients

- (709) *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.

4.86 Candor to Court

- (710) *In re Brent*, 458 BR 444 (Bankr. N.D. Ill. 2011) – Attorney sanctioned for false statements in fee applications. Fee application attached Model Retention Agreement that stated that attorney fees would total \$3500.00. Attorney failed to disclose second, separate agreement that provided for additional fees. By filing only standard MRA with court, Attorney falsely represented that the stated \$3500 fee would be the only fee for the duration of the case when undisclosed addendum would permit greater, undisclosed fee. Attorney sanctioned \$10,000 and ordered to complete ethics class at accredited law.

4.87 “Stand In” or Substitute Attorneys

- (711) *In re Lichtenberg*, 2011 WL 4006584 (Bankr. N.D. Ga. 2011) – Attorney who arranged for another lawyer to attend confirmation hearing without providing sufficient time for attorney to prepare and without advising attorney of outstanding issues in case failed to provide adequate representation to debtor. Court set show cause hearing to consider additional sanctions including reducing, disallowing or postponing payment of fees; requiring attorney to reimburse debtors for lost income and expenses incurred as a result of attorney’s failure to appear; and suspension of right to practice in bankruptcy court for up to 6 months.

4.88 Suspension and Disbarment

- (712) *Combs v. Kentucky Bar Association*, 2013 WL 5674540 (Ky. 2013) – Attorney suspended for failing to disclose assets in bankruptcy case. Although debtor did not initially disclose ownership of corporation, after petition was filed and while case was pending, attorney became aware of debtor’s interest yet failed to amend the schedules to disclose that interest and instead prepared documents that allowed debtor to sell the corporation and retain the proceeds.
- (713) *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.
- (714) *In re Gleason*, Case no. 12-11433 (11th Cir. 2012), *cert denied*, 2013 WL 1285334 (2013) – Bankruptcy Court acted within authority in suspending attorney from practice for 60 days for filing pleadings that are inappropriate or unprofessional. Court has inherent authority to oversee actions of attorneys practicing before it. Attorney is entitled to notice and due process before discipline is handed down. Before court can issue suspension, court must make finding of bad faith or that attorney acted vexatiously, wantonly or for oppressive reasons. Attorney compounded violation when, after disciplinary proceedings had been commenced, attorney had ex-parte communication with complaining Judge that included bottle of wine and a note suggesting that attorney and judge have private meeting to “resolve our issues privately”. Attorney cannot use First Amendment as shield against disciplinary proceedings arising out of tone and tenor of communications. Sanction of 60 days suspension was “minimal sanction” that would preserve integrity and authority of court.
- (715) *Parker v. Jacobs*, Case No. 12-10599 (11th Cir. 2012) – Attorney disbarred from practice before Alabama Middle District Bankruptcy Court. Bankruptcy Administrator filed Motion for Sanctions based on false statements of debtor’s residence in at least 6 separate case; 28 cases in which counsel failed to timely pay filing fees although in most of those cases the clients had paid counsel for the fees; and counsel’s numerous false and incomplete statements in counsel’s own Chapter 7 case. Counsel also consistently failed to appear or habitually came late and unprepared for scheduled hearings. Court found that counsel made practice of misappropriating funds and intentionally making false statements, with the conduct being so widespread that disbarment was only appropriate sanction.
- (716) *In re Thav*, 852 F.Supp.2d 857 (E.D. Mi. 2012) – Attorney suspended from practice in Western District is automatically suspended from practice in Eastern District for reciprocal time period. Western District suspension for repeated failure to appear for hearings notwithstanding repeated warnings from court warranted suspension that had not been modified or vacated. Western District suspension procedure did not constitute deprivation of due process and implementing same discipline in Eastern District had not resulted in grave injustice. Court would consider vacating or modifying reciprocal order only on showing of “grave injustice” which focused on original suspension order and whether severity of punishment imposed by first court fit the misconduct.
- (717) *In re Lichtenberg*, 2011 WL 4006584 (Bankr. N.D. Ga. 2011) – Attorney who arranged for another lawyer to attend confirmation hearing without providing sufficient time for attorney to prepare and without advising attorney of outstanding issues in case failed to provide adequate representation to debtor. Court set show cause hearing to consider additional sanctions including reducing, disallowing or postponing payment of fees; requiring attorney to reimburse debtors for lost income and expenses incurred as a result of attorney’s failure to appear; and suspension of right to practice in bankruptcy court for up to 6 months.

V. Commencing Case

A. Eligibility for Relief

5.1 Section 109 – Generally

- (718) *In re Kwiatkowski*, 486 BR 409 (Bankr. E.D. Mi. 2013) – Bankruptcy Court can consider whether debtor’s total non-contingent, liquidated, unsecured debt was such as to render debtor ineligible for Chapter 13 relief even in absence of objection by any party.
- (719) *White v. Lewis*, Case No. 04-60231 (E.D. Mi. 2008) – Section 109 limitations on eligibility are not jurisdictional. Failure to assert a Debtor’s lack of eligibility prior to entry of the discharge does not void the discharge. Accordingly, even if Debtor would not have been eligible under section 109 had issue been timely raised, creditor was not permitted to collaterally attack or attempt to set aside discharge based on alleged lack of eligibility.

5.2 Standing to Contest Eligibility

- (720) *In re Grason*, 2013 WL 412916 (Bankr. C.D. Il. 2013) – Party who is not creditor or party in interest in case lacks standing to object to eligibility. Purchaser who purchased property at foreclosure sale minutes after the bankruptcy petition was filed did not acquire any interest in property as sale was void, and did not acquire any claim against debtor or estate.

5.3 Time to Contest Eligibility

- (721) *In re Benton*, Case No. 09-36642 (Bankr. E.D. Mi. 2016) – Debtors barred by laches from attempting to repudiate electronic signatures on petition and schedules and have case dismissed. Laches requires negligent and unintentional failure to protect one’s rights. Debtors were in bankruptcy case pending for 6 years and debtors were actively involved at all stages of process. Debtors did not attempt to disavow signatures until convicted for bankruptcy fraud.
- (722) *General Lending Corp. v. Cancio*, 505 BR 63 (S.D. Fl. 2014) – Creditor barred by laches from contesting eligibility where creditor waited two years while engaging in discovery and participating in numerous hearings.

5.4 Debt Limits

- (723) *Free v. Malaier*, 2015 WL 9252592 (9th Cir. BAP 2015) – Where debtor previously received discharge in Chapter 7, unsecured portion of secured claim in chapter 13 is not included in calculation of unsecured debts for purposes of Section 109.
- (724) *In re Kwiatkowski*, 486 BR 409 (Bankr. E.D. Mi. 2013) – Eligibility is generally determined by face of debtor’s schedules, as long as schedules are completed in good faith. Debtor’s schedules lacked good faith when debtor scheduled unsecured deficiency claims on foreclosed mortgages with amounts as “unknown”. Property had been foreclosed in 2009 and by date of bankruptcy filing, debtor knew that deficiency claim was, at a minimum, \$250,000.00. Debtor knew the balance of the mortgage as of the foreclosure date was at least \$575,000 and that property sold for less than \$302,000, as evidenced by debtor’s own tax returns and the sheriff’s deed. Debtor’s assertion that the deficiency balance was “unknown” lacked good faith where debtor knew that the actual balance was at least \$250,000.00. As result, debtor had total unsecured debt in excess of statutory limit for relief under Chapter 13. Under Michigan law, foreclosure satisfies the debt only to extent of foreclosure sale price. If the foreclosure bid is not sufficient to pay the debt in full, the remaining balance is an unsecured deficiency claim for purposes of Chapter 13 eligibility.
- (725) *In re Shenan*, 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.
- (726) *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 debt s are within limits. Cased dismissed where each debtor, standing alone, had debtors that exceeded Section 109 limits.
- (727) *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.
- (728) *Liggett v. Schwartz*, 2012 WL 1020011 (E.D. Mi. 2012) – Wholly unsecured debt is included in calculation of unsecured debts for purposes of eligibility, notwithstanding debtor’s classification of the obligation as a secured claim. Unsecured portion of under secured debt is counted as unsecured for eligibility purposes. Debtors schedules valued property at \$225,000, subject to first mortgage in excess of \$250,000 and a second mortgage of \$137,000. Adding entire unsecured balance of second mortgage to debtor’s scheduled unsecured debt would debtor far beyond section 109 debt limit. Absent a good faith dispute as to the value of the property or the secured status of the debt, debtor would be deemed ineligible for chapter 13 relief.
- (729) *In re Winters*, 2012 WL 1067696 (Bankr. E.D. Tn. 2012), *affirmed in further proceeding, Winters v. IRS*, 485 BR 375 (Bankr. M.D. Tn. 2013) – Debtor’s liability on personal guarantee may be “contingent debt” to the extent that the underlying obligation is not yet in default. However, once a default in the underlying obligation arises, liability on personal guarantee is no longer contingent as debtors liability is no longer conditioned upon the occurrence or happening of any extrinsic event. Value of collateral securing loan was substantially less than the amount owed on the obligation, leaving a noncontingent unsecured balance owing substantially in excess of the debt limits under section 109, requiring dismissal of Chapter 13 case.
- (730) *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.

5.5 Debt Limits – Unliquidated or Contingent Debts

- (731) *In re Yuen*, 2013 WL 5567266 (Bankr. S.D. Tx. 2013) – Appeal of final judgment does not render debt unliquidated or contingent.

5.6 Prior Voluntary Dismissal

- (732) *In re Harris*, Case No. 16-47256 (Bankr. E.D. Mi. 2016) – Section 109(g)(2) does not bar refiling within 180 days of voluntary dismissal even where there was request for stay relief in prior case if new case is not intended to interfere with stay relief entered in prior case. Creditor received stay relief in first case in September, 2014, in connection with a lease that expired during the term of the case. The debtor returned the car when the stay lifted. Debtor voluntarily dismissed the first case in April, 2016; and filed the new case. While Section 109(g)(2) appears absolute, if there is no connection between the stay lift, the voluntary dismissal, and the new filing, then the debtor remains eligible. Section 109(g)(2) only bars a debtor where it appears there is some connection between the stay lift and the refiling, such as an attempt in the new case to obtain a new stay and circumvent the prior stay lift order.
- (733) *In re Mace*, Case No. 15-53898 (Bankr. E.D. Mi. 2015) – Section 109(g) bars refiling for 180 days where case is voluntarily dismissed after creditor has requested relief from stay. During prior case, creditor requested relief from stay and court entered stipulated order resolving motion and later entered subsequent order granting stay relief. Dismissal is mandatory as Section 109(g) unambiguously states that debtor may not be a debtor in bankruptcy. It is irrelevant whether there is some causal link between filing of stay relief motion on one hand and later voluntary dismissal of prior case. Court later dismissed case in response to debtor's motion for voluntary dismissal. Case dismissed with new bar to refiling for 180 days from date of prior voluntary dismissal.
- (734) *In re Buchowski*, Case No. 15-53517 (Bankr. E.D. Mi. 2015) – Section 109(g) bars refiling for 180 days where case is voluntarily dismissed after creditor has requested relief from stay. During prior case, creditor requested relief from stay and court entered stipulated order resolving motion and later entered subsequent order granting stay relief. Dismissal is mandatory as Section 109(g) unambiguously states that debtor may not be a debtor in bankruptcy. It is irrelevant whether there is some causal link between filing of stay relief motion on one hand and later voluntary dismissal of prior case. Court later dismissed case in response to debtor's motion for voluntary dismissal. Case dismissed with new bar to refiling for 180 days from date of prior voluntary dismissal.
- (735) *In re Herremans*, 2015 WL 3955284 (Bankr. W.D. Mi. 2015) – Section 109(g) bars refiling for 180 days where case is voluntarily dismissed after creditor has requested relief from stay. Agreed orders provided that if debtor failed to make payments, creditors could provide notice of the default to debtors who would then have 30 days to cure the default, and if the default was not cured, creditors would be entitled to relief from stay upon filing affidavit of default. "Request" for relief from stay means that creditor has applied to court for order lifting stay. Creditor's notices of defaults to debtor did not constitute "request" for relief from stay. Request would have occurred if creditors filed affidavits of default as that would be point where creditors sought action by court. Debtors voluntarily dismissed case after creditors served notice of default but before creditors submitted affidavits. As such, debtors voluntarily dismissed before creditor requested relief and dismissal was without prejudice to debtor's refiling case.
- (736) *In re Gorges*, Case No. 14-53911 (Bankr. E.D. Mi. 2015) – Debtor has absolute right to voluntarily dismiss. However, dismissal after creditor sought stay relief, and court had granted that request, operated as 180 day bar to re-filing from date of dismissal.
- (737) *In re Teets*, 2015 WL 1263226 (Bankr. W.D. Ohio 2015) – Debtor not eligible to re-file where debtor voluntarily dismissed prior case after filing of motion for relief from stay. Debtor voluntarily dismissed prior case after bank filed motion for stay relief to pursue foreclosure. Order in prior case retained stay but conditioned continuation of stay on debtor keeping home insured, making all plan payments, and paying all real estate taxes. Debtor later voluntarily dismissed and refiled 118 days later. Section 109 does not require a causal link between dismissal of prior case and commencement of new case, and new case may be entirely unrelated to stay relief granted in prior case but will still fall within prohibition of Section 109. Fact that court acted on motion for relief in prior case does not remove it from scope of Section 109, as determination of creditor's motion does not eradicate its act of filing. While dismissal order itself did not contain any prohibition against refiling under Section 349, prohibition unnecessary as Section 109 contains its own prohibition.
- (738) *In re Stanek*, Case No. 15-41533 (Bankr. E.D. Mi. 2015) – Debtor not eligible for relief where debtor voluntarily dismissed prior case after creditor requested and received relief from stay, and new case filed less than 180 days after dismissal of prior case.
- (739) *In re Murphy*, Case No. 15-40168 (Bankr. E.D. Mi. 2015) – Debtor not eligible for relief where debtor, after entry of order lifting stay in prior case, voluntarily dismissed that case and filed new case within 180 days.
- (740) *Rivera v. Matos*, Case No. 12-087 (9th Cir. BAP 2013) – Court dismissed second filing where debtor voluntarily dismissed first case after mortgage company filed for relief from stay. Regardless of whether court adopted "mandatory", "discretionary" or "causal connection" approach, debtor's conduct precluded designed to thwart foreclosure would bar second filing which was also for purpose of thwarting foreclosure.
- (741) *In re Henderson*, 2012 WL 4498887 (Bankr. S.D. Ohio 2012) – Debtor ineligible where debtor voluntarily dismissed prior case after creditor had filed request for relief from stay.
- (742) *In re Durham*, 461 BR 139 (Bankr. D. Mass. 2011) – "Causal connection" analysis required to determine if debtor is precluded from filing

where prior case had been voluntarily dismissed after request for stay relief. Debtors were ineligible where first case was voluntarily dismissed six days after stay relief granted to mortgage and car creditors, and second filing was attempt to thwart creditors' efforts to liquidate collateral.

- (743) *In re Riekema*, 456 BR 365 (Bankr. C.D. Ill, 2011) – Section 109(g)(2) does not have any limitation on bar to refiling. Voluntary dismissal of case following request for relief from stay mandates bar to refiling, without regard to whether second filing would be prejudicial to the creditor receiving relief in prior case.
- (744) *In re Sargent*, Case No. 11-45499 (Bankr. E.D. Mi. 2011) – Debtors not eligible under Section 109(g)(2) where car finance creditor filed Motion for Relief and obtained an Order Granting Relief before debtors voluntarily dismissed. Voluntary dismissal after a Motion for Relief has been filed operates as dismissal with automatic bar for 180 days.
- (745) *In re Donovan*, Case No. 11-41734 (Bankr. E.D. Mi. 2011) – Debtors not eligible under Section 109(g)(2) where car finance creditor filed Motion for Relief and obtained an Order Granting Relief before debtors voluntarily dismissed. Voluntary dismissal after a Motion for Relief has been filed operates as dismissal with automatic bar for 180 days regardless of lack of nexus between prior stay relief order and prior voluntary dismissal.
- (746) *In re Moses*, Case No. 11-40639 (Bankr. E.D. Mi. 2011) – Debtor is eligible for relief following voluntary dismissal of prior case where debtor and creditor in prior case filed stipulation for relief from automatic stay. Section 109(g)(2) applies only when the creditor in the prior case files a motion for relief and case is then voluntarily dismissed. Stipulation for relief is not “motion” and does not trigger Section 109(g)(2) bar against refiling.

5.7 Simultaneous Estates

- (747) *In re Arciencega*, Case No. 12-50710 (Bankr. E.D. Mi. 2012) – Debtor filed second chapter 13 case after court converted prior case from Chapter 7 to Chapter 13 and prior case remained pending. Second case dismissed. Debtors may not have two simultaneously pending Chapter 13 cases.
- (748) *In re Brunson*, Case No. 11-66141 (Bankr. E.D. Mi. 2011) – Debtor may not have two separate Chapter 13 cases pending at same time. Second filed case dismissed.
- (749) *In re Galloway*, Case No. 11-66088 (Bankr. E.D. Mi. 2011) – Debtor may not have two separate Chapter 13 cases pending at same time. Second filed case dismissed.
- (750) *In re Smith*, Case No. 11-45460 (Bankr. E.D. Mi. 2011) – Debtor is not precluded from filing Chapter 13 case while prior Chapter 7 is still pending, where debtor has received discharge in Chapter 7 and that case remains pending solely to allow the Chapter 7 trustee to administer assets, debtor does not attempt in the Chapter 13 to deal with assets that are being administered by the Chapter 7 Trustee, and Debtor needs relief under Chapter 13 in attempt to save home from foreclosure.
- (751) *In re Neely*, Case No. 10-75800 (Bankr. E.D. Mi. 2010) – Debtor may not have two Chapter 7 cases pending at same time. Debtor's not eligible to file second Chapter 7 case while Debtor's prior case was still pending, requiring dismissal of second filed case.
- (752) *In re Donovan*, Case No. 10-75145 (Bankr. E.D. Mi. 2010) – Debtor may not have two Chapter 13 cases pending at same time. Debtor's not eligible to file second Chapter 13 case while Debtor's prior case was still pending, requiring dismissal of second filed case.
- (753) *In re Corder*, Case No. 10-74323 (Bankr. E.D. Mi. 2010) – Debtor may not have two Chapter 13 cases pending at same time. Debtor's not eligible to file second Chapter 13 case while Debtor's prior case was still pending, requiring dismissal of second filed case.
- (754) *In re Huff*, Case No. 10-52285 (Bankr. E.D. Mi. 2010) - Debtor may not have two Chapter 13 cases pending at same time. Debtor's not eligible to file second Chapter 13 case while Debtor's prior case was still pending, requiring dismissal of second filed case.
- (755) *In re Basmajian*, Case No. 10-58953 (Bankr. E.D. Mi. 2010) - Debtor may not have two Chapter 13 cases pending at same time. Debtor's not eligible to file second Chapter 13 case while Debtor's prior case was still pending, requiring dismissal of second filed case.
- (756) *In re Coleman*, Case No. 10-50324 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Dismiss first of two simultaneously filed cases denied. Second filed case must be dismissed and first filed case must remain open case. Court denied Motion to Dismiss first case but *sua sponte* dismissed second filed case.
- (757) *In re Coleman*, Case No. 10-50341 (Bankr. E.D. Mi. 2010) – Debtor is not permitted to have two open Chapter 7 cases pending simultaneously. Court dismissed second filed case *sua sponte*.
- (758) *In re Rogers*, Case No. 09-42767 (Bankr. E.D. Mi. 2009) - Debtor's Chapter 7 petition dismissed. Debtor filed petition under Chapter 7 while Debtor had active Chapter 13 proceeding with confirmed plan. Debtor may not have two bankruptcy cases pending at same time.
- (759) *In re Smith*, Case No. 08-70461 (Bankr. E.D. Mi. 2009) – Case dismissed where Debtors had previously filed a petition under Chapter 7 and that prior case was still pending. Further, discharge in second case would be vacated as Debtors received discharge in the prior, simultaneously pending case.

5.8 Petition – Execution by Holder of Power of Attorney

- (760) *In re Hemminger*, 2015 WL 1593655 (Bankr. N. D. Ohio 2015) – Bankruptcy petition can be signed on behalf of debtor by person holding power of attorney as long as power of attorney is either broad enough or specific enough to encompass bankruptcy filing. General form

power of attorney that gives holder “complete power of attorney in all matters” did not contain any reasonably specific language to authorize bankruptcy filing. General grant of authority to manage affairs does not convey authority to commence bankruptcy filing.

5.9 Petition - Name of Debtor

- (761) *In re Balhoff*, Case No. 15-46781 (Bankr. E.D. Mi. 2015) – Petition dismissed where counsel uploaded petition bearing one name, but uploaded all other documents containing a different debtor name, and different debtor had filed her own case.
- (762) *In re Abazeed*, Case No. 08-69306 (Bankr. E.D. Mi. 2015) – Chapter 13 Petition that included as “other names” at least 2 LLCs and one corporation attempted to join improper parties in Chapter 13. LLC is separate entity for debtor, even if LLC has been dissolved, and there is no basis to join LLC as “formerly doing business as”.
- (763) *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.
- (764) *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.
- (765) *In re Jawad*, Case No. 11-49496 (Bankr. E.D. Mi. 2011) – Individual’s petition that listed as “Other Name” the name of a Limited Liability Company improperly attempted to join a corporate entity as debtor. Joint filings are limited under Section 302 to spouses.
- (766) *In re Xclusive*, Case No. 10-78256 (Bankr. E.D. Mi. 2011) – Petition must be filed using Debtor’s legal name. Other names are to be included in “All Other Names” box on petition. Case dismissed where Debtor filed under assumed or fictitious name “XCLUSUVE”.

5.10 Petition – Lack of Original Signature

- (767) *In re Benton*, Case No. 09-36642 (Bankr. E.D. Mi. 2016) – Debtor’s failure to affix original signature to petition before petition is electronically filed with court does not automatically invalidate filing or require dismissal of case. Code only requires that petition be filed to commence case and does not specify any requirement that debtor affix original signature. Lack of original signature deprives petition of evidentiary presumption in favor of appropriateness. Although nobody could produce originally signed petition, evidence was sufficient to demonstrate that petition was properly filed even if debtors did not sign original. Petition was filed in 2009 yet debtors never raised issue until 2015, after debtors were convicted of bankruptcy fraud. At original Section 341 meeting, record indicated that debtors each reviewed the petition and confirmed that the petition contained their original signatures. Debtors were in Chapter 13 for extended time and made significant plan payments. Debtors completed post-petition financial management classes. After case was converted to Chapter 7, debtors continued to participate in case and paid Chapter 7 Trustee to settle certain issues and allowed Trustee to sell assets. Evidence was sufficient to find that debtors did authorize filing and knowingly participated without disavowing petition even though no party could produce original signed petition.

5.11 Corporate Authorization

- (768) *In re Intervention Energy Holdings, LLC*, Case No 16-11246 (Bankr. D. Del. 2016) – Secured creditor who also holds one limited partnership interest cannot use that limited partnership interest to prevent bankruptcy filing. After defaulting on loan, LLC gave lender one share as part of forbearance agreement, and amendment to operating agreement that required unanimous consent of all limited partners before filing for bankruptcy. LLC later filed petition without consent of lender and lender sought to dismiss case. Court held that Bankruptcy Code prevented debtor from contracting away right to file bankruptcy. Even if agreement was valid under state law, that did not make agreement enforceable as a matter of federal bankruptcy relief as state law cannot deny party’s right to seek bankruptcy protection.
- (769) *Byrd v. Arvest Bank*, Case No. 10-8071 (6th Cir. BAP 2011) – Entity such as corporation or partnership can file bankruptcy only if properly authorized according to State law. Chapter 11 Petition filed by “Chief Manager” of limited partnership without proper authorization according to limited partnership documents dismissed and sanctions imposed against “Chief Manager” under Rule 9011.

5.12 Decedent’s Estate

- (770) *Estate of Gray v. McDermott*, 2011 WL 3946729 (E.D. Mi. 2011) – Decedent’s probate estate is not a “person” and is not eligible for relief under Chapter 11.

5.13 Trusts

- (771) *In re Lady Bug Corp.*, 2013 WL 5707775 (Bankr. E.D. Tn. 2013) – Trust whose only assets are those titled in trust name for benefit of third parties is not eligible for relief, as trust has no assets subject to administration. Property of estate does not include property held by trustee where trustee holds bare legal title for benefit of third parties. Section 1112(b) allows the court to dismiss a case for cause including lack of good faith. The lack of any property to be administered constitutes cause for dismissal.
- (772) *In re Thomas Kuttkuhn Family Trust*, Case No. 11-69390 (Bankr. E.D. Mi. 2011) – Trust is not eligible for relief unless the Trust constitutes a “business trust” within meaning of Section 101(9)(A)(v).

5.14 Chapter 12 – “Family Farmer”

- (773) *In re Williams*, 2016 WL 1644189 (Bankr. W.D. Ky. 2016) – “Family farmer” for purposes of Chapter 12 means an individual and spouse

engaged in a farming operation whose aggregate debts do not exceed \$4,031,575 and not less than 50 percent of whose aggregate noncontingent, liquidated debts on the date the case is filed, arise out of a farming operation owned or operated by the debtor and spouse, and the debtor (and spouse, if married) receive more than 50% of the individual and spouse's gross income from farming for either (i) the taxable year preceding; or (ii) each of the 2d and 3d taxable years preceding the filing of the petition. "Family Farmer with regular income" means family farmer whose annual income is sufficiently stable and regular to enable the farmer to make payments under a plan under chapter 12. A "farming operation" includes farming, tillage the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state. Although debtors were not engaged in farming operations when case was filed and debtors stated that they had no intention of ever being in the farming business again, debtors were "family farmers" in Chapter 12 filed in 2015 where their 2012 and 2013 tax returns showed that debtors rented land and contacted with their son to do physical planting and harvesting; debtors owned the equipment used in the operations; debtors purchased seed, fertilizer and materials used; debtors procured insurance in their own names; debtors made all decisions on crops to be planted; debtors incurred all profits and losses personally; and debtors bore all risks related to operations. Debtors are not required to own the land on which the farm operations are located and debtors are not required to do all of the physical labor involved in the operation. Debtors need not be actively engaging in the farm operation on the date of the Petition to be eligible under Chapter 12.

B. Joint Cases

5.15 Same Sex Couple

- (774) *U.S. v. Windsor*, _____ US _____, 133 S.Ct. 2675, 2013 WL 3196928 (2013) – Federal Defense of Marriage Act is unconstitutional. Federal Government cannot deny benefits to same sex couples where couple is lawfully married as a matter of state law where the ceremony was performed.
- (775) *In re Somers*, 2011 WL 1709839 (Bankr. S.D.N.Y. 2011) – Chapter 7 petition filed by legally married same-sex couple. Motion to Dismiss did not establish "cause" for dismissal based on DOMA under Section 707.
- (776) *In re Ziviello-Howell*, Case No. 11-22706 (Bankr. E.D. Ca. 2011) – DOMA did not constitute cause for dismissal of joint petition filed by legally married same-sex couple.
- (777) *In re Kandu*, 315 BR 123 (Bankr. W.D. Wa. 2004) – Same sex couple not permitted to file joint petition, although parties were legally married in Canada pursuant to Canadian law.
- (778) *In re Balas*, 449 BR 567 (Bankr. C.D. Ca. 2011) – Section 302 authorizes joint filing by same-sex couple that is legally married as a matter of State law. Federal Defense of Marriage Act which would limit "married" to "man and woman" violates Federal guarantee of equal protection and cannot be used to defeat "married" status for purposes of Section 302.

5.16 Common Law Spouses

- (779) *In re Elliott*, 2009 WL 2611220 (Bankr. N.D. Ohio 2009) – Pursuant to Section 302(a), only an individual and the spouse may file a Joint Petition. Where Debtors had established common law marriage at a time when Ohio law validated them, Debtors are spouses for purposes of Section 302. Common law marriage requires (1) a meeting of the minds between two competent individuals to become husband and wife; (2) cohabitation as husband and wife; (3) a holding out to those with whom the couple normally come in contact that they are husband and wife; and (4) a reputation in the community as husband and wife. Debtors who had continuously lived together since 1985, had two children, purchased and wore wedding rings, held themselves out to friends and family as "married" and signed other legal documents including wills that described themselves as married established a common law marriage as of 1986, prior to Ohio's bar against common law marriages. That Debtors filed separate tax returns as "single" based on "advice of their accountant" and "Debtor-wife's" decision not to change her last name did not alter conclusion that Debtors considered themselves married and held themselves out as such.

5.17 Effect

- (780) *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

5.18 Improper Joinder

- (781) *In re Jawad*, Case No. 11-49496 (Bankr. E.D. Mi. 2011) – Individual's petition that listed as "Other Name" the name of a Limited Liability Company improperly attempted to join a corporate entity as debtor. Joint filings are limited under Section 302 to spouses.
- (782) *In re Percha*, Case No. 11-68173 (Bankr. E.D. Mi. 2011) – Petition filed by individual debtors that also listed Limited Liability Company as "another name" constituted improper attempt to file joint case for debtors and a separate legal entity. Case dismissed where debtors failed to amend petition to delete improperly joined debtor-entity.

C. Credit Counseling

5.19 Deadline to Obtain

- (783) *In re Williams*, Case No. 15-52770 (Bankr. E.D. Mi. 2015) – Debtor not eligible for relief where debtor received credit counseling four days

after filing of petition.

- (784) *In re Dinino*, Case No. 15-51614 (Bankr. E.D. Mi. 2015) – Debtor not eligible for relief where debtor received pre-petition credit counseling 190 days prior to commencement of case.
- (785) *In re Moultry*, Case no. 15-42099 (Bankr. E.D. Mi. 2015) – Debtor not eligible for relief where debtor received pre-petition credit counseling 301 days prior to commencement of case.
- (786) *In re VanBelle*, Case No. 15-41121 (Bankr. E.D. Mi. 2015) – Debtor not eligible for relief where debtor received credit counseling ten days after filing of petition.
- (787) *In re Liddell*, Case No. 15-41121 (Bankr. E.D. Mi. 2015) – Debtor not eligible for relief where debtor received credit counseling six days after filing of petition.
- (788) *In re Arkuszewski*, 507 BR 244 (Bankr. N.D. Ill. 2014) – Debtor not eligible for relief where debtor received credit counseling after filing of petition, although on the same date.
- (789) *In re Walker*, 2013 WL 6440225 (Bankr. N.D. Ill. 2013) – Under amendments to Section 109(h), credit counseling is timely if obtained on date petition is filed, even if obtained after petition is filed. Section 109 requires only that the counseling be completed “on the date of filing of the petition” and does not limit time to moment when petition is filed.
- (790) *In re John*, 2012 WL 1998405 (Bankr. M.D. Pa. 2012) – To determine relevant 180 day period, court starts with date of petition and counts backward 180 days, rather than starting with date of credit counseling and counting forward. Counting forward from date of counseling produced 180 day period that ended on a weekend, such that deadline would be extended to the first business day following. However, counting backward indicated that counseling was received 182 days prepetition. Counseling was not timely under Section 109(h).
- (791) *In re Lane*, 2012 WL 1865448 (Bankr. N.D. Ok. 2012) – Technical Corrections Act which removed “preceding” and added the phrase “ending on” so that statute now reads “during the 180-day period ending on the date of the filing of the petition” clarified that the credit counseling can be completed at any time up to the moment of the filing of the petition. Court noted ambiguity as to whether counseling could be completed after the filing but on the same date but rejected this interpretation in favor of “bright line” that counseling must be completed at any moment up to the filing of the petition.
- (792) *In re Koo*, 2012 WL 692578 (Bankr. D.D.C. 2012) – Technical Corrections Act was not intended to change substance of Section 109(h) but was only intended to clarify that the required prepetition credit counseling can be received up to the moment of filing the bankruptcy petition and need not be received prior to the calendar date on which the petition is filed.

5.20 Failure to Obtain

- (793) *Franco v. U.S. Trustee*, Case No. 15-1281 (9th Cir. BAP 2016) – Case dismissed with one year bar to re-filing where debtor obtained credit counseling 4 years prior to filing of current case. Failure to obtain credit counseling within 180 days pre-petition constituted cause for dismissal under Section 707(a). Debtor could not “cure” defect by taking credit counseling course post-petition.
- (794) *In re Elliott*, Case No. 15-45740 (Bankr. E.D. Mi. 2015) – Case dismissed where debtor obtained counseling three days after petition filed.
- (795) *In re Cicchelli*, Case no. 15-51553 (Bankr. E.D. Mi. 2015) – Case dismissed where credit counseling completed one day after petition filed.
- (796) *In re Dinino*, Case No. 15-51614 (Bankr. E.D. Mi. 2015) – Case dismissed where debtor received credit counseling 190 days prior to commencement of case.
- (797) *In re Brooks*, Case No. 15-49606 (Bankr. E.D. Mi. 2015) – Court dismissed case *sua sponte* where debtor obtained credit counseling 253 days before commencement of case. Debtor not eligible for relief under Title 11 pursuant to Section 109(g)(1).
- (798) *In re MacKinder*, Case No. 15-48782 (Bankr. E.D. Mi. 2015) – Court dismissed case *sua sponte* where debtor did not obtain credit counseling until 9 days after commencement of case. Debtor not eligible for relief under Title 11 pursuant to Section 109(g)(1).
- (799) *In re Thomas*, Case No. 15-49361 (Bankr. E.D. Mi. 2015) – Court dismissed case *sua sponte* where debtor did not obtain credit counseling until 7 days after commencement of case. Debtor not eligible for relief under Title 11 pursuant to Section 109(g)(1).
- (800) *In re Hemminger*, 2015 WL 1593655 (Bankr. N. D. Ohio 2015) – Debtor-husband ineligible for relief where husband failed to take pre-petition credit counseling. Debtor-wife could not take course on behalf of incarcerated husband under Power of Attorney. Husband’s incarceration did not amount to incapacity for purposes of excusing credit counseling requirement.
- (801) *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.
- (802) *In re Jordan*, Case no. 15-41526 (Bankr. E.D. Mi. 2015) – Debtor must either complete credit counseling prior to commencement of case or must file certificate of exigent circumstances *and* motion to approve certification. Case dismissed where debtors did not complete counseling prior to commencement of case and did not file either certificate of exigent circumstances or a motion to approve that certification. Certificate indicated that debtor obtained counseling 268 days pre-petition mandating dismissal of case.

- (803) *In re Spitzer*, Case No. 14-58874 (Bankr. E.D. Mi. 2015) – Debtor must either complete credit counseling prior to commencement of case or must file certificate of exigent circumstances *and* motion to approve certification. Case dismissed where debtors did not complete counseling prior to commencement of case and did not file either certificate of exigent circumstances or a motion to approve that certification.
- (804) *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.
- (805) *In re Shamily*, Case No. 12-57958 (Bankr. E.D. Mi. 2012) – Case dismissed by court sua sponte where debtor obtained counseling 6 days post-petition.
- (806) *In re Kang*, 467 BR 327 (Bankr. D.N.J. 2012) – Debtor’s non-compliance with credit counseling requirement is not absolute mandate for dismissal nor bar to court’s inquiry into debtor’s motive for seeking dismissal, impact of dismissal on creditors, or estoppel based on debtor’s prior conduct. Debtor’s purported failure to obtain credit counseling did not establish cause for dismissal of her Chapter 7 case. Debtor engaged bankruptcy process by taking advantage of automatic stay, stopping execution and foreclosure on her real and personal property, and implicating trustee’s administration of case. Motive in seeking dismissal stemmed from realization that asset-diversion tactic had failed, was other than pure. Debtor’s filings reflecting preposterous financial picture had developed attributes of involuntary case in which credit counseling would not be required, such that public purpose would be served by investigating debtor’s finances in bankruptcy forum. Judicial estoppel barred debtor from denying compliance with credit counseling requirement where debtor entered bankruptcy through her authorized representative’s filing, which acknowledged that credit counseling had occurred, and debtor appeared either to have actually received credit counseling or could not deny that counseling occurred.
- (807) *In re Fiorillo*, 455 BR 297 (D. Mass. 2011) – Judicial estoppel applied to bar debtor from asserting that he was ineligible to be debtor under Bankruptcy Code, due to his failure to satisfy prepetition credit-counseling requirement, in support of his motion to dismiss his Chapter 7 case, where debtor filed for Bankruptcy to take advantage of automatic stay to avoid foreclosure, but participated in Bankruptcy process only to the extent that he thought it convenient for him, debtor represented his reasons for noncompliance with counseling requirement as exigent in at least two court filings before arguing that asserted circumstances were not exigent, and failed to file certificate of counseling compliance for more than three months, and debtor’s initial representations of compliance and purported desire to cure noncompliance caused court, creditors, and trustee to proceed with case.
- (808) *In re Samuel*, Case no. 12-60566 (Bankr. E.D. Mi. 2012) – Case dismissed where debtor received credit briefing 7 days after commencement of case.
- (809) *In re Weeks*, Case No. 12-60428 (Bankr. E.D. Mi. 2012) – Case dismissed where debtor received credit briefing 223 days prior to commencement of case.
- (810) *In re Weikert*, Case No. 12-45454 (Bankr. E.D. Mi. 2012) – Case dismissed where credit counseling obtained 7 days post-petition.
- (811) *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.
- (812) *In re Hartley*, Case No. 11-46047 (Bankr. E.D. Mi. 2012) – Motion to Excuse Debtor’s Attendance at Consumer Credit Counseling Session denied where Motion did not state any reason why debtor could not complete course prior to or on the date of filing the petition. Case dismissed.
- (813) *In re Stamos*, Case No. 12-47872 (Bankr. E.D. Mi. 2012) – Case dismissed where debtor obtained pre-petition counseling 5 days after case filed.
- (814) *In re Houle*, Case no. 11-69787 (Bankr. E.D. Mi. 2011) – Case dismissed where debtor obtained credit counseling three days after case filed. Section 109(h) requires counseling to occur prior to or on date petition filed.
- (815) *In re Ingram*, 460 B.R. 904 (6th Cir. BAP 2011) – Case dismissed where debtor obtained credit counseling one day after filing petition. Debtor commenced counseling prior to filing petition but did not complete that counseling until the next day. Debtor’s alleged confusion, believing that on-line portion concluded prior to commencement of case constituted completion of session was insufficient to excuse debtor’s admitted failure to complete all aspects of counseling pre-petition. Debtor was not eligible and case dismissed.
- (816) *In re Key*, Case No. 10-76608 (Bankr. E.D. Mi. 2011) – Debtor must obtain credit counseling during the 180 day period preceding commencement of case. Debtor not eligible for relief where Certificate of Credit Counseling indicated that counseling occurred 195 days prior to the commencement of the case.
- (817) *In re Paul*, Case No. 10-76000 (Bankr. E.D. Mi. 2010) – Debtor who obtained credit counseling after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court sua sponte.
- (818) *In re Farah*, Case No. 10-70577 (Bankr. E.D. Mi. 2010) - Debtor who obtained credit counseling after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court sua sponte.

- (819) *In re Lowry*, Case No. 10-71363 (Bankr. E.D. Mi. 2010) - Debtor who obtained credit counseling more than 180 days prior to commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.
- (820) *In re Morris*, 2010 WL 3943927 (Bankr. M.D. Tn. 2010) – Individual debtor under Chapter 11 who failed to obtain pre-petition credit counseling and failed to file proof of counseling as required by Section 109 was not eligible for relief. Dismissal for cause warranted.
- (821) *In re Evans*, Case No. 10-67920 (Bankr. E.D. Mi. 2010) - Debtor who obtained credit counseling 6 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.
- (822) *In re Harris*, Case No. 10-43325 (Bankr. E.D. Mi. 2010) – Debtor who obtained credit counseling 6 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.
- (823) *In re Norman*, Case No. 10-44879 (Bankr. E.D. Mi. 2010) – Debtor who obtained credit counseling 3 hours after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.
- (824) *In re Booker*, Case No. 10-58422 (Bankr. E.D. Mi. 2010) - Debtor who obtained credit counseling 4 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.
- (825) *In re Williams*, Case No. 10-49130 (Bankr. E.D. Mi. 2010) – Debtor who obtained credit counseling 3 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.
- (826) *In re Solomon*, Case No. 10-48338 (Bankr. E.D. Mi. 2010) – Debtor who obtained credit counseling 10 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.
- (827) *In re Poydras*, Case No. 10-44798 (Bankr. E.D. Mi. 2010) – Debtor who obtained credit counseling 12 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.
- (828) *In re Szymanski*, Case No. 10-53533 (Bankr. E.D. Mi. 2010) – 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).
- (829) *In re Harris*, Case No. 10-61156 (Bankr. E.D. Mi. 2010) – Debtor who obtained credit counseling 13 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.
- (830) *In re Gray*, Case No. 10-63758 (Bankr. E.D. Mi. 2010) – Debtor who obtained credit counseling 90 minutes after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.
- (831) *In re Alexander*, Case No. 10-55077 (Bankr. E.D. Mi. 2010) - Debtor who obtained credit counseling 12 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.
- (832) *In re Pease*, 2010 WL 2670815 (Bankr. N.D. Ohio 2010) – Debtor who failed to obtain prepetition credit counseling is not eligible to be debtor under section 109. Credit Briefing Certificate indicated that debtor wife attended the briefing. Certificate for debtor husband indicated that debtor wife purported to attend on behalf of her husband pursuant to a Power of Attorney. Section 109 credit counseling requirement is not a delegable obligation. Party is not permitted to delegate obligation to obtain credit counseling to another person purportedly acting under a power of attorney. Section 109 requires the debtor, a representative of the debtor, to attend the credit counseling program and obtain the credit counseling certificate. Although debtor wife remained eligible as she had attended credit counseling, that her husband was not eligible. Case would be dismissed as to debtor husband only.
- (833) *In re Ferrell*, Case No. 09-71886 (Bankr. E.D. Mi. 2009) - Debtor who obtained credit counseling 4 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.
- (834) *In re Grant*, Case No. 09-70553 (Bankr. E.D. Mi. 2009) - Debtor who obtained credit counseling after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Court records indicated that Petition was filed at 10:52 a.m. and Credit Counseling Certificate indicated that counseling occurred at 6:06 p.m. the same date. Case dismissed by Court *sua sponte*.
- (835) *In re Wyche*, Case No. 09-71300 (Bankr. E.D. Mi. 2009) - Debtor who obtained credit counseling 6 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.
- (836) *In re Hall*, Case No. 10-53494 (Bankr. E.D. Mi. 2010) - Debtor who obtained credit counseling 24 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1).
- (837) *In re Harris*, Case No. 10-55770 (Bankr. E.D. Mi. 2010) - Debtor who obtained credit counseling 34 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1).
- (838) *In re Byrd*, Case No. 10-55905 (Bankr. E.D. Mi. 2010) - Debtor not eligible for relief where Certificate of Credit Counseling indicated that counseling occurred in April, 2008, more than two years prior to the commencement of the case.
- (839) *In re Champney*, Case No. 10-57311 (Bankr. E.D. Mi. 2010) - 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.
- (840) *In re Jeffries*, Case 10-42245 (Bankr. E.D. Mi. 2010) – Case dismissed where Debtor received credit counseling 531 days before bankruptcy

petition filed in violation of Section 109(h)(1). Section 109 requires counseling no more than 180 days prior to the filing of the petition.

- (841) *In re Smith*, Case No. 10-42134 (Bankr. E.D. Mi. 2010) – Case dismissed where Debtor received credit counseling 300 days before bankruptcy petition filed in violation of Section 109(h)(1). Section 109 requires counseling no more than 180 days prior to the filing of the petition.
- (842) *In re Squalls*, Case No. 10-53296 (Bankr. E.D. Mi. 2010) – Case dismissed where Debtor received credit counseling 213 days after bankruptcy petition filed in violation of Section 109(h)(1). Section 109 requires counseling no more than 180 days prior to the filing of the petition.
- (843) *In re Seabrooks*, Case No. 10-55185 (Bankr. E.D. Mi. 2010) – Case dismissed where Debtor received credit counseling 366 days after bankruptcy petition filed in violation of Section 109(h)(1). Section 109 requires counseling no more than 180 days prior to the filing of the petition.
- (844) *In re Barnett*, Case No. 08-70815 (Bankr. E.D. Mi. 2009) - Case dismissed where Debtor did not receive credit counseling until 19 days after bankruptcy petition filed in violation of Section 109(h)(1).
- (845) *In re Hoke*, Case No. 08-66997 (Bankr. E.D. Mi. 2009) - Debtor who received credit counseling after petition was filed is not eligible for relief. Case must be dismissed. Obtaining counseling post-petition does not comply with requirement of Section 109(h)(1) and Debtor is not eligible.
- (846) *In re Hicks*, Case No. 09-41591 (Bankr. E.D. Mi. 2009) - Debtors who initially received credit counseling 237 days prior to filing petition and then did not update credit counseling until after petition filed are not eligible for relief and case must be dismissed. Obtaining counseling more than 180 days pre-petition or post-petition does not comply with requirement of Section 109(h)(1) and Debtors are not eligible.
- (847) *In re Mack*, Case No. 09-58533 (Bankr. E.D. Mi. 2009) - Court *sua sponte* dismissed case where Debtor did not receive credit counseling until after the petition was filed. Section 109(h)(1) requires that counseling be obtained before the petition is filed.
- (848) *In re Depew*, Case No. 09-56915 (Bankr. E.D. Mi. 2009) - Case 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.
- (849) *In re Garza*, Case No. 09-44633 (Bankr. E.D. Mi. 2009) – Debtor not eligible for relief where Debtor did not obtain credit counseling until 4 days after the petition was filed. Case dismissed by Court *sua sponte*.
- (850) *In re Culbert*, Case No. 09-47894 (Bankr. E.D. Mi. 2009) – Debtor not eligible for relief where Debtor did not obtain credit counseling until 17 days after petition was filed.
- (851) *In re Rhodes*, Case No. 09-43128 (Bankr. E.D. Mi. 2009) – Debtor not eligible for relief where Debtor did not obtain credit counseling until 17 days after petition was filed.
- (852) *In re Holland*, Case No. 09-55622 (Bankr. E.D. Mi. 2009) – Debtor not eligible for relief pursuant to section 109 (h)(1) where Debtor did not receive credit counseling until after bankruptcy petition filed.

5.21 Waiver of Requirement

- (853) *In re Ramey*, 2016 WL 5539789 (6th Cir. BAP 2016) – Bankruptcy Court properly denied debtors’ request for permanent exemption based on incapacity or disability where debtor did complete counseling post-petition, belying debtor’s contention that she would be permanently unable to complete the counseling. Debtor did not demonstrate basis for temporary waiver where debtor had medical issues in past but did not rise to incapacity of disability and while debtor filed Motion for finding of exigent circumstances she did not properly notice Motion as required by local rules, and motion did not allege either exigent circumstances or an inability to obtain counseling within 7 days of attempting to do so. Motion alleged that debtor knew of requirement but merely misunderstood that counseling had to be completed pre-petition.
- (854) *In re Drenth*, 2015 WL 5331797 (Bankr. W.D. Mi. 2015) – Court excused debtor from completing pre-petition counseling where debtor suffered from dementia related cognitive impairment and psychosis. Debtor had limited ability to understand his own financial affairs. Debtor’s sister, acting under a durable power of attorney, assembled information for petition by visiting debtor’s former home and reviewing files and papers.
- (855) *In re Anderson*, 2008 Fed. App. 0021P (6th Cir. BAP 2008) – Debtor’s incarceration at Michigan Department of Corrections facility does not amount to any “disability” that would excuse Debtor from obtaining prepetition credit counseling. Evidence established that prison would allow Debtor to make a phone call to a credit counseling agency if directed to do so by Court Order. Court is authorized to extend time to obtain credit counseling for up to 30 days after the filing of the petition. Court has authority to grant an additional 15 days if Debtor faces “exigent circumstances”. Court is not required to grant a full 15 day extension and can grant a shorter extension if the Court deems appropriate. Court properly dismissed case *sua sponte* where Debtor failed to obtain credit counseling either prior to the commencement of the case or within the extended time approved by the Bankruptcy Court.
- (856) *In re Oliver*, 2013 WL 1403336 (Bankr. S.D. Ga. 2013) – Debtor can be excused from counseling only if debtor requested, but was unable to obtain, counseling before filing the petition. Debtor’s Motion denied where motion did not allege that debtor even attempted to obtain

counseling prior to commencement of case. Debtor also failed to demonstrate disability. Disability requires that debtor is so physically impaired as to be unable, after reasonable effort, to participate in counseling. Debtor's allegation that he was elderly, wheel-chair bound, and in prison did not evidence any inability to understand and make rational financial decisions. Incarceration, without more, did not meet definition of disability.

- (857) *In re Gordon*, 2012 WL 975423 (Bankr. W.D. Ky. 2012) - Debtor who was incarcerated is not "disabled" and so is not entitled to waiver of credit counseling requirement.
- (858) *In re Evans*, Case No. 10-67920 (Bankr. E.D. Mi. 2010) - Debtor would not be excused from requirement for pre-petition counseling where debtor failed to file Motion under Local Rule 9014-1 to excuse credit counseling. Even if debtor had filed Motion, debtor apparently was not disabled so as to prevent debtor from receiving counseling where debtor admittedly receive counseling 6 days after confirmation.
- (859) *In re Solomon*, 2010 WL 3369146 (Bankr. W.D. MI. 2010) – Debtor not exempt from pre-petition 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).
- (860) *In re Scofield*, 2010 WL 3430446 (Bankr. N.D. Ohio 2010) – Debtor's motion requested temporary exemption from briefing requirement, but did not contain any facts or arguments in support of that request. Burden is on debtor to describe exigent circumstances that merit a waiver of the briefing requirement, and must state that the debtors requested counseling services but were unable to obtain those services within 5 days. Motion is fatally defective where it fails to provide any facts or explanation to support request.

5.22 Exigent Circumstances

- (861) *In re Wise*, 2015 WL 3424733 (Bankr. N.D. Ohio 2015) – Exigent circumstances requires that debtor made attempt to obtain counseling before filing but was unable to do so. Motion seeking exemption from credit counseling certificate was facially defective here request made no mention of any pre-petition efforts to obtain counseling. Exigent circumstances also requires an urgent situation not created by the debtor that compels the immediate action. Imminent foreclosure is not exigent where debtor had months of notice prior to foreclosure and took on action to comply with requirement. Debtor's bankruptcy statements were internally inconsistent, leaving court confused about true state of case. Debtor's failure to demonstrate entitlement to exigent circumstances exception required dismissal of case.
- (862) *In re Stuart*, 2014 WL 3534017 (Bankr. N.D. Ohio 2014) – Court would not extend time to obtain counseling where debtor failed to file motion asking for temporary waiver and stated only that debtor lacked funds to pay for credit counseling program. Certification that debtor does not believe he can pay the cost of the counseling is not "exigent" circumstance. Case dismissed where debtor did not obtain counseling until 11 days after case filed and debtor failed to demonstrate exigent circumstances warranting extension of deadline.
- (863) *In re Duncan*, 418 BR 278 (8th Cir. BAP 2009) – Failure to file a certificate of exigent circumstances when seeking temporary exemption from credit briefing requirement is fatal to the request. Debtor's motion requested temporary exemption from briefing requirement, but did not contain any facts or arguments in support of that request. Burden is on debtor to describe exigent circumstances that merit a waiver of the briefing requirement, and must state that the debtors requested counseling services but were unable to obtain those services within 5 days. Motion is fatally defective where it fails to provide any facts or explanation to support request.
- (864) *In re Mitchell*, 2009 WL 2877859 (Bankr. N.D. Ohio 2009) – Section 109(h)(3) permits a waiver of pre-petition credit counseling where Debtor (1) describes exigent circumstances that merit a waiver; and (2) states that Debtor requested credit counseling but was not able to obtain that counseling within 5 days; and (3) the certification is acceptable to the Court. Debtor stated that Debtor was unable to find a credit counselor who would waive their fee as Debtor had no income or money. Debtor's certification failed to state what specific steps Debtor took in an attempt to obtain counseling and failed to identify any agencies Debtor contacted or the dates of those contacts. Debtor also failed to demonstrate any exigent circumstances. Financial hardship alone is not exigent circumstance as Section 111 requires all approved counseling agencies to provide counseling without regard to ability to pay.
- (865) *In re Vandoran*, Case No. 11-65165 (Bankr. E.D. Mi. 2011) – Case dismissed where debtors failed to obtain credit counseling until day after filing petition. Motion for Approval of Certificate of Exigent Circumstances denied where Motion failed to allege any facts that would constitute exigent circumstance or otherwise warrant waiver of pre-petition counseling requirement. Motion alleged only that the Petition was filed on Sunday and Debtor's counsel "was under the impression that the counseling had been completed".
- (866) *In re Thompson*, Case No. 11-70219 (Bankr. E.D. Mi. 2012) – Section 109(h) requires debtor to obtain credit counseling prior to filing. Section 109(h) allows Court to approve extension of time to complete counseling where debtor establishes exigent circumstances, debtor was unable to obtain services within 7 days of first attempting to obtain counseling and that Court finds declaration satisfactory. If granted, debtor must then complete counseling within 30 days. Motion that asked that debtor be excused from completing counseling denied where debtor arguably established exigency where foreclosure sale was imminent, but debtor did not allege that debtor had attempted to obtain counseling and was not able to do so. Further, debtor did not seek deferment, but sought excusal entirely. Court can excuse requirement entirely only where there is determination that debtor is unable to complete counseling because of disability, incapacity or active military duty in combat zone. Disability requires debtor be so physically impaired as to be unable, after reasonable effort, to participate in person, telephone or internet. Debtor's Motion made conclusory allegation that debtor was disabled but did not provide any information to establish that debtor met statutory definition.
- (867) *In re Logsdon*, 2012 WL 3762513 (Bankr. W.D. Ky. 2012) – Case dismissed where debtors did not complete credit counseling until 6 days after filing petition. Court can grant temporary waiver and allow debtor to complete counseling post-petition only debtor files a certification describing exigent circumstances and stating that debtor attempted to obtain counseling but was unable to do so within 7 days of first request. Debtors did not demonstrate exigent circumstances. Allegations that debtors were not able to complete the counseling because of

Debtor-Husband's work schedule did not demonstrate an inability to obtain counseling prior to commencement of case.

- (868) *In re Thompson*, Case No. 11-70219 (Bankr. E.D. Mi. 2012) – Section 109(h) requires debtor to obtain credit counseling prior to filing. Section 109(h) allows Court to approve extension of time to complete counseling where debtor establishes exigent circumstances, debtor was unable to obtain services within 7 days of first attempting to obtain counseling and that Court finds declaration satisfactory. If granted, debtor must then complete counseling within 30 days. Motion that asked that debtor be excused from completing counseling denied where debtor arguably established exigency where foreclosure sale was imminent, but debtor did not allege that debtor had attempted to obtain counseling and was not able to do so. Further, debtor did not seek deferment, but sought excusal entirely. Court can excuse requirement entirely only where there is determination that debtor is unable to complete counseling because of disability, incapacity or active military duty in combat zone. Disability requires debtor be so physically impaired as to be unable, after reasonable effort, to participate in person, telephone or internet. Debtor's Motion made conclusory allegation that debtor was disabled but did not provide any information to establish that debtor met statutory definition.

5.23 Equitable Exception

- (869) *In re Jahn*, 2012 WL 1998405 (Bankr. M.D. Pa. 2012) – Credit counseling requirement is not jurisdictional. Although normally court would enforce requirement and dismiss case on request of party in interest, where debtor did receive counseling (albeit 182 days pre-petition and therefore untimely) confirmed a chapter 13 plan, and then completed that plan, and Trustee had filed final report, Court would waive requirement based on finding of substantial compliance. Court has sufficient authority under Section 105 to excuse technical non-compliance. There was no question of debtor's good faith and no party would be prejudiced by allowing case to proceed to discharge.
- (870) *In re Cox*, Case No. 10-61052 (Bankr. N.D. Ohio 2010) – Wife dismissed from Joint Filing where documents indicated that only Husband completed pre-petition credit counseling.

5.24 Pay Advices

- (871) *Community Bank v. Riffle*, 2010 WL 3079307 (2d Cir. 2010) - Under 11 U.S.C. Section 521(a)(1)(B)(iv), a debtor must file "copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor." If a voluntary filer under Chapter 7 or Chapter 13 does not comply with this requirement within 45 days after the filing of the petition, the case is automatically dismissed. The statute requires a debtor alternatively to file either (1) all payment advices of payment received within 60 days before the date of the filing of the petition, or (2) other evidence of payment received within 60 days before the date of the filing of the petition. A debtor will be in compliance so long as he files credible evidence that sets forth all payments received from his employer in the 60 days prior to the petition. Statute does not require all payment advices received in the preceding 60 days as long as the documents provided include all income received in the preceding 60 days. Debtor complied by providing one payment advice which included debtor's earnings and deductions for that pay period and identified his year-to-date earnings and payroll deductions for various categories; and by submitting a chart generated by his employer which showed his gross earnings for each pay period from January 5, 2007 through August 31, 2007.

D. Venue

5.25 Generally

- (872) *Thurman v. Michael W. Boyd Law Firm*, 2013 WL 1103645 (W.D. Tn. 2013) – When jurisdiction is founded on a question of federal law, venue lies in: (1) A judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) A judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) If there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.
- (873) *State Bank of Florence v. Miller*, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6th Cir. BAP 2011), *aff'd* 2013 WL 425342 (6th Cir. 2012) – Venue is proper in the district in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district. Venue is proper if Debtor meets any one of the four tests (domicile, residence, principal place of business or principal assets). There is a presumption that the debtor has filed in the correct district; the party objecting to venue is required, by a preponderance of evidence, to show that venue is improper.

5.26 Domicile

- (874) *Thurman v. Michael W. Boyd Law Firm*, 2013 WL 1103645 (W.D. Tn. 2013) – Complaint alleging violation of civil rights not properly filed in Tennessee where all parties to transaction were residents of Mississippi. Plaintiff resided in Mississippi, Attorney resided in Mississippi, Chapter 13 Trustee resided in Mississippi, and corporate defendant was Delaware corporation with principal place of business in Texas. No party to action resided in Tennessee.
- (875) *State Bank of Florence v. Miller*, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6th Cir. BAP 2011) – Domicile is largely a matter of intention - what is the fixed location to which he intends to return when he is elsewhere? Domicile is an individual's permanent place of abode where he need not be physically present, and residence is where the individual is physically present much of the time. An individual consequently may have several residences, but only one domicile. Debtor's testimony is relevant but not determinative, and court

will also consider objective evidence that establishes the Debtor's intent such as affidavits of intention, registration for driver's licenses, opening bank accounts, addressing tax returns, motive for establishing domicile, and other physical facts evidencing that the desire to remain will not expire. Some years earlier, Debtor filed a statement with the taxing authorities in Wisconsin declaring the Wisconsin Cottage to be his principal residence and paid a lesser amount of real estate taxes in Wisconsin; Debtor previously filed a chapter 13 case in the Eastern District of Wisconsin that was later dismissed; and Debtor had not filed for the Michigan Homestead Exemption. However, evidence established that Debtor has resided within seven miles of Iron Mountain, Michigan for his entire life. The Debtor was born in Michigan. The Debtor was employed in Michigan. The Debtor's parents were Michigan residents. The Debtor was educated in Michigan. The Debtor earned his certification as a union journeyman plumber and pipefitter in Michigan. The Debtor's stated subjective intention is overwhelmingly buttressed by the objective facts including that the Debtor offered the Wisconsin Cottage for sale and posted for sale signs on the property; all of the Debtor's real property was subject to the Bank's foreclosure except for the Michigan Cabin Property; Debtor hired contractors to substantially improve the Michigan Cabin Property, by doubling its size, adding a new roof, adding a deck, adding a generator to supply electricity, and adding a propane tank to cook food and heat the cabin; Debtor opened a bank account with the State Bank of Norway, Michigan, which he used exclusively thereafter; Debtor moved the vast majority of his personal property from the Wisconsin Cottage to Michigan, using it to furnish the Michigan Cabin Property and storing the balance in a Michigan storage facility; Debtor's dentist and doctor are both in Michigan and he regularly received his medical treatment at a hospital in Marquette, Michigan; Debtor's Wisconsin driver's license expired and Debtor immediately obtained a Michigan driver's license; all of the Debtor's vehicles were titled in Michigan; Debtor filed his 2008 state income tax return as a Michigan resident; Debtor receives most of his mail at the Michigan Cabin Property; Michigan Cabin Property has been the Debtor's address of record for the Social Security Administration and his union pension plan; and the Debtor resides approximately 50% of the time at the Michigan Cabin Property. Venue proper in the Western District of Michigan.

5.27 Location of Principal Assets

- (876) *Thurman v. Michael W. Boyd Law Firm*, 2013 WL 1103645 (W.D. Tn. 2013) – Complaint alleging violation of civil rights not properly filed in Tennessee where all parties to transaction were residents of Mississippi. Plaintiff resided in Mississippi, Attorney resided in Mississippi, Chapter 13 Trustee resided in Mississippi, and corporate defendant was Delaware corporation with principal place of business in Texas. No party to action resided in Tennessee.
- (877) *State Bank of Florence v. Miller*, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6th Cir. BAP 2011) – Alternative basis for venue is the location of the debtor's principal assets during a “longer portion of such one-hundred-eighty-day period” immediately prior to the bankruptcy filing. Debtor maintained personal and real property in both Western Michigan and Wisconsin. Value of personal property in Michigan exceeded \$100,000, while personal property in Wisconsin was worth about \$13,000.00. All of debtor's real property was owned by a Trust in which debtor was the settlor, trustee and primary beneficiary. Trust stated that it was a Michigan trust. Under Michigan law, the trust itself is a Michigan Asset. Even disregarding trust, the bulk of debtor's real property would have been located in Michigan.

5.28 Residence

- (878) *Thurman v. Michael W. Boyd Law Firm*, 2013 WL 1103645 (W.D. Tn. 2013) – Complaint alleging violation of civil rights not properly filed in Tennessee where all parties to transaction were residents of Mississippi. Plaintiff resided in Mississippi, Attorney resided in Mississippi, Chapter 13 Trustee resided in Mississippi, and corporate defendant was Delaware corporation with principal place of business in Texas. No party to action resided in Tennessee.
- (879) *In re Carpenter*, Case No. 11-33006 (Bankr. E.D. Mi. 2011) – Venue proper where debtor relocated from Virginia to Michigan more than 90 days before filing case. Although debtor spent time in both states and traveled back and forth to care for ill mother, debtor permanently relocated to Michigan and moved in with mother to care for her more than 90 days pre-petition.

5.29 Principal place of business

- (880) *In re Golembiewski*, 2015 WL 1061962 (Bankr. N.D. Ohio 2015) – Salaried individual's workplace is not “principal place of business” for purposes of venue.

5.30 Location of Claim or Property

- (881) *In re Golembiewski*, 2015 WL 1061962 (Bankr. N.D. Ohio 2015) – Potential future earnings or future employment are not principal assets for venue purposes.
- (882) *Thurman v. Michael W. Boyd Law Firm*, 2013 WL 1103645 (W.D. Tn. 2013) – 28 USC Section 1391 allows venue in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred or where a substantial part of the property that is the subject of the action is located. Venue in Tennessee improper where all elements of cause of action occurred in northern District of Mississippi and Plaintiff failed to allege that any action or event occurred in Tennessee.

5.31 Affiliate Venue

- (883) *In re Barrington Spring House, LLC*, 2014 WL 1652195 (Bankr. S.D. Ohio 2014) – Individual debtor and corporate debtor, neither of whom had a domicile or principal place of business in Ohio, could nonetheless file in Ohio where debtor's second entity was Ohio LLC with principal place of business and principal assets located in Ohio, and LLC was the first filing entity. Affiliate includes owner and managing member of LLC, and same individual was himself affiliate of second business.

5.32 Default Venue

- (884) *Thurman v. Michael W. Boyd Law Firm*, 2013 WL 1103645 (W.D. Tn. 2013) – 28 USC Section 1391 allows venue in any judicial district where any defendant is subject to the court’s personal jurisdiction if there is no other district in which the action may be brought. Plaintiff’s complaint alleged that all of the actions and events occurred in Mississippi and Plaintiff could bring action for alleged violation of civil rights in Mississippi. Default venue did not support venue o action in Tennessee.

5.33 Dismissal – Venue Improper

- (885) *In re Golembiewski*, 2015 WL 1061962 (Bankr. N.D. Ohio 2015) – Case can proceed in improper venue as long as no creditor or party in interest objects. Dismissal or transfer is not mandatory absent timely objection.
- (886) *Thurman v. Michael W. Boyd Law Firm*, 2013 WL 1103645 (W.D. Tn. 2013) – Court has broad discretion in dismissing or transferring case that is filed in improper venue. Party seeking transfer rather than dismissal bears burden of proof that transfer is warranted. Court cannot transfer case if there is no district in which venue would have been proper in first instance. Court then determines whether transfer is consistent with interests of justice. Case would not be transferred where complaint failed to state cause of action with requisite particularity as required by *Twombly*.

5.34 Transfer - Venue Proper – Interests of Justice

- (887) *In re Barrington Spring House, LLC*, 2014 WL 1652195 (Bankr. S.D. Ohio 2014) – 28 USC Section 1412 allows court to transfer venue of otherwise properly located case where transfer is in the interests of justice or, alternatively, for the convenience of parties. “Interests of justice” is broad and flexible standard and focuses on whether transfer would promote efficient administration of estate, judicial economy, timeliness and fairness, as well as integrity of transferor court system and “learning curve” of new judge if case is transferred. Administration of cases does not support transfer of case where debtor’s sole asset is property located in Ohio not in interest of justice because assets are in Ohio and local community has significant interest in outcome of case. Further, there was pending motion to sell property and transfer would only delay process. Transfer of related case also denied where assets have already been liquidated and transfer would merely delay case administration. However, transfer of individual debtor’s case may promote judicial economy where key witnesses, claimants and defendants and retained counsel are all located in Florida and predominate issues in case involved single creditor with significant claims involving substantial assets, plus related litigation in Florida and possibility that Florida State Courts may be called up on to play role in resolution of issues, and Florida was situs of joint venture that gave rise to bankruptcy. Judicial economy would be furthered by transfer of all three cases given substantial interrelationship of business affairs and impact that key decisions would impact all three estates, and pendency of at least three pending non-bankruptcy cases in Florida. “Learning curve” was not likely to be issue as motions to transfer venue were filed early in case before any “serious business” had been concluded and Florida courts already had superior knowledge and information regarding claims. Transfer also supported by fairness. Debtor’s conduct evidenced long and complex pattern of manipulation and a multi-faceted “shell game” such that filing in Ohio was done more as exercise in forum shopping than legitimate effort to obtain effective and efficient bankruptcy relief. Debtor’s conduct amounted to cavalier treatment of security interests, property rights and separate legal entities, asserting or disregarding them as suited his objections, and filing in Ohio indicated intent to use and abuse system. Connection to Ohio was think based only on location of single asset real estate case in Ohio, while remainder of assets and claims are connected to Florida, and proceeding in Ohio would be far more expensive and difficult for all of the debtor’s creditors (10 of 12 of whom were in Florida). While debtor’s choice of venue is entitled to due consideration, lack of any meaningful connection to Ohio coupled with debtor’s conduct warranted transfer of three related cases to Florida.
- (888) *In re West*, 2012 WL 1252984 (Bankr. N.D. Ohio 2012) – Party requesting change of venue in case where initially chosen venue was proper bears burden of showing that transfer would be in the interests of justice or for convenience of parties. Court uses 6 factors to determine whether transfer is in the interest of justice: (1) whether transfer would promote economic and efficient administration of case; (2) whether judicial economy would be served by the transfer; (3) whether parties would receive fair trial in both possible venues; (4) whether either forum has an interest in having the controversy decided within its borders; (5) whether enforceability of judgment would be impacted by a transfer; and (6) whether the original choice of forum should be disturbed. Debtor’s Motion to Transfer denied where only grounds asserted was that Debtor was a city councilman who sought transfer “to avoid any semblance of impropriety or undue embarrassment regarding his financial distress.” Debtor’s Motion did not address any of the 6 factors and failed to demonstrate that a transfer of the case to another district that has a significantly higher caseload would somehow promote efficiency. Motion failed to address convenience of creditors or impact on case administration. Debtor resided in the initially chosen county; bulk of assets are in initially chosen county; and more than half in number and amount of secured claims and debts in general are within initially chosen county. Debtor presented no evidence that transfer to another district, more than 30 minutes away, would in any way be more “convenient”.

5.35 Transfer - Venue Proper – Convenience of Parties

- (889) *In re Barrington Spring House, LLC*, 2014 WL 1652195 (Bankr. S.D. Ohio 2014) – 28 USC Section 1412 allows court to transfer venue of otherwise properly located case where transfer is in the interests of justice or, alternatively, for the convenience of parties. Whether convenience is served by transfer depends on 1) the proximity of creditors of every kind to the court; 2) the proximity of the debtor to the court; 3) the proximity of witnesses necessary to the administration of the estate; 4) location of the assets; and 5) the economic administration of the estate. Proximity of creditors focuses on number of creditors and amounts owed. Court would disregard foreign creditors as burden on them would be equally distant and inconvenient. As to one related debtor, Ohio was closer and more convenient of majority of creditors, where substantial number of unsecured creditors are local or regional service provides or current and former tenants of apartment complex with claims to security deposit. However, largest and most active creditors held mortgages on property with deficiency balances that dwarfed all other unsecured claims. One related case had very creditors and sole issue involved entitlement to funds from assets that had already been

liquidated. Second related case was large and complex, and focused on assets that were subject to litigation in Florida; largest creditor by far was located in Florida; 12 of 15 US creditors were in Florida, and 10 of 20 largest unsecured creditors in entire case were in Florida; and none of the creditors were located in Ohio. Only individual debtor resided in Australia, such that proximity to court was not relevant factor. Other than need to obtain new counsel in Florida or paying travel expenses of Ohio counsel, transfer posed little risk of harm to debtor. Although primarily witnesses in Ohio LLC case were located in Ohio, the larger and more complex case was debtor's personal case, rendering it "inescapable conclusion" that most witnesses were in Florida. Similarly, while assets of one debtor were located entirely in Ohio, that asset was currently being marketed by trustee and soon would be reduced to sales proceeds that can be easily administered. Only asset in second case was money located in attorney trust account in Florida. Debtor's individual case involved multiple Florida assets and business ventures and most of the claims relates to debtor's Florida business activities. Administrative efficiency would be furthered by transfer for two cases and, once Ohio property is sold, that case would be better served in Florida.

5.36 Transfer - Venue Improper

E. Filing Fee

5.37 Failure to Pay

- (890) *In re Gilbert*, Case No. 15-45780 (Bankr. E.D. Mi. 2015), *aff'd*, 2016 WL 627902 (E.D. Mi. 2016) – Bankruptcy Court can dismiss case with bar to refiling unless debtor first pays filing fees owed for current and prior case. Section 105 gives court power to enforce requirement to pay filing fees, and Section 707(a)(2) allows court to dismiss case for nonpayment of any fees required in Title 28, Chapter 123, United States Code. Fees for prior cases are fees required to be paid, and Section 707 is not limited to fees in current case but any unpaid fees in any prior case.
- (891) *In re Wilson*, Case No. 1544055 (Bankr. E.D. Mi. 2015) – Debtor's case dismissed where debtor failed to pay filing fees in either of two prior cases, although court in dismissing prior order barred debtor from filing another petition until prior filing fees were paid.
- (892) *In re Clark*, 2013 WL 3849610 (E.D. Mi. 2013) – Court properly denied Debtor's Motion to pay filing fee in installments and dismissed case where Debtor previously had filed four bankruptcy actions, three of which were dismissed for failure to pay filing fee, file required documents, or attend required hearings; and Bankruptcy Court was unconvinced that Debtor would do any better in this case.
- (893) *In re Coleman*, Case No. 12-54116 (Bankr. E.D. Mi. 2012) – Case dismissed where debtor failed to pay filing fee as required by Court order directing payment by date certain, failing which the case would be dismissed without further notice or hearing.
- (894) *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.
- (895) *In re Bass*, Case No. 11-61823 (Bankr. E.D. Mi. 2011) – Case reopened, discharge vacated and case dismissed where debtor failed to pay the filing fee for the current case or the as yet unpaid filing fee for debtor's prior case. Discharge order entered in error where filing fee not paid as ordered by Court.
- (896) *In re Anderson*, Case No. 11-60818 (Bankr. E.D. Mi. 2011) – Case dismissed where Debtor failed to pay filing fee within time set by Order of Court.

5.38 Waiver

- (897) *In re Bussey*, 2014 WL 2765703 (Bankr. N.D. Ohio 2014) – 28 USC Section 1930(f)(1) allows court discretion to waive filing fee where debtor has income that is less than 150% of the federal poverty line. Public policy weighs in favor of requiring debtors to pay fees, and court will not waive filing fees unless debtor clearly meets statutory criteria for a waiver, to be established by debtor on preponderance of evidence. Debtor not eligible for waiver where stated net income was higher than 150% of poverty line. While debtor may anticipate future reduction in income, for purposes of waiver issue is income as of petition date. Motion to waive filing fee denied without prejudice to debtor paying fees in installments.
- (898) *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.
- (899) *In re McMann*, Case No. 12-49259 (Bankr. E.D. Mi. 2012) – Debtor not entitled to waiver of filing fee where Schedule I discloses monthly income that exceeds 150% of the official poverty line.
- (900) *In re Jackson*, Case No. 11-65307 (Bankr. E.D. Mi. 2011) – Motion to Waive Filing Fee denied where Schedule B indicated that debtor

was owed Federal Tax Refund of \$7,500 and Debtor's Schedule C claimed the tax refund receivable as exempt. Debtor's statement in the Motion that Debtor had already received and spend the tax refund directly contracted by statements in Schedules B and C.

- (901) *In re Taylor*, Case No. 11-64590 (Bankr. E.D. Mi. 2011) – Debtor's Motion to Waive Filing Fee denied where schedule B listed a savings account with \$1,599 balance and debtor claimed balance in account as exempt. Debtor's statement in the Motion that the funds in the account belonged to Debtor's minor son contradicted by Schedules B and C.
- (902) *In re George*, Case No. 11-67210 (Bankr. E.D. Mi. 2011) – Debtor's motion was not clear as to whether debtor had received and spent tax refund prior to filing case. Debtor's Motion indicated that debtor had done so but debtor's schedule B showed tax refund as receivable that had not been received. Debtor's statement on Schedule B, made under penalty of perjury, was inconsistent with any assertion the debtor made in the motion that the refund had been spent. Refund would have provided sufficient funds to pay filing fee.
- (903) *In re Field*, 2011 WL 4101075 (Bankr. W.D. Mi. 2011) – Court can reconsider Order waiving filing fee where developments in administration of case demonstrate that the waiver was unwarranted. Court would not reconsider waiver where debtor, shortly after filing, obtained new employment at \$16 per hour but job ended up being short lived because of debtor's physical condition and the debtor's budget painted a "bleak picture".
- (904) *In re Daniels*, Case No. 09-44335 (Bankr. E.D. Mi. 2009) – Debtor's Application for Waiver of Chapter 7 Filing Fee denied where Debtors schedules revealed that Debtor had a garnishment of \$407 per month that should have ceased upon the filing of the bankruptcy case which would result in Debtor having average monthly net income in excess of \$1500 per month. Information on Debtor's Application was inconsistent with information Debtor provided on Schedule I which indicated that Debtor was single with no dependents, and Debtor's monthly income on Schedule I exceeded 150% of the official poverty line. Therefore, Court lacks authority to waive filing fee under 28 USC Section 1930(f)(1).
- (905) *In re Walker*, Case No. 09-55153 (Bankr. E.D. Mi. 2009) - Debtor's Motion to waive filing fee denied where schedules indicated that Debtor had sufficient exempt assets from which to pay the filing fee including tax refunds totaling over \$4000.

F. Means Test

5.39 "Primarily Consumer Debts"

- (906) *In re Jones*, Case No. 15-32931 (Bankr. E.D. Mi. 2016) – Section 707(b) allows a court to dismiss a case for abuse only where the debtor's debts are primarily consumer debts. "Consumer debts" are defines as those incurred primarily for personal, family or household purpose. Whether debt is consumer depends on the purpose for which the debt was incurred and, if incurred for more than one purpose, the primary purpose. Student loans may be non-consumer debts if debtor demonstrates that loan was incurred purely or primarily as business investment; but will be consumer loans if incurred for purposes of supporting one personally or one's family. Debtor judicially estopped from asserting that student loans were non-consumer debts. Debtor's initial bankruptcy petition indicated that debtor's debts were primarily consumer debts. Debtor's initial Means Test included required calculations assuming that debts were consumer, and debtor did not file a Statement of Exemption for Presumption of Abuse on which debtor would have indicated that debts were non-consumer. After the UT Trustee filed a Motion to Dismiss under Section 707(b)(3), debtor amended the petition and means test, and filed the Statement of Exemption all of which asserted for the first time that the student loans were not consumer debts. Judicial estoppel applies where party takes contrary position under oath earlier in the proceeding and that position was accepted by the court. Debtor can avoid effect of judicial estoppel by showing that conduct was nothing more than inadvertent or mistake. Inadvertence requires that the debtor lacked knowledge of factual basis of unasserted claim; debtor has no motive for concealment; and there is no evidence of bad faith. Debtor's initial filings, under oath, asserted that debtor's debts were not primarily non-consumer. The Court and the US Trustee relied on those assertions in the first instance, causing the US Trustee to file the Section 707 Motion. Debtor did not change assertions until after the US Trustee file the Motion to Dismiss. Debtor failed to provide any explanation for the late amendments and did not resent any evidence of inadvertence. Debtor's actions in amending were done with the clear motive of avoiding the consequences of debtor's prior assertions that the debts were primarily consumer debts.
- (907) *Bushkin v. Singer*, Case No. 15-1285 (9th Cir. BAP 2016) – Whether debt is consumer debt as defined in Section 101(8) depends on purposed for which loan was made, not use to which proceeds were ultimately used. If loan was made for purposes of profit making venture, it is not consumer loan. Debtor who borrowed money to pay living expenses while debtor wrote book, with lender and debtor to share proceeds if book sold or with repayment with interest if book did not sell was loan for business purpose even where debtor used proceeds to pay normal living expenses incurred during writing process. Purpose of loan in first instance was to fund attempt at profit making venture, making loan a business loan.
- (908) *In re De Cunae*, 2013 WL 6389205 (Bankr. S.D. Tx. 2013) – Student loan debts will be considered "non-consumer" debts where debtor's motivation in attending school was to increase earning power. Court would use "profit test" to determine whether debts were consumer or non-consumer, such that a debt incurred with an eye toward profit would be classified as noon-consumer. While debtor enjoyed "personal enhancement" as result of education, primary purpose was to obtain a skill that would improve his ability to earn future income, which is the hallmark of incurring a debt with an eye toward profit. Once student loans were considered non-consumer, debtor's debts were primarily non-consumer, preventing dismissal under Section 707(b).
- (909) *AFF Ohio, LLC v. Jelinger*, 2014 WL 996466 (Bankr. N.D. Ohio 2014) – Section 707(b)(1) applies only to debtors whose debts are primarily consumer debts. Court would rely on schedules to determine whether debtor's debts were consumer or business. Debts for personal guarantees of business obligations are not consumer debts as the debts were not incurred for personal or household purposes. Income tax debts are not "consumer debts" as taxes are incurred for public purposes, not for family or household purposes. Debtor's business and tax debts exceeded 50% of total scheduled debt. As such, Section 707(b)(1) did not apply.

- (910) *In re Price*, 2013 WL 4017149 (Bankr. E.D. Ky. 2013) – Court is not precluded from considering amendments to debtor’s schedules in determining whether debtor’s debts are primarily consumer. Debtor is free to amend schedules as long as amendment is in good faith.
- (911) *In re Hernandez*, 2011 WL 1541691 (Bankr. E.D. Ky. 2011) – Case cannot be dismissed under Section 707(b)(2)(A) where debtor’s debts are not primarily consumer debts. Court will determine amounts of claims based on scheduled amounts. Debtor had total debt of \$373,000.00, including debtor’s scheduled the secured claim for debtor’s commercial property of \$189,000.00. As “business” debt amounted to 50.6% of the total debt, debtor had primarily non-consumer debts for purposes of Section 707.
- (912) *In re Lapke*, 428 BR 839 (8th Cir 2010) – Debtor’s non-recourse obligation on two mortgages on debtor’s home would be considered consumer debts even though Debtor signed only the mortgages and not the notes themselves. Mortgages constituted claims against debtor’s property and constituted claims in bankruptcy case. Debt secured by lien on principal residence is generally consumer debt. Including amounts due on mortgages resulted in Debtor having consumer debt in excess of \$1 million versus non-consumer debt of only \$667,000.00, resulting in debtor having primarily consumer debt for purposes of Section 707.
- (913) *In re Swartzentruber*, 2009 WL 28730003 (Bankr. N.D. Ohio 2009) – Section 707(b)(2) applies only to debtors with “primarily consumer debts”. A “consumer debt” is one incurred by an individual primarily for a personal, family, or household purpose. A “business debt” is one incurred with an eye toward profit. Debtors testified that they acquired condominium in Florida for investment purposes, although the mortgage documents stated that the unit was being acquired as a “second residence”. Debt found to be business debt where Debtors did not have the means to finance and maintain the Florida condominium without rental income. Debtors did not list any expenses for the Florida condominium included on Schedule J making it impossible to conclude that Debtors would have been able to afford the condominium as a second residence. Debtor was told he would make \$4,000 per month and that the rental income from the property was imperative to pay the mortgage and the related expenses of the condominium. Debtor testified that his family had been vacationing in the area for fifteen years and they were aware of how rapidly the price of real estate increased from 1999 to 2005 in the area. Debtor always looked at the transaction as an investment. Debtor signed the rental agreement with the management company before he signed the mortgage and for at least two years the expenses were treated as business losses on Debtors’ tax returns. Condo was only 400 square feet, not large enough for Debtor’s family which included three small children and local ordinances prohibited him from occupying unit for more than 30 days in any year.

5.40 Calculation of Current Monthly Income – Timing

- (914) *In re Schuldt*, 2015 WL 1010882 (Bankr. W.D. Mi. 2015) – Current Monthly Income includes all income received by debtor during the preceding 6 calendar months regardless of when income was earned. Debtor’s wages were counted as received within 6 preceding months although attributable to a pay cycle that ended in 7th month before petition.
- (915) *In re Maura*, 2013 WL 1730040 (Bankr. E.D. Mi. 2013) – Current Monthly Income is statutorily defined based on all income received in the 6 calendar months preceding commencement of case. There is no basis to increase or adjust CMI calculation based solely on fact that as of date of petition, debtor was earning more money than debtor had earned during the relevant 6 month time period.

5.41 Calculation of Disposable Income – Generally

- (916) *In re Wenzel*, 2015 WL 1087409 (Bankr. N.D. Ohio 2015) – Debtor’s calculation of CMI failed to include \$400 per month received by debtor from employer to reimburse transportation expenses, and failed to include bonus that debtor received in prior 6 months where debtor received similar bonuses in 5 of past 19 years at same employer.
- (917) *In re Wise*, 2011 WL 2133843 (Bankr. S.D. Ill. 2011) – In completing means test for Chapter 7, debtor cannot deduct income from child support that is expected to end one year post-petition. Although *Hamilton* allows consideration of changes in income for purposes of calculating CMI in Chapter 13, there is no corresponding exception in Chapter 7. Unlike Chapter 13, means test in Chapter 7 is exclusively backward looking. Debtor received support for entire 6 months pre-petition and, therefore, that income must be included in CMI for purposes of determining abuse under Section 707.
- (918) *Hildebrand v. Wimberly*, 2010 WL 2571977 (M.D. Tn. 2010) – Starting point for calculating Disposable Income for above median debtor is Current Monthly Income less allowable expenses itemized in Section 707(b)(2)(A)(i). However, Court must then adjust that calculation based on changes in income or expenses that are known or are virtually certain as of the date of confirmation of plan. Lower Court’s strict “mechanical approach” to calculation of projected disposable income was error where debtors were unemployed during prior 6 months but now had employment, making calculation of “disposable income” substantially lower than “projected income”.
- (919) *Darrohn v. Hildebrand*, 615 F.3d 470 (6th Cir. 2010) – Starting point for calculating Disposable Income for above median debtor is Current Monthly Income less allowable expenses itemized in Section 707(b)(2)(A)(i). Debtor obtained new employment at lower salary during the 6 month look-back period. Because of gap in employment, CMI was significantly less than Debtor’s actual income. Debtor’s higher income was known or substantially certain as of the date of confirmation. Therefore, the Court could take into account this additional income in determining Debtor’s Projected Disposable Income. Debtor’s intent to surrender property was also known or substantially certain at the time of confirmation. Therefore, Court could disregard the mortgage and other payments and expenses attendant to that property in determining Projected Disposable Income.
- (920) *Hildebrand v. Petro*, 395 BR 369 (6th Cir. BAP 2008) – “Disposable income” is a backward looking determination based on the six months preceding the commencement of the bankruptcy case. Although Debtors “disposable income” calculation resulted in negative income, Schedules I and J indicated that Debtors had “projected disposable income” of \$1386.33. Section 1325(b)(1) would require Debtor to make monthly payments in the amount of \$1386.33 as 100% of Debtor’s “projected disposable income”.

