



AMERICAN
BANKRUPTCY
INSTITUTE

2017 Hon. Steven W. Rhodes Consumer Bankruptcy Conference

Annual Case Law Update

Hon. James W. Boyd

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

Thomas D. DeCarlo

Office of the Chapter 13 Trustee; Detroit

Laura J. Genovich

Foster, Swift, Collins & Smith, PC; Grand Rapids, Mich.

AMERICAN BANKRUPTCY INSTITUTE
CONSUMER BANKRUPTCY SEMINAR

NOVEMBER 10, 2017

Case Law Update

Honorable James Boyd
United States Bankruptcy Court
Western District of Michigan

Laura Genovich, Esquire
Foster, Swift, Collins & Smith, PC
Grand Rapids, Michigan

Thomas DeCarlo, Esquire
Staff Attorney – Office of David Wm. Ruskin

Henson v. Santander Consumer USA, Inc., Case No. 16-349 (U.S. 2017) – Fair Debt Collection Practices Act applies only to third-parties were collecting debts owed to a different creditor. Purchaser of debts from original creditor and who has thereafter owned debts out right are not “debt collectors” within scope of FDCPA.

Czyzewski v. Jevic Holding Corp., ____ US ____, 2017 WL 1066259 (2017) – Bankruptcy Court cannot approve “structured dismissal” of Chapter 11 case where distributions would not follow ordinary priority rules without assent of impacted creditors. Dismissal does not propose to preserve Debtor as going concern, does not make disfavored creditors better off, does not propose possibility of confirmable plan, does not restore status quo, and does not protect reliance interest.

Midland Funding, LLC v. Johnson, 137 S.Ct. 1407 (2017) - Debt collector who files claim that is obviously barred by statute of limitations has not engaged in false, deceptive, misleading, unconscionable, or unfair conduct and does not violate Fair Debt Collection Practices Act.

New Products Corporation v. Tibble, 2016 WL 245908 (Bankr. W.D. Mi. 2016), *aff'd*, 2017 WL 4216081 (W.D. Mi. 2017) – Trustee has duty to protect assets consistent with ordinarily prudent person in conduct of private affairs under similar circumstances and with a similar object in view. Trustee does not have duty to protect asset where liens on asset exceed value, as any money expended would solely benefit secured creditor while depleting the few assets of estate.

Jahn v. Burke, 2017 WL 2990162 (6th Cir. 2017) – Debtor has standing to seek to compel abandonment of exempt property if property is of inconsequential value. Court cannot force Debtor to vacate property while Trustee attempts to sell property merely by tendering to Debtor the value of the claimed exemption in the property.

In re Coslow, 2017 WL 3225450 (Bankr. W.D. Ky. 2017) – Value for purposes of abandonment is determined as of petition date. Fact that property appreciated in value post-petition or that amount owed on junior mortgage was reduced post-petition does not create value for purposes of abandonment.

Additional Cite – Page 272, Case Number 1607

In re Haber, 2016 WL 1211339 (Bankr. S.D. Ohio 2016), *aff'd*, 2017 WL 1017731 (S.D. Ohio 2017), *aff'd*, Case No. 17-3323 (6th Cir. 2017) – Abandonment is irrevocable action that permanently 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. Trustee had no claim to surplus proceeds from sale of home where trustee abandoned property prior to foreclosure sale.

Charnetsky v. Buenviaje, Case No. 16-15191 (9th Cir. BAP 2017) - Deadline for objection to exemptions is 30 days after the Section 341 meeting is concluded or 30 days after any amendment to claim to exemptions is filed, whichever is later. Amendments to exemptions do not restart objection period as to assets which were claimed as exempt and previously filed Schedule C and prior claim of exemption is not modified.

New cases not in materials

In re Lynn, 2017 WL 4676245 (Bankr. W.D. Ky. 2017) – Debtor can amend exemptions to exempt previously known but undisclosed asset. Following *Law and Ellmann v. Baker*, Court has no discretion to overrule exemption based on Debtor's alleged bad faith in failing to disclose asset.

In re Awan, 2017 WL 4179816 (Bankr. D.C. Il. 2017) – Rule 1009 allows Debtor to amend exemptions at any time until the case is closed. Court conditioned right to amend after reopening on showing that failure to amend before case closed is due to excusable neglect.

Moyer v. Rosich, 2017 WL 2838285 (Bankr. W.D. Mi. 2017) – Trustee who avoided transfer of property by Debtor to Debtor and husband as tenants by entireties could not recover property itself where Debtor claimed entireties interest exempt and there were no objections to exemptions filed. Once entireties exemption was established, Debtor's interest in property could not be made subject to Debtor's individual creditors and avoidance of transfer that created entireties exemption in first instance does not change fact that Debtor's interest in property is exempt. Remedy under Section 550 would be to enter money judgment against husband for value of property transferred to him.

New case not in materials

In re Mickens, 2017 WL 4767771 (Bankr. W.D. Mi. 2017) – Transfer of property from debtor-spouses as joint tenants to tenants by entireties was avoidable fraudulent transfer as transfer adversely affected rights of individual creditors. Although transfer did not have effect on total estate as Debtors both continued to own property, transfer did adversely affect creditors of one debtor solely.

Ivey v. First Citizens Bank & Trust Co., Case No. 15-2209 (4th Cir. 2017), *cert denied*, ____ US ____ (2017) – Debtor’s deposit of funds into Debtor’s own, unrestricted, bank account is not a “transfer” within scope of Section 101(54). Accordingly, deposits cannot be recovered as fraudulent transfers even if funds were deposited into account as part of Ponzi scheme with actual intent to hinder, delay or defraud creditors.

Bellinger v. Buckley, Case No. 17-0068 (D. Md. 2017) – In Chapter 7 case, Death of spouse after bankruptcy filing does not affect debtor’s entireties exemption. Debtor’s acquisition of spouse’s share of property, although defeating entireties status, converts debtor’s ownership interest into new interest that did not exist prior to commencement of case and so is beyond reach of trustee.

Hawk v. Engelhart, Case No. 15-914 (S.D. Tx. 2016), *affd*, Case No. 16-20641 (5th Cir. 2017), *opinion on rehearing*, Case No. 16-20641 (5th Cir. 2017) – In Chapter 7 proceeding, once exemptions have been claimed and either time for objecting has expired or objections have been overruled and exemptions determined, subsequent change in character of property does not defeat objection. Decision would be different in Chapter 13 as Section 1306 allows Estate to capture after acquired property interest including non-exempt interests even if acquired with previously exempt assets.

Brown v. Ellmann, Case No. 14-48421 (Bankr. E.D. Mi. 2015), *aff'd*, 2016 WL 3055618 (E.D. Mi. 2016), *aff'd*, 2017 WL 1046107 (6th Cir. 2017) – 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.

New case not in materials

In re Arndt, 2017 5164141 (Bankr. N.D. Ohio 2017) – Test for “presumed abuse” under Section 707(b)(2) is backward looking test that is mechanically applied that does not consider future “projected disposable income”. Debtor permitted to deduct secured debt payments where Debtor intends to surrender collateral. Section 707(b)(3) allows Court to dismiss case where totality of Debtor's financial circumstances, including both pre-petition and post-petition circumstances, demonstrates that debtor is not needy and that granting discharge would be abuse of Chapter 7 including ability to repay debts out of future earnings stability of income; eligibility for Chapter 13; potential State Law remedies and relief obtainable through private negotiations; and whether expenses can be reduced.

Fern v. US Department of Education, 2017 WL 490416 (8th Cir. BAP 2017) – Evidence supported finding of undue hardship if Debtor, a single mother of three, had to repay student loans. Debtor had maximized her income and was also receiving food stamps and rental assistance, yet could barely meet living expenses. Court rejected lender's argument that Debtor had ability to pay where under applicable guidelines, Debtor's required payment would be \$0.00, which would not affect Debtor's standard of living.

Price v. DeVos, 2017 WL 2729073 (Bankr. E.D. Pa. 2017) – *Brunner* test requires proof that Debtor is unable to maintain minimal standard of living if required to repay loan; additional circumstances exist to show that state of affairs is likely to continue “for a significant portion of the repayment period on the student loan”; and that the Debtor has made good faith efforts to repay loan. In determining whether state of affairs was likely to continue, Court would consider remaining repayment term of the existing note. Debtors note provided for a 10 year repayment of which 3 years had expired, leaving 7 years remaining. Court concluded that loans original maturity date constituted the “relevant time period.” Court rejected “certainty of hopelessness” standard under Section 523.

New case not in materials

In re Kindle, Case No. 17-1245 (Bankr. D.S.C. 2017) – Plan did not unfairly discriminate where proposed treatment would produce 33% recovery to general unsecured creditors while student loans will receive 44%; and if student loans are not separately classified, all unsecured creditors including student loans would receive 36%. But for “cure and maintain” Plan, interest would accrue on student loans at \$200 per month and payments would not be sufficient to cover interest and default charges, which is inconsistent with goal of fresh start. While characterization of student loans as non-dischargeable is not enough standing alone to support discriminatory treatment, combined with other factors proposed treatment while discriminatory was not unfair.

New case not in materials

In re Lundy, 2017 WL 4404271 (Bankr. N.D. Ohio 2017) – Chapter 13 Trustee not authorized to receive or retain trustee fee when case is dismissed before confirmation of Plan. Section 1326 allows disbursement of funds to creditors and payment of administrative expenses, which do not include Chapter 13 Trustee fees. While 28 USC Section 586 directs Trustee to collect the fees, Section 1326 directs that the fees not be retained after dismissal. Trustee must collect and hold trustee fee pending confirmation and refund fees if Plan is not confirmed

In re Burkall, 2017 WL 3890106 (Bankr. W.D. Mi. 2017) – Attorney for Debtor in case converted from Chapter 13 to Chapter 7 entitled to fees for services rendered while case was pending in Chapter 13, to be paid after payment of Chapter 7 administrative expenses under Section 726. However attorney is not entitled to compensation from estate for any services rendered after date of conversion where attorney was not retained by Chapter 7 Trustee.

In re Post, 2017 WL 3822037 (Bankr. W.D. Mi. 2017) – Upon conversion of case, all funds on hand must be returned to debtor without payment of administrative expenses. There is no difference between conversion before or after confirmation. Attorney has administrative claim in Chapter 7 case subordinate to administrative expenses of Chapter 7.

In re Munroe, 2017 WL 2712784 (Bankr. E.D. Mi. 2017) – Debtor not permitted to have two estates open at same time. Debtor who was presently in Chapter 7 could not file Chapter 13 where Chapter 13 proposed to administer property that was property of Chapter 7 estate.

In re Bremer, 2017 WL 383348 (Bankr. W.D. Mi. 2017) - Bankruptcy Code does not permit Debtor to have two separate bankruptcy cases pending simultaneously. Debtor filed for relief under Chapter 7 and received a discharge. Debtor's options are either to convert Chapter 7 to Chapter 13 proceeding or to wait until Chapter 7 administration is completed and estate is closed and to then file Chapter 13 petition.

In re Haddad, 2017 WL 3894984 (Bankr. E.D. Mi. 2017)

- Debtor has duty to disclose all assets to Bankruptcy Court. Duty is continuing one throughout debtor's case. Duty to disclose does not terminate on filing of initial Bankruptcy Schedules.
- Section 349 provides that on dismissal, unless Court orders otherwise, property of estate reverts in entity in which property was vested immediately before commencement of case. Section 349 applies to post-petition assets such as cause of action for post-petition auto accident even though claim did not exist as of petition date and no entity could have been vested as of commencement.
- Section 349 allows Court to order that property remain in estate for cause which does not require showing of fraud or bad faith.
- Court addressed but did not decide whether Debtor had absolute right to dismiss as that issue was not necessary for the ultimately resolution of the matter.

New case not in materials

In re Moore, 2017 WL 4417582 (Bankr. N.D. Ohio 2017) – Deceased Debtor in Chapter 13 cannot convert case to Chapter 7 and receive discharge. Rule 1016 allows case to either be dismissed or proceed with case administration. Rule does not mention conversion as option. Further, Section 1307 allows conversion only if Debtor would be eligible for relief under Chapter 7. Decedent's estate, which is the surviving "debtor" in the Bankruptcy Case, would not be eligible for relief under Chapter 7.

New case not in materials

In re Tingley, Case No. 17-49801 (Bankr. E.D. Mi. 2017) – Foreclosure sale is not complete and does not transfer title until Sheriff Deed is executed and delivered to Buyer and Buyer records Deed. Property was property of Estate where Debtor filed Chapter 13 Petition 2 hours post-foreclosure sale but before Deed executed or recorded.

In re Sims, 2017 WL 104751 (Bankr. N.D. Il. 2017) – Debtor had sufficient interest in property to allow Debtor to redeem property through Chapter 13, where property had been owned solely by debtor's spouse who had passed away prior to bankruptcy filing. Spouse's death created inchoate interest in property in Debtor as intestate heir of Spouse sufficient to support Chapter 13 filing and redemption of property sold at property tax sale through Chapter 13 where Bankruptcy filed before expiration of redemption period

Vander Roest v. Vander Roest, 2017 WL 2627914 (Bankr. W.D. Mi. 2017) – “Anti-Bankruptcy Clause” in judgment of divorce that purports to convert property settlement into nondischargeable alimony in the event one party files for bankruptcy does not automatically render obligations nondischargeable or deprive Bankruptcy Court of authority to determine dischargeability of obligation. Although state courts enjoy concurrent jurisdiction to determine dischargeability, there is no authority to determine dischargeability in advance of any bankruptcy filing.

In re Garigan, 2017 WL 3669509 (Bankr. E.D. Mi. 2017) – Section 366 prevents utility from refusing or discontinuing service based on debt owed to utility for services rendered pre-petition. However, utility can refuse or disconnect service if debtor does not, within 20 days of commencement of the case, furnish a deposit or other security for service post-petition. Debtor has obligation to pay deposit within 20 days and fact that utility does not contact debtor to obtain deposit does not prevent utility from disconnecting service after 20 days if no deposit is paid.

New case not in materials

In re Packard Square, LLC, 2017 WL 4570699 (Bankr. E.D. Mi. 2017) – Section 543 presumptively requires custodian to deliver to Debtor all property of estate in custodian's possession, custody or control and file an accounting of the property that came into hands of custodian. Court is required to protect entities to which custodian became obligated and to provide for the reasonable compensation to custodian and may surcharge custodian for any improper or excessive disbursements. Section 543(d) allows Court to excuse turnover by custodian if interests of creditors are better served by permitting custodian to continue. Court would leave receiver in place and dismiss case where state court receiver had been in possession for more than 10 months pre-petition, best interests of creditors is to complete construction project, and Debtor lacks funding to do so as Court has denied Motion for DIP Financing.

ECP Commercial II, LLC v. Town Center Flats, LLC, 2016 WL 1237662, 2016 U.S. Dist. LEXIS 42063 (E.D. Mi. 2016), *aff'd*, 2017 WL 1573827 (6th Cir. 2017) – 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).

New case not in materials

In re Cherry Growers, Inc., 2017 WL 4990443 (Bankr. W.D. Mi. 2017) – Property held by Debtor in Trust is property of estate to extent of Debtor’s legal interest in property. Assets subject to Trust are not entirely removed from Bankruptcy Estate and Debtor retains interest in those assets. All funds held by Debtor (PACA Trustee) are considered Cash Collateral as subject to PACA Trust and Debtor cannot use those assets without providing adequate protection under Section 363. PACA Creditor held interest in Trust Assets to extent of amount owed to Creditor. Value of Debtor’s assets in toto (and to which PACA Trust could attach) far exceeded amount owed to Creditor and provided adequate equity cushion to constitute adequate protection to allow Debtor to use Cash Collateral for operation of business.

Hargreaves v. Nuverra Environmental Solutions, Inc., Case No. 17-1024 (D. Del. 2017) – *Jevic* does not prevent confirmation of “gift plans” where senior creditor voluntarily “gifts” portion of senior creditor’s distribution to lower class of creditor, jumping intervening creditor class or produces unequal distribution between similarly situated class. Plan proposed that secured creditors made “gift” to unsecured creditors that would produce 1% recovery to general unsecured creditors other than trade creditors, and 6% to trade creditors.

Kendrick v. Rister, Case No. 16-2010 (Bankr. E.D. Ky. 2017) – Debtor does not have interest in motor vehicle where, as of petition date, Debtor has signed contract to acquire vehicle but vehicle had not been titled in Debtor's name.

Palmer v. Paul Miller Ford, Inc., 2017 WL 455391 (Bankr. E.D. Ky. 2017) - Motor vehicle that Debtor purchased from motor vehicle dealer became property of Debtor upon completion of transaction. Upon delivery of physical possession and completion of sales agreement, dealership was no longer owner of motor vehicle merely because of assignment of title to dealership or certificate of title remained in dealership name.

Gold v. Harper, 2017 WL 377933 (Bankr. E.D. Mi. 2017) – Ownership of automobile is determined by certificate of title. Defendant who is not on title cannot claim ownership even where Debtor purchased vehicle in Debtor's name on behalf of defendant; defendant paid the entire purchase price; defendant maintained all insurance on the vehicle; defendant paid for all maintenance and upkeep on vehicle; and vehicle was in defendant's sole and exclusive possession.

New case not in materials

In re Witham, 2017 WL 4570698 (Bankr. E.D. Ky. 2017) – Creditor violated stay by continuing automatic debits on account of pre-petition contractual relationship between Debtor and Creditor. Creditor refused to cure stay violation by refunding post-petition debits and stated intention to continue debiting account as long as Debtor owed Creditor money.

In re Taylor, Case No. 16-21506 (Bankr. E.D. Mi. 2017) – State Department of Corrections violated both stay and discharge injunction by continuing to deduct from Debtor's prison account funds to pay pre-petition federal and state court filing fees.

House v. Craft Auto Sales, LLC, 2017 WL 2579026 (Bankr. S.D. Miss. 2017) – Creditor who repossessed car pre-petition did not violate stay by asking for proof of insurance. However, once debtor provided proof of insurance, creditor violated stay by refusing to return vehicle based on creditor’s assumption that debtor ultimately intended to abandon vehicle.

WD Equipment v. Cowen, Case No. 15-1413 (10th Cir. 2017) - Passive retention of asset of estate in face of demand for turnover does not violate automatic stay under Section 362(a)(3) as Act to exercise control over property of estate.

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. Bankruptcy Court entered Order directing Debtors to stop contesting foreclosure or risk losing discharge. District Court affirmed and 11th Circuit affirmed.

In re Kurzban, Case No. 09-30656 (Bankr. S.D. Fla. 2017) – “Surrender” prevents Debtor from contesting foreclosure in action pending or ripe for filing when bankruptcy case in which property is surrendered is filed. However, decision to surrender does not last in perpetuity no matter what might occur after Debtor “surrenders” property.

Additional Cite – Page 702, Case Number 5765

Rosenfeld v. Rosenfeld, 2015 WL 4623586 (Bankr. E.D. Mi. 2015), *aff'd* 2016 WL 4761786 (E.D. Mi. 2016), *aff'd*, 2017 WL 4461037 (6th Cir. 2017) – Creditor holding claims that were all excepted from discharge under Section 523(a)(5) and (15) lacks standing to seek to deny discharge under Section 727. Denial of discharge would not improve creditor's position and lacks standing to object to object to discharge solely on behalf of other creditors.

New case not in materials

Cawood v. Seterus, Inc., 2017 WL 4404258 (Bankr. E.D. Tn. 2017) – Discharge injunction prevents any action to collect or recover any discharged debt as personal liability of debtor. Long term debt in Chapter 13 is excepted from discharge and continued collection efforts after completion of Chapter 13 case cannot violate discharge injunction even if efforts are aimed at collection of payments coming due before Court entered Order deeming mortgage current.

Maplethorpe v. CitiMortgage, Inc., 2017 WL 2712596 (Bankr. E.D. Mi. 2017) – Stripping of junior lien requires proof that value of property is less than amount owed on superior liens and encumbrances. Although Debtor presented appraisal testimony to establish value of property, Debtor did not present evidence of balance owed on mortgage. Only testimony on alleged debt was that of Debtor as to which Court sustained objection based on hearsay. Debtor did not testify that he had any personal knowledge of balance owed and was merely parroting amount shown on account statement

In re Haynes, 2017 WL 3559509 (Bankr. E.D. Tn. 2017) – Party objecting to discovery on basis of attorney-client privilege must show that legal advice was sought; from professional legal adviser in capacity as such; communication related to that purpose; was made in confidence; by the client; at his insistence are permanently protected; from disclosure by the legal adviser; unless waived by client. Work product privilege requires objecting party to show that document was prepared because of party's subjective anticipation of litigation rather than ordinary business purposes and that the subjective anticipation was objectively reasonable. Party asserting privilege as defense to discovery must provide "privilege logs" that describe nature of documents or information and enables other parties to assess claim.

In re Patriot Solar Group Inc., 569 BR 451 (Bankr. W.D. Mi. 2017) - Federal Arbitration Act makes written agreements to arbitrate valid, irrevocable and enforceable except upon grounds in law or equity to revoke contract. Whether arbitration “inherently conflicts” with bankruptcy code depends in part on whether subject of arbitration is core or non-core proceeding. Claims resolution process is core proceeding even where all facts and circumstances arose before the filing of bankruptcy and all issues to be addressed were based on state law.

In re No Place Like Home, Inc., 559 BR 863 (Bankr. W.D. Tn. 2016) – Cause existed to lift stay and Court should do so where there is valid arbitration provision and doing so would be helpful to bankruptcy court in exercising jurisdiction. Court would order arbitration where majority of arbitration proceedings were commenced pre-petition; party seeking to compel arbitration had chosen non-bankruptcy forum to arbitrate disputes; issues required specialized knowledge and experience; although piecemeal litigation may result, that does not override arbitration agreement where issues were complex and involved non-bankruptcy law; resolution would not be subject to appeal, speeding finality; and issues would not later be re-litigated in bankruptcy court; even though claims are core proceedings as involving liquidation of claims against estate, there would be little if any impact on bankruptcy case as plan has already been confirmed and resolution of claims already factored into confirmed plan.

New case not in materials

Navient Solutions, LLC v. Farmer, 2017 WL 4619209 (W.D. Wash. 2017) – Student lender not entitled to arbitrate issue of whether debt qualifies as educational loan for purposes of Section 523(a)(8) as dischargeability of loan is core proceeding and allowing arbitration to decide would conflict with underlying purpose of Code.

In re Adams, Case No. 15-75191 (Bankr. E.D.N.Y. 2017) – Lien on mixed use property that includes Debtor's residence cannot be modified under Section 1322(b)(2). Section 1322(b) precludes modifying lien secured only by property that is principal residence.

In re Colcord, 2015 WL 5461543 (Bankr. E.D. Mi. 2015) – Duplex was not debtor's "principal residence" where debtor lived in half and rented out half, and debtor had never resided in property as a whole. Loan not within anti-modification protections of Section 1322(b)(2).

AMERICAN BANKRUPTCY INSTITUTE

CONSUMER BANKRUPTCY SEMINAR

NOVEMBER 10, 2017

Case Law Update

Thomas DeCarlo
Staff Attorney – Office of David Wm. Ruskin

© 2017 Thomas D. DeCarlo

Table of Contents

I.	Hot off the Press	1
II.	Cases to Watch	1
III.	Automatic Stay	2
A.	Actions Stayed	2
3.1	Generally.....	2
3.2	Persons Protected	3
3.3	Co-Debtor Stay	5
3.4	Property of Estate.....	5
3.5	Collection Efforts.....	6
3.6	Causes of Action.....	7
3.7	Abandoned Property	7
3.8	Utilities	7
3.9	Bare Possessory Interests	8
3.10	Evictions	8
3.11	Evictions – Section 362(l).....	9
3.12	Actions by Debtor	9
3.13	Appellate Proceedings.....	10
3.14	Foreign Property	10
3.15	Foreign Bankruptcy Proceedings	10
3.16	Levy Against Trustee	10
B.	Exceptions.....	12
3.17	Police Power	12
3.18	Police Power – Suspension of Driver’s License.....	14
3.19	Police Power – Bad Checks	14
3.20	Police Power – Parking Tickets	15
3.21	Police Power – Court Disciplinary Proceedings	15
3.22	Police Power – Qui Tam Actions.....	15
3.23	Police Power – Fraud Actions.....	15
3.24	Police Power – Medicare and Medicaid.....	15
3.25	Police Power- Private Attorney General	16
3.26	Criminal Restitution.....	16
3.27	Contempt.....	16
3.28	Setoff	17
3.29	Recoupment.....	19
3.30	Injunctive Relief.....	20
3.31	Possessory Security Interests	20

3.32	Post-petition Debts.....	20
3.33	Post-Petition Perfection of Lien	20
3.34	Domestic Support Obligations	21
3.35	Administrative Freeze – Financial Accounts	22
3.36	Administrative Freeze - State Actions.....	22
3.37	Final Judgment in Dischargeability Proceedings	22
3.38	Post-Petition Assignment of Mortgage	22
3.39	Debtor as Witness	23
3.40	Estoppel Against Enforcement of Stay	23
3.41	Pending Adversary Proceedings.....	23
3.42	Section 542(c) - Sale in Violation of Stay.....	23
C.	Relief From Stay	23
3.43	Service of Motion	23
3.44	Filing Fee	23
3.45	Purpose of Stay Relief.....	24
3.46	Grounds Generally	24
3.47	Effect of Confirmed Plan.....	25
3.48	Failure to Respond to Motion	25
3.49	Failure to Conduct or Conclude Hearing	25
3.50	Cause - Section 362(d)(1)	25
3.51	Cause – Serial Filings	31
3.52	Cause – Default in Chapter 13 Payments.....	31
3.53	Cause – Lack of Adequate Protection.....	31
3.54	Cause – Appellate Proceedings	31
3.55	Cause – Arbitration Provisions.....	32
3.56	Lack of Equity - Section 362(d)(2)(A).....	32
3.57	Necessity for Effective Reorganization - Section 362(d)(2)(B).....	33
3.58	Insurance Claims	34
3.59	Leases – Section 365(p)(1).....	34
3.60	Expiration of Right of Redemption	34
3.61	Family Law Proceedings.....	35
3.62	Single Asset Real Estate – Section 362(d)(3).....	35
3.63	In Rem Relief.....	36
3.64	Burden of Proof.....	36
3.65	Mootness.....	37
3.66	Standing to Obtain Relief From Stay.....	37
3.67	Conditional Relief.....	39
3.68	Retroactive Relief.....	39
3.69	Denial – Bad Faith of Lender.....	39

3.70	Marshaling of Assets	39
3.71	Procedural Requirements	39
3.72	Procedural Requirements – Withdrawal of Motion.....	40
3.73	Termination – Dismissal and Reinstatement of Case	40
3.74	Termination – Failure to Reaffirm or Redeem	40
3.75	Termination – Denial of Discharge	41
3.76	Post-petition Default on Residential Mortgage.....	41
3.77	Closing of Case Without Discharge	41
3.78	Setoff.....	41
3.79	Relief From Co-Debtor Stay	41
3.80	Adequate Protection Payments	41
3.81	Administrative Claim – Insufficiency or Lack of Adequate Protection	42
3.82	Attorney Fees - Prosecuting or Defending Motion	42
3.83	GMAC Bankruptcy.....	42
D.	Annulment of Stay	42
3.84	Grounds.....	42
3.85	Standing to Request	43
3.86	Effect of Annulment	43
E.	Violations of Automatic Stay.....	43
3.87	Notice of Filing	43
3.88	Effect of Violation.....	44
3.89	Violations – Continued Collection Efforts.....	44
3.90	Violations – Commencement or Continuation of Foreclosure Proceedings.....	46
3.91	Violations – Commencement of Continuation of Other Actions	46
3.92	Violations – Seizure of or Failure to Return Property	47
3.93	Violations – Exercise of Dominion and Control	49
3.94	Violations – Sale of Property	50
3.95	Violations – Executory Contracts and Unexpired Leases	50
3.96	Domestic Relations Actions.....	50
3.97	Violations – Taxing Authorities.....	51
3.98	Violations – Administrative Actions.....	51
3.99	Violations – Appeals.....	51
3.100	Violations – Contempt Proceedings.....	51
3.101	Violations – Perfecting or Recording Liens	51
3.102	Violations – Garnishments.....	51
3.103	Violations – Threat of Criminal Proceeding	51
3.104	Violations – Automobile “Kill” Switch	52
3.105	Violations - Other Actions	52
3.106	Violations – Refusal to Comply With Contract	52

3.107	Violations – Post-dated Checks	52
3.108	Violations – Loan Modifications.....	53
3.109	Violations – Transfer of Claims	53
3.110	Violations – Failure to Return Funds	53
3.111	Violations – Co-Debtor Stay.....	53
3.112	Actions by Debtor	54
F.	Particular Actions Not Violations	54
3.113	Inadvertent or Good Faith Actions.....	54
3.114	Harmless Error	54
3.115	Satisfaction of Judgments or Claims	55
3.116	Setoff.....	55
3.117	Actions Against Property Not Property of Estate.....	55
3.118	Adjournment or Continuation of Foreclosure Sale.....	55
3.119	Refusal to Extend Additional Credit	56
3.120	Criminal Proceedings.....	56
3.121	Contempt Proceedings	56
3.122	Furnishing Information	56
3.123	Filing Proof of Claim.....	57
3.124	Internal Recordkeeping.....	57
3.125	Litigation – Debtor as Plaintiff	57
3.126	Post-Petition Perfection of Lien – Safe Harbor	57
3.127	Surrendered Collateral	57
3.128	Domestic Support Litigation.....	58
3.129	Pre-petition Mortgage Escrow Claims.....	58
3.130	Voluntary Post-Petition Transfers	59
3.131	Administrative Closing of State Court Proceeding	59
G.	Sanctions.....	59
3.133	Sanctions – Standing to Request.....	59
3.134	Sanctions Generally	59
3.135	Sanctions – Absence of Actual Damages	66
3.136	Sanctions – Duty to Mitigate.....	66
3.137	Sanctions – Inadvertent or Technical Violations.....	67
3.138	Emotional Distress	67
3.139	Sanctions – Actual Damages.....	69
3.140	Sanctions – Punitive Damages	70
3.141	Sanctions - Parties Liable.....	73
3.142	Sanctions – Attorney Fees.....	73
3.143	Sanctions – Appellate Attorney Fees	75
3.144	Void and Voidable	75

3.145	Procedural Requirements	75
3.146	State Law Remedies.....	76
H.	Extension of Automatic Stay.....	76
3.147	When Necessary.....	76
3.148	Timing of Motion and Hearing	76
3.149	Grounds for Denial.....	77
3.150	Grounds for Extension	77
3.151	Effect of Expiration of Stay.....	78
3.152	“Re-imposition” of Expired Stay	78
I.	Imposition of Automatic Stay	79
3.153	When Necessary.....	79
3.154	Timing of Motion and Hearing	79
3.155	Grounds for Denial	79
3.156	Grounds for Imposition	79
3.157	Order Confirming No Stay in Effect	79
3.158	Effect of Failure to Impose Stay	79
3.159	Re-imposing Stay After Grant of Stay Relief.....	80
J.	Serial Filing – Small Business	80
3.160	Non-Applicability of Stay	80
K.	Reinstatement of Automatic Stay.....	80
3.161	Generally.....	80
3.162	Procedure	80
L.	Jurisdiction	80
3.163	Dismissal of Bankruptcy Case.....	80
3.164	Non-Bankruptcy Court Jurisdiction.....	81
IV.	Attorneys	81
A.	Debt Relief Agency	81
4.1	Generally.....	81
4.2	Attorneys as Debt Relief Agency	81
4.3	Duties of Attorney as DRA	81
4.4	Sanctions.....	81
B.	Necessity for	82
4.5	Corporations.....	82
4.6	Individuals	83
4.7	Partnerships.....	83
4.8	Conservatorship	83
4.9	Trusts	83
C.	Pro Bono Appointment	83
4.11	Parties Entitled to Appointment	83

4.12	Limitations on Appointment	83
4.13	Termination of Pro Bono Appointment	83
D.	Attorney Fees	83
4.14	Generally	83
4.15	Choice of Laws	85
4.16	Duty of Court	85
4.17	Standing to Oppose Retention	85
4.18	Standing to Object to Fee Application	86
4.19	Conversion from Chapter 7 to Chapter 13	86
4.20	Chapter 13 – “No Look” Fees	86
4.21	Fee Agreement	86
4.22	Rule 2016 Disclosure	88
4.23	Necessity for Court Approval – Payment Directly by Debtor	89
4.24	Fees Paid by Third Party	89
4.25	Counsel for Debtor Not in Possession	89
4.26	Special Counsel for Debtor	89
4.27	Fee Sharing	90
4.28	Time for Filing Application	90
4.29	Time for Filing Application – Pre-Confirmation	91
4.30	Paralegal and Paraprofessional Services	91
4.31	Disinterestedness	91
4.32	Notice	93
4.33	Content of Application	93
4.34	Burden of Proof	93
4.35	Lodestar	94
4.36	Reasonableness	98
4.37	Billing Judgment	100
4.38	Time Entries	101
4.39	Allocation of Time Between Causes of Action	102
4.40	Hourly Rate	102
4.41	Hours Expended	103
4.42	Clerical Services	105
4.43	Excessive Number of Professionals	106
4.44	Benefit to Debtors or Estate	107
4.45	Fee Application – Time for Preparing	109
4.46	“Fees on Fees”	109
4.47	“Fees on Fees” – Receiver	110
4.48	Sanctions and Disgorgement	110
4.49	Res Judicata	112

4.50	Costs	112
4.51	Travel Time.....	112
4.52	Overhead	113
4.53	Effect of Discharge	113
4.54	Post-Petition Services.....	113
4.55	Bankruptcy Court Review	114
4.56	Fee Enhancements	114
4.57	Surcharge	114
4.58	Voluntary Reduction.....	114
4.59	Contingency Fees.....	114
4.60	“End of Case” Issues.....	115
4.61	Attorney for Chapter 7 Trustee	116
4.62	Effect of Order Awarding Compensation	117
E.	Pro Hac Vice.....	117
4.63	Grant and Withdrawal of Approval	117
F.	Withdrawal or Disqualification of Counsel.....	118
4.64	Procedure	118
4.65	Mootness.....	118
4.66	Standing to Request Withdrawal	118
4.67	Grounds to Request Withdrawal.....	118
4.68	Death or Incapacity of Counsel.....	119
4.69	Disqualification – Attorneys for Non-Debtor Parties.....	119
G.	Professional Fees	120
4.70	Generally.....	120
4.71	Limitations.....	120
4.72	Retention of Professionals – Standing to Request.....	120
4.73	Time for Application.....	120
4.74	Retention of Professionals – Salaried Employees	120
4.75	Retention of Professionals – Nunc Pro Tunc Approval	120
4.76	Retention of Professionals – Standard for Approval Generally	122
4.77	Retention of Professionals –Ethical Limitations	122
4.78	Retention of Professionals – Disinterestedness.....	122
4.79	Retention of Professionals – Failure to Obtain Court Authorization	122
H.	Bankruptcy Petition Preparer	123
4.80	Disclosure	123
4.81	Allowable Services	123
4.82	Compensation	123
4.83	Disgorgement.....	124
4.84	Sanctions.....	124

4.85	Unauthorized Practice of Law	125
I.	Ethical Issues	125
4.86	Reliance on Advice of Counsel	125
4.87	Duty to Communicate With and Advise Client	125
4.88	Filing for Improper Purpose	125
4.89	Communication with Clients	125
4.90	Candor to Court	126
4.91	“Stand In” or Substitute Attorneys	126
4.92	Suspension and Disbarment	126
V.	Commencing Case	126
A.	Eligibility for Relief	127
5.1	Section 109 – Generally	127
5.2	Standing to Contest Eligibility	127
5.3	Time to Contest Eligibility	127
5.4	Debt Limits	127
5.5	Debt Limits – Unliquidated or Contingent Debts	128
5.6	Prior Voluntary Dismissal	128
5.7	Simultaneous Estates	129
5.8	Improper Purpose	130
5.9	Petition Generally	130
5.10	Petition – Execution by Holder of Power of Attorney	130
5.11	Petition - Name of Debtor	130
5.12	Petition – Lack of Original Signature	131
5.13	Corporate Authorization	131
5.14	Decedent’s Estate	131
5.15	Trusts	131
5.16	Chapter 12 – “Family Farmer”	131
B.	Joint Cases	132
5.17	Same Sex Couple	132
5.18	Common Law Spouses	132
5.19	Effect	133
5.20	Improper Joinder	133
C.	Credit Counseling	133
5.21	Deadline to Obtain	133
5.22	Failure to Obtain	134
5.23	Waiver of Requirement	137
5.24	Exigent Circumstances	137
5.25	Equitable Exception	138
5.26	Pay Advices	139

D.	Venue.....	139
5.27	Generally.....	139
5.28	Domicile	139
5.29	Location of Principal Assets.....	140
5.30	Residence.....	140
5.31	Principal place of business	140
5.32	Location of Claim or Property	140
5.33	Affiliate Venue	140
5.34	Default Venue.....	140
5.35	Dismissal – Venue Improper.....	140
5.36	Transfer - Venue Proper – Interests of Justice	140
5.37	Transfer - Venue Proper – Convenience of Parties	141
5.38	Transfer – Forum Selection Clauses	142
5.39	Transfer - Venue Improper.....	142
E.	Filing Fee	142
5.40	Failure to Pay	142
5.41	Waiver.....	142
F.	Means Test.....	143
5.42	“Primarily Consumer Debts”	143
5.43	Calculation of Current Monthly Income – Timing.....	144
5.44	Calculation of Disposable Income – Generally	145
5.45	Calculation of Disposable Income – Allowances.....	146
5.46	Calculation of Disposable Income – Surrendered Collateral	146
5.47	Calculation of Disposable Income - Lien Strips	146
5.48	Calculation of Disposable Income – Automobile Ownership Expense.....	147
5.49	Calculation of Disposable Income – Automobile Operating Expense	147
5.50	Calculation of Disposable Income – Automobile Title Liens	147
5.51	Home Maintenance Expense	148
5.52	Calculation of Disposable Income – Health Care Expenses	148
5.53	Calculation of Disposable Income – Health Savings Account	148
5.54	Calculation of Disposable Income – Education Expenses	148
5.55	Calculation of Disposable Income – Housing Deduction	148
5.56	Calculation of Disposable Income – Retirement Loan Repayment.....	148
5.57	Calculation of Disposable Income – Child Care Expenses	149
5.58	Expense Reimbursements	149
5.59	Social Security Income	149
5.60	Pension Income.....	151
5.61	Veteran’s Disability Benefits	151
5.62	Veteran’s Voluntary Separation Incentive Payments	151

5.63	Private Disability Income	151
5.64	Foster Care Income	151
5.65	Adoption Assistance Payments	151
5.66	Unemployment Income	152
5.67	Railroad Retirement Income	152
5.68	Projected Disposable Income – Firefighters Retirement	152
5.69	Projected Disposable Income – Civil Service Retirement System	152
5.70	Child Support Income	152
5.71	“In Kind” Income	152
5.72	Self-Employed Debtor	153
5.73	Debtor as Owner of Corporation	153
5.74	Compensation for “Wrongful Incarceration”	153
5.75	Household Size	153
5.76	Variance From IRS Allowances	154
5.77	Special Circumstances	154
5.78	Marital Adjustment – Non-filing spouse	156
5.79	Cases Converted From Chapter 13	157
5.80	Standing to Seek Dismissal Under 707(b) for Abuse	157
5.82	Amendments to Schedules – Continuing Duty to Disclose	158
5.83	Amendments to Schedules – Motion to Compel Amendments to Correct Errors	159
H.	Involuntary Petitions	159
5.84	Elements	159
5.85	Credit Counseling – Section 109(h)	160
5.86	Petitioning Creditors	160
5.87	Debts Subject to Bona Fide Dispute	161
5.88	Not Generally Paying Debts as They Come Due	161
5.89	Secured Versus Unsecured Creditors	162
5.90	Eligible for Relief Under Chapter in Which Involuntary Petition Filed	162
5.91	Burden of Proof	162
5.92	Sanctions	162
5.93	Damages Caused to Third Parties - Preemption	163
I.	Notice	163
5.94	Known Creditors	163
5.95	Unknown Creditors	163
VI.	Property of Estate	164
A.	Defined	164
6.1	Generally	164
6.2	Social Security Benefits	166
6.3	Jointly Owned Property	167

6.4	Treasury Bonds	168
6.5	Community Property	168
6.6	Insurance Policies.....	168
6.7	Insurance Proceeds.....	168
6.8	Insurance Proceeds – Health Insurance	169
6.9	Property Acquired Post-Petition.....	169
6.10	Pre-Petition Causes of Action.....	169
6.11	Post-Petition Causes of Action.....	173
6.12	Pre-petition Casualty Insurance Proceeds.....	174
6.13	Post-Petition Property – Insurance Proceeds	175
6.14	Post-Petition Equity	175
6.15	Probate Estates	175
6.16	Tenants by Entireties.....	175
6.17	Partnership Interests.....	177
6.18	Corporations and LLCs.....	177
6.19	Stock and Corporate Ownership Interests.....	178
6.20	Leaseholds	178
6.21	Life Estates	178
6.22	Tax Refunds Generally	178
6.23	Tax Refund – Non-Filing Spouse	179
6.24	Post-Foreclosure Interests	180
6.25	Right of Redemption Following Foreclosure	180
6.26	Property Settlements	180
6.27	Pre-Petition Alimony and Support Awards.....	181
6.28	Titled Assets – Generally	181
6.29	Titled Assets – Auction Sales	181
6.30	Jointly Owned Bank Accounts.....	182
6.31	Contract Rights	182
6.32	Contract Deposits.....	182
6.33	Land Contract Interests	182
6.34	Easements	182
6.35	Accounts Receivable.....	183
6.36	Intellectual Property	183
6.37	Internet Domain Name.....	183
6.38	Commission Income	183
6.39	Unrecorded Interests	183
6.40	Marital Property	183
6.41	Equitable Interests.....	184
6.42	Trust Property – Generally	184

6.43	Retirement Accounts – Section 521(c)(2)	185
6.44	Express Trusts – Spendthrift Provisions	186
6.45	Resulting Trusts and Estate Planning Devices	186
6.46	Recovered Property	187
6.47	Constructive Trusts.....	187
6.48	Possessory Liens	188
6.49	Restrictions on Alienation.....	188
6.50	Consignment Transactions	188
6.51	Cash Collateral Generally	188
6.52	Cash Collateral and Assignment of Rents – Defined.....	188
6.53	Assignment of Rents – Effect of Perfection	189
6.54	Cash Collateral - Adequate Protection	189
6.55	Cash Collateral – Casualty Insurance Proceeds	190
6.56	Cash Collateral – Payment of Professional Fees	190
6.57	Cash Collateral – Effect of Confirmation of Plan	190
6.58	Assignment of Rents – Perfection and Enforcement.....	190
6.59	Bare Possessory Interests	190
6.60	Incomplete Transfers.....	191
6.61	Pre-petition Transfers Generally	191
6.62	Pre-petition Attorney Fee Retainers	191
6.63	Fixtures and Personalty – Defined	191
6.64	Contingent and Future Interests.....	192
6.65	Season Tickets.....	192
6.66	Political Campaign Contributions	192
6.67	Bonuses.....	192
6.68	Encumbered Property	193
6.69	Proceeds and Products	193
6.70	After Acquired Property – Section 541(a)(7).....	193
6.71	Mineral Interests and Rights.....	193
6.72	Criminal Forfeiture.....	194
6.73	Equitable Distribution and Marital Interests	194
6.74	Health Savings Accounts.....	194
6.75	Inheritance	194
6.76	Marshalling of Assets	195
6.77	After Confirmation of Chapter 13 Plan – Generally	195
6.78	After Confirmation of Chapter 13 Plan - Personal Injury Proceeds.....	195
6.79	After Confirmation of Chapter 13 Plan – Life Insurance Proceeds	195
6.80	After Confirmation of Chapter 13 Plan – Inheritance	195
6.81	After Confirmation of Chapter 13 Plan – Casualty Insurance.....	196

6.82	Stay Violations – Chapter 13	196
6.83	Conversion From Chapter 13 to Chapter 7	196
6.84	Ipsa Facto Clauses	197
B.	Turnover	197
6.85	Generally.....	197
6.86	Turnover – Procedure.....	200
6.87	Turnover – Tax Refunds	200
6.88	Excusal – State Court Receiver.....	200
6.89	Property in Possession of Custodian	200
6.90	Defenses.....	201
6.91	Refusal to Turnover - Sanctions	201
C.	Failure to Disclose Causes of Action	202
6.92	Future Prosecution Barred – Judicial Estoppel.....	202
6.93	Future Prosecution Not Barred.....	207
D.	Protection and Preservation of Estate.....	209
6.94	Expenses	209
E.	Sale of Assets.....	209
6.95	Approval Generally.....	209
6.96	Sale Free and Clear of Liens or Interests.....	210
6.97	Procedure.....	211
6.98	Objections.....	211
F.	Abandonment by Trustee	211
6.99	Procedure	211
6.100	Technical Abandonment	212
6.101	Implied Abandonment.....	213
6.102	“Delayed” Abandonment	213
6.103	Motion to Compel Abandonment.....	213
6.104	Effect of Abandonment	214
6.105	Revocation of Abandonment.....	215
G.	Prosecution of Pre-petition Causes of Action.....	216
6.106	Role of Trustee and Debtor	216
VII.	Exemptions	216
A.	Exemptible Property	216
7.1	Generally	216
7.2	Time for Determining	216
7.3	Interest of Debtor in Property to be Exempted.....	218
7.4	Equity in Property to be Exempted.....	218
7.5	Bankruptcy Only Exemptions.....	219
7.6	Amended Claim of Exemptions	220

7.7	Recovery of Avoidable Transfer	222
7.8	Waiver of Exemptions.....	223
7.9	Statutory Basis for Exemptions.....	224
7.10	Applicable Law	224
7.11	Extra-territorial Application	224
7.12	Disposition of Property Post-Petition – Effect on Exemptions	225
B.	Objections to Exemptions	225
7.13	Jurisdiction – Mootness	225
7.14	Standing to Object	225
7.15	Burden of Proof.....	225
7.16	Deadline for Objections	225
7.17	Valuation of Property Claimed as Exempt	227
7.18	Conversion of Non-Exempt Into Exempt Property	227
7.19	Proceeds of Wrongful Conduct	228
7.20	Waiver	228
7.21	Collateral Estoppel	228
7.22	Equitable Estoppel	228
7.23	“In Kind” and Dollar Limitations on Exemptions.....	229
C.	Specific Property Exempt	230
7.24	Social Security	230
7.25	Stock Account.....	230
7.26	Payments as Replacement for Lost Earnings.....	230
7.27	Undisclosed Assets.....	232
7.28	Homestead	233
7.29	Homestead – Limitation Under Section 522(o).....	237
7.30	Homestead – Limitation Under Section 522(p).....	237
7.31	Homestead – Limitation Under Section 522(q).....	237
7.32	Redemption Rights.....	237
7.33	Life Estate	237
7.34	Inheritances.....	238
7.35	Trust – Beneficial Interest.....	238
7.36	Marital Property	238
7.37	Household Goods.....	238
7.38	Motor Vehicles.....	238
7.39	Wearing Apparel	239
7.40	Unmatured Life Insurance Contracts.....	239
7.41	Personal Injury Claims	239
7.42	Life Insurance Policy.....	239
7.43	Insurance Proceeds.....	240

7.44	Health Savings Accounts	241
7.45	Annuities.....	241
7.46	Employee Buyout.....	243
7.47	Post-petition Assets.....	243
7.48	Property Owned by Third Party	243
7.49	Dower Interests	244
7.50	Tools of the Trade.....	245
7.51	Entireties Property.....	245
7.52	Co-mingled and Segregated Funds.....	246
7.53	Salary and Bonuses.....	246
7.54	Garnishment Limitations.....	246
7.55	Consumer Credit Protection Act	246
7.56	Unemployment Compensation.....	247
7.57	Workers Compensation.....	247
7.58	Retirement Accounts.....	247
7.59	Retirement Accounts – Prohibited Transactions	249
7.60	Employee Benefit Plan	249
7.61	Inherited Retirement Accounts.....	249
7.62	Retirement Accounts – QDRO and QRBCO	250
7.63	Section 529 Educational Savings Plans	251
7.64	Inherited 529 Plans	251
7.65	Tax Refunds.....	251
7.66	College Savings Accounts and Student Loan Proceeds.....	252
7.67	Spousal Support, Child Support and Separate Maintenance	252
7.68	Property In Possession Of Custodian or Receiver.....	253
7.69	Exemptions – Contract Rights	253
7.70	Tracing of Proceeds of Exempt Asset	253
D.	Liens Impairing Exemptions – Avoidance	254
7.71	Procedure	254
7.72	Service of Motion	254
7.73	Grounds – Generally	254
7.74	Valuation.....	256
7.75	Joint Ownership.....	257
7.76	Trust Property.....	257
7.77	Liens Avoidable – Judicial Liens	257
7.78	Liens Avoidable – Non-Possessory Non-Purchase Money	259
7.79	Liens Not Avoidable – Statutory Liens.....	260
7.80	Judgment Arising Out of Mortgage Foreclosure.....	260
7.81	Effect of Avoidance	260

E.	Effect of Claimed Exemptions	260
7.82	Generally	260
7.83	Trustee's Power to Sell Exempt Assets	261
7.84	Setoff and Exempt Assets	261
7.85	Exemptions and Non-dischargeable Claims	261
7.86	Value of Claimed Exemption – Appreciation in Value	261
7.87	Surcharge of Exempt Property	261
VIII.	Claims	262
A.	Specific Claim Types	262
8.1	Administrative	262
8.2	Administrative – Section 503(b)(9)	265
8.3	Administrative – Competing Priorities	266
8.4	Administrative – Post-Petition Taxes	266
8.5	Administrative – Post-Petition Pre-Rejection Lease	267
8.6	Administrative - “Stub Rent”	267
8.7	Administrative – Procedural Requirements	267
8.8	Priority – Choice of Laws Generally	267
8.9	Priority – Qualifying Wages and Benefits	267
8.10	Priority – Severance Benefits	267
8.11	Priority – Tax Claims	267
8.12	Priority – Unemployment Compensation Reimbursement	269
8.13	Priority – Perishable Agricultural Commodities Act	269
8.14	Priority – Unredeemed Gift Cards	269
8.15	Priority - Fines and Penalties	270
8.16	Environmental	270
8.17	Secured – Generally	270
8.18	Secured – Property Taxes	272
8.19	Federal and State Tax Liens	272
8.20	Secured – Domestic Support Obligations	272
8.21	Secured – Failure to Record Generally	273
8.22	Lien Avoidance – Section 506(d)	273
8.23	Secured – Void Lien – Section 506(d)	273
8.24	Secured – Release of Lien	273
8.25	Secured – Proof of Perfection	274
8.26	Secured – Method of Perfection	274
8.27	Secured – Description of Collateral	276
8.28	Secured – After-Acquired Property	276
8.29	Secured – Personal Services Contract	277
8.30	Secured – Property of Third Party	277

8.31	Security Deposits	277
8.32	Secured – Accounts Receivable	277
8.33	Secured – Proceeds of Collateral	278
8.34	Secured – Products of Collateral	278
8.35	Secured – Insurance Proceeds of Collateral	278
8.36	Secured - Priority of Competing Interests	278
8.37	Secured Claims – Equitable Subordination	281
8.38	Purchase Money Security Interests	281
8.39	Secured Claim – Allowed Charges Generally	281
8.40	Secured – Attorney Fees	281
8.41	Secured – Interest Rate	283
8.42	Secured – Cross Collateralization	284
8.43	Secured – Future Advance Mortgage	284
8.44	Secured – Assignment of Claim	284
8.45	Secured – Assignment of Insurance Proceeds	284
8.46	Secured – Property Acquired Subject to Lien	284
8.47	Secured – Forged Mortgage	284
8.48	Secured – Equitable Mortgage	284
8.49	Secured – Judgment Lien	285
8.50	Secured – Waiver	285
8.51	Secured – Attorney Charging Liens	285
8.52	Secured – Attorney Retaining Liens	286
8.53	Secured – Mechanics and Materialmen Liens	286
8.54	Secured – Statutory Liens	286
8.55	Secured – Patient Lists	286
8.56	Secured – Valuation	287
8.57	Secured – Non-Recourse Debt	288
8.58	Secured – Maritime Liens	288
8.59	Claims Against Individual Debtor in Joint Case	288
8.60	Corporate versus Personal Obligations	288
8.61	Disguised Security Agreements and Leases	288
8.62	Pre-Petition Versus Post-Petition Actions – When Claim Arises	289
8.63	Membership Interests as Collateral	290
8.64	Landlord’s Lien	290
8.65	Liquidated Damages	290
8.66	Unsecured Claims – Solvent Estate	290
8.67	Default Interest Rate	290
8.68	Late Fees and Charges	291
8.69	Injunctions	291

8.70	Income Taxes	291
8.71	Tax Claims – Interest Rate	292
8.72	Corporate Tax Liabilities	293
8.73	Pre-Petition Attorney Fees	293
8.74	Pre-Petition Attorney Fees – Contingency Fees	294
8.75	Pre-petition Divorce Judgment	294
8.76	Domestic Support Obligations	294
8.77	Pre-Petition versus Post-Petition Claims	296
8.78	Right to Payment Generally	297
8.79	Contingent Claims	297
8.80	Contingent Claims – Contribution	297
8.81	Guaranty Claims	297
8.82	Employment Agreements	298
8.83	“Advancement of Fees”	298
8.84	Executory Contracts and Unexpired Leases – Assumed	298
8.85	Executory Contracts and Unexpired Leases – Rejected	299
8.86	Condominium and Homeowners Associations	299
8.87	Deficiency Claims	299
8.88	Fraudulent Transfer	300
8.89	Guaranty Claims	301
8.90	Claims Resulting From Avoidance Actions	301
8.91	Custodian	301
8.92	Pre-petition Interest – Unsecured Claims	302
8.93	Unmatured Unsecured Claims	302
8.94	Pre-petition Escrow Balances	302
8.95	Punitive and Treble Damages	302
B.	Proof of Claim	303
8.96	Standing to File Proof of Claim	303
8.97	Standing to File – Class Claims	304
8.98	Standing to File – Debtor	304
8.99	Required – Secured Creditors	304
8.100	Not Required – Secured Creditors	305
8.101	Required – Unsecured Claims	305
8.102	Failure to File - Priority Claims	305
8.103	Contents of Proof of Claim	306
8.104	Contents of Proof of Claim – Rule 3001(c)	306
8.105	Informal Proof of Claim	306
8.106	Effect of Filed Proof of Claim	307
8.107	Deadline for Filing Proof of Claim	308

8.108	Proof of Claim Filed on Behalf of Creditor	310
8.109	Failure to File Proof of Claim – Court Jurisdiction.....	311
8.110	Amended Proof of Claim.....	311
8.111	Withdrawal of Proof of Claim.....	311
8.112	Satisfaction of Claim.....	312
C.	Objections.....	312
8.113	Jurisdiction to Resolve.....	312
8.114	Standing to Object.....	313
8.115	Service of Objections	314
8.116	Time for Filing – Laches.....	314
8.117	Objection – Deadline for Responding	314
8.118	Procedural Requirements	314
8.119	Burden of Proof.....	315
8.120	Burden of Proof – Insider as Creditor	316
8.121	Calculation of Amount of Claim	316
8.122	Grounds – Technical Error.....	317
8.123	Grounds – Fraud on Court.....	317
8.124	Grounds – Failure to Attach Documents Generally.....	318
8.125	Grounds – Failure to Attach Documents – Rule 3001(c)(3).....	319
8.126	Grounds – Failure to Itemize Claim	320
8.127	Grounds – Form of Proof of Claim – Official Form 10.....	320
8.128	Grounds – Technical Defects	320
8.129	Late Filed.....	320
8.130	Grounds – Personally Identifiable Information	322
8.131	Grounds – Surrender in Full Satisfaction of Secured Claim.....	322
8.132	Grounds – Failure to Comply With Administrative Requirements.....	322
8.133	Grounds – Payment and Credit Bid.....	323
8.134	Grounds – Mortgage Escrows, Fees and Charges	323
8.135	Grounds – Conflict With Confirmed Chapter 13 Plan	323
8.136	Grounds – Unconscionability.....	323
8.137	Grounds – Cancellation of Debt	324
8.138	Grounds – Debt Incurred Through Fraud.....	324
8.139	Grounds – Fraudulent Inducement	324
8.140	Grounds - Lack or Failure of Consideration.....	324
8.141	Grounds – Payment	324
8.142	Grounds – Refusal to Accept Payment.....	325
8.143	Grounds – Statute of Limitations	325
8.144	Grounds – Section 502 Recovered Avoidable Transfer	326
8.145	Grounds – Lack of Authority.....	326

8.146	Death of Debtor	326
8.147	Collateral Estoppel	326
8.148	Judicial Estoppel.....	326
8.149	Statutory Subordination – Section 726(a)	326
8.150	Equitable Subordination.....	326
8.151	Subordination – Stock Interests Under Section 510.....	327
8.152	Recharacterization of Debt to Equity	328
8.153	Objections – Other State Law Defenses.....	328
8.154	Insider Claims	329
8.155	Default – Creditor Failure to Respond	329
8.156	Settlement of Objections.....	329
8.157	Sanctions Against Filing Creditor	330
8.158	Effect of Order Disallowing Claim	331
8.159	Reconsideration of Allowed or Disallowed Claim – Grounds Generally.....	332
8.160	Reconsideration of Allowed or Disallowed Claim – Time for Request	332
8.161	Res Judicata Effect of Confirmed Plan.....	332
8.162	Res Judicata Effect of Other Court Orders	333
8.163	Effect of Amended or Withdrawn Claim - Mootness.....	334
D.	Priority of Distribution.....	334
8.164	Generally.....	334
8.165	“Carve Outs” Generally	334
8.166	Surcharge of Secured Collateral.....	334
8.167	Exempt Assets.....	335
8.168	Unclaimed Funds	335
E.	Non-Dischargeability.....	335
8.169	Standing	335
8.170	Generally.....	337
8.171	Bankruptcy Court and State Court Jurisdiction.....	338
8.172	Amount of Non-Dischargeable Claim.....	339
8.173	Section 523(a)(1)	340
8.174	Section 523(a)(1) – “Late” Returns.....	342
8.175	Section 523(a)(1) – Definition of “Return”	344
8.176	Section 523(a)(2)(A) – False Pretenses and False Representations.....	344
8.177	Section 523(a)(2)(A) – Actual Fraud	360
8.178	Section 523(a)(2)(A) -Actual Fraud in Other Transactions.....	373
8.179	Section 523(a)(2)(B) – False Financial Statements	374
8.180	Section 523(a)(2) – Cash Advances	379
8.181	Section 523(a)(2)(C) – Credit Card Debt	379
8.182	Section 523(a)(3)	379

8.183	Section 523(a)(4) – Larceny.....	381
8.184	Section 523(a)(4) – Embezzlement.....	382
8.185	Section 523(a)(4) – Bad Check.....	388
8.186	Section 523(a)(4) – Defalcation.....	388
8.187	Section 523(a)(4) – Builders Trust Fund Act.....	391
8.188	Section 523(a)(4) – PACA Claims.....	392
8.189	Fiduciary Relationship.....	393
8.190	Section 523(a)(5).....	401
8.191	Section 523(a)(5) – Delinquency Proceedings.....	404
8.192	Section 523(a)(5) – Hold Harmless Clause.....	405
8.193	Section 523(a)(6).....	405
8.194	Section 523(a)(7).....	428
8.195	Section 523(a)(8).....	430
8.196	Section 523(a)(9).....	443
8.197	Section 523(a)(10).....	443
8.198	Section 523(a)(11).....	444
8.199	Section 523(a)(12).....	444
8.200	Section 523(a)(13).....	444
8.201	Section 523(a)(14).....	444
8.202	Section 523(a)(15).....	444
8.203	Section 523(a)(16).....	447
8.204	Section 523(a)(17).....	447
8.205	Section 523(a)(19).....	447
8.206	Other Grounds.....	448
8.207	Recovery of Interest and Costs.....	448
8.208	Recovery of Attorney Fees.....	449
8.209	Treble Damages.....	450
8.210	Punitive Damages.....	451
8.211	Sanctions – Section 523(d).....	451
F.	Deadline for Objecting to Dischargeability.....	451
8.212	Generally.....	451
8.213	Extension of Time to Object.....	453
8.214	Construction of Pleadings.....	455
8.215	Amendment of Pleadings.....	455
IX.	Chapter 7.....	456
A.	Standing to Commence.....	456
9.1	Corporations.....	456
9.2	Guardian Ad Litem – Appointment by Bankruptcy Court.....	456
B.	Nature of Business of Debtor.....	456

9.3	Health Care Business – Section 101(27A)	456
C.	Dismissal	456
9.4	Sua Sponte Dismissal – Notice	456
9.5	Deadline to File Motion to Dismiss – 707(a)	456
9.6	Cause and Bad Faith – Section 707(a)	456
9.7	Section 707(b)(1)	460
9.8	Presumed Abuse – Section 707(b)(2)	461
9.9	“Safe Harbor” - Section 707(b)(7)	462
9.10	“Special Circumstances”	462
9.11	Non-presumed Abuse – Section 707(b)(3)	463
9.12	“Primarily Consumer Debts”	476
9.13	Bad Faith – Section 707(b)(3)	478
9.14	Failure to File Documents	478
9.15	Failure to Appear at 341 Meeting	479
9.16	Failure to Cooperate With Trustee	479
9.17	Dismissal for Cause – Procedure	479
9.18	Death of Debtor	479
9.19	Voluntary Dismissal	480
9.20	Dismissal – Section 305	481
9.21	Dismissal With Bar to Re-filing	481
9.22	Filing in Violation of Bar	482
9.23	Dismissal for Abuse – Deadline for Motion	483
D.	Conversion to Chapter 11	483
9.24	Request of Debtor	483
E.	Conversion to Chapter 13	483
9.25	Request of Debtor	483
9.26	Effect of Chapter 7 Discharge	485
9.27	Reconversion	486
9.28	Based on Finding of Presumed Abuse	486
F.	Denial of Discharge – Grounds	486
9.29	Section 727(a)(1)	486
9.30	Section 727(a)(2)	486
9.31	Section 727(a)(3)	494
9.32	Section 727(a)(4)	499
9.33	Section 727(a)(5)	514
9.34	Section 727(a)(6)	517
9.35	Section 727(a)(7)	520
9.36	Section 727(a)(8)	520
9.37	Section 727(a)(9)	521

9.38	Section 727(a)(10)	521
9.39	Section 727(a)(11)	521
9.40	Effect – Termination of Automatic Stay	521
G.	Deadline for Objecting to Discharge	521
9.41	Generally.....	521
9.42	Tolling – Equitable Concealment.....	522
9.43	Extension of Time	522
H.	Parties Entitled to Object to Discharge	523
9.44	Standing	523
9.45	Procedure	524
I.	Discharge	524
9.46	Timing.....	524
9.47	Motion to Delay Entry of Discharge	524
9.48	Scope of Discharge – Generally.....	524
9.49	Scope of Discharge – State Court Jurisdiction to Determine	525
9.50	Scope of Discharge – Attorney Fees	525
9.51	Scope of Discharge – Unscheduled Creditors	525
9.52	Scope of Discharge – Secured Claims.....	526
9.53	Scope of Discharge – Student Loans.....	526
9.54	Scope of Discharge – Equitable Remedies.....	526
9.55	Scope of Discharge – Police Powers.....	526
9.56	Scope of Discharge – Insurance and Indemnification Claims	527
9.57	Scope of Discharge – Misapplied Payments	527
9.58	Scope of Discharge – Non-compete Agreements.....	527
9.59	Scope of Discharge – Post-Petition Obligations.....	527
9.60	Notice - Known Creditors.....	527
9.61	Notice - Unknown Creditors.....	528
9.62	Scope of Discharge – Setoff.....	528
J.	Discharge Injunction	528
9.63	Generally.....	528
9.65	Discharge Injunction – Credit Reporting	532
9.66	Discharge Injunction – Secured Creditors Generally	533
9.67	Secured Creditors – Section 524(j) Safe Harbor	534
9.68	Discharge Injunction – Failure to Credit Payments.....	534
9.69	Eviction Proceedings.....	534
9.70	Surrendered Collateral	535
9.71	Discharge Injunction – Reaffirmed Debts.....	535
9.72	Discharge injunction – Debtor as Nominal Defendant.....	536
9.73	Discharge Injunction – Subsequent Proof of Claim	536

9.74	Dischargeability Actions.....	536
9.75	Discharge Injunction – Non-Dischargeable Debts	536
9.76	Secured Creditors – Attorney Fees.....	536
9.77	Tax Forms.....	537
9.78	Tax Claims.....	537
9.79	Criminal Proceedings.....	537
9.80	Domestic Support Obligation.....	538
9.81	Recoupment.....	538
9.82	Garnishment.....	539
9.83	Post-Discharge Perfection of Lien	539
9.84	Utilities	539
9.85	Sanctions – Jurisdiction	539
9.86	Sanctions – Procedure.....	539
9.87	Sanctions – Contempt	540
9.88	Sanctions – Attorney Fees.....	542
9.89	Sanctions – Actual Damages.....	542
9.90	Punitive Damages	542
9.91	Sanctions - IRS	542
9.92	Violation – Arbitration of	543
K.	Revocation of Discharge – Section 727(d).....	543
9.93	Grounds Generally	543
9.94	On Request of Debtor	547
9.95	Knowledge of Alleged Fraud.....	548
9.96	Partial Revocation.....	548
9.97	Deadline for Bringing Action.....	548
9.98	Defense – Laches	548
9.99	Standing	549
9.100	Procedure.....	549
L.	Executory Contracts and Unexpired Leases	549
9.101	Executory Contract and Lease Defined.....	549
9.102	Debtor’s Authority to Assume or Reject	550
9.103	Trustee’s Authority to Assume or Reject	550
9.104	Agreements Subject to Assumption or Rejection	550
9.105	Deadline to Assume or Reject	551
9.106	Failure to Assume or Reject	551
9.107	Procedural Requirements for Assumption.....	551
9.108	Effect of Rejection	552
9.109	Subleases and Assignments.....	552
9.110	Sale of Property Subject to Lease Under Section 363	553

M.	Statement of Intentions – Section 521(a)(6).....	553
9.111	When Required	553
9.112	Effect of Filing.....	553
9.113	Failure to File.....	553
N.	Reaffirmation Agreements	553
9.114	Time for Execution and Filing	553
9.115	Form of Reaffirmation Agreement	556
9.116	Terms of Reaffirmed Loan.....	557
9.117	Motion for Approval – Represented Debtor	557
9.118	Motion for Approval – Unrepresented Debtor	558
9.119	Court Review – Scope.....	558
9.120	Hearing Required	559
9.121	Effect of Denial.....	559
9.122	Effect of Approval	559
9.123	Rescission of Reaffirmation Agreement.....	559
9.124	Reinstatement of Rescinded Agreement.....	560
9.125	Jurisdiction to Enforce.....	560
9.126	Relationship to Assumed Leases	560
O.	Redemption.....	561
9.127	Generally.....	561
9.128	Deadline to Redeem	561
9.129	Value of Property Being Redeemed	561
9.130	Enforcement of Order for Redemption.....	562
P.	Lien Strips.....	562
9.131	Permitted.....	562
9.132	Not Permitted.....	563
9.133	Value of Property.....	564
Q.	Trustee	564
9.134	Election of Trustee	564
9.135	Removal of Trustee	564
9.136	Suspension of Trustee	564
9.137	Duty to Preserve or Protect Assets	564
9.138	Sale or Disposition of Assets – Section 363.....	564
9.139	Sale or Disposition of Assets – Section 363 and Avoidance Action	566
9.140	Sale or Disposition of Assets – Section 363 – Standing of Debtor to Request.....	567
9.141	Sale or Disposition of Assets – Section 363 – Standing to Object.....	567
9.142	Sale or Disposition of Assets – Section 363 – Notice	567
9.143	Sale or Disposition of Assets – Section 363 – Court Approval.....	567
9.144	Sale or Disposition of Assets – Break Up Fee	568

9.145	Final Report	568
9.146	Amended Final Report	568
9.147	Final Report – Objections	569
9.148	Liability of Trustee – Standing to Sue	569
9.149	Retention of Attorney for Trustee	569
9.150	Compensation for Trustee	569
9.151	Banking Relationships	570
9.152	Closing Case	570
R.	Property Subject to Lease	570
9.153	Sale Free and Clear of Leasehold	570
S.	Property Owned by Co-Tenants	570
9.154	Sale Pursuant to Section 363	570
9.155	Distribution of Proceeds of Sale	570
X.	Chapter 11	570
A.	Generally	570
10.1	Debtor-in-Possession – “Mere Continuation”	570
10.3	Standing to Appear	571
10.4	Classification of Claims	571
10.5	Payment of Claims Before Confirmation	571
10.6	Modification of Mortgage on Principal Residence	572
10.7	Insider Defined	572
10.8	“Governmental Unit”	572
10.9	Best Interests of Creditors	573
10.10	Interest/Discount Rate	573
10.11	Valuation	573
10.12	“Deemed Recourse” Rights – Section 1111	574
10.13	Feasibility	574
10.14	Good Faith	574
10.15	Impairment Generally	575
10.16	Artificial Impairment	575
10.17	Unfair Discrimination – Generally	575
10.18	Fair and Equitable – Secured Claims	575
10.19	Preservation of Liens	576
10.20	Release of Debtor Claims	576
10.21	Competing Plans	576
10.22	Effect of Confirmation Order	577
10.23	Revocation of Confirmation Order	578
10.24	Interpretation of Confirmed Plan	578
10.25	Modification of Confirmed Plan	578

10.26	Absolute Priority Rule.....	578
10.27	Absolute Priority – New Value Exception	579
10.28	“Carve Outs”	580
10.29	Final Decree	580
10.30	Equitable Mootness – Appeal of Confirmation	580
B.	Assumption or Rejection of Executory Contracts	581
10.31	Definition of “Executory”	581
10.32	Agreements Subject to Assumption or Rejection.....	581
10.33	Time for Assuming or Rejecting	582
10.34	Right to Assume.....	582
10.35	Right to Assign	582
10.36	Curing Defaults and Future Performance	582
10.37	Non-Competition Agreements	583
10.38	Effect of Assumption	583
10.39	Grounds for Rejection.....	583
10.40	Effect of Rejection	584
10.41	Failure to Timely Assume or Reject.....	584
10.42	Collective Bargaining Agreements	584
C.	Conversion to Chapter 7.....	584
10.43	On Request of Debtor.....	584
10.44	On Request of Creditor	584
10.45	On Request of United States Trustee.....	585
10.46	By Court.....	585
10.47	Burden of Proof.....	585
10.48	Property in Hands of Debtor at Conversion	586
10.49	Funds on Hand at Conversion	586
D.	Dismissal	586
10.50	Defects in Petition.....	586
10.51	Procedure for Dismissal.....	586
10.52	Cause for Dismissal or Conversion	587
10.53	Dismissal – Failure to Provide Information – Section 1112(b)(4)	588
10.55	Dismissal With Prejudice to Re-filing.....	589
10.56	Sanctions for Filing.....	589
E.	Retention and Compensation of Counsel	590
10.57	Requirements for Retention	590
10.58	Lack of Authorization to Retain Counsel	590
10.59	Denial of Application to Retain Counsel – Effect.....	590
10.60	Compensation	590
XI.	Chapter 13.....	591

A.	Eligibility.....	591
11.1	Generally.....	591
11.2	Section 109 – Regular Income	591
11.3	Section 109 – Debt Limits.....	591
11.4	Debt Limits – Unliquidated or Contingent Debts.....	592
11.5	Eligibility – Stockbroker	592
B.	Confirmation of Plan.....	593
11.6	Form of Plan.....	593
11.7	100% Plans.....	593
11.8	Requirements for Confirmation Generally	594
11.9	Modification of Plan Pre-Confirmation	594
11.10	Section 1325(a)(1) – Compliance with Law.....	594
11.11	“Means Forbidden by Law” – Section 1325(a)(2)	595
11.12	Projected Disposable Income – Future Income	595
11.13	Projected Disposable Income – Litigation Recovery	595
11.14	Projected Disposable Income – Non-Filing Spouse.....	595
11.15	Projected Disposable Income – Social Security Income.....	596
11.16	Projected Disposable Income – Railroad Retirement Act.....	598
11.17	Projected Disposable Income – Firefighters Retirement.....	598
11.18	Projected Disposable Income – Civil Service Retirement System	598
11.19	Projected Disposable Income – Expiration of Secured Debt Payments.....	598
11.20	Projected Disposable Income – Long Term Care Insurance	598
11.21	Projected Disposable Income – Child Support.....	598
11.22	Housing Expense	598
11.23	Projected Disposable Income – “In Kind” Income	598
11.24	“Reasonably Necessary” Expenses Generally	599
11.25	Projected Disposable Income – Actual and “Reasonably Necessary” Expenses.....	599
11.26	Private School or College Tuition	599
11.27	Recreation Expense.....	600
11.28	Home Maintenance	600
11.29	Modification of Mortgage on Principal Residence – Section 1322(b)(2)	600
11.30	Modification of Mortgage on Principal Residence – Post-petition Mortgage Payments.....	602
11.31	Modification of Mortgage on Principal Residence – Attorney Fees	602
11.32	Modification of Mortgage on Principal Residence – Section 1322(b)(5).....	603
11.33	Modification of Mortgage on Principal Residence – Voluntary Acceleration	603
11.34	Modification of Mortgage on Principal Residence – Fully Matured Mortgage.....	603
11.35	Default Interest	603
11.36	Modification of Other Liens on Personal Residence.....	604
11.37	Modification of Mortgage on Property Other Than Principal Residence.....	604

11.38	"Cure and Maintain"	605
11.39	Curing Mortgage Default After Foreclosure	605
11.40	Cure and Maintain – Reverse Mortgage	605
11.41	Secured Claims Generally	606
11.42	Secured Claim – Inherited Property	606
11.43	Purchase Money Security Interest Defined	606
11.44	Secured Claims - Preservation of Lien	606
11.45	Secured Claim – Lien Invalidation in Plan	606
11.46	Secured Claims – Modification Versus “Cure and Maintain”	607
11.47	Secured Claims - Interest Rate	607
11.48	Secured Claims – Adequate Protection	607
11.49	Secured Claims – Acceptance by Creditor	608
11.50	Secured Claims – Property Taxes	608
11.51	Secured Claims – Equal Monthly Installments Generally	609
11.52	Secured Claims – Balloon Payments	609
11.53	“Catch All” Provision in Hanging Paragraph	609
11.54	910 Car Claims – Modification of Interest Rate	609
11.55	910 Car Claims – Defined	610
11.56	Surrender Generally	610
11.57	Surrender in Full Satisfaction	612
11.58	Secured Claims – Vesting Title in Creditor Permitted	612
11.59	Secured Claims – Vesting Title in Creditor Not Permitted	612
11.60	Deficiency Claims – Limiting Provisions	613
11.61	Applicable Commitment Period	613
11.62	Attorney Fee Provisions	615
11.63	Disposable Income Distinguished From Projected Disposable Income	615
11.64	Tax Refunds as Disposable Income	616
11.65	Exempt Assets as Disposable Income	616
11.66	Ambiguous Provisions	616
11.67	Retirement Contributions	616
11.68	Retirement Loans	618
11.69	Cramdown	618
11.70	Liquidation Analysis	619
11.71	Liquidation Discount Rate	620
11.72	Unfair Discrimination Generally	620
11.73	Unfair Discrimination – Co-signed Debt	620
11.74	Student Loans – Cure and Maintain Payments	621
11.75	Unfair Discrimination – Student Loans	621
11.76	Good Faith – Generally	623

11.77	Good Faith – Voluntary Mortgage Acceleration	626
11.78	Good Faith – Social Security Income.....	626
11.79	Good Faith - Plan Length	628
11.80	Good Faith – “Attorney Fee Only” Plans	628
11.81	Plan Length and Disposable Income	629
11.82	Domestic Support Obligations	629
11.83	Transfer of Property	630
11.84	Income Tax Claims	630
11.85	Other Tax Claims	630
11.86	Joint Cases – Substantive Consolidation for Plan Administration.....	631
11.87	Best Interests of Creditors	631
11.88	Duty to Insure – Section 1326(a)(4).....	631
11.89	Feasibility	631
11.90	Feasibility – Plan Dependent on Sale of Property	632
11.91	Feasibility – Funding Dependent on Non-Debtor	633
11.92	Feasibility – Balloon Payments.....	633
11.93	60 Month Plan Length.....	633
11.94	Expiration or Non-Accrual of Automatic Stay.....	634
11.95	Disbursing Agent	634
C.	Objections to Confirmation.....	634
11.96	Procedural Requirements	634
11.97	Standing to Object.....	634
11.98	Deadline for Filing.....	635
11.99	Failure to Raise Objection.....	635
11.100	Failure to Prosecute	635
11.101	Burden of Proof.....	635
D.	Effect of Confirmation.....	636
11.102	Generally.....	636
11.103	Effective Date of Plan	638
11.104	Parties Bound.....	638
11.105	Distribution of Payments	639
11.106	Vesting of Property of Estate	639
11.107	Surrender of Collateral Upon Confirmation	640
11.108	Application of Payments – Section 524(i)	640
11.109	Modification of Secured Claims	640
11.110	Discharge or Release of Secured Claims	641
11.111	Direct Pay Obligations	641
11.112	Actions in Violation of Confirmed Plan – Remedy	641
11.113	Post-petition Claims.....	642

E.	Revocation of Order Confirming Plan.....	642
11.114	Time for Bringing	642
11.115	Grounds – Section 1330.....	642
11.116	Grounds – Rule 60	642
F.	Modification of Order Confirming Plan	642
11.117	Compliance With Code Generally.....	642
11.118	Grounds – Error in Order Confirming Plan	643
11.119	Altering Treatment of Secured Creditor.....	643
11.120	Surrender of Previously Retained Collateral in Full Satisfaction	643
G.	Modification of Plan Post-Confirmation	643
11.121	Generally.....	643
11.122	Timing of Modification.....	644
11.123	Good Faith	644
11.124	Liquidation Value	645
11.125	Ambiguous Terms.....	645
11.126	Feasibility	645
11.127	Grounds - Change of Circumstances.....	646
11.128	Grounds – Increased Income	647
11.129	Grounds – Error in Order Confirming Plan	647
11.130	Reclassification of Claims.....	647
11.131	Surrender of Property.....	648
11.132	Vesting of Property in Creditor.....	648
11.133	Minimum Plan Length – Applicable Commitment Period.....	649
11.134	60 Month Maximum Plan Length	649
11.135	Lien Stripping	649
11.136	Disposable Income	650
11.137	Changing Disbursing Agent.....	651
11.138	Post-Petition Property	652
11.139	Procedural Requirements	652
11.140	Changing Plan Length.....	652
11.141	Curing Post-Petition Defaults on Secured Claims	653
H.	Lien Stripping	653
11.142	Permissible.....	653
11.143	Discharge Required	654
11.144	Discharge Not Required.....	654
11.145	Primary Residential Collateral.....	655
11.146	Non-Primary Residential Collateral.....	655
11.147	Procedure.....	655
11.148	Necessary Parties – Jointly Owned Property.....	656

11.149	Necessity for Proof of Claim.....	656
11.150	Valuation Date	657
11.151	Valuation and Secured Status.....	657
11.152	Cross-Collateralized Liens and Future Advance Clauses.....	659
11.153	Partially Secured Mortgage – Generally	659
11.154	Partially Secured Mortgage – Maturity Within Plan Term	659
11.155	Condominium Fees	660
11.156	Mechanic’s Lien.....	660
11.157	Tax Liens	660
11.158	Following Chapter 7 Discharge – Deficiency Claim.....	660
I.	Sale of Assets – Section 363	660
11.160	Generally.....	660
J.	Incurring Debt Post-Confirmation	661
11.161	Court Authorization Required.....	661
11.162	Court Authorization Not Required.....	661
K.	Discharge	661
11.164	Domestic Support Certification	661
11.165	Requirements Generally.....	661
11.166	Completion of Plan Payments	661
11.167	Converted Cases.....	661
11.168	Time Between Cases	662
11.169	Scope and Effect Generally.....	663
11.170	Scope and Effect – Mortgage Claims.....	663
11.171	Scope and Effect – Criminal Fines and Court Costs	663
11.172	Hardship Discharge.....	664
11.173	Early Payoff of Plan	664
11.174	Objections to Discharge	664
11.175	Waiver of Discharge	665
L.	Scope of “Super Discharge”	665
11.176	Domestic Support Obligation – Sections 523(a)(5) and (a)(15).....	665
11.177	Section 1328(a)(2)	666
11.178	Section 1328(a)(4)	666
11.179	Penalties Owed to Governmental Agencies	666
11.180	Enforcement of Injunctive Relief	666
11.181	Discharge Injunction	667
M.	Rule 3002.1	667
11.182	Applicability – Non-principal Residence	667
11.183	Applicability – Grant of Relief From Stay	667
11.184	Applicability – Obligation Treated in Plan	668

11.185	Applicability – Property Surrendered at Confirmation	668
11.186	Applicability – “Direct Pay” Mortgage.....	668
11.187	Applicability – Stripped Liens	668
11.188	Conflict with Local Rule – Preemption.....	668
11.189	Notice of Payment Change – Failure to Provide	668
11.190	Notice of Payment Change - Excusal of Compliance – HELOC	669
11.191	Notice of Payment Change - Expenses for Filing	669
11.192	Notice of Post-petition Fees and Expenses – Generally	669
11.193	Failure to File Timely	669
11.194	Notice of Post-petition Fees and Expenses – Expenses for Filing.....	670
11.195	Recoverable Charges.....	670
11.196	Sanctions.....	670
11.197	Trustee’s Notice of Final Cure – Generally	670
11.198	Notice of Final Cure – Failure to Respond.....	670
11.199	Notice of Final Cure – Creditor Response	670
11.200	Notice of Final Cure – Expenses for Filing Response.....	670
11.201	Notice of Final Cure – Debtor’s Response.....	671
N.	Dismissal	671
11.202	Voluntary Dismissal – Absolute Right to Dismiss	671
11.203	Voluntary Dismissal – No Absolute Right to Dismiss	672
11.204	Voluntary Dismissal – After Conversion from Chapter 7	673
11.205	Voluntary Dismissal – Imposition of Bar Against Re-Filing	673
11.206	Notice.....	674
11.207	Failure to File Documents.....	674
11.208	Failure to File Amended Plan	674
11.209	Death of Debtor – Pre-Confirmation.....	674
11.210	Death of Debtor – Post-Confirmation.....	674
11.211	Payment Default.....	675
11.212	ECF Deficiency.....	675
11.213	Good Faith – Section 1307.....	675
11.214	Failure to Prosecute – Section 1307(c)(1)	676
11.215	Nonpayment of Fees or Charges – Section 1307(c)(2).....	677
11.216	Failure to File Plan Timely – Section 1307(c)(3).....	677
11.217	Failure to Commence Payments – Section 1307(c)(4)	677
11.218	Denial of Confirmation – Section 1307(c)(5).....	677
11.219	Material Default – Section 1307(c)(6)	677
11.220	Revocation of Confirmation – Section 1307(c)(7)	678
11.221	Termination of Confirmed Plan – Section 1307(c)(8).....	678
11.222	Failure to File Documents – Section 1307(c)(9) and (10)	678

11.223	Failure to Pay Domestic Support – Section 1307(c)(11)	678
11.224	Failure to Comply with Orders of Court	678
11.225	Failure to Pay Post-Petition Taxes	678
11.226	Effect of Dismissal – Section 349	678
11.227	Bar to Refiling.....	678
11.228	Distribution of Funds – Dismissal Before Confirmation.....	679
11.229	Distribution of Funds – Dismissal After Confirmation	680
O.	Conversion.....	681
11.231	On Request of Debtor	681
11.232	On Request of Chapter 13 Trustee	681
11.233	Effective Date	682
11.234	Recovery of Funds by Trustee.....	682
11.235	Distribution of Funds – Conversion Before Confirmation	682
11.236	Distribution of Funds – Conversion After Confirmation	683
11.237	Distribution of Funds – Assignment of Proceeds.....	683
11.238	Reconversion Back to Chapter 13	683
P.	Borrowing Money Post-Petition	683
11.239	Motions Generally	683
11.240	Notice.....	684
11.241	Burden of Proof.....	684
Q.	Trustee Fees.....	684
11.242	Fees on Receipts	684
XII.	Adversary Proceedings	684
A.	Jurisdiction.....	684
12.1	Dismissal of Bankruptcy Case.....	684
12.2	Relationship of Adversary to Bankruptcy Case	685
12.3	“Arising In”, “Arising Under” and “Related to”	686
12.4	Personal Jurisdiction Over Defendant – “Minimum Contacts”	692
12.5	Personal Jurisdiction Over Defendant – Forum Selection Clauses.....	692
12.6	Third Party Complaint	693
12.7	Diversity Jurisdiction – Generally.....	693
12.8	Diversity Jurisdiction- Interpleader	693
12.9	Supplemental Jurisdiction	694
12.10	Jurisdiction – US Claims Court	694
12.11	Jurisdiction – Fannie Mae.....	694
12.12	Limitations on Jurisdiction – Probate Exception.....	694
12.13	Limitations on Jurisdiction – FIRREA	695
12.14	Limitations – Rooker-Feldman	696
12.15	Limitations – Jurisdictional Priority.....	701

12.16	Particular Causes of Action	702
12.17	Authority of Bankruptcy Court to Enter Final Judgment – Generally	703
12.18	Authority of Bankruptcy Court to Enter Final Judgment - Dischargeability Actions	703
12.19	Authority of Bankruptcy Court to Enter Final Judgment – Post-Petition Causes of Action	704
12.20	Authority of Bankruptcy Court to Enter Final Judgment – Consent of Parties	704
12.21	Authority of Bankruptcy Court to Enter Final Judgment – State or Non-Bankruptcy Federal Law Claims	704
12.22	Authority of Bankruptcy Court to Enter Final Judgment – Fraudulent Transfer Claims.....	706
12.23	Authority of Bankruptcy Court to Enter Final Judgment – Preferential Transfers	706
12.24	Authority of Bankruptcy Court to Enter Final Judgment – Adjudication of Claims and Liens.....	707
12.25	Authority of Bankruptcy Court to Enter Final Judgment – Confirmed Plan	707
12.26	Authority of Bankruptcy Court to Enter Final Judgment – Turnover from Non-Debtor.....	707
12.27	Authority of Bankruptcy Court to Enter Final Judgment – Section 544 “Strong Arm” Powers.....	708
12.28	Authority of Bankruptcy Court to Enter Final Judgment – Stay Issues and Discharge Injunctions	708
12.29	Authority of Bankruptcy Court to Enter Final Judgment – Property of Estate.....	708
12.30	Certifying Questions to State Court	708
B.	Venue.....	708
12.31	Generally.....	708
12.32	Forum Selection Clauses.....	709
12.33	“Small-dollar” Venue.....	709
12.34	Change of Venue – Chosen Venue Proper	709
12.35	Change of Venue – Chosen Venue Improper	711
C.	Trial	711
12.36	Generally.....	711
12.37	Arbitration.....	711
12.38	Bifurcation of Issues for Trial.....	717
D.	Non-Bankruptcy Actions	717
12.39	Referral to Bankruptcy Court.....	717
E.	Withdrawal of Reference	718
12.40	Mandatory.....	718
12.41	Discretionary – Cause for Withdrawal.....	720
12.42	Timing of Motion.....	725
12.43	Burden of Proof.....	726
12.44	Waiver of Right to Object	726
12.45	Stay of Proceedings While Pending	726
12.46	Appeal of Grant or Denial of Motion.....	726
12.47	Stay Pending Appeal.....	727
F.	Abstention and Removal	727
12.48	Actions Subject to Removal or Abstention	727
12.49	Grounds – Mandatory Abstention	729

12.50	Grounds – Permissive Abstention	731
12.51	Timeliness of Notice of Removal	738
12.52	Waiver of Right to Remove	739
12.53	Procedure	739
12.54	Removal – Consent of All Defendants	739
12.55	Removal – Lack of State Court Jurisdiction.....	740
12.56	Removal – FHLMC	740
12.57	Removal – Securities Actions	740
12.58	Burden of Proof.....	740
12.59	Effect of Removal	740
G.	Remand	741
12.60	Grounds.....	741
12.61	Equitable Remand	743
12.62	Appellate Review	744
12.63	Sanctions – Frivolous Removal	744
H.	Standing to Prosecute	744
12.64	Generally.....	744
12.65	Derivative Standing	750
12.66	Ratification	750
12.67	Intervention - Mandatory	750
12.68	Intervention – Permissive	751
12.69	Joinder and Severance.....	751
12.70	Class Actions	752
12.71	Exhausting of Administrative Remedies – State Law	754
12.72	Exhausting of Administrative Remedies – Actions Against United States	754
I.	Commencement	754
12.73	Technical Requirements.....	754
12.74	Filing Fee – Failure to Pay.....	754
12.75	Filing Fee – Waiver	754
12.76	Filing Fee – Refund of	755
12.77	Generally – Time For.....	756
12.78	Extension of Time – Granted	756
12.79	Extension of Time – Denied.....	757
12.80	Ripeness.....	758
J.	Service of Process	758
12.81	Deadline for Service	758
12.82	Rules 7004 and 5003	759
12.83	Federally Insured Depository Institution.....	761
12.84	Service Address	761

12.85	Alternative Service.....	761
12.86	Failure to Serve	762
K.	Parties	762
12.87	Necessary and Indispensable Parties	762
12.88	FDIC as Receiver	763
12.89	Identity of Plaintiffs	763
12.90	Substitution of Parties.....	763
L.	Pleadings.....	763
12.91	Calculation of Deadlines – Generally	763
12.92	Complaint	764
12.93	Counterclaim	767
12.94	Third Party Complaint.....	767
12.95	Responsive Pleadings – Deadline for Filing	767
12.96	Answer and Affirmative Defenses	767
12.97	In Pari Delecto	768
12.98	Statute of Limitations.....	769
12.99	Statute of Limitations – Section 544.....	771
12.100	Statute of Limitations – Section 108.....	771
12.101	Statute of Limitations - Tolling.....	772
12.102	Statute of Limitations – FIRREA	774
12.103	Statute of Limitations – Continuing Violations.....	774
12.104	Statute of Repose.....	774
12.105	Laches	774
12.106	First Breach Rule.....	775
12.107	Economic Loss Rule.....	775
12.108	Repudiation	775
12.109	Impossibility or Impracticability of Performance	775
12.110	Frustration of Purpose	775
12.111	Force Majeure Clause.....	776
12.112	Mutual Mistake	776
12.113	Illegality	776
12.114	Contract of Adhesion.....	776
12.115	Cross Claims	776
12.116	Motion to Dismiss.....	776
12.117	Motion to Strike Pleadings.....	779
12.118	Amendments to Pleadings – Matter of Right	779
12.119	Leave to Amend Complaint/Counterclaim	779
12.120	Amendment to Pleadings – Leave to Amend Answer.....	784
12.121	Amendments to Pleadings – Relation Back.....	785

12.122	Scheduling Order	786
12.123	Attorney Fees as Element of Recovery	786
M.	Preemption	787
12.125	Conflict with State Law	787
12.126	Bankruptcy Preemption of Non-Bankruptcy Law Causes of Action	787
N.	Financial Institutions Reform Recovery and Enforcement Act (FIRREA)	787
12.127	Generally	787
12.128	Injunctive Relief	788
O.	Dismissal	788
12.129	Failure to Prosecute	788
12.130	Voluntary Dismissal	789
12.131	Voluntary Dismissal Without Prejudice	789
12.132	Lack of Subject Matter Jurisdiction	790
12.133	Dismissal as Moot	790
12.134	Dismissal by Court Sua Sponte	791
12.135	Disentitlement	791
12.136	Bar to Filing or Refiling	792
12.137	Failure to Pay Filing Fee	792
P.	Default	792
12.138	Generally	792
12.139	Jurisdiction	793
12.140	Entry – Discretion of Court	793
12.141	Setting Aside	794
12.142	Final Judgment After Default	797
Q.	Settlement	798
12.143	Approval by Court Required	798
12.144	Approval by Court Not Required	798
12.145	Limits on Jurisdiction	798
12.146	Service of Motion	799
12.147	Standards for Approval	799
12.148	Standing to Object	804
12.149	Burden of Proof	805
12.150	Setting Aside Settlement	805
12.151	Interpretation of Settlement Agreement	805
12.152	Settlement Agreement – Injunctions Against Non-Debtor	806
12.153	Sanctions	807
12.154	Release – Setting Aside	807
R.	Collateral Estoppel and Res Judicata	807
12.155	Elements Generally	807

12.156	Same Parties.....	824
12.157	Claims Actually and Necessarily Litigated.....	825
12.158	Valid Final Judgment – Generally.....	832
12.159	Valid Final Judgment - Involuntary Dismissal of Complaint.....	832
12.160	Dismissal With Prejudice.....	832
12.161	Valid Final Judgment – Arbitration Award.....	832
12.162	Valid Final Judgment - “True Default Judgment”.....	833
12.163	Valid Final Judgment - Separation Agreement and Dissolution of Marriage.....	834
12.164	Valid Final Judgment - Default Judgment – Failure to Defend.....	834
12.165	Valid Final Judgment - Default Judgment – “Penalty Default”.....	836
12.166	Valid Final Judgment – Criminal Proceedings.....	837
12.167	Valid Final Judgment – Pending Appeal.....	837
12.168	Valid Final Judgment – Consent Judgment.....	837
12.169	Valid Final Judgment – Sale Order.....	838
12.170	Void Judgment.....	838
12.171	Orders - Prior Administrative Determinations.....	838
12.172	Orders – Prior Bankruptcy Proceedings.....	839
12.173	Subsequent Change in Law.....	839
12.174	Particular Claims Barred.....	840
12.175	Particular Claims Not Barred.....	844
12.176	Defensive Collateral Estoppel.....	846
12.177	Reversal of Underlying Judgment.....	847
S.	Stare Decisis and Administrative Preclusion.....	847
12.178	Binding Effect of District Court Decisions.....	847
12.179	Binding Effect of Federal Court Decisions on State Court.....	847
12.180	Administrative Preclusion.....	847
T.	Claim Preclusion.....	847
12.181	Defined.....	847
U.	Judicial Estoppel.....	847
12.182	Elements.....	847
12.183	Parties Estopped.....	856
12.184	Particular Claims Barred.....	857
12.185	Particular Claims Not Barred.....	862
V.	Equitable Estoppel.....	864
12.186	Elements.....	864
12.187	Governmental Action.....	864
12.188	Elements – Fraudulent Transfer.....	864
W.	Promissory Estoppel.....	865
12.189	Elements.....	865

X.	Law of the Case	865
12.190	Elements	865
12.191	Particular Claims Barred	867
12.192	Particular Claims Not Barred	867
12.193	Mandate After Appeal	867
Y.	Evidentiary Issues	867
12.194	Generally	867
12.195	Authentication of Documents	867
12.196	Privilege – Time for Asserting Generally	868
12.197	Fifth Amendment Privilege	868
12.198	Attorney-Client Privilege	868
12.199	Common Interest Doctrine	870
12.200	Work Product Privilege	870
12.201	Accountant-Client Privilege	870
12.202	Membership Lists	871
12.203	Valuation - Rule 701	871
12.204	Expert Witnesses	871
12.205	Trade Secrets	874
12.206	11 USC Section 107(b)	874
12.207	Constitutional Limitations on Discovery	874
12.208	Hearsay – Generally	875
12.209	Government Report	875
12.210	Hearsay – Business Records Exception	875
12.211	Subsequent Remedial Measures	875
12.212	Parole Evidence Rule	875
12.213	Judicial Notice	876
12.214	Waiver – Inadvertent Disclosure	876
12.215	Video Testimony	876
12.216	Settlement Discussions	876
Z.	Discovery	877
12.217	Generally	877
12.218	Motion for Leave to Take Discovery	877
12.219	Scope of Discovery	877
12.220	Subpoenas – Rule 26	877
12.222	Depositions	877
12.223	Depositions - Perpetuation of Testimony	878
12.224	Request for Admissions	878
12.225	Interrogatories	879
12.226	Production of Documents	880

12.227	Objections – Timing	880
12.228	Objections – Boilerplate.....	880
12.229	Objections – Proportionality	881
12.230	Objections – Privilege.....	881
12.231	Protective Orders	881
12.232	Time for Taking Discovery	882
12.233	United States Trustee	882
12.234	Expert Witness Opinions	882
12.235	Motion to Compel	882
12.236	Sanctions – Rule 37 and 7037.....	883
12.237	Sanctions – Contempt.....	886
12.238	Sanctions – Spoliation of Evidence.....	886
AA.	Pre-trial Disclosures.....	886
12.239	Generally.....	886
12.240	Failure to Make	886
BB.	Summary Judgment	887
12.241	Timing of Motion.....	887
12.242	Sua Sponte Grant In Favor of Non-Moving Party.....	887
12.243	Burden of Proof.....	888
12.244	Failure to Respond to Motion	891
12.245	Affidavits – Requirements	891
12.246	Affidavits – Motion to Strike	891
12.247	Presentation of Record.....	891
12.248	Particular Cases – Summary Judgment Granted.....	891
12.249	Particular Cases – Summary Judgment Denied	892
CC.	Judgment on the Pleadings.....	892
12.250	Time for Filing.....	892
DD.	Report and Recommendations	892
12.251	Objections.....	892
12.252	Standard of Review	893
EE.	Jury Trial.....	893
12.253	Actions Subject to Jury Trial.....	893
12.254	Waiver of Right to Jury Trial	894
FF.	Motion for New Trial or Amendment of Judgment – Rule 9023	894
12.255	Jurisdiction.....	894
12.256	Grounds.....	894
12.257	Time for Filing.....	896
GG.	Motion for Relief From Judgment or Order – Rule 9024	896
12.258	Grounds Generally.....	896

12.259	Grounds – Fraud, Misrepresentation or Misconduct	897
12.260	Grounds – Mistake, Inadvertence or Surprise	897
12.261	Grounds – Excusable Neglect	898
12.262	Newly Discovered Evidence	899
12.263	Void Judgment	899
12.264	Satisfaction, Release or Discharge	900
12.265	Other Grounds	900
12.266	Time for Bringing Motion	900
HH.	Enforcement of Judgment	900
12.267	Taxable Costs	900
12.268	Expert Witness Fees	901
12.269	Pre-Judgment Interest Rate	901
12.270	Rate of Interest on Judgment	901
12.271	Executions	901
12.272	Garnishment	901
12.273	Statute of Limitations	902
12.274	Renewal of Judgment	902
XIII.	Appeals	902
A.	Parties	902
13.1	Standing to Appeal	902
13.2	In Forma Pauperis	905
13.3	Waiver of Right to Appeal	906
13.4	Cross-Appeal	906
B.	Appellate Jurisdiction	907
13.6	Generally	907
13.7	Exceptions	907
13.8	Content of Notice of Appeal	907
13.9	Certification for Direct Appeal	908
13.10	Jurisdiction of Lower Court Pending Appeal	908
13.11	Jurisdiction of Lower Court Pending Appeal – Rule 8008	909
C.	Time for Filing Appeal	909
13.12	Bar to Filing	909
13.13	Filing Before Order Entered	909
13.14	“Separate Document” Rule	909
13.15	Deadline for Notice of Appeal	909
13.16	Effect of Motion for New Trial or Amendment of Judgment	911
13.17	Motion for Leave to File Untimely Notice of Appeal	912
13.18	Deadline – Direct Appeal to Circuit Court	913
D.	Appealable Orders	913

13.19	Finality of Order.....	913
13.20	“Collateral Order” Doctrine.....	916
13.21	Interlocutory Appeal	916
13.22	Default Judgment	923
13.23	Particular Orders Appealable – Order Denying Confirmation	923
13.24	Particular Orders Appealable – Order Confirming Plan	923
13.25	Particular Orders Appealable – Order Denying Modification of Plan.....	923
13.26	Particular Orders Appealable – Order Granting Stay Relief.....	923
13.27	Particular Orders Appealable – Order Dismissing Adversary Proceeding	923
13.28	Particular Orders Appealable – Claims Resolutions	923
13.29	Particular Orders Appealable – Sanctions	924
13.30	Particular Orders Not Appealable – Sanctions	924
13.31	Order Reversing Prior Order	924
13.32	Particular Orders Not Appealable – Order Denying Motion to Dismiss	924
13.33	Particular Orders Not Appealable – Order Denying Motion to Withdraw Reference	925
13.34	Particular Orders Not Appealable – Order Denying Motion for Abstention	925
13.35	Particular Orders Not Appealable – Order Setting Aside Default	925
13.36	Particular Orders Not Appealable – Order Determining Liability Only.....	925
13.37	Particular Orders Not Appealable – Order Denying Confirmation of Plan	925
13.38	Particular Orders Not Appealable – Partial Default Judgment	926
13.39	Particular Orders Not Appealable – Conditional Stay Relief	926
13.40	Particular Orders Not Appealable – Temporary Injunctions	926
13.41	Particular Orders Not Appealable – Arbitration.....	926
13.42	Other Orders	926
E.	Stay Pending Appeal.....	927
13.43	Jurisdiction to Enter Stay	927
13.44	Elements of Stay	927
13.45	Scope of Stay	933
13.46	Effect of Failure to Obtain Stay – Generally.....	933
13.47	Effect of Failure to Obtain Stay – Mootness	934
13.48	Effect of Stay	936
13.49	Stay of Other Proceedings.....	936
13.50	Supersedeas Bond	937
F.	Appeal Costs.....	937
13.52	Filing Fee - In Forma Pauperis	937
13.53	Appeal Bond	937
13.54	Taxable Costs.....	938
13.55	Attorney Fees.....	938
13.56	Sanctions – Frivolous Appeal.....	938

G.	Dismissal	938
13.57	Voluntary Dismissal	938
13.58	Mootness	938
13.59	Equitable Mootness	940
13.60	On Motion by Party	942
13.62	Dismissal by Court Sue Sponte	943
13.63	Disentitlement	944
13.64	Reconsideration of Dismissal	944
13.65	Vacatur	944
13.66	Settlement During Appeal	944
H.	Issues on Appeal	944
13.67	Consideration by Lower Court	944
13.68	Specification of Issues – Generally	945
13.69	Specification of Issues – Failure to File	945
13.70	Waiver of Issues – Generally	946
13.71	Standard of Review	946
13.72	Certified Questions of State Law	946
I.	Briefs	946
13.73	Deadline for Filing	946
13.74	Extension of Time to File	946
13.75	Content	947
J.	Record on Appeal	947
13.77	Time for Filing	947
13.78	Disputes – Jurisdiction to Resolve	947
13.79	Disputes – Generally	947
13.80	Failure to Provide	947
13.81	Redaction of Transcript	948
K.	Standards of Review	948
13.82	De Novo Review	948
13.83	Question of Law	948
13.84	Question of Fact	948
13.85	Mandate After Appeal	948
XIV.	Avoidable Transfers	948
A.	Trustee Strong Arm Powers	948
14.1	Section 544 Generally	948
14.2	Trustee as Judicial Lien Creditor	949
14.3	Trustee as Holder of Unsatisfied Execution	951
14.4	Trustee as Bona Fide Purchaser	952
14.5	Trustee as Unsecured Creditor	954

14.6	Standing – Chapter 13 Trustee	954
14.7	Standing – Debtor	954
14.8	Standing – Third Parties.....	956
14.9	Defenses – Earmarking	956
14.10	Defenses – Reasonably Equivalent Value	956
14.11	Defenses – Stockholder Distributions	957
14.12	Defenses – Constructive Notice	958
14.13	Defenses – Equitable Subrogation	963
14.14	Lien Strip of Subordinate Lien.....	964
14.15	Defenses - Statute of Limitations	964
14.16	Defenses – Equitable Defenses	965
14.17	Defenses – Solvency.....	965
14.18	Parties Liable – Transferees	965
14.19	Parties Liable – “Mere Conduit”	965
B.	Fraudulent Transfers	965
14.20	Bankruptcy Court Jurisdiction.....	965
14.21	Fraudulent Transfer Versus Preference.....	965
14.22	State Uniform Fraudulent Transfer Act	965
14.23	Standing	967
14.24	Standing – Chapter 13 Trustee	967
14.25	Actual Intent to Hinder, Delay, Defraud	968
14.26	Constructive Fraud.....	972
14.27	Transfer of Property of Debtor.....	975
14.28	Time of Transfer	977
14.29	Payments Under Employment Contracts	977
14.30	Transfer of Property of Estate	978
14.31	Particular Transfers Avoidable.....	978
14.32	Particular Transfer– Perfection of Security Interest.....	979
14.33	Particular Transfers – Tax Sales	979
14.34	Particular Transfers Not Avoidable.....	979
14.35	Reasonably Equivalent Value.....	980
14.36	Reasonably Equivalent Value – Lien Securing Pre-Existing Indebtedness.....	982
14.37	Reasonably Equivalent Value – Tax Sale.....	984
14.38	Secured Claims – Novation	984
14.39	Insolvency.....	984
14.40	Defenses – Charitable Giving	986
14.41	Defense – Securities Settlement Payments.....	986
14.42	Defense – Leveraged Buyout	986
14.43	Defense – Forward Contract Payment.....	986

14.44	Defense – Wrongful Conduct of Debtor.....	987
14.45	Defense – Earmarking.....	987
14.46	Defense – Prepetition Return of Money to Third Party.....	987
14.47	Defense – Good Faith and Value	987
14.48	Defense – Equitable Grounds.....	988
14.49	Statute of Limitations.....	989
14.50	Damages	990
14.51	Damages – Setoff by Defendant	991
14.52	Complaint.....	991
14.53	Parties Liable – Initial Transferee	991
14.54	Mediate and Immediate Transferee of Initial Transferee	992
14.55	Parties Liable – “Mere Conduit”.....	992
C.	Turnover of Property.....	993
14.58	Generally.....	993
14.59	Jurisdiction.....	994
14.60	Parties	994
14.61	Procedure.....	994
D.	Preferences.....	994
14.62	Standing to Bring Action.....	994
14.63	Standing – Chapter 13 Trustee.....	995
14.64	Preference Versus Fraudulent Transfer	995
14.65	Procedure.....	995
14.66	Transfers to “Insiders”	995
14.67	Parties Liable – Initial Transferee	996
14.68	Mediate and Immediate Transferee of Initial Transferee	996
14.69	Parties Liable – “Mere Conduit”.....	997
14.70	Damages	997
14.71	Elements – Generally.....	997
14.72	Elements – Transfer of Property	1000
14.73	Elements – Perfection of Security Interest	1001
14.74	Elements – Lack of Reasonably Equivalent Value	1002
14.75	Elements – To or For Benefit of Creditor	1002
14.76	Elements - Antecedent Debt.....	1002
14.77	Elements – Insolvency	1003
14.78	Elements – Timing of Transfer	1004
14.79	Elements – Timing of Transfer – “Insider”.....	1004
14.80	Elements – Timing of Transfer – Garnishment	1005
14.81	Elements – Allow Creditor to Recover More Than Hypothetical Chapter 7.....	1005
14.82	Element – Intent.....	1006

14.83	Setoff as Preference	1006
14.84	Defenses – De Minimis Transfers	1007
14.85	Defenses – Safe Harbor – 547(c)(3).....	1007
14.86	Defenses – Not Primarily Consumer Debts – 547(c)(9).....	1007
14.87	Defenses – Earmarking	1008
14.88	Defenses – Administrative Expenses	1009
14.89	Defenses – Payments for Fines and Penalties.....	1009
14.90	Defenses – Contemporaneous Exchange of Value	1009
14.91	Defenses – New Value.....	1009
14.92	Defenses – Liquidation Amount in Chapter 7	1010
14.93	Defenses – Ordinary Course of Business	1010
14.94	Defenses – Short Term Loans or Equity Contributions.....	1013
14.95	Defenses – Constructive Notice	1013
14.96	Defenses – Duly Conducted Foreclosure Sale	1013
14.97	Statute of Limitations.....	1013
14.98	Particular Transfers – Tax Sales	1014
14.99	Avoidable.....	1014
14.100	Particular Transfers – Not Avoidable.....	1014
14.101	Claim Following Avoidance of Transfer.....	1015
E.	Post-Petition Transfers – Section 549	1016
14.102	Elements.....	1016
14.103	Jurisdiction.....	1017
14.104	Defenses.....	1017
14.105	Defenses – Statute of Limitations	1017
14.106	Defenses - Involuntary Petitions	1017
14.107	Particular Transfers Avoidable.....	1018
14.108	Particular Transfers Not Avoidable.....	1018
14.109	Persons Liable – Debtors	1018
14.110	Persons Liable - Transferees	1018
F.	Reformation of Loan Documents	1019
14.111	Standing	1019
14.112	Requirements	1019
14.113	Statute of Limitations.....	1019
14.114	Laches	1019
G.	Effect of Avoidance	1020
14.115	Preservation for Benefit of Estate.....	1020
14.116	Damages	1020
XV.	Collateral Attack – Final Orders	1020
A.	Parties Bound.....	1020

15.1	Successor Trustee.....	1020
B.	Particular Orders.....	1020
15.2	Confirmation Order.....	1020
15.3	Sale Orders.....	1021
15.4	Criminal Convictions.....	1021
15.5	State Court Judgments.....	1021
XVI.	Closed Cases.....	1021
A.	Reopening and Reinstatement.....	1021
16.1	Reopening Case - Futility.....	1021
16.2	Reopening Case - Grounds.....	1022
16.3	Reopening Case – Conditional Reopening.....	1026
16.4	Reopening Adversary Proceeding.....	1026
16.5	Standing to Request.....	1027
16.6	Filing Fee.....	1027
XVII.	Post-Petition Financial Management Education.....	1028
A.	Requirement.....	1028
17.1	Generally.....	1028
17.2	Waiver of Requirement.....	1028
17.3	Attendance by Person Other Than Debtor.....	1028
B.	Failure to Obtain.....	1028
17.4	Closing Case Without Discharge.....	1028
17.5	Reopening Closed Case.....	1029
XVIII.	Judicial and Trustee Immunity.....	1029
A.	Judicial Immunity.....	1029
18.1	Generally.....	1029
B.	Trustee Immunity.....	1030
18.2	Generally.....	1030
18.3	Limitations.....	1031
C.	Creditor Committee Immunity.....	1033
18.4	Generally.....	1033
XIX.	Bankruptcy Crimes.....	1033
A.	Fraud.....	1033
19.1	Generally.....	1033
19.2	Failure to Disclose Names.....	1034
19.3	Failure to Disclose Assets.....	1034
19.4	Failure to List Creditors.....	1034
19.5	Alteration or Destruction of Documents.....	1034
19.6	Sanctions.....	1034
19.7	Statute of Limitations.....	1034

19.8	Advice of Counsel Defense.....	1035
XX.	Personally Identifiable Information	1035
A.	Generally	1035
20.1	Statutory Requirements.....	1035
B.	Information Considered “Personally Identifiable”	1035
20.2	Account Numbers	1035
C.	Remedies	1035
20.3	Disclosure in Proof of Claim.....	1035
20.4	Injunctive Relief.....	1035
20.5	Damages	1035
20.6	Contempt.....	1036
20.7	Redaction from Transcript	1036
XXI.	Real Estate Settlement Procedures Act	1036
A.	Generally	1036
21.1	Statutory Authority	1036
21.2	Construction With Bankruptcy Code.....	1037
21.3	Statute of Limitations.....	1037
B.	Qualified Written Request.....	1037
21.4	Defined	1037
21.5	Address for Mailing Qualified Written Request	1038
21.6	Servicer’s Duty to Respond.....	1039
21.7	Damages	1040
C.	Duties Generally	1041
21.8	Notice of Assignment, Sale or Transfer of Servicing.....	1041
21.9	Loss Mitigation.....	1041
D.	Remedies	1042
21.10	Rescission	1042
21.11	Vacating Sale	1042
21.12	Loan Modification	1042
21.13	Parties Liable	1042
21.14	Pleading Requirements	1042
21.15	Actual Damages.....	1043
21.16	Exemplary Damages	1043
XXII.	Mortgage Issues.....	1043
A.	Validity	1043
21.1	Tenants in Common	1043
21.2	Dower	1043
B.	Foreclosures.....	1043
21.3	Homestead	1043

22.4	Standing to Foreclose.....	1044
22.5	Refusal to Foreclose.....	1045
22.6	“Securitization”.....	1045
22.7	State Law Procedures.....	1046
22.8	Chain of Title – MCL 600.3204.....	1047
22.9	Timing of Sale – MCL 600.3220.....	1047
22.10	Posting Notice of Sale – MCL 600.3208.....	1047
22.11	Publication – MCL 600.3212.....	1048
22.12	Perfection of Mortgage.....	1048
22.13	Redemption.....	1048
22.14	Expungement of Sale.....	1049
22.15	Assignment of Mortgage – Validity.....	1049
22.16	Assignment of Mortgage – Recording.....	1050
22.17	Assignment of Mortgage – Splitting Note and Mortgage.....	1051
22.18	Assignment of Mortgage – Securitizing Trusts.....	1051
22.19	Assignment of Mortgage – Standing to Contest.....	1051
22.20	Contest of Mortgage Foreclosure Pre-Sale – Ripeness.....	1053
22.21	Contest of Mortgage Foreclosure Post-Redemption.....	1053
22.22	Standing to Contest – Robosigning.....	1056
22.23	Foreclosure Fraud – “Excessive” Bid.....	1056
22.24	Foreclosure Fraud Generally.....	1056
22.25	Forgery of Mortgage.....	1058
22.26	Standing to Object – Lack of Interest in Property.....	1058
22.27	Standing to Contest – Notice of Foreclosure Sale.....	1058
22.28	Standing to Contest – Other Grounds.....	1059
22.29	Deficiency Claims.....	1059
22.30	Discharge or Release of Mortgage at Final Payment – MCL §§ 565.41 and 565.44.....	1059
22.31	Effect of Sale – Junior Interests.....	1060
XXIII.	Fair Debt Collection Practices Act.....	1060
A.	Generally.....	1060
23.1	Standing.....	1060
23.2	Debt Collector” Defined.....	1060
23.3	Debt Collector – Mortgage Servicer.....	1062
23.4	Relationship to Bankruptcy Code – Pre-Emption.....	1063
23.5	Statute of Limitations.....	1063
23.6	Statute of Limitations – Equitable Tolling.....	1064
23.7	“Communication” Defined.....	1065
23.8	Public Communication – 15 USC Section 1692c(b).....	1065
23.9	“Consumer Debts”.....	1065

23.10	“Person” Defined	1066
23.11	“Consumer Debts” Defined.....	1066
23.12	Eviction Proceedings.....	1066
23.13	Bankruptcy Court Jurisdiction	1066
23.14	Complaint – Generally	1067
23.15	Venue for Action to Collect Debts	1067
23.16	Arbitration.....	1067
B.	Allowed and Prohibited Actions	1067
23.17	Initial Communication	1067
23.18	Location Information	1067
23.19	Enforcement of Security Interest Generally	1068
23.20	Enforcement of Security Interest Post-Bankruptcy	1068
23.21	Verification of Debt	1068
23.22	False or Misleading Statements – Section 1692e.....	1069
23.23	Communication to Third Party.....	1072
23.24	Unfair or Unconscionable Means – Section 1692f.....	1072
23.25	Fraud.....	1072
23.26	Harassment.....	1073
23.27	Disputed Debts.....	1073
23.28	Filing Proof of Claim	1073
23.29	Proof of Claim – Time Barred Debts	1073
23.30	Discharge Injunction.....	1075
23.31	Non-Dischargeable Debts	1075
23.32	Adversary Proceedings	1075
23.33	Collection Efforts Not Permitted by Law – Section 1692(f).....	1076
23.34	Collection Efforts Not Permitted by Law – Usury	1076
23.35	Collection Efforts Permitted by State Law.....	1076
23.36	Garnishment.....	1077
23.37	Language, Symbols or Account Numbers on Envelope.....	1077
23.38	Credit Reporting.....	1077
C.	Remedies	1077
23.39	Standing to Sue	1077
23.40	Parties Liable	1078
23.41	Statutory Damages	1078
23.42	Punitive Damages	1078
23.43	Attorney Fees.....	1078
D.	Defenses.....	1078
23.44	Bona Fide Error.....	1078
23.45	Substantial Compliance.....	1079

23.46	Unclean Hands	1079
23.47	Michigan Regulation of Collection Practices Act	1079
XXIV.	Other Causes of Action	1079
A.	Generally	1079
24.1	Tortious Interference with Contract	1079
24.2	Innocent or Negligent Misrepresentation	1080
24.3	Punitive Damages	1080
24.4	Conversion	1081
24.5	Unjust Enrichment	1082
24.6	Legal Malpractice	1082
24.7	Piercing Corporate Veil	1083
24.8	Alter Ego Theory	1085
24.9	Continuation of Debtor	1085
24.10	Federal Tort Claims Act	1085
24.11	Injunctions and Temporary Restraining Orders	1085
24.12	Tax Injunction Act and Section 505	1088
24.13	Declaratory Relief	1089
24.14	Quiet Title	1089
24.15	Accounting	1089
24.16	Recoupment	1089
24.17	Federal Debt Collection Practices Act	1090
24.18	Telephone Consumer Protection Act	1090
24.19	Truth in Lending Act	1091
24.20	Truth in Lending – Rescission	1093
24.21	Fair Credit Reporting Act	1093
24.22	Equal Credit Opportunity Act	1096
24.23	Credit Repair Organizations Act	1097
24.24	Mortgage Brokers, Lenders and Services Licensing Act	1097
24.25	Servicemembers Civil Relief Act – Adjustment of Loan Terms	1097
24.26	Servicemembers Civil Relief Act – Injunctive Relief	1097
24.27	Servicemembers Civil Relief Act – Credit Reporting	1097
24.28	Interpleader	1097
24.29	Michigan Consumer Protection Act	1097
24.30	Michigan Motor Vehicle Sales Act	1098
24.31	Conspiracy	1098
24.32	Racketeer Influenced and Corrupt Organizations Act (RICO)	1099
24.33	Intentional Infliction of Emotional Distress	1100
24.34	Negligent Infliction of Emotional Distress	1101
24.35	Defamation	1102

24.36	Invasion of Privacy	1102
24.37	Constitutional Claims – Generally	1102
24.38	Slander of Title	1102
B.	Mediation.....	1104
24.42	When Appropriate.....	1104
24.43	Confidentiality	1104
24.44	Sanctions.....	1104
C.	Expedited hearing	1104
24.45	Procedure	1104
D.	Disqualification or Recusal of Judge	1105
24.46	Grounds.....	1105
24.47	Appeal of Order	1107
E.	Sealing Court Papers and Records.....	1107
24.48	Section 107 and Federal Rule 5	1107
F.	Rehearing or Reconsideration	1108
24.49	Motion for Amended or Additional Findings of Fact – Rule 52	1108
24.50	Motion to Amend Versus Motion for Relief From Judgment	1108
24.51	Orders Subject to Relief – Final Orders	1108
24.52	Orders Subject to Relief – Non-Final Orders.....	1109
24.53	Standing to Bring Rule 60 Motion	1109
24.54	Waiver of Issues.....	1109
24.55	Standard of Review	1109
24.56	Grounds – Rule 54 and 7054.....	1110
24.57	Grounds – Rule 59 and 9023 Generally	1110
24.58	Clear Error of Law	1113
24.59	Grounds – Rule 60 and 9024 Generally	1113
24.60	Excusable Neglect.....	1122
24.61	Meritorious Defense.....	1123
24.62	By Court Sua Sponte.....	1123
24.63	Defect in Notice	1123
24.64	Rule 60(a) - Clerical Error.....	1123
24.65	Rule 60 (b)(1) - Mistake, Inadvertence, Surprise or Excusable Neglect	1124
24.66	Rule 60(b)(2) - Newly Discovered Evidence	1126
24.67	Rule 60(b)(3) - Fraud, Misrepresentation or Misconduct	1126
24.68	Rule 60(b)(3) - Fraud on the Court.....	1127
24.69	Rule 60(b)(4) – Void Judgment	1128
24.70	Rule 60(b)(5) – Reversal of Earlier Judgment.....	1129
24.71	Rule 60(b)(5) – Inequitable Result From Prospective Application	1129
24.72	Rule 60(b)(5) - Equitable Relief.....	1129

24.73	Rule 60(b)(6) - “Catchall” Provisions	1130
24.74	Failure to File Response	1131
24.75	Time for Bringing Motion.....	1131
24.76	Conditional Grant of Motion.....	1132
24.77	Stay Pending Disposition	1132
G.	Federal Court Review of State Court Actions.....	1132
24.78	Limitations – Rooker-Feldman	1132
24.79	Limitations – Jurisdictional Priority.....	1136
H.	Section 341 – Court Authority	1136
24.80	Generally.....	1136
24.81	Excusal of Attendance	1136
24.82	Compelling Attendance.....	1137
I.	Discrimination	1137
24.83	Section 525	1137
J.	Consolidation.....	1138
24.84	Authority to Substantively Consolidate Cases.....	1138
24.85	Standing to Request Substantive Consolidation	1138
24.86	Grounds for Substantive Consolidation.....	1138
24.87	Effect of Substantive Consolidation.....	1140
24.88	Substantive Consolidation – Non-Debtor entities	1140
24.89	Procedural (Administrative) Consolidation	1141
K.	Duties of Debtor.....	1141
24.90	Duty to Cooperate with Trustee	1141
24.91	Schedules and Statements	1141
24.92	Change of Address	1141
24.93	Incompetent Debtor - Appointment of “Next Friend”.....	1142
L.	Loan Modifications.....	1142
24.94	Chapter 7 Proceeding.....	1142
24.95	Chapter 11 Proceeding.....	1142
24.96	Chapter 13 Proceeding.....	1142
24.97	Breach of Contract	1142
24.98	Breach of Good Faith and Fair Dealing	1144
24.99	Negligence.....	1145
24.100	Fraud.....	1145
24.101	Tortious Interference with Contractual Relationship	1147
24.102	Michigan Hardest Hit Program	1147
24.103	Troubled Asset Relief Program (TARP)	1148
24.104	Homeowners Assistance Mortgage Program (HAMP).....	1148
24.105	National Mortgage Settlement	1150

24.106	National Housing Act (NHA).....	1150
24.107	Home Owners Loan Act	1150
24.108	Home Ownership Equity Protection Act (HOEPA)	1150
24.109	USDA Rural Housing Service	1150
24.110	Michigan Compiled Laws Section 600.3205	1150
24.111	Statute of Frauds	1152
24.112	Estoppel	1153
24.113	Promise to Adjourn Foreclosure Sale.....	1154
24.114	Fair Labor Standards Act	1154
M.	ECF Procedures	1154
24.115	Electronic Filing Required	1154
24.116	Electronic Filing Excused	1154
24.117	Original Signature.....	1154
24.118	Electronic Signature.....	1154
24.119	Service on United States Trustee	1155
24.120	Service by ECF	1155
24.121	Service by Mail.....	1155
24.122	Sanctions.....	1155
N.	Habeas Corpus	1156
24.123	Authority to Issue Writ.....	1156
24.124	Requirements	1156
O.	Mandamus.....	1156
24.125	Authority to Issue	1156
P.	Choice of Laws and Forum Selection Clauses	1156
24.126	Choice of Laws – Generally.....	1156
24.127	Binding Effect of State Court Decisions	1157
24.128	Forum Selection Clauses - Enforcement Generally	1157
24.129	Foreclosure Proceedings	1157
24.130	Exemption Statutes.....	1158
Q.	Governmental Sovereign Immunity	1158
24.131	State Law Claims Against Governmental Agency	1158
24.132	Governmental Agencies and Subdivisions	1158
24.133	Entity Entitled to Immunity – Native American Tribe.....	1159
24.134	Congressional Abrogation	1159
24.135	Waiver.....	1159
24.136	Punitive Damages	1160
R.	Michigan Seller Disclosure Act	1160
24.137	Generally.....	1160
S.	Rule 2004 Examinations	1160

24.138	Parties Entitled to Conduct.....	1160
24.139	Authorization by Court	1160
24.140	Scope	1160
24.141	Location of Examination.....	1161
24.142	Motion for Examination – Mootness.....	1161
24.143	Motion for Examination – Granted	1161
24.144	Motion for Examination – Denied.....	1162
XXV.	Sanctions.....	1162
A.	Authority to Impose	1162
25.1	28 USC §1927.....	1162
25.2	Inherent Authority of Court.....	1164
25.3	Section 105	1166
25.4	Rule 9011	1170
25.5	All Writs Act 28 USC §1651	1175
25.6	Sanctions Generally.....	1175
25.7	Failure to Seek Concurrence.....	1176
25.8	Frivolous Removal	1176
25.9	Attorney Fees	1176
25.10	Punitive Damages.....	1176
25.11	Discharge Injunction	1176
25.12	Injunction Against Filing.....	1178
25.13	Contempt – Generally	1178
25.14	Contempt - Civil	1179
25.15	Contempt – Criminal.....	1182
25.16	Show Cause.....	1182
25.17	Defense – Bad Faith and Unclean Hands of Moving Party.....	1183

I. Hot off the Press

Henson v. Santander Consumer USA, Inc., Case No. 16-349 (U.S. 2017) – Fair Debt Collection Practices Act applies only to third-parties were collecting debts owed to a different creditor. Purchaser of debts from original creditor and who has thereafter owned debts out right are not “debt collectors” within scope of FDCPA. FDCPA does not contain any suggestion that would limit or expand the scope based on how that owner came to be debt owner for any provision that would limit “debt owner” only to original creditor.