- (921) *In re Welsh*, 440 BR 836 (Bankr. D. Montana 2010) - Debtor could deduct the monthly payments on debts secured by three automobiles, two ATVs and an Airstream travel trailer in calculating disposable income, even where the retention of those items would not have been “reasonable” under pre-BAPCPA law. “The Trustee’s good faith objection based on their payments to secured claims ignores the fact that payments to secured claims are authorized in the means test at 11 U.S.C. § 707(b)(2)(A)(i) and (iii). The Supreme Court in *Lanning* noted that, for above-median income debtors, the expenses included in § 707(b)(2) are included in the means test. Thus, *Lanning* recognizes that secured claims provided at § 707(b)(2)(A)(iii) are included.”
- (922) *In re Collier*, 2010 WL 2643542 (Bankr. M.D. Al. 2010) – *Lanning* does not preclude determination as to whether proposed secured debt expense is reasonably necessary. Status of debt as “secured” does not automatically make retention of the collateral or payment of the debt reasonable, and court can disallow that deduction where the expense is not reasonably necessary.
- (923) *In re Wing*, 2010 WL 3522260 (Bankr. D. Co. 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).
- (924) *In re Johnson*, 2010 WL 2594354 (7th Cir. 2010) – Debtor’s income was temporarily inflated pre-petition based on receipt of workers compensation payments. “Projected disposable income” would not include these amounts where debtor stopped receiving this income pre-petition, making it “known or substantially certain” as of confirmation that debtor would not have this income.
- (925) *Hildebrand v. Wimberly*, 2010 WL 2571977 (M.D. Tn. 2010) – Starting point for calculating Disposable Income for above median debtor is Current Monthly Income less allowable expenses itemized in Section 707(b)(2)(A)(i). However, Court must then adjust that calculation based on changes in income or expenses that are known or are virtually certain as of the date of confirmation of plan. Lower Court’s strict “mechanical approach” to calculation of projected disposable income was error where debtors were unemployed during prior 6 months but now had employment, making calculation of “disposable income” substantially lower than “projected income”.

5.42 Calculation of Disposable Income – Surrendered Collateral

- (926) *In re Byers*, 501 BR 82 (Bankr. E.D.N.C. 2013) – Debtor cannot take deduction for home mortgage payment where debtor had placed property for sale prior to commencement of case and did not have any intention of retaining property.
- (927) *Morris v. Quigley*, 673 F.3d 269 (4th Cir. 2012) – Debtor cannot deduct secured debt expenses on Form B22 for assets that are to be surrendered in the Chapter 13 Plan.
- (928) *In re Grabarczyk*, 2012 WL 909511 (Bankr. N.D. Ohio 2012) – In calculating disposable income, debtors could not deduct expense for ownership of vehicle or other secured debts that debtors chapter 13 plan proposes to surrender. Debtor not permitted to deduct mortgage obligation on rental property where amount of mortgage payment has already been deducted in determining the net rental income which is been used by debtor’s in calculating Current Monthly Income. Allowing the debtors to deduct the mortgage debt in determining net income and then allowing debtors to again deduct the mortgage expense and calculate Current Monthly Income would oh resulted debtor’s double deduction of this mortgage expense. 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 debtor’s online 49 and line 50 of the form B22C must be added back into the disposable income calculated online 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.
- (929) *Darrohn v. Hildebrand*, Case No. 09-5499 (6th Cir. 2010) – Chapter 13 Debtor may not deduct expense on B22C relating to property that Debtor’s plan intends to surrender.
- (930) *In re Phillips*, 2009 WL 3019815 (Bankr. S.D. Ohio 2009) – Chapter 7 Debtor may deduct expenses on the means test form for payments on secured debt even when the collateral is surrendered as long as the Debtor’s continuing contractual obligations remain unextinguished on the date of the bankruptcy filing.
- (931) *In re Goble*, 401 BR 261 (Bankr. S.D. Ohio 2009) - Chapter 7 Debtor may deduct expenses on the means test form for payments on secured debt even when the collateral is surrendered as long as the Debtor’s continuing contractual obligations remain unextinguished on the date of the bankruptcy filing; additional secured debt payments that Debtor would be required to make in Chapter 13 in order to cure the pre-petition mortgage arrears; and priority claim for real property taxes owed on property to be surrendered.
- (932) *In re Marchionna*, 393 BR 512 (Bankr. N.D. Ohio 2008) – Chapter 13 debtor may not take deductions on Form 22C for future payments on debt secured by real estate which she plans to surrender.
- (933) *In re Thomas*, 395 BR 914 (6th Cir. BAP 2008) – Means test in Chapter 13 is no different than in Chapter 7. Means test is mechanical, formulaic test to calculate “disposable income”. Chapter 13 Debtors entitled to deduct on Means test payments that they were contractually obligated to make on petition date on their secured debt, even though Debtors intended to surrender collateral securing this indebtedness.

5.43 Calculation of Disposable Income - Lien Strips

- (934) *Blaies v. Carroll*, 436 BR 35 (E.D. Mi. 2010) – Debtor may not deduct monthly mortgage payments on B22 where mortgage is entirely

unsecured. The B22C allows deductions only for payment of secured claims. Where the mortgage is entirely unsecured, Section 506 prevents the mortgage from constituting a “secured claim” and the amount of the payment cannot be deducted as a payment on a “secured claim”.

- (935) *In re Terrell*, 2009 WL 1586753 (Bankr. N.D. Ohio 2009) – Chapter 13 Debtor is entitled to deduct payments on Means Test payments on Second Mortgage that Plan proposes to strip and pay as unsecured claim. Citing *Hildebrand v. Thomas*, Court concluded that there is no reason for difference in treatment of lien on collateral to be surrendered versus lien to be stripped in Chapter 13 Plan. Debt was “contractually due” on Petition Date. Therefore, Debtor entitled to take secured debt deduction for that mortgage obligation.

5.44 Calculation of Disposable Income – Automobile Ownership Expense

- (936) *Drury v. U.S. Trustee*, Case No. 15-1441 (9th Cir. BAP 2016) – Debtor who does not own vehicle and has no legal liability or obligation to pay loan may take automobile ownership expense if debtor’s continued possession and use of vehicle is contingent on debtor making payments and debtor will lose possession unless debtor continues payments. Debtor’s sister purchased car in sister’s name because debtor lacked credit to purchase car. Debtor exclusively drove car and paid loan payment each month. Car ownership expenses for purposes of means test deduction are not limited to those for which debtor is legally obligated as long as payment is requirement for retention of vehicle and lender could repossess vehicle if payments are not made.
- (937) *Ransom v. FIA Card Services, N.A.*, 2011 WL 66438 (2011) – Debtor who does not have an automobile payment (either loan or lease) cannot take standard “ownership” expense on the Means Test.
- (938) *In re Kimbro*, 2011 WL 383067 (6th Cir. 2011) – Citing *Ransom*, Debtor who does not have an automobile payment (either loan or lease) cannot take standard “ownership” expense on the Means Test.
- (939) *In re Meyers*, Case No. 09-77897 (Bankr. E.D. Mi. 2010) – Debtor entitled to ownership expense for vehicle owned by debtor’s brother where brother resided with debtor and debtor provided most, if not all, of brother’s support. Any repairs to the vehicle, and its eventual replacement, would be paid by the debtor in light of brother’s lack of any income.

5.45 Calculation of Disposable Income – Automobile Operating Expense

- (940) *In re Molina*, 2015 WL 1243664 (Bankr. E.D. Ky. 2015) – “Older Vehicle” allowance in IRS Manual does not allow debtors with older cars to deduct operating expense in excess of IRS Local Standard. Code incorporates IRS national and local standards and does not incorporate IRS Manual.
- (941) *In re Melander*, 506 BR 855 (Bankr. D. Mn. 2014) – Debtor can deduct transportation amount in excess of allowance where amount to be deducted was reasonable under circumstances of case.
- (942) *Drummond v. Luedtke*, 2014 WL 1386618 (9th Cir. BAP 2014) - Above median debtor who owns unencumbered vehicle over 6 years old or with more than 75,000 miles may not claim additional \$200.00 monthly operating expense for old car. Additional “old car” allowance in IRS manual is not incorporated into the allowed deductions under Section 707(b)(2). IRS Handbook can be helpful to interpret National Standards and Local Standards to extent Handbook does not conflict with Bankruptcy Code, but Handbook cannot create a deduction where none exists under either the Standards or the Code.
- (943) *In re Maura*, 2013 WL 1730040 (Bankr. E.D. Mi. 2013) – Operating expense may be claimed for up to two operating automobiles. Debtors with three automobiles not permitted to multiply single car allowance by three and claim higher amount. Although IRS Collection Guidelines permit taxpayer to claim operating expenses for every vehicle for which operating is reasonable, Section 707 limits operating expense to two vehicles. IRS guidelines cannot overrule express statutory limit.
- (944) *In re Warden*, 2012 WL 1414277 (Bankr. E.D. Wis. 2012) – Single debtor who owned and drove two vehicles entitled to operating expense deduction for both cars. Deduction is not limited to reasonableness of retention of second vehicle. Further, it appeared reasonable for debtor to retain both cars as both were older and debtor retained both cars in the event one became inoperable.
- (945) *In re Thiel*, 446 BR 434 (Bankr. D. Idaho 2011) - Debtors are limited to transportation expenses allowed by Local Standards when actual transportation expenses are greater.
- (946) *In re Reynolds*, 2011 WL 3651347 (Bankr. N.D. Ohio 2011) – Debtor is not permitted to claim operating expenses for vehicles that do not run. Fact that “operating expense” is one of the items in the IRS Allowances does not mean that debtor automatically can take deduction where debtor does not have the corresponding expense. Court rejected Debtor claimed operating expense deduction for three cars, two of which did not run; and also claimed additional \$200 expense for two of the non-running vehicles based on ages of vehicles.
- (947) *In re Hargis*, 2011 WL 1651235 (Bankr. D. Utah 2011) – Above median debtor who owns unencumbered vehicle over 6 years old or with more than 75,000 miles may not claim additional \$200.00 monthly operating expense for old car. Additional “old car” allowance in IRS manual is not incorporated into the allowed deductions under Section 707(b)(2).
- (948) *In re Schultz*, Case No. 11-40490 (Bankr. W.D. Mo. 2011) – Above median debtor who owns unencumbered vehicle over 6 years old or with more than 75,000 miles may not claim additional \$200.00 monthly operating expense in calculating projected disposable income on B22.
- (949) *In re VanDyke*, 2011 WL 1833186 (Bankr. C.D. Ill. 2011) – Debtor who owns older, high mileage car that is paid in full is not permitted to take “old car” deduction of \$200.00. IRS Collection Guideline that generally allows deduction of up to \$200 where the debtor owns

a car that is more than 6 years old or has more than 75,000 miles is not part of the National or Local Standards imported by Section 707(b), which set the caps for ownership and operating expenses. As vehicle operating expenses are specifically part of the National and Local Standards, any “excess” operating cost cannot be “special circumstance”. Further, Debtor is not permitted to take operating expense for a vehicle that is inoperable and of negligible value there will be no actual expense incurred and, under *Ransom*, the expense cannot be applicable if it is not actually incurred.

5.46 Calculation of Disposable Income – Automobile Title Liens

- (950) *In re Carroll*, Case no. 12-41350 (Bankr. D. Idaho 2013) – Automobile “Title Loans” are not “Ownership Expenses” for purpose of means test. “Ownership” expenses are those expenses incurred to purchase or lease automobile. Title Loan taken out by debtor on automobile owned free and clear was not for purpose of acquiring or leasing vehicle. Loans were short term, high interest loans used by debtor to “help make ends meet”. Debtor does have to repay loans if debtor wants to retain vehicle. Debtor can take secured debt deduction for payment, but cannot use Title Loan to gain benefit of larger deduction for “ownership expense”.

5.47 Home Maintenance Expense

- (951) *In re Barbutes*, 2010 WL 3522420 (Bankr. M.D. Tn. 2010) – Section 707(b)(2)(A) provides several instances where debtor may be entitled to deduct expenses in excess of IRS standards. Section 707(b)(2)(A)(iv)(A) reference to “actual expenses for home energy costs” allows additional deduction for home energy costs that are actually documented, but does not allow additional deduction for general maintenance expenses even if otherwise documented.

5.48 Calculation of Disposable Income – Health Care Expenses

- (952) *In re Barbutes*, 2010 WL 3522420 (Bankr. M.D. Tn. 2010) – Section 707(b)(2)(A)(ii)(II) allows debtor to deduct actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family. Debtor's expenses related to operation and maintenance of swimming pool allowed as deduction where wife's chronic back problems necessitated upkeep of the pool for her continued therapy. Gym membership allowed as medical expense where debtor testified that Debtor must maintain excellent physical health for his position as a pilot, and Wife needed to exercise to keep her back healthy for her employment.

5.49 Calculation of Disposable Income – Health Savings Account

- (953) *In re Maura*, 2013 WL 1730040 (Bankr. E.D. Mi. 2013) – Debtors cannot deduct contributions to HSA where debtor has already deducted “National Standards: Health Care”. Allowing debtor to deduct for both health care and for HSA contributions would amount to double deduction. Debtors can deduct HSA contributions only to extent those contributions exceed the National Standard for health care that has already been claimed.

5.50 Calculation of Disposable Income – Education Expenses

- (954) *In re Maura*, 2013 WL 1730040 (Bankr. E.D. Mi. 2013) – Student loan payments are not special circumstances as those expenses are not beyond the control of the debtor and are not extraordinary or exceptional. Parochial school expense is not special circumstance where debtors failed to prove no alternative. UST presented expert testimony that Dearborn Public Schools presented a reasonable alternative that could meet educational requirements of children and there was no evidence that public schools had levels of safety and security that were lower than the parochial schools involved. Preference for religious education is not special circumstance. Further, Congress specifically allowed school expenses not to exceed \$1775 per year per child, indicating that Congress specifically intended to provide limited amount which debtors could claim for purposes of means test.
- (955) *In re Golematitis*, 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.
- (956) *In re Peterlin*, 457 BR 630 (Bankr. N.D. Ohio 2011) – In the bankruptcy context private school tuition is considered a luxury expense that amounts to a debtor requiring his or her creditors to donate toward his children's education absent evidence that the available public schools are insufficient or that children have special needs that require private school. Debtor had at least one car loan that would be paid off within plan term, allowing for additional payments to creditors.
- (957) *In re Wise*, 2011 WL 2133843 (Bankr. S.D. Ill. 2011) – Creditors should not bear the burden of putting a debtor's adult child through college. Means test does not allow debtor to deduct future expenses for child's college tuition.

5.51 Calculation of Disposable Income – Housing Deduction

- (958) *In re Haroldson*, 2016 WL 3034794 (Bankr. D. Colo. 2016) – Debtor cannot claim housing allowance for house owned solely by non-filing spouse free and clear. Debtor does not pay either mortgage or rent and so cannot deduct any “expense” allowance. Following *Ransom*, debtor who does not actually incur expense in a particular category is not entitled to deduct the allowance for that category.
- (959) *In re Currie*, 2015 WL 5474475 (Bankr. C.D. Ill. 2015) – Debtor who does not have mortgage or rent expense but who pays taxes and insurance is entitled to full housing expense. IRS publishes single housing standard that is not broken down into separate components of ownership expenses versus operating expenses. Allocation that appears on the UST web page is creature of UST, not IRS. Debtor who has tax expense cannot be limited to just “operating” allowance as statute allows debtor full allowance set by IRS. Court rejected argument that *Ransom* precluded debtor from taking ownership expense as debtor does not have ownership expense, holding that if debtor has either

ownership or operating expense, debtor gets full allowance.

- (960) *Sturm v. U.S. Trustee*, 2011 WL 2746059 (N.D. Ohio 2011) – Debtor may not be entitled to standard housing deduction where debtor does not have actual rent or mortgage payment, based on Supreme Court holding in *Ransom*.
- (961) *Sturm v. U.S. Trustee*, 2012 WL 4344605 (Bankr. N.D. Ohio 2011) – On remand after district court ruling, see above, Debtor could not deduct mortgage/rent component of standard housing allowance where debtor did not have mortgage or rent expense. House owned solely by non-filing spouse with debt solely in non-filing spouse name did not constitute mortgage expense for purposes of triggering allowance.

5.52 Calculation of Disposable Income – Retirement Loan Repayment

- (962) *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.
- (963) *In re Maura*, 2013 WL 1730040 (Bankr. E.D. Mi. 2013) – Debtors cannot deduct on means test payments on retirement loans or voluntary contributions to retirement accounts. Loan payments are not involuntary deductions that are required for employment. While contributions are required to participate in employer's "matching contribution" program, they are not conditions of employment itself.
- (964) *In re Weinert*, 2013 WL 1694482 (Bankr. E.D. Mi. 2013) – Debtor cannot deduct on means test payments on retirement loan. Repayment of retirement loan is not "other necessary expense" within scope of Section 707. Participation in plan is voluntary and ability to borrow is at employee's discretion. Means test form expressly excludes from "other necessary expenses" contributions to retirement plans, and there is no reason to distinguish between contributions and loan payments. Continued repayment of loan is not condition of employment, where failure to repay loan would trigger tax consequence but no adverse employment actions.

5.53 Calculation of Disposable Income – Child Care Expenses

- (965) *In re Knorr*, 2013 WL 5550209 (Bankr. M.D. Pa. 2013) – Debtor cannot deduct child care expense incurred to allowed debtor to be adult supervisor at scout camp. Child care expenses are deductible only to extent reasonably necessary to allow debtors to meet health and welfare or for production of income. Expense to allow debtor to pursue charitable work is not a reasonably necessary expense in context of chapter 13.

5.54 Expense Reimbursements

- (966) *In re Reinhart*, Case No. 16-21042 (Bankr. E.D. Wis. 2016) – Expense reimbursements paid to employee are included in calculating Current Monthly Income for purposes of determine whether debtor is "above" or "below" median. CMI includes all income received by a debtor without consideration of whether income is taxable. Debtor can deduct correlating expenses in calculating Disposable Income after determination is made that debtor is above median. Chapter 13 Plan did not comply with Section 1325(b) where debtor, if expense reimbursements are included, is above median yet plan proposed only 36 month term.

5.55 Social Security Income

- (967) *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.
- (968) *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.
- (969) *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.
- (970) *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.
- (971) *Beaulieu v. Ragos*, 2012 WL 5292949 (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.

- (972) *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
- (973) *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.
- (974) *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.
- (975) *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.
- (976) *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.
- (977) *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).
- (978) *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.
- (979) *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.
- (980) *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.
- (981) *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.
- (982) *In re Olquin*, 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.
- (983) *In re Wilson*, 397 BR 299 (Bankr. M.D.N.C. 2008) – Social security benefits paid to non-filing spouse are not included in debtor’s calculation

of CMI.

- (984) *Carpenter v. Ries*, 614 F.3d 930 (8th Cir. 2010) – Social Security benefits are not property of estate pursuant to 42 USC Section 407. Although “property of the estate” as defined in Section 541 is broad, Section 541 cannot supersede the express limitations of the Social Security Act. Benefits received under the Social Security Act pre-petition retain excluded from estate as long as proceeds are in segregated account. Debtor’s right to exempt only the “right to receive” benefits does not preclude holding that funds that have already been received and cannot be exempted under Section 522(d)(10) are nonetheless not property of the estate in the first instance without regard to whether the funds are subject to exemption. Section 407 operates as a complete bar to the forced inclusion of past and future social security proceeds in the bankruptcy estate.

5.56 Pension Income

- (985) *In re Briggs*, 2010 WL 4272585 (Bankr. N.D. Ohio 2010) – Income received by debtor from State Pension is included in calculation of CMI. Although pension income is exempt from reach of creditors, CMI does not distinguish between exempt and non-exempt sources.

5.57 Disability Income

- (986) *Blausey v. U.S. Trustee*, 552 F.3d 1124 (9th Cir. 2009) – CMI includes private disability benefits. Calculation of CMI excludes only Social Security payments and payments to victims of war crimes and terrorism. Statute does not expressly exclude disability income, so income must be calculated in determining CMI.

5.58 Foster Care Income

- (987) *In re Hite*, 2016 WL 4626124 (Bankr. W.D. Va. 2016) – Parents of severely disabled adult child who receive “Medicaid Benefit Waiver” (MBW) payments are not required to include those payments in calculating Current Monthly Income. Under MBW program, rather than place individuals who would qualify for institutional care at Medicaid expense in facilities, MBW causes funds to be transferred from Social Security to the States and other authorized agencies which then use the funds to provide benefits to caregivers. Debtors elected to care for child and parents received MBW payments through a Virginia Medicaid approved provider that pays Medicaid benefits to debtors. Source of funds was SSI which are excluded from calculation of CMI. Fact that funds are funneled through outside agencies or that SSI covers between 50% and 83% of cost, with State making up remainder, did not convert the funds into something other than benefits under Social Security Act. CMI is not limited to SSI benefits received directly from federal government. Section 1325(b) also excludes from calculation of disposable income any “foster care” payments to extent reasonably necessary for support of the dependent. Although bankruptcy code does not define “foster care” payments, other federal legislation including Internal Revenue Code and Medicaid include care providers who live with the qualified beneficiary are considered “foster care” providers including individuals related to the recipient.

5.59 Adoption Assistance Payments

- (988) *Adinolfi v. Meyer*, 543 BR 612 (9th Cir. BAP 2016) – Adoption Assistance and Child Welfare Act of 1980 was created to assist families who adopt special needs children from foster care. Each state receives funds from federal government under Social Security Act and supplemental federal matching funds to subsidize multiple programs including Adoption Assistance program. Individuals who qualify under State law for assistance receive benefits consisting of 50% federal funding, 37.5% state funding and 12.5% county funding. Payments are administered and paid by state agency, not federal government. Adoption Assistance payments constitute a “benefit” under the Social Security Act for purposes of excluding income from calculation of Current Monthly Income. “Benefits under” the Social Security Act does not required that benefits be exclusively under the control of Social Security Administration. Social Security encompasses multiple programs, some of which are exclusively federally funded and others such as Medicaid and Adoption Assistance which are partially funded by SSI and partially by state or local governments, while others provide reimbursement of state costs of administration of programs including unemployment compensation and child support collection. Most natural reading of “benefits under the Social Security Act” is benefits received subject to the authority of and in accordance with the Social Security Act. Adoption Assistance, while only partly funded by SSA, is benefit under SSA as program itself exists as result of provision of SSA and SSA administers program for benefit of federal government. Further, Congress knew when it drafted BAPCPA and the exclusion for Social Security payments that Social Security encompassed all types of payments and programs, and yet did not choose to draw any distinction between programs wholly or only partially funded by SSA or based on whether Federal or State Government administered the program. Nothing in exclusion from CMI requires that payments be made from or y the federal government.

5.60 Unemployment Income

- (989) *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.
- (990) *In re Winkles*, 2010 WL 2680895 (Bankr. S.D. Il. 2010) – The Social Security Act did not mandate that the states adopt an unemployment compensation system. When the Act was passed, Congress rejected the idea of a uniform national unemployment insurance system, preferring instead to preserve the autonomy of the states to adopt their own systems. The Social Security Act merely provides financial incentives as a way of encouraging the states to implement and administer an unemployment compensation program. Although states receive funds from the federal government to help defray the costs of administering its unemployment compensation program, unemployment benefits are provided for and paid by the State. Unemployment compensation paid to debtor is not a benefit “received under the Social Security Act,” and must be included in calculation of CMI on From B22.

- (991) *In re Overby*, Case No. 10-20602 (Bankr. W.D. Mo. 2010) – Unemployment compensation is not a benefit received under Social Security Act and therefore must be included in calculation of Current Monthly Income.
- (992) *In re Shankland*, Case No. 10-33320 (Bankr. E.D. Ca. 2010) – Unemployment Compensation paid by the State of California is not a benefit under Social Security Act but instead is a benefit paid by the State under its unemployment compensation law. Unemployment received in 6 months pre-petition must be included in calculating Current Monthly Income.
- (993) *In re Winkles*, 2010 WL 2680895 (Bankr. S.D. Il. 2010) - Unemployment compensation is not a benefit received under Social Security Act and therefore must be included in calculation of Current Monthly Income.
- (994) *In re Kucharz*, 418 BR 635 (Bankr. C.D. Il. 2009) - Unemployment compensation is not a benefit received under Social Security Act and therefore must be included in calculation of Current Monthly Income.
- (995) *In re Meyers*, Case No. 09-77897 (Bankr. E.D. Mi. 2010) – Unemployment compensation received by debtor’s brother who lived with debtor must be included in income component of means test. Fact that brother’s unemployment compensation ended after date of filing of case did not permit removal of income from means test, as petition date is the correct date from which to draw the figures used in the means test, and the means test is not a fluid calculation to be updated as circumstances change.

5.61 Railroad Retirement Income

- (996) *In re Scholz*, 447 BR 887 (9th Cir. BAP 2011), *affd*, 699 F.3d 1167 (9th Cir. 2012) – Railroad Retirement Act benefits, while in the nature of Social Security, are not excluded from calculation of CMI.

5.62 Projected Disposable Income – Firefighters Retirement

- (997) *In re Charron*, Case No. 2016 WL 3003144 (Bankr. E.D. Mi. 2016) – Although Firefighter’s Pension is similar to and in lieu of Social Security, benefits are not “under” Social Security Act and cannot be excluded in calculating disposable income.

5.63 Projected Disposable Income – Civil Service Retirement System

- (998) *In re Moose*, 2012 Bankr. LEXIS 1175 (M.D.N.C. 2012) – Benefits paid under Civil Service Retirement, although in nature of Social Security, are not Social Security and so are not excluded in calculating disposable income.

5.64 Child Support Income

- (999) *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.

5.65 “In Kind” Income

- (1000) *In re Perez*, Case No. 15-31645 (Bankr. E.D. Wis. 2016) – “In kind” income received by debtor is not “income” for purposes of calculating Disposable Income even where value of income is included in taxable income. Debtor worked for a car dealership. Employer provided debtor, at no cost, with a car for personal use. Dealer included value of car usage in taxable income at end of year. However, debtor did not receive any cash or other spendable income from the car. Court compared definition of “income” in dictionary, IRS Code, and Census Bureau standards and concluded that while definitions are not co-extensive, Census Bureau definition which excludes “in kind” income from calculation of household income made most sense, as Debtor could not use the value of the automobile to pay creditors and forcing debtor to include value of automobile in calculation of disposable income would artificially increase her “income” available for creditors leaving debtor unable to make payments out of actual income.

5.66 Self-Employed Debtor

- (1001) *In re Hoffman*, 2014 WL 2118435 (Bankr. D. Mn. 2014) – Self-employed debtor must calculate CMI using gross income. Although From B22 refers to gross income less expenses, Code does not allow deduction of expenses in determining CMI.
- (1002) *In re Harkins*, 2013 WL 1830838 (Bankr. S.D. Ohio 2013) – Self-employed debtor must use gross income in calculating current monthly income.
- (1003) *In re Romero*, 2013 WL 241742 (Bankr. S.D. Fla. 2013) – Self-employed debtor is entitled to deduct business expenses in determining whether debtor is above or below median income. Precluding debtor from deducting expenses produces artificial calculation of income that does not actually exist. Debtor was below median and had 36 month applicable commitment period even though, without deducting expenses, debtor would have been above median.
- (1004) *In re Grabarczyk*, 2012 WL 909511 (Bankr. N.D. Ohio 2012) – Debtor not permitted to deduct mortgage obligation on rental property where amount of mortgage payment has already been deducted in determining the net rental income which is been used by debtor's in calculating Current Monthly Income. Allowing the debtors to deduct the mortgage debt in determining net income and then allowing debtors to again deduct the mortgage expense and calculate Current Monthly Income would oh resulted debtor's double deduction of this mortgage expense. 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 debtor's online 49 and line 50 of the from B22C must be added back into the disposable income calculated online 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.

5.67 Debtor as Owner of Corporation

- (1005) *In re Geiger*, 2010 WL 2756760 (Bankr. N.D. Ohio 2010) – Current Monthly Income for Debtor who is shareholder of closely held corporation is to be determined by amount of money received by Debtor from Corporation, not Corporation's Gross Income and Expenses. Bankruptcy Code will respect corporate formality absent sufficient evidence to warrant piercing corporate veil. Although Corporation did not maintain separate bank account and all income to corporation was deposited into Debtor's personal account and all business expenses were paid from that account. Corporation was "S" Corporation and taxed to Debtor at personal tax level. Gross income to business is not money debtor "receives" because business expenses need to be accounted for. When dealing with corporation, those business expenses must be deducted from gross income before determining funds paid to Debtor. Because corporate net income after expense was such that debtor was below median income, debtor could be in 36 month plan.

5.68 Household Size

- (1006) *In re Skiles*, 2014 WL 92477 (Bankr. N.D. Ohio 2014) – 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.
- (1007) *In re Gaut*, 2014 WL 293556 (Bankr. N.D. Ohio 2014) – 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.
- (1008) *In re Ford*, 509 BR 695 (Bankr. D. Idaho 2014) – Household size requires nuanced view of economic unit test to determine who is a member of debtor's household. While debtor had no legal obligation to provide support for step-son, debtor was "deeply committed" to supporting step-son. Economic unit requires some sort of financial dependence on debtor or financial support by debtor, or intermingling of income and expenses. Facts indicated that step-son, while receiving some support from debtor, was not dependent on debtor's support and informal, quasi-custody arrangement was not sufficient to make step-son part of debtor's economic unit.
- (1009) *In re Johnson*, 2013 WL 1344561 (Bankr. M.D.N.C. 2013) – Debtor could not include child who lived away at college and who had part time job sufficient to pay her rent, food and utilities in apartment she shared with other students. Younger daughter also was member of household where she lived in a dorm and all of her college expenses including room and board were covered by scholarships. Applying economic unit test of household, court concluded that older daughter was financially independent while debtor provided significant assistance to younger child in from of additional spending money, transportation costs, insurance, medical expenses, and cell phones. Youngest daughter stayed in debtor's home several nights per month during which debtor provides food and groceries for daughter to take back to school.
- (1010) *In re VanDyne*, 2011 WL 3664551 (Bankr. N.D. Ohio 2011) – Adult child who lives at home and attends college is considered member of household for determination of household size.

- (1011) *In re Robinson*, 2011 WL 864397 (Bankr. E.D. Va. 2011) – Courts have used three different methods of determining household size – Census Bureau “heads on beds” approach, which counts everyone who occupies a housing unit without regard to family or economic relationship; IRS “dependent” approach which counts only people who meet IRS standard as a “dependent”; and “economic unit” approach which looks at number of individuals who form an “economic unit”. Court adopted “economic unit” approach as leading to the most accurate and realistic calculation of projected disposable income given economic realities of debtor’s family. Single debtor had four kids. Kids spent, on average, 3-4 nights per week at debtor’s house. Court determined that 4 kids staying on half-week basis was equivalent of 2 kids staying “full time”. Debtor’s household consisted of three people, debtor and the equivalent of two “full time” kids.
- (1012) *In re Meyers*, Case No. 09-77897 (Bankr. E.D. Mi. 2010) – Debtor who resides with her 47 year old brother and 58 year old sister had household of 3 regardless of whether Census Bureau test is used (all of the people who occupy a housing unit) or the “dependent” test is used (household includes only those members for whom debtor provides support) where debtor’s siblings are unemployed and debtor provided most, if not all, of their living expenses and support.
- (1013) *In re Smith*, Case No. HG 08-00850 (Bankr. W.D. Mi. 2008) – “Household” means all persons, related or not, who reside in the same housing unit as does the Debtor. Adopting the Census Bureau’s definition of household, Court expressly rejected argument that “household” should include or take into account only those for whom the Debtor provides financial assistance or support. Therefore, Court concluded that “Debtors’ household” included not only Debtors, but also Debtors’ adult daughter and grandchild who also resided in their home, regardless of whether Debtors provided any support or financial assistance to their daughter and granddaughter. Court did not reach the issue of whether “household” included adult child who lived elsewhere but maintained a room and occasionally ate meals at the Debtor’s home; or the Debtor’s adult child who lived away at college but returned home for summers.

5.69 Variance From IRS Allowances

- (1014) *In re Smith*, 2010 WL 3270019 (Bankr. N.D. Ohio 2010) – Debtor can take deduction on B22A for amounts that exceed IRS allowances only where Debtor demonstrates that IRS standards do not accurately represent what debtor should be permitted to deduct. Debtor’s attempt to claim housing and utility expenses in excess of IRS standards rejected where Debtor did not offer any justification for those increased expenses.

5.70 Special Circumstances

- (1015) *In re Fudge*, 2016 WL 285449 (Bankr. E.D. Mi. 2016) – Special circumstances are those that put a strain on the debtor’s budget and that arise from circumstances beyond debtor’s control. Debtor’s student loans, and the payments required on those loans, are not special circumstances. Debtor voluntarily borrowed money to fund her education to improve her job prospects. No event outside the control of the debtor necessitated decision to incur loans in first instance.
- (1016) *In re Robinson*, 2013 WL 5567265 (Bankr. S.D. Miss. 2013) – Debtor’s non-filing spouse’s spending habits are not “special circumstance”. Non-filing spouse’s income must be included in calculating means test even if spouse does not contribute to household expenses. Even after “marital adjustment” debtor had disposable income on means test. Fact that debtor’s spouse chose to send money on himself rather than contribute to household did not overcome presumption of abuse.
- (1017) *In re Weinert*, 2013 WL 1694482 (Bankr. E.D. Mi. 2013) – Presumption of abuse under Section 707(b)(2) can be rebutted only by showing of “special circumstances” such as serious medical condition or call to active military duty. Special circumstances are limited to events which require debtor to incur additional expenses or adjustments to income. Retirement plan loans are not special and are common events in bankruptcy cases.
- (1018) *In re Barbutes*, 2010 WL 3522420 (Bankr. M.D. Tn. 2010) – Special circumstances are limited to those that put a strain on debtor’s budget and arise from circumstances normally beyond debtor’s control and that are highly unusual. Debtor’s high monthly home maintenance expense is “special circumstance” on peculiar facts of this case, where Debtor works 2 jobs; debtor’s wife also works full time notwithstanding serious and chronic back pain; debtor’s home was built in the 1970’s and requires serious and well- documented maintenance expenses, and debtor’s daughter and disabled son-in-law live with debtor. Debtor lacked any reasonably alternative to the necessary maintenance where debtor’s house was fully encumbered and debtor lacked any reasonably ability to sell house or to obtain alternative housing. Court would allow IRA contributions to be considered special circumstances where Debtor is 52 years old and has a limited amount of years he is employable in his profession as a pilot. Debtor’s wife suffers from chronic back pain as a result of her work as a hygienist and is also likely limited in her employment life span. Today’s America, which promotes not relying solely on Social Security requires some retirement savings. For these debtors, the court finds the Roth IRA contributions are allowed as a special circumstance for which there is no reasonable alternative.
- (1019) *In re Meyers*, Case No. 09-77897 (Bankr. E.D. Mi. 2010) – Debtor rebutted presumption by filing affidavit of special circumstances alleging that debtor’s brother, who lived with debtor, received unemployment but did not provide any of those funds for household expenses. With that income excluded, debtor had income below Section 707(b) presumption.
- (1020) *In re Roach*, Case No. 09-76184 (Bankr. E.D. Mi. 2010) - Congress did not provide exhaustive list of special circumstances but did provide examples including serious medical condition or call to armed forces, which are events that are beyond debtor’s control and put a strain on debtor’s budget. 401-k loan payments are not “special circumstances”. There is nothing unusual or special for either borrowing money from a retirement plan or loan payments. Loan payments were not taken by deducting from debtor’s pay, but were voluntarily paid by deductions from debtor’s checking account.
- (1021) *In re Burggraf*, Case No. 10-32297 (Bankr. N.D. Ohio) - Bankruptcy Code does not specifically define what constitutes a “special

circumstance” as applied to Section 707(b)(2)(B)(i) but does provide two examples: (1) a serious medical condition; or (2) a call to active duty in the Armed Forces. A condition giving rise to a “special circumstance” should be limited to situations which not only put a strain on a debtor’s household budget, but they arise from circumstances normally beyond the debtor’s control. Expenses incurred merely at debtor’s discretion are not a special circumstances. Expenses will be “special circumstances” only if debtor had no reasonable alternative but to incur the expense and the obligation must be highly unusual, and of the type not normally encountered by most debtors. Debtors’ student-loan debt does not result from unforeseen circumstances or from events beyond their reasonable control. Non-dischargeability of obligation is not “special circumstance”. Debtors’ ineligibility for relief under Chapter 13 is not “special circumstance” as Debtors still have available relief under Chapter 11.

- (1022) *In re Conlee*, 2010 WL 3210974 (Bankr. N.D. Ohio 2010) – Required payments on non-dischargeable student loans are not “special circumstances” for above median debtor with a presumption of abuse under Section 707(b)(2).
- (1023) *In re Smith*, 2010 WL 3270019 (Bankr. N.D. Ohio 2010) – Debtor may rebut presumption of abuse that results from “means test” calculation by proving special circumstances which justify an additional expense or adjustment to income coupled with the lack of any reasonable alternative to making the adjustment. Special circumstances normally involve circumstances beyond the debtor’s reasonable control, or result from circumstances highly unusual in character and of the type not normally encountered by most debtors. Section 707(b)(2)(B) presents two examples of “special circumstances” - (1) a serious medical condition, or (2) a call to active duty in the Armed Forces.
- (1024) *In re Taylor*, 2009 WL 2872997 (Bankr. N.D. Ohio 2009) –The Code does not define “special circumstances” but does provide two examples: (1) a serious medical condition; or (2) active duty in the armed forces. To qualify as a “special circumstance”, debtor’s situation must have “traits in common” with one of these two categories. Debtor must also provide (I) documentation for such expense or adjustment to income; and (II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable. Debtor failed to demonstrate any allowable “special circumstance” where the “special circumstance” was the failure of Debtor’s former wife, to hold the Debtor harmless on the mortgage obligation on the marital residence and the former wife’s subsequent Chapter 7 filing. An obligation based on a divorce agreement related to the marital homestead “can hardly be said to have, in any meaningful way, traits in common with a serious medical condition or call to active duty in the Armed Forces.” Therefore, this additional obligation, while unfortunate, does not constitute a “special circumstance” to rebut the presumption of abuse.

5.71 Marital Adjustment – Non-filing spouse

- (1025) *In re Montalto*, 537 BR 147 (Bankr. E.D.N.Y. 2015) – Non-filing spouse’s payments on retirement loan were not deductible under marital adjustment as proceeds of loan were deposited into joint household account and debtor could not itemize what portion of funds were then used for household expenses versus those used solely for non-filing spouse benefit.
- (1026) *In re Lancaster*, Case No. 14-16672 (Bankr. D. Md. 2015) – “Marital adjustment” to calculation of Current Monthly Income is fact dependent taking into account the specific facts of the marital relationship and the debts to be discharged, whether debts were incurred solely by debtor before marriage, what benefits were obtained in exchange for debts, is non-filing spouse legally obligated to repay debts and will benefit from plan payments that reduce liability. First and Second mortgage payments are not within marital adjustment. While house was owned solely by spouse and spouse was solely responsible for payments, payments provided home for debtor and the debtor’s minor children and neither debtor nor the children had any other residence. Payments for auto loan on automobile owned solely by spouse and on which spouse was solely liable not excluded as debtor failed to carry burden to show that expenses were not household expenses, as debtor did not present any evidence that auto is not used by either debtor or otherwise for benefit of children. Payroll deductions for insurance, taxes and retirement were not excluded by marital adjustment, where it appeared that insurance deduction provided health insurance for entire household and tax withholdings benefitted household as it allowed debtor to withhold less from her income. Retirement account contribution by spouse may not be benefit to household but debtor failed to demonstrate that 401-k loan payments should be excluded as debtor failed to present any evidence of uses of proceeds of loans. If loans were used for household expenses, then repayment is not excluded by marital adjustment. Debtor also failed to meet burden with regard to spouse’s individual credit cards as debtor did not present evidence as to what cards were used for in first instance, and to extent cards were used for household purposes payments are not excludable.
- (1027) *U.S. Trustee v. Holmes*, 2013 WL 4446947 (Bankr. M.D. Pa. 2013) – Debtor could exclude money of debtor’s same sex partner in calculating current monthly income. Although debtor and partner had significant joint debt, debtor not required to include income of partner not used for payment of joint debts. Debtor and partner had no legal relationship that would warrant combination of assets and liabilities, and personal expenses of partner were not expenses of debtor nor payment of obligations for the support of debtor. Partner was separate individual with separate property rights and liabilities which the court must respect.
- (1028) *In re Persaud*, 486 BR 251 (Bankr. E.D.N.Y. 2103) – Debtor cannot deduct as marital adjustment educational expenses paid by non-filing spouse, from separate account of non-filing spouse, for expenses of debtor’s and non-filing spouse’s children. Section 101(10A)(B) includes in CMI amounts regularly paid for expenses of debtor’s dependents. Section 101(10A)(B) does not focus on the source of the funds used to pay those expenses, but on the nature of the expenses paid. Educational expenses for debtor’s children constitute expenses regularly paid for the benefit of debtor’s dependents.
- (1029) *In re Tosvard*, 2013 WL 122508 (Bankr. D. Colo. 2013) – Chapter 13 Debtor permitted to take marital adjustment for mortgage payments made by non-filing spouse on property owned solely by non-filing spouse. Property owned by non-filing spouse before parties were married. Debtor and spouse maintained separate checking accounts and did not co-mingle funds. Payments by non-filing spouse were for his individual debts related to his individual property and could be excluded from CMI calculation.

- (1030) *Bankruptcy Administrator v. Gregory*, 471 BR 823 (Bankr. E.D. N.C. 2012) – Income of non-filing spouse used over preceding 6 months to renovate debtor’s and spouse’s former to prepare for possible sale can be excluded from calculation of Current Monthly Income. Section 101(10A)(B) sweeps in payments made by third parties for expenses of debtor or debtor’s dependents. Capital improvements to home in which neither debtor nor dependents resided are not “household expenses” of debtor or dependents.
- (1031) *Sturm v. U.S. Trustee*, 2011 WL 2746059 (N.D. Ohio 2011) – Debtor is entitled to marital adjustment for mortgage payment made by non-filing spouse for property owned solely by the non-filing spouse. Debtor can take marital adjustment for non-filing spouse’s credit card payments to the extent that the cards were used solely for the benefit of the non-filing spouse’s separate expenses. To the extent the credit cards may have been used to purchase goods that benefitted the debtor, those payments are not included in the marital adjustment. If the credit cards have “mixed use”, some solely for non-filing spouse and some for the benefit of the debtor, the court must determine the respective proportions of use and allocate the marital adjustment to reflect that proportion. If the non-filing spouse is not a dependent of the debtor, then the sole expenses of the non-filing spouse are not “regularly contributed for the support of the debtor or a dependent of the debtor” as CMI is defined.
- (1032) *Sturm v. US Trustee*, 2012 WL 4344605 (Bankr. N.D. Ohio 2012) – following remand from district court (see above), Court found that deduction for expenses of non-filing spouse were proper where expenses were for personal use and not household expenses. Expenditures by spouse were for collectibles and comic books purchase on the internet, and charitable contributions which were personal in nature. Evidence did not indicate how much of expenses were household versus personal which precluded large reduction in amount claimed as marital adjustment. However, spouse could not claim marital deduction for expenses for operation of motor vehicle where debtor charged those expenses and was also claiming marital deduction for credit card payments.
- (1033) *In re Rable*, 445 BR 826 (Bankr. N.D. Ohio 2011) – Debtor was not entitled to downward “marital adjustment” in his household income based on first and second mortgage payments made by non-debtor spouse made from her monthly income even though non-debtor spouse was the sole owner of the property and was solely responsible for the payments. Debtor lived with spouse and the mortgage payments represented payments regularly made by non-debtor party toward household expenses of debtor. Non-debtor mortgage payments on home where debtor also resided were not expenses that were “purely personal” to the debtor.
- (1034) *In re Braathun*, 2011 WL 1299605 (Bankr. S.D. Iowa 2011) – “Current Monthly Income” of a debtor does not include income of non-filing spouse except to the extent regularly contributed to the household expenses of the debtor. Allowable deductions under Section 707(b)(2)(A) are limited to those expenses actually paid by the debtor and do not include any monthly expenses or debt payments that are solely those of the non-filing spouse.

5.72 Cases Converted From Chapter 13

- (1035) *In re Lassiter*, 2011 WL 2039363 (Bankr. E.D. Va. 2011) – Section 707(b)(1) applies in case converted from Chapter 13. Debtors who convert their cases are deemed to have filed under the *converted to* chapter, as of the date the original petition was filed. Provision of Section 707 that allows court to dismiss case filed by an individual debtor under Chapter 7 encompasses cases originally filed under Chapter 7 and those converted to Chapter 7. Debtors with income above median and who are presumptively abusive could re-convert or Court would dismiss case.
- (1036) *In re Chapman*, 447 BR 250 (8th Cir. BAP 2011) - Section 707(b)(1) provides, in pertinent part, that: the court, . . . may dismiss a case *filed by an individual debtor under this chapter* [Chapter 7] whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter [Chapter 7]. Section 707(b)(1) identifies the type of debtor ("filed by an individual debtor"), rather than limits how the case arrived in Chapter 7. Further, limiting the abuse analysis only to individual debtors who originally "filed under" Chapter 7 would create a potential loophole for debtors to "abuse" the system by filing and failing under Chapter 13 in order to avoid the § 707(b) analysis upon conversion. Courts would be left with using "equitable powers" to curb such abuses. Cases, that were filed under Chapter 13 and later converted to Chapter 7, are considered to be "filed under" Chapter 7 for the purposes of § 707(b)(1).

5.73 Standing to Seek Dismissal Under 707(b) for Abuse

- (1037) *Cousins v. Westbrook*, 2014 WL 5771424 (Bankr. N.D. Ohio 2014) – If debtor’s CMI times 12 is equal to or less than the applicable median income, only the Judge or United States Trustee can file motion to dismiss under Section 707(b). Plaintiff failed to produce any evidence to rebut debtor’s evidence regarding income and marital status. Debtor presented evidence that debtor was legally separated from her spouse leaving a household of one person; and her income was entirely social security which is excluded from the calculation of current monthly income.
- (1038) *In re Gandy*, 2013 WL 3712425 (Bankr. E.D. Tn. 2013) – Where debtor’s statement of current monthly income indicates that debtor’s CMI multiplied by 12 is less than the applicable median income, creditors lack standing to request dismissal under Section 707(b). Determination is made on face of from B22. Creditor could not circumvent restrictions on ability to allege abuse by alleging that debtor falsely underreported income. Creditors are not authorized to go behind the figures listed in the Chapter 7 Statement of Current Monthly Income and Means–Test Calculation for the purposes of filing a § 707(b) motion. What is reflected on the face of the filed document is the basis by which a determination under § 707(b)(6) and/or (7) is made. Creditor’s remedy, if at all, was to seek contest discharge under Section 727.

G. Debtor’s Duties

5.74 Section 521 Generally

- (1039) *Miller v. Mathis*, 2016 WL 1569329 (Bankr. E.D. Mi. 2016) – Section 521 imposes on debtor duty to file documents including statement disclosing reasonably anticipated changes in income or expenses over 12 months post-petition; cooperate with trustee as necessary to enable trustee to perform duties; and to surrender property of estate and all books and records relating to property of estate. However, Bankruptcy Code does not authorize Chapter 7 Trustee to recover damages against Debtor for alleged breaches of duties. Code also does not warrant implied cause of action. Court will imply cause of action where none expressly exists if plaintiff is member of class for whose special benefit the statute was enacted; there is indication of legislative intent to create or deny a remedy; whether an implied cause of action would be consistent with underlying purpose of legislative scheme; and whether cause of action is one relegated to state law such that it would be inappropriate for federal court to imply cause of action. Ultimate issue is whether Congress intended to create private cause of action, and private cause of action will not be implied lightly or haphazardly. Debtor's duty to file schedule of changes in income and expenses is intended primarily to benefit creditors to evaluate whether debtor should be in Chapter 13 rather than Chapter 11 and to evaluate exemptions that are based on reasonably necessary for support of debtor or dependent. While information is helpful to trustee, trustee is not member of class that is primarily intended to benefit. Cooperation with trustee, while helpful to trustee, is intended to benefit creditors by allowing trustee to collect, liquidate and administer assets and pay claims. Similarly, duty to surrender property to trustee is intended to benefit creditors, not trustee. Nothing in Section 521 demonstrates any legislative intent to create cause of action by trustee against debtor for violation of those duties. Court provides other adequate remedies including dismissal or conversion, orders compelling performance, sanctions including monetary relief to induce debtor to perform duties, and denial of or revocation of discharge.

5.75 Amendments to Schedules – Continuing Duty to Disclose

- (1040) *In re Haber*, 2016 WL 1211339 (Bankr. S.D. Ohio 2016) – Debtor has continuing duty to amend schedules to correct inaccuracies as of the petition date to correct those errors. However, Code does not impose on debtor duty to amend schedules that are accurate when case is filed to disclose changes that occur post-petition. Debtor disclosed ownership of property including value and liens. After trustee abandoned the property, property was sold and generated proceeds above amount owed on mortgage. Debtor had no duty to amend schedules to disclose surplus proceeds as proceeds did not exist as of petition date and proceeds were not, in any event, property of estate as underlying property had already been abandoned by trustee.
- (1041) *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.
- (1042) *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.
- (1043) *Parsons v. Southern Tennessee Medical Center*, 2014 WL 2159749 (E.D. Tn. 2014) – Debtor's action under Americans with Disabilities Act precluded where debtor suffered injury that caused disability and gave rise to cause of action occurred at least two years prior to filing bankruptcy. Even if debtor did not know of cause of action at time case commenced, she certainly knew about it prior to closing of bankruptcy case yet failed to disclose. Debtor has continuing duty to disclose including all potential causes of action even if not known at time case filed.
- (1044) *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. Whether a particular asset should be available to satisfy creditors may be contested issue, and disclosure allows that issue to be resolved as part of orderly bankruptcy process. Debtor failed to amend schedules to disclose post-petition cause of action for automobile accident. Debtor judicially estopped from pursuing undisclosed cause of action.
- (1045) *EEOC v. JPMorgan Chase Bank*, 2013 WL 944200 (S.D. Ohio 2013) – Debtor has continuing duty to disclosed changes in financial condition and assets during pendency of case. Debtor wrongfully failed to schedule pre-petition tort claim initially and wrongfully failed to amend schedules to disclose that claim at any point during bankruptcy case.
- (1046) *Dickerson v. Federal Express*, 2010 WL 8747316 (W.D. Tn. 2010) – Debtor has continuing duty to disclose changes in financial conditions and affairs during pendency of case. Debtor's duty to disclose financial condition does not end when schedules are filed with court. Debtor failed to advise court or trustee of employment discrimination claim that arose after confirmation of plan but prior to completion. Debtor judicially estopped from pursuing cause of action post-discharge.

5.76 Amendments to Schedules – Motion to Compel Amendments to Correct Errors

- (1047) *In re Wyse*, 2015 WL 5144888 (Bankr. N.D. Ohio 2015) – Creditor can file Motion to Compel Debtor to Amend Petition and Schedules to correct erroneous designation of creditor. Debtor's Schedules identified Creditor as an unsecured creditor. Creditor held judgment against debtor and had obtained security interest based on that judgment in pending state court personal injury action brought by debtor against third

party. On Motion of the creditor, the Court required Debtor to file amended Schedules D and F to properly reflect creditor's secured status.

H. Involuntary Petitions

5.77 Elements

- (1048) *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.
- (1049) *In re Hicks*, 2011 WL 6000861 (Bankr. E.D. Tn. 2011) – Involuntary petition requires at least three petitioning creditors including any additional creditor who timely joins the petition, who hold claims that are not contingent as to liability or the subject of a bona fide dispute as to liability or amount, and where the non-contingent undisputed claims aggregate at least \$14,425.00 more than the value of any liens on property of the Debtor securing the claims; and that as of the petition date, debtor was not generally paying debts as they came due; and that the alleged debtor be eligible for relief under the chapter in which the involuntary petition was filed.
- (1050) *Huszt v. Huszt*, 2011 WL 2745818 (E.D. Mi. 2011) – Section 303(b)(1) requires involuntary petition be signed by three entities that hold claims. Where multiple creditors hold a single claim, the creditors will be treated as single entity unless the three joint creditors also hold separate, distinct claims. Judgment that awarded damages to three parties “jointly and severally” was not readily severable and did not create three separate claims, but constituted a single claim. Therefore, three claimants were treated as a single “claim” for purposes of Section 303(b)(1).
- (1051) *In re Lundeen*, Case No. 09-51277 (Bankr. S.D. Ohio 2009) – Creditor filing Involuntary petition under §303(b) must hold a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount. If there is a legitimate legal or factual basis for the alleged debtor not to pay the claim, then the creditor is not eligible to file an involuntary petition. If there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts, then the petition must be dismissed. In deciding whether the claims of the petitioning creditors are subject to a legitimate dispute of law, and must make an inquiry sufficient to determine whether a legitimate question exists about the application of law to the undisputed facts presented. Petitioning creditors bear burden to establish a prima facie case that a bona fide dispute does not exist, by a preponderance of the evidence, at which point the burden of proof then shifts to the putative debtor to show otherwise. In light of the ambiguities and Chapter 11 Plan of related corporate defendants, there was a bona fide dispute as to whether the corporate principle was liable for the obligations owed to the Petitioning Creditors. Bankruptcy Court, and dismissing Involuntary Petition, was not ruling on the merits of the claims or making a determination as to whether the individual corporate officer was or was not liable to the Petitioning Creditors, but only that in light of the ambiguities in the confirmed Plan, there is a bona fide dispute on the issue of personal liability. Section 105 does not allow the court to contravene the express requirements of section 303 that the claims of the petitioning creditors not be subject to bona fide dispute.
- (1052) *In re Fallon Luminous Products Corporation*, Case No. 09-35581 (Bankr. E.D. Tn. 2010) – Petitioning creditors bear burden of proof that debtor is generally not paying debts asked those debts become too. Creditors must show more than the existence of a few unpaid debts. Court will consider proportion of debts being paid, though in terms of proportion of number of creditors being paid and proportion of that kind of dollar value, being paid. Calculations will include creditors who are not currently pressing debtor for payment if the debts are due. Court can't conclude that a debtor is failing to pay debts as those debts come due even where debtor has failed to pay only one debt if that makes up a substantial portion of debtor's overall liability. Court will examine number of unpaid claims; amount of unpaid claims; materiality of nonpayment; and the debtor's overall conduct of financial affairs; as well as whether debtor has terminated business operations and whether past due debts are substantially large in comparison to assets. Alleged debtor had substantial past-due obligations including large judgment which was currently on appeal, alleged debtor had been having business difficulties for at least five years, and secured creditors were owed more than \$23,000,000 on which debtor had defaulted in payments. Debtor has generally not been paying debts as those debts come due sufficient to warrant entry of an order for relief under chapter 7.

5.78 Credit Counseling – Section 109(h)

- (1053) *In re Sims*, 2009 WL 161343 (Bankr. D. Kansas 2009) - Credit counseling requirement of Section 109(h)(1) does not apply in involuntary case.

5.79 Petitioning Creditors

- (1054) *In re Miller*, 2013 WL 1092116 (Bankr. E.D. Tn. 2013) – Involuntary petition requires three qualified unsecured creditors holding claims in the aggregate of at least \$14,425. Additional unsecured creditors can join the petition after filing for purposes of meeting requirements for number of petitioning creditors and dollar amount of debt.
- (1055) *In re Hicks*, 2011 WL 6000861 (Bankr. E.D. Tn. 2011) – Involuntary petition requires at least three petitioning creditors including any additional creditor who timely joins the petition, who hold claims that are not contingent as to liability or the subject of a bona fide dispute as to liability or amount, and where the non-contingent undisputed claims aggregate at least \$14,425.00 more than the value of any liens on property of the Debtor securing the claims; and that as of the petition date, debtor was not generally paying debts as they came due. Claim is subject to bona fide dispute if there is either a genuine issue of material fact that bears on liability or a meritorious contention as to the application of law to the undisputed facts. Congress intended to disqualify a creditor if there is any legitimate basis for the debtor not paying the debt. Court does not need to resolve dispute, it is sufficient that a dispute exists. Court can conduct limited analysis to determine whether and objective legal basis for the dispute exists. Deficiency balances remaining after foreclosure sales will not be subject to bona fide dispute absent evidence of irregularity, misconduct, fraud or unfairness. Fact that successful bid is far less than appraised value, without more, is not

sufficient to create bona fide dispute.

- (1056) *In re Lundeen*, Case No. 09-51277 (Bankr. S.D. Ohio 2009) – Petitioning Creditors must hold claims that are not contingent as to liability or subject of a bona fide dispute as to liability or amount. If there is a legitimate legal or factual basis for the alleged debtor not to pay the claim, then the creditor is not eligible to file an involuntary petition. A creditor is not qualified to file an involuntary petition whenever there is any legitimate basis for the debtor not paying the debt, whether that basis is factual or legal. The bankruptcy court is expected to make an inquiry sufficient to determine whether a legitimate question exists about the application of law to the undisputed facts presented. Creditors whose claims arose out of a Confirmed Chapter 11 Plan of a related company lacked standing to bring involuntary petition where confirmed Chapter 11 Plan was unclear as to whether confirmation of the Plan extinguished Debtor's personal liability.

5.80 Debts Subject to Bona Fide Dispute

- (1057) *In re Freedom Filler, LLC*, 2013 WL 3379365 (Bankr. N.D. Ohio 2013) – Whether there is a bona fide dispute depends upon “there [being] either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts. Debts were not subject to good faith dispute where terms of contract required delivery of machines that Creditors bought from Debtor but which had not been delivered. Nothing in contract excused delivery of machines where law regarding use of machines by purchasers may have changed, but law had not changed regarding sale or delivery of machines. Contract clause that purports to allow Debtor to refuse to deliver for any reason, or no reason, would render contract illusory but would not provide basis for Debtor to retain funds paid by creditors without delivering machines, and would at least create cause of action for unjust enrichment which is sufficient basis for involuntary petition.
- (1058) *In re Miller*, 2013 WL 1092116 (Bankr. E.D. Tn. 2013) – Debt is subject to bona fide dispute if there is genuine issue of material fact that bears on debtor's liability or a meritorious contention as to the application of law to undisputed facts. Court is not required to resolve any dispute, only to determine whether there is a legitimate legal basis to challenge the claim. Debts were not subject to bona fide dispute where debtor admitted signing promissory notes and admitted that debtor had not made payments. Debtor's assertion that notes were not intended to be cross collateralized with loans to debtor's husband were not supported by documents themselves which unequivocally cross-defaulted and cross collateralized loans, such that Lender properly called a default on Debtor's Notes based on husband's defaults on individual cross-defaulted notes. Evidence also indicated that debtor had failed to pay property taxes on collateral which constituted independent default, and that debtor had stopped paying on her notes because of disputes with the Bank and as a result the loans were in default.
- (1059) *In re Miller*, 487 BR 875 (Bankr. E.D. Tn. 2012) – Claim is subject to a bona fide dispute if there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts. bankruptcy court is expected to make an inquiry sufficient to determine whether a legitimate question exists about the application of law to the undisputed facts presented. Debtor must have legitimate legal or factual basis to challenge the claim. State court denial of lender's Motion of r Summary Judgment does not conclusively establish that claim is subject to bona fide dispute. Denial of Summary Judgment is not disposition of any aspect of the claim, but is merely pretrial order that case can proceed to trial. Further, Debtor's counsel acknowledged to State Court Judge at Summary Judgment hearing that even if Debtor's defenses were valid, Debtor nonetheless owed lender the principal sum of the note, which was \$2.8 million. Debtor also had a number of other loans owed to the same creditor as to which Debtor had not lodged any defenses, and on which Debtor owed at least \$350,000.00, which is sufficient to support the involuntary petition.
- (1060) *In re Seventh Avenue Properties*, 2013 WL 655871 (Bankr. M.D. Tn. 2013) – Involuntary Petition established that bona fide dispute did not exist. Debtor was partnership consisting of four partners. One of the partners borrowed money on behalf of the partnership, apparently without knowledge of the other partners. Each partner was agent of partnership and actions taken on behalf of partnership bound partnership even in absence of knowledge of remaining partners. Further, party who borrowed money was managing general partner and remaining partners previously agreed to allow partner to manage day-to-day affairs of business. Alleged debtor did not present any evidence that partner was not authorized to borrow money on behalf of partnership.
- (1061) *In re Hicks*, 2011 WL 6000861 (Bankr. E.D. Tn. 2011) – Claim is subject to bona fide dispute if there is either a genuine issue of material fact that bears on liability or a meritorious contention as to the application of law to the undisputed facts. Congress intended to disqualify a creditor if there is any legitimate basis for the debtor not paying the debt. Deficiency balances remaining after foreclosure sales will not be subject to bona fide dispute absent evidence of irregularity, misconduct, fraud or unfairness. Fact that successful bid is far less than appraised value, without more, is not sufficient to create bona fide dispute.
- (1062) *In re Lundeen*, Case No. 09-51277 (Bankr. S.D. Ohio 2009) – If there is a legitimate legal or factual basis for the alleged debtor not to pay the claim, then the creditor is not eligible to file an involuntary petition. A creditor is not qualified to file an involuntary petition whenever there is any legitimate basis for the debtor not paying the debt, whether that basis is factual or legal. The bankruptcy court is expected to make an inquiry sufficient to determine whether a legitimate question exists about the application of law to the undisputed facts presented. Creditors whose claims arose out of a Confirmed Chapter 11 Plan of a related company lacked standing to bring involuntary petition where confirmed Chapter 11 Plan was unclear as to whether confirmation of the Plan extinguished Debtor's personal liability.

5.81 Not Generally Paying Debts as They Come Due

- (1063) *In re Miller*, 2013 WL 1092116 (Bankr. E.D. Tn. 2013) – Creditor must show more than a general showing that debtor's financial condition and debt structure results in a few unpaid debts. Court must consider proportion of debt being paid to total debt as well as the number of creditor being paid as a percentage of the total creditor body. However, where the debtor fails to pay just one creditor or one debt that makes

up a substantial portion of debtor's liability, debtor will be found to not generally paying debts as they come due. Evidence indicated that debtor was in default on four separate loans from Bank as well as a least obligation to another petitioning creditor and an unsecured obligation owed to a private creditor. Although debtor demonstrated that she was generally paying living expenses and day-to-day creditors, the large majority of her debt was owed to the petitioning creditors and far outweighed the total debt owed to debtor's day-to-day creditors such as credit cards and utility services.

- (1064) *In re Seventh Avenue Properties*, 2013 WL 655871 (Bankr. M.D. Tn. 2013) – Finding that debtor is not paying debts as they come due requires more than a general showing of financial condition or debt structure, and more than the existence of a few unpaid creditors. Court will consider the number of debts; the timeliness of payments on past due obligations; the amount of debts long overdue; the material nature of the non-payment; the length of time during which the debtor has been unable to meet large debts; any reduction in the debtor's assets; and the debtor's overall financial situation. Debtor was generally not paying debts where debtor had not made payments to primary lender in over a year; debtor's property in Florida was almost lost due to unpaid property taxes for years 2008-2010, and tax sale was avoided at last minute only because taxes were paid by insider who had not yet been reimbursed. Homeowners association were past due on at least two parcels and debtor had no liquid assets to pay any past due or current amounts owed. Financial condition has continued to deteriorate and debtor has dissipated over \$1 million in assets. Debtor was not paying debts as they came due as required in Section 303.

5.82 Secured Versus Unsecured Creditors

- (1065) *In re Miller*, 2013 WL 1092116 (Bankr. E.D. Tn. 2013) – Involuntary proceeding can be brought only by unsecured creditor, or by secured creditor if amount of debt exceeds value of collateral by sufficient amount to meet the dollar threshold set out in Section 303. Debt will be unsecured as to debtor if debtor does not have ownership interest in property otherwise pledged as collateral. Creditor holding loan secured by property that was owned solely by third party was not "secured creditor" for purposes of Debtor's involuntary case, even where Debtor had also signed the Deed of Trust.

5.83 Eligible for Relief Under Chapter in Which Involuntary Petition Filed

- (1066) *In re Medpoint Management, LLC*, 528 BR 178 (Bankr. D. Az. 2015) – Involuntary petition against Medical Marijuana Dispensary dismissed where putative debtor would not have been eligible for relief under Chapter 7. Chapter 7 Trustee would not have been able to take possession of property of estate or to liquidate property without violating Federal Controlled Substances Act.

5.84 Burden of Proof

- (1067) *In re Seventh Avenue Properties*, 2013 WL 655871 (Bankr. M.D. Tn. 2013) – Petition granted where alleged debtor failed to file response to Involuntary Petition until night before hearing.
- (1068) *In re Hicks*, 2011 WL 6000861 (Bankr. E.D. Tn. 2011) – If an involuntary petition is not timely controverted, the court shall order relief under the chapter in which the petition was filed. If the petition is controverted, Court must determine whether requirements of Section 303 are met. Petitioning creditors bear burden of proof.
- (1069) *In re Lundeen*, Case No. 09-51277 (Bankr. S.D. Ohio 2009) – Petitioning creditors bear burden to prove that they are qualified to file the Petition. Creditors must establish prima facie case that they hold debts and that are not subject to a bona fide dispute. If creditors meet this burden, putative debtor then bears burden to prove ineligibility of creditors.

5.85 Sanctions

- (1070) *National Medical Imaging, LLC v. DVI Receivables XIV, LLC*, Case No. 15-147 (E.D. Pa. 2016) – Request for punitive damages following dismissal of involuntary petition triggers right to jury trial warranting withdrawal of reference.
- (1071) *In re John Richards Homes Bldg. Co.*, 2013 WL 6097548 (6th Cir. 2013) – Bankruptcy court properly awarded debtor attorney fees and costs incurred in successfully defending involuntary bankruptcy petition. Fees and costs can include additional fees and costs incurred by debtor after dismissal of the underlying bankruptcy case. After court entered initial award of sanctions against petitioning creditor, creditor liquidated all of his assets and purchased home in Florida in attempt to shelter assets from creditors including debtor. Debtor brought subsequent proceedings against creditor to set aside fraudulent transfers of assets and conversion of assets from non-exempt to exempt. Bankruptcy court concluded that additional sanctions were warranted as creditor repeatedly committed perjury in attempting to fend off fraudulent transfer action; creditor actively participated with two related corporations to evade post-judgment garnishment efforts of debtor; and creditor filed bad faith bankruptcy petition in Florida in effort to obtain stay without providing requisite Supersedeas bond. Bankruptcy court erred in awarding punitive damages. While court had authority to do so under Section 105 and court's inherent authority, 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 punitive measure that was beyond authority of court.
- (1072) *Rosenberg v. DVI Receivables, XIV, LLC*, 2012 WL 3990725 (Bankr. S.D. Fl. 2012) – An award of fees and costs, pursuant to 11 U.S.C. § 303(i)(1) requires: (1) the court must have dismissed the involuntary petition; (2) the dismissal must be other than a consent by all petitioners and the debtor; and (3) the debtor did not waive its right to recovery under the statute. Once involuntary case is dismissed, burden shifts to petitioning creditors to present evidence to disallow an award of fees, and there is no requirement that petitioner have acted in bad faith in filing the petition. Award of fees should be made unless petitioners demonstrate otherwise based upon the totality of the circumstances. Fees can include fees and costs incurred by the involuntary debtor in defending an appeal from the bankruptcy court's decision to dismiss an involuntary case. Section 303(i) imposes liability on "petitioners." Petitioning creditor refers to those entities commencing an involuntary

bankruptcy case—whether or not these entities are qualified or authorized to do so and is not limited to person who actually signed the petition but include creditors who cause the filing of the petition. In determining amount, court must consider (1) the time and labor required, (2) the novelty and difficulty of the legal questions, (3) the skill required to perform the legal services properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee for similar work in the community, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorney, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

- (1073) *Adell v. John Richards Homes Building Company, LLC*, 2012 WL 3029643 (E.D. Mi. 2012) – Section 303(i) allows award of reasonable attorney fees when involuntary petition is dismissed. All costs incurred in litigating the fees actions are compensable, including those spent to enforce the judgment or collect the fees. Involuntary debtor entitled to award of fees incurred in having involuntary petition dismissed, and also to fees incurred in attempting to collect that award including fees incurred in having the petitioning creditor’s subsequent bankruptcy proceeding dismissed. Recoverable fees including the fees incurred in the first instance in the bankruptcy case to have the involuntary petition dismissed plus fees incurred in “collateral” actions in other bankruptcy and non-bankruptcy forums to collect that fee award.
- (1074) *In re Huszti*, Case No. 10-65758 (Bankr. E.D. Mi. 2011) – Section 303 allows Court discretion to award reasonable attorney fees and costs where involuntary petition is dismissed. Section 303 creates presumption that fees and costs should be awarded unless petitioning creditor rebuts presumption. Court will consider (1) merits of involuntary petition; (2) reasonableness of actions of petitioning creditors; (3) motivations and objectives behind filing the petition; and (4) any improper behavior of the debtor. Creditor’s allegation that debtors were dishonest in pre-petition dealings with creditors was not sufficient to overcome presumption.
- (1075) *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.
- (1076) *In re Lundeen*, Case No. 09-51277 (Bankr. S.D. Ohio 2009) – Court has the discretion under § 303(i) to award costs or a reasonable attorney’s fee and for damages, including punitive damages, against a Petitioning Creditor who files an involuntary petition in bad faith. Court exercised discretion not to award fees or damages considering the totality of the circumstances, including the credibility of the witnesses and the complexity of the bona-fide-dispute issue in the context of this case. Debtor did not rebut presumption of good faith in favor of the petitioning creditor based on totality of circumstances. Although the Petitioning Creditors were not successful after trial, there was no evidence that they believed when they filed the involuntary petition that the allegations in the petition were untrue.

5.86 Damages Caused to Third Parties - Preemption

- (1077) *Rosenberg v. DVI Receivables XVII*, Case No. 15-2622 (3d Cir. 2016) – Section 303(i) which allows debtor to recover costs, damages and attorney fees against party filing involuntary petition does not preempt state law claims of non-debtors resulting from involuntary petition. Defendant filed involuntary petition against individual and related businesses. After involuntary was dismissed, court awarded debtors damages under Section 303(i). Debtor’s spouse and various affiliated business entities then brought suit against Involuntary Petitioner for tortious interference based on filing of involuntary petition. Preemption is not presumed and will not be found unless Federal Statute contains clear and manifest intent by Congress to preempt the entire field or where Congress specifically provides for preemption. Section 303 lacks any “clear and manifest” intent of Congress to preempt entire field of damages arising out of failed involuntary petition.

I. Notice

5.87 Known Creditors

- (1078) *Palmer v. Wayne County Sheriff*, 2016 WL 3922630 (E.D. Mi. 2016) – Notice in bankruptcy case must be sufficient to satisfy due process, which is satisfied if notice is reasonably calculated to reach interested parties, reasonably conveys all required information and permits a reasonable time for response. Claims of creditors who are not given reasonable notice cannot be constitutionally discharged. If a creditor is known to the debtor, notice by publication is not constitutionally reasonable, and actual notice of the relevant bar dates must be afforded to the creditor. Known creditors are defined as creditors that a debtor knew of, or should have known of, when serving notice of the bar date. Among known creditors may be parties who have made a demand for payment against a debtor in one form or another before the compilation of a debtor’s schedules. Typically, a known creditor may have engaged in some communication with a debtor concerning the existence of the creditor’s claim. This communication by itself does not necessarily make the creditor known. Direct knowledge based on a demand for payment is not, however, required for a claim to be considered “known.” A known claim arises from facts that would alert the reasonable debtor to the possibility that a claim might reasonably be filed against it. Motion to Dismiss denied where record was unclear whether plaintiff was “known” creditor before expiration of claims bar date as Defendant did not proffer any evidence that Defendant was unaware of plaintiff’s claim before plaintiff commenced litigation some months after expiration of claims bar date.

5.88 Unknown Creditors

- (1079) *Palmer v. Wayne County Sheriff*, 2016 WL 3922630 (E.D. Mi. 2016) – Notice in bankruptcy case must be sufficient to satisfy due process, which is satisfied if notice is reasonably calculated to reach interested parties, reasonably conveys all required information and permits a

reasonable time for response. Claims of creditors who are not given reasonable notice cannot be constitutionally discharged. When a creditor is unknown to the debtor, publication notice of the claims bar date may satisfy the requirements of due process. Known creditors are defined as creditors that a debtor knew of, or should have known of, when serving notice of the bar date. Among known creditors may be parties who have made a demand for payment against a debtor in one form or another before the compilation of a debtor's schedules. Typically, a known creditor may have engaged in some communication with a debtor concerning the existence of the creditor's claim. This communication by itself does not necessarily make the creditor known. Direct knowledge based on a demand for payment is not, however, required for a claim to be considered "known." A known claim arises from facts that would alert the reasonable debtor to the possibility that a claim might reasonably be filed against it. Motion to Dismiss denied where record was unclear whether plaintiff was "known" creditor before expiration of claims bar date as Defendant did not proffer any evidence that Defendant was unaware of plaintiff's claim before plaintiff commenced litigation some months after expiration of claims bar date.

VI. **Property of Estate**

A. Defined

6.1 Generally

- (1080) *Title Max v. Northington*, Case No. 16-172 (Bankr. M.D. Ga. 2016) – Debtor has right to redeem pawn transaction over life of Chapter 13 case as long as petition is filed before expiration of the statutory period of redemption. Unlike foreclosure sales, where redemption is not extended beyond 60 days per Section 108, in pawn transaction until expiration of redemption debtor retains full title and ownership of pawned asset. Fact that redemption would expire post-petition does not deprive debtor of ownership interest or prevent debtor from redeeming property through Chapter 13 plan.
- (1081) *Ohio Land Management, LLC. V. Chesapeake Exploration, LLC*, 2016 WL 4430833 (N.D. Ohio 2016) – Obligation to arbitrate arises only when there is valid contract containing arbitration clause. Debtor's lease of property post-petition was invalid as property was property estate and lease was not executed or approved by Trustee. Arbitration clause in lease was invalid as debtor lacked authority to enter into lease in first instance.
- (1082) *In re Abdallah*, 2016 WL 3676637 (Bankr. N.D. Ohio 2016) – Exemptions are determined as of petition date and apply to property in which debtor has interest as of petition date. Where state court prior to commencement of bankruptcy case held debtor's attempts to transfer title to his wife and his mother to be ineffective for lack of delivery of a deed and as violation of Ohio's fraudulent transfer action, as of commencement of case debtor owned property and could claim property as exempt.
- (1083) *In re Stewart*, 2013 WL 5592899 (Bankr. E.D. Mi. 2013) – Whether and to what extent a party has an interest in property is determined by applicable non-bankruptcy law. Personal property of debtor/tenant did not become property of landlord where none of the conditions of lease providing to transfer of title had occurred. Debtor did not abandon leased premises when debtor closed business, as evidence indicated that debtor did not intent to abandon. Closing of business, without more such as surrendering keys, is not abandonment. Debtor had superior property rights to personal property than did lessor, the lender who foreclosed after the lessor defaulted on the mortgage, or the purchaser from the lender after foreclosure. Creditors committed conversion of property by refusing to return property to debtor upon demand.
- (1084) *In re Creekside Senior Apartments, LP*, 477 B.R. 40 (6th Cir. BAP 2012) – "Property of the estate" includes real property and all rights and privileges attached to, and covenants running with, the land. Property consisted of low income apartment complexes, each of which had Low-Income Housing Tax Credits attached to the property. Tax credits provide incentive to develop low-income housing properties in exchange for stream of tax credits, and are conditioned on property maintaining compliance with Tax Credit program requirements. If the property is sold during the term of the tax credits, the purchaser acquires the remaining stream of tax credits as if the prior owner had not sold the property. Tax credits are attached to the property and belong to the owner of the property. Tax credits could not be severed from the property and do not exist separate from ownership of the property, and must be considered in valuing the property itself.
- (1085) *Elswick v. Miller*, 2012 WL 2122170 (E.D. Ky. 2012) – Property of the estate is broad and far-reaching concept and includes every conceivable interest of the debtor, future, non-possessory, contingent, speculative, and derivative. Even a contingent future interest is a legally cognizable interest and is property of the estate. Under Kentucky law, husband had dower interest in property inherited solely by wife during marriage. Although dower interest does not vest or become present interest until and unless wife dies intestate, making it difficult to determine what property may actually be subject to husband's dower interest and impossible to value that interest, the husband's dower interest is nonetheless property of the husband for purposes of property of the estate.
- (1086) *Rankin v. Lavan*, Case No. 09-1087 (6th Cir. 2011) – Undisclosed property rights of debtor become property of estate upon filing. Trustee does not abandon undisclosed property merely by failing to administer property as trustee had no opportunity to pursue or liquidate property.
- (1087) *In re O'Brien*, 2011 WL 10077 (Bankr. W.D. Mi. 2011) – Potential tax refunds to the extent attributable to events prior to commencement of case are property of estate.
- (1088) *Mayer v. Giarmarco, Mullins & Horton, PC.,* 451 BR 702 (E.D. Mi. 2011), *appeal after remand*, 2013 WL 4786826 (Bankr. E.D. Mi. 2013) – Property of Estate does not include property in which Debtor holds only legal title and not an equitable interest. Property held by debtor in constructive trust established prior to commencement of case constitutes trust property in which debtor holds bare legal title. State domestic relations laws regarding spouse's claim to portion of IRA gave rise to equitable claim but equitable claim, without more, does not establish constructive trust. Domestic relations arbitration did establish constructive trust in favor of attorneys. Constructive trust was based on unjust enrichment, as award of portion of IRA to ex-husband was designed to reimburse ex-husband for disproportionate share of divorce expenses, absent which ex-wife would have been unjustly enriched. Further, evidence indicated that portion of IRA that was in

dispute was “recovered” by plaintiff in that she was allowed to retain the funds, such that attorney services produced a “recovery” against which a charging lien could be imposed.

- (1089) *In re Fleming*, 424 BR 795 (Bankr. W.D. Mi. 2010) – Debtor would be required to turn over to Trustee property of estate even if debtor had already divested himself of that property. Section 542 requires turnover to the Trustee of all property of the estate. Debtor’s schedules did not list a potential tax refund and Debtor did not exempt any potential tax refund. When Debtor filed his tax return, it indicated a refund, which was sent directly to the debtor who then spent the money. Debtor cannot relieve himself of duty to surrender property of estate to Trustee merely by divesting himself of it.
- (1090) *In re Burlett*, Case No. 09-57450 (Bankr. E.D. Mi. 2009) – State Court Judgment of Divorce directed that if Husband accepted buyout from employer, the proceeds of the buyout would be paid to Wife in an amount equal to the then unpaid spousal support. Husband filed Chapter 7 six weeks later. The Chapter 7 Trustee demanded turnover of the undisbursed proceeds from the buyout. Bankruptcy Court held that State Court Order which directed that the proceeds be paid directly to Wife to satisfy spousal support impressed buyout proceeds with constructive trust pursuant to Michigan law. Property that has been impressed with a constructive trust by a court in a separate proceeding prepetition does not constitute property of Debtor’s estate. Wife’s entitlement to the proceeds was fixed in the State Court Order and Debtor had an interest in the Buyout funds only to the extent not necessary to satisfy the spousal support obligation.
- (1091) *In re Grady*, 2009 WL 3254435 (Bankr. W.D. Mi. 2009) – Property owned by Debtor’s wholly owned corporate entity does not constitute property of Debtor’s estate. Evidence including receipts, invoices and purchase orders established that the assets were purchased by Debtor’s business and not by Debtor personally.
- (1092) *Guaranty Residential Lending, Inc. v. Homestead Mortgage Co., LLC*, 2008 WL 4093495 (6th Cir. 2008) – Property equitably owned by Debtor as a result of dissolution of corporation revested in corporation and removed from property of estate when corporation was lawfully reinstated. Corporation forfeited corporate privileges for failure to pay annual fees due to state. Upon forfeiture, sole shareholder and president of corporation became owner of an official title to corporate assets. Shareholder then filed proceeding under Chapter 7 but failed to list his beneficial interest in these corporate assets and beneficial assets became property of estate. When the corporation repaid outstanding fees, the corporation was restored to active status and all of its assets were reinvested in the corporation. Therefore, upon reinstatement of the corporation, shareholder no longer had any interest, equitable or legal, in the corporate assets and the corporate assets were automatically removed from Debtor’s estate. Once legal and beneficial titles to the assets revested in corporation, debtor no longer had any personal title to the assets. Bankruptcy trustee cannot hold rights greater than those that could have been held by the Debtor.
- (1093) *Doucet v. Drydock Coal Co.*, 397 BR 36 (Bankr. S.D. Ohio 2008) – Property of estate includes all legal or equitable interests of the Debtor in property as of the commencement of the case. If property is subject to restriction against transfer that is enforceable under state law, that restriction is equally enforceable. Restriction on stock subjecting any transfer to a right of first refusal to other shareholders does not prevent the stock from becoming property of estate, but right of first refusal will be enforceable if Trustee proposes to sell stock.
- (1094) *Incline Energy, LLC v. Stice*, 2009 WL 1975038 (W.D. Ky. 2009) – Property of the estate includes all legal or equitable interests of the Debtor in property as of the commencement of the case. A pre-petition assignment of Debtor’s interest in property will not divest that property from the estate if the underlying assignment is unenforceable as a matter of state law. Debtor’s attempt to assign proceeds of personal injury cause of action was unenforceable as a matter of Kentucky law. Therefore, Debtor’s interest in that personal injury cause of action and in the proceeds of that cause of action remained property of the estate for benefit of creditors.
- (1095) *Wells Fargo Bank, N.A. v. Nelson*, 2009 WL 1651533 (Bankr. S.D. Ohio 2009) – Mortgage on property owned by husband and wife signed by wife with qualifier “signing to release dower” does not create enforceable security interests against wife’s undivided one-half interest. Mortgage does not evidence of intent to convey a security interest in wife’s undivided one-half interest where mortgage signed solely for purposes of releasing wife’s dower interest. Further, wife did not sign and is not obligated on underlying promissory note. Therefore, there is no consideration to support mortgage as to her one-half interest in the property.
- (1096) *In re United Robotics*, Case No. 09-50376 (Bankr. E.D. Mi. 2009) - Pre-petition creditor who held assignment of Debtor’s right to receive ongoing lease payments from lease under which Debtor was lessor violated automatic stay when creditor, post-petition, made demand on the lessee for payment of lease payments directly to creditor. Assignment agreement did not assign to creditor title to the lease or to future lease payments, but rather assigned future lease payments only to the extent necessary to pay the prepetition debt. Court construed “property of the estate” broadly and held that the assignment of the lease payments did not constitute an assignment of an account receivable and did not vest in creditor unencumbered title to either the lease or to the future stream of lease payments. Thus, creditor’s demand that lessee make payments to creditor constituted an attempt to exert possession, custody or control over property of the estate for purposes of collecting a prepetition obligation in violation of section 362.

Note: The District Court stayed pending appeal that portion of the Order that required the creditor to refund to the Debtor the lease payments that the creditor had collected. Creditor demonstrated substantial likelihood that it has a perfected, enforceable security interest in the PPG lease payments; creditor demonstrated risk that, if it is required to pay in the funds without being treated as a secured creditor, the funds will be dissipated and it will suffer resultant irreparable harm; there is little likelihood of harm to others should a stay be granted; and public interests are furthered by a brief stay until the bankruptcy Court is able to ensure that creditor will be treated as a secured creditor pending the outcome of this appeal. *In re United Robotics*, Case No. 09-12591 (E.D. Mi. 2009).

- (1097) *Rhoads v. The Cash Store*, 2009 WL 1636253 (Bankr. E.D. Tn. 2009) – Whether property constitutes property of estate is determined by applicable state law. Pawn agreement grants pawnbroker a perfected possessory lien during duration of pawn contract. If the property is not redeemed at the end of the contract, title defaults to pawnbroker. Debtor did not file bankruptcy until after the pawn contract expired.

Therefore, Debtor's automobile, which was the subject of the pawn and which was in the possession of the pawnbroker, became property of the pawnbroker prior to commencement of case and did not constitute property of estate as Debtor held neither title nor any right of possession.

- (1098) *In re Hatman*, 2009 WL 2855771 (Bankr. M.D. Tn. 2009) – Debtor's right and interest in pawned property during the pendency of the pawn transaction is a right of redemption only. If a debtor fails to redeem within the allowed time (which is 30 days after the date on which the pawn transaction is to be paid), then the pawnbroker acquires full and absolute title to the pawned goods. Where the pawn ticket identified three separate payoff dates, with each later date requiring a larger payment, the "date on which the pawn transaction is to be paid" would be the latest of the three dates. Debtor who filed Chapter 13 10 days after the third payoff date had, at the time of commencement of the case, a right to redeem post-petition, making the pawned items property of the estate. However, Section 108 extends the redemption period only for 60 days from the petition date. Therefore, Debtor could not redeem by paying over the life of the Chapter 13 Plan. Debtor given 15 days to redeem from date of Court Order, failing which ownership of the property would pass to the pawnbroker.
- (1099) *In re Osterwalder*, 407 B.R. 291 (Bankr. N.D. Ohio 2009). Debtor failed to establish his non-ownership of assets in his possession by way of defense to turnover motion.
- (1100) *In re Two Springs Membership Club*, 408 B.R. 453 (Bankr. N.D. Ohio 2009). Previously filed tax lien had priority over later-attaching judgment lien, even though liens attached simultaneously.
- (1101) *H.S. Die & Engineering, Inc. v. Ford Motor Company*, Adv. No. 09-4815 (Bankr. E.D. Mi. 2009) – Michigan Moldbuilders Lien Act and Michigan Special Tools Lien Act permit the manufacturer of a die, mold or from to perfect a lien in the item by (1) permanently recording the builder's name, street address, city and state; and (2) filing a financing statement. Sufficiency and duration of financing statement determined by applicable state law. Name of debtor in financing statement will be sufficient if it "substantially" identifies the debtor even if it has minor errors or omissions. A financing statement that fails sufficiently to provide the name of the debtor in accordance with section 9503(1) is seriously misleading.

6.2 Social Security Benefits

- (1102) *Carpenter v. Ries*, 614 F.3d 930 (8th Cir. 2010) – Social Security benefits are not property of estate pursuant to 42 USC Section 407. Although "property of the estate" as defined in Section 541 is broad, Section 541 cannot supersede the express limitations of the Social Security Act. Benefits received under the Social Security Act pre-petition retain excluded from estate as long as proceeds are in segregated account. Debtor's right to exempt only the "right to receive" benefits does not preclude holding that funds that have already been received and cannot be exempted under Section 522(d)(10) are nonetheless not property of the estate in the first instance without regard to whether the funds are subject to exemption. Section 407 operates as a complete bar to the forced inclusion of past and future social security proceeds in the bankruptcy estate.

6.3 Jointly Owned Property

- (1103) *Peet v. Checkett*, Case No. 15-2040 (8th Cir. 2016) – Filing of bankruptcy by one joint tenant with right of survivorship does not terminate joint tenancy. When other joint tenant passes away during bankruptcy case, estate becomes vested with entire property under survivorship clause. Joint tenancy requires unity of interest title, time and possession. Language in *Harris v. Viegelahn* that filing "immediately transferred" debtor's assets to bankruptcy estate does not actually transfer anything and unities of title and time remain as if bankruptcy case never occurred.
- (1104) *Gold v. Demeter*, 2015 WL 6437654 (Bankr. E.D. Mi. 2015) – 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.
- (1105) *Peet v. Ceckett*, 2015 WL 1810496 (8th Cir. BAP 2015) – Bankruptcy filing by one joint tenant does not sever joint tenancy. Debtor and her parents owned assets as joint tenants with rights of survivorship. After debtor filed bankruptcy, her parents passed away and Chapter 7 trustee sought to sell assets for benefit of estate. Court rejected debtor's contention that bankruptcy filing severed joint tenancy such that property was then owned by her and parents as tenants in common, with parent's share passing to other beneficiaries through will.
- (1106) *Rhiel v. Central Mortgage Co.*, 2014 WL 8276561 (Bankr. S.D. Ohio 2014) – Section 363 allows trustee to sell property belonging to debtor and non-debtor jointly where selling property would produce benefit to estate that outweighs detriment to other owners. Sale of property would benefit estate where property was valued at \$105,000.00 which, after costs, would generate sufficient proceeds to estate to produce dividend to unsecured creditors. However, sale would cause significant hardship to other owner were other owner lived in property as his principal residence with his wife and 2 children; debtor did not reside at the property; and the other owner maintained all financial responsibility for the property. Property value was substantially less than amount owed on mortgage, such that non-debtor would not suffer any financial loss from the sale of the property although sale could increase the amount of a deficiency claim against non-debtor. Non-owner would incur additional costs in relocating himself and his family; risk of losing family home of 10 years has adversely affected owner's health and would cause additional loss of his standing in the ethnic and religious community. Combined economic and non-

economic losses would be substantial. Sale would produce dividend to unsecured creditors of no more than 5% of allowed claims which is an insignificant benefit compared to loss that would be suffered by non-debtor.

- (1107) *Baumgart v. Laurie*, 2011 WL 3879507 (Bankr. N.D. Ohio 2011) – Section 363(h) allows sale of interest of debtor and joint tenant if (1) partition in kind of such property among the estate and such co-owners is impracticable; (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners; (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power. Trustee demonstrated existence of each element where property consisted of single family residence that cannot be partitioned; sale of undivided one-half interest would produce significantly lower price given limited market for one-half ownership of single family home; and property was not used for production of energy. However, record did not demonstrate that benefit of sale for estate would far outweigh adverse impact on joint owner as required for summary judgment.
- (1108) *Drown v. Dollar Bank, FSB*, 437 BR 253 (Bankr. S.D. Ohio 2010) – Property owned as of date of petition by debtor and non-filing co-owner is presumptively property of estate only to extent of debtor's interest. Property of estate would not normally include property interest of non-filing co-owner. However, if debtor and co-owner had reached an agreement prior to the commencement of the case that the co-owner would transfer the co-owner's interest to the debtor upon the happening of a specific condition, then the debtor acquired an equitable interest in the property as of the date of that agreement and, upon the occurrence of the condition, the full property interest would become property of the estate.
- (1109) *In re Olson*, Case No. 09-66979 (Bankr. E.D. Mi.), *aff'd*, 2010 WL 4386543 (E.D. Mi. 2010) – Annuity purchased by non-filing spouse from lump sum settlement arising from motorcycle accident was jointly owned by debtor and by non-filing spouse where specification page of annuity contract identified debtor and non-filing spouse as co-owners of the annuity. Debtors one half interest in the annuity is property of the estate, regardless of the source of funds used to purchase the annuity.
- (1110) *In re Kipling*, 2010 WL 2584191 (Bankr. E.D. Ky. 2010) – Bankruptcy Court lacks jurisdiction to order non-debtor joint tenant to convey title to debtor joint tenant, even if reason for proposed transfer would be to benefit estate. Court could not compel non-debtor-husband to quit-claim his interest to debtor-wife for purposes of facilitating a mortgage restructuring.
- (1111) *In re Musilli*, Case No. 06-55963 (Bankr. E.D. Mi. 2009) – When property is held as joint tenants, presumption exists that each party is entitled to half of the proceeds of the property. Therefore, when Debtor lists an asset owned jointly by Debtor and third party, presumption is that Debtor owns one half of the asset and the value of that one half becomes property of the estate. Presumption may be overcome if creditor or trustee can prove that Debtor contributed more of the funds to the jointly owned asset. Conversely, Debtor can rebut presumption if Debtor can prove that co-owner contributed all or practically all of the money in the asset. Where Debtor made substantial deposits to the Cash Management Account from his own funds, those funds constituted property belonging to the Debtor which becomes property of the estate. Further, one half of the funds which were deposited into the account from a separate jointly held account also became property of the Debtor and, therefore, property of the estate. Trustee could trace \$76,100 of balance of \$110,744.36 in the CMA to Debtor individually (either personal funds or one-half of funds transferred from joint account). Trustee was entitled to recover \$76,100 for benefit of estate.
- (1112) *Yoppolo v. Missler*, 2009 WL 2163534 (Bankr. N.D. Ohio 2009) – Section 363(h) permits Trustee to sell Debtor's interest in jointly owned property free and clear of interests of other owners if (1) Debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety; (2) partition in kind of such property among the estate and such co-owners is impracticable; (3) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners; (4) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and (5) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power. Trustee bears burden of proof of each element of the sale under section 363(h). Trustee sought to sell Debtor's remainderman interest, which would not take effect as an estate in possession until the death of the "life in being". Trustee's sale under section 363(h) would not result in sale of property free from the interest of the life tenant. Given the already partitioned state of title (divided between life estate and remainder interest), trustee failed to demonstrate that a partition is not practical. Trustee also failed to show that a sale of only the Debtor's interest in property would realize significantly less for the estate as Trustee could not demonstrate that there was any prospective purchaser for property where there was no present right to possess the property and title would be subject to the interests and rights of the life tenant. Finally, Trustee failed to demonstrate that the remainderman interest could be sold for more than the proportionate amount of the lien on the property. Therefore, trustee failed to demonstrate that the benefit to the estate would exceed the harm suffered to the remainderman.

6.4 Treasury Bonds

- (1113) *Gold v. Demeter*, 2015 WL 6437654 (Bankr. E.D. Mi. 2015) – Treasury 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.

6.5 Community Property

- (1114) *Shapiro v. Harajli*, 2012 WL 255326 (Bankr. E.D. Mi. 2012) – Section 521(a)(2) includes “community property”. Michigan is not “community property” state. As such, Section 521(a)(2) is not applicable to property interests located in Michigan. Community property is limited to property acquired during the marriage and located in Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas and Washington.

6.6 Insurance Policies

- (1115) *In re Licking River Mining , LLC*, 2016 WL 3251890 (Bankr. E.D. Ky. 2016) – Liability insurance policies owned by the debtor are property of the estate. Whether the proceeds of that policy are property of estate depends on facts of each case and specific language in the policy itself.
- (1116) *In re Birmingham Cosmetic Surgery, PLLC*, 2015 WL 1404296 (Bankr. E.D. Mi. 2015) – Debtor’s malpractice insurance policy is property of estate as policy is contractual relationship between debtor and the insurer. Court would not lift stay to allow injured party to receive proceeds of insurance policy where insurer had appealed the judgment where insurer complied with state law requirements for stay pending appeal. Even if Bankruptcy Court lifted stay, injured party could not demand payment of insurance pending outcome of appeal, rendering request for stay relief moot.

6.7 Insurance Proceeds

- (1117) *In re Licking River Mining , LLC*, 2016 WL 3251890 (Bankr. E.D. Ky. 2016) – Liability insurance policies owned by the debtor are property of the estate. Whether the proceeds of that policy are property of estate depends on facts of each case and specific language in the policy itself. When a debtor’s liability insurance policy provides direct coverage to the debtor the proceeds are property of the estate, because the proceeds are payable to the debtor. Further when the liability insurance policy only provides direct coverage to the directors and officers the proceeds are not property of the estate. However, when there is coverage for the directors and officers and the debtor, the proceeds will be property of the estate if depletion of the proceeds would have an adverse effect on the estate to the extent the policy actually protects the estate’s other assets from diminution. Lastly, when the liability policy provides the debtor with indemnification coverage but indemnification either has not occurred, is hypothetical, or speculative, the proceeds are not property of the bankruptcy estate. Policy at issue provided (a) direct coverage to Directors and Officers; (b) indemnification coverage to Debtor; and (c) entity coverage to Debtor. Policy proceeds are property of estate only to extend the indemnification and entity coverages protect other assets of estate. Or protect estate from adverse effect of payment of Directors & Officers Defense costs. Fact that payment to Directors & Officers may impact Trustee’s suit against insurer to recover from policy is of no effect as only question is whether payment would adversely affect trustee’s rights to be protected by policy. Fact that payment of attorney fees to Directors & Officers may reduce insurer’s total policy limits does not convert proceeds into property of estate. However, where debtor had previously paid attorney fees to defend Directors & Officers, debtor is entitled to indemnification claim against policy to extent that policy would then reimburse Directors & Officers. Stay relief granted to allow insurer to pay portion of claimed defense costs and to allow Directors & Officers to submit more complete information on specific amount that Directors & Officers intend to claim against insurer. Stay lifted to allow payment by insurer of \$1 million in defense costs without prejudice to Directors & Officers submitting additional information on amounts claimed.
- (1118) *Sweet v. Liberty Mutual Group, Inc.*, 2015 WL 3440859 (E.D. Mi. 2015) – Asset becomes property of bankruptcy estate only where asset is “sufficiently rooted in the pre-bankruptcy past” based on the facts and when the cause of action arose, determined by whether, as of the petition date, there was some hypothetical cause of action that could be asserted. If cause of action is rooted in pre-bankruptcy period, then entire cause of action becomes property of estate including damages suffered post-petition. Insurance claim for water damage to debtor’s home was not property of estate where insurance policy was purchased by debtor post-petition, water damage occurred post-petition, and insurer denied coverage post-petition. Fact that estate had interest in property as of the petition date did not convert insurance claim into pre-petition cause of action where neither the insurance policy nor the damages existed or occurred pre-petition.
- (1119) *In re Birmingham Cosmetic Surgery, PLLC*, 2015 WL 1404296 (Bankr. E.D. Mi. 2015) – Proceeds of Debtor’s malpractice insurance policy is not property of estate as debtor has no interest in proceeds. Only parties to proceeds are the insurance company and the beneficiary to whom the proceeds are owed. Insurance company’s lodging of the policy with the clerk of court as part of a stay pending appeal did not make proceeds of policy property of estate as proceeds themselves were not lodged with the clerk.
- (1120) *Wojcik v. Gold*, 522 BR 743 (6th Cir. BAP 2014) – Debtor’s interest in insurance proceeds for damage to property was property of estate where damage to property occurred prior to commencement of bankruptcy case. Property of estate includes inchoate claims as of commencement of case. While debtor may have had contractual obligation to turn funds over to mortgage company, debtor was the owner of the policy and debtor had vested interest in proceeds from date claim arose. Claim was sufficiently rooted in pre-petition conduct where all of the damages to the property occurred prior to commencement of case and only thing left was to determine amount of damages.

6.8 Property Acquired Post-Petition

- (1121) *Banfield v. Gentry*, 2016 WL 4061248 (E.D. Mi. 2016) – Debtor’s interest in various trusts not property of estate where debtor’s rights in trusts did not arise until Mom, the trust settlor, passed away. Mom passed away more than 2 years after debtor filed for Chapter 7 relief. Section 541 sweeps in property that debtor acquires as a result of bequest, devise or inheritance where the debtor acquires those interests within 180 days post-petition. Debtor’s interest did not arise until 2 years post-petition, and debtor’s interests in trusts were not property of estate.
- (1122) *In re Sizemore*, 2013 WL 6328160 (Bankr. E.D. Ky. 2013) – Proceeds of life insurance received by debtor during pendency of Chapter 13 case are property of estate. Section 1306 expands 180-day time period of Section 541 to entire length of Chapter 13 Plan.

- (1123) *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.
- (1124) *In re Kirby*, 2012 WL 733884 (Bankr. D. Neb. 2012) – Proceeds of personal injury action received post-petition are property of estate.
- (1125) *Williamson v. Hall*, Case No. 08-088 (10th Cir. BAP 2009) – The debtor’s “Property” and “interest in property” are defined by state law. Section 541(a)(5), which sweeps into the estate property acquired by bequest, devise or inheritance, is limited to transfers by will, and the term “inheritance” is limited to property acquired through intestate succession, and does not include property that transfers by operation of law to a joint tenant with right of survivorship or a designation of an account or asset that passes to a beneficiary or through contractual provision for transfer on death. Section 541(a)(1) does not encompass contingent interests such as survivorship interests where under state laws the owner of the asset has the absolute right to change the designation. Even if the power to change is not exercised, until the moment of death, the beneficiary had no legally recognizable right in or ownership of the property. Where the owner was still alive at the time the beneficiary filed bankruptcy, the beneficiary had no interest in the property and, therefore, the property and the beneficiary’s contingent interest in the property are not property of the estate.

6.9 Pre-Petition Causes of Action

- (1126) *Porrett v. Hillen*, Case No. 16-0135 (D. Idaho 2016) – Section 541(a)(1) sweeps in all legal or equitable interests of debtor in property as of date of commencement of case. Causes of action and legal claims are “legal or equitable interests” within meaning of Section 541, and includes all accrued causes of action even if debtor is unaware of claim at time of bankruptcy filing, and does not require that formal action be taken prior to commencement of case. Cause of action that arises post-petition is not property of estate as there was no legal or equitable interest in existence as of petition date. However, cause of action that arises pre-petition is property estate and recovery is property as “proceeds” of estate property. Whether cause of action arises pre- or post-petition is based on state law and looks to whether claim could have been brought pre-petition. Cause of action is pre-petition where cause of action was based on alleged fraud in mortgage origination and origination occurred prior to commencement of case. Although debtors may have been completely unaware of alleged wrongful conduct and fact that remedy may have been unliquidated as of petition date, that does not remove action from property of estate. Damages accrued when fraud was committed, which was indisputably pre-petition.
- (1127) *In re Ross*, 2016 WL 1556002 (Bankr. E.D.N.Y. 2016) – Cause of action arose post-petition and was not property of estate even though all elements of action arose pre-petition where debtor did not suffer any harm until after bankruptcy case completed. Debtor had transvaginal mesh inserted in 1998 and removed in 1999. She filed Chapter 7 in 2004 and received a discharge in 2005. In 2011, when was advised that FDA issued public health warning that mesh posed health risks In 2012, debtor retained counsel and recovered settlement. When debtor filed bankruptcy, neither she nor the medical supplier knew device could cause harm and debtor never suffered any actual harm from device. Tort claim does not accrue until injury results and as long as injury is hypothetical debtor has no property interest in cause of action that could become property of estate.
- (1128) *In re Segura*, 2016 WL 829830 (Bankr. N.D. Ohio 2016) – Whether cause of action is property of Chapter 7 estate depends on when cause of action arose. Cause that arose pre-petition is property of estate. However, cause of action that arose post-petition is not property of estate even if some of the factual underpinnings occurred pre-petition. Debtor’s cause of action arising out of pelvic mesh product arose post-petition where although debtor had surgery to insert mesh well prior to commencement of case, debtor had not suffered any symptoms or harm from mesh until post-petition. Implantation of mesh, alone, was not actionable until injury actually occurred, which was post-petition. Cause of action and proceeds were not property of estate.
- (1129) *In re Chaban*, 2016 WL 354308 (S.D. Mi. 2016) – Action constituted pre-petition cause of action that is property of estate where facts forming basis for cause of action occurred prior to filing and any cognizable injury had been suffered. Debtor’s counterclaim for damages against creditor for alleged violations of due process resulting from pre-petition state court litigation was pre-petition asset which was property of estate and which only Chapter 7 Trustee could pursue.
- (1130) *Pauley v. Bank of America*, 2016 WL 213032 (E.D. Mi. 2016) – Upon filing of bankruptcy, causes of action become property of estate and debtor loses standing to pursue claims. Debtor failed to list causes of action in schedules and failed to amend schedules at any time during bankruptcy case. Debtor judicially estopped from pursuing cause of action after discharge in bankruptcy.
- (1131) *Brown v. Florida Coastal Partners*, 2015 WL 4205157 (S.D. Ohio 2015) – Upon filing of bankruptcy, causes of action become property of estate and debtor loses standing to pursue claims. Debtor’s action alleging that lender violated Fair Debt collection Practices Act prior to commencement of bankruptcy case became property of estate, divesting debtor of standing to pursue.
- (1132) *Rugiero v. Nationstar Mortgage, LLC*, 2014 WL 4549003 (6th Cir. 2014) – Upon filing for Chapter 13, debtor lost standing to pursue pre-petition cause of action for alleged wrongful foreclosure. Even if debtor was not aware of causes of action prior to filing for bankruptcy protection, where causes of action were entirely pre-petition, those actions became property of the estate and only the Trustee has standing to pursue recovery.
- (1133) *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.
- (1134) *In re Nicole Energy Services, Inc.*, 2015 WL 1321567 (Bankr. S.D. Ohio 2015) – Pre-petition cause of action commenced by minority

shareholder to recover under RICO for damages allegedly suffered by corporation became property of estate when corporation filed for bankruptcy. Action was based on alleged illegal scheme that commenced years pre-petition and continued through petition date. Injuries were suffered exclusively by corporation, not by shareholder, making cause of action property of corporation alone. Cause of action properly sold by Trustee after proper notice under Section 363 and only purchaser thereafter had standing to pursue recovery.

- (1135) *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.
- (1136) *Scott v. Bank of America*, 2015 WL 643334 (Bankr. W.D. Mi. 2015) – To extent cause of action arose pre-petition, it is property of estate and debtor lacks standing to prosecute action unless trustee abandons asset.
- (1137) *Barefield v. Hanover Insurance Company*, 2014 WL 5473079 (E.D. Mi. 2014) – Debtor’s pre-petition cause of action for wrongful termination became property of estate upon filing. Debtor lacks standing to prosecute action unless trustee abandons cause of action. Case dismissed without prejudice as trustee was not party to action and had not abandoned estate’s in cause of action.
- (1138) *In re Nicole Gas Production, Ltd.*, 2014 WL 4855005 (Bankr. S.D. Ohio 2014) – Principal of corporate debtor violated stay by filing complaint against third party that asserted cause of action belonging to debtor. Cause of action for alleged breach of contract and violation of Ohio Corrupt Practices Act in dealings with debtor belonged to debtor’s estate. Principal’s filing of complaint sought to exercise possession and control over cause of action.
- (1139) *Underhill v. Huntington National Bank*, 2014 WL 4435977 (6th Cir. 2014) – Cause of action that arises post-petition is not property of estate. When cause of action accrues is determined by state law, but generally requires conduct of third party that causes harm or loss to debtor. Although corporation’s competition allegedly contacted suppliers in effort to cause suppliers to terminate relationship with debtor, suppliers did not actually terminate relationships or otherwise act on the contacts by competitor until post-petition. Cause of action accrued when supplier first terminated relationship, such that cause of action against competitor for tortious interference was post-petition and was not property of estate.
- (1140) *Smith v. United Parcel Service*, 2014 WL 4377680 (10th Cir. 2014) – Upon filing of bankruptcy case, Chapter 7 Trustee becomes real party in interest for purposes of prosecuting pre-petition cause of action. Subsequent discharge does not alter real party in interest and closing of estate does not alter real party in interest for assets that were not disclosed and, therefore, were not abandoned by the estate.
- (1141) *Boynton v. Headwaters, Inc.*, 2014 WL 1674082 (6th Cir. 2014) – Prepetition cause of action for fraud became property of bankruptcy estate when case was filed, such that only Trustee of bankruptcy estate could maintain action. Litigation brought by investors post-petition dismissed.
- (1142) *Hedrick v. Tennessee Valley Authority Board of Directors*, 2014 WL 1515422 (E.D. Tn. 2014) – When debtor files for bankruptcy, all causes of action become property of estate and trustee is vested with sole authority to prosecute. Debtor thereafter lacks standing to pursue action. Unless trustee formally abandons claim.
- (1143) *Willess 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.
- (1144) *In re Jeter*, 2014 WL 99.043 (Bankr. E.D. Tn. 2014) – Upon filing of case, trustee takes title to any unliquidated personal injury lawsuits or claims, and all proceeds from any claims. Entire settlement proceeds from pre-petition cause of action became property of estate, subject to state law rights of third parties. State law of New Jersey allows assignment of proceeds of personal injury claim if subject matter of assignment is sufficiently described, and there is intent to make assignment immediate and complete, without any ability of assignor to revoke assignment. Litigation funding agreement expressly stated that plaintiff was assigning his right to receive a portion of any settlement proceeds, and described adequately the proceeds being assigned. Assignment was irrevocable as plaintiff had no right to revoke assignment, although assignment was subject to contingencies including the successful prosecution of cause of action. Funding corporation held valid assignment of proceeds resulting in debtor having no interest in assigned proceeds as of commencement of case, and proceeds were not property of estate to extent of assignment and must be paid to funding corporation.
- (1145) *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.
- (1146) *Michigan First Credit Union v. Smith*, 2013 WL 6139719 (Bankr. E.D. Mi. 2013) – All pre-petition causes of action become property of estate that can be prosecuted solely by Chapter 7 Trustee. Debtor was not authorized to assert “counterclaims” in adversary proceeding to except debt from discharge where counterclaims were all based on pre-petition causes of action that debtor lacked standing to pursue. Alleging causes of action as “counterclaim” does not alter conclusion that claims are property of estate unless abandoned by Trustee.
- (1147) *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.

- (1148) *CH Holding Co. v. Miller Parking Co.*, 2013 WL 5423047 (E.D. Mi. 2013) – Causes of action to recover fraudulent transfers by debtor and to impose alter ego liability on debtor's related entities are property of estate that only Trustee has authority to pursue. Upon filing of bankruptcy, creditor suits against debtor and third parties for fraudulent transfers and alter ego are dismissed as plaintiff no longer has standing to pursue claims.
- (1149) *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 lack of standing. 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.
- (1150) *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.
- (1151) *Buzulencia v. Ohio Bell Telephone Co.*, 2013 WL 4049679 (N.D. Ohio 2013) – Bankruptcy trustee becomes real party in interest when bankruptcy petition is filed, and has authority to commence and prosecute any action or proceeding on behalf of the estate. 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.
- (1152) *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 absent abandonment by the trustee.
- (1153) *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. Debtor has duty to disclose all causes of action and has continuing duty to disclose any potential claims. Debtor need not know all of the facts or the legal basis, if the debtor has enough information to suggest that it may have a possible claim.
- (1154) *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.
- (1155) *Auday v. Wet Seal Retail, Inc.*, 2012 WL 5259002 (6th Cir. 2012) – 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.
- (1156) *In re Schwartz*, 2012 WL 4965284 (Bankr. W.D. Ky. 2012) – Post-petition claim that is rooted in pre-bankruptcy past or relationship will be property or estate. Question is not whether malpractice claim accrued prior to filing, but whether malpractice claim is rooted in pre-bankruptcy conduct. Debtor's action against prior bankruptcy counsel was rooted in pre-bankruptcy past as entire cause of action arose out of attorney's malpractice in filing case in first instance. But for negligent handling of case at the outset, later events that gave rise to actual claim would never have occurred.
- (1157) *In re Fritzsch Custom Builders, LLC*, 474 BR 515 (Bankr. S.D. Ohio 2012) – Cause of action against debtor's insurer for breach of duty to defend litigation based on alleged encroachment of easement was property of Chapter 7 estate. Attorney who represented debtor in action against insurance company is third party beneficiary of insurance policy and was not entitled to be paid from proceeds of litigation absent court approval.
- (1158) *Simmerman v. Ocwen Financial & Mortgage Services, Inc.*, 463 BR 47 (Bankr. S.D. Ohio 2011) - Property of the estate encompasses a broad range of assets, including a debtor's lawsuits and causes of action that arose prior to the petition filing date. In determining when a cause of action arises, so as to determine whether it is property of the estate, the court looks not to when it accrued, but whether it is sufficiently rooted in debtor's pre-bankruptcy past to constitute property of the estate. Chapter 13 debtors' cause of action against bank serving as trustee for registered holders of mortgage pass-through certificates and mortgage loan servicer for alleged violation of Equal Credit Opportunity Act (ECOA) arose prior to debtors' previous bankruptcy case, and thus should have been scheduled as part of estate created in that case; debtors alleged that mortgage lenders and its representatives violated ECOA by failing to provide debtors with written notification that their loan application had been rejected and was supplanted with loan offer that included materially different terms, which allegedly occurred in conjunction with loan closing that took place prior to debtors' first petition filing.
- (1159) *Rankin v. Lavan*, 2011 WL 3701441 (6th Cir. 2011) – Causes of action that accrue pre-petition are property of estate and only trustee can pursue those unless the cause of action is abandoned by the trustee. Debtor's asserted contingent interest in real property pursuant to unconsummated purchase and sale agreement is contingent interest that becomes property of estate.
- (1160) *Lincoln Electric Company v. Manahan*, 2011 WL 3516201 (N.D. Ohio 2011) – Causes of action for alleged fraudulent transfers by debtor and alleged civil conspiracy to defraud creditors constitute property of estate. Actions are not individual as to any creditor but constitute

actions which benefit creditor body as a whole.

- (1161) *Prifogle v. Goodyear Tire & Rubber Co.*, 2011 WL 1466457 (E.D. Tn. 2011) – Debtor’s cause of action against former employer for violation of Equal Pay Act became property of estate when case filed. Trustee entitled to substitute in as plaintiff and to then settle the underlying claim.
- (1162) *Cappuccilli v. Lewis*, 2010 WL 4683932 (E.D. Mi. 2010) – Debtor’s action against bankruptcy counsel based on alleged pre-petition malpractice is property of estate.
- (1163) *Kleven v. Walgreen Company*, 2010 WL 1252892 (7th Cir. 2010) - Debtor's action for employment discrimination and wrongful termination became property of the estate upon filing of the petition. Chapter 7 Trustee was properly substituted as party plaintiff and had full authority to settle the action and dismiss with prejudice.

6.10 Post-Petition Cause of Action

- (1164) *Henry v. Abbott Laboratories*, 2016 WL 3209498 (6th Cir. 2016) – Cause of action for wrongful discharge was not property of Chapter 7 estate where debtor filed for bankruptcy relief one year prior to the date on which debtor was allegedly wrongfully terminated was not property of estate. Neither wrongful discharge nor alleged discrimination occurred until after debtor filed bankruptcy petition.
- (1165) *In re Segura*, 2016 WL 829830 (Bankr. N.D. Ohio 2016) – Whether cause of action is property of Chapter 7 estate depends on when cause of action arose. Cause that arose pre-petition is property of estate. However, cause of action that arose post-petition is not property of estate even if some of the factual underpinnings occurred pre-petition. Debtor’s cause of action arising out of pelvic mesh product arose post-petition where although debtor had surgery to insert mesh well prior to commencement of case, debtor had not suffered any symptoms or harm from mesh until post-petition. Implantation of mesh, alone, was not actionable until injury actually occurred, which was post-petition. Cause of action and proceeds were not property of estate.
- (1166) *In re Carter*, 2015 WL 4116676 (Bank. S.D. Ohio 2015) – Cause of action that accrues post-petition in Chapter 13 is property of estate.
- (1167) *Sweet v. Liberty Mutual Group, Inc.*, 2015 WL 3440859 (E.D. Mi. 2015) – Asset becomes property of Chapter 7 bankruptcy estate only where asset is “sufficiently rooted in the pre-bankruptcy past” based on the facts and when the cause of action arose, determined by whether, as of the petition date, there was some hypothetical cause of action that could be asserted. If cause of action is rooted in pre-bankruptcy period, then entire cause of action becomes property of estate including damages suffered post-petition. Insurance claim for water damage to debtor’s home was not property of estate where insurance policy was purchased by debtor post-petition, water damage occurred post-petition, and insurer denied coverage post-petition. Fact that estate had interest in property as of the petition date did not convert insurance claim into pre-petition cause of action where neither the insurance policy nor the damages existed or occurred pre-petition.
- (1168) *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.
- (1169) *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.
- (1170) *Chung-Chan v. Bankowski*, 2009 U.S. Dist. LEXIS 106857 (D. Mass. 2009) – Proceeds of post-petition personal injury action received during pendency of Chapter 13 case constitute property of estate that must be accounted for in payments to creditors.

6.11 Pre-petition Casualty Insurance Proceeds

- (1171) *BDA Design Group, Inc. v. Unsecured Creditors Committee*, 2014 WL 3722086 (5th Cir. 2014) – Casualty insurance proceeds for pre-petition fire loss are property of estate. Architect retained by debtor pre-petition to provide services in rebuilding and repairing property was pre-petition creditor of Chapter 11 estate. Debtor in possession did not hold funds in trust for creditor and as unit owner had interest in proceeds such that power to disburse proceeds was not power that debtor could exercise solely for benefit of others. Further, condominium act that required that proceeds must be used for repair or restoration did not create spendthrift trust in favor of architect for services rendered in connection with those repairs.

6.12 Post-Petition Property – Insurance Proceeds

- (1172) *Sweet v. Liberty Mutual Group, Inc.*, 2015 WL 3440859 (E.D. Mi. 2015) – Asset becomes property of bankruptcy estate only where asset is “sufficiently rooted in the pre-bankruptcy past” based on the facts and when the cause of action arose, determined by whether, as of the petition date, there was some hypothetical cause of action that could be asserted. If cause of action is rooted in pre-bankruptcy period, then entire cause of action becomes property of estate including damages suffered post-petition. Insurance claim for water damage to debtor’s home was not property of estate where insurance policy was purchased by debtor post-petition, water damage occurred post-petition, and insurer denied coverage post-petition. Fact that estate had interest in property as of the petition date did not convert insurance claim into pre-petition cause of action where neither the insurance policy nor the damages existed or occurred pre-petition.
- (1173) *Wojcik v. Gold*, 522 BR 743 (6th Cir. BAP 2014) – Debtor’s interest in insurance proceeds for damage to property was property of estate where damage to property occurred prior to commencement of bankruptcy case. Property of estate includes inchoate claims as of

commencement of case. While debtor may have had contractual obligation to turn funds over to mortgage company, debtor was the owner of the policy and debtor had vested interest in proceeds from date claim arose. Claim was sufficiently rooted in pre-petition conduct where all of the damages to the property occurred prior to commencement of case and only thing left was to determine amount of damage.

- (1174) *In re Partin*, 2014 WL 2566073 (Bankr. N.D. Ohio 2014) – Life insurance proceeds received by debtor as owner and beneficiary of life policy received within 180 days of commencement of case are property of estate that must be turned over to the trustee. Debtor must turn over proceeds. Fact that debtor used proceeds to pay funeral expenses does not defeat duty of turnover.
- (1175) *In re Hodge*, 2014 WL 988611 (Bankr. W.D. Mi. 2014) – Insurance proceeds received by debtor following death of father days after commencement of case were property of estate that must be turned over to the Trustee. Father was listed on policy as “owner” and debtor acquired the proceeds as a beneficiary of the policy. Had debtor been the owner of the policy as well as a beneficiary, then proceeds are received on account of pre-petition ownership of policy and would not be covered by Section 541(a)(5) as debtor would not acquire or become entitled to acquire the proceeds post-petition. However, policy itself, and its proceeds, would be property of estate under Section 541(a)(1) and (a)(6). In either event, debtor would be required to remit proceeds to Chapter 7 Trustee as proceeds are property of estate.
- (1176) *In re Sizemore*, 2013 WL 6328160 (Bankr. E.D. Ky. 2013) – Proceeds of life insurance received by debtor during pendency of Chapter 13 case are property of estate. Section 1306 expands 180-day time period of Section 541 to entire length of Chapter 13 Plan.

6.13 Post-Petition Equity

- (1177) *Kakos v. Stevenson*, 2015 WL 5212033 (E.D. Mi. 2015) – Abandonment requires proof that the property is of inconsequential value and benefit to estate, or that retention of property is unduly burdensome. Although property was fully encumbered as of date of bankruptcy petition, debtor’s subsequent redemption of second mortgage left only first mortgage remaining and created substantial equity above amount owed to first mortgage holder. Although payments made to secured creditor under confirmed Chapter 13 plan are not property of estate when case is converted, redemption payment was not made pursuant to a plan and debtor did not disclose “gift” of money from third party or debtor’s intent to use those funds to redeem the property as part of debtor’s proposed chapter 13 plan. Property of estate includes property that is part of estate at commencement of case plus all increases in value whether due to appreciation, payments or other circumstances. Redemption payment is part of Chapter 7 estate.
- (1178) *In re Hodges*, 2013 WL 1755483 (Bankr. E.D. Tn. 2013) – Equity that accrues in converted case between commencement of Chapter 13 and conversion to Chapter 7 is not property of the estate. In determining whether property has value that could benefit estate, court will fix value as of original petition date. As of original petition, property value was substantially less than amount owed. Fact that property appreciated and may now have equity did not give Trustee claim to that equity. Property that would be available to Chapter 7 trustee worth less than debt, such that order to compel abandonment would be entered.
- (1179) *In re Orton*, Case No. 11-4157 (3d Cir. 2012) – Debtor’s claimed exemption of specific dollar amount of value in asset limits amount exempted to amount claimed. Any additional value, whether existing at time of petition or accruing during pendency of case, accrues to benefit of Trustee and estate. Debtor scheduled interest in royalties from oil and gas lease, valued interest at \$1 and exempted \$1. Trustee entitled to any future income stream from the royalties beyond \$1 that was the value claimed as exempt. Debtor, by valuing asset at \$1 and exempting \$1 did not exempt entire asset but only value of asset to extent claimed. Section 522(d)(5) allowed the debtor to exempt only the value of an asset and not the asset itself, leaving asset as property of estate with appreciation in value accruing to estate.

6.14 Probate Estates

- (1180) *Rentas v. Gonzalez*, Case No. 13-011 (1st Cir. BAP 2014) – Beneficiary of probate estate has interest in probate estate but not in any particular asset of estate or proceeds of sale of assets of estate. Chapter 7 Trustee could not compel Probate Court under Section 542 to turnover proceeds of sale of property as property was not property of estate and was not subject to turnover.

6.15 Tenants by Entireties

- (1181) *Holley v. Corcoran*, 2016 WL 6211975 (6th Cir. 2016) – Michigan law protected the *entire* value of couple's property minus deductions for sums due to joint creditors. Debtors properly claimed TBE exemption under Michigan Compiled Laws 600.5451(1) subsection (o). After case was filed, Michigan Legislature changed TBE exemption to subsection (n). Debtors amended Schedule C to claim property as TBE under then-designated subsection (n). Although exemptions are determined as of date of filing, nothing indicated that debtors’ amendment was intended to change exemption from TBE to “standard” homestead which was subsection (n) when the case was filed but was subsequently re-designated subsection (m). Instead, amendment was intended to continue TBE exemption and to adjust to the current nomenclature of the statute. Trustee not permitted to charge exempt property for payment of administrative expenses. Debtor claimed home exempt as tenants by entireties. Trustee, with Debtors’ consent, sold house to third party and used proceeds to pay joint creditors of Husband and Wife. Trustee then sought to recover trustee fee from remaining proceeds. Section 522 prohibits exempt property from being charged for payment of any administrative expense. Entireties exemption applies to all proceeds of sale of property other than proceeds used to pay joint creditors, leaving no non-exempt funds available for administrative expenses.
- (1182) *Lewiston v. Kohut*, 2015 WL 5009253 (E.D. Mi. 2015) – Michigan state law allows only certain types of property to be held as entireties. Real property may be held as entireties. Entireties ownership of personal property is limited to property described in Section 557.151, constituting bonds, certificates of stock, mortgages, promissory notes, debentures and other evidences of indebtedness. Trust, and property in trust, is not within scope of Section 557.151 even if the property in the trust consists of items that could be held as entireties. Under Michigan law, the trust is the owner of the assets in the trust. Section 557.151 requires the asset to be owned by husband and wife. Fact that husband and wife are the beneficiaries of the trust does not transform beneficial interest or each into an interest in the assets themselves. As

assets in trust are not property of beneficiaries, assets cannot meet requirements of Section 557.151.

- (1183) *U.S. v. Barczyk*, Case No. 10-1498 (6th Cir. 2011) – United States can foreclose tax lien and sell real property owned by husband and wife as tenants in the entirety even where only one of the owners is liable for the unpaid taxes. Non-liaable owner is entitled to one-half of the net proceeds with taxing authority retaining half of proceeds, up to amount necessary to satisfy tax lien.
- (1184) *Jahn v. Bank of America*, 2011 WL 1167115 (Bankr. E.D. Tn. 2011) – Deed naming vendees as Husband and Wife, “both unmarried persons with Right of Survivorship for and during their joint natural lives, with the remainder over upon the death of either of them to the survivor of them” sufficient to establish entirety estate. Law presumes real estate acquired by husband and wife during marriage is held as entirety but presumption can be overcome by evidence that parties intended acquisition as joint tenants or as tenants in common. Mistake in deed that reflected “unmarried” when parties were admittedly married on date of deed would not overcome presumption. Reference to “rights of survivorship”, standing alone, did not defeat presumption or create clear inference that other method of ownership was intended, particularly in light of references to remainder passing on death and ownership for “their joint natural lives”.
- (1185) *In re McKain*, 2011 WL 3022542 (Bankr. E.D. Tn. 2011) – Property owned as Tenants in the Entireties is exempt from estate of bankruptcy of one spouse to the extent that debts are not joint debts of Debtor and Spouse. Entireties requires proof of unities of interest, title, time, possession, and marriage. Property owned by Debtor and “significant other” as joint tenants with right of survivorship prior to marriage is not converted into entirety property by later marriage. Bank accounts denominated “joint with survivorship” are owned jointly with right of survivorship but are not entirety accounts. Presumption that property is owned by entirety applies only to real estate acquired during the marriage. Stock account captioned “joint-tenant by entirety” sufficient to establish ownership of account as entirety account beyond scope of Husband’s individual bankruptcy where schedules disclosed no joint debt with non-filing spouse.
- (1186) *Shapiro v. Sassak*, Case No. 09-61221 (Bankr. E.D. Mi. 2010) - Michigan law creates statutory presumption that certain types of personal property owned by spouses are held as tenants by the entirety, including bonds, stocks, mortgages, notes and evidence of indebtedness. Brokerage Account originally titled as "Joint Tenants and not as tenants in common or as tenants by the entirety" not sufficient to rebut presumption of entirety where debtor and wife testified that they really did not have any intent with regard to the manner in which the account was originally held, and that account was later re-titled as “Joint - tenants in entirety”.
- (1187) *Tomasi v. Citizens Bank*, Case No. 09-63027 (Bankr. E.D. Mi. 2010) - Bankruptcy estate's interest in entirety property is in whatever equity is available in the entirety property that can be liquidated for the benefit of the joint creditors of the debtor and the non-filing spouse. A tenancy by the entirety is a type of concurrent ownership in real property that is unique to married persons and is intended to protect the marital estate. Each spouse is considered to own the whole and, therefore, is entitled to the enjoyment of the entirety and to survivorship. When real property is so held as tenants by the entirety, neither spouse acting alone can alienate or encumber to a third person an interest in the fee of lands so held. Neither the husband nor the wife has an individual, separate interest in entirety property, and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other. A creditor with a judgment on a joint debt may levy upon the property itself and thus on the interests of both spouses. The debtor's interest in that portion of entirety property reachable by joint creditors therefore is not exempt. As a result, the trustee is authorized to liquidate entirety property for the benefit of the joint creditors of the individual debtor and that debtor's non-filing spouse. Where the value of the property at issue is less than the amount due on the first mortgage, there is no equity available to pay joint claims. Therefore, the estate has no interest in the entirety properties of the debtor and the non-filing spouse.
- (1188) *In re Musilli*, Case No. 06-55963 (Bankr. E.D. Mi. 2009) – Debtors’ interest in Cash Management Account is not protected as Tenancy by the Entireties. Michigan law presumes property obtained by a husband and wife to be held as Tenants by Entireties. Presumption can be overcome by use of specific language or by factual evidence that spouses did not intend to hold the property as Entireties. Debtor was not married when he opened CMA account. Therefore, account could not have been opened as Tenancy by Entireties. After Debtor married, Debtor added wife to account by checking box labeled “Joint Tenancy with Rights of Survivorship” rather than box for “Tenancy by the Entireties”. Debtor’s testimony that he opened the account in contemplation of marriage and intended to create an Entireties account did not overcome the presumption that arose from the Joint Account Agreement which indicated that the account was held as joint tenants. Debtor’s wife required to surrender one-half of account to trustee.

6.16 Corporations and LLCs

- (1189) *In re Tellico Lake Properties, LP*, 2016 WL 1258287, 548 BR 800 (Bankr. E.D. Tn. 2016) – Automobiles were part of estate of bankruptcy corporation where principal of corporation purchased autos in his own name using corporate funds, vehicles were never titled in either individual’s name or corporate name, corporate tax returns for 2005 – 2010 listed vehicles as assets of corporation, there was no documentation that corporation gave or transferred interests to principal, and corporation’s SOFA listed transfer of vehicles from corporation to “purchaser” as satisfaction of pre-existing loan. Purchaser of vehicles from principal did not acquire title superior to that of Trustee where purchaser never obtained certificates of title in purchaser’s name. Evidence indicated that vehicles were transferred to “purchaser” as security for loans to corporate principal, principal testified that he used cars as collateral, and “purchaser” testified that transaction was loan with cars to stand as collateral. However, purchaser also never recorded lien on title leaving liens unperfected under Tennessee law.
- (1190) *In re Erskine*, 2016 WL 1644483 (Bankr. W.D. Tn. 2016) – Upon administrative dissolution of corporation, corporation lacks authority to transact business other than as part of winding up of operations. Where debtor, as sole shareholder, continued business operations, he did so as “sole proprietor” and not as corporation. When debtor later filed for bankruptcy protection, all assets of business including bank accounts became estate property.
- (1191) *In re Talbut*, 2016 WL 937373 (Bankr. N.D. Ohio 2016) – Section 363 allows sale of property free and clear of any interest in the property

of another entity if (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. Virginia state law applied to proposed sale of debtor's interest in Virginia LLC. Only transferrable interest is member's share of profits and losses and right to receive distributions. Under Virginia law, while creditor could obtain lien on member interest, law does not allow lien to be foreclosed or to otherwise allow forced sale. As Virginia law did not allow forced sale of interest, trustee could not sell interest free and clear of interests of other members of LLC without consent. Operating Agreement allowed member to sell interest only after first offering to sell interest back to LLC and if LLC declines to exercise right to purchase, any later sale must be on terms that are no less than and on terms no more favorable than those offered to LLC.

- (1192) *Whittaker v. Groves Venture, LLC*, 2015 WL 5781111 (Bankr. S.D. Ohio 2015) – Property owned by LLC is property of entity and not property of members of LLC. Transfer of assets by LLC is not transfer of property of investor in LLC. Debtor was sole member of LLC. LLC then transferred property to third party, reducing value of debtor's membership interest. Debtor did not own and had no interest in property transferred, such that transfer could not have been fraudulent as to debtor as matter of law. While transfer may have diminished value of debtor's interest, debtor did not have interest in assets owned by LLC.
- (1193) *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.
- (1194) *In re Talbut*, 2015 WL 5145598 (Bankr. N.D. Ohio 2015) – Debtor's membership in LLC becomes property of estate when petition is filed. Specific assets of LLC are not property of estate and Trustee has no right to administer those assets.
- (1195) *In re Breece*, 2013 WL 197399 (6th Cir. BAP 2013) – Debtor's status as sole member of LLC does not convey to debtor an ownership interest in the assets of the LLC. Assets of the LLC are not property of the estate. Debtor cannot claim as exempt property owned by the LLC even where property otherwise constituted debtor's homestead, as debtor had no interest in the specific property to claim as exempt.
- (1196) *In re Schmakel*, 2013 WL 594317 (Bankr. N.D. Ohio 2013) – Debtor does not have interest in property that is owned by LLC merely because Debtor is a member of the LLC. Debtor's membership interest becomes property of the estate on filing, but the assets of the LLC are not property of estate. Debtor cannot claim exemption in real property owned by LLC in which Debtor was member, even where property would otherwise have constituted Debtor's homestead, as debtor had no interest in the property that could be properly claimed as exempt.
- (1197) *In re Hopkins*, Case No. 10-13592 (Bankr. W.D. Mi. 2012) – Estate's interest where debtor was sole member of LLC is the debtor's ownership interest in the LLC and not the property and assets of the LLC themselves. Court lacked jurisdiction to allow Trustee to sell assets of LLC "free and clear of liens and encumbrances" as the property owned by the LLC was not property of estate. However, court could authorize Trustee, in his capacity as sole member of LLC, to sell property subject to claims and obligations of the LLC, with any proceeds remaining after payment of LLC's creditors and obligations becoming property of estate for purposes of distribution to debtor's creditors.
- (1198) *In re Liber*, 2012 WL 1835164 (Bankr. N.D. Ohio 2012) – Debtor's interest in property for determining property of estate is debtor's ownership interest in Corporation or LLC and not the property of the entity itself. Although Debtor was sole member of single-member LLC, law recognizes separate corporate existence of LLC apart from Debtor. When debtor filed for Chapter 7 relief, Debtor's ownership interest in the LLC became property of estate, but property that was owned by LLC did not. Creditor of LLC had first claim to proceeds of sale of property of LLC ahead of any claim of the Chapter 7 Trustee in debtor's personal case. When corporation or LLC sells assets, proceeds must first be used to pay creditors. Debtor, as principal, would receive only what is left after payment of all business debts and claims.

6.17 Stock and Corporate Ownership Interests

- (1199) *Tutor v. Durkin*, 2015 WL 151701 (9th Cir. 2015) – Debtor's 100% membership interest in LLC became property of the estate. Trustee empowered to vote ownership interest to remove LLC management pursuant to management agreement. Trustee had full rights of member of LLC including right under management agreement to remove manager as long as trustee complied with requirements of management agreement. Trustee properly removed manager for cause where manager had made contradictory statements about assets, liabilities and financial affairs such that manager's statements could not be trusted. Trustee also had authority to place LLC into bankruptcy if trustee determines that to be prudent course of action.

6.18 Leaseholds

- (1200) *Ohio Land Management, LLC. V. Chesapeake Exploration, LLC*, 2016 WL 4430833 (N.D. Ohio 2016) – Obligation to arbitrate arises only when there is valid contract containing arbitration clause. Debtor's lease of property post-petition was invalid as property was property estate and lease was not executed or approved by Trustee. Arbitration clause in lease was invalid as debtor lacked authority to enter into lease in first instance.
- (1201) *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.
- (1202) *In re KY USA Energy, Inc.*, 2010 WL 4923644 (Bankr. W.D. Ky. 2010) – An oil and gas lease is not truly a lease but rather a conveyance of an interest in realty.

- (1203) *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. A termination notice must clearly and unequivocally terminate the lease and must leave no doubt as to the intention of the party giving notice. Notice delivered by Landlord was not “clear and unequivocal” termination where notice failed to identify any alleged breach of the lease and stated only “I will be compelled” to take action. Further, lease required Landlord to retake possession before attempting to terminate lease. Landlord had not retaken possession nor taken any steps that would operate as a “legal substitute” for re-entry and had no right under the lease to attempt to terminate the lease. Lease remained property of estate subject to assumption and assignment.

6.19 Life Estates

- (1204) *Still v. Hopkins*, 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Section 541 includes all of debtor’s legal or equitable interests as property of estate. Debtor who, pre-petition, transferred fee title to children subject to retained life estate. Debtor’s interest in life estate became property of bankruptcy case unless claimed exempt and exemption allowed, or trustee abandoned that interest.

6.20 Tax Refunds Generally

- (1205) *Bowers v. United States*, 2014 WL 7745851 (Bankr. N.D. Ohio 2014) – Debtor had no right to receive or recover funds levied by IRS prior to commencement of case. IRS issued levy to debtor’s employer which incorrectly paid all of debtor’s net wages to the IRS without accounting for the statutory exemption amount. IRS applied that payment to reduce debtor’s tax debt. At that point, debtor had no interest in the funds and had, at most, an inchoate right to request a refund, amounting to the assertion of a claim. Therefore, when debtor later filed for bankruptcy, funds paid to IRS were not property of estate and debtor could not maintain action to recover those funds. Debtor had not requested return of funds from IRS such that there was no matured debt, payable on demand or on order, that could be enforced under Section 542.
- (1206) *US Department of Agriculture v. Riley*, 485 BR 361 (W.D. Ky. 2012) – Post-petition setoff by governmental agency against debtor’s tax refund did not violate stay. To establish a valid right of setoff in bankruptcy, creditor must establish four conditions: (1) creditor’s claim must arise before the commencement of the case, (2) creditor must have a debt to debtor that arose before the commencement of the case, (3) the claim and debt must be mutual, and (4) the claim must be valid and enforceable. Governmental agencies have statutory right to setoff against tax refunds and direct the Secretary of Treasury to reduce a debtor’s “tax overpayment” by past-due amounts owed to other agencies before determining whether taxpayer is entitled to refund. Taxpayer “overpayment” of taxes does not create entitlement to refund. An overpayment of taxes is any payment made by taxpayer that is over and above tax liability, whereas a refund is amount that Internal Revenue Service is obligated to pay taxpayer after IRS has exercised its statutory right to offset. Debtor’s interest in a refund is contingent upon the statutory determination of what portion of tax overpayment remains for debtor to receive as a refund. Where unpaid governmental debt exceeds entire tax overpayment, there is no money left over to become property of debtor-taxpayer’s estate, and thus nothing for debtor-taxpayer to claim as exempt. Given that amount of Chapter 7 debtor-taxpayers’ obligation to federal agency, for deficiency balance remaining after mortgage loan foreclosure, exceeded amount of debtors’ overpayment of federal income tax, debtors never became entitled to tax refund, and thus had no refund that became estate property and could be claimed as exempt.
- (1207) *Winters v. Comm’n of Internal Revenue Service*, 2013 WL 364328 (Bankr. M.D. Tn. 2013), *reversed and remanded*, 503 BR 434 (6th Cir. BAP 2013) – Because neither Bankruptcy Court nor Tax Court had issued final determination of the amount of tax debt for year in question, issues regarding statute of limitations, prior and nondischargeability could not be resolved. Case remanded to Bankruptcy Court for further proceedings. Prior to appeal, Bankruptcy Court had held that IRS issued erroneous refund to debtor post-petition although debtor had substantial liability owed for prior years taxes. Debtor returned the check to the IRS a few months later. To extent debtor may have been entitled to pre-petition refund, that entitlement would be property of estate. However, refund check was erroneously issued as debtor had no right to that refund. Debtor never acquired legal or equitable interest in the refund and court could not compel IRS to turnover the check or its proceeds to the Trustee.
- (1208) *Santiago v. Rivera*, Case No. 11-075 (1st Cir. BAP 2012) – All tax refunds received by debtor in Chapter 13 are property of estate. To extent refund is rooted in pre-petition earnings, refund is property of estate pursuant to Section 541(a). To extent refund is rooted in post-petition earnings, refund is property of estate pursuant to Section 1306.
- (1209) *Matos v. Rivera*, Case no. 11-074 (1st Cir. BAP 2012) – All tax refund received by debtor in Chapter 13 are property of estate. To extent refund is rooted in pre-petition earnings, refund is property of estate pursuant to Section 541(a). To extent refund is rooted in post-petition earnings, refund is property of estate pursuant to Section 1306.
- (1210) *In re McCrory*, 2011 WL 4005455 (Bankr. N.D. Ohio 2011) – Where an overpayment of a tax obligation results in a tax refund that derives solely from one debtor’s income, debtor’s spouse has no property interest in the refund even if a joint return was filed and the refund check is made jointly payable to both the husband and wife. Debtor’s non-filing spouse had minimal income and had no taxes withheld from her pay. That portion of the tax refund attributable to over-withholding from Debtor’s income is property of the estate and must be turned over without reduction. However, First Time Home Buyer Tax Credit is refundable credit even if the taxpayer had no income at all. Had debtor and his wife filed separate returns, the wife would have received \$4,000 of the tax credit as a refund, even though she had no income. Therefore, \$4,000 of the refund is property of the non-filing spouse and is not property of the estate. Tax credits for Making Work Pay, Earned Income and Additional Child Tax credits would be allocated proportionate to gross income of debtor and wife. Where Debtor earned 96.65% of the household income, debtor’s estate included 96.65% of the credits in calculating the amount of the tax refund obligation.
- (1211) *In re Zingale*, 2011 WL 2330271 (6th Cir. BAP 2011), *aff’d* 2012 WL 3764693 (6th Cir. 2012) – Non-refundable portion of Child Care Tax

Credit is not property of estate as debtor has no right to collect or receive the amount of that credit. Non-refundable credit is applied first to pay any tax liability. To the extent the credit exceeds the tax liability, taxpayer has no right to collect or retain the unused portion. Refundable portion of Child Care Tax Credit is property of estate to extent not used to pay tax liabilities as that excess will be refunded to taxpayer.

- (1212) *In re Wengerd*, 2010 WL 4054322 (Bankr. N.D. Ohio 2010) – Tax refunds received and spent by debtor prior to commencement of case are not property of estate. However, to extent refunds were received prior to commencement of case but remain in debtor’s possession those refunds are property of estate that must be turned over to Trustee.
- (1213) *Weinman v. Graves*, 609 F.3d 1153 (10th Cir. 2010) – Chapter 7 Trustee’s interest in pre-petition tax refunds limited to extent of Debtor’s interest. Debtor who pre-petition irrevocably assigned tax refund as prepayment of taxes for following year held only contingent right to receive refund of any taxes that were overpaid for the following year. Trustee could not compel turnover of pre-petition portion of current year tax refund as debtors had no interest, as of the date of filing, in that refund. Trustee would be entitled to recover the pre-petition refund if and to the extent Debtors received a tax refund for the year to which the pre-petition refund was applied.
- (1214) *In re Meyers*, 2010 WL 2990826 (7th Cir. 2010) - Tax refunds received after the petition may, in some cases, represent pre-petition assets and thus are part of the estate. Pro rata by days method is presumptively the correct way to apportion tax refunds attributable to the year of the filing of the case, absent some evidence that the allocation may not correctly reflect the refund as determined on a pro rata by days method such as a debtor who has not been employed for the entire year or one who has income spikes such that the income received post-petition may be disproportionate to the income received pre-petition. Pro ration by days applied to debtor who had steady employment at fairly constant rate of pay. Debtor who filed on September 25 filed after 73.42% of the year had gone by required to remit to the Trustee 73.42% of the tax refund for that year.

6.21 Tax Refund – Non-Filing Spouse

- (1215) *Lee v. Walro*, 2014 WL 1324281 (S.D. Ind. 2014) – Court should use “separate filings” approach to allocate tax refund between debtor and non-filing spouse. District Court rejected bankruptcy court’s application of 50-50 rule, instead requiring court to determine what each spouse’s contributions and tax liabilities would have been had they filed separate and apply that proportion to the joint refund.
- (1216) *In re Bowles*, Case No. 11-35340 (Bankr. E.D. Mi. 2012) – Tax refunds for year in which case is filed are allocated pre- and post-petition on per diem basis, with only that portion accruing before the petition date being property of estate. Where debtor is married and spouse does not file joint case, court must allocate tax refund between spouses. Allocation is governed by state law. Michigan Consolidated Law Section 557.151 holds that a tax refund is “other evidence of indebtedness” that are jointly and severally owned. Tax refunds must be allocated between debtor and non-filing spouse on 50-50 basis.
- (1217) *In re Palmer*, 2011 WL 890690 (Bankr. D. Mt. 2011) – Debtor and non-filing spouse tax refund allocated by first calculating total tax payments by each spouse and calculate the tax liability that each spouse would have incurred on his or her separate income by calculating the hypothetical “Married Filing Separately” liability. The Court will then calculate the percentage of joint tax liability by dividing the individual liability by the total combined “Married Filing Separately” liability for the two spouses. The actual joint liability is then multiplied by the proportionate share based on the “Married Filing Separately” to determine each spouse’s share of the total tax liability. That share is then subtracted from the amount of the taxes paid by that spouse, and the excess payment over the allocated liability is the amount of the refund that belongs to the respective spouse.

6.22 Post-Foreclosure Interests

- (1218) *Kakos v. Stevenson*, 2015 WL 5212033 (E.D. Mi. 2015) – Abandonment requires proof that the property is of inconsequential value and benefit to estate, or that retention of property is unduly burdensome. Although property was fully encumbered as of date of bankruptcy petition, debtor’s subsequent redemption of second mortgage left only first mortgage remaining and created substantial equity above amount owed to first mortgage holder. Although payments made to secured creditor under confirmed Chapter 13 plan are not property of estate when case is converted, redemption payment was not made pursuant to a plan and debtor did not disclose “gift” of money from third party or debtor’s intent to use those funds to redeem the property as part of debtor’s proposed chapter 13 plan. Property of estate includes property that is part of estate at commencement of case plus all increases in value whether due to appreciation, payments or other circumstances. Redemption payment is part of Chapter 7 estate.
- (1219) *In re Hopkins*, 2014 WL 922773 (E.D. Mi. 2014) – Where foreclosure proceedings were completed and sheriff deed had been issued prior to commencement of case, debtor had no interest in the property such that property was not property of bankruptcy estate.
- (1220) *Scott v. Bierman*, 2011 WL 1807330 (4th Cir. 2011) – Maryland law provides that the combined acts of a completed foreclosure sale, a ratification of the sale by the circuit court, and a conveyance of the property to the purchaser passes all the title which the borrower had in the property at the time of the recording of the mortgage or deed of trust. At this point, a borrower also loses the right to possess the property. Debtors did not object to the foreclosure sale before it occurred, or during the 30–day time period before the sale was ratified by the circuit court. Debtors held no interest in the property when Debtor later filed his bankruptcy petition and the property was not part of Debtor’s bankruptcy estate.
- (1221) *Greer v. Gateley*, 2010 WL 4817993 (Bankr. M.D. Tn. 2010) – Property does not become property of estate where foreclosure proceedings were completed, purchase at foreclosure sale had paid consideration and foreclosure deed had been recorded 9 days before petition filed. Foreclosure was effective to transfer title leaving no interest in debtor to become property of estate.
- (1222) *Wisotzke v. Ontario County*, 2010 WL 2588192 (2d Cir. 2010) – Debtor’s rights in property are extinguished when the redemption period expires. Bankruptcy Code Section 1322 does not extend time to redeem property.

6.23 Right of Redemption Following Foreclosure

- (1223) *Schlarman v. Nageleisen*, 2015 WL 1058704 (Bankr. E.D. Ky. 2015) – Debtor’s right of redemption with respect to property sold post-petition is property of estate as proceed of real property. Debtor lacks standing to exercise right of redemption unless abandoned by estate. Trustee’s actions in stipulating to stay relief to allow foreclosure to proceed did not implicitly abandon estate’s interest in property.

6.24 Property Settlements

- (1224) *Silagy v. Protz*, 2013 WL 6185005 (Bankr. N.D. Ohio 2013) – Prior to commencement of bankruptcy, debtor was awarded one-half interest in ex-husband’s retirement, with ex-husband directed to pay one-half of the balance in the account to debtor when ex-husband retired. Trustee presented evidence of value of marital portion of account and valued one-half of the account as property of the estate and ordered ex-husband to pay that value to Chapter 7 Trustee.
- (1225) *Mayer v. Giarmarco, Mullins & Horton, PC.*, 41 BR 702 (E.D. Mi.), *appeal after remand*, 2013 WL 4786826 (Bankr. E.D. Mi. 2013) – State Court can impose constructive trust on marital assets for benefit of third parties, not just one of the spouses. A pre-petition court-granted equitable interest in an asset can be the basis for the imposition of a constructive trust with respect to that asset. Something more than a simple failure to live up to a legal obligation is required to justify the imposition of a constructive trust. There must be some other basis pursuant to which debtor was under an equitable—and not simply a legal—duty to convey IRA proceeds to creditors in order to support the finding that the judgment of divorce impressed those proceeds with a constructive trust. State domestic relations laws regarding spouse’s claim to portion of IRA gave rise to equitable claim but equitable claim, without more, does not establish constructive trust. Domestic relations arbitration did establish constructive trust in favor of attorneys. Constructive trust was based on unjust enrichment, as award of portion of IRA to ex-husband was designed to reimburse ex-husband for disproportionate share of divorce expenses, absent which ex-wife would have been unjustly enriched. Further, evidence indicated that portion of IRA that was in dispute was “recovered” by plaintiff in that she was allowed to retain the funds, such that attorney services produced a “recovery” against which a charging lien could be imposed.
- (1226) *In re Combs*, 2010 WL 3467730 (Bankr. E.D. Mi. 2010) - Judgment in dissolution of marriage that awarded wife “as her sole and separate property ... one-half of [the] marital interest” in debtor’s pension operated to convey one half of the pension to wife even without preparation or entry of an Eligible Domestic Relations Order. One half of any funds received by debtor belong to wife and are received and held by debtor in a constructive trust for the benefit of the wife and neither the wife’s one-half interest in the pension nor the funds received and held by the debtor in the constructive trust become property of the estate.

6.25 Pre-Petition Alimony and Support Awards

- (1227) *Mehlhoff v. Allred*, Case no. 13-6012 (8th Cir. BAP 2013) – Debtor’s interest in pre-petition alimony award is property of estate subject to debtor’s right to claim as exempt. Court order awarding alimony constituted a “legal or equitable interest of the debtor” for purposes of Section 541(a)(1).

6.26 Titled Assets – Generally

- (1228) *In re Harvey*, 2012 WL 1865426 (Bankr. N.D. Ohio 2012) – Debtor’s ex-spouse did not have legally recognizable interest in boat. Boat was titled solely in debtor’s name. Although boat was allegedly purchased with marital funds and was intended to be jointly owned, certificate of title issued solely in debtor’s name. Ex-spouse did not have legally recognizable interest in boat or in proceeds of sale of boat. All proceeds remained property of Chapter 7 estate.
- (1229) *US Bank, NA v. Barbee*, 2011 WL 6141648 (6th Cir. BAP 2011) – Debtors held sufficient legal or equitable title in mobile home so as to bring home within property of estate. Although title to mobile home was never signed over to debtors by seller and transferred title had never been filed with State as required to effectuate transfer of title, so that state records reflected seller as the titled owner, debtors purchased home and paid seller for it giving rise to at least an equitable interest that became property of the estate.

6.27 Titled Assets – Auction Sales

- (1230) *In re Dixon*, 2015 WL 1803924 (Bankr. E.D. 2015) – Evidence indicated that auction sale was concluded and buyer took possession of motorcycle and the auctioneer provided signed bill of sale to buyer prior to commencement of bankruptcy case. However, seller had not executed either an application for title or an assignment of certificate of title within meaning of MCL 257.233 prior to commencement of bankruptcy case. As such, title had not transferred and debtor still had legal title to motorcycle as of filing of petition, and later execution or certificate of title violated stay.
- (1231) *In re Dixon*, 2013 WL 1397464 (Bankr. E.D. Mi. 2013) – In auction sales, Michigan Compiled Laws section 440.2328 states that title transfers when the auctioneer announces that the auction is complete. However, under Michigan law, ownership of a titled motor vehicle does not pass to a purchaser until purchaser signs application for title and takes possession of vehicle. Court could not determine ownership of motorcycle without evidentiary hearing. Although auctioneer announced sale as closed prior to bankruptcy petition being filed, record was unclear as to when the buyer at the sale signed the title documents or took possession of the motorcycle

6.28 Jointly Owned Bank Accounts

- (1232) *Lake Trust Credit Union v. Houston*, Case No. 12-10534 (E.D. Mi. 2012) – Reversing lower court ruling, Court concluded that joint account in credit union, bearing name of debtor and debtor’s mother, is a “multi-party account” under Michigan Credit Union Act on which credit union holds perfected lien and rights of setoff regardless of identity of party making deposits. MCUA imposes lien on any deposit account from which a member may withdraw funds without the consent of another person and for any obligation owed to the credit union by that

member. Credit Union that holds claim against one of the parties is not required to establish that the obligor is the owner of some or all of the funds in the account. Non-debtor third party cannot avoid credit union right to setoff or enforce lien against entire account by presenting evidence that non-debtor made all deposits and withdrawals from account. While presumptions of ownership may be relevant in disputes between members or between members and creditors, these presumptions do not apply to credit union which is not a “creditor” within meaning of statute creating presumption.

6.29 Contract Rights

- (1233) *In re Morgan*, Case No. 13-5825 (Bankr. W.D. Mi. 2015) – Debtor’s right to receive payment under judgment of divorce is property of estate. Trustee has right to sell debtor’s interest including sale back to debtor’s ex-spouse, subject only to notice and hearing.
- (1234) *Barbacci v. Marshall Buck Financial Group, LLC*, 2013 WL 1222599 (Bankr. N.D. Ohio 2013) – Property of estate includes all proceeds, product, offspring, rents or profits of or from property or the estate, except as such earnings are for services performed by an individual debtor after commencement of the case. Debtor had pre-petition employment agreement for 2 years at \$2,000 per month, for which debtor was to provide referrals to employer. Although written agreement did not make right to receive payments conditional on continued referrals, evidence indicated that debtor’s right to receive post-petition payments were conditioned on debtor’s continued provision of services post-petition, making future payments the result of services performed after commencement. As such, future contract payments were not property of estate.
- (1235) *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.
- (1236) *Shapiro v. Harajli*, 2012 WL 255326 (Bankr. E.D. Mi. 2012) – Unexercised right to draw on line of credit is not property interest for purposes of property of estate.
- (1237) *In re Wise*, 2010 WL 3430849 (Bankr. N.D. Ohio 2010) - Chapter 7 Trustee acquires all contract rights which the debtor had as of the commencement of the case. Contract signed by debtor individually becomes property of the estate notwithstanding testimony by debtor that contract was intended to be signed by debtor's wholly-owned corporate entity with debtor signing solely in a representative capacity. Debtor executed contract in debtor's own name with no mention of or reference to any corporate entity or status of debtor as corporate officer or representative. Trustee acquired contract rights and could sell those contract rights under section 363.

6.30 Contract Deposits

- (1238) *Lawrence v. Commonwealth of Kentucky*, 2013 WL 2422669 (Bankr. W.D. Ky. 2013), *aff’d*, 2014 WL 297868 (W.D. Ky. 2014), *aff’d* 2015 WL 51602 (6th Cir. 2015)– Ability of Trustee to pursue turnover action depends on status of property in hands of third party as “property of estate”. Prior to commencement of case, debtor’s assignor paid non-refundable deposit in connection with proposed purchase of real estate. Prior to bankruptcy filing assignor assigned all rights in the contract to Debtor. Debtor was unable to assume contract as required by Section 365 and contract was deemed rejected. Trustee made demand for the return of the deposit, claiming deposit was property of estate. Trustee’s rights were limited to those that the debtor had as of the moment of commencement of case. Debtor had no right to return of money – remedies were limited to either application of the purchase price to the balance due at closing, or forfeiture to seller as liquidated damages. Contract language was clear and unequivocal and did not afford debtor any right to retake possession of deposit. As such, deposit was not property of estate and trustee could not compel turnover.

6.31 Land Contract Interests

- (1239) *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.

6.32 Accounts Receivable

- (1240) *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.

6.33 Intellectual Property

- (1241) *Maxberry v. University of Kentucky*, 2014 WL 3887217 (E.D. Ky. 2014) – Intellectual property of debtor including patents and copyrights are property of bankruptcy estate. Debtor loses right to prosecute action for alleged violation of copyright upon filing bankruptcy.

6.34 Internet Domain Name

- (1242) *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.

6.35 Commission Income

- (1243) *In re Facione*, Case No. 10-75538 (Bankr. E.D. Mi. 2012) – Debtor’s right to receive commission income that is earned but unpaid as of petition date becomes property of estate. Commissions must be paid to Chapter 7 Trustee. Debtor worked as commission salesman. Debtor became entitled to receive payment when sales were recorded, but was not actually paid commissions until customer made payments. Commissions on sales that occurred pre-petition but were not paid for until post-petition are contract rights that pass to Chapter 7 Trustee. Although the exact amount of each commission could not be determined until the customer made the payment and the employer conducted

an audit to determine correct amount, Debtor had fully completed his duties pre-petition and there was nothing left for him to do post-petition as a condition of earning commissions. Debtor's right to payment fully vested as of date of sale, subject only to final determination of amount and not contingent on any further actions or performance by Debtor. Trustee entitled to turnover of commission payments from employer.

6.36 Unrecorded Interests

- (1244) *Ray v. Durkop*, 2010 WL 3632155 (Bankr. E.D. Tn. 2010) - Debtor's unrecorded ownership of property was enforceable by Trustee in action to quiet title. Debtor entered into land contract for purchase of property. Debtor thereafter occupied the land and used it in farming and for cultivation of tobacco. Although Debtor allegedly paid the full purchase price and received the deed, the purchaser never recorded the deed and ultimately lost the deed. Requests for the vendor to issue a replacement deed went unresponded to. Trustee was vested in title in fee simple free and clear of liens and claims.

6.37 Marital Property

- (1245) *In re Kooi*, 2016 WL 1178377 (Bankr. W.D. Mi. 2016) – Husband acquired vested interest in assets to be distributed upon filing of action for dissolution of marriage. Property awarded to debtor in divorce judgment entered more than 180 days post-petition was property of estate. Divorce proceedings were pending at time of petition, such that debtor had contingent interest in marital assets subject to vesting upon entry of judgment awarding assets. Debtor's interest in marital estate including cash paid to debtor and interests received by debtor in inventory of marital business became property of estate that must be turned over to trustee for liquidation, with proceeds subject to any right of debtor to claim property as exempt.

6.38 Equitable Interests

- (1246) *US Bank, NA v. Barbee*, 2011 WL 6141648 (6th Cir. BAP 2011) – Debtors held sufficient legal or equitable title in mobile home so as to bring home within property of estate. Although title to mobile home was never signed over to debtors by seller and transferred title had never been filed with State as required to effectuate transfer of title, so that state records reflected seller as the titled owner, debtors purchased home and paid seller for it giving rise to at least an equitable interest that became property of the estate.

6.39 Trust Property – Generally

- (1247) *Banfield v. Gentry*, 2016 WL 4061248 (E.D. Mi. 2016) – Debtor's interest in various trusts not property of estate where debtor's rights in trusts did not arise until Mom, the trust settlor, passed away. Mom passed away more than 2 years after debtor filed for Chapter 7 relief. Section 541 sweeps in property that debtor acquires as a result of bequest, devise or inheritance where the debtor acquires those interests within 180 days post-petition. Debtor's interest did not arise until 2 years post-petition, and debtor's interests in trusts were not property of estate.
- (1248) *The Gladys Ragsdale Trust v. Tostige*, 2015 WL 5449997 (Bankr. E.D. Mi. 2015) – Debtor had contingent interest as beneficiary in revocable trust which had not been revoked as of petition date. Interest, while contingent and subject to being defeated if settlor elected to revoke trust, was vested interest in trust where trust had not been revoked.
- (1249) *The White Family Companies, Inc. v. Slone*, 2013 WL 3925820 (6th Cir. 2013) – Property held in trust by a debtor, where debtor holds only bare legal title, is not property of debtor. Bank's provisional credit of deposit into Debtor's trust account did not create a trust relationship when the deposited check bounced. Although the money had been deposited into the trust account with intent to create trust relationship, the check that had been entrusted to the debtor bounced, which prevented the creation of any trust relationship between Debtor and remitter 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.
- (1250) *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. 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.
- (1251) *In re Harvey*, 2012 WL 1865426 (Bankr. N.D. Ohio 2012) – Property in which debtor holds as trustee is not property of estate. Express trust will exist where there is a manifestation of intent to create a fiduciary relationship with regard to property that subjects the person in whom title is vested with equitable duty to deal with property for benefit of another. Party proving express trust can claim in titled asset even though name is not on the title documents. Debtor's ex-spouse failed to prove existence of express trust in titled boat where there was no evidence of intent to have spouse own boat for the benefit of the ex-spouse. That boat was purchased using marital assets and marital funds were used for storage fees and expenses, debtor did not take title until after the parties separated and there was no evidence that ex-spouse used the boat or that it was even available for her use once the boat was titled in debtor's name. Cases supporting an express trust in a titled vehicle generally require that debtor agreed to take title simply as an accommodation in order to overcome a problem raised by the dealer in titling the vehicle, such that the "beneficiary" was intended as the actual owner and the beneficiary actually paid for and used the vehicle. Bankruptcy Code recognizes constructive trusts solely as remedies and not an independent claim, and must have been created by judicial order prior to commencement of bankruptcy case. Divorce court did not impose any constructive trust as part of the divorce proceeding, as order stated that if the bankruptcy court did not take possession of the boat, then the boat would be sold with the proceeds distributed between the parties. At the time of the bankruptcy filing, there was no unconditional status of the ex-spouse as a constructive trust beneficiary. In fact, the bankruptcy court did take possession of the boat and sold the boat.
- (1252) *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.

- (1253) *Mayer v. Giarmarco, Mullins & Horton, PC.*, 41 BR 702 (E.D. Mi.), *appeal after remand*, 2013 WL 4786826 (Bankr. E.D. Mi. 2013) – Property of Estate does not include property in which Debtor holds only legal title and not an equitable interest. Property held by debtor in constructive trust established prior to commencement of case constitutes trust property in which debtor holds bare legal title. State domestic relations laws regarding spouse's claim to portion of IRA gave rise to equitable claim but equitable claim, without more, does not establish constructive trust. Domestic relations arbitration did establish constructive trust in favor of attorneys. Constructive trust was based on unjust enrichment, as award of portion of IRA to ex-husband was designed to reimburse ex-husband for disproportionate share of divorce expenses, absent which ex-wife would have been unjustly enriched. Further, evidence indicated that portion of IRA that was in dispute was "recovered" by plaintiff in that she was allowed to retain the funds, such that attorney services produced a "recovery" against which a charging lien could be imposed.
- (1254) *Fifth Third Bank v. JPMorgan Chase Bank, N.A.*, 2011 WL 30770 (W.D. Ky. 2011) - Estate includes all legal or equitable interests of the debtor in property as of the commencement of the case including any interest which a debtor retains in a trust such as a power to amend trust or to revoke a revocable trust and recover the remaining funds. When interpreting a trust agreement, a court must endeavor to determine the maker's intent from the words used within the agreement itself. Where possible, all parts of the instrument must be given effect and every part of the instrument must be read in conjunction with every other part. In the absence of ambiguity, a court must strictly enforce a written instrument according to its own terms, assigning language its ordinary meaning and without resorting to extrinsic evidence. Where ambiguity in the trust instrument exists, court may not only consider what is expressed in the trust instrument, but may also look at the conduct of the parties affected by the instrument in their performance of it, including actions taken by a party that were ostensibly pursuant to the terms of the trust instrument. Debtor's right to revoke trust and to recover property that debtor previously conveyed to the trust constitutes property of estate that can be exercised by trustee.

6.40 Express Trusts – Spendthrift Provisions

- (1255) *Scott v. King*, Case No. 15-1343 (10th Cir. 2016) – Although Section 521(c)(2) allows debtor to exclude spendthrift trust from property of estate, exception is permissive, not mandatory. Where debtor scheduled Spendthrift Trust interest as asset and neither stated that interest was not property of estate under Section 521(c) or attempted to claim interest as exempt, interest became property of estate subject to administration for benefit of creditors.
- (1256) *In re Erskine*, 2016 WL 1644483 (Bankr. W.D. Tn. 2016) – Trust interest does not become property of estate if debtor had only legal and not equitable interest in trust. Trust did not qualify as valid "spendthrift" or "asset protection" trust under Tennessee law where although trust purported to be irrevocable and debtor was not identified as beneficiary, debtor nonetheless retained total power and control to direct payments, add or remove trust property, or to revoke trust; and power to direct trustee to distribute income to debtor at least monthly. Although trust contained spendthrift provision, that provision specifically allowed debtor to alienate, pledge, assign and encumber debtor's interest in the trust. While debtor was not named beneficiary, debtor retained substantial beneficial interest in trust that defeated any "asset protection" nature of trust as to creditors of debtor. All asset in trust became property of bankruptcy estate upon filing. Tennessee law also prohibits "asset protection" trusts from having the settlor as the trustee, while debtor's trust named himself as both settlor and trustee; trust was not irrevocable as required by state law.
- (1257) *Kohut v. Lewiston*, 2015 WL 3894609 (Bankr. E.D. Mi. 2015), *affd*, 2015 WL 4771285 (E.D. Mi. 2015) – Spendthrift clause in trust is unenforceable where beneficiary of trust is also settlor. Michigan public policy precludes party from creating trust and then placing his own assets in that trust to protect assets from settlor's own creditors when settlor also has beneficial interest in trust. Status of trust as revocable or irrevocable is irrelevant as spendthrift provision is unenforceable in either event. Fact that there was more than one co-settlor is also irrelevant as long as one settlor is also the beneficiary seeking to protect assets from creditors. Bankruptcy Trustee can invade trust to full extent of debtor's beneficial interest as if spendthrift clause did not exist. Where debtor had full beneficial interest in assets, Bankruptcy Trustee could compel turnover of all assets in trust.
- (1258) *Heifner v. Rosen*, 2013 WL 12110254 (N.D. Ohio 2013) – Property of estate includes interests of debtor notwithstanding any provision in an agreement that restricts conditions transfers of the interest by debtor. Code "carve out" property subject to a trust that, under applicable non-bankruptcy law, restricts debtor's power of transfer, and includes spendthrift trusts that are valid as a matter of state law. Although trust agreement contained spendthrift provision allowing trustee to make distributions in his sole and absolute discretion, trust agreement also allowed beneficiary to name himself as trustee. Spendthrift trusts cannot have same person as beneficiary and trustee as that defeats discretionary power of trustee to control payments to beneficiary. Even where beneficiary has not exercised right to become trustee, provision that permits that to occur is sufficient to defeat spendthrift nature of trust.
- (1259) *Bendon v. Reynolds*, Case No. 11-1433 (9th Cir. BAP 2012) – Beneficiary's interest in spendthrift trust is protected from claims of creditors as long as the income and principal remain in the trust. However, once income or principal is distributed to the beneficiary, the distributed funds are no longer protected and can be seized by creditors.
- (1260) *Meoli v. Thrun*, Case No. 13-80072 (Bankr. W.D. Mi. 2013) – Section 541(c)(2) excludes from property of the estate any property that is subject to a restriction on transfer of a beneficial interest in a trust that is enforceable under applicable non-bankruptcy law. Inquiry is three part test: does the debtor have a beneficial interest in a trust; is there a restriction on the transfer of that interest; and is that restriction enforceable under non-bankruptcy law. Debtor had interest in trust that contained clauses preventing mandatory distributions and allowing

distributions solely in trustee's discretion, trust expenses and claims had to be paid before any distributions could be made and those expenses and claims had not been determined, and trust otherwise had a valid spendthrift provision. First two conditions were not restrictions on transfer of interest but were merely limitations on distribution rights which do not prevent interest from becoming property of estate, as conditions may affect value of interest but not transferability of interest. Whether spendthrift clause itself is valid is matter of state law. Spendthrift clause is invalid to extent beneficiary has equivalent of ownership allowing beneficiary to demand distribution. Trust document specified that at age 30, beneficiary could demand full distribution of assets. Spendthrift clause enforceable only to point where beneficiary turns age 30, after which the spendthrift clause is lifted. Debtor had attained age 42 before filing bankruptcy. As such, spendthrift clause no longer controlled and interest became property of estate.

6.41 Resulting Trusts and Estate Planning Devices

- (1261) *Tabor v. Lineback*, Adv. No. 12-5154 (Bankr. W.D. Tn. 2013), *affd*, Case No. 14-8011 (6th Cir. BAP 2014) – 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. Resulting trust can be used where third party provides money to acquire property such that third party should be considered the owner of the property where at time of initial transfer intent was for person providing consideration to become the owner, and not that the intent arise of or subsequent conduct or transaction. 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.
- (1262) *FDIC v. AmFin Financial Corp.*, 2014 WL 3057097 (6th Cir. 2014) – “Resulting Trust” arises where parties intended to create trust but failed to complete requirements of express trust. Resulting trust occurs where legal estate in property is transferred to or acquired by one under facts and circumstances that indicate that the beneficial interest is not to be held by the holder of legal title. Property held by debtor that is subject to resulting trust for third party is not property of bankruptcy estate. Tax sharing agreement was ambiguous as to whether tax refunds received based on consolidated return of parent and subsidiary corporations were property solely of parent, or whether parent held funds in resulting trust for benefit of subsidiaries in proportion to relative contributions of parent and subsidiaries to total tax refund.
- (1263) *Goddard v. Heldt*, 2013 WL 1960599 (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.

6.42 Recovered Property

- (1264) *Advanced Telecommunications Network, Inc. v. Allen*, 768 F.3d 274 (3d Cir. 2014) – Property is “recovered” under Section 550 when the court enters judgment avoiding transfer and directing return of property, even if property has not been returned. ATN filed bankruptcy and obtained a judgment against Allen avoiding transfers of certain property and directing Allen to turn over property to ATN. Allen refused and instead filed his own bankruptcy estate, and argued that the property was property of his estate as the property was still in his possession. Third Circuit rejected the argument, holding that upon entry of judgment avoiding transfer, transfer was effectively avoided and title revested in ATN. As such, property did not become property of Allen's bankruptcy estate and ATN was not stayed by the automatic stay from pursuing recovery of property.

6.43 Constructive Trusts

- (1265) *Carrick v. Hagan*, 2016 WL 1604683 (E.D. Mi. 2016) – Constructive trust is a remedy administered in certain fraudulent breaches of trusts and may be imposed upon a finding of fraud, concealment, misrepresentation, or any other circumstances that would render an unconscionable outcome or when an inequitable outcome would result. Constructive trust may also be imposed to do equity or to prevent unjust enrichment or it becomes necessary to prevent a failure of justice. Constructive trust does not arise until judicial decision imposes such a trust, and the trust does not exist before that recognition. Where party did not obtain declaration of constructive trust in property nominally held by debtor, party could not prevail against Trustee to claim title to property.
- (1266) *Tabor v. Lineback*, Adv. No. 12-5154 (Bankr. W.D. Tn. 2013), *affd*, Case No. 14-8011 (6th Cir. BAP 2014) – 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 knowingly and intentionally 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.
- (1267) *Endeavor Energy Resources, LP v. Heritage Consolidated, LLC*, 2014 WL 4238605 (5th Cir. 2014) – Constructive trust requires breach of fiduciary duty or fraud accompanied by unjust enrichment of wrongdoer and traceability to res. Parties must have had confidential or fiduciary relationship before and apart from the transaction in question and must extend beyond mere business interactions. Relationship between claimant was mere contractual relationship and lacked any hallmark of fiduciary obligation. Debtor's failure to pay creditor for services performed, without more, is not sufficient to establish constructive trust.
- (1268) *Helbling v. Thomas*, 2014 WL 1978939 (6th Cir. BAP 2014) – Property erroneously conveyed to debtor by debtor's father impressed with

constructive trust as matter of law and did not become property of estate.

- (1269) *Mason v. Clark*, 2013 WL 3991857 (Bankr. N.D. Ohio 2013), *reh'g denied*, 2013 WL 5300694 (Bankr. N.D. Ohio 2013) – Constructive trust is remedy, not cause of action. Bankruptcy court lacks authority to impose constructive trust unless, prior to commencement of case, constructive trust was imposed under state law. Where debtor's mother never claimed that debtor held title to property under constructive trust for mother's benefit prior to commencement of bankruptcy case, mother could not assert constructive trust as defense to action by Trustee to recover preferential transfer of property by debtor to mother 5 months pre-petition
- (1270) *Mayer v. Giarmarco, Mullins & Horton, PC.*, 41 BR 702 (E.D. Mi. 2011), *appeal after remand*, 2013 WL 4786826 (Bankr. E.D. Mi. 2013) – Property of Estate does not include property in which Debtor holds only legal title and not an equitable interest. Property held by debtor in constructive trust established prior to commencement of case constitutes trust property in which debtor holds bare legal title. State domestic relations laws regarding spouse's claim to portion of IRA gave rise to equitable claim but equitable claim, without more, does not establish constructive trust. Domestic relations arbitration did establish constructive trust in favor of attorneys. Constructive trust was based on unjust enrichment, as award of portion of IRA to ex-husband was designed to reimburse ex-husband for disproportionate share of divorce expenses, absent which ex-wife would have been unjustly enriched. Further, evidence indicated that portion of IRA that was in dispute was "recovered" by plaintiff in that she was allowed to retain the funds, such that attorney services produced a "recovery" against which a charging lien could be imposed
- (1271) *In re Warns*, 2013 WL 2422708 (Bankr. N.D. Ohio 2013) – Property held by debtor in constructive trust determined by state law is not property of estate as debtor holds bare legal title. However, constructive trust is remedy that must have been imposed by state law or state court prior to commencement of case. Remedy is normally limited to extraordinary circumstances to prevent a fraud or other wrongful acquisition or holding of property. Alleged transfer of property by debtor's wholly owned corporation to debtor individually did not impress property with constructive trust, even if transfer was done in violation of state law requirements for winding down business. Property was transferred by corporation to debtor before corporation ceased operations or entered winding down process, and there was no basis to impose a constructive trust on those assets. Bank held valid lien on assets regardless of whether property was vested in debtor individually or in debtor under a constructive trust, such that transfer did not cause any harm or loss to bank and there were no other equitable circumstances that would have impressed property with constructive trust pre-petition under applicable state law.

6.44 Possessory Liens

- (1272) *In re TMT, Inc.*, 2013 WL 1154532 (Bankr. N.D. Ohio 2013) – Debtor which operated warehouse had possessory lien on all items stored in warehouse for payment of unpaid storage fees. Although debtor does not own stored items, debtor's possessory lien constitutes property of the estate protected by automatic stay from any effort by owner to recover possession of stored items, as recovery of items would defeat validity of lien. Court would not grant owner's request for stay relief to allow to recover possession. To extent creditor alleged in stay relief motion that possessory lien was invalid or contested amount owed, action to contest validity, priority or extent of lien must be brought as adversary proceeding.