Czyzewski v. Javid Holding Corp., ____ US ____, 2017 WL 1066259 (2017) – Bankruptcy Court cannot approve “structured dismissal” of Chapter 11 case where distributions would not follow ordinary priority rules without assent of impacted creditors. Section 349 is intended to allow Judges flexibility to protect “reliance interests” acquired in bankruptcy, not to make general end of case distributions that would be flatly impermissibly Chapter 11 Plan or Chapter 7 liquidation. Courts have allowed interim distributions that violate ordinary priority rules such as “first-day” wage orders that allow payment of prepetition wages, “critical vendor” orders that allow payment of essential suppliers, and “roll up” that allow lenders who continue financing the Debtor to be paid on prepetition claims. These distributions make a successful reorganization more likely and make even disfavored creditors better off. Those policy concerns do not apply in structured dismissal context where dismissal does not propose to preserve Debtor as going concern, does not make disfavored creditors better off, does not propose possibility of confirmable plan, does not restore status quo, and does not protect reliance interest.

Lightfoot v. Cendant Mortgage Corp., ____ U.S. ____, 137 S.Ct. 553, 2017 WL 182911 (2017) – “Sue-or-be-sued” clause in Fannie Mae Charter provides for Fannie Mae to have authority to sue and can be sued in any State or Federal Court of competent jurisdiction. Clause does not grant jurisdiction to Federal Courts in actions against Fannie Mae. Clause is not independent grant of jurisdiction to Federal Court. Action cannot be removed to Federal Court based solely on clause in Fannie Mae charter as inclusion in charter does not create federal question. Action can be removed to federal Court only if there is independent basis to remove action under 28 USC Section 1441 and must be remanded to State Court for lack of federal jurisdiction.

Midland Funding, LLC v. Johnson, 137 S.Ct. 1407 (2017) - Debt collector who files claim that is obviously barred by statute of limitations has not engaged in false, deceptive, misleading, unconscionable, or unfair conduct and does not violate Fair Debt Collection Practices Act. Filing proof of claim is not false, deceptive or misleading because state law provides that creditor has right to payment of debt even after limitation period has expired and bankruptcy code uses broadest available definition of claim to include disputed claims. Statute of limitations is an affirmative defense which must be raised. Filing time-barred claim is not unfair or unconscionable as bankruptcy claim is subject to review by a “knowledgeable Trustee” which is not available where the debt collector, in a non-bankruptcy context, files State Court litigation.

II. Cases to Watch

Merit Management Group, LP v. FTI Consulting, Inc., Case No. 16-784 (US 2017) – Certiorari granted to determine whether “safe harbor” provision of Section 546(e) protects securities transactions when financial institution acts as “mere conduit” for the proceeds of the securities transaction.

US Bank, NA v. Village at Lakeridge, LLC, Case No. 15-1509 (US 2017) – Certiorari granted to determine standard of review on appeal from Bankruptcy Court Order determining that purchaser of claim from insider takes seller’s insider status. General partner of Debtor held unsecured claim. Vote of general partner would not count for confirmation purposes as a vote of an insider. General partner sold claim to friend for significant discount, and friend voted claim in favor of reorganization plan. Secured creditor contended that purchaser of claim from insider assumed insider status and so vote of friend should not be considered, resulting in failure to obtain the required consent of one impaired class. On appeal, 9th Circuit in split decision held that purchaser of claim does not automatically take insider status and issue turns on facts of particular case.

Credit One Financial v. Anderson, 553 BR 221 (S.D. N.Y. 2016), *appeal pending*, Case No. 16-2496 (2d Cir. 2016) – Oral Argument scheduled October 23, 2017 - 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).

Ivey v. First Citizens Bank & Trust Co., Case No. 15-2209 (4th Cir. 2017), *petition for certiorari pending*, Case No. 16-1330 (S.Ct. 2017) – Debtor’s deposit of funds into Debtor’s own, unrestricted, bank account is not a “transfer” within scope of Section 101(54). Accordingly, deposits cannot be recovered as fraudulent transfers even if funds were deposited into account as part of Ponzi scheme with actual intent to hinder, delay or defraud creditors. Court relied on 90 year old Fourth Circuit holding, rejecting Western District of Michigan holding in *Meoli v. Huntington Bank*.

Applying v. Lamar, Archer & Cofrin, LLP, Case No. 16-11911 (11th Cir. 2017) - *petition for certiorari pending*, Case No. 16-1215 (S.Ct. 2017) – Is false statement concerning only one asset (an anticipated tax refund) a statement of “financial condition” that must be in writing for purposes of Section 523(a)(2).

Ho v. ReconTrust Co., *petition for certiorari pending*, Case No. 17-278 (S. Ct. 2017) – Are entities that foreclose mortgages such as loan servicers, trustees under deeds of trust and their counsel “debt collectors” within scope of Fair Debt Collection Practices Act?

National Bank v. Sunnyslope Housing Ltd., Case No. 12-17241 (9th Cir. 2017) *petition for certiorari pending*, Case No. 17-455 (S. Ct. 2017)

– Is secured lender forced to accept value of property given debtor’s contemplated use where lender could recognize higher value through foreclosure?

Tower Credit v. Schott, Case No. 16-30274 (5th Cir. 2017), *petition for certiorari pending*, Case No. 17-444 (S. Ct. 2017) – Are wages garnished within 90 days pre-petition recoverable as preferences or does date of “transfer” relate back to date of service of writ of garnishment which was more than 90 days pre-petition?

Deutsche Bank Trust Co. v. Robert R. McCormick Foundation, *petition for certiorari pending*, Case No. 16-317 (S. Ct. 2017) – Does save harbor of Section 546(e) supersede state law and preclude individual creditors from filing fraudulent transfer suits arising out of leveraged buyouts?

III. Automatic Stay

A. Actions Stayed

3.1 Generally

- (1) *Vulpine, 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 suits 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) *In re Ayoub*, 2017 WL 4161110 (E.D. Mi. 2017) – Automatic stay applies only to Debtor and does not stay actions against Debtor's wholly owned corporation. Debtor's adversary proceeding alleging that creditors violated stay by pursuing state court litigation and by blocking Debtor's ability to collect debts allegedly owed to Debtor and to pierce corporate veil was frivolous as all actions were directed against corporations and assets solely owned by corporants. Fact that Debtor was sole shareholder of corporations did not convert action into one against Debtor personally or one within scope of stay. Court properly determined that sanctions were appropriate against Debtor and counsel for filing frivolous action under Rule 9011. However, Court should have rescheduled hearing on amount of sanctions where Debtor's attorney missed originally scheduled hearing because he was dealing with father's terminal illness that wreaked havoc on attorney's personal and professional life. While Court's desire to rule on amount of sanctions was understandable given imminent retirement of Judge, balance of equities tipped in favor of resetting hearing where there was no evidence that successor judge would have been unable to fashion appropriate relief.
- (19) *Konstantinou v. Manchester CP*, 2017 WL 83350 (Bankr. D. Vt. 2017) - In Chapter 13, Co-Debtor stay does not apply to non-consumer debts. However, Court can extend automatic stay to cover non-Debtor entities where failure to do so would require impede ability of Debtor, owner and manager of entities, to reorganize financial affairs under Chapter 13. Debtor owned 3 businesses. Debtor filed for relief under Chapter 13 and one of Debtor's business is filed for relief under Chapter 7. Creditors of Chapter 7 company sought to impose "alter ego" liability on Debtor's 2 remaining, viable businesses. Debtor sought to extend automatic stay to protect non-Debtor business entities. Court has authority to extend automatic stay under Section 362 in face of "unusual circumstances" such as when a claim against a non-Debtor would have an immediate, adverse economic consequence on Debtor's estate. Continuation of litigation would have immediate, substantial and adverse impact on ability to conduct orderly reorganization under Chapter 13 because Debtor would have to be actively involved in litigation; creditors intended to have State Court determined amount of liability on claim and then pursue claim against Debtor in bankruptcy case, and action could result in obtaining possession of property of estate in violation of Section 362. Court would reasonably infer that continuation of State Court proceeding would violate Debtor's automatic stay and jeopardize efforts to reorganize..
- (20) *Ferguson v. DirecTV, LLC*, 2017 WL 1963443 (N.D. Ohio 2017) – Non-Debtor seeking to stay proceedings pending bankruptcy of Debtor must show (i) extent to which issues in civil proceeding overlap those in bankruptcy; (ii) status of civil action; (iii) interests of plaintiffs in proceeding weighed against prejudice to plaintiff if action is delayed; (iv) private interests of and burden on defendants; (v) interests of the courts; and (vi) public interest. Party seeking stay must show pressing need for delay and that either the opposing party or the public will suffer harm if the matter is stayed. Fact that certain depositions may have to be taken twice, once in current action against co-defendant and again against Debtor after stay terminates, is not sufficient where same attorneys represent both co-defendant and Debtor in the civil proceedings. Codefendant's possible entitlement to indemnity from Debtor did not create significant risk where bankruptcy proceeding were near an end and would be completed by time discovery is finished in civil action allowing discovery to proceed without undue delay. Plaintiff needed discovery from co-defendant to establish class action status and had already been delayed one year in efforts to take

depositions Both public interests and court interests are furthered by expedition resolution of civil action and plaintiff's injuries are remedied in timely manner.

- (21) *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.
- (22) *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.
- (23) *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.
- (24) *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.
- (25) *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.
- (26) *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.
- (27) *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.
- (28) *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.
- (29) *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.
- (30) *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.
- (31) *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.

- (32) *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

- (33) *Konstantinou v. Manchester CP*, 2017 WL 83350 (Bankr. D. Vt. 2017) - In Chapter 13, Co-Debtor stay does not apply to non-consumer debts. However, Court can extend automatic stay to cover non-Debtor entities where failure to do so would require impede ability of Debtor, owner and manager of entities, to reorganize financial affairs under Chapter 13. Debtor owned 3 businesses. Debtor filed for relief under Chapter 13 and one of Debtor's business is filed for relief under Chapter 7. Creditors of Chapter 7 company sought to impose "alter ego" liability on Debtor's 2 remaining, viable businesses. Debtor sought to extend automatic stay to protect non-Debtor business entities. Court has authority to extend automatic stay under Section 362 in face of "unusual circumstances" such as when a claim against a non-Debtor would have an immediate, adverse economic consequence on Debtor's estate. Continuation of litigation would have immediate, substantial and adverse impact on ability to conduct orderly reorganization under Chapter 13 because Debtor would have to be actively involved in litigation; creditors intended to have State Court determined amount of liability on claim and then pursue claim against Debtor in bankruptcy case, and action could result in obtaining possession of property of estate in violation of Section 362. Court would reasonably infer that continuation of State Court proceeding would violate Debtor's automatic stay and jeopardize efforts to reorganize..
- (34) *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.
- (35) *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

- (36) *Springer RNBj RTO, LLC*, 2017 WL 3575859 (Bankr. W.D. Ky. 2017) – Debtor's leasehold or rental interest is property of estate. Outright ownership is not required to have interest in property. Creditor attempted to exert control over property of estate in form of Debtor's rental interest in the property by withdrawing post-petition rental payments from Debtor's bank account although rental agreement had not been assumed and by attempting to repossess furniture where rental agreement had not been rejected.
- (37) *In re Johnson*, 565 BR 835 (Bankr. S.D. Ohio 2017) – Debtor's partnership interests, both economic and management rights, become property of estate. Economic interests include partner's share of profits and losses and right to receive distributions. Management rights include authority of Debtor over partnership affairs. Debtor held 55% partnership interest and was designated as managing partner in charge of managing all partnership affairs subject only to requirement that any debt in excess of \$10,000 be approved by 65% vote. After Debtor filed bankruptcy, remaining partners attempted to dissociate Debtor from partnership and to appoint new managing partner. Remaining partner's actions violated automatic stay as attempt to obtain possession and control of property of estate consisting of Debtor's management and economic interests. Actions taken in violation of stay are generally void and invalid, but may be voidable under equitable circumstances such as where Debtor is attempting to use stay unfairly to avoid unfavorable result. Record demonstrated sufficient equitable grounds to determine that partner's actions were voidable, and court would allow actions to remain in force and effect where Debtor had effectively abandoned post as managing partner leaving partners with no choice but to take on management responsibilities and left partnership with need to borrow money to keep property afloat until it could be sold. Debtor's wrongful conduct constituted grounds to dissolve partnership under state law and remaining partners had commenced action in State Court pre-petition to accomplish dissolution.
- (38) *Kent v. Worldwide Financial Services, Inc.*, 2017 WL 1044990 (E.D. Mi. 2017) - Automatic Stay ceases to apply where property is not property of the estate. Property was not property of estate where foreclosure had already occurred and sheriff sale was scheduled for one day after bankruptcy petition was filed. At time automatic stay went into place, estate did not have possession of the property removing property from scope of Section 362(a)(3).
- (39) *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.
- (40) *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.

- (41) *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.
- (42) *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.
- (43) *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.
- (44) *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.
- (45) *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.
- (46) *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.
- (47) *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

- (48) *Torres v. Cooperativa de Ahorro y Credito La Puertorriquena*, 2017 WL 123727 (Bankr. D. P.R. 2017) – Creditor violated stay by continuing automatic withdrawals from Debtor’s bank account after being notified of bankruptcy filing.
- (49) *Springer RNBj RTO, LLC*, 2017 WL 3575859 (Bankr. W.D. Ky. 2017) – Creditor violated automatic stay by continuing to debit Debtor’s checking account for post-petition furniture rental payments before rental agreement was assumed by Debtors; by refusing to return post-petition payments; and by attempting to repossess rented furniture without seeking stay relief, filing a Motion to Compel Assumption or Rejection, or filing Motion to allow Setoff.
- (50) *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.
- (51) *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

- (52) *Ukrainian Future Credit Union v. Garak*, 2017 WL 2992479 (Bankr. E.D. Mi. 2017) – Debtor lacks standing to assert counterclaims in adversary proceeding where Debtor did list those counterclaims in bankruptcy schedules. Causes of action are property of bankruptcy estate and can be brought only by Chapter 7 Trustee unless abandoned or claimed exempt and exemption allowed. Debtors’ amendment to claim counterclaims as exempt did not permit Debtors to pursue counterclaims where 30 day objection period had not expired. Debtors’ continued prosecution of counterclaims violates stay requiring dismissal of counterclaims from adversary proceeding without prejudice to Debtors’ right to reassert if causes of action cease to be property of estate.
- (53) *Wilson v. Primesource Health Care of Ohio*, 2017 WL 2869341 (N.D. Ohio 2017) - On filing bankruptcy, all claims and causes of action in favor of Debtor that accrued before bankruptcy petition becomes property of estate. Absent Trustee abandoning claims, only Trustee has standing to pursue prebankruptcy claims.
- (54) *J&L Holding Company v. Curtis*, 2016 WL 6879264 (Bankr. E.D. Tn. 2016) – Co-defendant in pending litigation violates stay by filing cross claim against Debtor in pending litigation. Although plaintiff received stay relief to bring action against Debtor and co-defendant, co-defendant did not receive stay relief to prosecute cross-claim. Although co-defendant’s claim may be prejudiced by res judicata if the cross-claim is not litigated, that does not excuse codefendant’s obligation to receive stay relief before filing cross-claim. Court Ordered co-defendant to cease all prosecution of the cross-claim and set separate hearing for future sanctions.
- (55) *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.
- (56) *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.
- (57) *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.
- (58) *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.
- (59) *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 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.

3.7 Abandoned Property

- (60) *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.
- (61) *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

- (62) *In re Garigan*, 2017 WL 3669509 (Bankr. E.D. Mi. 2017) – Section 366 prevents utility from refusing or discontinuing service based on

debt owed to utility for services rendered pre-petition. However, utility can refuse or disconnect service if debtor does not, within 20 days of commencement of the case, furnish a deposit or other security for service post-petition. Debtor has obligation to pay deposit within 20 days and fact that utility does not contact debtor to obtain deposit does not prevent utility from disconnecting service after 20 days if no deposit is paid. Debtor's Motion to prevent utility from disconnecting services acknowledged that debtor did not pay deposit or even attempt to pay deposit or have any other contact with utility for more than 3 months, and then only after Debtor received shutoff notice. Utility acted within statutory right to shut off utilities without violating Stay or Section 366.

- (63) *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.
- (64) *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

- (65) *County of Imperial Treasurer-Collector v. Stadtmueller*, Case No. 16-1227 (9th Cir. BAP 2017) - Automatic Stay protects Debtors possessory right to real property even after expiration of right of redemption as long as sale of property has not been completed before bankruptcy filing. Tax collector giving notice to Debtor of unpaid taxes triggered state law right of redemption which must expire before property could be sold. After Debtor's right of redemption expired, but before property could be sold, Debtor filed for bankruptcy protection. Although Treasurer had commenced sale process before bankruptcy filing, tax collector did not accept highest offer and did not complete tax sale until after filing. Tax collector's action in concluding sale and accepting high bid violated Section 362 because Debtor still had some legal or equitable interest in the property including a right to possession. Court noted that result may not be same in states where law provides that expiration of right of redemption also divests owner of interest in property.
- (66) *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.
- (67) *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.
- (68) *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.
- (69) *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.
- (70) *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.
- (71) *Escobedo v. Davis*, ___ WL ___ (Bankr. D. N.Mex. 2014) – Creditor sanctioned for attempt to enforce pre-petition eviction order in violation of automatic stay.
- (72) *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

- (73) *In re Roberson*, 2016 WL 6783301 (Bankr. N.D. Ohio 2016) – Landlord who continues eviction proceeding post-petition and with knowledge of bankruptcy filing willfully violates stay warranting imposition of sanctions. Landlord willfully violated stay when landlord takes actions in violation of stay, at a time when landlord has actual notice of the bankruptcy filing, acts in a willful manner, and causes actual damages. Willful does not require ill will or specific intent to violate stay, but only an intentional act that violates stay by a party aware of the filing.

Landlord was advised by voice mail left at landlord's office of bankruptcy filing, and thereafter (1) caused a notice of leave premises to be delivered; (2) send an e-mail to Debtors attempting to collect pre-petition balance due on rent; (3) sent another e-mail also attempting to collect pre-petition rent; (4) caused a second notice to leave premises to be served; and (5) engaged attorney who sent collection letter for pre-petition balance due. Actions were willful as landlord had actual knowledge of filing. Where actions are willful, award of actual damages is mandatory, but must be damages caused by the violation itself. Debtors entitled to recover attorney fees but not entitled to recover costs of moving where there was on specific testimony on amount of expenses incurred, and moving expenses were incurred after Debtors received discharge which terminated automatic stay without further order of court and Debtors had indicated in initial filing intention to reject the lease. Party seeking damages must also prove efforts to mitigate damages. Although Debtor's counsel perhaps could have cut off landlord's actions by simple phone call, attorney instead chose to file Motion for Sanctions, which generally evidences lack of effort to mitigate. However, where facts indicate that landlord would not have been likely to desist even if attorney had called, Debtors cannot be faulted for failing to mitigate, sufficient to award attorney fees incurred in prosecuting motion. Debtors not entitled to non-economic damages absent presentation of sufficient evidence to indicate that Debtors suffered anything more than fleeting or inconsequential distress or embarrassment. Debtors not entitled to punitive damages where landlord's conduct, while willful, was not particularly egregious or vindictive or intentionally malicious. Evidence indicated that to extent landlord failed to abide by stay, that was result of sloppiness or breakdown of landlord's internal procedures that prevented notice of bankruptcy filing from reaching correct person who would have halted eviction process.

- (74) *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. Creditor 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.
- (75) *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)

- (76) *Wilson v. Desert Realty, Inc.*, Case No. 14-1589 (9th Cir. BAP 2016) – Section 362(b)(22) excepts from automatic stay continuation of act 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.
- (77) *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".
- (78) *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

- (79) *In re Munroe*, 2017 WL 2712784 (Bankr. E.D. Mi. 2017) – Debtor not permitted to have two estates open at same time. Debtor who was presently in Chapter 7 could not file Chapter 13 where Chapter 13 proposed to administer property that was property of Chapter 7 estate. Debtor's attempt to exercise control over property of Chapter 7 estate violated automatic stay, rendering Debtor's actions in filing Chapter 13 void. Further, Debtor may not have two bankruptcy cases pending at the same time, requiring dismissal of second case.
- (80) *Kent v. Worldwide Financial Services, Inc.*, 2017 WL 1044990 (E.D. Mi. 2017) - Automatic Stay prevents commencement or continuation of judicial, administrative or other action or proceeding against the Debtor. Automatic stay does not apply to action where Debtor is the plaintiff seeking relief for alleged defective foreclosure sale.
- (81) *Ukrainian Future Credit Union v. Garak*, Case No. 17-4074 (Bankr. E.D. Mi. 2017) – Counterclaims asserted by Debtors arose prior to commencement of Chapter 7 case. Causes of action are property of estate and unless and until Chapter 7 Trustee abandons claims under Section 554 or claims cease to be estate property, only Trustee has standing to pursue recovery. Any attempt by Debtors to prosecute causes of action would violate Automatic Stay under Section 362(a)(3) as action to exercise control over property of estate. Counterclaims filed by Debtors dismissed without prejudice to Chapter 7 Trustee's rights to bring actions or for Debtors to refile if causes of action cease to be estate property.
- (82) *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.
- (83) *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.
- (84) *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.
- (85) *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

- (86) *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.
- (87) *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

- (88) *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

- (89) *Zobel v. Contech Enterprises*, 2016 WL 1237384 (S.D. Ohio 2016), *reh'g denied* 2017 WL 1064713 (S.D. Ohio 2017) – 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

- (90) *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.

- (91) *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.
- (92) *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.
- (93) *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.
- (94) *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.
- (95) *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.
- (96) *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.
- (97) *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.
- (98) *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.

- (99) *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.
- (100) *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.
- (101) *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

- (102) *Atilas-Gabriel v. Commonwealth of Puerto Rico*, Case No. 15-2108 (D.P.R. 2017) - Filing for bankruptcy protection by Governmental Unit does not automatically stay *habeas corpus* proceedings. *Habeas corpus* concerns person's liberty and does not seek right to payment or any equitable remedy which would otherwise fall within scope of Section 362. Government's argument that costs of responding to *habeas* petition would be "gargantuan" did not compare to fundamental liberty interest protected by *habeas corpus*.
- (103) *McClafferty v. DeWine*, 2017 WL 1379344 (Bankr. N.D. Ohio 2017) - Police power exception to automatic stay includes proceeding where governmental unit is suing to prevent or stop violation of fraud, environmental protection, consumer protection, safety or similar police or regulatory law or attempting to fix damages for violation of such a law. Court will consider both pecuniary purpose test and public policy test. Pecuniary purpose test focuses on whether governmental proceeding relates primarily to protection of governments pecuniary interest in Debtor's property rather than matters of public safety. Public policy test requires Court to distinguish between proceedings that adjudicate private rights and those that affect public policy. Complaint brought by State Attorney General alleging violations of Consumer Sales Practices Act in seeking money damages, punitive damages and penalties constituted exercise of police and regulatory power. Although enforcement action would necessarily result in financial recovery for consumers, action furthers both public and private interests and private interests do not significantly outweigh public benefit such that Court will defer to legislative decision to invest enforcement authority in Attorney General States action sought permanent injunction against Debtor based on alleged unfair or deceptive practices sufficiently constituting protection of public interest. However, although State Court has jurisdiction to enter Final Judgment awarding damages, neither Attorney General nor any of the injured consumers may pursue collection of damages against Debtor without violating automatic stay.
- (104) *In re Thompson*, 2017 WL 448578 (Bankr. S.D. Ohio 2017) – Section 362(b)(1) excepts from automatic stay commencement or continuation of criminal proceedings against Debtor. Courts have adopted two different tests for whether action is "criminal proceeding". One test focuses on whether action is result of legislative enactment applicable to class of individuals, that prohibits specific conduct and provides for punishment by fine or imprisonment at the request of the state. Contempt order fails to meet this test as contempt order is judicial act to enforce judicial pronouncement; state is not typically party to contempt proceeding; proceeding is directed only to specific individual; and proceeding does not involve any legislative enactment. Only parallel between criminal proceeding and contempt is that contempt employs sanctions of fines or imprisonment. Second test is broader and focuses on circumstances of contempt proceeding to determine if proceeding is civil or criminal Civil contempt is generally used to coerce individual to perform act or compensate injured party, while criminal contempt is designed to vindicate authority of court itself. If sanction of incarceration is conditional, such that defendant can avoid imprisonment by performing specific act, contempt is civil in nature and not excepted from stay. If incarceration is for definite time, relief is punitive and not

remedial and is criminal in nature. Monetary sanction is civil of it is payable to complainant as compensation for damages or if defendant can avoid paying fine by performing act as directed by Court Order. Creditor's proceeding was not criminal under either test as State was not party to action, sole relief sought was to compel Debtor to answer discovery in aid of execution, only relief provided in order other than directing Debtor to file discovery is award of attorney fees to creditor for pursuing collection efforts and discovery, any obligations imposed were done by court and not legislature, and although particular sanctions had not yet been determined by State Court making it difficult to determine whether sanctions were to be punitive or coercive, it appeared purpose of proceeding was to coerce Debtor into providing information rather than to vindicate inherent authority of court. Action not excepted from stay under Section 362(a) and creditor did not demonstrate cause for relief from stay under Section 362(d)(1) for cause.

- (105) *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).
- (106) *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 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.
- (107) *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.
- (108) *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.
- (109) *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.
- (110) *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.
- (111) *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.

- (112) *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.
- (113) *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.
- (114) *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.
- (115) *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.
- (116) *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.
- (117) *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.
- (118) *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

- (119) *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

- (120) *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.
- (121) *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.
- (122) *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

- (123) *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

- (124) *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.
- (125) *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

- (126) *Porter v. Nabors Drilling USA, LP*, Case No. 15-16985 (9th Cir. 2017) – *Qui tam* actions, such as actions to enforce labor laws, brought by governmental unit is within Police Power exception to automatic stay. However, exception does not apply where governmental unit is not party an action is being prosecuted by private individual as “Private Attorney General”.
- (127) *United States v. Vanguard Healthcare LLC*, 2017 WL 959356 (M.D. Tn. 2017) – Automatic Stay does not stay action brought by Federal Government under False Claims Act. False Claim Act litigation seeking to recover improper payments of Federal benefits constitutes exercise of police or regulatory power within exception to automatic stay under Section 362 (B) (4). Action falls within a government police or regulatory power and outside Automatic Stay if focus of proceeding is to protect public safety and does not relate primarily to protection of governments pecuniary interest; or where proceeding is one to effectuate public policy rather than adjudicate private rights. Civil actions by government to enforce FCA are intended to punish wrongdoers and deter fraud within scope of police powers exception. Although chief purpose is to make government whole, that does not outweigh overriding public purpose for purposes of police power exception. Action did not involve pecuniary interests of government were action sought only to liquidate claim without any corresponding attempt to enforce a judgment. Government recognized that claim, once liquidated, would be general unsecured claim in bankruptcy case such that government would not obtain any advantage to detriment of other creditors.
- (128) *In re McQuat*, 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.
- (129) *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

- (130) *In re McQuat*, 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 Police Power – Medicare and Medicaid

- (131) *Parkview Adventist Medical Center v. U.S.*, Case No. 16-1731 (1st Cir. 2016) – Termination of Medicare and Medicaid funding to Chapter 11 Debtor is within scope of policy and regulatory power and is exempted from automatic stay. Hospital advised government that it would cease inpatient admissions and transfer patients to other facilities but would remain open to provide outpatient services while hospital reorganized its affairs. Government concluded that hospital no longer qualified as “hospital” and terminated any further Medicare or Medicaid funding. Although there is dispute whether Court can order continuation of Medicare and Medicaid benefits under 42 USC Section 405, that does not bring government’s actions with scope of automatic stay. Hospital took actions to disqualify itself from the Medicare program and it was plainly exercise of regulatory power to prevent waste of public monies.

3.25 Police Power- Private Attorney General

- (132) *Porter v. Nabors Drilling USA, LP*, Case No. 15-16985 (9th Cir. 2017) – Action brought by individual as “Private Attorney General” is not excepted from stay under Police Power provision of Section 362(b)(4). After worker complained that employer violated state labor laws, state agency did not act, allowing employee to file suit in state Court under Private Attorney General Act. District Court ultimately dismissed suit an employee filed appeal. While appeal was pending, company filed Chapter 11 Petition. Allowing private party to use Police Power exception would read phrase “by a governmental unit” out of Section 362(b)(4). Automatic stay applied to privately prosecuted suits resulting in stay of further proceedings on appeal.

3.26 Criminal Restitution

- (133) *Werneck v. United States*, Case No. 16-5313 (N.D. Ill. 2016) - Mandatory Victims Restitution Act, 18 USC section 3613, allows the federal government to enforce a civil judgment under federal law or state law “notwithstanding any other Federal law”. Automatic stay does not impair governments ability to collect restitution judgment from individuals Social Security payments when the collection action complies with MVRA. However, collection action complies with MVRA only where the method of enforcement used is one that is capable of “enforcing” a civil judgment. Social Security Administration’s use of set off of Debtor’s future Social Security benefits as an administrative means of collecting the debt but is not, in and of itself, a method that may be used to collect a judgment. Accordingly, Social Security Administration’s actions in continuing to collect prepetition overpayments is not within scope of MVRA and is not excluded from the automatic stay. However, to the extent that actions constitute recoupment by Social Security administration, actions are excluded from automatic stay as automatic stay does not prevent party from exercising rate of recoupment post-petition to collect a prepetition debt.
- (134) *US v. Partida*, 2015 WL 3398362 (9th Cir. BAP 2015), *aff’d*, 2017 WL 2884050 (9th Cir. 2017) – 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.
- (135) *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.
- (136) *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.
- (137) *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.

3.27 Contempt

- (138) *FTC v. Bluehippo Funding, LLC*, Case No. 08-1819 (S.D.N.Y. 2017) – Chapter 7 filing does not stay action by FTC to hold Debtor in contempt for violation of injunction. Debtor violated injunction and Court imposed damage award of \$13 million as form of disgorgement or equitable restitution which is available through contempt proceedings. FTC brought contempt proceeding to imprison Debtor until he paid some portion of the judgment, and Debtor filed for Chapter 7 protection. Automatic stay did not stay proceeding to hold Debtor in contempt and determine appropriate sanction as proper exercise of police power under Section 362(b)(4) but FTC could not enforce any contempt sanction until termination of modification of stay.
- (139) *United States v. Vanguard Healthcare LLC*, 2017 WL 959356 (M.D. Tn. 2017) – Automatic Stay does not stay action brought by Federal Government under False Claims Act. False Claim Act litigation seeking to recover improper payments of Federal benefits constitutes exercise of police or regulatory power within exception to automatic stay under Section 362 (B) (4). Action falls within a government police or regulatory power and outside Automatic Stay if focus of proceeding is to protect public safety and does not relate primarily to protection of governments pecuniary interest; or where proceeding is one to effectuate public policy rather than adjudicate private rights. Civil actions by government to enforce FCA are intended to punish wrongdoers and deter fraud within scope of police powers exception. Although chief purpose is to make government whole, that does not outweigh overriding public purpose for purposes of police power exception. Action did not involve pecuniary interests of government were action sought only to liquidate claim without any corresponding attempt to enforce a judgment. Government recognized that claim, once liquidated, would be general unsecured claim in bankruptcy case such that government would not obtain any advantage to detriment of other creditors.

- (140) *Dingley v. Yellow Logistics, LLC*, 852 F.3d 1143 (9th Cir. 2017) – Proceedings to hold Debtor in contempt of Court are within scope of governmental police and regulatory authority and excepted from automatic stay unless governments action is intended either to protect governments pecuniary interest or to adjudicate private rights. State Court proceeding to hold Debtor in contempt for failure to pay discovery sanctions fell within police and regulatory power exception as contempt proceedings were intended to effectuate courts public policy interest in deterring litigation misconduct. Creditors effort to collect civil contempt sanctions did not violate stay as collection efforts were pursuant to Nevada State Court public policy interest in deterring litigants from violating Court Orders imposing sanctions for litigation misconduct.
- (141) *In re Thompson*, 2017 WL 448578 (Bankr. S.D. Ohio 2017) – Section 362(b)(1) excepts from automatic stay commencement or continuation of criminal proceedings against Debtor. Courts have adopted two different tests for whether action is “criminal proceeding”. One test focuses on whether action is result of legislative enactment applicable to class of individuals, that prohibits specific conduct and provides for punishment by fine or imprisonment at the request of the state. Contempt order fails to meet this test as contempt order is judicial act to enforce judicial pronouncement; state is not typically party to contempt proceeding; proceeding is directed only to specific individual; and proceeding does not involve any legislative enactment. Only parallel between criminal proceeding and contempt is that contempt employs sanctions of fines or imprisonment. Second test is broader and focuses on circumstances of contempt proceeding to determine if proceeding is civil or criminal. Civil contempt is generally used to coerce individual to perform act or compensate injured party, while criminal contempt is designed to vindicate authority of court itself. If sanction of incarceration is conditional, such that defendant can avoid imprisonment by performing specific act, contempt is civil in nature and not excepted from stay. If incarceration is for definite time, relief is punitive and not remedial and is criminal in nature. Monetary sanction is civil if it is payable to complainant as compensation for damages or if defendant can avoid paying fine by performing act as directed by Court Order. Creditor’s proceeding was not criminal under either test as State was not party to action, sole relief sought was to compel Debtor to answer discovery in aid of execution, only relief provided in order other than directing Debtor to file discovery is award of attorney fees to creditor for pursuing collection efforts and discovery, any obligations imposed were done by court and not legislature, and although particular sanctions had not yet been determined by State Court making it difficult to determine whether sanctions were to be punitive or coercive, it appeared purpose of proceeding was to coerce Debtor into providing information rather than to vindicate inherent authority of court. Action not excepted from stay under Section 362(a) and creditor did not demonstrate cause for relief from stay under Section 362(d)(1) for cause.
- (142) *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.
- (143) *Yellow Express, LLC v. Dingley*, Case no. 13-1261 (9th Cir. BAP 2014), *aff’d*, 852 F.3d 1143 (9th Cir. 2017) – 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.
- 3.28 Setoff
- (144) *In re Patriot Solar Group Inc.*, 569 BR 451 (Bankr. W.D. Mi. 2017) - Right of set off permits person that owes money to another to apply mutual debts against one another. Set off is not created by Bankruptcy Code or federal law, but is preserved under Section 553. Party must show that there are mutual obligations owed between parties, giving rise to a presumption in favor of set off. Court made his deny set off or set off may prejudice third parties. Creditor’s motion for relief from automatic stay to exercise right of set off did not contain any legal or factual explanation as to why creditor contended it had right of set off under applicable non-bankruptcy law. Creditor’s claims against Debtor were disputed and unliquidated and allowing set off may adversely affect the secured creditors rights in collateral.
- (145) *United States of America v. Taalib-din*, 2017 WL 3447903 (E.D. Mi. 2017) - Automatic Stay does not prohibit efforts by creditor to seize property which is excluded from bankruptcy estate. United States did not violate Automatic Stay of Section 362(a)(3), which prevents any act to obtain possession of property the estate, by seizing Debtor’s post-petition Social Security payment. 42 USC Section 407 absolutely excludes Social Security from inclusion in property of estate. Therefore, right to Social Security payments does not constitute property of estate and IRS’s seizure of post-petition Social Security payments could not violate Section 362(a)(3). United States did not violate Automatic Stay of Section 362(a)(4), which prevents any act to create, perfect or enforce a lien against property the estate, by seizing Debtors post-petition Social Security payment. 42 USC Section 407 absolutely excludes Social Security from inclusion in property of estate. Therefore, right to Social Security payments does not constitute property of estate and IRS’s seizure of post-petition Social Security payments could not violate Section 362(a)(4). United States did not violate Automatic Stay of Section 362(a)(6), which prevents any act collected debt or claim against Debtor that arose before commencement of case, by seizing Debtors post-petition Social Security payment. Action to collect that is to obtain payment by personal solicitation or legal proceedings. Set off of Social Security benefits against outstanding tax obligations is neither personal solicitation nor legal proceeding to obtain debt owed, but rather is application of mutual debts against one another. Further, construing set off as “act to collect, assess, or recover” that would render Section 362(a)(7), which specifically deals with set of rights, superfluous. United States did not violate Automatic Stay of Section 362(a)(7), which prevents any act to set off any debts owing to the Debtor that arose before commencement of the case against any claim against Debtor, by seizing Debtors post-petition Social Security payment. Governments obligation to make specific Social Security payments to Debtor arose after bankruptcy petition was filed. Because obligation of the United States to Debtor for ongoing Social Security payments accrued post-petition, Section 362(a)(7) is inapplicable.
- (146) *In re Parrish*, 2016 WL 6783326 (Bankr. W.D. Ky. 2016) – Army & Air Force Exchange Service is considered part of the “unitary” Federal Government for purposes of setoff of debts against tax refunds. Exchange held right of setoff against former service member who defaulted

on Exchange account. Exchange had right under non-bankruptcy law to exercise right of setoff against any sums owed to Debtor by any federal agency. Thus, Exchange had right of setoff that remained enforceable under Section 553. However Exchange inadvertently exercised right post-petition when Exchange intercepted Debtor's Federal Tax Refund before Exchange had notice of bankruptcy case. Inadvertent violation of stay does not warrant waiver of creditor's right to setoff, particularly where violation did not prejudice any third party creditor and creditor would have been given stay relief had proper request been filed. Sanctions in amount of \$250 for attorney fees plus \$2000 to Debtor sufficient under facts stated.

- (147) *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.
- (148) *In re Buttrill*, 2016 WL 1314494 (Bankr. E.D. Tn. 2016) – Section 553 preserves creditor's right to setoff pre-petition obligation owed 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.
- (149) *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.
- (150) *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.
- (151) *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.
- (152) *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.
- (153) *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.
- (154) *In re Stiles*, 2012 Bankr. LEXIS 3266 (Bankr. N.D. Ga. 2012) - IRS setoff of refund was excepted from stay.
- (155) *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.

- (156) *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.
- (157) *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.
- (158) *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.
- (159) *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 seeing stay relief.
- (160) *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.

3.29 Recoupment

- (161) *In re Patriot Solar Group Inc.*, 569 BR 451 (Bankr. W.D. Mi. 2017) - Recoupment is in the nature of a defense to a claim, and permits the party to reduce the amount of the other parties claim to the extent it has valid defense out arising out of same transaction or series of transactions. Recoupment does not require existence of mutual debts. Creditor may use defensive recoupment without authorization from Court. Creditor's motion for relief from automatic stay to assert recoupment was premature where Debtor had not asserted any claims against creditor and creditor did not provide any details as to why creditor's defenses against Debtor arose out of same contracts or series of integrated contracts.
- (162) *Wernick v. United States*, Case No. 16-5313 (N.D. Ill. 2016) - Recoupment is equitable principal that where mutual debts arise from a single transaction, the Debtor's claim against the creditor and the creditors claim against the Debtor reduces the balance owing. Creditor holding right of recoupment can recoup amounts owed by the Debtor four prepetition debts from payments to Debtor for post-petition earnings. Recoupment differs from set off, as set off is a cross action occurring where there are two separate, mutual obligations. Recoupment does not violate automatic stay because a valid recoupment defense results in Debtor having no continuing interest in funds. Social Security Administration did not violate stay by post-petition reduction in Debtor's Social Security income to recover amounts which Debtor obtained by defrauding Social Security Administration by using false identity. Under Social Security act and regulations, amount of Social Security income to be paid to recipient must be adjusted to recover overpayments to Debtor that result from Debtor's own fault. Debtor's right to receive Social Security payments is directly related to Debtor's receipt of prior payments and adjustment for prior overpayments is integral part of calculating payments due and owing.
- (163) *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.

- (164) *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.

3.30 Injunctive Relief

- (165) *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.
- (166) *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.
- (167) *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.

3.31 Possessory Security Interests

- (168) *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.
- (169) *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.

3.32 Post-petition Debts

- (170) *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.

3.33 Post-Petition Perfection of Lien

- (171) *In re Linear Electric Co.*, Case No. 16-1477 (3d Cir. 2017) – Avoidability of mechanics lien filed by supplier after filing of Chapter 11 petition is determined by state law. Where state law did not provide that recording of lien “related back” to some prepetition event, recording lien violated automatic stay and voided lien. If state law allows for mechanics lien to relate back to some prepetition event, recording of lien post-petition would not violate stay under Section 546(b)(1)(A).
- (172) *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(c)(2)(A).

- (173) *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.
- (174) *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.
- (175) *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.
- (176) *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).
- (177) *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.

3.34 Domestic Support Obligations

- (178) *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.
- (179) *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.
- (180) *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.
- (181) *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.
- (182) *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.
- (183) *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.

- (184) *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.

3.35 Administrative Freeze – Financial Accounts

- (185) *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.
- (186) *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.

3.36 Administrative Freeze - State Actions

- (187) *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.

3.37 Final Judgment in Dischargeability Proceedings

- (188) *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.
- (189) *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.
- (190) *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.
- (191) *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.

3.38 Post-Petition Assignment of Mortgage

- (192) *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.
- (193) *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.

- (194) *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.

3.39 Debtor as Witness

- (195) *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.

3.40 Estoppel Against Enforcement of Stay

- (196) *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.

3.41 Pending Adversary Proceedings

- (197) *Cowin v. Countrywide Home Loans, Inc.*, Case No. 15-20600 (5th Cir. 2017) – Section 362 prevents commencement or continuation of any judicial, administrative or other proceeding to recover a claim against Debtor that arose before commencement of case. However, automatic stay is not absolute, as creditor is permitted to file Proof of Claim and to institute adversary proceedings in Bankruptcy Court without violating stay. Debtor previously filed under Chapter 7 and Plaintiff brought adversary proceeding that case. Court ultimately dismissed that case but expressly retained jurisdiction over pending adversary to determine whether Debtor's obligations to Plaintiff were dischargeable. Shortly before the Bankruptcy Court entered judgment in the adversary, Debtor filed another Chapter 7 petition in the same Bankruptcy Court. Bankruptcy Court proceeded to enter final judgment in adversary proceeding determining debt to be non-dischargeable. Court did not lift stay in second case prior to entering judgment. Continuation of adversary proceeding did not violate stay as prosecution of adversary proceeding is specifically permitted in Code. Even if Bankruptcy Court violated stay in second case by proceeding with Adversary Proceeding from first case any error was harmless as Bankruptcy Court would have lifted stay had it been asked and outcome of adversary proceeding would remain unchanged if Adversary Judgment was voided and case remanded to Bankruptcy Court to grant relief from stay and re-enter same judgment. Debtor was not prejudiced as Debtor was willing participant in Adversary Proceeding and result of litigation would have been no different if it had been filed in the later filed Chapter 7.

3.42 Section 542(c) - Sale in Violation of Stay

- (198) *In re McDuffie*, 2017 WL 3098099 (Bankr. N.D. Ohio 2017) – Entity without actual notice or actual knowledge of bankruptcy filing may in good faith transfer property of the estate to an entity other than the trustee with same effect as if bankruptcy case had not been commenced. Creditor sold contents of Debtor's self-storage unit at auction after Debtor filed for relief but before Debtor provided any notice to creditor. Sale was properly conducted and neither creditor nor buyer had any notice of bankruptcy case. Sale passed title to buyer free and clear of claims of Debtor.

C. Relief From Stay

3.43 Service of Motion

- (199) *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.

3.44 Filing Fee

- (200) *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.
- (201) *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. Fee 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.

3.45 Purpose of Stay Relief

- (202) *Jackson v. US Bank National Association*, 2016 WL 1211278 (Bankr. W.D. Mi. 2016), *aff'd*, 2017 WL 3981109 (W.D. Mi. 2017) – 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.

3.46 Grounds Generally

- (203) *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.
- (204) *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.
- (205) *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.
- (206) *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.
- (207) *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.
- (208) *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.
- (209) *Jim's Maintenance & Sons, Inc. v. Target Corporation*, 2011 WL 1206782 (1st 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.
- (210) *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.
- (211) *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.

- (212) *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.

3.47 Effect of Confirmed Plan

- (213) *Dempsey v. Florida Department of Revenue*, 2017 WL 2656154 (E.D. Tn. 2017) – State precluded from attempting to recover via wage garnishment pre-petition child support arrearage where confirmed Chapter 13 Plan provided for payment of arrearages through Plan. However, although Plan specified that the confirmation order "require[d] the Department to discontinue all collection activity outside the plan once the plan is confirmed, ... the plan was not sufficiently clear and definite in this requirement to provide a basis for a finding of contempt" where the law at the time of the DOR action was unclear and undeveloped, and Eleventh Circuit had not issue ruling in *Gonzales* until two months after bankruptcy court denied motion for contempt. The bankruptcy court did, however, order the Department to: (1) terminate its income withholding order; (2) refund to Debtor any amounts received and not yet disbursed; and (3) amend its proof of claim to reduce its amount by all sums received from Debtor's employer after confirmation and not refunded.
- (214) *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.
- (215) *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.
- (216) *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.

3.48 Failure to Respond to Motion

- (217) *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.

3.49 Failure to Conduct or Conclude Hearing

- (218) *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.

3.50 Cause - Section 362(d)(1)

- (219) *In re HardRock HDD, Inc.*, 2017 WL 2774314 (Bankr. E.D. Mi. 2017) – "Cause" is not defined in Code and is determined on case by case basis. Fact that Debtor is in default of pre- and post-petition payments is not cause. Cause existed to lift stay as to one piece of equipment where Debtor was allegedly renting property to third party in express violation of terms of lender's note and security agreement. However, cause did not exist as to remainder of collateral where Debtor was using property consistent with requirements of security agreement and used, and intended to use, equipment in continued operation of business in effort to reorganize.
- (220) *In re Johnson*, 565 BR 835 (Bankr. S.D. Ohio 2017) – Court may modify or annul stay for cause. Stay lift appropriate where partners of

partnership in which Debtor was managing partner had commenced action pre-petition to dissolve partnership. Dissolution would have little if any impact on bankruptcy administration and lifting stay would allow dissolution proceedings to resume in State Court which will result in speedy liquidation of Debtor's economic interest in partnership. Record also indicated that Debtor's bankruptcy filing was attempt to forum shop and partnership itself had not filed bankruptcy, and allowing stay to remain in place would only thwart otherwise orderly State Court proceedings to dissolve partnership.

- (221) *In re Rombkowski*, 2017 WL 1103527 (Bankr. N.D. Ohio 2017) – Section 362(d)(1) allows Court to grant relief from automatic stay “for cause” but does not define “cause”. In determining whether to allow pending State Court case against the Debtor to proceed, Court may consider judicial economy; trial readiness; resolution of preliminary bankruptcy issues; creditor's chance of success on merits; and cost of defense or other potential burden to bankruptcy estate. Where State Court action has reached advanced stage, Courts are more willing to lift stay to allow litigation to proceed. Stay would be lifted where State Court action had been pending for more than eight months before Debtor filed bankruptcy and State Court had already determined that case was ready for trial and had scheduled jury trial. Refusing to grant relief from stay would unfairly require State Court plaintiff to duplicate its efforts in Bankruptcy Court, and State Court litigation involved state law claims for fraud and embezzlement in which Debtor was entitled to jury trial and involved issues routinely addressed by State Court judges and did not present the need for any expertise of Bankruptcy Court. Further, State Court litigation involved party (Debtor's husband) who is not a party to the Bankruptcy Court proceeding. Judicial economy would be furthered by allowing State Court action to proceed as a resolution in favor of Debtor would eliminate need for Bankruptcy Court adversary proceeding.
- (222) *In re Thompson*, 2017 WL 448578 (Bankr. S.D. Ohio 2017) – Section 362(b)(1) excepts from automatic stay commencement or continuation of criminal proceedings against Debtor. Courts have adopted two different tests for whether action is “criminal proceeding”. One test focuses on whether action is result of legislative enactment applicable to class of individuals, that prohibits specific conduct and provides for punishment by fine or imprisonment at the request of the state. Contempt order fails to meet this test as contempt order is judicial act to enforce judicial pronouncement; state is not typically party to contempt proceeding; proceeding is directed only to specific individual; and proceeding does not involve any legislative enactment. Only parallel between criminal proceeding and contempt is that contempt employs sanctions of fines or imprisonment. Second test is broader and focuses on circumstances of contempt proceeding to determine if proceeding is civil or criminal. Civil contempt is generally used to coerce individual to perform act or compensate injured party, while criminal contempt is designed to vindicate authority of court itself. If sanction of incarceration is conditional, such that defendant can avoid imprisonment by performing specific act, contempt is civil in nature and not excepted from stay. If incarceration is for definite time, relief is punitive and not remedial and is criminal in nature. Monetary sanction is civil if it is payable to complainant as compensation for damages or if defendant can avoid paying fine by performing act as directed by Court Order. Creditor's proceeding was not criminal under either test as State was not party to action, sole relief sought was to compel Debtor to answer discovery in aid of execution, only relief provided in order other than directing Debtor to file discovery is award of attorney fees to creditor for pursuing collection efforts and discovery, any obligations imposed were done by court and not legislature, and although particular sanctions had not yet been determined by State Court making it difficult to determine whether sanctions were to be punitive or coercive, it appeared purpose of proceeding was to coerce Debtor into providing information rather than to vindicate inherent authority of court. Action not excepted from stay under Section 362(a) Abd creditor did not demonstrate cause for relief from stay under Section 362(d)(1) for cause.
- (223) *In re Elkins*, 2016 WL 6892728 (Bankr. E.D. Ky. 2016) – “Cause” for relief from stay is dependent on all facts and circumstances of case. Creditor demonstrated cause where case was Debtor's second case, both filed on eve of foreclosure sale; Chapter 13 plan vaguely referred to a sale of the property but Debtor took no action to follow through, has not retained a broker, or undertaken to market property; plan did not provide express timetable for sale to occur; Debtor did not provide proof that co-owner consented to sale and Debtor had not commenced adversary proceeding under Section 363(h) to sell free and clear of co-owner's interest; property was not Debtor's residence; property was diminishing in value; and Debtor had ample time to find private buyer as foreclosure process had been pending for 7 years plus the many months since filing is first bankruptcy case.
- (224) *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.
- (225) *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.
- (226) *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.

- (227) *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 truck or food cart vendors to arrange sales to nightclub patrons, and continued efforts to mitigate potential noise from nightclub.
- (228) *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.
- (229) *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.
- (230) *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.
- (231) *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 one 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.
- (232) *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.

- (233) *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.
- (234) *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.
- (235) *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.
- (236) *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.
- (237) *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
- (238) *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.
- (239) *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.
- (240) *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.
- (241) *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).
- (242) *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.

- (243) *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.
- (244) *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.
- (245) *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 received exceed that necessary to satisfy secured claim, excess proceeds would be remitted to the Chapter 13 trustee.
- (246) *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.
- (247) *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.
- (248) *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.
- (249) *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.
- (250) *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.

- (251) *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.
- (252) *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.
- (253) *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.
- (254) *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.
- (255) *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.
- (256) *In re Semeniuk*, 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.
- (257) *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.
- (258) *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.
- (259) *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.

3.51 Cause – Serial Filings

- (260) *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.

3.52 Cause – Default in Chapter 13 Payments

- (261) *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".

3.53 Cause – Lack of Adequate Protection

- (262) *In re HardRock HDD, Inc.*, 2017 WL 2774314 (Bankr. E.D. Mi. 2017) – Section 361 provides that adequate protection can be provided through cash payments to the lender to extent that use of collateral results in decrease in value; provide an additional or replacement lien to the extent the use of the collateral decreases value; or such other relief that will allow lender to realize indubitable equivalent of value of creditor's interest in collateral. If the collateral value is declining or if there is some impairment of secured creditor's interest, then creditor is entitled to adequate protection. Debtor maintained insurance on equipment protecting from loss or destruction. Creditor did not present any evidence of amount by which value will diminish, but collateral had useful life of 5 years, so amortizing loan over useful life of collateral provided reasonable basis for adequate protection payments. Court would require monthly cash payment to creditor in amount equal to monthly loan amortization over remaining useful life.
- (263) *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.
- (264) *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.

3.54 Cause – Appellate Proceedings

- (265) *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.

3.55 Cause – Arbitration Provisions

- (266) *In re Patriot Solar Group Inc.*, 569 BR 451 (Bankr. W.D. Mi. 2017) - Federal Arbitration Act makes written agreements to arbitrate valid, irrevocable and enforceable except upon grounds in law or equity to revoke contract. Act represents liberal federal policy favoring arbitration and is designed to encourage efficient and speedy resolution of disputes. Court must rigorously enforced agreements to arbitrate even if result is piecemeal litigation absent countervailing policy manifested in another federal statute. Whether Arbitration Act mandate is overridden by contrary Congressional command depends on (1) text of the statute; (2) statutes of legislative history; or (3) inherent conflict between arbitration and statutes underlying purpose. Neither legislative history nor text of Bankruptcy Code reflects congressional intent to preclude enforcement of arbitration agreements. In bankruptcy case, whether arbitration “inherently conflicts” with bankruptcy code depends in part on whether subject of arbitration is core or non-core proceeding. If dispute is non-core, Court is generally without discretion to preclude enforcement of arbitration. Moving party sought to arbitrate claims against the Debtor. Claims resolution process is core proceeding even where all facts and circumstances of rows before the filing of bankruptcy and all issues to be addressed were based on state law. Debtor was seeking to reorganize under Chapter 11, giving other creditors direct interest in the liquidation of movants claim which posed risk of significantly reducing amount available for distribution to other creditors. Debtors major secured creditor and major unsecured creditor sought to participate in claims resolution process and would be denied opportunity if arbitration agreement was enforced. Enforcement of arbitration did not appear to promote judicial economy where arbitration proceeding was in its infancy and moving party had not presented arbitration schedule indicating that arbitration would be more efficient than allowing Court to resolve claims process. Enforcement of arbitration provision would deprive Debtor of relief that Chapter 11 is intended to provide including modification of rights between Debtors and creditors by centralizing disputes in Bankruptcy Court. Debtor asserted desperate need for respite from dispute with moving party in order to avoid immediate liquidation given Debtor’s limited resources. Centralization of disputes between Debtors and creditors is particularly critical in Chapter 11, particularly where arbitration would make it difficult for Debtor to attract additional funding, would undermine creditor confidence in Debtor’s ability to reorganize, would undermine confidence of third parties conducting business with Debtor, and would impose additional costs on estate while diverting attention of Debtor’s management. Enforcement of arbitration agreement in this case would deprive Debtor of breathing spell during which it can develop exit strategy and allowing arbitration to proceed would interfere with Debtor’s efforts to execute rehabilitation. Chapter 11 case was less than 4 months old. Debtor should be given reasonable period of time to proposed Plan without simultaneously having to devote significant time and resources toward arbitration process.
- (267) *In re No Place Like Home, Inc.*, 559 BR 863 (Bankr. W.D. Tn. 2016) – Cause existed to lift stay and Court should do so where there is valid arbitration provision and doing so would be helpful to bankruptcy court in exercising jurisdiction. Validity of arbitration provision is severable determination to be made by bankruptcy court. Once provision is deemed valid and dispute is determined to be within scope of that provision, court must leave remainder of issue for arbitrator to decide. Whether arbitration would be helpful to exercise of bankruptcy jurisdiction depends on whether arbitration was commenced pre-petition; whether party seeking arbitration has appeared in bankruptcy case; whether arbitrator has special knowledge or expertise; whether there is strong likelihood that Debtor will have plan confirmed; whether there is international arbitration provision; likelihood of piecemeal litigation; whether issue to be arbitrated is core or non-core; and impact of resolution on bankruptcy case. Court would order arbitration where majority of arbitration proceedings were commenced pre-petition; party seeking to compel arbitration had chosen non-bankruptcy forum to arbitrate disputes; issues required specialized knowledge and experience; although piecemeal litigation may result, that does not override arbitration agreement where issues were complex and involved non-bankruptcy law, resolution would not be subject to appeal, speeding finality, and issues would not later be re-litigated in bankruptcy court; claims are technically core proceedings as involving liquidation of claims against estate; and there would be little if any impact on bankruptcy case as plan has already been confirmed and resolution of claims already factored into confirmed plan.

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

- (268) *In re HardRock HDD, Inc.*, 2017 WL 2774314 (Bankr. E.D. Mi. 2017) – Section 362(d)(2) requires Court to grant relief from stay where Debtor does not have equity in the property and property is not necessary to effective reorganization. Equity is value that can be realized from sale of property for benefit of unsecured creditors. Necessary to an effective reorganization requires that there be an effective reorganization in prospect a reasonable possibility of successful reorganization in reasonable time. Debtor conceded that it did not have equity in equipment that stood as collateral for creditor’s lien. Property was not necessary to Debtor’s effective reorganization where property was owned by related company that was also bankruptcy, but cases were not substantively consolidated. Fact that second corporation may have reasonable prospect of reorganization does not benefit second, related Debtor. Debtor presented reasonable possibility of reorganization in prospect, which does not require feasible or confirmable plan. Debtor had existing contracts and was bidding on new projects, and had some income stream from one project. All equipment, including that owned or leased by related company was used in Debtor’s business and was essential to Debtor’s operations. At early stage of Chapter 11, evidence was sufficient to show that Debtor had prospect or reorganization sufficient to deny Motion for Relief From Stay.
- (269) *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.
- (270) *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.

- (271) *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.
- (272) *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.
- (273) *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.
- (274) *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.
- (275) *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.
- (276) *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.
- (277) *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.
- 3.57 Necessity for Effective Reorganization - Section 362(d)(2)(B)
- (278) *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.
- (279) *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.
- (280) *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.
- (281) *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.
- (282) *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.

- (283) *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.
- (284) *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.
- (285) *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.

3.58 Insurance Claims

- (286) *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.

3.59 Leases – Section 365(p)(1)

- (287) *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.

3.60 Expiration of Right of Redemption

- (288) *First American Title Lending of Georgia, LLC v. Holt*, Case No. 16-12150 (Bankr. N.D. Ga. 2017) – Debtor in Chapter 13 cannot stretch our redemption time for pawn loan. Section 108(b) extends redemption period that has not expired prepetition to 60 days from the petition date. After extended redemption period, pawned property is no longer property of estate and cannot be redeemed by treating pawnbroker as secured creditor in Chapter 13. Rejecting *Title Max v. Northington*.

- (289) *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.
- (290) *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.
- (291) *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.
- (292) *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.
- (293) *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.
- (294) *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.
- (295) *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.

3.61 Family Law Proceedings

- (296) *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.
- (297) *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.
- (298) *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.

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

- (299) *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.

- (300) *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 lift automatically and without further order of court.
- (301) *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.
- (302) *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.

3.63 *In Rem* Relief

- (303) *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.
- (304) *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.

3.64 Burden of Proof

- (305) *In re Spencer*, 2017 WL 2303958 (Bankr. W.D. Mi. 2017) – Burden of proof on Motion for Relief from Stay is on party requesting relief as to issue of Debtor’s equity in property; and on party opposing relief on all other issues. However, Section 362 does not contemplate creditor blindly asserting causes of action without bearing some burden of production. Creditor’s unsworn Motion alleged bad faith based on Debtor’s poor payment history and the filing of second Chapter 13 case only 2 months after dismissal of first case and other alleged conduct by Debtor designed to frustrate and forestall creditors efforts at foreclosure. Creditor’s motion was supported only by legal argument, which is not evidence, and underlying loan documents which shed no light on alleged bad faith. If creditor had supported motion with affidavit or declaration, Court would have shifted burden to Debtor. Further, Court’s Order in second case extending the automatic stay expressly contain finding that second case was filed in good faith. Thus, even if Debtors lacked good faith in first case, lack of good faith in first case did not warrant finding of lack of good faith in second case. Further, creditor did not file any objections to Debtor’s proposed Plan, in the absence of which Court will presume good faith.
- (306) *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.

- (307) *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.

3.65 Mootness

- (308) *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.
- (309) *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.
- (310) *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.
- (311) *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.
- (312) *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.
- (313) *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.
- (314) *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.

3.66 Standing to Obtain Relief From Stay

- (315) *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.
- (316) *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.
- (317) *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.
- (318) *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.
- (319) *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.
- (320) *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.
- (321) *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.
- (322) *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.

- (323) *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.
- (324) *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.
- (325) *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.
- (326) *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.
- (327) *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.
- (328) *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.
- (329) *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.
- (330) *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.
- (331) *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.
- (332) *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.
- (333) *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.
- (334) *In re Keger*, 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.
- (335) *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.

- (336) *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.

3.67 Conditional Relief

- (337) *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.
- (338) *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.

3.68 Retroactive Relief

- (339) *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.
- (340) *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.

3.69 Denial – Bad Faith of Lender

- (341) *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.

3.70 Marshaling of Assets

- (342) *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.

3.71 Procedural Requirements

- (343) *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.
- (344) *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.

3.72 Procedural Requirements – Withdrawal of Motion

- (345) *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.

3.73 Termination – Dismissal and Reinstatement of Case

- (346) *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.
- (347) *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.

3.74 Termination – Failure to Reaffirm or Redeem

- (348) *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.
- (349) *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 *Ipsa Facto* Clause denied as relief is prohibited by Section 521(d).
- (350) *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.
- (351) *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.
- (352) *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.
- (353) *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.

3.75 Termination – Denial of Discharge

- (354) *Belleba v. Grigorian*, 2016 WL 8115418 (E.D. Mi. 2016) – Order denying discharge under Section 727 automatically terminated automatic stay. Creditor's efforts to collect judgment after entry of order denying discharge not stayed even though Chapter 7 case remained open and in administration. There was no indication that allowing collection effort would result in double recovery where creditor had filed proof of claim but there were no assets in estate to make distributions.

3.76 Post-petition Default on Residential Mortgage

- (355) *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.

3.77 Closing of Case Without Discharge

- (356) *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.

3.78 Setoff

- (357) *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.
- (358) *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.

3.79 Relief From Co-Debtor Stay

- (359) *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.
- (360) *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.

3.80 Adequate Protection Payments

- (361) *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.

3.81 Administrative Claim – Insufficiency or Lack of Adequate Protection

- (362) *Partap Investments, LLC v. Kittusamy*, Case No. 16-1242 (9th Cir. BAP 2017) - Party to “Lease” that is actually disguised as security interest not entitled to administrative claim for post-petition, pre-rejection “rent”. Prepetition “lease” was disguised security agreement convey title to property to Debtor. Accordingly, “lessor” is not entitled to administrative claim under Section 503(b)(1)(A) for unpaid post-petition lease payments. Secured lender is entitled to administrative claim only to the extent that secured lender can prove that asset diminished in value as a result of bankruptcy filing. Creditors are not entitled to administrative claim where creditor did not present evidence to establish diminution in value as alleged diminution was based on purchase price of assets in first instance less value at time secured creditor recovered possession, neither of which accurately measures actual diminution as a result of bankruptcy case. Creditor did not present evidence of actual value of property at commencement of case or actual value of property at time creditor re-obtained possession.

3.82 Attorney Fees - Prosecuting or Defending Motion

- (363) *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.

3.83 GMAC Bankruptcy

- (364) *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

3.84 Grounds

- (365) *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.
- (366) *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.
- (367) *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.

- (368) *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.
- (369) *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.
- (370) *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.
- (371) *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.
- 3.85 Standing to Request
- (372) *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.
- 3.86 Effect of Annulment
- E. Violations of Automatic Stay
- 3.87 Notice of Filing
- (373) *Markley v. Department of Treasury, Internal Revenue Service*, 2017 WL 456416 (Bankr. N.D. Ohio 2017) - Rule 5003(e) requires service on governmental agency at specified address. Notice mailed to IRS at address other than address required in Rule 5003(e) is ineffective to constitute “notice” of proceeding.
- (374) *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.
- (375) *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.
- (376) *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.
- (377) *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.

3.88 Effect of Violation

- (378) *In re Johnson*, 565 BR 835 (Bankr. S.D. Ohio 2017) – Debtor’s partnership interests, both economic and management rights, become property of estate. Economic interests include partner’s share of profits and losses and right to receive distributions. Management rights include authority of Debtor over partnership affairs. Debtor held 55% partnership interest and was designated as managing partner in charge of managing all partnership affairs subject only to requirement that any debt in excess of \$10,000 be approved by 65% vote. After Debtor filed bankruptcy, remaining partners attempted to dissociate Debtor from partnership and to appoint new managing partner. Remaining partner’s actions violated automatic stay as attempt to obtain possession and control of property of estate consisting of Debtor’s management and economic interests. Actions taken in violation of stay are generally void and invalid, but may be voidable under equitable circumstances such as where Debtor is attempting to use stay unfairly to avoid unfavorable result. Record demonstrated sufficient equitable grounds to determine that partner’s actions were voidable, and court would allow actions to remain in force and effect where Debtor had effectively abandoned post as managing partner leaving partners with no choice but to take on management responsibilities and left partnership with need to borrow money to keep property afloat until it could be sold. Debtor’s wrongful conduct constituted grounds to dissolve partnership under state law and remaining partners had commenced action in State Court pre-petition to accomplish dissolution.
- (379) *In re Grason*, 2013 WL 412916 (Bankr. C.D. Ill. 2013) – Foreclosure sale conducted minutes after petition was filed was void and did not convey to purchaser any interest in property.
- (380) *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.
- (381) *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.
- (382) *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.

3.89 Violations – Continued Collection Efforts

- (383) *In re Taylor*, Case No. 16-21506 (Bankr. E.D. Mi. 2017) – State Department of Corrections violated both stay and discharge injunction by continuing to deduct from Debtor’s prison account funds to pay pre-petition federal and state court filing fees. Debtor seeking recovery for contempt must demonstrate that alleged contemnor had knowledge of order said to be violated; alleged contempt did in fact violate order; and order violated was specific and definite. Willfulness is not element of contempt and intent to disobey is irrelevant, except that any request for punitive damages must show that contemnors actions were particularly egregious and punitive damages are necessary to deter future conduct. Debtor demonstrated that State had notice of bankruptcy filing and continued to debit prison account which constituted violation of both automatic stay (pre-discharge) and discharge injunction (post-discharge). Damages awarded in the amount of \$87.72 deducted from account plus \$26.58 in costs for bringing the Motion.
- (384) *Torres v. Cooperativa de Ahorro y Credito La Puertorriquena*, 2017 WL 123727 (Bankr. D. P.R. 2017) – Creditor violated stay by continuing automatic withdrawals from Debtor’s bank account after being notified of bankruptcy filing.
- (385) *United States of America v. Taalib-din*, 2017 WL 3447903 (E.D. Mi. 2017) - United States did not violate Automatic Stay of Section 362(a)(6), which prevents any act to collect a debt or claim against Debtor that arose before commencement of case, by seizing Debtors post-petition Social Security payment. Action to collect that is to obtain payment by personal solicitation or legal proceedings. Set off of Social Security benefits against outstanding tax obligations is neither personal solicitation nor legal proceeding to obtain debt owed, but rather is application of mutual debts against one another. Further, construing set off as “act to collect, assess, or recover” that would render Section 362(a)(7), which specifically deals with set of rights, superfluous.
- (386) *Lansaw v. Zokaites*, Case No. 16-1867 (3d Cir. 2017) – Section 362(k) allows court to award damages against person who violates stay including damages for emotional distress and, in appropriate circumstances, punitive damages. Party seeking to recover for emotional distress

bears burden to demonstrate distress and establish causal relationship. Professional testimony such as corroborating medical testimony is not necessary where creditor's conduct is so egregious as to support plaintiff's credible testimony that distress resulted. Court would consider other sources of stress in Debtor's life in attempt to determine degree of distress caused by defendant's conduct and discount total stress related damages accordingly. Creditor, Debtor's business landlord, violated stay by, after filing, visiting Debtor's day care business, taking pictures of children and parents in facility, and physically backing Debtor against wall. A few days later, creditor entered business after hours and removed Debtor's personal property and padlocked the doors in effort to prevent Debtor from entering. Debtor had to call police who persuaded creditor to let Debtor enter building to remove parent contact information but refused to allow business to open or for Debtor to remove any other property. Creditor then sent note that creditor would not unchain doors unless Debtors stated that creditor had not committed any assault, Debtor reaffirmed lease with landlord, and Debtors ceased removing property from premises. Creditor then took Debtor's keys to the facility which also included Debtor's car keys and refused to return keys. Landlord then stated that unless Debtor signed new lease, he would file state court complaint for eviction, including copy of complaint in letter to Debtor's attorney. When Debtors entered into new lease with new landlord, Creditor approached new landlord in effort to induce landlord to break new lease, thereby forcing Debtor to sign new lease with Creditor. Creditor's conduct was sufficiently extreme that emotional distress would likely result and Debtor's testimony regarding distress was sufficient to warrant award of damages for emotional distress, plus punitive damages in light of Creditor's attempts to downplay violations at trial, and where amount was consistent with due process based on degree of Creditor's reprehensibility, disparity between harm to Debtor and amount of award, and difference between punitive damages awarded in this case versus other comparable cases. Punitive damages of \$40,000 warranted given egregious nature of conduct and actual damages including attorney fees totaled only \$10,100, which may not be sufficient to deter future conduct.

- (387) *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.
- (388) *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.
- (389) *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.
- (390) *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.
- (391) *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.
- (392) *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.
- (393) *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.
- (394) *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.
- (395) *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.

- (396) *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.
- (397) *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.
- (398) *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.
- (399) *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.

3.90 Violations – Commencement or Continuation of Foreclosure Proceedings

- (400) *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.
- (401) *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.
- (402) *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.
- (403) *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.
- (404) *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.
- (405) *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.

3.91 Violations – Commencement of Continuation of Other Actions

- (406) *In re Roberson*, 2016 WL 6783301 (Bankr. N.D. Ohio 2016) – Landlord who continues eviction proceeding post-petition and with knowledge of bankruptcy filing willfully violates stay warranting imposition of sanctions. Landlord willfully violated stay when landlord takes actions in violation of stay, at a time when landlord has actual notice of the bankruptcy filing, acts in a willful manner, and causes actual damages. Willful does not require ill will or specific intent to violate stay, but only an intentional act that violates stay by a party aware of the filing. Landlord was advised by voice mail left at landlord’s office of bankruptcy filing, and thereafter (1) caused a notice of leave premises to be delivered; (2) send an e-mail to Debtors attempting to collect pre-petition balance due on rent; (3) sent another e-mail also attempting to collect pre-petition rent; (4) caused a second notice to leave premises to be served; and (5) engaged attorney who sent collection letter for pre-petition balance due. Actions were willful as landlord had actual knowledge of filing. Where actions are willful, award of actual damages is mandatory, but must be damages caused by the violation itself. Debtors entitled to recover attorney fees but not entitled to recover costs of moving where there was on specific testimony on amount of expenses incurred, and moving expenses were incurred after Debtors received discharge which terminated automatic stay without further order of court and Debtors had indicated in initial filing intention to reject the lease. Party seeking damages must also prove efforts to mitigate damages. Although Debtor’s counsel perhaps could have cut off landlord’s actions by simple phone call, attorney instead chose to file Motion for Sanctions, which generally evidences lack of effort to mitigate. However, where facts indicate that landlord would not have been likely to desist even if attorney had called, Debtors cannot be faulted for failing to mitigate, sufficient to award attorney fees incurred in prosecuting motion. Debtors not entitled to non-economic damages absent presentation of sufficient evidence to indicate that Debtors suffered anything more than fleeting or inconsequential distress or embarrassment. Debtors not entitled to punitive damages where landlord’s conduct, while willful, was not particularly egregious or

vindictive or intentionally malicious. Evidence indicated that to extent landlord failed to abide by stay, that was result of sloppiness or breakdown of landlord's internal procedures that prevented notice of bankruptcy filing from reaching correct person who would have halted eviction process.

- (407) *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.
- (408) *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".
- (409) *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.
- (410) *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.
- (411) *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.
- (412) *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.
- (413) *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.
- (414) *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.
- (415) *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.
- (416) *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.

3.92 Violations – Seizure of or Failure to Return Property

- (417) *House v. Craft Auto Sales, LLC*, 2017 WL 2579026 (Bankr. S.D. Miss. 2017) – Creditor who repossessed car pre-petition did not violate

stay by asking for proof of insurance. However, once debtor provided proof of insurance, creditor violated stay by refusing to return vehicle based on creditor's assumption that debtor ultimately intended to abandon vehicle. Retention of possession after receipt of insurance was willful violation of stay warranting award of actual damages and attorney fees.

- (418) *In re Parham*, 2017 WL 3207663 (Bankr. E.D. Mi. 2017) – Funds garnished pre-petition, although within preference period, were not property of bankruptcy estate as Debtor lost all interest in funds when funds were paid to creditor. Lender had no duty to voluntarily return property in which Debtor had no interest as of date of commencement of case, even assuming that transfer itself may have been avoidable.
- (419) *United States of America v. Taalib-din*, 2017 WL 3447903 (E.D. Mi. 2017) - Automatic Stay does not prohibit efforts by creditor to seize property which is excluded from bankruptcy estate. United States did not violate Automatic Stay of Section 362(a)(3), which prevents any act to obtain possession of property the estate, by seizing Debtors post-petition Social Security payment. 42 USC Section 407 absolutely excludes Social Security from inclusion in property of estate. Therefore, right to Social Security payments does not constitute property of estate and IRS's seizure of post-petition Social Security payments could not violate Section 362(a)(3).
- (420) *WD Equipment v. Cowen*, Case No. 15-1413 (10th Cir. 2017) - Passive retention of asset of estate in face of demand for turnover does not violate automatic stay under Section 362(a)(3) as Act to exercise control over property of estate. 10th Circuit joined DC Circuit and split from 2nd, 7th, 8th and 9th Circuits as to effect of passive retention without any effort to liquidate or sell assets. Statute requires "act to exercise control over property". "Act" means "to take action or do something". Automatic Stay enjoins "doing something" but does not cover active passively holding onto asset and Section 362(a)(3) does not impose affirmative obligation to turn over property. Although Section 542 provides a right of return, there is no textual link between Section 542 and Section 362 that would result in passive retention of property violating Automatic Stay. Although Debtor in Chapter 13 retain the right to recover vehicle where title had not been lawfully transferred prior to commencement of bankruptcy case, correct procedures action for turnover under Section 542.
- (421) *In re Banks*, Case No. 16-53113 (Bankr. E.D. Mi. 2016) – Creditor willfully violates stay where creditor repossesses vehicle prepetition and refuses to return vehicle post-petition despite fact that creditor has actual knowledge of bankruptcy case. Willful violation does not require proof of specific intent to violate stay, but rather intentional action by party aware of bankruptcy filing. Violation of automatic stay is willful when creditor knows of stay and violate stay by intentional act. However, sanctions are not appropriate against party who repossessed vehicle and turned the vehicle over to creditor prior to commencement of bankruptcy case as repossession agent did not have possession of the vehicle and did not refuse to return vehicle or otherwise seek to exercise dominion and control over property of estate.
- (422) *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.
- (423) *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.
- (424) *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.
- (425) *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.

- (426) *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.
- (427) *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.
- (428) *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.
- (429) *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.
- (430) *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.
- (431) *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.
- (432) *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.
- (433) *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.
- (434) *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.
- (435) *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).

3.93 Violations – Exercise of Dominion and Control

- (436) *WD Equipment v. Cowen*, Case No. 15-1413 (10th Cir. 2017) - Passive retention of asset of estate in face of demand for turnover does not violate automatic stay under Section 362(a)(3) as Act to exercise control over property of estate. 10th Circuit joined DC Circuit and split from 2nd, 7th, 8th and 9th Circuits as to effective passive retention without any effort to liquidate or sell assets. Statute requires “act to exercise control over property”. “Act” means “to take action or do something”. Automatic Stay enjoins “doing something” but does not cover

passively holding onto asset and Section 362(a)(3) does not impose affirmative obligation to turn over property. Although Section 542 provides a right of return, there is no textual link between Section 542 and Section 362 that would result in passive retention of property violating Automatic Stay. Although Debtor in Chapter 13 retain the right to recover vehicle where title had not been lawfully transferred prior to commencement of bankruptcy case, correct procedures action for turnover under Section 542.

- (437) *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.

3.94 Violations – Sale of Property

- (438) *In re McDuffie*, 2017 WL 3098099 (Bankr. N.D. Ohio 2017) – Self-storage unit landlord violated stay by selling property located in Debtor’s Self-storage unit post-petition even though Creditor did not have notice of bankruptcy filing at time of sale.

3.95 Violations – Executory Contracts and Unexpired Leases

- (439) *Springer RNBj RTO, LLC*, 2017 WL 3575859 (Bankr. W.D. Ky. 2017) – Creditor violated automatic stay by continuing to debit Debtor’s checking account for post-petition furniture rental payments before lease was assumed by Debtors. Creditor’s violation was willful when Creditor had actual notice of stay but continued to process withdrawals. Creditor also violated stay by refusing to return post-petition payments and by attempting to repossess rented furniture without seeking stay relief, filing a Motion to Compel Assumption or Rejection, or filing Motion to allow Setoff. Automatic stay stops all collection efforts including repossessions and foreclosures, and prohibits any other effort by creditor to recover against Debtor or property of estate. Violation of stay is willful where creditor with knowledge of bankruptcy case deliberately carries out prohibited actions, and creditor has affirmative duty to halt any collection efforts. Good faith of creditor is no defense although Debtor does have duty to mitigate damages. Section 362(k) allows imposition of sanctions equal to actual damages. Debtor made every effort to mitigate damages where counsel for Debtors made repeated phone calls to creditor and sent creditor correspondence informing it of bankruptcy case and asking creditor to cease offending actions, yet creditor retained funds and attempted repossession. Creditor attempted to exert control over property of estate in form of Debtor’s rental interest in the property. Debtor awarded damages in amount of funds withdrawn from account post-petition. Debtor not entitled to emotional distress where Debtor testified that while the phone call she received at work was embarrassing, she did could not say that anyone at the office overheard her conversation and Debtor had not sought medical treatment for any emotional troubles. Hurt feelings, anger and frustration are not “emotional harm” for purposes of actual damages. Debtor also entitled to recover attorney fees resulting from violations, including out of court attorney fees in effort to resolve matters without litigation as well as litigation fees themselves. Section 362(k)(1) allows punitive damages if creditor’s conduct was egregious, vindictive or intentionally malicious. Creditor was sophisticated business involved in retail furniture rental and must have encountered bankruptcy in the past, yet neither anyone at creditor or any of creditor’s attorneys apparently know anything about bankruptcy and creditor had no effective procedures in place to deal with bankruptcy filings amounting to willful and egregious act warranting punitive damages. Creditor’s attempt to repossess furniture notwithstanding actual knowledge of bankruptcy filing coupled with multiple post-petition debits, post-petition phone calls, and one trip to Debtor’s residence, constituted 10 stay violations with punitive damages of \$500 per violation or a total of \$5,000.

3.96 Domestic Relations Actions

- (440) *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.
- (441) *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.
- (442) *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.
- (443) *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.

- (444) *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.

3.97 Violations – Taxing Authorities

- (445) *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".

3.98 Violations – Administrative Actions

- (446) *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.

3.99 Violations – Appeals

- (447) *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).

3.100 Violations – Contempt Proceedings

- (448) *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.
- (449) *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.

3.101 Violations – Perfecting or Recording Liens

- (450) *United States of America v. Taalib-din*, 2017 WL 3447903 (E.D. Mi. 2017) - United States did not violate Automatic Stay of Section 362(a)(4), which prevents any act to create, perfect or enforce a lien against property the estate, by seizing Debtors post-petition Social Security payment. 42 USC Section 407 absolutely excludes Social Security from inclusion in property of estate. Therefore, right to Social Security payments does not constitute property of estate and IRS's seizure of post-petition Social Security payments could not violate Section 362(a)(4).
- (451) *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.
- (452) *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.

3.102 Violations – Garnishments

- (453) *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.

3.103 Violations – Threat of Criminal Proceeding

- (454) *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.

3.104 Violations – Automobile “Kill” Switch

- (455) *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.

3.105 Violations - Other Actions

- (456) *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 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.
- (457) *In re Kelly*, 2014 WL 5449639 (Bankr. N.D. Ohio 2014) – Landlord violates stay by pursuing State Court proceeding for eviction post-petition.
- (458) *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.

3.106 Violations – Refusal to Comply With Contract

- (459) *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.
- (460) *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.
- (461) *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.

3.107 Violations – Post-dated Checks

(462) *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.

(463) *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.

3.108 Violations – Loan Modifications

(464) *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.

3.109 Violations – Transfer of Claims

(465) *In re Thompson*, 2016 WL 6637891 (Bankr. N.D. Ohio 2016) - Creditor willfully violates automatic stay, Section 362(a)(3) by filing Notice of Transfer of Claim where creditor has no right to or interest in the claim allegedly transferred. Filing transfer of claim entertaining trustee’s distributions amounts to wrongful acquisition and retention of property of the estate. Creditor’s actions were willful allowing Court to impose additional sanctions.

(466) *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.

3.110 Violations – Failure to Return Funds

(467) *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.

3.111 Violations – Co-Debtor Stay

(468) *In re Tucker*, Case No. 16-1127 (Bankr. N.D. Iowa 2017) – Although Section 1301 is silent on issue of sanctions for violation of Codebtor stay, Section 105 provides basis for Bankruptcy Court to award sanctions for violation of Codebtor stay. Wife filed individual Chapter 13

petition. Post-petition, power company sued husband for Bill owed by husband and wife, and then began garnishing husband's salary. Husband twice notified power company of bankruptcy proceeding and Codebtor stay at power company continued garnishment. Garnishment cause Debtor to miss Plan payments and mortgage payments. Court concluded that Section 105 Allows Court to impose sanctions as appropriate to carry out and give meaning to Section 1301. Court awarded \$1500 for "emotional upset and needless stress" and \$1400 in attorney fees.

3.112 Actions by Debtor

- (469) *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

3.113 Inadvertent or Good Faith Actions

- (470) *Franklin v. Credit Acceptance Corp.*, 2017 WL 2562305 (Bankr. N.D. W.Va. 2017) – Creditor who promptly took action to stop collection upon being notified of bankruptcy filing not liable for violation of stay. Creditor served pre-petition writ of garnishment on debtor's employer. Creditor released garnishment 6 days after debtor filed bankruptcy and advised debtor's employer that the garnishment had been released. Employer continued to withhold money from debtor's wages for two pay cycles, and creditor returned funds to debtor on same day as funds were received by creditor.
- (471) *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.
- (472) *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.
- (473) *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.
- (474) *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."

3.114 Harmless Error

- (475) *Cowin v. Countrywide Home Loans, Inc.*, Case No. 15-20600 (5th Cir. 2017) – Section 362 prevents commencement or continuation of any judicial, administrative or other proceeding to recover a claim against Debtor that arose before commencement of case. However, automatic stay is not absolute, as creditor is permitted to file Proof of Claim and to institute adversary proceedings in Bankruptcy Court without violating stay. Debtor previously filed under Chapter 7 and Plaintiff brought adversary proceeding that case. Court ultimately dismissed that case but expressly retained jurisdiction over pending adversary to determine whether Debtor's obligations to Plaintiff were dischargeable. Shortly before the Bankruptcy Court entered judgment in the adversary, Debtor filed another Chapter 7 petition in the same Bankruptcy Court. Bankruptcy Court proceeded to enter final judgment in adversary proceeding determining debt to be non-dischargeable. Court did not lift stay in second case prior to entering Judgment. Continuation of adversary proceeding did not violate stay as prosecution of adversary proceeding is specifically permitted in Code. Even if Bankruptcy Court violated stay in second case by proceeding with Adversary Proceeding from first case any error was harmless as Bankruptcy Court would have lifted stay had it been asked and outcome of adversary proceeding would remain unchanged if Adversary Judgment was voided and case remanded to Bankruptcy Court to grant relief from stay

and re-enter same Judgment. Debtor was not prejudiced as Debtor was willing participant in Adversary Proceeding and result of litigation would have been no different if it had been filed in the later filed Chapter 7.

3.115 Satisfaction of Judgments or Claims

- (476) *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.

3.116 Setoff

- (477) *In re Patriot Solar Group Inc.*, 569 BR 451 (Bankr. W.D. Mi. 2017) - Right of set off permits person that owes money to another to apply mutual debts against one another. Set off is not created by bankruptcy code or federal law, but is preserved under Section 553. Party must show that there are mutual obligations owed between parties, giving rise to a presumption in favor of set off. Court made his deny set off or set off may prejudice third parties. Creditor's motion for relief from automatic stay to exercise right of set off did not contain any legal or factual explanation as to why creditor contended it had right of set off under applicable nonbankruptcy law. Creditor's claims against Debtor were disputed and unliquidated and allowing set off may adversely affect the secured creditors rights in collateral.
- (478) *United States of America v. Taalib-din*, 2017 WL 3447903 (E.D. Mi. 2017) - United States did not violate Automatic Stay of Section 362(a)(7), which prevents any act to set off any debts owing to the Debtor that arose before commencement of the case against any claim against Debtor, by seizing Debtors post-petition Social Security payment. Government's obligation to make specific Social Security payments to Debtor arose after bankruptcy petition was filed. Because obligation of the United States to Debtor for ongoing Social Security payments accrued post-petition, Section 362(a)(7) is inapplicable.
- (479) *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.

3.117 Actions Against Property Not Property of Estate

- (480) *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.
- (481) *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.
- (482) *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.
- (483) *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.
- (484) *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.

3.118 Adjournment or Continuation of Foreclosure Sale

- (485) *Billings v. Portnoff Law Associates, Ltd.*, Case No. 16-3096 (3d Cir. 2017) – Written Motion to Adjourn Foreclosure Sale is not violation of stay. Creditor does not violate stay by taking action to preserve status quo, even if actions cause creditor to incur attorney fees that ultimately will be passed on to Debtor. Requiring Debtor to pay incidental costs to preserve status quo does not upset quo but helps the Debtor by preserving status quo.
- (486) *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. Continuation of foreclosure sale is not “continuation of action” as specified in Section 362 and is in fact a cessation of pending actions.
- (487) *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.

- (488) *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.
- (489) *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.

3.119 Refusal to Extend Additional Credit

- (490) *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.

3.120 Criminal Proceedings

- (491) *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.
- (492) *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.
- (493) *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.
- (494) *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.
- (495) *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.

3.121 Contempt Proceedings

- (496) *Yellow Express LLC v Dingley*, 514 BR 591 (BAP 9th Cir. 2014), *aff'd*, 852 F.3d 1143 (9th Cir. 2017) - 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.

3.122 Furnishing Information

- (497) *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.

- (498) *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.
- (499) *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.

3.123 Filing Proof of Claim

- (500) *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.
- (501) *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.

3.124 Internal Recordkeeping

- (502) *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.

3.125 Litigation – Debtor as Plaintiff

- (503) *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".
- (504) *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.
- (505) *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.

3.126 Post-Petition Perfection of Lien – Safe Harbor

- (506) *In re Linear Electric Co.*, Case No. 16-1477 (3d Cir. 2017) – Avoidability of mechanics lien filed by supplier after filing of Chapter 11 petition is determined by state law. Where state law did not provide that recording of lien "related back" to some prepetition event, recording lien violated automatic stay and voided lien. If state law allows for mechanics lien to relate back to some prepetition event, recording of lien post-petition would not violate stay under Section 546(b)(1)(A).
- (507) *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.

3.127 Surrendered Collateral

- (508) *In re Kurzban*, Case No. 09-30656 (Bankr. S.D. Fla. 2017) – "Surrender prevents Debtor from contesting foreclosure in action pending or ripe for filing when bankruptcy case in which property is surrendered is filed. However, decision to surrender does not last in perpetuity no matter what might occur after Debtor "surrenders" property. Debtor not prevented from contesting foreclosure where, after Debtor surrendered property, Lender voluntarily dismissed foreclosure action and engaged in loan modification efforts. Over 7 years after Debtor obtained discharge and more than 5 years after dismissal of prior action, lender instituted new action to foreclose mortgage based on new,

post-bankruptcy defaults. Debtor's prior surrender of property was not binding in subsequent foreclosure action relating to defaults that did not exist as of date on which Debtor made decision to surrender.

- (509) *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.
- (510) *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.
- (511) *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.
- (512) *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.
- (513) *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.
- (514) *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.

3.128 Domestic Support Litigation

- (515) *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.
- (516) *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.
- (517) *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.

3.129 Pre-petition Mortgage Escrow Claims

- (518) *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.
- (519) *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.

3.130 Voluntary Post-Petition Transfers

- (520) *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.

3.131 Administrative Closing of State Court Proceeding

- (521) *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.

3.132 Tax Forms

- (522) *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

3.133 Sanctions – Standing to Request

- (523) *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.
- (524) *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.
- (525) *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.
- (526) *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.
- (527) *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.

3.134 Sanctions Generally

- (528) *Torres v. Cooperativa de Ahorro y Credito La Puertorriquena*, 2017 WL 123727 (Bankr. D. P.R. 2017) – Sanctions warranted where violation of stay is “willful”, defined as knowledge of stay and intentional taking of actions that violate stay. Where creditor received notice of bankruptcy filing, Court presumes subsequent violation is willful. Creditor violated stay by continuing automatic withdrawals from Debtor’s bank account after being notified of bankruptcy filing.

- (529) *In re McDuffie*, 2017 WL 3098099 (Bankr. N.D. Ohio 2017) – Self-storage unit landlord violated stay by selling property located in Debtor’s Self-storage unit post-petition even though Creditor did not have notice of bankruptcy filing at time of sale. However, Debtor not entitled to sanctions where Creditor’s actions were not willful. Creditor sold property in properly conducted auction sale before receiving any notice of bankruptcy filing. Willfulness requires that he creditor know of the stay and take action in violation of it. Creditor did not take any action post-notice of the bankruptcy filing. Under Section 542, sale conveyed good title to the buyer and creditor lacked any ability to recovery property from buyer such that creditor’s failure to return property was not violation of stay. Debtor not entitled to damages resulting from creditor’s inadvertent violation of stay based on actions taken before creditor was apprised of bankruptcy filing and there was no evidence of any actions taken by creditor after receiving notice.
- (530) *In re Banks*, Case No. 16-53113 (Bankr. E.D. Mi. 2016) – Individual Debtor injured by willful violation of automatic stay under Section 362(k)(1) entitled to actual damages including costs and attorney’s fees and, in appropriate circumstances, punitive damages. Creditor willfully violates stay where creditor repossesses vehicle prepetition and refuses to return vehicle post-petition despite fact that creditor has actual knowledge of bankruptcy case. Willful violation does not require proof of specific intent to violate stay, but rather intentional violation by party aware of bankruptcy filing. Violation of automatic stay is willful when creditor knows of stay and violates stay by intentional act. Sanctions awarded in the amount of \$1622.14 representing cost to rent replacement vehicle and attorney’s fees incurred in prosecuting motion.
- (531) *In re Roberson*, 2016 WL 6783301 (Bankr. N.D. Ohio 2016) – Landlord who continues eviction proceeding post-petition and with knowledge of bankruptcy filing willfully violates stay warranting imposition of sanctions. Landlord willfully violated stay when landlord takes actions in violation of stay, at a time when landlord has actual notice of the bankruptcy filing, acts in a willful manner, and causes actual damages. Willful does not require ill will or specific intent to violate stay, but only an intentional act that violates stay by a party aware of the filing. Landlord was advised by voice mail left at landlord’s office of bankruptcy filing, and thereafter (1) caused a notice of leave premises to be delivered; (2) send an e-mail to Debtors attempting to collect pre-petition balance due on rent; (3) sent another e-mail also attempting to collect pre-petition rent; (4) caused a second notice to leave premises to be served; and (5) engaged attorney who sent collection letter for pre-petition balance due. Actions were willful as landlord had actual knowledge of filing. Where actions are willful, award of actual damages is mandatory, but must be damages caused by the violation itself. Debtors entitled to recover attorney fees but not entitled to recover costs of moving where there was on specific testimony on amount of expenses incurred, and moving expenses were incurred after Debtors received discharge which terminated automatic stay without further order of court and Debtors had indicated in initial filing intention to reject the lease. Party seeking damages must also prove efforts to mitigate damages. Although Debtor’s counsel perhaps could have cut off landlord’s actions by simple phone call, attorney instead chose to file Motion for Sanctions, which generally evidences lack of effort to mitigate. However, where facts indicate that landlord would not have been likely to desist even if attorney had called, Debtors cannot be faulted for failing to mitigate, sufficient to award attorney fees incurred in prosecuting motion. Debtors not entitled to non-economic damages absent presentation of sufficient evidence to indicate that Debtors suffered anything more than fleeting or inconsequential distress or embarrassment. Debtors not entitled to punitive damages where landlord’s conduct, while willful, was not particularly egregious or vindictive or intentionally malicious. Evidence indicated that to extent landlord failed to abide by stay, that was result of sloppiness or breakdown of landlord’s internal procedures that prevented notice of bankruptcy filing from reaching correct person who would have halted eviction process.
- (532) *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.
- (533) *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.
- (534) *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.

- (535) *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.
- (536) *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.
- (537) *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.
- (538) *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.
- (539) *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.
- (540) *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.

- (541) *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.
- (542) *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.
- (543) *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.
- (544) *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.
- (545) *In re Galutan*, Case No. 12-31837 (Bankr. E.D. Ill. 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.
- (546) *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.
- (547) *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.
- (548) *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.
- (549) *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.
- (550) *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.

- (551) *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”.
- (552) *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.
- (553) *Schwartz-Tallard v. America’s Servicing Company*, Case No. 11-1429 (9th Cir. BAP 2012), *aff’d*, 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).
- (554) *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.
- (555) *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.
- (556) *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.
- (557) *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.
- (558) *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.
- (559) *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.

- (560) *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.
- (561) *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.
- (562) *In re Weislak*, 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.
- (563) *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.
- (564) *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.
- (565) *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.
- (566) *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.
- (567) *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.

- (568) *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.
- (569) *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.
- (570) *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.
- (571) *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.
- (572) *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.
- (573) *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.
- (574) *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.
- (575) *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.
- (576) *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.

3.135 Sanctions – Absence of Actual Damages

- (577) *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.
- (578) *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.

3.136 Sanctions – Duty to Mitigate

- (579) *Springer RNBJ RTO, LLC*, 2017 WL 3575859 (Bankr. W.D. Ky. 2017) – Creditor violated automatic stay by continuing to debit Debtor’s checking account for post-petition furniture rental payments before lease was assumed by Debtors; by refusing to return post-petition payments; and by attempting to repossess rented furniture without seeking stay relief, filing a Motion to Compel Assumption or Rejection, or filing Motion to allow Setoff. Debtor made every effort to mitigate damages where counsel for Debtors made repeated phone calls to creditor and sent creditor correspondence informing it of bankruptcy case and asking creditor to cease offending actions, yet creditor retained funds and attempted repossession.
- (580) *In re Roberson*, 2016 WL 6783301 (Bankr. N.D. Ohio 2016) – Landlord who continues eviction proceeding post-petition and with knowledge of bankruptcy filing willfully violates stay warranting imposition of sanctions. Landlord willfully violated stay when landlord takes actions in violation of stay, at a time when landlord has actual notice of the bankruptcy filing, acts in a willful manner, and causes actual damages. Willful does not require ill will or specific intent to violate stay, but only an intentional act that violates stay by a party aware of the filing. Landlord was advised by voice mail left at landlord’s office of bankruptcy filing, and thereafter (1) caused a notice of leave premises to be delivered; (2) send an e-mail to Debtors attempting to collect pre-petition balance due on rent; (3) sent another e-mail also attempting to collect pre-petition rent; (4) caused a second notice to leave premises to be served; and (5) engaged attorney who sent collection letter for pre-petition balance due. Actions were willful as landlord had actual knowledge of filing. Where actions are willful, award of actual damages is mandatory, but must be damages caused by the violation itself. Debtors entitled to recover attorney fees but not entitled to recover costs of moving where there was on specific testimony on amount of expenses incurred, and moving expenses were incurred after Debtors received discharge which terminated automatic stay without further order of court and Debtors had indicated in initial filing intention to reject the lease. Party seeking damages must also prove efforts to mitigate damages. Although Debtor’s counsel perhaps could have cut off landlord’s actions by simple phone call, attorney instead chose to file Motion for Sanctions, which generally evidences lack of effort to mitigate. However, where facts indicate that landlord would not have been likely to desist even if attorney had called, Debtors cannot be faulted for failing to mitigate, sufficient to award attorney fees incurred in prosecuting motion. Debtors not entitled to non-economic damages absent presentation of sufficient evidence to indicate that Debtors suffered anything more than fleeting or inconsequential distress or embarrassment. Debtors not entitled to punitive damages where landlord’s conduct, while willful, was not particularly egregious or vindictive or intentionally malicious. Evidence indicated that to extent landlord failed to abide by stay, that was result of sloppiness or breakdown of landlord’s internal procedures that prevented notice of bankruptcy filing from reaching correct person who would have halted eviction process.
- (581) *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.
- (582) *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.

- (583) *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.
- (584) *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.
- (585) *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.

3.137 Sanctions – Inadvertent or Technical Violations

- (586) *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 and 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.

3.138 Emotional Distress

- (587) *Odom v. Philadelphia Parking Authority*, Case NO. 16-0195 (Bankr. E.D. Pa. 2017) – Section 362(k) supplements, but does not replace, Court's contempt power for violation of stay, and Section 362(k) and contempt provide no material difference as to remedies available. Damages for emotional distress warranted where City impounded Debtor's car twice during Chapter 13 proceeding. There was no dispute that Parking Authority had knowledge of bankruptcy because Parking Authority previously impounded car and returned car after Debtor filed Motion for Sanctions under Section 362(k). Debtor provided evidentiary basis for emotional distress where Debtor was out of town caring for ill mother when he learned car had been impounded second time, requiring Debtor to cut short his travel and causing Debtor difficulty sleeping as well as marital discord. Damages awarded in amount of \$5,000 for willful violation of stay.
- (588) *Springer RNBj RTO, LLC*, 2017 WL 3575859 (Bankr. W.D. Ky. 2017) – Creditor violated automatic stay by continuing to debit Debtor's checking account for post-petition furniture rental payments before lease was assumed by Debtors; refusing to return post-petition payments; and by attempting to repossess rented furniture without seeking stay relief, filing a Motion to Compel Assumption or Rejection, or filing Motion to allow Setoff. Debtor not entitled to emotional distress where Debtor testified that while phone call she received at work was embarrassing, she did not say that anyone at the office overheard her conversation and Debtor had not sought medical treatment for any emotional troubles. Hurt feelings, anger and frustration are not "emotional harm" for purposes of actual damages.
- (589) *In re Tucker*, Case No. 16-1127 (Bankr. N.D. Iowa 2017) – Although Section 1301 is silent on issue of sanctions for violation of Codebtor stay, Section 105 provides basis for Bankruptcy Court to award sanctions for violation of Codebtor stay. Wife filed individual Chapter 13 petition. Post-petition, power company sued husband for Bill owed by husband and wife, and then began garnishing husband's salary. Husband twice notified power company of bankruptcy proceeding and Codebtor stay at power company continued garnishment. Garnishment cause Debtor to miss Plan payments and mortgage payments. Court concluded that Section 105 Allows Court to impose sanctions as appropriate to carry out and give meaning to Section 1301. Court awarded \$1500 for "emotional upset and needless stress" and \$1400 in attorney fees.