6.45 Restrictions on Alienation

- (1273) *ELM Road Development Co. v. Buckeye Retirement Co, LLC.*, 419 BR 328 (6th Cir. BAP 2009) – Under Ohio law, debtor's agreement not to sell interests in two business entities without prior consent of remaining shareholders was unenforceable restraint on alienation. Ohio law distinguishes between stock transfer restrictions giving other shareholders a right of first refusal, and stock transfer restrictions that essentially give other shareholders a right to veto the transfer; the former is considered a permissible "temporary" restriction and the latter an impermissible "permanent" restriction. Agreement gave the other shareholders an absolute power to veto the transfers constituted an impermissible "permanent" restriction on alienation, and neither prior instances of shareholder consent to a sale, nor a duty on shareholders' part to exercise their veto power in good faith, served to transform the transfer restriction from "permanent" to "temporary." Trustee authorized to sell debtor's interests in companies free and clear of agreement not to transfer without consent of all other shareholders.

6.46 Consignment Transactions

- (1274) *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. A consignment transaction requires that the materials be delivered to the consignee for purposes of sale; the consignee is a merchant in goods of that kind; and the goods at the time of the consignment are not consumer goods. Court could not grant summary judgment where record was not clear as to whether jewelry was delivered to jewelry store for purposes of sale or only for purposes of "trunk show" where store was permitted to display but not sell the items.
- (1275) *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. A consignment transaction requires that the materials be delivered to the consignee for purposes of sale; the consignee is a merchant in goods of that kind; and the goods at the time of the consignment are not consumer goods. Court could not grant summary judgment where record was not clear as to whether jewelry was delivered to jewelry store for purposes of sale or only for purposes of "trunk show" where store was permitted to display but not sell the items.

6.47 Cash Collateral Generally

- (1276) *Baker v. Harrington*, Case No. 15-2384 (1st Cir. 2016) – Cash collateral is any cash or cash equivalent in which the estate and any third part

hold interests. Cash collateral is not limited to consensual security agreements, and taxing authority with lien on debtor's assets held interest in cash, making cash "cash collateral". Attorney's argument that cash collateral is limited to consensual security interest was frivolous and not supported either by existing law or by any good faith argument for extension of existing law, warranting sanctions under Rule 9011.

6.48 Cash Collateral and Assignment of Rents – Defined

- (1277) *In re Colcord*, 2015 WL 5461543 (Bankr. E.D. Mi. 2015) – 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.
- (1278) *ECP Commercial II, LLC v. Town Center Flats, LLC*, 2016 WL 1237662, 2016 U.S. Dist. LEXIS 42063 (E.D. Mi. 2016) – Effect of perfected assignment of rents is determined by state law. Under Michigan law upon perfection of assignment by giving notice of default and demand for payment of rents to tenants, debtor loses all right, title and interest in rents and creditor acquires ownership of rents and divests debtor of interest in rents. Rents are not property of estate in Bankruptcy case filed after perfection of assignment and creditor may enforce assignment without need for relief from stay. Reversing *In re Town Center Flats, LLC*, 2015 WL 2265842 (Bankr. E.D. Mi. 2015).
- (1279) *In re Madison Heights Group, Inc.*, 2013 WL 8059810, 506 BR 728 (Bankr. E.D. Mi. 2013), *reh'g denied*, 2014 WL 1075809, 506 BR 734 (Bankr. E.D. Mi. 2014) – Properly implemented assignment of rents is absolute and transfers ownership of rents to mortgagee, such that there is no cash collateral for debtor to use. To enforce assignment of rents, there must be: (1) execution of assignment of rents; (2) recording of assignment of rents; (3) default under the mortgage; (4) recording of notice of default; and (5) service of recorded notice of default and the instrument creating the assignment of rents upon mortgagor's tenants. Once all five elements are fulfilled, title to rents passes to mortgagee free of any interest of debtor. Mortgagor's rights to rents revests in mortgagor if mortgagor redeems property, but any rent collected by mortgagee from time of default to time of redemption belong to mortgagee.
- (1280) *In re Kelley*, 2012 WL 5457331 (Bankr. E.D. Ky. 2012) – Proceeds of automobile insurance where automobile is destroyed in accident constitute substitute "cash collateral" in which secured lender retains security interest to extent of balance of allowed secured claim plus interest at rate in confirmed plan. Debtor cannot use those proceeds to acquire a new vehicle without the consent of the secured lender unless debtor provides adequate protection. Lienholder retains lien in remainder of proceeds until discharge or payment in full pursuant to non-bankruptcy law.
- (1281) *In re Williams*, Case No. 10-70559 (Bankr. E.D. Mi. 2011) – Proceeds of disposition of collateral constitutes cash collateral for purposes of Section 363. Insurance proceeds from destruction of automobile in accident that was itself subject to a properly perfected security interest constitutes lender's cash collateral. Debtor is not permitted to use cash collateral without consent of creditor absent showing that lien is adequately protected.
- (1282) *Far East National Bank v. US Trustee*, Case No. 11-1508 (9th Cir. BAP 2012) – Loan secured by Assignments of Leases and Rents did not encumber green fees and driving range fees. Bank held security interest in all of Debtor's real and personal property and all proceeds thereof. Green fees and driving range fees are not "rents, proceeds or profits" of lender's security interest. "Rents" consists of income produced by the real property, but does not include income generated as a result of business conducted on the property. Green fees and driving range fees were not directly tied to or wholly dependent on the property, but were the result of the operation of the golf course business. Green fees and driving range fees are not proceeds or profits. Although proceeds are derived from "licenses" granted to each golfer, allowing each golfer the temporary right to enter upon the real property, and are considered personal property subject to a security interest under the UCC. However, "proceeds" do not include compensation for goods and services provided by debtor in its everyday business performance, but are limited to after-acquired property that is directly attributable to the pre-petition collateral. Fees are considered money and not general intangibles. Fees are not "profits" as they do not relate to the sale of the property to which a perfected security interest attached. Fees are not within scope of collateral and so are not cash collateral.
- (1283) *In re Senior Housing Alternatives, Inc.*, 2010 WL 165991 (Bankr. E.D. Tn. 2011) – "Absolute Assignment of Leases, Rents, and Profits" that purported to be absolute and unconditional assignment of rents and income and not just as assignment as security, but then granted to the borrower the right to collect as agent for the Assignee absent default in underlying loan agreement did not divest Debtor of title to income and proceeds received post-petition. Income and right to receive income remained property of estate and constituted cash collateral subject to Section 363. Notwithstanding the representations in the Assignment, the Court would examine the transaction as a whole, which evidenced that assignment was given to secure loan obligations and not to immediately convey all right, title and interest to the Assignee.
- (1284) *In re Buttermilk Towne Center, LLC*, 2010 WL 5185870 (6th Cir. BAP 2010) – Under Kentucky law, mortgage that assigns rents and profits operated to grant security interest in rents and profits in favor of lender, but the rents and profits remain property of the estate subject to lien. Debtor cannot use those rents and profits absent authority of court to use cash collateral. Notices to tenants exercising right to receive rents sent pre-petition operates only to perfect the lien against future rents and does not divest debtor of title to the rents in the first instance.

6.49 Assignment of Rents – Effect of Perfection

- (1285) *In re Town Center Flats, LLC*, 2015 WL 2265842 (Bankr. E.D. Mi. 2015) – Effect of perfected assignment of rents is determined at state law. Under Michigan law, upon perfection of assignment, creditor acquires perfected security interest in rents but does not acquire ownership of rents or divest debtor of interest in rents, expressly noting conflict with decision in *In re Madison Heights Group, Inc.*.
- (1286) *In re Madison Heights Group, Inc.*, 2013 WL 8059810 (Bankr. E.D. Mi. 2013), *reh'g denied*, 2014 WL 1075809 (Bankr. E.D. Mi. 2014)

– Properly implemented assignment of rents is absolute and transfers ownership of rents to mortgagee, such that there is no cash collateral for debtor to use. Enforcement of assignment of rents, there must be: (1) execution of assignment of rents; (2) recording of assignment of rents; (3) default under the mortgage; (4) recording of notice of default; and (5) service of recorded notice of default and the instrument creating the assignment of rents upon mortgagor's tenants. Once all five elements are fulfilled, title to rents passes to mortgagee free of any interest of debtor. Mortgagor's rights to rents reverts in mortgagor if mortgagor redeems property, but any rent collected by mortgagee from time of default to time of redemption belong to mortgagee.

6.50 Cash Collateral - Adequate Protection

- (1287) *In re Williams*, Case No. 10-70559 (Bankr. E.D. Mi. 2011) – Proceeds of disposition of collateral constitutes cash collateral for purposes of Section 363. Insurance proceeds from destruction of automobile in accident that was itself subject to a properly perfected security interest constitutes lender's cash collateral. Debtor is not permitted to use cash collateral without consent of creditor absent showing that lien is adequately protected.
- (1288) *In re SI Grand Traverse, LLC*, 450 BR 703 (Bankr. W.D. Mi. 2011) – Chapter 11 debtor-hotel franchise operator failed to establish adequate protection in seeking permission to use cash collateral consisting of post-petition hotel rents to fund hotel's operations where expert's appraisal of hotel did not establish existence of equity cushion that adequately protected interest of secured creditor that held first and third liens on hotel and rents, debtor did not sufficiently establish second lienholder's purported guaranty of third lien position, and concerns regarding debtor's prepetition management and underfunded allocation for property improvement plan payments required under franchise agreement, among other factors, weighed against disengaging rents from creditor's security interest. Unauthorized use of cash collateral to make payroll by Chapter 11 debtor-hotel franchise operator, in violation of court order, and debtor's inability to fund hotel operations in light of court's denial of its request to use cash collateral provided cause for dismissal or conversion of case.
- (1289) *In re Williams*, Case No. 10-70559 (Bankr. E.D. Mi. 2011) – Debtor who seeks to use secured lender's cash collateral must provide creditor with adequate protection. Adequate protection may consist of an additional or replacement lien to the extent that he use of the cash collateral decreases the value of the creditor's security interest. Debtor proposed to use insurance proceeds from automobile accident, which constituted lender's cash collateral, and to provide lender with lien on newly acquired vehicle. Proposed purchase price for new vehicle was 100% of the amount of lender's cash collateral, placing lender at serious risk of loss as the automobile will depreciate immediately upon being purchased, leaving lender with collateral that is worth significantly less than the amount of the cash collateral. Proposed replacement lien would be unlikely to protect secured creditor from diminution in value of collateral.

6.51 Cash Collateral – Casualty Insurance Proceeds

- (1290) *In re Granville*, 2014 WL 1347039 (Bankr. E.D. Ky. 2014) – Insurance proceeds resulting from destruction of asset that was collateral for loan become cash collateral where security agreement covers collateral plus any proceeds of the collateral. Debtor could use insurance proceeds under Section 363 to purchase new vehicle only if creditor remains adequately protected. Debtor's proposal to use cash collateral to purchase new vehicle reasonable where debtor proposed to grant lender a replacement lien on new vehicle. Debtor had no other vehicle and debtor needed transportation to ensure successful completion of plan.

6.52 Cash Collateral – Payment of Professional Fees

- (1291) *In re Shivshankar Partnership, LLC*, 517 BR 812 (Bankr. E.D. Tn. 2014) – Cash collateral cannot be used to pay debtor's professional fees unless creditor is adequately protected, determined by (1) the value of the secured creditor's interest, (2) the risks to the secured creditor's value resulting from the debtor's request for use of cash collateral, and (3) whether the debtor's adequate protection proposal protects value as nearly as possible consistent with the concept of indubitable equivalence. Creditor's security interest was substantially undersecured and debtor failed to offer any adequate protection to compensate creditor for diminution in security interest that would result from diversion of cash collateral to pay professional fees.

6.53 Cash Collateral – Effect of Confirmation of Plan

- (1292) *In re Birdstone, Inc.*, 2016 WL 5794721 (Bankr. N.D. Ohio 2016) – Upon confirmation of plan, any prior adequate protection orders for use of cash collateral terminate and provisions of plan control. Confirmation reverts property in debtor and once property is removed from estate, automatic stay terminates, with property being “emancipated” subject only to plan terms. However, where plan provided for effective date 30 days after conformation, property remained property of estate for those 30 days. Any prior adequate protection order must, therefore, be honored during that 30 day window as property remains in the bankruptcy estate and is not yet property of debtor.

6.54 Assignment of Rents – Perfection and Enforcement

- (1293) *In re Madison Heights Group, LLC*, 2014 WL 1075809 (Bankr. E.D. Mi. 2014) – Under Michigan law, five steps are required to complete enforcement of assignment of rents. (1) Execution of the Assignment of Rents; (2) Recording of the Assignment of Rents; (3) Default under the Mortgage; (4) Recording of Notice of Default; and (5) Service of the Recorded Notice of Default and the instrument creating the Assignment of Rents upon the tenants.

6.55 Bare Possessory Interests

- (1294) *Bank of Kentucky v. Nageleisen*, 2014 WL 7408931 (Bankr. E.D. Ky. 2014) – Property interests are not limited to legal title. Bare possessory interest, even in absence of any legal or equitable title, is property of estate. State Court order that quieted title in partnership name did not result in property being entirely beyond scope of property of estate in debtor's later individual bankruptcy where debtor continued to reside in and had possessory interest in the property. Second property owned by partnership in which debtor was partner also protected as property

of estate where debtor had no title to property owned by partnership but debtor occupied property, as debtor's possessory right is property of estate.

- (1295) *In re Salov*, 510 BR 720 (Bankr. S.D. N.Y. 2014) – Creditor violated stay by issuing writ of eviction after commencement of case. Creditor completed foreclosure process and purchased property at valid pre-petition foreclosure sale. After debtor filed Chapter 13, creditor attempted to evict debtor. While debtor had no ownership after foreclosure sale and no ability to prevent issuance of deed even post-petition, property of estate includes all rights and interests including bare possessory rights and interests. Mere possessory interest even absent any legal interest is protected by automatic stay.
- (1296) *Escobedo v. Davis*, ___ WL ___ (Bankr. D.N. Mex. 2014) – Creditor sanctioned for attempt to enforce pre-petition eviction order in violation of automatic stay.
- (1297) *Caffey v. Jag Autocare, LLC*, 2014 WL 3888318 (Bankr. N.D. Ohio 2014) – Debtor retained possessory interest in motor vehicle that was repossessed but not sold as of petition date. Creditor's refusal to turnover vehicle to Trustee constituted violation of stay.
- (1298) *In re Comer*, 2014 WL 917485 (Bankr. E.D. Tn. 2014) – After foreclosure sale and transfer of title pre-petition, debtor had bare possessory right. However, bare possessory right is also protected by stay and creditor cannot pursue action to dispossess debtor absent relief from stay. Where foreclosure sale completed and title transferred pre-petition, court would modify stay to permit lender to complete action for possession. Where all events occurred pre-petition, rents became property of creditor and debtor has no right or ownership interest in the rents. While the rents may be proceeds of property of the estate, the rents do not themselves become property of estate as debtor has no interest in rents as of petition date.
- (1299) *Litzynger v. Farmers Deposit Bank*, 2012 WL 1190695 (Bankr. E.D. Ky. 2012) – Bare possessory interest in property constitutes property of estate for bankruptcy purposes. Prior to commencement of case, debtor delivered to bank a deed in lieu of foreclosure pursuant to a settlement of possible foreclosure proceedings. Bank did not record deed because of subordinate liens and instead filed foreclosure proceedings that were pending at time Bankruptcy petition filed. Even if as Bank alleged conveyance of deed operated to divest debtor of title, debtor remained in possession of the property as the foreclosure proceeding had not been completed. Debtor's possessory interest sufficient to constitute property of estate and Bankruptcy Court could exercise jurisdiction over property and claim.

6.56 Incomplete Transfers

- (1300) *Bruess v. Dietz*, Case no. 15-6019 (8th Cir. BAP 2015) – Section 522(p) limits the homestead exemption to \$155,675.00 where debtor acquires property within 1215 days prior to commencement of the case. Debtor “acquires” property when deed is recorded, not when the deed is executed and deed remained in possession of grantor's attorney at all times until recording and evidence indicated that grantor (grantee's father) did not intend deed to be effective until grantor directed attorney to record deed. Debtor's exemption limited where deed was executed 3 years pre-petition but not recorded until 700 days pre-petition.
- (1301) *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.
- (1302) *Litzynger v. Farmers Deposit Bank*, 2012 WL 1190695 (Bankr. E.D. Ky. 2012) – Debtor did not divest himself of title to property by delivery of deed in lieu of foreclosure where lender did not accept the deed. Bank received deed in lieu but determined that subsequent liens required foreclosure. Bank never recorded deed but did institute foreclosure proceedings. To be effective conveyance, deed must be delivered by the vendor and accepted by the vendee sufficient to divest vendor of title and vest title in vendee. Bank never evidenced any intent to accept deed. Bank did not record deed and did not credit the debtor's account for the value of the property. Instead, Bank chose to pursue foreclosure which would be entirely unnecessary if Bank had accepted deed. As deed, while tendered by debtor, was never accepted by Bank, title to property remained vested in debtor subject to Bank's rights under the mortgage documents.

6.57 Pre-petition Transfers Generally

- (1303) *Hall v. Huntington National Bank*, 2011 WL 1135955 (N.D. Ohio 2011) – A deed under Ohio law must be signed by the grantor, and acknowledged before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor, who shall certify the acknowledgement and subscribe the official's name to the certificate of the acknowledgement. However, defectively executed deed is valid as between parties to the deed absent evidence of fraud. Debtor who admitted signing deed but who claimed that deed was not signed in the presence of a notary cannot seek to invalidate deed and to recover property. Although deed may have been unenforceable against a third party, the deed was valid as between the grantor and grantee and could not be set aside by either of them.

6.58 Pre-petition Attorney Fee Retainers

- (1304) *In re Newcomb Print Communications, Inc.*, Case No. 12-8042 (Bankr. W.D. Mi. 2013) – Pre-petition attorney fee retainer, even if paid by third party, is property of bankruptcy estate until fees are approved by court and paid from retainer. Until approval and payment, fees must be held in attorney trust account for benefit of client and may be withdrawn only as and when earned. To extent attorney holds retainer that has not been applied to fees, attorney must turnover retainer to Chapter 7 trustee upon conversion of case.

6.59 Fixtures and Personality – Defined

- (1305) *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 personalty 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.
- (1306) *In re Rolling Hills Camping Resort, Inc.*, 2011 WL 1793348 (Bankr. W.D. Ky. 2011) – whether something is a fixture is determined by looking at whether the item was (1) annexed, either actually or constructively, to the property; (2) adapted to the use/purpose of the property to which it is connected so as to materially affect its use; and (3) intentionally made a permanent part of the property to which it was annexed. Item can be fixture even if it is capable of being moved. Campground cabins sat on concrete slabs designed for that purpose and were connected to hurricane straps and utility connections. Ability to disconnect utility lines and remove cabins did not defeat status as fixtures attached to the property. Cabins were integral part of operation of property as campground, and removal of cabins would adversely affect the use and value of the real property. Parties intended cabins to be permanent part of campground. Creditor perfected security interest by recording Notice of Lien which indicates intention to treat cabins as permanently affixed. Debtor treated cabins as fixtures when he sought to sell the property; Debtor did not pay separate personal property taxes on the individual cabins; did not separately insure the individual cabins; did not have separate titles on the cabins; and did not list the cabins as separate property in its sworn schedules filed in the case. Creditor held properly perfected lien on cabins as fixtures to real property and was entitled to proceeds received from bankruptcy sale of the collateral.
- (1307) *In re Joseph*, 450 B.R. 679 (Bankr. E.D. Mi. 2011) - Under Michigan common law, items of property that are fixtures are treated as part of the real estate, and are deemed transferred as part of a transfer of the real estate, except to the extent the transfer parties expressly agree otherwise. Property is a fixture if (1) it is annexed to the realty, whether the annexation is actual or constructive; (2) its adaptation or application to the realty being used is appropriate; and (3) there is an intention to make the property a permanent accession to the realty. Property is “affixed” if its removal would impair the value of the item removed and would also impair the value of the real estate itself. Window blinds that were secured to property using brackets that were permanently screwed to the property; refrigerator and refrigerator door panels which were custom designed to blend in with kitchen cabinets and designed to look like permanent part of kitchen; built-in dishwasher; exterior garden bell affixed to property on post attached to house; and mailbox hung on outside of house and intended as mail receptacle; constituted fixtures. Window drapes and hardware were not fixtures where drapes were purely decorative, were easily removable, and were designed to complement furniture, were not fixtures. Debtor improperly removed fixtures from house that became property of estate when debtor vacated the premises.

6.60 Contingent and Future Interests

- (1308) *Dietz v. Barth*, 2013 Bankr. Lexis 579 (Bankr. D. M. 2013) – Debtor’s mere contingent or potential future interest in payment stream is not property of estate. Debtors were Native Americans and members of a Tribe that operated a casino. Under the Compact with the state, the casino was required to remit a certain portion of the proceeds to the State and to distribute the rest according to Tribal regulations. The Tribal regulations provided that at the end of each year, the Tribe would determine whether the Tribe had earned a profit and, if so, whether and to what extent that profit would be distributed. The Tribe was not obligated to make distributions and there was no assurance that in any given year the Tribe would have profits to distribute. Debtor’s potential interest in future distributions, as of the date of commencement of the case, was too remote and contingent, such that debtor did not have any interest sufficient to constitute property of the estate.

6.61 Season Tickets

- (1309) *Crocker v. McWhorter*, 2016 WL 4928001 (Bankr. E.D. Ky. 2016) – Season tickets to University of Kentucky Basketball, where 15 of 21 games remained as of petition date, were assets that debtor is required to disclose. Failure to disclose was evidence of fraudulent intent partially contributing to denial of discharge under Section 727(a)(2).

6.62 Political Campaign Contributions

- (1310) *In re Chambers*, 2011 WL 2144558 (Bankr. N.D. Ga. 2011) – “Property of estate” is broad, sweeping in all rights the debtor had as of the moment of the petition. however, Section 541(a) does not alter the pre-petition interest the debtor had. Whether and to what extent debtor had an interest in property is determined by state law. Debtor who was running for political office but who had not incorporated campaign had interest in funds received as campaign donations. State law that restricts use of campaign funds does not restrict ownership of the funds. Bankruptcy code invalidates restrictions on use unless created by express spendthrift trust. Funds were in unrestricted bank account and became property of estate upon commencement of case.

6.63 Bonuses

- (1311) *Seaver v. Klein-Swanson*, Case no. 12-6054 (8th Cir. BAP 2013) – Debtor’s bonus received post-petition was not property of Chapter 7 estate. As of date of commencement of case, employer had not declared or determined any bonuses. Whether to declare bonus and, if so, amount, remained entirely within the discretion of the employer. Debtor’s alleged contingent interest in bonus, if employer decided to declare one, was not sufficient to make later received bonus property of estate, even if later-declared bonus was based on pre-petition financial results of company. Before employer decided to declare bonus, debtor had nothing more than hope or expectancy – as of the petition date, debtor had no interest in the bonus pool and so, had a contingent interest in nothing. Further, because later-declared bonus

payments were not property of estate, funds received by debtor as bonus were not proceeds or products of property of estate as used in Section 541(a)(6) and were not an interest that the estate acquired an interest after commencement of the case, as there was no basis for the estate to assert any interest in the later-declared bonus.

- (1312) *In re Miller*, 2011 WL 3741846 (Bankr. N.D. Ohio 2011) – Bankruptcy estate consists of all legal or equitable interests of debtor when case is filed. Whether debtor has legal or equitable interest is question of state law. Debtor’s Employer’s Handbook specified circumstances under which Debtor’s right to receive a bonus would arise. Although the circumstances had not yet fully occurred (which included that debtor was still employed as of the date of the bonus and the decision of employer to declare bonus), Debtor had contingent right to receive bonuses which constituted a property interest which became property of estate.

6.64 Encumbered Property

- (1313) *In re Webb*, Case no. 11-8016 (6th Cir. BAP 2012) – The fact that property was encumbered by lies pendent when originally acquired by debtor did not prevent property from becoming property of estate upon filing of bankruptcy petition. Creditor’s continued prosecution of foreclosure after debtor filed bankruptcy petition constituted willful violation of automatic stay warranting sanctions.

6.65 Proceeds and Products

- (1314) *Porrett v. Hillen*, Case No. 16-0135 (D. Idaho 2016) – Section 541(a)(6) sweeps in all proceeds of or from property of estate after commencement of case. There must be some property of the bankruptcy estate in the first instance to bring proceeds into estate. Proceeds include all funds traceable to or substituted for original property and include all post-petition payments attributable to pre-petition claim. Cause of action that arises post-petition is not property of estate so recovery from cause of action cannot constitute “proceeds”. Whether cause of action arises pre- or post-petition is based on state law and looks to whether claim could have been brought pre-petition. Cause of action is pre-petition where cause of action was based on alleged fraud in mortgage origination and origination occurred prior to commencement of case. Although debtors may have been completely unaware of alleged wrongful conduct and fact that remedy may have been unliquidated as of petition date, that does not remove action from property of estate. Damages accrued when fraud was committed, which was indisputably pre-petition. Damages recovered were “proceeds” of cause of action as recovery was traceable to pre-petition cause of action.
- (1315) *In re Williams*, Case No. 10-70559 (Bankr. E.D. Mi. 2011) – Proceeds of property of estate are themselves property of estate. Insurance proceeds received after destruction of automobile in accident were themselves property of the estate where the underlying automobile itself was property of estate.

6.66 After Acquired Property – Section 541(a)(7)

- (1316) *Porrett v. Hillen*, Case No. 16-0135 (D. Idaho 2016) – Section 541(a)(7) sweeps in any property acquired by the estate after commencement of case and is intended to ensure that all property interests created with or by property of the estate are themselves property of estate. Provision presupposes that estate has interest in first instance. Merely because property comes into possession of estate does not make it property of estate unless some property of estate was used to acquire or create interest. Cause of action that accrues Postpetition is not property of estate as action itself is not property and so proceeds cannot be “after acquired” property. Whether cause of action arises pre- or post-petition is based on state law and looks to whether claim could have been brought pre-petition. Cause of action is pre-petition where cause of action was based on alleged fraud in mortgage origination and origination occurred prior to commencement of case. Although debtors may have been completely unaware of alleged wrongful conduct and fact that remedy may have been unliquidated as of petition date, that does not remove action from property of estate. Damages accrued when fraud was committed, which was indisputably pre-petition. Damages recovered were “after acquired” property as recovery was traceable to pre-petition cause of action.

6.67 Mineral Interests and Rights

- (1317) *In re Cassetto*, 2012 WL 3193555 (Bankr. N.D. Ohio 2012) – Oil and gas rights that underlie property owned by debtors and that have not previously been severed are property of the estate. Trustee is required to administer those rights for the benefit of the estate, which can include execution of oil and gas leases. Mineral rights attendant to debtor’s homestead were nonetheless property of estate subject to administration. Trustee could enter into mineral lease even where exploration may produce noise and require access to the property where debtors did not present any evidence that debtors would be unable to continue to use and enjoy the homestead.
- (1318) *In re Loveday*, 2012 WL 1565479 (Bankr. N.D. Ohio 2012) – Oil and gas interest are not part of the real property owned by debtor. Oil and gas move freely from place to place. While it may from a part of a tract of land at one point or another, if it moves to an adjoining tract then it becomes part of that tract. It remains a migratory item until it is actually raised to the surface through a well, at which time it becomes personal property subject to distinct ownership separate from the realty. Debtor’s scheduling of the real property without any separate listing of oil and gas rights does not constitute proper disclosure of oil and gas rights. Therefore, debtor’s scheduled valuation of the real property would not include the value, if any, of the separate oil and gas rights. Valuation of real property is assumed to be the value given to the top surface rights unless debtor specifically schedules retention of other rights associated with the real property. Debtor’s failure to disclose oil and gas rights means that rights remained property of estate post-confirmation of Debtor’s Chapter 13 plan, and the proceeds and profits received from oil and gas leases are property of estate available for additional funding of Debtors plan.

6.68 Criminal Forfeiture

- (1319) *U.S. v. Erpenbeck*, 682 F.3d 472 (6th Cir. 2012) – Forfeiture proceedings allow government to seize property and proceeds of criminal offense. If assets connected to the offense cannot be located despite due diligence, government can forfeit substitute assets, which is any

property owned by the criminal defendant that is not otherwise a product of the criminal activity. Proceeds of criminal activity that occurred pre-petition and are later forfeited are not property of estate, as forfeiture of criminal proceeds is deemed to have occurred at the moment of the crime, such that debtor did not have title to those assets as of the date of commencement of the bankruptcy case. However, “substitute assets” to not become subject to forfeiture proceeding until government can establish that it cannot locate proceeds of criminal activity. Trustee of criminal defendant’s bankruptcy estate has a cognizable interest in “substitute property” and has a right to direct notice of criminal forfeiture proceedings against defendant’s cash and an opportunity to contest forfeiture proceeding. Notice by publication is sufficient as to any person whose interest is unknown to the government. However, when the government knows of a competing interest, government must provide actual, direct notice. Although government knew of trustee’s potential interest, government failed to provide actual, direct notice. Trustee entitled to set aside order of forfeiture and to commence ancillary proceedings to determine right to “substitute property”.

6.69 Equitable Distribution and Marital Interests

- (1320) *In re Ripberger*, 2014 WL 5474057 (Bankr. E.D. Ky. 2014) – State court judgment of divorce that awarded marital residence to debtor and ordered debtor to pay former spouse money to compensate for spouse’s equity in property unconditionally transferred equitable title to debtor. When debtor later filed bankruptcy, debtor properly listed himself as the sole owner of the property and listed his ex-wife as an unsecured creditor. Ex-wife did not have any further interest in property as judgment unconditionally transferred property and did not amount to an “option” for debtor to purchase ex-wife’s interest.
- (1321) *Brown v. Brown*, 2013 WL 2338233 (E.D. Ky. 2013) – 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.

6.70 Health Savings Accounts

- (1322) *Leitch v. Christians*, Case no. 13-6009 (8th Cir. BAP 2013) – Debtor’s interest in Health Savings Account is not excluded from property of the estate by Section 541(c)(2). HSA is not a “health insurance plan regulated by state law”, but is merely trust account over which debtor, as account beneficiary, has unrestricted control and access.

6.71 Inheritance

- (1323) *Banfield v. Gentry*, 2016 WL 4061248 (E.D. Mi. 2016) – Debtor’s interest in various trusts not property of estate where debtor’s rights in trusts did not arise until Mom, the trust settlor, passed away. Mom passed away more than 2 years after debtor filed for Chapter 7 relief. Section 541 sweeps in property that debtor acquires as a result of bequest, devise or inheritance where the debtor acquires those interests within 180 days post-petition. Debtor’s interest did not arise until 2 years post-petition, and debtor’s interests in trusts were not property of estate.
- (1324) *In re Davis*, 2015 WL 5770780 (Bankr. SD. Ohio 2015) – Debtor’s right to receive inheritance and life insurance became property of estate where debtor’s father passed away after discharge but before expiration of 180 days from the petition date. Debtor required to disclose entitlement within 14 days per Rule 1007 and to remit non-exempt proceeds to Chapter 7 Trustee for distribution to creditors.

6.72 Marshalling of Assets

- (1325) *In re Marble Cliff Crossing Apartments, LLC*, 484 BR 175 (Bankr. S.D. Ohio 2012) – Marshalling of assets applies when senior lender has lien on two funds belonging to common debtor, while junior lender has lien on only one of those funds. In that event, senior lender will be precluded from exercising rights to extent that lien would be satisfied to exclusion of others. Senior lender will first be required to satisfy claim from assets that are not subject to junior lien, and will be permitted to exercise rights to other collateral only to satisfy any remaining claims. Senior lender who had security interest in real property and equipment would be prevented from exercising rights in equipment which was subject to junior lien, as real property itself had value sufficient to satisfy first lien.

6.73 After Confirmation of Chapter 13 Plan – Generally

- (1326) *In re Williams*, Case No. 10-70559 (Bankr. E.D. Mi. 2011) – Property of the estate in a confirmed Chapter 13 plan depends on the intersection of Sections 1306, 1327, 363 and 541. Code as a whole is most consistent with “estate preservation” interpretation. Confirmation does not affect status of property as property of estate. Status of property can change only on dismissal, conversion or closing of case. “Vesting” under Section 1327(b) does not mean a transfer or conveyance of title but fixes in the debtor the right to use and possess property of the estate, but the property itself remains property of the estate.
- (1327) *In re Jackson*, 403 B.R. 95 (Bankr. D. Idaho 2009) – Assets acquired by a Chapter 13 debtor after confirmation of a plan but before the case is closed, dismissed, or converted become property of the bankruptcy estate. Where plan provided for property to vest in debtors at

confirmation, property ceased to be property of estate. Therefore, post-petition creditor who recorded judgment against debtor's residence did not violate stay, as creditor's actions were not attempt to collect pre-petition obligation and did not interfere with property of the estate.

6.74 After Confirmation of Chapter 13 Plan - Personal Injury Proceeds

- (1328) *Chung-Chan v. Bankowski*, 2009 U.S. Dist. LEXIS 106857 (D. Mass. 2009) – Proceeds of post-petition personal injury action received during pendency of Chapter 13 case constitute property of estate that must be accounted for in payments to creditors.

6.75 After Confirmation of Chapter 13 Plan – Life Insurance Proceeds

- (1329) *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.
- (1330) *In re Smith*, 2012 WL 43647 (Bankr. N.D. Ohio 2012) – Life insurance proceeds received by debtor where non-filing spouse died during pendency of Chapter 13 case are property of estate per Section 1306.

6.76 After Confirmation of Chapter 13 Plan – Inheritance

- (1331) *In re Gilbert*, 2015 WL 798711, 526 BR 414 (Bankr. N.D. Ga. 2015) – Inheritance to which debtor became entitled one year after confirmation of plan is property of Chapter 13 estate. Proceeds of sale of property must first be used to pay unsecured creditors in full before debtors could retain any proceeds.
- (1332) *In re Stillwaggon*, 2014 WL 1087898 (Bankr. M.D. Fl. 2014) – Inheritance received 34 months into 36 month plan is property of estate. However, debtor's request to convert case not bad faith where debtor had no expectation of inheritance when case filed and there was no evidence of intent to "game the system".
- (1333) *In re Castillo*, 508 BR 1 (Bankr. W.D. Tx. 2014) – Inheritance received by debtor more than 180 days after commencement of case is property of Chapter 13 estate. However, debtor's request to convert case after receiving inheritance not bad faith where there were other circumstances that would support conversion including job loss, illness and three deaths in family.
- (1334) *Carroll v. Logan*, 2013 WL 5781211 (4th Cir. 2013) – Property of Chapter 13 estate includes all property received during pendency of case. Inheritance to which debtor became entitled three years after commencement of case is property of estate under Section 1326.
- (1335) *In re Tinney*, 2012 WL 2742457 (Bankr. N.D. Ala. 2012) - Inheritance received more than 180 days after petition date was property of the estate. Section 1306 sweeps in all property of any kind that is acquired after commencement of the case but before case is closed or dismissed or converted. Broad language of Section 1306 operates to expand 180-day time period of Section 541. Trustee's plan modification to require remittance of inheritance granted.
- (1336) *In re Wiggins*, 2012 WL 3889099 (Bankr. E.D. Tn. 2012) – Inheritance to which debtor became entitled more than a year after confirmation of plan was property of estate. Debtor's expenditure of funds received constituted improper conversion of property of estate by debtor.
- (1337) *In re Zeitchik*, 2011 WL 5909279 (Bankr. E.D.N.C. 2011) – Inheritance received more than 180 days after commencement of case became property of Chapter 13 estate. Section 1306 extends 180 day period found in Section 541(a)(5) to include all property received before closing, conversion or dismissal. Debtor must modify plan to account for new property for purposes of best interests of creditors.
- (1338) *In re Walsh*, 2011 WL 2621018 (Bankr. S.D. Ga. 2011) – Inheritance to which Debtor became entitled more than 180 days after petition date did not become property of estate in Chapter 13 proceeding. Section 1306 sweeps in after-acquired property to extent that property would have been included in property of estate in Chapter 7 proceeding, which includes 180 day limitation on inherited property.
- (1339) *In re Key*, 2012 WL 315446 (Bankr. S.D. Ga. 2012) - Inheritance to which Debtor became entitled more than 180 days after petition date did not become property of estate in Chapter 13 proceeding. Section 1306 sweeps in after-acquired property to extent that property would have been included in property of estate in Chapter 7 proceeding, which includes 180 day limitation on inherited property.
- (1340) *In re Wetzel*, 381 BR 247 (Bankr. E.D. We. 2008) – Property inherited by Chapter 13 debtor during pendency of case becomes property of estate regardless of when during case property is inherited. Property must be included in liquidation analysis and income derived from property must be contributed to the plan.

6.77 After Confirmation of Chapter 13 Plan – Casualty Insurance

- (1341) *In re Granville*, 2014 WL 1347039 (Bankr. E.D. Ky. 2014) – Whether insurance proceeds are property of estate is fact specific determination. Debtor's automobile vested in debtor upon confirmation of plan. Thereafter, automobile was totaled in accident caused by third party. Proceeds paid by third party's insurance are property of estate. The proceeds result from tort committed by third party, the result of which was debtor's entitlement to compensation. Tort became property of estate under Section 1306 when the tort occurred. Vesting provision of Section 1327 is not implicated as tort did not exist as of moment of confirmation of plan and so could not have vested in debtor.

6.78 Stay Violations – Chapter 13

- (1342) *Richardson v. The Koch Law Firm, PC*, 768 F.3d 732 (7th Cir. 2014) – Damages for creditor's alleged violation of Truth in Lending Act in attempting to collect, post-petition, final judgment entered in violation of stay, is property of estate and not property of debtor.
- (1343) *Crouser v. BAC Home Loan Servicing, LP*, Case No. 11-1047 (Bankr. S.D. Ga. 2012) – Damages resulting from post-petition violation of

stay are property of Chapter 13 estate pursuant to Section 1306. Debtor must turn over proceeds to Chapter 13 Trustee for distribution to creditors.

6.79 Conversion From Chapter 13 to Chapter 7

- (1344) *Lentz v. Myers*, 486 BR 365 (Bankr. S.D. Miss. 2013) – Bad faith conversion from Chapter 13 to Chapter 7 results in Chapter 7 estate including all property of debtor acquired after commencement of Chapter 13 up through date of conversion. Debtor's conversion was motivated by substantial improvement in financial condition that would have permitted debtor to increase plan payments rather than increase payments, debtor converted case to Chapter 7. Conversion done not because debtors could no longer afford Chapter 13 payments but, instead, to retain substantial post-petition assets and income evidenced bad faith.
- (1345) *In re Wiggins*, 2012 WL 3889099 (Bankr. E.D. Tn. 2012) – Upon conversion of case from Chapter 13 to Chapter 7, property of Chapter 7 estate includes property of the estate as of the date of the filing that remains in possession or control of debtor as of date of conversion. However, if debtor converts case in bad faith, property of Chapter 7 estate is all property in estate as of date of conversion, including property acquired post-petition. Inference of bad faith does not rise solely because debtor acquired assets post-petition that would be excluded from converted estate. Court must ascertain whether debtor is merely seeking advantage over creditors or whether debtor is honest in dealing with creditors and truly needy in sense that financial predicament warrants discharge of debts in exchange for liquidation of assets. Evidence indicated lack of good faith. Although debtor received inheritance in October, 2011, he did not tell his attorney until February, 2012. Debtor testified that he contacted attorney because he was concerned that property and money would go into Chapter 13 estate and debtor wanted to keep land out of hands of creditors and debtor had already used portion of inheritance to pay off second mortgage. Debtor's desire to keep the property and the \$48,000 in cash outweighed any consideration for unsecured creditors. Further, after conversion, although debtor disclosed real estate, he did not disclose receipt of \$48,000 in cash proceeds, which would have been sufficient to pay unsecured creditors in full leaving over \$12,000 surplus. Case did not have any significant change in circumstances other than inheritance that would have prompted conversion. Debtors consciously attempted to manipulate the bankruptcy system to the detriment of their unsecured creditors when they converted their case to Chapter 7, thus necessitating a finding that their case was converted in bad faith. Accordingly, pursuant to § 348(f)(2), all property acquired during the pendency of the Debtors' Chapter 13 bankruptcy case, including the Hubbard Road Property and the remaining \$10,000.00 from the \$48,000.00 cash inheritance, is property of their Chapter 7 bankruptcy case and subject to administration by the Trustee.
- (1346) *In re Smith*, 2012 WL 43647 (Bankr. N.D. Ohio 2012) – Life insurance proceeds received by debtor where non-filing spouse died during pendency of Chapter 13 case are property of estate per Section 1306. However, when case is later converted to chapter 7, insurance is not property of Chapter 7 estate. On conversion, only property of the estate that existed as of the date of the filing of the petition that remains in possession or control of the debtor on the date of conversion is included. Only exception is where case is converted in bad faith under Section 348, in which case property of estate includes all property of the estate as of the date of conversion. Bad faith depends on nature of debt, whether debt would be dischargeable in Chapter 7, timing of petition, how debt arose, debtor's motive in filing petition, how actions will affect creditors, treatment of creditors both pre- and post-petition, and whether debtor has been forthcoming. Evidence indicated lack of good faith in conversion. Debtor falsely alleged that debtor sought to convert because debtor could not afford payments, when debtor had substantial assets in from of life insurance proceeds to use for payments. When debtor received insurance, debtor selectively decided to pay creditors that were close to her and used between \$14,000 and \$18000 on new furniture and gifts to charity. Debtor also failed to completely account for use of insurance proceeds. Debtor's expenses substantially increased after death of spouse with no explanation and in spite of smaller household size. Debtor had paid nothing to unsecured creditors by the time of conversion although insurance proceeds would have allowed debtor to complete Chapter 13 case and pay 50% dividend to unsecured creditors while retaining significant portion of proceeds.

6.80 Ipso Facto Clauses

- (1347) *In re FKA, FC, LLC*, 2016 WL 690854 (Bankr. W.D. Mi. 2016) – Bankruptcy filing alone is not event of default under lease between debtor and landlord, pursuant to Section 365(b)(2).
- (1348) *In re Denman*, 2014 WL 3687246 (Bankr. W.D. Tn. 2014) – Debtor's interest in LLC is property of estate. Provision of agreement that provided that filing of bankruptcy constitutes event of default allowing other members to exercise right to purchase debtor's membership interest is invalid ipso facto clause. Option to purchase was triggered solely by bankruptcy filing and seeks to effect a forfeiture or termination of debtor's interest in the membership interest.
- (1349) *Zeh v. Orthodontic Centers of America, Inc.*, 2013 WL 5966784 (W.D. Ky. 2013) – *Ipso Facto* clause in settlement agreement in pre-petition litigation was ineffective to cut off debtor's rights to enforce contract in bankruptcy. Settlement agreement obligated Zeh to pay OCI and provided that if either party seeks relief under the Bankruptcy Code, the other party would be relieved from any further obligations under the settlement agreement. Court rejected Zeh's contention that after OCI filed Chapter 11, he was no longer required to make payments under the settlement agreement pursuant to the *ipso facto* clause. Section 541(c)(1) expressly precludes enforcement of any clause that operates as a modification, forfeiture or termination of debtor's interest in property merely because debtor filed bankruptcy. Clause purported to terminate or forfeit debtor's right to enforce settlement agreement in the event of bankruptcy and was unenforceable to defeat debtor's claim for payment.

B. Turnover

6.81 Generally

- (1350) *Parker v. Horvath*, 2016 WL 5887316 (Bankr. N.D. Ohio 2016) – Party in possession of recipe book, determined by pre-bankruptcy state

court judgment to belong to debtor, is property of estate. However, State Court Order also concluded that while Book itself was property of estate, recipes and contents of book were not property of estate but belonged to and were the intellectual property of, a third party. Accordingly, party in possession of book would not be required to turn book over to Trustee, as Trustee has no right to use, possess, or sell the recipes themselves.

- (1351) *Reed v. Nathan*, 2016 WL 5844579 (E.D. Mi. 2016) – Bankruptcy Court has Constitutional jurisdiction to adjudicate Motion for Turnover as summary proceeding brought by Motion for Turnover rather than Adversary Proceeding. Court has constitutional jurisdiction over assets in hands of third party and subject to turnover because assets remain property of estate and are constructively possessed by Estate; and Debtor remained in control of assets notwithstanding purported ownership by third party. Court has statutory jurisdiction because turnover is core proceeding over which Court has jurisdiction to enter final judgment. Turnover involves two step process. First step is to determine whether assets are property of estate, which is power granted to Court under Section 541 and is “core”. Second step is to require surrender of those assets, which is remedy created by Bankruptcy Court and expressly recognized as “core” power under 28 USC Section 157. Where there is no legitimate or bona fide dispute as to third party’s interest in property, matter is core; where there is good faith or legitimate dispute as to title to assets, action is non-core as it has not yet been determined whether assets are property of estate. Court properly disposed of matter on motion rather than adversary as Rule 7001 specifically defines action to recover money or property from the debtor as done by adversary, while action to recover from third party is by adversary, where essential cause of action was that debtor and third party were one-and-the-same. Even if adversary had been required, any error was harmless where defendant did not demonstrate any prejudice or denial of any right that would have been afforded in adversary proceeding. Court gave defendant three weeks to respond to Motion; allowed both parties to make legal argument and submit memoranda of law; held three day trial during which defendant fully participated; and allowed supplemental briefing at end of trial. Evidence established that third party corporation that held assets allegedly belonging to debtor was mere alter ego of debtor and that assets of corporation are in fact owned by debtor. Debtor used corporation as “personal piggy bank” retaining all attributes ownership and control. Defendant in turnover action does not have a right to Jury trial under the 7th Amendment where action did not rely on any fraudulent transfer theory or any argument other than property belonged at all times to debtor.
- (1352) *In re Tellico Lake Properties, LP*, 2016 WL 1258287, 548 BR 800 (Bankr. E.D. Tn. 2016) – Trustee seeking turnover must prove that property is or was in possession of entity during pendency of case; that property may be used by trustee under Section 363 or exempted under Section 522; and that property has more than inconsequential value. Automobiles transferred by corporation to third party remained property of estate where principal of corporation purchased autos in his own name using corporate funds, vehicles were never titled in either individual’s name or corporate name, and party in possession of vehicles never obtained certificates of title in purchaser’s name or recorded liens on title as collateral for loans. Vehicles were type of property that trustee could sell for benefit of estate and, as classic cars, there was little dispute that cars had more than inconsequential value.
- (1353) *Gold v. Demeter*, 2015 WL 6437654 (Bankr. E.D. Mi. 2015) – Trustee can compel turnover only of property of estate, defined as interest debtor had in property as of date of commencement of case. 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 before commencement of case, and debtor had no interest in intestate interest to become property of estate.
- (1354) *In re Licking River Mining, LLC*, 2015 WL 5001009 (Bankr. E.D. Ky. 2015) – Under Section 542, trustee must prove by preponderance of evidence that property is in possession, custody or control of noncustodial party; property constitutes property of the estate; property is a type that the trustee can use, sell or lease or that debtor could exempt; and that property is not of inconsequential value. Funds held by debtor’s Chapter 11 counsel resulting from settlement of action prior to conversion to Chapter 7 are property of Chapter 7 estate and must be turned over to Chapter 7 Trustee.
- (1355) *Spradlin v. Khouri*, 2015 WL 4735660 (Bankr. E.D. Ky. 2015) – Trustee can compel turnover only of property of estate. Even assuming funds were at one point property of estate, debtor divested himself of interest in funds by paying funds to Defendant prior to Trustee’s demand for turnover. Transfer must first be avoided through adversary proceeding against Debtor and Transferee. If adversary proceeding is successful in avoiding transfer, then property is restored to “property of estate” and turnover motion would then be proper.
- (1356) *In re Partin*, 2014 WL 2566073 (Bankr. N.D. Ohio 2014) – Life insurance proceeds to which debtor became entitled within 180 days of petition are property of estate and must be turned over to trustee. Debtor had to turnover proceeds notwithstanding that debtor used proceeds to pay funeral expenses for debtor’s son. Although debtor no longer had money, debtor received it during 180 day window and must account for the proceeds under Section 542.
- (1357) *Yoppolo v. Aubiel*, 2014 WL 3386421 (Bankr. N.D. Ohio 2014) – Trustee entitled to order requiring turnover of boat in possession of debtor’s son. Boat was titled in debtor’s name and constituted property of estate. Trustee entitled to possession of boat as matter of law
- (1358) *In re Black Diamond Mining Co., LLC*, 2014 WL 1117458 (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.
- (1359) *Rentas v. Gonzalez*, Case No. 13-011 (1st Cir. BAP 2014) – Beneficiary of probate estate has interest in probate estate but not in any particular asset of estate or proceeds of sale of assets of estate. Chapter 7 Trustee could not compel Probate Court under Section 522 to turnover proceeds of sale of property s property was not property of estate and was not subject to turnover.
- (1360) *Lawrence v. Commonwealth of Kentucky*, 2013 WL 2422669 (Bankr. W.D. Ky. 2013), *affd*, 2014 WL 297868 (W.D. Ky. 2014) – Ability of Trustee to pursue turnover action depends on status of property in hands of third party as “property of estate”. Prior to commencement of case, debtor paid non-refundable deposit in connection with proposed purchase of real estate. Upon filing, Trustee made demand for the

return of the deposit, claiming deposit was property of estate. Trustee's rights were limited to those that the debtor had as of the moment of commencement of case. Debtor had no right to return of money – remedies were limited to either application of the purchase price to the balance due at closing, or forfeiture to seller as liquidated damages. Contract language was clear and unequivocal and did not afford debtor any right to retake possession of deposit. As such, deposit was not property of estate and trustee could not compel turnover.

- (1361) *In re Stewart*, 2013 WL 5592899 (Bankr. E.D. Mi. 2013) – Once creditor has notice of bankruptcy filing, Section 542 imposes affirmative obligation on creditor to return to debtor any property of the estate. Creditor wrongfully withheld property that belonged to debtor and constituted property of estate.
- (1362) *Okke v. Okke*, 513 BR 896 (Bankr. W.D. Mi. 2013) – Creditor holding property subject to a security interest that is perfected by possession can be required to turn over property to debtor, but court can impose conditions and restrictions as necessary to protect creditor's lien rights. Court ordered turnover of property expressly conditioned on finding that creditor does not lose perfected security interest as result of turnover, and prohibiting debtor from selling, disposing of or otherwise transferring property without further order of court.
- (1363) *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 had 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.
- (1364) *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.
- (1365) *Newman v. Schwartz*, 487 BR 193 (9th Cir BAP 2013) – Chapter 7 Trustee could compel debtor to turnover amount of pre-petition tax refund even though Debtor had spent the refund before entry of the turnover order. Although debtor was entitled to refund, he neither scheduled the refund as an asset nor claimed it as exempt. Tax refund constituted property of the estate as "an interest in property" as of commencement of the case and as community property under Nevada law. The fact that the Debtor had spent the refund prior to the Turnover Order did not defeat the Trustee's right to compel turnover, because the refund constituted property in the Debtor's "possession, custody or control" during the case, and, pursuant to Bankruptcy Code Section 542, the Debtor must account to the Trustee for either the property or its value. There is no requirement for the "present possession" of property before turnover can be compelled under Section 542.
- (1366) *Vining v. Comerica Bank*, Case No. 03-4950 (Bankr. E.D. Mi. 2011) – To prevail in turnover action, Trustee must prove that the property sought is property of the estate and that the property is of more than inconsequential value. Trustee failed to demonstrate that failure to turnover original documents as of consequence where Trustee had been provided with exact copies of documents and Trustee could not allege or prove any actual harm or prejudice from receiving copies rather than originals.
- (1367) *In re Watkins*, 2013 WL 1289157 (Bankr. N.D. Ohio 2013) – Court ordered turnover to Trustee of automobile in debtor's possession and valued at \$2,500, subject to Trustee's agreement to allow debtor to redeem vehicle for \$2,000.00. Vehicle would be turned over, with debtor retaining the right to redeem for \$2,000 up through the date of the auction of the vehicle.
- (1368) *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.
- (1369) *Vining v. Comerica Bank*, Case No. 03-4950 (Bankr. E.D. Mi. 2011) – Documents belonging to Debtor but in the hands of third party constitute property of the estate that must be turned over. Motion to Compel Turnover rendered moot when documents were turned over to Chapter 7 Trustee after filing of Motion but before hearing.
- (1370) *In re Driesenga*, Case No. 09-0925 (Bankr. W.D. Mi. 2010) – Trustee cannot bring Motion for Turnover where there is a dispute as to debtor's ownership of property. Trustee must first begin adversary to determine validity, priority and extent of debtor's interest in the property to determine ownership of property and extent to which property is subject to turnover.

6.82 Turnover – Tax Refunds

- (1371) *In re Spence*, 2015 WL 627975 (Bankr. N.D. Ohio 2015) – IRS regulations allow debtor who is otherwise entitled to refund to "irrevocably" elect to apply refund to future tax obligations. Court unable to determine whether tax refund was property of estate as evidence did not indicate whether tax refund was filed before or after commencement of case.

6.83 Excusal – State Court Receiver

- (1372) *In re Denning*, Case No. 13-4630 (Bankr. W.D. Mi. 2013) – Court would not order receiver to turnover property seized pre-petition where Chapter 7 Trustee had already filed Notice of No Distribution. Given that the Trustee has concluded that the estate has been fully administered, there is no point in ordering turnover, and creditors would be better served allowing assets to remain in possession of receiver for appropriate proceedings after entry of discharge when stay lifts.
- (1373) *In re Tam*, 2012 WL 3555416 (Bankr. W.D. Mi. 2012) – Court will generally require turnover where there is a likelihood of successful reorganization, subject to overall consideration of interests of creditors. Debtor's turnover motion denied where state court receiver had been in possession of and managing 72 unit apartment project for more than 16 months. Foreclosure sale had recently been completed although not confirmed by state court as a result of stay. Lender who caused appointment of receiver in first instance was successful bidder

and would have received title but for bankruptcy petition. Court had already lifted stay to allow completion of foreclosure proceedings, so removal of receiver would, at best, be fruitless and meaningless. Debtor failed to demonstrate even a hint of a possible reorganization, as debtor had virtually no income from which to fund reorganization. Although there was no evidence of any misconduct by debtor in managing property before appointment of receiver, to require turnover now would just cause unnecessary delay and would create risk of confusion to tenants who had been sending rent payments to receiver for 16 months.

6.84 Property in Possession of Custodian

- (1374) *In re Bullitt Utilities, Inc.*, 2016 WL 4574310 (Bankr. W.D. Ky. 2016) – Once a bankruptcy petition is filed, even after the appointment of a state court-appointed receiver is in place, the default position under the Bankruptcy Code is that a debtor is entitled to custody of its property and custodians of estate property must turnover the property to the Trustee unless best interests of creditors would be better served by allowing the custodian continuing in possession, custody or control of the property. Appointment of custodian or receiver does not divest debtor of title to assets and any property of debtor as of date of commencement of case remains property of estate regardless of pre-petition appointment of receiver or custodian.
- (1375) *Joseph and David Johnsman Ltd. v. Egbert*, 2015 WL 4873014 (Bankr. N.D. Ohio 2015) – Section 543 allows debtor to recover possession of property of estate that is in hands of custodian. “Custodian” is one who is a trustee, receiver or agent under applicable law or contract that is appointed or authorized to take charge of property of the debtor for purposes of enforcing lien or for general administration of property for benefit of creditors. Defendant who purchases assets from debtor arguably in violation of Section 550 was not custodian, even if proceeds of sale were then used to pay third party who held valid lien on assets and where third party lender had obtained stay relief to allow foreclosure sale. Defendant was nothing more than purchaser of unconditional title to assets evidenced by two bills of sale conveying title without restriction.

6.85 Defenses

- (1376) *Bowers v. United States*, 2014 WL 7745851 (Bankr. N.D. Ohio 2014) – Debtor had no right to receive or recover funds levied by IRS prior to commencement of case. IRS issued levy to debtor’s employer which incorrectly paid all of debtor’s net wages to the IRS without accounting for the statutory exemption amount. IRS applied that payment to reduce debtor’s tax debt. At that point, debtor had no interest in the funds and had, at most, an inchoate right to request a refund, amounting to the assertion of a claim. Therefore, when debtor later filed for bankruptcy, funds paid to IRS were not property of estate and debtor could not maintain action to recover those funds. Debtor had not requested return of funds from IRS such that there was no matured debt, payable on demand or on order, that could be enforced under Section 542.
- (1377) *In re Partin*, 2014 WL 2566073 (Bankr. N.D. Ohio 2014) – Life insurance proceeds received by debtor as owner and beneficiary of life policy received within 180 days of commencement of case are property of estate that must be turned over to the trustee. Debtor must turn over proceeds. Fact that debtor used proceeds to pay funeral expenses does not defeat duty of turnover. While “equity” may have supported debtor’s argument that funds were necessary to pay funeral expenses for decedent (debtor’s son), Section 105 did not allow court to depart from clear requirement that debtor turnover all property of estate.
- (1378) *Shapiro v. Henson*, 2014 WL 68998 (9th Cir. 2014) – Debtor required to turnover to Trustee balance in Checking account as of petition date even though funds were later withdrawn to pay checks written before commencement of the case. Debtor had possession and control of funds on petition date. Fact that debtor later lost control of funds did not defeat Trustee’s ability to recover funds from debtor.
- (1379) *TTOD Liquidation, Inc. v. Lim*, 2014 WL 554532 (Bankr. E.D. Mi. 2014) – Creditor properly rejected turnover demand where debtor had no right, title or interest in the property held by creditor as of the petition date.
- (1380) *Newman v. Schwartzer*, 487 BR 193 (9th Cir BAP 2013) – The fact that the Debtor had spent the refund prior to the Turnover Order did not defeat the Trustee’s right to compel turnover, because the refund constituted property in the Debtor’s “possession, custody or control” during the case, and, pursuant to Bankruptcy Code Section 542, the Debtor must account to the Trustee for either the property or its value. There is no requirement for the “present possession” of property before turnover can be compelled under Section 542.
- (1381) *Winters v. Comm’n of Internal Revenue Service*, 2013 WL 364328 (Bankr. M.D. Tn. 2013), *reversed and remanded*, 503 BR 434 (6th Cir. BAP 2013) – Because neither Bankruptcy Court nor Tax Court had issued final determination of the amount of tax debt for year in question, issues regarding statute of limitations, prior and nondischargeability could not be resolved. Case remanded to Bankruptcy Court for further proceedings. Prior to appeal, Bankruptcy Court had held that IRS issued erroneous refund to debtor post-petition although debtor had substantial liability owed for prior years taxes. Debtor returned the check to the IRS a few months later. To extent debtor may have been entitled to pre-petition refund, that entitlement would be property of estate. However, refund check was erroneously issued as debtor had no right to that refund. Debtor never acquired legal or equitable interest in the refund and court could not compel IRS to turn over the check or its proceeds to the Trustee.
- (1382) *Shapiro v. Henson*, 449 BR 109 (D. Nv. 2011) – Trustee could not compel debtor to turnover balance in debtor’s checking account as of the date of the bankruptcy petition where checks written pre-petition were ultimately honored post-petition. Debtor no longer had possession or control over funds that had been in the account as of the petition date. Section 542 allows turnover only of assets that are in the possession of the debtor as of the date on which the turnover motion is filed. Court disagreed with 6th Circuit BAP opinion that held that right of turnover does not depend on continued possession of the asset by the debtor.
- (1383) *In re Fleming*, 424 BR 795 (Bankr. W.D. Mi. 2010) – Chapter 7 Trustee’s action for turnover of property by debtor barred by laches where Trustee waited more than three years after discovering existence of asset until demanding turnover. Trustee knew that Debtors were

about to receive a large tax refund and knew that the Trustee would be asserting a claim to that refund but failed to take action to recover the refund. Debtors had long since spent the money and no longer had the funds available for turnover. Delay in asserting claim under Section 522 also unfairly impacted Debtors exemptions, as had Trustee made timely demand for turnover, Debtors could have timely amended Schedule C to claim the funds as exempt.

6.86 Refusal to Turnover - Sanctions

- (1384) *Souther 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. Court imposed sanctions where debtor failed and refused to turn over arbitration award in excess of amount claimed exempt. Fact that debtor used some or all of the proceeds did not excuse debtor's obligation to turnover proceeds where debtor had ability to do so yet retained and spent the money.
- (1385) *Livecchi v Gordon*, 513 B.R. 209 (W.D. N.Y. 2014) - Bankruptcy court did not abuse its discretion in finding debtor in civil contempt and sanctioning \$100 per day, plus \$500 fees to trustee, when debtor failed to turnover certificates of title and keys to cars to trustee.

C. Failure to Disclose Causes of Action

6.87 Future Prosecution Barred – Judicial Estoppel

- (1386) *Hawkins v. Michigan Department of Corrections*, 2016 WL 3230663 (E.D. Mi. 2016) – 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 is inappropriate in cases of conduct amounting to nothing more than mistake or inadvertence looking to whether: (i) debtor lacked knowledge of factual basis of undisclosed claims; (ii) debtor had a motive for concealment; and (iii) the evidence indicates an absence of bad faith. Debtor filed EEOC complaint in 2014 and filed suit against employer in January, 2015. Debtor filed Chapter 13 in May, 2015, but did not disclose cause of action. Debtor's Plan was confirmed by the Court based on omission from schedules, amounting to judicial adoption of debtor's representation that no causes of action existed. After defendant filed Motion for Summary Judgment in District Court action, debtor voluntarily dismissed the Chapter 13 case. Debtor's action against MDOC barred by judicial estoppel. Debtor possessed knowledge of factual basis of the claims well before she filed for bankruptcy. Debtor had motive for concealment, because if harassment claim became part of bankruptcy estate, then the proceeds from it could go towards paying creditors. Debtor failed to demonstrate lack of bad faith. Although debtor claimed that she told bankruptcy attorney about this lawsuit, debtor did not file an affidavit from her bankruptcy attorney to that effect. Debtor's own affidavit merely stated that debtor told her bankruptcy attorney about lawsuit and debtor did not realize that the lawsuit was left off petition.
- (1387) *Jenkins v. Davidson Transit Organization*, 2016 WL 2939910 (M.D. Tn. 2016) – Judicial estoppel protects integrity of courts by preventing party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. Court must find: (1) debtor assumed a position that was contrary to the one 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) omission did not result from mistake or inadvertence. Debtor estopped from post-discharge pursuit of employment discrimination charge where debtor failed to disclose cause of action in bankruptcy case and bankruptcy court entered discharge. Lawsuit asserted contrary position to bankruptcy schedules that indicated that debtor did not have any contingent or unliquidated claims. Failure to disclose based on inadvertence or mistake, to avoid preclusive effect, requires that (1) debtor lack knowledge of the factual basis of the undisclosed claims; (2) debtor lacked motive for concealment; and (3) evidence indicates an absence of bad faith. Debtor does not need to know exact nature of action or be aware of right to sue, as long as debtor is in possession of sufficient facts to suggest a possible cause of action. Prior to bankruptcy filing, debtor believed he was discriminated against on the basis of his age because he saw his significantly younger replacement driving his route a couple of weeks after his termination, and debtor believed he was discriminated against on the basis of disability because he was assigned to work in difficult conditions while he was on light duty recovering from surgery. Debtor had motive to conceal his claims because a debtor has an interest in minimizing income and assets. Fact that debtor had not filed complaint with EEOC or received right to sue letter was not justification for failure to disclose, as debtor considered right to sue as contingent, distant and remote but bankruptcy schedules specifically required disclosure of contingent claims. Debtor could also not escape by arguing reliance on counsel, as debtor has duty to complete and sign petition accurately.
- (1388) *Pauley v. Bank of America*, 2016 WL 213032 (E.D. Mi. 2016) – Upon filing of bankruptcy, causes of action become property of estate and debtor loses standing to pursue claims. Undisclosed assets are not abandoned at completion of case and remain property of estate. Debtor failed to list causes of action in schedules and failed to amend schedules at any time during bankruptcy case. Debtor judicially estopped from pursuing cause of action after discharge in bankruptcy.
- (1389) *Smith v. United Parcel Service*, 2014 WL 4377680 (10th Cir. 2014) – Judicial estoppel requires that party assert later position that is inconsistent with prior position; that party persuaded earlier court to accept earlier position so that acceptance of the contrary position in the second case would create an impression that either the first court or the second court was misled; and the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party. Debtor failed to schedule unfair labor practice claim against former employer in bankruptcy schedules. After discharge, debtor sought to prosecute claim. District court afforded debtor an opportunity to correct misinformation in bankruptcy court and inform court of proceedings but failed to do so and continued to assert inconsistent position in district court that he had cause of action when he asserted in bankruptcy court that no cause of action existed. Debtor's actions were clearly intentional and not inadvertent, even if initial failure to disclose was inadvertent failure to amend bankruptcy schedules after being advised by district court was intentional. Debtor obtained advantage by receiving discharge of

debts without disclosing causes of action. Debtor precluded by judicial estoppel from asserting undisclosed causes of action.

- (1390) *Parsons v. Southern Tennessee Medical Center*, 2014 WL 2159749 (E.D. Tn. 2014) – Debtor’s action under Americans with Disabilities Act precluded where debtor suffered injury that caused disability and gave rise to cause of action occurred at least two years prior to filing bankruptcy. Even if debtor did not know of cause of action at time case commenced, she certainly knew about it prior to closing of bankruptcy case yet failed to disclose. Debtor has continuing duty to disclose including all potential causes of action even if not known at time case filed. Bankruptcy Court relied on debtor’s assertion that debtor had no cause of action when, after debtor was discharged from employment, debtor requested and court approved modification of confirmed plan but debtor did not disclose claim in connection with modification. Disclosure only in response to opposing party’s threat to file motion to dismiss is not good faith disclosure and does not cure previous failure to disclose. Evidence also did not support finding of inadvertence where debtor had enough information to suggest that debtor may have had possible cause of action; debtor sought and obtained modification of plan following employment termination; debtor waited only seven months before filing EEOC claim after modifying plan; and debtor filed suit against former employer before notifying bankruptcy court, and then did so only in response to actions taken by opposing party. Debtor had motive to conceal as debtor would be able to retain valuable asset without accounting for value to creditors. Alleged lack of detriment to opposing party does not excuse non-disclosure in first instance.
- (1391) *Garrett v. University Hospitals of Cleveland, Inc.*, 2013 WL 2186116 (N.D. Ohio 2013) – Debtor’s complaint dismissed based on judicial estoppel. Although debtor knew of cause of action and knew that complaint had already been filed and litigation was ongoing, debtor failed to disclose cause of action in bankruptcy schedules and failed to advise either the Court or the Trustee of the pending action prior to confirmation of Debtor’s Chapter 13 plan. Debtor did not amend pleadings or disclose cause of action until after defendant had brought motion for judgment based on judicial estoppel. Non-disclosure was not inadvertent where debtor knew of action and failed to disclose it, and where debtor was at all times represented by bankruptcy counsel and litigation counsel.
- (1392) *EEOC v. JPMorgan Chase Bank*, 2013 WL 944200 (S.D. Ohio 2013) – Debtor’s failure to schedule sexual discrimination claim estopped debtor from recovering, but did not preclude action by EEOC to enforce statutes. EEOC enforcement is to vindicate public interest, not merely personal interests of the debtor.
- (1393) *Catron v. Dr. James S. Hayes Living Home Health Care Agency, Inc.*, 2013 WL 1729124 (W.D. Tn. 2013) – Debtor’s failure to disclose cause of action in Chapter 13 bankruptcy filing estopped debtor from later pursuing cause of action after dismissal of Chapter 13 case. Debtor’s failure to schedule cause of action constitutes statement on which court relied in confirming Debtor’s plan. Debtor’s later pursuit of action would be judicially estopped unless debtor can demonstrate that failure to disclose was inadvertent. Non-disclosure is not inadvertent where debtor was fully aware of all facts on which debtor’s claim was based, where claim was predicated on debtor’s extensive uncompensated overtime for prior 5 years. Debtor’s contention that debtor did not know that she could bring action against employer did not demonstrate inadvertence. Standard is whether debtor knew of factual basis for claim, not that debtor know the exact legal claim that could be asserted. Non-disclosure lacked good faith where debtor made no effort to disclose the action or to amend the schedules even after she filed the complaint to initiate the lawsuit. Debtor filed complaint 40 days prior to dismissal of Chapter 13, allowing debtor ample time to advise the bankruptcy court of the pending claim. Debtor’s allegation that she relied on counsel where debtor did not allege that she told attorney of cause of action and attorney failed to disclose, but only alleged that her attorney did not tell her she had to disclose potential claim.
- (1394) *Jones v. US*, 2012 WL 833320 (11th Cir. 2012) – Debtor judicially estopped from pursuing toxic tort claim against Federal government. Debtor failed to disclose the claim during pendency of chapter 13 case, or when debtor sought to convert case to Chapter 7. Disclosure would have materially impacted debtor’s Chapter 7 case which was discharged as “no asset” case. Debtor seeking shelter under the bankruptcy laws must disclose all assets, or potential assets, to the bankruptcy court. Duty to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court; debtor must amend financial statements if circumstances change. Creditors rely on debtor’s disclosure statements in determining whether to contest or consent to a no asset discharge; and Bankruptcy courts rely on accuracy of the disclosure statements when considering whether to approve a no asset discharge. Accordingly, the importance of full and honest disclosure cannot be overstated.
- (1395) *EEOC v. CRST Van Expedited, Inc.*, 2012 WL 1583026 (8th Cir. 2012) – Debtor’s failure to schedule sexual harassment claim estopped debtor from recovering, but did not preclude action by EEOC to enforce statutes.
- (1396) *Guay v. Burak*, Case No. 10-2513 (1st Cir. 2012) – Debtor’s failure to disclose causes of action in Chapter 11 Schedules or in supplemental schedules filed after conversion to Chapter 7 precluded later prosecution of actions after entry of discharge. Debtor had numerous opportunities to amend schedules to disclose causes of action, although Debtor did provide Trustee with copies of relevant pleadings and the lawsuits were discussed among the parties and the Bankruptcy Trustee.
- (1397) *Young v. Independent Bank*, slip op. No. 299192 (Mich. Ct. App. September 20, 2011) - 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.
- (1398) *Walker v. Moldex Metric, Inc.*, 2011 WL 3044529 (E.D. Tn. 2011) – Debtor has affirmative duty to disclose all assets at the time of filing a bankruptcy petition. Duty of disclosure is a continuing one, and a debtor is required to disclose all potential causes of action. 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 is not appropriate in cases involving conduct that amounts to mistake or inadvertence demonstrated by (1) where the debtor lacks knowledge

of the factual basis of the undisclosed claims, and (2) where the debtor has no motive for concealment. Debtors barred from prosecution of cause of action where debtors did not schedule claim in Schedule B or SOFA. Debtors could not show inadvertence where litigation had been filed one month prior to commencement of the bankruptcy case. Debtors have motive to conceal as omitting lawsuit would allow debtors to discharge debts at same time seeking to recover and retain large claim. Although litigation was pending at time petition was filed, debtors made no effort to inform bankruptcy court of claims to amend schedules to disclose. First notice to bankruptcy court did not occur until after Defendant filed Motion for Summary Judgment based on judicial estoppel.

- (1399) *Al-Mansoor v. Malloy*, 2010 WL 3906954 (E.D. Mi. 2010) – Debtor’s failure to list cause of action in bankruptcy schedules precluded debtor or Chapter 7 Trustee from later pursuing cause of action. Debtor is judicially estopped from bringing or maintaining a suit against a defendant if: 1) the party asserting the claim is taking a position that is plainly inconsistent with its prior legal position; 2) the court accepted the previous position; and 3) the disclosure was not inadvertent. Courts strictly apply test to foreclose a party from pursuing existing claims and/or lawsuits where such matters were not disclosed during the debtor/plaintiff’s pending bankruptcy. Debtor failed to initially identify and failed to amend his schedules during pendency of his bankruptcy proceeding to include this litigation as an asset and received discharge based, at least in part, on representation that no cause of action existed. Debtor could not demonstrate “inadvertence” where Debtor had knowledge of his personal injury claims because they were pending before he filed for bankruptcy protection; and Debtor had an obvious motive for failing to disclose-wanting to keep any settlement or judgment to himself. Reliance on bankruptcy lawyer’s expertise does not excuse failure to list action, particularly where Debtor made no effort to cure the omission before Defendants’ motion for summary judgment was filed.
- (1400) *Baker v. Rent-A-Center, Inc.*, 2010 WL 3896153 (E.D. Tn. 2010) – To support a finding of judicial estoppel, the court must find that (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) plaintiff’s omission did not result from mistake or inadvertence. In determining whether plaintiff’s conduct resulted from mistake or inadvertence, the court considers whether (1) plaintiff/debtor lacked knowledge of the factual basis of the undisclosed claim, (2) plaintiff/debtor had a motive for concealment, and (3) the evidence indicates an absence of bad faith. In determining whether there was an absence of bad faith, the court will look, in particular, at plaintiff’s “attempts” to advise the bankruptcy court of omitted claim. Plaintiff/debtor made affirmative representation that she did not possess any cause of action by filing to list any cause of action in her bankruptcy schedules. Although Plaintiff/debtor knew of potential cause of action when bankruptcy petition was filed and failed to disclose that potential cause of action, Plaintiff/debtor also failed to amend the bankruptcy schedules even after Plaintiff/debtor filed suit after commencement of the bankruptcy case. Attorney’s failure to list the cause of action on the schedules is not a defense. Debtor personally declared “under penalty of perjury” that the contents of her bankruptcy petitions were “true and correct”; debtor failed to point out the omission at any time during the pendency of the 2008 bankruptcy case; debtor failed to disclose the lawsuit notwithstanding multiple opportunities to do so; and at the first meeting of creditors, debtor specifically denied having any potential claim and stated that she carefully reviewed her bankruptcy schedules and that those were complete and accurate. Debtor’s actions in amending the schedules only after the Defendant filed a Motion to Dismiss the litigation was too late to avoid dismissal of the action for judicial estoppel.
- (1401) *Fairdale Area Community Ministries, Inc. v. Hollingsworth*, 2010 WL 3447590 (Bankr. W.D. Ky. 2010) – 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. Bankruptcy court must also consider an absence of bad faith in determining whether to apply judicial estoppel. Estoppel will not apply where Debtor demonstrated that omission was in good faith and Debtor made repeated efforts to inform the trustee and the bankruptcy court of the claim. Debtor swore in his schedules that he possessed no set-off claims. In granting a discharge and closing this “no asset” case, this Court adopted Debtor’s statement that he had no claims against Ministries. Debtor’s failure to list possible claims for setoff and failure to notify the Trustee at the meeting of creditors, to correspond with the Trustee or to file an amendment to disclose these claims estoppel Debtor from attempting to assert those claims to set off against claims owed by Debtor.
- (1402) *Riddle v. Chase Home Finance*, 2010 WL 3504020 (E.D. Mi. 2010) – 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 and applies where a party is (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 who failed to list in Bankruptcy Schedules cause of action that was actually pending at the time of commencement of the Bankruptcy Case would be estopped from pursuing that cause of action following entry of the discharge. Debtor knew of the facts underlying her claims well before the commencement of the bankruptcy proceedings; Debtor had filed her action in the Wayne County court before her debts were discharged; Debtor did not allege that either the trustee or other creditors knew of her cause of action against the defendant; Debtor stood to benefit from her decision not to list the cause of action in the bankruptcy court because her assets would thus remain minimal and she did not have to surrender her right to bring the cause of action to the trustee; and Debtor did not take any steps to reopen the bankruptcy and amend the schedule notwithstanding promised to do so.
- (1403) *White v. Wyndham Vacation Ownership, Inc.*, 2010 WL 3155161 (6th Cir. 2010) – 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. To support a finding of judicial estoppel, Court must find that: (1) Debtor assumed a position that was contrary to the one 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 Debtor’s conduct resulted from mistake or inadvertence, court considers whether: (1) Debtor lacked knowledge of the factual basis of the undisclosed claims; (2) Debtor had a motive for concealment; and (3) the evidence indicates an absence

of bad faith. In determining whether there was an absence of bad faith, court will consider Debtor's attempts to advise the bankruptcy court of her omitted claim. Debtor's failure to schedule a harassment claim constituted an affirmative statement that no claim existed although debtor had already filed a Notice of Claim with the EEOC, had received a Notice of Right to Sue from the EEOC, had hired an attorney, and had earlier filed complaints with the EEOC and Tennessee Human Rights Commission. Court adopted these misrepresentations when Court directed debtor to attend first meeting of creditors and to commence payments to the Chapter 13 Trustee. Debtor had motive to conceal claim in effort to keep proceeds for herself rather than paying proceeds for benefit of creditors. Evidence indicated that Debtor's attorney advised Trustee of claim as early as first meeting of creditors but did not indicate what may have been discussed with whom from the Trustee's office it was discussed, or whether the omission from the schedules was emphasized. Transcript of 341 meeting did not indicate any discussion of claim. Debtor's application for retention of non-bankruptcy counsel failed to indicate whether Debtor was the plaintiff or the defendant in the action, the amount of the lawsuit, the facts giving rise to the lawsuit, or even when the actions giving rise to the lawsuit took place; and did not indicate that the harassment claim had been omitted from Debtor's initial filings. Debtor did not update her inaccurate filing statements until after the Defendants filed their motion to dismiss. Debtor's schedules did list a different action to which Debtor was party, further evidencing that the omission of this action was intentional. Allegation that Debtor advised attorney of action and attorney inadvertently omitted action from schedules would not preclude judicial estoppel. Debtor has obligation to review the documents for accuracy, and Debtor is held responsible for actions of attorneys.

- (1404) *Swanigam 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.
- (1405) *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.
- (1406) *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.

- (1407) *Caprella v. CSX Trans., Inc.*, 2009 WL 2950248 (Bankr. N.D. Ohio 2009) – Debtor’s action to recover damages for personal injury dismissed where Debtor failed to disclose the existence of that personal injury claim in his bankruptcy schedules. At the time of commencement of Debtor’s bankruptcy, Debtor was a plaintiff in a personal injury case. Disclosure of obligations by consumer Debtors is at the very core of the bankruptcy process and are part of the price a Debtor pays for receiving a bankruptcy discharge. Pursuing a cause of action not disclosed as an asset in the bankruptcy proceeding creates an inconsistency sufficient to support judicial estoppel, as Debtor has already asserted position that no such claim exists.
- (1408) *Lisiecki v. Bank of America, N.A.*, 2009 WL 1438550 (E.D. Mi. 2009) - Debtor who failed to list in Bankruptcy Schedules a possible action against former employer for discrimination judicially estopped from bringing action against employer after entry of discharge. Pursuing cause of action not disclosed as asset in bankruptcy proceeding creates an inconsistency sufficient to support consideration of judicial estoppel, as the Debtor has already asserted the position that no such claim exists. Judicial estoppel will not apply (1) where the Debtor lacked knowledge of the factual basis of the undisclosed claims, and (2) where the Debtor had no motive for concealment. Debtor knew of that possible action existed before filing bankruptcy where Debtor had received "right to sue" letter from EEOC prior to filing bankruptcy and filed suit only two weeks after Chapter 7 trustee discharged and case closed. Debtor has duty to review schedules and cannot rely on alleged "error of counsel" for failing to disclose asset.

6.88 Future Prosecution Not Barred

- (1409) *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.
- (1410) *Rodgers v. Atkins*, 2015 WL 4425899 (E.D. Mi. 2015) – Judicial estoppel is a discretionary equitable doctrine that applies when: (1) a party’s later position must be clearly inconsistent with its earlier position; (2) 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 proceeding would create the perception that either the first or the second court was misled; and (3) 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; or that failure to disclose cause of action in bankruptcy schedules is result of mistake or inadvertence. Judicial estoppel will not apply where trustee discovered cause of action and subsequently abandoned action as burdensome or of inconsequential value.
- (1411) *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.
- (1412) *Crawford v. Franklin Credit Management Corp.*, 758 F.3d 473 (2d Cir. 2014) – Failure to disclose cause of action does not deprive debtor of standing to later pursue recovery. Debtor not judicially estopped where debtor did not disclose potential cause of action but debtor’s bankruptcy case was dismissed prior to entry of a discharge, re-vesting in debtor all assets including cause of action. Although property was not abandoned by trustee, dismissal under Section 349 operated to re-vest property in debtor regardless of abandonment. Further, debtor had not obtained relief based on a contrary representation where debtor did not confirm a plan or receive a discharge, and case was dismissed. Debtor did not receive any ruling regarding undisclosed assets or receive any relief notwithstanding the non-disclosure.
- (1413) *Rizka v. State Farm Fire & Casualty Co.*, 2014 WL 3123681 (E.D. Mi. 2014) – Insurer not entitled to summary judgment on judicial estoppel grounds where there were disputed issues of fact concerning timing of debtor’s acquisition of interest in insured property. Debtor’s bankruptcy schedules filed in 2011 stated that debtor owned no real property and minimal personal property. Two years later, debtor filed an insurance claim for damages resulting from fire at debtor’s home. Insurer alleged that debtor’s insurance claim was barred by judicial estoppel as debtor did not disclose any interest in the real or personal property. Debtor filed opposing affidavit that alleged that debtor did not acquire interest in the property until after the bankruptcy discharge and that debtor did not make any omissions or misstatements in the bankruptcy documents. District court unable to resolve conflicting testimony as part of summary judgment motion.
- (1414) *Gibson v. Mortgage Electronic Registration Systems*, 2014 WL 2091258 (W.D. Tn. 2014) – Judicial estoppel does not apply to oral adjournment of foreclosure sale under deed of trust. Court never reached issue of whether notice was proper as part of prior proceedings. Judicial estoppel requires that party to be estopped have asserted contrary position and have received relief based on that position. Creditor never received any relief based on assertions regarding proper notice and so creditor could not be judicially estopped from later asserting that oral notice complied with deed of trust.
- (1415) *In re Rotunda*, 2013 WL 486968 (Bankr. D.C. 2013) – Chapter 7 Trustee is not judicially estopped from pursuing unscheduled and undisclosed cause of action. Either Debtor or Trustee can seek to reopen case to administer undisclosed cause of action. However, Trustee is estopped from recovering any amount in excess of administrative costs plus amount necessary to pay allowed claims in full, so that debtor does not receive any recovery from undisclosed action.
- (1416) *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.

- (1417) *Cannata v. Wyndham Worldwide Corp.*, 798 F. Supp. 2d 1165 (D. Nev. 2011) – Judicial estoppel did not prevent debtor from pursuing Title VII claim, but recovery would be limited to amounts necessary to pay creditors in full, with debtor to receive nothing. Evidence indicated that failure to disclose was not inadvertent oversight or mistake. Motion filed by Chapter 13 Trustee to convert case to Chapter 7 demonstrated that undisclosed claims resulted in prejudice to creditors.
- (1418) *EEOC v. CRST Van Expedited, Inc.*, 2012 WL 1583026 (8th Cir. 2012) – Debtor’s failure to schedule sexual harassment claim estopped debtor from recovering, but did not preclude action by EEOC to enforce statutes.
- (1419) *Rainey v. United Parcel Service*, 2012 WL 753680 (7th Cir. 2012) – Debtor has continuing duty to disclose causes of action acquired post-petition Debtor could re-open bankruptcy case to inform trustee of undisclosed claims and if debtor can pursue recovery for benefit of creditors unless trustee elects to abandon asset. Debtor cannot profit from action but can pursue to the extent recovery benefits creditors.
- (1420) *Kelso v. Pilot Travel Centers*, 2011 WL 6130919 (W.D. Mo. 2011) – Judicial estoppel not appropriate where debtor amends schedules to disclose post-petition employment discrimination action, even where amendment not filed until after Motion to Dismiss filed in the litigation. Amendment would put all parties in same position as parties would have been in had disclosures been timely made and plan had not been concluded allowing creditors and Trustee to seek to modify plan if asset has value. Amending schedules to disclose would not prejudice either the estate or the defendant in the litigation.
- (1421) *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.
- (1422) *Finney v. Free Enterprise System, Inc.*, 2011 WL 1157696 (W.D. Ky. 2011) – Judicial estoppel may warrant the dismissal of a plaintiff’s claim if the plaintiff fails to disclose the existence of the claim to the bankruptcy court. Judicial estoppel is inappropriate in cases of conduct amounting to nothing more than mistake or inadvertence. Court must determine whether (1) debtor lacked knowledge of the factual basis of the undisclosed claims; (2) debtor had a motive for concealment; and (3) the absence of bad faith. Debtor filed suit more than three months prior to commencement of bankruptcy case. However, debtor acted quickly to amend his bankruptcy documents once problem was disclosed and record lacks evidence of bad faith. Judicial estoppel would not apply to other debtors who lacked knowledge of possible claim before receiving discharge in Chapter 7.
- (1423) *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. Debtor not estopped where debtor disclosed the possibility of a lawsuit in her bankruptcy petition and bankruptcy trustee later abandoned all scheduled assets. Debtor did not conceal or deny owning an asset. Even if Debtor should have supplemented her bankruptcy pleadings after she actually filed this action, her initial disclosure of the claims finding that she acted in bad faith.
- (1424) *Crouch v. Guardian Angel Nursing, Inc.*, 2009 WL 2960757 (M.D. Tn. 2009) – Judicial estoppel is an equitable doctrine that bars a party from asserting a position that is contrary to one the party has asserted in a prior proceeding ready prior Court adopted the contrary position as either a preliminary matter or a part of a final disposition. Judicial estoppel is designed to prevent parties from “playing fast and loose with the Courts to suit the exigencies of self-interest”. Debtor who fails to disclose causes of action in bankruptcy proceedings will generally be prohibited by the doctrine of judicial estoppel from continuing to pursue those claims. Court will not permit Debtor to obtain relief in the bankruptcy Court by representing that no claims exist and then subsequently assert those claims were Debtor’s own benefit in a separate proceeding. Where Debtors amended bankruptcy schedules to disclose cause of action and trustee sought to intervene in actions and to recover for benefit of creditors, Court would not apply doctrine of judicial estoppel. Claims will be pursued by bankruptcy trustees and Debtors will not improperly benefit from failure to schedule claims.

D. Protection and Preservation of Estate

6.89 Expenses

- (1425) *In re Carvalho*, Case No. 14-45654 (Bankr. E.D. Mi. 2015) – Court would not approve Trustee’s request to spend \$11,500 to fence property while asbestos remediation took place, where trustee did not also propose security to protect property and it was highly likely that if fence was installed it would be removed by scrappers well before remediation work would be completed.