- (590) *Lansaw v. Zokaites*, Case No. 16-1867 (3d Cir. 2017) – Section 362(k) allows court to award damages against person who violates stay including damages for emotional distress and, in appropriate circumstances, punitive damages. Party seeking to recover for emotional distress bears burden to demonstrate distress and establish causal relationship. Professional testimony such as corroborating medical testimony is not necessary where creditor's conduct is so egregious as to support plaintiff's credible testimony that distress resulted. Court would consider other sources of stress in Debtor's life in attempt to determine degree of distress caused by defendant's conduct and discount total stress related damages accordingly. Creditor, Debtor's business landlord, violated stay by, after filing, visiting Debtor's day care business, taking pictures of children and parents in facility, and physically backing Debtor against wall. A few days later, creditor entered business after hours and removed Debtor's personal property and padlocked the doors in effort to prevent Debtor from entering. Debtor had to call police who persuaded creditor to let Debtor enter building to remove parent contact information but refused to allow business to open or for Debtor to remove any other property. Creditor then sent note that creditor would not unchain doors unless Debtors stated that creditor had not committed any assault, Debtor reaffirmed lease with landlord, and Debtors ceased removing property from premises. Creditor then took Debtor's keys to the facility which also included Debtor's car keys and refused to return keys. Landlord then stated that unless Debtor signed new lease, he would file state court complaint for eviction, including copy of complaint in letter to Debtor's attorney. When Debtors entered into new lease with new landlord, Creditor approached new landlord in effort to induce landlord to break new lease, thereby forcing Debtor to sign new lease with Creditor. Creditor's conduct was sufficiently extreme that emotional distress would likely result and Debtor's testimony regarding distress was sufficient to warrant award of damages for emotional distress, plus punitive damages in light of Creditor's attempts to downplay violations at trial, and where amount was consistent with due process based on degree of Creditor's reprehensibility, disparity between harm to Debtor and amount of award, and difference between punitive damages awarded in this case versus other comparable cases. Punitive damages of \$40,000 warranted given egregious nature of conduct and actual damages including attorney fees totaled only \$10,100, which may not be sufficient to deter future conduct.
- (591) *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.
- (592) *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.
- (593) *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.
- (594) *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.
- (595) *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.
- (596) *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.
- (597) *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.

3.139 Sanctions – Actual Damages

- (598) *In re Taylor*, Case No. 16-21506 (Bankr. E.D. Mi. 2017) – State Department of Corrections violated both stay and discharge injunction by continuing to deduct from Debtor’s prison account funds to pay pre-petition federal and state court filing fees. Debtor seeking recovery for contempt must demonstrate that alleged contemnor had knowledge of order said to be violated; alleged contempt did in fact violate order; and order violated was specific and definite. Willfulness is not element of contempt and intent to disobey is irrelevant, except that any request for punitive damages must show that contemnors actions were particularly egregious and punitive damages are necessary to deter future conduct. Debtor demonstrated that State had notice of bankruptcy filing and continued to debit prison account which constituted violation of both automatic stay (pre-discharge) and discharge injunction (post-discharge). Damages awarded in the amount of \$87.72 deducted from account plus \$26.58 in costs for bringing the Motion.
- (599) *Springer RNBj RTO, LLC*, 2017 WL 3575859 (Bankr. W.D. Ky. 2017) – Creditor violated automatic stay by continuing to debit Debtor’s checking account for post-petition furniture rental payments before lease was assumed by Debtors; by refusing to return post-petition payments; and by attempting to repossess rented furniture without seeking stay relief, filing a Motion to Compel Assumption or Rejection, or filing Motion to allow Setoff. Section 362(k) allows imposition of sanctions equal to actual damages. Debtor awarded damages in amount of funds withdrawn from account post-petition. Debtor not entitled to emotional distress where Debtor testified that while the phone call she received at work was embarrassing, she did could not say that anyone at the office overheard her conversation and Debtor had not sought medical treatment for any emotional troubles. Hurt feelings, anger and frustration are not “emotional harm” for purposes of actual damages.
- (600) *In re Banks*, Case No. 16-53113 (Bankr. E.D. Mi. 2016) – Individual Debtor injured by willful violation of automatic stay under Section 362(k)(1) entitled to actual damages including costs and attorney’s fees and, in appropriate circumstances, punitive damages. Creditor willfully violates stay where creditor repossesses vehicle prepetition and refuses to return vehicle post-petition despite fact that creditor has actual knowledge of bankruptcy case. Willful violation does not require proof of specific intent to violate stay, but rather intentional violation by party aware of bankruptcy filing. Violation of automatic stay is willful when creditor knows of stay and violates stay by intentional act. Sanctions awarded in the amount of \$1622.14 representing cost to rent replacement vehicle and attorney’s fees incurred in prosecuting motion.
- (601) *In re Roberson*, 2016 WL 6783301 (Bankr. N.D. Ohio 2016) – Landlord who continues eviction proceeding post-petition and with knowledge of bankruptcy filing willfully violates stay warranting imposition of sanctions. Landlord willfully violated stay when landlord takes actions in violation of stay, at a time when landlord has actual notice of the bankruptcy filing, acts in a willful manner, and causes actual damages. Willful does not require ill will or specific intent to violate stay, but only an intentional act that violates stay by a party aware of the filing. Landlord was advised by voice mail left at landlord’s office of bankruptcy filing, and thereafter (1) caused a notice of leave premises to be delivered; (2) send an e-mail to Debtors attempting to collect pre-petition balance due on rent; (3) sent another e-mail also attempting to collect pre-petition rent; (4) caused a second notice to leave premises to be served; and (5) engaged attorney who sent collection letter for pre-petition balance due. Actions were willful as landlord had actual knowledge of filing. Where actions are willful, award of actual damages is mandatory, but must be damages caused by the violation itself. Debtors entitled to recover attorney fees but not entitled to recover costs of moving where there was on specific testimony on amount of expenses incurred, and moving expenses were incurred after Debtors received discharge which terminated automatic stay without further order of court and Debtors had indicated in initial filing intention to reject the lease. Party seeking damages must also prove efforts to mitigate damages. Although Debtor’s counsel perhaps could have cut off landlord’s actions by simple phone call, attorney instead chose to file Motion for Sanctions, which generally evidences lack of effort to mitigate. However, where facts indicate that landlord would not have been likely to desist even if attorney had called, Debtors cannot be faulted for failing to mitigate, sufficient to award attorney fees incurred in prosecuting motion. Debtors not entitled to non-economic damages absent presentation of sufficient evidence to indicate that Debtors suffered anything more than fleeting or inconsequential distress or embarrassment. Debtors not entitled to punitive damages where landlord’s conduct, while willful, was not particularly egregious or vindictive or intentionally malicious. Evidence indicated that to extent landlord failed to abide by stay, that was result of sloppiness or breakdown of landlord’s internal procedures that prevented notice of bankruptcy filing from reaching correct person who would have halted eviction process.
- (602) *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.
- (603) *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.

- (604) *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.

3.140 Sanctions – Punitive Damages

- (605) *In re Taylor*, Case No. 16-21506 (Bankr. E.D. Mi. 2017) – State Department of Corrections violated both stay and discharge injunction by continuing to deduct from Debtor's prison account funds to pay pre-petition federal and state court filing fees. Debtor seeking recovery for contempt must demonstrate that alleged contemnor had knowledge of order said to be violated; alleged contempt did in fact violate order; and order violated was specific and definite. Willfulness is not element of contempt and intent to disobey is irrelevant, except that any request for punitive damages must show that contemnors actions were particularly egregious and punitive damages are necessary to deter future conduct. Debtor demonstrated that State had notice of bankruptcy filing and continued to debit prison account which constituted violation of both automatic stay (pre-discharge) and discharge injunction (post-discharge). Damages awarded in the amount of \$87.72 deducted from account plus \$26.58 in costs for bringing the Motion.
- (606) *Springer RNBj RTO, LLC*, 2017 WL 3575859 (Bankr. W.D. Ky. 2017) – Creditor violated automatic stay by continuing to debit Debtor's checking account for post-petition furniture rental payments before lease was assumed by Debtors; by refusing to return post-petition payments; and by attempting to repossess rented furniture without seeking stay relief, filing a Motion to Compel Assumption or Rejection, or filing Motion to allow Setoff. Section 362(k)(1) allows punitive damages if creditor's conduct was egregious, vindictive or intentionally malicious. Creditor was sophisticated business involved in retail furniture rental and must have encountered bankruptcy in the past, yet neither anyone at creditor or any of creditor's attorneys apparently know anything about bankruptcy and creditor had no effective procedures in place to deal with bankruptcy filings amounting to willful and egregious act warranting punitive damages. Creditor's attempt to repossess furniture notwithstanding actual knowledge of bankruptcy filing coupled with multiple post-petition debits, post-petition phone calls, and one trip to Debtor's residence, constituted 10 stay violations with punitive damages of \$500 per violation or a total of \$5,000.
- (607) *Lansaw v. Zokaite*, Case No. 16-1867 (3d Cir. 2017) – Section 362(k) allows court to award damages against person who violates stay including damages for emotional distress and, in appropriate circumstances, punitive damages. Party seeking to recover for emotional distress bears burden to demonstrate distress and establish causal relationship. Professional testimony such as corroborating medical testimony is not necessary where creditor's conduct is so egregious as to support plaintiff's credible testimony that distress resulted. Court would consider other sources of stress in Debtor's life in attempt to determine degree of distress caused by defendant's conduct and discount total stress related damages accordingly. Creditor, Debtor's business landlord, violated stay by, after filing, visiting Debtor's day care business, taking pictures of children and parents in facility, and physically backing Debtor against wall. A few days later, creditor entered business after hours and removed Debtor's personal property and padlocked the doors in effort to prevent Debtor from entering. Debtor had to call police who persuaded creditor to let Debtor enter building to remove parent contact information but refused to allow business to open or for Debtor to remove any other property. Creditor then sent note that creditor would not unchain doors unless Debtors stated that creditor had not committed any assault, Debtor reaffirmed lease with landlord, and Debtors ceased removing property from premises. Creditor then took Debtor's keys to the facility which also included Debtor's car keys and refused to return keys. Landlord then stated that unless Debtor signed new lease, he would file state court complaint for eviction, including copy of complaint in letter to Debtor's attorney. When Debtors entered into new lease with new landlord, Creditor approached new landlord in effort to induce landlord to break new lease, thereby forcing Debtor to sign new lease with Creditor. Creditor's conduct was sufficiently extreme that emotional distress would likely result and Debtor's testimony regarding distress was sufficient to warrant award of damages for emotional distress, plus punitive damages in light of Creditor's attempts to downplay violations at trial, and where amount was consistent with due process based on degree of Creditor's reprehensibility, disparity between harm to Debtor and amount of award, and difference between punitive damages awarded in this case versus other comparable cases. Punitive damages of \$40,000 warranted given egregious nature of conduct and actual damages including attorney fees totaled only \$10,100, which may not be sufficient to deter future conduct.
- (608) *In re Roberson*, 2016 WL 6783301 (Bankr. N.D. Ohio 2016) – Landlord who continues eviction proceeding post-petition and with knowledge of bankruptcy filing willfully violates stay warranting imposition of sanctions. Landlord willfully violated stay when landlord takes actions in violation of stay, at a time when landlord has actual notice of the bankruptcy filing, acts in a willful manner, and causes actual damages. Willful does not require ill will or specific intent to violate stay, but only an intentional act that violates stay by a party aware of the filing. Landlord was advised by voice mail left at landlord's office of bankruptcy filing, and thereafter (1) caused a notice of leave premises to be delivered; (2) send an e-mail to Debtors attempting to collect pre-petition balance due on rent; (3) sent another e-mail also attempting to collect pre-petition rent; (4) caused a second notice to leave premises to be served; and (5) engaged attorney who sent collection letter for pre-petition balance due. Actions were willful as landlord had actual knowledge of filing. Where actions are willful, award of actual

damages is mandatory, but must be damages caused by the violation itself. Debtors entitled to recover attorney fees but not entitled to recover costs of moving where there was on specific testimony on amount of expenses incurred, and moving expenses were incurred after Debtors received discharge which terminated automatic stay without further order of court and Debtors had indicated in initial filing intention to reject the lease. Party seeking damages must also prove efforts to mitigate damages. Although Debtor's counsel perhaps could have cut off landlord's actions by simple phone call, attorney instead chose to file Motion for Sanctions, which generally evidences lack of effort to mitigate. However, where facts indicate that landlord would not have been likely to desist even if attorney had called, Debtors cannot be faulted for failing to mitigate, sufficient to award attorney fees incurred in prosecuting motion. Debtors not entitled to non-economic damages absent presentation of sufficient evidence to indicate that Debtors suffered anything more than fleeting or inconsequential distress or embarrassment. Debtors not entitled to punitive damages where landlord's conduct, while willful, was not particularly egregious or vindictive or intentionally malicious. Evidence indicated that to extent landlord failed to abide by stay, that was result of sloppiness or breakdown of landlord's internal procedures that prevented notice of bankruptcy filing from reaching correct person who would have halted eviction process.

- (609) *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.
- (610) *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.
- (611) *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.
- (612) *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.
- (613) *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.
- (614) *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.

- (615) *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.
- (616) *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.
- (617) *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.
- (618) *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.
- (619) *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.
- (620) *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.

- (621) *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.
- (622) *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”.
- (623) *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.
- (624) *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.

3.141 Sanctions - Parties Liable

- (625) *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.
- (626) *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.

3.142 Sanctions – Attorney Fees

- (627) *Springer RNBJ RTO, LLC*, 2017 WL 3575859 (Bankr. W.D. Ky. 2017) – Creditor violated automatic stay by continuing to debit Debtor’s checking account for post-petition furniture rental payments before lease was assumed by Debtors; by refusing to return post-petition payments; and by attempting to repossess rental furniture without seeking stay relief, filing a Motion to Compel Assumption or Rejection, or filing Motion to allow Setoff. Section 362(k) allows imposition of sanctions equal to actual damages including attorney fees resulting from violations, including out of court attorney fees in effort to resolve matters without litigation as well as litigation fees themselves.
- (628) *In re Tucker*, Case No. 16-1127 (Bankr. N.D. Iowa 2017) – Although Section 1301 is silent on issue of sanctions for violation of Codebtor stay, Section 105 provides basis for Bankruptcy Court to award sanctions for violation of Codebtor stay. Wife filed individual Chapter 13 petition. Post-petition, power company sued husband for Bill owed by husband and wife, and then began garnishing husband’s salary. Husband twice notified power company of bankruptcy proceeding and Codebtor stay at power company continued garnishment. Garnishment cause Debtor to miss Plan payments and mortgage payments. Court concluded that Section 105 Allows Court to impose sanctions as appropriate to carry out and give meaning to Section 1301. Court awarded \$1500 for “emotional upset and needless stress” and \$1400 in attorney fees.
- (629) *Lansaw v. Zokaite*, Case No. 16-1867 (3d Cir. 2017) – Section 362(k) allows court to award damages against person who violates stay including damages for emotional distress and, in appropriate circumstances, punitive damages. Party seeking to recover for emotional distress bears burden to demonstrate distress and establish causal relationship. Professional testimony such as corroborating medical testimony is not necessary where creditor’s conduct is so egregious as to support plaintiff’s credible testimony that distress resulted. Court would consider other sources of stress in Debtor’s life in attempt to determine degree of distress caused by defendant’s conduct and discount total stress related damages accordingly. Creditor, Debtor’s business landlord, violated stay by, after filing, visiting Debtor’s day care business, taking pictures of children and parents in facility, and physically backing Debtor against wall. A few days later, creditor entered business after hours and removed Debtor’s personal property and padlocked the doors in effort to prevent Debtor from entering. Debtor had to call police who persuaded creditor to let Debtor enter building to remove parent contact information but refused to allow business to open or for Debtor to remove any other property. Creditor then sent note that creditor would not unchain doors unless Debtors stated that creditor had not committed any assault, Debtor reaffirmed lease with landlord, and Debtors ceased removing property from premises. Creditor then took Debtor’s keys to the facility which also included Debtor’s car keys and refused to return keys. Landlord then stated that unless Debtor signed

new lease, he would file state court complaint for eviction, including copy of complaint in letter to Debtor's attorney. When Debtors entered into new lease with new landlord, Creditor approached new landlord in effort to induce landlord to break new lease, thereby forcing Debtor to sign new lease with Creditor. Creditor's conduct was sufficiently extreme that emotional distress would likely result and Debtor's testimony regarding distress was sufficient to warrant award of damages for emotional distress, plus punitive damages in light of Creditor's attempts to downplay violations at trial, and where amount was consistent with due process based on degree of Creditor's reprehensibility, disparity between harm to Debtor and amount of award, and difference between punitive damages awarded in this case versus other comparable cases. Punitive damages of \$40,000 warranted given egregious nature of conduct and actual damages including attorney fees totaled only \$10,100, which may not be sufficient to deter future conduct.

- (630) *In re Banks*, Case No. 16-53113 (Bankr. E.D. Mi. 2016) – Individual Debtor injured by willful violation of automatic stay under Section 362(k)(1) entitled to actual damages including costs and attorney's fees and, in appropriate circumstances, punitive damages. Creditor willfully violates stay where creditor repossesses vehicle prepetition and refuses to return vehicle post-petition despite fact that creditor has actual knowledge of bankruptcy case. Willful violation does not require proof of specific intent to violate stay, but rather intentional violation by party aware of bankruptcy filing. Violation of automatic stay is willful when creditor knows of stay and violates stay by intentional act. Sanctions awarded in the amount of \$1622.14 representing cost to rent replacement vehicle and attorney's fees incurred in prosecuting motion.
- (631) *In re Roberson*, 2016 WL 6783301 (Bankr. N.D. Ohio 2016) – Landlord who continues eviction proceeding post-petition and with knowledge of bankruptcy filing willfully violates stay warranting imposition of sanctions. Landlord willfully violated stay when landlord takes actions in violation of stay, at a time when landlord has actual notice of the bankruptcy filing, acts in a willful manner, and causes actual damages. Willful does not require ill will or specific intent to violate stay, but only an intentional act that violates stay by a party aware of the filing. Landlord was advised by voice mail left at landlord's office of bankruptcy filing, and thereafter (1) caused a notice of leave premises to be delivered; (2) send an e-mail to Debtors attempting to collect pre-petition balance due on rent; (3) sent another e-mail also attempting to collect pre-petition rent; (4) caused a second notice to leave premises to be served; and (5) engaged attorney who sent collection letter for pre-petition balance due. Actions were willful as landlord had actual knowledge of filing. Where actions are willful, award of actual damages is mandatory, but must be damages caused by the violation itself. Debtors entitled to recover attorney fees but not entitled to recover costs of moving where there was on specific testimony on amount of expenses incurred, and moving expenses were incurred after Debtors received discharge which terminated automatic stay without further order of court and Debtors had indicated in initial filing intention to reject the lease. Party seeking damages must also prove efforts to mitigate damages. Although Debtor's counsel perhaps could have cut off landlord's actions by simple phone call, attorney instead chose to file Motion for Sanctions, which generally evidences lack of effort to mitigate. However, where facts indicate that landlord would not have been likely to desist even if attorney had called, Debtors cannot be faulted for failing to mitigate, sufficient to award attorney fees incurred in prosecuting motion. Debtors not entitled to non-economic damages absent presentation of sufficient evidence to indicate that Debtors suffered anything more than fleeting or inconsequential distress or embarrassment. Debtors not entitled to punitive damages where landlord's conduct, while willful, was not particularly egregious or vindictive or intentionally malicious. Evidence indicated that to extent landlord failed to abide by stay, that was result of sloppiness or breakdown of landlord's internal procedures that prevented notice of bankruptcy filing from reaching correct person who would have halted eviction process.
- (632) *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.
- (633) *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.
- (634) *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.
- (635) *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).
- (636) *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.

- (637) *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.
- (638) *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.
- (639) *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.

3.143 Sanctions – Appellate Attorney Fees

- (640) *Weary v. Poteat*, 2015 WL 4747883 (E.D. Tn. 2015), *affid*, 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.

3.144 Void and Voidable

- (641) *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.
- (642) *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.
- (643) *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 and 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.
- (644) *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.
- (645) *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.
- (646) *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.

3.145 Procedural Requirements

- (647) *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.

3.146 State Law Remedies

- (648) *Bednar v. Pierce & Associates, PC*, Vase No. 16-638 (N.D. Ill. 2016) – Bankruptcy Code preempts state law where claim would not exist but for some violation of Bankruptcy Code. Debtor could not bring action under State Consumer Protection Act for Creditor's alleged violation of stay as violation of stay was uniquely bankruptcy related and Code provided its own remedy. State law preempted to extent that claim was based on violation of Section 362.

H. Extension of Automatic Stay

3.147 When Necessary

- (649) *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.
- (650) *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.
- (651) *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.
- (652) *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.
- (653) *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.
- (654) *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.
- (655) *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.

3.148 Timing of Motion and Hearing

- (656) *In re Riffle*, Case No. 17-42572 (Bankr. E.D. Mi. 2017) – Section 362(c)(3)(B) requires Motion to Extend Automatic Stay to be filed sufficiently in advance of 30 day hearing deadline to allow Court to give proper notice to creditors of hearing. Local Bankruptcy Rule 4001-4 (a) requires any Motion to Extend State to be filed within 7 days after bankruptcy petition is filed. Motion filed 25 days after petition date was untimely under Local Bankruptcy capital 4001-4 and was only 3 business days before expiration of the 30 day hearing deadline, rendering it impossible for Court to scheduling conclude hearing on Motion within required 30 day period. Motion to Extend Automatic Stay denied.
- (657) *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).
- (658) *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.
- (659) *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.
- (660) *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.
- (661) *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.
- (662) *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).
- (663) *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.

- (664) *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.

3.149 Grounds for Denial

- (665) *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.
- (666) *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.
- (667) *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.
- (668) *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).
- (669) *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.
- (670) *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).
- (671) *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.
- (672) *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.

3.150 Grounds for Extension

- (673) *In re Spencer*, 2017 WL 2303958 (Bankr. W.D. Mi. 2017) – Court's Order in refiled case extending the automatic stay necessarily requires finding that second case was filed in good faith. Thus, even if Debtors lacked good faith in first case, lack of good faith in first case did not warrant lifting of stay in second case.

- (674) *In re Bieniek*, 2016 WL 6903421 (Bankr. N. D. Ohio 2016) – In determining whether Debtor rebuts presumption of bad faith, courts consider totality of circumstances including reasons why prior Chapter 13 plan failed and what has changed in Debtor’s circumstances so that present plan is likely to be successful. Debtor that can make showing of changed circumstances or show that present case is likely to be successful rebuts presumption and is entitled to extension of stay. Debtors’ prior case was confirmed when both Debtors were employed and Debtors made all plan payments until Debtor-husband lost his job, leaving the unable to complete payments. Debtor-husband has new employment and a Schedule I reflects current income greater than Debtors’ income in first case when confirmed showing that Debtors’ current plan is likely to be successful.
- (675) *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.

3.151 Effect of Expiration of Stay

- (676) *In re Bender*, Case No. 16-73280 (Bankr. E.D.N.Y. 2017) – Termination of Automatic Stay under Section 362(c)(3)(A) terminates stay entirely as to Debtor, Debtor’s property and property of estate.
- (677) *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.
- (678) *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).
- (679) *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.
- (680) *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.
- (681) *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.
- (682) *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).
- (683) *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.
- (684) *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.

3.152 “Re-imposition” of Expired Stay

- (685) *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.

- (686) *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

3.153 When Necessary

- (687) *Brantley v. CitiMortgage, Inc.*, 2017 WL 521549 (S.D. Ohio 2017) – Where Debtor had three other bankruptcy petitions dismissed in one year prior to filing current petition, no Stay came into effect upon the filing of the current petition. Accordingly, lender did not violate stay and there was no basis to impose sanctions where lender proceed with foreclosure sale shortly after Debtor filed bankruptcy petition.
- (688) *In re Skoglund*, 2014 WL 1089865 (Bankr. W.D. Mi. 2014) – Imposition of stay not applicable where although Debtor had two pending cases in prior year, only one case was dismissed and second case resulted in discharge. Section 362(c)(4) applies only where Debtor had two prior cases dismissed within prior year.
- (689) *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).
- (690) *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.

3.154 Timing of Motion and Hearing

- (691) *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.

3.155 Grounds for Denial

- (692) *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.
- (693) *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.

3.156 Grounds for Imposition

3.157 Order Confirming No Stay in Effect

- (694) *In re Nevils*, Case No. 17-42339 (Bankr. E.D. Mi. 2017) - Under Section 362(c)(4), if individual Debtor had 2 or more bankruptcy case is dismissed within previous year before filing present case, automatic stay does not go into effect on filing of such present case. Debtor had two separate bankruptcy cases dismissed within one year preceding filing of case resulting in no automatic stay in case and rendering it unnecessary for Court to conduct hearing regarding Initial Statement About Eviction Judgment Against You, Official Form 101A. Court would issue Order confirming that no stay is in effect under Section 362(c)(4).
- (695) *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.

3.158 Effect of Failure to Impose Stay

- (696) *In re Nevils*, Case No. 17-42339 (Bankr. E.D. Mi. 2017) - Under Section 362(c)(4), if individual Debtor had 2 or more bankruptcy case is dismissed within previous year before filing present case, automatic stay does not go into effect on filing of such present case. Debtor had two separate bankruptcy cases dismissed within one year preceding filing of case resulting in no automatic stay in case and rendering it unnecessary for Court to conduct hearing regarding Initial Statement About Eviction Judgment Against You, Official Form 101A. Court would issue Order confirming that no stay is in effect under Section 362(c)(4).

- (697) *Brantley v. CitiMortgage, Inc.*, 2017 WL 521549 (S.D. Ohio 2017) – Where Debtor had three other bankruptcy petitions dismissed in one year prior to filing current petition, no Stay came into effect upon the filing of the current petition. Accordingly, lender did not violate stay and there was no basis to impose sanctions where lender proceed with foreclosure sale shortly after Debtor filed bankruptcy petition.
- (698) *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”.
- (699) *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.
- (700) *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.

3.159 Re-imposing Stay After Grant of Stay Relief

- (701) *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

3.160 Non-Applicability of Stay

- (702) *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

3.161 Generally

- (703) *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.
- (704) *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.

3.162 Procedure

- (705) *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.
- (706) *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, 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

3.163 Dismissal of Bankruptcy Case

- (707) *WD Equipment v. Cowen*, Case No. 15-1413 (10th Cir. 2017) - Court retains jurisdiction to impose damages for violation of automatic stay even after underlying bankruptcy case is dismissed. Court must retain power to compensate victims of violation of automatic stay and punish violators.

3.164 Non-Bankruptcy Court Jurisdiction

- (708) *McClafferty v. DeWine*, 2017 WL 1379344 (Bankr. N.D. Ohio 2017) - Although State Court has concurrent jurisdiction to determine whether automatic stay precludes prosecution of State Court litigation, *Rooker-Feldman* does not preclude bankruptcy courts review applicability of automatic stay to State Court litigation. *Rooker-Feldman* does not apply where a federal plaintiff presents some independent claim, even one that denies legal conclusion that a State Court reached in a case to which plaintiff was party. Dispute regarding applicability of automatic stay subject to Bankruptcy Court review where, if State Court erroneously concluded that stay did not apply, proceedings which continued we constitute violation of automatic stay and would be void. Prohibition against Federal Court reviewing Final Judgment of State Court does not apply where proceedings were void and, therefore, there is no Final Judgment of State Court.
- (709) *United States v. Vanguard Healthcare LLC*, 2017 WL 959356 (M.D. Tn. 2017) – Court in which litigation is pending has jurisdiction to determine whether action is excepted from scope of automatic stay. Party is not required to seek relief from stay to pursue action which is excepted from the scope of the automatic stay in first instance. District Court concluded that Federal government action under False Claims Act was excepted from automatic stay under police power exception eliminating requirement for creditor to seek relief from automatic stay in order to continue prosecution.
- (710) *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 Sect. 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) *Caldwell v. Kaufman Englett & Lynd, PLLC*, Case No. 16-662 (M.D. Fl. 2017) – Although attorneys constitute “debt relief agencies” and are prohibited from advising client to incur more debt in contemplation of bankruptcy, retention agreement that called for client to pay \$1700 retainer by using credit card did not violate Section 526(a)(4). Section 526 requires that lawyer encourage Debtor to incur additional debt with some improper motive. Section 526 does not prevent a Debtor from incurring additional debt for a valid purpose. Mere use of credit card to pay prepetition retainer is not advising Debtor to incur debt for improper purpose and does not violate Section 526.
- (351) *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.
- (352) *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

- (353) *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.
- (354) *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.
- (355) *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
- (356) *Cash Now X v. Mozee*, Case No. 17-4191 (Bankr. E.D. Mi. 2017) - Corporation must be represented by attorney in Federal Court. Corporate officers and shareholders, as laypeople, may not represent separate legal entity. Adversary proceeding commenced by principles of plaintiff where no attorney signed complaint on behalf of plaintiff must be dismissed.
- (357) *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.
- (358) *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.
- (359) *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.
- (360) *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.
- (361) *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.
- (362) *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.
- (363) *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.
- (364) *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

- (365) *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.
- (366) *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.
- (367) *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

- (368) *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

- (369) *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

- (370) *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

- (371) *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.
- (372) *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.
- (373) *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.
- (374) *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.
- (375) *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

- (376) *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.
- (377) *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.

- (378) *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.
- (379) *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.
- (380) *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.
- (381) *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.
- (382) *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.
- (383) *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".
- (384) *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.
- (385) *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.
- (386) *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.
- (387) *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.
- (388) *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.
- (389) *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.
- (390) *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.

- (391) *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".
- (392) *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.
- (393) *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.
- (394) *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.
- (395) *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

- (396) *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

- (397) *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

- (398) *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

- (399) *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

- (400) *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.
- (401) *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.
- (402) *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

- (403) *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

- (404) *In re Vandesande*, 2017 WL 474320 (Bankr. N.D. Ohio 2017) - Section 329 allows Court to void fee agreement to extent that the agreement provides for excessive compensation. Fee agreement signed by Debtor provided for hourly rate that exceeds reasonable hourly rate and excluded basic bankruptcy services from initial “flat fee”. Court would not cancel fee agreement where counsel for Debtor was not seeking to actually recover fees for “excluded” services and had limited hourly rate to actual, reasonable hourly rate under circumstances; and counsel had provided adequate services to justify initial “flat fee” received prior to commencement of case. Fee agreement canceled to extent that it does not require counsel to include in initial fee services necessary to complete chapter 7 case. Exclusion from “flat fee” for routine bankruptcy services stricken other than for objections to discharge, adversary proceedings or heavily contested matters, or other services not contemplated when fee agreement was signed, and limiting hourly rate for excluded services to reasonable hourly rate.
- (405) *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.
- (406) *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.
- (407) *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.
- (408) *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.

- (409) *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.
- (410) *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.
- (411) *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.
- (412) *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 to 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”.
- (413) *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”.
- (414) *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.
- (415) *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.

- (416) *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.
- (417) *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.
- (418) *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.
- (419) *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.
- (420) *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

- (421) *In re Mann*, 2017 WL 3575899 (Bankr. W.D. Ky. 2017) – Rule 2016 requires attorney who represents Debtor to file disclosure of compensation received. However, attorney who did not represent Debtor and who had no meaningful communication with Debtor not required to file where attorney was not aware that case had been filed. Debtor obtained official Petition, Schedules and other Chapter 7 forms and filled them out himself. Debtor then contacted attorney and asked for advice on how to fill out paperwork. Attorney met Debtor one time, reviewed forms, suggested some changes and received \$200.00. Disgorgement not warranted where Attorney had no further contact with Debtor and did not know that Debtor even filed for relief until attorney received UST Motion for Disgorgement, and attorney immediately filed Rule 2016 disclosure.
- (422) *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.
- (423) *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.
- (424) *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.
- (425) *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.

- (426) *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.
- (427) *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 2016(b) 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 2016(b) because those fees were properly disclosed in 2016(b) statement, but must disgorge all fees received directly from Debtor and would be denied any request for additional compensation in Chapter 13 case.
- (428) *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

- (429) *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.
- (430) *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

- (431) *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

- (432) *Tann v. Pees*, 2017 WL 3599568 (Bankr. S.D. Ohio 2017) – Attorney for Debtor in Chapter 13 case is not entitled to compensation from estate for services in prosecuting claim against third party where attorney was never retained by estate. Once case was filed, Debtor lacked standing to represent estate and attorney for debtor lacked authority to represent estate unless retention by Trustee is approved by Judge. After filing, debtor’s counsel continued for three years to prosecute action absent third party. After three years of litigation, Trustee stepped in and settled the action. Attorney for debtor lacked any legal claim to proceeds of property of estate as attorney never represented estate and debtor was not authorized to prosecute action on behalf of estate. Attorney also lacked any equitable claim to proceeds where attorney was not retained by Trustee and Debtor’s Motion to Retain Counsel on behalf of estate was denied by Court.
- (433) *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

- (434) *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.
- (435) *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.

- (436) *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

- (437) *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

- (438) *In re Long*, 2016 WL 6884305 (Bankr. W.D. Mi. 2016) – Court has authority to determine reasonableness of fee application even when filed post-plan completion. Court would not determine whether fees were discharged under Section 1328 where Debtors agreed to voluntarily pay the fees as determined by the Court. Discharge does not prevent Debtors from voluntarily paying claims, even claims that were discharged in bankruptcy case.
- (439) *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.
- (440) *In re Mears*, 2016 WL 2899459 (Bankr. W.D. Mi. 2016), *aff’d*, 2017 WL 1190554 (W.D. Mi. 2017) – 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.

- (441) *Cripps v. Foley*, 2016 WL 2899459 (Bankr. W.D. Mi. 2016), *aff'd*, 2017 WL 1190554 (W.D. Mi. 2017) – 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.
- (442) *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.
- (443) *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.
- (444) *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.
- (445) *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

- (446) *In re Fairnot*, 2017 WL 3605341 (Bankr. E.D. Mi. 2017) – Fee application in Chapter 13 filed before confirmation of plan is premature as court cannot determine whether services provided any benefit to Debtor, estate or creditors. Fact that Application discloses that Debtor has no intention of seeking to confirm a plan and no intention of converting but instead plans on voluntarily dismissing case does not make fee application any less premature. Attorney can file fee application following pre-confirmation dismissal and Trustee will pay finds from funds on hand at dismissal.
- (447) *In re Williams*, Case No. 16-46249 (Bankr. E.D. Mi. 2016) - Fee application filed an Chapter 13 case prior to disposition of case, either by confirmation of plan, conversion or dismissal, is premature. Motion did not state or demonstrate any good cause for Court to consider fee application prior to disposition of case. Fee application denied without prejudice.
- (448) *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

- (449) *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.
- (450) *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

- (451) *In re Horvath*, 2017 WL 1017727 (Bankr. N.D. Ohio 2017) – Section 327 Allows Court to approve retention of attorney that does not hold or represent interest adverse to estate and is disinterested. “Disinterested person” is defined as a person who does not have any interest that is materially adverse to interest of the estate, creditors or equity security holders. Interest is “adverse to the estate” if attorney possesses or asserts any economic interest that would tend to lessen value of bankruptcy estate or create actual or potential dispute in which estate is rival

claimant, or possesses a predisposition under circumstances that render a bias against the estate. However, Section 327(c) provides that person is not disqualified solely because of person's employment by or representation of creditor absent objection by another creditor. Court can also deny compensation under Section 328 if at any time during the person's employment the person is not a disinterested person or represents or holds interest adverse to interest of the estate with respect to matter on which professional is employed. Counsel fully disclosed at time of initial retention that counsel was associated with firm and that firm represented creditor in unrelated matters and confirmed with Trustee that if Trustee were to seek relief against specific creditor, Trustee would need to employ separate counsel. There was no indication of actual conflict of interest at time of retention and no Creditor objected to retention in first instance. There was no indication of course of case that any actual conflict of interest arose Trustee's assertion that communications between Trustee and particular creditor were privileged under "common interest privilege" where communications related to creditor's claims that were independent of and had no relationship to claims of other creditors and did not demonstrate that Trustee was attempting to prefer one creditor over remaining creditors.

- (452) *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.
- (453) *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.
- (454) *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.
- (455) *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.

- (456) *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

- (457) *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.
- (458) *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

- (459) *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.
- (460) *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.
- (461) *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.
- (462) *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.
- (463) *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.
- (464) *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.
- (465) *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

- (466) *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.
- (467) *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.
- (468) *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.

- (469) *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.
- (470) *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.
- (471) *In re Waldo*, Case No. 09-30969 (Bankr. E.D. Tn. 2009) – Attorney claiming fees bears burden to prove that fees requested are reasonable.
- (472) *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.
- (473) *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.
- (474) *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

- (475) *In re Luark*, Case No. 14-32209 (Bankr. E.D. Mi. 2016) – Lodestar uses reasonable number of hours expended multiplied by reasonable hourly rate. Court can consider novelty and difficulty of issues presented; special skills of counsel; results obtained; and whether fee requested is commensurate with fees for similar fees for professional services in non-bankruptcy cases. Court can also take into account typical compensation for attorneys in Chapter 13 cases.
- (476) *In re Johnson*, Case No. 14-31791 (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.
- (477) *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.
- (478) *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.

- (479) *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.
- (480) *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.
- (481) *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.
- (482) *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.
- (483) *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.
- (484) *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.
- (485) *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.
- (486) *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.
- (487) *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.

- (488) *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.
- (489) *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.
- (490) *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.
- (491) *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.
- (492) *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.
- (493) *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.

- (494) *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.
- (495) *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.
- (496) *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 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.
- (497) *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.
- (498) *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 spent 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.
- (499) *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.
- (500) *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 recognize that the second mortgage could be avoided; Debtors' attorney should have 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.
- (501) *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”.

- (502) *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

- (503) *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.
- (504) *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.
- (505) *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.

- (506) *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.
- (507) *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.
- (508) *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.
- (509) *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.
- (510) *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.
- (511) *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.
- (512) *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.

- (513) *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.
- (514) *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

- (515) *In re Peterson*, 2017 WL 1319733 (Bankr. M.D. Tn. 2017) – Section 330 charges Court with independent duty to review all fee applications to ensure the requested fees are reasonable, necessary and justified. Section 327(d) addresses strict limitation when Trustee is authorized to also serve as attorney for estate, preventing attorney-Trustee from separately, and doubly, being compensated for services. And imposes on Court heightened duty of independent review to ensure that there is no conflict or impropriety in administration of estate. Duties assigned to Trustee under Section 704 and associated duties may not be delegated or relinquished to professionals and time spent by professionals in performing those duties is not compensable. Trustee demonstrated total misunderstanding, if not blatant disregard, of issues regarding compensation for Trustee who also serves as attorney for Trustee. Fees requested as attorney for Trustee plus statutory compensation for Trustee told over 50% of estate receipts while creditors would receive 2.82%. Trustee was unable to answer questions in manner which would justify request for fees. Further, services include services for which an attorney was not necessary including stipulating to an adjourned hearing on the Motion for Relief from Stay where it was creditors responsibility, not Trustee’s responsibility, to prosecute that matter; Trustee should not have had to expend professional time dealing with a motion for relief from automatic stay where property was held as tenants by the entireties out of reach of Trustee for purposes of administration and creditor asserted there was no equity in property, as Trustee should have been more than familiar with applicable law on these issues and should not have needed professional assistance to perform most perfunctory task of reviewing Motion. Trustee would not be allowed compensation for services within scope of Trustee’s responsibility including phone calls to counsel for lienholders; employment professionals; correspondence regarding commissions as assets of the estate; attending hearing and third-party bankruptcy on behalf of the estate; reviewing mail-in documents from financial institutions; filing a motion to extend discharge objection deadline; administrative objection to closure of case; agreement regarding stay relief lienholders; initial review of bank statements; initial meeting/conferences regarding possible Ponzi scheme; and preparation of fee application for special counsel and accountant. Trustee could not articulate with specificity any particular complexity, novelty or unique circumstances surrounding the matter such as to require assistance of counsel. Trustee also failed to exercise business judgment in allocating professional resources or exercise of appropriate billing judgment. Billing judgment requires delegation of tasks so as to avoid charging estate inflated rate for task that could and should be performed by less costly employee.
- (516) *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.
- (517) *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.
- (518) *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

- (519) *In re Horvath*, 2017 WL 1017727 (Bankr. N.D. Ohio 2017) – Bankruptcy Code permits Trustee, with Court approval, to retain counsel to assist Trustee in carrying out Trustee duties and to award counsel reasonable compensation for actual, necessary services rendered and actual, necessary expenses. Reasonableness of fees as determined by lodestar analysis in which Court determines number of hours reasonably expended multiplied by a reasonable hourly rate. Party seeking compensation must provide sufficient documentation in support of hours charged containing sufficient detail and probative value to enable Court to determine with high degree of certainty that hours were actually and reasonably expended. If documentation is inadequate, Court may reduce award. Time entries dealing with telephone calls, meetings and correspondence were sufficiently particular where entries indicated general subject matter involved and allowed Court to make necessary determination with high degree of certainty that hours charged were actually expended and reasonable.
- (520) *In re Peterson*, 2017 WL 1319733 (Bankr. M.D. Tn. 2017) – Section 330 Charges Court with independent duty to review all fee applications to ensure the requested fees are reasonable, necessary and justified. Fee Application must contain sufficient descriptions to allow Court to determine reasonableness of time expended and amount charged. Professionals who lump time together or have inadequate descriptions, such as "research", "work in motion", "telephone calls to counsel for creditor", do so at their peril and Court should not be expected to intuit benefit of such work to estate. Court would not award compensation for time entries that were "so utterly lacking that it is impossible to determine if the services are in the nature of Trustee services, legal fees, clerical duties, or within the scope of professional employment." Description such as "finish reviewing boxes" did not describe contents of boxes, sources of boxes, or whether "review" was of contents of boxes or boxes themselves. Trustee's "lackadaisical approach" presented 28 different time entries totaling more than \$7700 in requested but unsubstantiated fees for which compensation would be denied in its entirety.
- (521) *In re Johnson*, Case No. 14-31791 (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.
- (522) *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.
- (523) *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.
- (524) *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.
- (525) *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.

- (526) *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

- (527) *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.
- (528) *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

- (529) *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.
- (530) *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.
- (531) *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.
- (532) *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.
- (533) *Mike Vaughn Custom Sports, Inc. v. Piku*, 2015 WL 4603171 (E.D. Mi. 2015) – For lodestar purposes, reasonably 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.

- (534) *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.
- (535) *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.
- (536) *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.
- (537) *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.
- (538) *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.
- (539) *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.
- (540) *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.
- (541) *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.
- (542) *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.
- (543) *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.
- (544) *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

- (545) *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 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.

- (546) *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.
- (547) *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.
- (548) *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.
- (549) *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”.
- (550) *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.
- (551) *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.
- (552) *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.

- (553) *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.
- (554) *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.
- (555) *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.
- (556) *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.
- (557) *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

- (558) *In re Peterson*, 2017 WL 1319733 (Bankr. M.D. Tn. 2017) – Section 330 Charges Court with independent duty to review all fee applications to ensure the requested fees are reasonable, necessary and justified. Counsel is not entitled to compensation for clerical services performed

every day by nonlegal staff of law firms where no legal analysis is required, tasks are simple and require no advanced educational abilities, and there has been no explanation offered why ministerial tasks required expertise of attorney. To the extent services are compensable at all, tasks should be charged at clerical staff, not attorney, hourly rate.

- (559) *In re Reif*, Case No. 15-21097 (Bankr. E.D. Mi. 2017) – Clerical services relating to scanning and e-mailing documents are compensable at staff rate rather than attorney rate even if attorney performed scanning and e-mailing. Hourly rate reduced from \$150 to \$50 for time spent scanning and e-mailing.
- (560) *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.
- (561) *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.
- (562) *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.
- (563) *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.
- (564) *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.
- (565) *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.
- (566) *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.
- (567) *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.
- (568) *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.
- (569) *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

- (570) *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.

- (571) *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.
- (572) *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

- (573) *In re Horvath*, 2017 WL 1017727 (Bankr. N.D. Ohio 2017) – To be compensable, attorneys time must relate to service that is reasonably likely to benefit estate or is necessary to administration of bankruptcy case. Question is not whether services performed can for actual benefit, but whether, when viewed under circumstances in existence at time, services were reasonably calculated to benefit estate. Services may be necessary to administration of case without financially benefiting estate. Services performed in seeking proposed compromise of complex State Court litigation were reasonably calculated to produce benefit to estate where issues involved were complex and involved ownership of potentially significant asset of estate, sale of which would have produced significant benefit to estate. While Court ultimately denied motion to approve compromise, Trustee’s assessment of value of State Court claims and proceedings was reasonable given lack of funds to pursue litigation and settlement was denied based on ambiguities and inconsistencies which, if clarified, may have resulted in approval of the compromise. While efforts in selling State Court litigation were unsuccessful, services rendered were reasonably calculated to benefit estate at time services were rendered.
- (574) *In re Johnson*, Case No. 14-31791 (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.
- (575) *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.
- (576) *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.
- (577) *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 off 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.
- (578) *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.

- (579) *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.
- (580) *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.
- (581) *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.
- (582) *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.
- (583) *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.
- (584) *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.
- (585) *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.
- (586) *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.
- (587) *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.

- (588) *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.
- (589) *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.
- (590) *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.
- (591) *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

- (592) *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”

- (593) *In re Hungry Horse LLC*, Case No. 16-11222 (Bankr. D.N. Mx. 2017) – *ASARCO* does not preclude Court from awarding fees for defense of fee application where initial Application for Retention attached retainer agreement that specifically allowed attorneys to recover fees for prosecuting and defending fee applications and Court approved retention on those terms. Court rejected *Boomerang Tube* and limited *ASARCO* where terms of retention specifically allowed compensation bringing matter within scope of Section 328 rather than more general provision of Section 330.
- (594) *Blixseth v. Yellowstone Mountain Club*, Case No. 12-35986 (9th Cir. 2017) - Party awarded attorney fees under “fee-shifting” provision in contract or statute may also recover attorney fees in attempting to collect fees awarded pursuant to “fee-shifting” provision. 28 USC Section 1927 is “fee-shifting” provision allowing award of fees-on-fees. Thus, party is entitled to recover cost of establishing right to and amount of attorney's fees to be awarded under Section 1927.
- (595) *In re Rose*, 2016 WL 6993738 (Bankr. W.D. Mi. 2016) – *Asarco* precludes award of attorney fees for time spend defending prior fee application. Services are performed for benefit of counsel and do not produce benefit to estate. Contractual clause requiring Debtor to pay fees does not create exception as counsel is not seeking fees from the Debtor, but from the estate, which is not party to and is not bound by terms of retainer agreement. Services to review Trustee's objections to fee application; analyze trustee's objection to fee application and calculate possible settlement scenarios; researching Section 704 cases to determine if trustee has right to object to fee application; letter to client advising of hearing on fee application, preparing for and attending the hearing, and analyzing disallowance and notes from court's bench opinion are services rendered in connection with prosecution of fee application and are not compensable.
- (596) *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.
- (597) *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.
- (598) *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.
- (599) *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.
- (600) *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.

- (601) *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.
- (602) *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.
- (603) *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

- (604) *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

- (605) *Maik v. United Financial Credit Union*, 2017 WL 3485717 (E.D. Mi. 2017) – Administrative expenses including attorney fees do not have absolute priority under Section 1326, and may be paid first or concurrently. Attorney fees may not be paid in full at the expense of the homestead mortgagee. First funds distributed by Trustee must be applied to post-petition mortgage payments that have come due. Attorney who received payment ahead of mortgagee’s receipt of full payment of post-petition mortgage payments required to disgorge portion of fees received to Trustee for Trustee to re-disburse to mortgagee for payment of post-petition payments. Attorney retained portion of fees after disgorgement fulfilling requirement that attorney receive *some* distribution concurrent with the mortgage company.
- (606) *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.
- (607) *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.
- (608) *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.
- (609) *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.

- (610) *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.
- (611) *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.
- (612) *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.
- (613) *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.
- (614) *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.
- (615) *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.
- (616) *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.
- (617) *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; 2016(b) statement failed to disclose that counsel collected a \$150.00 fee for “service fees in conjunction with the due diligence”; 2016(b) statement was otherwise materially incomplete and inaccurate; and counsel never amended 2016(b) statement even after being advised by court that it was inadequate and inaccurate. Court Ordered disgorgement of \$500.
- (618) *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.

- (619) *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.
- (620) *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.
- (621) *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

- (622) *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.
- (623) *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

- (624) *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.
- (625) *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.
- (626) *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.
- (627) *In re Smith*, 2011 WL 2293261 (Bankr. N.D. Ohio 2011) – Court cannot award reimbursement of expenses without itemized statement of expenses.
- (628) *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

- (629) *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

- (630) *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

- (631) *In re Long*, 2016 WL 6884305 (Bankr. W.D. Mi. 2016) – Court has authority to determine reasonableness of fee application even when filed post-plan completion. Court would not determine whether fees were discharged under Section 1328 where Debtors agreed to voluntarily pay the fees as determined by the Court. Discharge does not prevent Debtors from voluntarily paying claims, even claims that were discharged in bankruptcy case.
- (632) *Cripps v. Foley*, 2016 WL 2899459 (Bankr. W.D. Mi. 2016), *aff’d*, 2017 WL 1190554 (W.D. Mi. 2017) – 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.
- (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.
- (634) *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.
- (635) *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.
- (636) *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.
- (637) *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

- (638) *In re Burkall*, 2017 WL 3890106 (Bankr. W.D. Mi. 2017) – Attorney for Debtor in case converted from Chapter 13 to Chapter 7 entitled to fees for services rendered while case was pending in Chapter 13, to be paid after payment of Chapter 7 administrative expenses under Section 726. However attorney is not entitled to compensation from estate for any services rendered after date of conversion where attorney was not retained by Chapter 7 Trustee. Debtor may pay the fees, and attorney may recover fees, but bankruptcy estate has no liability for them.
- (639) *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.

- (640) *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*.
- (641) *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.
- (642) *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

- (643) *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

- (644) *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.
- (645) *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.
- (646) *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

- (647) *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.
- (648) *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 Voluntary Reduction

- (649) *In re Pichado*, Case No. 10-48900 (Bankr. E.D. Mi. 2015) – If counsel intends to voluntarily reduce the amount of the fees requested, that voluntary reduction should be noted in the Application itself. However, the Order should not refer to or reflect any “voluntary reduction” and should only reflect the net fees awarded, as the Court is neither “ordering” nor “blessing” the voluntary reduction.

4.59 Contingency Fees

- (650) *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.

4.60 "End of Case" Issues

- (651) *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.
- (652) *In re Mears*, 2016 WL 2899459 (Bankr. W.D. Mi. 2016), *aff'd*, 2017 WL 1190554 (W.D. Mi. 2017)– 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.
- (653) *Cripps v. Foley*, 2016 WL 2899459 (Bankr. W.D. Mi. 2016), *aff'd*, 2017 WL 1190554 (W.D. Mi. 2017) – 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.
- (654) *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.
- (655) *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.
- (656) *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.

4.61 Attorney for Chapter 7 Trustee

- (657) *Tann v. Pees*, 2017 WL 3599568 (Bankr. S.D. Ohio 2017) – Attorney for Debtor in Chapter 13 case is not entitled to compensation from estate for services in prosecuting claim against third party where attorney was never retained by estate. Once case was filed, Debtor lacked standing to represent estate and attorney for debtor lacked authority to represent estate unless retention by Trustee is approved by Judge. After filing, debtor's counsel continued for three years to prosecute action absent third party. After three years of litigation, Trustee stepped in and settled the action. Attorney for debtor lacked any legal claim to proceeds of property of estate as attorney never represented estate and debtor was not authorized to prosecute action on behalf of estate. Attorney also lacked any equitable claim to proceeds where attorney was not retained by Trustee and Debtor's Motion to Retain Counsel on behalf of estate was denied by Court.
- (658) *In re Horvath*, 2017 WL 1017727 (Bankr. N.D. Ohio 2017) – Bankruptcy Code authorizes compensation to counsel for Trustee only for services that are not included within normal Trustee services. In general, professional time is limited to tasks performed while representing Trustee in prosecution contested matters and adversary proceedings, attendance at Court hearings incapacity as attorney, preparation of professional related applications, and performance of other specialized services that cannot be performed practically or lawfully by Trustee without engaging services of professional. Counsel not entitled to compensation for time expended requesting originals of newly disclosed publicly traded stock and locating broker to sell that stock; preparing reports for United keeps states Trustee and reviewing United States Trustee guidelines regarding reporting of obligations of Chapter 7 Trustee; or reviewing and revising United States Trustee's complaint against Debtor to assist with background facts, as these items were services which would normally be performed by Trustee.
- (659) *In re Peterson*, 2017 WL 1319733 (Bankr. M.D. Tn. 2017) – Section 330 charges Court with independent duty to review all fee applications to ensure the requested fees are reasonable, necessary and justified. Section 327(d) addresses strict limitation when Trustee is authorized to also serve as attorney for estate, preventing attorney-Trustee from separately, and doubly, being compensated for services. And imposes on Court heightened duty of independent review to ensure that there is no conflict or impropriety in administration of estate. Duties assigned to Trustee under Section 704 and associated duties may not be delegated or relinquished to professionals and time spent by professionals in performing those duties is not compensable. Trustee demonstrated total misunderstanding, if not blatant disregard, of issues regarding compensation for Trustee who also serves as attorney for Trustee. Fees requested as attorney for Trustee plus statutory compensation for Trustee told over 50% of estate receipts while creditors would receive 2.82%. Trustee was unable to answer questions in manner which would justify request for fees. Further, services include services for which an attorney was not necessary including stipulating to an adjourned hearing on the Motion for Relief from Stay where it was creditors responsibility, not Trustee's responsibility, to prosecute that matter; Trustee should not have had to expend professional time dealing with a motion for relief from automatic stay where property was held as tenants by the entireties out of reach of Trustee for purposes of administration and creditor asserted there was no equity in property, as Trustee should have been more than familiar with applicable law on these issues and should not have needed professional assistance to perform most perfunctory task of reviewing Motion. Trustee would not be allowed compensation for services within scope of Trustee's responsibility including phone calls to counsel for lienholders; employment professionals; correspondence regarding commissions as assets of the estate; attending hearing and third-party bankruptcy on behalf of the estate; reviewing mail-in documents from financial institutions; filing a motion to extend discharge objection deadline; administrative objection to closure of case; agreement regarding stay relief lienholders; initial review of bank statements; initial meeting/conferences regarding possible Ponzi scheme; and preparation of fee application for special counsel and accountant. Trustee could not articulate with specificity any particular complexity, novelty or unique circumstances surrounding the matter such as to require assistance of counsel. Trustee also failed to exercise business judgment in allocating professional resources or exercise of appropriate billing judgment. Billing judgment requires delegation of tasks so as to avoid charging estate inflated rate for task that could and should be performed by less costly employee.
- (660) *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.
- (661) *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.
- (662) *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.

- (663) *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.
- (664) *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.
- (665) *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.
- (666) *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.
- (667) *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.
- (668) *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.

4.62 Effect of Order Awarding Compensation

- (669) *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.
- (670) *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*

4.63 Grant and Withdrawal of Approval

- (671) *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.

- (672) *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

4.64 Procedure

- (673) *Gold v. Harper*, Case No. 15-5446 (Bankr. E.D. Mi. 2017) – Attorney waived Motion to Withdraw by continuing to represent Debtor for 8 months after filing Motion including extensive representation of Debtor in adversary proceedings. Long delay coupled with extensive representation amounted to abandonment of Motion. Motion denied without prejudice to attorney to file new Motion if counsel desired to do so.
- (674) *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.
- (675) *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.
- (676) *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.
- (677) *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).

4.65 Mootness

- (678) *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.

4.66 Standing to Request Withdrawal

- (679) *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.

4.67 Grounds to Request Withdrawal

- (680) *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.
- (681) *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.
- (682) *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.
- (683) *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.

4.68 Death or Incapacity of Counsel

- (684) *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.

4.69 Disqualification – Attorneys for Non-Debtor Parties

- (685) *In re Licking River Mining*, 2016 WL 7321312 (Bankr. E.D. Ky. 2016) - Disqualification of counsel is drastic measure which Court should hesitate to impose except when absolutely necessary. Attorney employed as "special counsel" is not required to be disinterested under Section 327(e). Rather, issue focuses on factual evaluation of actual or potential conflicts only as related to particular matters for which representation is sought. Interest is "adverse" if interest would tend to lessen value of bankruptcy estate or would create actual or potential dispute in which estate is a rival claimant, or produces a predisposition that renders a bias against of the estate. Interests are not "adverse" merely because it is possible to conceive of set of circumstances under which they might clash. Counsel who has previously been retained with Court approval is under continuing duty to disclose any adverse interest throughout employment on behalf of the estate, giving rise to Courts obligation to revisit propriety of engagement. Moving parties demonstrated that relationship between counsel and creditor pre-petition created adverse interest where relationship between Debtors, its officers and directors and the represented creditor led to actions described in complaint, although creditor was not named in that complaint. Issues involved complex loan transaction and related agreements involving Debtors and Debtor now seeks to represent a party to challenge the transaction involving to loans and financing and other documents which were part of the initial transaction.
- (686) *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.
- (687) *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.
- (688) *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.
- (689) *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.
- (690) *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

4.70 Generally

- (691) *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.”

4.71 Limitations

- (692) *In re Todd Grinding Co.*, Case No. 14-32717 (Bankr. E.D. Mi. 2017) – Auctioneer properly employed by Debtor with approval of court entitled to compensation in amount set out in Application for Retention. Although there was some evidence that auctioneer agreed to lower fee after reaching initial agreement with Debtor, Application and Order presented by Debtor contained terms of initial agreement approved by Court. To extent that Application and Order contained incorrect information regarding compensation to auctioneer, fault was that of Debtor and would not warrant reduction in fees to auctioneer below those approved by the Court. Auctioneer would be paid pursuant to terms of Order Approving Retention, not terms allegedly agreed to by parties but not incorporated into Application and Order.
- (693) *In re Molycorp, Inc.*, Case No. 15-11357 (Bankr. D. Del. 2017) – Cap on professional fees imposed as part of DIP financing order does not limit professional compensation once Chapter 11 plan as confirmed. Cap applies only if reorganization of boards and no plan is confirmed. Creditors committee entitled to full recovery of fees and expenses even though amount far exceeded On committee expenses in financing order.
- (694) *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.

4.72 Retention of Professionals – Standing to Request

- (695) *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.

4.73 Time for Application

- (696) *In re Greentown 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.

4.74 Retention of Professionals – Salaried Employees

- (697) *In re Butterflies Services, LLC*, 2017 WL 8234658 (Bankr. S.D. Ohio 2016) – Section 327(b) contains a limited exception to requirement for Court approval if Debtor has regularly employed attorneys, accountants or other professionals on salary and Debtor needs to retain or replace those professionals in the operation of Debtor’s business. Attorney and accountant who were not salaried employees of Debtor prior to commencement of case and were not replacements for salaried employees did not fit within scope of Section 327(b). Court deferred potential disgorgement of fees to give Debtor opportunity to file application to employ attorney and accountant on *nunc pro tunc* basis.

4.75 Retention of Professionals – *Nunc Pro Tunc* Approval

- (698) *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 represent an estate’s interest. This screening process is most effective when performed at the outset of the bankruptcy case.

- (699) *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.
- (700) *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.
- (701) *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.
- (702) *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.
- (703) *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.
- (704) *In re Greentown 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.

4.76 Retention of Professionals – Standard for Approval Generally

- (705) *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.

4.77 Retention of Professionals – Ethical Limitations

4.78 Retention of Professionals – Disinterestedness

- (706) *In re Licking River Mining*, 2016 WL 7321312 (Bankr. E.D. Ky. 2016) - Disqualification of counsel is drastic measure which Court should hesitate to impose except when absolutely necessary. Attorney employed as “special counsel” is not required to be disinterested under Section 327(e). Rather, issue focuses on factual evaluation of actual or potential conflicts only as related to particular matters for which representation is sought. Interest is “adverse” if interest would tend to lessen value of bankruptcy estate or would create actual or potential dispute in which estate is a rival claimant, or produces a predisposition that renders a bias against of the estate. Interests are not “adverse” merely because it is possible to conceive of set of circumstances under which they might clash. Counsel who has previously been retained with Court approval is under continuing duty to disclose any adverse interest throughout employment on behalf of the estate, giving rise to Courts obligation to revisit propriety of engagement. Moving parties demonstrated that relationship between counsel and creditor pre-petition created adverse interest where relationship between Debtors, its officers and directors and the represented creditor led to actions described in complaint, although creditor was not named in that complaint. Issues involved complex loan transaction and related agreements involving Debtors and Debtor now seeks to represent a party to challenge the transaction involving to loans and financing and other documents which were part of the initial transaction.
- (707) *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.
- (708) *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.
- (709) *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.
- (710) *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 adverse 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.

4.79 Retention of Professionals – Failure to Obtain Court Authorization

- (711) *In re Butterflies Services, LLC*, 2017 WL 8234658 (Bankr. S.D. Ohio 2016) – Sections 327 and 330 preclude compensation for professional services where Debtor has not obtained authorization to employ and pay those professionals. Section 327(a) conditions the retention of attorneys, accountants, appraisers, auctioneers or other professionals on Court approval. Debtor’s retention of professionals to assist in resolving payment issues with previous employees and vendors and to assist in accounting matters including preparation of tax returns involved matters within scope of Debtor in possession’s duties under Code, unambiguously requiring Court approval to employ attorney or accountant. Section 327(b) contains a limited exception if Debtor has regularly employed attorneys, accountants or other professionals on salary and Debtor needs to retain or replace those professionals in the operation of Debtor’s business. Attorney and accountant who were not salaried employees of Debtor prior to commencement of case and were not replacements for salaried employees did not fit within scope of Section 327(b). Court deferred potential disgorgement of fees to give Debtor opportunity to file application to employ attorney and

accountant on *nunc pro tunc* basis.

H. Bankruptcy Petition Preparer

4.80 Disclosure

- (712) *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.

4.81 Allowable Services

- (713) *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.
- (714) *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.
- (715) *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.
- (716) *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 drafter 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.
- (717) *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.

4.82 Compensation

- (718) *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.
- (719) *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.
- (720) *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.
- (721) *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.
- (722) *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.
- (723) *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.
- (724) *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.

- (725) *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.
- (726) *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.

4.83 Disgorgement

- (727) *In re Sullivan*, Case No. 16-54737 (Bankr. E.D. Mi. 2016) – Petition preparer, American Bankruptcy Company, ordered to disgorge entire \$249 fee. Company violated 11 USC Section 110 by failing to file disclosure or file affidavit explaining why fee exceeds Court’s \$100 presumptive fee for a petition preparer, supplying outdated forms, refusing to sign declaration needed by Debtor to file with the assistance of a BPP, failing to sign documents Company did prepare, and failing to respond to Court inquiries regarding fees.
- (728) *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.”
- (729) *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.
- (730) *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.

4.84 Sanctions

- (731) *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.
- (732) *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.
- (733) *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.
- (734) *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.
- (735) *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 broke 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.

4.85 Unauthorized Practice of Law

- (736) *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.
- (737) *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.
- (738) *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

4.86 Reliance on Advice of Counsel

- (739) *In re Sharp*, Case No. 16-54917 (Bankr. E.D. Mi. 2017) – Debtor is bound by acts of attorney even if attorney's acts fall below what is reasonable under circumstances. Debtor could not avoid consequences of bankruptcy filing where attorney allegedly incorrectly failed to disclose Debtor's ownership of property and did not claim property as exempt.

4.87 Duty to Communicate With and Advise Client

- (740) *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.
- (741) *In re Monroe*, 2011 WL 6010280 (Bankr. E.D.N.C. 2011) – Attorney has duty to effectively communicates 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.
- (742) *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.

4.88 Filing for Improper Purpose

- (743) *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.

4.89 Communication with Clients

- (744) *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.

4.90 Candor to Court

- (745) *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.

4.91 “Stand In” or Substitute Attorneys

- (746) *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.

4.92 Suspension and Disbarment

- (747) *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.
- (748) *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.
- (749) *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.
- (750) *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.
- (751) *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.
- (752) *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

- (753) *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.
- (754) *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

- (755) *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

- (756) *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.
- (757) *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

- (758) *In re Gamble*, Case No. 16-36498 (Bankr. S.D. Tex. 2017) - Cap on lease rejection damages under Section 502(b)(6) does not apply in determining whether debts exceed Section 109 debt limits. Debt limits for eligibility are determined as of petition date and possibility statutory limit under Section 502(b)(6) may eventually cap landlord’s claim does not alter analysis. Landlord’s claim liquidated by pre-petition State Court judgment allowed in full amount leaving Debtors ineligible for Chapter 13 relief.
- (759) *In re Perkins*, 2016 WL 8078319 (Bankr. W.D. Ky. 2016) - Debtor met Chapter 12 debt limit requirement where scheduled that aggregated \$3,500,000 and proofs of claim filed by bar date totaled \$4,012,000, either of which is less than Chapter 12 limit. In determining amount of outstanding debt, schedules will be afforded prima facie validity which can be overcome by evidence controverting schedules. Creditor did not present any evidence to rebut presumption of accuracy of debt represented on schedules. Although proofs of claim were filed by creditors who were not scheduled, that does not demonstrate a lack of good faith in Debtor’s preparation of schedules in first instance. Court would not combine proofs of claim with scheduled debt for which no claim was filed by claims bar date to determine total debt.
- (760) *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.
- (761) *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.
- (762) *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.
- (763) *In re Hannon*, 455 BR 814 (Bankr. S.D. Fla. 2011) – Joint Chapter 13 Debtors with combined debts exceeding statutory limits are eligible for relief under Chapter 13 if each individual’s debts are within limits. Cased dismissed where each Debtor, standing alone, had Debtors that exceeded Section 109 limits.
- (764) *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.
- (765) *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.

- (766) *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.
- (767) *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

- (768) *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

- (769) *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.
- (770) *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.
- (771) *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.
- (772) *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.
- (773) *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.
- (774) *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.
- (775) *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.
- (776) *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.

- (777) *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.
- (778) *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.
- (779) *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.
- (780) *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.
- (781) *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.
- (782) *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.
- (783) *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

- (784) *In re Munroe*, 2017 WL 2712784 (Bankr. E.D. Mi. 2017) – Debtor not permitted to have two estates open at same time. Debtor who was presently in Chapter 7 could not file Chapter 13 where Chapter 13 proposed to administer property that was property of Chapter 7 estate. Debtor’s attempt to exercise control over property of Chapter 7 estate violated automatic stay, rendering Debtor’s actions in filing Chapter 13 void. Further, Debtor may not have two bankruptcy cases pending at the same time, requiring dismissal of second case.
- (785) *In re Bremer*, 2017 WL 383348 (Bankr. W.D. Mi. 2017) - Bankruptcy Code does not permit Debtor to have two separate bankruptcy cases pending simultaneously. Debtor filed for relief under Chapter 7 and received a discharge. While the Chapter 7 remained pending, Debtor filed Chapter 13 in effort to retain motor vehicle for which the creditor was unwilling to enter into reaffirmation agreement. Although Debtor’s Chapter 13 filing was not in bad faith, issues resulting from concurrent pendency of two voluntary petitions presented both practical and theoretical problems including possible conflicting exercise of avoidance and turnover powers and issues of exemptions. Motor vehicle at issue was still property of Chapter 7 estate which would result in two cases having two fiduciaries with authority over the same motor vehicle. Although Chapter 7 Trustee had filed “no asset report”, filing of that report does not, itself, abandon an asset and Chapter 7 Trustee has right to withdraw a report and seek to administer asset which, by virtue of filing of Chapter 13 petition, may also be part of Debtor’s Chapter 13 estate. Overlapping estates could lead to conflicting decisions, competing claims for authority, unnecessary litigation, uncertainty, strife, delay and waste. Debtor’s options are either to convert Chapter 7 to Chapter 13 proceeding or to wait until Chapter 7 administration is completed and estate is closed and to then file Chapter 13 petition.
- (786) *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.
- (787) *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.
- (788) *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.
- (789) *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.
- (790) *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.
- (791) *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.

- (792) *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.
- (793) *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.
- (794) *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.
- (795) *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.
- (796) *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*.
- (797) *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.
- (798) *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 Improper Purpose

- (799) *In re Lockhart*, 2017 WL 187560 (Bankr. W.D. Ky. 2017) – Rule 9011 Allows Court to impose sanctions against party filing petition, pleading, Motion or other paper for improper purpose. “Improper purpose” is objective test that may be inferred when effect of pleading or motion is to delay proceedings or to manipulate bankruptcy process. Debtor and Debtor's counsel admitted that Chapter 13 petition was filed solely to delay State Court proceedings in which Debtor had been ordered to pay a domestic support arrearage or go to jail for contempt of Court. Debtor's Chapter 13 plan was not confirmable on its face and Debtor's counsel acknowledge that sole purpose for filing was to obtain more time to prepare and file pleadings in State Court action to modify domestic support obligation. Debtor did not appeal State Court Order holding him in contempt, instead hiring bankruptcy counsel to file plan that provided for payments to domestic support obligation Creditor in amounts substantially less than the amounts owed by the State Court. Bankruptcy Court does not have jurisdiction to modify orders previously entered by State Court and Bankruptcy Court lacked jurisdiction to alter amount of domestic support obligation payment absent consent of the creditor. State Court Order required payments far in excess of amounts proposed in chapter 13 plan evidencing lack of good faith in filing of petition and established “beyond doubt” that petition was delay tactic.

5.9 Petition Generally

- (800) *In re Grabowski*, Case No. 16-55180 (Bankr. E.D. Mi. 2016) - Section 301 provides that a voluntary case is commenced by the filing of a petition. Debtor who filed schedules and statement of financial affairs but did not file petition did not properly commence bankruptcy case. If Debtor wants to proceed in bankruptcy, Debtor must commence new case by filing a voluntary petition. Court will not reinstate case even if petition is filed as petition must be first document filed in case.

5.10 Petition – Execution by Holder of Power of Attorney

- (801) *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.

5.11 Petition - Name of Debtor

- (802) *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.
- (803) *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”.
- (804) *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.
- (805) *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.
- (806) *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.

- (807) *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 “XCLUSIVE”.

5.12 Petition – Lack of Original Signature

- (808) *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.

5.13 Corporate Authorization

- (809) *In re Lexington Hospitality Group, LLC*, 2017 WL 4118117 (Bankr. E.D. Ky. 2017) – Corporation that was Company Manager of LLC has authority to authorize LLC’s bankruptcy filing. Contract provision that prohibits Debtor from filing bankruptcy absent prior consent of lender is void and unenforceable. Initial LLC organizational documents gave right to control business operations to Controlling Manager. Lender later imposed restriction that would prevent LLC from seeking bankruptcy protection absent the consent of an “independent manager”, a provision that was not part of the pre-lending relationship of LLC’s operating documents. Purpose was to impair LLC’s ability to file without lender’s consent as “independent manager” was not truly independent but was required to consider interests of creditors such that duties diverged from best interests of LLC. Further, provision that LLC could declare bankruptcy only with 75% consent of LLC members was illusory where “independent manager” held 30% interest and could effectively veto any bankruptcy resolution.
- (810) *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.
- (811) *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.

5.14 Decedent’s Estate

- (812) *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.

5.15 Trusts

- (813) *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.
- (814) *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).

5.16 Chapter 12 – “Family Farmer

- (815) *In re Penick*, 2017 WL 3772620 (Bankr. E.D. Ky. 2017) – Only “family farmer” with regular annual income is eligible for relief under Chapter 12. Debtor must receive more than 50% of gross income for certain taxable periods preceding their chapter 12 filing from “farming operation” including farming, tillage of soil, dairy farming, ranching, production or raising of crops, poultry or livestock, and production of poultry or livestock products in an unmanufactured state. Definition of “farming operation” in Section 109 is not exclusive and includes nontraditional enterprises based on totality of circumstances including: (1) Is location of the operation considered a traditional farm; (2) The nature of the enterprise at the location; (3) The type of product and its eventual market (not limited to traditional farm products); (4) The physical presence/absence of family members on the farm; (5). Ownership of traditional farm assets; (6). Whether the debtor is involved in the process of growing/developing crops or livestock; and (7) Whether the operation is subject to the inherent risks of farming. Debtors were “farmers” where they generated significant income from timber production. Timber production was ongoing and not merely cut of all merchantable timber at one time; Debtors selectively cut dead and smaller trees sold as firewood to campgrounds, restaurants, individuals, and the federal government; Debtors also harvest mature trees and sell timber in log form; although Debtors do not plant trees or seedlings, they monitor the reseed progress and strategically burn brush and identify which timber to harvest to ensure wooded area’s canopy is cleared so that area can reseed and replant itself; Debtor-husband has harvested trees all his life, including before he owned his property and

provided credible testimony regarding knowledge of timber operation and expertise in managing operation; and Debtors evaluated tree species and size to determine when it should be cut. Enterprise was subject to the normal risks inherent in farming, including weather and fire. Both Debtors are directly involved in farming activities on property, and their barn and real property were essential to operations where property housed operations, stored equipment, and served as Debtors' residence, and size, nature, and location of real property evidences that it constituted traditional farm.

- (816) *In re Perkins*, 2016 WL 8078319 (Bankr. W.D. Ky. 2016) - To be eligible for relief under Chapter 12, Debtor (and Debtor's spouse, if any, must have aggregate debts not exceeding \$4,031,575, at least half of which must arise out of a "farming operation"; and Debtor (and spouse) must receive more than 50% of their gross income from farming for either (1) the taxable year immediately preceding filing the bankruptcy; or (2) each of the second and third taxable years preceding the taxable year in which the case is filed. "Farming operation" includes farming, tilling of soil, dairy farming, ranching, production or raising of crops, poultry or livestock, and production of poultry or livestock products in an unmanufactured state. Debtors met income requirement where Debtor's 2015 tax returns showed gross income from farming constituted substantially more than 50% of Debtor's income. Debtor permitted to include income received by partnerships where Debtor received "pass-through" income entirely attributable to partnership farming operations. Debtor met debt limit requirement where scheduled that aggregated \$3,500,000 and proofs of claim filed by bar date totaled \$4,012,000. In determining amount of outstanding debt, schedules will be afforded prima facie validity which can be overcome by evidence controverting schedules. Creditor did not present any evidence to rebut presumption of accuracy of debt represented on schedules. Although proofs of claim were filed by creditors who were not scheduled, that does not demonstrate a lack of good faith in Debtor's preparation of schedules in first instance. Court would not combine proofs of claim with scheduled debt for which no claim was filed by claims bar date to determine total debt.
- (817) *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

5.17 Same Sex Couple

- (818) *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.
- (819) *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.
- (820) *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.
- (821) *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.
- (822) *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.

5.18 Common Law Spouses

- (823) *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.

5.19 Effect

- (824) *In re Bransford*, Case No. 14-30468 (Bankr. E.D. Mi. 2016) – Petition filed under Section 302 commences joint case of individual and spouse. However, joint petition does not constitute consolidation of Debtors’ Estates. Rule 1015 allows joint administration where the Debtors are a husband and wife. Joint administration does not consolidate estates. Absent substantive consolidation, assets of one Debtor, owned separately, stay within that estate and cannot be used to pay creditors of the Codebtor. Substantive consolidation is drastic remedy that requires unusual circumstances such as a substantial co-mingling of assets, liabilities and handling of financial affairs of the separate Debtors. Substantive consolidation not appropriate where asset in question could be clearly ascribed to Debtor-husband and liabilities were easily separated between those of Debtor-husband and Debtor-wife. Debtor-husband’s creditors would suffer minimal harm if estates are consolidated – although personal injury lawsuit of Debtor-husband was personal to Debtor-husband and constituted his property and not property of Debtor-wife. Debtor-husband’s creditors would receive 100% absent substantive consolidation but 98% of cases are consolidated. However, Debtor-husband would suffer substantial prejudice where husband would receive zero dollars if cases are substantively consolidated versus \$34,000 if husband’s assets are used only to pay husband’s debts. Absent substantive consolidation of Debtors’ estates, there was no authority for Trustee to use proceeds of husband’s personal injury litigation to pay wife’s individual creditors.
- (825) *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

5.20 Improper Joinder

- (826) *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.
- (827) *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

5.21 Deadline to Obtain

- (828) *In re Wise*, Case No. 17-43735 (Bankr. E.D. Mi. 2017) – Case dismissed where Debtor did not complete credit counseling prior to commencement of case. Although Debtor’s Bankruptcy Petition indicated that Debtor had been unable to obtain credit counseling, Debtor did not file separate sheet explaining efforts made to obtain briefing, why Debtor was unable to obtain briefing before filing, and what exigent circumstances require Debtor to file. Debtor’s failure to file satisfactory certificate of exigent circumstances or file a motion to approve certification as required by Local Bankruptcy Rule 1007-3(a) requires Court to dismiss case without prejudice.
- (829) *In re Tillman*, Case No. 17-30037 (Bankr. W.D.N.C. 2017) - Debtor can take required Pre-Petition Credit Counseling on same day as petition is filed, even if counseling is not completed until after case is filed. Section 109(h) (1) requires only that counseling be completed during 180 day period ending on the date of filing the petition and does not cut off the opportunity to take counseling as of the moment of the filing of the petition. Plain language of statute unambiguously allows Debtor to satisfy credit counseling requirement on same day case commences, even if counseling takes place later that day. Although Congress may have intended counseling to incur before filing, plain language of statute was unambiguous and not absurd.
- (830) *In re Jackson*, Case No. 16-57060 (Bankr. E.D. Mi. 2017) – Debtor not eligible for relief where Debtor received pre-petition credit counseling 190 days prior to commencement of case.
- (831) *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.
- (832) *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.
- (833) *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.
- (834) *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.
- (835) *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.
- (836) *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.
- (837) *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.

- (838) *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).
- (839) *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.
- (840) *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.

5.22 Failure to Obtain

- (841) *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.
- (842) *In re Elliott*, Case No. 15-45740 (Bankr. E.D. Mi. 2015) – Case dismissed where Debtor obtained counseling three days after petition filed.
- (843) *In re Cicchelli*, Case no. 15-51553 (Bankr. E.D. Mi. 2015) – Case dismissed where credit counseling completed one day after petition filed.
- (844) *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.
- (845) *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).
- (846) *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).
- (847) *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).
- (848) *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.
- (849) *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.
- (850) *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.
- (851) *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.
- (852) *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.
- (853) *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.
- (854) *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.

- (855) *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.
- (856) *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.
- (857) *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.
- (858) *In re Weikert*, Case No. 12-45454 (Bankr. E.D. Mi. 2012) – Case dismissed where credit counseling obtained 7 days post-petition.
- (859) *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.
- (860) *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.
- (861) *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.
- (862) *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.
- (863) *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.
- (864) *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.
- (865) *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*.
- (866) *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*.
- (867) *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*.
- (868) *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.
- (869) *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*.
- (870) *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*.
- (871) *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*.
- (872) *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*.
- (873) *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*.
- (874) *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*.

- (875) *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*.
- (876) *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).
- (877) *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*.
- (878) *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*.
- (879) *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*.
- (880) *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.
- (881) *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*.
- (882) *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*.
- (883) *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*.
- (884) *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).
- (885) *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).
- (886) *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.
- (887) *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.
- (888) *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.
- (889) *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.
- (890) *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.
- (891) *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.
- (892) *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).
- (893) *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.
- (894) *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.

- (895) *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.
- (896) *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.
- (897) *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*.
- (898) *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.
- (899) *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.
- (900) *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.

5.23 Waiver of Requirement

- (901) *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.
- (902) *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.
- (903) *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.
- (904) *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.
- (905) *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 acquirement.
- (906) *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.
- (907) *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).
- (908) *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.

5.24 Exigent Circumstances

- (909) *In re Wise*, Case No. 17-43735 (Bankr. E.D. Mi. 2017) – Case dismissed where Debtor did not complete credit counseling prior to

commencement of case. Although Debtor's Bankruptcy Petition indicated that Debtor had been unable to obtain credit counseling, Debtor did not file separate sheet explaining efforts made to obtain briefing, why Debtor was unable to obtain briefing before filing, and what exigent circumstances require Debtor to file. Debtor's failure to file satisfactory certificate of exigent circumstances or file a motion to approve certification as required by Local Bankruptcy Rule 1007-3(a) requires Court to dismiss case without prejudice.

- (910) *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.
- (911) *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.
- (912) *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.
- (913) *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.
- (914) *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".
- (915) *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.
- (916) *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.
- (917) *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.

5.25 Equitable Exception

- (918) *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.

- (919) *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.

5.26 Pay Advices

- (920) *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

5.27 Generally

- (921) *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.
- (922) *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.

5.28 Domicile

- (923) *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.
- (924) *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.

5.29 Location of Principal Assets

- (925) *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.
- (926) *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.

5.30 Residence

- (927) *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.
- (928) *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.

5.31 Principal place of business

- (929) *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.

5.32 Location of Claim or Property

- (930) *In re Golembiewski*, 2015 WL 1061962 (Bankr. N.D. Ohio 2015) – Potential future earnings or future employment are not principal assets for venue purposes.
- (931) *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.

5.33 Affiliate Venue

- (932) *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.

5.34 Default Venue

- (933) *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 of action in Tennessee.

5.35 Dismissal – Venue Improper

- (934) *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.
- (935) *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*.

5.36 Transfer - Venue Proper – Interests of Justice

- (936) *ICICI Bank, Ltd. v. Essar Global Fund, Ltd.*, Case No. 16-7836 (S.D.N.Y. 2017) - Transfer of venue for non-core proceeding is governed by 28 USC Section 1404. Party seeking to transfer otherwise proper venue must show by clear and convincing evidence that transfer is warranted. Forum selection clause contained in contract between Debtor's non-bankrupt affiliate and third-party was valid and enforceable and would not be disregarded absent "most exceptional" circumstances. Non-Debtor affiliate failed to present any justification to transfer venue to Court in which Debtor's bankruptcy case was pending. While Bankruptcy Court had "related to" jurisdiction as the affiliate had rights of subrogation against Debtor, those rights were non-core because they arose from pre-bankruptcy contract and asserted rights not created by bankruptcy law. There were no "exceptional circumstances" warranting disregarding of forum selection clause as action by Plaintiff against affiliate was not attempt to limit conduct of Debtor, creditors or committee; did not seek to interfere in the administration of the estate; and would not foster judicial economy as Bankruptcy Judge could not enter final order such that matter would end up in District Court whether or not venue was transferred.
- (937) *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.
- (938) *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".

5.37 Transfer - Venue Proper – Convenience of Parties

- (939) *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 providers 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.

5.38 Transfer – Forum Selection Clauses

- (940) *ICICI Bank, Ltd. v. Essar Global Fund, Ltd.*, Case No. 16-7836 (S.D.N.Y. 2017) - Transfer of venue for non-core proceeding is governed by 28 USC Section 1404. Party seeking to transfer otherwise proper venue must show by clear and convincing evidence that transfer is warranted. Forum selection clause contained in contract between Debtor's non-bankrupt affiliate and third-party was valid and enforceable and would not be disregarded absent "most exceptional" circumstances. Non-Debtor affiliate failed to present any justification to transfer venue to Court in which Debtor's bankruptcy case was pending. While Bankruptcy Court had "related to" jurisdiction as the affiliate had rights of subrogation against Debtor, those rights were non-core because they arose from pre-bankruptcy contract and asserted rights not created by bankruptcy law. There were no "exceptional circumstances" warranting disregarding of forum selection clause as action by Plaintiff against affiliate was not attempt to limit conduct of Debtor, creditors or committee; did not seek to interfere in the administration of the estate; and would not foster judicial economy as Bankruptcy Judge could not enter final order such that matter would end up in District Court whether or not venue was transferred.

5.39 Transfer - Venue Improper

E. Filing Fee

5.40 Failure to Pay

- (941) *In re Hicks*, 2017 WL 3225913 (Bankr. N.D. Ohio 2017) – Rule 9006(b)(3) allows Court to extend deadline to pay filing fee to a date no longer than 180 days after filing of the petition. Case dismissed where Debtor did not pay filing fee within time permitted by Order allowing payment of filing fees in installments. Debtor did not tender payment of the filing fee until eleven months after dismissal and did not allege any excusable neglect for failing to pay filing fee timely, and allowing Debtor to reinstate and pay filing fee 11 months after dismissal would violate time limits of Rule 1006. Discharges are not favors given for attending a party. Discharges are the result of a Debtor timely and thoroughly fulfilling the duties and responsibilities set forth in the Bankruptcy Code and Rules. Allowing Debtors to continually ignore their obligations, only to later seek to avoid the repercussions, creates a culture of only performing obligations if it is convenient. The court cannot condone, and will not foster, this culture.
- (942) *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.
- (943) *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.
- (944) *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.
- (945) *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.
- (946) *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.
- (947) *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.
- (948) *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.

5.41 Waiver

- (949) *In re Wilson*, Case No. 17-42454 (Bankr. E.D. Mi. 2017) - Motion to Waive Filing Fee in previous bankruptcy case construed as motion for reconsideration of order filed in prior case denying application to waive filing fee in prior case. Motion failed to demonstrate any palpable defect or otherwise to establish any basis for excusable neglect sufficient for granting relief from prior order. Debtor's present motion which

asserted that Debtor paid a Bankruptcy Petition Preparer to prepare prior case directly contradicted Debtor's declaration under penalty of perjury in prior case that Debtor did not have help in preparing documents for bankruptcy filing and did not pay anyone for that out. Present motion was also untimely. Federal Rule Of civil Procedure 60 requires motion to be brought within reasonable time. Motion brought in 2017 seeking relief from order entered in 2009 was not reasonable. Finally, Debtor never filed required Schedules or Statement of Financial Affairs in prior case rendering it impossible for Court to determine whether facts existed to justify waiver of filing fee or whether Debtor's income was below maximum income for family size under 28 USC Section 1930.

- (950) *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.
- (951) *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.
- (952) *In re McMcCann*, 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.
- (953) *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 contradicted by statements in Schedules B and C.
- (954) *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.
- (955) *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.
- (956) *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".
- (957) *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).
- (958) *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

5.42 "Primarily Consumer Debts"

- (959) *Palmer v. Laying*, Case No. 15-2856 (D. Colo. 2016) – Whether student loans are "consumer debts" depends on purpose of incurring loans. Student loans can be considered "non-consumer" if they are incurred primarily as business investment in oneself. Debtor is not required to show that education relates to existing business or current employer or that education is required to comply with mandate or for advancement or for higher income. Debtor must only show that student loans were incurred with intent to realize profit, even if profit is never actually realized. Nurse striving for professional development would be considered business investment in nature. However, if loans are taken out where Debtor aims for job that would require no education loans are consumer in nature as there is no profit motive behind obtaining loans in first instance.
- (960) *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 defined 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 present 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.

- (961) *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.
- (962) *In re De Cuna*, 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 non-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).
- (963) *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.
- (964) *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.
- (965) *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.
- (966) *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.
- (967) *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.

5.43 Calculation of Current Monthly Income – Timing

- (968) *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.
- (969) *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.

5.44 Calculation of Disposable Income – Generally

- (970) *In re Weaver*, 2017 WL 1501407 (Bankr. M.D. Tn. 2017) – Section 707(b)(1) allows the Court to dismiss a case filed by Debtor whose debts are primarily consumer debts if granting relief would constitute an abuse of the provisions of Chapter 7. Section 707(b)(2)(A)(i) creates a presumption of abuse if Debtor's current monthly income reduced by allow deductions and multiplied by 60 is greater than \$12,850. Section 707(b)(2)(A)(i) identifies the categories of expenses that Debtors may deduct from current monthly income in calculating net disposable income. Once presumption of abuse arises under Section 707(b)(2), Court is required to dismiss case unless Debtor can successfully rebut presumption by demonstrating special circumstances such as serious medical condition or a call or order to active duty in the armed forces, and Debtor can itemize each additional expense or adjustment of income and provide documentation and detailed explanation. Even where presumption of abuse does not arise, Section 707(b)(3) allows Court to dismiss case based on totality of circumstances including whether Debtor's financial situation demonstrates abuse. Most critical element in determining abuse is whether Debtor has ability to repay debts out of future earnings, determined by whether there is sufficient disposable income to fund a Chapter 13 Plan. United States Trustee Motion to Dismiss under Section 707(b)(2) and b(3) granted. Although Debtor's calculations on Means Test indicated that Debtor had monthly disposable income of only \$36.40 such that Means Test did not demonstrate presumption of abuse, calculations and adjustments included in Means Test were erroneous resulting in an understatement of Debtor's actual income and expenses. Debtor claimed marital adjustment of \$1100 per month but was able to document only \$650 per month. Means Test listed payroll tax deductions based on amount actually withheld from Debtor and Debtor's nonfiling spouse's pay rather than Debtor and Debtor's nonfiling spouse's actual tax liability. Debtor and Debtor's nonfiling spouse's annualized income significantly exceeded applicable state median and adjustments to Means Test calculation indicated that Debtor had disposable income of \$758 per month which would pay more than \$45,000 to unsecured creditors over 60 months. Debtor did not claim any special circumstances to justify expenses or adjustments of current monthly income and Debtor did not present any evidence of any additional expenses. Inaccuracies on Means Test were also carried over on Debtor's Schedule I and Schedule J and included expenses that were excessive were not properly documented.
- (971) *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.
- (972) *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.
- (973) *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".
- (974) *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.
- (975) *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".
- (976) *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."
- (977) *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.
- (978) *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).

- (979) *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.
- (980) *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”.

5.45 Calculation of Disposable Income – Allowances

- (981) *Lynch v. Jackson*, Case No. 16-1358 (4th Cir. 2017) – Debtors are permitted to deduct full IRS National and Local Standard expenses even where those standards exceed Debtor’s actual expenses. Once the Debtor incurs an expense, then Debtor can deduct entire applicable amount under Local or National Standard.

5.46 Calculation of Disposable Income – Surrendered Collateral

- (982) *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.
- (983) *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.
- (984) *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.
- (985) *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.
- (986) *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.
- (987) *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.
- (988) *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.
- (989) *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.

5.47 Calculation of Disposable Income - Lien Strips

- (990) *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”.
- (991) *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.

5.48 Calculation of Disposable Income – Automobile Ownership Expense

- (992) *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.
- (993) *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.
- (994) *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.
- (995) *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.

5.49 Calculation of Disposable Income – Automobile Operating Expense

- (996) *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.
- (997) *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.
- (998) *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.
- (999) *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.
- (1000) *In re Warden*, 2012 WL 1414277 (Bankr. E.D. Wis. 2012) – Single Debtor who owned and drove two vehicles entitled to operated 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.
- (1001) *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.
- (1002) *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.
- (1003) *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).
- (1004) *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.
- (1005) *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.

5.50 Calculation of Disposable Income – Automobile Title Liens

- (1006) *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”.

5.51 Home Maintenance Expense

- (1007) *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.

5.52 Calculation of Disposable Income – Health Care Expenses

- (1008) *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.

5.53 Calculation of Disposable Income – Health Savings Account

- (1009) *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.

5.54 Calculation of Disposable Income – Education Expenses

- (1010) *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.
- (1011) *In re Golematas*, 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.
- (1012) *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.
- (1013) *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.

5.55 Calculation of Disposable Income – Housing Deduction

- (1014) *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.
- (1015) *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.
- (1016) *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*.
- (1017) *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.

5.56 Calculation of Disposable Income – Retirement Loan Repayment

- (1018) *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.
- (1019) *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.
- (1020) *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.

5.57 Calculation of Disposable Income – Child Care Expenses

- (1021) *In re Knorr*, 2013 WL 5550209 (Bankr. M.D. Pa. 2013) – Debtor cannot deduct child care expense incurred to allow 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.

5.58 Expense Reimbursements

- (1022) *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.

5.59 Social Security Income

- (1023) *In re Drake*, Case No. 16-12280 (Bankr. N.D. Ga. 2017) - Social Security income does not need to be paid into a Chapter 13 Plan because Social Security benefits are excluded from “current monthly income”. Debtor’s Plan proposed to allow Debtor to save \$900 each month from her Social Security benefits for “unforeseen circumstances” quote resulting in Debtors saving more than \$30,000 over life of Plan while paying unsecured creditors only \$8000. Section 101 shows clear intent to protect Social Security income from bankruptcy process and Debtor need not disclose disposition of Social Security income he does not intend to use toward Plan. While optics of the situation are not pleasant and raise a specter of unfairness, retaining Social Security income is not sufficient to show lack of good faith because Debtor’s withholding of Social Security income is consistent with plain language of Bankruptcy Code.
- (1024) *Charnetsky v. Buenviaje*, Case No. 16-15191 (9th Cir. BAP 2017) - 42 USC Section 407(a) operates as complete bar to forced inclusion of past and future Social Security proceeds in bankruptcy estate. Section 407 creates exception to the general rule of Section 541 that all of Debtor’s interest in property becomes property of estate. Debtor is not required to assert exemption in Social Security proceeds already received and in the bank as proceeds never became property of estate in first instance. Debtor is required to list account in Schedule A/B. Funds do not lose status upon deposit into bank if Debtor segregates proceeds and maintains funds in account that contains only Social Security proceeds. Fact that statute limits exemption to “right to receive” proceeds does not alter conclusion as Debtor is not required to exempt property that is not property of estate in first instance.
- (1025) *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.
- (1026) *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.
- (1027) *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.
- (1028) *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.

- (1029) *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.
- (1030) *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
- (1031) *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.
- (1032) *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.
- (1033) *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.
- (1034) *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.
- (1035) *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).
- (1036) *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.
- (1037) *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.
- (1038) *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.
- (1039) *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.

- (1040) *In re Olguin*, 429 BR 346 (Bankr. D. Colo. 2010) – Section 101(10A) excludes social security benefits received by Debtor from calculation of CMI, but does not exclude social security benefits received by non-Debtor and regularly contributed to household expenses. Debtor’s grandparents resided with Debtor. Grandparents received social security and gave that to the Debtor to cover household expenses. Debtor must include the social security received by grandparents and contributed to household expenses in determining CMI.
- (1041) *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.
- (1042) *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.

5.60 Pension Income

- (1043) *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.

5.61 Veteran’s Disability Benefits

- (1044) *In re Brah*, 562 BR 922 (Bankr. E.D. Wis. 2017) - Veterans Disability Benefits are included in calculating disposable income. “Current monthly income” includes income from all sources other than Social Security Act, payments to victims of war crimes, and payments to victims of terrorism. Although VA benefits are similar to Social Security benefits, benefits are not provided under Social Security Act. Fact that benefits are exempt under Section 522 and 38 USC Section 5301 does not prevent benefits from being “disposable income” as nothing in Section 1325 or Section 101 excludes “exempt” assets from the calculation of disposable income. Although Section 522 provides that exempt property is not liable for prepetition debts, that provision does not apply in Chapter 13. Nothing in either Section 522 or Section 5301 alters conclusion that disposable income includes exempt assets.

5.62 Veteran’s Voluntary Separation Incentive Payments

- (1045) *In re Hewitt*, 2017 WL 371916 (Bankr. S.D. IL 2017) – Debtor’s right to receive VSI payments excluded from property of estate in Chapter 7 filing as payments are “earnings from services performed ... after the commencement of the case”. Debtor was in the Army, and accepted a VSI in exchange for release from active duty. VSI called for payment annually through the year 2020. When debtor filed for Chapter 7 the Trustee sought to recover the remaining payments due under VSI. Court concluded that payments were compensation for future services as Debtor, while on VSI, had same ongoing duties and burdens as debtor in military service, including duty to stand ready for recall to active duty and remaining subject to Uniform Code of Military Justice.

5.63 Private Disability Income

- (1046) *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.

5.64 Foster Care Income

- (1047) *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.

5.65 Adoption Assistance Payments

- (1048) *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 require 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 by the federal government.

5.66 Unemployment Income

- (1049) *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.
- (1050) *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 Form B22.
- (1051) *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.
- (1052) *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.
- (1053) *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.
- (1054) *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.
- (1055) *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.

5.67 Railroad Retirement Income

- (1056) *In re Scholz*, 447 BR 887 (9th Cir. BAP 2011), *aff’d*, 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.

5.68 Projected Disposable Income – Firefighters Retirement

- (1057) *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.

5.69 Projected Disposable Income – Civil Service Retirement System

- (1058) *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.

5.70 Child Support Income

- (1059) *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.

5.71 “In Kind” Income

- (1060) *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.

5.72 Self-Employed Debtor

- (1061) *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.
- (1062) *In re Harkins*, 2013 WL 1830838 (Bankr. S.D. Ohio 2013) – Self-employed Debtor must use gross income in calculating current monthly income.
- (1063) *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.
- (1064) *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.

5.73 Debtor as Owner of Corporation

- (1065) *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.

5.74 Compensation for “Wrongful Incarceration”

- (1066) *Elkins v. United States*, 2016 WL 7742203 (Bankr. N.D. Ohio 2016) - Provision of Internal Revenue Code enacted December 18, 2015 excludes from “gross income” any civil damages, restitution or other monetary award paid to an individual who is “wrongfully incarcerated”. Exclusion from income is limited to compensation paid to incarcerated individual. Compensation paid to incarcerated individuals spouse is not compensation “to a wrongfully incarcerated individual”. Therefore, recovery by spouse of wrongfully incarcerated individual is included in calculating gross income.

5.75 Household Size

- (1067) *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.

- (1068) *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.
- (1069) *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 party of Debtor's economic unit.
- (1070) *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 form 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.
- (1071) *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.
- (1072) *In re Robinson*, 2011 WL 864937 (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.
- (1073) *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.
- (1074) *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.

5.76 Variance From IRS Allowances

- (1075) *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.

5.77 Special Circumstances

- (1076) *In re Weaver*, 2017 WL 1501407 (Bankr. M.D. Tn. 2017) – Section 707(b)(1) allows the Court to dismiss a case filed by Debtor whose debts are primarily consumer debts if granting relief would constitute an abuse of the provisions of Chapter 7. Section 707(b)(2)(A)(i) creates a presumption of abuse if Debtor's current monthly income reduced by allow deductions and multiplied by 60 is greater than \$12,850. Section 707(b)(2)(A)(i) identifies the categories of expenses that Debtors may deduct from current monthly income in calculating net disposable income. Once presumption of abuse arises under Section 707(b)(2), Court is required to dismiss case unless Debtor can successfully rebut

presumption by demonstrating special circumstances such as serious medical condition or a call or order to active duty in the armed forces, and Debtor can itemize each additional expense or adjustment of income and provide documentation and detailed explanation. Even where presumption of abuse does not arise, Section 707(b)(3) allows Court to dismiss case based on totality of circumstances including whether Debtor's financial situation demonstrates abuse. Most critical element in determining abuse is whether Debtor has ability to repay debts out of future earnings, determined by whether there is sufficient disposable income to fund a Chapter 13 Plan. United States Trustee Motion to Dismiss under Section 707(b)(2) and b(3) granted. Although Debtor's calculations on Means Test indicated that Debtor had monthly disposable income of only \$36.40 such that Means Test did not demonstrate presumption of abuse, calculations and adjustments included in Means Test were erroneous resulting in an understatement of Debtor's actual income and expenses. Debtor claimed marital adjustment of \$1100 per month but was able to document only \$650 per month. Means Test listed payroll tax deductions based on amount actually withheld from Debtor and Debtor's nonfiling spouse's pay rather than Debtor and Debtor's nonfiling spouse's actual tax liability. Debtor and Debtor's nonfiling spouse's annualized income significantly exceeded applicable state median and adjustments to Means Test calculation indicated that Debtor had disposable income of \$758 per month which would pay more than \$45,000 to unsecured creditors over 60 months. Debtor did not claim any special circumstances to justify expenses or adjustments of current monthly income and Debtor did not present any evidence of any additional expenses. Inaccuracies on Means Test were also carried over on Debtor's Schedule I and Schedule J and included expenses that were excessive were not properly documented.

- (1077) *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.
- (1078) *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.
- (1079) *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.
- (1080) *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.
- (1081) *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.
- (1082) *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.
- (1083) *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.
- (1084) *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).
- (1085) *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.

- (1086) *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.
- 5.78 Marital Adjustment – Non-filing spouse
- (1087) *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.
- (1088) *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.
- (1089) *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.
- (1090) *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.
- (1091) *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.
- (1092) *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.
- (1093) *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.

- (1094) *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.
- (1095) *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.
- (1096) *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.

5.79 Cases Converted From Chapter 13

- (1097) *Pollitzer v. Gebhardt*, Case No. 16-11506 (11th Cir. 2017) – Means test applies in case filed under Chapter 13 and later converted to Chapter 7. Although Section 707(b) references “case filed ... under this chapter”, history and evolution of Section 707 would be eviscerated if Debtor could file under Chapter 13 and then convert and avoid means testing.
- (1098) *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.
- (1099) *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).

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

- (1100) *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.
- (1101) *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

5.81 Section 521 Generally

- (1102) *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.

5.82 Amendments to Schedules – Continuing Duty to Disclose

- (1103) *In re Haddad*, 2017 WL 3894984 (Bankr. E.D. Mi. 2017) – Debtor has duty to disclose all assets to Bankruptcy Court. Duty is continuing one throughout debtor’s case. Duty to disclose does not terminate on filing of initial Bankruptcy Schedules. Chapter 13 debtor injured in automobile accident post-petition had duty to disclose potential cause of action to Court and Chapter 13 Trustee. Although potential cause of action was not initially disclosed on Schedule A/B because accident occurred post-petition, Debtor had ongoing duty to amend Schedules to disclose possible cause of action. Fact that Debtor did not know if Debtor would ever ultimately receive anything on account of accident did not excuse duty to disclose. Debtor also did not amend liquidation analysis although accident occurred some months prior to confirmation, which deprived the Trustee and Court of the ability to determine whether Plan met requirement that value of property to be distributed be no less than would be distributed in Chapter 7 proceeding. Debtor had multiple opportunities to disclose accident including right after accident; after consulting with personal injury attorneys about possibly pursuing claim; at the Section 341 Meeting of Creditors; at the confirmation hearing; when Debtor later hired attorney to prosecute claim; and when Debtor filed her own plan modification to reduce the dividend to unsecured creditors from 4% to 0% and Liquidation Analysis attached to Plan Modification continued to represent that Debtor had no assets available for distribution in Chapter 7. Had Debtor disclosed cause of action in connection with Plan Modification, Court and Trustee would have been able to take into consideration impact of claim on Debtor’s Plan and to deny modification to allow Trustee to file his own Plan Modification to bring proceeds of action into estate for benefit of creditors. Fact that Debtor eventually filed amended Schedules did not cure problem where amendments were not filed until after Trustee had discovered cause of action, requested Debtor to agree to remit proceeds to Trustee to extent necessary to pay 100% dividend to allowed unsecured claim, after Trustee filed his own Plan Modification to capture proceeds, and after Debtor voluntarily dismissed case on eve of hearing on Trustee’s Plan Modification. Debtor’s amendment, filed in reaction to Trustee’s efforts to recover proceeds, was far short of Debtor’s obligation to disclose.
- (1104) *Owens v. Arvato Digital Services, Inc.*, 2016 WL 7173793 (W.D. Ky. 2016) - Judicial Estoppel precludes party from asserting position in litigation where (1) party asserts position that is contrary to one party has asserted under oath in prior proceeding; (2) prior Court adopted contrary position either preliminarily or as part of final disposition; and (3) omission was not due to mistake or inadvertence. Debtor must disclose all causes of action that exists when bankruptcy petition is filed, and has duty of continuing disclosure of any potential causes of action that arises post-petition until the case is closed. Plaintiffs action barred by judicial estoppel where plaintiff was pursuing cause of action which was not disclosed in previous bankruptcy filing and plaintiff did not amend Chapter 13 case after she lost job to reflect claims resulting from termination. Debtor also omitted claims on subsequent chapter 7 bankruptcy petition filed almost one year after termination and one month after letter threatening litigation was sent to former employer. Bankruptcy Court adopted contrary position created by failure to disclose by confirming Chapter 13 Plan and subsequent discharging debts in Chapter 7 case. Confirmation of plan and entry of order of discharge “adopted” contrary position that no claims existed. Omission will be inadvertent if (one) Debtor lack knowledge of the factual basis of the claim; (two) Debtor had no motive for concealment; and (three) evidence indicates lack of bad faith. Debtor knew of factual basis for claims on day she was terminated from employment. Debtor knew that she was the only woman and eldest in her unit and that her termination was not based on poor job performance. Although not required, Debtor also knew legal basis of claim as her attorney sent letter threatening litigation to Debtor’s employer one month before Debtor file Chapter 7 petition. While Debtor did not have notice of action when Debtor commenced chapter 13 case because she had not been terminated, Debtor had continuing duty to update petition to disclose accrual of cause of action. Court presumes in Chapter 13 proceeding that failure to disclose litigation’s effort to minimize income and assets resulting in motive to conceal. Motive to conceal can be inferred from soul fact that Debtor knew of a claim and did not disclose it. Debtor’s conclusory statement that she had no motive to conceal lacked any factual basis to rebut presumption of motive to conceal. Evidence indicated lack of good faith as Debtor did not take any steps to advise Court or Trustee of wrongful termination and eve as of date of hearing on Motion for Summary Judgment still had not taken any steps to advise Bankruptcy Court of cause of action. Fact that Debtor could reopen case did not make up for fact that Debtor had not done so
- (1105) *In re Haber*, 2016 WL 1211339 (Bankr. S.D. Ohio 2016), *aff’d*, 2017 WL 1017731 (6th Cir. 2017) – 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.
- (1106) *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.
- (1107) *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.

- (1108) *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.
- (1109) *Axis Surplus Insurance Company v. Flugence*, 738 F.3d 126 (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.
- (1110) *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.
- (1111) *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.

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

- (1112) *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

5.84 Elements

- (1113) *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.
- (1114) *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.
- (1115) *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).
- (1116) *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.

- (1117) *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.
- 5.85 Credit Counseling – Section 109(h)
- (1118) *In re Sims*, 2009 WL 161343 (Bankr. D. Kansas 2009) - Credit counseling requirement of Section 109(h)(1) does not apply in involuntary case.
- 5.86 Petitioning Creditors
- (1119) *In re Zenga*, 2017 WL 3951705 (Bankr. M.D. Tn. 2017) – Debtor equitably estopped from claiming that Debtor had 12 or more creditors where Debtor, in pre-petition litigation, asserted in responses to interrogatories that Debtor had only 11 creditors. Equitable estoppel requires misrepresentation by party against whom estoppel is asserted; reasonable reliance on misrepresentation by party asserting estoppel; and detriment to party asserting estoppel. Detrimental reliance requires some loss, damage or disadvantage or change in position suffered by party asserting estoppel, and reliance must be actual and substantial. Debtor had every opportunity disclose information that Debtor chose to hide regarding number and identity of creditors. Petitioning Creditor was adversely affected by filing involuntary petition, during which time Creditor was precluded from pursuing collection; amount of debt increased from \$2.5 million to \$4.4 million as result of passage of time; and Creditor's ability to collect debt from non-bankruptcy remedies were stalled by Debtor's actions both before and during bankruptcy case. Had Debtor correctly disclosed number and identity of creditors, Creditor would have been able to seek out additional petitioning creditors and would not solely have incurred attorney fees and costs incurred in filing bankruptcy petition as well as costs associated with appeals; or he could have pursued collection in state court.
- (1120) *In re Zenga*, 2017 WL 167908 (6th Cir. BAP 2017) - 11 USC Section 303 requires that involuntary petition be signed by three or more partitioning creditors when potential Debtor has 12 or more creditors in total. However, number of petitioning creditors is not jurisdictional and Court may apply equitable doctrines such as estoppel to supplant statutory requirement of three petitioning creditors. Supreme Court's ruling in *Law v. Siegel*, which prohibits use of Section 105 to override express provisions of rules and Code in context of amendment to exemptions does not apply to Section 303 requirement for three or more partitioning creditors as issue under Section 303 does not involve use of Section 105. Debtor not equitably estopped from asserting that involuntary petition lacked sufficient petitioning creditors. Debtor filed responses to interrogatories in State Court action asserting that Debtor had fewer than 12 creditors. However, statements in answers to interrogatories, while filed under oath, are not "judicial determinations" for purposes of judicial estoppel. Equitable estoppel requires (1) misrepresentation by party against whom estoppel is asserted; (2) reasonable reliance on misrepresentation by party asserting estoppel; and (3) detriment to party asserting estoppel. "Detriment" must be "actual and substantial" such as loss of opportunity to improve one's position or loss of evidence. While there was no dispute that Debtor misrepresented number of creditors and that petitioning creditor relied on that representation, there was no evidence to demonstrate that creditor suffered detriment due to his reliance. Creditor was unable to articulate any specific detriment other than loss of time, and creditor failed to avail himself of remedy under Section 303 to obtain joinder of additional creditors to meet three creditor requirement.
- (1121) *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.
- (1122) *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.
- (1123) *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.

5.87 Debts Subject to Bona Fide Dispute

- (1124) *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.
- (1125) *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.
- (1126) *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.
- (1127) *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.
- (1128) *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.
- (1129) *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.

5.88 Not Generally Paying Debts as They Come Due

- (1130) *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.
- (1131) *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.

5.89 Secured Versus Unsecured Creditors

- (1132) *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.

5.90 Eligible for Relief Under Chapter in Which Involuntary Petition Filed

- (1133) *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.

5.91 Burden of Proof

- (1134) *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.
- (1135) *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.
- (1136) *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.

5.92 Sanctions

- (1137) *Vibe Micro, Inc. v. SIG Capital, LLC*, Case No. 14-1618 (D. Nv. 2017) - Shareholder purporting to act on behalf of Debtor does not have right to recover costs and attorney's fees following dismissal of involuntary petition. Creditor filed involuntary petition against Corporation. Corporation did not appear in involuntary case but another shareholder, owning 50% of stock, appeared and filed motion to dismiss. Although Bankruptcy Court dismissed case on petition of opposing shareholder, Section 303 did not provide shareholder was standing to recover costs as Section 303 allows awarded reasonable attorney fees and costs only in favor of the Debtor.
- (1138) *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.
- (1139) *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.
- (1140) *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.

- (1141) *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.
- (1142) *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.
- (1143) *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.
- (1144) *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.

5.93 Damages Caused to Third Parties - Preemption

- (1145) *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

5.94 Known Creditors

- (1146) *Markley v. Department of Treasury, Internal Revenue Service*, 2017 WL 456416 (Bankr. N.D. Ohio 2017) - Rule 5003(e) requires service on governmental agency at specified address. Notice mailed to IRS at address other than address required in Rule 5003(e) is ineffective to constitute "notice" of proceeding.
- (1147) *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.

5.95 Unknown Creditors

- (1148) *Markley v. Department of Treasury, Internal Revenue Service*, 2017 WL 456416 (Bankr. N.D. Ohio 2017) - Rule 5003(e) requires service on governmental agency at specified address. Notice mailed to IRS at address other than address required in Rule 5003(e) is ineffective to

constitute “notice” of proceeding.