E. Sale of Assets

6.90 Approval Generally

- (1426) *Junk v. Citimortgage, Inc.*, 2014 WL 2985937 (Bankr. S.D. Ohio 2014) – Approval of Section 363 motion for sale is limited to circumstances indicating that sale is consistent with sound business practices. Court must consider whether terms of sale reflect highest and best offer for assets; whether negotiations were at arm's length; and whether sale is in best interest of estate. Party proposing sale bears burden of proof.
- (1427) *In re Ungar*, 2012 WL 5505784 (Bankr. N.D. Ohio 2012) – Debtor could not force trustee to refund proceeds received from sale of household goods by trustee to debtor. Debtor scheduled household goods having a value of \$2,500.00. Trustee conducted an inventory and concluded that the assets were worth at least \$10,600. Trustee entered into sale agreement with debtor where Trustee sold estate's interest in goods back to debtor for \$11,570.00. Motion to approve sale was properly noticed to debtor and all creditors and no party filed an objection to the sale. After the sale closed and debtor paid the Trustee, debtor sought to compel Trustee to return payment to debtor claiming that the Trustee had coerced debtor into a settlement. Motion denied as it did not appear that Trustee had overreached, particularly as debtor was represented by counsel at all times; and debtor did not object to the proposed sale.
- (1428) *In re Crabtree*, 2009 WL 2999165 (Bankr. W.D. Ky. 2009) – Trustee's Motion to Approve Sale denied. Schedules listed value at \$200,499.00 with mortgages of \$200,499.00 and Debtor claimed exemption of \$10,000.00. Motion failed to support proposed sale price of \$156,000.00 and failed to demonstrate any benefit to the estate.

6.91 Sale Free and Clear of Liens or Interests

- (1429) *Giese v. Community Trust Bank*, 2016 WL 1573498, 549 BR 469 (Bankr. E.D. Ky. 2016) – Order allowing sale of property free and clear of liens is *in rem* relief, and transfers property rights against the world, not just parties to the judgment or persons with notice of proceedings. Plaintiff, an alleged heir to the owner of the property sold, cannot collaterally attach order approving sale of property or attempt to claim that property sold did not constitute property of estate. Sale Order is *res judicata* on all issues raised or that could have been raised including status of property sold as property of estate.
- (1430) *In re Talbut*, 2016 WL 937373 (Bankr. N.D. Ohio 2016) – Section 363 allows sale of property free and clear of any interest in the property of another entity if (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. Virginia state law applied to proposed sale of debtor's interest in Virginia LLC. Only transferrable interest is member's share of profits and losses and right to receive distributions. Under Virginia law, while creditor could obtain lien on member interest, law does not allow lien to be foreclosed or to otherwise allow forced sale. As Virginia law did not allow forced sale of interest, trustee could not sell interest free and clear of interests of other members of LLC without consent. Operating Agreement allowed member to sell interest only after first offering to sell interest back to LLC and if LLC declines to exercise right to purchase, any later sale must be on terms that are no less than and on terms no more favorable than those offered to LLC.
- (1431) *In re P.D.M. Co.*, 2015 WL 128159 (Bankr. W.D. Mi. 2015) – Chapter 11 debtor not authorized to sell assets in business operation free and clear of liens absent good business reason. Debtor's belief that proposed purchaser was most likely the only entity interest in purchasing lumber yard was not good reason where debtor had failed to make any effort to market assets other than to proposed purchaser.
- (1432) *Higgason v. Brown*, 2014 WL 24040 (Bankr. E.D. Ky. 2014) – Section 363 allows sale of property owned jointly by debtor and co-owner only if partition is impracticable; sale of undivided interest would produce substantially lower proceeds for estate; benefit to estate of sale of entire property outweighs prejudice to co-owner; and property is not used for specific purposes. Trustee did not present any evidence that partition is impracticable. Property was 125 acres of vacant land that was already bisected by road used for removing timber from property. Trustee's only evidence was testimony of appraiser that property was worth \$500 per acre if sold as whole but "substantially less" if partitioned, but appraiser did not walk land, had no knowledge of topography, and viewed property only by a brief view from a neighbor's home and review of an aerial map. Appraiser's conclusory statement that property cannot be divided was not sufficient where appraiser did not explain why and did not give any opinion as to amount of decrease in value, leaving it impossible to determine if decrease would be significant. Co-owner of property testified that the property had been in family for many years and was already effectively split into two halves by the existing logging road. Trustee also failed to present any evidence that sale of undivided interest would produce substantially lower proceeds for estate. Trustee did not present any evidence that property which was vacant and mostly located on a rocky hillside had any alternative uses or how partition and sale would actually impact proceeds to estate. Appraisal submitted by Trustee valued property as a whole at between \$62,500 and \$75,000, meaning estate's one-half interest would be valued \$31,250 to \$37,750 for a sale of a one-half interest, or a difference in value of, at most, \$6,100, which is not such a significant difference to constitute a "substantial loss" to the estate.
- (1433) *In re Scott*, 2013 WL 4498987 (Bankr. E.D. Ky. 2013) – Section 363(f) allows sale free and clear of liens if the creditor consents; if the price to be received is more than the aggregate value of liens on the property; the lien is in bona fide dispute; or the creditor could be compelled to accept money satisfaction of interest. Creditor's lien constitutes an "interest" for purposes of Section 363(f)(5). However, sale can occur under Section 363(f)(5) only if the holder of the interest could be compelled to accept less than payment of the full balance owed. Fact that foreclosure of lien could result in creditor receiving less than full balance owed is not the same as a creditor being compelled to accept less, as the lienholder could bid at the foreclosure sale an amount that would be sufficient to pay its liens in full. No matter how broadly "compelled" is construed, there is no legal basis on which a debtor could force the lienholder to accept less than full payment.
- (1434) *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.

- (1435) *Allen Group Partners v. Golden*, Case No. 10-55227 (9th Cir. 2011) – Motion to approve the sale of the real property free and clear of liens and interests granted over creditor objection that creditor maintained an equitable interest (or lien) on the subject property, notwithstanding the Bankruptcy Court’s ruling in the earlier adversary proceeding avoiding alleged lien. Creditor could not collaterally attack the judgment in the adversary proceeding but objecting to the proposed sale.
- (1436) *In re Sumner Regional Health Systems, Inc.*, 2010 WL 2521081 (Bankr. M.D. Tn. 2010) – Chapter 11 debtor-in-possession, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate and can sell all a Chapter 11 debtor’s assets when a sound business purpose. Section 363 allows sale free and clear of liens, claims and encumbrances if (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) the entity holding the interest consents; (3) the interest is a lien and the price at which the property is to be sold is greater than the aggregate value of all liens on such property; (4) the interest is in bona fide dispute; or (5) the entity holding the interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. The requirements of 11 U.S.C. § 363(f) are in the disjunctive. The sale can be approved if any one of the five factors is present. Deed which contained clause that if property is sold, the assets are to be distributed to the County did not preclude sale under non-bankruptcy law, but only controlled disposition of proceeds of sale. County could be compelled to accept a money satisfaction if its interest by receiving proceeds of sale. Finally, there was a bona fide dispute concerning the legal scope and effect of the restrictive covenant in the deed.

6.92 Procedure

- (1437) *In re Holwerda*, Case No. 09-7725 (Bankr. W.D. Mi. 2010) – Sale of estate’s interest in LLCs approved by Court over creditor objection. Court had previously approved sale of LLCs to creditor but creditor failed to close within agreed deadline. Trustee entered into new sale agreement at higher price to party related to debtor. Trustee was not required to complete transaction under prior order which merely authorized, but did not mandate, sale by trustee. Second sale produced better return to creditors and first creditor failed to submit any competing bid during second sale procedure.
- (1438) *In re Crabtree*, 2009 WL 2999165 (Bankr. W.D. Ky. 2009) – Motion to Shorten Time to Approve Sale denied. Only reason given for expedited hearing is that the contract must close by date which was only 12 days after Motion filed. Motion to Shorten Time failed to demonstrate grounds to shorten time. If the buyers needed to close by a certain date, they should have contacted the Trustee sooner or reached an arrangement in time to allow for normal notice period. There is no reason to truncate due process notice requirements just to satisfy convenience of buyers.

6.93 Objections

- (1439) *In re Morgan*, Case No. 13-5825 (Bankr. W.D. Mi. 2015) – Debtor’s right to receive payment under judgment of divorce is property of estate. Trustee has right to sell debtor’s interest including sale back to debtor’s ex-spouse, subject only to notice and hearing. Where debtor did not object to proposed sale for amount less than debtor claimed as exempt, debtor effectively agreed to the value of the asset as determined by trustee and debtor’s ex-spouse and could not later claim that sale adversely affected her exemption rights or that balance of exemption should be paid from other assets.
- (1440) *In re Starr*, 2012 WL 2921375 (Bankr. N.D. Ohio 2012) – Trustee’s proposed sale pursuant to Section 363 of fraudulent transfer claims, which were only asset of estate, to one creditor for 10% of any recovery, with purchasing creditor retaining other 90% and retaining all control over prosecution of cases, rejected. Sale would effectively delegate to one creditor the sole and unrestricted power to sue another creditor with no trustee oversight. Bankruptcy code specifically delegates the power to pursue avoidance actions to a trustee. Bankruptcy courts are properly hesitant to authorize the sale or assignment of a trustee’s avoidance powers or causes of action to a single creditor to avoid delegation of Trustee’s responsibilities and duty ‘to marshal the debtor’s property for the recovery of all property available under state law. To support sale, the trustee must consent, and the transfer must be “(a) in the best interest of the bankruptcy estate and (b) necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings.” Although the Trustee consented, it was not with any meaningful support. Estate had no assets with which to pursue claims, although there was no evidence that Trustee attempted to find counsel who could pursue actions and did not provide any information as to merits of claims. Trustee’s consent appeared to be based solely on fact that estate was currently insolvent and this proposed sale provided at least a hope of recovery for the estate. Trustee’s consent did not appear to be informed decision based on all facts of case. Further, motion did not demonstrate that sale was in best interest of estate. Sale represented transfer of the entire value of the estate to a third party, the largest creditor of the estate, who will be proceeding, in part, against the second largest creditor of the estate. The total claims between these two creditors represents 99.7% of the claims filed in the case, producing clear evidence of conflict between creditor’s role as creditor and creditor’s role as plaintiff. Sale would also disproportionately disadvantage targeted creditor. If Trustee pursued the claims and recovered funds, Creditor would be entitled to receive up to almost nineteen percent of any net recovery. If sale is approved, only 10% of recover flows back into estate, and creditor would have to share that 10% with other creditors of the estate. Purchasing creditor would be pocketing that share of the recovery that would otherwise have gone to the other creditors, producing a “one-sided” benefit to purchasing creditor sufficient to defeat creditor’s derivative standing. Sale would give one creditor complete control of the estate for a maximum creditor benefit of \$3,000 (the total of all claims excluding those of the purchasing creditor and the creditor/target of the litigation). Trustee would retain no control over the litigation. There is no indication how long the litigation would last. Debtor’s case has been pending for almost three years. Creditor is pursuing Debtor in a non-dischargeability action and now wants to sue debtor’s ex-husband raising concern that creditor is seeking to “grind an axe” with the creditor/target.

F. Abandonment by Trustee

6.94 Procedure

- (1441) *In re Concepts Plus, LLC*, 2016 WL 2344244 (Bankr. W.D. Mi. 2016) – Cause of action that is properly scheduled but is not pursued by Trustee is deemed abandoned when court closes case pursuant to Section 554. Debtor disclosed pending cause of action in schedules and pursued that action during bankruptcy case, ultimately receiving a judgment in its favor. The trustee there after filed a Final Report and the Court closed the case, at which time the judgment was abandoned back to debtor to pursue as debtor thought appropriate. Fact that Trustee did not specifically list in Final Report each and every item of property that was not administered does not change outcome, as it would be unduly burdensome to require a trustee to itemize each and every item of property that was not administered by estate.
- (1442) *Pauley v. Bank of America*, 2016 WL 213032 (E.D. Mi. 2016) – Upon filing of bankruptcy, causes of action become property of estate and debtor loses standing to pursue claims. Undisclosed assets are not abandoned at completion of case and remain property of estate. Debtor failed to list causes of action in schedules and failed to amend schedules at any time during bankruptcy case. Debtor judicially estopped from pursuing cause of action after discharge in bankruptcy.
- (1443) *Cook v. Wells Fargo Bank, NA*, Case No. 12-2100 (10th Cir. 2013) – Failure to follow procedural requirements of Section 554 and Rule 6007 renders abandonment ineffective. Debtor did not reacquire title to pre-conversion actions for alleged violation of Automatic Stay while case was in Chapter 11 and prior to conversion to Chapter 7, where Chapter 7 Trustee did not provide notice and an opportunity for hearing on potential abandonment. Neither Trustee’s Notice of Abandonment nor Report of No Distribution provided any opportunity for an objection to the abandonment, where the Notice merely stated that the Trustee “gives notice that he abandons all remaining property of the estate”. There were no provisions for objecting to abandonment, no indication that either the notice or report of no distribution were sent to interested parties, and no hearing to entertain objections. Intent to abandon, without proper notice to creditors, is insufficient to establish abandonment.
- (1444) *In re DeGroot*, Case No. 05-12996 (Bankr. W.D. Mi. 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 revest 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.
- (1445) *Cook v. Wells Fargo Bank*, Case No. 11-082 (10th Cir. BAP 2012) –Purported abandonment by Chapter 7 Trustee of property allegedly involved in stay violation did not vest in debtors the claim for violation of stay where abandonment was pending but had not been approved by the court or properly noticed to creditors.
- (1446) *In re Alexander*, 2011 WL 3626420 (Bankr. W.D. Ky. 2011) – Debtor received notice of Trustee’s intent to abandon pre-petition malpractice case against Debtor’s counsel and did not object to abandonment. Debtor prohibited from later arguing that cause of action should not have been abandoned or attempting to force Trustee to prosecute claim.
- (1447) *Rankin v. Lavan*, Case No. 09-1087 (6th Cir. 2011) – Undisclosed property rights of debtor become property of estate upon filing. Trustee does not abandon undisclosed property merely by failing to administer property as trustee had no opportunity to pursue or liquidate property.
- (1448) *In re USA Baby, Inc.*, 2011 WL 2076342 (7th Cir. 2011) – Bankruptcy Court denied Equity Holder’s motion to allow holder to pursue pre-petition claims that Trustee allegedly unjustifiably refused to pursue. Trustee has duty to exercise sound business judgment in determining whether to pursue actions. Trustee did not have funds available to finance action and could not find attorney who would take action on contingency basis given remote possibility of success.
- (1449) *Maloof v. Level Propane, Inc.* 2011 WL 2515970 (6th Cir. 2011) – Bankruptcy Trustee can abandon any property that is burdensome of inconsequential value. Abandonment requires notice and a hearing to allow interested parties to object. Letter from trustee to debtor’s principal questioning whether cause of action exists or has any value does not constitute clear notice by trustee of intent to abandon but merely questions whether allegations could support claims.
- (1450) *In re Reiman*, 2010 WL 2802675 (Bankr. E.D. Mi. 2010) – Section 554 of the Bankruptcy Code permits the trustee to abandon any property that is burdensome to the estate or is of inconsequential value. The Trustee can abandon property, or any party in interest can request that the Court compel abandonment.

6.95 Technical Abandonment

- (1451) *Smith v. United Parcel Service*, 2014 WL 4377680 (10th Cir. 2014) – Upon filing of bankruptcy case, Chapter 7 Trustee becomes real party in interest for purposes of prosecuting pre-petition cause of action. Subsequent discharge does not alter real party in interest and closing of estate does not alter real party in interest for assets that were not disclosed and, therefore, were not abandoned by the estate.
- (1452) *In re Stahl*, 2014 WL 1329551 (Bankr. N.D. Ohio 2014) – 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.

- (1453) *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. Causes of action that are not disclosed in bankruptcy schedules are not abandoned upon closing of case and remain property of estate that may be prosecuted only by the Trustee.
- (1454) *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. Debtor has duty to disclose all causes of action and has continuing duty to disclose any potential claims. Debtor need not know all of the facts or the legal basis, if the debtor has enough information to suggest that it may have a possible claim. 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. 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.
- (1455) *In re Rotunda*, 2013 WL 486968 (Bankr. D.C. 2013) – Pre-petition cause of action constitutes property of estate. Cause of action that was not disclosed and not administered is not abandoned upon closing of case, and Trustee of the Debtor can move to reopen case to administer.
- (1456) *Rankin v. Lavan*, Case No. 09-1087 (6th Cir. 2011) – Undisclosed property rights of debtor become property of estate upon filing. Trustee does not abandon undisclosed property merely by failing to administer property as trustee had no opportunity to pursue or liquidate property.
- (1457) *In re Reiman*, 2010 WL 2802675 (Bankr. E.D. Mi. 2010) – Section 554(c) provides that any property scheduled by the Debtor that is not administered at the time of closing of the case is abandoned. Abandonment occurs by operation of law when the case is closed, without the need for motion or separate Order of Court.

6.96 Implied Abandonment

- (1458) *Pauley v. Bank of America*, 2016 WL 213032 (E.D. Mi. 2016) – Upon filing of bankruptcy, causes of action become property of estate and debtor loses standing to pursue claims. Undisclosed assets are not abandoned at completion of case and remain property of estate. Debtor failed to list causes of action in schedules and failed to amend schedules at any time during bankruptcy case. Debtor judicially estopped from pursuing cause of action after discharge in bankruptcy.
- (1459) *Rugiero v. Flagstar Bank*, 2013 WL 3849930 (E.D. Mi. 2013) – There is no concept in the bankruptcy code for “implied abandonment”. Abandonment requires notice to creditors, with a hearing if anyone objects. Unscheduled assets cannot be abandoned even if the trustee knows of its existence. Debtor had a dispute with the lender prior to commencement of case, yet failed to disclose that dispute in the schedules. Dispute is property of estate and debtor lacks standing to pursue it independent of Chapter 7 Trustee.

6.97 “Delayed” Abandonment

- (1460) *In re Jarrett*, 2014 WL 1393954 (Bankr. M.D.N.C. 2014) – Court denied Trustee’s request to excuse portion of debtor’s property from abandonment. Trustee argued that debtor’s remainder interest in mother’s house, while currently of no value, would at some point become valuable. Court found that as of date that case would close and property would be abandoned, the chance that the property would bring money into the estate at some future date was too tenuous to warrant keeping the property in the estate.

6.98 Motion to Compel Abandonment

- (1461) *Kakos v. Stevenson*, 2015 WL 5212033 (E.D. Mi. 2015) – Abandonment requires proof that the property is of inconsequential value and benefit to estate, or that retention of property is unduly burdensome. Although property was fully encumbered as of date of bankruptcy petition, debtor’s subsequent redemption of second mortgage left only first mortgage remaining and created substantial equity above amount owed to first mortgage holder. Although payments made to secured creditor under confirmed Chapter 13 plan are not property of estate when case is converted, redemption payment was not made pursuant to a plan and debtor did not disclose “gift” of money from third party or debtor’s intent to use those funds to redeem the property as part of debtor’s proposed chapter 13 plan. Property of estate includes property that is part of estate at commencement of case plus all increases in value whether due to appreciation, payments or other circumstances. Redemption payment is part of Chapter 7 estate.
- (1462) *In re Hodges*, 2013 WL 1755483 (Bankr. E.D. Tn. 2013) – In determining whether to compel abandonment, Court should consider whether there is a reason that the estate’s interest should be preserved or whether the property is so worthless or burdensome that the property should be removed from the estate. If the asset has no equity and the estate is being liquidated, abandonment is almost always appropriate because no unsecured creditor could benefit from administration. Lack of equity creates rebuttable presumption that can be rebutted by proof that liens can be subordinated to interest of trustee or that some other value or benefit will accrue based on estate’s retention of property. Equity that accrues in converted case between commencement of Chapter 13 and conversion to Chapter 7 is not property of the estate. In determining whether property has value that could benefit estate, court will fix value as of original petition date. As of original petition, property value was substantially less than amount owed. Fact that property appreciated and may now have equity did not give Trustee claim to that equity. Property that would be available to Chapter 7 trustee worth less than debt, such that order to compel abandonment would be entered.
- (1463) *In re Williams*, Case No. 08-71337 (Bankr. E.D. Mi. 2010) – Debtor has standing to file Motion to Compel Abandonment of property by Trustee. However, Debtor cannot seek to “abandon” debtor’s own interest in the property.

6.99 Effect of Abandonment

- (1464) *In re Haber*, 2016 WL 1211339 (Bankr. S.D. Ohio 2016) – Abandonment is irrevocable action that permanent divests estate of interest in abandoned property and property is no longer property of estate, reverting to debtor free and clear of claims of estate. If asset is not disclosed in schedules, then implied abandonment at close of case is revocable. Trustee had no claim to surplus proceeds from sale of home where trustee abandoned property prior to foreclosure sale. Debtor did not conceal property or undervalue asset and trustee had full opportunity to investigate property before abandonment. Fact that real property was sold for amount owed on mortgage did not cause either property or excess sale proceeds to become property of the estate.
- (1465) *Brown v. Florida Coastal Partners*, 2015 WL 6604165 (S.D. Ohio 2015) – Abandonment by Trustee restores property to debtor as if bankruptcy had never occurred. Causes of action belonging to debtor became property of estate upon filing and only trustee had standing to pursue action. Upon abandonment of causes of action, debtor immediately resumes standing to pursue causes of action *nunc pro tunc* to date of filing of the petition such that debtor effectively had ownership continuously. Court would allow debtor 21 days to file responses to defendant's motion for summary judgment.
- (1466) *In re Alexander*, 2011 WL 3626420 (Bankr. W.D. Ky. 2011) – Debtor received notice of Trustee's intent to abandon pre-petition malpractice case against Debtor's counsel and did not object to abandonment. Upon abandonment, cause of action re-vested in Debtor. Debtor's failure to diligently pursue claim was not basis to revoke abandonment or to force Trustee to pursue claim.
- (1467) *In re Williams*, Case No. 08-71337 (Bankr. E.D. Mi. 2010) – Upon abandonment, whatever legal or equitable interests the debtor may have had in the property are no longer included in property of the estate. Property reverts *nunc pro tunc* to its pre-petition status as if no bankruptcy had ever been filed, and Court is divested of jurisdiction over that property. Debtor cannot abandon debtor's own interest in the property in an attempt to cut off post-petition condominium fees and assessments under Section 523(a)(16).
- (1468) *Moses v. Howard University Hospital*, Case No. 08-7087 (D.C. Cir. 2010) - When property of the bankrupt is abandoned, the title reverts to the bankrupt, *nunc pro tunc*, so that he is treated as having owned it continuously. Debtor was plaintiff in Title VII action when he filed bankruptcy. Chapter 7 Trustee later abandoned the cause of action. Once the trustee abandoned the estate's claims, Debtor regained standing to pursue action was free to seek redress as if no bankruptcy petition had been filed.
- (1469) *In re Reiman*, 2010 WL 2802675 (Bankr. E.D. Mi. 2010) – Abandonment of property, whether by the affirmative act of the Trustee or “technical” abandonment, returns the abandoned property to the debtor *nunc pro tunc*, as if the debtor owned the property continuously.

6.100 Revocation of Abandonment

- (1470) *In re Alexander*, 2011 WL 3626420 (Bankr. W.D. Ky. 2011) – Debtor received notice of Trustee's intent to abandon pre-petition malpractice case against Debtor's counsel and did not object to abandonment. Debtor prohibited from later arguing that cause of action should not have been abandoned or attempting to force Trustee to prosecute claim. Debtor failed to allege any basis under Rule 60(b) to modify or reconsider Order of Abandonment.
- (1471) *Hock v. Stevenson*, 2011 WL 2173837 (E.D. Mi. 2011) – Buyer at foreclosure sale lacks standing to object to Motion to Revoke 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.
- (1472) *In re Langley*, Case No. 10-55688 (Bankr. E.D. Mi. 2011) – Motion to Revoke Abandonment must be based on some ground cognizable under Federal Rule 60(b). Motion does not evidence excusable neglect where only error was assuming property had no equity. Although error may have been “neglect”, there was no evidence that the error was excusable or that equity compelled granting of relief. Trustee had proper notice of existence of property, and of Motion for Relief From Stay and to Compel Abandonment. Trustee may have made incorrect assumption in not objecting to Motion, but decision was within control of Trustee and failure to object was not excusable. Motion failed to demonstrate that Order of Abandonment was void or any equitable basis to set that order aside as required by Rule 60(b)(5) and Motion failed to allege any extraordinary circumstances that would warrant relief under Rule 60(b)(6).
- (1473) *In re Schick*, Case No. 09-7-103 (Bankr. E.D. Mi. 2010) – Court can revoke abandonment under Rule 60(b)(5) and 60(b)(6) on a motion filed within a reasonable time. Motion filed less than two weeks after Sheriff's sale occurred and roughly 3 months after bankruptcy case was closed is filed within a reasonable time. Moving party must establish a significant change in either factual conditions or in the law that warrants revocation. Successful bid at foreclosure sale was substantially below market value property such that revocation of abandonment would permit chapter 7 trustee to make a meaningful distribution to general unsecured creditors. Chapter 7 trustee presented evidence of actual offers far in excess of foreclosure sale price and cancellations supporting argument that revocation would produce substantial recovery to unsecured creditors. Chapter 7 trustee had no reason to expect that the Sheriff sale bid amount would be substantially less than the value of property or that redemption of property would be able to produce recovery to creditors. Revocation of abandonment does not affect creditor as rights of redemption are unchanged and, if property is not redeemed, mortgage holder will receive title at expiration of redemption period, just as would happen had revocation not occurred. Equities strongly favored granting revocation of abandonment, and revocation is necessary to achieve substantial justice and further the principles of equity.
- (1474) *In re Tisler*, Case No. 09-73374 (Bankr. E.D. Mi. 2010) – Court can revoke abandonment under Rule 60(b)(5) where the abandonment operate prospectively in a manner that is no longer equitable where the party seeking revocation can show a significant change in either factual conditions or the law. Recent practice of underbidding by mortgage companies at foreclosure sales was not a foreseeable development. Court would revoke abandonment where result of underbidding was to create substantial value of both the redemption amount which could be recovered by Chapter 7 Trustee for benefit of estate. Rate of redemption is personal to debtor. Court would not revoke abandonment where debtor sold right of redemption to third party.

- (1475) *LPP Mortgage, Ltd. v. Brinley*, 547 F.3d 643 (6th Cir. 2008) – Bankruptcy Court has authority to set aside technical abandonment of assets that were not administered prior to the closing of the bankruptcy case. Federal Rule of Civil Procedure 60(b) permits Bankruptcy Court to reopen case and set aside technical abandonment where abandonment is the result of clerical error or other ground which would justify relief under Rule 60. Technical abandonment resulted from trustee’s failure to administer property on which Debtors sought to avoid judicial lien. At time case closed and property technically abandoned, Trustee believed there was no equity in the property for the benefit of the estate. Later decisions by District and Circuit Court rendered Trustee’s understanding incorrect as equity in property after avoidance of judgment liens could be administered for benefit of creditors. Equities dictated that any windfall go to bankruptcy estate rather than Debtor.
- (1476) *In re Pioch*, Case No. 08-61473 (Bankr. E.D. Mi. 2010) - Section 544 provides for automatic abandonment to the debtor of all property not administered at the time of the closing of the case. Revocation of abandonment is governed by Rule 60(b), and is revocable in very limited circumstances such as where the trustee is given incomplete or false information of the assets by the debtor. Abandonment will not be revoked where doing so would unfairly prejudice the owner of the property. Revocation denied where case was closed after Trustee fully investigated debtor’s financial affairs and filed a no-asset report. Trustee did not cite any unexpected changes in the law that would warrant reconsideration of abandonment. That successful bidder at the foreclosure sale held 2 months after abandonment bid far less than what the Trustee believed to be the true value of the property would not support revocation of abandonment.
- (1477) *In re Reiman*, 431 BR 901 (Bankr. E.D. Mi. 2010) – Section 544 does not provide a procedure to revoke abandonment. As a general rule, abandonment is irrevocable. However, a Court can permit revocation of abandonment where the abandonment itself resulted from inadvertence or neglect. Revocation is authorized by Federal Rule 60(b) and request to revoke abandonment must prove one of the bases for relief under Rule 60(b). Trustee would not be permitted to revoke abandonment of real property where Chapter 7 case had been fully administered and properly closed; there had been no changes in the law after abandonment such that the Trustee would not have abandoned the property in the first instance; the Trustee performed all of his statutory duties in investigating the value of the property and, although the value of the property may ultimately turn out to be more than the Trustee perceived, the Trustee’s evaluation was not the product of any mistake nor was the Trustee affirmatively misled. 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.

G. Prosecution of Pre-petition Causes of Action

6.101 Role of Trustee and Debtor

- (1478) *CH Holding Co. v. Miller Parking Co.*, 2013 WL 5423047 (E.D. Mi. 2013) – Causes of action to recover fraudulent transfers by debtor and to impose alter ego liability on debtor’s related entities are property of estate that only Trustee has authority to pursue. Upon filing of bankruptcy, creditor suits against debtor and third parties for fraudulent transfers and alter ego are dismissed as plaintiff no longer has standing to pursue claims.
- (1479) *Wilson v. Dollar General Corporation*, Case no. 12-1573 (4th Cir. 2013) – Debtor who files Chapter 13 petition does not lack standing to continue prosecution of pre-petition cause of action. Cause of action is property of estate and under Section 323, the Trustee has capacity to sue and be sued as representative of estate. In a Chapter 7 case, this standing is conferred exclusively on the Chapter 7 Trustee and debtor in Chapter 7 lacks standing unless action is abandoned by Chapter 7 trustee. However, Chapter 13 allows debtor to retain possession of property and affords powers to debtor exclusive of those afforded to the trustee. Power to use and possess property must include ability of debtor to prosecute cause of action in his own name for benefit of estate.
- (1480) *In re Johnson*, 409 B.R. 459 (Bankr. N.D. Ohio 2009). Chapter 13 debtor was the proper party to pursue prepetition personal injury claim. Good discussion of the roles of the debtor and the Chapter 13 trustee.

VII. Exemptions

A. Exemptible Property

7.1 Generally

- (1481) *Earl v. Lund Cadillac, LLC*, Case No. 15-1693 (D. Ariz. 2016) – Debtor is limited to exemptions as of date of filing. On petition date, debtor lived in her residence and had second residence she used as rental property. Debtor claimed exemption in property where she resided at petition date, but debtor had no interest in that property as property had been foreclosed prior to commencement of case. After debtor filed bankruptcy, she moved into property that was rental and attempted to amend exemption to claim that property as exempt homestead. Court recognized that debtor had right to amend exemptions but could not do so to create exemption that did not exist when case was filed. As debtor did not reside in “rental” on petition date, debtor could not claim exemption merely because debtor later moved into that property and established as homestead. Debtor rendered homeless after trustee took rental property and sold it for benefit of estate.
- (1482) *In re Kennedy*, 2016 WL 3226244 (Bankr. E.D. Tn. 2016) - Debtor’s bankruptcy estate consists of all property and property interests debtor owned at the time. Certain property interests may be exempted and are subtracted from the bankruptcy estate and not distributed to creditors. Exemptions are determined as of the date upon which the bankruptcy case is commenced, are construed liberally in favor of debtors, and should be construed in light of the purpose for which they are created.

7.2 Time for Determining

- (1483) *Holley v. Corcoran*, 2016 WL 6211975 (6th Cir. 2016) – Michigan law protected the *entire* value of this couple's property minus deductions for those sums due to joint creditors. Debtors properly claimed TBE exemption under Michigan Compiled Laws 600.5451(1) subsection (o). After case was filed, Michigan Legislature changed TBE exemption to subsection (n). Debtors amended Schedule C to claim property as TBE under then-designated subsection (n). Although exemptions are determined as of date of filing, nothing indicated that debtors' amendment was intended to change exemption from TBE to "standard" homestead which was subsection (n) when the case was filed but was subsequently re-designated subsection (m). Instead, amendment was intended to continue TBE exemption and to adjust to the current nomenclature of the statute. Trustee not permitted to charge exempt property for payment of administrative expenses. Debtor claimed home exempt as tenants by entireties. Trustee, with Debtors' consent, sold house to third party and used proceeds to pay joint creditors of Husband and Wife. Trustee then sought to recover trustee fee from remaining proceeds. Section 522 prohibits exempt property from being charged for payment of any administrative expense. Entireties exemption applies to all proceeds of sale of property other than proceeds used to pay joint creditors, leaving no non-exempt funds available for administrative expenses.
- (1484) *Salven v. Galli*, Case No. 15-1376 (9th Cir. BAP 2016) – Parties are not irrevocably bound to exemptions that were available at time case commenced where circumstances change. Husband and wife filed joint Chapter 13 case and declared their marital residence as exempt homestead. Sometime after commencing the case, debtors divorced and debtor-wife purchased a new home of her own. The parties severed their bankruptcy cases and Wife then converted her case to Chapter 7. The Chapter 7 Trustee objected to wife's claimed exemption as property was not wife's home when case commenced. Court held that the parties were not bound by homestead claimed at commencement of case as "marital status is not fossilized for duration of the case". Although Wife also had interest in property that was the former marital residence, Husband still resided in that property and could claim his interest as exempt even though Husband had voluntarily dismissed his case. Since the couple was no longer married, each of the parties could assert separate homestead exemptions. As such, Trustee could not sell the former marital residence unless the Trustee generated sufficient proceeds of sale to pay husband's exemption in full.
- (1485) *In re Abdallah*, 2016 WL 3676637 (Bankr. N.D. Ohio 2016) – Exemptions are determined as of petition date and apply to property in which debtor has interest as of petition date. Where state court prior to commencement of bankruptcy case held debtor's attempts to transfer title to his wife and his mother to be ineffective for lack of delivery of a deed and as violation of Ohio's fraudulent transfer action, as of commencement of case debtor owned property and could claim property as exempt.
- (1486) *In re Davis*, 2015 WL 5936873 (Bankr. S.D. Ohio 2015) – Exemption rights are determined by law in effect as of petition date. When debtor acquired property, Ohio exemptions were low. Thereafter, creditor acquired judgment and obtained judgment lien against property. Ohio later increased the exemption amount, such that debtor's homestead no longer had exempt equity. Debtor filed petition and sought to avoid lien under Section 522(f). Lienholder claimed that debtor was limited to exemptions in effect when lien attached and that any attempt to use higher exemption amount constituted unlawful "retroactive" effect of higher exemption. Court concluded that exemptions are determined by date of petition. Debtor permitted to claim higher exemption even where lower exemption had previously been in place when lien attached.
- (1487) *In re Hamacher*, 2015 WL 4555374 (Bankr. E.D. Mi. 2015) – Property did not lose its status as tenancy by entireties where debtor's non-filing spouse died after debtor filed for bankruptcy protection. Exemptions are determined as of petition date. While spouse's later passing would terminate entireties as of that moment, as of the petition date spouse was alive and property was owned by debtor and spouse as entireties.
- (1488) *In re Morris*, 2015 WL 1879460 (Bankr. N.D. Ohio 2015) – Life insurance policy owned by debtor becomes property of estate. Ohio law allows a debtor to exempt the debtor's interest in life insurance contracts as long as the policy beneficiary is a spouse, child or other dependent of the debtor. As of the petition date, debtor's father was listed as the beneficiary on the policy and there was no indication that the father was a dependent (father was already deceased). Exemptions are fixed as of the petition date. As the named beneficiary was not a member of the protected class of beneficiaries, debtor could not exempt the policy.
- (1489) *In re Varela*, Case No. 14-5886 (Bankr. W.D. Mi. 2014) – Debtor who voluntarily transferred property prior to commencement of case cannot claim property exempt if trustee later recovers property pursuant. Section 522(g) allows debtor to exempt recovered property only if initial transfer was not voluntary. Debtor cannot evade limits on Section 522(g) by causing the recipient to voluntarily re-convey property to debtor post-petition. Property obtained by debtor post-petition is not property of estate and debtor cannot claim exemption in property that is not property of estate. If trustee recovers property, then property becomes property of estate that cannot be exempted.
- (1490) *In re Kyle*, 2014 WL 1931608 (Bankr. SD. Ohio 2014) – Debtor entitled to take exemption in full amount available as of petition date. State increased exempt amount for homestead after debtor had run up unsecured debts but before debtor filed bankruptcy. Debtor entitled to full amount of new exemption amount regardless of when debts were incurred.
- (1491) *In re Mitchell*, 2014 WL 1725819 (Bankr. N.D. Ohio 2014) – Debtor is entitled to claim full amount of exemptions not limited to amount that debtor would have been able to claim as exempt when judicial lien attached. At time judgment was recorded, state exemption limits resulted in equity over and above exempt amount. However, state later increased exemptible amount to an amount in excess of equity in property. Debtor then filed bankruptcy and sought to avoid judicial lien to full extent of higher exemption amount. Amount of exemption determined by law in effect when case filed. As debtor could fully exempt equity under law in effect as of petition date, debtor could avoid liens notwithstanding that debtor had non-exempt equity when liens originally attached.
- (1492) *In re Pursley*, 2014 WL 293557 (Bankr. N.D. Ohio 2014) – Exemptions are determined by law in effect on petition date. State law amendment increased exemption amounts but only as to claims that arose after the effective date of the amendment. Court concluded that Section 522 preempted state law that purported to limit availability of increased exemptions. Under Section 522, debtor could claim

exemptions to full amount allowed under state law as of the date of the petition, which was increased amount under statutory amendment, without regard to when claims arose or any conditions otherwise imposed by state law on increased exemption amount.

- (1493) *In re Depascale*, 2013 WL 4478692 (Bankr. N.D. Ohio 2013) – Extent of homestead exemption for purposes of determining whether judgment lien impaired exemptions is allowable exemption when bankruptcy case is filed, not earlier date when judgment lien attached. Debtor entitled to full Ohio exemption of \$132,900 in effect when bankruptcy case filed rather than \$21,625 exemption that was allowed at time judicial liens attached.
- (1494) *Eleiwa v. Whitmore*, Case No. 12-1559 (9th Cir. BAP 2013) – Property cannot be claimed as exempt unless property is property of estate as of petition date. Debtor could not claim exemption in two parcels of property that had been conveyed to third party more than one year prior to commencement of case.
- (1495) *Leicht v. Anspach*, 475 BR 612 (Bankr. S.D. Ohio 2012) – Exemptions are determined as of the date of the bankruptcy filing.
- (1496) *Cook v. Wells Fargo Bank*, Case No. 11-082 (10th Cir. BAP 2012) – Fact that debtor claimed exemption in underlying asset did not confer standing for purposes of alleging violation of automatic stay. Claim of exemption does not remove asset from estate until the exemption is allowed or by operation of law if no timely objection is filed. Creditor timely objected to claimed exemption and claimed exemption had not been determined as of date of alleged stay violation. As property remained property of estate, debtor lacked standing to pursue alleged stay violation.
- (1497) *In re Pellegrini*, 2012 WL 129842 (Bankr. W.D. Mi. 2012) – Exemptions are determined on the bankruptcy filing date. Only the facts as they existed on the filing date are relevant to determination as to whether debtor qualifies for claimed exemption, without reference to any subsequent changes in the character or value of the property.
- (1498) *In re Wengerd*, 453 BR 243 (6th Cir. BAP 2011) – Debtor’s admitted intent to abandon homestead after filing does not defeat status of property as homestead as of moment of bankruptcy filing. Debtors’ entering into pre-petition contract for sale of homestead does not defeat homestead status where, as of petition date, Debtors occupied their home and intended the property to be the homestead.
- (1499) *Williamson v. Hall*, Case No. 08-088 (10th Cir. BAP 2009) – Homestead exemption is determined as of the date of the bankruptcy petition.
- (1500) *In re O’Guinn*, 2009 WL 2132619 (Bankr. N.D. Ohio 2009) – Exemptions are governed by law in effect at the time of the filing of the petition. Subsequent conversion of case from Chapter 13 to get chapter 7 does not permit Debtor to avail herself of higher exemption limits which came into effect during the pendency of the chapter 13 proceeding. Debtor’s exemptions are limited to those in effect when the chapter 13 case was originally commenced.

7.3 Interest of Debtor in Property to be Exempted

- (1501) *In re Harris*, Case No. 13-36395 (Bankr. S.D. Tx. 2016) – Exemptions are determined by debtor’s interest in property as of petition date. Debtor cannot claim exemption in property that debtor fraudulently transferred pre-petition even if transfer was determined, post-petition, to be avoidable, as debtor did not have interest in property as of petition date and alleged recovery of title post-petition did not create new right to exempt property. Debtor could not claim exemption in property that debtor fraudulently transferred before filing and was later recovered by Trustee. Debtor cannot recover fraudulently transferred property for his own benefit as fraudulent transfers are voidable only by or for benefit of defrauded creditors.
- (1502) *In re Abdallah*, 2016 WL 3676637 (Bankr. N.D. Ohio 2016) – Exemptions are determined as of petition date and apply to property in which debtor has interest as of petition date. Where state court prior to commencement of bankruptcy case held debtor’s attempts to transfer title to his wife and his mother to be ineffective for lack of delivery of a deed and as violation of Ohio’s fraudulent transfer action, as of commencement of case debtor owned property and could claim property as exempt.
- (1503) *In re Adams*, 2016 WL 1688747 (Bankr. E.D. Tn. 2016) - Bank account was held by debtor husband individually and was not entireties account. Account was titled in name of husband d/b/a husband’s sole proprietorship. Although wife’s name was on account as “authorized signatory” and wife did, in fact, use account to pay household expenses and account was only account for the house, wife was not owner of account. Account was not entireties property and wife could not claim exemption in funds in account as wife lacked any legal interest in account.

7.4 Equity in Property to be Exempted

- (1504) *Brown v. Ellman*, Case No. 14-48421 (Bankr. E.D. Mi. 2015), *aff’d*, 2016 WL 3055618 (E.D. Mi. 2016), *appeal pending*, 2016 WL _____ (6th Cir. 2016) – 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.
- (1505) *In re Diener*, 2015 WL 4086154, 2015 Bankr. LEXIS 2235 (Bankr. N.D. Ga. 2015) – Where property is over encumbered at commencement of case, debtor lacks equity to which exemption can attach. Value to estate created when lender agreed to “carve out” of sale proceeds to allow creditors to receive some benefit does not create equity. Carve out represents value added from trustee’s efforts, not from the property itself.
- (1506) *Goben v. Corydon State Bank*, Case No. 13-6039 (8th Cir. BAP 2013) – Debtor cannot claim exemption in asset in which debtor has no equity. Statute allows debtor to exempt value of debtor’s interest in automobile. Where liens exceed value of car, debtor has no “interest” to exempt.

- (1507) *Baldrige v. Ellmann*, 2013 WL 1759365 (E.D. Mi. 2013), *aff'd* 2014 WL 350076 (6th Cir. 2014) – Section 522(d) allows a debtor to exempt only the value of debtor's interest in property, not the property itself. Where debtor has no equity in property because liens exceed value, there is no equity for debtor to claim as exempt. Lender's agreement to "carve out" where lender agrees to accept less than full payment and to allow the estate to retain a portion of the sales proceeds benefits the estate, but does not create equity in the property itself. Further, Debtor can claim asset as exempt only to extent asset constitutes property of estate. Carve out did not exist on petition date and came into existence during case administration. As such, carve out did not constitute property of the estate that debtor could claim as exempt.

7.5 Bankruptcy Only Exemptions

- (1508) *Williamson v. Murray*, 2014 WL 6436635 (10th Cir. 2014) – Bankruptcy only state exemptions are constitutional. State law that allows debtor to exempt Earned Income Credit is neither preempted by Bankruptcy Clause of the constitution nor violative of equal protections clause of 14th Amendment.
- (1509) *In re Schafer*, 2012 WL 3553294 (6th Cir. 2012), *cert denied*, *Richardson v. Schafer*, 133 S.Ct. 1244, 185 L.Ed.2d 179, 81 USLW 3310, 81 USLW 3446, 81 USLW 3452 (2013) – Bankruptcy specific exemption statute MCL 600.5451 is constitutional. State exemption statutes that create special exemptions that apply only in bankruptcy do not violate either the supremacy clause or the Bankruptcy clause on uniform laws. Debtor in Michigan can elect federal exemptions or can elect Michigan exemptions to the extent those exemptions apply in all cases and are not "bankruptcy specific".
- (1510) *In re Reinhart*, 460 BR 466 (Bankr. E.D. Mi. 2011) – 11 USC Section 522(b)(3)(A) does not authorize a state to create bankruptcy-specific exemptions. Congress authorized state exemptions only to the extent the exemptions are available to a debtor if the bankruptcy had not been filed. Further, limiting exemptions to those available to debtors outside bankruptcy avoids the constitutional issues presented in *In re Schafer*.
- (1511) *Sticka v. Applebaum*, 422 B.R. 684 (9th Cir. BAP 2009), California bankruptcy only exemption did not violate the Uniformity Clause. Uniformity Clause required only that federal bankruptcy laws apply equally to all creditors and debtors. California bankruptcy only exemption applied equally to all debtors and creditors in bankruptcy, resulting in no violation of the Uniformity Clause.
- (1512) *In re Westby*, 2012 WL 1144412 (Bankr. D. Kn. 2012) – State "bankruptcy only" exemptions are not unconstitutional. Uniformity Clause of Constitution requires only that exemptions apply equally to all debtors and creditors in bankruptcy, not to all debtors and creditors in general.
- (1513) *In re Pontius*, 421 BR 814 (Bankr. W.D. Mi. 2009) – Michigan State Exemptions which apply solely in context of bankruptcy is unconstitutional. Congress' attempt to delegate to states the authority to enact bankruptcy exemptions in Section 522(b)(1) is unconstitutional as Constitution gives sole authority to Congress to enact uniform laws" regarding bankruptcy. Congress cannot constitutionally delegate its legislative powers or attempt to transfer these legislative powers to the States. Section 522 does authorize non-federal exemptions that states extend generally to individuals in their jurisdiction, but cannot constitutionally authorize "bankruptcy specific" exemptions. Michigan Compiled Laws Section 600.5451 is an attempt by the Michigan Legislature to write part of the Bankruptcy Code. Constitution mandates "uniform" bankruptcy laws. Any attempt by Congress to delegate to the States the power to make bankruptcy law destroys the constitutionally mandated uniformity. Uniformity requires that the property available to be taken by the Trustee be the same property that would have been available to creditors had the bankruptcy never ensued. State statutory exemptions that apply only in bankruptcy "ensure that that bankruptcy trustee" not be able to reach all of the property that would have been available to creditors outside bankruptcy. Homestead exemption in Section 600.5451 purports to exempt in bankruptcy an amount far in excess of the generally available homestead exemption under non-bankruptcy Michigan State law and is unconstitutional and unenforceable against Bankruptcy Trustee.
- (1514) *In re Jones*, Case No. DK 09-9415 (Bankr. W.D. Mi. 2010) – Michigan exemptions statute Section 600.5451 is constitutional exercise of lawfully delegated authority. Section 522 permits a state to choose the exemption scheme available to a debtor filing for bankruptcy in that state. States and Federal Government hold concurrent legislative authority in area of bankruptcy exemptions. Section 522 is not delegation of authority, but merely recognition of the concurrent powers of the Federal and State governments. Supremacy Clause will invalidate state statutes to the extent they are inconsistent with or contrary to federal law. Michigan exemption laws do not actually conflict with or object the federal Bankruptcy Law. The Bankruptcy Code expressly recognizes state authority to concurrently legislate exemptions. That Michigan's bankruptcy exemptions are broader than non-bankruptcy exemptions does not actively encourage or discourage anyone from seeking bankruptcy protection. States can enact exemptions that are more, or less, protective than the Federal exemptions without running afoul of the Supremacy Clause.
- (1515) *Sticka v. Applebaum*, 422 BR 684 (9th Cir. BAP 2009) – California state statute that created exemptions available only in bankruptcy is not inconsistent with either the Supremacy Clause of the Uniformity clause of the United States Constitution. The Supremacy Clause and the doctrine of preemption invalidate state statutes to the extent they are inconsistent with, or contrary to, the purposes or objectives of federal law. A state law may be preempted when federal legislation expressly declares its intent to do so; when Congress has legislated comprehensively so as to "occupy the field" of regulation leaving no room for states to supplement federal law; or, when the state law actually conflicts with federal law. Federal bankruptcy law is not so pervasive, nor is the federal interest so dominant, as to wholly preclude state legislation in the area. Congress has not occupied the field of bankruptcy regulation to the point of preempting state exemption statutes. State statute will be in actual conflict with federal law only if it obstructs the basic objectives of the federal law. Section 522 specifically permits states to opt out of the federal exemption scheme and implement their own exemptions. Congress did not limit the exempt property to a state's applicable non-bankruptcy law. There is no requirement that the state or local law referenced in §522(b)(3)(A) be the same as the law that applies to nonbankruptcy debtors. The uniformity requirement pertains only to Congress. States

have the authority to enact exemption laws even if they produce varying effects on its citizens, so long as the laws do not conflict with federal law.

7.6 Amended Claim of Exemptions

- (1516) *Earl v. Lund Cadillac, LLC*, Case No. 15-1693 (D. Ariz. 2016) – Debtor is limited to exemptions as of date of filing. On petition date, debtor lived in her residence and had second residence she used as rental property. Debtor claimed exemption in property where she resided at petition date, but debtor had no interest in that property as property had been foreclosed prior to commencement of case. After debtor filed bankruptcy, she moved into property that was rental and attempted to amend exemption to claim that property as exempt homestead. Court recognized that debtor had right to amend exemptions but could not do so to create exemption that did not exist when case was filed. As debtor did not reside in “rental” on petition date, debtor could not claim exemption merely because debtor later moved into that property and established as homestead. Debtor rendered homeless after trustee took rental property and sold it for benefit of estate.
- (1517) *In re Haber*, 2016 WL 1211339 (Bankr. S.D. Ohio 2016) – Trustee’s objection to claimed homestead exemption overruled as property was no longer property of estate where trustee abandoned property under Section 554. Abandonment relinquished any interest in property including proceeds of sale, and there was no basis to revoke abandonment.
- (1518) *Sheehan v. Scotchel*, Case No. 14-196 (N.D. W.Va. 2015) – Court lacks equitable authority to deny debtor’s amended claimed exemptions even assuming debtor intentionally undervalued assets when first disclosed and did not amend until trustee discovered true value.
- (1519) *In re Lua*, 2015 WL 1969903, 529 BR 766 (Bankr. C.D. Ca. 2015), *aff’d*, 2015 WL 7176005, 2015 U.S. Dist. LEXIS 155510 (C.D. Ca. 2015) – Although *Law v. Siegel*, precludes bankruptcy court from denying debtor’s right to amend exemptions based on lack of good faith, where debtor claims State law exemptions, bankruptcy court can use state law grounds to deny exemptions. After trustee sought to sell real property, debtor sought to amend claimed exemptions to claim property as homestead under state law. Debtor’s amendment came 3 years after petition and 33 months after debtor’s prior amended exemptions that deleted exemption in real property. Court concluded that debtor’s attempt to amend exemptions was barred by state law doctrine of equitable estoppel. Estoppel requires representation or concealment of material fact; made with knowledge, real or virtual, of the truth; made to a party who was ignorant of the truth; with intention that the other party rely; and that the party was induced to act. Debtor represented that property was not homestead and was not otherwise exempt for almost 3 years while trustee diligently performed duties, and with intent to reap benefits for debtor at expense of creditors.
- (1520) *Ellman v. Baker*, 514 BR 860 (E.D. Mi. 2014), *aff’d* 2015 WL 4033098, 791 F.3d 677 (6th Cir. 2015) – Rule 1009 allows debtor to amend exemptions at any time before closing of case. Court lacks equitable power to deny exemptions or to overrule claimed exemptions. Even where debtor had fraudulently concealed assets and those assets are later discovered, debtor can amend to claim as exempt. Authority to amend is specific in rules and based on Supreme Court decision in *Law v. Siegel*, court lacks “general equitable power” or authority under Section 105 to deny amendments based on debtor’s misconduct, bad faith, or fraudulent conduct. Objections to exemption are limited to grounds stated in Section 522 or applicable state law.
- (1521) *In re Pratts*, 2015 WL 3484286 (Bankr. D.P.R. 2015) – Court cannot deny debtor’s claimed exemptions on basis of bad faith.
- (1522) *In re Hale*, 511 BR 870 (Bankr. W.D. Mi. 2014) – Debtor ordinarily can amend exemptions at any time prior to closing of case as a matter of course. Amended objection relates back to filing date. However, Court can deny request to amend exemptions when entire record in case demonstrates that debtor has acted in bad faith by concealing assets in first instance and only claiming exemption after property is discovered by Trustee or creditor and allowing exemption would unfairly prejudice estate. Debtor’s conduct amounted to bad faith where debtors concealed property, denied ownership even after trustee discovered property, and then thwarted trustee’s efforts to sell property. Further debtors waited more than 2 years after discovery of property and after court established deadline to amend exemptions. Debtor’s non-disclosure coupled with debtor’s failure to timely amend even when given chance by court established bad faith prejudicial to estate.
- (1523) *In re Mitchell*, 2014 WL 1725819 (Bankr. N.D. Ohio 2014) – Debtor permitted to amend exemptions where original claimed exemptions erroneously claimed amount lower than amount statutorily authorized. Debtor erroneously exempted \$60,000, the amount by which the state exemption had previously been capped. However, state had increased cap to \$132,900 prior to commencement of case. There was no evidence that increase was result of bad faith or attempt by debtor to gain unfair advantage in original claim of exemption or later amendment to take advantage of full exemption to which debtor was initially entitled. Debtor was initially pro se and schedule C indicated intent to exempt full value of property, and only when debtor later retained counsel was error discovered and promptly corrected.
- (1524) *Westry v. Lim*, 2014 WL 7398898 (6th Cir. 2014) – Debtor is not permitted to amend exemptions where the amendment would be prejudicial to creditors. Delay in amending alone is not prejudice. Prejudice may be established by showing harm to litigation posture of parties in interest, such that the parties would have taken different actions or asserted different positions has the exemption been claimed earlier, and those parties are detrimentally affected by timing of amendment; or where amendment is attempt to frustrate trustee’s continued administration of estate. Bankruptcy Court failed to make necessary findings of prejudice to support denial of amendment. Trustee’s argument that substantial delay in disclosing asset resulting in trustee monitoring the litigation, but failed to demonstrate that estate incurred any significant cost in monitoring the litigation. Trustee’s allegation that delay impacted administration of estate did not demonstrate prejudice where trustee did not indicate how amendment would have impaired trustee’s duties or how trustee would have acted differently, such as by not agreeing to settlement for sum less than statutory cap on exemptions. Further, regardless of trustee’s actions, creditors were not going to recover any funds as there were no funds beyond the exempt amounts. Absent evidence of actual prejudice, such as loss of asset that would otherwise have been available, debtor has right to amend exemptions to correct amount of exemptions previously claimed to take advantage of available, but previously unused, exemptions.
- (1525) *In re Wiggs*, 2013 WL 4460881 (Bankr. S.D. Il. 2013) – Debtor’s failure to list interest in principal residence in schedules was bad faith

attempt to conceal asset. Debtor did not disclose interest until two years after filing and after the house was sold, at which time debtor sought to claim property as exempt. Although debtor stated that he thought property was in wife's name alone, evidence indicated that property was originally in debtor's name and a few years prior to filing he conveyed property to debtor and wife as joint tenants. Debtor worked for a title company and owned an interest in title company and knew how to read public records. Debtor failed to disclose alleged lack of understanding until forced to under oath in adversary proceeding called into question debtor's credibility, compounded by later sale of property without court permission and check for proceeds of sale was made out to debtor and wife jointly.

- (1526) *In re Gilliam*, 479 BR 768 (Bankr. E.D. Tn. 2012) – Debtors are permitted to amend exemptions to add previously undisclosed asset where omission of asset was not result of bad faith or intent to conceal. Debtors' failure to schedule a 2007 automobile was not bad faith where debtors thought automobile belonged to daughter. In 2007, debtors purchased a car in their names in order to take advantage of employee discounts available to debtor-husband. At all times since the purchase, the car was driven exclusively by the daughter and the daughter made all of the payments on the car. Shortly after the first meeting of creditors, debtors amended Schedule B to disclose auto and amended Schedule C to exempt auto. Although debtors actions indicated a lack of understanding of the bankruptcy process, actions did not indicate lack of good faith where debtors genuinely thought of the auto as being the "daughter's car".
- (1527) *In re Younoszai*, 478 BR 841 (Bankr. W.D. Ky. 2012) – Rule 1009 allows debtor to amend scheduled exemptions at any time while case is pending. Court may reject amendment only where debtor has acted in bad faith or concealed property. Bad faith requires proof of intentional misconduct. Debtor permitted to amend exemptions after case filed to drop homestead exemption on property occupied by debtor as of petition date and to add "wild card" exemption for second property owned by debtor as of petition date.
- (1528) *In re McConaughay*, Case No. 11-32155 (Bankr. E.D. Mi. 2012) – Debtor will be permitted to amend Schedules and SOFA absent bad faith or concealment of property. Debtor not permitted to amend exemption to claim interest in property that debtor inherited and then transferred to his brothers one year prior to commencement of case. Debtor failed to list transfer in SOFA question 10 as required. Failure to list property transferred as required constituted evidence of concealment. Debtor listed and exempted that portion of inheritance that debtor was still entitled to receive but did not disclose that portion already received and transferred, further evidencing intent to conceal true intentions regarding estate. Debtor's failure to disclose transfer frustrated Trustee's investigation of assets and determination as to possible action or liquidation of asset until issue came to light at first meeting of creditors. Although debtor ultimately did disclose assets orally, Trustee should not have to resort to questioning at first meeting of creditors to discover assets and transfers that should have been disclosed in schedules.
- (1529) *In re Stiltner*, 2012 WL 1805423 (Bankr. E.D. Tn. 2012) – Judicial estoppel sufficient to preclude post-petition amendment to claimed exemptions 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 on schedules or claim as exempt. 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 remained 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. Creditor's objection to claimed exemption overruled.
- (1530) *Rossi v. Westenhoefer*, Case No. 11-8048 (6th Cir. BAP 2012) - Debtors will not be barred by doctrine of judicial estoppel from amending schedules and exemptions to increase asset valuation if debtor can establish that differing valuations were due to mistake or inadvertence rather than bad faith. Fire destroyed the house of Cary and Dana Rossi ("Debtor") while their Chapter 7 bankruptcy was pending. On the schedules, household goods, furnishings and wearing apparel were valued at \$2,200. On the insurance claim the same assets plus medical equipment and living expenses were valued at \$45,924.88. Debtor then amended the schedules, increasing the value of the property in question to \$24,309.88, adding the medical equipment valued at \$13,145.00, and claiming all of these assets as exempt. Bankruptcy court erred in denying debtor's request to modify exemptions without providing debtor an opportunity to explain the substantial discrepancy in values as well as debtors apparent failure to list all assets.
- (1531) *In re Rice*, 2011 WL 3290312 (Bankr. E.D. Mi. 2011) *aff'd* 2012 WL 3870587 (E.D. Mi. 2012) – Debtor may amend petition and schedules at any time before the case is closed, provided there is no bad faith or concealment of property. Debtor's admitted failure to read schedules and statements before signing evidences that omissions were reckless and evidenced improper disregard of duty of disclosure. Debtor's failure to disclose Cashier's Check and garnished funds on schedules precluded later disclosure and amendment to claim as exempt.
- (1532) *In re Clark*, 2011 WL 2837478 (Bankr. W.D. Mi. 2011) – Debtor's request to amend Schedule C to add previously undisclosed tax refund denied. Debtors did not list anticipated tax refund in Schedule B or claim as exempt on Schedule C based on advice by Bankruptcy Petition Preparer that "if the tax returns have not been filed, you do not have to list the refunds". Debtors completed the Chapter 7 Trustee's standard questionnaire which also denied that debtors anticipated any tax refund for the current year. Debtors were at least reckless in failing to disclose tax refund in either schedules or questionnaire, such that request to amend to add refunds would be denied.
- (1533) *In re Borbi*, Case No. 10-31247 (Bankr. E.D. Mi. 2011) – Rule 1009 authorizes debtor to amend schedules at any time before case is closed unless debtor acts in bad faith or property has been concealed. Debtor did not disclose the retention of \$10,000 representing proceeds of life insurance on debtor's deceased husband and initially failed to disclose that omission under questioning at the first meeting of creditors. Debtor offered incomplete, insufficient and contradictory statements about why these assets were not disclosed, although debtor had ample

opportunity to disclose. Debtor's conduct indicated that debtor concealed the assets, precluding amended claim of exemption.

- (1534) *In re John*, 2011 WL 143871 (Bankr. E.D. Mi. 2011) – Debtor will not be permitted to amend exemptions if the amendment would prejudice creditors or the estate. Mere delay in filing the amendment does not constitute prejudice, absent proof that parties would have taken different actions or asserted different positions had the exemption been claimed earlier, and the interests of those parties are detrimentally affected by the timing of the amendment; or if the amendment impairs a trustee in the diligent administration of the estate. Debtor's delay in amending the exemption for 4 weeks after issue first raised at Section 341 meeting was not prejudicial delay sufficient to warrant denial of exemption where exemption would have been allowed had it been raised in the first instance.
- (1535) *In re O'Brien*, 2011 WL 10077 (Bankr. W.D. Mi. 2011) – Debtors who filed Chapter 7 in January and failed to list possible tax refund for prior year would be permitted to amend schedules and claim exemption where Debtors timely filed tax return and amended schedules to disclose refund and assert exemption shortly after filing return that first indicated existence of refund. Amended exemptions relate back to date of bankruptcy petition. Debtors filed tax returns post-petition and before Section 341 meeting and disclosed anticipated tax refunds at the time of the first meeting of creditors. There was no evidence of any intent by debtors to deceive or defraud trustee by failing to list potential tax refunds in the initial schedules. Debtor's receipt and expenditure of the refund post-petition and before amending Schedules to disclose and exempt does not prevent refund from being claimed as exempt.
- (1536) *In re Lambert*, 2010 WL 3604116 (Bankr. N.D. Ohio 2010) – Debtors not permitted to amend exemptions in Chapter 7 on same date that Chapter 7 Trustee filed final report. Debtor does not have unrestricted right to amend where circumstances indicate bad faith or concealed property of the estate. Debtors' amendments evidenced lack of good faith by listing and exempting two assets that were not properly listed in Debtor's original Schedule B and amendments also deleted assets that had been previously disclosed without explanation. Last minute amendment would result in definite prejudice to creditors by reducing estate that will be available for distribution yet debtors failed to provide notice to creditors of proposed amendments. Finally, debtors waited more than three months to amend exemptions after learning that additional assets would be available, doing so only after the Chapter 7 Trustee filed his final report.
- (1537) *In re Bailey*, Case No. 05-41609 (Bankr. N.D. Ohio 2010) - Debtor who scheduled a cause of action as an asset would not be permitted to amend the exemption to claim the action as exempt where the amendment was not filed until 4 months after the Trustee settled the action with the defendant and recovered \$17,000.00. Trustee not put on notice that he needed to adduce any evidence concerning the composition of the Settlement, and the Court was deprived of jurisdiction to have the parties supplement the record of the evidentiary hearing.

7.7 Recovery of Avoidable Transfer

- (1538) *In re Harris*, Case No. 13-36395 (Bankr. S.D. Tx. 2016) – Debtor could not claim exemption in property that debtor fraudulently transferred before filing and was later recovered by Trustee. Debtor cannot recover fraudulently transferred property for his own benefit as fraudulent transfers are avoidable only by or for benefit of defrauded creditors.
- (1539) *In re Slane*, 2015 WL 5255329 (Bankr. N.D. Ohio 2015) – Section 522(h) allows a debtor to exempt property that is recovered by estate where initial transfer was not voluntary and debtor did not conceal initial transfer. Wage garnishments are not voluntary transfers.
- (1540) *Atkins v. Gelt Properties, LLC*, 2015 WL 846696 (Bankr. E.D. Pa. 2015) – Chapter 13 Debtor cannot use Section 522(g) and (h) to avoid unrecorded mortgage. Section 522(h) limits avoidance to property that debtor could exempt if recovered where the initial transfer was not voluntary. Debtor voluntarily executed the mortgage which debtors now sought to avoid as not properly recorded.
- (1541) *In re Varela*, Case No. 14-5886 (Bankr. W.D. Mi. 2014) – Debtor who voluntarily transferred property prior to commencement of case cannot claim property exempt if trustee later recovers property pursuant to Section 550. Section 522(g) allows debtor to exempt recovered property only if initial transfer was not voluntary. Debtor cannot evade limits on Section 522(g) by causing the recipient to voluntarily reconvey property to debtor post-petition. Property obtained by debtor post-petition is not property of estate and debtor cannot claim exemption in property that is not property of estate. If trustee recovers property, then property becomes property of estate that cannot be exempted.
- (1542) *In re Diamantis*, 2014 WL 1203182 (Bankr. N.D. Ohio 2014) – Debtor cannot claim exemption in money that debtor voluntarily paid to employer as repayment of disability benefits after Trustee recovered money as preference. Section 522(g) does not permit debtor to claim exemption in recovered property where the debtor initially transferred the property voluntarily. Debtor received disability benefits from employer subject to obligation to repay if debtor received lump sum Social Security Disability payment. When debtor received SSD, he signed agreement that required SSD to deposit funds into designated account and authorized employer to withdraw funds from that account to recover disability payments. Transfer was voluntary as debtor voluntarily signed agreement allowing employer to withdraw funds. Transfer is "involuntary" where transfer is by operation of law such as execution, repossession or garnishment or is otherwise without the consent of the debtor absent evidence of fraud, material misrepresentation or coercion which tends to negate debtor's free will. Debtor admitted that no one tricked, intimidated, shamed or threatened him into signing the papers. Debtor's argument that if he had not signed, he would not have received his disability benefits and he would likely have been fired did not amount to fraud, misrepresentation, coercion, or duress. The cases in which court have found transfers to be involuntary as a result of fraud, misrepresentation, coercion or duress describe extraordinary circumstances. Communications between employer and the debtor explained debtor's options and solicited his agreement. Employer did not exert any pressure on the debtor to sign, and the debtor had access to knowledgeable counsel. While debtor may have had only two bad courses of action: sign and have to give back any overpayment or refuse to sign and not get any benefits from employer, choice was not one that unfairly but was term negotiated labor agreement.
- (1543) *In re McKinnon*, 2013 WL 4518714 (Bankr. M.D. Fl. 2013) – Debtor cannot claim exemption in automobile recovered by trustee as either fraudulent transfer or avoidable preference. Section 522(g) applies only to property that is transferred involuntarily. Section 522(g) requires

that transfer be both involuntary and not concealed. Debtor's open disclosure of voluntary transfer did not bring property within scope of Section 522(g).

- (1544) *Johnson v. Jones*, 2013 WL 3216136 (Bankr. W.D. Ky. 2013) – Section 522(g)(1)(A) allows debtor to exempt property recovered under Section 550, 551 or 552 if the transfer that is being avoided was not a voluntary transfer by the debtor. Granting of a mortgage or security interest is considered a voluntary transfer. Debtor may not exempt equity in property that may result from trustee's successful action to avoid mortgage.
- (1545) *In re Lawson*, 2011 WL 1219225 (Bankr. E.D. Tn. 2011) – Although debtor's interest in property held as tenant in the entirety would not have been property of estate, where debtor attempted to convey her interest in the property to third party, entirety was destroyed. Trustee could set aside transfer where transfer was not properly perfected and recover debtor's interest for the benefit of estate, but debtor could not attempt to re-assert entirety exemption based on trustee's successful avoidance of transfer. Avoidance does not re-vest property in debtor or resurrect entirety status.
- (1546) *In re Morgan*, 2010 WL 4922581 (Bankr. E.D. Tn. 2010) – Debtor permitted claim as exempt funds garnished shortly before debtor filed bankruptcy. Section 522(g) permits debtor to exempt property recovered by the trustee if the transfer was not voluntary and was not concealed.
- (1547) *Smith v. U.S. Bank*, 2010 WL 3277795 (Bankr. E.D. Ky. 2010) – Avoidance of transfer under Section 551 is subject to debtor's right to exempt the property subject to the trustee's preserved lien position if the preserved lien was otherwise avoidable under section 522. Section 522(g) allows a debtor to exempt property that the trustee recovers as long as the transfer was involuntary. Property that was voluntarily transferred by the debtor and recovered by the trustee under section 550 and preserved under 551 cannot be exempted. Debtor not permitted to claim exemption in property where grant of a security interest in the Mobile Home was voluntary.

7.8 Waiver of Exemptions

- (1548) *Spradlin v. Baker*, 2010 WL 2612585 (Bankr. E.D. Ky. 2010) – Debtor has power to waive exemptions to which Debtor would otherwise be eligible to claim. Debtor voluntarily agreed to limit claimed exemptions to permit Creditor to recover preferential transfers from second creditor where, as a result of Debtor's waiver, funds would be available from recovery of preference for distribution to creditors.

7.9 Statutory Basis for Exemptions

- (1549) *In re Trofatter*, Case No. 09-7423 (Bankr. W.D. Mi. 2010) – Michigan Constitution Article X, Section 3 does not create an independent and self-executing basis for exemptions. The drafters did not intend the exemption provisions of the State Constitution to be self-effectuating but rather intended the provisions to serve as a floor to guide legislative enactments. Debtor's claimed exemptions based on Constitutional provisions disallowed.

7.10 Extra-territorial Application

- (1550) *In re Alcorn*, 2013 WL 3353837 (Bankr. D.S.D 2013) – Where debtors relocate within 730 days prior to filing, exemptions are determined by law of prior residence. Where applicable state law (Nebraska) opted out only in cases filed in Nebraska, debtors who filed in South Dakota could use Federal exemptions.
- (1551) *In re Long*, 470 BR 186 (Bankr. D. Kn. 2012) – Opt-out provision of Nebraska law did not prevent Kansas resident (who was required to use Nebraska exemptions) from using Federal exemptions. Nebraska law limits exemptions to state residents. If Kansas resident could not use federal exemptions, debtor would not be able to use any exemptions at all.
- (1552) *In re Rody*, 468 BR 384 (D. Az. 2012) – Applicable state law that opted out of federal exemptions for residents of that state did not prevent non-resident who was required to use that state law from using federal exemptions. If debtor could not use federal exemptions, effect of state statute that limits exemptions to "residents" of state would effectively deprive debtor of any exemptions at all. While "residents" of Arizona could not use federal exemptions, residents of Massachusetts who were required to use Arizona exemptions not precluded from using federal exemptions.
- (1553) *In re Shell*, 2012 WL 3578657 (Bankr. N.D. In. 2012) – Debtor who resided in Indiana less than three months prior to filing case must use exemptions from state where debtor lived for the 180 days that is more than 730 days prior to commencement of case. Prior to moving to Indiana, Debtor resided continuously in Illinois. Debtor limited to exemptions available under Illinois law. Illinois opted out of Federal exemptions, leaving debtor with requirement to use Illinois state exemptions exclusively. Court recognized three separate lines of cases on the issue of extra-territorial reach of exemptions. First line holds that state exemption laws can never extend beyond state borders, and debtor who did not reside in one state for 730 days preceding filing is limited to federal exemptions. Second line, adopted by majority of cases, holds that state exemptions apply extra-territorially to extent state exemption laws provide. Third line holds that state exemptions are applied extra-territorially and to out-of-state property regardless of whether state exemption laws provide for extra-territorial effect of not. Court adopted third line of cases – exemptions are based on applicable state law regardless of residence of debtor or location of property. Debtor must use Illinois state exemptions that were in effect on date of filing of petition.
- (1554) *In re Beckwith*, 448 BR 757 (Bankr. S.D. Ohio 2011) – Debtors who had resided in Ohio for only 180 days prior to filing case must use exemptions applicable to residence for 180 days preceding 730 days before the filing of the petition. Debtors resided in Florida for 180 days that preceded 730 day lookback, and must use Florida exemptions. Florida statutory exemptions do not have extra-territorial application. Although Florida law "opts out" of federal exemptions for Florida residents, Florida Statutes do not control exemptions for debtors who live outside state. Therefore, debtors are entitled to claim Federal exemptions notwithstanding Florida "opt out".

7.11 Sale of Property Post-Petition – Effect on Exemptions

- (1555) *Garcia v. Bassel*, 507 BR 907 (N.D. Tx. 2014) – Under Texas law, post-confirmation sale of homestead forfeits exemption unless proceeds are reinvested in new homestead within 6 months of closing of sale.

B. Objections to Exemptions

7.12 Jurisdiction – Mootness

- (1556) *Maestas v. Old World Construction, Inc.*, Case No. 12-100 (10th Cir. BAP 2013) – Bankruptcy Court retains jurisdiction to consider claim of exemption even after Trustee has abandoned asset and asset is no longer property of the estate, as long as the debtor holds a cognizable interest in the asset.

7.13 Burden of Proof

- (1557) *In re Perkins*, 2011 WL 4458961 (Bankr. N.D. Ohio 2011) – Under Bankruptcy Rule 4003(c), the party objecting to the exemption has the burden of establishing that the debtor is not entitled to the claimed exemption.
- (1558) *In re Waller*, 424 BR 306 (Bankr. S.D. Ohio 2010), *aff'd* 2010 WL 3521956 (6th Cir. BAP 2010) – Party objecting to debtor's claim of exemption bears burden of proving that exemption is not properly claimed and must produce evidence which rebuts prima facie presumption that exemption is correct.
- (1559) *Williamson v. Hall*, Case No. 08-088 (10th Cir. BAP 2009) – Party objecting to claimed exemptions bears burden of proof that exemption is improperly claimed. Court will construe exemption statutes in light most favorable to Debtor.
- (1560) *In re Vickers*, 2009 WL 1544459 (Bankr. E.D. Tn. 2009) – Party objecting to claimed exemptions bears burden of proof that exemption is improperly claimed. Court will construe exemption statutes in light most favorable to Debtor.

7.14 Deadline for Objections

- (1561) *In re Kennedy*, 2016 WL 3226244 (Bankr. E.D. Tn. 2016) – Rule 4003(a) requires debtor to file a statement listing the property and its value, the statutory basis for the exemption, and the amount of the claimed exemption be filed. Parties in interest may object to claimed exemptions within thirty days after conclusion of the meeting of creditors or within thirty days after an amendment is filed, whichever is later. The objecting party bears the burden of proof by a preponderance of the evidence that the exemption is not proper. Absent objection, once the deadline to object passes, the exemption is final and may not be contested by a party in interest, even if the debtor lacked a colorable statutory basis for claiming the exemption.
- (1562) *Risk v. Hunter*, 2015 WL 4643836 (Bankr. N.D. Ohio 2015) – Deadline for objecting to exemptions is 30 days after conclusion of the first meeting of creditors or 30 days after any amendment. Timely filed adversary complaint can constitute objection to claimed exemption. Objection was not timely where first raised in adversary complaint filed 60 days after conclusion of section 341 meeting.
- (1563) *In re Walker*, 2014 WL 505452 (Bankr. E.D. Tn. 2014) – When debtor files amended Schedule C, time to object runs from date of filing of amendment only as to claimed exemptions that changed in the amendment. Filing amendment does not re-start time to object for exemptions previously claimed and as to which no timely objection had been filed.
- (1564) *In re James*, 498 BR 813 (Bankr. E.D. Tn. 2013) – Objections to exemptions must be filed within 30 days of conclusion of first meeting of creditors. Objections can be filed at any time during case and up to one year after closing of case if the exemptions were claimed fraudulently. Debtor's alleged substantial overvaluation of exempt amount did not amount to fraud where debtor disclosed his ownership in the property and made no effort to mislead trustee about intention to exempt entire interest in condominium as tenancy by entireties. Schedules listed numerous joint creditors of debtor and wife and wife was listed on schedule H. Trustee did not present any evidence that debtor knew that the condominium was worth more than the value listed and debtor's schedules listed substantial equity that would have been exempt as entireties. Although debtor failed to reduce the exempt amount to recognize amounts of joint claims, that failure did not prevent the trustee from discovering the true exempt value or taking action to object to exemptions within 30 day window. Absent fraud, court lacks equitable authority to extend deadline beyond 30 day period allowed by rule.
- (1565) *Santiago v. Rivera*, Case No. 11-075 (1st Cir. BAP 2012) – Trustee waived objection to exemption by failing to object within time permitted. Trustee's objection to Plan based on plan's failure to commit tax refunds as disposable income did not constitute an objection to the claimed exemption. Court rejected Trustee's only basis for objecting to exemption based on assertion that tax refunds were not property of estate. Fact that debtor's plan voluntarily offered to contribute non-exempt portions of tax refunds did not overrule debtor's claimed exemption by implication. Trustee's belated attempt to add "disposable income" as additional basis to overrule claimed exemption was time barred.
- (1566) *Matos v. Rivera*, Case no. 11-074 (1st Cir. BAP 2012) – All tax refunds received by debtor in Chapter 13 are property of estate. To extent refund is rooted in pre-petition earnings, refund is property of estate pursuant to Section 541(a). To extent refund is rooted in post-petition earnings, refund is property of estate pursuant to Section 1306. Debtor could claim exemption in tax refunds in Chapter 13 case. Trustee waived objection to exemption by failing to object within time permitted. Trustee's timely objection to Plan based on plan's failure to commit tax refunds as disposable income did not constitute an objection to the claimed exemption. Court rejected Trustee's only basis for objecting to exemption based on assertion that tax refunds were not property of estate. Fact that debtor's plan voluntarily offered to contribute non-exempt portions of tax refunds did not overrule debtor's claimed exemption by implication. Trustee's belated attempt to add "disposable income" as additional basis to overrule claimed exemption was time barred.

- (1567) *Leicht v. Anspach*, 475 BR 612 (Bankr. S.D. Ohio 2012) – Trustee’s failure to object to debtor’s claimed exemption for 100% of workers compensation benefits waived Trustee’s right to later object after court concluded that proceeds were not properly exempted under State statute covering workers compensation. Trustee contended that funds lost their characteristic as workers compensation when debtor received check. Therefore, debtor’s claimed exemption for workers compensation did not include these funds as these funds were now cash, and not workers compensation. Court concluded that the funds, after receipt, were not entitled to Ohio exemption that was limited to workers compensation that had not been received, but funds did not lose their status as workers compensation after receipt.
- (1568) *In re Miller*, 2011 WL 3741846 (Bankr. N.D. Ohio 2011) – Trustee’s failure to object to amended claim of exemptions within 30 days of filing barred later objection. Although debtor’s amended Schedule C claimed exemptions in excess of the allowable amount, Trustee’s failure to object rendered entire property exempt. Debtor did not have to turn over the excess amounts to the Trustee.
- (1569) *In re Messina*, 2010 WL 2712141 (3d Cir. 2010) *aff’d after remand* Case No. 11-1426 (3d Cir. 2012) - 30 day deadline to object to claimed exemption applies only to (1) the description of the exempted property; (2) the Code provisions governing the claimed exemptions; and (3) the amount “listed in the column titled ‘value of claimed exemption.’ When the objection is based on other elements in that case, the debtor’s market value estimation and the estate’s right to retain any value in the property beyond the value of the exempted interest the thirty-day time limit does not apply. Debtors’ Schedule C valued Debtors’ homestead at \$250,000, encumbered by two mortgages, the first of which exceeded the value of the property. Debtors’ claimed exemption for \$36,000, pursuant to Section 522(d)(2). Trustee later successfully avoided lien of first mortgage and sold property, netting about \$42,000. Debtors claimed a right to \$36,000 as the exempt portion of the proceeds, and the Trustee filed a Motion to Determine Value of Exemption as \$0 as debtors, on the date of the filing of the case, had no equity in the property and, therefore, nothing to which an exemption could attach. Debtors responded that *Taylor* precluded Trustee’s belated objection to exemption. Court held that Trustee’s objection was not time barred as possible objection was not discernible from face of schedules and that issue did not arise until after avoidance action had been successful. Court also concluded that Trustee’s Motion to Value Exemption at \$0 would be granted because, as of the date of the petition, debtors had no equity in the property. To extent lien is avoided, benefit is preserved for estate and debtors are not entitled to receive the benefit of that avoidance under Section 522(g).
- (1570) *In re Schewe*, Case No. 09-75270 (Bankr. E.D. Mi. 2010) – Request for extension of deadline to file objections to exemptions must be filed before expiration of initial deadline. Stipulation between Trustee and Debtor to extend deadline disapproved by Court where stipulation was not filed until 2 days after expiration of the deadline to object under Rule 4003.
- (1571) *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.
- (1572) *Moyer v. Dutkiewicz*, 408 BR 103 (6th Cir. BAP 2009) – Objections to exemptions must be filed within 30 days of conclusion of Section 341 meeting. Where trustee ended 341 meeting without a definite statement that the meeting is not concluded, the Trustee impliedly concluded the meeting. If the Trustee seeks to hold the meeting open to a future date, the Trustee must announce that before ending the meeting. Trustee’s request at the Section 341 meeting that the Debtor provide additional documents and the statement that if the documents “cause[] me to need any further information or need to ask any further questions, I’ll contact [counsel] directly. Assuming that doesn’t become necessary, I’ll close your file at that time.” does not constitute a declaration that the Section 341 meeting is being held open. Trustee’s filing of objections to exemptions more than 30 days later was untimely and objections were overruled.

7.15 Valuation of Property Claimed as Exempt

- (1573) *In re Robinson*, Case No. 14-3585 (7th Cir. 2016) – Debtor could exempt rare, valuable copy of Book of Mormon under Illinois exemption that allowed debtor to exempt one bible without limitation as to value. Exemption could not be disallowed merely because debtor owned other copies of the Book of Mormon of negligible value or because debtor did not actually use valuable copy in worship services, instead using the other copies. Statute did not require debtor to exempt only the least valuable copy or in any way limit debtor’s right to designate which copy would be claimed as exempt.
- (1574) *In re James*, 498 BR 813 (Bankr. E.D. Tn. 2013) – Debtor’s exemption as tenancy by entireties is limited to amount of debtor’s interest that would have been exempt under applicable non-bankruptcy law. Where debtor’s schedules valued the entireties property at \$260,000 and there was a mortgage on the property that was the joint obligation of debtor and spouse, property would be sold, lien paid off and debtor would receive net proceeds up to \$260,000 less amount paid to joint secured creditor. Debtor’s claimed exemption limited to values shown on schedules, such that if property sells for more than \$260,000, Trustee would be entitled to retain balance remaining after payment of lien and debtor’s allowed exemption limit.
- (1575) *In re Schmakel*, 2013 WL 694317 (Bankr. N.D. Ohio 2013) – Where debtor claims property under exemption that allows for specific dollar limit on exempt amount and lists value of property as “unknown”, exemption is limited to the value of the property up to the specific dollar limit. Asset listed with value of “unknown” cannot produce exemption that exceeds amount of statutory limit.

7.16 Conversion of Non-Exempt Into Exempt Property

- (1576) *In re Hurt*, 2015 WL 9592064 (Bankr. E.D. Tn. 2015) – Debtor’s deposit of proceeds of sale into two accounts, one in debtor’s name and one in his spouse’s name, was not basis to disallow exemption claimed by either debtor or spouse in subsequent joint bankruptcy case. Property was inherited by debtor and debtor’s brother and was then sold. The check for the proceeds was payable only to debtor-husband, but debtors caused one-half to be deposited into husband’s separate account and one-half to be deposited into wife’s separate account. By doing so, debtors reduced the total funds held by each to amounts below the allowable exemption, while if husband had retained entire amount the total would have exceeded exempt amount. Although deposits were clearly exemption planning – debtors waited to file until the

property sold and the proceeds were deposited, and doing so allowed the full proceeds to be exempted – that alone is not bad faith sufficient to warrant denial of exemptions. Further, after *Ellman*, in the Sixth Circuit a claimed exemption may be disallowed only for one of the statutory reasons set out in the Code, and alleged bad faith in conversion of the asset is not one of those grounds. While Rule 4003(b)(2) allows an objection to claimed exemption up to one year after closing of case if debtor fraudulently asserted claim of exemption, Rules cannot expand on or create new statutory rights or limits, and so did not provide a separate basis to disallow the exemption. Remedy, if any, is denial of discharge under Section 727(a)(1), avoidance of transfer as fraudulent transfer, or dismissal of case, but not objection to exemption.

- (1577) *In re Halinga*, 2013 WL 6199152 (Bankr. D. Idaho 2013) – Section 522(o) allows court to disallow exemptions to extent exemptions result from fraudulent conversion of non-exempt assets into exempt assets. To prevail, objecting party must prove that (1) value of homestead exemption increased; (2) increase is attributable to disposition of non-exempt assets; (3) debtor disposed of non-exempt assets with intent to hinder, delay or defraud a creditor; and (4) debtor disposed of the non-exempt property no more than 10 years prior to filing bankruptcy. Debtors sold non-exempt liquor license and used \$90,000 of proceeds to pay down mortgage. There was no dispute that value of homestead increased as a result of use of non-exempt proceeds and that transaction happened within prior 10 years. However, Trustee failed to prove fraudulent intent where Trustee did not present any evidence to show that debtors were familiar with Idaho law regarding exemptions or that debtor was advised of homestead exemption or that paying down mortgage would increase exemption. Debtors were less than financially sophisticated and testified that they (erroneously) assumed that lump sum payment would result in reduction in monthly mortgage payment. Purpose of lump sum payment was to reduce monthly mortgage expenses to allow debtors more cash flow to pay creditors, not to hinder or defraud creditors, and goal fell apart only after debtors learned that lump sum payment had no effect on monthly mortgage payment.
- (1578) *Soule v. Willcut*, Case No. 11-023 (10th Cir. BAP 2012) – Section 522(o)(4) requires reduction in value of interest in homestead to extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with intent to hinder or delay or defraud a creditor and where the debtor could not have exempted if the debtor still owned the property as of the date of the petition. Debtors sold non-exempt property for \$100,000 and used proceeds toward purchase of new home. As of petition date, new home had market value of \$425,000 subject to mortgage of at least \$415,000, leaving “no realizable equity in the home”. Section 522(o)(4) provision applies only where there is increased economic equity in property as a result of the transfer. Where debtor has no equity in the property as a result of mortgages on the property, there is no “value” that was enhanced by the transfer and so no basis to offset the claimed exemption.