- (1149) *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

- (1150) *In re Sharp*, Case No. 16-54917 (Bankr. E.D. Mi. 2017) – In general, property of estate and Debtor's exemptions are both determined on petition date. Debtor cannot exempt property transferred by Debtor pre-petition as Debtor did not have any interest in that property as of the petition date and so the property did not become property estate. Debtor could not exempt property once recovered by Trustee as fraudulent transfer as Section 522(g) limits Debtor's ability to exempt recovered property to property that was not initially voluntarily transferred. Evidence indicated that pre-petition, Debtor voluntarily conveyed property to Debtor's mother, ostensibly to assist in obtaining homeowners insurance.
- (1151) *Irons v. Maginnis*, 2017 WL 2889657 (Bankr. N.D. Ohio 2017) – Upon filing for relief, all equitable and legal interests of Debtor become property of bankruptcy estate. Bankruptcy estate does not include any power that Debtor may exercise solely for benefit of entity other than Debtor, but powers that Debtor may exercise for his or her own benefit are included in bankruptcy estate. Debtor's beneficial interest in trust gave Debtor “right to reside” in house owned by parents and part of parents trust. “Right to reside” is power that Debtor may exercise for her own benefit and became property of Debtor's estate that could be legally sold by Chapter 7 Trustee. Right to reside was sufficiently rooted in prepetition past and while interest was, at one point, contingent, even contingent interest are property of estate.
- (1152) *First American Title Lending of Georgia, LLC v. Holt*, Case No. 16-12150 (Bankr. N.D. Ga. 2017) – Debtor in Chapter 13 cannot stretch out redemption time for pawn loan. Section 108(b) extends redemption period that has not expired prepetition to 60 days from the petition date. After extended redemption period, pawned property is no longer property of estate and cannot be redeemed by treating pawnbroker as secured creditor in Chapter 13. Rejecting *Title Max v. Northington*.
- (1153) *In re Cibella*, 2016 WL 7030318 (Bankr. N.D. Ohio 2016) – Estate includes all causes of action belonging to Debtor at time case is commenced including causes of action for personal or bodily injury. A cause of action is a series of operative facts that give rise to a basis to sue or obtain relief in court. Where statute of limitations expired prior to filing bankruptcy petition, as of date of petition Debtor did not have any viable cause of action to become property of estate. Some years post-petition, an entity offered Debtor money to settle any claims, although claims had long been barred by statute of limitations. Payment could not be in settlement of any personal injury claim as Debtor had no such rights and had no legal or equitable interest that could lead to recovery.
- (1154) *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.
- (1155) *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.
- (1156) *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.
- (1157) *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 intend 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.

- (1158) *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.
- (1159) *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.
- (1160) *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.
- (1161) *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.
- (1162) *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.
- (1163) *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.
- (1164) *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.
- (1165) *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.
- (1166) *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.
- (1167) *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.
- (1168) *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.

- (1169) *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.
- (1170) *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).
- (1171) *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.
- (1172) *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.
- (1173) *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.
- (1174) *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.
- (1175) *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 form 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

- (1176) *Charnetsky v. Buenviaje*, Case No. 16-15191 (9th Cir. BAP 2017) - 42 USC Section 407(a) operates as complete bar to forced inclusion of past and future Social Security proceeds in bankruptcy estate. Section 407 creates exception to the general rule of Section 541 that all of Debtor’s interest in property becomes property of estate. Debtor is not required to assert exemption in Social Security proceeds already received and in the bank as proceeds never became property of estate in first instance. Debtor is required to list account in Schedule A/B. Funds do not lose status upon deposit into bank if Debtor segregates proceeds and maintains funds in account that contains only Social Security proceeds. Fact that statute limits exemption to “right to receive” proceeds does not alter conclusion as Debtor is not required to exempt property that is not property of estate in first instance.
- (1177) *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

- (1178) *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. Viegela* 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.
- (1179) *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.
- (1180) *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.
- (1181) *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.
- (1182) *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.
- (1183) *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.
- (1184) *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.
- (1185) *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.
- (1186) *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.

- (1187) *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

- (1188) *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

- (1189) *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

- (1190) *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.
- (1191) *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

- (1192) *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.

- (1193) *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.
- (1194) *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.
- (1195) *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 Insurance Proceeds – Health Insurance

- (1196) *Phi Air Medical, LLC v. Westenhoefer*, 2016 WL 6783262 (Bankr. E.D. Ky. 2016) – Debtor’s right to receive reimbursement from health insurance company as of date of petition is property of estate unless Debtor validly assigned right to receive proceeds directly to medical provider pre-petition. Debtor incurred expense pre-petition and submitted invoice for payment to insurance company pre-petition but insurer had not issued payment as of petition date. Medical provider did not produce evidence of any assignment by Debtor of proceeds where alleged assignment was in document that was signed by Debtor’s spouse but not by Debtor and there was no evidence that wife had authority to sign for or to bind Debtor. Wife conceded in deposition that Debtor had not expressly conferred any formal authority to her, and fact that wife regularly handled household finances was not specific enough constitute authority to execute assignment. Debtor did not ratify the actions of his wife in signing the assignment because there was no evidence of any pre-petition statements or actions by Debtor that could constitute ratification and Debtor refused to release funds to the medical provider even after receipt, undercutting argument that Debtor intended to ratify wife’s signature on the assignment form. Bankruptcy Code does not allow Debtor to ratify pre-petition conduct after filing petition as doing so would allow Debtor to alienate property that is otherwise property of the estate.

6.9 Property Acquired Post-Petition

- (1197) *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.
- (1198) *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.
- (1199) *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.
- (1200) *In re Kirby*, 2012 WL 733884 (Bankr. D. Neb. 2012) – Proceeds of personal injury action received post-petition are property of estate.
- (1201) *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.

6.10 Pre-Petition Causes of Action

- (1202) *Ukrainian Future Credit Union v. Garak*, 2017 WL 2992479 (Bankr. E.D. Mi. 2017) – Debtor lacks standing to assert counterclaims in

adversary proceeding where Debtor did list those counterclaims in bankruptcy schedules. Causes of action are property of bankruptcy estate and can be brought only by Chapter 7 Trustee unless abandoned or claimed exempt and exemption allowed. Debtors' amendment to claim counterclaims as exempt did not permit Debtors to pursue counterclaims where 30 day objection period had not expired. Debtors' continued prosecution of counterclaims violates stay requiring dismissal of counterclaims from adversary proceeding without prejudice to Debtors' right to reassert if causes of action cease to be property of estate.

- (1203) *Wilson v. Primesource Health Care of Ohio*, 2017 WL 2869341 (N.D. Ohio 2017) - On filing bankruptcy, all claims and causes of action in favor of Debtor that accrued before bankruptcy petition becomes property of estate. Absent Trustee abandoning claims, only Trustee has standing to pursue prebankruptcy claims.
- (1204) *Nowakowski v. Bank of America, NA*, Case No. 17-1305 (N.D. Ill. 2017) – Chapter 13 Debtor and the Chapter 13 Trustee have concurrent standing to prosecute prepetition claims which are property of estate. However, Debtor could not bring lawsuit for his own benefit unless Debtor claimed cause of action as exempt and Debtor's right to exempt that asset was subject to final determination.
- (1205) *Ukrainian Future Credit Union v. Garak*, Case No. 17-4074 (Bankr. E.D. Mi. 2017) – Counterclaims asserted by Debtors arose prior to commencement of Chapter 7 case. Causes of action are property of estate and unless and until Chapter 7 Trustee abandons claims under Section 554 or claims cease to be estate property, only Trustee has standing to pursue recovery. Counterclaims filed by Debtors dismissed without prejudice to Chapter 7 Trustee's rights to bring actions or for Debtors to refile if causes of action cease to be estate property.
- (1206) *McCray v. Wells Fargo Bank, N.A.*, Case No. 14-03445 (D. Md. 2015), *affd.*, Case No. 16-1415 (4th Cir. 2016) - Cause of action arising from prepetition contract is property of bankruptcy estate. Debtor lacks standing to pursue recovery based on alleged violations of state and federal consumer protection statutes. Only chapter 7 Trustee has standing to pursue recovery on causes of action for claims arising from prepetition contract.
- (1207) *In re Cibella*, 2016 WL 7030318 (Bankr. N.D. Ohio 2016) – Estate includes all causes of action belonging to Debtor at time case is commenced including causes of action for personal or bodily injury. A cause of action is a series of operative facts that give rise to a basis to sue or obtain relief in court. Where statute of limitations expired prior to filing bankruptcy petition, as of date of petition Debtor did not have any viable cause of action to become property of estate. Some years post-petition, an entity offered Debtor money to settle any claims, although claims had long been barred by statute of limitations. Payment could not be in settlement of any personal injury claim as Debtor had no such rights and had no legal or equitable interest that could lead to recovery.
- (1208) *Alan Presswood, D.C., P.C. v. Pernix Therapeutics Holdings*, 2016 WL 6995874 (E.D. Mo. 2016) – Prepetition cause of action for receipt of unsolicited fax advertising was property of estate even where claim not initially disclosed. Debtor later amended schedules to disclose and claim as exempt but Chapter 7 Trustee had not yet abandoned cause of action. Plaintiff lacked standing as only Trustee could file action or represent Estate in pending litigation unless Trustee has abandoned cause of action. Belated disclosure and exemption does not retroactively provide standing where Debtor lacked standing to institute action in first instance.
- (1209) *Wolfe v. American Family Insurance*, 2016 WL 6986707 (W.D. Mo. 2016) – On filing of bankruptcy, pre-petition cause of action vests in and becomes property of estate and only Trustee has standing to prosecute case unless estate abandons interest. Court lacked jurisdiction to consider action brought by Debtor based on pre-petition conduct as Debtor lacked standing to maintain action in first instance.
- (1210) *Cruse v. Sun Products Corp.*, 2016 WL 6892795 (W.D. Tn. 2016) – Judicial estoppel precludes later employment related claims not disclosed in prior bankruptcy proceedings, where (1) Debtor assumed position contrary to the one asserted under oath in bankruptcy; (2) bankruptcy court adopted contrary position; and (3) Debtor's omission did not result from mistake or inadvertence, Debtor has ongoing and affirmative duty to disclose assets, including unliquidated litigation interests.
- (1211) *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.
- (1212) *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.
- (1213) *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.

- (1214) *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.
- (1215) *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.
- (1216) *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.
- (1217) *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.
- (1218) *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.
- (1219) *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.
- (1220) *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.
- (1221) *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.
- (1222) *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.
- (1223) *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.
- (1224) *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.
- (1225) *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.
- (1226) *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.
- (1227) *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.

- (1228) *Williss v. U.S.*, Case No. 13-6159 (10th Cir. 2014) – Debtor lacked standing to appeal dismissal of personal injury action where Debtor filed bankruptcy after date on which injury occurred and cause of action became property of estate. Only the Chapter 7 Trustee has standing to pursue recovery of cause of action that accrued prior to commencement of case where cause of action has not been abandoned.
- (1229) *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.
- (1230) *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.
- (1231) *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.
- (1232) *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.
- (1233) *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.
- (1234) *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.
- (1235) *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.
- (1236) *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.
- (1237) *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.
- (1238) *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.
- (1239) *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.
- (1240) *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.

- (1241) *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.
- (1242) *In re Fritsch 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.
- (1243) *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.
- (1244) *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.
- (1245) *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.
- (1246) *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.
- (1247) *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.
- (1248) *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.

6.11 Post-Petition Causes of Action

- (1249) *In re Haddad*, 2017 WL 3894984 (Bankr. E.D. Mi. 2017) – Section 1306 sweeps into Chapter 13 estate all assets that Debtor acquires post-petition. Claim that first arose when Debtor had automobile accident post-petition became property of estate by reason of the accident itself. Revesting provision of Section 1327 does not remove assets from property of estate where Debtor did not disclose or schedule claim when obtaining confirmation of plan. Chapter 13 Debtor cannot fail to disclose assets prior to confirmation and then be rewarded by having undisclosed property “vest” in Debtor free of Estate.
- (1250) *McKinney v. Russell*, Case No. 16-522 (N.D. Ala. 2017) - Proceeds of settlement of personal injury action that arose during Chapter 13 case are property of estate even if proceeds were received after expiration of Applicable Commitment Period. Debtor was “below median” and had 36 month Applicable Commitment Period. However, Debtor proposed and confirmed a Plan with a 60 month term. Shortly after expiration of the three-year ACP, Debtor sued and recovered \$12,000 from personal injury action. Trustee could modify Plan to require remittance of proceeds where Debtor would otherwise discharge \$62,000 in unsecured debt for no payment, as equity would not permit Debtor to receive benefits of Chapter 13 without bearing its attendant duties. Cause existed for modification to prevent unmistakable lack of balance between benefits and burdens of Chapter 13 case.
- (1251) *Owens v. Arvato Digital Services, Inc.*, 2016 WL 7173793 (W.D. Ky. 2016) - Judicial Estoppel precludes party from asserting position in litigation where (1) party asserts position that is contrary to one party has asserted under oath in prior proceeding; (2) prior Court adopted contrary position either preliminarily or as part of final disposition; and (3) omission was not due to mistake or inadvertence. Debtor must disclose all causes of action that exists when bankruptcy petition is filed, and has duty of continuing disclosure of any potential causes of action that arises post-petition until the case is closed. Plaintiffs action barred by judicial estoppel where plaintiff was pursuing cause of action which was not disclosed in previous bankruptcy filing and plaintiff did not amend Chapter 13 case after she lost job to reflect claims resulting from termination. Debtor also omitted claims on subsequent chapter 7 bankruptcy petition filed almost one year after termination and one month after letter threatening litigation was sent to former employer. Bankruptcy Court adopted contrary position created by failure to disclose by confirming Chapter 13 Plan and subsequent discharging debts in Chapter 7 case. Confirmation of plan and entry of order of discharge “adopted” contrary position that no claims existed. Omission will be inadvertent if (one) Debtor lack knowledge of the factual basis of the claim; (two) Debtor had no motive for concealment; and (three) evidence indicates lack of bad faith. Debtor knew of factual basis for claims on day she was terminated from employment. Debtor knew that she was the only woman and eldest in her unit and that her

termination was not based on poor job performance. Although not required, Debtor also knew legal basis of claim as her attorney sent letter threatening litigation to Debtor's employer one month before Debtor file Chapter 7 petition. While Debtor did not have notice of action when Debtor commenced chapter 13 case because she had not been terminated, Debtor had continuing duty to update petition to disclose accrual of cause of action. Court presumes in Chapter 13 proceeding that failure to disclose litigation's effort to minimize income and assets resulting in motive to conceal. Motive to conceal can be inferred from fact that Debtor knew of a claim and did not disclose it. Debtor's conclusory statement that she had no motive to conceal lacked any factual basis to rebut presumption of motive to conceal. Evidence indicated lack of good faith as Debtor did not take any steps to advise Court or Trustee of wrongful termination and even as of date of hearing on Motion for Summary Judgment still had not taken any steps to advise Bankruptcy Court of cause of action. Fact that Debtor could reopen case did not make up for fact that Debtor had not done so

- (1252) *Finney v. Volvo Group North America, LLC*, 2016 WL 7057374 (M.D. Tn. 2016) – Debtor in bankruptcy has ongoing duty to disclose all assets, including potential legal claims that arise after bankruptcy case is filed but before case is closed. Judicial estoppel is appropriate where Debtor fails to disclose legal claim to bankruptcy court and later seeks to assert that claim in different manner. Judicial estoppel requires proof that plaintiff did not disclose cause of action in prior bankruptcy case; that bankruptcy court adopted contrary position as preliminary matter or as part of final disposition; and that omission did not result from mistake or inadvertence including a lack of knowledge or factual basis for underlying claim and lack of motive for concealment. Motive for concealment is found by very nature of bankruptcy case, as Debtor has motive to conceal assets for his own benefit rather than having assets liquidated for benefit of creditors. Once evidence of elements of judicial estoppel are present, Debtor can avoid effect by showing lack of bad faith though efforts to inform bankruptcy court or trustee about claims prior to assertion of judicial estoppel defense and Debtor took affirmative steps to rectify omission. During course of Chapter 13 case, Debtors suffered injury in auto accident. Debtors had knowledge of factual basis for claim and did not disclose claim to the court, and had clear motive for concealment in order to avoid prolonging bankruptcy case or sharing proceeds with creditors. Debtors did not make any effort to notify bankruptcy court or trustee of potential claims or raise any questions with the court as to how claims might affect bankruptcy case. While Debtors may not have understood full legal theory on which recovery could be based or know specifically what parties could be held liable, Debtors knew of the factual basis for claim. Fact that Debtors had not retained counsel to pursue litigation did not mitigate duty to disclose.
- (1253) *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.
- (1254) *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.
- (1255) *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.
- (1256) *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.
- (1257) *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.
- (1258) *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.
- (1259) *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.

6.12 Pre-petition Casualty Insurance Proceeds

- (1260) *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.

6.13 Post-Petition Property – Insurance Proceeds

- (1261) *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.
- (1262) *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.
- (1263) *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.
- (1264) *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.
- (1265) *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.

6.14 Post-Petition Equity

- (1266) *In re Coslow*, 2017 WL 3225450 (Bankr. W.D. Ky. 2017) – To determine whether property has value for purposes of abandonment, value is determined as of petition date. Fact that property appreciated in value post-petition or that amount owed on junior mortgage was reduced post-petition does not create value for purposes of abandonment. Equity accrued through date of petition is available for estate. Equity that accrues post-petition as compensation for post-petition services belongs to Debtor, as Chapter 7 estate includes only Debtor’s rights as they existed on petition date.
- (1267) *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.
- (1268) *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.
- (1269) *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.

6.15 Probate Estates

- (1270) *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.

6.16 Tenants by Entireties

- (1271) *Bellinger v. Buckley*, Case No. 17-0068 (D. Md. 2017) – Death of spouse after bankruptcy filing does not affect debtor’s entireties exemption.

Exemptions are based on property of estate which is fixed as of moment of bankruptcy filing.

- (1272) *Holley v. Corcoran*, 2016 WL 6211975 (6th Cir. 2016), *opinion on remand*, Case No. 12-33873 (Bankr. E.D. Mi. 2017) – 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.
- (1273) *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.
- (1274) *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 entireties even where only one of the owners is liable for the unpaid taxes. Non-liable 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.
- (1275) *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 entireties estate. Law presumes real estate acquired by husband and wife during marriage is held as entireties 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".
- (1276) *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 entireties property by later marriage. Bank accounts denominated "joint with survivorship" are owned jointly with right of survivorship but are not entireties accounts. Presumption that property is owned by entireties applies only to real estate acquired during the marriage. Stock account captioned "joint-tenant by entirety" sufficient to establish ownership of account as entireties account beyond scope of Husband's individual bankruptcy where schedules disclosed no joint debt with non-filing spouse.
- (1277) *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 entireties 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".
- (1278) *Tomasi v. Citizens Bank*, Case No. 09-63027 (Bankr. E.D. Mi. 2010) - Bankruptcy estate's interest in entireties property is in whatever equity is available in the entireties property that can be liquidated for the benefit of the joint creditors of the Debtor and the non-filing spouse. 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 entireties, 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 entireties 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 entireties property reachable by joint creditors therefore is not exempt. As a result, the trustee is authorized to liquidate entireties 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 entireties properties of the Debtor and the non-filing spouse.
- (1279) *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.

6.17 Partnership Interests

- (1280) *In re Johnson*, 565 BR 835 (Bankr. S.D. Ohio 2017) – Debtor’s partnership interests, both economic and management rights, become property of estate. Economic interests include partner’s share of profits and losses and right to receive distributions. Management rights include authority of Debtor over partnership affairs. Debtor held 55% partnership interest and was designated as managing partner in charge of managing all partnership affairs subject only to requirement that any debt in excess of \$10,000 be approved by 65% vote. After Debtor filed bankruptcy, remaining partners attempted to dissociate Debtor from partnership and to appoint new managing partner. Remaining partner’s actions violated automatic stay as attempt to obtain possession and control of property of estate consisting of Debtor’s management and economic interests. Actions taken in violation of stay are generally void and invalid, but may be voidable under equitable circumstances such as where Debtor is attempting to use stay unfairly to avoid unfavorable result. Record demonstrated sufficient equitable grounds to determine that partner’s actions were voidable, and court would allow actions to remain in force and effect where Debtor had effectively abandoned post as managing partner leaving partners with no choice but to take on management responsibilities and left partnership with need to borrow money to keep property afloat until it could be sold. Debtor’s wrongful conduct constituted grounds to dissolve partnership under state law and remaining partners had commenced action in State Court pre-petition to accomplish dissolution.

6.18 Corporations and LLCs

- (1281) *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.
- (1282) *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.
- (1283) *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.
- (1284) *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.
- (1285) *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.
- (1286) *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.
- (1287) *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.
- (1288) *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.

- (1289) *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.
- (1290) *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.

6.19 Stock and Corporate Ownership Interests

- (1291) *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.

6.20 Leaseholds

- (1292) *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.
- (1293) *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.
- (1294) *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.
- (1295) *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.

6.21 Life Estates

- (1296) *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.

6.22 Tax Refunds Generally

- (1297) *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.
- (1298) *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.

- (1299) *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.
 - (1300) *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.
 - (1301) *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.
 - (1302) *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.
 - (1303) *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.
 - (1304) *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.
 - (1305) *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.
 - (1306) *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.
- 6.23 Tax Refund – Non-Filing Spouse
- (1307) *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.
 - (1308) *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.

- (1309) *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.

6.24 Post-Foreclosure Interests

- (1310) *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.
- (1311) *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.
- (1312) *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.
- (1313) *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.
- (1314) *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.

6.25 Right of Redemption Following Foreclosure

- (1315) *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.

6.26 Property Settlements

- (1316) *Corzin v. Lawson*, 2017 WL 1207521 (Bankr. N.D. Ohio 2017) – Debtor’s beneficial interest in ex-spouse’s 403(b) vested where State Court had already entered judgment of divorce and ordered division of account, although judgment did not specify that division constituted Qualified Domestic Relations Order. QDRO is not required to invest divorcing Debtor with beneficial interest in spouse’s retirement plan. ERISA does not distinguish between Final Judgment and other domestic relation orders for determining whether sufficient independent basis exists for Debtor to obtain vested beneficial interest in qualified plan. Debtor’s beneficial interest in plan as excluded from estate under section 54(c)(2) as interest in trust that contains a transfer restriction enforceable under nonbankruptcy law which includes ERISA qualified pension plans.
- (1317) *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.
- (1318) *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.

- (1319) *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.

6.27 Pre-Petition Alimony and Support Awards

- (1320) *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).

6.28 Titled Assets – Generally

- (1321) *Kendrick v. Rister*, Case No. 16-2010 (Bankr. E.D. Ky. 2017) – Debtor does not have interest in motor vehicle where, as of petition date, Debtor has signed contract to acquire vehicle but vehicle had not been titled in Debtor's name. State law provides exclusive method of transferring interest in motor vehicle which requires that purchaser obtain Certificate of Title in purchaser's name. Trustee could not seek turnover of motor vehicle as motor vehicle was not property of estate as of date of petition.
- (1322) *Palmer v. Paul Miller Ford, Inc.*, 2017 WL 455391 (Bankr. E.D. Ky. 2017) - Motor vehicle that Debtor purchased from motor vehicle dealer became property of Debtor upon completion of transaction. Although motor vehicle dealer was unable to complete paperwork necessary to transfer title on records of Department of Motor Vehicles, under state law, purchase of motor vehicle from motor vehicle dealer conveyed title when purchaser receives physical possession of vehicle pursuant to bona fide sale agreement. Upon delivery of physical possession and completion of sales agreement, dealership was no longer owner of motor vehicle merely because of assignment of title to dealership or certificate of title remained in dealership's name. Ownership transfers upon delivery of vehicle subject to applicable security interest. Fact that Debtor did not arrange state-mandated inspection of vehicle does not void sale or delay transfer of ownership interest. Motor vehicle dealer order to provide certificate of title to chapter 7 Trustee.
- (1323) *Gold v. Harper*, 2017 WL 377933 (Bankr. E.D. Mi. 2017) – Ownership of automobile is determined by certificate of title. Defendant who is not on title cannot claim ownership even where Debtor purchased vehicle in Debtor's name on behalf of defendant; defendant paid the entire purchase price; defendant maintained all insurance on the vehicle; defendant paid for all maintenance and upkeep on vehicle; and vehicle was in defendant's sole and exclusive possession. Michigan Motor Vehicle Code specifies exclusive method of conveying title to vehicle by having certificate of title endorsed and delivered to purchaser or transferee or, if he vehicle is purchased from dealer, by having dealer complete assignment and warranty of title on certificate of title. Dealer issued title solely in Debtor's name and Debtor never made any effort to endorse certificate or otherwise convey legal interest in vehicle to defendant. Absent compliance, Debtor never conveyed title to defendant and Debtor, as of petition date, remained sole legal owner. Other sections of Motor Vehicle Code that extend liability to third parties who have exclusive use of vehicle for more than 30 days did not make defendant an "owner" for purposes of title to vehicle against claims of third parties. Provisions of Insurance statute that allows person not named on title to insure vehicle if person is in possession of the vehicle for more than 30 days also did not alter statute requiring transfer of title to be effective against third parties. Vehicle is property of estate and must be turned over to trustee for administration.
- (1324) *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.
- (1325) *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.

6.29 Titled Assets – Auction Sales

- (1326) *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 and 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.
- (1327) *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

6.30 Jointly Owned Bank Accounts

- (1328) *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.

6.31 Contract Rights

- (1329) *Nebel v. Warfield*, Case No. 16-8240 (D. Ax. 2017) – Debtor’s accrued vacation pay as of date of bankruptcy petition becomes property of estate and must be paid to Chapter 7 Trustee as funds are paid out by employer. Debtor’s prepaid vacation which Debtor’s purchased prior to bankruptcy petition for travel after completion of bankruptcy case constitute property of the estate, the value of which must be turned over to Chapter 7 Trustee.
- (1330) *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.
- (1331) *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.
- (1332) *U.S. v. Kurlmann*, 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.
- (1333) *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.
- (1334) *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.

6.32 Contract Deposits

- (1335) *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.

6.33 Land Contract Interests

- (1336) *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.

6.34 Easements

- (1337) *Jahn v. Candler*, 2017 WL 3126920, *reh’g denied*, 2017 WL 3732012 (Bankr. E.D. Tn. 2017) – Easement rights owned by Debtor as of petition date become property of estate. Easement may be created by (1) express grant, (2) reservation, (3) implication, (4) prescription, (5) estoppel, and (6) eminent domain. Implied easements arise either from prior use,” where prior to conveyance severing ownership of land into two or more parts, use was made of one part for benefit of another and when circumstances show that parties had reasonable grounds to expect that conveyance would not terminate right to continue prior use, and requires proof that (1) there has been separation of title, (2) prior to separation of title, there was long established and obvious use as to show that use was intended to be permanent, and (3) easement is essential to beneficial enjoyment of land. Implied easement resulting from “servitude created by necessity,” when conveyance would otherwise deprive transferee or transferor of rights necessary to reasonable enjoyment of land transferred or retained and includes access to

one's property where easement is so essential to full enjoyment of property that clear presumption of easement arises. Use must be of such necessity that implied reservation must be presumed to have been within contemplation of parties at time of conveyance, and requires 1) titles to two tracts must have been held by one person; 2) unity of title must have been severed by conveyance of one tract; 3) easement must be necessary for owner of dominant tenement to use land with necessity existing both at time of severance of title and time of exercise of easement. Debtor owned two adjacent parcels. During Chapter 13, stay was lifted as to one parcel and lender proceeded to foreclose. After acquiring title, lender resold property to Defendant. At time of bankruptcy, title to one property was in name of one Trustee under Deed of Trust, while second parcel was "owned" by different Trustee under different Deed of Trust. Accordingly, at time of foreclosure sale, there was no unity of title between two parcels and sale did not "sever" that unity. Further, any implied easement would have come into existence only after Debtor acquired both parcels and after Deeds of Trust attached to parcels, foreclosure of one Deed of Trust would foreclose out the easement just as it would any junior interest. Defendant's action in blocking access to remaining property of estate was not violation of stay where no implied easement came into existence in first instance and even if one did it was foreclosed out before Defendant obtained title to adjacent parcel.

6.35 Accounts Receivable

- (1338) *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.

6.36 Intellectual Property

- (1339) *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.

6.37 Internet Domain Name

- (1340) *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.

6.38 Commission Income

- (1341) *Anderson v. Rainsdon*, Case No. 16-1316 (9th Cir. BAP 2017) – Commission that is received post-petition is asset of estate if commission is rooted in pre-bankruptcy conduct. Right to commission is contingent interest as of petition date that is property of estate under Section 541 and commission, when ultimately received, is property of estate to extent services were performed pre-petition. If services straddle petition date, commission will be allocated to pre-petition property of estate and amount due to post-petition services. Real estate broker became entitled to commission when broker introduced buyer and seller and procured contract, but was not entitled to payment of commission until contact closed. Commissions for contacts signed pre-petition are property of estate. Entire commission is property of estate where Debtor did not present any evidence of post-petition services for which commission could be prorated.
- (1342) *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.

6.39 Unrecorded Interests

- (1343) *Gold v. Harper*, 2017 WL 377933 (Bankr. E.D. Mi. 2017) – Ownership of automobile is determined by certificate of title. Defendant who is not on title cannot claim ownership even where Debtor purchased vehicle in Debtor's name on behalf of defendant; defendant paid the entire purchase price; defendant maintained all insurance on the vehicle; defendant paid for all maintenance and upkeep on vehicle; and vehicle was in defendant's sole and exclusive possession. Michigan Motor Vehicle Code specifies exclusive method of conveying title to vehicle is by having certificate of title endorsed and delivered to purchaser or transferee or, if he vehicle is purchased from dealer, by having dealer complete assignment and warranty of title on certificate of title. Dealer issued title solely in Debtor's name and Debtor never made any effort to endorse certificate or otherwise convey legal interest in vehicle to defendant. Absent compliance, Debtor never conveyed title to defendant and Debtor, as of petition date, remained sole legal owner. Other sections of Motor Vehicle Code that extend liability to third parties who have exclusive use of vehicle for more than 30 days did not make defendant an "owner" for purposes of title to vehicle against claims of third parties. Provisions of Insurance statute that allows person not named on title to insure vehicle if person is in possession of the vehicle for more than 30 days also did not alter statute requiring transfer of title to be effective against third parties. Vehicle is property of estate and must be turned over to trustee for administration.
- (1344) *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.

6.40 Marital Property

- (1345) *Gertz v. Warner*, 2017 WL 1379341 (Bankr. N.D. Ohio 2017) – Designation of Debtor as beneficiary under Tax qualified Thrift Savings Plan is sufficient to establish that Debtor has beneficial interest in Plan as of date of commencement of bankruptcy case. However, Section 541(c)(2) excludes from a bankruptcy estate any asset that includes a restriction on transfer of a beneficial interest that is enforceable under applicable nonbankruptcy law. The Thrift Savings Plan is a trust subject to an anti-alienation clause under 5 USC Section 8437, rendering Debtor's interest in fund immune from assignment, alienation, execution, levy, attachment, garnishment or other legal process. Only exception to anti-alienation provision is Qualified Retirement Benefits Court Order which is mechanism that is analogous, but not identical to, Qualified Domestic Relations Order. QRBCO allows distribution of Plan assets that would otherwise violate anti-alienation provision where recipient is either divorcing spouse or surviving child. Where Court had not yet entered QRBCO, standard anti-alienation provision protected Debtor's contingent beneficial interest from becoming property of bankruptcy estate. Further, under Ohio law, upon filing divorce action, Debtor acquired contingent interest in all marital assets including husband's retirement Plan. Interest is in each item of specific marital property, not merely a generalized equitable claim, and interest is not speculative but constitutes present interest in each item marital property. Contingent interest in Thrift Savings Plan can be exempted under Ohio State exemption for rights to or interest in pension, benefit, annuity, retirement allowance or accumulate contributions and in rights or interests in assets held in or directly or indirectly constituting payment or benefit under an individual retirement account or individual retirement annuity. Exemptions expressly apply to alternate payee under Qualified Domestic Relations Order or similar Court Order. Further, Section 522(b)(3)(A) allows Debtor to exempt retirement funds to the extent far funds are in account that is exempt from taxation under Internal Revenue Code which includes Thrift Savings Fund which is treated under Section 401(a). Debtor's contingent interest in Thrift Savings Plan which arose on filing of complaint for divorce was sufficient interest in retirement Plan to support Debtor's claimed exemption.
- (1346) *Corzin v. Lawson*, 2017 WL 1207521 (Bankr. N.D. Ohio 2017) – When one spouse files for divorce, each spouse acquires contingent interest in all marital property. Contingent interest applies to all marital property regardless of name in which property may be titled. Marital property includes retirement accounts maintained by either spouse, such that on filing petition for divorce, each spouse obtains contingent interest in other spouse's retirement account independent of any vested beneficial interest arising from Orissa, the terms of the plan and/or any domestic relations order. Although interest is contingent, it is not speculative and is not just a generalized equitable claim. Debtor can exempt contingent interest in spouse's retirement account under Ohio Revised Code Section 2329.66 which allows a Debtor to exempt rights to or in a pension, benefit, annuity, retirement allowance or accumulate contributions" and rights or interests in assets held in, or directly or indirectly constituting any payment or benefit under an individual retirement account or individual retirement annuity. Debtor can also exempt funds under section 522(b)(3)(C).
- (1347) *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.

6.41 Equitable Interests

- (1348) *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.

6.42 Trust Property – Generally

- (1349) *Irons v. Maginnis*, 2017 WL 2889657 (Bankr. N.D. Ohio 2017) – Upon filing for relief, all equitable and legal interests of Debtor become property of bankruptcy estate. Bankruptcy estate does not include any power that Debtor may exercise solely for benefit of entity other than Debtor, but powers that Debtor may exercise for his or her own benefit are included in bankruptcy estate. Debtor's beneficial interest in trust gave Debtor "right to reside" in house owned by parents and part of parents trust. "Right to reside" is power that Debtor may exercise for her own benefit and became property of Debtor's estate that could be legally sold by Chapter 7 Trustee. Right to reside was sufficiently rooted in prepetition past and while interest was, at one point, contingent, even contingent interest are property of estate.
- (1350) *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.
- (1351) *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.
- (1352) *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.

- (1353) *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.
- (1354) *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.
- (1355) *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.
- (1356) *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.
- (1357) *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.

6.43 Retirement Accounts – Section 521(c)(2)

- (1358) *Gertz v. Warner*, 2017 WL 1379341 (Bankr. N.D. Ohio 2017) – Designation of Debtor as beneficiary under Tax qualified Thrift Savings Plan is sufficient to establish that Debtor has beneficial interest in Plan as of date of commencement of bankruptcy case. However, Section 541(c)(2) excludes from a bankruptcy estate any asset that includes a restriction on transfer of a beneficial interest that is enforceable under applicable nonbankruptcy law. The Thrift Savings Plan is a trust subject to an anti-alienation clause under 5 USC Section 8437, rendering Debtor's interest in fund immune from assignment, alienation, execution, levy, attachment, garnishment or other legal process. Only exception to anti-alienation provision is Qualified Retirement Benefits Court Order which is mechanism that is analogous, but not identical to, Qualified Domestic Relations Order. QRBCO allows distribution of Plan assets that would otherwise violate anti-alienation provision where recipient is either divorcing spouse or surviving child. Where Court had not yet entered QRBCO, standard anti-alienation provision protected Debtor's contingent beneficial interest from becoming property of bankruptcy estate. Further, under Ohio law, upon filing divorce action, Debtor acquired contingent interest in all marital assets including husband's retirement Plan. Interest is in each item of specific marital property, not merely a generalized equitable claim, and interest is not speculative but constitutes present interest in each item marital property. Contingent interest in Thrift Savings Plan can be exempted under Ohio State exemption for rights to or interest in pension, benefit, annuity, retirement allowance or accumulate contributions and in rights or interests in assets held in or directly or indirectly constituting payment or benefit under an individual retirement account or individual retirement annuity. Exemptions expressly apply to alternate payee under Qualified Domestic Relations Order or similar Court Order. Further, Section 522(b)(3)(A) allows Debtor to exempt retirement funds to the extent far funds are in account that is exempt from taxation under Internal Revenue Code which includes Thrift Savings Fund which is

treated under Section 401(a). Debtor's contingent interest in Thrift Savings Plan which arose on filing of complaint for divorce was sufficient interest in retirement Plan to support Debtor's claimed exemption.

6.44 Express Trusts – Spendthrift Provisions

- (1359) *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.
- (1360) *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.
- (1361) *Kohut v. Lewiston*, 2015 WL 3894609 (Bankr. E.D. Mi. 2015), *aff'd*, 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.
- (1362) *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.
- (1363) *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.
- (1364) *Meoli v. Thrum*, 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.

6.45 Resulting Trusts and Estate Planning Devices

- (1365) *Tabor v. Lineback*, Adv. No. 12-5154 (Bankr. W.D. Tn. 2013), *aff'd*, 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.
- (1366) *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.

- (1367) *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.

6.46 Recovered Property

- (1368) *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.

6.47 Constructive Trusts

- (1369) *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.
- (1370) *Tabor v. Lineback*, Adv. No. 12-5154 (Bankr. W.D. Tn. 2013), *aff’d*, 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.
- (1371) *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.
- (1372) *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.
- (1373) *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.
- (1374) *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.
- (1375) *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.

6.48 Possessory Liens

- (1376) *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.

6.49 Restrictions on Alienation

- (1377) *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.

6.50 Consignment Transactions

- (1378) *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.
- (1379) *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.

6.51 Cash Collateral Generally

- (1380) *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 party 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.

6.52 Cash Collateral and Assignment of Rents – Defined

- (1381) *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 fewer than 6 units. Debtor’s occupancy of one half of duplex while renting out other half was less than 6 units rendering assignment unenforceable.
- (1382) *ECP Commercial II, LLC v. Town Center Flats, LLC*, 2016 WL 1237662, 2016 U.S. Dist. LEXIS 42063 (E.D. Mi. 2016), *aff’d*, 2017 WL 1573827 (6th Cir. 2017) – 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).
- (1383) *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.

- (1384) *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.
- (1385) *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.
- (1386) *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.
- (1387) *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.
- (1388) *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.

6.53 Assignment of Rents – Effect of Perfection

- (1389) *Town Center Flats, LLC v. ECP Commercial II, LLC*, 2017 WL 1573827 (6th Cir. 2017) – Assignment of rents absolutely transfers ownership and title to rents to assignee. Assignment becomes effective and terminates any right of assignor to use rents upon issuance of notice of default, notification to tenants to pay rents to assignee, and recording of notice of default in public records. Where assignee validly called assignment of rents and issued notice to tenants, assignor lost any interest in the rents. Because assignor did not have any rights in rents upon commencement of bankruptcy proceeding, rents are not included as property of estate but are sole property of assignee.
- (1390) *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 revests in mortgagor if mortgagor redeems property, but any rent collected by mortgagee from time of default to time of redemption belong to mortgagee.

6.54 Cash Collateral - Adequate Protection

- (1391) *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.
- (1392) *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.

- (1393) *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.
- 6.55 Cash Collateral – Casualty Insurance Proceeds
- (1394) *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.
- 6.56 Cash Collateral – Payment of Professional Fees
- (1395) *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.
- 6.57 Cash Collateral – Effect of Confirmation of Plan
- (1396) *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 confirmation, 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.
- 6.58 Assignment of Rents – Perfection and Enforcement
- (1397) *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.
- 6.59 Bare Possessory Interests
- (1398) *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.
- (1399) *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.
- (1400) *Escobedo v. Davis*, ___ WL ___ (Bankr. D.N. Mex. 2014) – Creditor sanctioned for attempt to enforce pre-petition eviction order in violation of automatic stay.
- (1401) *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.
- (1402) *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.
- (1403) *Litzinger 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.

6.60 Incomplete Transfers

- (1404) *Kendrick v. Rister*, Case No. 16-2010 (Bankr. E.D. Ky. 2017) – Debtor does not have interest in motor vehicle where, as of petition date, Debtor has signed contract to acquire vehicle but vehicle had not been titled in Debtor's name. State law provides exclusive method of transferring interest in motor vehicle which requires that purchaser obtain Certificate of Title in purchaser's name. Trustee could not seek turnover of motor vehicle as motor vehicle was not property of estate as of date of petition.
- (1405) *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.
- (1406) *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.
- (1407) *Litzinger 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.

6.61 Pre-petition Transfers Generally

- (1408) *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.

6.62 Pre-petition Attorney Fee Retainers

- (1409) *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.

6.63 Fixtures and Personalty – Defined

- (1410) *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.
- (1411) *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.

- (1412) *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.

6.64 Contingent and Future Interests

- (1413) *Gertz v. Warner*, 2017 WL 1379341 (Bankr. N.D. Ohio 2017) – Designation of Debtor as beneficiary under Tax qualified Thrift Savings Plan is sufficient to establish that Debtor has beneficial interest in Plan as of date of commencement of bankruptcy case. However, Section 541(c)(2) excludes from a bankruptcy estate any asset that includes a restriction on transfer of a beneficial interest that is enforceable under applicable nonbankruptcy law. The Thrift Savings Plan is a trust subject to an anti-alienation clause under 5 USC Section 8437, rendering Debtor’s interest in fund immune from assignment, alienation, execution, levy, attachment, garnishment or other legal process. Only exception to anti-alienation provision is Qualified Retirement Benefits Court Order which is mechanism that is analogous, but not identical to, Qualified Domestic Relations Order. QRBCO allows distribution of Plan assets that would otherwise violate anti-alienation provision where recipient is either divorcing spouse or surviving child. Where Court had not yet entered QRBCO, standard anti-alienation provision protected Debtor’s contingent beneficial interest from becoming property of bankruptcy estate. Further, under Ohio law, upon filing divorce action, Debtor acquired contingent interest in all marital assets including husband’s retirement Plan. Interest is in each item of specific marital property, not merely a generalized equitable claim, and interest is not speculative but constitutes present interest in each item marital property. Contingent interest in Thrift Savings Plan can be exempted under Ohio State exemption for rights to or interest in pension, benefit, annuity, retirement allowance or accumulate contributions and in rights or interests in assets held in or directly or indirectly constituting payment or benefit under an individual retirement account or individual retirement annuity. Exemptions expressly apply to alternate payee under Qualified Domestic Relations Order or similar Court Order. Further, Section 522(b)(3)(A) allows Debtor to exempt retirement funds to the extent far funds are in account that is exempt from taxation under Internal Revenue Code which includes Thrift Savings Fund which is treated under Section 401(a). Debtor’s contingent interest in Thrift Savings Plan which arose on filing of complaint for divorce was sufficient interest in retirement Plan to support Debtor’s claimed exemption.
- (1414) *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.

6.65 Season Tickets

- (1415) *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).

6.66 Political Campaign Contributions

- (1416) *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.

6.67 Bonuses

- (1417) *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.

- (1418) *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.

6.68 Encumbered Property

- (1419) *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.

6.69 Proceeds and Products

- (1420) *Kendrick v. Rister*, 2017 WL 3381810 (Bankr. E.D. Ky. 2017) – Asset constitutes "proceed" or "product" of only where asset that generated product or proceed was itself property of estate. Debtor does not have interest in motor vehicle where, as of petition date, Debtor has signed contract to acquire vehicle but vehicle had not been titled in Debtor's name. State law provides exclusive method of transferring interest in motor vehicle which requires that purchaser obtain Certificate of Title in purchaser's name. Automobile could not be proceed or product where Debtor had only contract right to purchase vehicle as of date of commencement of case. Trustee had no cognizable claim to vehicle acquired by Debtor post-petition.

- (1421) *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.

- (1422) *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.

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

- (1423) *In re Burton*, Case No. 15-31915 (Bankr. E.D. Mi. 2017) – Life insurance proceeds resulting from death of insured within 180 days of filing chapter 7 bankruptcy petition constituted property of estate pursuant to 11 USC Section 541(a)(5)(C). Amendments to exemptions may not be disallowed or limited merely because Debtor fraudulently concealed exempt asset as Court does not have general equitable power to deny exemptions. Rule 1009 allows Debtor a general right to amend any schedule at any time before case is closed. Filing of asset Report does not close case where requisite 30 day period had not expired when final report was withdrawn by Trustee, Trustee was never discharged in case, and Court never entered order closing case.

- (1424) *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 Post-petition 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.

6.71 Mineral Interests and Rights

- (1425) *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.

- (1426) *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.

6.72 Criminal Forfeiture

- (1427) *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”.

6.73 Equitable Distribution and Marital Interests

- (1428) *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.
- (1429) *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.

6.74 Health Savings Accounts

- (1430) *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.

6.75 Inheritance

- (1431) *In re Portell*, Case No. 12-44058 (Bankr. W.D. Mo. 2016) – Debtor's inheritance received during life of Chapter 13 case is property of the estate. Under state law, inheritance received by one spouse is not chargeable for debts of other spouse. Husband who inherited property during Chapter 13 required to account for inheritance to extent needed to pay joint debts plus his individual debts in full but not required to account for inheritance to extent of wife's individual debts, as wife had no interest in inheritance and her creditors had no claim to inheritance. Joint filing does not create single estate or render assets of one spouse chargeable for debts of other spouse.
- (1432) *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.
- (1433) *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.

6.76 Marshalling of Assets

- (1434) *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.

6.77 After Confirmation of Chapter 13 Plan – Generally

- (1435) *In re Haddad*, 2017 WL 3894984 (Bankr. E.D. Mi. 2017) – Section 1306 sweeps into Chapter 13 estate all assets that Debtor acquires post-petition. Claim that first arose when Debtor had automobile accident post-petition became property of estate by reason of the accident itself. Revesting provision of Section 1327 does not remove assets from property of estate where Debtor did not disclose or schedule claim when obtaining confirmation of plan. Chapter 13 Debtor cannot fail to disclose assets prior to confirmation and then be rewarded by having undisclosed property “vest” in Debtor free of Estate.
- (1436) *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.
- (1437) *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.

6.78 After Confirmation of Chapter 13 Plan - Personal Injury Proceeds

- (1438) *In re Haddad*, 2017 WL 3894984 (Bankr. E.D. Mi. 2017) – Section 1306 sweeps into Chapter 13 estate all assets that Debtor acquires post-petition. Claim that first arose when Debtor had automobile accident post-petition became property of estate by reason of the accident itself. Revesting provision of Section 1327 does not remove assets from property of estate where Debtor did not disclose or schedule claim when obtaining confirmation of plan. Chapter 13 Debtor cannot fail to disclose assets prior to confirmation and then be rewarded by having undisclosed property “vest” in Debtor free of Estate.
- (1439) *McKinney v. Russell*, Case No. 16-522 (N.D. Ala. 2017) - Proceeds of settlement of personal injury action that arose during Chapter 13 case are property of estate even if proceeds were received after expiration of Applicable Commitment Period. Debtor was “below median” and had 36 month Applicable Commitment Period. However, Debtor proposed and confirmed a Plan with a 60 month term. Shortly after expiration of the three-year ACP, Debtor sued and recovered \$12,000 from personal injury action. Trustee could modify Plan to require remittance of proceeds where Debtor would otherwise discharge \$62,000 in unsecured debt for no payment, as equity would not permit Debtor to receive benefits of Chapter 13 without bearing its attendant duties. Cause existed for modification to prevent unmistakable lack of balance between benefits and burdens of Chapter 13 case.
- (1440) *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.

6.79 After Confirmation of Chapter 13 Plan – Life Insurance Proceeds

- (1441) *In re Roscoe*, Case Number 13-6517 (Bankr. M.D. Fl. 2017) - Life insurance proceeds to which Debtor becomes entitled more than 180 days after bankruptcy petition belong to Chapter 13 estate unless case has been dismissed, closed or converted. Section 1306 expands definition of estate property to include property acquired after commencement of case. Proceeds of insurance must go to Chapter 13 Trustee for distribution to creditors.
- (1442) *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.
- (1443) *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.

6.80 After Confirmation of Chapter 13 Plan – Inheritance

- (1444) *In re Portell*, Case No. 12-44058 (Bankr. W.D. Mo. 2016) – Debtor’s inheritance received during life of Chapter 13 case is property of the estate. Under state law, inheritance received by one spouse is not chargeable for debts of other spouse. Husband who inherited property during Chapter 13 required to account for inheritance to extent needed to pay joint debts plus his individual debts in full but not required to account for inheritance to extent of wife’s individual debts, as wife had no interest in inheritance and her creditors had no claim to inheritance. Joint filing does not create single estate or render assets of one spouse chargeable for debts of other spouse. Husband’s plan modification to pay inheritance only to extent necessary to pay his creditors and joint creditors in full but not to pay wife’s individual creditors did not lack good faith as husband’s retention of proceeds beyond amount needed to pay his creditors in full was merely doing what state law allowed

him to do. Plan needed to be modified only to require husband to pay his creditors and joint creditors in full but not to pay wife's individual creditors any amount in excess of dividend promised when plan was confirmed.

- (1445) *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.
- (1446) *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".
- (1447) *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.
- (1448) *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.
- (1449) *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.
- (1450) *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.
- (1451) *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.
- (1452) *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.
- (1453) *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.
- (1454) *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.

6.81 After Confirmation of Chapter 13 Plan – Casualty Insurance

- (1455) *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.

6.82 Stay Violations – Chapter 13

- (1456) *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.
- (1457) *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.

6.83 Conversion From Chapter 13 to Chapter 7

- (1458) *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.
- (1459) *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.

- (1460) *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.

6.84 *Ipsa Facto* Clauses

- (1461) *CMH Liquidating Trust v. National Union Fire Insurance Co. of Pittsburgh*, Case No. 16-14434 (E.D. Mi. 2017) - Code provisions voiding "ipso facto" clauses are construed broadly and may result in unenforceability of clause even if provision does not purport to avoid entire contract. Section 365 provides that executory contract or lease may not be terminated solely because of a provision in the contract that is conditioned upon insolvency or financial condition or filing of a bankruptcy petition; law Section 541 provides that property becomes property of the estate notwithstanding any provision that is conditioned on the insolvency or financial condition of the Debtor. There is no authority for proposition that clause is unenforceable only if it applies to entire contract.
- (1462) *In re Johnson*, 565 BR 835 (Bankr. S.D. Ohio 2017) – Debtor's bankruptcy petition did not work automatic dissolution of partnership. Although Ohio law specified that bankruptcy filing would result in partner being dissociated, Section 365(e) prohibits enforcement of clauses that are triggered solely by bankruptcy filing.
- (1463) *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).
- (1464) *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.
- (1465) *Zeh v. Orthodontic Centers of America, Inc.*, 2013 WL 5966784 (W.D. Ky. 2013) – *Ipsa 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

6.85 Generally

- (1466) *Kendrick v. Rister*, Case No. 16-2010 (Bankr. E.D. Ky. 2017) – Debtor does not have interest in motor vehicle where, as of petition date, Debtor has signed contract to acquire vehicle but vehicle had not been titled in Debtor's name. State law provides exclusive method of transferring interest in motor vehicle which requires that purchaser obtain Certificate of Title in purchaser's name. Trustee could not seek turnover of motor vehicle as motor vehicle was not property of estate as of date of petition.

- (1467) *Ball v. United Cumberland Bank*, 2017 WL 3037447 (Bankr. E.D. Ky. 2017) – Section 542 applies only to turnover of property of estate. Bank setoff of Debtor’s account after bankruptcy case was dismissed and before case was reinstated removed funds from property of estate and not subject to action under Section 542 unless setoff itself was avoided and funds recovered for benefit of estate. Contractual setoff is not a judicial or quasi-judicial process that would violate 42 U.S.C. § 407 and Bank had contractual right of setoff exercised by the Bank at a time when there was no bankruptcy proceeding.
- (1468) *Palmer v. Paul Miller Ford, Inc.*, 2017 WL 455391 (Bankr. E.D. Ky. 2017) - Motor vehicle that Debtor purchased from motor vehicle dealer became property of Debtor upon completion of transaction. Although motor vehicle dealer was unable to complete paperwork necessary to transfer title on records of Department of Motor Vehicles, under state law, purchase of motor vehicle from motor vehicle dealer conveyed title when purchaser receives physical possession of vehicle pursuant to bona fide sale agreement. Upon delivery of physical possession and completion of sales agreement, dealership was no longer owner of motor vehicle merely because of assignment of title to dealership or certificate of title remained in dealership’s name. Ownership transfers upon delivery of vehicle subject to applicable security interest. Fact that Debtor did not arrange state-mandated inspection of vehicle does not void sale or delay transfer of ownership interest. Motor vehicle dealer order to provide certificate of title to chapter 7 Trustee.
- (1469) *Davis v. West Virginia Tax Department*, Case No. 16-3109 (Bankr. E.D. Va. 2016) – Eleventh Amendment prohibits any action against any State by a citizen of that state in federal court and broadly prohibits entering money judgment against State. Protection extends only to “suits” which are generally determined by degree of coercion exercised by federal court in compelling state to attend and whether resolution or remedy requires jurisdiction over state. If the substance of a bankruptcy proceeding will impact state treasury, it will likely be considered a suit against the state. Section 106 waives sovereign immunity only to extent action is “in rem”. Action for turnover is part of essential process of assembling property of the estate and action against state to recover property of the estate is consistent with principals of creditor equity and essential to core purpose of bankruptcy code and so is not precluded by sovereign immunity. However, action of Trustee sought not only turnover of tax refunds, but sought determination that state actually owed Debtor tax refunds. Until the right to the refund is determined, there is no identifiable and undisputed property of the estate that could give rise to a turnover action. Debtor’s entitlement to tax refunds was disputed by state and Federal Court cannot exercise jurisdiction over state to determine that state owes tax refunds to Debtor. If and when State Court determines that tax refunds are owed to Debtor without question, then Trustee can bring action for turnover. Until that time, action seeks to liquidate alleged debt of state which is barred by Sovereign Immunity.
- (1470) *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.
- (1471) *Reed v. Nathan*, 2016 WL 5844579 (E.D. Mi. 2016), *aff’d*, Case No. 16-2685 (6th Cir. 2017) – 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.
- (1472) *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.
- (1473) *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.

- (1474) *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.
- (1475) *Spradlin v. Khouri*, 2015 WL 4735660 (Bankr. E.D. Ky. 2015), *aff’d*, 2017 WL 33514 (6th Cir. BAP 2017) – 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.
- (1476) *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.
- (1477) *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
- (1478) *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.
- (1479) *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.
- (1480) *Lawrence v. Commonwealth of Kentucky*, 2013 WL 2422669 (Bankr. W.D. Ky. 2013), *aff’d*, 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.
- (1481) *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.
- (1482) *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.
- (1483) *In re Brown*, 2013 WL 5493213 (Bankr. E.D. Ky. 2013) – Debtor’s failure to turnover assets to Trustee notwithstanding turnover order constituted contempt of court. Debtor hand actual notice of turnover order and admittedly failed to completely comply. Order was specific and definite as to items to be turned over. Court awarded monetary judgment against Debtor for \$147,000 representing the value of items not turned over plus attorney fees incurred by Chapter 7 Trustee in attempting to obtain possession of items.
- (1484) *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.
- (1485) *Newman v. Schwartzer*, 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.
- (1486) *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.
- (1487) *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.

- (1488) *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.
- (1489) *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.
- (1490) *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.

6.86 Turnover – Procedure

- (1491) *Reed v. Nathan*, Case No. 16-2685 (6th Cir. 2017) – Turnover action must be brought by adversary proceeding. However, Bankruptcy Court's consideration of Motion for Turnover was harmless error. Defendant had ample notice of proceedings where Court gave defendant three weeks to respond to motion; held three separate evidentiary hearings; and allowed defendant to file supplemental memo of law. Discovery rules in contested matter are same as adversary proceedings and Federal Rules of Evidence applied. Defendant could not point to any specific deprivation or indicate how it was prejudiced by Motion versus Adversary Proceeding.

6.87 Turnover – Tax Refunds

- (1492) *Davis v. West Virginia Tax Department*, Case No. 16-3109 (Bankr. E.D. Va. 2016) – Eleventh Amendment prohibits any action against any State by a citizen of that state in federal court and broadly prohibits entering money judgment against State. Protection extends only to "suits" which are generally determined by degree of coercion exercised by federal court in compelling state to attend and whether resolution or remedy requires jurisdiction over state. If the substance of a bankruptcy proceeding will impact state treasury, it will likely be considered a suit against the state. Section 106 waives sovereign immunity only to extent action is "in rem". Action for turnover is part of essential process of assembling property of the estate and action against state to recover property of the estate is consistent with principals of creditor equity and essential to core purpose of bankruptcy code and so is not precluded by sovereign immunity. However, action of Trustee sought not only turnover of tax refunds, but sought determination that state actually owed Debtor tax refunds. Until the right to the refund is determined, there is no identifiable and undisputed property of the estate that could give rise to a turnover action. Debtor's entitlement to tax refunds was disputed by state and Federal Court cannot exercise jurisdiction over state to determine that state owes tax refunds to Debtor. If and when State Court determines that tax refunds are owed to Debtor without question, then Trustee can bring action for turnover. Until that time, action seeks to liquidate alleged debt of state which is barred by Sovereign Immunity.
- (1493) *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.

6.88 Excusal – State Court Receiver

- (1494) *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.
- (1495) *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.

6.89 Property in Possession of Custodian

- (1496) *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.

- (1497) *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.

6.90 Defenses

- (1498) *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.
- (1499) *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.
- (1500) *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.
- (1501) *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.
- (1502) *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.
- (1503) *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.
- (1504) *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.
- (1505) *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.

6.91 Refusal to Turnover - Sanctions

- (1506) *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.

- (1507) *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
- 6.92 Future Prosecution Barred – Judicial Estoppel
- (1508) *Hermann v. Hartford Casualty Co.*, 2017 WL 117118 (10th Cir. 2017) – Debtor judicially estopped from pursuing lawsuit against automobile insurance carrier for bad faith denial of coverage where Debtor’s Schedule B listed only “Potential Personal Injury Award”. Although disclosure would have been sufficient to notify Chapter 7 Trustee of pending personal injury action, disclosure did not notify Trustee of separate “bad faith” action against insurer itself.
- (1509) *Anderson v. Seven Falls Co.*, 2017 WL 2533356 (10th Cir. 2017) – Judicial estoppel applies where party takes position in current action that is clearly inconsistent with position asserted in earlier action, prior position was successful so that accepting later one would create perception that one court or the other was misled, and party would gain unfair advantage. Court may also consider whether failure to disclose material fact in prior proceeding was due to mistake or inadvertence. Debtor did not list personal injury claim in bankruptcy schedules and specifically denied suffering any personal injury in the year preceding commencement of case. Chapter 7 case was deemed no asset case and debtor received discharge. Debtor then filed suit to recover for personal injury. At that point, Debtor amended Bankruptcy Schedules to disclose claim and Chapter 7 Trustee moved to replace Debtor as plaintiff. Debtor originally took inconsistent positions by not disclosing injury when filing bankruptcy. Debtor received benefit of non-disclosure by receiving discharge in “no asset” case. Court could infer motive to conceal potential asset such that non-disclosure was not result of mistake or inadvertence. Trustee is not judicially estopped by Debtor’s actions. However, Trustee could recover only amount necessary to pay creditors holding allowed claims in Chapter 7 case in full plus administrative expenses. Although Complaint sought \$10 million in damages, Trustee’s recovery limited to \$46,000, with Debtor to receive none of the proceeds of the litigation.
- (1510) *Rizka v. State Farm Fire & Casualty Co.*, 2017 WL 1363891 (6th Cir. 2017) – Debtor judicially estopped from claiming damages against homeowners insurance for \$250,000 damage to Debtor’s home and over \$200,000 of personal property. Debtor filed bankruptcy approximately one year previously, attesting that Debtor owned only \$1800 in personal property and Debtor did not own any real property at all. Debtor obtained discharge based on representation to Bankruptcy Court that Debtor owed nothing but then sought almost \$500,000 in real and personal property loss from insurance company. Positions were contrary and did not result from mistake or inadvertence where Debtor was aware of what she was doing, did it in bad faith, and could not blame it on her bankruptcy attorney. Debtor’s argument that homeownership is “too confusing for a layperson to understand” did not constitute a mistake or inadvertence.
- (1511) *Bey v. Brown*, 2017 WL 1179126 (N.D. Ohio 2017) – Judicial Estoppel precluded attempt by plaintiff to bring action under RESPA for claims surrounding origination of mortgage as plaintiff failed to disclose those causes of action in her prior chapter 7 bankruptcy case. Judicial estoppel applies where Debtor is asserting position that is contrary to one that Debtor asserted under oath in bankruptcy proceeding; the Bankruptcy Court adopted the contrary position; and the omission did not result from mistake or inadvertence. Debtor has affirmative obligation to schedule known claims and causes of action and failure to list a claim operates as representation a claim does not exist. Plaintiff filed bankruptcy more than one year after obtaining loan which is now subject to RESPA dispute. Debtor knew or should have known of existence of any dispute or claim concerning origination of mortgage at time of bankruptcy filing yet did not disclose any dispute regarding origination of mortgage in bankruptcy filing and Debtor obtained discharge based on statements and schedules filed with Court, judicially stopping Debtor from now asserting challenges related to origination of mortgage.
- (1512) *Owens v. Arvato Digital Services, Inc.*, 2016 WL 7173793 (W.D. Ky. 2016) - Judicial Estoppel precludes party from asserting position in litigation where (1) party asserts position that is contrary to one party has asserted under oath in prior proceeding; (2) prior Court adopted contrary position either preliminarily or as part of final disposition; and (3) omission was not due to mistake or inadvertence. Debtor must disclose all causes of action that exists when bankruptcy petition is filed, and has duty of continuing disclosure of any potential causes of action that arises post-petition until the case is closed. Plaintiffs action barred by judicial estoppel where plaintiff was pursuing cause of action which was not disclosed in previous bankruptcy filing and plaintiff did not amend Chapter 13 case after she lost job to reflect claims resulting from termination. Debtor also omitted claims on subsequent chapter 7 bankruptcy petition filed almost one year after termination and one month after letter threatening litigation was sent to former employer. Bankruptcy Court adopted contrary position created by failure to disclose by confirming Chapter 13 Plan and subsequent discharging debts in Chapter 7 case. Confirmation of plan and entry of order of discharge “adopted” contrary position that no claims existed. Omission will be inadvertent if (1) Debtor lack knowledge of the factual basis of the claim; (2) Debtor had no motive for concealment; and (3) evidence indicates lack of bad faith. Debtor knew of factual basis for claims on day she was terminated from employment. Debtor knew that she was the only woman and eldest in her unit and that her termination was not based on poor job performance. Although not required, Debtor also knew legal basis of claim as her attorney sent letter threatening litigation to Debtor’s employer one month before Debtor file Chapter 7 petition. While Debtor did not have notice of action when Debtor commenced chapter 13 case because she had not been terminated, Debtor had continuing duty to update petition to disclose accrual of cause of action. Court presumes in Chapter 13 proceeding that failure to disclose litigation’s effort to minimize income and assets resulting in motive to conceal. Motive to conceal can be inferred from sole fact that Debtor knew of a claim and did not disclose it. Debtor’s conclusory statement that she had no motive to conceal lacked any factual basis to rebut presumption of motive to conceal. Evidence indicated lack of good faith as Debtor did not take any steps to advise Court or Trustee of wrongful termination and even as of date of hearing on Motion for Summary Judgment still had not taken any steps to advise Bankruptcy Court of cause of action. Fact that Debtor could reopen case did not make up for fact that Debtor had not done so
- (1513) *Finney v. Volvo Group North America, LLC*, 2016 WL 7057374 (M.D. Tn. 2016) – Debtor in bankruptcy has ongoing duty to disclose all assets, including potential legal claims that arise after bankruptcy case is filed but before case is closed. Judicial estoppel is appropriate

where Debtor fails to disclose legal claim to bankruptcy court and later seeks to assert that claim in different manner. Judicial estoppel requires proof that plaintiff did not disclose cause of action in prior bankruptcy case; that bankruptcy court adopted contrary position as preliminary matter or as part of final disposition; and that omission did not result from mistake or inadvertence including a lack of knowledge or factual basis for underlying claim and lack of motive for concealment. Motive for concealment is found by very nature of bankruptcy case, as Debtor has motive to conceal assets for his own benefit rather than having assets liquidated for benefit of creditors. Once evidence of elements of judicial estoppel are present, Debtor can avoid effect by showing lack of bad faith though efforts to inform bankruptcy court or trustee about claims prior to assertion of judicial estoppel defense and Debtor took affirmative steps to rectify omission. During course of Chapter 13 case, Debtors suffered injury in auto accident. Debtors had knowledge of factual basis for claim and did not disclose claim to the court, and had clear motive for concealment in order to avoid prolonging bankruptcy case or sharing proceeds with creditors, Debtors did not make any effort to notify bankruptcy court or trustee of potential claims or raise any questions with the court as to how claims might affect bankruptcy case. While Debtors may not have understood full legal theory on which recovery could be based or know specifically what parties could be held liable, Debtors knew of the factual basis for claim. Fact that Debtors had not retained counsel to pursue litigation did not mitigate duty to disclose.

- (1514) *Cruse v. Sun Products Corp.*, 2016 WL 6892795 (W.D. Tn. 2016) – Judicial estoppel precludes later employment related claims not disclosed in prior bankruptcy proceedings, where (1) Debtor assumed position contrary to the one asserted under oath in bankruptcy; (2) bankruptcy court adopted contrary position; and (3) Debtor's omission did not result from mistake or inadvertence, Debtor has ongoing and affirmative duty to disclose assets, including unliquidated litigation interests.
- (1515) *Neidenbach v. Amica Mutual Insurance Company*, 2016 WL 6775961 (8th Cir. 2016) – Insured's claim against insurer for loss of personal property in fire judicially estopped to deny value of assets listed in Bankruptcy schedules filed one year earlier. Claim for loss of property in excess of \$260,000 amounted to fraud allowing insurer to void policy. Although Debtors testified that bankruptcy schedules reflected "garage sale value" while policy covered replacement cost, disparity between values was too great to result from mistake or inadvertence.
- (1516) *Green v. Liberty Insurance Corporation*, 2016 WL 6777848 (E.D. Mi. 2016) – Judicial estoppel prevents party from asserting a position in one proceeding prevailing on that position, and then asserting contrary position in later proceeding merely because his interests have changed. Judicial estoppel requires that party's current position be clearly inconsistent with prior position; party must have succeeded in persuading court to accept earlier position so that acceptance of later position would create perception that court was misled; and party would gain an unfair advantage if allowed to assert inconsistent position. Debtor barred by judicial estoppel from asserting claim against homeowner's insurance for alleged theft of property. Insurance policy allowed insurer to void policy if Debtor engaged in fraudulent conduct or makes false statements. Debtor filed claim for theft of property exceeding \$100,000.00. In Debtor's prior bankruptcy case filed 5 years earlier, he disclosed only \$4,150 in total household goods. Discovery in insurance litigation revealed the Debtor at time of bankruptcy, owned three guitars which Debtor contended were worth thousands of dollars each; a workstation valued at over \$2,500; a \$2,800 keyboard; other assets including video games that Debtor had been collecting since he was 12 years old valued at \$250 each; and a diamond ring purchased for \$2,700.00 and a sax worth at least \$3,000.00. Assertions in insurance claim were clearly inconsistent with prior bankruptcy pleadings and Debtor received benefit of discharge based on those assertions, such that allowing Debtor to make contrary assertions now would be judicially estopped.
- (1517) *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.
- (1518) *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.

- (1519) *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.
- (1520) *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.
- (1521) *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.
- (1522) *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.
- (1523) *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.
- (1524) *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.
- (1525) *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.

- (1526) *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.
- (1527) *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.
- (1528) *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.
- (1529) *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.
- (1530) *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.
- (1531) *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.
- (1532) *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.
- (1533) *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.

- (1534) *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.
- (1535) *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 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.
- (1536) *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.
- (1537) *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.

(1538) *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.

(1539) *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.

6.93 Future Prosecution Not Barred

(1540) *Slater v. U.S. Steel Corp.*, Case No. 12-15548 (11th Cir. 2017) – Judicial estoppel requires that Debtor failed to disclose pending cause of action if, based on all factors including Debtor's level of sophistication, explanation of omissions, whether Debtor subsequently corrected disclosures, and any action taken by Bankruptcy Court concerning non-disclosures, evidences Debtor's intent to "make a mockery" of judicial system. Mere non-disclosure, even if Debtor knew of action at time Debtor completed bankruptcy schedules, does not automatically constitute "calculated attempt to undermine" judicial process or establish any inference of intent to misuse courts without consideration of individual Debtor and circumstances surrounding non-disclosure.

(1541) *Paul v. Hewlett Packard Enterprise Co.*, 2017 WL 3668497 (E.D. Mi. 2017) - Judicial estoppel is equitable doctrine designed to protect integrity of court and prevent abuse of process. Judicial stopped requires that party assert position that is contrary to one asserted under oath in prior proceeding where prior court adopted contrary position either as preliminary matter or part of final disposition. Judicial estoppel is inapplicable where conduct amounts to nothing more than mistake or inadvertence, evidenced where debtor lacks knowledge of factual basis for claim or where debtor has not motive for concealment and lack of bad faith. Plaintiff's failure to disclose cause of action that arose during Chapter 13 case constituted assertion of contrary position that plaintiff had no claims, and bankruptcy court relied on proposition for at least some time during pendency of Chapter 13 case. Plaintiff also had motive to conceal because Chapter 13 Debtor always has interest in minimizing income and assets. However, evidence indicated that Plaintiff repeatedly advised bankruptcy counsel of claim and bankruptcy counsel repeatedly advised Plaintiff that it was not necessary to amend or disclose. Only after Plaintiff discharged prior counsel and hired new bankruptcy counsel was Plaintiff informed of need to amend and Plaintiff timely amended to disclose cause of action. Prompt amendment on being advised of need coupled with prior reliance on advice of counsel demonstrated absence of bad faith preventing application of judicial estoppel in this case.

(1542) *Jones v. University of Phoenix*, 2017 WL 3334020 (E.D. Mi. 2017) – Debtor permitted to amend complaint to add Bankruptcy Trustee as party plaintiff for cause of action that arose pre-petition where Debtor initially commenced litigation Debtor's own name without joining Trustee. Although Debtor may have lacked standing to institute litigation in first instance as claim belonged to estate, Debtor not prevented by judicial estoppel from adding Trustee who would have standing to pursue claim.

(1543) *Wilson v. Primesource Health Care of Ohio*, 2017 WL 2869341 (N.D. Ohio 2017) - Judicial Estoppel bars Debtor from bringing post-petition cause of action against a third-party where Debtor does not disclose existence of claim in bankruptcy schedules. Judicial estoppel applies where (1) Debtor asserts position that is contrary to one that Debtor asserted under oath in prior proceeding; and (2) prior Court adopted contrary position either as preliminary matter or as part of final disposition. Judicial estoppel does not apply when Debtors omission might be inadvertent such as where Debtor lacks knowledge of the factual basis of undisclosed claim or where Debtor has no motive for concealment. Debtor did not have knowledge of possible claim as of date of bankruptcy petition. Although Debtor suspected that employer may owe money for unpaid overtime, employer repeatedly asserted that Debtor was salaried and in eligible for overtime. Debtor reasonably believed she was salaried and Debtor's general frustration with earning so little for so much work was insufficient to show that Debtor knew

factual basis for claim.

- (1544) *Wilkey v. Management & Training Corporation*, 2017 WL 1015857 (W.D. Ky. 2017) – Judicial estoppel does not prevent trustee from pursuing recovery of cause of action that was initially not disclosed. Debtor's failure to disclose pre-petition cause of action for wrongful termination would have barred Debtor from pursuing recovery but once Trustee substitutes in as party plaintiff, trustee has full right to pursue recovery for benefit of estate. Trustee does not stand in shoes of Debtor for purposes of judicial estoppel.
- (1545) *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.
- (1546) *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.
- (1547) *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.
- (1548) *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.
- (1549) *Rizka v. State Farm Fire & Casualty Co.*, 2014 WL 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.
- (1550) *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.
- (1551) *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.
- (1552) *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.
- (1553) *Cannata v. Wyndham Worldwide Corp.*, 798 F. Supp. 2d 1165 (D. Nv. 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.
- (1554) *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.
- (1555) *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.

- (1556) *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.
- (1557) *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.
- (1558) *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.
- (1559) *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.
- (1560) *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
- 6.94 Expenses
- (1561) *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
- 6.95 Approval Generally
- (1562) *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.
- (1563) *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.

- (1564) *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.
- 6.96 Sale Free and Clear of Liens or Interests
- (1565) *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.
- (1566) *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.
- (1567) *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.
- (1568) *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.
- (1569) *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.
- (1570) *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.
- (1571) *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.
- (1572) *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.

6.97 Procedure

- (1573) *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.
- (1574) *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.

6.98 Objections

- (1575) *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.
- (1576) *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

6.99 Procedure

- (1577) *In re Humbert*, 2017 WL 650128 (Bankr. N.D. Ohio 2017) – Creditor violated discharge injunction by filing eviction action against Debtor post-discharge seeking not only possession of property but also award of unpaid rent accruing after entry of discharge. Section 502(g) treats a claim for post-petition damages for breach of an unexpired prepetition lease as prepetition, discharged claim. Any debt owed to landlord on lease deemed rejected under Section 365 including post-petition rent arrearage is deemed prepetition debt. Abandonment of property under Section 554 does not render Debtor liable for post-petition rental payments. Property had not yet been abandoned by Chapter 7 estate as Chapter 7 case remained pending and Court had not entered Order deeming property to be abandoned. There was no indication that Debtor entered into new post-petition lease agreement where Debtor did not make any payments nor offer to make any payments. Holdover tenants are not liable for post-petition rent simply because they wait for landlord to take steps to complete eviction action.
- (1578) *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.

- (1579) *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.
- (1580) *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.
- (1581) *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 revert 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.
- (1582) *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.
- (1583) *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.
- (1584) *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.
- (1585) *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.
- (1586) *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.
- (1587) *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.

6.100 Technical Abandonment

- (1588) *In re Wright*, Case No. 16-8019 (6th Cir. BAP 2017) - Section 554(d) provides that unless Court orders otherwise, property of estate that is not abandoned and is not administered remains property of estate. Debtor’s failure to schedule assets precludes abandonment of assets upon closure of case, and not disclosed assets remain property of estate, even if Trustee otherwise had actual knowledge of unscheduled claim. Debtor’s failure to list claim against Bureau of Workers Compensation resulted in claim not being abandoned and closing of case, allowing Trustee to reopen case and administer recovery for benefit of creditors.
- (1589) *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.
- (1590) *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.

- (1591) *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.
- (1592) *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.
- (1593) *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.
- (1594) *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.
- (1595) *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.

6.101 Implied Abandonment

- (1596) *In re Wright*, 2017 WL 1371293 (6th Cir. BAP 2017) - Abandonment of asset by bankruptcy estate under Section 554 occurs when property scheduled under Section 521 is not administered at time of closing of case. Abandonment under Section 554(c) results from ministerial act of clerk's office. Personal injury claim properly disclosed in Schedule B and not administered by Chapter 7 Trustee was statutorily abandoned by operation of law upon entry of final decree. Trustee did not request Court to "order otherwise" as provided in Section 554 and statement in Trustee's Report of No Distribution that purported to retain personal injury claim is property of bankruptcy estate was not sufficient as technical abandonment can be avoided only by entry of Bankruptcy Court.
- (1597) *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.
- (1598) *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.

6.102 "Delayed" Abandonment

- (1599) *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.

6.103 Motion to Compel Abandonment

- (1600) *In re Coslow*, 2017 WL 3225450 (Bankr. W.D. Ky. 2017) – To determine whether property has value for purposes of abandonment, value is determined as of petition date. Fact that property appreciated in value post-petition or that amount owed on junior mortgage was reduced post-petition does not create value for purposes of abandonment. Equity accrued through date of petition is available for estate. Equity that accrues post-petition as compensation for post-petition services belongs to Debtor, as Chapter 7 estate includes only Debtor's rights as they existed on petition date.
- (1601) *Jahn v. Burke*, 2017 WL 2990162 (6th Cir. 2017) – Debtor has standing to seek to compel abandonment of exempt property if property is of inconsequential value. Debtor is "party in interest" as Debtor has direct pecuniary interest in outcome of abandonment motion because Debtor will get to keep the property if the trustee is ordered to abandon it. Debtor also has Article III standing because Debtor would suffer injury in fact caused by Trustee, and Court can redress injury, if trustee proceeds to sell property thereby dispossessing Debtor of his interest in property. Court must determine whether property has value sufficient to benefit estate. Court cannot force Debtor to vacate property while Trustee attempts to sell property merely by tendering to Debtor the value of the claimed exemption in the property. Bankruptcy Court heard conflicting evidence from appraisers, Debtor and property inspectors regarding condition and value of property and concluded that property was of inconsequential value warranting abandonment, and Court's findings were not clearly erroneous given volume of conflicting testimony that Court was required to evaluate.

- (1602) *In re East*, 2016 WL 6952471 (Bankr. E.D. Tn. 2016) – Party seeking to compel abandonment must show that property is burdensome to estate or is of inconsequential value. Compelling abandonment is appropriate only to help creditors by assuring some benefit in administration of asset. Court will generally defer to trustee’s decision as long as made using business judgment and in good faith, with some reasonable basis, and within scope of authority. Court must determine whether property should be preserved or whether property is so worthless or burdensome that it should be removed from estate. Party seeking to compel abandonment did not present any evidence that property was valueless or a burden to estate. Trustee presented appraisal showing that property had value of at least \$9,000; and existence of easement for access to property of which trustee was previously unaware may enhance that value. Trustee’s decision to retain and not abandon property was within trustee’s business judgment and discretion, and court would not compel trustee to abandon property at end of Chapter 7 case.
- (1603) *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.
- (1604) *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.
- (1605) *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.
- 6.104 Effect of Abandonment
- (1606) *In re Wright*, 2017 WL 1371293 (6th Cir. BAP 2017) - Abandonment of asset by bankruptcy estate under Section 554 occurs when property scheduled under Section 521 is not administered at time of closing of case. Abandonment under Section 554(c) results from ministerial act of clerk’s office. Personal injury claim properly disclosed in Schedule B and not administered by Chapter 7 Trustee was statutorily abandoned by operation of law upon entry of final decree. Trustee did not request Court to “order otherwise” as provided in Section 554 and statement in Trustee’s Report of No Distribution that purported to retain personal injury claim is property of bankruptcy estate was not sufficient as technical abandonment can be avoided only by entry of Bankruptcy Court Order.
- (1607) *In re Haber*, 2016 WL 1211339 (Bankr. S.D. Ohio 2016), *aff’d*, 2017 WL 1017731 (6th Cir. 2017) – 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.
- (1608) *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.
- (1609) *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.
- (1610) *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).
- (1611) *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.

- (1612) *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.
- 6.105 Revocation of Abandonment
- (1613) *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.
- (1614) *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.
- (1615) *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).
- (1616) *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.
- (1617) *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.
- (1618) *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.
- (1619) *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.
- (1620) *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

6.106 Role of Trustee and Debtor

- (1621) *Ukrainian Future Credit Union v. Garak*, 2017 WL 2992479 (Bankr. E.D. Mi. 2017) – Debtor lacks standing to assert counterclaims in adversary proceeding where Debtor did list those counterclaims in bankruptcy schedules. Causes of action are property of bankruptcy estate and can be brought only by Chapter 7 Trustee unless abandoned or claimed exempt and exemption allowed. Debtors' amendment to claim counterclaims as exempt did not permit Debtors to pursue counterclaims where 30 day objection period had not expired. Debtors' continued prosecution of counterclaims violates stay requiring dismissal of counterclaims from adversary proceeding without prejudice to Debtors' right to reassert if causes of action cease to be property of estate.
- (1622) *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.
- (1623) *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.
- (1624) *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

- (1625) *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.
- (1626) *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

- (1627) *In re Sharp*, Case No. 16-54917 (Bankr. E.D. Mi. 2017) – In general, property of estate and Debtor's exemptions are both determined on petition date. Debtor cannot exempt property transferred by Debtor pre-petition as Debtor did not have any interest in that property as of the petition date and so the property did not become property estate. Debtor could not exempt property once recovered by Trustee as fraudulent transfer as Section 522(g) limits Debtor's ability to exempt recovered property to property that was not initially voluntarily transferred. Evidence indicated that pre-petition, Debtor voluntarily conveyed property to Debtor's mother, ostensibly to assist in obtaining homeowners insurance.
- (1628) *In re Burton*, Case No. 15-31915 (Bankr. E.D. Mi. 2017) – Section 522(d)(11)(c) allows a Debtor to exempt a right to receive payment under life insurance contract that insured life of an individual on whom Debtor was dependent on date of death to the extent reasonably necessary for support of Debtor. Debtor maintains right to exempt insurance proceeds even where insured individual has not died as of the date of bankruptcy petition. Debtor could not have exempted life insurance proceeds that did not exist when case was filed. Court would allow Debtor to amend exemptions and claim insurance proceeds as exempt under Section 522(d)(11)(C).
- (1629) *In re Lincoln*, Case No. 16-12650 (Bankr. E.D. La. 2017) – When case converts from Chapter 11 to Chapter 7, property acquired by Debtor post-petition becomes property of Chapter 7 estate. Section 1115 includes in Chapter 11 estate all property acquired by Debtor after commencement of the case. Section 348 which provides that property of estate in converted case is determined as of the petition date is applicable only in Chapter 13. Congress limited Section 348(f)(1)(A) to Chapter 13 and chose not to add similar provision for individual

Chapter 11 cases. Section 348(f) does not limit or condition the scope of Section 1115 following conversion to Chapter 7.

- (1630) *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.
- (1631) *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.
- (1632) *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.
- (1633) *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.
- (1634) *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.
- (1635) *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.
- (1636) *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. 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.
- (1637) *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.
- (1638) *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.
- (1639) *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.

- (1640) *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.
- (1641) *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.
- (1642) *Leicht v. Anspach*, 475 BR 612 (Bankr. S.D. Ohio 2012) – Exemptions are determined as of the date of the bankruptcy filing.
- (1643) *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.
- (1644) *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.
- (1645) *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.
- (1646) *Williamson v. Hall*, Case No. 08-088 (10th Cir. BAP 2009) – Homestead exemption is determined as of the date of the bankruptcy petition.
- (1647) *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

- (1648) *Ball v. United Cumberland Bank*, 2017 WL 3037447 (Bankr. E.D. Ky. 2017) – Debtor could not exempt Social Security Funds where Bank exercised contractual right of setoff while the case was dismissed. As of reinstatement of case, funds were no longer in Debtor's account and were not property of estate. Section 522 did not apply because Debtor did not claim funds as exempt and, as result of setoff, funds were not property of estate and were not subject to exemption.
- (1649) *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.
- (1650) *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.
- (1651) *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

- (1652) *In re Morris*, 2017 WL 2984116 (Bankr. W.D. Ky. 2017) – Debtor not entitled to exemption on homestead where mortgage creditor obtained stay relief and sold property for less than amount owed leaving no equity to be claimed as exempt.
- (1653) *Brown v. Ellmann*, Case No. 14-48421 (Bankr. E.D. Mi. 2015), *aff'd*, 2016 WL 3055618 (E.D. Mi. 2016), *aff'd*, 2017 WL 1046107 (6th Cir. 2017) – 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.
- (1654) *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.

- (1655) *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.
- (1656) *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

- (1657) *State of Tennessee v. Hildebrand*, 2017 WL 710473 (6th Cir. 2017) – Interest rate for unpaid property taxes is determined by “applicable non-bankruptcy law” pursuant to Section 511. “Applicable non-bankruptcy law” is any statute that is not aimed solely at bankruptcy proceedings. “Bankruptcy law” includes both Federal provisions in Code itself and any state law that is targeted to bankruptcy proceedings and does not constitute “applicable non-bankruptcy law”. State law provided for interest rate of 12% plus 6% penalty rate provided for interest at 12%. Statute that purported to “convert” penalty into interest solely in bankruptcy cases qualified as “bankruptcy law” as it applied only in bankruptcy cases, and so was not “applicable state law and did not apply under Section 511. Plan needed to provide for interest at rate of 12% as that was rate specified by non-bankruptcy law.
- (1658) *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.
- (1659) *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”.
- (1660) *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*.
- (1661) *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.
- (1662) *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.
- (1663) *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.
- (1664) *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.

- (1665) *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

- (1666) *Lua v. Miller*, Case No. 15-56814 (9th Cir. 2017) – Reversing decision of Bankruptcy Court and affirmed on appeal, Ninth Circuit holds that Debtor is not equitably estopped from amending Schedule C to assert previously unasserted exemption, even if Debtor waits until after Trustee expends substantial time prosecuting adversary proceeding that significantly increased value of property. Equitable estoppel requires that Debtor make representation of or conceal material facts, with actual knowledge of true state of facts, to a party who is ignorant of true state of facts, with intent to cause ignorant party to act, and party is induced to act. Debtor's initial exemptions which did not include the property was representation that Debtor was not, presently, claiming exemption but did not make assertion that Debtor would never assert exemptions. Initial decision not to claim property as exempt was based on facts known to Debtor at the time and Trustee had equal knowledge of facts at time Schedules were filed. Trustee also knew or should have known that Debtor could amend exemptions at any time before case closed. Trustee did not present any evidence that at time Debtor initially decided not to exempt property Debtor had reason to believe that she would later amend schedule in future to claim exemption. Further, circumstances changed between initial filing and amended filing as Bankruptcy Court entered order finding that property was 100% community property, creating new basis on which Debtor could claim exemption. Case remanded with instructions to allow amended claim of homestead exemption.
- (1667) *In re Burton*, Case No. 15-31915 (Bankr. E.D. Mi. 2017) – Life insurance proceeds resulting from death of insured within 180 days of filing chapter 7 bankruptcy petition constituted property of estate pursuant to 11 USC Section 541(a)(5)(C). Amendments to exemptions may not be disallowed or limited merely because Debtor fraudulently concealed exempt asset as Court does not have general equitable power to deny exemptions. Rule 1009 allows Debtor a general right to amend any schedule at any time before case is closed. Filing of asset Report does not close case where requisite 30 day period had not expired when final report was withdrawn by Trustee, Trustee was never discharged in case, and Court never entered order closing case.
- (1668) *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.
- (1669) *In re Haber*, 2016 WL 1211339 (Bankr. S.D. Ohio 2016), *aff'd*, 2017 WL 1017731 (6th Cir. 2017) – 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.
- (1670) *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.
- (1671) *Ellmann 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.
- (1672) *In re Pratts*, 2015 WL 3484286 (Bankr. D.P.R. 2015) – Court cannot deny Debtor's claimed exemptions on basis of bad faith.
- (1673) *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.

- (1674) *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.
- (1675) *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.
- (1676) *In re Wiggs*, 2013 WL 4460881 (Bankr. S.D. Ill. 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.
- (1677) *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".
- (1678) *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.
- (1679) *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.
- (1680) *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.

- (1681) *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.
- (1682) *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.
- (1683) *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.
- (1684) *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.
- (1685) *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.
- (1686) *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.
- (1687) *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.
- (1688) *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

- (1689) *In re Sharp*, Case No. 16-54917 (Bankr. E.D. Mi. 2017) – In general, property of estate and Debtor's exemptions are both determined on petition date. Debtor cannot exempt property transferred by Debtor pre-petition as Debtor did not have any interest in that property as of the petition date and so the property did not become property estate. Debtor could not exempt property once recovered by Trustee as fraudulent transfer as Section 522(g) limits Debtor's ability to exempt recovered property to property that was not initially voluntarily transferred. Evidence indicated that pre-petition, Debtor voluntarily conveyed property to Debtor's mother, ostensibly to assist in obtaining homeowners insurance.
- (1690) *In re Hill*, 2017 WL 1458860 (Bankr. W.D. Mi. 2017) – Section 522(g) allows a Debtor to claim an exemption in property which is recovered by the Trustee if the Debtor could have exempted the property had the property might not been transferred and the transfer was not a voluntary transfer by Debtor. If the Trustee avoids a voluntary transfer by the Debtor, Debtor is not entitled to claim to exemption in the recovered property. Transfer is "voluntary" if it is unconstrained by interference, not compelled by another's influence, done by design, intention or purpose, and with knowledge of essential facts. Involuntary transfers include transfers by operation of law such as execution of judgment,

repossession or garnishment. Debtor's payment to Court Officer to avoid execution is not voluntary where Court Officer was acting pursuant to Seizure Order entered by State Court; Court Officer arrived at Debtor's residence with intent to seize personal property; and Court Officer afforded Debtor opportunity to pay \$4000 cash in lieu of having property seized. Fact that Debtor paid cash to Court Officer to avoid seizure does not make transfer voluntary. Court Officer waited at Debtor's residence while funds in amount necessary to satisfy payment demand were obtained; Court Officer followed Debtor to bank and waited in parking lot while Debtor cashed check to make payment; and Court Officer intended to carry out Seizure Order and was not going to depart empty-handed.

- (1691) *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 voidable only by or for benefit of defrauded creditors.
- (1692) *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.
- (1693) *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.
- (1694) *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.
- (1695) *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.
- (1696) *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).
- (1697) *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.
- (1698) *In re Lawson*, 2011 WL 1219225 (Bankr. E.D. Tn. 2011) – Although Debtor's interest in property held as tenant in the entireties would not have been property of estate, where Debtor attempted to convey her interest in the property to third party, entireties 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 entireties exemption based on trustee's successful avoidance of transfer. Avoidance does not re-vest property in Debtor or resurrect entireties status.
- (1699) *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.
- (1700) *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

- (1701) *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

- (1702) *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 Applicable Law

- (1703) *In re Felix*, 2017 WL 320828 (Bankr. S.D. Ohio 2017) – Section 522(b) makes applicable the law of the state of Debtor's domicile for 730 days pre-petition. Domicile is combination of physical presence and intent to permanently remain. Once established, person may be absent for long periods without losing it, as long as new domicile is not obtained. Domicile differs from residence as residence is place of habitation, and Debtor can have different domicile versus residence. Where Debtor has resided in multiple places, domicile becomes question of subjective intent of Debtor, evidenced by objective factors but discounting self-serving or inconsistent statements. Evidence indicated that Debtor's domicile was in Maryland such that Debtor could not exempt property under Ohio law. Debtors acknowledged at Section 341 meeting that Debtors did not live in Ohio house and intended to surrender house to IRS as part of offer and compromise of tax liabilities., and then do loan modification on their house in Maryland which Debtors intended to maintain. As of petition date, Debtors wanted to move to Maryland. Debtors owned a new home there, Debtor-wife's family resided there and she had grown tired of living and working in Ohio., She planned to start new businesses and incorporated several entities in Maryland and Washington DC. Wife physically resided in Maryland with her older daughter, partially furnished the house, registered to vote, obtained Maryland driver's license, and opened bank account. Debtor husband remained in Ohio where minor children were in school but frequently commuted between Maryland and Ohio and conducted daily activities in both states. Two years pre-petition, Debtors sold their Ohio based business and tried to start new business in Maryland but ran into regulatory issues. Domicile was in Maryland at time of filing for more than 730 days pre-petition such that Maryland, not Ohio law, applied. Debtors' attempt to claim homestead under Ohio law disallowed.

7.11 Extra-territorial Application

- (1704) *Sheehan v. Ash*, Case No. 16-109 (N.D. W. Va. 2017) – State law exemptions apply extraterritorial he unless applicable state law specifically prohibits applying exemptions to property located in another state. Debtors moved from Louisiana to West Virginia a few months before filing bankruptcy. Parties agreed that Louisiana exemptions applied, but raise questions as to whether Debtors could exempt property located in West Virginia based on Louisiana exemptions. Louisiana opted out of "federal exemptions" but there is nothing in Louisiana law that appeared to limit state exemptions is solely to property located in Louisiana. Accordingly, Debtor could use Louisiana exemptions to exempt property located in West Virginia.
- (1705) *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.
- (1706) *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.
- (1707) *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.
- (1708) *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.
- (1709) *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".

7.12 Disposition of Property Post-Petition – Effect on Exemptions

- (1710) *Bellinger v. Buckley*, Case No. 17-0068 (D. Md. 2017) – In Chapter 7 case, Death of spouse after bankruptcy filing does not affect debtor's entireties exemption. Exemptions are based on property of estate which is fixed as of moment of bankruptcy filing. On death, surviving tenant acquires new, whole interest in property but Chapter 7 does not sweep into estate post-petition property. Debtor's acquisition of spouse's share of property, although defeating entireties status, converts debtor's ownership interest into new interest that did not exist prior to commencement of case and so is beyond reach of trustee.
- (1711) *Hawk v. Engelhart*, Case No. 15-914 (S.D. Tx. 2016), *affid*, Case No. 16-20641 (5th Cir. 2017), *opinion on rehearing*, Case No. 16-20641 (5th Cir. 2017) – In Chapter 7 proceeding, once exemptions have been claimed and either time for objecting has expired or objections have been overruled and exemptions determined, subsequent change in character of property does not defeat objection. Debtor did not forfeit objection in IRA where, after claimed exemption became final, Debtor withdrew funds from IRA and placed funds into non-exemptible bank account. There was no provision in Chapter 7 for Trustee to recover after acquired property including property acquired by liquidation of exempt assets. Decision would be different in Chapter 13 as Section 1306 allows Estate to capture after acquired property interest including non-exempt interests even if acquired with previously exempt assets.
- (1712) *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

7.13 Jurisdiction – Mootness

- (1713) *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.

7.14 Standing to Object

- (1714) *In re Sharkey*, 2017 WL 633322 (Bankr. E.D. Mi. 2017) – Administrative priority creditor has standing to object to Debtor's claimed exemptions. Creditor has standing if creditor has pecuniary interest in outcome of proceeding. Although Chapter 13 Plan proposed to pay administrative claims in full, Debtor's Plan had not yet been confirmed and creditor's claim had not yet been paid and there was no guarantee that Debtor's Plan would actually be confirmed or actually pay the claims. Possibility that Debtor's Chapter 13 case will fail causing case to be converted back to Chapter 7 gives administrative claim sufficient pecuniary interest in outcome of objection to exemptions.

7.15 Burden of Proof

- (1715) *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.
- (1716) *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.
- (1717) *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.
- (1718) *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.

7.16 Deadline for Objections

- (1719) *Charnetsky v. Buenviaje*, Case No. 16-15191 (9th Cir. BAP 2017) - Deadline for objection to exemptions is 30 days after the Section 341 meeting is concluded or 30 days after any amendment to claim to exemptions is filed, whichever is later. Amendments to exemptions do not restart objection period as to assets which were claimed as exempt in previously filed Schedule C and prior claim of exemption is not modified. Creditor's objection to exemptions of asset that was initially listed in Schedule C untimely where objections were not filed until 32 days after the conclusion of the Section 341 meeting where Debtor's intervening amendment did not alter or modify Debtor's prior claim to exemption in that asset. Absent a timely objection to exemption, asset is deemed "exempt" by default even if there was no legal basis for claimed exemption in first instance.
- (1720) *In re Sharkey*, 2017 WL 633322 (Bankr. E.D. Mi. 2017) – Conversion of case from Chapter 13 to Chapter 7 generally creates new right of creditors to object to exemptions. However, no fresh time period arises if the case is converted to Chapter 7 more than one year after entry of the first order confirming a Plan under Chapter 13; or the case was previously pending in Chapter 7 and the time to object to exemptions expired in the original Chapter 7. Administrative claimant had sufficient pecuniary interest to support filing of objections to exemptions in Chapter 13 where Debtor proposed 60 month Chapter 13 Plan and creditor would be deprived of ability to object to exemptions if case converted back to Chapter 7 after one year from confirmation of a Plan.
- (1721) *In re Sharkey*, 2016 WL 6573997 (Bankr. E.D. Mi. 2016) – Deadline to object to exemptions is 30 days after conclusion of Section 341 meeting or 30 days after any amendment, whichever is later. Where case was commenced as Chapter 7 and later converted to Chapter 13, deadline to object to exemptions runs from date of post-conversion Section 341 meeting. Objections filed within 30 days of post-conversion

341 meeting timely even if deadline to object to exemptions in Chapter 7 proceeding had expired.

- (1722) *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 to 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.
- (1723) *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.
- (1724) *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.
- (1725) *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.
- (1726) *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.
- (1727) *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.
- (1728) *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.
- (1729) *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.
- (1730) *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).
- (1731) *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.

- (1732) *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.
- (1733) *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.

7.17 Valuation of Property Claimed as Exempt

- (1734) *In re Morris*, 2017 WL 2984116 (Bankr. W.D. Ky. 2017) – Where Debtor has only partial ownership interest in property, exemption applies only to that partial interest. Debtors owned homestead with third party, but failed to present any evidence of value of property attributable to Debtor's ownership interests or extent to which proceeds of sale were attributable to Debtor's interest versus interest of third party. Absent evidence of amount of exemption, exemption would be disallowed and proceeds of sale would be property of estate for distribution to creditors. As to parcel that was owned solely by Debtors, mortgage creditor obtained stay relief and sold property for less than amount owed leaving no equity to be claimed as exempt.
- (1735) *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.
- (1736) *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.
- (1737) *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.

7.18 Conversion of Non-Exempt Into Exempt Property

- (1738) *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 *Ellmann*, 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.
- (1739) *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.

- (1740) *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.

7.19 Proceeds of Wrongful Conduct

- (1741) *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.
- (1742) *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.

7.20 Waiver

- (1743) *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.

7.21 Collateral Estoppel

- (1744) *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.

7.22 Equitable Estoppel

- (1745) *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.

7.23 “In Kind” and Dollar Limitations on Exemptions

- (1746) *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.
- (1747) *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.
- (1748) *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
- (1749) *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.
- (1750) *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.
- (1751) *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).
- (1752) *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.
- (1753) *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.
- (1754) *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.

- (1755) *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

7.24 Social Security

- (1756) *Ball v. United Cumberland Bank*, 2017 WL 3037447 (Bankr. E.D. Ky. 2017) – Debtor could not exempt Social Security funds where Bank exercised contractual right of setoff while case was dismissed. As of reinstatement of case, funds were no longer in Debtor’s account and were not property of estate. Complaint did not plead cause of action to avoid transfer and bring funds back into estate, but only sought relief under Section 522 and Section 542. Section 522 did not apply because Debtor did not claim funds as exempt and, as result of setoff, funds were not property of estate and were not subject to exemption.

- (1757) *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.

7.25 Stock Account

- (1758) *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.

- (1759) *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.

7.26 Payments as Replacement for Lost Earnings

- (1760) *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 persona 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)(1)(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.

- (1761) *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)(1)(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.

- (1762) *In re Sizemore*, 2013 WL 6328160 (Bankr. E.D. Ky. 2013) – Insurance proceeds are exempt under Section 522(d)(1)(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)(1)(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)(1)(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.

- (1763) *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.
- (1764) *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.
- (1765) *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.
- (1766) *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.
- (1767) *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.
- (1768) *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.
- (1769) *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.
- (1770) *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.
- (1771) *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).

- (1772) *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).
- (1773) *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.

7.27 Undisclosed Assets

- (1774) *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.
- (1775) *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.
- (1776) *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.
- (1777) *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.
- (1778) *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."

- (1779) *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.

7.28 Homestead

- (1780) *In re Morris*, 2017 WL 2984116 (Bankr. W.D. Ky. 2017) – Debtor can claim homestead exemption for house and adjacent land used incidental to home. Debtor cannot claim exemption in vacant land that is separated from Debtor's home by a road or otherwise separated from the homestead. Where Debtor has only partial ownership interest in property, exemption applies only to that partial interest. Debtors owned homestead with third party, but failed to present any evidence of value of property attributable to Debtor's ownership interests or extent to which proceeds of sale were attributable to Debtor's interest versus interest of third party. Absent evidence of amount of exemption, exemption would be disallowed and proceeds of sale would be property of estate for distribution to creditors. As to parcel that was owned solely by Debtors, mortgage creditor obtained stay relief and sold property for less than amount owed leaving no equity to be claimed as exempt.
- (1781) *In re Villarreal*, 564 BR 264 (Bankr. N.D. Ohio 2016) – Although United States unrecorded statutory assessment lien was not valid against Chapter 7 Trustee due to Trustee's status as hypothetical bona fide purchaser, strong-arm powers did not reach to Debtor's exemption and United States right to collect against exempt property permitted statutory lien to attach to proceeds of any future sale of property by Trustee to the extent of Debtor's claimed exemptions where underlying tax obligations were themselves nondischargeable. 26 USC Section 6334(e)(1) prevents levy on principal residence where government is attempting to seize the residence. However, Section 6334 does not prohibit a sale or attachment by a bankruptcy Trustee or the attachment of the lien to the proceeds of that sale. United States did not waive secured status by filing unsecured proof of claim as unrecorded statutory assessment lien under Section 6321 did not provide United States secured status against Trustee's rights to property, but that status does not prevent United States from enforcing assessment lien against Debtor's share of proceeds of sale.
- (1782) *In re Felix*, 2017 WL 320828 (Bankr. S.D. Ohio 2017) – Section 522(b) makes applicable the law of the state of Debtor's domicile for 730 days pre-petition. Domicile is combination of physical presence and intent to permanently remain. Once established, person may be absent for long periods without losing it, as long as new domicile is not obtained. Domicile differs from residence as residence is place of habitation, and Debtor can have different domicile versus residence. Where Debtor has resided in multiple places, domicile becomes question of subjective intent of Debtor, evidenced by objective factors but discounting self-serving or inconsistent statements. Evidence indicated that Debtor's domicile was in Maryland such that Debtor could not exempt property under Ohio law. Debtors acknowledged at Section 341 meeting that Debtors did not live in Ohio house and intended to surrender house to IRS as part of offer and compromise of tax liabilities., and then do loan modification on their house in Maryland which Debtors intended to maintain. As of petition date, Debtors wanted to move to Maryland. Debtors owned a new home there, Debtor-wife's family resided there and she had grown tired of living and working in Ohio., She planned to start new businesses and incorporated several entities in Maryland and Washington DC. Wife physically resided in Maryland with her older daughter, partially furnished the house, registered to vote, obtained Maryland driver's license, and opened bank account. Debtor husband remained in Ohio where minor children were in school but frequently commuted between Maryland and Ohio and conducted daily activities in both states. Two years pre-petition, Debtors sold their Ohio based business and tried to start new business in Maryland but ran into regulatory issues. Domicile was in Maryland at time of filing for more than 730 days pre-petition such that Maryland, not Ohio law, applied. Debtors' attempt to claim homestead under Ohio law disallowed.
- (1783) *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.
- (1784) *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.
- (1785) *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.

- (1786) *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.
- (1787) *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.
- (1788) *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.
- (1789) *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.
- (1790) *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.
- (1791) *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.
- (1792) *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).
- (1793) *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.

- (1794) *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.
- (1795) *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.
- (1796) *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.
- (1797) *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.
- (1798) *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.
- (1799) *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.
- (1800) *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.
- (1801) *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.
- (1802) *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.
- (1803) *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.
- (1804) *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.
- (1805) *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.

- (1806) *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.
- (1807) *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.
- (1808) *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.
- (1809) *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.
- (1810) *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.
- (1811) *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.
- (1812) *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.
- (1813) *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.
- (1814) *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.
- (1815) *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.
- (1816) *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.

- (1817) *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.
- (1818) *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.
- (1819) *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”.

7.29 Homestead – Limitation Under Section 522(o)

- (1820) *Crabtree v. McDermott*, Case No. 16-6028 (8th Cir. BAP 2017) - Section 522(o) provides that the value of the homestead exemption shall be reduced to the extent that such value is attributable to any nonexempt property that Debtor used within 10 years of the bankruptcy with intent to hinder, delay or defraud creditor. Trustee must prove both that Debtor had actual intent to hinder, delay or defraud creditor and extent by which increase in value of Homestead was attributable to the nonexempt property used. Where Debtor used nonexempt cash to improve home and increase value of exemption, Trustee must prove extent to which increased value was attributable to improvements as opposed to increases in normal market appreciation. To prove increase in value attributable to improvements, Trustee needs to prove value of home both with the improvements and value had improvements not been made. Objection to exemptions overruled where Trustee proved actual intent to hinder, delay or defraud creditors but did not prove extent to which improvements increased value in home.

7.30 Homestead – Limitation Under Section 522(p)

- (1821) *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.

7.31 Homestead – Limitation Under Section 522(q)

- (1822) *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.

7.32 Redemption Rights

- (1823) *Brown v. Ellmann*, Case No. 14-48421 (Bankr. E.D. Mi. 2015), *aff’d*, 2016 WL 3055618 (E.D. Mi. 2016), *aff’d*, 2017 WL 1046107 (6th Cir. 2017) – 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.

7.33 Life Estate

- (1824) *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.

7.34 Inheritances

- (1825) *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.

7.35 Trust – Beneficial Interest

- (1826) *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.

7.36 Marital Property

- (1827) *Corzin v. Lawson*, 2017 WL 1207521 (Bankr. N.D. Ohio 2017) – When one spouse files for divorce, each spouse acquires contingent interest in all marital property. Contingent interest applies to all marital property regardless of name in which property may be titled. Marital property includes retirement accounts maintained by either spouse, such that on filing petition for divorce, each spouse obtains contingent interest in other spouse’s retirement account independent of any vested beneficial interest arising from Orissa, the terms of the plan and/or any domestic relations order. Although interest is contingent, it is not speculative and is not just a generalized equitable claim. Debtor can exempt contingent interest in spouse’s retirement account under Ohio Revised Code Section 2329.66 which allows a Debtor to exempt rights to or in a pension, benefit, annuity, retirement allowance or accumulate contributions” and rights or interests in assets held in, or directly or indirectly constituting any payment or benefit under an individual retirement account or individual retirement annuity. Debtor can also exempt funds under section 522(b)(3)(C).

- (1828) *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.

7.37 Household Goods

- (1829) *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.

7.38 Motor Vehicles

- (1830) *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.
- (1831) *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”.

(1832) *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.

(1833) *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.

7.39 Wearing Apparel

(1834) *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”.

7.40 Unmatured Life Insurance Contracts

(1835) *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.

(1836) *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.

(1837) *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.

7.41 Personal Injury Claims

(1838) *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 persona 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.

(1839) *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.

7.42 Life Insurance Policy

(1840) *In re Phoongtoop*, 2017 WL 3707304 (Bankr. N.D. Ohio 2017) – 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. Policy named as beneficiaries people who were other than spouses, children or dependents of debtors. Although debtors intended that beneficiaries would use money for benefit of debtors’ children, policy was not payable to children or trust for benefit of debtors’ children.

(1841) *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.

7.43 Insurance Proceeds

- (1842) *In re Roscoe*, Case Number 13-6517 (Bankr. M.D. Fl. 2017) - Under Florida law, Life insurance proceeds are exempt from claims of creditors of the decedent, but are not exempt from claims of creditors of beneficiary. Life insurance proceeds received by Debtor during the pendency of Chapter 13 case resulting from death of Debtor's wife (a joint Debtor with husband in Chapter 13) could be administered by Trustee for payment of husbands creditors and a joint creditors of husband and wife, but could not be used to pay claims of wife individually.
- (1843) *In re Burton*, Case No. 15-31915 (Bankr. E.D. Mi. 2017) – Section 522(d)(11)(c) allows a Debtor to exempt a right to receive payment under life insurance contract that insured life of an individual on whom Debtor was dependent on date of death to the extent reasonably necessary for support of Debtor. Debtor maintains right to exempt insurance proceeds even where insured individual has not died as of the date of bankruptcy petition. Debtor could not have exempted life insurance proceeds that did not exist when case was filed. Court would allow Debtor to amend exemptions and claim insurance proceeds as exempt under Section 522(d)(11)(C).
- (1844) *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.
- (1845) *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.
- (1846) *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.
- (1847) *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.
- (1848) *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.
- (1849) *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.
- (1850) *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.
- (1851) *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".

- (1852) *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.
- (1853) *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.
- (1854) *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.

7.44 Health Savings Accounts

- (1855) *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.

7.45 Annuities

- (1856) *In re Sharkey*, 2017 WL 633322 (Bankr. E.D. Mi. 2017) – Michigan Compiled Laws Section 600.5451(1)(k) permits Debtor to exempt annuities as "individual retirement accounts" or "retirement annuities" if annuities meet requirements of Section 408 or Section 408a of the Internal Revenue Code. 11 USC Section 522(b)(3)(C) allows annuities to be exempted only to extent that funds are exempt from taxation under specified provisions of Internal Revenue Code. 11 USC Section 522(b)(4) exempts annuities that are "in substantial compliance with the applicable requirements of the Internal Revenue Code" or that would be in compliance and Debtor is not materially responsible for the noncompliance. Neither annuity was in substantial compliance with applicable requirements of Internal Revenue Code and Debtor was responsible for noncompliance as Debtor purchased annuity contracts, each of which specifically contained terms that failed to qualify them as "individual retirement annuities". Debtor could have established in purchased "individual retirement account" or "individual retirement annuity" but instead chose to purchase nonqualified contracts. Annuities were not "retirement" annuities as annuities were freely transferable, removing annuities from tax-advantaged status under Internal Revenue Code. Annuities purchased by Debtor as investments were not individual retirement account or individual retirement annuity as defined in Internal Revenue Code. Debtor's claimed exemption disallowed.
- (1857) *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.
- (1858) *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.
- (1859) *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”.

- (1860) *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 of wrongful death of individual on whom Debtor was dependent; and payment in compensation of loss for future earnings of Debtor or an individual on whom 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.
- (1861) *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).
- (1862) *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.
- (1863) *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.
- (1864) *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.
- (1865) *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.

- (1866) *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.

7.46 Employee Buyout

- (1867) *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).
- (1868) *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).
- (1869) *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".

7.47 Post-petition Assets

- (1870) *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.

7.48 Property Owned by Third Party

- (1871) *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.
- (1872) *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.
- (1873) *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.
- (1874) *Kahn v. Regions Bank*, 2013 WL 5942052 (6th Cir. 2013) – Debtor cannot claim an exemption in home that is owned by Irrevocable Trust.
- (1875) *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.

- (1876) *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.
- (1877) *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.
- (1878) *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.
- (1879) *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.
- (1880) *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.
- (1881) *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.
- (1882) *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.
- (1883) *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.

7.49 Dower Interests

- (1884) *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.
- (1885) *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.
- (1886) *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.
- (1887) *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.

7.50 Tools of the Trade

- (1888) *In re MacMillan*, 2015 WL 148339 (Bankr. D. Ks. 2015) – Website and digital images constitute tools of the trade subject to exemption.
- (1889) *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.
- (1890) *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.
- (1891) *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.
- (1892) *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.
- (1893) *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.
- (1894) *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.
- (1895) *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.

7.51 Entireties Property

- (1896) *Bellinger v. Buckley*, Case No. 17-0068 (D. Md. 2017) – Death of spouse after bankruptcy filing does not affect debtor's entireties exemption. Exemptions are based on property of estate which is fixed as of moment of bankruptcy filing
- (1897) *In re Jaffe*, 2017 WL 2462678 (Bankr. N.D. Ill. 2017) – Property claimed exempt as entireties property must retain characteristic during bankruptcy case. Severance of unity of title required for entireties during pendency of bankruptcy case voids debtor's claimed exemption. While both tenants are alive, each tenant owns an entireties interest and also has a contingent future interest in property if entireties ends, that becomes actual interest in entire property when entireties unity of title terminates. Debtor filed bankruptcy and claimed home owned by debtor and wife as exempt entireties property. There were no objections to the claimed exemption. One year later, debtor's wife died at which point the entireties state terminated and debtor's claimed exemption filed. Debtor could not thereafter avoid judicial lien on home as impairing exemption as property was on longer exempt and lien could not impair non-existent exemption.
- (1898) *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.
- (1899) *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.
- (1900) *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.
- (1901) *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.

7.52 Co-mingled and Segregated Funds

- (1902) *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.
- (1903) *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.
- (1904) *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.
- (1905) *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.

7.53 Salary and Bonuses

- (1906) *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.
- (1907) *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.
- (1908) *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.

7.54 Garnishment Limitations

- (1909) *Church Joint Venture v. Blasingame*, 2017 WL 3403788 (W.D. Tn. 2017) – State law that limits garnishment of wages to no more than 25% of gross earnings does not create exemption for remaining 75% of wages. Garnishment statute is fundamentally different than statute creating exemptions and while statute limits to 25% earnings that may be garnished, it does not deal with whether remaining earnings are exempt once paid over to Debtor.

7.55 Consumer Credit Protection Act

- (1910) *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 condensation, 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.

7.56 Unemployment Compensation

- (1911) *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.

7.57 Workers Compensation

- (1912) *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.
- (1913) *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.
- (1914) *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.
- (1915) *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.
- (1916) *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.

7.58 Retirement Accounts

- (1917) *Corzin v. Lawson*, 2017 WL 1207521 (Bankr. N.D. Ohio 2017) – When one spouse files for divorce, each spouse acquires contingent interest in all marital property. Contingent interest applies to all marital property regardless of name in which property may be titled. Marital property includes retirement accounts maintained by either spouse, such that on filing petition for divorce, each spouse obtains contingent interest in other spouse’s retirement account independent of any vested beneficial interest arising from Orissa, the terms of the plan and/or any domestic relations order. Although interest is contingent, it is not speculative and is not just a generalized equitable claim. Debtor can exempt contingent interest in spouse’s retirement account under Ohio Revised Code Section 2329.66 which allows a Debtor to exempt rights to or in a pension, benefit, annuity, retirement allowance or accumulate contributions” and rights or interests in assets held in, or directly or indirectly constituting any payment or benefit under an individual retirement account or individual retirement annuity. Debtor can also exempt funds under section 522(b)(3)(C).
- (1918) *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.
- (1919) *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.
- (1920) *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.

- (1921) *In re Banks*, 2014 WL 180693 (Bankr. C.D. Ill. 2014) – Money transferred from Debtor’s retirement account into bank account where it was co-mingled with non-exempt funds lost their exempt status.
- (1922) *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).
- (1923) *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.
- (1924) *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.
- (1925) *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.
- (1926) *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.
- (1927) *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.
- (1928) *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.
- (1929) *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.

7.59 Retirement Accounts – Prohibited Transactions

- (1930) *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.
- (1931) *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.
- (1932) *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.
- (1933) *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.

7.60 Employee Benefit Plan

- (1934) *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.

7.61 Inherited Retirement Accounts

- (1935) *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.
- (1936) *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.
- (1937) *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.
- (1938) *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.

- (1939) *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.
 - (1940) *In re Taber*, 2011 WL 4048521 (Bankr. N.D. Ohio 2011) – Ohio law allowed Debtor to exempt inherited IRA.
 - (1941) *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.
 - (1942) *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.
 - (1943) *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.
 - (1944) *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.
 - (1945) *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.
 - (1946) *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.
 - (1947) *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).
- 7.62 Retirement Accounts – QDRO and QRBCO
- (1948) *Gertz v. Warner*, 2017 WL 1379341 (Bankr. N.D. Ohio 2017) – Designation of Debtor as beneficiary under Tax qualified Thrift Savings Plan is sufficient to establish that Debtor has beneficial interest in Plan as of date of commencement of bankruptcy case. However, Section 541(c)(2) excludes from a bankruptcy estate any asset that includes a restriction on transfer of a beneficial interest that is enforceable under applicable nonbankruptcy law. The Thrift Savings Plan is a trust subject to an anti-alienation clause under 5 USC Section 8437, rendering Debtor's interest in fund immune from assignment, alienation, execution, levy, attachment, garnishment or other legal process. Only

exception to anti-alienation provision is Qualified Retirement Benefits Court Order which is mechanism that is analogous, but not identical to, Qualified Domestic Relations Order. QRBCO allows distribution of Plan assets that would otherwise violate anti-alienation provision where recipient is either divorcing spouse or surviving child. Where Court had not yet entered QRBCO, standard anti-alienation provision protected Debtor's contingent beneficial interest from becoming property of bankruptcy estate. Further, under Ohio law, upon filing divorce action, Debtor acquired contingent interest in all marital assets including husband's retirement Plan. Interest is in each item of specific marital property, not merely a generalized equitable claim, and interest is not speculative but constitutes present interest in each item marital property. Contingent interest in Thrift Savings Plan can be exempted under Ohio State exemption for rights to or interest in pension, benefit, annuity, retirement allowance or accumulate contributions and in rights or interests in assets held in or directly or indirectly constituting payment or benefit under an individual retirement account or individual retirement annuity. Exemptions expressly apply to alternate payee under Qualified Domestic Relations Order or similar Court Order. Further, Section 522(b)(3)(A) allows Debtor to exempt retirement funds to the extent far funds are in account that is exempt from taxation under Internal Revenue Code which includes Thrift Savings Fund which is treated under Section 401(a). Debtor's contingent interest in Thrift Savings Plan which arose on filing of complaint for divorce was sufficient interest in retirement Plan to support Debtor's claimed exemption.

- (1949) *Corzin v. Lawson*, 2017 WL 1207521 (Bankr. N.D. Ohio 2017) – Debtor's beneficial interest in ex-spouse's 403(b) vested where State Court had already entered judgment of divorce and ordered division of account, although judgment did not specify that division constituted Qualified Domestic Relations Order. QDRO is not required to vest divorcing Debtor with beneficial interest in spouse's retirement plan. ERISA does not distinguish between Final Judgment and other domestic relation orders for determining whether sufficient independent basis exists for Debtor to obtain vested beneficial interest in qualified plan. Debtor's beneficial interest in plan as excluded from estate under section 54(c)(2) as interest in trust that contains a transfer restriction enforceable under nonbankruptcy law which includes ERISA qualified pension plans. Debtor can exempt contingent interest in spouse's retirement account under Ohio Revised Code Section 2329.66 which allows a Debtor to exempt rights to or in a pension, benefit, annuity, retirement allowance or accumulate contributions" and rights or interests in assets held in, or directly or indirectly constituting any payment or benefit under an individual retirement account or individual retirement annuity. Debtor can also exempt funds under section 522(b)(3)(C).
- (1950) *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.
- (1951) *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.
- (1952) *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.

7.63 Section 529 Educational Savings Plans

- (1953) *Roach v. Skidmore College*, Case No. 15-4048 (Bankr. S.D. Ga. 2017) – Debtor's payment of adult-child's college tuition is constructively fraudulent transfer. Funds transferred from Section 529 plan to college were not property of estate even though funds passed through Debtor's personal checking account as long as funds paid to college could be fairly traced to Section 529 withdrawals.

7.64 Inherited 529 Plans

- (1954) *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.

7.65 Tax Refunds

- (1955) *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.
- (1956) *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 t 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.

- (1957) *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.
- (1958) *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.
- (1959) *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.
- (1960) *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.
- (1961) *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.
- (1962) *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.

7.66 College Savings Accounts and Student Loan Proceeds

- (1963) *In re Perkins*, 2011 WL 4458961 (Bankr. N.D. Ohio 2011) – Ohio exemption for Sate 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.

7.67 Spousal Support, Child Support and Separate Maintenance

- (1964) *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 form 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.
- (1965) *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.

- (1966) *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 or 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.
- (1967) *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.
- (1968) *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.
- (1969) *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.
- (1970) *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.

7.68 Property In Possession Of Custodian or Receiver

- (1971) *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.

7.69 Exemptions – Contract Rights

- (1972) *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.

7.70 Tracing of Proceeds of Exempt Asset

- (1973) *Charnetsky v. Buenviaje*, Case No. 16-15191 (9th Cir. BAP 2017) - 42 USC Section 407(a) operates as complete bar to forced inclusion of past and future Social Security proceeds in bankruptcy estate. Section 407 creates exception to the general rule of Section 541 that all of Debtor’s interest in property becomes property of estate. Debtor is not required to assert exemption in Social Security proceeds already received and in the bank as proceeds never became property of estate in first instance. Debtor is required to list account in Schedule A/B. Funds do not lose status upon deposit into bank if Debtor segregates proceeds and maintains funds in account that contains only Social Security proceeds. Fact that statute limits exemption to “right to receive” proceeds does not alter conclusion as Debtor is not required to exempt property that is not property of estate in first instance.
- (1974) *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.
- (1975) *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.

- (1976) *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.
- (1977) *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.
- (1978) *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.
- (1979) *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

7.71 Procedure

- (1980) *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.
- (1981) *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.
- (1982) *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).

7.72 Service of Motion

- (1983) *In re Roby*, 2017 WL 112519 (Bankr. N.D. Ohio 2017) - Motion to reconsider order avoiding liens that impaired exemptions granted where motion to avoid liens was not properly served rendering order avoiding liens void for lack of jurisdiction. Motion to Avoid Liens is contested matter that must be served according to Rule 7004, which allows service by first class mail on a governmental organization as prescribed by state law. Ohio state law requires that any service on the state or any department must be made by serving the officer responsible for administration of the department. Service of the motion on a Postcard Office box in Columbus did not qualify, as motion was not served on tax Commissioner or Attorney General and was not served at address used by tax Commissioner or Attorney General. Proper service is not "inconsequential factor" and rule 7004 require strict compliance. Even if state treasurer department may actually have received motions, actual receipt does not eliminate need for proper service.
- (1984) *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.

7.73 Grounds – Generally

- (1985) *In re Walker*, Case No. 15-42265 (Bankr. E.D. Mi. 2017) – Section 522(f) does not permit Debtor to avoid valid, consensual lien. Retainer agreement between attorney and client granted attorney charging lien which was valid, consensual lien. Although judicial process was required to enforce lien, that does not result in lien being a "judicial lien" for purposes of Section 522(f). Debtor's motion to reopen case to avoid lien under Section 522(f) denied as reopening case would be futile.
- (1986) *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).
- (1987) *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).

- (1988) *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.
- (1989) *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.
- (1990) *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.
- (1991) *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.
- (1992) *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.
- (1993) *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.
- (1994) *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.
- (1995) *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.
- (1996) *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.
- (1997) *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.
- (1998) *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.
- (1999) *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”.

- (2000) *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.
- (2001) *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.
- (2002) *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.
- (2003) *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.

7.74 Valuation

- (2004) *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*.
- (2005) *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.
- (2006) *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.
- (2007) *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 less homestead of \$40,348 leaves \$26,879 to which liens 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.
- (2008) *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.
- (2009) *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.
- (2010) *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.

- (2011) *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.
- (2012) *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.
- 7.75 Joint Ownership**
- (2013) *Bellinger v. Buckley*, Case No. 17-0068 (D. Md. 2017) – Death of spouse after bankruptcy filing does not affect debtor's entireties exemption. Exemptions are based on property of estate which is fixed as of moment of bankruptcy filing.
- (2014) *In re Jaffe*, 2017 WL 2462678 (Bankr. N.D. Ill. 2017) – Property claimed exempt as entireties property must retain characteristic during bankruptcy case. Severance of unity of title required for entireties during pendency of bankruptcy case voids debtor's claimed exemption. While both tenants are alive, each tenant owns an entireties interest and also has a contingent future interest in property if entireties ends, that becomes actual interest in entire property when entireties unity of title terminates. Debtor filed bankruptcy and claimed home owned by debtor and wife as exempt entireties property. There were no objections to the claimed exemption. One year later, debtor's wife died at which point the entireties state terminated and debtor's claimed exemption filed. Debtor could not thereafter avoid judicial lien on home as impairing exemption as property was on longer exempt and lien could not impair non-existent exemption.
- (2015) *In re O'Sullivan*, Case No. 15-30713 (W.D. Mo. 2017) – Following remand from Eighth Circuit, District Court concluded that judgment against one spouse and recorded in public records did not create lien on property held as tenants in entireties under State law. However, recording did create "cloud" on title amounting to interest in property. Whether "interest" rises to level of "lien" for federal bankruptcy purposes turns on Bankruptcy Code definition of "lien" as any interest in property. According, judgment against only one spouse that did not constitute lien on entireties property nonetheless was a "lien" for Bankruptcy purposes and could be avoided under Section 522(f).
- (2016) *CPR Holdings, A-1, LLC v. O'Sullivan*, 841 F.3d 786 (8th Cir. 2016) – On determining whether judicial lien is avoidable, court must first determine whether lien attached to Debtor's interest in property in first instance. State law was unclear whether judgment against one spouse attached to spouse's interest in entireties property, even if lien was unenforceable against entireties property; or whether lien never attached at all as property was entireties. Matter remanded for Bankruptcy Court to determine whether, under state law, lien ever attached. If no, lien avoidance unnecessary and should be denied. If so, court could then consider whether lien should be avoided under Section 522(f).
- (2017) *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.
- (2018) *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.

7.76 Trust Property

- (2019) *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.

7.77 Liens Avoidable – Judicial Liens

- (2020) *In re Jaffe*, 2017 WL 2462678 (Bankr. N.D. Ill. 2017) – Property claimed exempt as entireties property must retain characteristic during bankruptcy case. Severance of unity of title required for entireties during pendency of bankruptcy case voids debtor's claimed exemption. While both tenants are alive, each tenant owns an entireties interest and also has a contingent future interest in property if entireties ends,

that becomes actual interest in entire property when entireties unity of title terminates. Debtor filed bankruptcy and claimed home owned by debtor and wife as exempt entireties property. There were no objections to the claimed exemption. One year later, debtor's wife died at which point the entireties state terminated and debtor's claimed exemption filed. Debtor could not thereafter avoid judicial lien on home as impairing exemption as property was no longer exempt and lien could not impair non-existent exemption.

- (2021) *In re O'Sullivan*, Case No. 15-30713 (W.D. Mo. 2017) – Following remand from Eighth Circuit, District Court concluded that judgment against one spouse and recorded in public records did not create lien on property held as tenants in entireties under State law. However, recording did create “cloud” on title amounting to interest in property. Whether “interest” rises to level of “lien” for federal bankruptcy purposes turns on Bankruptcy Code definition of “lien” as any interest in property. According, judgment against only one spouse that did not constitute lien on entireties property nonetheless was a “lien” for Bankruptcy purposes and could be avoided under Section 522(f).
- (2022) *CPR Holdings, A-1, LLC v. O'Sullivan*, 841 F.3d 786 (8th Cir. 2016) – On determining whether judicial lien is avoidable, court must first determine whether lien attached to Debtor's interest in property in first instance. State law was unclear whether judgment against one spouse attached to spouse's interest in entireties property, even if lien was unenforceable against entireties property; or whether lien never attached at all as property was entireties. Matter remanded for Bankruptcy Court to determine whether, under state law, lien ever attached. If no, lien avoidance unnecessary and should be denied. If so, court could then consider whether lien should be avoided under Section 522(f).
- (2023) *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.
- (2024) *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.
- (2025) *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.
- (2026) *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.
- (2027) *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.
- (2028) *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.
- (2029) *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.
- (2030) *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.
- (2031) *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.
- (2032) *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.
- (2033) *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.

- (2034) *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.
- (2035) *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.
- (2036) *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.
- (2037) *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.
- (2038) *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).
- (2039) *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.
- (2040) *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.
- (2041) *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.

7.78 Liens Avoidable – Non-Possessory Non-Purchase Money

- (2042) *In re Goodman*, 2017 WL 122983 (Bankr. M.D. Al. 2017) – Section 522(f)(1)(B) allows Debtor to avoid non-possessory - non-purchase money lien in household goods to extent lien impair exemptions. Section 523(f)(4) defines household good to exclude motor vehicles “including a tractor or lawn tractor”. Riding lawn mower is not “tractor” or “lawn tractor” where primary purposes is cutting grass. Statutory construction implies that “lawn tractor” is one that may be used for transportation. While riding lawnmower theoretically can be used for transportation, it is poorly suited, while farm tractor is suitable for short trips but not for cutting grass. Lawn tractor is a smaller tractor capable of some speed in excess of brisk walk which excludes Debtor's riding lawn mower.
- (2043) *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.

7.79 Liens Not Avoidable – Statutory Liens

- (2044) *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.

7.80 Judgment Arising Out of Mortgage Foreclosure

- (2045) *In re Pace*, 2017 WL 2644630 (6th Cir. BAP 2017) – Deficiency judgment remaining after foreclosure sale is avoidable judgment lien under Section 522(f). Overwhelming majority of courts hold that mortgage deficiency judgments are not “judgments that arise out of a mortgage foreclosure” subject to exception under Section 522(f)(2)(C). Section 522(f)(2)(C) just make clear that foreclosure judgment itself is not converted into avoidable judgment lien, and has no bearing on post-foreclosure sale deficiency.
- (2046) *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.

7.81 Effect of Avoidance

- (2047) *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

7.82 Generally

- (2048) *Bellinger v. Buckley*, Case No. 17-0068 (D. Md. 2017) – In Chapter 7 case, Death of spouse after bankruptcy filing does not affect debtor’s entireties exemption. Exemptions are based on property of estate which is fixed as of moment of bankruptcy filing. On death, surviving tenant acquires new, whole interest in property but Chapter 7 does not sweep into estate post-petition property. Debtor’s acquisition of spouse’s share of property, although defeating entireties status, converts debtor’s ownership interest into new interest that did not exist prior to commencement of case and so is beyond reach of trustee.
- (2049) *Moyer v. Rosich*, 2017 WL 2838285 (Bankr. W.D. Mi. 2017) – Trustee who avoided transfer of property by Debtor to Debtor and husband as tenants by entireties could not recover property itself where Debtor claimed entireties interest exempt and there were no objections to exemptions filed. Once entireties exemption was established, Debtor’s interest in property could not be made subject to Debtor’s individual creditors and avoidance of transfer that created entireties exemption in first instance does not change fact that Debtor’s interest in property is exempt. Remedy under Section 550 would be to enter money judgment against husband for value of property transferred to him.
- (2050) *Nowakowski v. Bank of America, NA*, Case No. 17-1305 (N.D. Ill. 2017) – Chapter 13 Debtor and the Chapter 13 Trustee have concurrent standing to prosecute prepetition claims which are property of estate. However, Debtor could not bring lawsuit for his own benefit unless Debtor claimed cause of action as exempt and Debtor’s right to exempt that asset was subject to final determination.
- (2051) *Ukrainian Future Credit Union v. Garak*, Case No. 17-4074 (Bankr. E.D. Mi. 2017) – Claimed exemptions or Amended Claimed exemptions are not allowed until 30 days after exemptions are claimed. Counterclaims asserted by Debtors arose prior to commencement of Chapter 7 case. Causes of action are property of estate and unless and until Chapter 7 Trustee abandons claims under Section 554 or claims cease to be estate property, only Trustee has standing to pursue recovery. Debtor’s Amended Schedules which disclosed and exempted cause of action were not yet effective to provide Debtors with standing as 30 day opportunity to object to exemptions had not expired. Counterclaims filed by Debtors dismissed without prejudice to Chapter 7 Trustee’s rights to bring actions or for Debtors to refile if causes of action cease to be estate property.
- (2052) *In re Villarreal*, 564 BR 264 (Bankr. N.D. Ohio 2016) – Although United States unrecorded statutory assessment lien was not valid against Chapter 7 Trustee due to Trustee’s status as hypothetical bona fide purchaser, strong-arm powers did not reach to Debtor’s exemption and United States right to collect against exempt property permitted statutory lien to attach to proceeds of any future sale of property by Trustee to the extent of Debtor’s claimed exemptions where underlying tax obligations were themselves nondischargeable. 26 USC Section 6334(e)(1) prevents levy on principal residence where government is attempting to seize the residence. However, Section 6334 does not prohibit a sale or attachment by a bankruptcy Trustee or the attachment of the lien to the proceeds of that sale. United States did not waive secured status by filing unsecured proof of claim as unrecorded statutory assessment lien under Section 6321 did not provide United States secured status against Trustee’s rights to property, but that status does not prevent United States from enforcing assessment lien against Debtor’s share of proceeds of sale.
- (2053) *Alan Presswood, D.C., P.C. v. Pernix Therapeutics Holdings*, 2016 WL 6995874 (E.D. Mo. 2016) – Prepetition cause of action for receipt of unsolicited fax advertising was property of estate even where claim not initial disclosed. Debtor later amended schedules to disclose and claim as exempt but Chapter 7 Trustee had not yet abandoned cause of action. Plaintiff lacked standing as only Trustee could file action or represent Estate in pending litigation unless Trustee has abandoned cause of action. Belated disclosure and exemption does not retroactively provide standing where Debtor lacked standing to institute action in first instance.

- (2054) *Hawk v. Engelhart*, Case No. 15-914 (S.D. Tx. 2016), *affid.*, Case No. 16-20641 (5th Cir. 2017), *petition for rehearing en banc filed* – 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.
- (2055) *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.
- (2056) *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.

7.83 Trustee's Power to Sell Exempt Assets

- (2057) *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.

7.84 Setoff and Exempt Assets

- (2058) *Ball v. United Cumberland Bank*, 2017 WL 3037447 (Bankr. E.D. Ky. 2017) – Complaint failed to state cause of action contesting Bank's offset of Social Security proceeds on deposit in Debtor's bank account where, after bankruptcy case was dismissed and before case was reinstated, Bank setoff against Debtor's account. 42 USC Section 407 prevents levy or execution against Social Security funds but does not prohibit Bank from exercising contractual right of setoff as Contractual setoff is not a judicial or quasi-judicial process.
- (2059) *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.

7.85 Exemptions and Non-dischargeable Claims

- (2060) *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.

7.86 Value of Claimed Exemption – Appreciation in Value

- (2061) *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.
- (2062) *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.

7.87 Surcharge of Exempt Property

- (2063) *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.
- (2064) *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.

- (2065) *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.
- (2066) *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

- (2067) *In re VPH Pharmacy, Inc.*, Case No. 17-30077 (Bankr. E.D. Mi. 2017) – Section 503(b)(1) defines administrative expenses as actual and necessary costs and expenses of preserving estate, and are strictly construed. Debt qualifies as actual and necessary administrative expense only if it arose from transaction with bankruptcy estate and substantially and directly benefitted estate, and is limited to cases where consideration for claim was received post-petition. Continued occupancy by Debtor of business property during post-petition pre-rejection period is actual and necessary cost of preserving estate and assets and operations. However, Debtor retained right to assert set off against administrative claim for damages resulting from creditor's alleged breach of the lease which must be resolved before Court can determine actual outstanding administrative expense claim.
- (2068) *Partap Investments, LLC v. Kittusamy*, Case No. 16-1242 (9th Cir. BAP 2017) - Party to "Lease" that is actually disguised as security interest not entitled to administrative claim for post-petition, pre-rejection "rent". Prepetition "lease" was disguised security agreement convey title to property to Debtor. Accordingly, "lessor" is not entitled to administrative claim under Section 503(b)(1)(A) for unpaid post-petition lease payments. Secured lender is entitled to administrative claim only to the extent that secured lender can prove that asset diminished in value as a result of bankruptcy filing. Creditors are not entitled to administrative claim where creditor did not present evidence to establish diminution in value as alleged diminution was based on purchase price of assets in first instance less value at time secured creditor recovered possession, neither of which accurately measures actual diminution as a result of bankruptcy case. Creditor did not present evidence of actual value of property at commencement of case or actual value of property at time creditor re-obtained possession.
- (2069) *In re Maqsoudi*, Case No. 13-26429 (Bankr. C.D. Ca. 2017) – Creditor who makes substantial contribution to Chapter 7 estate entitled to administrative expense claim. Substantial contribution under Section 503 is not limited to Chapter 9 and Chapter 11 cases. Efforts of creditor discovered Debtor's undisclosed ownership of real property that Trustee was able to liquidate and produce significant funds for creditors justifying recovery of creditor's reasonable attorney fees and costs incurred in discovering asset.
- (2070) *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.
- (2071) *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.
- (2072) *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.

- (2073) *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.
- (2074) *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.
- (2075) *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.
- (2076) *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.
- (2077) *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".
- (2078) *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.
- (2079) *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.
- (2080) *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.
- (2081) *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.

- (2082) *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.
- (2083) *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.
- (2084) *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.
- (2085) *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.
- (2086) *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.
- (2087) *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.
- (2088) *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.
- (2089) *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.
- (2090) *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.

- (2091) *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.
- (2092) *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.
- (2093)
- (2094) *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.
- (2095) *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.
- (2096) *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.
- (2097) *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.
- (2098) *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 – Section 503(b)(9)

- (2099) *In re SRC Liquidation, LLC*, Case No. 15-10541 (Bankr. D. Del. 2017) – Seller of goods entitled to administrative claim only for goods delivered to Debtor-buyer within 20 days before the Order for Relief. Seller not entitled to administrative status for goods shipped directly from seller to Debtor-buyer's customers as goods were never "delivered" to Debtor.
- (2100) *In re World Imports, LTD.*, Case No. 16-1357 (3d Cir. 2017) – Section 503(b)(9) requires that goods be delivered to Debtor within 20 days preceding Notice of Commencement. Delivery requires transfer of physical possession to buyer. Goods shipped "FOB" were not delivered to Debtor until goods were physically transferred to Debtor. Although "FOB" designation may shift to Debtor the risk of loss in transit, that is not same as delivery. Seller not entitled to administrative claim where goods were shipped within 20 days pre-petition but were not delivered to Debtor until post-petition.
- (2101) *In re Escalera Resources Co.*, Case No. 15-22395 (Bankr. D. Colo. 2017) - Electricity constitutes "good" for purposes of administrative priority status under Section 503(b)(9).
- (2102) *In re Spencer*, Case No. 16-11722 (Bankr. N.D. Miss. 2016) – Section 503(b)(9) allows administrative expense status to creditor who (1) sold goods to Debtor; (2) goods were received by Debtor within 20 days pre-petition; and (3) goods were sold to Debtor in ordinary course of business. Creditor who sold supplies to General Partnership did not have administrative claim in bankruptcy of individual partner. State law recognized separate existence of General Partnership from the partners themselves. Sale of supplies to Partnership did not constitute sale of assets to "Debtor". While Debtor as general partner was liable for all partnership debts, giving supplier an unsecured claim in Debtor's bankruptcy, that did not amount to administrative priority claim.
- (2103) *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.
- (2104) *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.
- (2105) *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.

8.3 Administrative – Competing Priorities

- (2106) *In re Burkall*, 2017 WL 3890106 (Bankr. W.D. Mi. 2017) – Attorney for Debtor in case converted from Chapter 13 to Chapter 7 entitled to fees for services rendered while case was pending in Chapter 13, to be paid after payment of Chapter 7 administrative expenses under Section 726. However attorney is not entitled to compensation from estate for any services rendered after date of conversion where attorney was not retained by Chapter 7 Trustee. Debtor may pay the fees, and attorney may recover fees, but bankruptcy estate has no liability for them.
- (2107) *In re Post*, 2017 WL 3822037 (Bankr. W.D. Mi. 2017) – Upon conversion of case, all funds on hand must be returned to debtor without payment of administrative expenses. There is no difference between conversion before or after confirmation. Under Section 726(b), attorney has administrative claim in Chapter 7 case subordinate to administrative expenses of Chapter 7.
- (2108) *United States Trustee v. Ste-Bri Enterprises, Inc.*, 2017 WL 4226873 (E.D. Mi. 2017) – 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. UST Quarterly Fees are not "administrative expenses" but are cost of bankruptcy case that to be paid ahead of Chapter 11 administrative expense and concurrently and prorata with Chapter 7 administrative expenses. UST fees are afforded equal priority with Chapter 7 professional fees and paid concurrent and pro-rata.

8.4 Administrative – Post-Petition Taxes

- (2109) *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.

8.5 Administrative – Post-Petition Pre-Rejection Lease

- (2110) *In re VPH Pharmacy, Inc.*, Case No. 17-30077 (Bankr. E.D. Mi. 2017) – Section 503(b)(1) defines administrative expenses as actual and necessary costs and expenses of preserving estate, and are strictly construed. Debt qualifies as actual and necessary administrative expense only if it arose from transaction with bankruptcy estate and substantially and directly benefitted estate, and is limited to cases where consideration for claim was received post-petition. Continued occupancy by Debtor of business property during post-petition pre-rejection period is actual and necessary cost of preserving estate and assets and operations. However, Debtor retained right to assert set off against administrative claim for damages resulting from creditor’s alleged breach of the lease which must be resolved before Court can determine actual outstanding administrative expense claim. Creditor not entitled to award of attorney fees as part of administrative rent claim where lease did not provide for recovery of attorney fees and there was neither contractual nor statutory basis for award of attorney fees.

8.6 Administrative - “Stub Rent”

- (2111) *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.

8.7 Administrative – Procedural Requirements

- (2112) *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 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.

8.8 Priority – Choice of Laws Generally

- (2113) *In re Hellgrath*, 2017 WL 3173969 (Bankr. S.D. Ohio 2017) – Bankruptcy Code controls over State Law for determining priority of distribution. State Court Order that appointed receiver and directed that receiver be paid fees and costs first from the property did not control priority of distribution in Bankruptcy. Receiver was unsecured creditor and would be treated as such in bankruptcy notwithstanding State Court Judgment. Using Bankruptcy Code does not violate Full Faith and Credit clause and State Court Order is not res judicata on issue of priority in bankruptcy. Further, even if res judicata could apply, issue of priority in bankruptcy is not issue that was actually and necessarily litigated or determined as part of proceeding to appoint receiver.

8.9 Priority – Qualifying Wages and Benefits

- (2114) *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.

8.10 Priority – Severance Benefits

- (2115) *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.

8.11 Priority – Tax Claims

- (2116) *In re Robinson*, 2017 WL 2414430 (Bankr. N.D. Ohio 2017) – Priority tax claims are governed by Section 507(a)(8) which grants priority status for unpaid income or gross receipts taxes for which a return, if required, was last due within 3 years of the date of the filing of the

petition. Priority status is available only to taxes due within 3 years before the petition date. Debtors filed bankruptcy on December 17, 2016 resulting in taxes coming due before December 17, 2013 lacking priority status. Debtor's 2012 taxes, due on April 17, 2013, were not entitled to priority status. 2015 taxes plus interest on those unpaid taxes entitled to priority treatment. However, fines and attorney fees charged by governmental agency based on failure to pay taxes constitute "penalties" which are not entitled to priority treatment under Section 507(a)(8)(G) which allows priority treatment only for penalties that are compensation for actual pecuniary loss. City did not present any evidence that fines and fees were designed to compensate for actual pecuniary loss or anything other than penalty. Accordingly, fines and fees not entitled to priority treatment.

- (2117) *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).
- (2118) *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.
- (2119) *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.
- (2120) *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.
- (2121) *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.
- (2122) *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.
- (2123) *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.
- (2124) *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.

- (2125) *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.
- (2126) *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.
- (2127) *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.

8.12 Priority – Unemployment Compensation Reimbursement

- (2128) *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.

8.13 Priority – Perishable Agricultural Commodities Act

- (2129) *S&H Packing & Sales Co. v. Tanimura Distributing, Inc.*, Case No. 14-56059 (9th Cir. 2017) – PACA creates statutory trust that protects growers from not being paid by giving producers rights a head of accounts receivable financing. True sale of accounts receivable precludes farmers from recourse under PACA against purchaser of receivables. Court must determine whether true sale of receivables actually occurred and whether sales were commercially reasonable. Court noted split between prior 9th Circuit precedent and decisions in other Circuits that have considered issue and suggested 9th Circuit needed *en banc* review to reconcile split. Other Circuits focus on whether sale transferred risk from original lender to “receivable purchaser” in determining whether transaction was true sale versus secured lending relationship.
- (2130) *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.
- (2131) *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.

8.14 Priority – Unredeemed Gift Cards

- (2132) *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.

8.15 Priority - Fines and Penalties

- (2133) *In re Robinson*, 2017 WL 2414430 (Bankr. N.D. Ohio 2017) – Priority tax claims are governed by Section 507(a)(8) which grants priority status for unpaid income or gross receipts taxes for which a return, if required, was last due within 3 years of the date of the filing of the petition. Priority status is available only to taxes due within 3 years before the petition date. Debtors filed bankruptcy on December 17, 2016 resulting in taxes coming due before December 17, 2013 lacking priority status. Debtor's 2012 taxes, due on April 17, 2013, were not entitled to priority status. 2015 taxes plus interest on those unpaid taxes entitled to priority treatment. However, fines and attorney fees charged by governmental agency based on failure to pay taxes constitute "penalties" which are not entitled to priority treatment under Section 507(a)(8)(G) which allows priority treatment only for penalties that are compensation for actual pecuniary loss. City did not present any evidence that fines and fees were designed to compensate for actual pecuniary loss or anything other than penalty. Accordingly, fines and fees not entitled to priority treatment.

8.16 Environmental

- (2134) *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.
- (2135) *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.

8.17 Secured – Generally

- (2136) *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.
- (2137) *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.
- (2138) *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.
- (2139) *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.
- (2140) *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.

- (2141) *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.
- (2142) *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.
- (2143) *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.
- (2144) *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.
- (2145) *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.
- (2146) *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.
- (2147) *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.
- (2148) *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.
- (2149) *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.
- (2150) *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.
- (2151) *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.
- (2152) *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.

- (2153) *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.

8.18 Secured – Property Taxes

- (2154) *State of Tennessee v. Hildebrand*, 2017 WL 710473 (6th Cir. 2017) – Interest rate for unpaid property taxes is determined by “applicable non-bankruptcy law” pursuant to Section 511. “Applicable non-bankruptcy law” is any statute that is not aimed solely at bankruptcy proceedings. “Bankruptcy law” includes both Federal provisions in Code itself and any state law that is targeted to bankruptcy proceedings and does not constitute “applicable non-bankruptcy law”. State law provided for interest rate of 12% plus 6% penalty rate provided for interest at 12%. Statute that purported to “convert” penalty into interest solely in bankruptcy cases qualified as “bankruptcy law” as it applied only in bankruptcy cases, and so was not “applicable state law and did not apply under Section 511. Plan needed to provide for interest at rate of 12% as that was rate specified by non-bankruptcy law.
- (2155) *JPMorgan Chase Bank NA v. Wheeler Financial Inc.*, Case No. 16-4924 (N.D. Ill. 2017) - Chapter 11 plan that did not explicitly provide for preservation of lien leaves previously secured creditor unsecured, with only contractual right to payment of sums specified under plan. Plan proposed to pay \$40,000 in real estate tax arrears to the tax certificate holder. Tax certificate holder and Debtor negotiated amendment that required Debtor to sell property and pay entire balance owed within six months. Creditor’s failure to provide for specific preservation of lien resulted in “trade-off” of secured claim for contractual right to payment. Creditor not entitled to relief from automatic stay following Debtor’s failure to make payment as required by plan as holder of tax certificate gave up its prepetition lien in return for promise under plan to be paid in six months. Tax lien on property was replaced by new contractual right defined by terms of plan.
- (2156) *In re Rice*, 2016 WL 4574301 (Bankr. E.D. Mi. 2016), *order on rehearing*, _____ (2016) – County Property Tax collector who acquires statutory assignment of unpaid taxes from municipality after confirmation of Plan can add 4% statutory administrative fee to case. Section 511 requires rate of interest to be fixed as of month of confirmation of plan but administrative transfer fee is not “interest”. However, tax collector precluded from imposing fee in this case where tax collector delayed for three years before attempting to charge fee, prejudicing Debtor’s ability to confirm plan. Laches warranted denial of additional fee in this case.

8.19 Federal and State Tax Liens

- (2157) *In re Villarreal*, 564 BR 264 (Bankr. N.D. Ohio 2016) – Although United States unrecorded statutory assessment lien was not valid against Chapter 7 Trustee due to Trustee’s status as hypothetical bona fide purchaser, strong-arm powers did not reach to Debtor’s exemption and United States right to collect against exempt property permitted statutory lien to attach to proceeds of any future sale of property by Trustee to the extent of Debtor’s claimed exemptions where underlying tax obligations were themselves nondischargeable. 26 USC Section 6334(e)(1) prevents levy on principal residence where government is attempting to seize the residence. However, Section 6334 does not prohibit a sale or attachment by a bankruptcy Trustee or the attachment of the lien to the proceeds of that sale. United States did not waive secured status by filing unsecured proof of claim as unrecorded statutory assessment lien under Section 6321 did not provide United States secured status against Trustee’s rights to property, but that status does not prevent United States from enforcing assessment lien against Debtor’s share of proceeds of sale.
- (2158) *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.
- (2159) *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.

8.20 Secured – Domestic Support Obligations

- (2160) *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.

8.21 Secured – Failure to Record Generally

- (2161) *In re Villarreal*, 564 BR 264 (Bankr. N.D. Ohio 2016) – Although United States unrecorded statutory assessment lien was not valid against Chapter 7 Trustee due to Trustee’s status as hypothetical bona fide purchaser, strong-arm powers did not reach to Debtor’s exemption and United States right to collect against exempt property permitted statutory lien to attach to proceeds of any future sale of property by Trustee to the extent of Debtor’s claimed exemptions where underlying tax obligations were themselves nondischargeable. 26 USC Section 6334(e)(1) prevents levy on principal residence where government is attempting to seize the residence. However, Section 6334 does not prohibit a sale or attachment by a bankruptcy Trustee or the attachment of the lien to the proceeds of that sale. United States did not waive secured status by filing unsecured proof of claim as unrecorded statutory assessment lien under Section 6321 did not provide United States secured status against Trustee’s rights to property, but that status does not prevent United States from enforcing assessment lien against Debtor’s share of proceeds of sale.
- (2162) *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 unavoids and enforceable where trustee does not pursue avoidance.
- (2163) *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.

8.22 Lien Avoidance – Section 506(d)

- (2164) *In re Shank*, Case No. 11-10480 (Bankr. S.D. Tx. 2017) - Plan that proposes to satisfy mortgage by paying specific principal amount plus interest does not require filing of adversary proceeding. Adversary proceeding is required to challenge the validity, priority or extent of lien. Chapter 13 Plan did not contest the validity of mortgage or contest that mortgage was valid lien on collateral and, in fact, specifically provided for payment of mortgage to full extent of amount allegedly owed. Code allows valuation of collateral to be determined in contested matter such as through confirmation process. Creditor who did not object to confirmation of Plan and did not file proof of claim asserting any amount due inconsistent with amounts set forth in Plan agreed to treatment of mortgage as specified in Plan. Upon completion of Plan, Debtor entitled to entry of order deeming mortgage satisfied.
- (2165) *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.

8.23 Secured – Void Lien – Section 506(d)

- (2166) *Kohout v. Nationstar Mortgage, LLC*, Case No. 15-80004 (Bankr. N.D.N.Y. 2016) – Secured creditor not required to file claim in bankruptcy case and can enforce lien after conclusion of case. If creditor files claim, Debtor may substantively challenge claim under Section 502. Statutory bases under Section 502 to disallow claim do not include lack of documentation, but will disallow claim if the claim unenforceable against the Debtor or property of the Debtor. If the claim is disallowed in whole or in part, the claim is not secured to extent of the disallowance and would be bifurcated into secured and unsecured portions consistent with the disallowance process. Claim that is disallowed for reasons other than those specified in Section 502, such as procedural infirmities including late filed and lack of supporting documents, is not “void” for purposes of Section 506 and, therefore, is not void even if proof of claim is disallowed. Court distinguished *Blendheim* as objection in *Blendheim* was based on alleged forgery of mortgage and note which would render note and mortgage legally unenforceable, while objection to claim in this case was predicated solely on failure to attach documents and did not raise any substantive defect in or defense to the enforcement of the note and mortgage.
- (2167) *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.

8.24 Secured – Release of Lien

- (2168) *JPMorgan Chase Bank NA v. Wheeler Financial Inc.*, Case No. 16-4924 (N.D. Ill. 2017) - Chapter 11 plan that did not explicitly provide for preservation of lien leaves previously secured creditor unsecured, with only contractual right to payment of sums specified under plan. Plan proposed to pay \$40,000 in real estate tax arrears to the tax certificate holder. Tax certificate holder and Debtor negotiated amendment that required Debtor to sell property and pay entire balance owed within six months. Creditor's failure to provide for specific preservation of lien resulted in "trade-off" of secured claim for contractual right to payment. Creditor not entitled to relief from automatic stay following Debtor's failure to make payment as required by plan as holder of tax certificate gave up its prepetition lien in return for promise under plan to be paid in six months. Tax lien on property was replaced by new contractual right defined by terms of plan.
- (2169) *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.

8.25 Secured – Proof of Perfection

- (2170) *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.

8.26 Secured – Method of Perfection

- (2171) *In re Linear Electric Co.*, Case No. 16-1477 (3d Cir. 2017) – Avoidability of mechanics lien filed by supplier after filing of Chapter 11 petition is determined by state law. Where state law did not provide that recording of lien "related back" to some prepetition event, recording lien violated automatic stay and voided lien. If state law allows for mechanics lien to relate back to some prepetition event, recording of lien post-petition would not violate stay under Section 546(b)(1)(A).
- (2172) *Security Seed & Chemical Inc. v. French*, 2016 WL 8078320 (Bankr. W.D. Ky. 2016) – Under Kentucky law, judgment becomes lien on real property by recording judgment in the public records in the county in which the property is located. Creditor perfected judgment lien prepetition by filing judgment lien with Clerk of Court. Lien can be avoided under Section 522(f) to extent that lien impairs exemptions. Debtor bears burden to prove that value of the lien plus all other liens on property plus claimed exemption exceeds value of Debtor's interest in property. Debtor's attempt to avoid lien overruled where Debtor failed to produce any evidence of value of the property.
- (2173) *Security Seed & Chemical Inc. v. French*, 2016 WL 8078320 (Bankr. W.D. Ky. 2016) – Under Kentucky State Law, judgment becomes a lien against personal property by levy of a writ of attachment. Mere issuance of writ of attachment or placing written hands of officer does not become lien until officer actually levies on property itself. Although creditor obtained prepetition judgment against Debtor and caused a Writ of Execution to be served on Debtor, there was no evidence presented that sheriff actually took possession of any item listed in Writ of Execution. Levying officer's action to simply locate property is not sufficient to indicate that officer brought property within his immediate control or did something equivalent to exercising dominion over property.
- (2174) *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.
- (2175) *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, crating in lienholder valid, perfected and unavoidable lien, although certificate of title was not amended to show correct lienholder until after commencement of case.
- (2176) *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.
- (2177) *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.
- (2178) *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.

- (2179) *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.
- (2180) *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. 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. 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. Section 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. Section 547(b).
- (2181) *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.
- (2182) *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.
- (2183) *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.
- (2184) *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.
- (2185) *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.
- (2186) *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.
- (2187) *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.

- (2188) *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.
- (2189) *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.
- (2190) *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 personalty 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.

8.27 Secured – Description of Collateral

- (2191) *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.
- (2192) *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.

8.28 Secured – After-Acquired Property

- (2193) *Johnson v. RFF Family Partnership, LP*, 2016 WL 4401609 (Bankr. S.D. Ohio 2016), *aff’d* Case No. 16-8035 (6th Cir. BAP 2017) – 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. Player 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.

- (2194) *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.

8.29 Secured – Personal Services Contract

- (2195) *Johnson v. RFF Family Partnership, LP*, 2016 WL 4401609 (Bankr. S.D. Ohio 2016), *aff’d* Case No. 16-8035 (6th Cir. BAP 2017) – 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.

8.30 Secured – Property of Third Party

- (2196) *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).

8.31 Security Deposits

- (2197) *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.

8.32 Secured – Accounts Receivable

- (2198) *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.
- (2199) *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.
- (2200) *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.

8.33 Secured – Proceeds of Collateral

- (2201) *Johnson v. RFF Family Partnership, LP*, 2016 WL 4401609 (Bankr. S.D. Ohio 2016), *aff'd* Case No. 16-8035 (6th Cir. BAP 2017) – 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.
- (2202) *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.
- (2203) *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.
- (2204) *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

8.34 Secured – Products of Collateral

- (2205) *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.

8.35 Secured – Insurance Proceeds of Collateral

- (2206) *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.

8.36 Secured - Priority of Competing Interests

- (2207) *Sunshine Heifers, LLC v. Citizens First Bank*, 2017 WL 3747194 (6th Cir. 2017) – Mandate rule requires that after superior court has determined law of case and issued mandate, lower court is not free to depart from that finding. In determining whether issue is subject to mandate rule, Court must determine whether issue was expressly or impliedly decided by superior court and whether mandate was so narrow in scope as to preclude lower court from reconsidering issue. Prior appeal may resolve issue implicitly where resolution of issue was necessary step in resolving earlier appeal; resolution of issue would abrogate prior decision and so must have been considered in prior appeal; or issue is so closely relate to earlier appeal its resolution requires no additional consideration and so was resolved even if unstated. Exceptions apply where evidence in subsequent trial is substantially different; controlling authority since made contrary decision applicable; or decision was so clearly erroneous and would work substantial justice. If appellate court issues general remand, Lower Court is free to consider all issues subject to law of case. If appellate court issues limited remand that expressly outlines issues to be addressed, framework within which lower court acts is narrow and limited. Prior opinion that determined that Interest in cattle was not “disguised security interest” did not address or even attempt to address title to cattle where debtor leased some cattle and owned others subject to security interest. Bankruptcy Court concluded that debtor had sold all of the leased cattle before filing such that cattle in possession of debtor must be owned by debtor subject to security interests. Further, to extent cattle were leased using funds that were subject to Lender's security interest, Lender had superior interest in funds and in proceeds and products acquired by funds such that security interest would have attached to leased cattle superior to rights of lessor. Bankruptcy Court's later ruling did not violate mandate rule as issues in remand were distinct and not involved in prior appeal.

- (2208) *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.
- (2209) *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.
- (2210) *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.
- (2211) *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.
- (2212) *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.
- (2213) *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.
- (2214) *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.
- (2215) *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.
- (2216) *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.

- (2217) *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.
- (2218) *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.
- (2219) *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.
- (2220) *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 refinanced 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.
- (2221) *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
- (2222) *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
- (2223) *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.
- (2224) *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.

8.37 Secured Claims – Equitable Subordination

- (2225) *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.
- (2226) *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.
- (2227) *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.
- (2228) *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.

8.38 Purchase Money Security Interests

- (2229) *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.

8.39 Secured Claim – Allowed Charges Generally

- (2230) *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.
- (2231) *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.

8.40 Secured – Attorney Fees

- (2232) *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.

- (2233) *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.
- (2234) *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.
- (2235) *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 incurred during pendency of Chapter 13 but not sought or awarded pursuant to Federal Rule of Bankruptcy Procedure 2016. After completion of Chapter 13 plan and issuance of discharge, Lender would immediately threaten foreclosure unless borrower paid fees charged while bankruptcy cases were still pending. Bankruptcy Court correctly concluded that “under the plan language of Rule 2016, a mortgage lender must file a Rule 2016 application before collecting any reimbursable fees and costs while a chapter 13 case remains pending.” Rule 2016 applies to all fees that were assessed during the bankruptcy but not collected until post-bankruptcy.
- (2236) *RNPC, LLC v. Alvarez*, Case No. 11-080 (1st Cir. BAP 2012) – Pursuant to Section 1322(e) of the Bankruptcy Code, the amount of an arrearage under a mortgage secured by the Debtor’s principal residence, including the amount of the mortgagee’s attorney’s fees and costs recoverable under the mortgage, is determined by applicable nonbankruptcy law, and not the reasonableness, lodestar-based standards of Section 506(b) or Bankruptcy Rule 2016, which are overridden by Section 1322(b). Since applicable Puerto Rico law provides that the amount of attorneys’ fees and costs recoverable under “penal clauses”—which permit recovery of attorneys’ fees and costs as a percentage of the original principal of the mortgage note—is subject to adjustment on equitable grounds, the Bankruptcy Court properly considered those grounds in reducing the mortgagee’s claim for attorneys’ fees from \$7,600 (the contract rate, equal to 10% of the original principal amount) to \$2,000.
- (2237) *In re Ware*, 2011 WL 5975269 (Bankr. E.D. Ky. 2011) – Fees incurred in adversary proceeding that contested validity of mortgage and future advance clause were expended to protect the security of the mortgage and were properly recoverable as additional sums under the mortgage.
- (2238) *In re Criegler*, 2011 WL 1344497 (Bankr. E.D. Ky. 2011) – Holder of property tax certificates is secured creditor. As oversecured creditor, holder is entitled to interest and reasonable attorney fees, including fees incurred both pre- and post-petition. Chapter 13 Plan that failed to treat post-petition interest and post-petition attorney fees could not be confirmed.
- (2239) *In re Makris*, 2011 WL 499948 (D.N.J. 2011) – Oversecured Creditor was entitled by note to reasonable fees, including fees for litigation over whether attorney fees were appropriate—notwithstanding that some issues were decided adverse to creditor. Attorney fees are not denied simply because legal actions taken by secured creditor were unsuccessful. Note provided for fees related to creditor’s enforcement of note to extent not prohibited by applicable law. This contractual language entitled creditor to litigation fees for all reasonable actions taken to enforce the note without cap or limitation, and including fees for litigating entitlement to and amount of fees. Fees on fees are generally allowed under fee-shifting provisions, whether those provisions arise under contract or statute. Attorneys’ fees under Section 506(b) will not be denied solely because legal actions taken by a secured creditor are unsuccessful, as long as those actions were reasonable at the time taken.
- (2240) *State of Montana, Department of Revenue v. Duncan*, 2010 WL 4903952 (9th Cir. 2010) – Governmental Agency holding undisputed

oversecured claim not entitled to recover attorney fees paid to outside counsel where Agency also had three salaried attorneys also working on case. Work performed by outside counsel did not affect in any way the outcome of the case. Agency could not demonstrate under circumstances of case that fees incurred for outside counsel were “reasonable”.

8.41 Secured – Interest Rate

- (2241) *In re Perkins*, 2017 WL 439319 (Bankr. W.D. Ky. 2017) - Section 506(b) allows fully secured creditor to recover interest on the claim plus any reasonable fees, costs or charges provided for under the agreement or state statute. Over-secured Creditor is entitled to default rate of interest to compensate creditor for loss resulting from nonpayment as long as default interest rate is intended to compensate lender for administrative expenses and inconvenience. Award of fees, costs or charges is dictated by terms of loan agreement. However, whether Creditors entitled to default rate of interest depends on facts and equities of each particular case, with presumption that contractual rate of interest is appropriate subject to being rebutted by evidence that default rate is significantly higher than pre-default rate without any justification; and whether secured creditor runs realistic risk of nonpayment, whether Plan proposes relatively quick orderly liquidation, and whether contract rate of interest was prevailing market rate at time of default. Debtor rebutted presumption in favor of default rate of interest of additional 5% where default rate would double contractual interest rate on note; pre-default rate of 5% was prevailing market rate at time of default; and creditor did not present any evidence to establish that additional 5% rate was either justified or in line with prevailing market rates. Creditor did not present any evidence as to why doubling of interest rate would be anything other than windfall to creditor, creditor had already received substantial payments from liquidation of collateral; and creditor’s risk of nonpayment was low given its substantial over-secured status. Application of default rate would materially decrease payments, if not completely eviscerate payments, to unsecured creditors. Court would not apply default rate of interest and would limit recovery to over-secured creditor to contractual pre-default rate.
- (2242) *In re Jones*, 2015 WL 4624481 (Bankr. E.D. Ky. 2015) – Rate of interest is appropriate for paying secured claim in Chapter 13. Although Supreme Court decision in *Till* is plurality and non-binding as to methodology, Sixth Circuit has recognized *Till* as appropriate method of determining interest rate, rejecting pre-*Till* “coerced loan” method. Plan that provided for 5.25% on mobile home loan met *Till* standards for prime (3.25%) plus 2% “adjustment”.
- (2243) *In re Johnson*, Case No. 15-20959 (Bankr. E.D. Mi. 2015) – Court would adjust proposed interest rate to secured creditor in Chapter 13. Plan initially proposed rate of 5.25% on automobile and motorcycle loans, later increased to 6.25% after creditor objected, and Trustee objected to higher rate. Court concluded that initial rate calculated at prime plus 2% was insufficient where Debtor purchased one of the vehicles less than one year pre-petition and purchased the other vehicle only 6 months pre-petition, and Debtors had significant secured debt overall and little, if any, equity in vehicles to provide equity cushion. *Till* warranted slight adjustment to initial rate, to 5.75%.
- (2244) *Allen-Morris v. Nicholas Financial, Inc.*, 2104 WL 5480825 (E.D. Mi. 2014) – Loan is criminally usurious if lender knowingly charges interest at rate that exceeds 25% simple interest. Sales contract that specified rate of 25% is not criminally usurious unless the transaction contains charges that are disguised interest. Fact that vehicle was sold at price above blue book value does not amount to additional interest. Usury statute applies only to the loan, not the purchase transaction, unless sale of property is mere pretense to avoid usury limits. Debtor’s purchase of car was not “mere pretense” where there was no evidence of any intent to violate usury laws and as general rule sellers are free to charge whatever price it can exact.
- (2245) *Prudential Insurance Company v. SW Boston Hotel Venture, LLC*, Case no. 11-079 (1st Cir BAP 2012) – Under Section 506(b), oversecured creditor is unqualifiedly entitled to Post-petition interest on its oversecured claim regardless of whether loan documents provide for interest. Whether loan is oversecured is determined using flexible approach, such that even an originally undersecured loan can become oversecured based on changing events and circumstances. Although parties initially believed loan to be undersecured, and court had entered an order to that effect, property was later sold during course of Chapter 11 case for substantially more than was owed, resulting in creditor being oversecured and entitled to interest on the claim from the petition date. Creditor entitled to compound interest where loan documents provided that interest would compound monthly and Court lacks authority to deny compound interest where loan documents clearly provide for compounding. Bankruptcy code presumes that creditor is entitled to interest at contractual default rate, provided that there are no equitable considerations that would compel different result. In considering whether equitable basis exists to deny default rate, court will focus on whether the creditor is guilty of misconduct; the imposition of default rate would harm unsecured creditors; default rate would impair fresh start; or default rate constitutes a penalty. Loan documents provided for additional 5% on contractual non-default rate in event of default. Plan proposed to pay all creditors in full, such that use of default rate would not harm other creditors, and there was no evidence of creditor misconduct. Rate was not penalty as rate was consistent with rates generally used by lender and used by other lenders. Rate would not impair Debtor’s ability to reorganize or impair fresh start. Default rate of 5% higher than non-default rate was not a penalty and was not inequitable.
- (2246) *McDonald v. Credit Acceptance Corp.*, 2011 WL 6643074 (E.D. Mi. 2011) – Interest rate that exceeds 3% risk factor not prohibited by *Till*. *Till* did not impose ceiling over prime as risk factor. Plan that provided for interest to secured creditor at 15% approved when contract rate was 24% and car was purchased only one week prior to filing.
- (2247) *In re Gift*, 469 BR 800 (Bankr. M.D. Tn. 2012) – Property tax claim, as oversecured claim, is entitled to post-petition interest at the statutory rate. However, creditor is not entitled to secured status on penalty interest rate. Interest rate in Chapter 13 had only to ensure that stream of payments to taxing authority had present value which was at least equal to amount of the claim plus 12% state statutory interest. Where Debtor had solvent estate, plan must also provide for payment of additional penalty interest rate as unsecured claim.
- (2248) *In re Meyhoeffer*, 2011 WL 2580043 (Bankr. N.D.N.Y. 2011) – Creditor who purchased property tax certificates is the holder of a tax claim pursuant to Section 511. Creditor entitled to interest at certificate rate without modification or adjustment for *Till*. Plan that proposed to modify interest rate from statutory 12% to 6% could not be confirmed.

- (2249) *In re Dimery*, 2011 WL 2470057 (Bankr. N.D. Ohio 2011) – “Formula approach” adopted by Supreme Court plurality in *Till* requires court to use national prime plus appropriate “risk” factor. Sixth Circuit has indicated at least in dicta that Courts should use *Till* formula. Court used prime of 3.25% plus 2% “risk” adjustment.
- (2250) *First United Sec. Bank v. Garner*, 2011 WL 93763 (M.D. Ala. 2011) - Oversecured creditor was entitled to contract rate of interest until confirmation, then prime-plus rate established by *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (May 17, 2004). Section 1325(a)(5)(B)(ii) is more specific than § 506(b) and fixes cutoff date for accrual of contract interest at effective date of plan.
- (2251) *In re Blanton*, 2010 WL 4503188 (Bankr. N.D. Ohio 2010) - “Formula approach” adopted by Supreme Court plurality in *Till* requires court to use national prime plus appropriate “risk” factor. Sixth Circuit has indicated at least in dicta that Courts should use *Till* formula. Court rejected both the contract rate approach and the “prime with no risk adjustment” approach. Court used prime of 3.25% plus 2% “risk” adjustment.
- 8.42 Secured – Cross Collateralization
- (2252) *In re McGregor*, 2011 WL 2173732 (Bankr. D.S.C. 2011) – Credit Card that is cross-collateralized with loan secured by Debtor’s motor vehicle is secured debt. Lien passed through Chapter 7 discharge unaffected and fully enforceable. Debt remains secured in subsequent Chapter 13 to extent of value of Debtor’s vehicle and must be paid as a secured claim.
- 8.43 Secured – Future Advance Mortgage.
- (2253) *In re Ware*, 2011 WL 5975269 (Bankr. E.D. Ky. 2011) – Future Advance Clause in mortgage valid and enforceable where Future Advance Clause did not specify maximum amount of future advances but body of mortgage contained cap on amount secured. First mortgage secured to full amount including future advances as long as total indebtedness did not exceed amount stated in mortgage as overall cap on amount.
- 8.44 Secured – Assignment of Claim
- (2254) *In re Rice*, Case No. 11-8032 (6th Cir. BAP 2011) – 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.
- 8.45 Secured – Assignment of Insurance Proceeds
- (2255) *State Farm Insurance Company v. P.M.C.*, 2013 WL 4009031 (E.D. Mi. 2013) – Assignment of insurance policy as collateral for loan transfers policy to creditor to extent necessary to secured debt and extinguished beneficiary’s interest to the same extent. Lender’s receipt of payments in borrower’s bankruptcy case did not extinguish secured claim to extent that debt remained unpaid after application of proceeds received in bankruptcy case. Although lender was treated in bankruptcy case as unsecured, lender filed unsecured proof of claim, and lender received payments as an unsecured creditor, those payments did not extinguish the secured interest, as discharge eliminates personal liability but does not extinguish the underlying debt itself.
- 8.46 Secured – Property Acquired Subject to Lien
- 8.47 Secured – Forged Mortgage
- (2256) *Haddad v. Randal S. Miller Associates, PC*, 2014 WL 5303001 (6th Cir. 2014) – Debtors were judicially estopped from alleging that husband forged wife’s signature on mortgage rendering mortgage void. After lender commenced foreclosure, Debtors filed bankruptcy. Schedule A listed property subject to mortgage; Schedule D listed the mortgage without indicating that the debt was in any way disputed; and Debtors’ Statement of Intentions stated that Debtors intended to retain the property and reaffirm the debt. All of the documents were signed by both Debtor husband and Debtor wife under penalty of perjury. Debtors’ statements constitute affirmative representations that would be inconsistent with Debtors’ new assertion that the mortgage was void. Debtors knew at time of bankruptcy filing of factual basis to dispute the mortgage as the issue had been raised in a counterclaim filed in a pre-petition lawsuit; and had clear motive to conceal the claim because if they did not reaffirm the mortgage the trustee could sell the home to pay creditors.
- (2257) *Bazinski v. JPMorgan Chase Bank*, 2014 WL 1405253 (E.D. Mi. 2014), *aff’d*, 2015 WL 1003036 (6th Cir. 2015) – Once foreclosure sale has occurred and redemption expired, former owner can seek relief only for irregularities in the foreclosure process itself that caused or will cause prejudice to former owner. Plaintiff failed to state cause of action based on allegation that Plaintiff never signed the mortgage or that her signature was forged by her former husband because Plaintiff did not bring action or contest foreclosure before sale occurred or redemption expired. No aspect of foreclosure complaint went to foreclosure process itself, as Plaintiff did not contend that her signature was forged on any documents relating to the foreclosure process itself.
- (2258) *Sutter v. US National Bank*, 2012 WL 5734 (6th Cir. 2012) – Lender’s assignee did not have secured claim based on forged mortgage. Although borrowers signed the promissory note and the lender advanced the proceeds to pay off the prior liens on the property, borrowers never signed the mortgage itself. Mortgage was apparently signed by originating lender as notary indicated that mortgage was signed in Michigan on date when borrower was in California. Forged mortgage is void ab initio; therefore, there can be no bona fide purchaser for value. Subsequent holder of mortgage could not enforce otherwise void mortgage.
- 8.48 Secured – Equitable Mortgage
- (2259) *Sutter v. US National Bank*, 2012 WL 5734 (6th Cir. 2012) – Equitable mortgage is generally imposed when one party intended to grant security interest but instrument actually transferred property in total to third party. Equitable mortgages can be imposed where the underlying

mortgage is void, particularly where the party purportedly giving the mortgage received the benefits of the mortgage. However, equity prevents imposition of equitable mortgage where party seeking to impose mortgage lacks clean hands. Actions of originating lender in forging signatures of borrowers on mortgage would be imputed to subsequent purchaser of the note and mortgage, resulting in unclean hands and precluding imposition of equitable mortgage, even where borrower would not be harmed by imposition of mortgage and borrower unquestionable received benefit in form of payoff of prior mortgage.

8.49 Secured – Judgment Lien

- (2260) *In re Hellgrath*, 2017 WL 3173969 (Bankr. S.D. Ohio 2017) – Judicial Lien is one obtained by judgment, levy, sequestration or other legal or equitable process or proceeding. Judgment standing alone does not give rise to lien or security interest. State Court Order Appointing Receiver does not constitute judicial lien in favor of receiver for receiver fees and expenses.
- (2261) *Security Seed & Chemical Inc. v. French*, 2016 WL 8078320 (Bankr. W.D. Ky. 2016) – Under Kentucky law, judgment becomes lien on real property by recording judgment in the public records in the county in which the property is located. Creditor perfected judgment lien prepetition by filing judgment lien with Clerk of Court. Lien can be avoided under Section 522(f) to extent that lien impairs exemptions. Debtor bears burden to prove that value of the lien plus all other liens on property plus claimed exemption exceeds value of Debtor's interest in property. Debtor's attempt to avoid lien overruled where Debtor failed to produce any evidence of value of the property.
- (2262) *Security Seed & Chemical Inc. v. French*, 2016 WL 8078320 (Bankr. W.D. Ky. 2016) – Under Kentucky State Law, judgment becomes a lien against personal property by levy of a writ of attachment. Mere issuance of writ of attachment or placing written hands of officer does not become lien until officer actually levies on property itself. Although creditor obtained prepetition judgment against Debtor and caused a Writ of Execution to be served on Debtor, there was no evidence presented that sheriff actually took possession of any item listed in Writ of Execution. Levying officer's action to simply locate property is not sufficient to indicate that officer brought property within his immediate control or did something equivalent to exercising dominion over property.
- (2263) *In re Szymanski*, Case No. 10-22054 (Bankr. E.D. Mi. 2015) – Neither Michigan law nor Bankruptcy law toll time for re-recording judgment lien. Lien recorded in 2009 expired in 2014 where judgment holder did not renew recording.
- (2264) *Jones v. Simon*, 2014 WL 3695818 (W.D. Ky. 2014) – Settlement agreement approved by State Court pre-petition did not create security interest in proceeds of litigation. Debtor and creditor entered into pre-petition settlement agreement that provided that Debtor would prosecute claims against third parties and would pay \$30,000 to creditor when litigation completed. Security interest requires intent of parties to create security interest. While no magic words are required, the instrument's language must be such that the logical conclusion is that it was the intention of the parties to create a security interest. Settlement agreement did not create security interest. Agreement called for timing as to when payments were to be made but did not grant security interest in proceeds of third party litigation or identify any specific manner or source of funds for those payments.
- (2265) *Northedge v. Beckett*, Case No. 13-80089 (Bankr. W.D. Mi. 2013) – Judgment of Divorce was sufficient to create judgment lien on former marital home to secure balance owed by Debtor to spouse. JOD clearly states that parties intended to divide the value of the property equally, to permit Debtor to continue to live there, and for Debtor to have up to 5 years to pay spouse for his equity at a specified price. JOD also stated that spouse retained a secured interest and reserved to spouse power to have property sold if Debtor did not make payments as required. Lack of separate note and mortgage did not defeat spouse's status as holder of a lien where that was clearly spelled out in the JOD.
- (2266) *In re Wittmer*, 2013 WL 3808150 (Bankr. N.D. Ohio 2013) – Judgment lien attaches only to property owned by Debtor when lien is recorded or property obtained after recording, and located in county in which lien has been perfected. Judgment creditor did not hold lien against property that Debtor had transferred prior to creditor's recording of lien in county records. Although property may have been fraudulently transferred, creditor did not bring fraudulent transfer action prior to commencement bankruptcy case and creditor could not trace any connection between debt underlying the judgment and any property conveyed by Debtor.

8.50 Secured – Waiver.

- (2267) *Salysville National Bank v. Bailey*, 664 F.3d 1026 (6th Cir. 2011) – Creditor waived security interest in collateral by filing an unsecured claim in Chapter 7 case and receiving distributions from estate.

8.51 Secured – Attorney Charging Liens

- (2268) *Spears v. McBride*, 2017 WL 3498925 (E.D. Mi. 2017) –
- (2269) *Law Office of Phillip Strehle, P.C. v. Barnett*, 2017 WL 2332848 (E.D. Mi. 2017) - In Michigan, attorney has "charging lien" on any judgment, settlement or other money recovered as a result of attorney services. Attorney for creditor in Chapter 7 case not entitled to charging lien on proceeds received by creditor as distributions from estate. Assets recovered in bankruptcy case were recovered by bankruptcy Trustee and bankruptcy Trustee's counsel who pursued discovery and uncovered unscheduled assets generating approximate \$240,000 for payment in full of creditor claims.
- (2270) *Dymarkowski v. Savage*, 2015 WL 7455630, 541 BR 829 (Bankr. W.D. Ohio 2015), *aff'd*, 2016 WL 7383965 (6th Cir. BAP 2016) – Attorney has charging lien in fruits of judgment or decree and gives attorney prior right to proceeds before client or former client. Attorney did not have charging lien against automobile where client signed title to vehicle and gave it to attorney to hold as security for payment of attorney fees, and automobile was not involved in and did not constitute proceeds of litigation. Even if attorney held charging lien, lien was not perfected for purposes of Section 544 as state law provided that sole method of perfecting lien in automobile is by recording lien on title and attorney never recorded lien. Retention of title, without recording lien, does not operate to perfect lien. Trustee could avoid transfer of vehicle

where although attorney held title for more than 2 years pre-petition, Debtor actually signed over title less than 90 days pre-petition, at which point attorney actually obtained interest in vehicle.

- (2271) *In re Daher*, 2015 WL 4555394 (Bankr. N.D. Ohio 2015) – Motion filed within 14 days of entry of order is treated as motion to amend or alter order under Rule 59 and Bankruptcy Rule 9023. Rule 59 provides four grounds for relief: (1) clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) to prevent manifest injustice. Rule 59 is not merely to reargue a case or to raise issues or claims that could have been, but were not, raised in earlier proceeding. Motion denied where party failed to raise issue of charging lien in prior proceeding brought by trustee to determine parties' interests in the funds that were recovered from insurance company. Right to charging lien, if any, arose when the judgment was entered in the underlying action. Attorney should have asserted charging lien in response to trustee's action, rather than waiting until after determination by court that insurance proceeds were property of estate.
- (2272) *Kohut v. Ackerman & Ackerman*, 2015 WL 2165285 (Bankr. E.D. Mi. 2015) – Attorney retained by Debtor in possession to prosecute action has charging lien against proceeds of litigation that survives conversion to Chapter 7 and non-retention by Chapter 7 Trustee. Value of charging lien is based on contingency fee percentage multiplied by value of settlement that is attributable to counsel's efforts. If counsel's efforts produced 100% of the recover, such that Trustee and his counsel did not contribute any value, contingency fee would be based on entire settlement amount. Proper measure of fees is quantum meruit capped by contingency fee percentage, but where fee agreement is contingency based, it is not appropriate to limit fees to number of hours expended times hourly rate. Balance is amount of settlement attributable to terminated counsel and amount attributable to subsequent counsel. Where Trustee is not acting as attorney, amount of settlement attributable to trustee's actions is not deducted from value contributed by predecessor counsel, as efforts of party cannot reduce quantum meruit recovery. Evidence indicated that 90% of recovery was attributable to terminated counsel, such that proper award is contingency fee based on 90% of total recovery.
- (2273) *In re Saroff*, 2014 WL 1330900 (Bankr. E.D. Tn. 2014) – Charging lien is based on lawyer's equitable right to have fees and costs due for services in particular action secured by the judgment or recovery in that action, and attached to any proceeds flowing from the judgment if the lawyer worked to secured that judgment. Under state law, lien would date back to commencement of case and is enforceable even if the lien is not noted in the judgment or settlement if all affected parties have notice of the lien. Although attorney recorded perfection of lien post-petition in violation of stay, invalidity of perfection did not defeat enforceability of lien itself where all parties were aware of attorney's claim.
- (2274) *Mayer v. Giarmarco, Mullins & Horton, PC.*, 41 BR 702 (E.D. Mi.), *appeal after remand*, 2013 WL 4786826 (Bankr. E.D. Mi. 2013) – Attorney charging lien arises by operation of law without prior notice to client where attorney's actions results in judgment in favor of client. Lien extends to any judgment or other recovery in a particular suit, and includes any settlement or other money recovered as a result of attorney's efforts. In divorce action, "recovery" includes the outcome of the divorce case as a whole, and includes property transferred to or property retained by client. Attorney held charging lien in client's interest in IRA that Debtor retained as a result of divorce proceeding. Although Debtor had IRA prior to commencement of divorce action, and judgment did not "recover" anything that client did not already have, client's retention of that interest was recovery for purposes of charging lien.

8.52 Secured – Attorney Retaining Liens

- (2275) *Dymarkowski v. Savage*, 2015 WL 7455630, 541 BR 829 (Bankr. W.D. Ohio 2015), *aff'd*, 2016 WL 7383965 (6th Cir. BAP 2016) – Attorney has retaining lien in property, papers and documents and money coming into attorney's hands during representation. Attorney did not have perfected retaining lien against automobile where client signed title to vehicle and gave it to attorney to hold as security for payment of attorney fees, and automobile was not involved in and did not constitute proceeds of litigation. Ohio Ethics rules seriously limit retaining lien as ethics rules require that all papers and property must be promptly returned to client and attorney cannot hold lien where doing so requires attorney to violate ethical obligations. Even if attorney held charging lien, lien was not perfected for purposes of Section 544 as state law provided that sole method of perfecting lien in automobile is by recording lien on title and attorney never recorded lien. Retention of title, without recording lien, does not operate to perfect lien. Trustee could avoid transfer of vehicle where although attorney held title for more than 2 years pre-petition, Debtor actually signed over title less than 90 days pre-petition, at which point attorney actually obtained interest in vehicle.

8.53 Secured – Mechanics and Materialmen Liens

- (2276) *Endeavor Energy Resources, LP v. Heritage Consolidated, LLC*, 2014 WL 4238605 (5th Cir. 2014) – Under Texas law, material contractor and mineral subcontractors hold statutory lien to secure payment for labor and services related to mineral activities. Mineral contractor is one who furnishes or hauls materials under express or implied contract with mineral property owner or representative of property owner. Mineral subcontractor is one who furnishes or hauls materials or performs labor under contract with mineral contractor. Subcontractor must give notice to mineral owner when filing lien, and contractor must have contractual relationship with owner. Record was unclear whether creditor had direct contractual relationship with owner in which case creditor would be contractor entitled to lien; or with contractor in which case claimant would be subcontractor who failed to provide notice to owner and therefore forfeited any lien rights.

8.54 Secured – Statutory Liens

- (2277) *In re Posey*, 2016 WL 279809 (Bankr. W.D. Ky. 2016) – Statute that allowed State to acquire lien for overpaid unemployment compensation by filing lien in county public records created valid and enforceable lien in later bankruptcy case. Section 506 defines security interest as one that is consensual, statutory or judicial lien. Secured claim arises when there is a debt that is backed up by a security interest. There is no requirement that security interest or lien be consensual and can arise by operation of law.

8.55 Secured – Patient Lists

- (2278) *Bank of America, NA v. Killgrove*, 2013 WL 7018546 (Bankr. E.D. Mi. 2013), *aff'd*, 2014 WL 4187988 (E.D. Mi. 2014) – Physician can validly pledge patient lists as collateral and lender can obtain perfected security interest in those patient lists. While creditor may not legally enter the borrower's premises and repossess confidential patient information, creditor would have right to approach patient about voluntarily entering into patient relationship with other provider.
- 8.56 Secured – Valuation
- (2279) *In re Shank*, Case No. 11-10480 (Bankr. S.D. Tx. 2017) - Plan that proposes to satisfy mortgage by paying specific principal amount plus interest does not require filing of adversary proceeding. Adversary proceeding is required to challenge the validity, priority or extent of lien. Chapter 13 Plan did not contest the validity of mortgage or contest that mortgage was valid lien on collateral and, in fact, specifically provided for payment of mortgage to full extent of amount allegedly owed. Code allows valuation of collateral to be determined in contested matter such as through confirmation process. Creditor who did not object to confirmation of Plan and did not file proof of claim asserting any amount due inconsistent with amounts set forth in Plan agreed to treatment of mortgage as specified in Plan. Upon completion of Plan, Debtor entitled to entry of order deeming mortgage satisfied.
- (2280) *In re Coslow*, 2017 WL 3225450 (Bankr. W.D. Ky. 2017) – To determine whether property has value for purposes of abandonment, value is determined as of petition date. Fact that property appreciated in value post-petition or that amount owed on junior mortgage was reduced post-petition does not create value for purposes of abandonment. Equity accrued through date of petition is available for estate. Equity that accrue post-petition as compensation for post-petition services belongs to Debtor, as Chapter 7 estate includes only Debtor's rights as they existed on petition date.
- (2281) *National Bank v. Sunnyslope Housing Ltd.*, Case No. 12-17241 (9th Cir. 2017) – Valuation of collateral is determined in light of purpose of valuation and proposed disposition or use of property. Replacement value was appropriate standard even though foreclosure value exceeded replacement value where Chapter 11 Plan proposed for Debtor to retain the property used as low income housing. Although highest and best use of property would be for housing absent low income restrictions, absent foreclosure the property cannot be used other than for affordable housing. Accordingly, valuation of property as low income housing was appropriate standard.
- (2282) *In re Neace*, 2017 WL 75747 (Bankr. E.D. Ky. 2017) - Valuation of manufactured home must be determined in light of purpose of evaluation which is to determine secure portion of lien to be paid over life of Debtor's plan. "Replacement value" is standard used, defined as price a retail merchant would charge for property of that kind concerning age and condition of property at time of valuation. Costs to set up and deliver a new manufactured home are not included in the "replacement value" of manufactured home, particularly where Debtor intends to retain manufactured home and, therefore, would not include either set up or delivery charge. Neither costs of removal nor costs of setup and delivery are considered in determining replacement value and cannot be used to increase the value of property.
- (2283) *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*.
- (2284) *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.
- (2285) *In re Brown*, 2016 WL 3414816 (Bankr. N.D. Ohio 2016) – Replacement value of personal property held by consumer Debtors for personal, family, or household purposes is calculated as of the petition date. Motor vehicle valuation starts with Kelly Blue Book or NADA guide retail values for a like vehicle adjusted by other considerations such as condition of vehicle, vehicle age and mileage; but value is not adjusted for costs of sale or marketing. Published "Private Party" or "Trade In" values are not applicable as Congress specified that value must reflect "retail" value. Any value adjustment must be supported by evidence. Debtor's testimony that vehicle had 87,000 miles and needed unspecified deferred maintenance and cosmetic repairs was not sufficient to warrant adjustment from Book value absent evidence of specific deferred maintenance and specific cosmetic issues and estimated costs of repairs. Kelly Blue Book contained range of market values for car and specified \$3,536.00 as the "fair purchase price". There was no evidence as to whether car fell in high or low end of range of values and KBB defines "fair purchase price" as "the price people are typically paying a dealer for a used car with typical mileage in good condition or better. This price is based on actual used car transactions and adjusted regularly as market conditions change." Absent any additional evidence regarding the condition of Debtor's vehicle, this definition fits precisely with the standard that has been established by Congress in Section 506(b)(2).
- (2286) *In re Shefa, LLC*, (Bankr. E.D. Mi. 2015), *aff'd*, 2015 WL 4477911 (E.D. Mi. 2015) – Section 502 requires court to disallow claim for unpaid taxes to extent claim exceeds value of property. Taxes totaling \$1.9 million exceeded appraised value of property of \$690,000.00. Where property is encumbered by both property taxes and liens for unpaid water and sewerage charges, state law provides that taxes constitute superior lien. Where there are no liens superior to property taxes, taxes constitute enforceable lien to full extent of \$690,000 value of property. To extent value of property does not support tax debts, balance of tax claim is disallowed entirely. However, water and sewerage charges survive as general unsecured debts. Although there is no equity to support secured status, Section 502 does not extinguish unsecured claim for those charges.
- (2287) *In re Brown*, 2014 WL 1245266 (11th Cir. 2014) – When collateral is surrendered in Chapter 13 Plan, debt is extinguished to extent of value of collateral. Value of Collateral is determined by replacement value of collateral. Prior decision in *Rash* using foreclosure value

abrogated by BAPCPA provision of Section 1325(a)(5). Where replacement value of vehicle exceeded debt, debt was deemed satisfied in full upon surrender of collateral.

- (2288) *In re Gutierrez*, 2013 WL 6198220 (Bankr. C.D. Ca. 2013) – Value of collateral for purposes of determining extent of security interest is determined as of petition date.
- (2289) *Central State Bank v. Volas*, Case No. 12-75 (W.D. Mi. 2012) – Bankruptcy Court ruling was not clearly erroneous in classifying property as residential rather than commercial. Property was zoned residential and was actually used by Debtor as his principal residence. Fact that property had greenhouse on it was not inconsistent with residential use as zoning allowed greenhouse only as “incidental” to property’s residential use. Although property constituted “family farm” for purposes of Chapter 12, classification was based on income and expenses and not on actual use of property. Court’s conclusion of value not erroneous where court provided multiple reasons for the value, even though value ultimately derived solely from comparables that were all bank-owned properties.
- (2290) *In re Creekside Senior Apartments, LP*, 477 B.R. 40 (6th Cir. BAP 2012) – Section 506(a) requires valuation of the collateral for purposes of determining extent of secured claim. In valuing property, court must first determine the extent of the creditor’s interest in Debtor’s interest in the collateral; and must then determine how to value the collateral. Where the Debtor proposes to retain and use the collateral, valuation is based on amount which willing buyer in Debtor’s trade or business would pay to acquire like property from a willing seller. Collateral 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. Bankruptcy Court properly valued property, by reviewing appraisals submitted by each party, reviewing evidence and testimony, and concluding that the creditor’s appraiser more accurately reflected market conditions. Bankruptcy court engaged in thorough review of qualifications of appraiser for Debtor and appraiser for creditor and made detailed analysis of why Court gave more weight to creditor’s appraisal. Debtor failed to demonstrate clear error or abuse of discretion in Court’s determination of value of collateral.

8.57 Secured – Non-Recourse Debt

- (2291) *In re Perry*, 2016 WL 5210879 (Bankr. S.D. Ohio 2016) – Bank’s lien is enforceable against interest of party who signed mortgage but did not sign note. Promissory note signed solely by husband but mortgage signed by Wife included specific grant of security interest in entire property not limited to Husband’s one-half interest. Although only Husband was identified as “Borrower” in Mortgage, Documents taken as whole indicated that Wife encumbered her interest as well. Fact that Wife did not sign note has no impact on validity of mortgage, but only indicates that Wife never personally promised to pay and is not personally obligated to do so.

8.58 Secured – Maritime Liens

- (2292) *Clearlake Shipping Pte, Ltd. v. O.W. Bunker*, Case No. 14-9287 (S.D.N.Y. 2017) - Party asserting maritime lien must prove (1) goods provided were “necessaries”; (2) goods were provided to the ship; and (3) goods were delivered upon the order of the owner or someone authorized by owner. Company that delivered fuel two ships not entitled to maritime lien. Although fuel constitutes “necessary” and fuel was provided to vessels, suppliers provided fuel under contract with fuel distributor. Although fuel distributor provided fuel to ships at request of ships owner, subcontractors and suppliers who did not deal directly with ship-owner are not entitled to maritime lien.

8.59 Claims Against Individual Debtor in Joint Case

- (2293) *In re Newman*, 2017 WL 2589318 (Bankr. E.D. Tn. 2017) – Creditor of only one joint Debtor is entitled to payment only from assets of that joint Debtor and has no claim against assets of other joint Debtor. Joint filing does not substantively consolidate cases or make assets of one Debtor liable to creditors of other Debtor. Estates will not be substantively consolidated where creditors of one estate will benefit at expense of other estate and when affairs and assets are not so intertwined as to prevent efficient administration of estates.

8.60 Corporate versus Personal Obligations

- (2294) *In re Gilroy*, Case No. 17-20100 (Bankr. E.D. Mi. 2017) – Individual debtor is not liable for corporate obligation unless Debtor personally guaranteed loan obligation or grounds exist to pierce corporate veil. Promissory note indicated that Corporation was borrower and Note was signed by Debtor incorporate capacity. Promissory note did not indicate that Debtor was personally obligated and Debtor did not sign separate guarantee agreement. Michigan Compiled Laws Section 566.132 provides that agreement to answer for debt of third party must be in writing. Debtor’s alleged verbal agreement to repay loan if corporation failed to do so unenforceable as violating Statute of Frauds.

8.61 Disguised Security Agreements and Leases

- (2295) *Partap Investments, LLC v. Kittusamy*, Case No. 16-1242 (9th Cir. BAP 2017) - Party to “Lease” that is actually disguised as security interest not entitled to administrative claim for post-petition, pre-rejection “rent”. Prepetition “lease” was disguised security agreement convey title to property to Debtor. Accordingly, “lessor” is not entitled to administrative claim under Section 503(b)(1)(A) for unpaid post-petition lease payments. Secured lender is entitled to administrative claim only to the extent that secured lender can prove that asset diminished in value as a result of bankruptcy filing. Creditors are not entitled to administrative claim where creditor did not present evidence to establish diminution in value as alleged diminution was based on purchase price of assets in first instance less value at time secured creditor recovered possession, neither of which accurately measures actual diminution as a result of bankruptcy case. Creditor did not present evidence of actual value of property at commencement of case or actual value of property at time creditor re-obtained possession.

- (2296) *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.
- (2297) *In re Hyland*, 2013 WL 5979746 (Bankr. E.D. Tn. 2013) – Document which purports to be lease can constitute disguised security agreement rather than true lease, leaving creditor with rights and duties as secured creditor. A transaction creates a "security interest" if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and (a) the original term of the lease is equal to or greater than the remaining economic life of the goods, (b) 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, (c) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or (d) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement. Vehicle lease was true lease, such that lease had terminated prior to commencement of case and Debtor had no interest in vehicle and, therefore, lessor's refusal to return vehicle after filing of case did not violate stay. Lease defined relationship as lease; lessee was required to return vehicle at end of lease and did not have option of retaining vehicle or extending lease; upon breach, lessor was entitled to repossess and cancel the lease; and prohibited lessee from transferring, selling or conveying any interest in the vehicle.
- 8.62 Pre-Petition Versus Post-Petition Actions – When Claim Arises
- (2298) *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.
- (2299) *Sikirica v. Harber*, Case No. 14-20155 (W.D. Pa. 2016) – In *Segal*, Supreme Court in 1966 held that whether an asset is property of estate depends on whether asset is "sufficiently rooted in pre-petition past", such that tax loss carryforward, which could not immediately be used, was nonetheless property of estate because loss related entirely to transactions that occurred prior to commencement of case. In 1979, Court decided *Butner* that held that property interests are determined by state law. Under state law, claim for injuries resulting from defective product does not arise until plaintiff has right to institute suit, which is date on which plaintiff knows or should have discovered injury. Plaintiff had medical device implanted prior to commencement of case. Plaintiff had been notified pre-petition that device could be defective and cause injury. Plaintiff disclosed potential cause of action in schedules and valued cause at \$0.00. After Debtor received discharge, Debtor developed blood infection from failure of device and settled with manufacturer. Trustee claimed proceeds as property of estate. Court, recognizing difficulties presented by *Butner* decision concluded that although the device was manufactured, was defective and was implanted in Debtor prior to commencement of case, giving claim a root in the pre-bankruptcy past, claim was not "sufficiently rooted" as Debtor did not have state law cognizable claim until harm occurred which was indisputably post-petition. In light of lack of damages and absence of any manifestation of injury as of petition date, claim was not "pre-petition" and so was not property of estate.
- (2300) *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.
- (2301) *In re City of Detroit, Michigan*, 2016 WL 1588136, 548 BR 748 (Bankr. E.D. Mi. 2016) – Bankruptcy Code defines "claim" as right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured and is the broadest available definition of claim, sweeping in legal obligations of the Debtor, no matter how remote or contingent. Contingent debt is one where the Debtor's obligation arises upon the occurrence or happening of an extrinsic event such that right to payment need not be currently enforceable. Debt is noncontingent if all events giving rise to liability occurred prior to the filing of the bankruptcy petition. Claim is matured if it is unconditionally due and owing, while an unmatured claim is one which is not yet due and owing. However, determination must be consistent with creditor rights to due process. Courts have adopted three tests for determining if claim is pre- or post-petition. The "right to payment" test (now widely rejected) provides that a claim arises for bankruptcy purposes only after each element of the claim has been established. The "Debtor's conduct" test provides that a claim arises when the conduct by the Debtor occurs, even if the actual injury is not suffered until much later but this can be unfair to creditors where the creditor had no significant pre-petition relationship with the Debtor. Most widely adopted test, the "fair contemplation," "foreseeability," "pre-petition relationship," or "narrow conduct" test, looks at whether there was a pre-petition relationship between the Debtor and the creditor, such that a possible claim is within the fair contemplation of the creditor at the time the petition is filed. Claims against City for

damages under No-Fault Insurance Act arising out of pre-petition auto accident were within fair contemplation, although claimant waited until after the petition was filed to seek medical attention or treatment and actual right of medical provider to reimbursement did not arise until post-petition - provider was in position to know that City, as no fault insurer, was in bankruptcy before providing treatment. Claim for unlawful discrimination and wrongful dismissal also pre-petition where all of the alleged wrongful conduct occurred prior to commencement of case and claimant had actually been terminated by City pre-petition, although arbitrator decision was not handed down until post-petition. Claim may have been contingent on arbitrator decision but was nonetheless within fair contemplation of parties when petition filed. However, second wrongful termination claim was post-petition where City did not take action to terminate claimant's employment until after filing for bankruptcy protection. As of petition date, city apparently had not made decision on whether to discipline employee for alleged violation of work rules or whether City would ever take action based on alleged violations. While actual termination is not necessary for party to have claim, mere possibility that claimant might suffer some undetermined adverse action is not sufficient.

- (2302) *Hunter v. Lake Cumberland Regional hospital, LLC*, 2014 WL 1159674 (E.D. Ky. 2014) – Claim for damages against Debtor for medical malpractice was pre-petition claim as all of the conduct giving rise to the claim occurred pre-petition.

8.63 Membership Interests as Collateral

- (2303) *In re McKenzie*, 2012 WL 4742708 (E.D. Tn. 2012) – Creditor failed to prove security interest in alleged pledge of borrower's membership interest in LLC. Membership agreement did not permit Debtor to pledge interest without consent of all remaining members, and bank failed to produce evidence that all members consented. Further, state law governing LLCs prohibited assignments without consent of all parties unless the membership agreement provided to the contrary or where the restriction is "manifestly unreasonable". Given structure of LLC, restrictions were not manifestly unreasonable and were otherwise fully enforceable.

8.64 Landlord's Lien

- (2304) *Huntington National Bank v. Bruinsma*, 475 BR 602 (Bankr. W.D. Mi. 2012) – Where tenant enters into sub-lease, Landlord holds lien on rents to be paid under the sublease to the tenant in the event tenant fails to pay rent under the main lease. Rents from the subtenant to the tenant cannot be used to first pay tenant's creditors where tenant is in default under the main lease. However, there is no general common-law lien on tenant's property to secured payments under the main lease. To have lien to secure payment of rent, lease must contain express grant of lien and lien must be properly perfected.

8.65 Liquidated Damages

- (2305) *Empire Petroleum Partners, LLC v. Allen Petroleum Company of East Tennessee, Inc.*, 2015 WL 4545406 (E.D. Tn. 2015) – Liquidated damage provision in contract is enforceable if (1) the injury caused by the breach of contract is difficult or impossible to accurately estimate; (2) the parties intended to provide for damages rather than a penalty; and (3) the sum stipulated is a reasonable pre-estimate of the probable loss. Burden is on defaulting part to prove that liquidated damage clause is unenforceable penalty.

8.66 Unsecured Claims – Solvent Estate

- (2306) *In re Robinson*, Case No. 15-51556 (Bankr. N.D. Ga. 2017) – "Solvent Estate" in Chapter 7 proceeding requires payment of all claims in full including interest "at the legal rate". Applicable interest rate is the Federal Judgment Rate under 28 USC Section 1961, not rate which would otherwise have been applicable such as contract rate or state law judgment rate. Section 726(a)(5) refers to "the" legal rate, suggesting there is only one applicable interest rate, the Federal judgment rate, rather than myriad rates which would apply using either contract or state law interest rates.
- (2307) *Colfin Bulls Funding A, LLC v. Paloian*, Case NO. 15-6074 (N.D. Il. 2016) – Unsecured creditor in solvent Chapter 11 estate entitled to interest at contract rate rather than lower, Federal Judgment rate. Court expressly disagreed with 9th Circuit holding that interest is limited to Federal Judgment rate.

8.67 Default Interest Rate

- (2308) *In re Perkins*, 2017 WL 439319 (Bankr. W.D. Ky. 2017) - Section 506(b) allows fully secured creditor to recover interest on the claim plus any reasonable fees, costs or charges provided for under the agreement or state statute. Over-secured Creditor is entitled to default rate of interest to compensate creditor for loss resulting from nonpayment as long as default interest rate is intended to compensate lender for administrative expenses and inconvenience. Award of fees, costs or charges is dictated by terms of loan agreement. However, whether Creditors entitled to default rate of interest depends on facts and equities of each particular case, with presumption that contractual rate of interest is appropriate subject to being rebutted by evidence that default rate is significantly higher than pre-default rate without any justification; and whether secured creditor runs realistic risk of nonpayment, whether Plan proposes relatively quick orderly liquidation, and whether contract rate of interest was prevailing market rate at time of default. Debtor rebutted presumption in favor of default rate of interest of additional 5% where default rate would double contractual interest rate on note; pre-default rate of 5% was prevailing market rate at time of default; and creditor did not present any evidence to establish that additional 5% rate was either justified or in line with prevailing market rates. Creditor did not present any evidence as to why doubling of interest rate would be anything other than windfall to creditor, creditor had already received substantial payments from liquidation of collateral; and creditor's risk of nonpayment was low given its substantial over-secured status. Application of default rate would materially decrease payments, if not completely eviscerate payments, to unsecured creditors. Court would not apply default rate of interest and would limit recovery to over=secured creditor to contractual pre-default rate.
- (2309) *Bowles Sub Parcel C v. Wells Fargo Bank, NA*, Case No. 14-2894 (D. Mn. 2015) – Default interest rate enforceable where commercial loan agreement provided for initial rate of 5% with default rate of 10%. Default rate is presumptively allowable absent evidence that rate either violates state law or that equitable considerations preclude enforcement of clause. Equitable reasons look to difference between

default and non-default rate, reasonableness of difference between rates, whether enforcement of higher rate does injustice to concept of equitable distribution, and purpose of higher rate. 5% increase in rate was not facially unreasonable and parties were knowledgeable and specifically agreed to default interest rate provision.

- (2310) *Prudential Insurance Company v. SW Boston Hotel Venture, LLC*, Case no. 11-079 (1st Cir BAP 2012) – Bankruptcy code presumes that creditor is entitled to interest at contractual default rate, provided that there are no equitable considerations that would compel different result. In considering whether equitable basis exists to deny default rate, court will focus on whether the creditor is guilty of misconduct; the imposition of default rate would harm unsecured creditors; default rate would impair fresh start; or default rate constitutes a penalty. Loan documents provided for additional 5% on contractual non-default rate in event of default. Plan proposed to pay all creditors in full, such that use of default rate would not harm other creditors, and there was no evidence of creditor misconduct. Rate was not penalty as rate was consistent with rates generally used by lender and used by other lenders. Rate would not impair Debtor’s ability to reorganize or impair fresh start. Default rate of 5% higher than non-default rate was not a penalty and was not inequitable.
- (2311) *In re Gift*, 469 BR 800 (Bankr. M.D. Tn. 2012) – Property tax claim, as oversecured claim, is entitled to post-petition interest at the statutory rate. However, creditor is not entitled to secured status on penalty interest rate. Interest rate in Chapter 13 had only to ensure that stream of payments to taxing authority had present value which was at least equal to amount of the claim plus 12% state statutory interest. Where Debtor had solvent estate, plan must also provide for payment of additional penalty interest rate as unsecured claim.

8.68 Late Fees and Charges

- (2312) *Federal National Mortgage Corp. v. Royal Manor Apartments LLC*, 2014 WL 3735336 (E.D. Mi. 2014), *aff’d in part and rev’d in part*, 2015 WL 3505238 (6th Cir. 2015) – Lender allowed to recover late fees to extent that fees are reasonably calculated to compensate lender for expenses incurred as a result of missed installment payments. Lender also entitled to late payment fee on entire amount of balloon payment when payment not made by date required. Interest for purposes of redemption is calculated from date of sale at the rate specified in the mortgage. While mortgage did not state interest rate, it did incorporate note which provided for interest at 5.74%. However, lender not entitled to higher default rate of interest post-foreclosure and default rate applies only to payments past due, and upon foreclosure borrower no longer has obligation to make payments under note and mortgage and, therefore, those payments cannot be in “default”.

8.69 Injunctions

- (2313) *Murawski v. Campbell*, Case No. 08-3178 (Bankr. E.D. Mi. 2010) – State Court mandatory injunction required Debtor to remove obstructions from Plaintiff’s property and to alter storm water runoff to avoid damage to and flooding of Plaintiff’s property. Court unable to determine on Motion for Summary Judgment whether requirements of injunction constitute “claim” for purposes of discharge.

8.70 Income Taxes

- (2314) *In re Villarreal*, 564 BR 264 (Bankr. N.D. Ohio 2016) – Although United States unrecorded statutory assessment lien was not valid against Chapter 7 Trustee due to Trustee’s status as hypothetical bona fide purchaser, strong-arm powers did not reach to Debtor’s exemption and United States right to collect against exempt property permitted statutory lien to attach to proceeds of any future sale of property by Trustee to the extent of Debtor’s claimed exemptions where underlying tax obligations were themselves nondischargeable. 26 USC Section 6334(e)(1) prevents levy on principal residence where government is attempting to seize the residence. However, Section 6334 does not prohibit a sale or attachment by a bankruptcy Trustee or the attachment of the lien to the proceeds of that sale. United States did not waive secured status by filing unsecured proof of claim as unrecorded statutory assessment lien under Section 6321 did not provide United States secured status against Trustee’s rights to property, but that status does not prevent United States from enforcing assessment lien against Debtor’s share of proceeds of sale.
- (2315) *In re Thompson*, 2013 WL 6633022 (Bankr. W.D. Wis. 2013) – Section 507(a)(8) lookback for state priority tax claims is tolled during pendency of prior bankruptcy case. Although returns were filed in 2007, the three year lookback tolled during Debtor’s prior case and recommenced upon dismissal of that case. Debtor’s current case was filed (excluding the lookback period) only 2 years and 21 days after filing of returns, such that 2007 taxes remained priority claim in current case.
- (2316) *In re Pavone*, Case No. 11-70927 (Bankr. E.D. Mi. 2012) – Debtor cannot treat post-petition tax liability in Chapter 13 plan over objection of taxing authority. Case filed late in 2011 could not treat 2011 tax liability in plan over objection of State even if plan not confirmed until early 2012. “Straddle” tax claims are limited to those where the tax year ended prior to commencement of the case but where the return has not yet been filed.
- (2317) *In re Hight*, 426 BR 258 (Bankr. W.D. Mi.) *aff’d* 434 BR 505 (W.D. Mi. 2010), *Michigan Department of Treasury v. Hight*, 670 F.3d 699 (6th Cir. 2012) - Debtor has standing to file proof of claim on behalf of governmental unit for “straddle” tax claims. Under section 502, a tax on earnings for a taxable year ending on or before the date of the filing of the petition is a priority claim. Debtor filed for bankruptcy protection in January, 2009, prior to filing Debtors 2008 State Tax Return. Debtor then filed a Proof of Claim on behalf of the State for the 2008 tax year. Section 1305 does not exclusively govern filing of post-petition claims where section 501, section 502 and section 507 established that Debtor could treat the post-petition claim for a tax debt arising from the immediately preceding tax year as if it were a prepetition claim.
- (2318) *In re Haven Manor, Inc.*, 2012 WL 1301228 (Bankr. D. Ne. 2012) – “Straddle” tax claims for unemployment taxes accruing during fourth quarter of year were entitled to priority status where business shut down and filed bankruptcy during the quarter. Although the returns were not due until after the petition date, Section 507(a)(8)(D) affords priority status to employment taxes earned from the Debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition. Section is not limited to taxes for which returns are

required only pre-petition. The plain meaning of the phrase “after three years before the date of filing the petition” includes all dates that occur after the date set three years before the filing of the bankruptcy petition, including those that occur after the date of the petition. The language does not limit the period exclusively to the three-year period between the lookback date and the date the petition was filed.

- (2319) *Hayes v. Internal Revenue Service*, Case No. 10-6573 (Bankr. E.D. Mi. 2011) – 26 USC 6672 provides that person who willfully fails to account for and pay withholding taxes is liable for the full amount not paid. Taxpayer bears burden of proving that he is not a responsible person or that he did not act willfully in failing to pay. Responsible person is one who exercises influence and control over financial affairs of corporation, focusing on duties of person as outlined by corporate by-laws; ability of person to sign checks; identity of officers, directors and shareholders; identity of individuals who hire and fire employees; and identity of individuals in control of financial affairs. Willfulness is established if the person makes a knowing and voluntary choice to pay creditors other than the IRS or engages in course of conduct with reckless disregard for whether taxes are paid. Knowledge of payments to other creditors including employees with knowledge of unpaid withholding taxes is willfulness as matter of law. Debtor was responsible party for business owed by Debtor and his brother where testimony indicated that Debtor and brother made financial decisions jointly. However, once Debtor was called to active military duty and deployed, he no longer was responsible party. Although Debtor continued to be shareholder and officer and maintained signatory party on business bank account, evidence was uncontroverted that Debtor no longer had any contact with business and that Debtor’s brother made all future financial decisions individually.
- (2320) *In re Krause*, 2011 WL 3879480 (Bankr. E.D. Tn. 2011) – IRS’s proof of claim that alleged only that Debtor did not file tax returns but alleged no facts about the Debtor’s income did not contain sufficient facts to support claim. Debtor acknowledged receipt of income for tax years in question but contended that Debtor was not required to file returns as amount of income was insufficient to trigger requirement. IRS requirements state that person is not required to file a return if the gross income is less than the exemption amount plus basic standard deduction. IRS publication for years in question stated that a person is not required to file a return if the person is “single”, under age 65, and had gross income of less than \$8,200. Debtor’s un rebutted testimony that Debtor earned only \$7500 per year for two years in question sufficient to rebut IRS claim. Claim disallowed.
- (2321) *U.S. v. Krause*, 2011 WL 1206178 (10th Cir. 2011) – Federal Tax Lien attached to property Debtor fraudulently transferred prior to recording of lien. Tax lien attaches to the taxpayer’s interest in property or rights to property. Under state law, transferor of property fraudulently transferred retains equitable title which is subject to attachment by creditors.
- (2322) *In re Sencyszyn*, 2011 WL 500060 (E.D. Mi. 2010) – So called “straddle tax claim” for 2009 taxes constitute pre-petition claim in Chapter 13 filed in March, 2010. Although Tax Return is not due until April 15, the taxes “become payable” as of the end of the relevant tax year. Debtor can provide for treatment of this priority claim in the plan.
- (2323) *In re Turner*, 420 BR 711 (Bankr. E.D. Mi. 2009) – Debtor has standing to file claim on behalf of governmental agency for pre-petition taxes if the taxing authority fails to do so. However, only governmental agency can file claim for post-petition taxes pursuant to Section 1305. Debtor filed for Chapter 13 on January 13, 2009. Tax liability for 2009 would be post-petition tax claim under Section 1305. Section 1305 provides that only the governmental agency can file a claim for taxes that “become payable” while the case is pending. Taxes do not “become payable” until April 15 of the year following the tax year. “Payable” requires that the obligation be justly due and legally enforceable. Even though the tax liability may become fixed and determinable as of January 1, the taxpayer is not actually required to pay until April 15. Section 101(5)(A) definition of “claim” does not control because Section 101(5)(A) does not require the obligation to be “payable” while Section 1305 expressly includes that requirement. Tax claim would be post-petition for which Debtor is not permitted to file a claim and the governmental agency has the option of filing the claim and participating in the estate or pursuing its collection rights outside the scope of the bankruptcy case.
- (2324) *In re Wilson*, Case No. 10-45791 (Bankr. E.D. Mi. 2010), *aff’d* 2012 WL 441177 (E.D. Mi. 2012) - The State’s “right to payment” did not arise until April 15 and, therefore, the “claim” did not arise until April 15, well after the commencement of the cases. Section 507(a)(8) gives priority status to any claim that is measured by income for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due after three years before the date of the filing of the Petition. “Straddle” tax liabilities are “measured by income” for a tax year ending prior to the commencement of the Case - the Debtor’s income in 2009 certainly predates the filing of the case in 2010. The last date on which the Debtor could timely file a return would have been April 15, 2010, a date that is after a date that was three years prior to the commencement of the. Thus, the Debtor’s tax obligation for the year 2009 constituted a “priority” tax claim under Section 507. Section 502 provides that any claim that arises after commencement of the case for tax that is otherwise entitled to priority is determined and allowed as if the claim had arisen before the date of the Petition. Section 1322 requires that the Debtor’s Plan provide for full payment of all allowed priority claims over the life of the Plan.

8.71 Tax Claims – Interest Rate

- (2325) *State of Tennessee v. Hildebrand*, 2017 WL 710473 (6th Cir. 2017) – Interest rate for unpaid property taxes is determined by “applicable non-bankruptcy law” pursuant to Section 511. “Applicable non-bankruptcy law” is any statute that is not aimed solely at bankruptcy proceedings. “Bankruptcy law” includes both Federal provisions in Code itself and any state law that is targeted to bankruptcy proceedings and does not constitute “applicable non-bankruptcy law”. State law provided for interest rate of 12% plus 6% penalty rate provided for interest at 12%. Statute that purported to “convert” penalty into interest solely in bankruptcy cases qualified as “bankruptcy law” as it applied only in bankruptcy cases, and so was not “applicable state law and did not apply under Section 511. Plan needed to provide for interest at rate of 12% as that was rate specified by non-bankruptcy law.
- (2326) *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.

- (2327) *In re Bratt*, 2016 WL 1645147 (6th Cir. BAP 2016) – Section 511 sets interest rate on tax claims at rate set by applicable non-bankruptcy law. State statute that purported to set higher interest rate in bankruptcy cases exclusively was “bankruptcy law” enacted by State. Accordingly, higher rate did not apply as higher rate was not calculated based on “applicable non-bankruptcy law”. Statute statutory rate applicable to tax claims generally applied.

8.72 Corporate Tax Liabilities

- (2328) *Karban v. U.S.*, 2016 WL 1696668 (E.D. Mi. 2016) – Corporate officer is liable for corporate trust fund taxes where party is responsible for payment but willfully fails to remit the taxes. Willfulness does not require bad purpose or evil motive, but only that responsible party caused corporation to pay other creditors rather than taxing authority. Taxpayer’s argument that corporation’s funds were locked up in lockbox arrangement with major creditor and entity could not use funds for purposes other than those directed by lender did not mean that failure to pay taxes was not willful. Voluntary arrangements such as lockboxes do not encumber funds so as to prevent payment of taxes. While writing check to pay taxes would have caused corporation to default on loan obligations that likely would have led to lender calling loan and putting corporation out of business, meeting trust fund obligations trumps any adverse consequence that may result. Even if lender exercises total and complete control over funds, failure to pay is still willful because corporation voluntarily gave u control of funds by entering into contractual relationship. Although officer wanted to pay taxes and felt hampered by lockbox arrangement, that did not constitute legally sufficient basis to avoid willfulness for liability.
- (2329) *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).
- (2330) *U.S. v. Quality Stores, Inc.*, 2014 WL 1168968 (U.S. 2014) – Payment of severance constitutes “wages” for which employer must pay FICA contributions. Payments represented “remuneration for employment” within scope of Federal Insurance Contributions Act (FICA).
- (2331) *In re Community Memorial Hospital*, 2013 WL 2297042 (Bankr. E.D. Mi. 2013) – State’s claim for unpaid Unemployment taxes is not priority claim under Section 507(a)(8).
- (2332) *California v. Hansen*, Case No. 11-1320 (9th Cir. BAP 2012) – Unemployment Insurance tax levied on corporation and on principal as “responsible party” is not a tax that Debtor is required to collect from third parties and to remit to state. Tax is not of a type specified in Section 507(a)(8)(C).
- (2333) *Quiroz v. State of Michigan*, 450 B.R. 699 (Bankr. E.D. Mi. 2011), *aff’d* 472 B.R. 434 (E.D. Mi. 2012) – Michigan’s Single Business Tax is an excise tax on a “per transaction” basis and is entitled to priority status under Section 507(a)(8)(E). Michigan law allows assessment of corporate taxes against corporate officers who have control or supervision of, or are responsible for paying, corporation’s taxes. Debtor, as principal of corporation, was personally responsible for payment of Corporate Single Business Tax.
- (2334) *Noronha v. IRS*, 352 Fed. Appx. 18 (6th Cir. 2010). Chapter 13 Debtor was a person responsible for paying corporation’s withholding taxes - she was 50% owner of the company (her husband owned the other 50%), and she was secretary-treasurer.

8.73 Pre-Petition Attorney Fees

- (2335) *Smith v. Morse*, 2016 WL 3092630 (Bankr. E.D. Tn. 2016) – Creditor entitled to recover pre- and post-petition attorney fees incurred in action to except debt from discharge where promissory note that was basis of action provided for award of attorney fees if lender had to place not in hands of attorney for collection by suit or otherwise or to protect security for payment.
- (2336) *Budzynski v. Stephens*, Case No. 10-4230 (Bankr. E.D. Mi.), *aff’d* 2010 WL 4286186 (E.D. Mi. 2010) – Attorney may assert charging lien as either a general or retaining lien, which requires possession by the attorney of the money, documents or other property of the clients until the debt is paid; or a charging lien which arises of the recovery in particular litigation and attaches to the property or settlement obtained as a result of attorney services. Charging liens cannot attach to real property even where the litigation establishes title or recovers title to or possession of the property for the client absent an express agreement between the parties providing for such a lien. Attorney not entitled to charging lien for services rendered in unsuccessful Chapter 11 against rental stream produced by Debtor’s rental property where Debtors owned the rental property prior to the commencement of litigation. The rental property and the stream of income received from that property were not the “proceeds or property” derived by the litigation. The property and the rental stream were, at best, tangentially involved only to the extent they were included as assets in the Chapter 11.
- (2337) *In re Solis*, 2010 WL 2696518 (7th Cir. 2010) – Chapter 7 Trustee has standing to object to claim by Debtor’s pre-petition State Court counsel for unpaid attorney fees based on contingency fee agreement. Attorney entitled to contingency calculated on amount recovered as a result of acts of attorney. Attorney is not entitled to contingency fee based on partial recovery achieved by Debtor before he retained attorney.

8.74 Pre-Petition Attorney Fees – Contingency Fees

- (2338) *In re Saroff*, 2014 WL 1330900 (Bankr. E.D. Tn. 2014) – Attorney who performed services for Debtor pre-petition on contingency fee basis has claim against estate even if representation terminated at commencement of bankruptcy case (because trustee became holder of claim and did not retain same attorney), matter had not been resolved and contingency not fulfilled as of petition date, and attorney played no role in post-petition litigation or settlement. Attorneys performed considerable services and presented claims and issues of first impression that formed basis of ultimate settlement by Trustee. While client is free to terminate services of attorney at any time, attorney is entitled to recover on quantum meruit or contract price, whichever is greater. Contingency fee based on recovery would be starting point, subject to adjustment for additional expenses incurred by Trustee resulting from attorney's initial failure to cooperate with trustee.

8.75 Pre-petition Divorce Judgment

- (2339) *In re Saffron*, Case No. 10-9180 (Bankr. W.D. Mi. 2011) – Divorce judgments in Michigan do not accrue statutory interest unless Court exercises equitable jurisdiction to award interest. Party not entitled to attorney fees in divorce proceeding unless specifically awarded by Court. Proof of Claim founded on Divorce Judgment that included interest and attorney fees disallowed to extent of interest and attorney fees where documents attached to Proof of Claim failed to evidence entitlement.

8.76 Domestic Support Obligations

- (2340) *Reed v. Blount*, 2017 WL 3597425 (6th Cir. 2017) – Bankruptcy Court correctly rejected Debtor's objection to proof of claim that reflected amount of obligation in Final Judgment of Divorce. Objections based on alleged void nature of judgment and errors of the State Court are res judicata as the issues were or could have been raised in the State court action, prior action was decided on merits, and both actions involved same parties.
- (2341) *In re Bates*, Case No. 15-52459 (Bankr. W.D. Tx. 2017) – Section 502(b)(5) disallows claim for domestic support obligation that was not matured a date of bankruptcy filing. State could not assert priority claim for domestic support obligation where, as a petition date, Debtor was current in ongoing domestic support obligation payments. Fact that state Court, 3 months after bankruptcy petition was filed, entered order requiring Debtor to pay \$165,000 for all "current and future child-support" did not convert claim into prepetition priority claim. Filed claim did not attempt to bifurcate between amount of child support due as of date of filing a bankruptcy petition and any post-petition child-support that may arise in future. State did not provide any documentation to prove that there was any prepetition breach of obligation warranting acceleration of child support obligation, preventing state from attempting to retroactively make lump-sum a prepetition debt.
- (2342) *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.
- (2343) *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.
- (2344) *In re Edinger*, 2014 WL 5293561 (Bankr. E.D. N.C. 2014) – Attorney fees awarded to Debtor's ex-husband in post-divorce custody issue were non-dischargeable domestic support obligation even though award was payable to attorney and not to ex-husband. State Court award indicated that it was intended as support, where the underlying order required Debtor to pay ex-husband child support and post-divorce action was to enforce that obligation; order awarded attorney fees that ex-husband would not have incurred but for the bad acts of Debtor and ex-husband otherwise lacked ability to pay for attorney; State Court also entered upward adjustment of support based on egregious and reprehensible conduct of Debtor that was proximate cause of ex-husband's financial hardship and inability to meet needs of children. State Court clearly intended that payment of attorney fees be financial support to ex-husband for benefit of children, and ex-husband took actions to protect children and to obtain child support. Identity of payee does not determine whether obligation is domestic support obligation as award itself was in nature of support to ex-husband even if paid to third party on ex-husband's behalf.
- (2345) *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 holding a valid DSO for amount that Debtor owed ex-wife.