7.17 Proceeds of Wrongful Conduct

- (1579) *In re Hurt*, 2015 WL 9592064 (Bankr. E.D. Tn. 2015) – Tennessee state exemption allowing debtor to exempt personal property disallows the exemption if the property was purchased with fraudulently obtained funds. Party objecting to exemption must prove that debtor obtained the funds by defrauding another person and then used those funds to purchase the exempt asset. Debtor’s deposit of proceeds of sale into two accounts, one in debtor’s name and one in his spouse’s name, was not basis to disallow exemption claimed by either debtor or spouse in subsequent joint bankruptcy case. Property was inherited by debtor and debtor’s brother and was then sold. The check for the proceeds was payable only to debtor-husband, but debtors caused one-half to be deposited into husband’s separate account and one-half to be deposited into wife’s separate account. By doing so, debtors reduced the total funds held by each to amounts below the allowable exemption, while if husband had retained entire amount the total would have exceeded exempt amount. The initial acquisition of proceeds by husband was not fraudulent. Transfer of half of funds to wife was not itself the fraudulent acquisition by wife of the funds. Although debtors knew they were in precarious financial position and knew they intended to file bankruptcy and were waiting to maximize exemptions, debtors had not been sued and there was no creditor garnishing or attempting to assert a lien on property. Although wife was not on title to original property, wife had made substantial contributions to the property as she was primarily breadwinner for household and husband had unstable employment and the parties had disabled child with needs that were not covered by insurance. Debtors did not attempt to conceal transfers, fully disclosing all facts in bankruptcy schedules and statement of financial affairs. Total amount of money involved was small and entire proceeds were less than available combined personal property exemptions, and funds retained by wife nonetheless benefitted husband as those proceeds were used to pay joint living expenses.
- (1580) *In re Morgan*, 2011 WL 166120 (Bankr. E.D. Tn. 2011) – Trustee could not avoid claimed exemption of property purchased by debtor using funds obtained fraudulently. Debtor operated investment company and misappropriated funds belonging to clients and used those funds to purchase homestead. Trustee may be able to avoid exemption if debtor committed fraud in connection with the exemption claim or transferred non-exempt property into exempt property with intent to hinder or delay or defraud creditor. However, debtor’s mere use of wrongfully obtained proceeds to otherwise acquire homestead does not render homestead susceptible to claims of creditors in general and, therefore, not susceptible to attack by the Trustee.

7.18 Waiver

- (1581) *In re Abdallah*, 2016 WL 3676637 (Bankr. N.D. Ohio 2016) – While exemption can be waived if not timely exercised, debtor did not waive exemption in bankruptcy when debtor did not assert exemption in defense of pre-petition cause of action. State court action was to set aside fraudulent transfer of property, not to collect debt, and at time of commencement of fraudulent transfer action, debtor did not own property (and so could not assert exemption) as debtor had previously conveyed property. Further, debtor did not reside in property during pendency of state court proceeding and did not establish residency until after state court invalidated transfer and restored title to debtor. It was not until state court invalidated transfer and returned title to debtor that debtor could assert exemption, which debtor did upon commencement of bankruptcy proceeding.

7.19 Collateral Estoppel

- (1582) *In re Abdallah*, 2016 WL 3676637 (Bankr. N.D. Ohio 2016) – Collateral estoppel requires (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 not collaterally estopped to assert ownership interest in property to be exempted based on pre-petition action in state court to set aside fraudulent transfer. Debtor's assertion in state court that debtor did not own interest in property conveyed was not collateral estoppel on whether debtor owned interest after state court rejected debtor's contention and set aside transfer and restored title to debtor. While debtor was party to state court action and had full and fair opportunity to litigate issues in prior action, State Court action did not present issue of whether debtor was entitled to exempt property. Creditor's position that if debtor owned property and property was exempt, then State Court would not have set aside transfer as matter of law did not mean that issue or exemption was either expressly or impliedly joined where debtor did not reside in property as of commencement of state court litigation and debtor could not have claimed property exempt as matter of law, and determination of exemption was not necessary to resolution of state court action. While exemption may have been issue had it been raised, mere failure to raise issue as defense does not make issue "necessarily determined" where issue was on essential element of cause of action alleged.

7.20 Equitable Estoppel

- (1583) *In re Abdallah*, 2016 WL 3676637 (Bankr. N.D. Ohio 2016) – Equitable estoppel applies when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment as necessary to prevent actual or constructive fraud and to promote the ends of justice. Debtor's assertion in state court litigation to set aside fraudulent transfer that debtor was not true owner of property did not constitute grounds to deny later claimed bankruptcy exemption based on equitable estoppel. Creditor did not change position in reliance on claim, but instead pursued claim asserting that debtor was owner of property and asking court to set aside transfers. Based on state court judgment, debtor now has no choice but to claim ownership interest in property and to claim property exempt pursuant to bankruptcy exemptions.

7.21 "In Kind" and Dollar Limitations on Exemptions

- (1584) *In re Whitt*, 2015 WL 4558476 (Bankr. N.D. Ohio 2015) – Even if dower interest in automobile could be exempted, Debtor cannot claim value of exemption in dower interest in automobile at full value where statute limits dower exemption to \$5,000.00.
- (1585) *Mwangi v. Wells Fargo Bank, NA*, 764 F.3d 1168 (9th Cir. 2014) – Debtor could not bring action against bank for administrative freeze of account. Although debtor claimed funds as exempt, claimed exemption did not become effective until 30 days after debtor filed Schedule C and during interim debtor had no right to use or control the funds as the funds were property of estate. Upon expiration of 30 days, "in kind" exemption for funds resulted in funds being removed from estate and revested in debtor, at which point stay ceased to apply to funds.
- (1586) *Still v. Hopkins*, 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Tennessee law required only that property be real property that constitutes debtor's homestead, not that debtor own fee title or have any particular guaranteed possessory right of occupancy. Debtor's Schedule C which listed the life estate as valued at \$12,500 and claimed the full allowable exemption of \$12,500 exempted that amount. To extent property was worth in excess of \$12,500, Trustee was entitled to the excess. Valuing the property and the exemption at the same amount does not have the effect of exempting the entire property without regard to the actual value of the property or the extent to which the actual value exceeds the dollar amount claimed as exempt. Trustee could sell property free and clear of life estate, as long as Trustee paid debtor \$12,500 representing the value of the claimed exemption.
- (1587) *In re Orton*, Case No. 11-4157 (3d Cir. 2012) – Debtor's claimed exemption of specific dollar amount of value in asset limits amount exempted to amount claimed. Any additional value, whether existing at time of petition or accruing during pendency of case, accrues to benefit of Trustee and estate. Debtor scheduled interest in royalties from oil and gas lease, valued interest at \$1 and exempted \$1. Trustee entitled to any future income stream from the royalties beyond \$1 that was the value claimed as exempt. Debtor, by valuing asset at \$1 and exempting \$1 did not exempt entire asset but only value of asset to extent claimed. Section 522(d)(5) allowed the debtor to exempt only the value of an asset and not the asset itself, leaving asset as property of estate with appreciation in value accruing to estate.
- (1588) *In re Massey*, 455 BR 17 (Bankr. D. Mass. 2011) – Debtor's Schedule C improperly claimed exemption as to "100% of FMV" for asset where exemption was allowable only to specified dollar amount and was not "in kind" exemption. Trustee's objection to exemption was untimely where trustee missed objection deadline but objected to confirmation of plan. "Had the trustee timely objected to the debtors' attempt to exempt their home and automobile in the amount of '100% of FMV', the objection would certainly have merited serious consideration. The term '100% of FMV' on a debtor's Schedule C should be like catnip to a trustee. It should grab the trustee's attention and warrant an analysis to determine whether the asset in question could conceivably be worth more than the statutory exemption ceiling. If the trustee determines there is potential value in the asset beyond the exemption ceiling he must object to the exemption within the time allowed by Rule 4003 or lose the right to sell the asset later or, in the case of a Chapter 13 plan, lose the right to object to the plan based on Schedule C.
- (1589) *In re Salazar*, 2011 WL 1104109 (Bankr. N.D. Tx. 2011) – Debtor cannot claim exemption for "100% of FMV" where statutory basis for exemption contains dollar limitation. Debtor's claim of "100% of FMV" would exempt the entire value even if the actual value exceeds allowed dollar amount. Debtor cannot avoid this restriction by claiming value on Schedule A or B in an amount that is less than the allowable amount of the exemption, as the exemption claim would stand independent of the value stated on the schedules. Trustee properly objected to debtor's attempt to claim "100% of FMV" under Sections 522(d)(5) and (d)(6).
- (1590) *In re Reilly*, 130 Sect. 2652 (2010) – Where debtor's schedule of exempt property accurately describes the asset and declares the value of the claimed exemption in that asset to be an amount within the dollar limits that the Code prescribes, an interested party is entitled to rely

upon that value as evidence of the claim's validity and need not object to the exemption in order to preserve the estate's ability to recover value in the asset beyond the dollar value the debtor expressly declared exempt. If the property has a value in excess of the amount claimed, the excess must be remitted to the Trustee even if the debtor had additional unused exemptions and could have exempted the higher value. Debtor valued certain assets at \$10,718 and claimed exemptions in those assets aggregating \$10,718. Property ultimately determined to have value of \$17,200. Debtor required to account for difference. Debtor's claimed exemption of what debtor believed to be full value of assets did not make assets exempt without regard to value. Creditors and Trustee not obligated to object because assets "might" have value in excess of amount claimed in order to preserve right to recover excess value. However, where objection is readily discernible from face of Schedule C, such as where amount claimed as exempt is "unknown" or exceeds statutory limits, parties must timely object to preserve the issue.

- (1591) *In re Gebhart*, 2010 WL 3547641 (9th Cir. 2010) – Debtor who claimed only part of available exemption based on incorrect assumption of value of property limited to amount claimed. Debtor owned home which debtor valued at \$210,000, encumbered by mortgage of \$120,297.00, leaving equity of \$89,703. Although state law permitted debtor to exempt up to \$100,000, debtor claimed only \$89,703 as exempt, believing that to be 100% of the available equity. Trustee permitted to sell house and to retain equity to extent that exceeded \$89,703 properly claimed as exempt. Asserting exemption for amount that is equal to value of property claimed as exempt does not exempt entire property regardless of value and does not impose on creditors or trustee duty to object to preserve claim to excess value.
- (1592) *In re Stoney*, 2011 WL 577338 (Bankr. E.D. Va. 2011) – Debtor's purported claim of exemptions for 100% of FMV subject to objection where value of property allegedly claimed as exempt exceeded statutory limits on amount of exemptions under applicable State law. If the trustee fails to timely object, then trustee will be deemed to have waived exemption.
- (1593) *In re Moore*, 2010 WL 5397193 (Bankr. N.D. Tx. 2010) – Debtor's claimed exemption of "100% of FMV" of asset triggered Trustee's duty to object to claimed exemption. If Trustee files objection, Debtor bears burden to prove that value of "100% of FMV" is within statutory limits.

C. Specific Property Exempt

7.22 Social Security

- (1594) *In re Chehadi*, Case no. 15-46403 (Bankr. E.D. Mi. 2015) – Debtor's social security income lost any claim of exemption where debtor, before filing bankruptcy, transferred funds from her account into account held by spouse and daughter. Transfer conveyed absolute title to funds to spouse and daughter and debtor lost any interest in funds and funds lost character as social security. Further, debtor transferred funds for specific purpose of keeping funds away from garnishing creditor. Even if debtor transferred funds to spouse and daughter under trust relationship or where transferee was supposed to use funds for debtor's benefit, transfer itself was for improper purpose such that alleged conditional nature of transfer would be disregarded and funds would be deemed to have vested entirely in transferee. Debtor cannot transfer funds to keep funds from reach of creditors and later claim to have retained interest in funds for purposes of claiming funds as exempt.

7.23 Stock Account

- (1595) *Segovia v. Schoenmann*, 2011 WL 52481 (9th Cir. 2011) – Unexercised stock options under former employer's long term incentive compensation plan are not exempt as retirement funds. Under ERISA, a retirement plan that is exempt must be established or maintained by the employer and must provide either for retirement income to employees or results in deferral of income by employees for a period extending beyond the termination of employment. Employer's incentive plan designed to motivate employees and to recruit and retain talented employees by providing additional compensation during term of employment.
- (1596) *In re Musilli*, Case No. 06-55963 (Bankr. E.D. Mi. 2009) – Debtor's interest in Cash Management Account qualifies for exemption under M.C.L. Section 557.151. Trustee's argument that CMA account is really only a fund on deposit with a financial institution which the institution uses to purchase stocks does not deprive CMA account of status as "Stock Account" qualified for exemption.

7.24 Payments as Replacement for Lost Earnings

- (1597) *In re Kennedy*, 2016 WL 3226244 (Bankr. E.D. Tn. 2016) – Tennessee law allows debtor to exempt payment on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss; payment on account wrongful death of individual on whom debtor was dependent; and payment in compensation of loss for future earnings of debtor or an individual on who debtor was a dependent. Debtor's husband was killed in an automobile accident and debtor settled personal injury action in exchange for annuity to provide lifetime benefits to debtor. Annuity not exempt as compensation for personal bodily injury as that section, tailored after Section 522(d)(11)(D), is intended to cover actual bodily injury such as loss of limb, not attendant costs that accompany such loss such as medical expenses, pain and suffering, or loss of earnings. Debtor failed to demonstrate what portion of the annuity was compensation other than for personal injuries versus what portion was attributable to pain and suffering or actual pecuniary loss and failed to demonstrate what portion was attributable to her injuries versus wrongful death of husband. Debtor could claim annuity as compensation for wrongful death of individual only if debtor can prove that debtor was "dependent", considering factors such as debtor's present circumstances and income, future ability to be employed, available assets, and other exempted property, and exemption is limited to amount necessary to then compensate for loss of earnings. Settlement agreement pursuant to which annuity was purchased specifically state that annuity was for compensation for debtor's personal injuries and pain and suffering and not as compensation for lost income and included complete release of any claims for personal injury or damages suffered by debtor. Claims that annuity was compensation for lost earnings precluded by terms of settlement agreement itself. Settlement Agreement also precluded exemption for personal bodily injury as settlement agreement was all-inclusive, stating that settlement covered pain and suffering. Because there was no amount specified for actual bodily injury, annuity did not

constitute compensation solely for personal bodily injury versus pain and suffering or actual pecuniary loss and so was excluded from exemption.

- (1598) *Merillat v. Miller*, 2014 WL 1846105 (E.D. Mi. 2014) – Debtor’s attempt to claim marital home and interest in funds received divorce proceedings did not constitute replacement for lost earnings. Exemption does not arise from some undocumented promise to “take care of” someone for life, and not related to any specific incident that caused loss of future earning ability. While Section 522(d)(11)(E) may not apply only to tort liability, this cannot be expanded to include any payments made to debtor for any purpose whatsoever that are entirely distinct from any specific loss of future earnings.
- (1599) *In re Sizemore*, 2013 WL 6328160 (Bankr. E.D. Ky. 2013) – Insurance proceeds are exempt under Section 522(d)(11)(E) only to extent proceeds from policy on life of ex-husband replaced funds that debtor would have received from ex-husband, where there was no link between ex-husbands death and debtor’s ability to work. Only possible expectation of payment from ex-husband’s income would be limited to ex-husband’s share of obligations imposed under marital settlement agreement which totals \$10,000.00. For purposes of Section 522(d)(11)(E), debtor could qualify as “dependent” as debtor had previously been married to decedent and was defined while married as dependent, and nothing in Section 522(d)(11)(E) requires that debtor be dependent at time insurance is received. Debtor could exempt \$10,000 as proceeds to replace funds to be paid by ex-husband but remaining \$90,000 was not exempt and must be remitted to trustee for distribution to creditors.
- (1600) *Redd v. JPMorgan Chase, NA*, Adv. No. 10-7106 (Bankr. E.D. Mi. 2012) – Debtor’s claimed exemption in sick pay overruled where debtor failed to demonstrate whether the sick pay accrued prior to or subsequent to commencement of case. Debtor can exempt only property of estate. To extent right to sick pay accrued post-petition, that pay would not be property of estate. Further, there is no Michigan statutory basis for an exemption of sick pay.
- (1601) *In re Holstine*, 2012 WL 2891220 (Bankr. E.D. Mi. 2012) – Lump sum workers compensation benefits can be exempted under Section 522(d)(11)(E). Section 522(d)(11)(E) is not limited to tort awards, but includes any award that is traceable to payment of compensation for loss of future earnings to the extent reasonably necessary for support of the debtor. Sections (d)(11)(E) and (d)(10)(C) are not mutually exclusive. That award falls within scope of both (d)(11)(E) and (d)(10)(C) as a disability or unemployment benefit and may be claimed as exempt under either section. Fact that benefits were paid as lump sum does not deprive debtor of right to claim funds as exempt under (d)(11)(E) subject only to requirement that funds be reasonably necessary for debtor’s support.
- (1602) *In re Dang*, 2012 WL 2175778 (Bankr. W.D. Mi. 2012) – Lump sum workers compensation benefits that designated the award as compensation for lost wages can be exempted under Section 522(d)(11)(E) where the funds have not been received at the time the debtor files the petition. Although Debtor’s entitlement to compensation and the amount of that compensation had been finally determined prior to commencement of the case, debtor did not actually receive the check until one day after petition filed.
- (1603) *In re Bailey*, 2011 WL 834016 (6th Cir. BAP 2011) – Debtor’s pre-petition settlement of wrongful termination claim did not constitute loss of future earnings. Settlement did not award money for lost employment. Settlement permitted debtor to resign employment and to receive money for prior lost wages and debtor would be permitted to seek disability retirement. Debtor’s contention now that his resignation precluded him from obtaining different position with same agency does not transform settlement into payment for lost future wages, where debtor had no lost future wages as debtor was not employed by state at time bankruptcy case was filed and had no reasonably likelihood of ever being employed there in the future.
- (1604) *In re Bates*, Case No. 09-67133 (Bankr. E.D. Mi. 2010) - Asset is exempt under Section 522(d)(11)(E) only if the asset is payment in compensation of loss of future earnings and only to the extent the asset is reasonably necessary for the support of the debtor and debtor’s dependents. “Reasonably necessary” will be based on debtor’s present and anticipated living expenses; present and anticipated income from all sources; age of the debtor and dependents; health of the debtor and dependents; debtor’s ability to work and earn a living; debtor’s job skills, training and education; debtor’s other assets, including exempt assets; liquidity of other assets; debtor’s ability to save for retirement; special need of debtor and dependents; and debtor’s financial obligations such as alimony and support payments. Debtor’s vehicle voucher not reasonably necessary where debtor, a 56 year old disabled woman, had sufficient income and assets to support herself and had a reliable vehicle that was paid for, making it unnecessary for debtor to use voucher to purchase new vehicle.
- (1605) *In re Marble*, 2010 WL 3198901 (E.D. Mi. 2010) – Debtor may exempt property traceable to payments in compensation for loss of future earnings of an individual on whom the debtor is or was a dependent. Debtor must show that annuity given as part of structured settlement of Debtor’s father’s personal injury action is traceable to payment in compensation for lost future earnings of father and that Debtor is or was a dependent of Father. Annuity did not constitute payment for lost earnings of Father where only claim made in state court litigation on behalf of Debtor was for “lost consortium” and Michigan law did not permit a third party including a child to maintain a direct action for lost wages of a third party.
- (1606) *In re Bailey*, Case No. 05-41609 (Bankr. N.D. Ohio 2010) - Debtor had pre-petition state court action to require employer to re-hire debtor. Bankruptcy Trustee took control of the lawsuit as an asset of estate and settled for a lump sum of \$17,000.00. Court was not able to allocate reward between that portion of suit that sought to rehire and any possible claim for damages for lost earnings, precluding Debtor from claiming any part of the proceeds as exempt.
- (1607) *In re Vickers*, 2009 WL 1544459 (Bankr. E.D. Tn. 2009) –Tennessee statute allowed Debtor to claim exemption in payments received as a replacement for lost earnings not limited to retirement-type benefits such as “a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of death, age or length of service.” Debtor had previously rolled over IRA into “non-qualified” annuity that provided for defined monthly payments for specific term. Court should examine the facts and circumstances surrounding the purchase of the contract, as well as the nature and contents of the contract. Were the payments designed or intended to be a wage substitute? Were the

contributions made over time? The longer the period of investment, the more likely the investment is the result of a long standing retirement strategy, not merely a recent change in the nature of the asset. Do multiple contributors exist? Investments purchased in isolation, outside the context of work-place contributions, may be less likely to qualify as exempt. What is the return on investment? An investment which returns only the initial contribution with earned interest or income is more likely to be a nonexempt investment. In contrast, investments which compute payments based upon the participant's estimated life span, but which terminate upon the participant's death or the actual life span, are akin to a retirement investment plan. What control may the Debtor exercise over the asset? If the Debtor has discretion to withdraw from the corpus, then the contract most closely resembles a nonexempt investment. Where Debtor purchased annuity from already exempt retirement funds and did so to receive greater stream of payments once Debtor reached retirement age, Court had no difficulty finding that the monthly payments to the Debtor constituted substitutes for wages, to the same extent as wages.

- (1608) *In re John*, 2011 WL 143841 (Bankr. E.D. Mi. 2011) – Funds received as part of employee buyout constitute “payment in compensation for future income” for purposes of Section 522(d)(11)(E). Section 522(d)(11)(E) limits exemption to amount of buyout reasonably necessary for maintenance and support of debtor and debtor’s dependents. “Reasonably necessary” depends on factors such as (1) debtor’s present and anticipated living expenses; (2) debtor’s present and anticipated income from all sources; (3) the age of the debtor and his or her dependents; (4) the health of debtor and his or her dependents; (5) debtor’s ability to earn a living; (6) debtor’s job skills, training and education; (7) debtor’s other assets, including exempt assets; (8) the liquidity of these other assets; (9) debtor’s ability to save for retirement; (10) the special needs of the debtor and his or her dependents; and (11) debtor’s continuing financial obligations, e.g., alimony or support payments. Court declined to reach issue of whether debtor’s use of buyout funds to purchase car rendered car non-exempt where value of car was less than amount of exemptions available to debtor under subsections other than (d)(11)(E).
- (1609) *In re Lewis*, 2010 WL 2813328 (6th Cir. 2010) - Debtor’s right to receive, for up to four years, tuition reimbursement up to \$15,000.00 per year, continued health care benefits, and an annual living expense stipend, which is equivalent to 50% of the participant’s annualized straight-time hourly wage at the time of termination properly claimed as exempt under 11 USC Section 522(d)(11)(E) which exempts a Debtor’s right to receive “payment in compensation of loss of future earnings of the Debtor or an individual of whom the Debtor is or was dependent, to the extent reasonably necessary for the support of the Debtor or a dependent of the Debtor.” Section 522(d)(11)(E) does not require bodily injury as prerequisite for exemption. Section 522(d)(11)(E) exempts all compensation for loss of future earnings. Section 522(d)(11)(D) which contemplates payment on account of personal bodily injury is clearly delineated from subsection (E) by the word “or”. Any limitation under Subsection (D) to personal bodily injury does not carry through to subsection (E). Debtor’s termination of her employment constitutes an event that resulted in a “loss of future earnings.” The buyout was offered as compensation for such termination. It is immaterial whether the buyout was negotiated by the parties, or whether such termination was voluntary. In either case, the buyout benefit constitutes “compensation” for loss of future earnings which are properly claimed exempt under Section 522(d)(11)(E).
- (1610) *In re Cook*, 406 B.R. 770 (Bankr. S.D. Ohio 2009) - Debtors’ disability benefits traceable into federal income tax refund retained their exempt character under Ohio law.
- 7.25 Undisclosed Assets
- (1611) *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. Debtor has duty to disclose all causes of action and has continuing duty to disclose any potential claims. Debtor need not know all of the facts or the legal basis, if the debtor has enough information to suggest that it may have a possible claim. Undisclosed assets are not administered and remain property of the estate even after the case is closed.
- (1612) *In re Waller*, 424 B.R. 306 (Bankr. S.D. Ohio 2010), *aff’d*, 2010 WL 3521956 (6th Cir. BAP 2010) - Neither Chapter 7 debtors’ failure, in their initial schedules, to list or claim interest or exemption in any tax refund, nor their subsequent failure, after voluntarily amending schedules prior to meeting of creditors and without any prompting from trustee, to disclose that income tax refunds were anticipated in as-yet “unknown” amounts, to promptly amend schedules yet another time to disclose amount of claimed exemptions once they had completed their income tax returns and it became possible to calculate exemption amounts, provided permissible basis to deny debtors an exemption in refunds, where trustee did not introduce evidence of any bad faith, concealment or improper disclosure, and it appeared that debtors, in disclosing anticipated refunds, preparing tax returns and mailing copies of returns to trustee from which exemption amounts could have been calculated, had done everything they could to perform their duties under the Bankruptcy Code, and that trustee’s objection to debtors’ claimed exemptions was based principally on actions of debtors’ counsel in not calculating exemption amounts; to deny debtors their exemptions due to standoff between their counsel and trustee was unconscionable and an inappropriate use of bankruptcy process.
- (1613) *Corcoran v. Publow*, 418 BR 231 (E.D. Mi. 2009) – Debtors are permitted to amend schedules to disclose and exempt assets as long as non-disclosure in first instance was not the result of bad faith or intentional concealment. Federal Rule of Bankruptcy Procedure 1009 allows a debtor to amend schedules at any time before the case is closed, subject to Court’s authority to refuse to allow an amendment where debtor has acted in bad faith or with intent to conceal assets. Debtor’s Chapter 7 filing in October, 2008, failed to disclose potential tax refund for 2008. Chapter 7 Trustee made demand on IRS for turnover of 2008 refund. Debtors filed Amended Schedules B and C to disclose and exempt the tax refund. Debtors’ failure to list tax refund was not bad faith but resulted from unusual circumstances and misunderstanding by Debtors as to status of a future tax refund as an asset. Debtors’ delay in disclosing the tax refund did not prejudice any creditor as Debtors would have been entitled to exempt the tax refunds in the first instance.
- (1614) *In re Steiner*, Case No. 08-33717 (E.D. Mi. 2009) – Debtors are permitted to amend schedules to disclose and exempt assets as long as non-disclosure in first instance was not the result of bad faith or intentional concealment. Federal Rule of Bankruptcy Procedure 1009 allows a debtor to amend schedules at any time before the case is closed, subject to Court’s authority to refuse to allow an amendment

where debtor has acted in bad faith or with intent to conceal assets. Debtors' Chapter 7 Attorney did not inquire about or list tax refunds as counsel believed that tax refunds were not assets of the Bankruptcy estate. Debtor's Chapter 7 filing in October, 2008, failed to disclose potential tax refund for 2008. Chapter 7 Trustee filed two separate Interim Reports indicating that the Chapter 7 Trustee was pursuing tax refunds. Debtors finally amended Schedule B to disclose the 2008 tax refund and amended Schedule C to claim the refund as exempt. Debtors' failure to list tax refund was not bad faith but resulted from misunderstanding by Debtors, caused by advice of counsel, as to status of a future tax refund as an asset. Evidence indicated that Debtors did not intend to mislead. Court sanctions Debtors' counsel \$900 to be paid to the estate to compensate the Trustee for efforts to recover tax refunds.

- (1615) *In re LaRoche*, 409 BR 862 (Bankr. E.D. Mi. 2009) - After Chapter 7 Trustee filed an Interim Report abandoning most of the assets of the estate, Debtors amended Schedule B to disclose a Federal Tax Refund and also amended Schedule C to claim that refund exempt. Debtor is not permitted to amend Schedule C to claim a previously undisclosed asset as exempt if the failure to disclose the asset in the first instance results from bad faith or intent of the Debtor to conceal the asset. Court found no evidence of bad faith or intent to conceal. When Debtors filed case in first instance, they had a good faith belief that Debtors would not receive a tax refund as Debtor-husband had substantial periods of unemployment and had no taxes withheld for months where Debtor husband was working. "Although the better course of action would have been for the Debtors to list their potential receipt of a tax refund, there is certainly nothing in the record to suggest that either Debtor thought they were entitled to a refund when they testified at their December 15, 2008, first meeting of creditors." The Debtors should have acted more diligently to disclose that refund once they knew they were entitled to one. "Without these amendments (to expeditiously disclose the refund once it became known), absent extraordinary circumstances as demonstrated by the Debtor, the trustee would then have sufficient basis to object to the amendment of the schedule, including any exemptions claimed in Schedule C."
- (1616) *In re Thomasma*, Case No. HG 07-02149 (Bankr. W.D. Mi. 2008) – Failure to list assets in schedules in first instance is not fatal to later amendment to disclose asset and claim asset as exempt. Debtor's schedules failed to list an expected tax return for the year 2007. More than 13 months later, Debtor amended his schedules to disclose the anticipated tax refund and also amended Schedule C to claim the refund as exempt. Court concluded that absent bad faith or willful concealment, Debtor's right to claim the asset as exempt is not prejudiced by its nondisclosure in the schedules as initially filed.

7.26 Homestead

- (1617) *Salven v. Galli*, Case No. 15-1376 (9th Cir. BAP 2016) – Parties are not irrevocably bound to exemptions that were available at time case commenced where circumstances change. Husband and wife filed joint Chapter 13 case and declared their marital residence as exempt homestead. Sometime after commencing the case, debtors divorced and debtor-wife purchased a new home of her own. The parties severed their bankruptcy cases and Wife then converted her case to Chapter 7. The Chapter 7 Trustee objected to wife's claimed exemption as property was not wife's home when case commenced. Court held that the parties were not bound by homestead claimed at commencement of case as "{marital status is not fossilized for duration of the case". Although Wife also had interest in property that was the former marital residence, Husband still resided in that property and could claim his interest as exempt even though Husband had voluntarily dismissed his case. Since the couple was no longer married, each of the parties could assert separate homestead exemptions. As such, Trustee could not sell the former marital residence unless the Trustee generated sufficient proceeds of sale to pay husband's exemption in full.
- (1618) *Earl v. Lund Cadillac, LLC*, Case No. 15-1693 (D. Ariz. 2016) – Debtor is limited to exemptions as of date of filing. On petition date, debtor lived in her residence and had second residence she used as rental property. Debtor claimed exemption in property where she resided at petition date, but debtor had no interest in that property as property had been foreclosed prior to commencement of case. After debtor filed bankruptcy, she moved into property that was rental and attempted to amend exemption to claim that property as exempt homestead. Court recognized that debtor had right to amend exemptions but could not do so to create exemption that did not exist when case was filed. As debtor did not reside in "rental" on petition date, debtor could not claim exemption merely because debtor later moved into that property and established as homestead. Debtor rendered homeless after trustee took rental property and sold it for benefit of estate.
- (1619) *In re Wallace*, 2016 WL 829833 (Bankr. N.D. Ohio 2016) – Under Ohio law, real property must be used by debtor as residence on petition date to qualify as homestead. Where debtor inherited property pre-petition and had begun to repair property but had not completed repairs and had not moved in as of petition date, property was not homestead for purposes of exemption. Debtor's anticipated residence in property is not sufficient where debtor did not actually occupy property at or before petition date. While court will find "constructive possession", that requires that debtor had resided in property and was temporarily away for reasons beyond debtor's violation with intent to return. Constructive possession could not be expanded to circumstance where debtor never actually resided in property and had only expectation to reside there as of petition date.
- (1620) *In re Pugh*, 2015 WL 5145030 (Bankr. N.D. Ohio 2015) – Right to exempt property is determined on petition date. To claim homestead, debtor must have an interest in the property as of the petition date. "Interest" is not limited to titled ownership. Debtor's status as intestate heir to deceased property owner, with statutory claim under state law of descent and distribution, is sufficient. Debtor's mother owned property and died intestate. There was no evidence that mother was married at time of death. As such, under Ohio law, property would descend and pass to mom's children. As one of debtor's children, debtor had vested interest in property on the date of mom's death, sufficient as of the date of the petition to constitute an interest for purposes of homestead exemptions. Debtor's claim to title was subject only to extent necessary to pay late mother's debts. Debtor's husband (also a debtor) had a dower interest in property effective when Debtor's interest attached (at mom's death) which is also a sufficient interest in property to support claimed exemption.
- (1621) *In re McCormick*, 2015 WL 4638493 (Bankr. N.D. Ohio 2015) – Right to exemption is determined on petition date. Property must be occupied and use as a home by the person claiming the exemption. "Uses as a home" does not require an intention to continue to live at the property. Debtor entitled to homestead exemption in property where debtor was living at property on petition date even if petition listed separate mailing address (and debtor's spouse lived at that second address) where debtor was temporarily living at property with debtor's

son, while debtor recovered from a stroke. While debtor testified that his residence at property was intended to be temporary and he would move back in with wife once his health recovered, as of petition date debtor's residence was property where he actually lived, not property where wife resided.

- (1622) *White v. McDermott*, 2015 WL 4612349 (E.D. Mi. 2015) – 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.
- (1623) *In re Williams*, 2015 WL 3940602 (Bankr. N.D. Ohio 2015) – Ohio law allows debtor to exempt property used as a homestead by debtor or a dependent of debtor. Debtor demonstrated that property was residence through driver's license, paystubs, tax returns, and utility bills, as well as petition signed under penalty of perjury. Fact that debtor did not claim tax exemption based on homestead status did not defeat status as homestead where debtor resided in property. Debtor's possible future intention to move to a new residence does not defeat claim as statute requires only that debtor “uses” the property as a homestead, although intention to remain in residence can be relevant to credibility where debtor has resided in property for short period of time pre-petition.
- (1624) *In re Aubiel*, 2014 WL 4327952 (Bankr. N.D. Ohio 2014), *aff'd*, 2015 WL 4461503 (6th Cir. BAP 2015) – Ohio law allows debtor to exempt real or personal property that debtor uses as a residence, meaning that debtor occupies and uses the property as a home. Evidence did not support finding that debtor used boat as residence where debtor admittedly pulled boat out of water each winter, evidence was disputed on whether debtor actually resided elsewhere particularly in light of divorce judgment that stated that debtor lived in different county, and there was no testimony about layout of boat or how debtor used boat as residence such as household goods located on boat, physical dimensions of boat, any amenities on boat, or explanation of how debtor took care of daily needs on boat.
- (1625) *In re Horn*, 2014 WL 4187374 (Bankr. E.D. Mi. 2014) – Temporary displacement from property does not defeat homestead status where debtor indicates that absence is temporary and debtor intends to return to and use property as residence. Debtor resided in property for 18 years. When debtor lost job, she moved in with sister as debtor no longer had sufficient income to pay living expenses. Debtor then leased the former homestead to debtor's niece on a month-to-month basis just to provide additional income while debtor applied for social security disability. Debtor received SSD award shortly after filing bankruptcy at which point debtor had sufficient income to return to property, although debtor had not returned as of date of Section 341 meeting. Debtor did return to the property within a few months of the First Meeting. Evidence indicated that debtor's absence from the property was not voluntary but was product of economic and physical conditions beyond debtor's control and that at all times debtor intended to return as soon as debtor received SSD award or was able to find sufficient employment. Debtor did, in fact, move back after receiving SSD award and was in fact using property as residence further supporting finding that debtor did not voluntarily relinquish homestead with no intent of returning.
- (1626) *In re Viano*, Case No. 13-55614 (Bankr. E.D. Mi. 2014) – Homestead exemption under Section 522(d)(1) is not limited to debtor's primary or principal residence. Debtor can apply exemption to any property that debtor uses as residence, even if principal residence is elsewhere. Evidence indicated that while debtor maintained a residence in Michigan, debtor also maintained second residence in Florida. Debtor's driver's license bore Florida address; debtor was registered to vote in Florida; debtor presented utility bills for Florida residence; and debtor presented Real Estate Tax bill in debtor's name for Florida property. While Florida property may not have been debtor's “primary” or “principal” residence as of petition date, evidence established that Florida property was a “residence” where debtor resided in Florida for majority of year and debtor did not claim Michigan property as exempt under Section (d)(1).
- (1627) *Eleiwa v. Whitmore*, Case No. 12-1559 (9th Cir. BAP 2013) – Debtor could not claim exemption in home occupied by debtor where property was owned by Trust and not by debtor individually. Debtor's status as trustee of trust that owned property did not convey any equitable interest in property for purposes of claiming property as exempt. Further, debtor did not actually reside in property for which debtor sought to assert homestead exemption. Debtor's petition indicated that debtor resided at one address, while debtor was attempting to assert homestead exemption in two entirely different parcels of real property. Debtor's statement in petition constituted admission that can be used against debtor in bankruptcy proceedings.
- (1628) *In re Dougan*, 2013 WL 85146 (Bankr. D. Mass. 2013) – Debtor's 99-year leasehold, coupled with Debtor's interest in Co-op, sufficient to support homestead exemption. Although debtor did not technically “own” the apartment, the long term lease and co-op stock ownership conveyed a sufficient interest to constitute “ownership” for homestead purposes.
- (1629) *In re Breece*, 2013 WL 197399 (6th Cir. BAP 2013) – Debtor's status as sole member of LLC does not convey to debtor an ownership interest in the assets of the LLC. Assets of the LLC are not property of the estate. Debtor cannot claim as exempt property owned by the LLC even where property otherwise constituted debtor's homestead, as debtor had no interest in the specific property to claim as exempt.
- (1630) *In re Schmakel*, 2013 WL 594317 (Bankr. N.D. Ohio 2013) – Debtor does not have interest in property that is owned by LLC merely because Debtor is a member of the LLC. Debtor's membership interest becomes property of the estate on filing, but the assets of the LLC are not property of estate. Debtor cannot claim exemption in real property owned by LLC in which Debtor was member, even where property would otherwise have constituted Debtor's homestead, as debtor had no interest in the property that could be properly claimed as exempt.
- (1631) *In re Lehr*, 2012 WL 3763925 (Bankr. N.D. Ca. 2012) – Debtor not entitled to claim homestead exemption in property that debtor did not reside in as of petition date.
- (1632) *In re Carlew*, 469 BR 666 (Bankr. S.D. Tx. 2012) – Debtor could claim homestead exemption in insurance proceeds received for damages caused to debtor's homestead. Insurance proceeds did not lose homestead characterization simply because they were not used for repairing homestead.

- (1633) *In re Holland*, 474 BR 826 (Bankr. E.D. Mi. 2012) – As of the petition date, debtors were not using cabin in northern Michigan as residence. At the first meeting of creditors, debtors both affirmed that they lived in Garden City. Debtors described the cabin property as a one bedroom cabin and pole barn and stated that nobody lived in the cabin. Cabin was just a shell sitting there, with no plumbing or windows, and the barn contained just building materials, some windows, and a few odds and ends. Debtors testified that they intended to move to cabin property but, as of a month and a half after the petition date, debtors still had not done so. Even then, debtors testified that they intended to live with friends and not in the cabin itself. Debtors had not been to property for at least 6 months prior to first meeting of creditors. Debtors’ later affidavit, unsigned and not notarized, was not evidence and would be discounted given direct contradictions between affidavit and testimony at 341 meeting. Cabin property was not residence as of petition date as required for exemption as homestead.
- (1634) *In re Demeter*, 2012 WL 3780534 (Bankr. E.D. Mi. 2012) – Homestead exemption under Section 522(d)(1) is not limited to debtor’s primary or principal residence. Debtor can apply exemption to any property that debtor uses as residence, even if principal residence is elsewhere. Since 1972, Debtor’s principal residence has been in Riverview and debtors were physically occupying that residence on the petition date. In 1996, debtors bought second home in Cheboygan. Cheboygan property had utilities operating year round, and debtors kept personal property and clothing at that residence. Debtors lived in the Cheboygan property about 6 months each year since purchasing, and planned to ultimately live there full time. The Cheboygan property was never rented out and was never winterized and was used on winter holidays including Christmas and New Year. Property was one of debtors’ two residences as of the petition date. If Congress intended to limit Section 522 to “principal” or “primary” residence, it could have used those terms, as it does in other sections of the Bankruptcy Code. “Residence” in Section 522 is not qualified or limited.
- (1635) *Condit v. McKeithan*, Case No. 11-41305 (5th Cir. 2012) – Abandonment of homestead requires both cessation of use of property as homestead coupled with intent to permanently abandon property as homestead. Evidence indicated that although debtor had not resided in property for 9 years while debtor resided with debtor’s daughter, debtor’s absence was due to debtor’s medical condition including emergency surgery, and that debtor remained with her daughter as the primary care giver. Daughter repeatedly encouraged debtor to sell home, but debtor refused, stating that debtor intended to return when her health would permit. Debtor maintained property, paid taxes, maintained the utilities, kept the insurance, and even kept an active land-line telephone account. Debtor’s use of daughter’s address as mailing address and listed daughter’s address on her driver’s license, evidence did not indicate any intent to permanently abandon her homestead, and it was equally plausible that debtor used daughter’s address solely to ensure that important correspondence reached her.
- (1636) *In re Cassetto*, 2012 WL 3193555 (Bankr. N.D. Ohio 2012) – Oil and gas rights that underlie property owned by debtors and that have not previously been severed are property of the estate. Ohio homestead exemption does not apply to oil and gas interests as oil and gas that have not been recovered do not belong to anyone. Fact that oil and gas currently may be located under debtor’s property does not vest in debtor title to that oil and gas unless and until it is recovered. Exemption did not allow debtors to exempt proceeds of oil and gas lease to be signed by Chapter 7 Trustee.
- (1637) *Studensky v. Morgan*, Case No. 11-51180 (5th Cir. 2012) – Where debtor fails to claim homestead as exempt and then sells homestead post-petition but fails to timely assert exemption in proceeds as permitted by state law, debtor forfeits any exemption. Proceeds of sale are property of estate and must be turned over to Trustee.
- (1638) *In re Young*, 471 BR 715 (Bankr. E.D. Tn. 2012) – Petition date controls date of valuation for purposes of exemptions as well as actions to avoid liens that impair exemptions. Under Tennessee law, both Husband and Wife are entitled to \$25,000 exemption in homestead. In joint case, Husband and Wife are permitted to aggregate exemptions, allowing exemption of total of \$50,000.00.
- (1639) *In re Beck*, 2012 WL 1889789 (Bankr. W.D. Ky. 2012) – Debtor could not claim vacant land as exempt under homestead exemption. Debtor claimed as exempt the property on which debtor resided as well as a 22 acre parcel located across the road from debtor’s home. The separate parcel was not contiguous to debtor’s residence and had a separate street address. Debtor not entitled to claim homestead exemption on parcel that is separated from debtors residence and on which there were no structures.
- (1640) *In re Kaplan*, 468 BR 246 (Bankr. W.D. Ky. 2012) – Homestead requires actual intention to live permanently in a place, coupled with actual use and occupancy. Homestead is equivalent to residence and debtor can have only one residence. Mere intention to reside at property is insufficient to make property homestead where debtor does not actually reside there. Debtor who owned two parcels of property could not claim second parcel as homestead where debtor listed first property as address on petition; debtor’s license had first property address listed; debtor testified that he needs one or more of his children to live with him for health reasons, but second property had only one bedroom and was not sufficient for two people to live in; debtor’s health precluded anything but an occasional stay at second property; second property had no air-conditioning, stove or refrigerator; and although debtor may have stayed overnight from time to time, the limited occupancy coupled with a lack of intent or ability to use the property as a permanent residence defeated claim of homestead.
- (1641) *In re Young*, 2012 WL 1717868 (Bankr. E.D. Tn. 2012) – Homestead exemption applies as against real property owned by the Debtors, with the caveat that they use the real property as their principal place of residence, which this court has defined as “his or her home, the place where the debtor lives with his family, inclusive of any real property acquired therewith.” Homestead exemption does not apply simply to a debtor’s principal place of residence itself; the “real property” is the necessary prerequisite, and any improvements on the real property upon which a debtor’s principal place of residence is located are included within the scope of the homestead exemption. Debtor entitled to claim entire property as homestead where real estate was contiguous parcel improved by the home in which debtor resided plus a second residential property that was vacant. Fact that property contained non-residential unit or improvement does not defeat status of property as homestead as long as improvements on property are actually used by debtor as homestead.
- (1642) *In re Kane*, 2011 WL 2119015 (Bankr. D. Mass. 2011) – Debtors could not claim exemption in homestead that was owned by debtors’

Limited Liability Company. Debtors can claim exemption only in property owned by debtors, not property owned by third party, even where debtors were the sole members of the LLC. Dissolution of the LLC, without more, does not affect a transfer of the property to the members and the property remains in the LLC subject to state law requirements for winding up and liquidating assets of LLC.

- (1643) *Corcoran v. McDonald*, 471 BR 194 (E.D. Mi. 2012) - Debtors can claim Homestead exemption in vacant lot that is adjoining or continuous to the property where debtor's home is located. Although vacant lot had separate property tax identification number, local taxing authority granted debtors a homestead exemption on the vacant property; there were no natural or artificial boundaries, such as a river, a man-made road, or a fence separating the two parcels; debtors use of the vacant lot was consistent with debtors claim of Homestead and was used in a manner consistent with residential purposes; and the debtor's did not use the vacant lot for any commercial purpose.
- (1644) *In re Whitney*, 459 BR 712 (Bankr. N.D. Ohio 2011) – Debtor not allowed to claim homestead exemption for both parcel on which homestead was located and parcel of land adjacent to parcel where homestead was located where debtor failed to produce any evidence that debtor actually used both parcels as a contiguous parcel for a single purpose. Homestead can extend to multiple adjacent parcels only where parcels are occupied and used for a single purpose such that their separate identities become merged into one. Once Trustee carried burden of proof that property claimed as homestead consisted of two parcels and that family residence was located entirely on only one of the parcels, burden shifted to debtor to prove that multiple parcels were used for single purpose as debtor's homestead.
- (1645) *White v. Commercial Bank and Trust Co.*, Case No. 11-6032 (8th Cir. 2011) – In determining potential exemption of property that is subject to potentially avoidable judicial lien, Court must first determine whether property would be exemptible in the absence of the judicial lien. Debtor properly claimed exemption in homestead consisting of 80 acres where applicable state law allowed homestead with a value not to exceed \$2500 but in any event not less than 80 acres.
- (1646) *In re Wengerd*, 453 BR 243 (6th Cir. BAP 2011) – Debtor's admitted intent to abandon homestead after filing does not defeat status of property as homestead as of moment of bankruptcy filing. Debtors' entering into pre-petition contract for sale of homestead does not defeat homestead status where, as of petition date, Debtors occupied their home and intended the property to be the homestead.
- (1647) *Osborne v. Dumoulin*, 2011 WL 1772160 (11th Cir. 2011) – Under Florida law, debtor who did not claim or receive benefit of homestead exemption permitted to take expanded exemption for personal property. Debtor who indicated that homestead was to be surrendered in Chapter 7 proceeding does not "receive" benefit of exemption even though debtor could have claimed homestead exemption. Debtor has option to receive homestead exemption. If debtor declines that option by not electing homestead exemption, debtor can claim expanded personal property exemption.
- (1648) *In re Jackson*, 2011 WL 1741965 (Bankr. E.D. Tn. 2011) – Debtor properly claimed exemption of \$7500 in homestead even though secured debt exceeded value of property. However, exemption can attach only to equity in property. Trustee's subsequent avoidance of the mortgage does not create equity to which exemption can attach, as debtor is not permitted to exempt property that debtor voluntarily conveyed when that property is recovered by the Trustee. Where trustee later sold property for less than amount owed on the now-avoided mortgage, there was no equity as to which debtor could assert an exemption.
- (1649) *In re Ellis*, 2011 WL 1457258 (Bankr. S.D. Tx. 2011) – Debtor's allowable homestead exemption is reduced to the extent that the value is attributable to proceeds of the disposition of non-exempt property with intent to hinder or defraud creditors under Section 522(o). Objecting party must prove (1) the debtor disposed of property within the 10 years preceding the date of filing of the bankruptcy petition; (2) the property that the debtor disposed of was not exempt; (3) some of the proceeds from the sale of the nonexempt property were used to buy a new homestead, improve an existing homestead, or reduce the debt secured by an existing homestead; and (4) the debtor disposed of the nonexempt property with the intent to hinder, delay or defraud a creditor. Debtor's failure to list all assets and transactions in the schedules and statement of financial affairs was not result of debtor's attempt to defraud creditors but resulted from poor legal advice.
- (1650) *In re Morgan*, 2010 WL 4922581 (Bankr. E.D. Tn. 2010) – Debtor permitted to claim homestead exemption in real property where property was purchased using funds derived by debtor's significant other through criminal activity. Trustee presented no evidence that debtor participated in or had knowledge of the criminal source of the funds when the house was purchased. Although the significant other would not have been permitted to exempt property had he filed for bankruptcy based on the criminal source of the funds, that did not preclude the debtor in this case from claiming the homestead exemption.
- (1651) *In re Trofatter*, Case No. 09-7423 (Bankr. W.D. Mi. 2010) – Debtor's claimed exemption under Michigan Compiled Laws Section 600.5451(1)(p) disallowed. Section 600.5451(1)(p) allows a surviving spouse with no children to claim a homestead interest in the homestead previously owned by the deceased spouse at the time of death unless the surviving spouse, as of the date of death of the deceased spouse, owned a homestead in the surviving spouse's own right. Debtor and her deceased spouse jointly owned the family homestead. Debtor therefore "owned" a homestead in her own right as of the date of her husband's death and could not claim her now-deceased husband's homestead interest as an additional exemption. Debtor could still claim her interest in the property to the extent allowed but could not use Section 600.5451(1)(p) to expand the homestead exemption.
- (1652) *Williamson v. Hall*, Case No. 08-088 (10th Cir. BAP 2009) – Wife and Husband owned parcel of real property on which there was a residence in which Debtor-wife resided and a separate mobile home occupied by Debtor-husband. Kansas statute permits a Debtor to exempt property in which he lives or, in the alternative, property in which the debtor's family resides. Accordingly, Husband could exempt either his one-half interest in the mobile home in which he resided, or his one half interest in the home in which his family resided, but not both. Similarly, Wife could exempt either her one-half interest in the residence where she resided with her family or her one-half interest in the mobile home where her husband resided. The exemption statutes did not permit either debtor to individually claim as exempt an interest in both properties, as each debtor is entitled to only one homestead, but a Debtor-Husband and Debtor-Wife who are separated and have separate residences can each elect their individual homestead exemption.

- (1653) *In re Hickmott*, Case No. 09-20493 (Bankr. E.D. Mi. 2009) – Debtor is not required to occupy property on date of Petition to claim property as homestead. Court will recognize concept of “constructive possession”, defined as physical absence from a previously established homestead coupled with an intent to return at some point in the future. “Constructive possession” depends on whether the absence from the former homestead was done involuntarily or under some compulsion; and whether the departure was coupled with intent to move back in at a later time. Bare allegations of the Debtor are not sufficient to establish “constructive possession”. Debtor must present external circumstances that demonstrate that it would be realistic to expect that the debtor will actually return to the property. Debtor lived in property for only two or three months after her husband passed away, at which time she voluntarily purchased a larger home where she resided until filing bankruptcy. Debtor was under no compulsion to move – she did so entirely by choice, having a desire to live in a larger home. Debtor lived in the new home for more than 5 years, and did not decide to move back to the prior homestead until Debtor became unable to afford the mortgage payment on the current residence. Evidence indicated that had Debtor not had financial difficulties, she would have stayed in the current residence and not returned to the former homestead. Debtor used the prior homestead as a “recreational cabin” with no obvious intent to again use the property as her residence. Debtor’s voluntary absence from the prior residence and Debtor’s intent, at the time she vacated, to not return to the property as her residence, defeated Debtor’s claim of “Constructive Possession”.

7.27 Homestead – Limitation Under Section 522(p)

- (1654) *Bruess v. Dietz*, Case no. 15-6019 (8th Cir. BAP 2015) – Section 522(p) limits the homestead exemption to \$155,675.00 where debtor acquires property within 1215 days prior to commencement of the case. Debtor “acquires” property when deed is recorded, not when the deed is executed and deed remained in possession of grantor’s attorney at all times until recording and evidence indicated that grantor (grantee’s father) did not intend deed to be effective until grantor directed attorney to record deed. Debtor’s exemption limited where deed was executed 3 years pre-petition but not recorded until 700 days per-petition.

7.28 Homestead – Limitation Under Section 522(q)

- (1655) *In re Wyly*, Case No. 14-35043 (Bankr. N.D. Tx. 2016) – Section 522(q) limits available exemption under state law to \$155,675 where debtor owes a debt raising from a violation of federal securities law. Debtor’s attempt to claim unlimited homestead exemption in Texas limited as debtor had at least contingent claim owed to SEC based on securities fraud charges. Although judgment in favor of SEC was on appeal, “claim” still existed as claim may have been contingent on outcome of appeal but still meets definition of claim.

7.29 Redemption Rights

- (1656) *Brown v. Ellmann*, 2016 WL 3055618 (E.D. Mi. 2016) – Debtor can exempt property only if there is equity available after liens and encumbrances to which exemption can attach. Where property was over-encumbered at petition date, “redemption rights” were of no value. Trustee’s proposed sale with a “carve out” for the estate did not create equity to which exemption can attach.

7.30 Life Estate

- (1657) *Still v. Hopkins*, 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Tennessee law required only that property be real property that constitutes debtor’s homestead, not that debtor own fee title or have any particular guaranteed possessory right of occupancy. Debtor’s Schedule C which listed the life estate as valued at \$12,500 and claimed the full allowable exemption of \$12,500 exempted that amount. To extent property was worth in excess of \$12,500, Trustee was entitled to the excess. Valuing the property and the exemption at the same amount does not have the effect of exempting the entire property without regard to the actual value of the property or the extent to which the actual value exceeds the dollar amount claimed as exempt.

7.31 Inheritances

- (1658) *In re Pugh*, 2015 WL 5145030 (Bankr. N.D. Ohio 2015) – Right to exempt property is determined on petition date. To claim homestead, debtor must have an interest in the property as of the petition date. “Interest” is not limited to titled ownership. Debtor’s status as intestate heir to deceased property owner, with statutory claim under state law of descent and distribution, is sufficient. Debtor’s mother owned property and died intestate. There was no evidence that mother was married at time of death. As such, under Ohio law, property would descend and pass to mom’s children. As one of debtor’s children, debtor had vested interest in property on the date of mom’s death, sufficient as of the date of the petition to constitute an interest for purposes of homestead exemptions. Debtor’s claim to title was subject only to extent necessary to pay late mother’s debts. Debtor’s husband (also a debtor) had a dower interest in property effective when Debtor’s interest attached (at mom’s death) which is also a sufficient interest in property to support claimed exemption.

7.32 Trust – Beneficial Interest

- (1659) *The Gladys Ragsdale Trust v. Tostige*, 2015 WL 5449997 (Bankr. E.D. Mi. 2015) – Debtor had contingent interest as beneficiary in revocable trust which had not been revoked as of petition date. Interest, while contingent and subject to being defeated if settlor elected to revoke trust, was vested interest in trust where trust had not been revoked.

7.33 Marital Property

- (1660) *In re Adams*, 2016 WL 1688747 (Bankr. E.D. Tn. 2016) – Property nominally held in name of one spouse can be converted into marital property in which other spouse has legal interest if property is commingled with other marital property or with separate property of other spouse. Court will consider four factors: (1) the use of the property as marital property; (2) the ongoing maintenance and management of the property by both parties; (3) placing the title to the property in joint ownership; and (4) using the credit of the non-owner spouse to improve the property. Property is not converted into marital property where property remains segregated. Evidence did not support finding that bank account as marital property where account was titled solely in husband’s name and although wife occasionally used money in

account to pay household bills, she did not have access to checkbook or debit card; husband recently added son to account and provided son with debit card for business purposes. Wife did not have ownership interest in the business itself, was not owner of account, and only funds deposited in account were traceable to business. Wife could not claim exemption in funds in account as wife lacked any legal interest in account.

7.34 Household Goods

- (1661) *In re Demeter*, Case No. 12-44593 (Bankr. E.D. Mi. 2012) – Gun used for personal protection and security in debtor’s home can qualify as household good. However, debtor would not be entitled to claim exemptions in more than two guns. Any more than two are excessive and are not necessary or appropriate to meet the requirement of the day to day living in the home.

7.35 Motor Vehicles

- (1662) *In re Gilica*, 2015 WL 2256785 (Bankr. N.D. Ohio 2015) – Ohio state law that allows debtor to exempt one motor vehicle does not include boat with outboard motor or a personal watercraft.
- (1663) *Leavitt v. Alexander*, Case No. 11-1114 (9th Cir. BAP 2012) – Debtor’s Mobile Kitchen Trailer that debtors used in their mobile barbeque sandwich business is exempt as “vehicle”. “Vehicle” is an instrument of transportation or conveyance, or a means of transporting passengers or things by land, air or water. Mobile Kitchen was used to transport things and was a device for carrying goods and equipment. Attempt to limit scope to devices used to transport people was too narrow. Further, Mobile Truck was registered with State Department of Motor Vehicles and had a Vehicle Registration Number, indicating that state considered the Truck a vehicle. Further, although “vehicle” was not defined in the exemption statute, Court could look to other state statutes to determine definition. State motor vehicle statute defined “vehicle” as any device in, upon or by which any person or property it or may be transported or drawn on a public highway; while “trailer” was defined as a vehicle without motive power. Mobile Kitchen was designed to carry people and property and could be used on highways. Although Mobile Kitchen lacked motive power and had to be towed, exemption statute required only that asset constitute “vehicle” and not “motor vehicle”. Absence of motive power was not fatal to classification of Mobile Kitchen as “vehicle”.
- (1664) *In re King*, 2011 WL _____ (Bankr. N.D. Iowa 2011) – Motor vehicle is not “tool of the trade” although debtor uses the vehicle to commute to work.
- (1665) *In re Likes*, 406 B.R. 749 (Bankr. N.D. Ohio 2009) - Trailer that lacked any propulsion was not a “motor vehicle” for purposes of Ohio’s exemption statute.

7.36 Wearing Apparel

- (1666) *In re Cintron*, 2013 WL 5310849 (Bankr. D.P.R. 2013) – Debtor could claim wedding ring as exempt under Puerto Rico law that allowed debtor to exempt “wearing apparel”. Court rejected Trustee’s argument that wedding band was not “wearing apparel”.

7.37 Unmatured Life Insurance Contracts

- (1667) *In re DeMarco*, 2013 WL 2100521 (Bankr. W.D. Tn. 2013) – Debtor, as non-insured owner of policies issued on lives of daughter, with unfettered rights to surrender policies and receive cash surrender values, could not claim cash surrender values as exempt from claims of insured’s creditors. Debtor purchased policies not for benefit of daughters but for his own benefit, and was seeking to exempt cash surrender values from his own creditors, not from claims of creditors of the insured. Tennessee statute exempting from claims of insured’s creditors life insurance or annuity for, or assigned to, a spouse, child, or dependent relative protects beneficiaries from creditors of the insured, whether or not insured is owner of policy, but does not protect owners from their own creditors.
- (1668) *In re Schoof*, Case No. 10-60887 (Bankr. E.D. Mi. 2011) – Section 522(d)(7) allows debtor to exempt unmatured insurance policy, but does not include cash surrender value or any attribute of policy other than the life insurance contract itself.
- (1669) *In re Zerbi*, 2011 WL 175923 (Bankr. W.D. Mi. 2011) – Section 522(d)(7) allows a debtor to exempt an unmatured life insurance policy. The exemption is limited to the policy itself and not to other rights such as cash surrender value under whole life policy. Section 522(d)(8) allows for exemption of accrued interest or dividends or loan values of unmatured insurance policies to the extent of the stated dollar limit. Debtor must account for cash value to the extent it exceeds amount allowed under Section 522(d)(8) plus any available “wild card” under Section 522(d)(5). If debtor cannot satisfy this obligation, Court will order surrender of policy and payment of cash surrender value to debtor to the extent of available exemptions with the remainder to the Trustee.

7.38 Personal Injury Claims

- (1670) *In re Kennedy*, 2016 WL 3226244 (Bankr. E.D. Tn. 2016) – Tennessee law allows debtor to exempt payment on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss; payment on account wrongful death of individual on whom debtor was dependent; and payment in compensation of loss for future earnings of debtor or an individual on who debtor was a dependent. Debtor’s husband was killed in an automobile accident and debtor settled personal injury action in exchange for annuity to provide lifetime benefits to debtor. Annuity not exempt as compensation for personal bodily injury as that section, tailored after Section 522(d)(11)(D), is intended to cover actual bodily injury such as loss of limb, not attendant costs that accompany such loss such as medical expenses, pain and suffering, or loss of earnings. Debtor failed to demonstrate what portion of the annuity was compensation other than for personal injuries versus what portion was attributable to pain and suffering or actual pecuniary loss and failed to demonstrate what portion was attributable to her injuries versus wrongful death of husband. Debtor could claim annuity as compensation for wrongful death of individual only if debtor can prove that debtor was “dependent”, considering factors such as debtor’s present circumstances and income,

future ability to be employed, available assets, and other exempted property, and exemption is limited to amount necessary to then compensate for loss of earnings. Settlement agreement pursuant to which annuity was purchased specifically state that annuity was for compensation for debtor's personal injuries and pain and suffering and not as compensation for lost income and included complete release of any claims for personal injury or damages suffered by debtor. Claims that annuity was compensation for lost earnings precluded by terms of settlement agreement itself. Settlement Agreement also precluded exemption for personal bodily injury as settlement agreement was all-inclusive, stating that settlement covered pain and suffering. Because there was no amount specified for actual bodily injury, annuity did not constitute compensation solely for personal bodily injury versus pain and suffering or actual pecuniary loss and so was excluded from exemption.

- (1671) *In re Phillips*, 2012 WL 6721026 (Bankr. E.D. N. Y. 2012) – Section 522(d)(11)(d) allows debtor to claim only a single exemption up to the statutory limit, regardless of how many payments the debtor receives, how many accidents or incidents occurred which caused debtor to suffer personal bodily injuries, or how many different parts of the debtor's body are injured. Debtor with three separate personal injury claims, resulting from three separate auto accidents, could exempt total recoveries not to exceed statutory limit, not statutory limit for each of the three incidents.

7.39 Life Insurance Policy

- (1672) *In re Morris*, 2015 WL 1879460 (Bankr. N.D. Ohio 2015) – Life insurance policy owned by debtor becomes property of estate. Ohio law allows a debtor to exempt the debtor's interest in life insurance contracts as long as the policy beneficiary is a spouse, child or other dependent of the debtor. As of the petition date, debtor's father was listed as the beneficiary on the policy and there was no indication that the father was a dependent (father was already deceased). Exemptions are fixed as of the petition date. As the named beneficiary was not a member of the protected class of beneficiaries, debtor could not exempt the policy.

7.40 Insurance Proceeds

- (1673) *In re Stimer*, 2016 WL 3996342 (Bankr. N.D. Ohio 2016) – Ohio law allows debtor to exempt value of personal property up to specific aggregate dollar limit. Where debtor's personal property was destroyed by fire pre-petition and debtor received payment from insurance company pre-petition, debtor can exempt payment to same extent as debtor would be able to exempt personal property as if fire, but cannot exceed aggregate statutory cap.
- (1674) *In re Bellisari*, 2016 WL 4199497 (Bankr. S.D. Ohio 2016) – Annuity contract is not properly claimed as exempt as annuity contract is not property of the estate, but is instead owned by the Annuitant. Debtor's beneficial interest and right to stream of payments under annuity contract is property of estate that may be claimed as exempt. Ohio law allows exemption of future annuity payments up to \$23,000.00. Annuity contract purchased following automobile accident to supplant debtor's rights to payments under Liability Insurance Policy constituted benefits paid under the insurance policy itself, and is exemptible to extent debtor would be able to exempt benefits under insurance policy that covers "sickness and accident". Policy is "accident insurance" if it provides coverage for bodily injury or death of insured. However, exemption does not apply where policy is for uninsured motorist benefits as UM coverage is "supplemental" and Ohio exemption excludes benefits under supplemental policies.
- (1675) *In re Partin*, 2014 WL 2566073 (Bankr. N.D. Ohio 2014) – Life insurance proceeds to which debtor became entitled within 180 days of petition are property of estate and must be turned over to trustee. Debtor had to turnover proceeds notwithstanding that debtor used proceeds to pay funeral expenses for debtor's son. Although debtor no longer had money, debtor received it during 180 day window and must account for the proceeds under Section 542.
- (1676) *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.
- (1677) *In re Plant*, 2013 WL 6859261 (Bankr. D. Mass. 2013) – Debtor cannot exempt insurance proceeds earmarked to replace personal property destroyed prior to commencement of case. State personal property exemption did not include insurance proceeds even where personal property itself would have been exempt but for destruction in fire.
- (1678) *In re Sizemore*, 2013 WL 6328160 (Bankr. E.D. Ky. 2013) – Section 522(d)(10) does not allow debtor to exempt proceeds of life insurance policy. Section 522(d)(10)(E) applies to pensions and retirement accounts. A life insurance policy is not a plan or contract similar to a stock bonus, pension, profit sharing or annuity. Section 522(d)(11)(C) allows debtor to exempt insurance proceeds if the debtor was a dependent of the decedent; to the extent reasonably necessary for the support of the debtor or any dependent of the debtor. Proceeds of insurance received by debtor during pendency of case is property of estate regardless of when received. Decedent was debtor's ex-husband. Debtor and her ex-husband lived apart and the property settlement agreement expressly waived any right of debtor to alimony or support. As debtor was not a dependent of the decedent, debtor could not claim as exempt any portion of the insurance proceeds under Section 522(d)(11)(C). Insurance proceeds were not exempt under Section 522(d)(11)(E) where proceeds from policy on life of ex-husband were not payment for loss of future earnings where there was no link between ex-husbands death and debtor's ability to work. Only possible expectation of payment from ex-husband's income would be limited to ex-husband's share of obligations imposed under marital settlement agreement which totals \$10,000.00. For purposes of Section 522(d)(11)(E), debtor could qualify as "dependent" as debtor had previously been married to decedent and was defined while married as dependent, and nothing in Section 522(d)(11)(E) requires that debtor be dependent at time insurance is received. Debtor could exempt \$10,000 as proceeds to replace funds to be paid by ex-husband but remaining \$90,000 was not exempt and must be remitted to trustee for distribution to creditors.
- (1679) *In re Frederick*, 2013 WL 3808160 (Bankr. N.D. Ohio 2013) – Debtor entitled to claim as exempt proceeds received under group life

insurance policy. Ohio law allows debtor to claim as exempt proceeds of employer sponsored group life insurance that is paid to the employee. To be exempt, (1) the insurance policy must be a “policy of group insurance,” (2) the deceased person must be covered under the policy, and (3) the proceeds must be paid to “any employee thereunder.” Decedent does not need to be dependent of debtor for purposes of exemption. Debtor’s wife was insured person under the policy. Although debtor had previously been terminated as an employee of the employer, policy was initially provided by employer and at termination of employment debtor had option of keeping insurance in place. Debtor did not have to be employee at time of payment of proceeds as long as the proceeds are paid on account of the insured person’s death. Once policy attached while person was employee, later separation from employment would not disqualify the proceeds from exemption.

- (1680) *In re Ladd*, 448 BR 207 (Bankr. N.D. Ohio 2011) – Ohio statute that exempted life insurance proceeds from claims of the insured person was limited to debtors who were the insured party. Debtor could not claim as exempt proceeds on now-deceased husband’s life insurance policy as debtor was a beneficiary but was not the “insured person”.
- (1681) *In re Schoof*, Case No. 10-60887 (Bankr. E.D. Mi. 2011) – Section 522(d)(8) allows debtor to exempt dividends, interest and cash surrender value of insurance policy.
- (1682) *In re Kudela*, 427 B.R. 643 (Bankr. N.D. Ohio 2010). Debtor-beneficiary could not exempt her interest in life insurance proceeds under Ohio law. Ohio law does not create exemption for life insurance paid on death of debtor’s spouse. Ohio law protects proceeds of life insurance policy from creditors of the insured, not creditors of the beneficiary. Debtor’s husband passed away 18 months prior to commencement of case. Debtor, age 80, still had \$46,000 of life insurance proceeds in savings. Remaining proceeds are not exempt under Ohio law and must be turned over to Trustee.
- (1683) *Menninger v. Schramm*, 2010 WL 2489591 (6th Cir. BAP 2010) – Ohio law does not create exemption for life insurance paid on death of debtor’s spouse. Ohio law protects proceeds of life insurance policy from creditors of the insured, not creditors of the beneficiary. Debtor’s husband died 19 days after couple filed joint petition. Proceeds of husband’s life insurance policy became property of Debtor’s estate and could be used to pay creditors even though some of those creditors were also creditors of the deceased on joint accounts with Debtor. Ohio law does not allow exemption of proceeds from creditors of beneficiary. Although Federal exemptions protect proceeds from creditors of a dependent beneficiary as well as creditors of the insured, Ohio law is not so expansive and does not include protection from creditors of the beneficiary, even if the beneficiary is also a dependent of the deceased.

7.41 Health Savings Accounts

- (1684) *Leitch v. Christians*, Case no. 13-6009 (8th Cir. BAP 2013) – Debtor’s interest in Health Savings Account is not exempt under either Section 522(d)(10)(C) or (11)(D). Funds can be used and accessed by debtor for purposes other than “disability, illness or unemployment” and can be used for purposes other than personal bodily injury. Further, (d)(10)(C) and (11)(D) are limited to a “right to receive” the benefits. In an HSA, the debtor has already received the benefits in the form of money from debtor’s employer that has been deposited into HAS. While debtor has not yet chosen how to use the money received, nonetheless the money has already been received and there is no longer any “right to receive” any proceeds.

7.42 Annuities

- (1685) *In re Bellisari*, 2016 WL 4199497 (Bankr. S.D. Ohio 2016) – Annuity contract is not properly claimed as exempt as annuity contract is not property of the estate, but is instead owned by the Annuitant. Debtor’s beneficial interest and right to stream of payments under annuity contract is property of estate that may be claimed as exempt. Ohio law allows exemption of future annuity payments up to \$23,000.00. Annuity contract purchased following automobile accident to supplant debtor’s rights to payments under Liability Insurance Policy constituted benefits paid under the insurance policy itself, and is exemptible to extent debtor would be able to exempt benefits under insurance policy that covers “sickness and accident”. Policy is “accident insurance” if it provides coverage for bodily injury or death of insured. However, exemption does not apply where policy is for uninsured motorist benefits as UM coverage is “supplemental” and Ohio exemption excludes benefits under supplemental policies.
- (1686) *Wittman v. Koenig*, 2016 WL 3997251 (7th Cir. 2016) – Under Wisconsin state exemption for annuities (which substantially mirrors Section 522(d)(10)(E), annuity is exempt if it receives some tax advantaged position under Internal Revenue Code. Annuity does not have to comply with multiple provisions of Internal Revenue Code, as long as Annuity complies with any one provision of IRC. Annuity exemption is not limited to “retirement annuities” such as plans under Section 401, 403 or 408 of Internal Revenue Code. An “annuity” is broadly defined as a contractual right to receive a series of payments either during the life of the annuitant or during specific period. Annuity exemption applies to any annuity that has tax advantaged status and benefits arise by reason of age, illness, disability, death or length of service. Annuities were not employer sponsored and so were not within Sections 401, 403 or 408 of Internal Revenue Code, annuities did enjoy tax advantaged status under 26 USC Section 72 of the Internal Revenue Code. Debtor’s three annuity contracts purchased by de-party annuity company 18 months prior to bankruptcy filing provided for payments commence when debtor reaches specified age, met requirements for tax deferred status under Internal Revenue Code and were properly exempted.
- (1687) *In re Wyly*, Case No. 14-35043 (Bankr. N.D. Tx. 2016) – Annuities are exempt as matter of state law. Where beneficiary is an individual under an annuity the benefits received and benefits still owed are exempt. Debtor’s claimed exemption disallowed where debtor controlled company that purchased annuity and also controlled Offshore Corporations that “issued” annuity. Debtor had and exercised systematic control over annuity “issuers” including control of investments, terms of annuity agreements, full control over whether or not payments were made to debtor and timing of those payments, ability to manipulate companies to render certain of them insolvent for purposes of evading claims against annuity “issuers” by purchasing assets for one or more members of debtor’s family. Companies that set up annuities and

“annuity” issuers had no other assets or liabilities and did not issue annuities to any person other than debtor. Debtor never actually surrendered control over assets paid to annuity issuers. Although contracts were styled “annuities” accounts were little more than self-settled deposit accounts that are not exempt as “annuities”.

- (1688) *In re Kennedy*, 2016 WL 3226244 (Bankr. E.D. Tn. 2016) – Tennessee law allows debtor to exempt payment on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss; payment on account wrongful death of individual on whom debtor was dependent; and payment in compensation of loss for future earnings of debtor or an individual on who debtor was a dependent. Debtor’s husband was killed in an automobile accident and debtor settled personal injury action in exchange for annuity to provide lifetime benefits to debtor. Annuity not exempt as compensation for personal bodily injury as that section, tailored after Section 522(d)(11)(D), is intended to cover actual bodily injury such as loss of limb, not attendant costs that accompany such loss such as medical expenses, pain and suffering, or loss of earnings. Debtor failed to demonstrate what portion of the annuity was compensation other than for personal injuries versus what portion was attributable to pain and suffering or actual pecuniary loss and failed to demonstrate what portion was attributable to her injuries versus wrongful death of husband. Debtor could claim annuity as compensation for wrongful death of individual only if debtor can prove that debtor was “dependent”, considering factors such as debtor’s present circumstances and income, future ability to be employed, available assets, and other exempted property, and exemption is limited to amount necessary to then compensate for loss of earnings. Settlement agreement pursuant to which annuity was purchased specifically state that annuity was for compensation for debtor’s personal injuries and pain and suffering and not as compensation for lost income and included complete release of any claims for personal injury or damages suffered by debtor. Claims that annuity was compensation for lost earnings precluded by terms of settlement agreement itself. Settlement Agreement also precluded exemption for personal bodily injury as settlement agreement was all-inclusive, stating that settlement covered pain and suffering. Because there was no amount specified for actual bodily injury, annuity did not constitute compensation solely for personal bodily injury versus pain and suffering or actual pecuniary loss and so was excluded from exemption.
- (1689) *In re Sizemore*, 2013 WL 6328160 (Bankr. E.D. Ky. 2013) – Section 522(d)(10) does not allow debtor to exempt proceeds of life insurance policy. Section 522(d)(10)(E) applies to pensions and retirement accounts. A life insurance policy is not a plan or contract similar to a stock bonus, pension, profit sharing or annuity. Section 522(d)(11)(C) allows debtor to exempt insurance proceeds if the debtor was a dependent of the decedent; to the extent reasonably necessary for the support of the debtor or any dependent of the debtor. Proceeds of insurance received by debtor during pendency of case is property of estate regardless of when received. Decedent was debtor’s e-husband. Debtor and her ex-husband lived apart and the property settlement agreement expressly waived any right of debtor to alimony or support. As debtor was not a dependent of the decedent, debtor could not claim as exempt any portion of the insurance proceeds under Section 522(d)(11)(c).
- (1690) *Neal v. First Alliance Bank*, 2013 WL 5739701 (W.D. Tn. 2013), *aff’d* 2014 WL 3313890 (6th Cir. 2014) – State law that allowed debtor to exempt amount payable under annuity contract on the life of the debtor for the benefit of dependent relatives did not permit debtor to exempt annuity in which debtor was the beneficiary as well as the annuitant.
- (1691) *In re Jadud*, 2012 WL 4757870 (Bankr. N.D. Ohio 2012) – Ohio state law governing exemption of annuity parallels Section 522(d)(10), allows debtor to exempt annuity. Merely calling contract an “annuity” does not necessarily make it the type of annuity that can be exempted. To be exempt, annuity must provide income that is in the nature of a substitute for wages. Court will consider (1) were the periodic payments intended as a substitute for wages, (2) were contributions into the plan or contract made over time and were multiple contributions made, (3) is there a return on investment, (4) how much control can the owner exercise over the investment, and (5) whether the investment a prebankruptcy planning measure. Annuity was originally purchased for debtor’s son as part of a structured settlement following auto accident. Debtor inherited beneficial interest when son passed away. Annuity provided for fixed monthly payments for defined term in fashion that would be similar to employer-established retirement fund, indicating substitute for wages. Although annuity was purchased with single premium, that usually indicates an annuity that would not be exempt, origin of annuity was auto accident which left son unable to work and unable to purchase annuity through periodic purchases such that victim would not be prohibited from exempting annuity. Annuity was unclear as to whether annuity payments included return of principal and interest. Debtor had no ownership or control other than right or receive payments as they become due. Annuity was not purchased as part of pre-bankruptcy planning. Annuity does not have to be for retirement income or provided by employer to be exempt. Fact that annuity was not purchased for debtor but was inherited does not change fact that annuity was purchased on account of disability which meets requirement. Amount of payment was reasonably necessary where debtor was double amputee living only on social security income. Trustee’s objection to exemption overruled.
- (1692) *In re Abbott*, 466 BR 118 (Bankr. S.D. Ohio 2012) - Annuity which was purchased by hospital in order to fund its obligations to Chapter 7 debtor pursuant to prepetition settlement of her wrongful death claims, and which was owned and controlled solely by hospital, was not included among assets of Chapter 7 estate, and could not be reached by trustee; as of commencement of her bankruptcy case, debtor did not have any ownership interest in annuity and had no control over annuity or payment of benefits. Benefits to which Chapter 7 debtor was entitled under annuity purchased by hospital as part of prepetition settlement of debtor's wrongful death claims against it, unlike annuity itself, were included in property of the estate. Debtor could exempt these annuity benefits, to extent reasonably necessary for her support, under Ohio exemption for debtor's right to receive, or for moneys received, on account of wrongful death of individual on whom debtor was dependent. Annuity benefits were to compensate debtor for death of her husband while under hospital's care, and debtor, as stay-at-home wife, was plainly dependent on husband at time of death.
- (1693) *In re Ellis*, 2011 WL 1457258 (Bankr. S.D. Tx. 2011) – Annuity is exempt if the annuity qualifies under Section 403(b) of the Internal Revenue Code. Debtor must prove that the annuity (i) for an employee by an employer described in section 501(c)(3) which is exempt from tax under section 501(a); (ii) for an employee (other than an employee described in clause (i)), who performs services for an educational organization described in section 170(b)(1)(A)(ii), by an employer which is a State, a political subdivision of a State or an

agency or instrumentality of any one or more of the foregoing, or; (iii) for the minister described in section 414(e)(5)(A) by the minister or by an employer. Annuity is not covered by Section 403 where debtor used money received from retirement to purchase annuity, as the employer did not purchase the annuity. However, where annuity is purchased with “roll over” funds from qualified IRA, the annuity will retain its exempt status as a right to receive payment under an annuity purchased with pension or retirement funds.

- (1694) *In re Olson*, Case No. 09-66979 (Bankr. E.D. Mi. 2010) - Michigan Compiled Laws Section 500.4054 does not protect an annuity from claims of creditors of the named owner of the annuity. Section 500.4054 protects the annuity from claims by creditors of the beneficiaries. Where the debtor is the named owner of the annuity, the annuity is not exempt from claims of debtor’s creditors.

7.43 Employee Buyout

- (1695) *In re John*, 2011 WL 143871 (Bankr. E.D. Mi. 2011) – Funds received as part of employee buyout constitute “payment in compensation for future income” for purposes of Section 522(d)(11)(E). Section 522(d)(11)(E) limits exemption to amount of buyout reasonably necessary for maintenance and support of debtor and debtor’s dependents. “Reasonably necessary” depends on factors such as (1) debtor’s present and anticipated living expenses; (2) debtor’s present and anticipated income from all sources; (3) the age of the debtor and his or her dependents; (4) the health of debtor and his or her dependents; (5) debtor’s ability to earn a living; (6) debtor’s job skills, training and education; (7) debtor’s other assets, including exempt assets; (8) the liquidity of these other assets; (9) debtor’s ability to save for retirement; (10) the special needs of the debtor and his or her dependents; and (11) debtor’s continuing financial obligations, e.g., alimony or support payments. Court declined to reach issue of whether debtor’s use of buyout funds to purchase car rendered car non-exempt where value of car was less than amount of exemptions available to debtor under subsections other than (d)(11)(E).
- (1696) *In re Lewis*, 2010 WL 2813328 (6th Cir. 2010) - Debtor’s right to receive, for up to four years, tuition reimbursement up to \$15,000.00 per year, continued health care benefits, and an annual living expense stipend, which is equivalent to 50% of the participant’s annualized straight-time hourly wage at the time of termination properly claimed as exempt under 11 USC Section 522(d)(11)(E) which exempts a Debtor’s right to receive “payment in compensation of loss of future earnings of the Debtor or an individual of whom the Debtor is or was dependent, to the extent reasonably necessary for the support of the Debtor or a dependent of the Debtor.” Section 522(d)(11)(E) does not require bodily injury as prerequisite for exemption. Section 522(d)(11)(E) exempts all compensation for loss of future earnings. Section 522(d)(11)(D) which contemplates payment on account of personal bodily injury is clearly delineated from subsection (E) by the word “or”. Any limitation under Subsection (D) to personal bodily injury does not carry through to subsection (E). Debtor’s termination of her employment constitutes an event that resulted in a “loss of future earnings.” The buyout was offered as compensation for such termination. It is immaterial whether the buyout was negotiated by the parties, or whether such termination was voluntary. In either case, the buyout benefit constitutes “compensation” for loss of future earnings which are properly claimed exempt under Section 522(d)(11)(E).
- (1697) *Gold v. Lewis*, Case No. 09-1777 (6th Cir. 2010) – Debtor’s interest in Ford Employee Buyout is exempt under Section 522(d)(11)(E). “Loss of future earnings” is not limited to losses based on tort claims in light of separate provisions of Section 522(d)(11)(E) that exempts payments “on account of personal bodily injury”, reparation benefits, death benefits and life insurance. Debtor accepted right to receive future payments including tuition reimbursement, health care benefits, and an “annual living expense stipend” equal to 50% of debtor’s straight-time hourly wage as of the date of termination in exchange for waiving all future earnings with Ford. Payment under Employee Buyout is exempt as “future earnings”.

7.44 Post-petition Assets

- (1698) *Williamson v. Hall*, Case No. 08-088 (10th Cir. BAP 2009) – The debtor’s “Property” and “interest in property” are defined by state law. Section 541(a)(5), which sweeps into the estate property acquired by bequest, devise or inheritance, is limited to transfers by will, and the term “inheritance” is limited to property acquired through intestate succession, and does not include property that transfers by operation of law to a joint tenant with right of survivorship or a designation of an account or asset that passes to a beneficiary or through contractual provision for transfer on death.

7.45 Property Owned by Third Party

- (1699) *U.S. v. Robinson*, 2016 WL 3041879 (E.D. Ky. 2016) – Funds withdrawn from obligor’s 401-k account and deposited into checking account in spouse’s name are not exempt under Kentucky law. Obligor no longer had ownership interest in funds after transfer to spouse and so there was no interest for obligor to claim as exempt.
- (1700) *In re Adams*, 2016 WL 1688747 (Bankr. E.D. Tn. 2016) - Bank account was held by debtor husband individually and was not entireties account. Account was titled in name of husband d/b/a husband’s sole proprietorship. Although wife’s name was on account as “authorized signatory” and wife did, in fact, use account to pay household expenses and account was only account for the house, wife was not owner of account. Account was not entireties property and wife could not claim exemption in funds in account as wife lacked any legal interest in account.
- (1701) *Bank of America v. Killgrove*, 2013 WL 7018546 (Bankr. E.D. Mi. 2013), *aff’d*, 2014 WL 4187988 (E.D. Mi. 2014) – Debtor did not make false oath where debtor listed in schedules debtor’s 100% stock ownership of PC but did not separately list assets of PC. Schedule B requires debtor to disclose debtor’s interest in property. Debtor did not personally have any interest in assets of PC. Therefore, debtor’s failure to list those assets in debtor’s Schedule B was not inaccurate or false.
- (1702) *Kahn v. Regions Bank*, 2013 WL 5942052 (6th Cir. 2013) – Debtor cannot claim an exemption in home that is owned by Irrevocable Trust.
- (1703) *Bullard v. IndyMac Bank*, 2012 WL 4134839 (E.D. Mi. 2012), *aff’d* 2013 WL 4859785 (6th Cir. 2013) – Husband could not claim exemption in home that is owned solely by wife. Husband had no legal interest that could be claimed as exempt as a matter of law.

- (1704) *In re Breece*, 2013 WL 197399 (6th Cir. BAP 2013) – Debtor’s status as sole member of LLC does not convey to debtor an ownership interest in the assets of the LLC. Assets of the LLC are not property of the estate. Debtor cannot claim as exempt property owned by the LLC even where property otherwise constituted debtor’s homestead, as debtor had no interest in the specific property to claim as exempt.
- (1705) *In re Schmakel*, 2013 WL 594317 (Bankr. N.D. Ohio 2013) – Debtor does not have interest in property that is owned by LLC merely because Debtor is a member of the LLC. Debtor’s membership interest becomes property of the estate on filing, but the assets of the LLC are not property of estate. Debtor cannot claim exemption in real property owned by LLC in which Debtor was member, even where property would otherwise have constituted Debtor’s homestead, as debtor had no interest in the property that could be properly claimed as exempt.
- (1706) *Weinstein v. Fox*, Case No. 11-1009 (9th Cir. BAP 2013) – Debtor cannot claim exemption on behalf of non-debtor spouse. Although Debtor and spouse owned two cars, State law permitted debtor to exempt only one car. Debtor could not use exemption that would have been available to spouse to exempt second car. Debtor cannot claim exemption that belongs to a third party who is not a debtor in bankruptcy.
- (1707) *Eleiwa v. Whitmore*, Case No. 12-1559 (9th Cir. BAP 2013) – Debtor could not claim exemption in home occupied by debtor where property was owned by Trust and not by debtor individually. Debtor’s status as trustee of trust that owned property did not convey any equitable interest in property for purposes of claiming property as exempt.
- (1708) *Elswick v. Miller*, 2012 WL 2122170 (E.D. Ky. 2012) – In joint case under Section 302, each debtor is presumed to have a separate estate. The exemptions available to each co-debtor may be claimed only from his or her separate estate. Husband in joint case cannot claim exception in property owned by debtor-wife. Court must determine whether husband has interest in property separate and apart from the interest of debtor-wife in the property to determine whether, and to what extent, husband can claim exemption.
- (1709) *In re Kane*, 2011 WL 2119015 (Bankr. D. Mass. 2011) – Debtors could not claim exemption in homestead that was owned by debtors’ Limited Liability Company. Debtors can claim exemption only in property owned by debtors, not property owned by third party, even where debtors were the sole members of the LLC. Dissolution of the LLC, without more, does not affect a transfer of the property to the members and the property remains in the LLC subject to state law requirements for winding up and liquidating assets of LLC.
- (1710) *In re Young*, 468 BR 818 (Bankr. E.D. Mi. 2012) - Debtor-wife cannot claim an exemption in a vehicle that is titled solely in debtor-husband's name. Debtor's testimony that they considered the cars to be "ours" with "no sent thing" about who would be on the title for any car, and that both debtors jointly used the vehicles did not overcome titled ownership as shown on certificate of title. There was no evidence that debtor-wife paid for the vehicle, nor that debtor-husband and debtor-wife attempted to have the vehicle titled either jointly or in debtor-wife's name. There was no evidence that the name as shown on the certificate of title was in any way erroneous were the result of fraud. As vehicle was titled solely in debtor-husband's name, debtor-wife did not have any interest in the property under section 541 and, therefore, debtor-wife could not exempt any interest in the property pursuant to section 522.
- (1711) *In re Miller*, 427 B.R. 616 (Bankr. N.D. Ohio 2010) - Wife could not claim “wild card” exemption in motor vehicle titled solely in her husband’s name, even though she drove the vehicle - Ohio law only allowed exemption of the debtor’s interest in property, and she had none in the vehicle.