- (2346) *In re Asplund*, 2014 WL 5017833 (Bankr. E.D. Mi. 2014) – Domestic Support Obligation as defined in Section 101(14A) is one owed to or recoverable by spouse, former spouse or child of Debtor and is in the nature of alimony or support. Labels used by State Court are not controlling, but court will consider labels used by State Court, whether obligation is payable directly to spouse rather than assumption of third party liability, and whether payments are contingent on events such as death, remarriage, or eligibility for Social Security, as well as other factors deemed appropriate by court. Debtor's obligation to pay 50% of college expenses was not in nature of support. State Court judgment did not label it as support and instead listed the obligation in a separate portion of the order as a contractual obligation. Obligation did contemplate direct payments by Debtor to ex-spouse, but was not subject to any contingencies and was unaffected by any other resources for child's education such as financial assistance, scholarships, spouse's income, child's income, or whether child was otherwise self-sufficient. Provision also became effective only after child turned 18 years old, and expense, while desirable, is not necessary in the same vein as food, clothing, housing or medical care; and was entirely open ended with no cap on amount. Obligation to pay for college expenses is not "support" within Section 101(14A).
- (2347) *In re Thomas*, Case No. 13-8048 (6th Cir. BAP 2014), *aff'd* 2015 WL 127831 (6th Cir. 2015) – Whether obligation is domestic support obligation or other post-marital obligation depends on intent of parties. Language or labels attached by State Court do not control. Obligation will be domestic support obligation if parties intended to create support obligation and obligation has actual effect of providing support. If amount is excessive so as to be unreasonable, court can determine amount to which obligation is unreasonable and determine that the excessive amount is dischargeable. Debtor's obligation to pay half of second mortgage and to pay judgment lien that was Debtor's sole debt were domestic support obligations. Earlier divorce decree provided that ex-spouse would be solely responsible for mortgage and that Debtor would pay higher child support. Later decree provided that Debtor would be responsible for half of the mortgage but decreased child support. Reduction in child support raises implication that Debtor's obligation to pay mortgage was in place of previously ordered support, making mortgage itself part of the support. Decree also provide that upon sale of property, ex-spouse would be able to retain all surplus, indicating desire by State Court to preserve home for support of children and to also provide vehicle for ex-spouse to obtain new residence if she decided to sell, further indicating that house was intended to provide support. Ex-spouse's payment to satisfy judgment lien when property sold also created non-dischargeable obligation as ex-spouse was forced to use proceeds that were intended as support for purposes of paying lien, reducing amounts that would have been available. Fact that obligation was paid to third party did not defeat status as support where payment diminished funds that would otherwise, themselves, have been in the nature of support.
- (2348) *In re Thomas*, 2013 WL 5493214 (Bankr. E.D. Ky. 2013) – Section 507(a)(1) creates a first-priority claim for domestic support obligations. Whether debt is DSO is based on parties' intent interpreted under federal law and depends on whether obligation is in the nature of alimony, maintenance or support. Obligation constitutes support only if the State Court or parties intended to create a support obligation; obligation must have actual effect of providing necessary support; obligation must not be so excessive as to be unreasonable under traditional concepts of support; and if the amount is unreasonable, the obligation is non-priority general unsecured debt to extent necessary to serve purposes of federal bankruptcy law. Fact that domestic judgment expressly disavowed any continuing support obligation does not preclude finding that payment is in the nature of support. Decree that required Debtor to pay one-half of second mortgage was in the nature of support, where payments were essential to protecting former residence which was the residence of the Debtor's children. Ex-spouse did not receive any additional support that would support finding that spouse was taking sole responsibility for payment of mortgage. Agreement contemplated that ex-spouse would retain any excess proceeds upon sale of home, but in the event of a shortfall Debtor would be responsible for one-half of the shortfall indicating that purpose of agreement was to providing continuing home for children, and without Debtor's obligation to pay mortgage there was substantial risk that children would be left without a home. Debtor's obligation to reimburse ex-spouse for judgment lien that spouse satisfied at sale of home was also DSO where it appeared that Debtor withheld information that judgment lien existed at time of divorce which effectively eroded the support spouse negotiated at time of divorce.
- (2349) *In re Micek*, 2012 WL 1854280 (Bankr. E.D. Ky. 2012) – Obligation payable to third party can nonetheless be in the nature of support. Court will focus on nature of debt rather than identity of payee. Attorney fees owed to former spouse's attorney as awarded in final judgment of divorce may be non-dischargeable.
- (2350) *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.
- (2351) *Faircloth v. Hapner*, 2011 WL 6941489 (Bankr. N.D. Tn. 2011) – To qualify as DSO, obligation must meet 4 requirements of Section 101(14A) – obligation must be (1) owed to spouse or child or Debtor or governmental unit; (2) in the nature of alimony, maintenance or support; (3) established or subject to establishment before, on or after date of order for relief, in a separation agreement, divorce decree or property settlement agreement, or established by order of court, or other determination made by governmental unit; and (4) must not have been assigned to non-governmental unit other than for purposes of collection. Divorce decree required Debtor to sell marital home and pay mortgage on which both Debtor and ex-spouse were obligated. Debtor sold house but did not pay off debt. Obligation to pay mortgage was not included in divorce judgment as alimony or support and obligation does not otherwise qualify under Section 101(14A). Obligation is with the scope of Section 523(a)(15) as obligation owed to former spouse which is dischargeable under Section 1328.
- (2352) *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.

- (2353) *In re Nelson*, 2011 WL 1549008 (Bankr. D. Or. 2011) – Domestic support obligation is a debt owed to a spouse or former spouse that is "in the nature of alimony, maintenance, or support ... without regard to whether such debt is expressly so designated". Factors to be considered include whether the recipient spouse actually needed spousal support at the time of the divorce which requires looking at whether there was an imbalance in the relative income of the parties at the time of the divorce; whether the obligation terminates on the death or remarriage of the recipient spouse; and whether payments are made directly to the spouse in installments over a substantial period of time; as well as the labels the parties used for the payments. Obligation to assume and pay the mortgage on the jointly owned home was not in the nature of support – marriage was short term; ex-spouse had started a business and was getting remarried and moving away; Debtor had very low income the year the parties divorced; ex-spouse did not need support; parties did not intend that the assumed mortgage obligation would be support; and obligation did not terminate on the death or remarriage of ex-spouse.
- (2354) *In re Fath*, Case No. 09-21637 (Bankr. E.D. Mi. 2010) – Section 507 allows priority status only for domestic support obligations, defined as obligations which is in the nature of alimony, maintenance or support. In determining whether an obligation not specifically designated as alimony, maintenance or support will nonetheless be "in the nature of support", court will consider whether the State Court or parties intended to create a support obligation; whether the obligation has the actual effect of providing necessary support; whether the obligation is excessive or unreasonable under traditional concepts of support; and if the amount is unreasonable, the extent to which the dischargeability of the obligation serves the purpose of federal bankruptcy law. State Court Orders clearly did not award alimony to either party and court never labeled amounts owed to ex-wife as alimony, support or maintenance. Amounts owed to ex-wife were not in the nature of alimony or support and were not entitled to priority status.
- (2355) *In re Westerfield*, 403 BR 545 (Bankr. E.D. Tn. 2009) – Obligation to pay home mortgage for former marital residence and to hold ex-spouse harmless constitute domestic support obligations" entitled to priority treatment. Obligation bore traditional hallmarks of support including termination on death or remarriage and ex-wife needed Debtor to pay mortgage in order to allow her to remain in home. Ex-wife needed support at the time of divorce. Later change in circumstances such that ex-wife may no longer need support does not alter status of obligation as one for support, as that determination is made at the time of the dissolution of marriage. Debtor could not avoid priority status of ex-wife's claim by allegedly surrendering his interest in the home in full satisfaction of his obligation to secured creditor.

8.77 Pre-Petition versus Post-Petition Claims

- (2356) *Cripps v. Foley*, 2017 WL 1190554 (W.D. Mi. 2017) – Fees and expenses of attorney in Chapter 13 case are not post-petition claims under Section 1305.
- (2357) *In re Spencer*, 2014 WL 1599869 (Bankr. N.D. Ohio 2014) – Post-petition creditor cannot be required to participate in Chapter 13 case to recover debt. Section 1305 permits post-petition creditor to participate, but if creditor elects to remain outside bankruptcy case, creditor can pursue collection against Debtor and property of Debtor, even if collection imperils successful Chapter 13 proceeding.
- (2358) *Malin v. JPMorgan Chase Bank*, 2014 WL 820003 (E.D. Tn. 2014) – Debtor's prior bankruptcy discharge does not insulate Debtor from liability for attorney fees and costs in litigation against mortgage lender where Debtor voluntarily commenced litigation post-petition to contest validity of mortgage and loan documents. By voluntarily reinstituting litigation, Debtor assumed risk of incurring litigation expenses that were not discharged.
- (2359) *First Tennessee Bank, NA v. Hansen*, 2012 WL 1156409 (Bankr. E.D. Tn. 2012) – Attorney fees and costs expended by Bank in remediating damages to home after commencement of bankruptcy and surrender of home were pre-petition claims that were included in, and discharged as part of, the Chapter 13 case. Claim was result of pre-petition relationship between Debtor and creditor such that creditor could fairly contemplate possibility of a claim against bankruptcy estate at time bankruptcy petition was filed. Bank's basis for the claim is the pre-petition note and mortgage.
- (2360) *In re Beaudet*, 2011 WL 1402868 (Bankr. M.D. Tn. 2011) – "Claim" is defined broadly to include any right to payment that existed prior to commencement of case. Debtor's obligation to pay into the escrow account for taxes and insurance arose from pre-petition mortgage documents. Pre-petition shortfall in escrow account would be pre-petition obligation that creditor could not recover by post-petition increase in mortgage escrow requirement. Creditor could increase escrow for post-petition advances as permitted by mortgage documents.
- (2361) *Maple Forest Condominium Association v. Spencer*, Case No. 10-14413 (E.D. Mi. 2011) – Post-petition obligations to pay condominium fees are not dischargeable. The obligations constitute post-petition obligations that are not encompassed within discharge under Section 1328.
- (2362) *Bank of America v. Pigg*, 453 BR 728 (Bankr. M.D. Tn. 2011) – Bankruptcy Code § removal provides that a Debtor shall not receive a discharge for condominium fees and assessments that become due and payable after the bankruptcy petition is filed as long as the Debtor or the trustee "has a legal, equitable or possessory ownership interest" in the unit. In amending Section 523(a)(16) Congress "could not have foreseen the world and United States financial crisis that crashed Wall Street, sunk the real estate market, and affected, to some degree, almost every American". Lenders choose not to foreclose on their collateral leaving homeowners in limbo. A chapter 7 Debtor who has

surrendered her home in bankruptcy and been relieved of any personal liability on the mortgage cannot truly be given a fresh start where HOA fees accumulate until lender chooses to foreclose. If the lender never forecloses, that homeowner's liability for the HOA fees continues in perpetuity, thwarting the goals of the entire Bankruptcy Code. Court Ordered that the Chapter 7 trustee sell the property pursuant to 11 U.S.C. Section 363 and distribute the proceeds to administrative expenses incurred by the chapter 7 trustee; then the claim of the HOA for all fees and expenses covered by their first priority lien; then the Bank to the extent of its lien; then to the Second mortgage holder to the extent of its lien; then to the chapter 7 estate. Bank and the HOA consented to the sale by their inaction as equity demands that court fashion remedy that balances rights of the lienholders and the right of a Debtor to a fresh start.

- (2363) *Hutchinson v. Republic Bank & Trust Company*, 2010 WL 3218588 (Bankr. W.D. Ky. 2010) – “Claim” is given the broadest possible interpretation, so that all legal obligations of the Debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case and Debtor will receive broadest possible relief in the bankruptcy court. Claim based on alleged negligence of Debtor was pre-petition where all of the acts that gave rise to the claim occurred pre-petition. Although Creditor did not have a right to payment as of the petition date because Creditor, as of the petition date, had not suffered any actual loss, the claim itself arose pre-petition and constituted a contingent claim for purposes of bankruptcy.

8.78 Right to Payment Generally

- (2364) *In re Arcapita Bank*, ___ WL ___ (Bankr. S.D. N.Y. 2014) – Claim for purposes of bankruptcy requires right to payment of money. Creditor whose sole right was to purchase stock in Debtor's wholly owned subsidiary did not have any right to payment of money from Debtor and did not have a claim in bankruptcy.

8.79 Contingent Claims

- (2365) *Republic Bank & Trust Co. v. Hutchinson*, 444 BR 728 (W.D. Ky. 2011) – Chapter 7 Debtor-attorney's prepetition misfiling of client's security documents gave rise to prepetition claim that was dischargeable in Debtor-attorney's bankruptcy case, even though damages from Debtor-attorney's conduct were contingent on unrecorded security interest losing its validity and damages were not suffered by client until after Debtor-attorney received discharge. Client that lacked knowledge of its legal malpractice claim against Debtor until after Debtor received his Chapter 7 discharge suffered no harm, for due process purposes, from lack of knowledge of claim where Debtor's case had no-asset designation.
- (2366) *111 Debt Acquisition Holdings, LLC v. Six Ventures, Ltd.*, 2011 WL 383003 (6th Cir. 2011) – Loan Guarantee agreement that provided that guarantor's obligations were “not ... in any way affected by ... bankruptcy” of the corporate borrower remained fully liable for debt following bankruptcy of corporate borrower. Guarantor's unauthorized filing of bankruptcy petition on behalf of obligor was a “springing recourse event” which rendered debt fully recourse under loan agreement, and guarantors thereby became personally liable for debt under terms of guaranty of recourse obligations. Although guarantor may have lacked corporate authority to file petition on behalf of obligor without consent of other guarantor, the loan and guaranty were governing documents with respect to whether filing was springing recourse event, not obligor's internal documents, and loan agreement clearly provided that debt became fully recourse when “any Guarantor” filed a bankruptcy petition, and other guarantors' objection to filing were thus irrelevant.
- (2367) *Maple Forest Condominium Association v. Spencer*, Case No. 10-14413 (E.D. Mi. 2011) – Post-petition obligations to pay condominium fees are not dischargeable. The obligations constitute post-petition obligations that are not encompassed within discharge under Section 1328.
- (2368) *In re Huffly Corp.*, 424 B.R. 295 (Bankr. S.D. Ohio 2010) - Retailer had contingent, prepetition indemnity claim against Chapter 11 Debtor-manufacturer, of a kind discharged in bankruptcy.

8.80 Contingent Claims – Contribution

- (2369) *In re Caribbean Petroleum Corp.*, 2014 WL 1778050 (3d Cir. 2014) – Section 502(e)(1)(B) provides for the disallowance of any claim for reimbursement or contribution of any entity that is liable with the Debtor, to the extent the claim is contingent at the time of allowance or disallowance. Code reflects policy that estate should not be burdened with estimated claims that are contingent. To apply, claim must be contingent; it must be for reimbursement or contribution; and Debtor and claimant must be co-liable. Claim that asserted right of contribution in the event that any court finds claimant to be liable for any damages constituted contingent claim where no court had yet found claimant to be liable.

8.81 Guaranty Claims

- (2370) *n re Gilroy*, Case No. 17-20100 (Bankr. E.D. Mi. 2017) – Individual debtor is not liable for corporate obligation unless Debtor personally guaranteed loan obligation or grounds exist to pierce corporate veil. Promissory note indicated that Corporation was borrower and Note was signed by Debtor incorporate capacity. Promissory note did not indicate that Debtor was personally obligated and Debtor did not sign separate guarantee agreement. Michigan Compiled Laws Section 566.132 provides that agreement to answer for debt of third party must be in writing. Debtor's alleged verbal agreement to repay loan if corporation failed to do so unenforceable as violating Statute of Frauds.
- (2371) *Heritage Bank USA, Inc. v. Johnson*, 2016 WL 427833 (M.D. Tn. 2016) – Absolute and unconditional guarantee obligates guarantor to full extent that note obligates borrower. Promissory note that provided for recovery of attorney fees necessitated by enforcement allowed lender to recover from guarantor fees incurred in attempting to collect from main borrower. Nothing in note or guarantee agreement limited fees recoverable against guarantor to only those fees incurred in attempting to enforce guarantee.
- (2372) *United Fire & Casualty Co. v. Eldridge*, 2015 WL 5996417 (Bankr. E.D. Ky. 2015) – To determine whether liability on guaranty is

dischargeable, court must determine when liability arose. Claim for indemnity arise when indemnity agreement was signed, although indemnified party was not called on to answer for underlying debt until post-petition. Claim of indemnified party was contingent and unliquidated as of petition date but was a “claim” as the indemnity agreement, when signed, created a right to payment.

- (2373) *Heritage Bank v. Holt*, 2014 WL 2515404 (M.D. Tn. 2014) – Guarantor remains liable even following bankruptcy of primary obligor. Guarantee is independent promise to answer for debt of another. Where guarantor admitted execution of guarantee, the guarantee required the guarantor to pay the debt, and the primary obligor defaulted, holder of guaranty is entitled to summary judgment.
- (2374) *Cecilian Bank v. Goldsmith*, 2014 WL 1670086 (S.D. Ohio 2014) – Assignee of underlying promissory note has standing to enforce guarantee even absent express assignment of guarantee, where guaranty provided that assignment of the note will automatically inure benefits of guaranty to the assignee.
- (2375) *In re Presser*, 504 BR 452 (Bankr. S.D. Ohio 2014) – Mortgage with sufficiently broad language secured not only defaults under Note, but also secured defaults under guaranty. Mortgage secured “all other liabilities and indebtedness, direct or contingent, now or hereafter owing by Mortgagor to Mortgagee”. Loan documents then defined “mortgagor” as any person who assumes payment of any or all of the indebtedness, which includes the guarantor. While default arose out of the guaranty rather than the note, the obligation was secured within scope of mortgage and mortgage could be foreclosed upon default in the guaranty itself.
- (2376) *Key Bank v. Hartmann*, 2013 WL 1312013 (E.D. Ky. 2013) – Under Ohio law, lender on secured debt cannot pursue recovery from guarantor unless lender proves that it repossessed and disposed of collateral in a commercially reasonable manner. Lender not entitled to summary judgment on guarantee claim where guarantor disputed that sale was commercially reasonable and lender did not produce any evidence of commercially reasonable nature of sale or disposition.
- (2377) *In re Kaid*, 2012 WL 1929906 (Bankr. E.D. Mi. 2012) – Secured creditor who sold note and mortgage but excluded from sale the claim based on personal guarantee had standing to file proof of claim in individual corporate officer’s Chapter 13 case. Guarantee was separate document from note and mortgage given by corporation and transfer documents to creditor’s successor expressly excluded the guarantee from the interests and rights being transferred.
- (2378) *Michigan Commerce Bank v. Palms Investments, LLC*, Case No. 299168 (Mi. Ct. App. 2011) – Creditor who consented to sale of collateral conditioned on creditor waiving right of deficiency claim against obligor discharged liability of guarantors on the underlying debt. Although discharge in bankruptcy of principal obligor does not discharge liability of guarantors, sale of property was not “discharge” but was consented to sale and payment in exchange for release of deficiency claims against borrower.

8.82 Employment Agreements

- (2379) *Madden v. Morelli*, 2016 WL 1569113 (Bankr. E.D. Mi. 2016) – “More than” test requires court to construct hypothetical Chapter 7 case to determine how much creditor would have received in liquidation. In general, when transferee is unsecured creditor, any transfer will meet “more than” standard unless Chapter 7 estate is solvent and can pay all creditors in full. However, where payment is only fraction of what is owed in exchange for release of entire debt, Court must determine whether percentage received by creditor is more or less than would have been paid had transfer not occurred and case liquidated in Chapter 7 on date of transfer. Court had to first determine whether claim would have been capped by Section 502(b)(7). If claim is not capped, amount paid in satisfaction would have been lower percentage than would have been paid in Chapter 7 resulting in payment not being preferential. If the cap applied, however, amount of payment far exceeded distribution on capped claim and payment would be preferential. Claim was capped as Settlement Agreement that generated payment was to settle Debtor’s obligations under Executive Severance Plan (ESP). Under ESP transferee was entitled to certain payments. Settlement Agreement provided that transferee would release claims against Debtor in exchange for immediate payment of lower amount. Transferee’s claim arose from the termination of employment within meaning of Section 502(b)(7). Court was unable to determine actual cap amount where defendant included in calculation certain bonuses to which defendant would not have been entitled as they were not earned as of date of severance and plaintiff failed to present evidence concerning other bonuses to which defendant may have been entitled or whether financial conditions were met to trigger those bonuses. Absent evidence on whether defendant would have been entitled to bonuses and, if so, amount of bonuses, amount of cap could not be determined.

8.83 “Advancement of Fees”

- (2380) *Wojcik v. Hudson Funding, LLC*, 2013 WL 2085959 (N.D. Ohio 2013) – Corporate Chapter 7 Debtor’s estate not obligated to advance money to defendants, former corporate officers, for defense of action brought by Chapter 7 Trustee for alleged mismanagement. Corporate documents contained clause requiring corporation to advance costs of defense for any officer or director sued for actions taken in capacity as officer or director. While such clauses are valid and enforceable under Delaware law, which was Debtor’s state of incorporation, there is no bankruptcy precedent that would support enforcement against Debtor in bankruptcy context. Further, allowing claim for advancement of fees would elevate defendants, holders of unsecured claims, to administrative status ahead of all other creditors and administrative costs, in violation of Section 726.

8.84 Executory Contracts and Unexpired Leases – Assumed

- (2381) *Forest Creek Townhomes, LLC v. Carroll Property Management, LLC*, 2016 WL 2344230 (W.D. Tn. 2016) – Code allows assumption and assignment of executory contract unless contract contains provision prohibiting assignment that is enforceable under applicable state law. Georgia law prohibits assignment of personal services contract, defined as one in which the offeree is vested with discretion in accomplishing the assigned tasks because his skills, knowledge, experience and expertise are unique to the area and could not be duplicated by others not similarly qualified. Contract for property management services was “personal services contract” as to manager where the Management Agreement explicitly noted that “Manager is experienced in the business of managing multifamily apartment complexes such as the

Premises"; required manager manage, operate and maintain the Premises and carry out any rehabilitation activities in a commercially reasonable manner"; and gave property manager significant discretion in how to manage the Property including contracting for repairs and capital improvements; executing leases and collecting rents; hiring, discharging, and supervising employees; and performing other management activities within the budget proposed by the property manager and approved by the property owner. Manager also had discretion to exercise "other general authority and power as may be necessary or advisable to manage the property, and managing an apartment complex requires skill and experience and, while there may be other property management companies that can provide similar services, such services could not be duplicated by others not similarly qualified. Management contract, as executory contract, not subject to assumption and assignment.

8.85 Executory Contracts and Unexpired Leases – Rejected

- (2382) *In re Treetops Acquisition Company, LLC*, Case No. 14-22602 (Bankr. E.D. Mi. 2015) – Executory contract is one where both parties have obligations. Agreement by which individuals were granted right to unlimited golf, skiing and hunting at Debtor's property was executory as individuals were allowed to exercise right to use facility while facility was required to allow that use, such that each side still needs to perform its side of the agreement. As executory contract, right to use facilities was subject to rejection, with individuals having opportunity to file claim for economic value of lost rights of use.
- (2383) *Kendrick v. The Lamar Company, LLC*, 2014 WL 4417828 (Bankr. E.D. Ky. 2014) – Lessee of non-residential real estate from Debtor who rejects lease has option to retain property and continue to perform under lease. Lease is of real property where the lease gives the party an interest in land or anything growing on or attached to or erected on the land. Lessee leased property for purposes of erecting billboards. Lessee, at its own cost, was permitted to construct billboard including the support pole and panel structure. Lessee owned the pole and the advertising displays. Lease is a lease of real property where lease entailed the right to use and occupy the land on which the sign was located for purposes of erecting and maintaining the sign.
- (2384) *Tencup Property, LLC v. Riley*, Case No. 09-065 (1st Cir. BAP 2010) - Section 365(d) imposes two obligations on a trustee with respect to unexpired nonresidential real property leases. First, § 365(d)(3) requires the trustee to perform timely all obligations required under the lease, particularly the obligation to pay rent at the contract rate until the lease is rejected, and gives the lessor an administrative claim for such amounts. Second, Section 365(d)(4) requires the trustee to decide whether to assume or reject a lease within 120 days after the entry of the order for relief. If the trustee fails to act within 120 days, the lease is deemed rejected and the trustee must immediately surrender the leasehold to the lessor. However, no provision in the Bankruptcy Code or Rules requires the trustee to file a specific motion entitled "motion to reject." Therefore, the trustee can give notice of intent to reject a lease in another kind of formal motion, such as a sale motion or a settlement motion. The critical question is one of adequate notice — parties to the contract or lease must be given adequate notice of the proposed rejection or assumption. Court can order retroactive rejection where aggregate of facts indicates lessor had ample notice of intent to reject leases and Debtor had actually vacated premises and returned premises to the landlord prior to entry of formal order rejecting lease.

8.86 Condominium and Homeowners Associations

- (2385) *Driftwood Manor Homeowners Association v. Borgus*, 544 BR 315 (Bankr. E.D.N.C. 2016) – Homeowners association dues that accrue after filing of chapter 13 but before conversion to Chapter 7 are excepted from discharge. Section 523(a)(16) excepts from discharge homeowners' fees that become due after the "order for relief" not the date of conversion. Except for the narrow circumstances in Section 348(b), a conversion does not change the date of the order for relief. Section 348(b) provides that post-petition, pre-conversion debt is eligible for discharge except as provided in Section 523.
- (2386) *Wells Fargo Bank v. Country Place Condominium Association*, Case No. 11-122909 (Cir. Ct. Oakland Co. Mi. 2014) – Property owner is no longer liable for condominium association fees or charges after date of foreclosure sale. Under state law, purchaser at foreclosure sale is not liable for any fees or charges that accrue prior to date on which purchaser acquired title. Purchaser acquires title on date of issuance of sheriff deed, although title is subject to defeasance if borrower redeems within statutory period. Upon issuance of sheriff deed, borrower loses any right to or interest in the land unless and until borrower redeems. As such, purchaser at foreclosure sale, not borrower, is responsible for post-sheriff deed fees and assessments.
- (2387) *In re Kanohokula*, 2013 WL 1346020 (Bankr. D. Hawaii 2013) – Dischargeability is determined by date on which payment of assessment is due. Fact that board announced assessment prior to date on which Debtor commenced bankruptcy did not make debt dischargeable where assessment was not due and payable until after commencement of case.
- (2388) *In re Kelson*, 2012 WL 3990789 (Bankr. S.D. Fl. 2012) – Under Section 523(a)(16), post-petition fees and assessments are not dischargeable. Special Assessment levied pre-petition is a pre-petition claim, even if assessment cannot be enforced until post-petition. Obligation to pay special assessment arose when Board of Directors adopted assessment at duly noticed meeting, even if payment was not due until later date. fact that the board of directors opted to provide the members a longer period of time to pay the obligation does not change the fact that the obligation was established when the assessment was adopted. Assessment was pre-petition obligation that is discharged in Debtor's Chapter 13 proceeding.
- (2389) *Maple Forest Condominium Association v. Spencer*, Case No. 10-14413 (E.D. Mi. 2011) – Post-petition obligations to pay condominium fees are not dischargeable. The obligations constitute post-petition obligations that are not encompassed within discharge under Section 1328.

8.87 Deficiency Claims

- (2390) *In re Black*, 2014 WL 690159 (Bankr. E.D. Mi. 2014) – Lender may have violated Michigan statutory prohibition against deficiency

judgments where lender purchased property at foreclosure sale with a credit bid equal to full amount of the indebtedness, as lender is deemed to have received the amount of the credit bid, leaving no portion of the obligation outstanding. However, creditor's actions in attempting to collect deficiency judgment from second parcel of collateral, while possibly violating Michigan law, did not constitute violation of discharge injunction.

- (2391) *KeyBank, N.A. v. Hartman*, 2014 WL 641003 (E.D. Ky. 2014) – Deficiency claim resulting from liquidation of personal property pledged as collateral requires that collateral have been disposed of in commercially reasonable manner. Whether the disposition is commercially reasonable will turn upon all the facts in a particular case, with primary focus on procedures used, including method, manner, time, place and terms. Secured creditor has burden to show that sale was commercially reasonable. Secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, at any time and place, and on any terms.” In general, disposition of collateral is commercially reasonable if the disposition is made: (1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition. Lender's disposition of 7 yachts pledged as security was commercially reasonable where sales were made through known, reliable brokers for similar vessels, and yielded significantly higher sale price than other offers. Fact that lender did not use broker recommended by lender did not establish that sales were not commercially reasonable.
- (2392) *Fifth Third Bank v. Dial Properties, LLC.*, Case No. 11-5300 (6th Cir. 2012) - Under Tennessee law, successful bid a properly conducted foreclosure sale is presumed to be the value of the property for purposes of determining a deficiency claim. Alleged "value" of the property sold is not relevant absent evidence of fraud or irregularity in the conduct of the sale. While a "gross inadequacy" of the price may constitute evidence of fraud, party contesting deficiency claim carries burden of overcoming presumption that attaches to a sale free of irregularity. Successful bid at foreclosure sale was \$500,000. Defendant did not rebut presumption merely by providing appraisal that valued the property at \$625,000. Discrepancy in appraised value versus sale price was not "grossly inadequate", and appraisal was dated more than two months before the foreclosure sale where the general real estate market was in substantial decline. Merely because the defendant comes up with an alternative value does not rebut the presumption or shift the burden onto the plaintiff to establish the fair market price.
- (2393) *State Bank of Florence v. Miller*, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* 459 BR 657 (6th Cir. BAP 2011) – Bank that purchased property at foreclosure sale by credit bid must credit entire amount of bid against obligation owed. Bank that inadvertently bid full amount of debt, which was more than double actual value of property, cannot escape consequences of its decision to bid. Party who overbids at foreclosure sale through its own unilateral mistake bears the consequences of its actions. Bank would not be permitted to attack its own foreclosure sale, where Bank unilaterally decided to bid full amount of debt, Debtor took no part or role in foreclosure, and Bank failed to take any steps to set aside the foreclosure sale for more than one year. Bank's debt was fully satisfied by the credit bid, and Bank no longer held any debt or obligation as to Debtor.
- (2394) *Fifth Third Bank v. Miller*, 2011 WL 112423 (E.D. Ky. 2011) – Creditor holding deficiency claim must prove that collateral was disposed of in commercially reasonable manner. That a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner. Lender's conclusory statements reflecting a credit for the net proceeds from the sales fails to specify any further information about these net proceeds, including the amount and how these proceeds were calculated. Lender failed to provide specific information on the method, manner, time and other terms of the sales or any specific evidence regarding the reasonable commercial practices among dealers in horses, to indicate whether its actions conformed to these practices. Lender failed to submit evidence of whether efforts to prepare the horses for sale were commercially reasonable.

8.88 Fraudulent Transfer

- (2395) *Walker v. Vanwinkle*, 2016 WL 7443168 (Bankr. E.D. Ky. 2016) - Debtor's alleged fraudulent transfers of assets does not give rise to non-dischargeable debt to creditor who held judgment against Debtor before transfer occurred unless creditor had pre-existing interest in property transferred. Fraudulent transfer under Section 523(a)(2) requires that debt to creditor as debt was not "obtained by" fraud. Liability from Debtor to creditor flowed from contractual agreements and judgment that predated any transfers. Debt that was liquidated by the Kentucky State Court was not based on willful and malicious conduct, and only allegations in complaint for possibly willful and malicious conduct alleged events that occurred after Kentucky State Court entered judgment. Debtor as transferor is different situation than Debtor as recipient of fraudulent transfers, which can give rise to non-dischargeable debts in favor of transferor's creditors, as fraudulent transfers themselves give rise to liability to creditors in first instance.
- (2396) *Bancorpsouth v. Shahid*, Case No. 16-3009 (Bankr. N.D. Fl. 2016) – Debtor's alleged fraudulent transfers of assets does not give rise to non-dischargeable debt to creditor who held judgment against Debtor before transfer occurred unless creditor had pre-existing interest in property transferred. Fraudulent transfer under Section 523(a)(2) requires that debt to creditor as debt was not "obtained by" fraud. Liability from Debtor to creditor flowed from contractual agreements and judgment that predated any transfers. Debtor as transferor is different situation than Debtor as recipient of fraudulent transfers, which can give rise to non-dischargeable debts in favor of transferor's creditors, as fraudulent transfers themselves give rise to liability to creditors in first instance.
- (2397) *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.

- (2398) *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).
- (2399) *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.
- (2400) *JPMorgan Chase Bank, NA v. Barrocco*, 2014 WL 790873 (E.D. Mi. 2014) – Debtor can be personally liable for fraudulent transfer of property by third party, where transfer is orchestrated by Debtor to deprive creditors of third party of ability to satisfy judgments and claims. Debtor, as sole shareholder of corporation, caused corporation to transfer all of its assets to Debtor's wife in effort to hinder and defraud creditors of the corporation.

8.89 Guaranty Claims

- (2401) *Educational Credit Management Corporation v. Alfes*, Case No. 10-5557 (Bankr. E.D. Mi. 2010), *aff'd* 2011 WL 3651319 (E.D. Mi. 2011), *aff'd* 709 F.3d 631(6th Cir. 2013) – Guarantor of Debtor's obligation holds independent claim against Debtor to extent guarantor is required to answer for the guaranteed obligations. Guarantor holds right of reimbursement from Debtor, giving guarantor status as creditor in case. Default judgment against lender in action to determine dischargeability of student loans does not alter rights of guarantor who was not party to that action.

8.90 Claims Resulting From Avoidance Actions

- (2402) *In re Book*, 2015 WL 6153695 (Bankr. N.D. Ohio 2015) – Section 502(h) allows party against whom trustee prevailed in action to avoid transfer to file a claim against estate. Damages are measured by amount of loss to creditor as result of avoidance. Prior to commencement of case, co-owner purchased Debtor's one half interest in property for \$35,000 but did not record deed. Co-owner recorded deed 6 years later and only one month before Debtor filed bankruptcy. Transfer was effective as to the estate on date deed was recorded, transfer was made as result of payment by co-owner years earlier that resulted in liability of Debtor until deed transferred, and co-owner did not pay any consideration at time of transfer, allowing transfer to be avoided as preference. Co-owner settled with Trustee by purchasing Debtor's one-half interest for \$30,000, and then file claim for \$35,000 the amount originally paid by co-owner. Court concluded that creditor's damages were measured by the amount paid as a result of the preference, which was \$30,000.00.

8.91 Custodian

- (2403) *Jones v. Goodman*, 2013 WL 4084760 (E.D. Mi. 2013) – Under Section 101(11), custodian is a receiver or trustee of property of Debtor appointed in a case or proceeding not under Title 11; an assignee under a general assignment for benefit of creditors; or a trustee, receiver or agent under law or contract that is appointed to take charge of property of Debtor for purposes of enforcing lien. Section 543 provides that if property is in possession of custodian, court must provide for payment of reasonable compensation for services rendered and costs advanced by the custodian. Claimant was not "custodian" as claimant had not been appointed or authorized by State Court to take charge or seize Debtor's property. Seizure order named only a third party as the officer for purposes of seizure. Fact that named court officer may have received assistance from claimant did not transform claimant into court appointed officer. Further, based on State Court's own requirements, claimant was not eligible to have been named as court officer in first instance.
- (2404) *In re Ohakpo*, 2013 WL 794347 (Bankr. E.D. Mi. 2013) – Section 543 governs rights and duties of custodians. Section 101(11) defines custodian as a receiver or trustee; assignee under general assignment for benefit of creditors; or trustee, receiver or agent under law or contract appointed or authorized to take charge of property of Debtor for purposes of enforcing line or for administration of property for benefit of creditors. Persons acting as court officers for purposes of seizing property are appointed as court officers as defined in Section 101(11). State Court Order authorized named court officer to take possession of Debtor's property as defined in Section 101(11). Named individual took possession of property under writ of execution, issued for purposes of enforcing a charge against the seized property. As such, court officer who took possession of Debtor's property under writ of execution constitutes "custodian" under section 543. Under Section 543, Court can enter orders as necessary to protect entities to which the custodian has become obligated with respect to the property or its proceeds, and may provide for reasonable compensation for services rendered and costs and expenses incurred by the custodian. Michigan state law provides for compensation of \$32 plus mileage plus actual and reasonable expenses for seizing and keeping the property. Custodian entitled to recover actual costs paid to towing company for seizing vehicle plus \$32. Custodian is not entitled to percentage fee as property was neither sold by custodian nor released because Debtor paid the underlying judgment. Custodian has lien against seized property for payment of fees and expenses to extent that sale of collateral yields amounts in excess of liens on property. 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.

- (2405) *Spradlin v. Williams*, 2010 WL 4736905 (E.D. Ky. 2010) – Claims filed by insiders are subjected to a greater level of scrutiny than claims filed by non-insiders. Member of LLC is considered insider for purposes of evaluating claims using the same standard as for corporations set out in Section 101(31).

8.92 Pre-petition Interest – Unsecured Claims

- (2406) *Diamond v. Bakay*, Case No. 11-1372 (10th Cir. 2011) – Creditor not entitled to pre-judgment interest where creditor unduly delayed in attempting to enforce obligation. Creditor did not take any steps to collect loan that had been in default for more than 4 years prior to commencement of bankruptcy case by Debtor.
- (2407) *In re Edwards*, 446 BR 276 (8th Cir. BAP 2011) – Unsecured creditor who holds State Court judgment is permitted to add post-judgment interest at the applicable state rate through the filing of the Bankruptcy Petition, including interest that accrued while underlying judgment was on appeal where creditor prevailed in the appeal.

8.93 Unmatured Unsecured Claims

- (2408) *In re Bates*, Case No. 15-52459 (Bankr. W.D. Tx. 2017) – Section 502(b)(5) disallows claim for domestic support obligation that was not matured as of date of bankruptcy filing. State could not assert priority claim for domestic support obligation where, as a petition date, Debtor was current in ongoing domestic support obligation payments. Fact that state Court, 3 months after bankruptcy petition was filed, entered order requiring Debtor to pay \$165,000 for all “current and future child-support” did not convert claim into prepetition priority claim. Filed claim did not attempt to bifurcate between amount of child support due as of date of filing a bankruptcy petition and any post-petition child-support that may arise in future. State did not provide any documentation to prove that there was any prepetition breach of obligation warranting acceleration of child support obligation, preventing state from attempting to retroactively make lump-sum a prepetition debt.
- (2409) *Smith v. Morse*, 2016 WL 3092630 (Bankr. E.D. Tn. 2016) – Unsecured creditor is not entitled to recover unmatured and contingent interest as part of claim. Note signed by Debtor required Debtor to either sell property within one year to repay lender principal plus \$20,000 interest. Obligation to pay interest was contingent and unmatured as of petition date as year within which borrower could repay without interest had not expired as of petition date. Right to interest was entirely contingent and entire amount was unmatured as of petition date as event leading to lender’s right to interest had not occurred as of petition date. If note provided just for payment of interest at defined date, lender would have right to prorated interest, but where entire obligation to pay interest was contingent, lender not entitled to recover any interest under Section 502(b)(2).
- (2410) *Ground Improvement Techniques, Inc. v. Plan Committee*, Case No. 11-17447 (9th Cir. 2013) – Section 502(b)(2) prohibits claims for unmatured interest on unsecured claims. However, protection runs only to Debtor. To extent that non-Debtors are also liable on debt, creditor is entitled to full contract rights against non-Debtor including interest that accrued after commencement of Chapter 11 case.

8.94 Pre-petition Escrow Balances

- (2411) *In re Beaudet*, 2011 WL 1402868 (Bankr. M.D. Tn. 2011) – Escrow shortage existing as of date of petition is pre-petition claim that must be included in the pre-petition mortgage arrears. Creditor cannot increase post-petition mortgage payments in effort to recover pre-petition escrow shortage.

8.95 Punitive and Treble Damages

- (2412) *Gidelski v. Anton*, 2013 WL 1747907 (Bankr. E.D. Mi. 2013) – Where state law permits award of treble damages, Court has discretion to award treble damages or actual damages, but cannot award some intermediate amount such as double damages. Award of attorney fees where allowed by state law is also discretionary with court. Trebling is not automatic, but rather, is left to the exercise of judicial discretion, based on Court’s determination of what is fair under the circumstances. Debtor clearly acted wrongfully over the course of years by wrongfully embezzling trust funds that had been entrusted to her. Debtor expressed some remorse for her actions. State Court criminal proceeding resulted in incarceration and restitution to victim that will take Debtor some years to pay, and the somewhat relevant fact that the beneficiary of the required payments will not be the actual victim, who is deceased, but rather the victim’s heir. Totality of circumstances tipped the scale in favor of Debtor. Court would not award treble damages or attorney fees against Debtor.
- (2413) *R & L Pricecorp, LLC v. Hall*, 2013 WL 1739658 (Bankr. E.D. Tn. 2013) – Punitive damage claim was warranted where Debtors willfully and maliciously caused harm and injury to rented premises. Debtors rented house in pristine condition, to be occupied by no more than 6 people. When Debtors moved out, premises were substantially damaged and photos of damage were shocking to the court. Damage including extensive damage to the carpets, doors, walls, and windows, untreated mold and mildew growth, and broken appliances. More specifically, the house was filthy, wreaked of urine, and contained animal feces on the carpet, stairs, and a wall, there was writing on one of the walls in what appeared to be permanent ink and there were, among other things, missing and broken Levolor blinds, a broken dishwasher, a damaged stove, a damaged kitchen sink and damaged flooring. As many as 8 people lived in the house plus four dogs and one cat. Court awarded actual damages plus punitive damages as evidence indicated that actions of Debtors in damaging property were particularly egregious, and held that entire damage award was non-dischargeable.
- (2414) *In re Hamade*, 2013 WL 663736 (Bankr. E.D. Mi. 2013) – Claim for treble damages and attorney fees for conversion under Michigan statutory conversion law is permissive, not mandatory. Court would not impose attorney fees or treble damages where there was good faith dispute over lease of property, condition of property, or whether any property was actually missing or converted.

B. Proof of Claim

8.96 Standing to File Proof of Claim

- (2415) *SMS Financial JDC, LP v. Cope*, Case No. 16-6063 (10th Cir. 2017) – Promissory note is negotiable instrument that may be enforced only by someone with standing, defined as someone who is party to the note or in privity with party to note. Standing has established by presenting facially enforceable note.
- (2416) *Simon v. Miller*, 2015 WL 4459368 (Bankr. E.D. Mi. 2015) – Party can file proof of claim only for debt owed to it. Chapter 7 trustee in one case had standing to file claim in second case to the extent that Debtor in second case owed money to the Debtor in the case in which the Trustee served. However, trustee lacked standing to file claims against corporate Debtor for funds allegedly owed to creditors of the Chapter 7 estate. Chapter 7 Debtor was principal of company that filed separate bankruptcy case. Chapter 7 trustee filed proof of claim to pierce the corporate veil on behalf of creditors of the Chapter 7 entity. Although creditors had right to file claims against corporate Debtor, the Chapter 7 trustee lacked standing as the Chapter 7 Debtor could not recover against corporation on corporate veil theory because principal of corporation is precluded from suing on alleged basis that the principal bringing the action was the corporate alter ego, essentially producing a party who committed a fraud as to corporate creditors to now bring an action for fraud against himself. Any claim that the Chapter 7 Trustee had to pierce corporate veil was entirely derivative of the ability of the principal which could not do so as a matter of law.
- (2417) *In re Young*, 2013 WL 3299251 (Bankr. E.D. Tn. 2013) – An allegation of lack of documentation is not a valid objection even if the Debtor re-characterizes it as an objection to standing. A valid objection to standing must raise a factual dispute about who is the holder of the claim. The Debtor must allege that, to the best of her knowledge, information, and belief, either (a) she owes someone else or (b) she does not owe the obligation at all.
- (2418) *In re SCBA Liquidation, Inc.*, 489 BR 666 (Bankr. W.D. Mi. 2013) – State attorney general has standing to file proof of claim based on breach of warranty claims on behalf of individual purchasers and uses in their respective states. Although claims are primarily designed to protect economic interests of individual purchasers, claim is also attempt to protect State quasi-sovereign interests by ensuring general economic welfare of consumers. Claims were filed on behalf of police, firefighters, and first responders who purchased allegedly defective bullet proof vests.
- (2419) *Kreitzer v. Household Realty Corp.*, 489 WL 698 (Bankr. S.D. Ohio 2013) – Lender’s standing to file proof of claim was established by pre-petition judgment of foreclosure of mortgage. State Court judgment was entitled to res judicata and collateral estoppel effect on whether lender had standing to enforce mortgage. Any dispute as to proper party entitled to enforce mortgage based on alleged defective assignment of mortgage to lender or any alleged fraud in connection with that transfer would necessarily have been litigated in State Court either as part of main claim or would have been compulsory counterclaims logically connected to main action to foreclosure mortgage. Debtor’s failure to assert any defenses or raise any counterclaims in State Court as to right of lender to foreclose would be estopped and subject to res judicata. Debtor was not attacking any alleged transfer of the claim after entry of State Court Order.
- (2420) *In re Reed*, 2013 WL 2015984 (Bankr. E.D. Tn. 2013) – Proof of claim may be filed by “creditor”, defined as one holding a claim. A claim is a right to payment regardless of whether the claim is matured, unmatured, contingent, liquidated, disputed, unliquidated; and any right for equitable remedy for breach if the breach gives rise to a right to payment.
- (2421) *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.
- (2422) *Simmerman v. Ocwen Financial & Mortgage Services, Inc.*, 463 BR 47 (Bankr. S.D. Ohio 2011) – Only real party in interest may file a proof of claim in a Debtor’s bankruptcy case. Real party in interest is creditor entitled to payment on claim or creditor’s authorized agent at the time the bankruptcy petition is filed. The real party in interest with respect to a mortgage proof of claim “is the party entitled to enforce the note and its accompanying mortgage as determined by applicable nonbankruptcy law. In general, the holder of a negotiable instrument, including a promissory note, has the right to enforce it. The “holder” is either: a) a person in possession of the instrument if the instrument is payable to bearer; or b) the person identified in the instrument when that person is in possession of the instrument if the instrument is payable to an identified person. Debtors have standing to object where documents attached to the proof of does not bear Creditor’s name nor any endorsement of the instrument from the original lender to the Creditor. However, Debtors lack standing to contest transfer of note and mortgage based on failure to comply with the terms of a pooling and servicing agreement. Debtors lack standing to challenge the ownership of the note and mortgage based on the failure to comply with the terms of a third party PSA.
- (2423) *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.
- (2424) *Gordon v. Royal Manor Management, Inc.*, 2012 WL 1605910 (6th Cir. 2012) – Creditor lacked standing to file claim in corporate bankruptcy where documents attached to claim indicated that the loans were made to the corporate principals individually and not to the corporation, and documents did not indicate that corporation agreed to guarantee or otherwise undertake obligation to repay loan.

- (2425) *In re Hunter*, 466 BR 439 (Bankr. E.D. Tn. 2012) – Under Tennessee law, party in possession of allonge to deed of trust and original deed of trust note endorsed in blank presumptively has standing to enforce note and deed of trust, including filing of proof of claim based on note and deed of trust. Promissory note is negotiable instrument governed by State adoption of Uniform Commercial Code.
- (2426) *In re Smoak*, 2011 WL 4502596 (Bankr. S.D. Ohio 2011) – Only the real party in interest may file a claim. The party entitled to enforce the Note under applicable non-bankruptcy law is the real party in interest. Under the UCC, the holder of the Note is the party entitled to enforce it. Trustee of trust for pooled residential mortgages had standing to file proof of claim where Trustee possessed original note and note was endorsed in blank. Trustee is “holder” of note as defined in UCC. Promissory Note and Mortgage were originally in the name of Bank One. Note later transferred to JPMorgan and then from JP Morgan to Bank of New York as Trustee, with Ocwen servicing the Note at all times for each transferee. Debtor lacks standing to contest whether transfer of Note violates underlying the securitization agreements as Debtor is not a party to that agreement and as to the borrower the right to enforce a Note endorsed in blank lies with the holder.
- (2427) *Jones v. Federal National Mortgage Association*, Case No. 10-1042 (Bankr. N.D. Ohio 2010) - Complaint alleging that party filing claim lacked standing stated cause of action based on alleged lack of proper endorsement of note or assignment of mortgage. Complaint sought determination that the named parties do not have an interest in the property under the facts alleged and do not have claims in the chapter 13 case. The amended complaint alleged facts regarding the note endorsements and mortgage assignments which, if accepted as true, would be sufficient to state a plausible claim that this movant does not have a lien of the property and is not entitled to enforce the note.
- (2428) *In re Wilson*, Case No. 10-45791 (Bankr. E.D. Mi. 2010) – Chapter 13 case filed prior to April 15, 2010, could not fix 2009 tax liability or deem the governmental agency to have filed a proof of claim where no proof of claim has been filed. Plan that purports to fix amount of 2009 tax liability cannot be confirmed where no proof of claim has been filed. However, if either the governmental agency files a claim within the time permitted or the Debtor files a claim on behalf of the governmental agency as permitted under Rule 3004, then the claim must be paid in full as a priority claim pursuant to Section 1325.
- (2429) *In re Sencyszyn*, Case No. 09-49868 (Bankr. E.D. Mi.), *aff'd*, 2011 WL 500060 (E.D. Mi. 2010) – Debtor has standing to file a proof of claim on behalf of a governmental agency for pre-petition taxes where the governmental agency fails to file a claim within the time permitted under Rule 3002. Debtor has 30 days after expiration of governmental claims bar date to file that Claim.
- (2430) *In re Wells*, 407 BR 873 (Bankr. N.D. Ohio 2009) – Creditor not entitled to file claim where Promissory Note is payable to original lender and lacks any endorsement to claimant. Therefore, Note was still payable to original lender. Purported “Assignment of Promissory Note and Mortgage” was legally insufficient to transfer any interest in Note. Promissory Note can be transferred only by negotiation. Creditor does not have any interest in the Note and cannot maintain claim based on Note. Limited Power of Attorney attached to Proof of Claim which bore the name of one party but was signed by different party was ineffective. Further, Power of Attorney did not convey power to file Proof of Claim where party signing Power of Attorney was not the holder of the Promissory and so had no authority to enforce the Note in its own name.

8.97 Standing to File – Class Claims

- (2431) *In re Associated Community Services, Inc.*, 2014 WL 5483496 (Bankr. E.D. Mi. 2014) – Proofs of Claim can be filed by class representative on behalf of all members of defined class if class representative has obtained class certification by either state or federal court prior to commencement of bankruptcy case; or by bankruptcy court post-petition. Proof of claim disallowed to extent it sought class status where creditor did not, either prior to bankruptcy case or up to 7 months post-petition request class certification under Federal Rule of Bankruptcy Procedure 7023.

8.98 Standing to File – Debtor

- (2432) *In re Shank*, Case No. 11-10480 (Bankr. S.D. Tx. 2017) - Rule 3001 provide creditors with time to file proof of claim and allows Debtor to file proof of claim if creditor does not do so. Proof of claim filed by any party is deemed allowed unless an interested party objects. Proof of claim filed on behalf of mortgage company by Debtor to which no objection was filed is allowed claim. Plan proposed full payment of balance due consistent with proof of claim as filed by Debtor. At conclusion of Plan, Debtor entitled to order deeming mortgage satisfied.
- (2433) *In re Keller*, Case No. 13-1144 (Bankr. W.D. Mi. 2014) – Creditor cannot file amendment to protective proof of claim filed by Debtor. Permitting Creditor to file amendment would impermissibly extend the deadline for creditors to file claims and would bestow on creditors an unintended benefit under Section 501(c) that is a section designed to benefit the Debtor.

8.99 Required – Secured Creditors

- (2434) *In re Herrig*, 2017 WL 2729074 (Bankr. N.D. Ohio 2017) - Secured creditor in Chapter 13 is permitted, but not required, to file proof of claim. Secured creditor may choose not to participate in bankruptcy case and look to Lien for satisfaction of debt. However, if secured creditor wishes to participate and received distributions in Chapter 13, proof of claim must be filed.
- (2435) *In re Pajian*, 598 BR 708 (Bankr. N.D. Ill. 2014), *aff'd* 2015 WL 2182951 (7th Cir. 2015) – Distributions under confirmed plans may be made only on “allowed” claims. Allowed claim under Section 502 is one for which a proof of claim has been filed. Creditor who does not file claim not entitled to payment under plan.
- (2436) *In re Thompson*, 2014 WL 1330110 (Bankr. S.D. Ga. 2014) – Secured creditor not entitled to payments from plan unless creditor files proof of claim. Debtor’s “treatment” of claim in plan does not excuse creditor from filing claim. Lender who does not file claim retains lien after discharge and can enforce lien once discharge is entered.

- (2437) *In re Dumain*, 2013 WL 1890256 (Bankr. S.D.N.Y. 2013) – Although Secured creditor is not required to file proof of claim merely to protect lien, if creditor wants to participate in distributions under Chapter 13 plan, creditor must file proof of claim.

8.100 Not Required – Secured Creditors

- (2438) *In re Dumbuya*, 2017 WL 486917 (Bankr. N.D. Ohio 2017) - Rule 3002 requires Proof of Claim in Chapter 13 case to be filed within 90 days after date set for first meeting of creditors. Court may enlarge deadline to file proof of claim for limited reasons. Section 501 and Rule 3002 require only unsecured creditors to file proof of claim if claim is to be allowed. Secured creditor in Chapter 13 may, but is not required to, file proof of claim. If creditor wishes to participate in and receive distributions under Chapter 13 Plan, proof of claim must be filed. Instead, secured creditor may choose not to participate in bankruptcy case and enforce lien for satisfaction of debt after completion of bankruptcy case. If creditor elects to file proof of claim, creditor must do so within time permitted under Rule 3002. Proof of Claim filed after expiration of time allowed under Rule 3002 is untimely and must be disallowed.
- (2439) *Kohout v. Nationstar Mortgage, LLC*, Case No. 15-80004 (Bankr. N.D.N.Y. 2016) – Secured creditor not required to file claim in bankruptcy case and can enforce lien after conclusion of case.
- (2440) *Belser v. Nationstar Mortgage, LLC*, Case No. 14-065 (1st Cir. BAP 2015) – As a general rule, secured creditor is not required to file claim in Chapter 13 and can ignore the bankruptcy case and look to the lien for satisfaction of its debt. If the lender wants to participate in distributions under plan, lender must have an allowed claim, either because lender files a proof of claim or Debtor files one on behalf of the lender.
- (2441) *Matteson v. Bank of America, NA*, 2015 WL 4719556 (6th Cir. BAP 2015) – Secured creditor is not required to file proof of claim even where Chapter 13 Plan contemplates payments to the creditor on long term debt. Failure to file proof of claim does not affect validity, priority or extent of lien. Bankruptcy Court erred when, post-discharge, court entered judgment reducing amounts owed to lender by amounts lender would have received had lender filed a proof of claim. Creditor has right to ignore bankruptcy proceedings and enforce lien for satisfaction of debt. Failure to file proof of claim only means that creditor will not receive payments from Chapter 13 Trustee, but does not alter the validity or extent of creditor's lien.
- (2442) *In re Wears*, 2015 WL 3369146 (Bankr N.D. Ohio 2015) – Secured creditor's failure to file proof of claim does not invalidate lien. Section 506(d)(2) provides that lien is not void based solely on failure to file proof of claim. Further, Plan as confirmed specifically stated that secured claims would be allowed to the extent provided for in the plan, creating an allowed secured claim for the secured value listed in the plan. Failure to file a claim impacts only creditor's right to receive distributions from Trustee.
- (2443) *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.
- (2444) *Christo v. Wells Fargo Bank*, 2012 WL 3839238 (Bankr. N.D. Ohio 2012) – Secured creditor not required to file proof of claim to preserve security interest. Security interest passes through bankruptcy unaffected. Only unsecured creditors are required to file claims.

8.101 Required – Unsecured Claims

- (2445) *Spokane Law Enforcement Federal Credit Union v. Barker*, Case No. 14-60028 (9th Cir. 2016) – Creditor wishing to participate in distributions under Chapter 13 Plan must timely file proof of claim. Fact that Debtor scheduled debt as non-contingent liquidated and undisputed is not sufficient to constitute proof of claim or to excuse creditor's duty to file. Creditor's explanation that "disgruntled employee" did not file Proof of Claim does not excuse late filing.
- (2446) *Warner, Angle, Hallam, Jackson & Formanek, PLC v. Lock*, Case No. 15-1195 (9th Cir. BAP 2016) – In Chapter 11 proceeding, if Debtor's schedules list claim as undisputed, liquidated and non-contingent, claim is deemed allowed as scheduled and creditor is not required to file proof of claim to participate as creditor in case. However, court will not look behind schedules to determine if claim, scheduled as unliquidated, contingent or disputed, is in fact undisputed, liquidated and non-contingent in which case creditor would not have been required to file proof of claim. If a creditor listed as disputed, unliquidated or contingent wants to participate in case, creditor must file claim within claims bar date.
- (2447) *Hutchens v. American Eagle Airlines, Inc.*, 2015 WL 7074624 (W.D. Mi. 2015) – Creditor holding unsecured claim in Chapter 11 proceeding must file proof of claim by deadline or claim will be disallowed. Creditor holding claim for pre-petition wrongful termination failed to file proof of claim by bar date, leading to dismissal of federal court action. Creditor failed to demonstrate any good cause to excuse failure to file where creditor had actual knowledge of bankruptcy case and actual knowledge of bar date, as well as actual knowledge of termination of employment pre-petition. Creditor's argument that he was not aware that termination was potentially unlawful until after the bar date had expired was result of creditor's failure to exercise reasonable diligence as creditor made no effort to determine whether he had cause of action until more than two years after the bar date. Creditor's failure to adequately investigate and pursue rights is not excuse for failure to timely file claim.
- (2448) *In re Pajian*, 598 BR 708 (Bankr. N.D. Ill. 2014), *aff'd* 2015 WL 2182951 (7th Cir. 2015) – Distributions under confirmed plans may be made only on "allowed" claims. Allowed claim under Section 502 is one for which a proof of claim has been filed. Creditor who does not file claim not entitled to payment under plan.

8.102 Failure to File - Priority Claims

- (2449) *Municipality of Carolina v. Gonzalez*, 2013 WL 1629235 (1st Cir. BAP 2013) – Municipality holding priority claim for unpaid municipal

taxes must file proof of claim to participate in Chapter 13 distributions. Where claim is not filed, or claim is untimely filed and disallowed, priority claim will not be paid and will be discharged at successful completion of Chapter 13 plan.

8.103 Contents of Proof of Claim

- (2450) *In re Avery*, 2015 WL 4498181 (Bankr. N.D. Ohio 2015) – Judicial conference, acting under authority provided in Section 501 and Rule 9009, promulgated Form 10 for filing proof of claim. Rule 3001 requires use of proof of claim that conforms substantially to Official Form. Proof of claim must be executed by creditor or creditor's authorized agent and Rule 9011 requires claim to be signed by counsel or claimant. Rule 9007 prohibits disclosure of complete social security number and permits only last four digits. Properly prepared and executed proof of claim is prima facie evidence of validity of claim, and objecting party bears burden to present evidence to rebut presumption. Burden then shifts to claimant to support validity. Debtor has standing to object to claims in Chapter 13 as Debtor's disposable income will be used to satisfy claims. "Claim" consisting only of a copy of a State Court judgment was not proper proof of claim and had no presumption of validity. Claim was not signed to verify truthfulness, and information was generally incomprehensible. Amount claimed appeared to include attorney fees which had not been awarded by State Court although court reserved jurisdiction to award reasonable fees. Claim also appeared to include post-judgment interest but was not clear on methodology used to calculate that amount. Failure to file proper claim does not mandate disallowance of claim, but shifts burden to claimant to prove claim. Claimant's failure to appear at the hearing warranted disallowance for failure to prosecute.
- (2451) *Findling v. Rapoport*, Adv. No. 11-6933 (Bankr. E.D. Mi. 2014) – Proof of Claim for debt based on fraud does not have to state factual basis for claim with particularity. While Rule 7012 requires adversary complaint to plead fraud with specificity, Rule does not apply to proof of claim. However, claim was deficient where claim admittedly included interest, costs and attorney fees yet claim failed to itemize those amounts as required. Claimant's submission many months later of alleged itemization as part of adversary proceeding did not fulfill requirement that claim attach itemization. Rule 3001(c)(2)(A) requires that claim and itemization be filed concurrently to provide transparency in the claim process.
- (2452) *In re Hill*, 2014 WL 801517 (Bankr. E.D. Ky. 2014) – Rule 3001(c) requires that a claim for an open-end or revolving consumer credit agreement attach a statement showing the name of the entity from whom the creditor purchased the account; the name of the entity to whom the debt was owed at the time of the account holder's last transaction; the date of the last transaction; date of last payment on the account; and date on which account was charged to profit and loss. On written request, the holder of the claim must provide a copy of the credit agreement. To extent of Rule 3001(c), the provisions of Rule 3001(a) do not apply, and a proof of claim that attaches the required information is prima facie valid as filed.
- (2453) *In re S&A Dennis Enterprises, Inc.*, 2011 WL 1457204 (Bankr. W.D. N.C. 2011) – Proof of claim must attach sufficient documentation to provide fair notice of the conduct, transaction and occurrences underlying the claim. Account statements are usually sufficient to satisfy most questions about the claim. If a summary is to be employed in lieu of the documents, it should supply equivalent evidentiary import. More is required than the same information contained in the claim form or petition. Conclusory allegations are insufficient. Where the claim has been assigned, either by absolute transfer or for collection purposes, the assignment documents or a summary identifying the basis and particulars of the same should be attached to the claim. Proof of claim did not comply with Rule 3001 where proof of claim only provides the date, the creditor's name and address, an internal reference number, and an account balance. One-page summary that merely restated same information and "account open" date was insufficient to identify the claim or the claimant. Proof of claim did not describe the original cardholder agreement or provide any itemization of charges or specify whether its claim includes "interest or other charges in addition to the principal amount of the claim" or provide "itemized statement of interest or charges". Claims do not provide "fair notice of the conduct, transaction and occurrences that form the basis of the claim." Without making assumptions, a person examining these claims could not ascertain whether a debt is owed or whether the claimant is the proper party to assert it. They do not substantially comply with Rule 3001 or Official Form 10. Deficiency is not basis to disallow claim. However, if objection is filed to claim, the claimant cannot rely on the claim itself but must produce affirmative evidence in support of claim. As to the claimant's identity, the Statement of Accounts contains the briefest of assertions about the relationships: "FIA Card Services, N.A. as successor in interest to Bank of America, N.A. (USA) and MBNA America Bank, N.A. by American InfoSource L.P. as its agent." No details are provided about how FIA is a successor in interest to Bank of America or MBNA. Nor is the agency relationship between AIS and FIA described.

8.104 Contents of Proof of Claim – Rule 3001(c)

- (2454) *White v. McDermott*, 2015 WL 4612349 (E.D. Mi. 2015) – Rule 3001(c)(2)(A) requires that where Debtor is an individual, if the claim includes amounts for interest, fees, expenses or other charged incurred before the petition was filed, an itemized statement shall be filed with the proof of claim. Proof of claim included accounting up through petition date. Creditor's cessation of sending updated statements after petition date is violation of Rule 3001. Creditor also not required to provide accounting and itemization for each payment made prior to petition date.

8.105 Informal Proof of Claim

- (2455) *In re McCutchen*, Case No. 14-11601 (Bankr. N.D. Ok. 2015) – To constitute informal proof of claim in Chapter 7 case, document must be in writing, writing must contain demand by creditor on Debtor's state, writing must express intent to hold Debtor liable, informal proof of claim must be filed with court, and based on facts of case it would be equitable to allow claim. Court will carefully limit informal claims in Chapter 7 given need for prompt determination of claims and distribution of estate. Chapter 7 trustee should not be required to determine whether party who did not file claim intended to seek payment from estate. Adversary filed by creditor against Debtor to deny discharge and to except debt from discharge did not amount to informal proof of claim because nothing in the adversary indicated any intent to hold estate liable for claim. Adversary sought relief only against Debtor and only denial of discharge or dischargeability.

- (2456) *Belser v. Nationstar Mortgage, LLC*, Case No. 14-065 (1st Cir. BAP 2015) – Informal proof of claim is an equitable doctrine that rescues creditors from untimeliness and permits court to treat late filed claim as amendment to timely filed informal claim. Creditor must timely file document with court record that states the existence and amount of the claim and evidences creditor's intent to hold Debtor liable. Objection to confirmation of Chapter 13 plan was document filed with court that asserted status as secured creditor holding first lien on Debtor's property, and set forth the total owed to the creditor. Objection also stated that Debtor's plan that proposed to pay creditor \$10,000 did not provide for adequate treatment of lender's claim. Debtor repeatedly acknowledged creditor's claim multiple places in the schedules as well as the proposed Chapter 13 plan. Combination of events coupled with late filed claim by creditor that matched the objection to confirmation was sufficient to allow objection to serve as informal proof of claim that was later amended by filed proof of claim. Analysis should not be applied formalistically, and issue is one of notice and whether or not a creditor is attempting to introduce a new claim in disguise.
- (2457) *In re Barker*, Case No. 13-1393 (9th Cir. BAP 2014), *aff'd*, Case No. 14-60028 (9th Cir. 2016) – Debtor's listing of claim in schedules does not constitute informal proof of claim that would allow late filed claim to "date back". Informal claim requires that creditor, within time for filing proof of claim, have submitted some written instrument which brings to the attention of the court the nature and amount of the claim. Writing must show a demand made against the estate and evidence intent to hold estate liable. Creditor never made explicit demand in writing for payment of the debt through the estate, precluding finding of informal claim.
- (2458) *In re Dumain*, 2013 WL 1890256 (Bankr. S.D.N.Y. 2013) – Listing of debt to creditor in schedules or provision for claim in plan is not "informal proof of claim". Secured creditor who did not timely file proof of claim not entitled to distributions under confirmed chapter 13 plan.
- (2459) *In re Roman*, 2012 WL 2921507 (Bankr. N.D. Ohio 2012) – Court imposes four requirements for an informal proof of claim: (1) The proof of claim must be in writing; (2) The writing must contain a demand by the creditor on the Debtor's estate; (3) The writing must express an intent to hold the Debtor liable for the debt; and (4) The proof of claim must be filed with the bankruptcy court. Claim filed on pre-December, 2011, Proof of Claim form more than fulfilled requirement for "informal" claim. Even if failure to use new claim form was itself a failure to "substantially comply", court would not exalt form over substance and disallow claim.
- (2460) *PCFS Financial v. Spragin*, Case No. 586 F.3d 450 (6th Cir. 2009) – Rule 3002 generally requires an unsecured creditor to file a proof of claim to participate in distribution in Chapter 7 case. Where creditor fails to file formal proof of claim by bar date, court can allow informal proof of claim where creditor's filing fails to adhere to the formalities of the Code but has filed papers that put all parties on notice that a claim is asserted. The proof of claim must be in writing; the writing must contain a demand by the creditor on the Debtor's estate; the writing must express an intent to hold the Debtor liable for the debt; the proof of claim must be filed with the bankruptcy court and allowing the claim would be equitable to allow the informal proof. Where creditor's lien is invalidated in adversary proceeding under Section 544, creditor has 30 days from the date of the judgment to file a proof of claim for the resulting unsecured debt. Creditor's unexplained and substantial delay in filing a proof of claim and the significant affect that allowing the claim would have on the distribution of the estate rendered it inequitable to allow creditor to assert informal proof of claim. Lender was sophisticated creditor with competent counsel who knew of need to file proof of claim but failed to do so in spite of repeated opportunities to do so.

8.106 Effect of Filed Proof of Claim

- (2461) *In re Shank*, Case No. 11-10480 (Bankr. S.D. Tx. 2017) - Rule 3001 provide creditors with time to file proof of claim and allows Debtor to file proof of claim if creditor does not do so. Proof of claim filed by any party is deemed allowed unless an interested party objects. Proof of claim filed on behalf of mortgage company by Debtor to which no objection was filed is allowed claim. Plan proposed full payment of balance due consistent with proof of claim as filed by Debtor. At conclusion of Plan, Debtor entitled to order deeming mortgage satisfied.
- (2462) *In re Spittler*, Case No. 14-31693 (Bankr. E.D. Mi. 2015) – Proof of claim is presumptively valid. Objection must have probative force equal to contents of claims, and a mere unsubstantiated to object is insufficient. Once objection is filed burden is on objecting party to produce evidence to refute at least one allegation essential to legal sufficiency of claim, at which point burden shifts back to creditor to prove validity of claim.
- (2463) *In re Avery*, 2015 WL 4498181 (Bankr. N.D. Ohio 2015) – Properly prepared and executed proof of claim is prima facie evidence of validity of claim, and objecting party bears burden to present evidence to rebut presumption. Burden then shifts to claimant to support validity. Debtor has standing to object to claims in Chapter 13 as Debtor's disposable income will be used to satisfy claims. "Claim" consisting only of a copy of a State Court judgment was not proper proof of claim and had no presumption of validity. Claim was not signed to verify truthfulness, and information was generally incomprehensible. Amount claimed appeared to include attorney fees which had not been awarded by State Court although court reserved jurisdiction to award reasonable fees. Claim also appeared to include post-judgment interest but was not clear on methodology used to calculate that amount. Failure to file proper claim does not mandate disallowance of claim, but shifts burden to claimant to prove claim. Claimant's failure to appear at the hearing warranted disallowance for failure to prosecute.
- (2464) *Finding v. Rapoport*, Adv. No. 11-6933 (Bankr. E.D. Mi. 2014) – Rule 3001(f) provides that claim executed and filed in accordance with rules constitutes prima facie evidence of validity and amount of claim. Non-compliance does not negate claim in its entirety, but deprives claim of evidentiary presumption. Plaintiff failed to establish debt based on alleged conversion where property allegedly converted belonged to Debtor and not to the creditor. Debtor cannot commit conversion absent evidence that Debtor stole money or was in wrongful possession of money. Defendants did not exert control over property belonging to plaintiff. Plaintiff also failed to establish any fraudulent transfers by Debtor to defendant where plaintiff alleged such a transfer but did not present any evidence of any transfers. Plaintiff also could not prevail on fraud because there was no evidence of any representation by defendant to plaintiff on which plaintiff allegedly relied, which is predicate to any action for fraud.

- (2465) *In re Mace*, Case No. 13-4068 (6th Cir. 2014) – Claim is afforded prima facie validity only if the claimant alleges facts sufficient to support legal liability to the claimant. Facts must support both that Debtor had a legal obligation to claimant and that Debtor's breach of that obligation caused damages. Alleged oral promise by Debtor to creditor to try to obtain release of creditor from guaranty of corporate obligations. Agreement was sufficiently definite to be enforceable. While agreement to obtain release of guaranty could not have been performed because performance would require consent of third party, promise to support contract was not promise to obtain release, but promise to pursue release, actions entirely within control of Debtor. Further, evidence indicated meeting of minds where creditor's testimony was more credible and established that Debtor stated that he promised only to *try* to have creditor released, and Debtor thereafter made significant, if unsuccessful, attempts to do so. Damages constituted amount of judgment suffered by creditor when Debtor failed to obtain release of guarantee and lender thereafter sued creditor for payment.
- (2466) *Wren Alexander Investments, LLC v. Internal Revenue Service*, Case no. 12-50376 (5th Cir. 2013) – Proof of claim is entitled to presumption of correctness. Objecting party must offer evidence sufficient to overcome presumption. IRS proof of claim attached Form 4340 Certificate of Assessment which was sufficient to give rise to presumption. Debtor offered no evidence that assessment was incorrect.
- (2467) *Bavelis v. Doukas*, 490 BR 258 (Bankr. S.D. Ohio 2013), *aff'd* 2013 WL 6672988 (6th Cir. BAP 2013), *aff'd* 773 F.3d 148 (6th Cir. 2014) – Proof of claim executed and filed in accordance with Federal Rules of Bankruptcy Procedure constitutes prima facie evidence of validity and amount of claim. Debtor has initial burden of making a colorable challenge to properly filed proof of claim. Once Debtor meets this burden, burden of going forward shifts to creditor, and creditor bears ultimate burden of persuasion. If Debtor's objection to claim is based on affirmative defense for which Debtor would have burden of proof outside of bankruptcy, Debtor must carry same burden of proof in prosecuting objection.
- (2468) *In re Reed*, 2013 WL 2015984 (Bankr. E.D. Tn. 2013) – Proof of claim executed and filed in accordance with Bankruptcy Rules is prima facie evidence of validity and amount of claim absent objection filed by party in interest.
- (2469) *In re B & P Holdings, Inc.*, 2011 WL 5909669 (Bankr. W.D. Mi. 2011) – Proof of claim is prima facie evidence of validity and amount. Claim based on properly entered final judgment has preclusive effect in the bankruptcy court.
- (2470) *U.S. v. Oscher*, 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.
- (2471) *In re Krause*, 2011 WL 3879480 (Bankr. E.D. Tn. 2011) – If a proof of claim filed by a creditor alleges facts sufficient to support the claim, it is *prima facie* valid. IRS's proof of claim that alleged only that Debtor did not file tax returns but alleged no facts about the Debtor's income did not contain sufficient facts to support claim. Further, Debtor testified that she had lacked employment for the period in question and provided an explanation about how she supported herself during this period and why she could not keep a job. Explanation sufficient to overcome any presumption of validity of IRS claim. Claim disallowed.
- (2472) *In re S&A Dennis Enterprises, Inc.*, 2011 WL 1457204 (Bankr. W.D. N.C. 2011) – Noncompliance with Rule 3001 and Official Form 10 removes the presumption of validity such that the creditor bears both the burden of going forward and the burden of persuasion. If an objection is filed, and the objecting party has a reasonable basis to question the claim or the claimant, the claimant cannot simply rest upon its claim. In these circumstances, if the claimant fails to respond, the objection will be sustained.
- (2473) *In re Dewberry*, 2010 WL 4882016 (Bankr. N.D. Ga. 2010) - Debtor failed to rebut prima facie validity of proof of claim that attached security deed and assignment, which appeared to be properly executed.
- (2474) *In re Bunting*, Case No. 07-20864 (Bankr. E.D. Mi. 2010) – Proof of claim that sets for facts necessary to support claim and is in the proper form – in writing, setting forth the claim, executed by creditor, attaching writings on which the claim is based, and attaching any documents necessary to show perfection of secured claim – is entitled to presumption of correctness. Objecting party then has burden of introducing evidence sufficient to rebut presumption of validity. Review of extensive court proceedings in State Court divorce proceeding indicated that State Court considered and ruled on issues presented in Debtor's objection to claim. Although Bankruptcy Court may have reached a different decision, Bankruptcy Court would not look behind State Court judgment where there was ample evidence in State Court record to support conclusions.
- (2475) *Zino v. Baker*, 2010 WL 3155512 (11th Cir. 2010) - Bankruptcy Court Order allowing plaintiff's claim did not constitute a money judgment that enabled plaintiff to execute levy against assets held in trust for Debtor.

8.107 Deadline for Filing Proof of Claim

- (2476) *In re Norton*, 2017 WL 354320 (Bankr. N.D. Tx. 2017) – Rule 9006 does not permit extension of time for creditor to file proof of claim. However, Rule 9006 does permit extension of time for Debtor to file Proof of Claim under Rule 3004 if Debtor or Trustee shows excusable neglect in failing to file claim timely. Debtor permitted to file claim on behalf of creditor more than 18 months post-petition where creditor held lien on Debtor's automobile, Debtor's plan called for Debtor to retain automobile and pay creditor through Plan, and Trustee had paid claim even though no claim had been filed. Allowing claim would not work hardship to any third party.
- (2477) *In re Herrig*, 2017 WL 2729074 (Bankr. N.D. Ohio 2017) - Secured creditor in Chapter 13 is permitted, but not required, to file proof of claim. Time for filing a proof of claim by secured creditor is governed by Rule 3002(c). Court would not exercise equitable power to allow late filed claim where none of the circumstances under Rule 3002.4 extending deadline applied.
- (2478) *In re Chaban*, 2017 WL 2544346 (E.D. Mi. 2017) – Court can extend deadline before deadline expires, and can extend deadline after expiration on showing of excusable neglect. Whether “neglect” is excusable for purposes of filing proofs of claim depends on whether grant

will prejudice Debtor, length of delay and impact on court administration, whether delay was beyond reasonable control of party whose duty it was to perform, whether creditor acted in good faith, and whether clients should be penalized for counsel's errors. "Excusable neglect" existed to allow entry of order allowing filing of amended claims where Court sustained Debtor's objections to original claim and allowed creditor 7 days to amend but court did not reduce ruling to Order, instead making "text order" on docket. All parties understood at the hearing that the court was allowing creditor 7 days to amend claims and Debtor assented to that process. Fact that Court did not enter written order until sometime later did not change fact that all parties were in agreement with the extension. Failure to enter written order was, at best ministerial act and constituted excusable neglect under facts of case. Later written order merely memorialized earlier ruling.

- (2479) *In re Lewis*, Case No. 16-10780 (Bankr. M.D. Al. 2017) – Deadline for filing Proof of Claim is not extended for 3 days under Rule 9006 where notice of commencement is sent to creditors by US mail. Rule 9006 applies only where action is to be taken within specific time after service by mail. Rule 3002(c) sets deadline for filing claims has 90 days after the first meeting of creditors. Bar date is a function of date set for meeting of creditors without reference to service of anything by mail.
- (2480) *In re Dumbuya*, 2017 WL 486917 (Bankr. N.D. Ohio 2017) - Rule 3002 requires Proof of Claim in Chapter 13 case to be filed within 90 days after date set for first meeting of creditors. Court may enlarge deadline to file proof of claim for limited reasons. Section 501 and Rule 3002 require only unsecured creditors to file proof of claim if claim is to be allowed. Secured creditor in Chapter 13 May, but is not required to, file proof of claim. If creditor wishes to participate in and receive distributions under Chapter 13 Plan, proof of claim must be filed. Instead, secured creditor may choose not to participate in bankruptcy case and enforce lien for satisfaction of debt after completion of bankruptcy case. If creditor elects to file proof of claim, creditor must do so within time permitted under Rule 3002. Proof of Claim filed after expiration of time allowed under Rule 3002 is untimely and must be disallowed.
- (2481) *Warner, Angle, Hallam, Jackson & Formanek, PLC v. Lock*, Case No. 15-1195 (9th Cir. BAP 2016) – In Chapter 11 proceeding, claims bar date is set by Court Order. Court can allow late filed claim in its discretion, based on (1) danger of prejudice to non-moving parties; (2) length of delay and impact on proceedings; (3) reason for delay including whether it was within control of moving party; and (4) whether moving party is acting in good faith. Allowing late claim for more than \$1 million would cause serious prejudice to Debtors where Debtors, after claims bar date had expired, entered into extensive negotiations with largest creditor that produced almost 50% reduction in that claim in exchange for immediate payment. Debtors sufficiently demonstrated that they relied on expiration of claims bar date in negotiating deal with largest creditor and seeking court approval of that settlement. Before creditor sought to file late claim, Debtors had already proceeded well down the settlement path and were faced with serious time constraints imposed by terms of settlement. Debtors demonstrated that had creditor timely filed a claim Debtors would have had other options in dealing with largest creditor and would have been able to avoid issues that arose when creditor tried to file claim for the first time after the bar date and after the deal had been reached with largest creditor. Creditor's claim, filed after bar date, is allowed but shall not be treated for purposes of voting or distribution under Rule 3003(c)(2). Creditor's claim was treated in Debtor's schedules as disputed, contingent and unliquidated, and Court would not look behind schedules to determine if claim was actually undisputed and liquidated in which case creditor would not have been required to file proof of claim. If a creditor listed as disputed, unliquidated or contingent wants to participate in case, creditor must file claim within claims bar date.
- (2482) *In re Tench*, 2016 WL 2858792 (6th Cir. BAP 2016) – Rule 3002 sets deadline for filing proof of claim. There is no authority in Chapter 13 to extend deadline. Rule 9006 does not permit extension of deadline that has already expired. Court cannot allow late filed claim on "general equitable principals" and Section 105 does not allow Court to ignore clearly specified deadline and allow late claim. Equitable tolling also does not provide basis to ignore Rule 3002 deadlines. Further, creditor failed to establish basis for equitable tolling where failure to meet deadline was result of creditor's negligence, where creditor had notice of bankruptcy case 6 weeks before running of bar date but did not make effort to determine bar date until after bar had passed. Creditor had ample time to file claim and failure to do so was due to creditor's own negligence, which does not meet the requirement of diligence on the part of the creditor to warrant equitable tolling.
- (2483) *Enrique Gil-De La Madrid v. Bowles Custom Pools & Spa*, Case No. 14-2340 (1st Cir. 2016) – Rule 3002 requires proof of claim to be filed within 90 days of date first set for meeting of creditors. Rule 9006 allows extension of time only in limited circumstances. However, where case is dismissed before claims bar date and reinstated after claims bar date, creditor will be afforded reasonable additional time to file claim. Alternative would require creditors to file claims in all dismissed cases on the chance that it may be reinstated at some time in the future. Court did not decide whether time should be extended by same number of days that case was dismissed, or merely set new deadline using equitable powers, as creditor filed claim 6 days after reinstatement which would be timely under either approach.
- (2484) *In re Organek*, Case no. 15-5749 (Bankr. W.D. Mi. 2016) – Neither Rule 9006(b)(1) nor rule 3003(c)(3) allows court to enlarge time to file claims in Chapter 13 cases. Rule 9006 applies only to Rule 3002(c) and moving creditor was not governmental creditor or an infant or incompetent, which are only bases to extend bar date under Rule 3002. Rule 3003 applies only in Chapters 9 and 11, and not Chapter 13. Applicable rules and relatively unforgiving deadlines did not allow court to expand bar date to allow creditor to file claim. Request also improperly made on *ex parte* basis, as grant or denial of motion would have impact on other creditors who would be entitled to notice and opportunity to respond.
- (2485) *Hutchens v. American Eagle Airlines, Inc.*, 2015 WL 7074624 (W.D. Mi. 2015) – Creditor holding unsecured claim in Chapter 11 proceeding must file proof of claim by deadline or claim will be disallowed. Creditor holding claim for pre-petition wrongful termination failed to file proof of claim by bar date, leading to dismissal of federal court action. Creditor failed to demonstrate any good cause to excuse failure to file where creditor had actual knowledge of bankruptcy case and actual knowledge of bar date, as well as actual knowledge of termination of employment pre-petition. Creditor's argument that he was not aware that termination was potentially unlawful until after the bar date had expired was result of creditor's failure to exercise reasonable diligence as creditor made no effort to determine whether he had cause of action until more than two years after the bar date. Creditor's failure to adequately investigate and pursue rights is not excuse for failure to timely file claim.

- (2486) *Belser v. Nationstar Mortgage, LLC*, Case No. 14-065 (1st Cir. BAP 2015) – There is no deadline under Rule 3002 for filing of a secured proof of claim. However, if secured creditor wants to participate in distributions under Chapter 13 plan, creditor must file a claim within 90 days of date first set for meeting of creditors, or Debtor must file a claim on behalf of creditor within 30 days after expiration of claims bar date.
- (2487) *In re Pajian*, 598 BR 708 (Bankr. N.D. Ill. 2014), *aff'd* 2015 WL 2182951 (7th Cir. 2015) – Creditor must file claim by bar date in Chapter 13. Late filed claim must be disallowed if objection is filed, even if claim itself is secured. However, disallowance of claim in bankruptcy does not affect lien, which passes through bankruptcy unaffected regardless of whether claim is filed.
- (2488) *In re Stone*, 473 BR 465 (Bankr. M.D. Fl. 2012) – Court cannot exercise equitable discretion to allow late filed claim in Chapter 13 case.
- (2489) *In re Chaney*, 2010 WL 2925083 (Bankr. N.D. Ohio 2010) - Section 502(b)(9) precludes late filed claims in Chapter 13 proceeding. Proof of claim filed one day after bar date must be disallowed. Allegation that Debtor admitted the debt and that objection was filed in "bad faith" attempt to circumvent admittedly valid claim cannot avoid late filed status of claim and claim must be disallowed.
- (2490) *In re Ellison*, Case No. 09-74306 (Bankr. E.D. Mi. 2010) - Stipulation signed by Debtor and creditor to allow late filed claim rejected by Court. Creditor had notice of case and failed to file claim by bar date. Allowing late filed claim would adversely affect all other unsecured creditors.

8.108 Proof of Claim Filed on Behalf of Creditor

- (2491) *Belser v. Nationstar Mortgage, LLC*, Case No. 14-065 (1st Cir. BAP 2015) – Section 501 allows Debtor to file claim on behalf of creditor. Rule 3004 provides that Debtor has 30 days after claims bar date to file protective claim. Creditor cannot later file a claim that supersedes the Debtor filed claim as bar date has already expired, but creditor can file amended claim that amends Debtor filed claim unless allowing amendment would be inequitable. Bankruptcy Court did not err in allowing creditor's amended claim to Debtor filed claim where creditor filed amended claim 6 weeks after Debtor filed claim and only difference was in amount owed and amount of default, and claims were grounded in same right to payment, such that claim was not new or superseding claim.
- (2492) *In re Way*, 2015 WL 5667207 (Bankr. N.D. Ohio 2015) – Rule 3004 allows Debtor to file protective claim within 30 days after expiration of bar date if creditor has not filed a claim on its own behalf. Rule 9006 allows the court to extend deadline after expiration based on excusable neglect. Whether neglect is excusable is equitable finding taking into account all relevant circumstances, including danger of prejudice to Debtor, length of delay and potential impact on judicial process, reason for the delay, whether delay was within reasonable control of movant, and whether movant is acting in good faith. Debtor failed to demonstrate excusable neglect where only basis for creditor's failure to file was an incorrect address for creditor in original schedules. While danger of prejudice weighted in favor of Debtor because debt was non-dischargeable student loan, Debtor's delay of more than 2 years after expiration of deadline was unreasonable. Delay was within control of Debtor as delay resulted from erroneous address in first instance compounded by failure to file claim within time allowed under Rule 3004 once creditor failed to do so.
- (2493) *Municipality of Carolina v. Gonzalez*, 2013 WL 1629235 (1st Cir. BAP 2013) – Under Section 501 and Rule 3004, if creditor fails to timely file proof of claim, Debtor or Trustee may file claim on behalf of creditor. Deadline for filing claim on behalf of creditor is 30 days after expiration of deadline for creditor to file claim in first instance. Proof of claim filed by Debtor on behalf of creditor filed after expiration of 30 day window is untimely and must be disallowed pursuant to Section 502(b)(9).
- (2494) *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).
- (2495) *In re Barker*, Case No. 13-1393 (9th Cir. BAP 2014), *aff'd*, Case No. 14-60028 (9th Cir. 2016) – Court lacks discretion to allow late filed claim in Chapter 13 proceeding.
- (2496) *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.
- (2497) *In re Ketchum*, 2013 WL 3479652 (Bankr. N.D. Ohio 2013) – Section 502 requires disallowance of claim that is not timely filed in Chapter 13. Rule 3002 requires unsecured creditors to file a proof of claim within 90 days after the date first set for the meeting of creditors. Claim filed by holder of mortgage stripped in the plan was untimely where the claim was filed 2 days after the bar date. Creditor could not rely on order in adversary that "The lien on mortgage held by PHH Mortgage Corporation will be treated as an unsecured creditor and the lien will be stripped upon successful completion of the pending Chapter 13 Plan." as a basis for payment of the claim without a proof of claim. Further, Order in adversary did not constitute a judgment that denies or avoids entity's interest in property for purposes of additional 30 days to file claim after entry of Judgment. Proof of claim disallowed as untimely.
- (2498) *Municipality of Carolina v. Gonzalez*, 2013 WL 1629235 (1st Cir. BAP 2013) – Under Section 501 and Rule 3004, if creditor fails to timely file proof of claim, Debtor or Trustee may file claim on behalf of creditor. Deadline for filing claim on behalf of creditor is 30 days after expiration of deadline for creditor to file claim in first instance. Proof of claim filed by Debtor on behalf of creditor filed after expiration of 30 day window is untimely and must be disallowed pursuant to Section 502(b)(9).
- (2499) *In re Jazayeri*, Case No. 11-10107 (Bankr. W.D. Mi. 2012) – There is no provision to allow a late filed claim in Chapter 13. Although creditor did not have notice prior to bar date, resulting in claim being non-dischargeable under Section 523(a)(3), that does not create exception to Section 502(b)(9) requirement that claim be timely filed in Chapter 13.

- (2500) *Michigan Funds Administrator v. DPH Holdings Corp.*, Case no. 11-3782 (2d Cir. 2012) – Court has discretion to determine whether to allow creditor to file claim after bar date. Court must consider whether late claim produces prejudice to Debtor or creditors or whether, if late claim is disallowed, other creditors would receive windfall, and whether creditor acted in good faith and whether the delay was justified. Court concluded that State’s attempt to file late claim would be disallowed where State failed to provide any reasonable explanation for failure to timely file a claim, even if contingent and unliquidated and subject to amendment when the actual tax liability was determined.
- (2501) *In re Rivas*, 2012 WL 122412 (Bankr. E.D. Tn. 2012) – Under Section 726, claims that are not filed by the bar date can be considered “timely” and paid at the same priority as timely filed claims if the creditor did not have notice or actual knowledge of the case in time to timely file a proof of claim. Creditor had actual knowledge of bankruptcy case in time to file proof of claim. However, Court had issued “no asset” notice advising creditors not to file claims and creditor did not file either a claim or a notice of appearance. Court later issued notice of bar date but did not mail copy of that notice to the creditor. Claim was untimely and would be treated as late filed claim. Court’s notice of no assets does not relieve the claimant of the burden to determine the claims bar date and to ensure that a claim is timely filed. Plain language of Section 726 indicates that notice of the case is sufficient to trigger duty to file claim, not notice of a specific bar date. Creditor cannot rely on lack of notice of the bar date, or even a notice not to file claims, to avoid consequences of failure to timely file proof of claim.

8.109 Failure to File Proof of Claim – Court Jurisdiction

- (2502) *Harker v. Countrywide Home Loans, Inc.*, 2010 WL 3908978 (S.D. Ohio 2010) – Where creditor does not file Proof of Claim, court lacks subject matter jurisdiction to enter declaratory relief as to validity or enforceability of underlying agreement. Trustee could not bring action to determine validity, priority or extent of lien based on argument that creditor was not the holder of the claim when the case was filed, as doing so would require court to issue declaratory relief as to what would happen if a claim was filed.

8.110 Amended Proof of Claim

- (2503) *Belser v. Nationstar Mortgage, LLC*, Case No. 14-065 (1st Cir. BAP 2015) – Section 501 allows Debtor to file claim on behalf of creditor. Rule 3004 provides that Debtor has 30 days after claims bar date to file protective claim. Creditor cannot later file a claim that supersedes the Debtor filed claim as bar date has already expired, but creditor can file amended claim that amends Debtor filed claim unless allowing amendment would be inequitable. Bankruptcy Court did not err in allowing creditor’s amended claim to Debtor filed claim where creditor filed amended claim 6 weeks after Debtor filed claim and only difference was in amount owed and amount of default, and claims were grounded in same right to payment, such that claim was not new or superseding claim.
- (2504) *In re Keller*, Case No. 13-1144 (Bankr. W.D. Mi. 2014) – Creditor cannot file amendment to protective proof of claim filed by Debtor. Permitting Creditor to file amendment would impermissibly extend the deadline for creditors to file claims and would bestow on creditors an unintended benefit under Section 501(c) that is a section designed to benefit the Debtor.
- (2505) *Findling v. Rapoport*, Adv. No. 11-6933 (Bankr. E.D. Mi. 2014) – As general rule, amended proof of claim to correct defects or mistakes are liberally allowed. However, “amended” claim will not date back if amendment asserts new claim and it would be inequitable to allow the amendment to date back. Amendment does not assert new claim if amendment arises out of conduct, transaction or occurrence set out, or attempted to be set out, in original claim. Plaintiff’s amended claim properly filed where claim was based on same conduct – Debtor’s actual fraud as to first wife – as original claim. Merely changing claim from non-priority to priority does not constitute filing of new claim. Further, Debtor failed to produce any evidence of prejudice if the claim was allowed, and there was no evidence of undue delay or bad faith by filing creditor. Amendment was first and only amendment filed by creditor. Debtor was fully aware of claim as the underlying issues had been extensively litigated throughout the case. There was no legal issue that claim was properly domestic support obligation. While amendment was filed 11 months after original claim, it was filed only after testimony at trial established domestic support nature of claim and did not either create advantage for plaintiff or disadvantage for Debtor.
- (2506) *Michigan Funds Administrator v. DPH Holdings Corp.*, Case no. 11-3782 (2d Cir. 2012) – Court must carefully review amended proof of claim filed after claims bar date to ensure that amended claim is not a new claim filed under the guise of an amendment. Court must examine whether there was a timely assertion of a similar claim or demand, such that the amendment either corrects a defect in the form of the original claim; describes the original claim with greater particularity; or pleads a new theory of recovery on the same facts set forth in the original claim. State’s claim for unpaid taxes for 2010 did not relate back to state’s earlier, timely filed, claim for unpaid taxes for 2009. Workers compensation assessments depend on total indemnification payments for prior year and aggregate payments made by all self-insurers over same year. Thus, assessment in any one year is not “continuously accruing” but constitute separate, discrete claims from year-to-year.
- (2507) *In re Roten*, 2011 WL 3809946 (Bankr. N.D. Tx. 2011) - Ability of creditor to amend proof of claim following post-petition modification of plan which surrendered collateral and after expiration of claims bar date requires exercise of Court’s equitable jurisdiction. Creditors amended proof of claim to assert deficiency balance on surrendered automobile would be disallowed where creditor waited two years following entry of order approving modification before filing amended form claim. Further, substantial delay in filing amended proof of claim would cause prejudice to other unsecured creditors as claim would be filed on Eve of expiration of Debtors chapter 13 plan and would consume most of base amount which had been set aside for payment of unsecured claims (other than potential deficiency claim) in full.

8.111 Withdrawal of Proof of Claim

- (2508) *In re Masterson*, Case No. 15-12503 (Bankr. N.D. In. 2016) – Withdrawal of proof of claim does not render moot prior order reducing allowed amount of claim. Disallowance or modification of claim after objection shifts burden to creditor to seek reconsideration of claim under Section 502(j) and to show that cause exists to set aside prior decision. Creditor could not avoid adverse ruling on amount of claim by withdrawing original claim and filing amended claim at higher amount rather than filing Motion under Section 502(j) to reconsider.

- (2509) *In re Owens*, 2011 WL 3583249 (Bankr. W.D. Mi. 2011) – Rule 3006 permits creditor to withdraw proof of claim unless an objection to the claim has been filed; or an adversary has been filed against the creditor after the claim has been filed; or the creditor has accepted or rejected a plan; or otherwise participated significantly in the case. Adversary proceeding against creditor instituted prior to filing of claim does not preclude withdrawal of claim. Incidental communications between creditor and trustee regarding status of case do not constitute “significant participation” in case. “Significant participation” requires the creditor to have entered into the bankruptcy case and asked the court to act in some way. Creditor did not request substantive relief from Court in any manner and did not result in proceedings that would render withdrawal of the claim “unfair”. Further, even if creditor did not have right to withdraw claim, court can permit withdrawal where Debtor would not suffer any legal prejudice, and if claim is not withdrawn unfairness to creditors would significantly exceed any prejudice to Debtor from withdrawal.

8.112 Satisfaction of Claim

- (2510) *In re Sciortino*, 2017 WL 395086 (Bankr. W.D. Mi. 2017) – Creditor who filed Notice of Claim Satisfaction rendered claim satisfied and left Debtors no longer liable. Claim will be discharged under Section 1328 although Satisfaction itself terminates Debtor’s liability. Chapter 13 Trustee of relieved of any obligation to make further payments to creditor on account of claim.

C. Objections

8.113 Jurisdiction to Resolve

- (2511) *Ralph Roberts Realty, LLC v. Savoy*, 2016 WL 7655141 (Bankr. E.D. Mi. 2016) – After *Stern*, there are three classes of claims in which the bankruptcy court may enter final judgment: claims that are defined as “core” proceedings where Bankruptcy Court has statutory and constitutional authority to enter final judgment; claims that are defined as “core” proceedings but on which Bankruptcy Courts do not have constitutional authority to enter final judgments absent consent of all parties; and claims that are defined as non-core proceedings and Bankruptcy Courts do not have statutory or constitutional authority to enter final judgments absent consent of all parties. Bankruptcy Court has authority to enter final judgment to enforce agreement between Debtor and investors to share profits from acquisition and resale. Nature of cause of action and status of proceedings afforded Bankruptcy Court authority under any of three alternatives to enter final judgment.
- (2512) *Reed v. Zwick*, 2016 WL 5763863 (Bankr. N.D. Ohio 2016) – 28 USC 1334 grants original jurisdiction to District Court, over all cases arising in or related to cases under Title 11. “Related to” has expansive definition and includes civil proceeding where *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. Proceeding need not be against the Debtor or against the Debtor’s property if the outcome could alter Debtor’s rights, liabilities, options, or freedom of action or in any way impacts handling and administration of bankrupt estate. Fact that estate has no assets does not deprive court of jurisdiction to determine validity or avoidability of claims under Section 523 and Debtor can lodge objection to claim as part of adversary proceeding raising question as to whether creditor even has a claim. Debtor’s adversary proceeding seeking to except student loan from discharge properly raised counts contesting Debtor’s liability in first instance based on Debtor’s assertion that Debtor did not sign the student loan note and that Debtor’s signature was forged. Bankruptcy court has constitutional jurisdiction to adjudicate state law claims that are raised as part of claims process, although jurisdiction may be limited to disallowance of claims rather than affirmative relief by Debtor against claimant. Adversary sought only to disallow claims and did not seek any additional relief from creditor, giving bankruptcy court constitutional jurisdiction. Issues were raised within context of claims objection, and constitute core proceeding over which Bankruptcy Court can issue valid final judgment.
- (2513) *Bavelis v. Doukas*, 490 BR 258 (Bankr. S.D. Ohio 2013), *aff’d* 2013 WL 6672988 (6th Cir. BAP 2013), *aff’d* 773 F.3d 148 (6th Cir. 2014) Resolution of objection to proof of claim is within bankruptcy court’s core jurisdiction and court has constitutional authority to enter final judgment in claims resolution process.
- (2514) *Hagan v. Koviack Irrigation and Farm Services, Inc.*, 2014 WL 5426876 (Bankr. W.D. Mi. 2014) – Court has jurisdiction to enter final judgment in preference action under Section 547. Defendant in action was creditor in case and court cannot complete claim allowance process without first resolving preference action.
- (2515) *Galaz v. Galaz*, 765 F.3d 426 (5th Cir. 2014) – Fraudulent transfer action brought by Debtor based on state law was within court’s jurisdiction as related matter. However, because matter was “related to” rather than core proceeding, Bankruptcy court lacked jurisdiction to enter final judgment and instead should have entered report and recommendations to review by Article III court. Parties cannot stipulate to or consent to entry of final judgment by bankruptcy court as court lacks constitutional authority to enter judgment in non-core proceeding.
- (2516) *Hart v. Southern Heritage Bank*, 2014 WL 1663029 (6th Cir. 2014) – Bankruptcy Court has jurisdiction after *Stern* to enter final monetary judgment in action under Section 523(a)(2). Liquidating claim is inherently part of claims allowance process and did not implicate any state law counterclaims brought by Debtor against creditor and issues of dischargeability are entirely dependent on bankruptcy law and fall within scope of court’s express jurisdiction. Fact that Debtor may have had counterclaims that, if asserted, may have caused *Stern* issue did not change outcome where Debtor did not assert those counterclaims in Section 523 action.
- (2517) *Cai v. Shenzhen Smart-In Industry Co.*, Case No. 12-56656 (9th Cir. 2014) – Bankruptcy Court has jurisdiction after *Stern* to enter final monetary judgment in action under Section 523(a)(2). Liquidating state law counterclaim is inherently part of claims allowance process and issues of dischargeability are entirely dependent on bankruptcy law and fall within scope of court’s express jurisdiction.
- (2518) *In re Royal Manor Management, Inc.*, 2013 WL 1310881 (Bankr. N.D. Ohio 2013) – Court has jurisdiction to enter sanctions under 28 USC Section 1927 based on unreasonable and vexatious litigation arising out of an objection to claim. Federal courts have inherent authority to enter sanctions to protect integrity of the court and to preclude abuse of the litigation process.
- (2519) *Waldman v. Stone*, 2012 WL 5275241 (6th Cir. 2012) – Bankruptcy Court had authority to disallow claim where claim resulted from creditor’s

own fraud perpetrated on the Debtor. Although the Debtor's claims against creditor did not themselves arise under federal law (all were based on state law fraud), even a state law claim can be asserted and adjudicated by bankruptcy court as a defense to a claim asserted by the creditor, as it relates to the bankruptcy case and is at least related to the bankruptcy case as the outcome "conceivable" has an impact on the outcome of the case. However, Bankruptcy court lacked jurisdiction to enter further judgment in favor of Debtor and against creditor awarding damages arising out of that same fraudulent conduct. Article III, Section 1 of the Constitution vests jurisdiction for non-bankruptcy matters exclusively in the District Court. Issue to be adjudicated involved one solely of "private rights" that exist outside of and independent of the bankruptcy code. Affirmative claims required proofs beyond those necessary to resolve objection to claim itself, and included both actual and punitive damage claims. Case remanded for Bankruptcy Court to convert judgment into proposed findings of fact and conclusions of law for review and action by District Court.

- (2520) *In re Borin*, Case no. 11-3122 (Bankr. W.D. Mi. 2012) – Bankruptcy court has jurisdiction to resolve objections to claims as "core" proceedings and to enter final judgments on objections to claims. Resolution of claims allowance process is integral to the restructuring of Debtor-creditor relationships within scope of Bankruptcy Code and Court's decision in *Stern*.

8.114 Standing to Object

- (2521) *In re Ferguson*, Case No. 14-30604 (Bankr. W.D. Mo. 2017) - State Court judgment entered by consent between creditor and Debtor does not prohibit Trustee from later objecting to claim. *Rooker-Feldman* which prohibits party to State Court, Judgment from seeking Federal Court review of correctness of judgment does not apply as Trustee was not a party to State Court lawsuit. Collateral estoppel applies only when a judgment is rendered on merits. Under Missouri law, consent judgment is not judgment on the merits as issues were not "actually litigated". Res judicata requires that parties be identical or in privity. Bankruptcy Trustee owes duty to estate and is not in privity with either Debtor or creditor, such that res judicata did not preclude Trustee's objection to claim. Trustee entitled to present evidence in support of objection to claim to show that claims should be disallowed in whole or in part.
- (2522) *In re Kent*, Case No. 14-31499 (Bankr. E.D. Mi. 2017) – Debtor in Chapter 7 has standing to object to claims where estate may be solvent with surplus remaining for distribution to Debtor if objection to claim is sustained. Standing requires (1) actual or threatened injury; (2) injury can be traced to challenged conduct or action; and (3) injury may be redressed by favorable decision. Debtor must have actual pecuniary interest to demonstrate "actual or threatened injury". Debtor is not required to demonstrate absolutely that estate will be solvent, only that there is reasonably potential for surplus if objection is sustained. Debtor's objection raised factual issues which indicate that disallowance of claim is possibility.
- (2523) *Mandel v. Mastrogiorganni, Schorsch & Mersky*, Case No. 15-40864 (5th Cir. 2016) – Debtor in Chapter 7 normally lacks standing to object to proofs of claim or to appeal from orders allowing claims. However, where claim is also subject of adversary proceeding to except debt from discharge, and claim allowance would be binding on Debtor in any post-bankruptcy action if debt is excepted from discharge, Debtor is sufficiently "person aggrieved" for purposes of standing. "Person aggrieved" standard requires that person show direct and adverse impact of decision on person's pecuniary interest. Debtor's possible exposure if debt is excepted from discharge constitutes direct and adverse impact.
- (2524) *In re Avery*, 2015 WL 4498181 (Bankr. N.D. Ohio 2015) – Debtor has standing to object to claims in Chapter 13 as Debtor's disposable income will be used to satisfy claims.
- (2525) *Simon v. Miller*, 2015 WL 4459368 (Bankr. E.D. Mi. 2015) – Creditor with allowed claim has standing to object to claim filed by another creditor. Allowance or disallowance of claim would impact distribution to objecting creditor giving creditor sufficient pecuniary interest.
- (2526) *Kahn v. Regions Bank*, 2013 WL 5942052 (6th Cir. 2013) – Standing to object to claim requires that objecting party have a pecuniary interest in outcome of objection. Debtor lacked pecuniary interest in objection to claim where estate was insolvent such that regardless of whether objection to claim was sustained, Debtor would not receive any distributions from estate.
- (2527) *In re B & P Baird Holdings, Inc.*, 2011 WL 5909669 (Bankr. W.D. Mi. 2011), *aff'd* 2012 WL 4501016 (W.D. Mi. 2012) – Debtor's principals lacked standing to oppose Trustee's resolution of objection to creditor's claim. Estate was administratively insolvent, such that principals lacked any pecuniary interest in outcome of objection.
- (2528) *Simmerman v. Ocwen Financial & Mortgage Services, Inc.*, 463 BR 47 (Bankr. S.D. Ohio 2011) – Debtor may object to a proof of claim when the Debtor has a valid basis for questioning the creditor's alleged ownership of the claim or the enforceability of the claim against the Debtor outside of bankruptcy. Debtor is not judicially estopped from objecting to claim where Debtors received notice of change in servicer after prior bankruptcy case had been filed. Debtor's mere failure to object does not constitute an affirmative statement by Debtor on which the prior court relied, which is the standard for judicial estoppel.
- (2529) *In re Liber*, 2012 WL 1835164 (Bankr. N.D. Ohio 2012) – Trustee could not object to creditor's claim where claim was subject of valid State Court judgment. Although Trustee may have had valid argument as to why Debtor should not have been liable for debts arising out of corporation's liquidation of ERISA qualified pension plan, as it appeared that Debtor did not have "effective control" over corporate entity, Trustee precluded from disputing debt as creditor had already obtained Judgment in United States District Court against Debtor individually as a person in "effective control". Default judgment is nonetheless entitled to res judicata effect where there was no evidence that the District Court judgment was improper or the result of fraud or collusion and defendant had full knowledge of pendency of action but chose not to appear or defend.
- (2530) *Richardson v. Deutsche Bank National Trust Co.*, 2012 WL 1941846 (Bankr. W.D. MI. 2012) – Trustee lacks standing to contest validity of assignment of mortgage.

- (2531) *Kahn v. Regions Bank*, 2011 WL 6179941 (Bankr. E.D. Tn. 2011), *aff'd*, Case No. 12-6567 (6th Cir. 2013) – Debtor in “no asset” Chapter 7 lacks standing to object to claims. Creditor’s filing of proof of claim does not create standing in favor of Debtor to either object to claim or to seek to void lien held by creditor. Filing of proof of claim does not create or enhance rights or positions of creditors. Fact that lien is against property that Debtor claimed as exempt and will retain following bankruptcy does not create standing in favor of Debtor. Based on Debtor’s schedules, Debtor’s estate has no possibility of producing surplus as Debtor’s assets are clearly insufficient to satisfy creditors.
- (2532) *In re B & P Holdings, Inc.*, 2011 WL 5909669 (Bankr. W.D. Mi. 2011) – Shareholder of corporate Debtor has standing only if shareholder can show that outcome of objection will directly impact shareholder’s pecuniary interest. Where corporate is insolvent regardless of outcome of claim objection, Shareholder lacks standing and objection will be summarily denied.
- (2533) *In re Solis*, 2010 WL 2696518 (7th Cir. 2010) – Chapter 7 Trustee has standing to object to claim by Debtor’s pre-petition State Court counsel for unpaid attorney fees, notwithstanding that the trustee was not a party to the fee agreement; and that a portion of the fees were calculated on a partial recovery of money received by the Debtor pre-petition and which never became property of the estate. Bankruptcy Trustee acts as the Debtor’s representative and has full standing to contest claims filed in the estate.
- (2534) *In re Porrello*, Case No. 07-10053 (Bankr. N.D. Ohio 2009) – In most cases, a chapter 7 Debtor lacks standing to object to a proof of claim. A Debtor may file an objection to a proof of claim if: 1) there are sufficient assets to pay all administrative expenses and creditors in full; or 2) the claim involved may not be discharged. If the debt is not discharged, the Debtor becomes a party in interest as he or she would have a direct pecuniary interest in the outcome of the action. Debtor had standing to prosecute objection where Debtor was denied a general discharge and is not released from personal liability for any pre-petition obligation.
- (2535) *In re Malsch*, 2009 WL 1657475 (Bankr. N.D. Ohio 2009) – Only “party in interest” has standing to object to proof of claim. Party in interest is one who has actual pecuniary interest in outcome. Debtor in Chapter 7 normally is not party in interest for purposes of objecting to claims. However, Debtor will have standing if there are sufficient assets available for distribution to pay all administrative expenses and creditors in full and objection to a proof of claim will increase the surplus available to Debtor; or Chapter 7 Debtor may object to any claim for which the underlying debt is non-dischargeable.

8.115 Service of Objections

- (2536) *Monk v. LSI Title Company*, 2013 WL 4051864 (Bankr. D. Ore. 2013) – Objection to proof of claim must be served in accordance with Rule 7004. Objection mailed to address on proof of claim for notices failed service requirements of Rule 7004 and failed to satisfy due process, such that resulting order was void.

8.116 Time for Filing – Laches

- (2537) *In re Jackson*, Case No. 09-33790 (Bankr. E.D. Mi. 2015) – Laches is equitable doctrine that precludes a party from seeking relief where the party has negligently or unreasonably failed to protect one’s rights. Laches requires (1) lack of diligence by party in protecting interests; and (2) prejudice to opposing party if opposing party is now allowed to assert claims. Debtor’s objection to proof of claim overruled for laches where proof of claim was filed before confirmation of chapter 13 plan yet Debtor waited until more than five years later, after plan expired, to file objection. During plan period, Debtor’s counsel received the Trustee’s reports and should have been aware that Trustee was paying creditor pursuant to the filed proof of claim, and counsel had numerous opportunities to address claim both pre-confirmation and post-confirmation, yet counsel failed to do so until after plan expired. Allowing objection to claim more than five years after claim was filed, and after plan term expired, would necessarily prejudice creditor if the objection to claim was sustained.

8.117 Objection – Deadline for Responding

- (2538) *In re Vernon*, 2016 WL 110072 (Bankr. W.D. Ky. 2016) – Rule 3007 requires that a hearing date be set and that creditor be allowed 30 days to respond to the objection. Section 592(j) and Rule 3008 allow court to reconsider claim that was allowed or disallowed for cause. Order disallowing claim entered less than 30 days after service of objection set aside as creditor was given inadequate time to respond.
- (2539) *In re Thiel*, 2015 WL 4480390 (Bankr. W.D. Ky. 2015) – Court reconsidered claim under Rule 3008 where creditor attempted to timely file response but ECF error prevented filing, and creditor then refiled response the day after the response was due and 7 minutes after the court entered its order sustaining the objection based on the lack of response. Creditor acted diligently when it attempted to timely file the response, discovered the error within 24 hours, and immediately requested that the court grant leave to file the response and to reconsider the order disallowing the claim. Trustee who filed objection to claim could not demonstrate any prejudice and given very short time frames, there could have been no prejudice.

8.118 Procedural Requirements

- (2540) *In re Robinson*, 2015 WL 1263357 (Bankr. N.D. Ohio 2015) – Debtor’s objection to claim sustained and claim stricken where objection alleged that claim was not Debtor’s debt as Debtor was incapacitated at time debt incurred, and debt was incurred fraudulently, and creditor failed to file response or to appear for hearing. However, court would not order creditor to return funds paid by Chapter 13 trustee where payments were made at time when claim was filed and outstanding. Further, any request to compel creditor to return funds must be brought through an adversary proceeding, not as ancillary relief on objection to claim.
- (2541) *In re Atkinson*, Case 04-69315 (Bankr. E.D. Mi. 2010) – Objection to Claim failed to provide proper notice where Notice of Objection stated that responses were due not later than 10 days prior to hearing. Under Local Rules effective December 1, 2010, deadline for response is not less than 7 days prior to hearing. Movant’s failure to serve Notice that complied with Local Rule required Court to overrule objection to claim without prejudice.

- (2542) *In re Fawaz*, Case No. 08-45255 (Bankr. E.D. Mi. 2010) – Objection to Claim failed to provide proper notice where Notice of Objection stated that responses were due not later than 10 days prior to hearing. Under Local Rules effective December 1, 2010, deadline for response is not less than 7 days prior to hearing. Movant’s failure to serve Notice that complied with Local Rule required Court to overrule objection to claim without prejudice.

8.119 Burden of Proof

- (2543) *In re Avery*, 2015 WL 4498181 (Bankr. N.D. Ohio 2015) – Properly prepared and executed proof of claim is prima facie evidence of validity of claim, and objecting party bears burden to present evidence to rebut presumption. Burden then shifts to claimant to support validity. Debtor has standing to object to claims in Chapter 13 as Debtor’s disposable income will be used to satisfy claims. “Claim” consisting only of a copy of a State Court judgment was not proper proof of claim and had no presumption of validity. Claim was not signed to verify truthfulness, and information was generally incomprehensible. Amount claimed appeared to include attorney fees which had not been awarded by State Court although court reserved jurisdiction to award reasonable fees. Claim also appeared to include post-judgment interest but was not clear on methodology used to calculate that amount. Failure to file proper claim does not mandate disallowance of claim, but shifts burden to claimant to prove claim. Claimant’s failure to appear at the hearing warranted disallowance for failure to prosecute.
- (2544) *In re Hill*, 2014 WL 801517 (Bankr. E.D. Ky. 2014) – Filed proof of claim is allowed unless party in interest objects. If an objection is filed, the court must determine the amount of the claim and allow the claim except to the extent the claim is unenforceable against the Debtor under any agreement or applicable law. Rule 3001(c) requires that a claim for an open-end or revolving consumer credit agreement attach a statement showing the name of the entity from whom the creditor purchased the account; the name of the entity to whom the debt was owed at the time of the account holder’s last transaction; the date of the last transaction; date of last payment on the account; and date on which account was charged to profit and loss. On written request, the holder of the claim must provide a copy of the credit agreement. To extent of Rule 3001(c), the provisions of Rule 3001(a) do not apply, and a proof of claim that attaches the required information is prima facie valid as filed. Debtor’s objection that Debtor did not owe money to the entity filing the proof of claim did not defeat prima facie validity of the claim that complied with Rule 3001(c). Neither the creditor nor the Trustee had obligation to prove validity where Debtor did not present evidence sufficient to overcome presumption. Debtor’s objection to creditor’s standing based on alleged failure to attach documents was legally insufficient, as the objection did not raise good faith dispute about ownership of claim. Debtor’s objection only stated that they had no relationship with the creditor but did not present factual evidence to support either that Debtors owed money to someone else, or did not owe any money at all.
- (2545) *In re Calhoun*, 2013 WL 2403858 (Bankr. E.D. Tn. 2013) – Proof of claim is deemed allowed unless a party in interest objects. Proof of Claim executed and filed in accordance with rules constitutes prima facie evidence of validity of claim. Objection based on failure to follow rules is not sufficient to disallow claim, but does affect evidentiary effect of proof of claim. Claim failed to attach any documentation to support claim and, to extent claim was based on revolving charge, claim failed to attach documents required by Rule 3001(c). Claim lacked any evidentiary value and would be disallowed where creditor failed to produce any evidence in support of claim.
- (2546) *Bavelis v. Doukas*, 490 BR 258 (Bankr. S.D. Ohio 2013), *aff’d* 2013 WL 6672988 (6th Cir. BAP 2013), *aff’d* 773 F.3d 148 (6th Cir. 2014) – Proof of claim executed and filed in accordance with Federal Rules of Bankruptcy Procedure constitutes prima facie evidence of validity and amount of claim. Debtor has initial burden of making a colorable challenge to properly filed proof of claim. Once Debtor meets this burden, burden of going forward shifts to creditor, and creditor bears ultimate burden of persuasion. If Debtor’s objection to claim is based on affirmative defense for which Debtor would have burden of proof outside of bankruptcy, Debtor must carry same burden of proof in prosecuting objection. Where Debtor admitted signing promissory note on which claim was based, Debtor had burden to prove any affirmative defense to the obligation to pay the note.
- (2547) *In re Hamade*, 2013 WL 663736 (Bankr. E.D. Mi. 2013) – Creditor had burden to prove amount of claim where claim was based on equipment allegedly on premises leased by Debtor from creditor but not in premises after Debtor vacated. Creditor was not able to produce accurate inventory of items in premises at commencement of lease and did not take inventory until sometime after eviction when property had been left empty and suffered significant damage. However, for items where Debtor did not have specific challenge other than to argue, without testimony, that creditor overvalued missing items, Debtor failed to rebut prima facie evidence of claim, and claim would be allowed as filed.
- (2548) *In re Borin*, Case No. 11-3122 (Bankr. W.D. Mi. 2011) – Although Proof of Claim carries prima facie evidence of claim, that can be rebutted by evidence offered by Debtor. If Debtor rebuts presumption, then burden shifts back to creditor to establish validity, priority and extent of claim.
- (2549) *Hunsdon v. Batmanghelich*, 2010 WL 1258213 (9th Cir. 2010) – Objection to Claim overruled where objecting party failed to produce any evidence to rebut claim’s *prima facie* validity.
- (2550) *American Express Bank v. Askenaizer*, 418 BR 495 (1st Cir. BAP 2009) – Rule 3001(f) provides that a proof of claim that complies with the requirements of the Rule and Official Form 10 constitutes prima facie validity of the claim. Burden then shifts to objecting party to provide substantial evidence in opposition to claim. At that point, burden shifts back to creditor to prove claim by preponderance of evidence. Creditor seeking administrative treatment has burden of proving elements that qualify claim for that status.
- (2551) *Ward v. Pulito*, Case No. 09-1275 (9th Cir. BAP 2010) – Proof of claim filed pursuant to Section 502 is presumed valid. Objections to Proofs of Claim are limited to grounds set forth in Section 502(b). If claim does not fit within one of the exceptions in 502(b), the claim must be allowed.

- (2552) *Floyd v. Bloch*, Case No. 09-20299 (5th Cir. 2010) – Claims filed by creditor who is insider of Debtor will be subjected to greater scrutiny. Claim filed by Debtor’s mother, supported only by affidavit signed by Debtor and various handwritten notes was not sufficient to establish legally enforceable debt where claim failed to attach a written, signed copy of the alleged credit agreement and because of the age of the agreement, enforcement would be barred by state statute of frauds.
- (2553) *In re Roberts*, 2009 WL 2169218 (Bankr. N.D. Ohio 2009) – Proof of claim executed and filed in accordance with bankruptcy will 3001 constitutes prima facie evidence of the validity and amount of the claim. Party objecting to claim must come forth with evidence to defeat a properly filed proof of claim. The evidence must be sufficient to demonstrate a true dispute and must have probative force equal to the contents of the claim. Debtor’s objection to proof of claim denied where Debtor filed objections but failed to appear at the hearing and failed to offer any evidence, testimonial or documentary, to refute the proof of claim.
- (2554) *In re Wells*, 2009 WL 1872401 (Bankr. N.D. Ohio 2009) – Bankruptcy Rule 3001 requires a claim based on writing to include a copy of the writing and evidence of perfection. A proof of claim that does not attach documents necessary to support the claim is not entitled to the presumption of prima facie validity but is not, standing alone, a basis to disallow the claim. There must be an underlying factual dispute as to the validity, ownership or amount of a claim for a Court to disallow or reduce a claim. Promissory Note attached to proof of claim was payable to third party and proof of claim failed to attach proof that the Note had been endorsed to party filing proof of claim. Party filing proof of claim lacked standing to file claim.

8.120 Burden of Proof – Insider as Creditor

- (2555) *In re Inner City Properties, LLC*, 2016 WL 5498688 (Bankr. S.D. Ohio 2016) – When creditor is insider of Debtor, insider bears heavy burden of proof and claim will be carefully scrutinized. Claimant was mother of Debtor’s sole partner and manager and as such constituted “insider” as defined in Section 101(31). Creditor filed claim for \$1,331,224.80. Claim reduced to \$240,000 as many of the checks that were allegedly loans to LLC were made to Debtor’s son directly and not to LLC, and many of them predated either the formation or activity of the LLC. Court would not ignore corporate distinction between son and LLC for purposes of imposing liability on LLC, even if LLC ultimately ended up with loan proceeds. LLC not liable for promoter’s pre-petition contracts where agreements were not executed on behalf of LLC but were signed by creditor’s son individually and reflected loans to son. Creditor did not understand that she was lending to LLC or that son was acting on behalf of LLC. After formation, LLC never formally adopted loan agreements or received benefits of agreements from creditor but would have received funds, if at all, only from creditor’s son. Creditor and son attempted to characterize transactions in way that would benefit creditor and prejudice LLCs arms-length creditors, which is the reason for the heightened burden of proof on insider transactions. Claim reduced to \$240,000 representing proceeds actually advanced by Creditor or for benefit of LLC at request of LLC.

8.121 Calculation of Amount of Claim

- (2556) *Stratton v. Portfolio Recovery Associates, LLC*, 2014 WL 5394517 (6th Cir 2014) - When original lender enters into agreement with borrower to waive right to collect interest on debt, later debt buyer is bound by that agreement and cannot charge either statutory or contract interest. Debt buyer who acquired debt after lender waived interest violated Fair Debt Collection Practices Act when debt buyer later attempted to collect debt plus statutory interest as attempting to collect interest when not permitted by law.
- (2557) *Casteel v. Cornerstone Community Bank*, 2013 WL 4790540 (Bankr. E.D. Tn. 2013) – Claim of lender will be reduced by amounts actually paid to lender by third party, but not by amounts that third party promised to pay but has not yet paid.
- (2558) *In re Mead*, 2013 WL 64758 (Bankr. E.D.N.C. 2013) – IRS discriminated against Debtor when IRS refused to abide by pre-petition Offer in Compromise. Prior to commencement of bankruptcy, Debtor entered into OIC to repay liabilities in the reduced amount of \$4,000, to be paid in four quarterly installments. IRS accepted the offer and Debtor made one payment before filing bankruptcy. IRS filed claim in Debtor’s case for full tax liability and Debtor objected. IRS could not disregard OIC merely because Debtor filed bankruptcy, as IRS would not revoke OIC under similar circumstances for non-bankrupt taxpayer. Congress prohibited all discriminatory treatment based solely on bankruptcy filing, and that would include any effort by IRS to revoke OIC based on bankruptcy filing.
- (2559) *In re Borin*, Case No. 11-3122 (Bankr. W.D. Mi. 2011) – Debtor rebutted presumption of validity of proof of claim by producing evidence of payments totaling \$14,400 made by Debtor but not credited by the mortgagee. Mortgagee also failed to produce evidence to show how late charges may have been calculated or how failure to credit payments may have impacted that calculation, particularly where testimony of Debtor established that payments were not late but were only reduced in accordance with lender’s instructions regarding trial loan modification. Debtor made earnest and honest effort to meet obligations to lender by seeking modification of mortgage following serious injury and fire at property. Lender returned favor by dodging inquiries, failing to apply payments, imposing late fees after they induced Debtor to make reduced mortgage payments, ignoring counsel’s inquiries, and finally failing to send a witness to the claim objection hearing.
- (2560) *In re Kaid*, 2012 WL 1929906 (Bankr. E.D. Mi. 2012) – Amount owed on guarantee depends on amount owing on underlying obligation, even if State Court has already entered judgment liquidating amount owed on guaranty. Debtor entitled to credit against balance owed on guarantee by amount of successful bid at foreclosure sale. Debtor entitled to full credit of bid amount even where creditor holding the guarantee was not the creditor holding the note and mortgage and even though creditor did not receive benefit of sale price at foreclosure sale.
- (2561) *In re Brooks*, 2011 WL 5593084 (Bankr. N.D. Ohio 2011) – Debtor could not object to proof of claim based on alleged pre-petition agreements by creditors to accept a reduced amount in exchange for regular payments. Pre-petition agreement to reduce balance is not legally enforceable as the borrower does not give any valid consideration for agreement. Borrower’s agreement to pay what borrower already owes is not consideration to support agreement. Even if agreements had been enforceable, Debtor made only one payment before filing bankruptcy, constituting breach of the agreement and allowing creditors to fully enforce claims.

- (2562) *Bauer v. Gilmartin*, Case No. 11-6014 (8th Cir. 2011) – Plaintiff supported action under Section 523 for fraud. Debtor made fraudulent representations concerning investment in LLC where Debtor, the managing partner of the LLC, represented that the LLC was financial sound when, in fact, the LLC was experiencing severe cost overruns and financial distress and at the same time Debtor removed \$20,000 from LLC without authorization and without informing Plaintiff. Plaintiff was unable to prove measure of damages using “benefit of bargain” test as Plaintiff could not prove whether or to what extent LLC would have been profitable but for the actions of the Debtor. Court concluded that where Plaintiff could not prove “benefit of bargain”, Court could use “out of pocket” rule for determining amount of non-dischargeable claim. Court would liquidate claim amount based on funds invested following Debtor’s alleged fraudulent conduct.
- (2563) *Barracco v. JPMorgan Chase Bank, N.A.*, 2011 WL 3329755 (E.D. Mi. 2011), *aff’d* 2012 WL 3198531 (6th Cir. 2012) – Where State Court has confirmed arbitration award that determined that Debtor was not indebted to creditor, Full Faith and Credit Statute, 28 USC Section 1738, requires that Bankruptcy Court honor the arbitration award.
- (2564) *Jacks v. Wells Fargo Bank*, 2011 WL 2183979 (11th Cir. 2011) – Creditor’s recording of fees and costs on internal records without including those fees and costs on proof of claim does not constitute basis to object to claim.
- (2565) *In re Saffron*, Case No. 10-9180 (Bankr. W.D. Mi. 2011) – Divorce judgments in Michigan do not accrue statutory interest unless Court exercises equitable jurisdiction to award interest. Party not entitled to attorney fees in divorce proceeding unless specifically awarded by Court. Proof of Claim founded on Divorce Judgment that included interest and attorney fees disallowed to extent of interest and attorney fees where documents attached to Proof of Claim failed to evidence entitlement.
- (2566) *In re Perkins*, Case No. 09-32328 (Bankr. E.D. Mi. 2010) - Rooker-Feldman does not preclude Bankruptcy Court from reconsidering amount of claim where State Court Judgment was a default judgment and the State Court calculations of damages appears to result from mistake. State Court Judgment contained numerous mathematical errors as result of Court’s failure to calculate “cost to cover” for undelivered goods, failed to credit Debtor certain amounts, and failed to account for payments made by Debtor. Claim which stated amount based on erroneous State Court judgment disallowed without prejudice to creditor filing amended claim to correct mathematical errors.
- (2567) *MacDonald v. Gunther*, Case No. 08-8108 (6th Cir. BAP 2009) – Arbitration award confirmed by an appropriate court is entitled to same preclusive effect as would be given to a decision of that court. Res judicata and collateral estoppel prevent a party from attempting to relitigate in Federal Court matters that were or should have been advanced in the prior action. Allocation of costs and expenses of arbitration is necessarily one of the matters decided by the arbitrator. Although parties had pre-arbitration agreement concerning allocation of costs and expenses, parties failed to present that agreement to the arbitrator and the arbitrator did not award costs or expenses in the award. Creditor’s claim for arbitration costs and expenses based on the pre-arbitration agreement is barred. Claim allowed for the amount awarded by the arbitration and denied as to any additional costs or expenses.
- (2568) *Lindsay v. Covenant Management Group, LLC*, 561 F.3d 601 (6th Cir. 2009) – In determining validity and amount of proof of claim, Court applies applicable state law. Claim which objected to interest charged on loan discount fee would be overruled. Party’s loan agreement included discount fee which Debtor elected to finance and on which Debtor agreed to pay interest. “Discount fees” are not, in and of themselves, “interest” which would be subject to Michigan law which prohibits charging interest on interest. Further, lender not required to apply extension fee as a principal reduction. The Loan Modification Agreement plainly listed the fee as consideration for lender’s six-month forbearance and agreement to subordinate mortgage on Debtor’s residence.
- (2569) *In re Roberts*, 2009 WL 2169218 (Bankr. N.D. Ohio 2009) – Court must determine the amount of claim as of the date the petition filed in accordance with applicable state law. Proof of claim executed and filed in accordance with Bankruptcy Rule 3001 constitutes prima facie evidence of the validity and amount of the claim. Party objecting to claim must come forth with evidence to defeat a properly filed proof of claim. The evidence must be sufficient to demonstrate true dispute and must have probative force equal to the contents of the claim.

8.122 Grounds – Technical Error

- (2570) *In re Margoni*, 2014 WL 4430036 (Bankr. W.D. Mi. 2014) – Technical defect in claim does not automatically disqualify claim. Clerk’s notice that claim incorrectly listed creditor’s name where the Debtor’s name should have been was not objection to claim and did not result in disallowance of claim. Claim remained on file and clerk did not purport to strike the claim but rather filed notice to correct the filing designed to encourage creditor to amend claim.

8.123 Grounds – Fraud on Court

- (2571) *Followell v. Mills*, 2009 WL 723132 (6th Cir. Tn. 2009) – Bankruptcy Court has authority to inquire into the validity of the claim which is based on a judgment of another Court to the same extent that Bankruptcy Court could have reconsidered or vacated its own prior judgment. If Bankruptcy Court finds that claim is based on judgment which had been procured by fraud on Court, Bankruptcy Court has the power to retroactively refuse to allow the claim. Fraud on Court argument requires conduct on the part of an attorney or other officer of the Court directed to the “judicial machinery” that was either intentionally false or undertaken with willful blindness to one reckless disregard for the truth and constituted either a positive allegation or a concealment under circumstances that gave rise to a duty to disclose and where the fraud actually deceived the Court. Fraud on the Court will be sufficiently serious to set aside a judgment only if the fraud “actually subvert[ed] the judicial process”. Record failed to disclose that Florida bankruptcy judgment entered in Chapter 7 proceeding of Debtor’s husband was invalid or unenforceable. Proposed settlement of claims against wife in husband’s Chapter 7 proceeding was not binding where settlement was expressly made conditional upon approval by Florida bankruptcy Court and Florida bankruptcy Court never approved that settlement. Therefore, alleged settlement which would have resulted in claims substantially less than the amount asserted did not prohibited or limit creditor’s assertion of a claim for the full amount allegedly due and creditor’s claim for the full balance did not amount to “fraud on Court.”

8.124 Grounds – Failure to Attach Documents Generally

- (2572) *Kohout v. Nationstar Mortgage, LLC*, Case No. 15-80004 (Bankr. N.D.N.Y. 2016) – Secured creditor not required to file claim in bankruptcy case and can enforce lien after conclusion of case. If creditor files claim, Debtor may substantively challenge claim under Section 502. Statutory bases under Section 502 to disallow claim do not include lack of documentation, but will disallow claim if the claim unenforceable against the Debtor or property of the Debtor. If the claim is disallowed in whole or in part, the claim is not secured to extent of the disallowance and would be bifurcated into secured and unsecured portions consistent with the disallowance process. Claim that is disallowed for reasons other than those specified in Section 502, such as procedural infirmities including late filed and lack of supporting documents, is not “void” for purposes of Section 506 and, therefore, is not void even if proof of claim is disallowed. Court distinguished *Blendheim* as objection in *Blendheim* was based on alleged forgery of mortgage and note which would render note and mortgage legally unenforceable, while objection to claim in this case was predicated solely on failure to attach documents and did not raise any substantive defect in or defense to the enforcement of the note and mortgage.
- (2573) *Findling v. Rapoport*, Adv. No. 11-6933 (Bankr. E.D. Mi. 2014) – Claim based on writing must attach copy of writing. Where claim is not based on writing, there is no need to attach any writing. Debts based on “writing” are debts such as credit cards and mortgages. Alleged debt that arose out of common law cause of action for fraud is not based on writing. As such, Rule 3001(c) requirement for writing did not apply where underlying debt was based on alleged diversion of marital assets with intent to defraud Debtor’s first wife.
- (2574) *In re Halstead*, 2013 WL 5230041 (Bankr. E.D. Mi. 2013) – Where party filing claim is one other than the party to whom the debt was originally owed, claimant must attach to proof of claim documents establishing claimant’s title to the debt or authority to file claim. Creditor sold debt to collector and claim was filed by “servicer” for collector, but claim did not attach either documents establishing the sale of the claim to the collector or any authority of the servicer to then file the claim. Claim failed to establish that either servicer or collector had standing to file claim, resulting in disallowance.
- (2575) *In re Young*, 3992456 (Bankr. E.D. Tn. 2013) – Proof of claim that does not attach documentation lacks any presumption of validity. Proof of claim failed to attach any documents showing how the party filing the proof of claim allegedly came to be the party holding the claim, where the original debt was owed to another person and there were no documents attached showing assignment or transfer of the underlying obligation.
- (2576) *In re Young*, 2013 WL 3299251 (Bankr. E.D. Tn. 2013) – An allegation of lack of documentation is not a valid objection even if the Debtor re-characterizes it as an objection to standing. A valid objection to standing must raise a factual dispute about who is the holder of the claim. The Debtor must allege that, to the best of her knowledge, information, and belief, either (a) she owes someone else or (b) she does not owe the obligation at all. However, Proof of Claim not entitled to prima facie validity as claim was filed by entity other than creditor to whom debt was originally owed and claim did not attach any documents regarding either the underlying debt or how claimant came to be the holder of the debt. Claimant’s statement that the debt was for medical services and Health Care Privacy rules (HIPPA) prevented disclosure did not constitute sufficient explanation for failure to attach documents. However, where only objection was based on lack of documentation, and no substantive defense to the underlying claim itself (either that Debtor did not owe it or that Debtor owed it to someone else), Debtor’s objection to claim would be disallowed.
- (2577) *In re Gorman*, 2013 WL 2284985 (Bankr. E.D. Tn. 2013) – Failure to attach documents showing that claimant is the holder of the debt is not a basis to object to the claim. Debtor must do more than allege failure to attach assignment documents. Debtor must affirmatively allege that, to the best of their information and belief, either (a) the debt is owed to someone else; or (b) they do not owe the obligation at all. Failure to attach a copy of a power of attorney or other evidence of authority to execute claim is not basis to disallow claim. Rule 9010 specifically excuses requirement for power of attorney for filing proof of claim. Debtor cannot avoid this rule merely by raising the objection in the context of a lack of standing to file the claim. Although failure to attach documents may eliminate presumption of validity of claim, Rule 3001 states the exclusive grounds to object to claim, none of which are merely failure to attach documents.
- (2578) *Haines & Krieger, LLC v. National Capital Management, LLC*, Case No. 12-1375 (9th Cir. BAP 2013) – Debtor’s objection to proof of claim based on alleged failure to attach documents was frivolous and was properly overruled. Debtor scheduled the obligation as liquidated, non-contingent and undisputed, which provides evidentiary basis for validity of claim. Debtor had no good faith reason to believe that debt was not owed or that there was any other substantive objection to either existence or amount of claim. However, Bankruptcy Court erred in awarding sanctions under Rule 9011 where court failed to state the factual basis for conclusion why Court considered objection meritless under standard of Rule 9011 and where there was no evidence of compliance with safe harbor provisions of Rule 9011.
- (2579) *In re Reynolds*, 470 BR 138 (Bankr. D. Colo. 2012) – Rule 3001 does not provide authority for court to deny claim based solely on failure to attach documents. Failure to attach documents deprives claim of evidentiary presumption at any subsequent hearing on a substantive objection to claim under section 502(b).
- (2580) *In re MacFarland*, 462 BR 857 (Bankr. S.D. Fl. 2011) – Debtors counsel suspended from practice of law for 31 days as sanctioned for filing objections to proofs of claim based on lack of supporting documentation, despite fact that Debtors had scheduled, as undisputed, debts in amounts that equal or exceed amounts set forth in proof of claim. Failure to attach supporting documentation may rob claim of evidentiary presumption of validity, but where Debtor’s schedules independently establish prima facie case of Debtors liability, there is no legal basis to support and objection to claim based solely on a failure to attach documents.
- (2581) *Turner v. American Express Centurion Bank*, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Failure to attach documents defeats prima facie presumption of validity of claim. Without this presumption of validity, the burden of proving the existence and amount of the claim falls to the claimant; however, this initial burden is fulfilled by the presentation of any evidence of the claim. A credit card or consumer credit account creditor that attaches to its proof of claim a copy of the monthly statement generated for the Debtor’s account at the time of

the bankruptcy filing will be entitled to prima facie status, as long as the statement evidences the Debtor's name, account number, account balance as of the date of the bankruptcy filing, previous balance, finance or other charges for that period, and the annual percentage rate charged on the account. It is not necessary, however, for the creditor to attach a copy of the actual account agreement. Failure to attach documents does not create any private right of action against Creditor for alleged damages caused by failure – remedy is limited to objection to claim.

- (2582) *In re Saffron*, Case No. 10-9180 (Bankr. W.D. Mi. 2011) – Proof of Claim that asserted that Debtor converted assets belonging to ex-spouse failed to attach sufficient documentation to raise presumption of validity. Claim attached several pictures of various items but did not include any list or inventory of the items allegedly converted or the value of those items; and did not attach any evidence (beyond ex-spouse's naked suspicion) that the items were converted.
- (2583) *In re Stewart*, 2010 WL 3490976 (Bankr. E.D. La. 2010) – Mortgage Proof of Claim that fails to attach a copy of the note on which the claim is based fails to comply with Rule 3001 and does not constitute prima facie evidence of debt.
- (2584) *In re Bunting*, Case No. 07-20864 (Bankr. E.D. Mi. 2010) – Proof of claim that sets for facts necessary to support claim and is in the proper form – in writing, setting forth the claim, executed by creditor, attaching writings on which the claim is based, and attaching any documents necessary to show perfection of secured claim – is entitled to presumption of correctness. Objecting party then has burden of introducing evidence sufficient to rebut presumption of validity.
- (2585) *In re Kipling*, 2010 WL 2584191 (Bankr. E.D. Ky. 2010) – A claim asserted by a filed proof of claim is allowed unless an objection is filed and sustained. Bankruptcy Rule 3001(f) provides that a proof of claim properly filed and executed constitutes prima facie evidence of the validity and amount of the claim. An objector to the proof of claim then must produce evidence sufficient to overcome this presumption of validity. The objector must produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. The allegations of the proof of claim are taken as true and are enough to carry over a mere formal objection without more. If those allegations set forth all the necessary facts to establish a claim and are not self-contradictory, they prima facie establish the claim. Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to the allegations of the proofs of claims themselves. But the ultimate burden of persuasion is always on the claimant. Domestic Support Creditor's Proof of Claim attached a Statement of Account" and a listing of unspecified sums allegedly owed as "extracurricular activities"; and a list of mortgage payments allegedly paid by Creditor to the mortgage company on the former marital residence. Claim did not attach any documents showing that Debtor was obligated to pay mortgage or to reimburse claimant for any mortgage payments made by claimant. Debtor produced evidence to establish he does not owe any child support arrearage. Claimant required to supplement her documentation of the claim for the children's extracurricular activities expenses to show that they are due and owing and to establish that Debtor was obligated to make mortgage payments.
- (2586) *In re Chaney*, 2010 WL 2925083 (Bankr. N.D. Ohio 2010) - Rule 3001(c) requires proof of claim based on writing to attach original or a duplicate shall be filed with the proof of claim. Debtors' petition, in combination with other relevant circumstances, provided strong evidence that the claim was enforceable against the Debtor. Claim that attached only summary statement which was little more than screen shot of database would be sufficient where Debtor's schedules also listed the debt and, at least as to one creditor, also indicated that creditor held recorded final judgment. Schedules could also fill the gap in chain of assignments where schedules identify original account holder and amended claim attached proof of transfer of claim to party filing Proof of Claim.
- (2587) *In re Couch*, Case No. 09-30805 (Bankr. E.D. Mi. 2010) – Creditor's Proof of Claim failed to attach sufficient documents to allow Court to determine accuracy of claim. Court provided creditor with additional time to amend the proof of claim to attach documents. Creditor failed to amend the Claim within the time permitted but did amend the claim prior to entry of an Order disallowing the claim. Court would not disallow claim by default where amended claim was filed, although untimely. Court did award Debtor attorney fees incurred as a result of Creditor's failure to timely amend.
- (2588) *American Express Bank v. Askenazer*, 418 BR 495 (1st Cir. BAP 2009) – Rule 3001(f) provides that a proof of claim that complies with the requirements of the Rule and Official Form 10 constitutes prima facie validity of the claim. Burden then shifts to objecting party to provide substantial evidence in opposition to claim. At that point, burden shifts back to creditor to prove claim by preponderance of evidence. Proof of claim that failed to attach documents and failed to itemize interest or other charges included in claim amount not entitled to prima facie validity. Creditors and the Trustee are entitled to know what charges have been assessed and the contractual basis for each.
- (2589) *In re Wells*, 2009 WL 1872401 (Bankr. N.D. Ohio 2009) – Bankruptcy Rule 3001 requires a claim based on writing to include a copy of the writing and evidence of perfection. A proof of claim that does not attach documents necessary to support the claim is not entitled to the presumption of prima facie validity but is not, standing alone, a basis to disallow the claim. There must be an underlying factual dispute as to the validity, ownership or amount of a claim for a Court to disallow or reduce a claim. Promissory Note attached to proof of claim was payable to third party and proof of claim failed to attach proof that the Note had been endorsed to party filing proof of claim. Party filing proof of claim lacked standing to file claim.

8.125 Grounds – Failure to Attach Documents – Rule 3001(c)(3)

- (2590) *In re Hill*, 2014 WL 801517 (Bankr. E.D. Ky. 2014) – Filed proof of claim is allowed unless party in interest objects. If an objection is filed, the court must determine the amount of the claim and allow the claim except to the extent the claim is unenforceable against the Debtor under any agreement or applicable law. Rule 3001(c) requires that a claim for an open-end or revolving consumer credit agreement attach a statement showing the name of the entity from whom the creditor purchased the account; the name of the entity to whom the debt was

owed at the time of the account holder's last transaction; the date of the last transaction; date of last payment on the account; and date on which account was charged to profit and loss. On written request, the holder of the claim must provide a copy of the credit agreement. To extent of Rule 3001(c), the provisions of Rule 3001(a) do not apply, and a proof of claim that attaches the required information is prima facie valid as filed. Debtor's objection that Debtor did not owe money to the entity filing the proof of claim did not defeat prima facie validity of the claim that complied with Rule 3001(c). Neither the creditor nor the Trustee had obligation to prove validity where Debtor did not present evidence sufficient to overcome presumption. Debtor's objection to creditor's standing based on alleged failure to attach documents was legally insufficient, as the objection did not raise good faith dispute about ownership of claim. Debtor's objection only stated that they had no relationship with the creditor but did not present factual evidence to support either that Debtors owed money to someone else, or did not owe any money at all.

- (2591) *In re Lampard*, 2013 WL 2404016 (Bankr. E.D. Tn. 2013) – Failure to attach documents required by Rule 3001(c), standing alone, is not basis to disallow claim. Debtor must allege more than failure to attach documents, such as a factual dispute about who is the holder of the claim; that Debtors owe someone else or they do not owe the obligation at all. However. Lack of supporting documents deprives claim of prima facie validity, requiring creditor to come forward with evidence of validity and amount. Creditor's failure to do so would result in disallowance of claim by default.
- (2592) *In re Wheeler*, 2013 WL 2404003 (Bankr. E.D. Tn. 2013) – Failure to attach documents required by Rule 3001(c), standing alone, is not basis to disallow claim. Debtor must allege more than failure to attach documents, such as a factual dispute about who is the holder of the claim; that Debtors owe someone else or they do not owe the obligation at all. However. Lack of supporting documents deprives claim of prima facie validity, requiring creditor to come forward with evidence of validity and amount. Creditor's failure to do so would result in disallowance of claim by default.
- (2593) *In re Rodgers*, 2013 WL 2404000 (Bankr. E.D. Tn. 2013) – Failure to attach documents required by Rule 3001(c), standing alone, is not basis to disallow claim. Debtor must allege more than failure to attach documents, such as a factual dispute about who is the holder of the claim; that Debtors owe someone else or they do not owe the obligation at all. However. Lack of supporting documents deprives claim of prima facie validity, requiring creditor to come forward with evidence of validity and amount. Creditor's failure to do so would result in disallowance of claim by default.
- (2594) *In re Calhoun*, 2013 WL 2403858 (Bankr. E.D. Tn. 2013) – Proof of claim is deemed allowed unless a party in interest objects. Proof of Claim executed and filed in accordance with rules constitutes prima facie evidence of validity of claim. Objection based on failure to follow rules is not sufficient to disallow claim, but does affect evidentiary effect of proof of claim. Claim failed to attach any documentation to support claim and, to extent claim was based on revolving charge, claim failed to attach documents required by Rule 3001(c). Claim lacked any evidentiary value and would be disallowed where creditor failed to produce any evidence in support of claim.
- (2595) *In re Gorman*, 2013 WL 2284985 (Bankr. E.D. Tn. 2013) – Failure to attach documents showing that claimant is the holder of the debt is not a basis to object to the claim. Debtor must do more than allege failure to attach assignment documents. Debtor must affirmatively allege that, to the best of their information and belief, either (a) the debt is owed to someone else; or (b) they do not owe the obligation at all. Failure to attach a copy of a power of attorney or other evidence of authority to execute claim is not basis to disallow claim. Rule 9010 specifically excuses requirement for power of attorney for filing proof of claim. Debtor cannot avoid this rule merely by raising the objection in the context of a lack of standing to file the claim. Proof of claim filed prior to effective date of Rule 3001(c)(3) is not defective for failure to comply with rule, even if objection to proof of claim is filed after effective date of rule.

8.126 Grounds – Failure to Itemize Claim

- (2596) *American Express Bank v. Askenaizer*, 418 BR 495 (1st Cir. BAP 2009) – Rule 3001(f) provides that a proof of claim that complies with the requirements of the Rule and Official Form 10 constitutes prima facie validity of the claim. Proof of claim that failed to attach documents and failed to itemize interest or other charges included in claim amount not entitled to prima facie validity. Creditors and the Trustee are entitled to know what charges have been assessed and the contractual basis for each.

8.127 Grounds – Form of Proof of Claim – Official Form 10

- (2597) *In re Roman*, 2012 WL 2921507 (Bankr. N.D. Ohio 2012) – Rule 3001 requires a proof of claim “substantially conform” to the appropriate official form, Form B10. Use of the pre-December, 2011 form B10 substantially complies. Old form is largely identical to new form. New form makes three primary changes – an option uniform claim identifier; check boxes to show whether the interest rate on a secured claim is fixed or variable; and check boxes to identify the relationship of the person filing the claim to the named creditor and additional specific information about the filer.

8.128 Grounds – Technical Defects

- (2598) *In re Young*, 3992456 (Bankr. E.D. Tn. 2013) – Claim is not objectionable based merely on supposition that person who executed the claim did not review the claim, absent evidence to the contrary. Failure to attach power of attorney to the claim is not a basis to disallow the claim absent evidence that the person signing the claim lacked actual or apparent authority to do so.

8.129 Late Filed

- (2599) *In re Sims*, 2017 WL 4220426 (Bankr. W.D. Mi. 2017) – In Chapter 13, there is no authority for Court to extend Bar Date for governmental units after expiration of original bar date. Rule 3002(c)(1) allows Court to extend time for governmental entities to file claims on motion made before expiration of initial bar date. Unlike Chapter 7, where late filed claims are entitled to payment after full payment of timely filed claims, in Chapter 13 there is no exception for late filed claims. Michigan Unemployment Insurance Agency is governmental unit but did

not request extension of bar date until after expiration of initial bar date. UIA's argument that it did not have notice of case in time to file claim did not create grounds to extend bar date retroactively. UIA had right under Section 523 to seek to except debt from discharge If appropriate. Order denying Motion to extend bar date means that UIA will not be paid from Chapter 13 Plan because UIA does not have allowed claim; UIA is enjoined from collection activity during pendency of Chapter 13 absent further Order of Court because UIA holds pre-petition claim; and UIA can pursue collection post-discharge assuming that UIA did not have notice of case in time to file claim per Section 523(a)(3).

- (2600) *In re Norton*, 2017 WL 354320 (Bankr. N.D. Tx. 2017) – Rule 3002 does not allow Court discretion to extend deadline for creditor to file Proof of Claim in Chapter 13 case. However, Rule 3004 allows Debtor to file claim on behalf of Creditor and Court has authority under Rule 3004 and 9006(b) to allow late filed claim filed by Debtor if late filing was result of excusable neglect. Rule 3002(c) prohibits Court from extending time for creditors to file claims under Rule 3002 but does not prevent Court under Rule 9006(b) from extending time for Debtor to file claim under Rule 3004.
- (2601) *In re: Settlement Facility Dow Corning Trust, Couselo Longo, Claimant*, Case No. 14-10344 (E.D. Mi. 2017) - Decision to allow claim filed in Chapter 11 proceeding after claims bar date in Rule 3003 uses “excusable neglect” standard, based on (one) danger of prejudice to Debtor; (2) length of delay and potential impact of judicial proceedings; (3) reason for delay including whether it was within reasonable control of movement; and (4) whether movement acted in good faith. Errors or omissions of counsel do not constitute excusable neglect as clients must be held accountable for acts and omissions of attorneys. *Pro se* litigants failure to timely meet a deadline because of inadvertence, ignorance of the rules or mistakes can’s drilling the rules do not constitute excusable neglect. Allowing late filed claim against Trust liquidating breast implant claims would not, itself, prejudice assets of Trust, but would open door to numerous claimants which could result in disparate treatment of other claimants who timely submitted claims and would result in substantial costs in terms of claim payments and administrative expenses thereby depleting funds which could otherwise be used to pay timely filed claims. Allowing late filed claims would also impose administrative burdens by requiring late claimant’s medical records to be reviewed which would delay review of timely filed claims. Claimants statement that she did not file a claim at earlier date because she did not realize implant had ruptured until after deadline passed did not excuse failure to file proof of claim in timely fashion as Debtor’s lack of knowledge or existence of un-manifested claim was not excusable neglect.
- (2602) *In re Miller*, 2016 WL 3982681 (Bankr. N.D. Ohio 2016) – Rule 3002 sets deadline for filing claim in Chapter 13 case. Rule 3002 does not have excusable neglect standard available in Chapter 11 cases, and none of the six exceptions listed in Rule 3002(c) to the deadline for filing claims applies. Creditor’s Motion for Leave to File Late Claim is denied.
- (2603) *In re Tench*, 2016 WL 2858792 (6th Cir. BAP 2016) – Rule 3002 sets deadline for filing proof of claim. There is no authority in Chapter 13 to extend deadline. Rule 9006 does not permit extension of deadline that has already expired. Court cannot allow late filed claim on “general equitable principals” and Section 105 does not allow Court to ignore clearly specified deadline and allow late claim. Equitable tolling also does not provide basis to ignore Rule 3002 deadlines. Further, creditor failed to establish basis for equitable tolling where failure to meet deadline was result of creditor’s negligence, where creditor had notice of bankruptcy case 6 weeks before running of bar date but did not make effort to determine bar date until after bar had passed. Creditor had ample time to file claim and failure to do so was due to creditor’s own negligence, which does not meet the requirement of diligence on the part of the creditor to warrant equitable tolling. *In re Pajian*, 598 BR 708 (Bankr. N.D. Ill. 2014), *aff’d* 2015 WL 2182951 (7th Cir. 2015) – Creditor must file claim by bar date in Chapter 13. Late filed claim must be disallowed if objection is filed, even if claim itself is secured. However, disallowance of claim in bankruptcy does not affect lien, which passes through bankruptcy unaffected regardless of whether claim is filed.
- (2604) *In re Mackinder-Manous*, 2015 WL 790883 (Bankr. E.D. Ky. 2015) – There is no provision allowing a late filed claim in Chapter 13. Exception for late filed claims in Section 726 is not applicable in Chapter 13. Neither “equitable tolling” nor “fundamental fairness” are grounds to deviate from requirement of rule requiring timely filing of proof of claim.
- (2605) *In re Keller*, Case No. 13-1144 (Bankr. W.D. Mi. 2014) – Creditor cannot file amendment to protective proof of claim filed by Debtor. Permitting Creditor to file amendment would impermissibly extend the deadline for creditors to file claims and would bestow on creditors an unintended benefit under Section 501(c) that is a section designed to benefit the Debtor.
- (2606) *Municipality of Carolina v. Gonzalez*, 2013 WL 1629235 (1st Cir. BAP 2013) – Under Section 501 and Rule 3004, if creditor fails to timely file proof of claim, Debtor or Trustee may file claim on behalf of creditor. Deadline for filing claim on behalf of creditor is 30 days after expiration of deadline for creditor to file claim in first instance. Proof of claim filed by Debtor on behalf of creditor filed after expiration of 30 day window is untimely and must be disallowed pursuant to Section 502(b)(9).
- (2607) *In re Jazayeri*, Case No. 11-10107 (Bankr. W.D. Mi. 2012) – There is no provision to allow a late filed claim in Chapter 13. Although creditor did not have notice prior to bar date, resulting in claim being non-dischargeable under Section 523(a)(3), that does not create exception to Section 502(b)(9) requirement that claim be timely filed in Chapter 13.
- (2608) *In re Stone*, 473 BR 465 (Bankr. M.D. Fl. 2012) – Court cannot exercise equitable discretion to allow late filed claim in Chapter 13 case.
- (2609) *In re Ellison*, Case No. 09-74306 (Bankr. E.D. Mi. 2010) - Stipulation signed by Debtor and creditor to allow late filed claim rejected by Court. Creditor had notice of case and failed to file claim by bar date. Allowing late filed claim would adversely affect all other unsecured creditors.
- (2610) *Tennessee Commerce Bank v. Cox*, Case No. 309-0410 (Bankr. M.D. Tn. 2010) - Rule 3002 permits Debtor to file Proof of Claim on behalf of creditor within 30 days after expiration of the time for filing claims. Rule 9006 may permit extension of time to file claim where failure to timely file claim is result of excusable neglect, determined by danger of prejudice to the Debtor; the length of the delay and

its potential impact on judicial proceedings; the reason for the delay; whether the delay was within the reasonable control of the movant; and whether the movant acted in good faith. Debtor failed to demonstrate excusable neglect where request to file claim on behalf of creditor did not occur until 18 months after her plan was confirmed and granting request would adversely impact other unsecured creditors by reducing the dividend to the remaining creditors from 13% to only 9%.

- (2611) *In re Chaney*, 2010 WL 2925083 (Bankr. N.D. Ohio 2010) - Section 502(b)(9) precludes late filed claims in Chapter 13 proceeding. Proof of claim filed one day after bar date must be disallowed. Allegation that Debtor admitted the debt and that objection was filed in "bad faith" attempt to circumvent admittedly valid claim cannot avoid late filed status of claim and claim must be disallowed.
- (2612) *General Motors Acceptance Corporation v. Flynn*, Case No. 08-8109 and 08-8110 (6th Cir. BAP 2009) - Creditor prohibited from asserting cross-claim in adversary proceeding where the cross-claim is akin to a Proof of Claim against the Debtor and where the creditor failed to either file a timely Proof of Claim or timely obtain an order extending the time to file a claim.
- (2613) *Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6th Cir. BAP 2009) – Motion to Extend proof of Claim Deadline filed almost 1 year after deadline expired denied where creditor failed to establish excusable neglect to justify any extension of the deadline.

8.130 Grounds – Personally Identifiable Information

- (2614) *Holloway v. Community Bank*, 2011 WL 4500042 (E.D. Tn. 2011) – Creditor’s inclusion in proof of claim of social security number constituted improper disclosure of personally identifiable information as defined in Section 101(41A). However, Section 107(c) does not authorize private cause of action for disclosure and filing of claim, standing alone, does not constitute actionable invasion of privacy absent evidence of intent to convey information to public at large.
- (2615) *In re Chubb*, Case No. 09-60618 (Bankr. E.D. Mi. 2010) – Utility company account number constituted “personally identifiable information” that must be redacted in proof of claim. Claim filed with full account number would be stricken and restricted from public view without prejudice to creditor filing an amended proof of claim that omitted personally identifiable information.
- (2616) *Lentz v. Bureau of Medical Economics*, 405 BR 893 (Bankr. N.D. Ohio 2009) – Alleged disclosure of “personally identifiable information” is not one of enumerated grounds under 11 USC Section 502 to disallow a claim. Violation of Rule 9037 alone does not support objection to claim. Sole remedy under Rule 9037 is to redact or otherwise prevent disclosure of “personally identifiable information”.
- (2617) *French v. American General Financial Services*, 401 B.R. 295 (Bankr. E.D. Tn. 2009) – Disclosure of “personally identifiable information” is not a basis to disallow a proof of claim under 11 USC Section 502. Procedural violations alone are not one of the bases stated in Section 502 on which a proof of claim can be disallowed.

8.131 Grounds – Surrender in Full Satisfaction of Secured Claim

- (2618) *In re Brown*, 2014 WL 1245266 (11th Cir. 2014) – When collateral is surrendered in Chapter 13 Plan, debt is extinguished to extent of value of collateral. Value of Collateral is determined by replacement value of collateral. Prior decision in *Rash* using foreclosure value abrogated by BAPCPA provision of Section 1325(a)(5). Where replacement value of vehicle exceeded debt, debt was deemed satisfied in full upon surrender of collateral.
- (2619) *In re Menden*, 2011 WL 4433621 (Bankr. N.D. Ohio 2011) – Creditor received constitutionally sufficient notice of Debtor’s Amended Chapter 13 Plan that provided for surrender of automobile in full satisfaction of debt. Service on Creditor at one of two notice addresses and electronic service on Creditor’s attorney who had filed a Notice of Appearance was sufficient to comply with Rule 2002. Even if service had not complied with Rule 2002, service on Creditor’s attorney was reasonably calculated, under all the circumstances, to apprise Creditor that its rights may be altered and to advise Creditor of opportunity to object. Confirmation of Plan was *res judicata* on surrender in full satisfaction. Creditor’s unsecured deficiency claim would be disallowed. However, Creditor would not be required to refund payments received from the Chapter 13 Trustee prior to the date on which the Proof of Claim was disallowed where Debtor waited almost three years after Trustee began distributions to file objection to claim.
- (2620) *In re Finley*, 408 BR 111 (Bankr. E.D. Mi. 2009) – Debtor cannot surrender real property that is not the Debtor’s principal residence in full satisfaction of a mortgagee’s claim. A secured creditor retains the right to bifurcate the claim and to collect any deficiency as a general unsecured claim pursuant to Section 506(a) when the collateral is surrendered pursuant to section 1325(a)(5)(C). The power to “modify” pursuant to section 1322(b)(2) does not equate to “surrender in full satisfaction”.
- (2621) *In re Long*, 519 F.3d 88 (6th Cir. 2009) - “Hanging paragraph” added to section 1325(a)(5) does not preclude a creditor from asserting a deficiency claim when the Debtor surrenders a vehicle purchased within 910 days of the filing of bankruptcy. The amendment of section 1325 did not change the applicability of section 506 where the vehicle is being surrendered.
- (2622) *In re Woods*, 406 BR 293 (Bankr. N.D. Ohio 2009) – Provision in Chapter 13 Plan that real property would be surrendered in full satisfaction did not prevent secured creditor from filing unsecured deficiency claim. Creditor filed Proof of Claim before plan was confirmed, providing notice to Debtor that creditor contested treatment in plan and that creditor would expect that any objection to the deficiency claim would be resolved through the claim resolution process.

8.132 Grounds – Failure to Comply With Administrative Requirements

- (2623) *O’Rourke v. United States*, 587 F.3d 537 (2d Cir. 2009) – IRS complied with administrative requirements after audit concluded that taxpayer had additional tax liability. IRS required to demonstrate that deficiency existed and that IRS mailed notice by Certified Mail identifying the taxpayer, indicating that the Commissioner has made a determination of deficiency, and specifying the taxable year and

amount of the deficiency to taxpayer. IRS demonstrated mailing by reference to IRS Certified Mail Log which created presumption that the notice had been properly mailed by certified mail, notwithstanding minor defects in log.

8.133 Grounds – Payment and Credit Bid

- (2624) *Irwin v. Frankenmuth Credit Union*, Case No. 08-20212 (Bankr. E.D. Mi. 2009) – Debtor borrowed money from third party to repay loan from Credit Union, which resulted in loan being paid in full. Third party then threatened Credit Union with litigation when Credit Union declined to advance additional funds to Debtor, which would have been used by Debtor to generate resources to repay third party. Credit Union settled with third party and attempted to charge the cost of that settlement back against the Debtor's account. Record failed to establish that Debtor in fact owed any money to third party and purported assignment from third party to Credit Union was not valid absent proof of underlying enforceable obligation that could be assigned.
- (2625) *In re Finley*, Case No. 09-44480 (Bankr. E.D. Mi. 2010) – Credit bid at foreclosure sale for entire balance owed on notes secured by a mortgage extinguishes both note and mortgage. If mortgagee credit but it's less than the full balance owed on the note, the beat is credited against the balance owed in the mortgagee may sue for the deficiency balance, where the mortgage or be raised as a defense that the credit bid was substantially less than the true value of the property. Proof of claim filed by mortgage holder for alleged deficiency balance would be disallowed for mortgage holder bid for amount of the note at the foreclosure sale. Creditors argument that amount bid at the foreclosure sale was "a mistake" did not alter conclusion that full credit been at share sale extinguished the balance of the note as a matter of law.

8.134 Grounds – Mortgage Escrows, Fees and Charges

- (2626) *In re Otworth*, 2015 WL 5781512 (Bankr. W.D. Mi. 2015) – Lender properly advanced funds for taxes on non-escrowed mortgage and then instituted escrow for future taxes where Debtor had failed to pay taxes. Mortgage documents allowed lender to impose escrow for taxes if borrower failed to timely pay. Section 502 provides for disallowance of claim that is unenforceable against Debtor. Debtor's allegation that taxes were illegal was unsupported. Federal Court had previously determined in action between Debtor and governmental entities that entities were lawfully created and had power to levy taxes under State law. Although lender was not party to separate federal action, doctrine of "defensive collateral estoppel" allows lender to raise prior judgment as defense where plaintiff had full and fair opportunity to litigate issue in prior proceeding. Debtor would not be allowed to raise same challenges in context of claim litigation.
- (2627) *Kreitzer v. Household Realty Corp.*, 489 WL 698 (Bankr. S.D. Ohio 2013) – Charges that are included in claim for pre-petition foreclosure fees and costs are not allowed to extent they are not reasonable. Mortgage company should submit an amount certain that is owed by the borrower for principal, interest, and fees to provide Debtor with opportunity to object and to permit the court to review the charges and make sure that they are accurate and reasonable. State Court judgment that did not rule on any itemization of charges and contained general exception for "charges prohibited by law" without detailing any charges that would be disallowed or reduced was not collateral estoppel on issue of pre-petition fees as it was not clear what items were actually litigated or whether any charges reflected in proof of claim may have been added after entry of foreclosure judgment.
- (2628) *In re Aho*, 2009 WL 3820327 (Bankr. D. Mass. 2009) – Mortgagee claim for Auctioneer Fees unreasonable and disallowed where sale was cancelled by the bankruptcy filing. Mortgagee fee to assign the mortgage from MERS to US Bank disallowed as transfer did not benefit Debtor or anybody else other than the mortgagees themselves. Title Examination fee for two owner property cut in half where property was owned solely by Debtor. Unexplained line item for "professional fees" disallowed where claim provided no explanation or justification for the fees.

8.135 Grounds – Conflict With Confirmed Chapter 13 Plan

- (2629) *In re Tirone*, 2012 WL 3249551 (Bankr. N.D. Ohio 2012) – Debtor's objection to proof of claim based on alleged conflict with confirmed plan sustained and claim disallowed to extent of conflict. Plan proposed to bifurcate claim secured by Debtor's automobile into a secured claim in amount of \$6,000 plus interest at 4%; with the balance to be paid as unsecured claim. Prior to confirmation, Creditor filed a proof of claim alleging that the collateral value was \$10,250 and asserting an interest rate of 14.95%. However, creditor did not object to confirmation of plan. After confirmation, Debtor objected to proof of claim to extent inconsistent with confirmed plan. Court concluded that confirmed plan controlled. Debtor was not required to object to claim prior to confirmation of plan. After *Espinosa*, claims allowance process cannot trump confirmation process, and creditor cannot sit back and rely on filed claim while allowing plan to be confirmed with inconsistent terms or treatment.

8.136 Grounds – Unconscionability

- (2630) *In re MERV Properties, LLC*, 2015 WL 5827775 (6th Cir. BAP 2015) – Agreement will be unenforceable where agreement is one that no man in his senses and not under delusion would make and which no fair and honest man would accept. Doctrine does not affect "mere bad bargains" but applies only where terms are one-sided, oppressive and unfairly surprising. Agreement can be procedurally unconscionable based on process by which agreement is reached or the form of the agreement such as fine or inconspicuous print or convoluted or unclear language that conceals terms. Agreement can be substantively unconscionable where contractual terms are unreasonable or grossly favorable to one side and to which the disfavored party does not assent. Release and Forbearance Agreement was not unconscionable where all parties were sophisticated businessmen and all parties knew that borrowers were giving up possible claims against Bank in exchange for forbearance of foreclosure proceedings against commercial property. There was no evidence that borrowers were misled or that Bank conspired with certain corporate officers to extend foreclosure time while officers looted company asset. It is not unconscionable to give up potential causes of action in exchange for additional time to rehabilitate business.
- (2631) *In re Pierson*, 447 BR 840 (Bankr. N.D. Ohio 2011) – Unconscionability requires use of a standardized contract, drafted and imposed by

party of superior bargaining strength such that imposition of contract results from oppression and surprise. Surprise focuses on whether the challenged term is hidden in a prolix printed form or is otherwise beyond the reasonable expectation of the weaker party. Oppression refers not only to an absence of power to negotiate the terms of a contract, but also to the absence of reasonable market alternatives. Loan agreement made without any compelling need for loan but rather a desire of borrower to make home improvements that were not necessary and that provided borrower the opportunity to weigh options and consider other lenders did not evidence any surprise or oppression. Debtor meticulously initialed in the agreement all of the “more onerous” provisions and many of the more significant terms were in bold print or all capital letters preventing any argument of surprise. Disparity in amount received as loan versus amount that would be repaid over loan term was not evidence of unconscionability where Debtor was intelligent, understood the basic transaction, and was in charge of his mental faculties and knew what he was signing. Further, after signing first loan agreement, Debtor signed two later agreements, each time when Debtor sought to increase the amount of the loan to complete additional home improvements.

8.137 Grounds – Cancellation of Debt

- (2632) *In re Reed*, 2013 WL 2015984 (Bankr. E.D. Tn. 2013) – Creditor’s issuance of Form 1099-C “cancellation of debt” does not alone extinguish the underlying debt. Form 1099-C is issued by lender to comply with IRS reporting requirements and is for informational purposes only whether or not the debt has actually been discharged. IRS regulations also state that issuance of Form 1099-C is not admission that creditor has discharged debt or that creditor cannot legally pursue collection. However, where Form 1099-C has resulted in Debtor’s inclusion of amount stated in Gross Income on which Debtor then was required to pay taxes, the combination of the Form 1099-C and equity requires conclusion that creditor did discharge debt. Contrary ruling would require Debtor to include discharged debt in gross income and pay taxes on that amount yet remain liable for payment of the debt itself. However, discharge is limited to amount stated in Form 1099-C and does not discharge any interest, costs or collection fees incurred by lender by not included in principal amount of debt reported on Form 1099-C.

8.138 Grounds – Debt Incurred Through Fraud

- (2633) *In re Robinson*, 2015 WL 1263357 (Bankr. N.D. Ohio 2015) – Debtor’s objection to claim sustained and claim stricken where objection alleged that claim was not Debtor’s debt as Debtor was incapacitated at time debt incurred, and debt was incurred fraudulently, and creditor failed to file response or to appear for hearing. However, court would not order creditor to return funds paid by Chapter 13 trustee where payments were made at time when claim was filed and outstanding. Further, any request to compel creditor to return funds must be brought through an adversary proceeding, not as ancillary relief on objection to claim.

8.139 Grounds – Fraudulent Inducement

- (2634) *Bavelis v. Doukas*, 490 BR 258 (Bankr. S.D. Ohio 2013), *aff’d* 2013 WL 6672988 (6th Cir. BAP 2013), *aff’d* 773 F.3d 148 (6th Cir. 2014) – Affirmative defense of fraudulent inducement renders contract unenforceable by culpable party. Fraudulent inducement requires (1) an actual or implied false representation concerning a fact or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction; (3) knowledge of the falsity of the representation or such recklessness or utter disregard for its truthfulness that knowledge may be inferred; (4) intent to induce reliance on the representation; (5) justifiable reliance; and (6) injury proximately caused by the reliance. Creditor falsely represented that creditor had extensive estate planning experience where evidence indicated that creditor had no such experience. Creditor also falsely represented that after contract was executed, creditor would work with Debtor and third parties to resolve issues regarding estate plan and investment vehicles. Although promise made regarding future performance is not generally fraudulent merely because the promise is unperformed, where party making promise had no intention of performing, promise constitutes misrepresentation of present fact and is actionable as fraud.

8.140 Grounds - Lack or Failure of Consideration

- (2635) *Bavelis v. Doukas*, 490 BR 258 (Bankr. S.D. Ohio 2013), *aff’d* 2013 WL 6672988 (6th Cir. BAP 2013), *aff’d* 773 F.3d 148 (6th Cir. 2014) – Formation of contract requires mutual assent and consideration by both parties. Contract lacked both mutual consent and consideration where contract only required performance by Debtor and had no mutual obligations imposed on creditor; or where creditor failed to provide consideration for transaction. Loan agreement called for creditor to advance \$200,000 to Debtor and required Debtor to pay creditors \$200,000. Evidence indicated that creditor advanced funds as required, supporting Debtor’s obligation to repay creditor. However, where creditor otherwise failed to comply with obligations under agreements, remaining obligations of Debtor are unenforceable for failure of consideration. Failure of consideration occurs when promise has been made to support a contract but the promise has not been performed. In that event, other party is excused from further performance. Agreement between Debtor and creditor provided for initial \$200,000 loan to Debtor, to be followed up by additional loans and advances up to \$14 million. However, creditor failed to perform any obligations under the agreement beyond the original \$200,000.00. As such, Debtor was excused from performance under the agreements and proof of claim filed by creditor based on Debtor’s lack of performance would be disallowed to the extent it requested recovery beyond \$200,000.00.

8.141 Grounds – Payment

- (2636) *Reed v. Blount*, 2016 WL 3625602 (E.D. Mi. 2016), *aff’d*, 2017 WL 3597425 (6th Cir. 2017) – Documents showing that Debtor allegedly paid obligation dated 3 years before State Court entered judgment on which claim was based did not constitute evidence that the claim had been paid. Payments made and documents exchanged three years before entry of judgment did not amount to release of claim.
- (2637) *In re Vernon*, 2016 WL 110072 (Bankr. W.D. Ky. 2016) – Borrower’s objection that proof of claim failed to account for all pre-petition payments overruled where lender filed affidavit that established that borrower was given credit for all payments made.
- (2638) *Bavelis v. Doukas*, 490 BR 258 (Bankr. S.D. Ohio 2013), *aff’d* 2013 WL 6672988 (6th Cir. BAP 2013), *aff’d* 773 F.3d 148 (6th Cir. 2014)

– Evidence presented supported finding that Debtor, prior to commencement of case, repaid all amounts outstanding on loan from creditor.

8.142 Grounds – Refusal to Accept Payment

- (2639) *In re Hill*, 2015 WL 5575499 (Bankr. E.D. Tn. 2015) – Creditor and Chapter 13 Trustee did not wrongfully refuse payment based on Debtors tender of “bill of exchange” with instructions on how both parties should take the documents tendered to the United States Treasury for payment in full of the Debtors’ obligations. “Redemptionist” theory on which Debtor propounds that a person has a split personality: a real person and a fictional person called the “strawman.” The “strawman” purportedly came into being when the United States went off the gold standard in 1933, and, instead, pledged the strawman of its citizens as collateral for the country’s national debt. Redemptionists claim that government has power only over the strawman and not over the live person, who remains free. Individuals can free themselves by filing UCC financing statements, thereby acquiring an interest in their strawman, and government created “exemption account” for each citizen based on social security number. Redemptionists argue that debts are then collateralized by exemption amount, ultimately making US Government liable for satisfaction of individual’s debts. Argument is frivolous and a waste of time and judicial resources. Neither lender nor Trustee was required to accept “bill of exchange” as payment.
- (2640) *In re Sischo*, Case No. 10-8600 (Bankr. W.D. Mi. 2014) – Creditor’s refusal to accept payments from Chapter 13 Trustee is not basis to disallow claim under Section 502.

8.143 Grounds – Statute of Limitations

- (2641) *Collins v. Tennessee Department of Revenue*, 2016 WL 4224013 (W.D. Tn. 2016) – Tennessee statute imposed 6 year limitations period on collection of unpaid taxes and does not provide for tolling of that time period based on bankruptcy filing. State statute tolled limitations period for any time that an injunction prevents a party from filing a civil action which would include automatic stay. However, tolling lasts only for 30 days after expiration of stay. Taxing authority did not levy tax claims within applicable statute of limitations and did not act within 30 day window provided in Section 524.
- (2642) *Reed v. Blount*, 2016 WL 3625602 (E.D. Mi. 2016) – Statute of limitations in Michigan to enforce judgment is 10 years from entry of judgment. Even if underlying claim, but for judgment, would have been barred by statute of limitations, judgment creates new, independent limitations period. Proof of claim based on judgmental and filed less than 10 years after entry of judgment is timely.
- (2643) *In re Shippy*, 2016 WL 1178351 (Bankr. M.D. Tn. 2016) – Under Tennessee law, debt barred by statute of limitations can be revived either by borrower’s express promise to pay debt, or by acknowledgement of debt coupled with expressed willingness to repay. Debtor did not revive debt by listing debt in schedules as undisputed because listing in schedules is neither express promise to pay nor statement of willingness to pay. Debtor’s listing of debts in prior cases, including one in which Debtor confirmed plan, did not operate to revive debt for purposes of third bankruptcy case filed after second case dismissed where second case was dismissed prior to expiration of limitations period and third case was filed after expiration. Acknowledgement of debt during limitations period does not extend limitations period that later expired.
- (2644) *In re Back*, 2015 WL 4624543 (Bankr. E.D. Ky. 2015) – Kentucky statute of limitations on judgment is 15 years from execution of judgment. However, any execution on the judgment restarts the statute. Creditor obtained judgment but took no action to enforce it until claimant intervened in State Court foreclosure action brought by another creditor. Execution requires act of enforcing, carrying out or putting into effect the judgment including garnishments and judgment liens. Filing of motion to intervene satisfied commencement element such that statute of limitations had restarted less than 15 years prior to filing of bankruptcy case.
- (2645) *In re Young*, 3992456 (Bankr. E.D. Tn. 2013) – Dates of service shown on proof of claim were more than 6 years prior to commencement of bankruptcy case and are barred by statute of limitations.
- (2646) *In re Leopard*, 2013 WL 2404016 (Bankr. E.D. Tn. 2013) – Claim can be disallowed where underlying statute of limitations expired prior to commencement of case. Proof of claim stated that the “charge off” date was 2000, putting claim well beyond state law 6 year statute of limitations. Claim disallowed where face of claim showed that claim was barred.
- (2647) *In re Leopard*, 2013 WL 2404009 (Bankr. E.D. Tn. 2013) – Claim can be disallowed where underlying statute of limitations expired prior to commencement of case. Proof of claim stated that the “charge off” date was 1996, putting claim well beyond state law 6 year statute of limitations. Claim disallowed where face of claim showed that claim was barred.
- (2648) *In re Wheeler*, 2013 WL 2404003 (Bankr. E.D. Tn. 2013) – Claim can be disallowed where underlying statute of limitations expired prior to commencement of case. Proof of claim stated that the “charge off” date was 1999, putting claim well beyond state law 6 year statute of limitations. Claim disallowed where face of claim showed that claim was barred.
- (2649) *In re Rodgers*, 2013 WL 2404000 (Bankr. E.D. Tn. 2013) – Claim can be disallowed where underlying statute of limitations expired prior to commencement of case. Proof of claim stated that the “charge off” date was 1995, putting claim well beyond state law 6 year statute of limitations. Claim disallowed where face of claim showed that claim was barred.
- (2650) *In re Calhoun*, 2013 WL 2403858 (Bankr. E.D. Tn. 2013) – Claim can be disallowed where underlying statute of limitations expired prior to commencement of case. Proof of claim stated that the last transaction date was 2001, putting claim well beyond state law 6 year statute of limitations. Claim disallowed where face of claim showed that claim was barred.
- (2651) *In re Hardison*, 2011 WL 576066 (Bankr. M.D. Tenn. 2011) – Claim properly disallowed where State statute of limitations expired prior to commencement of case. Claim can be “revived” notwithstanding passing of statute either by expressly promising to pay the debt or by acknowledging the debt and expressing a willingness to pay it at a point after the statute of limitations expired. Partial payments made by

Debtor prior to expiration of limitations period does not revive claim. Debtor can be estopped from asserting limitations defense if, prior to expiration of limitations period, Debtor's statements or conduct represented that Debtor would pay entire debt without the need for a lawsuit and creditor's reliance on those statements to withhold timely filing of suit. Minimal and sporadic payments made by Debtor in response to repeated harassing phone calls by creditor's collection agent do not constitute representations that debt would be paid.

8.144 Grounds – Section 502 Recovered Avoidable Transfer

- (2652) *The Flower Factory, Inc., v. Magic Creations, Inc.*, 2014 WL 271651 (Bankr. N.D. Ohio 2014) – Section 502(d) disallows any claim filed by a party who has been found liable for an avoidable transfer under Section 550. Disallowance of claim happens by operation of law when judgment is entered by Bankruptcy Court avoiding the transfer unless the creditor pays the amount awarded or turns over the property at issue

8.145 Grounds – Lack of Authority

- (2653) *In re MERV Properties, LLC*, 2015 WL 5827775 (6th Cir. BAP 2015) – Apparent authority allows Agent to bind Principal even in absence of actual authority to do so, where Principal holds out to others that agent possesses authority that may not actually have been given to agent. Party who signed Forbearance Agreement on behalf of LLC had apparent authority to execute agreement and bind LLC. Bank entitled to rely on signature where Bank had no knowledge of alleged dispute regarding member's interest and Agreement was signed by other members of LLC. LLC's charter required execution of agreements by members holding 51% of membership interests. Three members holding (according to the membership records of LLC) more than 51% signed. LLC later contested Agreement alleging that one of the signors lacked authority to do so because, at time of signing, member's interest in LLC was "in dispute". Bank lacked knowledge of dispute and Agreement was also signed by two other members who now contend that third member lacked authority but there is no reason to believe that other two members would have signed had there been some doubt as to validity of third member's signature.

8.146 Death of Debtor

- (2654) *In re Uren*, Case No. 13-90369 (Bankr. W.D. Mi. 2014) – Death of one co-Debtor in joint Chapter 13 is not basis to disallow claims. Rule 1016 provides that upon death of Debtor, case proceeds as though death had not occurred.

8.147 Collateral Estoppel

- (2655) *In re Spittler*, Case No. 14-31693 (Bankr. E.D. Mi. 2015) – Collateral estoppel applies in objections to claims if claim has been subject to prior litigation that culminated in a valid final judgment and issues were actually litigated and necessarily determined. Issue is actually litigated if it is put into issue by pleadings, submitted to trier of fact, and determined by trier of fact, although a full trial is not necessarily required. Issue is necessarily determined if resolution is essential to judgment. Default judgment in State Court suit by creditor against Debtor collaterally estops Debtor from contesting validity or amount of debt in subsequent objection to proof of claim.

8.148 Judicial Estoppel

- (2656) *Bullard v. IndyMac Bank*, 2012 WL 4134839 (E.D. Mi. 2012), *aff'd* 2013 WL 4859785 (6th Cir. 2013) – Judicial estoppel precluded Debtor from contesting validity of mortgage following bankruptcy discharge. Debtor's schedules listed secured debt and did not list in bankruptcy schedules any alleged claim to invalidate mortgage and failed to disclose claim at Section 341 meeting. Based on Debtor's representations as to secured claims, trustee closed case as no asset case and did not administer property for benefit of estate. Pursuing cause of action that was not disclosed as an asset in prior bankruptcy filing is inconsistency sufficient to support judicial estoppel. Court adopted Debtor's representations by entering discharge and closing case without administering asset. Debtor did not disclose possible cause of action until day after discharge entered and even then never advised trustee that she believed that property was not subject to mortgage and never amended Schedule D to list mortgage as disputed or contingent.
- (2657) *In re Reynolds*, 470 BR 138 (Bankr. D. Colo. 2012) – Debtor is judicially estopped from seeking disallowance of claims which did not attach copies of credit agreements where Debtor scheduled debts as undisputed in similar claim amounts.
- (2658) *In re Oparaji*, 698 F.3d 231 (5th Cir. 2013) – Reversing lower court holding that Mortgage creditor was estopped from asserting claims in Chapter 13 case where the claims were inconsistent with claims asserted by mortgage creditor in Debtor's prior Chapter 13 case. Creditor's assertion in prior case of lower arrearage claim was not inconsistent with significantly higher arrearage claim in later case, even where later claim included fees, costs and charges that could have been, but were not, included in claim in prior case. Creditor had no legal duty to include all possible amounts in prior proof of claim, so failure to do so was not assertion of legally inconsistent position with claim in later case that did include additional amounts. Even if creditor had assumed legally inconsistent positions, any alleged reliance by Court on that inconsistent position terminated when prior case was dismissed prior to entry of a discharge. Dismissal negated Court's acceptance of plan and parties were no longer bound by the plan.

8.149 Statutory Subordination – Section 726(a)

- (2659) *In re College Book Rental Company, LLC*, 2016 WL 5936846 (Bankr. M.D. Tn. 2016) – Section 726(a)(4) provides for payment of allowed unsecured claims before payment of any claim for fines, penalties, forfeitures, or multiple, exemplary or punitive damages, arising before order for relief to extent not compensation for actual pecuniary loss. Statutory damages for violation of Copyright Act are designed to compensate infringed party and are not a "penalty" and are not subordinated.

8.150 Equitable Subordination

- (2660) *Spradlin v. Whitt*, 2017 WL 2869805 (Bankr. E.D. Ky. 2017) – Section 510(c) allows Court to equitably subordinate all or part of an allowed

claim to all or part of another allowed the claim or interest where (1) claimant engaged in inequitable conduct; (2) misconduct resulted in injury to creditors of Debtor or conferred unfair advantage on claimant; and (3) equitable subordination must not be inconsistent with provisions of code. Amended complaint sought to subordinate unsecured claim arising out of Debtor's purchase of securities were complaint did not allege any inequitable conduct by defendants in connection with that transaction. Complaint alleged in only conclusory manner that defendants, officers and controlling shareholders of Debtor, breached fiduciary duties, but failed to include any factual allegations showing any duties owed by defendants or how defendants may have breached those duties.

- (2661) *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) – Subordination requires that claimant have engaged in inequitable conduct that injures creditors of bankruptcy estate or obtains unfair benefit, and subordination must not be inconsistent with Code. Even assuming that corporation engaged in wrongful conduct, that would not amount to inequitable conduct by noteholders for purposes of subordinating noteholders to shareholders. Further, request to subordinate would be inconsistent with balance of Section 510 which specifically subordinates stock claims to other unsecured claims.
- (2662) *White Family Companies, Inc. v. PNC Bank*, 2015 WL 1245915 (Bankr. S.D. Ohio 2015) – Action requesting equitable subordination of unsecured claim to all other unsecured claims must be brought by adversary proceeding. Party lacked standing to pursue equitable subordination of bank's claim where party could not demonstrate any specific injury peculiar to it, and alleged only that bank's conduct was inequitable and resulted in harm to all general unsecured creditors. While trustee or Debtor-in-possession may have standing to seek equitable subrogation as to all other creditors, individual creditor must prove specific and distinct injury to maintain standing. Further, equitable subordination requires that the bank had engaged in inequitable conduct that caused injury to creditors of bankrupt or conferred an unfair advantage on the bank, with equitable subordination not being inconsistent with provisions of Code. As the bank was not an insider of Debtor, to warrant subrogation bank's conduct would have to be egregious such as gross mismanagement tantamount to fraud, overreaching, or spoliation to detriment of others; not merely "sharp dealing". Although complaint alleged that bank allowed transactions to clear accounts in violation of its own policies, allegations did not rise to level of egregious conduct but were more consistent with negligence or conduct that was imprudent and ill-advised. There was no allegation that bank's conduct was specifically directed to cause injury to Debtor or for purposes of gaining unfair advantage over other creditors.
- (2663) *Antioch Company Litigation Trust v. Morgan*, 2011 WL 1670952 (Bankr. S.D. Ohio 2011) – Three part test for determining whether equitable subordination of a claim is appropriate requires (1) the claimant must have engaged in some type of inequitable conduct; (2) this misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.
- (2664) *Greer v. Gateley*, 2010 WL 4817993 (Bankr. M.D. Tn. 2010) – In order for Debtor to establish that equitable subordination is appropriate, Debtor must allege and prove that: (1) Creditor engaged in some type of inequitable conduct, (2) the misconduct resulted in injury to the creditors of the bankrupt or conferred an unfair advantage to Creditor, and (3) the equitable subordination of Creditor claim is not inconsistent with the provisions of the Bankruptcy Code. Where Creditor is non-insider, Debtor must plead and prove egregious conduct to support equitable subordination. Creditor's actions in foreclosing mortgage after default is not type of "egregious" conduct that would support subordinating Creditor's secured claim to the interests of either the unsecured creditors or the Debtor.
- (2665) *Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Court cannot subordinate debt to equity for creditors who do not file proofs of claim. Failure to file claim by bar date results in creditor not having any debt to re-characterize or debt to subordinate.

8.151 Subordination – Stock Interests Under Section 510

- (2666) *Spradlin v. Whitt*, 2017 WL 2869805 (Bankr. E.D. Ky. 2017) – Section 510(b) provides that claim arising from purchase or sale of security of Debtor is subordinated to all claims or interests that are senior to or equal the claim or interest represented by the security, except that if the security is common stock, the claim has same priority as common stock. Section 510 only applies to subordinate claims for damages that directly concern a transaction involving security of the Debtor and the actual purchase or sale of the security must create the claim. Complaint failed to state cause of action were complaint alleged that defendants, officers and directors of Corporation, caused Corporation to purchase stock of second Corporation. Claims against defendants did not seek damages based on purchase and sale security by defendants. Further, claims were based on promissory notes issued for payment of purchased securities. Mere nonpayment of promissory note is not a claim for damages in connection with purchase or sale of security but is, instead, and action based on the promissory note itself.
- (2667) *Kahn v. Barton*, 2017 WL 279505 (9th Cir. 2017) - Subordination provision of Section 510(b) subordinates claims arising from rescission of purchase or sale of securities of the Debtor or an affiliate of the Debtor or for damages arising from purchase of securities. "Arising from" provision of Section 510 calls for broad interpretation but does not sweep in every claim that somehow touches on or involves stock. Creditor acquired 6 million shares in small company in 2001. Creditor left company in 2009 and two remaining shareholders caused company to cancel stock. Creditor sued two remaining shareholders and obtained District Court judgment for conversion. Debtors filed Chapter 13 petitions and sought to subordinate claim under Section 510. Ninth Circuit in a 2-1 decision concluded that Section 510 did not apply because claims did not arise out of purchase or sale of securities, but from Debtors' actions many years later when they fraudulently converted stock. Damages were not even "remotely related" to purchase and damages were not within broad interpretation of "arising from". Section 510 is limited to claims that arise out of purchase of securities and risks that purchase of securities might entail. Dissenting opinion asserts claim did arise from purchase or sale of securities as later conversion of stock did not change fact that claim arose from creditor's prior ownership of securities creating sufficient nexus or causal relationship between claim and purchase of securities.
- (2668) *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) – Section 510 subordinates claim for damages arising out of the purchase or sale

of security of Debtor. Claimant was pre-petition stockholder in Debtor. After filing, Debtor announced that it would be sold, causing drop in value of claimant's interests until the stock became worthless. Claimant contended that Debtor, by making disclosure of intent to liquidate company, breached fiduciary duty as Debtor had value as going concern but not if liquidated. Breach of fiduciary duty claim arises out of claimant's status as shareholder, such that claim arises out of purchase or sale of stock, even where conduct that caused damage occurred later. Court denied equitable subordination under Section 510(c)(1). Subordination requires that claimant have engaged in inequitable conduct that injures creditors of bankruptcy estate or obtains unfair benefit, and subordination must not be inconsistent with Code. Even assuming that corporation engaged in wrongful conduct, that would not amount to inequitable conduct by noteholders for purposes of subordinating noteholders to shareholders. Further, request to subordinate would be inconsistent with balance of Section 510 which specifically subordinates stock claims to other unsecured claims.

8.152 Recharacterization of Debt to Equity

- (2669) *Spradlin v. Whitt*, 2017 WL 2869805 (Bankr. E.D. Ky. 2017) – Section 105 allows Bankruptcy Court to recharacterize debt as equity where circumstances show that that transaction was actually equity contribution. Factors to be considered include (one) names given to instruments evidencing indebtedness; (2) presence or absence of fixed maturity date and schedule a payment; (3) presence or absence of fixed rate of interest and interest payments; (4) the source of repayments; (5) adequacy or inadequacy of capitalization; (6) identity of interest between creditor and stockholder; (7) security issued, if any, for advances; (8) corporations ability to obtain financing from outside lending institutions; (9) extent to which advances were subordinated to claims of outside creditors; (10) extent to which advances were used to acquire capital assets; and (11) presence or absence of sinking fund to provide for repayment. Where same individuals or entities control both transfer or and a transferee, inferences can be drawn that funds were put in with little or no expectation they would be paid back along with other creditor claims. Complaint did not plausibly allege that promissory notes were disguised equity where promissory notes were denominated as part promissory notes and contain fixed maturity dates and interest rates and required regular payments by Debtor, with Debtor actually making those payments as required; there was no allegation that Debtor was in adequately capitalized when it executed the notes; there was no allegation that defendant's ever own any stock in Debtor; Debtor had outside funding sources and was actively pursuing investment bankers and other investors; promissory notes did not include any provision for subordination of advances to claims of outside creditors; there was no allegation that loan transaction was other than arm's length transaction and there was no suggestion that defendants loan funds to Debtor with little or no chance of repayment.
- (2670) *PEM Entities, LLC v. Province Grande Olde Liberty, LLC*, Case no. 15-1669 (4th Cir. 2016), *cert dismissed*, Case No. 16-492 (US 2017) – Recharacterization of debt is within broad powers of bankruptcy court. Court applies 11 factors in considering whether to reclassify debt: (1) names given to instruments evidencing indebtedness; (2) presence or absence of fixed maturity date and schedule of payments; (3) presence or absence of fixed rate of interest and interest payments; (4) source of repayments; (5) adequacy or inadequacy of capitalization; (6) identity of interest between creditor and stockholder; (7) security, if any, for advances; (8) corporation's ability to obtain financing from outside lending sources; (9) extent to which the advances are subordinated to claims of outside creditors; (10) extent to which advances were used to acquire capital assets; and (11) presence or absence of sinking fund to provide repayment. No one factor is dispositive and significance of each varies with circumstances. Court reclassified funds advanced from PEM by which PEM purchased pre-existing loans form third party lender at discount, where agreement by which PEM acquired loans was captioned "settlement agreement"; Debtor's principals negotiated settlement agreement on behalf of PEM without involvement of any stockholder or principal of PEM; failure of both Debtor and PEM to observe any formalities such as payment schedule, interest payments, or ledger; Debtor was totally reliant on money from PEM to meet expenses and lacked any ability to obtain other financing; identity of interests between Debtor and PEM; and approximately 70% of funds used were obtained by pledge of assets owned by Debtor. Although initial debt from prior lender to Debtor was not insider relationship and would not have been subject to reclassification, transaction by which PEM acquired debt was the transaction at issue and court properly looked beyond form to determine that substance of transaction was settlement of debt in which Debtor used PEM as extension of itself to complete what was in effect satisfaction of obligation owed by Debtor to third party lender.

8.153 Objections – Other State Law Defenses

- (2671) *In re Citizens Corp.*, 2013 WL 4039048 (Bankr. M.D. Tn. 2013) – Party could not sustain claim against Debtor where party did not make loan to Debtor but instead made loan to wholly-owned subsidiary of Debtor. Party had no contractual relationship with Debtor that called for Debtor to guarantee or be liable for loans to subsidiary and subsidiary was at all times a lawfully formed and existing corporation and Party was fully aware of corporate existence and status of borrower as entity separate from Debtor. Fact that entity borrowing money then, in turn, loaned that money to either the Debtor or another wholly owned subsidiary did not unjustly enrich Debtor, particularly where subsidiary more than repaid any money loaned to it. Further, Party made loan to subsidiary in which Party was a significant shareholder and did so in effort to support subsidiary's operations which would produce a benefit to party. Where the loan was intended to produce a benefit to the lender, the lender cannot then claim unjust enrichment, as lender made loan in furtherance of lender's own financial interests in the borrower.
- (2672) *Eckhardt v. Federated Capital Corp.*, Case no. 12-12668 (E.D. Mi. 2012) – Statute of Frauds requires that any obligation to answer for debt incurred by another person must be in writing. However, writing does not have to be between creditor and party assuming debt. Debtor purchased business from third party and, as part of purchase, assumed debts of the business. Debtor's assumption, contained in the written purchase agreement, constituted sufficient "writing" to permit creditor to maintain action against Debtor on assumed debts.
- (2673) *In re Saffron*, Case No. 10-9180 (Bankr. W.D. Mi. 2011) – Divorce judgments in Michigan do not accrue statutory interest unless Court exercises equitable jurisdiction to award interest. Party not entitled to attorney fees in divorce proceeding unless specifically awarded by Court. Proof of Claim founded on Divorce Judgment that included interest and attorney fees disallowed to extent of interest and attorney fees where documents attached to Proof of Claim failed to evidence entitlement.

- (2674) *Floyd v. Bloch*, 2010 WL 1141599 (5th Cir. 2010) - Basic rule in bankruptcy is that state law governs the substance of claims. Claim disallowed where creditor, who was also Debtor's mother, failed to produce any documents concerning an alleged loan extended by mother more than 10 years earlier. Absent written documentation of the alleged loan, the claim was barred by the state Statute of Frauds.
- (2675) *Ward v. Pulito*, Case No. 09-1275 (9th Cir. BAP 2010) – Promissory note given in contemplation of marriage that did not comply with State law requirements for a pre-nuptial agreement unenforceable. Further, Promissory note delivered in contemplation of marriage not supported by consideration where Promissory note was delivered as an inducement for recipient to accept proposal of marriage. Although the parties ultimately did get married, promises intended to induce marriage must be in the form of a pre-nuptial agreement that meets the requirements of State law to be enforceable. Representation in Promissory Note that note was given “for value received” does not bar finding that no consideration was actually received.
- (2676) *In re Gregg*, 409 B.R. (Bankr. S.D. Ohio 2009). Proof of claim to recover on unjust enrichment theory was unenforceable under Ohio law, where true title holder had no knowledge that payments had been made.
- (2677) *H.S. Die & Engineering, Inc. v. Ford Motor Company*, Adv. No. 09-4815 (Bankr. E.D. Mi. 2009) – Action for unjust enrichment is generally limited to situations where there is no express contract. Contract between vendor and Debtor pursuant to which third party was “expected to pay” for items transferred did not create contractual relationship between vendor and third party. Vendor could maintain action for unjust enrichment against third party to whom items manufactured by Vendor had been transferred.

8.154 Insider Claims

- (2678) *Spradlin v. Williams*, 2010 WL 4736905 (E.D. Ky. 2010) – Claim filed by apparently controlling member of LLC in bankruptcy of LLC subjected to greater scrutiny. Claimant had controlling interest in LLC; Debtor's affairs had been grossly mis-managed by claimant both before and after Chapter 11 filing until case converted on request of US Trustee; the Proof of Claim attached very little support; the origin of the claim itself, and the assignment to the claimant, were not properly documented and the evidence was inconsistent and contradictory; and claimant failed to list the claim in Debtor's schedules in the first instance.

8.155 Default – Creditor Failure to Respond

- (2679) *In re Calhoun*, 2013 WL 2403858 (Bankr. E.D. Tn. 2013) – Court has authority to enter order disallowing claim where Debtor has filed objection and has properly served creditor with objection and notice of hearing, but creditor failed to either respond to the objection or to appear at the hearing. However, court is not obligated to enter default and has authority to independently review claim and objection to determine whether objection should be sustained.

8.156 Settlement of Objections

- (2680) *In re BX Acquisitions, Inc.*, 2016 WL 1734842 (Bankr. N.D. Ohio 2016) – Formation and enforcement of settlement are governed by state law applicable to contracts generally. Settlement agreement requires meeting of minds accompanied by offer and acceptance. Oral settlements are binding if there is sufficient particularity to form contract. Settlement agreement need not be written or formally executed where essential terms have been agreed upon and only remaining item is to memorialize agreement in writing. Party's objective actions reflect party's belief that settlement has been reached even if party later disputes enforceability of settlement. Evidence indicated that parties reached settlement regarding proposed rejection of executory contract as to material term at issue, involving waiving by landlord of administrative claim. Other discussions about potential claims that landlord may file, those issues were not central to issue of rejection of lease and objecting landlord's conduct coupled with plain language of e-mails exchange between parties supported conclusion that parties had reached enforceable settlement.
- (2681) *Cotter v. Stevenson*, 2016 WL 1084686 (E.D. Mi. 2016) – Debtor lacks standing to object to trustee's proposed resolution of claims where estate is insolvent and even if disputed claim were disallowed entirely, estate would not have surplus above amounts owed to creditors. Debtor lacked any direct pecuniary interest that would be adversely affected by settlement. Appeal of order resolving claims dismissed for lack of standing.
- (2682) *In re Batt*, 2013 WL 849219 (Bankr. W.D. Ky. 2013) – Courts are required to form educated estimate of complexity, expense and likely duration of litigation, as well as possible difficulties in collecting any judgment, and any other factors relevant to a full and fair assessment of wisdom of proposed settlement. Courts will consider: (a) the probability of success in the litigation, including value and likely outcome of claims to be settled; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. Proposed settlement was reasonable where merits of claim presented close questions of fact; settlement would avoid lengthy, expensive and complex litigation; and would preserve assets of Chapter 7 while producing additional funds for distribution to creditors. Settlement would avoid likely substantial difficulties in collection and would avoid possibility that one or more defendants would, themselves file bankruptcy and thwart any collection efforts. Proposed settlement was above the lowest point in the range of reasonableness and would foster economic interests of creditors by increasing pool of assets available and shortening time for distribution of those assets. Settlement of Section 727 action is not objectionable merely because Debtor is “buying a discharge” as that would prevent settlements in all Section 727 cases.
- (2683) *In re Marcola*, 2011 WL 7789569 (Bankr. E.D. Mi. 2011) – Court must form an educated estimate of complexity, expense and duration of litigation, possibility of collecting on judgment which might be obtained, and any other factors relevant to full and fair assessment of wisdom of proposed compromise. Interests of creditors and proper deference to their reasonable views are paramount. Debtor's proposed resolution of claims, which included dismissal of chapter 13 case, was reasonable. Debtors understood nature of the agreement and the effect that dismissal would have on agreements with other creditors.

- (2684) *In re B & P Baird Holdings, Inc.*, 2011 WL 5909669 (Bankr. W.D. Mi. 2011), *aff'd* 2012 WL 4501016 (W.D. Mi. 2012) – In evaluating Trustee’s proposed settlement of claims, court will apprise itself of underlying facts, weigh interests of all competing parties, consider the probability of success on the merits, and consider complexity and expense of litigation. Outcome of dispute was unclear and estate’s largest creditor supported the settlement. Court would not substitute its judgment for that of Trustee where trustee presented evidence to support reasonableness of settlement considering all relevant factors.
- (2685) *Ames v. Rabin*, 2011 WL 1630139 (N.D. Ohio 2011) – The Federal Rules of Bankruptcy Procedure specifically grant a trustee the authority to seek a compromise or settlement of claims available to the Debtor or Debtors, upon motion and after notice and a hearing. The court is charged with an affirmative obligation to apprise itself of the underlying facts and to make an independent judgment as to whether the compromise is fair and equitable. In determining if a settlement is fair, the court must weigh the conflicting interests of all relevant parties, considering such factors as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors. Settlement is fair and equitable and is in the best interests of the estate where claims brought by the Trustee are plausible, but face risk that claims could be dismissed on the pending motions to dismiss, on summary judgment, or that the claims may fail at trial with no recovery for the estate. Insurance policy had a declining balance that would continue to decline as further fees and expenses are incurred, depleting the only source of payment. Trustee’s determination that this settlement is in the best interest of the estate is given great weight.
- (2686) *In re Bunting*, Case No. 07-20864 (Bankr. E.D. Mi. 2010) – In considering proposed settlement, Court must apprise itself of the underlying facts and make an independent judgment whether the compromise is fair and equitable. Court is not permitted to act as rubber stamp for trustee. Court must form educated estimate of complexity, expense and likely duration of any litigation, difficulties in collecting on any judgment, and other factors relevant to a full and fair assessment of the wisdom of the proposed settlement, keeping in mind the paramount interests of creditors and with a proper deference to their reasonable views. Settlement compromising creditor’s claim from \$114,083 to \$35,000 in exchange for trustee’s release of any further claims against creditor was reasonable in light of anticipated complexity and uncertainty of further litigation, expense that would entail, and necessary delays in administration of case that would result.
- (2687) *General Motors Acceptance Corporation v. Flynn*, Case No. 08-8109 and 08-8110 (6th Cir. BAP 2009) - Bankruptcy Courts have significant discretion to approve or reject proposed settlements and compromises. Court must consider probability of ultimate success and costs attendant to litigation including complexity, expense, inconvenience, delay, and the likely duration of a lawsuit and difficulties in collecting on judgment. Court improperly approved settlement that was predicated on an agreement between the Trustee and creditor regarding certain offsets notwithstanding that the Bankruptcy Court previously determined that creditor was not entitled to the offsets as a matter of law.
- (2688) *Engman v. Boyd*, Case No. 1:09-cv-151 (W.D. Mi. 2008) – In determining whether to approve a proposed settlement, Bankruptcy Court must consider whether the disposition proposed is fair and equitable including whether the proposed settlement is the best alternative available to the estate under the circumstances taking into particular consideration whenever other alternatives the objecting party or parties might pose. Bankruptcy Court must consider the strength of the claim asserted, the difficulty, expense, and likelihood of success in litigation, against the benefit to the estate and creditors of settling the claim without litigation and determine whether the proposed settlement is reasonable and in the best interests of the estate. Implicit in that consideration must also be the Court’s separate determination of whether the proposed disposition is consistent with the Trustee’s duties as the estate fiduciary. District Court may set aside Bankruptcy Court’s approval or rejection of proposed settlement only if Bankruptcy Court abused its discretion, as decision to approve a proposed settlement is bound up in the ever-changing facts and circumstances of the bankruptcy case. The Bankruptcy Court need not conclusively determine whether and to what extent the claim will be successful or whether a proposed defense may be dispositive. The Court need only apprise itself of the relevant issues and make an informed judgment on the reasonableness of the proposed settlement.
- (2689) *Bailey v. White*, 2009 WL 928595 (6th Cir. 2009) - Court should approve the settlement only after a hearing “and on finding that it is fair, reasonable, and adequate.” Several factors inform this inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. District Court correctly applied the seven-factor test to approve settlement that terminated medical insurance and replaced that with VBA.
- (2690) *Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6th Cir. BAP 2009) – Bankruptcy Court has significant discretion to approve or disapprove a settlement with compromise. Bankruptcy Court is under affirmative duty to apprise itself of all necessary facts as to make informed and independent judgment as to whether the settlement is fair and equitable to the non-settling parties. Factors to be considered include probability of ultimate success should be claim be litigated and costs attendant to such litigation in terms of complexity, expense, inconvenience, delay and the likely duration of a lawsuit including possible difficulties of collecting on any judgment. Court must compare the terms of a compromise with the likely rewards of litigation, but is not required to conduct mini-trial when evaluating a settlement. Proponent of settlement bears burden of showing by preponderance of evidence that the proposed settlement is fair and equitable. Bankruptcy Court properly refused to approve the settlement by which defendant would have received credits far in excess of what the Bankruptcy Court concluded was the maximum which defendant could sustain in litigation. Proposed settlement which would have given defendant a credit of more than \$100,000 not fair and equitable where Bankruptcy Court had already concluded that defendant could reasonably establish a credit of only \$20,000 and had “serious doubts” that Debtor owed defendant any credit as claimed by defendant.

8.157 Sanctions Against Filing Creditor

- (2691) *Rosenfeld v. Rosenfeld*, Case No. 16-13329 (E.D. Mi. 2017) – Bankruptcy Court did not abuse discretion in disallowing Proof Claim as sanction for claimant’s failure to comply with Court Order. Bankruptcy Court “conditionally overruled” Debtor’s objection to Proof of Claim but required creditor to “take any appropriate action(s) necessary to bring the [DSO] issues before the state court for determination” by a date certain. Although

claimant filed a Motion State Court by the required deadline, claimant did not take any other action as claimant did not request a hearing on that motion or seek any relief on that motion at subsequent hearings in state court or take any other action in 5 months between Court imposed deadline and date on which Court disallowed claim.

- (2692) *In re Royal Manor Management, Inc.*, 2013 WL 1310881 (Bankr. N.D. Ohio 2013) – 28 USC Section 1927 authorizes court to enter sanctions against any attorney or party who multiplies the proceedings unreasonable and vexatiously in amount representing excess costs, expenses and attorney fees incurred because of the conduct. Party filed claim against Chapter 11 estate. Documents indicated that underlying loan was from one family member to another, the recipient of which was a principal in the Debtor. There was no indication that the funds were loaned to the Debtor or that the Debtor ever agreed to any repayment of the loan. After the Bankruptcy court sustained an objection to the claim, the attorney for the claim holder seemed to find any and every occasion to multiply the ongoing proceedings, including multiple appeals in the District Court, the Court of Appeals and in the Supreme Court, where *certiorari* was denied. Counsel continued to file unnecessary and vexatious pleadings even after the hearing on sanctions. Ongoing litigation delayed distributions to other creditors by 29 months and caused a substantial erosion of funds for distribution as those funds were used for counsel fees that resulted from creditor's "ever swelling and frivolous pleadings". Evidence indicated that litigation cost estate at least \$150,000. Court awarded sanctions in that amount without prejudice to Debtor's right to present evidence of additional costs and expenses that resulted from creditor's conduct.
- (2693) *Wells Fargo Bank, N.A. v. Stewart*, 647 F.3d 553 (5th Cir. 2011) – Debtor lacks standing to seek injunctive relief against Mortgage Creditor where Debtor failed to demonstrate any risk of future harm or injury. Debtor's objection to Creditor's Proof of Claim had already been sustained and Creditor had been sanctioned for filing incorrect proof of claim, and there was no evidence that Creditor would attempt to file another incorrect claim. Court lacked authority to *sua sponte* impose sanctions against creditor that would have required creditor to (1) to audit every proof of claim it has filed in any case pending on or filed after April 13, 2007; (2) to provide a complete loan history on every account and to file that history with the appropriate court; and (3) to amend any proofs of claim already on file to comply correct errors or inaccuracies.
- (2694) *Poteet v. eCast Settlement Corp.* 2011 WL 3626696 (Bankr. E.D. Tn. 2011) – Rule 3001 governing proofs of claim does not provide a remedy for a failure to comply with Rule 3001 and there is no basis for creating a private right of action under the rule. Remedy for the incomplete proofs of claim is to file an objection thereto, forcing the creditor to prove its claims without the benefit of Rule 3001(f).
- (2695) *In re Wingerter*, 394 BR 859 (6th Cir. BAP 2008) *reversed* 594 F.3d 931 (6th Cir. 2010)– Sixth Circuit BAP dismissed appeal of Order imposing sanctions under rule 9011, finding that the appeal had become moot. Bankruptcy Court imposed sanctions against debt purchasing company for filing a proof of claim without making any investigation as to the validity or enforceability of the underlying obligation and for filing proof of claim which contained erroneous information and was incomplete and failed to attach an itemized statement of the account. Debt purchasing company stated that Asset Purchase Agreement pursuant to which company acquired debt required seller to confirm that the Debtor is in a Chapter 13 proceeding; the debt has not been disputed or discharge; the amount owed is accurate; the statute of limitations on the claim has not expired; and the debt is not fraudulent. Debt purchasing company relied on statements and warranties set forth in Asset Purchase Agreement without conducting any independent investigation of the validity or enforceability of the obligation. Bankruptcy Court concluded that debt purchasing company's procedures for filing proofs of claim did not constitute a reasonable inquiry, prior to filing, as to whether there is admissible evidence to support the claim. Debt purchasing company, before filing a proof of claim with the Bankruptcy Court, must obtain originating documentation or, when that documents are not available, a clear understanding of the nature of the original dealings that support the assertion of a claim against the Debtor. The purchaser should then attach to the proof of claim the originating documents or an affidavit explaining the nonavailability of those documents so the Debtor and other interested parties are given fair notice of the source and particulars of the claim. Bankruptcy Court did not impose monetary sanctions, as expenses incurred by debt purchasing company were deemed to be a sufficient sanction.
- 8.158 Effect of Order Disallowing Claim
- (2696) *In re Pajian*, 598 BR 708 (Bankr. N.D. Ill. 2014), *aff'd* 2015 WL 2182951 (7th Cir. 2015) – Creditor must file claim by bar date in Chapter 13. Late filed claim must be disallowed if objection is filed, even if claim itself is secured. However, disallowance of claim in bankruptcy does not affect lien, which passes through bankruptcy unaffected regardless of whether claim is filed.
- (2697) *Municipality of Carolina v. Gonzalez*, 2013 WL 1629235 (1st Cir. BAP 2013) – Protective claim filed by Debtor on behalf of creditor where creditor did not timely file claim was disallowed as filed after the bar date. Priority claim for which there was no allowed proof of claim would not receive distributions under confirmed Chapter 13 plan and would be discharged at successful completion of Chapter 13 case.
- (2698) *Hahn v. Educational Credit Management Corporation*, Case No. 11-084 (1st Cir BAP 2012), *aff'd* 711 F.3d 235 (1st Cir. 2013) – Order disallowing student loan claim on basis that Debtor had paid non-dischargeable student loans prior to commencement of bankruptcy precluded post-discharge efforts to collect alleged balances owed. Court Order sustained Debtor's objection to proof of claim as filed and stated, "This [c]ourt allows the claim of ECMC in the amount of \$0.00." Order sustaining objection to claim was *res judicata*, precluding creditor for later arguing that findings were in error and there remained a balance owed. Court rejected argument that order disallowing proof of claim may not preclude creditor holding non-dischargeable claim from pursuing collection, as that order may not mean that no sums are owed, but only that there is a basis to disallow the claim for bankruptcy distribution purposes only. Where Court enters order disallowing claim, by definition there is no debt and, therefore, nothing that could be discharged. Debtor properly invoked bankruptcy procedure that resulted in order holding that balance owed to creditor was \$0.
- (2699) *Elkhoeiry v. Schroeder*, 2010 WL 3397471 (S.D. Ohio 2010) - Bankruptcy Court Order disallowing Proof of Claim bars any later attempt to prosecute the claim. Order Disallowing Claim required dismissal of prepetition litigation that was pending at the time of commencement of the case where prepetition litigation was based on same action as was asserted in Proof of Claim.

8.159 Reconsideration of Allowed or Disallowed Claim – Grounds Generally

- (2700) *In re Vernon*, 2016 WL 110072 (Bankr. W.D. Ky. 2016) – Rule 3007 requires that a hearing date be set and that creditor be allowed 30 days to respond to the objection. Section 592(j) and Rule 3008 allow court to reconsider claim that was allowed or disallowed for cause. Order disallowing claim entered less than 30 days after service of objection set aside as creditor was given inadequate time to respond.
- (2701) *Municipality of Carolina v. Gonzalez*, 2013 WL 1629235 (1st Cir. BAP 2013) – Section 502(j) allows party whose claim has been disallowed to request reconsideration of order. Party must show cause for reconsideration. If cause exists, then court will determine claim in accordance with equities of case. Cause is not defined and is vested in discretion of court, and may include but is not limited to grounds for reconsideration under Rule 60. Creditor failed to demonstrate basis for reconsideration where creditor failed to file claim although creditor had proper notice of bankruptcy proceeding. Debtor ultimately filed proof of claim on behalf of creditor but claim was disallowed as untimely. Creditor waited 10 months after entry of order disallowing claim before requesting reconsideration. Creditor did not evidence that order disallowing claim was result of mistake or excusable neglect, and creditor failed to move timely for reconsideration of the order.

8.160 Reconsideration of Allowed or Disallowed Claim – Time for Request

- (2702) *In re Thomas*, Case No. 14-57578 (Bankr. E.D. Mi. 2016) – Voluntary dismissal of Chapter 13 case deprives Court of jurisdiction to reconsider claim where initial order did not reserve jurisdiction. Section 349 terminates all actions of the bankruptcy court unless court has expressly reserved jurisdiction over administration of estate. Neither prior order disallowing claim nor order dismissing case retained jurisdiction, leaving parties to remedies in State Court only.
- (2703) *In re Thiel*, 2015 WL 4480390 (Bankr. W.D. Ky. 2015) – Court reconsidered claim under Rule 3008 where creditor attempted to timely file response but ECF error prevented filing, and creditor then refiled response the day after the response was due and 7 minutes after the court entered its order sustaining the objection based on the lack of response. Creditor acted diligently when it attempted to timely file the response, discovered the error within 24 hours, and immediately requested that the court grant leave to file the response and to reconsider the order disallowing the claim. Trustee who filed objection to claim could not demonstrate any prejudice and given very short time frames, there could have been no prejudice.
- (2704) *In re Ralph*, Case No. 13-8005 (6th Cir. BAP 2013) – Request for reconsideration of Claim under Section 502(j) is not subject to one year limitation of Rule 60(b). However, where Order that allowed claim included substantial additional provisions that were part of resolution and involved competing interests of multiple third parties, Debtor's request sought to do more than reconsider claim and sought to undermine substantial basis for overall resolution of issues, such that time for bringing request would be limited to one year. Request made three years after entry of Order determining priority and amount of secured claim was untimely.
- (2705) *In re Ralph*, Case No. 13-8006 (6th Cir. BAP 2013) – Request for reconsideration of Claim under Section 502(j) is not subject to one year limitation of Rule 60(b). However, where Order that allowed claim included substantial additional provisions that were part of resolution and involved competing interests of multiple third parties, Debtor's request sought to do more than reconsider claim and sought to undermine substantial basis for overall resolution of issues, such that time for bringing request would be limited to one year. Request made three years after entry of Order determining priority and amount of secured claim was untimely.

8.161 *Res Judicata* Effect of Confirmed Plan

- (2706) *In re Shank*, Case No. 11-10480 (Bankr. S.D. Tx. 2017) – *Res Judicata* prevents creditor from relitigating confirmation of Chapter 13 Plan. *Res judicata* applies when creditor has had adequate notice and was afforded the opportunity to litigate confidence of Plan or order; issue in second action is identical to issues adjudicated as part of confirmation process; confirmation order was entered by Court of competent jurisdiction; and confirmation order is final adjudication on merits of proposed Plan. Once a Plan is confirmed, even a Plan improperly modifies mortgage in violation of Section 1322 (b) (2) or otherwise contradicts code, provisions of confirmed Plan buying Debtor and creditor. Debtors Chapter 13 Plan provided for full satisfaction of mortgage by paying specified amount with fixed interest rate. Creditor neither filed an objection to confirmation or filed a Proof of Claim. At completion of Plan, Debtor entitled to order deeming mortgage satisfied even if principal balance of mortgage stated in Plan and interest rate stated in Plan very from actual amounts due under mortgage.
- (2707) *LVNV Funding, LLC v. Harling*, Case No. 16-1346 (4th Cir. 2017) – Order confirming plan in Chapter 13 does not bar later objections to proof of claim. Confirmation of proposed plan does not provide for determination of merits of individual unsecured claims or require ruling on validity of individual unsecured claim. Rules do not impose any deadline for initiation of claim the objection and nothing in Bankruptcy Code ties objections to claims to plan confirmation.
- (2708) *In re Michael*, Case No. 15-11133 (Bankr. N.D. Ok. 2016) – Confirmation Order does not bar post-confirmation objections to claims. Chapter 13 Plans are routinely confirmed before bar date and first confirmation hearing is always before bar date, rendering it “illogical” to argue that confirmation order precludes post-confirmation claims objections. Further, nothing in Rules sets any deadline to object to claims in Chapter 13 and confirmation order is not *res judicata* as claims allowance is not “necessary” to confirmation process which is essential element of *res judicata*.
- (2709) *In re Jackson*, Case No. 09-33790 (Bankr. E.D. Mi. 2015) – Chapter 13 Plan binds all parties including Debtors. Provision of Plan dealing with claims at variance with plan provided that claim would be allowed as filed. Although Chapter 13 plan proposed to cram IRS claim and to pay any remaining balance as unsecured, IRS filed Proof of Claim with secured, priority and unsecured components and claim must be allowed and treated accordingly. IRS failure to object to proposed cram down did not alter IRS right to rely on provision that claims are treated as filed even if at variance with plan.
- (2710) *Hope v. Acorn Financial, Inc.*, 2013 WL 5366291 (11th Cir. 2013) – Chapter 13 Trustee who was aware of defect in recorded mortgage but

recommended confirmation of plan that paid mortgage as secured claim was precluded from later seeking to contest validity of lien.

- (2711) *Pees v. CitiMortgage*, 2012 WL 4465505 (Bankr. S.D. Ohio 2012) – Plan proposed to surrender property to mortgage holder confirmed by court. After confirmation, Trustee became aware of possible defect in mortgage execution which could permit mortgage to be set aside. Confirmation of plan was res judicata on issues regarding status of mortgage. Plan disclosed existence and treatment of mortgage and Chapter 13 trustee never contested validity of mortgage or opposed confirmation based on alleged defect in mortgage. Trustee’s present position regarding avoidability of lien was inconsistent with that taken at confirmation hearing and allowing trustee to now change positions would result in unfair detriment to mortgage lender.
- (2712) *In re Tirone*, 2012 WL 3249551 (Bankr. N.D. Ohio 2012) – Debtor’s objection to proof of claim based on alleged conflict with confirmed plan sustained and claim disallowed to extent of conflict. Plan proposed to bifurcate claim secured by Debtor’s automobile into a secured claim in amount of \$6,000 plus interest at 4%; with the balance to be paid as unsecured claim. Prior to confirmation, Creditor filed a proof of claim alleging that the collateral value was \$10,250 and asserting an interest rate of 14.95%. However, creditor did not object to confirmation of plan. After confirmation, Debtor objected to proof of claim to extent inconsistent with confirmed plan. Court concluded that confirmed plan controlled. Debtor was not required to object to claim prior to confirmation of plan. After *Espinosa*, claims allowance process cannot trump confirmation process, and creditor cannot sit back and rely on filed claim while allowing plan to be confirmed with inconsistent terms or treatment.
- (2713) *In re Wright*, 461 BR 757 (Bankr. N.D. Iowa 2011) – Mortgage servicer’s failure to provide notice of payment changes to trustee, Debtor and Debtor’s attorney, and failure to respond to Debtor’s request for payment information and failure to prepare and distribute annual statements showing activity on account constituted willful violation of terms of confirmed plan that contained provisions imposing obligations on creditor and creditor failed to object to confirmation.
- (2714) *Ginn v. CitiMortgage, Inc.*, 365 BR 84 (Bankr. D.S.C. 2012) – Preclusive effect of confirmation of Chapter 13 Plan precluded Debtor from contesting assignee’s status as holder of mortgage. Chapter 13 plan expressly provided that purported mortgage assignee would be paid in the Chapter 13 case, affirmed continued applicability of pre-petition mortgage agreement, addressed acknowledged default, and provided for continued payment of contractual mortgage payments.
- (2715) *In re Soboleski*, Case No. 10-46291 (Bankr. E.D. Mi. 2011) – Confirmed Plan is *res judicata* on validity of Proof of Claim filed prior to confirmation of the Chapter 13 Plan. The Court’s standard Confirmation Order provides, “All filed claims to which an objection has not been filed are deemed allowed pursuant to 11 U.S.C. § 502(a)” Although allegations in objection to claim raised legitimate questions as to whether creditor held a valid claim, and although there is no specific rule that requires objections to claims to be brought within any specific deadline, the specific plan provision and provision of the Confirmation Order control.

8.162 Res Judicata Effect of Other Court Orders

- (2716) *Reed v. Blount*, 2016 WL 3625602 (E.D. Mi. 2016), *aff’d*, 2017 WL 3597425 (6th Cir. 2017) – Provisions of State Court Judgment awarding claimant certain monies was res judicata on issue of existence and amount of obligation for purposes of filing Proof of Claim in Bankruptcy. Debtor could not challenge in Federal Court through vehicle of Claim Objection the validity of the State Court Order. Any dispute with validity or correctness of State Court Order must be addressed to State Court. Federal Court lacks authority to look behind and revisit correctness of State Court judgment. Debtor failed to present any evidence that judgment itself was entirely “void” but only argued that judgment was incorrect.
- (2717) *Ford v. Wells Fargo Bank*, 2015 WL 5575977 (Bankr. E.D. Tn. 2015) – Adversary order in prior Chapter 13 proceeding that settled all claims of alleged misapplication of payments prior to date of filing of adversary complaint collaterally estopped Debtor from objecting to claim in subsequent bankruptcy case based on any payments that came due or were misapplied prior to commencement of adversary complaint.
- (2718) *In re City of Detroit, Michigan*, 2015 WL 2165018 (Bankr. E.D. Mi. 2015) – Debtor’s objection to claim sustained where multiple prior orders in multiple other courts had determined that City was not liable to creditor. Res judicata effect of prior federal Court Orders is determined by federal common law, which requires (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their ‘privies’; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action. Creditor had previously sued City and Court entered Summary Judgment in favor of City, which constituted final decision on merits. Parties were identical in earlier cause of action and claim in bankruptcy case arose out of same conduct of City concerning alleged wrongful seizure of personal property and demolition of structures on real property. Although bankruptcy claim included alleged damages to other items of personal property not specifically alleged in prior complaint, res judicata includes items which were raised or which could have been and should have been included.
- (2719) *In re Kelley*, 2014 WL 3767418 (Bankr. W.D. Mi. 2014) – Trustee’s objection to secured claim sustained where prior Court Order allowing sale of property determined that the only interest in the property was that of the mortgage company. Creditor filed a secured claim based on a State Court Order imposing a constructive trust. Thereafter, the Trustee, proposed to sell the property free and clear of liens, noting that the only secured claim shown in the chain of title was that of the mortgage company. The Trustee served the motion on creditors who did not file any opposition to the relief requested. The Order approving the sale determined that the only interest in the property other than Debtors’ was that of the mortgage company and ordered distribution of the proceeds accordingly. The Trustee then objected to the creditor’s secured claim, asserting that based on the court’s prior order, the claim was unsecured. The Court sustained the objection, noting that the creditor had full knowledge of the Trustee’s Motion and assertions in the motion that there were no other parties holding an interest in the property but failed to object and so were bound by the Order allowing the Section 363 sale. While the court likely would not have approved the Section 363 sale (or at least retained jurisdiction to determine entitlement to proceeds and the validity of creditor’s claim) had the creditor

opposed the sale or at least filed a response to the sale asserting an interest, creditor's failure to do so left creditor bound by the terms of the order approving sale, effectively extinguishing any interest which creditor had or claimed to have had in the property. Objection sustained to extent of secured status with claim allowed as unsecured only.

8.163 Effect of Amended or Withdrawn Claim - Mootness

- (2720) *Samartin Alliance, LLC v. Commonwealth of Kentucky*, 2014 WL 4104195 (Bankr. E.D. Ky. 2014) – Objection to proof of claim is rendered moot when claim is withdrawn.
- (2721) *In re Milano*, 2012 WL 1965661 (Bankr. N.D. Ohio 2012) – Filing of amended proof of claim while objection to original claim is pending renders prior objection moot. As Debtors did not file objection to amended proof of claim, the amended proof of claim is deemed allowed and there is no dispute before the court as to the validity of the amended claim.

D. Priority of Distribution

8.164 Generally

- (2722) *Old West Annuity and Life Insurance Company v. Apollo Group*, 605 F.3d 856 (11th Cir 2010) – Judgment lienholder's secured claim had to be paid from excess proceeds remaining after sale of collateral and payment of superior mortgages and liens. Government's administrative expense claim for taxes incurred in connection with sale of property could not trump properly perfected judgment lien.
- (2723) *American Express Bank v. Askenazer*, 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. Creditor must demonstrate entitlement to distribution at a particular level – there is no default level of distribution. Creditors who refused to provide documentation to allow Trustee to ascertain nature, amount and timing of, and contractual basis for, interest and other charges would have claims subordinated to Section 726(a)(4) for payment only after full payment to allowed general unsecured creditors.