7.46 Dower Interests

- (1712) *Flynn v. Deutsche Bank National Trust Co.*, 2016 WL 537484 (W.D. Mi. 2016) – Michigan Compiled Laws Section 558.1 creates a right in favor of a widow a 1/3 interest in all land in which the husband had an interest at any time during the marriage. Wife that voluntarily resides outside of state of Michigan has no dower interest in any real estate in Michigan prior to death of spouse, and is bound by all conveyances made by husband. However, non-residency does not defeat dower interest in property owned by Husband on date of death. Husband owned property at time of death although husband had previously executed mortgage on property, as mortgage operates only as lien and not as conveyance. Husband owned property prior to marriage but executed mortgage in his individual name during marriage and mortgage was not “purchase money” mortgage. Mortgage is subordinate to dower interest of widow. Wife is not judicially estopped from asserting dower interest in her prior bankruptcy case where her husband was still alive as of the petition date. The dower interest does not come into effect until the death of the husband. Further, at time of bankruptcy filing, Wife lived outside of State of Michigan and so no dower right existed.
- (1713) *In re Pugh*, 2015 WL 5145030 (Bankr. N.D. Ohio 2015) – Right to exempt property is determined on petition date. To claim homestead, debtor must have an interest in the property as of the petition date. “Interest” is not limited to titled ownership. Debtor’s status as intestate heir to deceased property owner, with statutory claim under state law of descent and distribution, is sufficient. Debtor’s mother owned property and died intestate. There was no evidence that mother was married at time of death. As such, under Ohio law, property would descend and pass to mom’s children. As one of debtor’s children, debtor had vested interest in property on the date of mom’s death, sufficient as of the date of the petition to constitute an interest for purposes of homestead exemptions. Debtor’s claim to title was subject only to extent necessary to pay late mother’s debts. Debtor’s husband (also a debtor) had a dower interest in property effective when Debtor’s interest attached (at mom’s death) which is also a sufficient interest in property to support claimed exemption.
- (1714) *In re Whitt*, 2015 WL 4558476 (Bankr. N.D. Ohio 2015) – Debtor cannot claim automobile as exempt where automobile is titled solely in debtor’s spouse’s name. Debtor’s statutory “dower” interest is not interest for purposes of claiming automobile as exempt. Dower is at best contingent interest that does not become an enforceable right until the spouses passes away while an Ohio resident, where the spouse still owns the vehicle as of the date of death, and the owner has not provided for the vehicle by testamentary disposition.
- (1715) *Elswick v. Miller*, 2012 WL 2122170 (E.D. Ky. 2012) – Under Kentucky law, husband has dower interest in property inherited by wife during marriage. Husband’s dower interest is property of the estate which can properly be claimed as exempt under Section 522(d)(5)

to the extent of the allowable dollar limitations under that section. Husband may claim as exempt this inchoate dower interest to the extent of the fair market value of that contingent interest.

7.47 Tools of the Trade

- (1716) *In re MacMillan*, 2015 WL 148339 (Bankr. D. Ks. 2015) – Website and digital images constitute tools of the trade subject to exemption.
- (1717) *Larson v. Sharp*, 2014 WL 1400073 (10th Cir. BAP 2014) – Exemption for tools of the trade can be disallowed if the objecting party can prove by preponderance of evidence that debtor’s occupation is unlikely to contribute to support of debtor and family in any significant way in a reasonable period of time. Debtor was employed but was starting new business as “outfitter”. Debtor had not yet turned a profit but owned several items of equipment including firearms, boats, camper, an ATV, a utility trailer, a two-horse trailer, and fishing poles as exempt, asserting that these items were used in the outfitting business. Occupation need not be profitable as of petition date where debtor was actively pursuing business as a valid occupation rather than hobby or pastime.
- (1718) *In re Nickeas*, 2013 WL 4017940 (Bankr. W.D. Wis. 2013) – Liquor license is not “tool of the trade even if essential to operation of business. Tools of the trade are personal property used in business but do not include intangible rights such as liquor licenses.
- (1719) *Maestas v. Old World Construction, Inc.*, Case no. 12-100 (10th Cir. BAP 2013) – “Tools of the trade” is limited to personal property. Debtor cannot claim real property as exempt as “tool of the trade” even if real property is location out of which debtor conducts business.
- (1720) *Eleiwa v. Whitmore*, Case No. 12-1559 (9th Cir. BAP 2013) – Debtor could not claim motor vehicles as tools of the trade of debtor’s spouse where there was no evidence that spouse actually used vehicles in course and scope of his trade.
- (1721) *In re Neff*, 2012 WL 3063141 (Bankr. N.D. Ohio 2012) – Debtor’s claimed exemption in 1996 Piper aircraft as “tool of the trade” disallowed where debtor was unemployed and had no business operations.
- (1722) *In re Gaydos*, 441 BR 102 (Bankr. N.D. Ohio 2010) – Truck driver who used a Semi-Truck for his daily employment could exempt truck as tool of the trade under Ohio state exemption statute. Fact that Ohio has separate exemption for motor vehicles does not prevent debtor from claiming vehicle as “tool of the trade”. Truck was “absolutely necessary” for debtor’s employment.
- (1723) *In re Montgomery*, 2010 WL 3369829 (Bankr. N.D. Ohio 2010) – Ohio statute that permits exemption of implements, professional books, or tools of the person’s profession, trade, or business does not include real estate in which Debtor’s business is owned. Tools of the trade are limited to personal property used in the course of business, not the real estate itself.

7.48 Entireties Property

- (1724) *In re Adams*, 2016 WL 1688747 (Bankr. E.D. Tn. 2016) - Bank account was held by debtor husband individually and was not entireties account. Account was titled in name of husband d/b/a husband’s sole proprietorship. Although wife’s name was on account as “authorized signatory” and wife did, in fact, use account to pay household expenses and account was only account for the house, wife was not owner of account. Account was not entireties property and wife could not claim exemption in funds in account as wife lacked any legal interest in account.
- (1725) *In re Hamacher*, Case No. 14-59741 (Bankr. E.D. Mi. 2015) – Property did not lose its status as tenancy by entireties where debtor’s non-filing spouse died after debtor filed for bankruptcy protection. Exemptions are determined as of petition date. While spouse’s later passing would terminate entireties as of that moment, as of the petition date spouse was alive and property was owned by debtor and spouse as entireties.
- (1726) *In re Mendez*, 2014 WL 2434622 (Bankr. W.D. Mi. 2014) – Property owned by husband and wife as tenants in entireties is not exempt to extent of joint debt. Court entered order determining that joint debt aggregated \$33,897.35 and directed that entireties property is not exempt to that extent. Fact that one or more joint creditors may not file claims or may later withdraw the claims does not warrant re-examining prior order or setting aside prior order, where determination was correct when made and no party appealed. Fact that actual joint debt to be administered in case was less than \$33,897.35 did not warrant reducing amount of non-exempt value. Trustee entitled to sell property and to use \$33,897.35 to pay unsecured creditors, with joint creditors receiving full payment and any remaining funds being available for costs of administration and payment to remaining unsecured claims.
- (1727) *In re Scioli*, 2013 WL 318718 (Bankr. D. Del. 2013) – Debtor’s ownership interest in three automobiles not exempt as entireties property under Section 522(b)(3). Vehicles were titled solely in debtor’s name, creating presumption that vehicles were owned by debtor individually and not jointly with spouse. Further, vehicles had been purchased by debtor using debtor’s individual assets and not funds that were themselves entireties property. Although presumption of individual ownership is rebuttable, debtor failed to present any evidence to overcome title and source of proceeds. Fact that spouse undoubtedly drove one or more of the vehicles, alone, did not give spouse ownership rights sufficient to constitute ownership interest.

7.49 Co-mingled and Segregated Funds

- (1728) *In re Greer*, 2016 WL 4260077 (Bankr. N.D. Ohio 2016) – Exempt funds retain their exempt status even if comingled with non-exempt funds as long as the Court is reasonably able to trace funds which are exempt and which must be turned over to the trustee. Generally, courts choose between three different tracing methods: (1) first-in, first-out; (2) allocating expenditures in proportion to the ratio of exempt funds to non-exempt funds; or (3) the lowest intermediate balance test. Funds in account consisted of pension distributions and social security income plus debtors’ tax refund from the prior year. Where most of the funds consist of pension and social security, “lowest intermediate balance” test is appropriate method to trace funds. LIB test starts at moment of commingling. Any expenditures from that time

on are presumed to be spent first from non-exempt funds. Once all of the non-exempt funds are spent, any further withdrawals are from exempt funds. Once exempt funds are spent, any new non-exempt funds will be used before any exempt funds that remain in the account. Total balance in account as of petition date was \$2517.06, consisting of tax refund of \$2,874.00 plus social security and pension that aggregated \$2359.06, less funds already expended for living expenses. As balance in account never fell below balance as of petition date, the funds expended are considered to have been the non-exempt funds. As such, after deducting pension and social security of \$2359.06, from full remaining balance on petition date, remaining sum of \$158 would be funds attributable to tax refund that would be non-exempt.

- (1729) *In re Neff*, 2012 WL 3063141 (Bankr. N.D. Ohio 2012) – Statutorily exempt funds do not lose their exempt status when deposited in a personal checking account so long as the source of the exempt funds is known or reasonably traceable. Spousal support and child support deposited into debtor’s checking account was exempt where funds were in segregated, separate account and were not co-mingled with any non-exempt funds.
- (1730) *In re Perkins*, 2011 WL 4458961 (Bankr. N.D. Ohio 2011) – In attempting to trace co-mingled funds, Court will use the accounting method that is most beneficial to the debtor. Court rejected “first in-first out” method and used “lowest intermediate balance” method to determine amount of exempt funds in bank account. Debtor received \$2,886.22 in student loan funds deposited into debtor’s account and debtor’s balance never fell below that amount prior to garnishment by creditor. Therefore, that balance would be deemed traceable to the student loans in which debtor properly claimed exemption.
- (1731) *In re Patterson*, 2010 WL 3606893 (Bankr. N.D. Ohio 2010) – Funds received from an exempt source will retain the exempt status even after being deposited into bank account as long as source of funds in account is known or reasonably traceable. Debtor’s pre-petition receipt and deposit into checking account of federal tax refund that was exempt under Ohio law did not defeat debtor’s ability to exempt proceeds where funds in account could be reasonably traceable to the tax refund. Court used “first in, first out” method to trace the funds in the account. Immediately before the deposit, Debtor had only \$362 in the account. After depositing the tax refund, the balance increased to \$5200.00. As of the date of the petition, the balance was only \$3700, and no additional money had been deposited after the tax refund. Therefore, the entire balance in the account was “reasonably traceable” to the tax refund and would be exempt.

7.50 Salary and Bonuses

- (1732) *In re Slane*, 2015 WL 5255329 (Bankr. N.D. Ohio 2015) – Ohio law allows a debtor to exempt from execution the greater of a multiple of the federal minimum wage, or 75% of disposable earnings. Debtor cannot claim as exempt the garnished funds after avoidance of the garnishment by the trustee as the funds paid to the creditor were not exempt in the first instance. The debtor’s first 75% of income was already exempted as the employer honored the garnishment only to the extent of the 25% permitted and non-exemptible. The funds retain the character that the funds had at the time of the garnishment. Since the funds were not exempt at that time, recovery of the funds by the Trustee does not convert them into exemptible assets. Court would not consider whether other statutory exemptions may apply as debtor did not claim any other statutory basis for the exemption.
- (1733) *In re Schmakel*, 2013 WL 594317 (Bankr. N.D. Ohio 2013) – Ohio law permits debtor to exempt earnings “owed to” debtor for personal services. Earnings remain exempt even after deposit into checking account, so long as source of exempt funds is known or reasonably traceable. Wages earned can be exempt even where the wages were paid and deposited into a bank account pre-petition.
- (1734) *In re Larkins*, 2012 WL 1378470 (Bankr. N.D. Ohio 2012) – Ohio statute that permitted debtor to exempt “personal earnings” did not include discretionary bonuses received by debtor. “Personal income” is limited to “money or other consideration or value paid or due to a person in exchange for work, labor or personal services. Debtor’s right to receive a bonus was not attributable to debtor’s services, but were entirely discretionary with the employer. Debtor was not automatically entitled to a bonus and depended entirely on employer’s determination of profit and decision to pay.

7.51 Consumer Credit Protection Act

- (1735) *In re Larkins*, 2012 WL 1378470 (Bankr. N.D. Ohio 2012) – State statute that prohibited creditor from garnishing or levying on disposable earnings up to 75% of amount of earnings did not protect debtor’s right to receive a bonus. Under CCPA, earnings are defined as periodic payments of compensation, not necessarily every asset that it traceable in some way to compensation. Bonus paid as lump sum and not as compensation which debtor could count on for support on a week-to-week or month-to-month basis removed bonus from status as “compensation” for purposes of CCPA.

7.52 Unemployment Compensation

- (1736) *In re Wyman*, 437 BR 478 (Bankr. D. Mass. 2010) – Debtor not entitled to exempt lump sum unemployment benefits received 14 days prior to filing. Section 522(d)(10)(A) allows exemption only of a debtor’s “right to receive” unemployment compensation, not unemployment compensation that has already been received.

7.53 Workers Compensation

- (1737) *In re Lebourdais*, 2014 WL 1165803 (Bankr. E.D. Mi. 2014) – Bank account holding funds traceable to lump sum worker’s compensation redemption award exempt under Section 522(d)(11)(E). Debtor received \$30,000 and netted \$27,750 after payment of attorney fees and costs and then spent part of the money on household expenses and purchased used car, and left remaining \$20,000 in bank account. “Loss of future earnings” is not limited to earnings that would have accrued post-petition, but includes all lost earnings after date of injury, and is intended only to distinguish between lost earnings that are exempt and non-exempt recoveries such as medical bills and expenses. Policy supports broad reading of exemption, particularly where debtor had limited income of \$1600 for debtor and her hearing-impaired 15 year

old son and award was indisputably necessary for debtor's reasonable expenses.

- (1738) *In re Stanley*, 2013 WL 2154787 (Bankr. E.D. Mi. 2013) – MCL Section 600.5451(1)(j) allows debtor to exempt money or benefits paid by an insurance company, provided or allowed to be paid, because of disability due to injury or sickness of an insured person. Benefits paid by State Workers Compensation Fund constitute payments by “insurance company” within meaning of statute. Michigan Workers Compensation Statute states that the state “insures” covered employees and is acting as functional equivalent of insurance company. Funds received under workers compensation benefits remain exempt even after receipt, and exemption is not limited to entitlement to future benefits, as long as funds remain in cash form. Once benefits are used to purchase asset, funds and the asset purchased cease to be exempt as workers compensation, even if asset purchase can be directly traced to workers compensation funds. Debtor entitled to exempt funds that remained in bank account but could not exempt \$6,000 that had been paid by debtor as deposit on purchase of automobile.
- (1739) *Leicht v. Anspach*, 475 BR 612 (Bankr. S.D. Ohio 2012) – Under Ohio law, workers compensation benefits exemption applies only to benefits that have not been paid. Once benefits are paid, benefits are no longer exempt under Ohio law governing exemption for workers compensation. Evidence indicated that debtor received check for lump sum benefits prior to filing bankruptcy, but that debtor had not deposited the check as of the date of the filing. Workers compensation benefits were “paid” when debtor received the check, not the date on which debtor cashed the check.
- (1740) *In re Dang*, Case No. 11-10091 (Bankr. W.D. Mi. 2012) – Lump sum workers compensation benefits can be exempted under Section 522(d)(10)(C) where the funds have not been received at the time the debtor files the petition. Although Debtor's entitlement to compensation and the amount of that compensation had been finally determined prior to commencement of the case, debtor did not actually receive the check until one day after petition filed. Further, the award designated 100% of the proceeds as compensation for lost wages. Debtor could also exempt the payment as a right to receive compensation for loss of future wages under Section 522(d)(11)(E) as debtor had not received the check as of the petition date.
- (1741) *In re Holstine*, 458 BR 392 (Bankr. E.D. MI. 2011) – 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)(11)(E) is not limited to tort recoveries and does not exclude other sources of replacement income such as workers compensation.

7.54 Retirement Accounts

- (1742) *U.S. v. Robinson*, 2016 WL 3041879 (E.D. Ky. 2016) – Funds withdrawn from obligor's 401-k account and deposited into checking account in spouse's name are not exempt under Kentucky law. Obligor no longer had ownership interest in funds after transfer to spouse and so there was no interest for obligor to claim as exempt.
- (1743) *In re Hamacher*, Case No. 14-59741 (Bankr. E.D. Mi. 2015) – Funds received by debtor from state retirement account exempt pursuant to MCL 38.40 remain exempt after being reduced to cash. Funds were held in separate account and were identifiable as proceeds of state retirement account.
- (1744) *Merillat v. Miller*, 2014 WL 1846105 (E.D. Mi. 2014) – Debtor can exempt funds in retirement account that is qualified under Section 401 of Internal Revenue Code. Funds must be “retirement funds” and must be in account that is exempt from taxation under one of the specified sections of the IRC. Funds distributed from account pre-petition are not exempt, even if debtor received but had not cashed check as of petition date and, as of petition date, still had opportunity to deposit funds into qualified account as “roll over”. On the petition date, the funds were not in a retirement account as defined in Section 522(d)(12) and could not be claimed as exempt.
- (1745) *In re Banks*, 2014 WL 180693 (Bankr. C.D. Il. 2014) – Money transferred from debtor's retirement account into bank account where it was co-mingled with non-exempt funds lost their exempt status.
- (1746) *In re Sizemore*, 2013 WL 6328160 (Bankr. E.D. Ky. 2013) – Section 522(d)(10) does not allow debtor to exempt proceeds of life insurance policy. Section 522(d)(10)(E) applies to pensions and retirement accounts. A life insurance policy is not a plan or contract similar to a stock bonus, pension, profit sharing or annuity. Section 522(d)(11)(C) allows debtor to exempt insurance proceeds if the debtor was a dependent of the decedent; to the extent reasonably necessary for the support of the debtor or any dependent of the debtor. Proceeds of insurance received by debtor during pendency of case is property of estate regardless of when received. Decedent was debtor's e-husband. Debtor and her ex-husband lived apart and the property settlement agreement expressly waived any right of debtor to alimony or support. As debtor was not a dependent of the decedent, debtor could not claim as exempt any portion of the insurance proceeds under Section 522(d)(11)(c).
- (1747) *Running v. Miller*, Case No. 13-6026 (8th Cir. BAP 2013) – IRA that was roll over from prior qualified retirement account was exempt although amount of roll over exceeded annual contribution limits to IRAs. Original account was qualified under Section 408 of IRC and would have been exempt in case, and new account was also qualified under IRC Section 408.
- (1748) *In re James*, 489 BR 731 (Bankr. E.D. Tn. 2013) – IRA is presumptively exempt where IRA disclosure statements indicated that from of IRA was model government from provided by IRS and there was no evidence by either party as to whether actual favorable determination had been requested or obtained with regard to account in question.
- (1749) *Ahmed v. Stevenson*, 2012 WL 4513771 (E.D. Mi. 2012) – Share of ex-husband's 401-k account awarded to debtor in divorce constitutes retirement funds that retain exemption as long as funds are deposited in qualified retirement account. However, court also ordered ex-husband to pay debtor her share of equity in marital property and provided that if ex-husband failed to do so, then the payment would be funded from ex-husband's 401-k account. Ex-husband failed to pay, and 401-k plan administrator removed funds from 401-k account and

paid debtor. Debtor received funds and 4 weeks later deposited funds into IRA. Once funds were removed from 401-k account, funds lost “tax exempt” status, distinguishing case from those involving inherited IRAs which pass intact. Debtor’s deposit of funds into new IRA could not protect all funds as IRS regulations limited debtor to an IRA deposit of no more than \$5,000 per year. Funds in IRA were “qualified” funds to extent of \$5,000 and were not exempt for all sums beyond \$5,000.

- (1750) *In re Lawless*, 2012 WL 2974759 (Bankr. E.D. Tn. 2012), *aff’d*, Case No. 14-5290 (6th Cir. 2014) – Debtor’s interest in deferred compensation plan was property of the estate subject to debtor’s right to claim exemptions under 11 U.S.C. Section 522. Tennessee state exemption statute allowed debtor to exempt a right to receive payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of death, age or length of service if the account or plan qualifies under Internal Revenue Code sections 401(a), 403(a), 403(b), 408, 408A, or 409 and where employee could not accelerate payments “so as to receive payment in a lump sum or in period payments over a period of sixty (60) months or less.” Compensation Plan falls within the definition of being paid out “on account of” or “because of” death, age, or length of service where Plan may only be paid out at death, total and permanent disability, or retirement. Plan was funded by employer, was not maintained in individually designated accounts for specified employees, and was a general debt of employer that is owed to the employee from the general assets of employer. Debtor exercised zero control over the funds which are contributed and held exclusively by employer until an agent’s death, total and permanent disability, or retirement. Although account was not qualified under Internal Revenue Code, debtor had not yet begun to receive payments. Condition that plan be qualified applied only to payments received by the debtor under the plan. Failure of those conditions such that the plan was not qualified under the Internal Revenue Code did not prevent debtor from claiming value of deferred compensation plan exempt. However, Plan allowed debtor to accelerate benefits to one lump sum payment or in as few as three annual installments. Both options fell outside statutory requirement that debtor not have the option to accelerate payments. That debtor did not actually elect either option and had elected to receive benefits over 10 years did not alter fact that debtor had the right to accelerate benefits, precluding debtor’s exemption of the assets in the plan.
- (1751) *In re Pellegrini*, 2012 WL 129842 (Bankr. W.D. Mi. 2012) – Debtor could not claim judgment against “investment company” as exempt retirement funds, even if judgment resulted from embezzlement of debtor’s retirement account. Debtor transferred his IRA to Florida company that was Ponzi scheme. When debtor was not able to recover funds from company, debtor sued and obtained judgment against company and principals. Debtor then hired collection agency to collect judgment but efforts were largely unsuccessful. To be exempt, funds must be retirement funds in account that is exempt from taxation. Final Judgment is not “retirement funds” held in “qualified” account. Judgment is not money and is, at best, a right to collect money from third party. Debtor’s stated intention to transfer any money recovered under the judgment into a retirement account does not put money into a qualified account as of the petition date. Court cannot use equitable arguments to override express requirement of statute.
- (1752) *In re Rice*, 2011 WL 3290312 (Bankr. E.D. Mi. 2011) *aff’d* 2012 WL 3870587 (E.D. Mi. 2012) – Section 522(d)(12) allows debtor to exempt amounts in fund or account that is exempt from taxation under specified sections of the Internal Revenue Code. Debtor who received lump sum payout on retirement benefits and used those funds to purchase cashier’s check could not exempt proceeds as they were no longer in a fund or account that was exempt from taxation but were instead in debtor’s possession.
- (1753) *In re Daley*, 459 BR 270 (Bankr. E.D. Tn. 2011), *reversed on other grounds*, 2013 WL 2922651 (6th Cir. 2013) – Issuance of favorable determination letter by IRS creates rebuttable presumption that Debtor’s IRA was tax exempt but presumption could be rebutted by evidence to contrary.

7.55 Retirement Accounts – Prohibited Transactions

- (1754) *Daniels v. Agin*, Case No 12-2376 (1st Cir. 2013) – Failure to maintain profit-sharing plan in substantial compliance with applicable tax law resulting assets in profit-sharing plan being part of bankruptcy estate with debtor failing to disclose his interests in account allowing court to revoke discharge; and also deprived debtor of ability to exempt plan assets or interest. Debtor’s scheduling of the account as tax deferred qualified pension was incorrect as pension was not qualified plan based on prohibited transactions. Plan violated IRS regulations by entering into loan transaction with debtor’s son, a “disqualified person”. Although IRS did not take adverse action when transactions were discovered, that did not alter conclusion that prohibited transaction had occurred and that account was no longer tax preferred under IRS regulations. Debtor also permitted or caused plan to accept deposits from third parties that were not permitted transfers and allowed plan to accept assignment of interest of Debtor’s wife in a realty trust although wife was not plan participant. Multiple prohibited transactions removed plan from scope of Internal Revenue Code 401 and removed account from exclusion from property of estate and disqualified plan from claimed exemption for qualified retirement accounts.
- (1755) *In re James*, 489 BR 731 (Bankr. E.D. Tn. 2013) – Debtor did not engage in prohibited transaction that would disallow favorable tax treatment under Internal Revenue Code when debtor signed account agreement to establish IRA that contained standard from provision granting broker/dealer a security interest for any indebtedness that debtor may thereafter incur, where agreement also stated that lien would be unenforceable to extent inconsistent with any provision of ERISA or Internal Revenue Code, and where there was never any actual indebtedness for lien to secure and lien provisions were never enforced.
- (1756) *In re Daley*, 2013 WL 2922651 (6th Cir. 2013) – Reversing the District Court, 459 BR 270 (Bankr. E.D. Tn. 2011), Sixth Circuit held that debtor did not engage in prohibited transaction merely by signing account agreement that granted to broker a security interest in the account for any indebtedness that debtor incurred with broker. Debtor never borrowed against IRA, never engaged in margin transactions through broker, and never incurred any actual indebtedness to broker, such that no lien ever actually arose against assets of IRA Account had received favorable determination from IRS creating presumption that funds are exempt. IRS provision that prohibits any lending of money or extension of credit by the IRA demands an actual lending or extension, neither of which occurred in this case. Mere inclusion of language in account agreement, without actual loan or extension of credit, did not constitute prohibited transaction.

- (1757) *Willis v. Menotte*, Case No. 10-11980 (11th Cir. 2011) – Debtor’s retirement accounts were not exempt where debtor had engaged in several prohibited transactions under Section 408 of the Internal Revenue Code, such that the accounts lost their tax-exempt status.

7.56 Employee Benefit Plan

- (1758) *Foellmi v. Ries*, Case no. 12-6003 (8th Cir. BAP 2012) – Debtor could exempt value of limited partnership interests under Minnesota state exemption that mirrored Section 522(d)(10)(e). Employer established benefit plan to provide employees with opportunity to participate in plan with goal of promotion of employee loyalty. Plan provided that employees who had been employed for 5 years would receive limited partnership interests, entitling holder to a share of profits and also pass-through tax losses related to real estate. However, interests were not redeemable unless and until corporate issuer agreed to redeem interests, and corporate policy provided that requests for redemption would be considered only if the holder was no longer employed. Debtor’s interests constituted payments received under a stock bonus or profit sharing account on account of length of service. Although statute did not specifically provide for plans that distribute limited partnership interest was not fatal as statute referred to stock bonus, profit sharing, or “similar” plans. Exemption includes any plan that provides income as substitute for wages and is not limited to retirement or disability payments or income. Payments were intended to approximate wages, as payments were intended to reward employee loyalty; interests were taxes as income when received; and redemption would be intended to replace or supplement ex-employee’s wages. Plan met “length of service” requirement as plan was available only to those employed for at least 5 years.

7.57 Inherited Retirement Accounts

- (1759) *In re Norris*, Case No. 15-26458 (Bankr. D.N.J. 2016) – Inherited IRA is not property of estate where applicable state law specified that “qualifying trust” is exempt from claims of creditors and “shall be excluded from the estate in bankruptcy”. Section 541(c)(2) provides that qualifying trusts are not property of estate. As such, issue of whether IRA could be exempted,, which was issue in *Rameker* did not impact debtor’s ability to retain IRA through bankruptcy case.
- (1760) *Clark v. Rameker*, 573 US ____ , 134 S.Ct. 2242, 189 L. Ed. 2d 157 (2014) – Inherited interest in IRA is not exempt as retirement account. Inherited IRA is either traditional IRA or Roth IRA where the original owner has died. If the heir is a spouse, heir can either roll-over IRA into a new IRA, or can maintain the original IRA. For persons other than the spouse, only option is to hold original IRA. Inherited IRAs can be withdrawn at any time without penalty and must be withdrawn either within 5 years of death of original owner or in minimum distributions on annual basis, and person inheriting IRA cannot make any additional contributions. “Retirement funds” are those set aside by a person to provide for the day when the individual stops working. Inherited IRAs are not objectively set aside for purposes of retirement because holder of inherited account never invested money in account; holders of inherited accounts are required to withdraw money, often many years before retirement; and holder can withdraw money at any time without penalty, even if not retired.
- (1761) *In re Jones*, 2013 WL 4084093 (Bankr. D. Neb. 2013) – Debtor’s inherited interest in deceased mother’s pension is not exempt under Section 522(b)(3) as money lost identity as retirement funds once distributed to debtor. Pension plan did not designate beneficiary, such that proceeds passed through mother’s probate estate before being paid to debtor. Once money was paid to estate’s personal representative, it lost identity as retirement funds and was nothing more than another asset of the debtor. Funds in plan lost retirement attributes by being liquidated through the probate estate.
- (1762) *In re Clark*, 2013 WL 1729600 (7th Cir. 2013) - Non-spousal inherited IRA is not exempt. Retirement funds are those funds in an account maintained by a person for his or her own retirement, and includes a decedent’s spouse who inherits the account. However, where beneficiary is a person other than the owner or the spouse, the funds no longer constitute funds set aside by a person for his or her own retirement. Although the inherited account remains sheltered for tax purposes until the money is withdrawn. The new beneficiary cannot make new contributions or roll over the balance or merge the balance with any other account; and distributions must begin within one year of the original owner’s death, rather than being deferred until the beneficiary reaches age 59 -1/2.
- (1763) *In re Stephenson*, 2011 WL 6152960 (E.D. Mi. 2011) – In determining whether inherited IRA may be claimed as exempt, court must first decide whether the funds constitute “retirement funds” and, if so, must determine whether the funds are exempt from taxation. Statute does not require that funds be “debtor’s” retirement funds, and can be retirement funds of others. Funds cannot be withdrawn by debtor and debtor is not taxed until funds are withdrawn, meaning funds must be considered tax exempt. “Overwhelming authority” supports claim of inherited IRA as exempt. Debtor properly claimed interest in inherited IRA as exempt.
- (1764) *In re Taber*, 2011 WL 4048521 (Bankr. N.D. Ohio 2011) – Ohio law allowed Debtor to exempt inherited IRA.
- (1765) *In re Kalso*, 2011 WL 3678326 (Bankr. E.D. Mi. 2011) – Debtor’s inherited IRAs can be exempted under Section 522(d)(12). The language of Section 522(d)(12) does not make a distinction as to who contributed the funds to the IRA.
- (1766) *In re Clark*, 2011 WL ____ (Bankr. W.D. Wis. 2011) – Inherited Individual Retirement Account was not exempt under Section 522(b)(3) or 522(d)(12). Debtor claiming exemption under State Law must comply with Section 522(b)(3) which requires (1) the amount the debtor seeks to exempt must be retirement funds; and (2) those retirement funds must be in an account that is exempt from taxation under 401, 403, 408, 408(A), 414, 457, or 501(a) of the Internal Revenue Code. Inherited IRA does not contain anyone’s “retirement funds.” Debtor’s Mother established the retirement account, and elected her daughter as a beneficiary of the account. Debtor’s Mother intended the funds to be for her retirement. After Ms. Heffon passed away, however, the funds passed to her beneficiary. Once Mom died, the funds could no longer be classified as anyone’s retirement funds - Mother had died and was incapable of retiring further or using the funds during her retirement, and Debtor was able (in fact obliged) to take distributions from the account while both of the debtors continued to work. The funds are held in anticipation of no person’s retirement and do not constitute “retirement funds.” They are not segregated to meet the needs of, nor distributed on the occasion of, any person’s retirement.

- (1767) *Chilton v. Moser*, 2011 WL 938310 (E.D. Tx. 2011), *aff'd* 674 F.3d 486 (5th Cir. 2012) - Individual retirement account (IRA) that Chapter 13 debtor inherited prepetition from her late mother was exempt from claims of her creditors pursuant to Bankruptcy Code exemption for sums in retirement fund or account. Funds in mother's IRA represented her retirement funds prior to her death and remained "retirement funds" following their direct transfer to account established by debtor, and inherited account was exempt from taxation under Internal Revenue Code Section 408(e). Section 522 exemption is not limited to retirement funds contributed by or constituting retirement funds of the debtor, only that the funds be retirement funds that are exempt from tax under Section 408(e). Code does not draw distinction between "ordinary" IRA and "inherited" IRA in section 522.
- (1768) *In re Nessa*, 426 B.R. 312 (8th Cir. 2010) - Bankruptcy Code imposes two requirements before a debtor may claim an exemption in retirement funds: (1) the amount the debtor seeks to exempt must be retirement funds, and (2) the retirement funds must be in an account that is exempt from taxation under one of the provisions of the Internal Revenue Code set forth therein. Individual retirement account (IRA) that Chapter 7 debtor inherited from her father prepetition qualified as exempt under the Bankruptcy Code's exemption for retirement funds; it was undisputed that the amounts in the father's IRA were his retirement funds prior to his death, the contents of the father's account remained, in form and substance, "retirement funds" following their direct "trustee-to-trustee" transfer to the inherited account, even though they were not debtor's own retirement funds, and debtor's inherited account was exempt from taxation under the section of the Internal Revenue Code governing individual retirement accounts.
- (1769) *In re Kuchta*, 434 B.R. 837 (Bankr. N.D. Ohio 2010) - Inherited individual retirement account (IRA) that Chapter 7 debtor acquired upon her mother's death qualified as exempt under federal bankruptcy exemption for retirement funds; it was undisputed that amounts in IRA represented retirement funds of debtor's mother prior to her death, these account funds remained, in form and substance, "retirement funds" following their direct trustee-to-trustee transfer even though they were not debtor's own retirement funds, and debtor's inherited IRA was exempt from taxation under section of the Internal Revenue Code governing IRAs.
- (1770) *In re Tabor*, 433 B.R. 469 (Bankr. M.D. Pa. 2010) - Chapter 7 debtor who elected exemptions that included property exempt under state law could claim as exempt funds in inherited individual retirement account (IRA) where, as with ordinary IRA, funds were deposited in original custodial account as retirement funds and were exempt from federal taxation until funds were withdrawn. Funds were transferred by direct transfer to IRA in Debtor's own name and debtor had not taken any distributions from that account.
- (1771) *In re Weilhammer*, 2010 WL 3431465 (Bankr. S.D. Cal. 2010) - Debtor inherited mother's individual retirement account (the "Initial IRA") on her death and directly transferred the funds held therein to an individual retirement account established in his name as beneficiary (the "Recipient IRA"). The Recipient IRA constituted an "inherited individual retirement account" within the meaning of 26 USC section 408(d)(3)(C). Funds in an inherited IRA are retirement funds that debtor may claim as exempt under Section 522(b)(3)(C).

7.58 Retirement Accounts – QDRO

- (1772) *In re Kizer*, 2015 WL 6437435 (Bankr. E.D. Mi. 2015) – Debtor's interest in former spouse's retirement account, acquired by debtor through QDRO entered in prior domestic proceeding, was not exempt as retirement account under Section 522(d)(12). To be exempt, funds must be in account that is "objectively" for retirement purposes, and not merely a fund that originated as retirement fund but is now fund that debtor can access at will. Account will not be "retirement account" if holder of account cannot invest additional money into account; or where holder of account is required to withdraw funds before specific retirement age; or where holder can withdraw funds at any time for any purpose without penalty. Debtor could not contribute to accounts acquired by debtor pursuant to Qualified Domestic Relations Order pursuant to terms of Plan, although debtor could leave funds in plan and relocate investments within plan. Debtor also permitted to withdraw funds at any time and for any purpose without penalty, and debtor did in fact withdraw large sums from accounts paying only income taxes but no early withdrawal penalty. While there was no evidence as to whether debtor was required to take required minimum distributions, evidence established that accounts, considered objectively, were pot of money that can be freely used and were not exempt retirement funds.
- (1773) *In re West*, 507 B.R. 252 (Bankr. N.D. Ill. 2014) – Transfer of IRA pursuant to QDRO expressly preserved retirement nature of the plan such that spouse's interest remained exempt in her Chapter 7 case. Under state law, retirement account was marital property in which debtor had interest that became quantifiable as her separate property upon entry of QDRO.
- (1774) *In re Swarup*, 521 B.R. 382 (Bankr. M.D. Fla. 2014) – Florida statutory exemption for retirement accounts encompassed debtor's interest in ex-spouse's retirement account received as part of division of marital assets.

7.59 Inherited 529 Plans

- (1775) *In re Hennessey*, 2015 WL 237231 (Bankr. D. Mn. 2015) – Debtor's inherited 529 plan is excluded from debtor's estate. Debtor's mother purchased 529 plan for debtor. When mom died, debtor inherited the 529 plan but debtor did not contribute any money to plan either before or after inheritance. Court distinguished *Clark v. Rameker* noting that *Clark* dealt with exemptability of IRA while issue with 529 plan is whether plan ever became property of estate in first instance. Under Section 541(b)(6), debtor's interest never became property of estate where mom satisfied all elements of Section 529. Plan was purchased through proper provider, plan was funded with single contribution made more than 720 days pre-petition, and heir possessed no different rights than did the purchaser. Unlike inherited IRA, a 529 plan is meant to serve the same purpose – payment of qualified educational expenses – regardless of whether account is owned by original settler or heir.

7.60 Tax Refunds

- (1776) *Webster v. Mooney*, 2015 WL 236432 Bankr. M.D. Ga. 2015) – Tax refunds will be prorated by number of days pre- and post-petition to determine amount which is pre-petition property of estate.

- (1777) *Christians v. Dmitruk*, Case No. 14-6023 (8th Cir. BAP 2014) – Portion of tax refund for State Education Tax Credit exempt under state statute that exempts “government assistance based on need”. Tax credit provided for maximum credit per child, with credit phasing out at the rate of \$1 for every \$4 of income over certain caps based on family size. Tax credit phases out at relatively low amount indicating intent that credit be based on economic needs of low income recipients. Credit has been determined by state to assist relatively low income people regardless of whether they pay taxes to assist with education expenses, and as such are based on need.
- (1778) *In re Yost*, 2014 WL 2547714 (Bankr. N.D. Ohio 2014) – Non-refundable portion of Child Tax Credit is not exempt under Ohio statute that allows exemption for “payments” under CTC. Payment requires that tax credit be refundable before it can be claimed as exempt. Non-refundable credit can be used only to offset tax liability. Debtor can exempt entire Earned Income Credit as EIC is fully refundable and constitutes “payment” under Ohio law. Where refund consists of both refundable and non-refundable credits, court will not require allocation of refundable and non-refundable credits as percentage of total refund. Debtor entitled to claim full refundable credit as exempt.
- (1779) *In re Briley*, 2013 WL 3146901 (Bankr. S.D. Ind. 2013) – Tax refund attributable to American Opportunity Tax Credit is not exempt. State statute that allowed for exemption of Earned Income Credit did not extend to AOTC.
- (1780) *In re Stepp*, 2013 WL 4853328 (Bankr. N.D. Ohio 2013) – Ohio law allows debtor to claim as exempt tax refunds to extent that refund results from earned income credit or child tax credit. Refund was clearly attributable to the credits where debtor’s W-2 statements reflected no tax withholdings, and returns showed that entire refund was attributable to credits.
- (1781) *US Department of Agriculture v. Riley*, 485 BR 361 (W.D. Ky. 2012) – Debtor does not have property interest in potential tax refund until IRS determines amount of tax overpayment and then exercises right of setoff for past-due obligations owed to Governmental agencies. Secretary of Treasury must reduce a debtor’s “tax overpayment” by past-due amounts owed to other agencies before determining whether taxpayer is entitled to refund. Debtor’s interest in a refund is contingent upon the statutory determination of what portion of tax overpayment remains for debtor to receive as a refund. Where unpaid governmental debt exceeds entire tax overpayment, there is no money left over to become property of debtor-taxpayer’s estate, and thus nothing for debtor-taxpayer to claim as exempt. Given that amount of Chapter 7 debtor-taxpayers’ obligation to federal agency, for deficiency balance remaining after mortgage loan foreclosure, exceeded amount of debtors’ overpayment of federal income tax, debtors never became entitled to tax refund, and thus had no refund that became estate property and could be claimed as exempt.
- (1782) *Cohen v. Borgman*, Case No. 11-1369 (10th Cir. 2012) – Amount of federal tax refund equivalent to the “nonrefundable” portion of the child tax credit cannot be claimed as exempt. Colorado Statute exempts only tax refund attributable to the child tax credit. Although the credit may result in a greater refund (as the credit offsets the tax liability), that does not convert the non-refundable portion into a part of the refund itself. State statute limited exemption to refund “attributable to” the child tax credit. As none of the refund was attributable to the non-refundable credit, debtor could not exempt the tax refund.
- (1783) *In re Zingale*, 2011 WL 2330271 (6th Cir. BAP 2011) *aff’d* 2012 WL 3764693 (6th Cir. 2012) – Non-refundable portion of Child Care Tax Credit is not a “payment” as defined in Ohio statute on exemptions and may not be claimed exempt. Non-refundable tax credit can be used only to satisfy tax liabilities and is not, itself, ever refunded to the taxpayer.

7.61 College Savings Accounts and Student Loan Proceeds

- (1784) *In re Perkins*, 2011 WL 4458961 (Bankr. N.D. Ohio 2011) – Ohio exemption for State created Tuition Payment Contract is limited to funds and rights to payment from that account and does not extend to student loans received under Federal Direct Loan program. However, 20 USC Section 1087a, which established the Federal Direct Loan program, provides that no grant, loan, or work assistance awarded or traceable to a Federal Direct Loan is exempt. Debtor can exempt student loan proceeds even after deposit into a bank account if debtor can trace the proceeds to the student loan using a standard accounting method. The Court will use the accounting method that is most beneficial to the debtor. Debtor received \$2,886.22 in student loan funds deposited into debtor’s account and debtor’s balance never fell below that amount prior to garnishment by creditor. Therefore, that balance would be deemed traceable to the student loans in which debtor properly claimed exemption.

7.62 Spousal Support, Child Support and Separate Maintenance

- (1785) *In re Asiedu*, 2016 WL 6269589 (Bankr. N.D. Ohio 2016) – Ohio Revised Code Section 2329.66(A)(11) allows a debtor to exempt right to receive spousal support, child support, an allowance or other maintenance to extent reasonably necessary for support of debtor and debtor’s dependents. Award of attorney fees and litigation expenses was in nature of support where state court specifically noted that award was in nature of support and was designed to compensate debtor for fees for multiple motions to show cause and extra discovery to obtain relevant financial records for determination of final support amount. Although State Court designation of award as “support” is not determinative, award was made in connection with efforts to obtain support and was not in the portion of the Divorce Decree where property was distributed or debts allocated. Fact that award would not terminate on remarriage was not dispositive as award was “one time” award to be paid immediately rather than long term stream of payments where continuation beyond remarriage would indicate that award was support. Other factors include disparity of earning power between parties; need for economic support and stability; presence of minor children; and marital fault. State Court specifically noted that debtor had been awarded temporary support, that parties had earning disparity, division of marital assets included no liquid assets from which attorney could be paid, and ex-husband’s conduct exacerbated litigation costs; all of which when coupled with designation as “support” created strong inference that award was intended as support and not property settlement. Court set subsequent hearing to determine whether award was reasonably necessary for maintenance and support of debtor and children.
- (1786) *In re Kooi*, 2016 WL 1178377 (Bankr. W.D. Mi. 2016) – Section 522(d)(10)(D) allows a debtor to exempt a right to receive alimony, support or separate maintenance. Distributions to debtor were not alimony or support but constituted property settlement where Divorce and Property

Settlement clearly excluded assets from portion of Agreement that covered spousal support and specifically included assets in section titled “Property Division”. Mediation transcript and hand written notes of mediator further evidenced that assets were part of property settlement. Documents were clear and unambiguous and court is not required to look behind plain language to determine nature of award. Order contained separate meaningful alimony provision; obligation in question was clearly defined as property settlement; label given matched actual characteristics of assets; and evidence did not indicate any conspiracy to disguise true nature of obligation.

- (1787) *In re Stookey*, 2015 WL 5056905 (Bankr. N.D. Ohio 2015) – Ohio law allows exemption of right to receive support, allowance or other maintenance to extent reasonably necessary to support person or dependent of person. Provision of divorce decree requiring husband to pay wife \$10,000 was in section defined as property settlement and was outside of two clearly defined sections dealing with spousal and child support. Payment did not appear to be for sustenance or support of former spouse and none of the statutory factors for determining support were used or reflected as the basis for the award. Property settlement was not within scope of exemption for support.
- (1788) *In re Roberts*, 2015 WL 4038946 (Bankr. N.D. Ohio 2015) – Exemption for unpaid child support is not limited to amount necessary for support of dependent child. Debtor, whose children are grown, can exempt arrearage to extent necessary for support of debtor. The “right to receive child support encompasses both current and past child support.
- (1789) *Merillat v. Miller*, 2014 WL 1846105 (E.D. Mi. 2014) – Alimony, support or separate maintenance is not limited to payments of money. Property to be transferred pursuant to divorce decree can constitute alimony or separate maintenance if parties intended for transfer to constitute separate maintenance. Homestead transferred to debtor as part of pre-petition divorce proceedings not automatically excluded as exempt under Section 522(d)(1) which provides for exemption of support or maintenance.
- (1790) *In re Smith*, 2012 WL 7006405 (Bankr. S.D. Ohio 2012) – Ohio law allows debtor to exempt a right to receive spousal support, child support, an allowance or other maintenance to extent reasonably necessary for support of debtor or dependent of debtor. “Right to receive” does not require court order. Entitlement created by statute is sufficient “right to receive” payment. Debtor had “right to receive” federal adoption tax credit under Federal tax law, even if IRS had not made final determination on return or possible offset against taxes owed. Credit is fully refundable, giving debtor a “right to receive” proceeds from IRS. Ohio does not define “allowance” and court would not limit scope of “allowance” to those emanating from divorce decree.
- (1791) *In re Traut*, 2012 WL 909550 (Bankr. N.D. Ohio 2012) - Ex-spouse’s obligation to pay debtor pursuant to a division of property was not “spousal support” and therefore, was not exempt under Ohio’s statute which permits debtor to exempt a right to receive spousal support, child support, and allowance, or other maintenance.

7.63 Property In Possession Of Custodian or Receiver

- (1792) *In re Bullitt Utilities, Inc.*, 2016 WL 4574310 (Bankr. W.D. Ky. 2016) – Once a bankruptcy petition is filed, even after the appointment of a state court-appointed receiver is in place, the default position under the Bankruptcy Code is that a debtor is entitled to custody of its property and custodians of estate property must turnover the property to the Trustee unless best interests of creditors would be better served by allowing the custodian continuing in possession, custody or control of the property. Appointment of custodian or receiver does not divest debtor of title to assets and any property of debtor as of date of commencement of case remains property of estate regardless of pre-petition appointment of receiver or custodian.

7.64 Exemptions – Contract Rights

- (1793) *In re Dunn*, 2015 WL 1865567 (Bankr. E.D. Tn. 2015) – Debtor with bare possessory right to property has no real property interest that can be claimed as exempt. Debtor defaulted on land contract and land contract vendor declared contract terminated. Contract provided that upon termination, all payments made by debtor were to be retained by vendor as liquidated damages. When debtor later filed bankruptcy, debtor had no interest in the real estate or in any of the payments made under the land contract. Debtor’s sole interest was a mere possessory interest as debtor still resided on the property. Debtor could not assert exemption in proceeds later recovered by trustee from land contract vendor in exchange for trustee’s agreement to abandon property.

7.65 Tracing of Proceeds of Exempt Asset

- (1794) *U.S. v. Robinson*, 2016 WL 3041879 (E.D. Ky. 2016) – Funds withdrawn from obligor’s 401-k account and deposited into checking account in spouse’s name are not exempt under Kentucky law. Obligor no longer had ownership interest in funds after transfer to spouse and so there was no interest for obligor to claim as exempt.
- (1795) *In re Chehadi*, Case no. 15-46403 (Bankr. E.D. Mi. 2015) – Debtor’s social security income lost any claim of exemption where debtor, before filing bankruptcy, transferred funds from her account into account held by spouse and daughter. Transfer conveyed absolute title to funds to spouse and daughter and debtor lost any interest in funds and funds lost character as social security. Further, debtor transferred funds for specific purpose of keeping funds away from garnishing creditor. Even if debtor transferred funds to spouse and daughter under trust relationship or where transferee was supposed to use funds for debtor’s benefit, transfer itself was for improper purpose such that alleged conditional nature of transfer would be disregarded and funds would be deemed to have vested entirely in transferee. Debtor cannot transfer funds to keep funds from reach of creditors and later claim to have retained interest in funds for purposes of claiming funds as exempt.
- (1796) *In re Hamacher*, Case No. 14-59741 (Bankr. E.D. Mi. 2015) – Funds received by debtor from state retirement account exempt pursuant to MCL 38.40 remain exempt after being reduced to cash. Funds were held in separate account and were identifiable as proceeds of state retirement account.

- (1797) *In re Karn*, 2014 WL 3844829 (Bankr. N.D. Ohio 2014) – Proceeds withdrawn from IRA retain exempt status after deposit of funds into bank account as long as account into which funds are deposited is not for immediate consumption but for retirement savings. Exemption continues as long as funds are withdrawn for retirement purposes of for a purpose reasonably certain to benefit the debtor in retirement. Funds withdrawn from IRA and deposited into business account for debtor's sole proprietorship retained exempt status. Although funds were actually used for business purposes, evidence indicated that business was profitable and use of funds would enhance debtor's financial condition and, eventually, would produce additional income and savings for retirement.
- (1798) *In re Stepp*, 2013 WL 4853328 (Bankr. N.D. Ohio 2013) – Ohio law allows debtor to claim as exempt tax refunds to extent that refund results from earned income credit or child tax credit. Refund was clearly attributable to the credits where debtor's W-2 statements reflected no tax withholdings, and returns showed that entire refund was attributable to credits. Fact that debtor received proceeds prior to commencement did not preclude debtor from claiming exemption where proceeds were traceable to funds paid as part of divorce proceeding.
- (1799) *Barbacci v. Worrell*, 2013 WL 4525227 (Bankr. N.D. Ohio 2013) – Generally, as long as funds can be traced, exempt funds do not lose their exempt nature merely through deposit into bank account. To extent debtors could trace portion of income tax refunds to earned income credit and child tax credit, debtors likely would have been able to exempt those funds.

D. Liens Impairing Exemptions – Avoidance

7.66 Procedure

- (1800) *Huston v. Haught*, 2014 WL 5089727 (Bankr. S.D. Ohio 2014) – Complaint to avoid judgment lien on garnished funds failed to state cause of action where complaint failed to reference any statutory provision in support of Plaintiffs' request that the lien be avoided and failed to contain any factual allegations that would otherwise provide notice to the Defendant and the Court of the basis upon which the Debtors believe the judgment lien is avoidable. The Complaint also failed to identify: (1) the dollar amount of the claimed exemptions; (2) whether one debtor or both have claimed an exemption in the Garnished Funds; and (3) the statutory provision(s) under which the exemptions are claimed.
- (1801) *White v. Commercial Bank and Trust Co.*, Case No. 11-6032 (8th Cir. 2011) – In determining potential exemption of property that is subject to potentially avoidable judicial lien, Court must first determine whether property would be exemptible in the absence of the judicial lien. Debtor properly claimed exemption in homestead consisting of 80 acres where applicable state law allowed homestead with a value not to exceed \$2500 but in any event not less than 80 acres.
- (1802) *In re Berry*, Case No. 09-43489 (Bankr. E.D. Mi. 2009) - Motion to Avoid Judicial Lien denied without prejudice. Action to avoid judicial lien pursuant to Section 522(f) must be by adversary proceeding pursuant to Federal Rules of Bankruptcy Procedure 7001(2) and 4003(d).

7.67 Service of Motion

- (1803) *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.

7.68 Grounds – Generally

- (1804) *In re Davis*, 2015 WL 5936873 (Bankr. S.D. Ohio 2015) – State exemption statute that purported to hold that certain judgment liens held by State were not subject to avoidance is pre-empted by bankruptcy code. State attempt to preserve lien that otherwise impairs exemption conflicts with Section 522(f)(1).
- (1805) *In re Gokay*, 2015 WL 4924562 (Bankr. S.D. Ohio 2015) – State exemption statute that purported to hold that certain judgment liens held by State were not subject to avoidance is pre-empted by bankruptcy code. State attempt to preserve lien that otherwise impairs exemption conflicts with Section 522(f)(1).
- (1806) *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 unavowed and enforceable where trustee does not pursue avoidance.
- (1807) *In re Harris*, 2014 WL 7361834 (Bankr. W.D. Mi. 2014) – Debtor can exempt judicial lien only to extent it impairs debtor's exemption in property. By definition, debtor must have interest in the underlying property. Debtor's Motion to Avoid Judicial Lien denied where debtor

did not own any real property to which lien could have attached. Debtor's request to avoid lien against "any current or future interest" did not avoid lien as lien had not attached to any property of debtor. Fact that judgment lien statute allows lien to attach to after acquired property does not create lien on any current property where debtor has not acquired any property to which lien could attach. Whether lien could theoretically attach to some property at some point in the future did not present current issue capable of determination and would present court with advisory opinion that courts are not authorized to enter.

- (1808) *In re Houser*, 2015 WL 128232 (Bankr. E.D. Tn. 2015) – Section 522(f) allows avoidance of judicial liens that impair exemptions. Formula for determining avoidability starts with value of exempt asset minus sum of non-avoidable liens, the exemption, and the judicial lien to be avoided. If the resulting sum is negative, the lien is subject to avoidance. If the motion seeks to avoid more than one lien, court starts with lowest priority lien and, once avoided, that lien is no longer taken into account for calculations relating to other liens. Lien survives only to extent calculation produces positive number, and survives to extent of that amount capped at the amount owed on the obligation.
- (1809) *In re Bonds*, 2014 WL 1796691 (Bankr. E.D. La. 2014) – Debtor can bifurcate partially secured lien and avoid wholly unsecured lien where lien in question is non-consensual lien. *Dewsnup* applies only to consensual liens and does not prevent bifurcation or stripping of judgment liens that are partially or wholly unsecured. Section 522(f) allows strip down or strip off of judicial liens to extent liens impair exemptions.
- (1810) *Goben v. Croyden State Bank*, Case No. 13-6039 (8th Cir. BAP 2013) – Debtor cannot avoid consensual lien given to bank secured by liens on debtor's automobile. Section 522(f) does not allow avoidance of lien on automobile as automobile is not in the classes of assets listed in Section 522(f) as to which lien avoidance is available.
- (1811) *In re Depascale*, 2013 WL 4478692 (Bankr. N.D. Ohio 2013) – Extent of homestead exemption for purposes of determining whether judgment lien impaired exemptions is allowable exemption when bankruptcy case is filed, not earlier date when judgment lien attached. Debtor entitled to full Ohio exemption of \$132,900 in effect when bankruptcy case filed rather than \$21,625 exemption that was allowed at time judicial liens attached.
- (1812) *In re McGuire*, 2013 WL 4029297 (Bankr. N.D. Ohio 2013) – Debtor cannot avoid lien on property where debtor has not claimed property as exempt. Debtors did not claim property as exempt where Debtors' Schedule C listed the value of debtors' interest at \$0.00 and asserted a value of claimed exemption of \$0.00. Debtors could not show that debtors had any property in which exemption is properly claimed.
- (1813) *In re Law*, 2013 WL 4078844 (Bankr. N.D. Ohio 2013) – Section 522(f) permits a debtor to avoid a judicial lien that impairs an exemption. A lien impairs an exemption to extent that sum of lien plus all other unavoidable liens plus exempt amount exceeds value of debtor's interest. Debtor cannot avoid a judicial lien on property in which debtor did not claim an exemption, even if the value of the property is less than the unavoidable liens in the property.
- (1814) *In re Pees*, 2013 WL 3808153 (Bankr. N.D. Ohio 2013) – Debtor can avoid judicial lien where value of property is less than value of unavoidable liens plus exemptions. Debtor permitted to avoid lien after claiming asset exempt to extent of \$1.00 using wild card exemption. As amount of unavoidable secured liens plus \$1.00 claimed exemption exceeded value of property, judgment lien was avoidable. Court rejected creditor argument that debtor's claiming of exemption only to extent of \$1.00 was "artificial impairment" done solely to allow avoidance of lien, and not for any good faith basis to actually claim exemption in which debtor had no equity. Court concluded that language of "wild card" exemption allowed debtor to spread that exemption as desired by the debtor and did not either require debtor to use specific amount on any particular asset or limit purposes for which exemption was claimed.
- (1815) *In re Young*, 2012 WL 1717868 (Bankr. E.D. Tn. 2012) – Judgment lien avoidable as impairing homestead exemption. Judgment lien may be avoided to extent that the sum of that lien plus all other liens on the property plus the amount of exemptions that could be claimed exceeds total value of property. Property valued at \$143,700.00 encumbered by mortgage of \$96,000 and exemption of \$50,000 left no equity to which judgment lien could attach, leaving entire lien avoidable.
- (1816) *In re Hettinger*, 2011 WL 6148623 (Bankr. W.D. Ky. 2011) – Judgment lien is avoidable to the extent the total of the lien to be avoided plus all other liens plus allowed exemptions exceeds the value of the property. Evidence indicated that value of property was \$410,000. Total liens and exemptions equaled \$512,000. Judgment lien avoidable to the extent of \$112,000, leaving \$22,000 of lien unavoidable.
- (1817) *In re King*, 2011 WL _____ (Bankr. N.D. Iowa 2011) – Lien on Motor vehicle not avoidable under Section 522(f)(1) – motor vehicle used by debtor to commute to work is not "tool of the trade" or "household good".
- (1818) *Gilchrist v. United Bank & Trust Co.*, 467 BR 113 (E.D. Ky. 2012) – Under Kentucky law, mortgage must identify property being encumbered, the interest that is being encumbered, and the party signing the mortgage. Although "not a model of clarity", mortgage which did not identify mortgagor in body of mortgage sufficiently identified mortgagor through reference to various riders to the mortgage all of which were incorporated in the mortgage by reference and which identified Debtor-husband as the party signing the mortgage, and including property description itself which states that property being encumbered was the property "acquired by John I. Gilchrist, a single person, by deed dated July 7, 1995". There was no dispute that husband executed mortgage and intended to encumber his interest in the property by doing so. As mortgage was valid and enforceable, bankruptcy court erred in excluding amounts owed on mortgage in determining whether judicial lien encumbered exemptions.
- (1819) *Johnson v. Cach, LLC*, 2010 WL 5296944 (E.D. Mi. 2010) – Debtor entitled to avoid lien and recover tax refund seized by creditor pursuant to Writ of Garnishment served on State of Michigan within preference period. Perfection of lien by service of Writ would be avoidable under Section 547. Under Section 522, Debtor is permitted to exempt property that is recovered under Section 547 as long as initial transfer was involuntary. Garnishment constituted involuntary transfer that would be avoidable and, if not avoided, would result in creditor receiving more than creditor would have received in Chapter 7 had transfer not been made.

- (1820) *In re Kuykendall*, Case No. 10-10358 (Bankr. W.D. Ky. 2010) - Section 522(f)(1) permits debtor to avoid security interest if the lien is a non-possessory non-purchase money obligation, to the extent it impairs an exemption. Debtor's Motion denied where Motion failed to demonstrate value of jewelry subject to security interest and debtor's exemption limited to jewelry with a fair market value in excess of \$600.
- (1821) *Akers v. Citimortgage, Inc.*, 427 B.R. 408 (Bankr. W.D. Ky. 2010) - Sections 522(f) and 522(h) permits debtor to avoid non-consensual liens. Debtor cannot avoid voluntarily conveyed security interest in Manufactured Home as granting of security interest is a voluntary act.

7.69 Valuation

- (1822) *First Southern National Bank v. Sunnyslope Housing, LP*, Case No. 12-17241 (9th Cir. 2016), *en banc* review pending, ____ WL ____ (9th Cir. 2016) – Valuation of collateral for purposes of Cramdown under Section 1129 is determined from perspective of creditor even where debtor proposes to retain collateral and its contemplated use. Ninth Circuit has set case for rehearing *en banc*.
- (1823) *Deutsche Bank National Trust v. Jackson*, Case No. 19-81506 (S.D. Fl. 2016) – Two-year delay between valuation hearing and proposed confirmation of plan required new valuation hearing. Substantial delay converted what would appear to be final valuation order into interlocutory order and lender would not be barred from introducing evidence of post-petition appreciation in value. While this does not convert all valuation orders into interlocutory ones or provide that parties are always at liberty to reargue valuation, confirmation two years later warranted reconsideration under Sections 506 and 1129 as valuation is to be contemporaneous with purposes of valuation in first instance.
- (1824) *McDuffie v. West*, 2016 WL 4186853 (E.D. N.C. 2016) – Judicial lien is avoidable to extent that value of property is less than superior, unavoidable liens and exemptions. If value exceeds liens and exemptions, then judicial lien attaches only to excess value. Debtor can testify as to value of property under Rule 701 as long as testimony is opinion rationally based on debtor's own perceptions. Debtor's testimony as to value not permitted where debtor merely parroted value assigned by tax assessor in property tax bills. Testimony did not present any opinion of debtor or any basis for an opinion, as debtor merely repeated value assigned by taxing authority. And took that value at face value without actually considering whether it was correct. Homeowner can offer opinion as long as it is his opinion, and is afforded long leash when it comes to basis of that opinion, and almost any basis within the perception of the homeowner is sufficient including information provided by third parties as to value, and familiarity with land and its productivity. Any discrepancies or miscalculations go to weight, not admissibility. But at end, testimony must be that of the Owner, not merely the conclusion reached by third party and repeated by Owner.
- (1825) *In re Baham*, 2014 WL 6485658 (Bankr. W.D. Ky. 2014) – Lien is avoidable only to extent that value of property is less than sum of unavoidable liens plus exemptions. Value of property is based on fair market value, and cannot be reduced for "depreciation". Property valued at \$81,000 less mortgage of \$13,755 and les homestead of \$40,348 leaves \$26,879 to which lines could attach. Bank's judicial lien of \$39,355 avoided to extent it exceeds \$26,879. Second lien of medical provider of \$1,653 avoided entirely.
- (1826) *In re Kindall*, 2014 WL 960794 (Bankr. S.D. Ohio 2014) – Property owned by two or more people with right of survivorship results in each owner being entitled to an equal share of the title during their lifetimes, and upon death of any one, the title of the decedent vests proportionately in the surviving tenants. Property owned by debtor and non-filing spouse gave to each owner an undivided one-half interest. Value of debtor's interest would be one-half of value of property as a whole.
- (1827) *In re Younoszai*, 478 BR 841 (Bankr. W.D. Ky. 2012) – Judgment lien is avoidable to extent sum of lien plus all other liens on property plus exempt amount exceeds value of property. Value is fair market value for property. Debtor's appraisal appeared to undervalue property as it used condominium units that were somewhat different than debtor's unit and did not take into account that debtor had previously rented unit for as much as \$2400 per month. Court also considered tax assessed value. Court concluded that actual value was mid-point between debtor's appraiser and tax assessed value.
- (1828) *In re Lavine*, 2012 WL 4106749 (Bankr. N.D. Ohio 2012) – Valuation of property for purposes of avoiding judicial lien where property is owned as joint tenants but judgment is against only one of the owners is based on one-half of the value of the property. As joint tenant, debtor had the right to use and possess one-half of the property versus tenancy-by-entirety in which each tenant owns the property in full. Property was also subject to first mortgage signed by both debtor and spouse. To determine whether lien impairs exemption, and to what extent, court would divide mortgage by two and charge only half of the mortgage balance plus the judicial lien against the value of debtor's one-half interest in the property.
- (1829) *In re Young*, 471 BR 715 (Bankr. E.D. Tn. 2012) – Petition date controls date of valuation for purposes of exemptions as well as actions to avoid liens that impair exemptions. Under Tennessee law, both Husband and Wife are entitled to \$25,000 exemption in homestead. In joint case, Husband and Wife are permitted to aggregate exemptions, allowing exemption of total of \$50,000.00.
- (1830) *In re Hettinger*, 2011 WL 6148623 (Bankr. W.D. Ky. 2011) – Valuation of property for purposes of avoiding exemptions is value of property on date petition is filed. Debtor's appraisal discounted as prepared more than one year after the petition was filed and debtor listed value in schedules as of petition date at significantly higher amount. Lender appraisal discounted because lender's appraisal was dated more than 4 years prior to the petition date, before the housing market crash. Court took into account scheduled value as well as court's knowledge of general market conditions and impact of market crash to determine value of property.

7.70 Joint Ownership

- (1831) *In re Kindall*, 2014 WL 960794 (Bankr. S.D. Ohio 2014) – Property owned by two or more people with right of survivorship results in each owner being entitled to an equal share of the title during their lifetimes, and upon death of any one, the title of the decedent vests proportionately in the surviving tenants. Property owned by debtor and non-filing spouse gave to each owner an undivided one-half interest. Value of debtor's interest would be one-half of value of property as a whole. Judicial lien would then be avoidable to extent lien impaired

exemptions. Under plain language of Section 522, Court would deduct from debtor's proportionate value 100% of the consensual liens, including the consensual lien executed by debtor and non-filing spouse. Court rejected argument that consensual liens should be deducted from whole value of property before allocating equity to debtor, or that only one-half of joint consensual liens should be deducted from value of debtor's one-half interest. Property valued at \$210,000 owned jointly by husband and wife, subject to consensual mortgage of \$130,000.00; and judgment lien against husband's interest only of \$142,000. Value of husband's interest was \$105,000, encumbered by entire balance of consensual lien of \$130,000 left no equity in property over and above claimed exemptions to which judgment lien could attach. Lien was avoidable in its entirety.

- (1832) *In re Law*, 2013 WL 4078844 (Bankr. N.D. Ohio 2013) – Section 522(f) permits a debtor to avoid a judicial lien that impairs an exemption. A lien impairs an exemption to extent that sum of lien plus all other unavoidable liens plus exempt amount exceeds value of debtor's interest. Where property is owned jointly with non-debtor, strict application of Section 522 may result in windfall to debtor as entire amount of unavoidable lien would be used while only value of debtor's interest in the property is included. Better method is to value debtor's interest in the property based on debtor's proportionate interest in the property, and then deduct from that interest the same proportionate amount of the liens against the property, plus all of the amount of any judgment lien where only the debtor is the judgment debtor.

7.71 Trust Property

- (1833) *Weilert v. Gwartz*, Case No. 15-1144 (9th Cir. BAP 2016) – Section 522(f) allows a debtor to avoid a judicial lien if the lien is on an interest of debtor in property; lien impairs exemption to which debtor would have been entitled; and lien is a judicial lien. Whether debtor has interest in property is matter of state law. Debtor's pre-petition transfer of real property owned solely by debtor into trust in which debtor was settlor, trustee and beneficiary did not divest debtor of interest in property for purposes of Section 522. As settlor, debtor retained all powers of trust including right to amend or revoke and retained reversionary interest in the property, and as beneficiary debtor had life interest in property, sufficient to allow debtor to claim property as homestead. Debtor could use Section 522(f) to avoid judicial lien against property to extent that lien impaired debtor's homestead exemption notwithstanding that property was held by trust and not by debtor individually.

7.72 Liens Avoidable – Judicial Liens

- (1834) *Clabaugh v. Grant*, Case no. 15-035 (10th Cir. BAP 2016) – Judgment lien is not unavoidable merely because judgment itself is non-dischargeable debt. Debtor's pre-petition wrongful conduct does not operate as basis to elevate judgment lien ahead of exempt status or to "carve out" or limit scope of exemption to allow judgment lien to survive bankruptcy.
- (1835) *In re Davis*, 2015 WL 5936873 (Bankr. S.D. Ohio 2015) – State exemption statute that purported to hold that certain judgment liens held by State were not subject to avoidance is pre-empted by bankruptcy code. State attempt to preserve lien that otherwise impairs exemption conflicts with Section 522(f)(1). Section 522(f) is simple mathematical formula, and where value of property is less than superior liens, inferior judgment lien held by state is avoidable.
- (1836) *In re Gokay*, 2015 WL 4924562 (Bankr. S.D. Ohio 2015) – State exemption statute that purported to hold that certain judgment liens held by State were not subject to avoidance is pre-empted by bankruptcy code. State attempt to preserve lien that otherwise impairs exemption conflicts with Section 522(f)(1). Section 522(f) is simple mathematical formula, and where value of property is less than superior liens, inferior judgment lien held by state is avoidable.
- (1837) *In re Williams*, 2015 WL 3940602 (Bankr. N.D. Ohio 2015) – Debtor could avoid judicial lien on homestead that was otherwise unencumbered where value was indisputably below state exemption amount.
- (1838) *In re Houser*, 2015 WL 128232 (Bankr. E.D. Tn. 2015) – If the motion seeks to avoid more than one lien, court starts with lowest priority lien and, once avoided, that lien is no longer taken into account for calculations relating to other liens. Property valued at \$130,000 encumbered by mortgages totaling \$120,102 in which debtor's claimed exemption was \$7500; and two judgment liens, senior one for \$4349.88 and junior one for \$7006.95. Junior lien entirely avoidable as unavoidable mortgages, exemptions and senior judgment lien was exceeded value of property. However, senior lien only partially avoidable, as value of property less unavoidable mortgages and exemption left remaining amount of \$2398.00 to which lien attached. Senior judgment lien avoided to extent of \$841.88, representing amount by which lien exceeded equity in property after deducting mortgages and exemptions.
- (1839) *In re Hunter*, 2014 WL 4929514 (Bankr. N.D. Ohio 2014) – Prerequisite to avoidance of judicial lien is that debtor had interest in property at time lien arises. Where debtor suffered judgment that was properly recorded, and debtor thereafter acquired real property, debtor could not avoid lien under Section 522. However, under Ohio law judgment lien does not attach to property acquired in future such that lien did not attach to after acquired property in any event.
- (1840) *In re Mitchell*, 2014 WL 1725819 (Bankr. N.D. Ohio 2014) – Debtor can avoid judicial lien in its entirety where amount of unavoidable liens plus amount of debtor's exemption exceeded total value of property. Property had value of \$85,000, subject to debtor's claimed exemption of \$132,900.00. As there was no equity left to support judicial liens after application of exemptions, liens were fully avoided.
- (1841) *In re Anderson*, 2013 WL 3878973 (Bankr. E.D. La. 2013) – Debtors may avoid judicial liens that impair exemptions even where liens attached to property prior to debtor's acquisition. Debtors suffered judgment and creditor properly recorded judgment in public records, constituting a lien on all real property of the debtor in the county. Debtors thereafter bought a house in the county, at which time the lien attached. Section 522(f) allows avoidance of any judicial lien, and does not distinguish between liens that created prior to or subsequent to the acquisition of the property.
- (1842) *In re Zorns*, 2013 WL 5310175 (Bankr. N.D. Ohio 2013) – Debtor's lack of personal liability on the senior mortgage does not exclude balance owed in determining whether judgment lien impairs exemption. Debtor purchased property subject to existing mortgage but did

not assume mortgage personally. Mortgage attaches to debtor's interest in property and operates to secured payment of the obligation. Even assuming highest value of property and lowest balance due on mortgage, total of mortgage and exemption far exceeded value of property such that entire judgment lien would be avoided.

- (1843) *In re Depascale*, 2013 WL 4478692 (Bankr. N.D. Ohio 2013) – Judicial lien avoidable where residence had fair market value of \$144,000 subject to mortgage of \$143,862.00 and debtor's exemption of \$132,900, leaving no equity in property to which lien could attach. Even if property was worth \$230,000 as alleged by creditor, prior lien plus exemption still exceeded value of property leaving nothing to which lien could attach.
- (1844) *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.
- (1845) *In re Younoszai*, 478 BR 841 (Bankr. W.D. Ky. 2012) – Judgment lien is avoidable to extent sum of lien plus all other liens on property plus exempt amount exceeds value of property. Court determined that property had value of \$456,000.00, subject to a first mortgage of \$331,461; a second mortgage of \$95,000; and a judgment lien sought to be avoided of \$1,229,393.97. Debtor entitled to exemption of \$5,100. Total of all liens plus exemptions was \$1,660,954.97, minus value of property of \$456,000 resulted in lien impairing exemptions in total amount of \$1,204,954.97. Thus, judgment lien avoidable to that extent, with surviving lien of \$24,439.00.
- (1846) *In re Mack*, 2012 WL 4882267 (Bankr. N.D. Ohio 2012) – Section 522(f) provides for avoidance of judicial liens to extent liens impair exemptions. A lien is considered to impair an exemption to the extent that the sum of the lien, all other liens on the property, and the amount of the exemption that the debtor could claim if there were no liens on the property exceeds the value that the debtor's interest in the property would have in the absence of any liens. Debtor entitled to avoid judicial lien on property worth \$15,000.00. Value of homestead was less than amount of available exemption. Thus, judicial lien would impair exemption to full extent of lien.
- (1847) *White v. Commercial Bank and Trust Co.*, Case No. 11-6032 (8th Cir. 2011) – Judicial lien avoided in its entirety where debtor could lawfully exempt full value of homestead. By definition, any amount of the judgment lien would impair the otherwise unlimited exemption. Debtor and spouse owned property jointly when the lien attached. Later divorce and severance of title did not break chain of title or result in divestment of all title with title then reattaching, such that the lien would have attached to the property before the exemption attached.
- (1848) *In re Railing*, 2011 WL 3321169 (Bankr. N.D. Ohio 2011) – Section 522(f)(1)(A), a debtor with an exemptible interest in property can avoid a preexisting lien interest in the property. Lien impairs exemption and can be avoided to the extent that the sum of: (i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens. Value of property was less than combined amount of exemption plus first and second mortgages, rendering judgment lien, which was subordinate to mortgages, subject to avoidance in its entirety. Judgment based on fraud is subject to avoidance of lien as Section 522 does not distinguish between types of judgments.
- (1849) *Johnson v. Cach, LLC*, 2011 WL 7637217 (E.D. Mi. 2011) – Writ of Garnishment served on State of Michigan for Debtor's future tax refunds resulted in garnishment lien attaching to future tax refunds. The garnishment is perfected once the State issues a notice of garnishment on the Debtor after the refund is known, and the debtor fails to object to the garnishment within 14 days of service of that notice. After expiration of the 14 day period without an objection, title to the refund passes to the creditor. Debtor can nonetheless recover property and avoid judicial lien to extent that debtor could claim tax refund as exempt, as judicial lien would impair exemptions under Section 522(h) as debtor can exempt proceeds of recovered pre-petition transfer if debtor could have exempted property had transfer not occurred and transfer was involuntary and trustee could avoid transfer under Section 547 but chooses not to do so. Had the transfer not been made, Debtor could have exempted the \$688 refund from property of the estate by avoiding the judicial lien. Although the lien was properly perfected, it would nonetheless have been avoided under section 522(f). Payment of tax refund by state to creditor enabled creditor to receive more than it would have otherwise received rendering transfer would have been avoidable under Section 547 allowing Debtor may avoid the transfer under Section 522(h).
- (1850) *In re Morgan*, 2010 WL 4922581 (Bankr. E.D. Tn. 2010) – Debtor permitted to partially avoid second priority judicial lien on exempt homestead where property had value of \$175,000 subject to first lien of \$13,693.24 and second priority lien exceeded \$500,000.00. Debtor permitted to exempt \$25,000 under Tennessee law. Deducting the amount of the first lien and the exemption from the property value left only \$136,306.76 to which second judicial lien could attach. Balance of lien in amount of \$426,881.57 avoided and allowed as general unsecured claim only. Debtor cannot avoid lien in case seized in execution on judgment without first avoiding transfer and then claiming funds as exempt. Until execution is avoided, funds are not property of estate and debtor cannot claim as exempt assets that are not property of estate.
- (1851) *In re Jaber*, 406 B.R. 756 (Bankr. N.D. Ohio 2009) - Debtor-wife could not avoid judgment lien on grounds that it impaired her homestead exemption under Ohio law when property was transferred to debtor- wife subject to the judgment lien.
- (1852) *In re Burns*, 2010 WL 2500360 (Bankr. N.D. Ohio 2010) – Judgment lien resulting from deficiency judgment obtained in connection with foreclosure of mortgage on non-residential properties is avoidable to the extent the lien impairs exemptions. Section 522(f)(2)(C) exclusion for judgments arising out of a mortgage foreclosure relates to the foreclosure judgment itself, not the deficiency judgment which may result after a foreclosure sale on another property.

- (1853) *In re Johnson*, 2010 WL 4235399 (Bankr. E.D. Mi. 2010), *aff'd* Case No. 10-14292 (E.D. Mi. 2011) - Under Michigan law, Debtor may not exempt property against a valid consensual lien. Voluntary granting of security interest waives right to claim exemption in property as against the security interest. Debtor validly pledged disability benefits to secure loans prior to commencement of bankruptcy.

7.74 Liens Not Avoidable – Statutory Liens

- (1854) *In re Cunningham*, 2012 WL 3588723 (Bankr. N.D. In. 2012) – Mechanics Lien arises automatically once notice of lien is recorded and is a “statutory” lien that is not subject to avoidance. Nature of lien as “statutory” versus “judgment” is determined by basis of lien, not method of enforcement. Commencement of judicial proceeding to enforce mechanic lien does not convert lien into judicial lien for purposes of lien avoidance.

7.75 Judgment Arising Out of Mortgage Foreclosure

- (1855) *First National Bank of Manchester v. Elza*, 2015 WL 5012890 (E.D. Ky. 2015) – Section 522(f) does not apply to and does not permit avoidance of lien that is “with respect to a judgment arising out of a mortgage foreclosure”. Recognizing split of authority, court concluded that deficiency judgment after foreclosure sale is an avoidable judicial lien and is not part of the foreclosure judgment itself. Foreclosure judgment is not avoidable judicial lien as judgment merely enforces already existing consensual lien, while deficiency judgment is true judgment lien independent of the mortgage itself.

7.76 Effect of Avoidance

- (1856) *LPP Mortgage, Ltd. v. Brinley*, 547 F.3d 643 (6th Cir. 2008) – Upon entry of order voiding judgment lien, entire unencumbered equity in property becomes property of the estate subject to Debtor’s right to claim an exemption. Action to avoid judicial lien does not vest in Debtor the unimpaired title to the property free and clear of claims of the bankruptcy estate.

E. Effect of Claimed Exemptions

7.77 Generally

- (1857) *Hawk v. Engelhart*, Case No. 15-914 (S.D. Tx. 2016) – Although exemption is properly claimed and no objection is lodged, essential elements of exemption must remain in effect during pendency of bankruptcy case. Debtor claimed IRA as exempt under Texas law which provided that IRA is exempt and funds withdrawn remain exempt if reinvested in new IRA within 60 days. No party objected to claimed exemptions within statutory time frame. Debtor thereafter withdrew funds from IRA but did not reinvest proceeds, instead using funds to pay living expenses, while case remained pending. Debtor’s withdrawal of funds without rolling funds over within 60 days caused removed funds to lose exempt status, and debtor was required to turnover proceed withdrawn from IRA to Trustee for distribution to creditors.
- (1858) *In re Morgan*, Case No. 13-5825 (Bankr. W.D. Mi. 2015) – Debtor’s claimed exemption in property does not remove property from estate. Claimed exemption only establishes right to payment if trustee sells property. Property is removed from estate only when abandoned or through court approved transfer.
- (1859) *In re Wolf*, 2012 WL 1856973 (Bankr. E.D. Ky. 2012) – If no objections are filed to claimed exemptions within 30 days of conclusion of First Meeting of Creditors, exempt property automatically reverts in debtor and removes the property from the estate.

7.78 Trustee’s Power to Sell Exempt Assets

- (1860) *Still v. Hopkins*, 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Tennessee law allows debtor to exempt value of homestead up to \$12,500, but does not guarantee debtor any right of possession or use of specific property. Debtor’s Schedule C which listed the life estate as valued at \$12,500 and claimed the full allowable exemption of \$12,500 exempted that amount. Valuing the property and the exemption at the same amount does not have the effect of exempting the entire property without regard to the actual value of the property or the extent to which the actual value exceeds the dollar amount claimed as exempt. Trustee could sell property free and clear of life estate, as long as Trustee paid debtor \$12,500 representing the value of the claimed exemption.

7.79 Setoff and Exempt Assets

- (1861) *Riley v. U.S. Department of Agriculture*, 472 BR 422 (Bankr. W.D. Ky. 2012) – Debtor’s tax refund for tax year ending prior to commencement of case constitutes prepetition obligation of government to debtors, against which debtors’ prepetition debt could potentially be set off. Chapter 7 debtors’ exemption rights in prepetition tax refund trumped any right of setoff that federal government possessed against tax refund on account of debtors’ prepetition liability on Farmers’ Home Administration (FmHA) loan, where government had not exercised right of setoff prepetition. Obligation to FmHA distinguished from obligation owed to IRS. Debtors cannot claim exemption in tax refund to extent of pre-existing obligations owed to IRS as refund does not become property of the estate subject to exemption until after government nets out overpayment and tax from prior tax years; however, this does not apply preexisting debts that debtors had to other federal agencies.

7.80 Exemptions and Non-dischargeable Claims

- (1862) *In re Wolf*, 2012 WL 1856973 (Bankr. E.D. Ky. 2012) – Once exemption is taken and allowed, property ceases to be property of estate. Creditors holding non-dischargeable obligations can then levy on that property. IRS properly issued levy to Chapter 7 Trustee and Trustee required to honor levy where property had been deemed exempt but was still in possession of Chapter 7 Trustee when levy served. Levy did not violate stay as levy was limited to property as to which exemption was allowed and so was no longer property or estate and parties agreed that tax debt was non-dischargeable.

7.81 Value of Claimed Exemption – Appreciation in Value

- (1863) *In re Orton*, Case No. 11-4157 (3d Cir. 2012) – Debtor’s claimed exemption of specific dollar amount of value in asset limits amount exempted to amount claimed. Any additional value, whether existing at time of petition or accruing during pendency of case, accrues to benefit of Trustee and estate. Debtor scheduled interest in royalties from oil and gas lease, valued interest at \$1 and exempted \$1. Trustee entitled to any future income stream from the royalties beyond \$1 that was the value claimed as exempt. Debtor, by valuing asset at \$1 and exempting \$1 did not exempt entire asset but only value of asset to extent claimed. Section 522(d)(5) allowed the debtor to exempt only the value of an asset and not the asset itself, leaving asset as property of estate with appreciation in value accruing to estate.
- (1864) *Still v. Hopkins*, 2013 WL 2154354 (Bankr. E.D. Tn. 2013) – Debtor’s Schedule C which listed the life estate as valued at \$12,500 and claimed the full allowable exemption of \$12,500 exempted that amount. To extent property was worth in excess of \$12,500, Trustee was entitled to the excess. Valuing the property and the exemption at the same amount does not have the effect of exempting the entire property without regard to the actual value of the property or the extent to which the actual value exceeds the dollar amount claimed as exempt. Trustee could sell property free and clear of life estate, as long as Trustee paid debtor \$12,500 representing the value of the claimed exemption.

7.82 Surcharge of Exempt Property

- (1865) *In re Coleman*, 2014 WL 1819339 (Bankr. S.D. Ohio 2014) – Trustee cannot surcharge debtor’s exempt share of proceeds of personal injury litigation to cover cost of litigation. Debtor claimed proceeds exempt in specific amount and trustee did not object to that exemption. Section 522(k) contains blanket prohibition on use of exempt property for payment of administrative expenses.
- (1866) *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.
- (1867) *In re Mitchell*, 2014 WL 1725819 (Bankr. N.D. Ohio 2014) – Court cannot surcharge debtor’s exemptions as sanction for conduct that frustrated administration of estate. Debtor made multiple inconsistent representations to state court to prevent creditor from foreclosing judgment lien and later to keep property out of hands of Chapter 7 trustee, and then made substantial homestead claim in bankruptcy that effectively kept property out of hands of creditors. While debtor’s misconduct may have been deliberate scheme to frustrate Chapter 7 Trustee and creditors, Court lacks authority to surcharge exemption or to deny exemption to which debtor is otherwise entitled.
- (1868) *Malley v. Agin*, Case No. 11-2042 (1st Cir. 2012) – Section 105 allows court to surcharge otherwise exempt property where debtor conceals assets resulting in loss of assets to the estate. Debtor sold marital residence shortly before filing. Debtor represented that all of the proceeds had gone to his ex-wife. Trustee later determined that debtor had received \$25,000 of the proceeds but failed to list those funds. By the time the Trustee discovered the concealed funds, Debtor had spent those funds and the money was no longer available for turnover to the Trustee. Court ordered that debtor’s exempt assets would be surcharged to the extent necessary to allow Trustee to recover the concealed funds. Relief was necessary to vindicate Section 521 which required honest disclosure of non-exempt assets.

VIII. Claims

A. Specific Claim Types

8.1 Administrative

- (1869) *Mediofactoring v. McDermott*, 2015 WL 5515229 (6th Cir. 2015) – Creditors who make substantial contribution to estate in Chapter 7 proceedings are entitled to administrative expense claim for attorney fees and costs incurred by creditor. Section 503 specifically allows reimbursement to creditors in Chapter 9 and Chapter 11. Omission from Section 503 of any reference to allowance of administrative claims to creditors does not preclude an award under circumstances that otherwise meet requirements of Section 503. Section 503 must be strictly construed as administrative claims reduce funds available for other creditors and claimants. Reference in Section 503 to Chapter 9 and Chapter 11, and list of administrative expenses in Section 503, are not intended to be limiting or restraining but are merely examples of when administrative claims may be appropriate. Creditors who successfully sought to remove Chapter 7 Trustee and who expended substantial sums in that effort were entitled to administrative claim where trustee was removed and successor trustee obtained large recovery from initial trustee for benefit of estate.
- (1870) *Kakos v. Stevenson*, 2015 WL 5212033 (E.D. Mi. 2015) – Section 503(b) allows administrative claim status for actual and necessary costs and expenses of preserving estate. Expense must arise from transaction with estate and directly and substantially benefit estate. Debtor’s use of “gift” to redeem second mortgage after commencement of case was not transaction with estate. Payments by debtor to secured creditor do not constitute administrative claims as matter of law as there is no longer any debt that would constitute “administrative claim” and transaction was not one with the estate but was a direct transaction between debtor and creditor without knowledge or involvement of estate or Trustee.
- (1871) *In re Energy Conversion Devices, Inc.*, 2015 WL 410690 (Bankr. E.D. Mi. 2015), *aff’d sub nom, Murphy v. Madden*, 2015 WL 3620685 (E.D. Mi. 2015), *aff’d*, Case No. 15-1734 (6th Cir. 2016) – Administrative claim is one that results from transaction with debtor and that

produces a benefit to the estate. Claim for alleged loss of value of stock based on Chapter 11 debtor's post-petition operations is not administrative claim as claim did not produce any benefit to estate and, in fact, rested on the argument that the value of the estate diminished during bankruptcy case.

- (1872) *In re Fremont Hospitality Group, LLC*, 2014 WL 4690317 (Bankr. N.D. Ohio 2014) – Administrative expenses are actual, necessary costs and expenses of preserving the estate including wages, salaries, and commissions for services rendered after the commencement of the case. Claimant must prove that debt (1) arose from a transaction with the debtor-in-possession as opposed to the preceding entity (or, alternatively, that the claimant gave consideration to the debtor-in-possession); and (2) directly and substantially benefitted the estate. Loan to trustee to pay insurance premium paid on debtor's business was administrative expense where business consisted of hotel and conference center including bar and restaurant and maintenance of insurance was essential to continuing operations, and estate otherwise lacked any funds to pay that premium. However, loans to debtor to pay attorneys for services prior to commencement of case and who were never employed under Section 327 are not administrative expenses. Further, funds advanced by debtor's principal were done for attorneys to perform services for principal, not for debtor, such that funds did not produce any benefit to estate.
- (1873) *In re Ohakpo*, 2013 WL 794347 (Bankr. E.D. Mi. 2013) – Section 543 governs rights and duties of custodians. Custodian retains secured claim in bankruptcy to extent of equity in property, but custodian is not entitled to administrative claim as the seizure of the property does not provide any benefit to the estate and the custodian has not been hired by the Chapter 7 Trustee.
- (1874) *Wojcik v. Hudson Funding, LLC*, 2013 WL 2085959 (N.D. Ohio 2013) – Debt is entitled to administrative status as actual and necessary expense only if action arose from transaction with bankruptcy estate and transaction directly and substantially benefitted estate. Administrative claims are limited to those where the consideration for the claim was received post-petition, and creditor must prove that benefit is more than a speculative or potential one. Fact that right to payment arises post-petition is not sufficient. Corporate debtor's obligation to indemnify officers and directors of company is not administrative where all of debtor's officers and directors resigned approximately one year pre-petition and the agreements containing the indemnification obligation were all executed well before filing of case. There were no transactions with the estate on which those obligations were based and there was no showing that enforcement of indemnification clauses would, in any way produce benefit to estate, particularly where indemnification being sought was for costs of defense of adversary proceeding brought by estate against former directors and officers for misconduct.
- (1875) *In re Halabu*, 2013 WL 780757 (Bankr. E.D. Mi. 2013) – Property taxes that come due during pendency of Chapter 13 case are administrative expenses. Section 502(b)(3) does not defeat administrative status as Section 502(b)(3) applies only to pre-petition taxes. Creditor who pays taxes is not entitled to administrative claim as administrative status is limited to taxes owed to taxing authority, not to secured creditor who pays those taxes on behalf of debtor.
- (1876) *In re Marotta*, 479 BR 681 (Bankr. M.D.N.C. 2012) – Filing fees advanced by counsel for debtor to file Chapter 13 constitutes pre-petition loan that is not entitled to administrative priority treatment. To extent counsel has claim for pre-petition filing fee advances, claim is, at best, general unsecured claim that cannot be paid more than is paid to general unsecured creditors as a whole. Reimbursement of advances are not recoverable as compensation under Section 330(a)(4) as they funds are not "compensation for services rendered".
- (1877) *In re Fornes*, 2012 WL 4904581 (Bankr. M.D.N.C. 2012) – Adopting holding in *Marotta*, filing fees advanced by counsel for debtor to file Chapter 13 constitutes pre-petition loan that is not entitled to administrative priority treatment. To extent counsel has claim for pre-petition filing fee advances, claim is, at best, general unsecured claim that cannot be paid more than is paid to general unsecured creditors as a whole as greater dividend would unfairly discriminate against remaining holders of general unsecured claims.
- (1878) *In re Hollingsworth*, 2012 WL 4832328 (Bankr. M.D. N.C. 2012) - Adopting holding in *Marotta*, filing fees advanced by counsel for debtor to file Chapter 13 constitutes pre-petition loan that is not entitled to administrative priority treatment. To extent counsel has claim for pre-petition filing fee advances, claim is, at best, general unsecured claim that cannot be paid more than is paid to general unsecured creditors as a whole as greater dividend would unfairly discriminate against remaining holders of general unsecured claims.
- (1879) *In re Energy Conversion Devices, Inc.*, 2013 WL 501732 (Bankr. E.D. Mi. 2013) – Section 503(b)(9) provides for administrative expense status for goods sold within 20 days prepetition and in the ordinary course of debtor's business. Trustee objected to administrative status based on other, unrelated allegedly preferential transfers, citing Section 502(d) that requires the court to disallow any claim of any entity that received an avoidable transfer unless the transferee has paid the amount, or turned over the property, representing the avoidable transfer. Acknowledging split of authority on whether Section 502 can defeat an otherwise valid administrative expense claim, court held that Section 502 provides for disallowance of "claims" but that a request for administrative expense status is not a "claim". Therefore, Section 502 cannot be used to defeat an otherwise proper claim for administrative expenses. Court would not defer payment of administrative expense claim where confirmed plan required payment and trustee had not filed avoidable transfer action and did not demonstrate any likelihood of success if one was filed, given numerous possible defenses to that action, and if trustee does prevail, there was no evidence that the transferee, a large multinational corporation, would be uncollectable.
- (1880) *In re Halabu*, Case No. 11-59449 (Bankr. E.D. Mi. 2012) – Under Section 503 as amended by BAPCPA, property taxes for which liability is in rem, in personam, or both, are entitled to administrative expense status. Governmental unit is not required to file request for payment of administrative expense for claim to be allowed as such. Section 503 does not explain how Trustee is to know of administrative taxes if no claim is filed. Once secured creditor filed request for administrative status, however, burden shifted to trustee to investigate and court to determine, whether any taxing authority has an allowed administrative claim for unpaid real estate taxes incurred during pendency of case. Trustee would thereafter be required to hold funds until Motion for Administrative Expense Claim can be heard and decided. To extent claim is to allowed and paid, it must be allowed to and paid to the taxing authority. Secured creditor lacks standing to assert administrative priority claim on behalf of taxing authority. Fact that unpaid taxes would adversely affect secured creditor's lien is not sufficient to create standing

in creditor to seek administrative claim status. However, dismissal of case does not, alone, deprive court of jurisdiction to determine administrative expense status. Court required service of motion and order on taxing authorities to provide opportunity for taxing authority to appear and seek administrative status if it so chose.

- (1881) *In re Michigan Biodiesel, LLC*, Case No. 10-5786 (Bankr. W.D. Mi. 2012) – Administrative claimant must prove by preponderance of evidence that claim represents actual, necessary costs and expenses of preserving the estate. Expense is “actual and necessary” only if the expense arose from transaction with bankruptcy estate and directly and substantially benefitted the estate. Claimant served as Chief Executive prior to commencement of case under oral agreement with Board of Directors. Claimant continued to serve in that capacity, although the executory contract for those services was never formally assumed, indicating that continued performance established transaction with estate. Services were also necessary as someone had to be in control of operations of debtor’s business. However, services did not help to preserve estate. Claimant caused certain dubious tax claims to be filed with the IRS resulting in \$13 million tax claim against estate. Claimant then paid substantial portion of tax credits to third party without court permission. Ongoing “misadventures” undercut allegation that claimant was good manager and steward. Debtor suffered serious financial losses post-petition while under control of claimant.
- (1882) *In re Kazi Foods of Michigan, Inc.*, 473 BR 711 (Bankr. E.D. Mi. 2012) – Bankruptcy Code provides for administrative expense claim for actual, necessary costs and expenses of preserving the estate. Debt qualifies as an actual, necessary administrative expense only if (1) it arose from a transaction with the bankruptcy estate and (2) directly and substantially benefitted the estate. Pre-petition Advertising Agreement on which creditor relied was not in effect between NACA and Kazi Michigan during the relevant post-petition time period. KFC Corporation terminated debtor’s franchise agreement more than a year before debtor filed bankruptcy case. Debtor never requested creditor to provide any national advertising, or assistance with local advertising, or any other services and creditor did not prove that debtor actually received a benefit from the national advertising services that creditor provided. Creditor did not prove that it would be inequitable for debtor to retain any such benefit, without payment, where creditor knew or should have known long before the relevant period that it had no contractual obligation to provide any services debtor; (2) debtor had stopped paying creditor and informed creditor pre-petition that it would not make any further payments; and (3) creditor did not cut off all national advertising services to debtor because it would have been prohibitively expensive to block the nationwide advertising for KFC restaurants in particular areas of the country Creditor could have terminated services but chose not to do so to save itself money.
- (1883) *In re Haven Manor, Inc.*, 2012 WL 1301228 (Bankr. D. Ne. 2012) – “Straddle” tax claims for unemployment taxes accruing during fourth quarter of year are not “administrative claims”. Section 503(b)(1)(B) affords administrative status only for actual, necessary costs and expenses of preserving the estate including any tax incurred by the estate. Business ceased operations prior to commencement of bankruptcy case. Any tax claims incurred pre-petition and prior to the existence of any estate.
- (1884) *In re Wolff*, 2010 WL 4959949 (Bankr. E.D. Tn. 2010) – Parties seeking payment of administrative expenses under Section 503(b) must prove that they are entitled to such priority treatment by a preponderance of the evidence, just as it is within the court’s discretion whether to allow an administrative expense. Claims for administrative expenses are strictly construed because priority claims reduce the funds available for creditors and other claimants. Debtor’s attorney who continued to perform services for debtor post-petition not entitled to administrative claim against estate. Attorney hired by Trustee will be compensated as administrative expense, but attorney hired by debtor is not hired by Trustee and does not represent estate.
- (1885) *In re Stokes*, 2010 WL 3980232 (Bankr. E.D. Tn. 2010) – Post petition property taxes held to be administrative claim in Chapter 13 case. Section 502(b)(1)(B)(i) allows administrative claim status for any taxes “incurred by the estate” whether in rem, in personam, or both, except for property taxes assessed or assessable prior to commencement of case. Taxes are deemed “incurred” when the tax liability accrues and becomes a fixed liability. Confirmation Order provided that the property would remain vested in estate. Property taxes for year in which case was filed would be pre-petition taxes as the tax obligation vested as of January 1 of that year. Taxes that accrued on January 1 of each of the three years after confirmation of the Plan constituted post-petition administrative expenses pursuant to Section 503. Had the property vested in the debtor at confirmation, the liability would have been one of the debtor’s and not an administrative expense of the estate subject to the filing of a claim under Section 1305.
- (1886) *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.
- (1887) *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 Petition. 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. Unpaid rent that accrued between petition and rejection is entitled to administrative priority pursuant to Section 365(d)(3) for the full amount of the rent not paid.
- (1888) *National Union Fire Insurance Co. v. VP Buildings, Inc.*, 606 F.3d 835 (6th Cir. 2010) – Section 503 affords administrative priority only for expenses that are actual and necessary costs and expenses. Expenses must arise from a post-petition transaction with the debtor and must directly and substantially benefit the estate. Debtor’s Workers Compensation Insurance provided that when an employee suffered a covered loss, the insurer would pay the claim and would seek reimbursement from Debtor. Employees injured during course of Chapter 11 proceeding would continue to receive benefits even after Company liquidated in Chapter 11 proceeding. Although parties agreed that the insurance benefitted the estate and that the contract between Debtor and the insurer was a post-petition contract, the claim was not “actual” and did not afford any benefit where claim consisted of a claim for reimbursement of future workers compensation benefits

not actually paid during course of Chapter 11 proceeding. Expenses necessarily incurred post-confirmation are not “actual and necessary” costs of administering the estate.

- (1889) *American Express Bank v. Askenaizer*, 418 BR 495 (1st Cir. BAP 2009) – Allowed claims are paid in order of distributional priority set forth in Section 726(a). Creditor seeking administrative treatment has burden of proving elements that qualify claim for that status.
- (1890) *In re Black Diamond Mining Company, LLC*, Case No. 08-70066 (Bankr. E.D. Ky. 2010) – Section 503 affords administrative priority only for expenses that are actual and necessary costs and expenses. Expenses must arise from a post-petition transaction with the debtor and must directly and substantially benefit the estate. Court need not reach the issue of whether wrongful termination claim would constitute “administrative expense” where terminated employee was an at will employee subject to termination for cause, no cause, or even a cause that some might view as morally indefensible. Terminated employees claim for alleged wrongful refusal to pay a bonus was not administrative claim where bonus payments that were made to other employees were both earned and accrued prepetition and, therefore, constitute prepetition unsecured claims.
- (1891) *McMillan v. LTV Steel, Inc.* 555 F.3d 218 (6th Cir. 2009) – Laid off steelworker did not have administrative expense claim for pension benefits that allegedly vested prior to commencement of company’s Chapter 11 proceeding. Administrative expense claims are limited to expenses that arise from transactions with bankruptcy estate and that directly and substantially benefit the estate. Claims must arise after the Debtor filed for bankruptcy in order to be accorded administrative expense priority. Pension benefits that allegedly vested or arose prepetition cannot constitute an administrative expense. Further, “retirement benefits” as used in Section 1114(e)(2) do not include pension benefits. “Retirement benefits” include only “payments to any ... person ... for the purposes of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program” that is “maintained or established in whole or in part by the Debtor prior to filing a petition commencing a case under this title.” A pension plan, while “maintained or established” by the Debtor prior to filing, does not provide payments for medical, surgical, or hospital-care benefits as required by section 1114. Section 1114 does not apply to a program that administers only pension benefits.
- (1892) *In re Tillim, LLC*, Case No. 08-42316 (Bankr. E.D. Mi. 2008) – Creditor’s Motion for Administrative Claim denied where Motion did not reflect the service on all creditors and parties in interest. Service on ECF creditors only does not constitute proper service.
- (1893) *In re Plastech Engineered Products, Inc.*, Case No. 08-42417 (Bankr. E.D. Mi. 2008) – Administrative expense status is available for goods sold to the Debtor only when the goods themselves are delivered to the Debtor and not merely because the Debtor “received” the value of the goods. Within 20 days of the filing of the case, creditor sold goods to the Debtor in the ordinary course of business but shipped the goods to a third party with whom the seller had no contractual relationship. Section 503(b)(9) does not support an administrative expense status unless the Debtor actually receives the goods, not just “constructively receives” the goods.
- (1894) *In re Plastech Engineered Products, Inc.*, Case No. 08-42417 (Bankr. E.D. Mi. 2008) – Section 502(d) cannot be used to disallow administrative expense claim under Section 503(b)(9), which (as amended by BAPCPA) allows administrative expense status to any claim for the value of goods received by the Debtor within 20 days prior to the filing of the case. Section 503(b)(9) as amended greatly expands the expenses of administration of the estate by sweeping in goods received prior to the commencement of the case. Section 502(d) allows a claim to be denied if the creditor received an avoidable transfer. However, the power to disallow a claim under 502(d) is limited to claims filed under Section 501 and does not allow a Court to disallow a 503(b) administrative expense claim in general and Section 503(b)(9) claims in particular.
- (1895) *In re Plastech Engineered Products, Inc.*, Case No. 08-4217 (Bankr. E.D. Mi. 2009) - Administrative expenses related to lease of real property from petition date until the lease is rejected are limited to obligations that arise from and after the order for relief. Obligations that occurred pre-petition, including damages to the leased premises that occurred pre-petition, are not entitled to administrative expense status, even if the lease required the property to be maintained in good condition. Creditor is entitled to administrative expense claim for damages that occurred in the first instance on or after the petition date but not for pre-existing damages that are not repaired or remediated after the petition date. Finally, obligations that do not arise until after surrender of the property are not entitled to administrative expenses as the breach could have occurred only post-rejection.
- (1896) *Zurich American Insurance Company v. Lexington Coal Co., LLC* - 536 F.3d 683 (6th Cir. 2008) - Court denied administrative expense status for claim for "estimate of deductible portion of the claims that [insurer] believes it will pay in the future for injuries that occurred during the coverage period but were not the subject of insurance claims until after confirmation" of the plan. Administrative expense claims are limited to those for actual, necessary costs and expenses of preserving estate. Potential future deductible claims would not arise until after confirmation of plan and not constitute claims or expenses of the estate.
- (1897) *In re Arts Dairy, LLC.*, 2009 WL 1758760 (Bankr. N.D. Ohio 2009) – Party entitled to administrative claim expense for goods sold to Debtor in ordinary course of business and received by Debtor within 20 days prior to commencement of bankruptcy. However, party not entitled to immediate payment of that administrative expense. Chapter 11 requires only that administrative expense claims be paid in full at confirmation of the Plan. Court has discretion to order earlier payment of administrative expense claim based on analysis of prejudice to Debtor, hardship to claimant, and potential detriment to other creditors from earlier payment. Evidence failed to indicate any hardship to creditor and amount of administrative expense claim was minor compared to assets of Debtor and annual operating revenue. Immediate payment could prejudice secured creditor which holds blanket lien on all assets including cash collateral. Only source of payment of administrative expense claim would be from assets subject to security interest, and Court could not conclusively determine that remaining assets would be sufficient to pay secured claim in full.
- (1898) *United Mine Workers Of America 1974 Plan and Trust v. Lexington Coal Company, LLC.*, 2008 Fed App 0018P (6th Cir. BAP 2008) –

To qualify as an administrative expense, the claim must be for the actual and necessary costs and expenses of preserving the estate, to facilitate the continued operation of Debtor's business by encouraging third parties to provide necessary goods and services. A debt is not entitled to administrative expense priority simply because the right to payment arose after the Debtor-in-Possession began managing the estate. A debt may qualify as an administrative expense only if it arose from a transaction with the bankruptcy estate and directly and substantially benefited the estate. Claim against Debtor resulting from withdrawal from pension plan did not occur until two years after Debtor filed Chapter 11 and after Debtor had ceased operations. The liability neither directly nor substantially benefited the estate. To be "direct" requires that the claim have an "immediate" impact on the estate free from any compromising or impairing element. To be "substantial", the benefit must be "important" or "essential". While there is no doubt that the post-petition work of Debtor's employees would be entitled to administrative status, the withdrawal liability claim does not relate directly to work performed by Debtor's employees post-petition. The existence and amount of any withdrawal liability claim is always dependent upon factors that are not directly related to the post-petition work of Debtor's employees as the amount of the withdrawal liability depends on the unfunded vested benefits at the time of the withdrawal which, in turn, is driven by a myriad of factors including interest rate assumptions, investment returns and actuarial methods. These intervening factors distinguish withdrawal liabilities from obligations such as wages that have a direct causal link to the employees' post-petition work or to normal post-petition contributions to the employee pension plan.

- (1899) *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.

8.2 Administrative – Competing Priorities

- (1900) *In re Ste-Bri Enterprises, Inc.*, 2016 WL 5763796 (Bankr. N.D. Ohio 2016) – Final Report in Chapter 7 case that was previously converted from Chapter 11 listed outstanding UST quarterly fees, pre-conversion professional fees, and fees owed to Chapter 7 Trustee, totaling about double the actual funds available to pay. Section 726(b) requires payment of claims be paid in full before paying lower priority, and if there are insufficient funds to pay all claims entitled to certain level, claims in that priority level are paid pro-rata. Section 507(a)(1) affords equal priority to fees and charges assessed against estate under 28 USC Section 123, which includes UST quarterly fees under 28 SC Section 1930(a)(6). However, Section 726(b) provides that if a case is converted, Section 503(b) claims incurred in the Chapter 7 are entitled to priority over 503(b) claims that arose pre-conversion. Chapter 7 administrative expenses must be paid first in full before payment of UST fees. UST fees are afforded equal priority with Chapter 11 professional fees and paid concurrent and pro-rata.

8.3 Administrative – Post-Petition Taxes

- (1901) *Collins v. Tennessee Department of Revenue*, 2016 WL 4224013 (W.D. Tn. 2016) – Although creditors generally must file an Application for approval of administrative expenses. Section 503(b)(1)(D) allows taxing authority to file only proof of claim with need to file application for allowance. Confirmed Plan that proposed to pay all allowed administrative claims included post-petition taxes as detailed in proof of claim filed by taxing authority before confirmation of plan and liabilities were not discharged as part of confirmation of Plan.

8.4 Administrative - "Stub Rent"

- (1902) *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.

8.5 Administrative – Procedural Requirements

- (1903) *In re Richfield Equities, LLC*, 2016 WL 4473222 (Bankr. E.D. Mi. 2016) – Section 503 allows an entity to timely file a request for administrative expense claims, or to tardily file if permitted by the court for cause. In Chapter 11, deadline is 90 days after first meeting creditors for claims that result from Section 503(b)(9) for goods and services provided to debtor within 30 days of preceding commencement of case. Conversion of case from Chapter 11 to Chapter 7 does not reset deadline to file application for administrative expenses, as nothing in Rule 1019(s) on conversion resets the original deadline although Rule 1019(2) does extend and reset other dates. Filing proof of claim is not sufficient to constitute application for administrative expenses as applications are served on all parties while proofs of claim are not. Creditor did not demonstrate cause for late filed application. Cause is based on considerations of (i) prejudice to party requesting administrative expense; (ii) prejudice to other parties including the debtor; (iii) cause of delay; (iv) length of delay; (v) reason for delay and whether it was in control of creditor; and (vi) whether movant acted in good faith. Creditor did not demonstrate any good reason for the delay and the delay would prejudice other creditors and the Chapter 7 Trustee. Creditor knew of administrative expense claim from outset of case but waited almost 4 years before filing Motion. Delay coupled with lack of proof of delivery of goods impacted Trustee's ability to confirm receipt of goods and would lead to significant and irreversible prejudice to Trustee.

8.6 Priority – Qualifying Wages and Benefits

- (1904) *In re Tristar Fire Protection, Inc.*, 466 BR 392 (Bankr. E.D. Mi. 2012) – To be entitled to priority as administrative expense, wages and benefits must be awarded pursuant to a judicial proceeding or a proceeding of the NLRB and award must be made as a result of a violation of Federal or State law. Union not entitled to priority claim based on alleged unfair labor practice for engaging in lockout of union employees. Although union filed unfair labor practice charge with NLRB, neither NLRB nor judicial proceeding had resulted in any award and bankruptcy court lacked jurisdiction to rule on unfair labor practice claim.

8.7 Priority – Severance Benefits

- (1905) *In re ADI Liquidation, Inc.*, Case No. 14-12092 (Bankr. D. Del. 2016) – Section 507(a)(4) allows priority claim for wages and severance that are earned within 180 days before the petition date. Claim for severance pay is “earned” on date on which employment is terminated. Company policy allowed employee to accrue severance benefits for each year of service. However, those benefits are not “earned” until employee is terminated at which point employee first has right to payment of benefits. Recognizing split of authority, Court held that entire balance of severance that was unpaid as of petition date was entitled to priority treatment as employee was terminated less than 180 days pre-petition.

8.8 Priority – Tax Claims

- (1906) *Carpenter v. Montana Department of Labor*, Case No. 14-1499 (9th Cir. BAP 2015) – Corporate officers have personal liability for unpaid corporate unemployment compensation taxes. Unemployment taxes are excise taxes as taxes are (1) an involuntary pecuniary burden; (2) imposed under state law; (3) for public purposes; (4) under police or taxing authority of state; and (5) no private creditor similarly situated can exist under statute. Tax is not Trust Fund tax under Section 507(a)(8)(c) but are excise taxes entitled to priority to extent incurred in three years prior to commencement of case under Section 507(a)(8)(e).
- (1907) *Taylor v. IRS*, 2014 WL 1884333 (Bankr. E.D. Tn. 2014) – Section 507(a)(8) makes priority taxes measured by income or gross receipts where the return was last due within three years preceding commencement of the case or assessed within 240 days pre-petition. Debtor filed for Chapter 7 relief in 2012. Debtor’s tax liability for 2007 was priority where debtor did not file a return until 2012, less than 240 days pre-petition. Debtor signed consent form for 2007 taxes on March 9, 2011, more than 240 days pre-petition, and signed consent form for 2008 taxes in June, 2011, also more than 240 days pre-petition. However, IRS did not actually process consent agreements or “assess” taxes until September, 2011, less than 240 days pre-petition. Under Internal Revenue Code and IRS rules, taxes are assessed by recording the liability in the office of the IRS, with the date of assessment being the date on which the summary record is signed by an assessment officer. Date of assessment shown on tax account transcript is presumed date on which taxes are assessed. Delay in processing consent agreements did not alter assessment date. Assessment date is not date on which taxpayer signs consent agreement but date on which IRS accepts it. Delay by IRS, even if “unjustified” does not alter assessment date.
- (1908) *Winters v. IRS*, 503 BR 434 (6th Cir. BAP 2013) – Section 507(a)(8)(A)(iii) provides that taxes on or measured by income for a taxable year prior to commencement of the case and not assessed, but assessable, as of the petition date are entitled to administrative priority. Taxes must ordinarily be assessed within three years after the return is filed, but the deadline is extended to six years if the debtor understated income by at least 25%. Court was unable to determine whether assessment more than 3 years after the return was filed but less than 6 years was barred by the 3-year limitations period where record did not indicate amount by which reported income understated actual income. Taxes that are not assessed within the applicable limitations period are not “assessable” as of the petition date and would not be entitled to administrative priority.
- (1909) *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.
- (1910) *In re Whitson*, 2013 WL 5965745 (Bankr. E.D. Tn. 2013) – Section 507(a)(8) applies to any tax measured by income. IRS audit that resulted in reduction of earned income tax credit and child care credits and produced tax liability constituted a claim for unpaid income taxes. While CTC and EITC were in the nature of “public assistance” rather than true tax credits, the resulting liability was one for unpaid income taxes within Section 507(a)(8). Both credits are created by Internal Revenue Code and size of each is directly related to income. Although credits are refundable and provide assistance to low income taxpayers, both tie directly to income and overpayment of previously issued tax refund stemmed directly from the credits.
- (1911) *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.
- (1912) *Winters v. Comm’n of Internal Revenue Service*, 2013 WL 364328 (Bankr. M.D. Tn. 2013), *reversed and remanded*, 503 BR 434 (6th Cir. BAP 2013) – Because neither Bankruptcy Court nor Tax Court had issued final determination of the amount of tax debt for year in question, issues regarding statute of limitations, prior and nondischargeability could not be resolved. Case remanded to Bankruptcy Court for further proceedings. Prior to appeal, Bankruptcy Court had held that Section 507(a)(8)(A) gives priority treatment to tax claims where the return is last due less than 3 years pre-petition, or where the taxes are assessed less than 240 days plus any time during which collection was stayed pre-petition. Income taxes must be assessed within three years of date on which return is due. Upon assessment, taxpayer has 90

days to file an appeal. If an appeal is filed, IRS is precluded from assessing until Tax Court decision becomes final. Thus, filing of tax court appeal tolls running of 240 day period until appeal is determined. Debtor filed bankruptcy before Tax Court issued ruling, which precluded Court from issuing ruling and precluded running of 240 period for assessment. Debtor's obligation for 2004 tax liability was entitled to priority under Section 507. Further Section 523 precludes discharge to taxes that have not been assessed as of the petition date but which are still assessable as of the petition date. Debtor's liability for 2004 taxes which were unassessed but still assessable as of the petition date were excepted from the discharge.

- (1913) *In re Paradis*, 2012 WL 3938644 (Bankr. D. Me. 2012) – 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.
- (1914) *In re Calabrese*, Case No. 11-3793 (3d Cir. 2012) – Sales taxes are considered “trust fund” taxes for purposes of priority and dischargeability under Section 507(a)(8)(C) rather than excise taxes under 507(a)(8)(E). Excise taxes are dischargeable if they are more than three years old as of the date of the petition, while trust fund taxes are never dischargeable.
- (1915) *In re Alexander Property Investments, LLC*, Case no. 11-52624 (Bankr. E.D. Mi. 2011) – Claim cannot be both unsecured priority and secured. City Water Department claim was secured claim. Plan that defined claim as allowed under Section 507(a)(8) and as allowed secured claim could not be confirmed.
- (1916) *In re Sarnovsky*, 2010 WL 2679878 (Bankr. N.D. Ohio 2010) – Section 726 controls the order of priority for distribution of assets of the estate. Assets are first used to pay claims entitled to priority under section 507; then to timely file the unsecured claims; then tardily filed claims; then penalties and non-compensatory damages; then post-petition interest; and, if estate assets still remain, the balance is distributed to the debtor. Debtors are not entitled to file priority claims, thereby obtaining a priority status for distribution head of remaining creditors. Debtor's claim for prepetition taxes allegedly paid by the debtors were not entitled to priority status. Section 508(a)(8) limits priority status to claims made by a “governmental unit”, which does not include the Debtors. Further, a “claim” must be predicated upon a right to payment. The law does not recognize a party's right to enforce a payment from himself. Thus, debtors cannot hold claims against their own bankruptcy estate. Debtors were not permitted to pay a prepetition tax liability and “step into the shoes” of the governmental unit for purposes of asserting a priority status and subverting the distributional priorities of section 726.

8.9 Priority – Unemployment Compensation Reimbursement

- (1917) *In re Community Memorial Hospital*, 494 BR 906 (Bankr. E.D. Mi. 2013) – Michigan Unemployment Insurance Agency claim for reimbursement of unemployment benefits paid by agency to former employees of debtor did not seek payment of “taxes” within provisions of Section 507(a)(8) and was not entitled to priority status.

8.10 Priority – Perishable Agricultural Commodities Act

- (1918) *Ruby Robinson Co. v. Herr*, Case No. 10-20788 (5th Cir. 2011) – PACA liability attaches first to the licensed commission merchant, dealer, or broker of perishable agricultural commodities. If the assets of the licensed commission merchant, dealer, or broker are insufficient to satisfy the PACA liability, then others may be held secondarily liable if they had some role in causing the corporate trustee to commit the breach of trust. Individual shareholders, officers, or directors of a corporation who are in a position to control trust assets, and who breach their fiduciary duty to preserve those assets, may be held personally liable under PACA. Stock Purchase Agreement granted purchasing shareholders authority over certain business and financial matters and entitled them to sit on the Debtor's board of directors gave them legal authority to control the trust assets for purposes of imposing PACA liability.
- (1919) *Thomas A. Hails Co., Inc. v. Olson*, 2010 WL 2802481 (Bankr. W.D. Mi. 2010) - Creditor holding properly perfected claim under Perishable Agricultural Commodities Act (PACA) is entitled to priority status. To hold PACA claim, creditor must give written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored. The Notice of intent to preserve trust benefits must include the statement that it is a notice of intent to preserve trust benefits and must include information which establishes for each shipment: (i) The names and addresses of the trust beneficiary, seller-supplier, commission merchant, or agent and the debtor, as applicable; (ii) The date of the transaction, commodity, invoice price, and terms of payment (if appropriate); (iii) The date of receipt of notice that a payment instrument has been dishonored (if appropriate), and; (iv) The amount past due and unpaid. Creditor's letter that “substantially complied” with PACA requirements was not sufficient to preserve PACA claim, as statute requires strict compliance.

8.11 Priority – Unredeemed Gift Cards

- (1920) *In re City Sports, Inc.*, Case No. 15-12054 (Bankr. D. Del. 2016) – Unused gift cards are not entitled to priority treatment under Section

507(a)(7). “Deposit” for purposes of priority status requires some temporal relationship to incomplete transaction with additional steps needed to complete. Gift cards have potential unlimited duration and transaction involving purchase of gift card is complete when card is purchased. Only use of card delayed, not transaction which card is purchased.

8.12 Environmental

- (1921) *In re Appalachian Fuels, LLC*, 2013 WL 1694769 (6th Cir. BAP 2013) – Environmental costs may be recoverable as administrative expenses. Debtor can be liable for environmental charges either for direct liability or on a derivative basis where the environmental claims are the result of actions of a related entity. Derivative liability requires independent basis to pierce corporate veil. Parent corporation is not generally liable for acts of subsidiary unless corporate form is being misused to accomplish some unlawful purpose such as fraud on behalf of the shareholder. Direct liability requires operation of the facility. Fact that facility is owned by subsidiary does not insulate parent where pollution is the result of the parent’s operations of that facility. Creditor could not prevail against debtor where creditor did not present any proof as to whether funds or property interests were commingled. There is no evidence of inadequate capital structures, failure to follow corporate formalities, siphoning off of funds to the other entities, or total control and dominance of debtor by the other entities. Aside from indicating that same individual served as director or president of all three entities, creditor did not present any evidence that debtor or the related entities had the same directors and officers or that the similar officers shared responsibility for supervision and management of debtor’s mining operations. There was also no evidence presented that debtor intended to use its corporate structure as a way to perpetrate a fraud or do grave injustice to a third party.
- (1922) *US Bank, N.A. v. US Environmental Protection Agency*, 563 F.3d 199 (6th Cir. 2009) – Debtor is responsible for environmental waste releases that occurred before Debtor acquired the plant that produced the waste under statutory obligation of successor liability. Further, the asset purchase agreement by which the Debtor acquired the plant provided that Debtor expressly assumed all liabilities and obligations of the seller, which would include all environmental claims that arose under seller’s control. Court may apportion environmental liability where two or more entities contribute to an environmental waste issue and the harm is divisible. Here, Debtor failed to demonstrate that its contribution to the environmental harm was divisible or could be calculated independent of the harm caused by other entities or where there was a reasonable basis to determine the contribution of separate causes to a single harm. Therefore, Debtor was fully responsible for all clean-up costs, jointly and severally with other entities that also contributed to the waste but whose contribution was not divisible. Bankruptcy Court properly allowed EPA claim for already incurred costs of clean up plus estimated future costs of clean up.

8.13 Secured – Generally

- (1923) *Shelton v. CitiMortgage, Inc.*, Case No. 12-3555 (8th Cir. 2013) – Disallowance of creditor’s claim solely because claim was filed after bar date in Chapter 13 does not invalidate lien under Section 506(d). Secured creditor is not required to file claim for lien to pass through bankruptcy, and creditor cannot be penalized for filing claim late where no claim was required in the first instance.
- (1924) *In re Caffey*, 2013 WL 3199816 (Bankr. N.D. Ohio 2013) – Security interest in personal property is enforceable if value has been given; debtor has rights in collateral; and debtor had authenticated a security agreement that provides description of collateral. Value has been given where creditor acquires security interest as security for pre-existing claim. Creditor had valid possessory security interest in debtor’s vehicle to secure costs of repairs. Creditor released vehicle to debtor in exchange for a lien on the vehicle title to secure the remaining balance owed. Documents signed when vehicle was returned sufficiently indicated intent to create security interest and contained an adequate description of the vehicle and was signed by both parties.
- (1925) *In re Hall*, 2012 WL 5051357 (Bankr. E.D. Tn. 2012) – Lien secured by debtor’s property passes through Chapter 7 bankruptcy, although underlying personal liability may be discharged. Chapter 7 proceeding valued car at less than amount of debt. Debtor did not reaffirm debt and received discharge. In later Chapter 13, debtor attempted to disallow lender’s entire claim under Section 502(b)(1) on theory that as a result of the discharge, the claim was no longer enforceable against the debtor. Court concluded that section 502(b)(1) disallows a claim only where the claim is unenforceable against the debtor *and* property of the debtor. Here, although the claim may have been unenforceable against debtor, the claim passed through the Chapter 7 and remained enforceable against property of the debtor. Further, creditor cannot be compelled to satisfy lien on vehicle for less than full contract value in subsequent Chapter 13. 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.
- (1926) *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.
- (1927) *Teague v. Taylor*, 2012 WL 2320898 (Bankr. E.D. Ky. 2012) – Properly perfected lien continues in collateral notwithstanding sale, lease, license, exchange or other disposition. Buyer of equipment subject to perfected security interest takes subject to security interest even if buyer did not have knowledge of interest at time of purchase. A buyer in the ordinary course takes free of even properly perfected security interests. BIOC is a person that buys goods in good faith without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged. Exception is designed to protect buyers in the very limited set of circumstances where a lender takes a security interest in goods and then leaves the goods in the possession of a debtor who sells goods of that kind. Buyer of heavy equipment could not qualify as BIOC where seller was not in the business of selling heavy equipment. Seller was in business of commercial landscaping. Although commercial landscaper may use heavy equipment, commercial landscapers are not considered sellers of heavy equipment.

- (1928) *Gilchrist v. United Bank & Trust Co.*, 467 BR 113 (E.D. Ky. 2012) – Under Kentucky law, mortgage must identify property being encumbered, the interest that is being encumbered, and the party signing the mortgage. Although “not a model of clarity”, mortgage which did not identify mortgagor in body of mortgage sufficiently identified mortgagor through reference to various riders to the mortgage all of which were incorporated in the mortgage by reference and which identified Debtor-husband as the party signing the mortgage, and including property description itself which states that property being encumbered was the property “acquired by John I. Gilchrist, a single person, by deed dated July 7, 1995”. There was no dispute that husband executed mortgage and intended to encumber his interest in the property by doing so.
- (1929) *Mostoller v. Dover Mortgage Company*, 2012 WL 1565125 (Bankr. E.D. Tn. 2012) – Action ostensibly brought pursuant to section 506 did not contest validity or priority of mortgage but only questioned whether named claimant was entitled to enforce the note and mortgage. Although face of note contained two endorsements, one was voided on the face of the note and the second contained initialed deletion of Wells Fargo and insertion of US Bank. Plaintiff did not call into question validity of any signature on note. As creditor was the holder of the note, by its very terms creditor had right to pursue foreclosure and enforce note.
- (1930) *In re Alexander Property Investments, LLC*, Case no. 11-52624 (Bankr. E.D. Mi. 2011) – Claim cannot be both unsecured priority and secured. City Water Department claim was secured claim. Plan that defined claim as allowed under Section 507(a)(8) and as allowed secured claim could not be confirmed.
- (1931) *U.S. v. Ocher*, Case No. 10-15627 (11th Cir. 2011) – IRS filed secured claim that was not objected to. IRS could not receive distribution from pot set aside for payment of unsecured claims where proof of claim did not show any portion of the claim was unsecured. Nothing in Section 506 creates an automatic unsecured deficiency claim after liquidation of collateral.
- (1932) *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.
- (1933) *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.
- (1934) *Hardesty v. Huntington National Bank*, 2011 WL 1322880 (Bankr. S.D. Ohio 2011) – Mortgage that identified only husband as “borrower” and “mortgagor” encumbered only husband’s undivided one half interest in property owned jointly by husband and wife. Wife’s signature on bottom of mortgage did not make her a “borrower” or “mortgagor” where terms were defined solely to refer to husband.
- (1935) *In re Pierson*, 447 BR 840 (Bankr. N.D. Ohio 2011) – Secured claim based on alleged assignment of future benefits under military pension not invalid where loan documents did not purport to transfer title to future benefits to creditor. Loan documents required debtor to deposit pension payments into specified bank account against which creditor held security interest. Debtor retained full control over pension including decision as to whether to deposit funds into designated account. Purported security agreement did not violate statutory prohibition against assignment of military pension. However, claim was secured solely by funds in designated account. Where account had no money in it as of date of petition, there was no collateral to secure debt and obligation is entirely unsecured.
- (1936) *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.
- (1937) *In re Beck*, Case No. 10-64377 (Bankr. E.D. Mi. 2011) – A claim is secured only to the extent of the debtor’s interest in the property. Claim secured by Property that is not owned by the debtor is not a secured claim. Debtor’s personal liability on note that is secured by property owned by LLC is a general unsecured claim. Plan cannot be confirmed that proposes to treat debt as secured.
- (1938) *Akers v. Citimortgage, Inc.*, 427 B.R. 408 (Bankr. W.D. Ky. 2010) - Properly executed mortgage or security agreement is enforceable between debtor and creditor even if not properly recorded.
- (1939) *Lindsay v. Covenant Management Group, LLC*, 561 F.3d 601 (6th Cir. 2009) – Lender is not prohibited from charging interest on capitalized “discount fee” where loan agreement expressly allows interest to be charged. Although “discount fee” may arguably be treated as “pre-paid interest”, there is nothing under Michigan Law that prohibits charging interest on that fee. Further, agreement could not be usurious under Michigan law because Michigan law expressly excepts from usury concerns any loan that is more than \$100,000 and secured by property other than a principal residence. Lender also not required to apply extension fee to reduce principal where Loan Modification Agreement “plainly listed” the fee as consideration for lender’s forbearance and subordination of loan.
- (1940) *Limor v. First National Bank of Woodbury*, 2009 WL 2208582 (Bankr. M.D. Tn. 2009) - Bank which held pledge of checking account to secure debt lost security interest when, after Debtor filed Bankruptcy, allowed Debtor to withdraw all money and close the account. Bank failed to exercise its right to freeze the account for purposes of setoff. Under Tennessee law, security agreement in deposit account perfected only by control of the account. Bank loses security interest when it releases the funds unless the transferee acts in collusion with

the Debtor in violating the rights of the secured party.

8.14 Secured – Property Taxes

- (1941) *In re Rice*, 2016 WL 4574301 (Bankr. E.D. Mi. 2016) – County Property Tax collector who acquires statutory assignment of unpaid taxes from municipality after confirmation of Plan cannot add 4% statutory administrative fee to case. Plan proposed to pay taxes in full. At time case filed and at time of confirmation, taxes were owed to municipality and were not transferred to County until after confirmation of plan. County as transferee takes claim in status that transferor had as of transfer date. County is bound by terms of confirmed plan which did not contemplate later assessment of administrative fee. Section 511 requires rate of interest to be fixed as of month of confirmation of plan and does not allow for any additional interest or fees to be added to outstanding amount. When plan confirmed in December, 2013, applicable interest rate was 12% and there was no administrative fee charged or chargeable.

8.15 Federal and State Tax Liens

- (1942) *In re Shefa, LLC*, 2015 WL 248496 (Bankr. E.D. Mi. 2015), *aff'd*, 2015 WL 4477911 (E.D. Mi. 2015) – Although County tax collector is designated statutory agent for collection of outstanding water and sewerage charges, those charges are not “tax” claims. Section 502, which allows disallowance of tax claims to extent claims exceed value of property, does not allow debtor to avoid liens for unpaid water and sewerage charges. A “tax” is a pecuniary burden laid on individuals or property, regardless of consent, for purposes of defraying expenses of government or undertakings authorized by government. Section 502 does allow court to disallow secured claim for taxes to extent that taxes exceed value of property where property has value, has not been abandoned by debtor, is marketable, and county does not face prospect of receiving nothing on lien, as only portion of lien is disallowed and debtor’s plan called for full payment of the secured portion of the tax lien.
- (1943) *Ryan v. United States*, 725 F.3d 623 (7th Cir. 2013) – Chapter 13 Debtor cannot strip lien federal tax lien where line is partially secured. Tax lien encumbered debtor’s personal property although lien was for taxes totaling over \$130,000 but debtor’s personal property had value of only \$1,625.00. *Dewsnup* precludes any attempt to strip or bifurcate lien where lien is secured by even one dollar of value.

8.16 Secured – Domestic Support Obligations

- (1944) *Okke v. Okke*, 2014 WL 3578599 (Bankr. W.D. Mi. 2014) – Domestic Support Order did not create security interest in property where order awarded possession of personal property to party in possession of that property, free and clear of rights of other spouse except to extent necessary to enforce provisions of judgment of divorce. Decree did not amount to security interest in personal property awarded to other spouse for purposes of ensuring compliance with divorce decree but only allowed court to enter further orders as may be necessary to enforce decree. Debtor’s ex-spouse did not have valid security interest in property awarded to debtor but which remained in possession of ex-spouse. Decree did not state that property held by ex-spouse was collateral or security for debtor’s performance under the decree and decree awarded possession of that property to debtor without limitation. Ex-spouse violate stay when she sold the items of personal property post-petition and retained proceeds of sale allegedly to offset obligations owed to her by debtor.

8.17 Secured – Failure to Record Generally

- (1945) *In re Neville*, Case N. 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 unavowed and enforceable where trustee does not pursue avoidance.
- (1946) *Bullard v. IndyMac Bank*, 2012 WL 4134839 (E.D. Mi. 2012), *aff'd* 2013 WL 4859785 (6th Cir. 2013) – Mortgage that is signed but not recorded is enforceable against mortgagor and any subsequent purchaser with notice. Mortgage is void only as against a good faith purchaser for value. Mortgage signed by debtor and her husband was valid and enforceable secured obligation as against husband even if not recorded. Later amended mortgage that was signed by wife alone also valid where wife acquired property prior to marriage can, after marriage, continue to deal with property as if owner never married. Thus, mortgage signed by wife alone on property owned by wife prior to marriage and still owned in wife’s name alone was enforceable and valid.

8.18 Lien Avoidance – Section 506(d)

- (1947) *In re Russell*, 2016 WL 3977472 (Bankr. N.D. Ohio 2016) – Action to avoid lien based on alleged insufficiency of value of debtor’s interest after deducting superior liens, must be brought in adversary proceeding. While avoidance of lien that impairs exemptions under Section 522(f) can be brought by motion, action to avoid liens based on value of collateral under Section 506 cannot be brought by motion. Debtor’s Motion to Avoid Statutory Lien denied without prejudice to debtor bringing adversary proceeding.

8.19 Secured – Void Lien – Section 506(d)

- (1948) *HSBC Bank v. Blendheim*, 2015 WL 5730015 (9th Cir. 2015) – Disallowance of claim for reasons other than the failure to file a claim or that claim was late filed or Section 502(b)(5) as unmaturing debt or Section 502(e) where the claim is based on contribution voids associated lien under Section 506(d). Creditor timely filed proof of claim for secured debt. Debtor objected to claim as claim failed to attach a copy of the promissory note. Creditor did not respond to the objection and the Court entered its order disallowing the claim. Lien deemed voided by operation of law at completion of Chapter 13 Case.

8.20 Secured – Release of Lien

- (1949) *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.

8.21 Secured – Proof of Perfection

- (1950) *Waldschmidt v. Nationstar Mortgage, LLC*, 2015 WL 3612875 (Bankr. M.D. Tn. 2015) – Lender's failure to provide to Chapter 7 Trustee proof that lender held original note and perfection of mortgage warranted sanctions against lender. Copy of note provided indicated that it was endorsed in blank. Standing to enforce note depended on possession of original note and as deed of trust follows note, right to enforce trust also depended on possession of the note. Court awarded sanctions in favor of Trustee for reasonable costs and attorney fees incurred by Trustee in attempt to obtain proof of possession of original note.

8.22 Secured – Method of Perfection

- (1951) *Jones v. Simon*, 2014 WL 3695818 (W.D. Ky. 2014) – Alleged security interest in proceeds of litigation was unperfected where creditor did not record financing statement.
- (1952) *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.
- (1953) *Merchants & Farmers Bank v. Coxwell*, Case No. 13-60368 (5th Cir. 2014) – Creditor held perfected security interest in accounts receivable but did not have present possessory right where creditor had not reduced lien to judgment or obtained writ of garnishment or replevin. Third party charged with collection and disbursement of receivables not liable to creditor for negligence or constructive trust where party paid money to debtor rather than lender who claimed security interest, as security interest alone did not give creditor possessory right with which the third party could have interfered or disregarded.
- (1954) *Rogan v. Greentree Financial Servicing Corp.*, 2013 WL 571796 (Bankr. E.D. Ky. 2013) – Method of perfection of security interest is governed by state law. Under Kentucky law, proper method of perfection on manufactured home is by recording lien on certificate of title. However, if manufactured home is converted to real property, then proper method of perfection is recording a lien in the real property records. To convert manufactured home to real property, owner must file affidavit with the county clerk that the home has been permanently affixed; and must surrender the certificate of title. Lender did not record lien on certificate of title and home was never converted to real property using statutory method. Lender's recording of lien with county clerk did not perfect lien as home never became part of real property. Although home was, as a matter of fact, permanently affixed to real property, that alone did not convert home to real property for purposes of perfecting lien. Lender could not avoid result by arguing that home was "fixture" on which lien perfected by recording, because under Kentucky law, only method to convert manufactured home from "title" to real estate was by statutory process for conversion. Thus, home never became part of real estate as matter of law even though it was permanently affixed.
- (1955) *In re Marble Cliff Crossing Apartments, LLC*, 484 BR 175 (Bankr. S.D. Ohio 2012) – Under Ohio law, no specific words or formal documents are necessary to create security agreement, but there must be some written documentation of intent to create security interest. Debtor signed purchased agreement and separate service agreement for acquisition and installation of wireless internet access equipment in apartment complex created security agreement. Although purchase agreement did not create security interest, language in servicing agreement that debtor conveyed security interest in equipment installed was sufficient. Equipment was not a fixture that required recording of security interest in real estate records. "Fixture" requires actual attachment to realty, appropriation of personal property to use of real property; and intention that personal property become permanent part of realty. Equipment was not fixture as equipment had "slight" attachment to realty by screws that could easily be removed with little or no harm to property; equipment benefitted rental business conducted on property rather than property itself; and testimony indicated that parties did not intend for the items to become fixtures. Resulting security interest was PMSI that was properly perfected by filing financing statement with secretary of state.
- (1956) *Mason v. Szerwinski*, 467 BR 893 (6th Cir. BAP 2012) - Perfection of security interest in "chattel" requires filing of financing statement with Secretary of State. Perfection of security interest in fixture accomplished by filing mortgage with the County recorder of deeds. A "chattel" is defined as movable goods or goods that are, for temporary purposes, somewhat attached to the land. A "fixture" is an article which was a chattel, but which by being physically annexed or affixed to the Realty, became an accessory to the Realty and a part and parcel of the Realty. Three-story "cottage" built on leased land constituted a fixture where the evidence indicated that the owner intended the cottage to be permanently affixed to the Realty and could not be readily severed from the Realty. Mortgage contained all requirements for a financing statement and was properly recorded in County in which cottage and underlying leasehold were located.

- (1957) *Soto-Rios v. Bancol Popular de Puerto Rico*, Case No. 10-2270 (1st Cir. 2011) – Mortgagee as purported secured creditor held an "interest in property" as that term is used in both 11 U.S.C. sec. 362(b)(3) and 11 U.S.C. sec. 546(b)(1)(A) even though the mortgage deeds executed by the debtors 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. Hence it held that under Section 546(b)(1)(A), the debtors' strong-arm powers could not be used to avoid the un-recorded mortgages - a bona-fide purchaser of the debtors' property would take the property subject to the mortgagee's interest in the debtors' property. Likewise, the mortgagee's actions in perfecting its mortgages during the post-petition period would be excepted from the automatic stay by virtue of 11 U.S.C. sec. 362(b)(3). Finally, the First Circuit ruled that the 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).
- (1958) *Gold v. Pasternak*, Adv. No. 11-5504 (Bankr. E.D. Mi. 2011) – 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.
- (1959) *Higgason v. Vanderbilt Mortgage and Finance, Inc.*, 2011 WL 4433620 (Bankr. E.D. Ky. 2011), *aff'd* 471 BR 876 (6th Cir. BAP 2012) – 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.
- (1960) *Higgason v. HSBC/Kawasaki*, 2011 WL 3878336 (Bankr. E.D. Ky. 2011) – All-Terrain Vehicle constitutes consumer good. Purchase using HSBC credit card constituted purchase money security interest in a "consumer good" that is automatically perfected. A consumer good is anything purchased for household or personal use and that is movable on the date on which the security interest arises. Trustee could not avoid lien on ATV.
- (1961) *In re Adkins*, 444 B.R. 374 (Bankr. N.D. Ohio 2011) - Under Ohio Uniform Commercial Code, creditor had no purchase money security interest in windows once they were installed in debtors' residence. Fixtures are excepted from purchase money security interest if they are ordinary building materials incorporated into improvement on land where alleged secured creditor did not hold a mortgage on the underlying realty or improvements located on the property.
- (1962) *In re Boston*, 2010 WL 5128960 (Bankr. D.S.C. 2010) - Amended car loan agreement that changed material terms but did not describe collateral or contain sufficient detail to stand alone as a new security agreement was "mere modification" of original contract, not "refinancing," and was entitled to purchase money status. Debtors purchased car in September 2007, modified the contract in January of 2008, then filed Chapter 13 in December of 2009. The Amendment changed several material terms of the Contract, including the annual percentage rate of interest, the payment amount, the number of payments, the date for payment, and the maturity date of the loan but no additional funds were advanced and no new note or security agreement was executed and the Amendment did not describe or otherwise reference the collateral for the loan. Amendment was modification of the original Contract and not a new agreement resulting in continuation of original purchase money security interest in the Vehicle.
- (1963) *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.
- (1964) *Keisler v. Mission Compound, LLC.*, 2010 WL 4627892 (Bankr. E.D. Tn. 2010) – Security interest in stock is created by execution of a document that purports to grant a security interest. The document does not need to be captioned "Security Agreement" or any other specific term as long as the document contains the requisite granting language. Where multiple documents are executed contemporaneously, those documents may be construed together to grant a security interest even though no one document contains the necessary granting language. The security agreement becomes perfected when the stock certificates are delivered to the secured lender. Possession of the stock certificates without a written agreement creating a security interest is ineffective to create a security interest. Where debtor pledged stock as security for loan from consortium of lenders, security interest was created and perfected as to entire consortium even though granting language identified only the "lead" lender and the stock certificates were delivered only to the lead lender. Loan documents provided that all lenders in consortium would have same rights and stand *in pari passu*, indicating intent that all lenders would benefit from security interest. Pledge and delivery to lead lender necessarily included pledge to and for benefit of all lenders in consortium, and not just the lead lender.
- (1965) *Boyd v. Direct Capital Corp.*, 2010 WL 4259981 (Bankr. W.D. Mi. 2010) – Creditor who failed to disclose lien on certificate of title to motor vehicle did not hold perfected security interest by virtue of security agreement. 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. The term "goods" is not akin to "all assets" and "all property" so as to be so generic as to be meaningless and ineffective. The latter terms are broader than the term "goods" and include both tangible and intangible property. In contrast, the term "goods" substantially narrows the universe of collateral by eliminating such common commercial collateral as "general intangibles," "accounts," "chattel paper," "money" and many other important categories of collateral. In addition, unlike the words "assets" and "property," the term "goods" is

defined in the UCC. 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.

- (1966) *In re Johnson*, 2010 WL 4235399 (Bankr. E.D. Mi. 2010) - Debtor validly pledged disability benefits to secure loans prior to commencement of bankruptcy. Debtor's right to receive disability benefits is a "contract right" within the scope of the pledge as either an "account receivable" or "general intangible". Spendthrift clause that prevents assigning rights or interests is not enforceable to the extent it purports to prohibit or restrict creating of security interest in an account or general intangible. Disability benefits are not "insurance" for purposes of Article 9 of the Uniform Commercial Code as "insurance" requires payment of a premium by the insured. In this case, the premiums were paid by debtor's employer depositing funds into a self-funded trust for payment of benefits, without any insurance policy, insurance company, named insured, or premiums. ERISA does not pre-empt assignment of employee welfare benefit plan. ERISA does pre-empt assignment of pension plan only.
- (1967) *Mason v. Szerwinski*, 2010 WL 3074389 (Bankr. N.D. Ohio 2010) – Whether mortgage or security interest is properly perfected depends on whether proper notice has been recorded in appropriate location as defined at state law. Documents required and location of recording depend on nature of collateral. Property generally falls into one of three categories – chattel, fixture and real property. Perfection of interest in Chattels requires filing of Financing Statement with Secretary of State. Perfection of Mortgage on real property is perfected by recording a mortgage that complies with state law in the County Register of Deeds. Perfection of a security interest in fixtures is also perfected by recording in County records. Chattels are goods that are movable. But chattels also include goods that are for temporary purposes somewhat attached to the land. “Fixtures” are goods that have become so related to particular real property that an interest in them arises under real property law and requires actual annexation to the realty or something appurtenant thereto; application to the use or purpose of that part of the realty with which it is connected, and the intention of the party making the annexation, to make the article a permanent accession to the freehold. However, if the articles which are annexed to realty become so absorbed within it by virtue of the method and degree of annexation, and their adaptability to the use of the realty, their identity as personality may be said to be destroyed and they become fixtures, regardless of the intention of the parties. The same article may be a fixture under certain circumstances and a chattel under others. The term “fixture” and the phrase “improvement to real property” are not synonymous. A fixture is often thought of as a former chattel which, while retaining its separate physical identity, is so connected with the realty that a disinterested observer would consider it a part thereof. An improvement after being installed, loses its identity separate from the overall system or building in which it is located and becomes part of the realty. Properly recorded Mortgage that encumbered realty and all fixtures “now or hereafter” attached to the land constituted perfected lien as to later constructed cottages sufficient to defeat Trustee’s strong arm power under Section 544, where the cottage was constructed on site and never had an independent identity before it was installed on the property and had a basement making it is well-integrated with difficult to remove from the property.

8.23 Secured – Description of Collateral

- (1968) *Bazinski v. JPMorgan Chase Bank*, 2014 WL 1405253 (E.D. Mi. 2014), *aff’d*, 2015 WL 1003036 (6th Cir. 2015) – Michigan law does not required legal description in mortgage or other grant of interest in real property, as long as property is sufficiently described as to be accurately ascertainable. Property described by common street address was sufficiently specific.
- (1969) *In re D & L Equipment, Inc.*, Case No. 10-72623 (Bankr. E.D. Mi. 2010), *aff’d* 2011 WL 3946814 (E.D. Mi. 2011) – Financing statement must provide name of debtor; provide name of secured party or representative of secured party; and description of collateral covered. Description is sufficient if it reasonably identifies what is covered, whether by specific listing, category, or type of collateral covered. Financing statement that identified collateral as “inventory” would be sufficient to place party on notice. Recorded transfer of Financing Statement that changed identity of secured party from CIT to Wells Fargo sufficient to cause third party to inquire as to obligations owed to Wells Fargo secured by inventory, whether loans were made by CIT or by Wells after assignment of Financing Statement recorded. Reasonable person would have notice and would have duty to inquire as to exactly what inventory was covered rendering description sufficient for purposes of perfection of security interest.

8.24 Secured – After-Acquired Property

- (1970) *Johnson v. RFF Family Partnership, LP*, 2016 WL 4401609 (Bankr. S.D. Ohio 2016) – Under Section 522, otherwise valid pre-petition security interest does not attach to property acquired by estate or by debtor after commencement of case. Under Section 1115, earnings from services performed after commencement of case are included in property estate. Post-petition salary payments under Personal Services Contract that was assigned pre-petition were “after acquired” property not subject to security agreement and assignment. Plyer not entitled to payment under contract until game is played. Debtor did not receive any payments under contract for 2014-15 season until after case was filed. Contract payments were not earned when contract was signed but only as debtor played games and otherwise fulfilled requirements of contract post-petition. Pre-petition assignment of wages unenforceable to extent wages were earned by player playing games post-petition.
- (1971) *Botson v. Citizens Banking Co.*, 2015 WL 3486616 (Bankr. N.D. Ohio 2015) – Lien continued in products and proceeds of collateral but would not be continued as to property first acquired by debtor post-petition under Section 552 which avoids after-acquired property clauses in pre-petition security agreements.

8.25 Secured – Personal Services Contract

- (1972) *Johnson v. RFF Family Partnership, LP*, 2016 WL 4401609 (Bankr. S.D. Ohio 2016) – Whether future payments under personal service contract are assignable is determined by state law. Loan agreement specified that California law controlled. Under California law, Wage assignments must be contained in separate agreement signed by person whose wages or salary have been or will be earned; if the assignor is married, the assignment must also be signed by the spouse; if the assignor is a minor, the assignment must bear the consent of the parent or

guardian; if the assignor is neither married nor a minor, the assignment must contain a statement setting forth those facts; no other assignment can exist; a copy of the assignment must be notarized. Agreement is then only valid for wages that have already been earned and assignment is limited to 50% of wages or salary. Debtor, a professional hockey player, assigned the rights under his Player Contract to lender to secure loans. Assignment was invalid where at time of execution of assignment, debtor's wages were already subject to garnishment, such that second assignment was statutorily void. Further, there was no evidence that the assignment was ever notarized or that the assignment attached a statement of amounts then due. Further, to extent that Player Contract required payment of wages as future games are played, assignment was not limited to wages already earned, but would include future payments under contract. Although contract specified amount of payments and dates of payments, right to receive money is still contingent on debtor showing up, strapping on skates, and playing.

8.26 Secured – Property of Third Party

- (1973) *In re Eyerman*, 517 BR 800 (Bankr. S.D. Ohio 2014) – Creditor was not “secured” creditor in Chapter 13 case where debtors signed loan agreements solely as representative of LLC and property covered by security agreement consisted solely of property belonging to LLC. Although loan documents listed debtors as “additional borrowers”, security interest did not include any property of debtors. As such, Chapter 13 plan that proposed to treat creditor as unsecured complied with requirements of Section 1325(a)(5).

8.27 Security Deposits

- (1974) *Iwanski v. Federal Home Loan Mortgage Corp.*, 477 BR 67 (E.D. MI. 2012) – Possession of property, including security deposits for rental property, remains in mortgagor until expiration of state law redemption. Prior to expiration of redemption, landlord/mortgagor can apply security deposits to rent arrearages. Adversary proceeding brought by tenants to compel return of security deposits remanded for proceedings to determine whether any unpaid rent remained outstanding as of date of redemption to which security deposits could be applied. To extent debtor retained security deposits remained in possession of the debtor and security deposits exceeded unpaid rents, deposits would have to be refunded by debtor.

8.28 Secured – Accounts Receivable

- (1975) *In re Brandon*, Case no. 14-23735 (D. Md. 2015) – Prepetition assignment to attorney of debtor's right to receive refund from Chapter 13 Trustee where case dismissed or converted prior to confirmation is valid and enforceable. Upon conversion of case prior to confirmation, Trustee must honor assignment and pay money on hand, to extent necessary, to pay awarded and unpaid administrative expenses. Court did not discuss impact of either Section 549 or 552.
- (1976) *1st Source Bank v. Wilson Bank & Trust*, 2013 WL 5942056 (6th Cir. 2013) – Financing statement that included “proceeds” did not perfect claim to accounts receivable. Financing Statement described collateral as various truck and tractors and “all proceeds thereof” but did not include the term “accounts”, “accounts receivable” or any other similar language. Income produced by use of collateral is not “proceed” as defined in Article 9.
- (1977) *Swope v. Commercial Savings Bank*, 2013 WL 1336998 (Bankr. N.D. Ohio 2013) – Whether and to what extent creditor holds security interest and whether that interest is perfected are matters of state law. Uniform Commercial Code provides that security interest is enforceable only when value has been given by the creditor, debtor has rights in the collateral or the power to transfer rights to third party, and debtor has authenticated a security agreement that describes the collateral. The description is sufficient whether or not it specifically identifies any item of collateral if it reasonably identifies the collateral, including a description by category or type of collateral. Security interest is valid against third party such as Bankruptcy Trustee only if interest is perfected, generally by filing a financing statement with the appropriate governmental agency. Security agreement did not create security interest in accounts receivable where security agreement described collateral as a specific piece of medical equipment and related equipment, and the proceeds and products of the equipment. Accounts receivable did not qualify as “proceeds of collateral”. Proceeds are whatever is acquired at the sale, lease, license, exchange or disposition of the collateral. Although use of equipment generated receivables, those receivables were not proceeds as the debtor never disposed of the equipment, but were rights to receive payment for services. Accounts receivable were not “products” of the collateral. Products are defined as a yield, income, receipt or return on the equipment. Accounts receivable were not derived from the equipment itself, but from services ancillary to the equipment. Although equipment may have been used to perform services, the receivables were not “income” from the collateral. Further, security agreement had box to identify “accounts and rights to payment” but box was not checked. As creditor did not hold security interest in accounts receivable, creditor's rights did not supersede the rights of the Trustee.

8.29 Secured – Proceeds of Collateral

- (1978) *Johnson v. RFF Family Partnership, LP*, 2016 WL 4401609 (Bankr. S.D. Ohio 2016) – Section 522(b) allows pre-petition security interest in property acquired by debtor before commencement of case to extended post-petition to proceeds, products and profits of the collateral. Proceeds are “obtained as result of some loss or disposition of the collateral, not merely its use”. Post-petition payments under Player Service Contract assigned by debtor pre-petition were not proceeds or profits. Post-petition salary payments were earned after commencement of case were not proceed of Personal Services Contract. Personal Service Contract would generate proceeds only if the contract itself is sold or transferred, not when it is performed. Payments for post-petition services are earnings and not proceeds for purposes of Section 552.
- (1979) *1st Source Bank v. Wilson Bank & Trust*, 735 F.3d 500 (6th Cir. 2013) – Security interest that encumbers collateral and “all proceeds thereof” does not perfect security interest in accounts receivable. Lender did not have automatically perfected PMSI in commercial trucks as commercial vehicles are not “goods” to which PMSI automatically attaches.
- (1980) *Swope v. Commercial Savings Bank*, 2013 WL 1336998 (Bankr. N.D. Ohio 2013) – Security agreement did not create security interest in accounts receivable where security agreement described collateral as a specific piece of medical equipment and related equipment, and the

proceeds and products of the equipment. Accounts receivable did not qualify as “proceeds of collateral”. Proceeds are whatever is acquired at the sale, lease, license, exchange or disposition of the collateral. Although use of equipment generated receivables, those receivables were not proceeds as the debtor never disposed of the equipment, but were rights to receive payment for services. Accounts receivable were not “products” of the collateral. Products are defined as a yield, income, receipt or return on the equipment. Accounts receivable were not derived from the equipment itself, but from services ancillary to the equipment. Although equipment may have been used to perform services, the receivables were not “income” from the collateral. Further, security agreement had box to identify “accounts and rights to payment” but box was not checked. As creditor did not hold security interest in accounts receivable, creditor’s rights did not supersede the rights of the Trustee.

- (1981) *Ferry Road Properties, LLC v. RL BB Acq II-Tn, LLC*, 2012 WL 3888201 (Bankr. E.D. Tn. 2012) – Proceeds of cause of action for damages to property are, in equity, treated as the land itself. Mortgaged land, in its present damaged condition, together with money awarded for injury to the land, stand in the place of the original uninjured land. Debtor filed suit against company that negligently constructed deficient improvements to property. During pendency of that action, lender foreclosed and purchased property at the foreclosure sale. To extent suit sought recovery for damages to property, that action passed from debtor to lender at foreclosure. However, to extent suit sought recovery of “commercial tort”, consisting of claim that arose in operation of business, action is not “proceeds” under mortgage and action remains property of debtor

8.30 Secured – Products of Collateral

- (1982) *Swope v. Commercial Savings Bank*, 2013 WL 1336998 (Bankr. N.D. Ohio 2013) – Security agreement did not create security interest in accounts receivable where security agreement described collateral as a specific piece of medical equipment and related equipment, and the proceeds and products of the equipment. Accounts receivable were not “products” of the collateral. Products are defined as a yield, income, receipt or return on the equipment. Accounts receivable were not derived from the equipment itself, but from services ancillary to the equipment. Although equipment may have been used to perform services, the receivables were not “income” from the collateral. Further, security agreement had box to identify “accounts and rights to payment” but box was not checked. As creditor did not hold security interest in accounts receivable, creditor’s rights did not supersede the rights of the Trustee.

8.31 Secured – Insurance Proceeds of Collateral

- (1983) *Farmer v. Citizens National Bank of Athens*, 2015 WL 1735242 (Bankr. E.D. Tn. 2015) – Settlement proceeds of insurance following damages to real property are part of the collateral and are lien in proceeds is perfected to same extent as lien in underlying property. It is not necessary for creditor to separately record UCC-1 financing statement to perfect lien in insurance proceeds.

8.32 Secured - Priority of Competing Interests

- (1984) *Sunshine Heifers, LLC v. Purdy*, 2016 WL 4392815 (W.D. Ky. 2016) – Where debtor at time of incurring debt has outward appearance of ownership and control of collateral, security interest attached free and clear of other parties who may have interest in collateral. However, where property in possession of debtor is leased and not owned by debtor, security interest cannot attach as debtor has no sufficient interest beyond leasehold interest to which security interest could attach. None of the cattle ultimately sold at auction were part of leased herd as those cattle had earlier been disposed of. Proceeds of auction belong to secured creditor as proceeds of collateral.
- (1985) *Cyber Solutions International, LLC v. Pro Marketing Sales, Inc.*, 2016 WL 106087 (6th Cir. 2016) – Perfected security agreement had priority over later executed license agreement. Security agreement covered all of debtor’s intellectual property “whether now or hereafter arising or acquired, or in which [debtor] now has or at any time the future may acquire any right, title or interest”. Subsequently executed license agreement called for licensee to invest money in debtor to allow debtor to develop new software with requirement that upon development, debtor would assign products to licensee. License specifically recognized existence of prior security interest and terms of security interest clearly included any rights which debtor acquired in future. Fact that license required debtor to assign future products to licensee meant that products became property of debtor, and security interest attached, before property conveyed to licensee. All property is subject to security interest and lien passes with property when assigned to licensee, with assignment being subject to security agreement.
- (1986) *In re Purdy*, 2015 WL 5176580 (Bankr. W.D. Ky. 2015) – Claim to proceeds of sale of collateral and products of collateral depends on priority of claims between competing creditors. Properly executed security agreement does not attach until borrower acquires interest in collateral, as law does not permit a person to encumber property of another person. Debtor acquired interest in collateral when debtor paid for the collateral out of an account established by lender for purpose of purchasing inventory. That Debtor was later reimbursed by debtor’s corporation for the purchase price did not change fact that debtor initially acquired interest and security interest attached when debtor acquired that interest.
- (1987) *Brainger v. JAO Distributors, Inc.*, 2015 WL 4910970 (S.D. Ohio 2015) – Distributor of produce licensed as PACA distributor with USDA has superior claim to produce and to proceeds of sale over that of secured creditor. PACA creates statutory trust to protect produce dealers which is non-segregated floating trust effective at moment buyer accepts shipment. Seller must notify buyer of intent to preserve trust, which can be done on the invoice from itself. PACA claimant was entitled to trust protection even where PACA license had expired, where USDA acknowledged that USDA error causes license to not be renewed, and USDA then retroactively renewed license as if license never lapsed and with all rights, duties and obligations remaining in full force and effect. Lender could not rely on bona fide purchaser defense to PACA trust. BFP requires acquisition of PACA trust property for value and without notice of purchaser’s breach of trust. Transfer of property to lender in payment of pre-existing debt or obligation is not “for value”. Further, lender had notice that purchaser was having financial difficulties at time lender extended credit, sufficient to defeat BFP status. Lender knew that purchaser/borrower: (1) was in default of its fixed charge and operating leverage loan covenants; (2) had lost its major customers and posted a loss of \$817M as of June 30, 2013; and (3) had year-end projected losses exceeding \$1MM; lender had advised purchaser/borrower that a significant contribution of equity sufficient

to cover the current and projected operating losses through fiscal year end; lender determined it would not renew purchaser/borrower's line of credit; ordered an appraisal of purchaser/borrower's real property and warehouse as a "troubled asset"; lender reported a collateral shortfall; and lender downgraded the loans to "substandard" based on interim losses and the continued default of loan covenants.

- (1988) *Susquehanna Bank. v. United States*, 2014 WL 5488166 (4th Cir. 2014) – Creditor's security interest entitled to priority over IRS lien even where security interest not recorded or perfected until after IRS lien recorded. Treasury regulations provide that Tax Lien is superior to any unrecorded interests as of date of recording even if competing interest arose prior to perfection of Tax Lien. However, tax lien is entitled only to priority that state law affords judgment liens. Under Maryland law, judgment liens are inferior to the holder of title pursuant to an unrecorded contract for sale. Although seller retains bare legal title until transfer is recorded, equity regards the transfer as having occurred and vendee becomes "owner" of property superior to any judgment lien subsequently obtained against seller. Bank, as grantee of deed of trust, was vendee and acquired equitable title when deed of trust executed and delivered. Later recorded IRS lien against "seller" was of no effect against property as deed of trust holder, not grantor, was deemed to be "owner" of property.
- (1989) *1st Source Bank v. Wilson Bank & Trust*, 735 F.3d 500 (6th Cir. 2013) – Security interest that encumbers collateral and "all proceeds thereof" does not perfect security interest in accounts receivable. Lender did not have automatically perfected PMSI in commercial trucks as commercial vehicles are not "goods" to which PMSI automatically attaches.
- (1990) *Agri-Max Financial Services, LP v. Springfield State Bank*, 2013 WL 4525175 (Bankr. W.D. Ky. 2013) – Priority of security interests is matter of state law. Lender failed to obtain perfected purchase money security interest in livestock where lender failed to provide statutorily required notice to second creditor who held perfected lien on all of debtor's livestock. As such, the lender holding the blanket lien on all livestock had priority in livestock and in proceeds received upon disposition of livestock.
- (1991) *Peoples National Bank v. Bandera Bank*, Case no. 12-3079 (7th Cir. 2013) – Cross collateralization clause in properly recorded first mortgage was sufficient constructive notice to second mortgage holder that actual balance secured by first mortgage may exceed face amount of debt stated in first mortgage and note as long as total amount of all secured indebtedness did not exceed "Maximum Lien" amount stated in the mortgage. While "Maximum Lien" amount stated was also the initial amount of the promissory note, once the borrower began making payments, the principal balance owed on the note would decrease and the amounts owed on any cross-collateralized obligations would attain secured status to extent of principal reduction on note. Information contained in recorded mortgage provided sufficient notice that any subsequent purchaser or lender would have duty to further inquire as to actual balance secured by mortgage and possible cross-collateralized loans.
- (1992) *Sunshine Heifers v. Citizens First Bank*, 763 F.3d 513 (6th Cir. 2014) – Whether a transaction creates a lease or a security interest if the consideration that the lessee is to pay is for a right to use and possess goods for a term that is not subject to termination by lessee, and original term of lease is equal to or greater than economic life of the goods; the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods; the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement. Debtor's lease of dairy cattle was true lease such that cattle were not subject to lender's blanket lien on all assets of debtor, where lease was clearly and conspicuously titled "Lease"; debtor was prohibited from terminating transaction during term; and debtor was obligated to return cattle at end of lease term. Agreement will be considered "disguised security agreement" sufficient to pass title to lessee where lease term runs longer than economic life of asset. If goods retain meaningful value after lease expires, economics of transaction indicate that agreement is true lease. Agreement also did not provide for purchase option at end of lease at nominal price nor was transaction such that only economically viable action for lessee is to purchase the goods.
- (1993) *Citizens Commerce National Bank v. Republic Bank & Trust Co.*, 2012 WL 3028466 (E.D. Ky. 2012) – Future advance clause in mortgage is valid if the clause describes the amount of additional indebtedness with reasonable certainty. nature and amount of permitted advances must be described such that terms can be determined with exercise of ordinary discretion and diligence. Future advance clause sufficiently described allowable amount of indebtedness by stating, "At no time shall the principal amount of the indebtedness secured by this mortgage, not including sums advanced in accordance herewith to protect the security of this mortgage, exceed the original amount of the Note, plus \$____. All additional advances secured by this mortgage shall be due and payable on or before the Final Maturity Date of the Note, or such time as demand for payment may be made by Mortgagee." Including of blank resulted in future advances permitted up to total amount of original note. As note is paid down, additional advances would be allowed as long as those did not exceed the stated principal amount of the note.
- (1994) *Brown Commercial Construction Co. v. Corbin Park, LP*, Case No. 10-084 (10th Cir. BAP 2012) – Mechanics lien did not trump recorded first mortgage where mortgage was recorded before contractor performed first lienable work, although contractor had provided other, non-lienable services, prior to date of recording of mortgage. Further, contractor-appellant who had done work on the subject property for a different owner under a different contract previously (which was satisfied), could not use that work to tack work performed under a different contract with the current owner (the Debtor) to achieve priority of its mechanic's lien.
- (1995) *Smoky Mountain Title, Inc. v. Tennessee State Bank*, 2012 WL 122539 (Bankr. E.D. Tn. 2012) – Court can use vehicle of equitable lien to restore a released deed of trust to its priority position. Plaintiff must show a clear intent to make particular property security for debt and that money has been parted with in reliance on the lien. However, court cannot restore lien where intervening rights of third parties would be adversely affected. Deed and mortgage cannot be restored where doing so would be adverse to status of trustee as bona fide purchaser. However, inquiry notice can defeat subsequent interest even absent actual or constructive notice if party had sufficient facts and information from which actual knowledge can be inferred. 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 fell 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.

- (1996) *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.
- (1997) *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
- (1998) *Fifth Third Bank v. JPMorgan Chase Bank, N.A.*, 2011 WL 30770 (W.D. Ky. 2011) – Mortgage executed by one trustee valid even where not signed by other co-trustee where trust agreement allowed either trustee to individually mortgage or encumber property
- (1999) *All Points Capital Corp. v. City of Cheyboygan*, Case No. 09-2007 (Bankr. E.D. Mi. 2010) – Court unable to determine on Summary Judgment relative priorities of secured interests where issues involved lengthy and complex series of agreements that were ambiguous on critical terms and points.
- (2000) *LaSalle Bank. v. Lim*, 2009 WL 2891229 (Bankr. E. D. Mi. 2009) – Mortgage recorded second in time will be granted first mortgage status where both mortgages were executed at the same time, both mortgagees were aware of the granting of the other mortgage, and the second recorded mortgage was the “purchase money” mortgage while the first recorded mortgage was a “construction loan”. Court concluded that if the construction mortgage had been granted prior to the purchase money mortgage, under Michigan law the construction mortgage would not take effect until acquisition of the property had been completed which would not occur until after the purchase money mortgage had been granted and titled vested in the purchaser. If the purchase money mortgage was granted first, that mortgage would have priority over the construction mortgage because the construction mortgagee had actual notice of the purchase money mortgage. Under either circumstance, the priority of the mortgages would not be governed by the time of recording of those mortgages.

8.33 Secured Claims – Equitable Subordination

- (2001) *Michigan Department of Environmental Quality v. Asmar*, Case No. 14-3172 (Bankr. E.D. Mi. 2015) – Court can equitably subordinate secured claim to claims of unsecured creditors where the party holding the secured claim engaged in inequitable conduct; conduct resulted in injury to debtor or conferred unfair benefit on creditor; and equitable subordination is not inconsistent with other provisions of Code. Satisfaction of all three elements does not mandate subordination but merely permits court to subordinate. Where the claimant is an insider, the court will apply the test with greater scrutiny and even less egregious conduct will support subordination. However, mere status as an insider is insufficient unless creditor-insider actually uses position to its advantage or to detriment of other creditors. Secured creditor acted inequitably in obtaining mortgage on debtor’s sole asset. Secured creditor owed money to lender. Creditor “loaned” money to corporation and took mortgage, and corporation then used money to pay off creditor’s sole debt to third party. Transaction was structured to allow secured creditor to take mortgage to benefit creditor and deprive other creditors of value in now-encumbered assets. Once subordination is deemed appropriate, court will subordinate claim only to extent necessary to offset injury or damage suffered by creditor.
- (2002) *Associates First Capital Corp. v. Hensley*, 2014 WL 4251567 (6th Cir. 2014) – Equitable subordination allows later mortgage to assume same priority as prior mortgage where lender advances money to pay off prior encumbrance and new mortgage fails to properly encumber property due to no fault of lender. Debtor owned two parcels subject to single mortgage. Debtor refinanced and new lender included only one of the two legal descriptions in the mortgage. Lender did not discover error for more than 10 years, and only after debtor filed bankruptcy. Court denied request for equitable subordination, noting that lender was negligent in protecting its rights, in making error in first instance and then in not discovering error for more than 10 years.
- (2003) *Ocwen Loan Servicing, LLC v. Summit Bank, NA*, Case No. 13-1615 (8th Cir. 2014) – Equitable subrogation 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. Sometime 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.

- (2004) *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.

8.34 Purchase Money Security Interests

- (2005) *In re Murphy*, 2013 WL 1856337 (Bankr. D. Kn. 2013) – Creditor holds perfected PMSI in goods purchased on Best Buy credit card. Credit application debtor signed when acquiring the car granted Bank a security interest in all goods purchased using the card. Description of goods in security agreement as "goods purchased" was sufficient description to create valid security interest.

8.35 Secured Claim – Allowed Charges Generally

- (2006) *Ginn v. CitiMortgage, Inc.*, 365 BR 84 (Bankr. D.S.C. 2012) – Section 506(b) allows oversecured creditor to add reasonable post-petition interest, costs and charges to the amount of the secured claim, to the extent permitted by the underlying contract. However, Section 506 is inapplicable to Chapter 13 Plans that propose to cure and maintain under Section 1325(b)(5). Court must determine whether and to what extent post-petition fees and charges are property under the loan documents without regard to oversecured versus undersecured.
- (2007) *First Tennessee Bank, NA v. Hansen*, 2012 WL 1156409 (Bankr. E.D. Tn. 2012) – Bank could include in secured claim damages to property that resulted from activities of debtors' grandson. Grandson was producing methamphetamines in basement without knowledge of debtors, causing substantial damage to house and requiring house to be gutted post-foreclosure to remediate. Mortgage imposed duty to preserve, maintain and protect property. Damages would be included in the allowed claim.

8.36 Secured – Attorney Fees

- (2008) *In re Simoukdalay*, 2016 WL 4613346 (Bankr. E.D. Tn. 2016) – Secured creditor entitled to attorney fees where and to extent provided for in contract or statute. Creditor not entitled to attorney fees for services that are not encompassed within services describe in attorney fee provisions of contract or statute. Note and Deed of Trust provided for attorney fees in case of enforcement, and restructuring was not part of "enforcement, which would not include fees for restructuring. However, Note and Deed of Trust contained second provision for fees incurred in connection with the indebtedness, not limited to collection, was broad enough to include pre-petition modification fees. Fees for services in the Chapter 13 including filing proof of claim, attendance at 341 meeting and review of plan are fees associated with default where debtor had defaulted on mortgage pre-petition and services were in direct response to debtors' defensive action of filing bankruptcy, similar to actions to defend lien created by deed of trust. Amount of fee award is governed by federal, not state law, based on all the facts and circumstances presented by the record, primarily the amount involved and available, the nature of the responsibility assumed by the attorneys, the character and extent of the services which they have performed, not only in the technical litigation itself, but also in matters arising out of and incidental to such litigation, and considering other factors including (1) the nature, extent, length and value of the services rendered; (2) the bankruptcy and non-bankruptcy experience, reputation, and ability of the attorneys; (3) awards in similar cases; (4) the novelty and difficulty (or lack thereof) of the questions presented; (5) the skill requisite to perform the legal services properly; (6) the customary fee; (7) professional time actually spent; (8) amount involved in potential risk; (9) the results of the cases; (10) specialty in which the attorneys may be practicing; (11) fees sought to be applied; (12) distinction between partner and associates time; (13) costs of comparable services; (14) use or lack thereof of paralegals; and (15) duplication of efforts. Fees of \$3500 for services in connection with enforcement of mortgage with principal balance of \$70,000 not unreasonable. Although debtor contended that fees were almost double the customary fee in the area, there was no evidence or implication that the time was not actually spent by the attorneys involved or that the attorneys involved were not worth their hourly rate. Attorneys were knowledgeable attorneys who have appeared before this court in a competent and professional manner. Court reduced the fees where there was duplication or educational charges that a regular bankruptcy practitioner would not have incurred but included fees legal research as attorney who regularly appears before the court should be compensated for making sure he or she is on solid legal ground. Creditor's attorneys were required to reconstruct the accounting in order to file the attachments now required for a mortgage claim allowing parties to reach a consensual resolution on the amount of the principal and interest due under the note.
- (2009) *In re Misleh*, 2015 WL 4464148 (Bankr. E.D. Mi. 2015) – Provision of mortgage allowing secured claim to recover attorney fees is valid and enforceable to extent fees are reasonable compensation for services rendered. Borrower's state court complaint seeking to enjoin foreclosure was legal proceeding that might significantly affect bank's interest within definition of mortgage documents and attorney fees incurred in defending action were recoverable by lender. Court scheduled evidentiary hearing to consider amount and reasonableness of fees.
- (2010) *In re Fuentes*, 2014 WL 988593 (Bankr. S.D. Tx. 2014) – Undersecured creditor is not entitled to post-petition attorney fees incurred prior to confirmation of plan. Chapter 13 plan is not effective until confirmation, such that provisions of 1322(b) and (e) do not apply until confirmation.
- (2011) *Rodriguez v. Countrywide Home Loans, Inc.*, Case No. 11-40056 (5th Cir. 2012) – Bankruptcy Court properly certified class action suit against mortgage lender and entered injunction prohibiting lender from adding into mortgage balance attorney fees and costs allegedly