8.165 "Carve Outs" Generally

- (2724) *Hargreaves v. Nuverra Environmental Solutions, Inc.*, Case No. 17-1024 (D. Del. 2017) – *Jevic* does not prevent confirmation of "gift plans" where senior creditor voluntarily "gifts" portion of senior creditor's distribution to lower class of creditor, jumping intervening creditor class or produces unequal distribution between similarly situated class. Plan proposed that secured creditors made "gift" to unsecured creditors that would produce 1% recovery to general unsecured creditors other than trade creditors, and 6% to trade creditors. Although disparate treatment raised presumption of unfair discrimination, treatment was not unfair as unsecured creditors, but for "gift" would have received nothing and disparate treatment fostered reorganization.
- (2725) *In re Fryar*, 2017 WL 1489822 (Bankr. E.D. Tn. 2017) – Court has duty to ensure that sale of assets is done for sound business purposes. Where settlement would result in disposition of property to creditors in manner which constitutes a reordering of distribution priorities under code, Court should not approve the settlement absent evidence that the proposed a distribution scheme will promote a significant code related objective. Debtor's proposed settlement would transfer funds to single unsecured creditor, bypassing lien held by Internal Revenue Service and priority claims, all of which are entitled to distributions ahead of unsecured claims. Following *Jevic*, settlement which amounts to either preamble to conversion or structured dismissal will not be approved where case had been pending for 8 months and was not "first-day" order necessary to the survival of Debtor, Debtor had not filed a proposed Plan of reorganization, Debtor had very little income, and settlement would result in junior creditors receiving payments while senior creditors received little or nothing in distributions. Proposed settlement would circumvent Code's procedural safeguards and could not be approved.
- (2726) *In re Fuel4Less, LLC*, Case No. 7-11-15240 (Bankr. D. N. Mex. 2016) - Order that provided that proceeds from settlement of adversary proceeding would be used to pay "general unsecured creditors" did not result in "carve out" of proceeds for payment of nonpriority unsecured claims ahead of payments to priority unsecured creditors. Code does not define "general unsecured creditors". Code divides claims into secured claims and unsecured claims. Within category "unsecured claims" there are priority unsecured claims and nonpriority unsecured claims. Without deciding whether "carve out" would be permissible, any attempt to "carve out" payment for nonpriority unsecured claims must be clear and explicit. Absent explicit explanation in order that remaining proceeds would be distributed among nonpriority unsecured claims, bypassing priority claims, Distribution Scheme Set Forth in Order is consistent with priorities set forth in bankruptcy code, requiring distribution first on priority unsecured claims.
- (2727) *Czyzewski v. Jevic Holding Corp.*, ____ US ____, 2017 WL 1066259 (2017) – Bankruptcy Court cannot approve "structured dismissal" of Chapter 11 case where distributions would not follow ordinary priority rules without assent of impacted creditors. Section 349 is intended to allow Judges flexibility to protect "reliance interests" acquired in bankruptcy, not to make general end of case distributions that would be flatly impermissibly Chapter 11 Plan or Chapter 7 liquidation. Courts have allowed interim distributions that violate ordinary priority rules such as "first-day" wage orders that allow payment of prepetition wages, "critical vendor" orders that allow payment of essential suppliers, and "roll up" that allow lenders who continue financing the Debtor to be paid on prepetition claims. These distributions make a successful reorganization more likely and make even disfavored creditors better off. Those policy concerns do not apply in structured dismissal context where dismissal does not propose to preserve Debtor as going concern, does not make disfavored creditors better off, does not propose possibility of confirmable plan, does not restore status quo, and does not protect reliance interest.

8.166 Surcharge of Secured Collateral

- (2728) *In re McCarty*, 2015 WL 4747185 (Bankr. S.D. Ohio 2015) – Chapter 7 Trustee is not entitled to statutory commission for sale of fully encumbered asset. Section 326 excludes from calculation of commission funds paid to or turned over for secured claims. Trustee did not

obtain secured creditor's consent to proposed "carve out" for unsecured creditors and trustee knew that property was fully encumbered and that sale would not produce any benefit to unsecured creditors. Even if compensation were appropriate, Section 506(c) prohibits surcharge against secured creditor's collateral for payment of administrative expenses other than necessary costs of preserving and disposing of the property. Trustee's compensation is not necessary cost of preserving or disposing of collateral. Compensation, if allowable, would be recoverable only against unencumbered assets of estate.

- (2729) *In re Purdy*, 2013 WL 5201906 (Bankr. W.D. Ky. 2013) – Section 506 allows trustee to surcharge collateral for reasonable and necessary expenses of preserving collateral. However, creditors or administrative claimants do not have right to surcharge collateral. Creditor who provided feed for cows that were lender's collateral lacked standing to surcharge cows for cost of feed even where feed was undoubtedly necessary to maintain the collateral pending disposition.

8.167 Exempt Assets

- (2730) *In re Villarreal*, 564 BR 264 (Bankr. N.D. Ohio 2016) – Although United States unrecorded statutory assessment lien was not valid against Chapter 7 Trustee due to Trustee's status as hypothetical bona fide purchaser, strong-arm powers did not reach to Debtor's exemption and United States right to collect against exempt property permitted statutory lien to attach to proceeds of any future sale of property by Trustee to the extent of Debtor's claimed exemptions where underlying tax obligations were themselves nondischargeable. 26 USC Section 6334(e)(1) prevents levy on principal residence where government is attempting to seize the residence. However, Section 6334 does not prohibit a sale or attachment by a bankruptcy Trustee or the attachment of the lien to the proceeds of that sale. United States did not waive secured status by filing unsecured proof of claim as unrecorded statutory assessment lien under Section 6321 did not provide United States secured status against Trustee's rights to property, but that status does not prevent United States from enforcing assessment lien against Debtor's share of proceeds of sale.
- (2731) *In re Wolf*, 2012 WL 32480 (Bankr. E.D. Ky. 2012) – Code does not authorize Chapter 7 Trustee to disburse exempt proceeds to IRS for payment of non-dischargeable tax debt. Although holder of non-dischargeable tax claim can enforce debt against otherwise exempt property, this does not permit Trustee to depart from Code requirement that exempt proceeds be returned to the Debtor.

8.168 Unclaimed Funds

- (2732) *In re Myers*, 2015 WL 5025275 (Bankr. N.D. Ohio 2015) – Petition for release of unclaimed funds must demonstrate that person has interest in funds or in property that was liquidated to generate fund, and that party is legally entitled to full or partial interest as co-owner directly or through inheritance as a result of proper order of probate court. Where property owned died intestate, alleged heirs did not demonstrate legal entitlement to proceeds and proceeds were subject to probate administrator's duty to ascertain debts and proper distribution of estate and had power to take possession of estate property and obtain an order of the probate court for proper distribution. Bankruptcy Court would not stand in shoes of state probate court for purposes of reviewing will and other documents to determine identity of proper heirs.
- (2733) *In re Sischo*, Case No. 10-8600 (Bankr. W.D. Mi. 2014) – Creditor's refusal to accept payments from Chapter 13 Trustee is not basis to disallow claim under Section 502. Proper remedy is for Trustee to accumulate funds and turnover funds to Clerk of Court pursuant to Section 347, with the creditor then being entitled to apply to clerk for payment of funds.
- (2734) *In re Checker Flag Lighting, LLC*, 2012 WL 3561969 (Bankr. W.D. Mi. 2012) – Funds deposited into court registry by Chapter 13 Trustee resulting for joint check issued to two creditors but never cashed could not be released on request of only one creditor or agent for one creditor. Single creditor could not establish entitlement to funds or provide full proof of the right to the funds as required by 28 USC Section 2042. Further, any request must be noticed to the US Attorney. Failure to serve the US Attorney precluded entry of an order allowing release of the funds.
- (2735) *In re Wilkerson*, 2011 WL 3419496 (Bankr. S.D. Ohio 2011) – Unclaimed funds which were the subject of checks written prior to conversion of Chapter 13 case to one under Chapter 7, in payment to mortgagee, were not under control or possession of Debtors when case was converted, given that they had been earmarked as payments to mortgagee, and thus did not have to be returned to Debtors. Funds received by Chapter 13 Trustee prior to conversion are distributed by Chapter 13 Trustee as part of completing statutory obligations, even where checks issued by Trustee prior to conversion are returned to the Trustee or are cancelled by Trustee post-conversion. Funds do not become property of the Chapter 7 estate and can be distributed only to the named creditor.
- (2736) *In re Nelson*, Case No. 06-6751 (Bankr. W.D. Mi. 2010) – Creditor making claim for unclaimed funds paid to Court registry at end of Chapter 13 case bears burden of making clear showing of entitlement to the funds. Secured creditor did not file proof of claim in Chapter 13 case although plan contemplated payments directly by Debtors or their son during the pendency of the Plan. Application for unclaimed funds failed to indicate whether any payments may have been made or how those funds were applied; whether the collateral had been refinanced; whether the collateral had been repossessed and, if so, whether the creditor had received any proceeds from the disposition; or whether creditor had any claim to funds paid to Chapter 13 Trustee as property of estate where plan provided for direct payment of the obligation rather than payment through the Trustee using property of the estate. Creditor's application denied without prejudice to creditor filing new application to clearly establish entitlement to funds.

E. Non-Dischargeability

8.169 Standing

- (2737) *Dewine v. Scott*, 2017 WL 1164904 (Bankr. N.D. Ohio 2017) – Complaint to except debt from discharge under Section 523 is rendered moot when Court enters Final Judgment denying Debtor discharge under Section 727.

- (2738) *Gumpher v. ECMC*, 2017 WL 187547 (Bankr. N.D. Ohio 2017) – Debtor’s action against creditor under Section 523(a)(2)(A) seeking to declare debt to be dischargeable failed to state cause of action. Section 523(a)(2)(A) contemplates an action by a creditor against a Debtor. Defendant in this case, the student loan Creditor, was not a “Debtor” in bankruptcy and, therefore, is not subject to action to determine dischargeability of debt under Section 523(a)(2)(A).
- (2739) *Michigan Unemployment Insurance Agency v. Perry*, 2016 WL 6407361 (Bankr. E.D. Mi. 2016) – Complaint to except debt for discharge dismissed where Court previously determined that Debtor as not eligible for discharge under Section 1328(f)(1) as Debtor had received discharge in prior Chapter 7 within 4 years of commencement of Chapter 13 case. Court could not afford any effective relief beyond that which resulted from denial of discharge in its entirety, leaving no case or controversy that was justiciable before the court.
- (2740) *Valdivia v. Hauk*, 2016 WL 39912029 (E.D. Mi. 2016) – Creditor lacks standing to bring action to except debt from discharge where debt is statutorily excepted from discharge without need for adversary. Debtor’s obligations to ex-spouse were non-dischargeable under Section 523(a)(5 and (a)(15). Debtor conceded that debts were non dischargeable. Plaintiff lacked standing to bring action as court lacked power to grant any effective relief. Court could, at best, rule that debts were non-dischargeable but as that result followed as matter of law and court decree could not add to or increase remedy available to plaintiff. Default judgment against Debtor void for lack of jurisdiction where plaintiff lacked standing to bring action in first instance.
- (2741) *In re Chaban*, 2016 WL 354308 (S.D. Mi. 2016) – Party who held unconditional assignment of State Court sanction award had standing to bring adversary to except debt from discharge under Section 523(a)(6). Assignment conveyed full right, title and interest in judgment to plaintiff putting plaintiff in same shoes as original creditor.
- (2742) *Bustos v. Molasky*, 2014 WL 5334735 (9th Cir. BAP 2014) – Party who did not bring separate Section 523 action but intervened in action brought by separate creditor lacked standing to pursue action where separate creditor settled with Debtor and dismissed Section 523 action. Intervenor was “permissible Intervenor” who lacked standing to bring actions on his own behalf because he failed to do so before the deadline for actions expired. Intervenor would be permitted to fully participate in action as appropriate to prosecute the initiating creditor’s action only. When that action was dismissed, Intervenor was left with no cause of action in his own right.
- (2743) *Vidov v. Marshak*, Case No. 13-1421 (9th Cir. BAP 2014) – Party lack standing to bring action under Section 523 where party does not have valid cause of action against Debtor. Prior to commencement of bankruptcy case, Debtor and creditor entered into settlement agreement by which creditor gave Debtor a general release of all claims. After Debtor filed bankruptcy, creditor, apparently unhappy with the settlement, brought action under Section 523(a)(2) and (a)(6). Court dismissed Section 523 action. The alleged misrepresentations, concealments and other misconduct about which creditor complained occurred prior to settlement and release, creditor lacked enforceable claim against Debtor and could not maintain action to contest dischargeability of that claim.
- (2744) *Ohio Attorney General v. Suwinski*, 509 BR 568 (Bankr. S.D. Ohio 2013) – State Attorney General has standing under doctrine of parens patriae, to pursue fraud-based non-dischargeability claim against Debtor. State has sufficient sovereign interest in dispute apart from interest of private parties where conduct underlying action was violation of State Consumer Protection Act and conduct produced indirect risks to all residents of state, as Debtor should not be permitted to defraud public at large and continued actions would harm housing and financial markets. Conduct threatened substantial segment of state population where conduct directly affected at least 92 separate parties and created risk to substantially greater numbers. While each injured individual had standing to bring action, remedies available to state were far broader that would be available to individuals and included injunctive relief and damages. Amount of money that each individual could recover was too small to warrant individual actions but potential losses to individuals were potentially far greater, and individuals lacked financial ability to pursue recovery given cap on possible recovery. State held “claim” as defined in Section 101 where state was seeking damages on behalf of injured homeowners and was also seeking restraining orders and injunctions which are enforceable and fall into definition of “claim”.
- (2745) *Caraway v. Klein*, Case No. 12-1263 (9th Cir. BAP 2013) – Creditor who had assigned and transferred judgment against Debtor prior to commencement of bankruptcy case lacked standing to bring action under Section 523. Plain terms of assignment showed that creditor gave up all right to enforce the judgment and acknowledged that the assignee thereafter held exclusive right to satisfy, settle, compromise or collect the judgment. To extent that arrangement between assignor and assignee required assignee to remit some portion of any recovery to assignor, that does not negate unconditional nature of assignment itself, but only gave assignor contract right against assignee if assignee failed to pay.
- (2746) *Pazdzierz v. First American Title Insurance Company*, 2013 WL 2460415 (6th Cir. 2013) – Title Insurance company, as assignee of original lender has standing to bring action against Debtor to have debt excepted from discharge based on fraud. Although fraud claims are generally not assignable, where promissory note can be assigned, assignee can bring fraud complaint incidental to execution of assigned note.
- (2747) *Gidelski v. Anton*, 2013 WL 1747907 (Bankr. E.D. Mi. 2013) – Action under Section 523 requires pre-existing debt. Court cannot consider dischargeability where creditor does not hold a debt owed by the Debtor. Husband is not *per se* liable for criminal activities of wife or for wife’s criminal restitution obligation. One spouse can be held liable for debts of other spouse only if those debts were the result of a legal relationship between the spouses other than that as spouses, for example as partners or principal/agent; or where the spouses are engaged in a civil conspiracy. Partnership is association of 2 or more persons, which may consist of husband and wife, to carry on as co-owners a business for profit. Agency is every relation in which one person acts for or represents another by his or her authority, formed by the mutual consent of the parties. Civil conspiracy requires (1) concerted action (2) combination of two or more persons (3) an unlawful purpose (4) a lawful purpose by unlawful means; and requires that the conspiracy be designed to commit an independent, underlying tort. Liability can be imputed to spouse if spouse was aware at the time of the wrongful conduct of the spouse and participated in the use and benefit of the wrongfully acquired property or funds. Knowledge of the wrongful act without participation in the proceeds is not sufficient. Spouse may be held to have knowledge where spouse was fully aware of family financial situation and knew or should have known that family was living beyond its apparent means. Although improperly obtained funds were used to purchase goods and services that family would otherwise not

have been able to obtain, Husband did not have knowledge of Wife's activities. Husband was frequently away from home for business, and Wife had exclusive management of household finances. Husband did not sign checks on household accounts, did not review bank statements, and was unaware of family hardships until Wife's scheme to defraud was exposed.

- (2748) *Hulsing Hotels Tennessee, Inc. v. Steffner*, 2012 WL 3563978 (Bankr. E.D. Tn. 2012) – Creditor of LLC that was wholly owned by Debtors lacked standing to object to Debtors' discharge. Creditor was not creditor of Debtors but was creditor of separate legal entity that was not, itself, in bankruptcy.
- (2749) *Automotive Finance Corp. v. Leonard*, 2012 WL 1565120 (Bankr. E.D. Tn. 2012) – For purposes of Section 523(a)(2), (4) or (6), party with standing is creditor to whom debt is owed. Real party in interest is the one who, under the applicable substantive law, has the legal right which is sought to be enforced or is the party entitled to bring suit. Legend on promissory note that stated that obligation had been sold to AFC Funding Corp. raised question as to whether American Funding Corp. had standing. However, where plaintiff lacks standing, Court should not dismiss action until real party in interest has opportunity to either join or ratify action. Party can "ratify" action by unequivocal statement authorizing the continued prosecution and stating that the party agrees to be bound by results. Affidavits filed by AFC Funding sufficient to stating that AFC was the servicer and specifically authorized action to be brought by Automotive Finance Corp. and agreed to be bound by result.

8.170 Generally

- (2750) *Ralph Roberts Realty, LLC v. Savoy*, 2016 WL 7655141 (Bankr. E.D. Mi. 2016) – After *Stern*, there are three classes of claims in which the bankruptcy court may enter final judgment: claims that are defined as "core" proceedings where Bankruptcy Court has statutory and constitutional authority to enter final judgment; claims that are defined as "core" proceedings but in which Bankruptcy Courts do not have constitutional authority to enter final judgments absent consent of all parties; and claims that are defined as non-core proceedings and Bankruptcy Courts do not have statutory or constitutional authority to enter final judgments absent consent of all parties. Bankruptcy Court has authority to enter final judgment to enforce agreement between Debtor and investors to share profits from acquisition and resale. Nature of cause of action and status of proceedings afforded Bankruptcy Court authority under any of three alternatives to enter final judgment.
- (2751) *Estate of Gower v. Parker*, 2016 WL 5763973 (Bankr. W.D. Ky. 2016) – Summons and complaint must be served on Debtor or Debtor's attorney within 7 days of issuance. Motion to Dismiss denied where attorney unquestionably received copy of complaint, summons and scheduling order even though plaintiff did not mail those to attorney, where attorney received them through ECF process. FI summons is not served on Debtor within 7 days, remedy is for plaintiff to obtain new summons and serve that. After Motion to Dismiss filed, plaintiff obtained new summons and properly served Debtor within time permitted rendering Motion to Dismiss moot.
- (2752) *Mitchell v. Harrison*, 2014 WL 2574000 (Bankr. W.D. Mi. 2014) – Action to contest dischargeability under Section 523 must be brought by Adversary Complaint. Motion denied where creditor afforded opportunity to convert motion into adversary proceeding by paying requisite filing fee and creditor declined to do so.
- (2753) *Hubbard v. Pennsylvania Higher Education Assistance Agency*, 2014 WL 1654703 (Bankr. E.D. Tn. 2014) – Complaint was defective where named defendant was not creditor or guarantor but was only servicer. However, court did not dismiss complaint but allowed pro se Debtor opportunity to amend complaint to name actual lender and guarantor.
- (2754) *Hart v. Southern Heritage Bank*, 2014 WL 1663029 (6th Cir. 2014) – Court has jurisdiction after *Stern* to enter final monetary judgment in action under Section 523(a)(2). Liquidating claim is inherently part of claims allowance process and did not implicate any state law counterclaims brought by Debtor against creditor and issues of dischargeability are entirely dependent on bankruptcy law and fall within scope of court's express jurisdiction. Fact that Debtor may have had counterclaims that, if asserted, may have caused *Stern* issue did not change outcome where Debtor did not assert those counterclaims in Section 523 action.
- (2755) *Cai v. Shenzhen Smart-In Industry Co.*, Case No. 12-56656 (9th Cir. 2014) – Bankruptcy Court has jurisdiction after *Stern* to enter final monetary judgment in action under Section 523(a)(2). Liquidating state law counterclaim is inherently part of claims allowance process and issues of dischargeability are entirely dependent on bankruptcy law and fall within scope of court's express jurisdiction.
- (2756) *In re McFadden*, 477 BR 686 (Bankr. N.D. Ohio 2012) – Motion seeking to object to discharge of debt must be denied as procedurally improper. Action to declare debt non-dischargeable under Section 523 must be brought by adversary proceeding.
- (2757) *Belfor USA Group, Inc. v. Williams*, 2011 WL 8197409 (Bankr. E.D. Mi. 2011) – Plaintiff in action under Section 523 bears burden of proof by preponderance of evidence. Plaintiff failed to sustain burden where plaintiff proved only that defendant possibly received funds but did not produce evidence that defendant ever actually received funds allegedly converted or the amount of money allegedly received and retained by defendant.
- (2758) *Retz v. Samson*, Case No. 08-60023 (9th Cir. BAP 2010) – Party objecting to discharge bears burden of proving by a preponderance of the evidence that the discharge should be denied. Section 727 is to be construed liberally in favor of Debtors and strictly against parties objecting to discharge.
- (2759) *Pearce v. Muncey*, 2009 WL 1651451 (Bankr. E.D. Tn. 2009) – Essential element of any action to determine non-dischargeability is proof of underlying debt. Plaintiff who brought action alleging misrepresentation of condition of real property could not prevail where, under State law, Plaintiff had not suffered any recoverable loss. Evidence established that property in damaged condition was worth same amount that Purchaser paid. As Purchaser received benefit of bargain, Purchaser suffered no recoverable damages and could not prevail in non-dischargeability action as matter of law.

8.171 Bankruptcy Court and State Court Jurisdiction

- (2760) *McClafferty v. DeWine*, 2017 WL 1379344 (Bankr. N.D. Ohio 2017) - Although State Court has concurrent jurisdiction to determine whether automatic stay precludes prosecution of State Court litigation, *Rooker-Feldman* does not preclude bankruptcy courts review applicability of automatic stay to State Court litigation. *Rooker-Feldman* does not apply where a federal plaintiff presents some independent claim, even one that denies legal conclusion that a State Court reached in a case to which plaintiff was party. Dispute regarding applicability of automatic stay subject to Bankruptcy Court review where, if State Court erroneously concluded that stay did not apply, proceedings which continued we constitute violation of automatic stay and would be void. Prohibition against Federal Court reviewing Final Judgment of State Court does not apply where proceedings were void and, therefore, there is no Final Judgment of State Court.
- (2761) *Zadeh v. Nelson*, 2016 WL 6783267 (Bankr. E.D. Ky. 2016) – *Rooker-Feldman* doctrine prevents Federal Court from ruling on matter previously adjudicated by State Court where Federal Court would essentially be sitting as appellate court to review and reverse unfavorable State Court ruling. Doctrine prevents federal court action by State Court loser complaining of injuries caused by State Court judgment rendered before the federal court action commenced, and asking federal court to review the correctness of those judgments. State Courts have concurrent jurisdiction with Bankruptcy Courts to determine whether debt is excepted from discharge under Section 523(a). State Court had previously determined on multiple occasions that obligation owed by Debtor to creditor was not DSO. Action brought in Bankruptcy Court seeking to except debt from discharge blocked by *Rooker-Feldman* as any judgment by Bankruptcy Court would necessarily amount to Federal Court review of State Court judgment.
- (2762) *Michigan Unemployment Insurance Agency v. Perry*, 2016 WL 6407361 (Bankr. E.D. Mi. 2016) – Complaint to except debt for discharge dismissed where Court previously determined that Debtor as not eligible for discharge under Section 1328(f)(1) as Debtor had received discharge in prior Chapter 7 within 4 years of commencement of Chapter 13 case. Court could not afford any effective relief beyond that which resulted from denial of discharge in its entirety, leaving no case or controversy that was justiciable before the court.
- (2763) *Reed v. Zwick*, 2016 WL 5763863 (Bankr. N.D. Ohio 2016) – 28 USC 1334 grants original jurisdiction to District Court, over all cases arising in or related to cases under Title 11. “Related to” has expansive definition and includes civil proceeding where *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. Proceeding need not be against the Debtor or against the Debtor’s property if the outcome could alter Debtor’s rights, liabilities, options, or freedom of action or in any way impacts handling and administration of bankrupt estate. Fact that estate has no assets does not deprive court of jurisdiction to determine validity or avoidability of claims under Section 523 and Debtor can lodge objection to claim as part of adversary proceeding raising question as to whether creditor even has a claim. Debtor’s adversary proceeding seeking to except student loan from discharge properly raised counts contesting Debtor’s liability in first instance based on Debtor’s assertion that Debtor did not sign the student loan note and that Debtor’s signature was forged. Bankruptcy court has constitutional jurisdiction to adjudicate state law claims that are raised as part of claims process, although jurisdiction may be limited to disallowance of claims rather than affirmative relief by Debtor against claimant. Adversary sought only to disallow claims and did not seek any additional relief from creditor, giving bankruptcy court constitutional jurisdiction. Issues were raised within context of claims objection, and constitute core proceeding over which Bankruptcy Court can issue valid final judgment.
- (2764) *Siragusa v. Collazo*, Case No. 15-2324 (7th Cir. 2016) – Bankruptcy court has jurisdiction to award money damages in connection with action to except debt from discharge. Action is “related to” bankruptcy case. To extent court is uncertain of jurisdiction, court is not required to abstain or send matter back to State Court to liquidate claim as court can enter money judgment with consent of parties, or can issue report and recommendation to District Court which has clear jurisdiction to enter final monetary judgment.
- (2765) *Wellness International Network, Ltd. v. Shariff*, ____ S.Ct. ____, 2015 WL 2456619 (2015) – Parties can consent to Bankruptcy Court exercise of jurisdiction over matters normally reserved for District Court where matters are within statutory authority of Bankruptcy Court but would otherwise be beyond constitutional authority. Consent does not need to be express. Parties can consent by implication as long as consent is knowing and voluntary, with inquiry focused on whether litigation or counsel was made aware of need for consent and right to refuse but still voluntarily appeared to try the case in the Bankruptcy Court.
- (2766) *Dietz v. Ford*, Case No. 12-60036 (9th Cir. 2014) – Bankruptcy court has inherent jurisdiction over action to except debt from discharge. Dischargeability issues are central to federal bankruptcy proceedings and are necessarily resolved during the process of allowing or disallowing claims. Bankruptcy court has constitutional jurisdiction to enter judgment determining debt to be non-dischargeable. Court also has jurisdiction to liquidate amount of claim as part of resolution of adversary proceeding. Determination of amount of non-dischargeable debt is inexorably intertwined with determination that debt is not dischargeable.
- (2767) *Hart v. Southern Heritage Bank*, 2014 WL 1663029 (6th Cir. 2014) – Court has jurisdiction after *Stern* to enter final monetary judgment in action under Section 523(a)(2). Liquidating claim is inherently part of claims allowance process and did not implicate any state law counterclaims brought by Debtor against creditor and issues of dischargeability are entirely dependent on bankruptcy law and fall within scope of court’s express jurisdiction. Fact that Debtor may have had counterclaims that, if asserted, may have caused *Stern* issue did not change outcome where Debtor did not assert those counterclaims in Section 523 action.
- (2768) *Cai v. Shenzhen Smart-In Industry Co.*, Case No. 12-56656 (9th Cir. 2014) – Bankruptcy Court has jurisdiction after *Stern* to enter final monetary judgment in action under Section 523(a)(2). Liquidating state law counterclaim is inherently part of claims allowance process and issues of dischargeability are entirely dependent on bankruptcy law and fall within scope of court’s express jurisdiction.
- (2769) *Lawson v. Conley*, 2012 WL 4845854 (Bankr. S.D. Ohio 2012) – Court has constitutional authority to enter final judgment in non-dischargeability action to also liquidate amount of previously unliquidated claim of creditor against Debtor.
- (2770) *Eaton v. Ford Motor Credit Co., LLC*, 2012 WL 3579644 (M.D. Tn. 2012) – Bankruptcy court has jurisdiction under *Stern* to enter final

judgments in non-dischargeability actions. Discharge is fundamental part of bankruptcy process.

8.172 Amount of Non-Dischargeable Claim

- (2771) *Dardinger v. Dardinger*, 2017 WL 1406453 (Bankr. S.D. Ohio 2017) – When debt is found to be nondischargeability, entirety of debt is nondischargeable including compensatory damages, punitive damages, prejudgment interest, attorneys fees, and any other amount traceable to or arising from nondischargeable claim.
- (2772) *Process Engineering Associates, LLC v. Smith*, 2017 WL 685111 (Bankr. E.D. Tn. 2017) – Section 523(a)(4) exempts from discharge a debt resulting from defalcation while acting in fiduciary capacity. Amount of nondischargeable debt includes actual damages plus interest at the applicable judgment rate. Payments made by Debtor prior to commencement of bankruptcy case are applied according to applicable state law. Creditor properly applied payments made by Debtor to interest accruing on State Court, Judgment. As amounts paid by Debtor did not cover full interest accrual, amount of debt determined to be nondischargeable included principal amount of debt plus all unpaid interest.
- (2773) *Oliver v. Zimmerman*, 2017 WL 663196 (Bankr. N.D. Ohio 2017) - Court has jurisdiction in nondischargeability action to enter monetary final judgment liquidating amount of debt. However, Court will not do so where prayer for relief in complaint asks only for determination of dischargeability without requesting that amount of debt be determined, and trial record did not contain sufficient evidence to allow Court to liquidate debt. Court would determine debt to be nondischargeable but allow State Court to liquidate debt and enter money judgment.
- (2774) *Gomez v. Saenz*, Case No. 13-7024 (Bankr. S.D. Tx. 2016) – *Stern* does not deprive Bankruptcy Court of authority to enter final judgment liquidating amount of debt as incident to action determining debt to be nondischargeable. Determination of nondischargeability and amount of nondischargeable debt are “directly intertwined” and action to except debt from discharge “arises in” title 11 because dischargeability claim has no existence outside of bankruptcy.
- (2775) *Estate of Jackson v. Hardaway*, 2016 WL 5799623 (Bankr. E.D. Mi. 2016) – Although court entered Judgment declaring debt(if any) to be excepted from discharge, court would abstain in favor of State Court to resolve issues of liability and damages. Court has discretion to abstain from proceeding in interest of justice or comity with State Courts or respect for state laws. Factors to consider include (1) the effect or lack of effect on the efficient administration of the estate if a court abstains; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in State Court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. Section 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted “core” proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in State Court with enforcement left to the bankruptcy court; (9) the burden of this court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; (12) the presence in the proceeding of non-debtor parties; and (13) any unusual or other significant factors. Court would abstain from hearing wrongful death action following determination by court that any award would be non-dischargeable under Section 523(a)(6). Plaintiff was entitled to jury trial which bankruptcy court is statutorily prohibited from conducting. All remaining issues were matters of state law including both liability and damages. There was no independent basis for federal court jurisdiction beyond relationship to bankruptcy case. Trustee had already filed “No Asset” report so outcome of proceeding would have no bearing on administration of bankruptcy case. Allowing case to proceed in State Court will not constitute forum shopping by plaintiff as action would be remanded to court where plaintiff instituted action in first instance. Court abstained from further rulings on liability and damages, as State Court where wrongful death action was pending was better forum to determine issues, with Court finding only that to extent decedent's estate prevails in State Court wrongful death action, any award that State Court may order will survive discharge.
- (2776) *Leonard v. RDLG, LLC*, 2016 WL 1178649 (6th Cir. 2016) – Bankruptcy Court has authority to determine amount of damages in suit to except debt from discharge, but is not required to do so. Bankruptcy Court did not err in determining that debt was excepted from discharge but allowing non-bankruptcy court in which action had been pending prior to bankruptcy case to liquidated damages. Litigation had been pending 2 years prior to commencement of bankruptcy case and State Court was well acquainted with facts of case and could conduct jury trial to resolve damage claims.
- (2777) *Szachta v. Benner*, Case no. 15-4555 (Bankr. E.D. Mi. 2016) – Where non-dischargeability action is based on state law conversion, plaintiff entitled to statutory treble damages. Debtor's actions were not result of negligence or bookkeeping error. Instead, Debtor, an attorney who represented plaintiff in personal injury action, used the proceeds of that action for Debtor's own personal and firm expenses rather than paying funds to client. Plaintiff also entitled to damages for mental distress where evidence indicated that Debtor's conduct caused plaintiff to become irritable, withdrawn, stressed, panicked, angry, upset and anxious; that plaintiff wakes up at night contemplating Debtor's actions; plaintiff is unable to focus and mind continuously drifts off to Debtor's actions and effect those actions had on plaintiff's life. Court award included \$5,000 for mental distress, which was also trebled as part of the damages suffered as a result of Debtor's conversion of funds.
- (2778) *Oregon v. Egbo*, Case No. 15-1580 (D. Ore. 2016) – Where non-dischargeability action was based on State Court judgment that liquidated damages and provided for post-judgment interest at specified rate. Bankruptcy Court abused discretion in Judgment that declared debt to be excepted from discharge but provided for interest at the lower, Federal judgment rate. Section 523 is intended to protect the full rights of the creditor including the right to receive interest at the rate specified in the pre-bankruptcy State Court judgment.
- (2779) *Leonard v. RDLG, LLC*, 2015 WL 1534520 (E.D. Tn. 2015) – Bankruptcy Court did not err in holding debt non-dischargeable without also liquidating amount of claim. Court properly held debt, in whatever amount, to be non-dischargeable, and leaving amount of claim for determination by Court in which litigation had been pending for some time before Debtor filed for bankruptcy.
- (2780) *Richardson v. Caswell*, 2015 WL 1403015 (Bankr. W.D. Ky. 2015) – Where court finds that debt is excepted from discharge, exception

includes all damages arising out of conduct giving rise to non-dischargeable determination. Post-judgment award of sanctions for failure to cooperate with discovery in aid of execution were fully traceable to the non-dischargeable claim and arose out of the creditor's claim for false representations and actual fraud.

- (2781) *McCallum v. Pixley*, 2014 WL 288046 (Bankr. E.D. Mi. 2014) – A “true default judgment” is entitled to preclusive effect under Michigan law as to any issues that were essential to support the judgment. State Court judgment that awarded treble damages for conversion was non-dischargeable in its entirety, including treble damages. If Debtor's debt is found to be non-dischargeable, all debt that arises from or is traceable to that conduct, is non-dischargeable.
 - (2782) *Fingerle Lumber Co. v. Boychuck*, Case No. 09-5477 (Bankr. E.D. Mi. 2010) - If debt is non-dischargeable, then interest and cost components to the debt are also non-dischargeable.
- 8.173 Section 523(a)(1)
- (2783) *HST Corporate Interiors LLC v. Sherrick*, 2017 WL 2889656 (Bankr. M.D. Tn. 2017) - Section 523(a)(14) renders a debt nondischargeable when debt is incurred to pay a tax owed to United States and tax owed to United States itself is nondischargeable. Obligation to third-party for funds obtained and used to pay Debtor's prepetition tax liability did not fall within exception to discharge where taxes were for returns which were filed more than 3 years prior to commencement of the case such that underlying tax liabilities themselves would be dischargeable under Section 523(a)(1).
 - (2784) *Giacchi v. United States of America Department of the Treasury Internal Revenue Service*, Case No. 15-3761 (3d Cir. 2017) - Tax Return filed after IRS has issued assessment resulting from Debtor's failure to timely file returns is not “return” for purposes of Section 523(a)(1)(B) to qualify as “return”, document must purport to be a return; it must be executed under penalty of perjury; it must contain sufficient data to allow honest calculation of tax; and it must represent honest and reasonable attempt to satisfy requirements of tax law. Forms filed after due dates and after IRS assessment do not qualify as “honest or reasonable attempt” to satisfy tax law is IRS has already determined tax liability and tax return cannot serve primary purpose of providing information to IRS regarding amount of tax due.
 - (2785) *In re McCarthy*, Case No. 13-30959 (Bankr. D. Ma. 2016) – Taxes owed based on late filed tax returns filed more than three years before petition date are not dischargeable. However, penalties assessed for failure to file returns are controlled by Section 523(a)(7) which governs penalties, not Section 523(a)(1) which governs taxes. Under Section 523(a)(7), penalties are dischargeable if the event giving rise to the penalty occurred more than three years before petition date. Relevant date for tax penalties is date on which tax returns were due. Penalties where therefore discharged and state violated discharge injunction in attempting to collect those penalties.
 - (2786) *Earls v. U.S.*, 2016 WL 2905374 (Bankr. S.D. Ohio 2016) – Section 523 does not except from discharge any penalties imposed by IRS for failure to pay or failure to file, but principal and interest are excepted from discharge if Debtor failed to file required returns. Whether “return” filed by Debtor constitutes a tax return as defined by applicable non-bankruptcy law is determined by whether 1) the “return” purports to be a return; (2) the “return” is executed under penalty of perjury; (3) the “return” contains sufficient data to allow calculation of tax; and (4) the “return” represents an honest and reasonable attempt to satisfy the requirements of the tax law. Returns filed in 2008 for tax years 2001-2004 served no purpose as returns were not filed until after IRS had begun procedure for filing substitute returns, even if returns themselves were prepared before SFR procedure began. Effort to file must be both honest and reasonable. While Debtor's commencement of return preparation may have been honest, three year delay between preparing returns and filing returns that were already 3 to 7 years delinquent was not reasonable. Fact that late filed return may benefit IRS or that taxpayer cannot participate in offer-in-compromise program if returns are unfiled does not make late filed returns a reasonable endeavor by taxpayer to comply with tax laws.
 - (2787) *McBride v. City of Kettering, Ohio*, 2015 WL 9665099 (Bankr. S.D. Ohio 2015) – Tax is not discharged if Debtor fails to file return when return is required. City tax code required that taxpayer amend any previously filed return if taxpayer's federal return is found to be deficient and is adjusted. Debtor timely filed tax returns for 1998 and 1999. The United States Tax Court later found that the taxes were deficient for those years. Debtors did not file amended returns as required by City tax code. City contacted Debtor and advised that as a result of the Tax Court action, Debtor owed more money to the City. Although City and Debtor's representative had communications regarding City's demand for more taxes, Debtor never amended returns. When Debtor later filed bankruptcy, Court concluded that Debtor had failed to file amended tax returns required by applicable law. Debtor's taxes were non-dischargeable.
 - (2788) *McBride v. City of Kettering, Ohio*, 2015 WL 4749278 (Bankr. S.D. Ohio 2015) – Late filed return is still “return” for purposes of Section 523(a)(1). Whether late filed return is dischargeable is determined by Section 523(a)(1)(B)(ii) which provides that taxes are dischargeable if filed after the last date due but more than 2 years before case filed. Return for tax year 1998 not filed until November, 1999, was late but was filed more than 2 years pre-petition.
 - (2789) *Hawkins v. Franchise Tax Board of California*, 2014 WL 4494845 (9th Cir. 2014) – Action to except tax debt under Section 523(a)(1)(C) on basis that Debtor willfully attempted to evade or defeat collection of tax liability requires proof of specific intent to evade tax. Conduct must be intended to cause injury, not that conduct leads to injury. Mere fact that Debtor spent money in excess of income, without more, does not demonstrate specific intent to defeat collection of taxes.
 - (2790) *Taylor v. IRS*, 2014 WL 1884333 (Bankr. E.D. Tn. 2014) – Taxes are not dischargeable if taxes constitute priority claim under Section 507(a)(8). 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.

- (2791) *Pitts v. U.S.*, 2013 WL 4170000 (Bankr. C.D. Cal. 2013) – Debtor as general partner was personally responsible for withholding taxes that were not paid by partnership. IRS properly issued notice of tax deficiency that identified Debtor’s general partner, thereby assessing taxes against Debtor. Debtor’s liability for unpaid “trust fund” taxes was non-dischargeable.
- (2792) *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.
- (2793) *US v. Coney*, 689 F.3d 365 (5th Cir. 2012) – Section 523(a)(1) is not limited to cases where Debtors fail to file tax returns or conduct designed to avoid assessment of taxes, and includes any affirmative conduct by Debtor designed to evade tax liability. To be willful, Debtor (1) must have had a duty to pay taxes; (2) Debtor knew he had that duty; and (3) Debtor voluntarily and intentionally violated that duty by intentionally committing or attempting to commit an act that, under the totality of the circumstances, constituted an attempt to evade or defeat assessment, collection or payment of tax. However, Debtor need not have made the attempt with specific intent to defraud IRS. Debtors timely filed correct tax returns and did not engage in pattern of conduct designed to conceal assets, but did not pay liabilities. Debtor was running up significant unpaid tax liabilities and was attempting to negotiate payment plans with the IRS, and seeking to stave off collection proceedings by promoting the continued viability of Debtor’s law firm to the IRS. At same time, Debtor was directing his employees to engage in a high volume of cash transactions and to illegally structure those transactions in a manner that would hide them from the Government. Debtor ordered the bulk of these transactions in order to acquire cash to illegally pay runners to generate cases for his firm but Debtor did not deduct payments on his tax returns as business expenses. Debtor’s efforts to circumvent the federal currency transaction reporting requirements defeated the IRS’s ability to collect his tax liabilities and therefore constituted attempts to evade or defeat collection and payment of his taxes. Bank Secrecy Act requires financial institutions to send a report to the IRS when a depositor withdraws more than \$10,000 in currency during one business day. If the IRS had received reports notifying it of the volume of cash withdrawals from operating account that were not being deducted as business expenses, IRS would have investigated and instituted collection proceedings years earlier. Broad scope and five-year duration of Debtor’s structuring activities allowed him to shift significant assets out of Debtor’s possession in a manner that concealed the movement from the IRS and prevented the agency from tracing how those assets were used, further thwarting the agency’s efforts to collect his tax liabilities.
- (2794) *Rizzo v. State of Michigan*, Adv. No. 11-7032 (Bankr. E.D. Mi. 2012), *aff’d* 2014 WL 397459 (6th Cir. 2014) – Michigan’s Single Business Tax is an excise tax on a “per transaction” basis and is entitled to priority status under Section 507(a)(8)(E). Michigan law allows assessment of corporate taxes against corporate officers who have control or supervision of, or are responsible for paying, corporation’s taxes. Debtor, as principal of corporation, was personally responsible for payment of Corporate Single Business Taxes which is not dischargeable under Section 523(a)(1)(A).
- (2795) *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.
- (2796) *California v. Hansen*, Case No. 11-1320 (9th Cir. BAP 2012) – Unemployment Insurance tax levied on corporation and on principal as “responsible party” is not a tax that Debtor is required to collect from third parties and to remit to state. Tax is not of a type specified in Section 507(a)(8)(C). Tax liability not entitled to priority treatment under Section 507(a)(3) or (a)(8), and so is not within scope of Section 523(a)(1). Debtor’s liability for unpaid unemployment taxes is discharged in Chapter 7 proceeding.
- (2797) *Fagan v. State of Michigan Department of Treasury*, 465 BR 472 (Bankr. E.D. Mi. 2012) – Debtor’s obligation to pay fuel taxes under International Fuel Tax Agreement is non-dischargeable under Section 523(a)(1)(A). International fuel tax is an excise tax on a transaction, and therefore is a priority claim under § 507(a)(8)(E), which is a type of nondischargeable tax specified in Section 523(a)(1)(A). IFTA imposes 15 cent per gallon charge on fuel consumed by commercial vehicles. Obligation to governmental agency is “tax” if obligation is (1) an involuntary pecuniary burden; (2) imposed by the state legislature; (3) for a public purpose; (4) under the police or taxing power of the state; (4) that the pecuniary obligation be universally applicable to similarly situated entities; and (5) that according priority treatment to the government claim not disadvantage private creditors with like claims. Tax is “excise tax” as it is paid as a condition of carrying on occupation or privilege of engaging in business. Taxes are based on “a transaction” as it is based on amount of fuel consumed – the transaction being the operation of a commercial motor carrier on state roads and consumption of fuel in that operation.

- (2798) *Quiroz v. State of Michigan*, 450 B.R. 699 (Bankr. E.D. Mi. 2011), *aff'd* 472 B.R. 434 (E.D. Mi. 2012) – Michigan’s Single Business Tax is an excise tax on a “per transaction” basis and is entitled to priority status under Section 507(a)(8)(E). Michigan law allows assessment of corporate taxes against corporate officers who have control or supervision of, or are responsible for paying, corporation’s taxes. Debtor, as principal of corporation, was personally responsible for payment of Corporate Single Business Taxes which is not dischargeable under Section 523(a)(1)(A).
- (2799) *Storey v. United States*, 640 F.3d 739 (6th Cir. 2011) – Section 523(a)(1)(c) excepts from discharge taxes that the Debtor willfully attempted to evade or defeat. Government must prove that Debtor did not pay taxes and that Debtor “knowingly and deliberately” sought to avoid payment. Mere non-payment, standing alone, is not sufficient. Debtor timely filed tax returns which acknowledged the obligations. Debtor’s purchase of a residence in the same year Debtor stopped paying taxes did not demonstrate a voluntary or intentional choice to purchase a home rather than pay taxes, where home was not lavish or unnecessary. Government could not demonstrate that at the time Debtor purchased the home, she was even aware that she would later have a tax liability. Debtor did not engage in excessive recreational, philanthropic or other discretionary activities such as expensive vacations or private school expenses.
- 8.174 Section 523(a)(1) – “Late” Returns
- (2800) *Jacob v. U.S.*, 2016 WL 6441280 (E.D. Mi. 2016) – “Filing” of Tax return requires proof of actual physical delivery to the IRS; or proof that a document was mailed before the deadline as evidenced by the postmark, even if received after the deadline; or mailing by certified or registered mail, where the registration is prima facie evidence of receipt. Tax refund claim was not mailed by registered or certified mail and IRS denied ever receiving form. Taxpayer did not meet requirement of “statutory mailbox” rule as taxpayer could not produce postmarked envelope and taxpayer did not introduce any evidence that form was ever actually mailed. Although “common law” mailbox rule is not applicable to tax forms, even if common law rule applied, taxpayer must present evidence that document was actually mailed with correct postage to correct address, and evidence must be corroborated by extrinsic evidence, not merely testimony of taxpayer himself. Only evidence was letter purportedly signed by taxpayer’s attorney that referenced tax form as enclosure, but taxpayer himself had no knowledge or when, or whether, form was ever sent and taxpayer did not present affidavit or any other evidence of mailing practices of the law firm in general, let alone the kind of detailed, specific, and corroborated testimony about the mailing of the tax claim or refund in question as required by those courts recognizing a presumption of receipt under the common law mailbox rule.
- (2801) *Biggers v. Internal Revenue Service*, 2016 WL 5121893 (M.D. Tn. 2016) – Return filed after due date is not automatically excluded from discharge. Pre-BAPCPA law in the Sixth Circuit used *Beard* test and there is no indication that Congress specifically intended to overrule *Beard*. Return is a “return” even if filed after the deadline if the “return” (1) purports to be a return; (2) is executed under penalty of perjury; (3) contains sufficient data to allow calculation of tax; and (4) represents an honest and reasonable attempt to satisfy the requirements of the tax law. Whether the taxpayer meets the “honest and reasonable” test looks to all facts and circumstances, not just those presented in the form and substance of the return, and must include consideration of length of delay, reasons for the delay, and number of tax years involved. IRS conceded first three elements where Debtor was unable to file returns because secured lender seized all records and refused to relinquish them; first accountant hired to file returns had to be fired for doing nothing; and Debtor moved 11 times in 9 year span. Case remanded for determination as to whether returns were honest and reasonable attempt to comply with law.
- (2802) *Nilsen v. Mass. Dept. Of Revenue*, Case No. 16-10148 (D. Mass. 2016) – Tax return filed after deadline is not “return” for purposes of Section 523(a)(1). Form 1040 filed by Debtor after deadline for filing return and more than 2 years pre-petition did not constitute “equivalent report” within scope of Section 523(a)(1)(B). A Form 1040 is a “return” and cannot be considered anything other than a “return”. Debtor’s tax liability was excepted from discharge.
- (2803) *Smith v. Internal Revenue Service*, 2016 WL 3749156 (9th Cir. 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.
- (2804) *Justice v. United States*, Case No. 15-10283 (11th Cir. 2016) – Section 523(a)(1) excepts from discharge any taxes for which the Debtor failed to file a return as required by law. Where the Debtor filed the return late, whether the return constitutes a “return” depends on whether the return is an honest and reasonable attempt to satisfy requirements of tax law. The Court rejected the “one day late” rule which holds that a return filed even one day after the due date is not a “return”. Instead, the Court must examine all of the facts and circumstances surrounding the delay in filing to determine whether Debtor was intentionally attempting to evade filing and circumvent the “self-reporting” requirement of the tax code; or whether the delay was attributable to something other than an attempt to evade self-reporting. Debtor’s failure to file tax returns evidenced attempt to evade self-reporting and so the liabilities were not dischargeable where Debtor did not file returns for 2000-2003. In 2006, the IRS issued tax deficiencies in amounts determined after IRS completed “Substitute for Return”. IN 2007, after issuance of assessments, Debtor finally prepared and filed returns which showed lower liabilities. IRS adjusted liabilities and abated portion previously assessed. Failure to file a timely return without a legitimate excuse or explanation evinces lack of reasonable effort to comply considering all factors from date on which return should have been filed through date on which return is belatedly filed. Return that is not filed until after IRS has completed Substitute for Return and Assessment process and taxpayer does not present any justification at all for the delay does not evince honest and reasonable attempt to satisfy requirements of tax law, rendering tax liability non-dischargeable.
- (2805) *U.S. v. Martin*, 542 BR 479 (9th Cir. BAP 2015) – Reversing the Bankruptcy Court’s decision in *Martin v. IRS*, 2014 WL 1330120 (Bankr. E.D. Ca. 2014), BAP concluded that return is a “return” even if filed after the deadline if the “return” (1) purports to be a return; (2) is executed under penalty of perjury; (3) contains sufficient data to allow calculation of tax; and (4) represents an honest and reasonable attempt to satisfy the requirements of the tax law. Whether the taxpayer meets the “honest and reasonable” test looks to all facts and circumstances, not just those presented in the form and substance of the return, and must include consideration of length of delay, reasons for the delay, and

number of tax years involved. Bankruptcy Court improperly restricted “reasonableness” analysis to content of return actually filed.

- (2806) *McBride v. City of Kettering, Ohio*, 2015 WL 4749278 (Bankr. S.D. Ohio 2015) – Late filed return is still “return” for purposes of Section 523(1)(1). Whether late filed return is dischargeable is determined by Section 523(a)(1)(B)(ii) which provides that taxes are dischargeable if filed after the last date due but more than 2 years before case filed. Return for tax year 1998 not filed until November, 1999, was late but was filed more than 2 years pre-petition.
- (2807) *Maitlina v. State of New Jersey*, 2015 WL 3609569 (Bankr. D.N.J. 2015) – 2008 tax return filed in January, 2012, was late filed but nonetheless constituted a “return” for purposes of Section 523.
- (2808) *Biggers v. Internal Revenue Service*, 2015 WL 1652342 (Bankr. M.D. Tn. 2015) – Section 523(a)(1)(B)(i) excepts from discharge any tax liability where the Debtor has not filed a return. A “return” under the hanging paragraph of Section 523 is one that meets with all applicable requirements of applicable non-bankruptcy law. Return that is filed late constitutes a return as long as substance of return complies with applicable law by (1) purporting to be a return; (2) executed under penalty of perjury; (3) containing sufficient data to allow calculation of tax; and (4) representing an honest and reasonable attempt to satisfy the requirements of the tax law. Return filed after IRS has assessed taxes is not honest and reasonable attempt to satisfy requirements of law as return no longer serves any purpose and has no effect under Internal Revenue Code unless return shows more taxes owed than IRS determination. Thus, returns filed for 2001, 2003 and 2004 were not “returns” as those were filed after IRS assessed liabilities and each return purported to show lower amount owed; but return for 2002 which showed higher liability “served a purpose” under the Internal Revenue Code and constituted a “return” that was dischargeable to extent of excess tax liability, but non-dischargeable as to amounts previously assessed by IRS.
- (2809) *Fahey v. Massachusetts Department of Revenue*, 2015 WL 677033 (1st Cir. 2015) – Taxes are not discharged where Debtor fails to file a return, or files a return late but less than 2 years prior to filing bankruptcy. “Hanging paragraph” at end of Section 523 defines a return as one that satisfies requirements of applicable non-bankruptcy law. Return filed after deadline is not filed in accordance with applicable non-bankruptcy law and so is not “return” for purposes of Section 521 leaving tax liability excepted from discharge. “Late return” provision of Section 523(a)(1)(B) applies only to returns that are prepared pursuant to Section 6020 of the Internal Revenue Code or similar state statutory procedures and that is filed, although late, more than 2 years prior to commencement of bankruptcy filing.
- (2810) *Mallo v. Internal Revenue Service*, 2014 WL 7360130 (10th Cir. 2014) – Return filed after deadline is not a return for purposes of Section 523(a)(1). Internal Revenue Code sets deadline by which return must be filed to qualify as meeting requirements of applicable non-bankruptcy law.
- (2811) *Largent v. Commissioner of Internal Revenue Service*, 2014 WL 2211531 (9th Cir. 2014) – Debtor’s tax liability for year 2005 was not discharged in bankruptcy under Section 523(a)(1)(B) where return was filed after statutory due date and less than two years prior to filing bankruptcy petition.
- (2812) *Pendergast v. Mass. Dept. of Revenue*, 2014 WL 1800838 (1st Cir. BAP 2014) – Tax return filed after last date on which return could have been timely filed is not a “return” for purposes of Section 523(a)(1). “Return” must comply with requirements of applicable non-bankruptcy law including deadline by which return must be filed. However, where return is filed before state assesses a deficiency (similar to 26 USC Section 6020(a)) then tax liability will be discharged if return is filed more than two years before the filing of the bankruptcy petition. If state agency assesses liability before return is filed, then return is not “return” and tax liability will be non-dischargeable.
- (2813) *Wendt v. U.S.*, 2013 WL 6198348 (Bankr. S.D. Fl. 2013) – Tax return filed after last date on which return could be timely filed is not “return” for purposes of Section 523 or discharge. Return filed late is considered “unfiled” such that tax liability is excepted from discharge under Section 523(a)(1), although return had actually been filed more than four years pre-petition.
- (2814) *Moffitt v. Massachusetts Dept. of Revenue*, 2013 WL 5441984 (Bankr. W.D. Ky. 2013) – Section 523(a)(1) makes non-dischargeable any tax for any year for which a return was not filed. A “return” is one that satisfies applicable non-bankruptcy law and includes a return prepared pursuant to Section 6020(a) of the Internal Revenue Code or similar State or local law but excludes a return prepared under Section 6020(b) of the Internal Revenue Code. To be a return, document must “(1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law. Debtor’s failure to file returns for years 2003, 2004 or 2005 until August, 2008, without any explanation for the long delays, did not represent a reasonable effort by Debtor to satisfy obligation to file tax returns, rendering debts non-dischargeable. Debtor’s 2002 tax liability was also non-dischargeable. While Debtor timely filed his 2002 return, Debtor did not respond to notice of adjustment issued by State as Debtor failed to file amended return to address deficiency in initial return. Section 523(a)(1) makes tax debt non-dischargeable if Debtor fails to file required notice or equivalent report with regard to the tax obligation.
- (2815) *Moffitt v. U.S.*, 2013 WL 3294898 (Bankr. W.D. Ky. 2013) – Section 523(a)(1)(B)(i) makes a tax debt non-dischargeable if a return is not filed. A “return” is one that satisfies all requirements so applicable non-bankruptcy law, which requires that the return “purport” to be return; it must be executed under penalty of perjury; it must contain sufficient data to allow calculating of tax due; and it must represent honest and reasonable attempt to comply with law. Tax return not filed until after IRS has issued assessment of taxes is not a “return” as the return would be too late to have any legal effect and served no purpose under non-bankruptcy law. Fact that Debtor filed return for purpose of stopping non-filing penalties and interest was not for any legitimate tax purpose, but was merely attempt to limit liability, not in any good faith attempt to comply.
- (2816) *McCoy v. Mississippi State Tax Commissioner*, 666 F.3d 924 (5th Cir. 2012) – Unless a late-filed tax return is filed under a “safe harbor” provision similar to Section 6020(a) of the Internal Revenue Code, a state income tax return that is filed late under the applicable nonbankruptcy state law is not a “return” for bankruptcy discharge purposes under Section 523(a)(1). Therefore, Debtor was not entitled to

discharge her state tax liabilities and failed to properly state a claim for relief.

8.175 Section 523(a)(1) – Definition of “Return”

- (2817) *Smith v. Internal Revenue Service*, 2016 WL 3749156 (9th Cir. 2016) – To constitute a tax return, document must: (1) purport to be a return; (2) be executed under penalty of perjury; (3) contain sufficient data to allow calculation of tax; and (4) represent an honest and reasonable attempt to satisfy the requirements of the tax law. “Return” filed 7 years after deadline to file and 3 years after IRS issued Substitute for Return was not “honest and reasonable attempt” to comply, even where Return disclosed higher income and greater tax liability than that asserted in SFR.
- (2818) *McBride v. City of Kettering, Ohio*, 2015 WL 4749278 (Bankr. S.D. Ohio 2015) – A document constitutes a “return” if 1) it must purport to be a return; 2) it must be executed under penalty of perjury; 3) it must contain sufficient data to allow calculation of tax; and 4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law. Document that contains “negligent mistake” in reporting income is not necessarily excluded from definition. Court unable to determine on summary judgment whether documents constituted “returns” where City contended that returns omitted 98% of Debtor’s income but Debtor represented that returns were prepared using system created by long time and trusted accountant and that the returns contained what Debtor believed to be legitimate income and tax obligations that Debtor promptly and timely paid. Factual issues remained regarding Debtor’s intent and alleged reliance on accountant, as well as whether documents contained enough information to allow calculation of tax liability.
- (2819) *Biggers v. Internal Revenue Service*, 2015 WL 1652342 (Bankr. M.D. Tn. 2015) – Section 523(a)(1)(B)(i) excepts from discharge any tax liability where the Debtor has not filed a return. A “return” under the hanging paragraph of Section 523 is one that meets with all applicable requirements of applicable non-bankruptcy law. Return that is filed late constitutes a return as long as substance of return complies with applicable law by (1) purporting to be a return; (2) executed under penalty of perjury; (3) containing sufficient data to allow calculation of tax; and (4) representing an honest and reasonable attempt to satisfy the requirements of the tax law.
- (2820) *Moffitt v. Massachusetts Dept. of Revenue*, 2013 WL 5441984 (Bankr. W.D. Ky. 2013) – Section 523(a)(1) makes non-dischargeable any tax for any year for which a return was not filed. A “return” is one that satisfies applicable non-bankruptcy law and includes a return prepared pursuant to Section 6020(a) of the Internal Revenue Code or similar State or local law but excludes a return prepared under Section 6020(b) of the Internal Revenue Code. To be a return, document must (1) purport to be a return; (2) be executed under penalty of perjury; (3) contain sufficient data to allow calculation of tax; and (4) represent an honest and reasonable attempt to satisfy the requirements of the tax law.
- (2821) *Moffitt v. U.S.*, 2013 WL 3294898 (Bankr. W.D. Ky. 2013) – Section 523(a)(1)(B)(i) makes a tax debt non-dischargeable if a return is not filed. A “return” is one that satisfies all requirements so applicable non-bankruptcy law, which requires that the return “purport” to be return; it must be executed under penalty of perjury; it must contain sufficient data to allow calculating of tax due; and it must represent honest and reasonable attempt to comply with law.
- (2822) *McCoy v. Mississippi State Tax Commissioner*, 666 F.3d 924 (5th Cir. 2012) – Unless a late-filed tax return is filed under a “safe harbor” provision similar to Section 6020(a) of the Internal Revenue Code, a state income tax return that is filed late under the applicable nonbankruptcy state law is not a “return” for bankruptcy discharge purposes under Section 523(a)(1). Therefore, Debtor was not entitled to discharge her state tax liabilities and failed to properly state a claim for relief.

8.176 Section 523(a)(2)(A) – False Pretenses and False Representations

- (2823) *Haire v. Padgett*, 2017 WL 3888293 (Bankr. W.D. Ky. 2017) – To except debt under Section 523 for false representations, Creditor must prove that Debtor obtained extension of credit using material misrepresentation made by debtor at time debtor knew it was false or made with gross recklessness as to truth; debtor intended to deceive creditor; creditor justifiably relied on representation; and reliance was proximate cause of loss. Creditor did not present any evidence that at time Debtor entered into lease with Creditor, that Debtor did so using any misrepresentation. Fact that business later closed and Debtor did not make payments under lease did not imply any fraudulent statement or representation at outset of lease relationship.
- (2824) *Prescription Supply, Inc. v. Musa*, 2017 WL 4118157 (Bankr. E.D. Mi. 2017) – To except debt from discharge as based on false representation, plaintiff must prove (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; and (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. Action requires more than proof of garden variety breach of contract and requires evidence that at time Debtor entered into contractual relationship, Debtor had no intention of complying with contractual terms. After Debtor’s business failed, Debtor entered into series of agreements with business creditor to transfer assets to creditor and continue to provide services for lender; debtor would keep lender’s proprietary information secret; and debtor would not compete with creditor for defined period of time. After Debtor filed bankruptcy, creditor sought to except debt from discharge alleging that Debtor fraudulently induced creditor into entering into settlement agreement by misrepresenting assets, accounts receivable, and by competing with creditor. Debtor initially complied with contractual terms by transferring assets and receivables to creditor and providing services to creditor. Although Debtor may later have started referring customers to other entities, that does not establish that Debtor, at outset of agreement, intended to not perform. However, where Debtor had already formed corporation to engage in competing business, evidence created question of fact whether Debtor misrepresented that he would not compete with creditor.
- (2825) *HST Corporate Interiors LLC v. Sherrick*, 2017 WL 2889656 (Bankr. M.D. Tn. 2017) - Section 523(a)(2)(A) requires creditor to prove that Debtor obtained money through material misrepresentation that, at the time made, Debtor due was false or made with gross recklessness as to truth; Debtor intended to deceive creditor; creditor justifiably relied on false representations; and reliance was proximate cause of loss.

Where there is evidence of “actual fraud”, false representation is not necessary element. Creditor failed to present any evidence of any material misrepresentation or any fraudulent scheme at outset of relationship between Debtors closely held corporation and Plaintiff.

- (2826) *Above-All Transportation, Inc., v. Fraher*, Case No. 16-026(1st Cir. BAP 2017) - Under Section 523(a)(2)(A), Court may deny Debtor discharge for debts obtained by false pretenses, false representations or actual fraud. False pretenses and false representations require proof that Debtor committed an act that constitutes fraud and is done with wrongful intent. Fraud can be effectuated without false representation although fraud generally requires deception or trickery. Plaintiff could not maintain action against the Debtor wife where evidence indicated that all alleged fraudulent statements and actions were performed by Debtor husband.
- (2827) *Allen v. Smith*, 2017 WL 1399685 (Bankr. M.D. Tn. 2017) – Section 523(a)(2)(A) requires proof that Debtor made materially false representation with knowledge of falsity and intent to deceive; creditor reasonably relied upon the representations; and in the reliance was the proximate cause of creditors loss. Debtor made fraudulent statements to induce plaintiff to invest in Debtor’s business by representing that investment would be used for purposes of building sales force, expanding and creating distribution channels, and creating revenue streams for business. Instead, Debtor diverted all of the funds for Debtor’s own personal use to support Debtor’s personal lifestyle. Debtor intends to deceive creditor where Debtor makes false statement which Debtor knows or should have known would induce another to advance money. Debtor’s intent to deceive apparent from Debtor’s actions where Debtor represented to creditor that creditor was investing in business and caused creditor to issue checks payable to business, it later contended that creditor was purchasing Debtor’s personal stock holdings. Further, initial investment was gone within 2 weeks and second investment, obtained after Debtor had looted corporate funds for payment of personal expenses, was gone within 2 days. Debtor was taking large amounts of money out of Corporation even at time when Corporation was not generating editing revenues. Weather reliance is justifiable is based on subjective intent of creditor, requiring creditor only to use his senses and not blindly rely on misrepresentation or the falsity would be known if he is the opportunity to make cursory examination. Creditor justifiably relied on Debtor’s statements regarding how investment would be used where there was no reason to believe that Debtor Plan to siphon creditors money out of company into Debtor’s own personal accounts. Proximate cause of loss require something more than speculation as to what creditor might have done and depends on whether Debtor’s conduct is so significant and important a cause as to hold Debtor legally responsible. Although company eventually failed because it lost distributorship agreement with its sole supplier, Debtor’s conduct in system automatically undermining corporate liability by bleeding company dry left company unable to find other sources of investment and intentionally undercapitalized company contributing to ultimate failure. Evidence supported finding that balance owed to creditor was nondischargeable as resulting from fraud.
- (2828) *National Credit Union Board v. Zovkic*, 2017 WL 1113101 (Bankr. N.D. Ohio 2017) – Section 523(a)(2)(A) and Section 523(a)(2)(B) require reliance as element of recovery. *D’Oench Duhme* doctrine and 12 USC Section 1787(p)(2) provide that no agreement is enforceable against liquidator of insolvent financial institution unless agreement is in writing and signed by representative of institution and approved by institution’s board of directors and included in official records of institution. Neither *D’Oench* nor Section 1787 excuses liquidating agent from proving that institution relied on false statements for purposes of non-dischargeability.
- (2829) *National Credit Union Board v. Zovkic*, 2017 WL 1113101 (Bankr. N.D. Ohio 2017) – Section 523(a)(2)(A) requires that Debtor obtained money through material misrepresentation that, at time made, was known to be false or was made with gross recklessness; Debtor intended to deceive; creditor justifiably relied; and reliance was proximate cause of loss. Material omission may constitute misrepresentation, as well as any fraudulent scheme to deprive another pf property or legal right. Misrepresentation is material is material if it contains substantial inaccuracies of a type that would generally affect lender’s decision. Intent requires either intent to deceive or gross recklessness and may be proven by circumstantial evidence including whether Debtor’s actions were so inconsistent with self-serving statements to demonstrate that Debtor lacked intent. Reliance must be both actual and justifiable, and creditor does not have duty to investigate to discover fraud but where facts should be apparent to one of creditor’s knowledge and intelligence from cursory glance, or if creditor discovers something to serve as warning of possible deception, creditor has duty to investigate further. Where officer of lender was aware of and participated in fraudulent scheme, knowledge will be imputed to lender for purposes of defeating reliance unless principal was acting as “rogue agent”, engaged in fraudulent act on own account and facts to be imputed relate to that act, such as where officer uses position to loot corporate assets for own benefit. Doctrine is limited by “sole actor” doctrine where “rogue agent” so dominated and controlled the institution such that institution had no ‘separate mind”, then officer is alter ego of principal and any malfeasance of officer will be imputed to institution. Conduct of Chief Operating Officer of institution imputed to institution where COO was authorized to make loans without consent of any board or other employee or officer of institution, effectively allowing COO to act as one person operation in making lending decisions including loans to Debtor.
- (2830) *National Credit Union Board v. Zovkic*, 2017 WL 1113101 (Bankr. N.D. Ohio 2017) – Lender could not have reasonably relied on Debtor’s statement that lender would receive first mortgage where pre-existing mortgages had been recorded more than two years earlier. Further, there was no evidence that Debtor intended construction loan to be recorded prior to lender’s mortgage at time loan was obtained. Lender also continue to approve additional loans for Debtor four years knowing that lender did not have first mortgage. Record lacked any evidence that lender relied on any alleged misrepresentation particularly after lender learned that lender did not actually have first mortgage but still extended additional credit to Debtor
- (2831) *National Credit Union Board v. Zovkic*, 2017 WL 1113101 (Bankr. N.D. Ohio 2017) – Lender could not have reasonably relied on Debtor’s statement that lender would receive first mortgage where pre-existing mortgages had been recorded more than two years earlier. Further, there was no evidence that Debtor intended construction loan to be recorded prior to lender’s mortgage at time loan was obtained. Lender also continue to approve additional loans for Debtor four years knowing that lender did not have first mortgage. Record lacked any evidence that lender relied on any alleged misrepresentation particularly after lender learned that lender did not actually have first mortgage.
- (2832) *Vizachero v. Brazieka*, 2017 WL 816871 (Bankr. E.D. Mi. 2017) – Section 523(a)(2)(A) excepts from discharge any debt obtained through material representation that Debtor knew was false or made with reckless disregard for truth where Debtor intended to deceive the creditor,

the creditor justifiably relied on the false representation, and creditor's reliance was the proximate cause of the loss. State Court judgment against the Debtor has same res judicata effect that judgment would be given under law of state in which judgment was rendered. Under Michigan law, res judicata bars all claims that were or might have been presented and all defenses that war might have been presented as though issues had been actually litigated. Res judicata requires that first action be decided on merits; matter contested in second action was or could have been resolved in first action, and both actions involve same parties or privies. Consent judgments have same res judicata effect under Michigan law. Whether prior judgment is res judicata in nondischargeability litigation depends on whether factual findings of State Court were sufficient to meet the bankruptcy code standards for deceit, fraud or malicious actions. Fact that nondischargeability action is based on same cause of action does not automatically result in res judicata if elements of cause of action in State Court did from elements of cause of action under Bankruptcy Code. To establish claim of fraud under Michigan law, plaintiff would have to establish that defendant made material misrepresentation that was false and was known to be false or was made recklessly and without any knowledge of truth, and that representation was made with intention that it should be acted on by plaintiff, the plaintiff acted in reliance, and suffered injury as a result. Judgment against Debtor for fraud under Michigan law was sufficient to constitute res judicata in subsequent action under Section 523 as elements of state law cause of action or identical to and overlapped issues presented by Bankruptcy Code.

- (2833) *Vizachero v. Brazieka*, 2017 WL 816871 (Bankr. E.D. Mi. 2017) – Collateral estoppel bars relitigation of any factual question determined by State Court that applies the same standards as Bankruptcy Court would use. Collateral estoppel prevents issue from being relitigation where issue was actually litigated and necessarily decided in prior action. Collateral estoppel requires identity of parties across proceeding; valid final judgment in first proceeding; same issue actually litigated and necessarily determined in first proceeding; and party against whom doctrine is asserted had full and fair opportunity to litigate in prior proceeding. As general rule, Michigan law does not afford collateral estoppel effect to consent judgments because a consent judgment reflects the agreement of the parties rather than any actual adjudication by Court of disputed issues. However, where allegations in State Court complaint, faxed deemed admitted by defendant in State Court, and consent judgment, taken together, indicate at issue was “actually litigated”, collateral estoppel may apply; or where consent judgment manifests intention of parties that judgment be conclusive with respect to one or more issues, agreement is preclusive as to those issues. Defendants responses to request for admissions in State Court admitted all facts necessary to establish claim based on fraud. Consent judgment, entered based on those admissions, is sufficient to demonstrate that issue is “actually litigated”, such that State Court, Judgment had collateral estoppel effect in later nondischargeability action.
- (2834) *Poole v. Batson*, 2017 WL 788307 (Bankr. M.D. Tn. 2017) – Section 523(a)(2)(A) renders debt nondischargeable to extent that that results from false representation or false pretenses. Plaintiff must prove materially false representation made with knowledge of falsity and with intent to deceive on which Creditor reasonably relies in which proximally results in loss. Debtor, a building contractor, falsely represented that “retainer” paid by plaintiffs at commencement of construction project would be placed into escrow account and used solely for construction of plaintiff's project, where immediately upon receipt of “retainer” Debtor deposited money into Debtor's general bank account which, at time, was overdrawn. Debtor knew at time Debtor made representation to plaintiff that funds would be set up in separate escrow that representation was not true as Debtor had never done business that way and Debtor was suffering substantial financial problems including negative balance in business checking account and Debtor used most of the retainer virtually immediately, once again resulting in negative balance in business account. Evidence indicated that Debtors needed cash, obtained retainer from plaintiff, and then immediately spent retainer on other projects, such that totality of circumstances supported finding of requisite fraudulent intent.
- (2835) *Oliver v. Zimmerman*, 2017 WL 663196 (Bankr. N.D. Ohio 2017) - Section 523(a)(2)(A) excepts from discharge a debt obtained by false pretenses, false representation or actual fraud. Plaintiff must prove (1) Debtor obtained money, property, services or credit through material misrepresentation, either express or implied, that Debtor at the time knew was false or made with gross recklessness as to truth; (2) Debtor intended to deceive creditor; (3) creditor justifiably relied on false representation; and (4) creditor's reliance was proximate cause of loss. Debtor's intent to defraud is measured by subjective standard based on totality of circumstances of this case and may be inferred using circumstantial evidence and Debtor's “course of conduct”. Mere breach of contract is not sufficient to support action under Section 523(a)(2) absent proof that Debtor did not intend to perform contract from inception. Corporate officer may be denied discharge where contract was between plaintiff and Corporation and money obtained was deposited into corporate bank account, if corporate officer obtained direct or indirect tangible or intangible financial benefit from transaction. Debtor obtained financial benefit from plaintiff's payment to Corporation as Debtor was principal of and controlled corporation, Corporation provided Debtor's livelihood, and bank statements indicated that funds received by the Corporation were partially paid to Debtor. Payment to Debtor would not have been possible but for corporation's receipt of check from plaintiff, constituting sufficient “financial benefit” for purposes of Section 523(a)(2).
- (2836) *Oliver v. Zimmerman*, 2017 WL 663196 (Bankr. N.D. Ohio 2017) - Section 523(a)(2)(A) excepts from discharge a debt obtained by false pretenses, false representation or actual fraud. Plaintiff must prove (1) Debtor obtained money, property, services or credit through material misrepresentation, either express or implied, that Debtor at the time knew was false or made with gross recklessness as to truth; (2) Debtor intended to deceive creditor; (3) creditor justifiably relied on false representation; and (4) creditor's reliance was proximate cause of loss. Debtor's intent to defraud is measured by subjective standard based on totality of circumstances of this case and may be inferred using circumstantial evidence and Debtor's “course of conduct”. Evidence did not indicate that at time Debtor entered into contract to construct pole barn for plaintiff, that Debtor did not intend to complete project, as Debtor had materials, tools and equipment delivered to jobsite and a crew of 4 to 5 people working on a daily basis for at least two weeks, completing construction of 85% of the framing for the pole barn. Construction stopped when Debtor lacked sufficient funds to obtain additional materials, although Debtor's actions indicated that Debtor continued to attempt to find sufficient funds to complete project by having crew finish another job which would generate sufficient proceeds to purchase materials for plaintiff's barn. However, Debtor did misrepresent to plaintiff the source and cost of materials to be purchased which allowed Debtor to divert funds advanced by plaintiff for other purposes at a time when Debtor lacked any additional source of funds to complete construction on plaintiff's project. Plaintiff advanced a total of \$30,000, but Debtor used only \$14,000 to purchase required materials and did not refund the balance to the purchaser, requiring plaintiff to incur cost of purchasing additional materials to finish project.

- (2837) *Sheen Falls Strategies, LLC v. Keane*, 2016 WL 6875897 (Bankr. N.D. Ohio 2016) – Under Section 523(a)(2)(A), creditor must prove: (1) Debtor obtained money through material misrepresentation that Debtor knew was false or made with gross recklessness as to truth; (2) Debtor intended to deceive creditor; (3) creditor justifiably relied on false representation; and (4) reliance was proximate cause of the loss. False pretenses involve implied representation or conduct intended to create false impression where party fails to exercise reasonable care to disclose material fact which may justifiably induce another party to act or refrain from acting, and the non-disclosing party knows that failure to disclose information renders prior statement or representation untrue or misleading. Creditor may justifiably rely on representation even if falsity would have been disclosed by investigation but, cannot turn blind eye where patent falsity can be determined by cursory examination or investigation or where misrepresentation should be apparent to person with creditor's knowledge and intelligence, and creditor is required to make more substantial investigation when creditor discovers red flag that should warn of deceit, including reluctance of fellow creditors to invest or promise that sounds too good to be true. Proximate cause requires that misrepresentation was substantial factor in the loss, or loss was reasonably expected to follow. Debtor obtained three loans through material misrepresentation that Debtor knew to be false, by claiming that Debtor had confidential and highly-successful financial formula for buying and selling stock options. In fact, the formula was an unsuccessful, simple model created using readily-available indicators. Debtor falsely represented intention to pay back the loans where Debtor incurred debts with the knowledge that the debts were unlikely to be repaid where Debtor knew that business model was not likely to make enough money to repay loans. Creditor would not have loaned Debtor money if creditor had known true nature of the business model and the likelihood that the Debtor would not be able to repay the loan. However, only first loan was determined to be result of justifiable reliance. Creditor made second loan two years after first, and only after complaining that he was unhappy with Debtor's investments and failure to actively manage money for creditor, and after Debtor had failed to make quarterly loan payments on first loan. Other investors had already refused to extend additional loans to Debtor. Creditor had sufficient "red flags" after first loan to raise doubts about Debtor's intent and ability to repay such that further reliance on Debtor's statements was not justified.
- (2838) *Monson v. Galaz*, Case No. 15-14939 (11th Cir. 2016) – Action under Section 523(a)(2) based on future promise requires evidence that Debtor new, at time promise is made, that Debtor could not fulfill promise or had no intention of fulfilling promise. Evidence did not support finding that Debtor fraudulently induced lender to loan money where Debtor obtained loan for purpose of opening business, Debtor completed a number of his obligations including overseeing construction and management of business, and business operated for 4 months before it was shut down by the Federal Government; and did not support allegations that Debtor withheld financial information, took unauthorized draws from loan proceeds, or refused to sign any documents.
- (2839) *Johnson v. Loomis*, 2016 WL 5940941 (Bankr. S.D. Ohio 2016) – Section 523(a)(2)(A) excepts from discharge an obligation for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false representation and requires proof that (i) the Defendants obtained money through representations at the time they knew were false or made with gross recklessness as to their truth; (ii) the representations were made with the intention and purpose of deceiving the Plaintiff; (iii) Plaintiff justifiably relied on the representations; and (iv) Plaintiff sustained damage as a proximate result of the misrepresentations. Debtor made misrepresentations in obtaining loan from plaintiff by stating that loan would be used to lease new business premises and to purchase inventory, but Debtor did not use either loan for the stated purpose and instead used loans for personal and family obligations. Further, at time Debtor requested loans, he had little if any income or savings and no ability to repay where twelve days before Plaintiff loaned Debtor \$2,000.00, Debtor's business only had \$0.81 in its checking account and funds were not used for their intended purposes, but rather served as Debtor's personal piggy bank. Debtor commingled personal and business funds in company checking account, making it difficult to fully and accurately account for the \$8,000.00 in loans, and Debtor failed to make any payment on the loans during the last four years. At time loans were extended plaintiff, a friend of Debtor, had no warning signs that Debtor's statements regarding purposes of loans were false, particularly where in past plaintiff purchased items for Debtor's business and was promptly repaid for those advances. A borrower who has been credible in the past can be assumed to be credible in the present. Debtor's promises to use loans for business and to repay them with business income was sole reason that plaintiff, a retired individual on a fixed income, agreed to make the loans.
- (2840) *Cardwell v. Hester*, 2016 WL 5922307 (Bankr. W.D. Ky. 2016) – Creditor must prove the following elements: (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of the loss. Debtor convinced Plaintiff to advance funds to bond defendant out of jail by promising to repay the funds, at a time when Debtor had no intention of repaying Plaintiff and instead claimed, after the fact, that the funds used for the bond belonged to Debtor's mother. Plaintiff justifiably relied on Debtor's representations that the funds would be repaid, constituting a material misrepresentation for purposes of Section 523(a)(2).
- (2841) *Mustafa v. Central Bank & Trust*, 2016 WL 4928053 (Bankr. E.D. Ky. 2016) – Debt is not dischargeable where Debtor obtains money, property or services by false pretense, false representation or actual fraud. Creditor must prove that Debtor obtained money through material misrepresentation that Debtor knew was false when made or made with gross recklessness; Debtor intended to deceive creditor; creditor justifiably relied; and reliance was proximate cause of loss. Material misrepresentation is a substantial inaccuracy of the type that would generally affect creditor's decision. False statements involve current or past facts, while false pretenses involve implied misrepresentation or conduct intended to create false impression. Debtor falsely represented to creditor that he sought automobile loan to purchase car for personal use when evidence indicated that Debtor instead intended to use car as inventory in used car business and to sell car through business. Debtor purchased the car at auction on behalf of Used Car company. Debtor immediately leased car to Use Car company and added business logo to car and parked car in front of used car lot. Debtor repeatedly advised lender that car was for personal use and that Debtor would not sell car, and lender made it clear that it would not finance car unless car was for personal use. Debtor prepared application on bank form for personal loans. Evidence indicated that at time of transaction, Debtor had reason to avoid financing car through Used Car operation, as Used Car business was struggling and floor plan financing carried high fees and ongoing issue with floor plan lenders; and Debtor could not wait for a commercial loan as that would have required extensive background check of Debtor and business, and Debtor needed to act quickly to

avoid auction from selling vehicle to third party. After Debtor acquired the vehicle, he sold it to out of state third party and made no attempt to notify bank of sale or to transfer title, and let the Used Car business use proceeds of sale for operating expenses without paying lien. Debtor continued to make monthly payments in effort to cover up sale of car. Evidence supported finding that Debtor had subjective intent to mislead bank when he applied for loan and then made false representations to conceal sale of car, sufficient to except debt from discharge.

- (2842) *Halpin v. Hardy*, 2016 WL 3766064 (Bankr. E.D. Ky. 2016) – Action to except debt from discharge must prove that Debtor obtained money through material misrepresentation that Debtor knew, when made, was false or made with gross recklessness as to truth; Debtor intended to deceive creditor; creditor justifiably relied on Debtor’s representations; and reliance was proximate cause of loss. Misrepresentations are material if is a substantial inaccuracy that would generally affect creditor’s decision. Representation is not material if creditor knows it is false or has sufficient information to call representation into question. False representations included statements that falsely purport to depict current or past facts and can include implied misrepresentations or conduct intended to create or encourage a false impression. Representation is “knowing” if Debtor had awareness or understanding of falsity; while gross recklessness is conscious indifference to consequences of act and includes some element of intent to deceive. Mere negligence is not sufficient to except debt from discharge and an honest belief that representations are true and the speaker has information to support statements is sufficient to defeat action to except debt from discharge. Reliance is justified even where creditor may have ascertained falsity of statement through investigation, and while person is not required to conduct independent investigation, person must use senses and cannot blindly rely on representation where falsity would be apparently if he made cursory examination or investigation. Creditor failed to prove that Debtor’s statements were false where Debtor adequately explained workings of television including standards in effect at time of sale that would lead one to conclude that television was not “high definition”. After creditor complained, Debtor and manufacturer offered to replace unit with newer, HD capable unit and creditor refused. At best, evidence indicated miscommunication or misunderstanding between parties and not fraudulent misrepresentation.
- (2843) *Smith v. Morse*, 2016 WL 3092630 (Bankr. E.D. Tn. 2016) – Exception from discharge under Section 523(a)(2)(A) requires (1) Debtor obtained money through material misrepresentation that, at time made, Debtor knew was false or was made with gross recklessness for truth; (2) Debtor intended to deceive creditor; (3) creditor justifiably relied on false representations; and (4) reliance was proximate cause of loss. Debtor induced creditor to invest \$100,000 with specific promise that fund would be used for construction of specific home on specific parcel of property. Instead, Debtor immediately transferred funds to Debtor’s personal account and other funds to Debtor’s general business account for payment of expenses unrelated to development of specifically represented house. While funds were initially deposited into business account rather than Debtor’s personal account, indirect benefit is sufficient for purposes of non-dischargeability. Debtor unquestionably obtained benefit by having his company transfer funds to him personally and use other funds for payment of business which was owned solely by Debtor and Debtor’s spouse, and caused company to pay Debtor’s personal expenses including groceries, vehicle expenses, meals and water bills; and company commingled the funds received from creditor with other funds of business that were unrelated to specific lot in which creditor thought he was investing. Debtor specifically represented that fund would be used to build specific house and that creditor’s investment, coupled with Debtor’s investment, would be sufficient to complete house, but Debtor did not advise creditor that Debtor did not intend to invest funds but instead intended to obtain construction loan for entire amount of cost of construction. Debtor knew that statements were false as Debtor obtained construction loan almost immediately after receiving creditor’s investment, indicating that Debtor never intended to split the risk or to share in the proceeds as repayment of construction loan would consume almost all of the sale proceeds leaving Debtor unable to repay even principal of investment much less an additional one-half of the proceeds. Intent to deceive is present when Debtor makes false representation knowing or where Debtor should have known that creditor would rely in deciding to advance money, goods or services. Fraudulent intent inferred from Debtor’s repeated misstatements including statements that Debtor’s business was “going well” when in fact it has been losing money for a number of years and Debtor knew of financial difficulties as he was having trouble obtaining financing for certain proposed developments; and Debtor almost immediately diverted creditor’s investment into other properties in which creditor had no interest. Evidence indicated that creditor relied justifiably and that reliance was proximate cause of loss, as without misstatements creditor would not have invested funds and would not have suffered loss. Creditor not entitled to award of interest as interest was contingent and unmatured as of petition date but was entitled to recover attorney fees incurred in adversary proceeding based on provision in promissory note that creditor was entitled to recover attorney fees in any collection by suit or otherwise or to protect security for payment.
- (2844) *Leonard v. RDLG, LLC*, 2016 WL 1178649 (6th Cir. 2016) – Default judgment entered as sanction for failure to participate in litigation is collateral estoppel on matters that are actually and necessarily determined. Default judgment entered in federal court litigation conclusively determined that debt was excepted from discharge based on fraudulent misrepresentation. Debt is not dischargeable where (1) Debtor obtained money through material misrepresentation that, at the time, the Debtor knew was false or made with gross misrepresentation that, at time, Debtor knew was false or made with gross recklessness as to truth; (2) Debtor intended to deceive; (3) creditor justifiably relied; and (4) reliance was proximate cause of loss. Judgment based on North Carolina law regarding fraud met standards of Section 523 as action required a fraudulent misrepresentation of fact, opinion, intention or law, for purpose of inducing reliance and with justifiable reliance. Although fraudulent conduct of Debtor did not produce any benefit to Debtor, misrepresentations did convince plaintiff to retain Debtor to conduct auction of residential lots but sale was unsuccessful, with plaintiff incurring costs and expenses as a result of failed auction. While Debtor did not gain, plaintiff did suffer loss based on fraudulent conduct of Debtor which is sufficient for purposes of Section 523. Further, Debtor did “obtain” something as Debtor convinced plaintiff to enter into contract with Debtor pursuant to which Debtor could earn commissions on each parcel sold, and contract came about as result of misrepresentation. Fact that contract did not actually produce any monetary benefit does not change fact that Debtor did obtain some benefit in form of possibility of payment.
- (2845) *Gaff v. Sheidler*, 2016 WL 1221656 (6th Cir. BAP 2016) – Creditor must prove (1) (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss.

Statements must involve representations of fact. Statements of future activity or statements of opinion are not actionable. Creditor failed to prove that Debtor, a developer of a real estate community, made any misrepresentations. Creditor purchased land from Debtor and entered into contract with separate builder (unaffiliated with Debtor) to construct unit. Debtor stated only that “We believe that we have the best interior designer & the most meticulous builder” and that “developer lives on site so you have confidence that everything will be done correctly” were not actionable statements. Statement about builder were statements of opinion and not statements of fact. Statement regarding residence of developer was accurate when made and fact that developer later moved off premises did not make statement false when made. Builder with whom Debtor contracted directly made false statements and representations to obtain draw payments from construction lender and then failed to complete job. Statements made by agent in course and scope of agency can be imputed to principal for purposes of dischargeability. Agency requires either actual authority, which requires that principal and agent enter into express agency relationship; or apparent authority which requires that principal acts in way that implicitly represents to third parties that agent has authority to act. Apparent authority requires acts of principal – acts of alleged agent alone cannot establish any agency relationship. However, actions of builder were not false statements of developer as there was no agency relationship between builder and developer; developer never made statements or representations or conducted himself in such a way as to create implied authority of builder; and Debtor directly contracted with and communicated with builder without involvement of developer. Creditor also did not prove reliance where there was no direct link between statements and losses suffered. It was builder’s fraudulent conduct, not any conduct of the developer, that caused loss.

- (2846) *Sequatchie Mountain Creditors v. Detweiler*, 2016 WL 321037 (Bankr. N.D. Ohio 2016) – Section 523(a)(2)(A) requires (1) Debtor obtained money or property through material misrepresentation that, at time made, Debtor knew was false or was made with reckless disregard; (2) Debtor intended to deceive creditor; (3) creditor justifiably relied; and (4) reliance is proximate cause of loss. Reliance is justified only when, under the circumstances, facts should be apparent to one of his knowledge an intellect from a cursory glance, or that person has discovered something which would serve as warning that he is being deceived, that he is required to make further investigation. Statements made by agents in course and scope of agency can be imputed to Debtor where Debtor knew agents were making statements that were not accurate and Debtor instructed agents to provide inaccurate and misleading information. Debtor’s knowingly telling agents to misrepresent facts sufficient to support action under Section 523. Statements were false when made as Debtor knew that development company lacked funds to complete amenities yet had sales agents promise completion by specific date where Debtor had no reason to believe that amenities would ever be completed, much less by the represented date.
- (2847) *Szachta v. Thompson*, 2016 WL 1055582 (E.D. Mi. 2016) – False pretenses includes any implied misrepresentations designed to create false impression and includes both conduct and material omissions. Implied misrepresentations by one co-conspirator are imputed to other co-conspirators for purposes of non-dischargeability. Debtor was office manager and bookkeeper for attorney. Attorney engineered scheme to misappropriate client funds, and Debtor was active participant in scheme, arranging for funds from settlement of personal injury cases to be deposited to IOLTA account and then withdrawing those funds for personal use of attorney rather than delivering funds to clients. Debtor would falsely state that funds needed to be held 6 months while Debtor either already had or was in process of transferring funds to attorney’s personal account or to operating account for purposes of meeting firm expenses including Debtor’s payroll. Even if Debtor did not make false statements to particular client, attorney did and statements could be imputed to Debtor as co-conspirator.
- (2848) *Gray v. Vinsant*, 2015 WL 5882291 (Bankr. E.D. Tn. 2015) – To except debt from discharge under Section 523(a)(2)(A), plaintiff must prove that Debtor obtained money or property from or belonging to plaintiff through material misrepresentations that Debtor either knew were false when made or were made with gross recklessness, that Debtor intended to deceive plaintiff and that plaintiff justifiably relied on Debtor’s representations, and that the false representations were proximate cause of plaintiff’s loss. Collateral estoppel can be used to prove elements of action if (1) issue sought to be preclude is identical to issue in earlier proceeding; (2) issue to be precluded was actually raised and litigated and decided on merits in earlier proceeding; (3) judgment in earlier proceeding has become final; (4) party against whom estoppel is asserted was party to, or was in privity with party to, prior action; and (5) party against whom estoppel is asserted had full and fair opportunity to litigate issue. Judgment in State Court was not collateral estoppel where it was not clear that court considered issues in State Court action that were central to Section 523 action as State Court judgment did not indicate whether Debtor’s actions amounted to conduct intended to deceive or were instead result of negligent misrepresentation which does not rise to level of fraud for purposes of Section 523. Complaint contained multiple causes of action and judgment did not make any finding of fact, merely stating that judgment was entered in favor of plaintiff and against Debtor. While action potentially fit within scope of Section 523(a)(2)(A), it was not clear that State Court made requisite findings regarding intent.
- (2849) *Greer Construction, Ltd. v. Compton*, 2015 WL 6445051 (Bankr. N.D. Ohio 2015) – Excepting debt from discharge under Section 523(a)(2) for false pretenses or false representations requires proof that (1) Debtor owes a debt to the creditor; (2) the Debtor obtained money, property, services or credit through a material misrepresentation, either express or implied, that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (3) the Debtor intended to deceive the creditor; (4) the creditor justifiably relied on the false representation; and (5) the creditor’s reliance was the proximate cause of loss. Intent to defraud a creditor is measured by a subjective standard and must be ascertained by the totality of the circumstances of the case at hand and may be inferred from circumstantial evidence or Debtor’s course of conduct. Evidence indicated that only Debtor-husband was indebted to plaintiff. Plaintiff, a construction company, performed work at Debtors’ house under a contract signed only by Debtor-husband. While husband consulted with wife during construction process, there was no evidence that she was party to the contract. Thus, there was no debt from Debtor-wife to survive discharge. As to husband, debt was non-dischargeable where Debtor represented that he would use insurance proceeds to pay for work when contract was completed but Debtor had no intention of doing so, as Debtor and wife had spent all of the insurance proceeds on trips to Barbados, Mexico, Tennessee and Kentucky, and Debtor had completely depleted bank account including all insurance proceeds before construction was complete. While mere breach of promise to pay is not fraud, evidence indicated that Debtor induced plaintiff to perform and complete work by creating impression that Debtor would use insurance proceeds to pay for work when Debtor never intended to do so and always intended to spend proceeds on personal expenses and then attempt to force plaintiff into accepting payment terms after contract was complete. Debtor

also misrepresented ability to pay for additional work beyond insurance repairs by promising full payment when the project was complete at a time when Debtor knew that Debtor would be unable to perform. Debtor lacked sufficient funds to pay for job at time of contracting and Debtor was living “paycheck to paycheck” leaving no additional money to save to pay for project. While job was ongoing, Debtor depleted his bank account from \$1,300 at time of contracting to only \$7.26 when the job was complete. At no time did Debtor have either the ability to pay for the project or any reasonable likelihood of being able to pay for project.

- (2850) *PRN Funding, LLC v. Cole*, 2015 WL 6122078 (Bankr. N.D. Ohio 2015) – Non-dischargeability of debt can be based on collateral estoppel effect of pre-bankruptcy State Court judgment. Collateral estoppel requires that the party against whom collateral estoppel is sought was a party-or in privity with a party-in the previous action; there was a final judgment on the merits in the previous action after a full and fair opportunity to litigate the issue; the issue was actually and directly litigated in the previous action and was necessary to the final judgment; and the issue in the present action is identical to the issue involved in the previous action. Whether State Court judgment is sufficient requires comparison of elements found by State Court with elements of subsection of Section 523 under which action is brought. State Court judgment found Debtor liable on three separate theories, fraud, breach of contract and conversion. Elements of fraud action were identical to elements under Section 523(a)(2), although neither breach of contract nor conversion met the identity of causes of action requirements. Findings of State Court sufficiently stated to allow court to determine that elements of fraud were found, but were not sufficiently stated to allow court to apportion damages between various causes of action. Collateral estoppel applied to State Court judgment to extent judgment was based on fraud, but Court could not determine on summary judgment the proper apportionment of damages between the non-dischargeable fraud claim and the dischargeable claims for conversion and breach of contract.
- (2851) *Lawrence Bank v. Brent*, 2015 WL 5935820 (Bankr. S.D. Ohio 2015) – False pretenses and False representations includes any express or implied representation that Debtor makes with knowledge of falsity or with gross recklessness for truth where Debtor intended creditor to rely and creditor justifiably relied causing loss to creditor. However, misrepresentation based on alleged misrepresentation respecting the Debtor's or an insider's financial condition; is not actionable under Section 523(a)(2)(A) and must be brought solely under subsection (B) which requires that where alleged misrepresentation is based on the financial condition of Debtor, misrepresentation must be in writing. Debt cannot be excepted from discharge under either Subsection A or B based solely on alleged oral misrepresentation of Debtor's financial condition. Statements “respecting” financial condition include statements showing Debtor's net worth as well as statements addressing asset or assets or liability or liabilities or any other communications that purport to state Debtor's overall financial health. Certification in loan application that Debtor had sufficient funds to make any required down payment did not constitute misrepresentation where Debtor believed he was not required to make down payment, so certification of source of any down payment was pure excess. HUD closing statement is not misrepresentation because although HUD statement contemplated a down payment, there was nothing on that statement identifying the party making the down payment. Under structure of transaction, Debtor was solely to obtain credit for developer to use to build unit and developer, not Debtor, was to make all payments on credit line including final payment when unit sold. Debtor never agreed to pay down payment and nothing in HUD statement indicated that Debtor had, or would, make that payment. Confirmation letter from developer to lender stating that it had received a down payment “with respect to” Debtor's loan was statement by developer and not Debtor and nothing in letter stated source of down payment or stated that Debtor had made that payment. Statements made by developer where Debtor was not aware of statements when made and had not authorized developer to make statements on behalf of Debtor were not misrepresentations attributable to Debtor. Debtor lacked any intent to deceive regarding down payment where evidence was undisputed that Debtor was never aware of any down payment requirement by lender and Debtor did not expect to have any out of pocket expenses for property. Down payment requirement was inserted by lender's credit committee and information was communicated to developer but information was never communicated by bank or by developer to Debtor. Lender's reliance was not justifiable. Justifiable reliance requires creditor to use his senses, and creditor cannot recover if he blindly relies on representation the falsity of which would have been patent to him if he used opportunity to make cursory investigation. Nothing in documents indicated that Debtor was making a down payment and bank closed transaction without verifying that down payment had been made or source of down payment. Bank deviated from internal standard practices which, if followed, would have disclosed that Debtor had not funded down payment and that down payment was funded entirely by developer.
- (2852) *Casab v. Grand Sky Enterprise Co., Ltd.*, 2015 WL 753365 (E.D. Mi. 2015) – Plaintiff must prove: (1) the Debtor obtained money, property, services or credit through a material misrepresentation, either express or implied, that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) the creditor's reliance was the proximate cause of loss. Elements of cause of action can be proven by collateral estoppel where State Court gives preclusive effect on issues presented. State Court judgment established non-dischargeability of debt where judgment specifically found that statements were false when made, that Debtor knew statements were false, statement were made with intent that plaintiff would rely, and plaintiff did rely and lacked any reason to doubt Debtor's representations. Judgment established each and every element of action under Section 523(a)(2). Entire State Court judgment was predicated on State Court fraud action and all damages found by State Court flowed from fraudulent conduct, leaving entire State Court judgment excepted from discharge.
- (2853) *Jenkins v. Schmank*, 2015 WL 4555582 (Bankr. E.D. Tn. 2015) – Action to except debt from discharge based on false pretenses or false representations requires that Debtor obtained money through material misrepresentation that Debtor knew was false when made or was made with gross recklessness as to truth; Debtor intended to deceive creditor; creditor justifiably relied; and reliance was proximate cause of loss. Material misrepresentations are those that would generally affect lender's or guarantor's decision. Plaintiff failed to show any misrepresentation by Debtor in use of funds contributed to partnership between plaintiff and Debtor where Debtor fully disclosed financial difficulties to plaintiff and plaintiff knew there was risk that the venture would not be successful. Debtor spent the money to pay bills and living expenses, exactly as he advised plaintiff that the funds would be used. Partnership was intentionally engaged in genuine business to develop real estate project. Ultimate failure of project did not indicate that Debtor's representations regarding project were false when made, only that subsequent real estate crisis caused failure of number of projects by multiple developers in same area. However, second advance by plaintiff was non-dischargeable where Debtor induced plaintiff to advance another \$23,000 under representation that funds

would be used for project but Debtor immediately withdrew \$11,500 for personal expenses. Debtor knew that funds were to be used for project and intentionally diverted funds for payment of personal expenses, and then covered up misappropriation of funds by refusing to provide plaintiff information from which misappropriation could have been discovered. Whether reliance is reasonable depends on totality of circumstances, considering factors such as whether parties had close personal relationship; whether there were prior business dealings that would inspire confidence by creditor in Debtor; whether debt was for personal or business purposes; whether there were any red flags that would have alerted ordinarily prudent lender to possibility that representations were not accurate; and whether even minimal investigation would have revealed inaccuracy of representations. Creditor's reliance was reasonable where Debtor initially was totally accurate and candid about financial situation and representations regarding project were accurate and confirmed by third parties. Nothing Debtor said or did would cause plaintiff to believe that Debtor's later statements were not truthful.

- (2854) *Risk v. Hunter*, 2015 WL 4643836 (Bankr. N.D. Ohio 2015) – Plaintiff must prove: (1) the Debtor obtained money, property, services or credit through a material misrepresentation, either express or implied, that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) the creditor's reliance was the proximate cause of loss. Plaintiff failed to produce any evidence that at time plaintiff and Debtor contracted for Debtor to move house, that Debtor lacked intention to perform or that Debtor made any misrepresentation that was false when made to induce plaintiff to enter into transaction.
- (2855) *Cornerstone Industries Corp v. Kaufman*, 2015 WL 4692569 (Bankr. W.D. Ky. 2015) – Collateral estoppel prevents defendant from relitigation factual elements of non-dischargeability claims. Issue preclusion requires four components: (1) identity of issues; (2) a final decision or judgment on the merits, (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a prior losing litigant. State Court judgment entitled to preclusive effect where jury instruction specifically required jury to determine whether Debtor acted with requisite fraudulent intent, and Jury Verdict form clearly stated that Debtor made material representation, intended Plaintiff to rely, Plaintiff did rely, and Debtor either knew the statement was false or made statement with reckless disregard for truth.
- (2856) *Smith v. Morse*, 2015 WL 4627940 (Bankr. E.D. Tn. 2015) – Action under Section 523(a)(2)(A) requires proof that (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. Conflicting evidence prevented summary judgment as parties disagreed on whether fraudulent statements were made or whether there was intent to deceive, or whether transaction was business deal gone bad.
- (2857) *Michigan Department of Human Services v. Marks*, Case No. 15-80301 (Bankr. W.D. Mi. 2015) – Debtor's alleged fraudulent obtaining of Supplemental Nutrition Assistance program benefits is not "domestic support obligation" even if benefits are based on representation of household income. However, Debtor's misrepresentation of Debtor's income for purposes of obtaining benefits constitutes fraud that would be excepted from discharge under Section 523(a)(2).
- (2858) *Chudzinski v. Hanif*, 2015 WL 1981518 (Bankr. E.D. Mi. 2015) – Prior State Court default judgment was collateral estoppel as to dischargeability of debt for fraudulent representations. Michigan law defines fraud as material misrepresentation; false when made; made either with knowledge of falsity or made recklessly; made with intention to induce reliance; plaintiff relied on misrepresentation; and reliance produced injury. State Court complaint adequately alleged that Debtor made representations to plaintiff that if plaintiff invests in business, Debtor will make plaintiff member of LLC and plaintiff will receive profits, at time when Debtor had no ability to fulfill the obligations and Debtor immediately obtained new Medicare certifications and locked plaintiff out of business premises. Default judgment established all well pled facts which met standard for finding of non-dischargeability. State Court judgment also collaterally estopped issue of damages. Although complaint contained multiple counts, some of which were dischargeable and some not, judgment awarded only single lump sum amount. Entire amount non-dischargeable as judgment for fraud, standing alone, would have supported entire amount of judgment. If trial court rests judgment on two grounds, each of which is adequate to support entire award, judgment is conclusive on to both counts.
- (2859) *Mission Compound, LLC v. Keisler*, 2015 WL 1775155 (Bankr. E.D. Tn. 2015) – Plaintiff's adversary arising out of alleged fraud in Debtor's pledge of stock interests barred by res judicata and collateral estoppel. While in Chapter 11, Debtors asserted that plaintiff did not hold pledge of stock as stock was held as tenants by entireties and only Debtor-husband signed pledge agreement. In course of Chapter 11, Court held hearing and concluded that stock had been properly pledged by both husband and wife and creditor held perfected security interest in entirety of stock. Case later converted to Chapter 7 and plaintiff brought action alleging that husband committed fraud by representing that he held all of the stock of the corporation and that he was pledging all of the stock to secure plaintiff's lien, when in fact husband only owned half interest in stock; and had plaintiff known of true state of affairs, plaintiff would not have entered into loan in first instance. Prior judgment determined that stock was validly pledged in full, precluding any element of reliance on representations of Debtor, as Debtor represented that plaintiff would receive pledge of 100% interest in stock and plaintiff, in fact, received that pledge. Even if husband misrepresented actual status of ownership of stock, plaintiff received what he bargained for.
- (2860) *Leonard v. RDLG, LLC*, 2015 WL 1534520 (E.D. Tn. 2015) – Judgment holding debt to be non-dischargeable can be based on estoppel effect of prior court judgment where judgment establishes all facts necessary to determine dischargeability. False pretenses and False representations requires proof that (1) Debtor obtained money through material misrepresentation that, at time Debtor made statement, Debtor knew it was false or made statement with gross recklessness for truth; (2) Debtor intended to deceive creditor; (3) creditor justifiably relied on false representation; and (4) reliance was proximate cause of loss. It is not necessary that the money be obtained directly by Debtor where Debtor indirectly receives tangible or intangible benefit from misrepresentation. Default Judgment set out factual findings that Debtor obtained \$40,000 from Plaintiff through fraudulent facts sufficient to support judgment of non-dischargeability.
- (2861) *Accounting/Tax Pros, LLC v. Schwartz*, 2015 WL 1407380 (Bankr. M.D. Tn. 2015) – False representations requires Debtor obtaining money or property through material misrepresentation that Debtor knew, when made, was false or was made with gross recklessness as to truth; and

made with intent to deceive. Intent to deceive is determined at time when Debtor makes representation. If there is room for an inference of honesty of intention, action must be resolved in favor of Debtor. Contract between Debtor and plaintiff was poorly written, leaving it ambiguous as to when title to assets transferred or Debtor's rights in the event of default. While evidence was in dispute, it was possible to reach inference that Debtor did not have fraudulent intent when Debtor declared plaintiff to be in breach of contract and retook and resold assets that Debtor previously sold to plaintiff.

- (2862) *Richardson v. Caswell*, 2015 WL 1403015 (Bankr. W.D. Ky. 2015) – State Court judgment is entitled to preclusive effect in adversary proceeding to same extent judgment would be afforded preclusive effect under applicable state law. Issue preclusion prevents parties from re-litigating issues that were actually litigated and decided in prior proceeding, and requires that prior proceeding involve same issue; issue was actually litigated, issue was actually decided. And resolution was necessary component of prior decision. State Court judgment against Debtor for fraud raised identical issue where State Court judgment expressly determined that Debtor obtained money through material misrepresentation that Debtor knew was false when made, Debtor intended to deceive creditor, creditor justifiably relied on representation, and reliance was proximate cause of loss. Debtor falsely stated that corporation was profitable, inducing creditor to invest, when Debtor knew that corporation was losing money and on verge of failing, and had creditor known of true state of corporation, creditor would not have invested.
- (2863) *Truban v. Draise*, 2015 WL 757485 (Bankr. S.D. Ohio 2015) – Debtor obtained property by false representations and false pretenses by inducing plaintiff to purchase a home for plaintiff and Debtor (who were at the time engaged) but Debtor caused title to be issued in her name alone. Debtor convinced plaintiff that Debtor wanted to build home on family property for her, plaintiff and their respective children to live in. Plaintiff invested sale proceeds from former marital home in purchase of new home and evidence indicated that all of the down payment was attributable to plaintiff's funds, and plaintiff also paid off some of Debtor's personal debts in order to facilitate the mortgage process. Debtor was fully aware of plaintiff's investment in new home as well as his plan to live with Debtor in the home both before and after marriage. Mortgage lender and title company were also under impression that title would be held jointly based on documents prepared for the closing. However, Debtor, without plaintiff's knowledge, caused property to be titled solely in her name. Debtor intentionally gave plaintiff the false impression that plaintiff was investing in home that would be titled in both names. Length of relationship and nature of relationship established that plaintiff justifiably relied on Debtor's representations. But for Debtor's misrepresentations, plaintiff would not have invested in the property, and would not have lost his investment in home now owned and occupied by Debtor and her new husband.
- (2864) *Kloeber v. Montanari*, 2015 WL 603874 (Bankr. E.D. Tn. 2015) – Plaintiff must prove that Debtor obtained money, property or services through material misrepresentation that Debtor knew was false or made with gross recklessness; that Debtor intended to deceive plaintiff; that plaintiff justifiably relied on the false representations; and that the reliance was proximate cause of loss. Material misrepresentation are substantial inaccuracies of the type that would generally affect lender's or guarantor's decisions; and are ones that misrepresent existing or past facts. Breach of promise to pay alone is not evidence of fraud absent evidence that at time debt was incurred, Debtor had no intention to repay the obligation. Intent to defraud is based on subjective standard, focusing on individual characteristics of the Debtor, based on totality of facts such as suspicious timing of events, insolvency, transfers to family members or insiders, whether Debtor made any effort to perform, adequacy of records kept, and whether any unusual transfers occurred. Intent is by definition fact based, such that summary judgment is inappropriate where plaintiff does not establish that Debtor had requisite intent.
- (2865) *Go Wireless, Inc. v. Lehrmitt*, 2015 WL 351211 (Bankr. W.D. Ky. 2015) – Final Judgment entered by State Court entitled to preclusive effect to same extent as judgment would be afforded by court in which judgment was initially entered. Judgment by default is just as conclusive as any other judgment and is entitled to preclusive effect and binds bankruptcy court in later dischargeability proceeding. State Court judgment conclusively established every fact to support finding that debt was incurred by false pretenses. Debtor's request that court disregard preclusive effect because Debtors are elderly, without significant assets or recourses, and care for special needs child and have health issues, unavailable as equitable determination would insert conditions into Section 523 that are not present in the statute.
- (2866) *Michigan Department of Human Services v. Marks*, 2015 WL 471608 (Bankr. W.D. Mi. 2015) – Claim arising from overpayment of benefits received under federal Supplemental Nutrition Assistance program excepted from discharge under Section 523(a)(2)(A). Debtor obtained benefits by making misstatements regarding financial condition resulting in overpayment of benefits by State.
- (2867) *Phoenix Financial Solutions, Inc. v. Williams*, 2015 WL 430242 (Bankr. N.D. Ohio 2015) – Party seeking to deny discharge must prove: (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance is the proximate cause of the loss. Intent to deceive is subjective standard but may be proven by circumstances of case. Action arising out of "bad check" is not based on false pretenses. Writing check is not representation that the author has funds necessary to cover the check. Section 523(a)(2)(A) action based on bad check fails to state cause of action.
- (2868) *Novotny v. Barnes*, 2014 WL 5771305 (Bankr. N.D. Ohio 2014) – To except a debt from discharge under Section 523(a)(2)(A) for false representation, creditor must prove: (1) the Debtor obtained money or services through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. Debt excepted from discharge where plaintiff hired Debtor to put new roof on plaintiff's home and paid \$5,125 in advance but Debtor never did any work on home. Evidence indicated that Debtor never purchased any materials and refused to either start work or refund deposit. Although mere breach of contract is insufficient for finding of fraud, evidence indicated that when Debtor entered into contract in first instance, Debtor never had any intention of complying. Payment of deposit constituted reliance on the representations by Debtor that the work would be performed. However, court could not award attorney fees incurred in Section 523 action where there was neither statutory nor contractual basis for award of attorney fees.

- (2869) *Escorihuela v. Faidengold*, 2014 WL 4067750 (11th Cir. 2014) – Creditor must show that (1) the Debtor made a false representation to deceive the creditor, (2) the creditor relied on the misrepresentation, (3) the reliance was justified, and (4) the creditor sustained a loss as a result of the misrepresentation. Evidence indicated that relationship between Debtor and plaintiff was one of Debtor-creditor and not one where Debtor agreed to manage or invest money for or on behalf of plaintiff. Agreement was that plaintiff would provide money to Debtor who would repay plaintiff the same fixed amount plus interest at a fixed rate. Nothing in the record supported plaintiff's contention that Debtor agreed to hold money and invest for plaintiff or that Debtor was prohibited from using money as personal loan for Debtor's personal expenses.
- (2870) *DeMarco Roofing, Inc. v. Coyle*, 2014 WL 5089732 (Bankr. S.D. Ohio 2014) – Section 523(a)(2)(A) requires that Debtor "obtained" money. It is not necessary that the money gained for the direct benefit of the Debtor if the Debtor derives indirect benefit from the funds fraudulently obtained. Funds wrongfully obtained from one entity and transferred into second entity provided sufficient indirect benefit to Debtor who was majority shareholder of transferee company. Creditor must also prove that money was obtained through material misrepresentation that, at the time, Debtor knew was false or made with gross recklessness as to truth; that Debtor intended to deceive; that creditor justifiably relied; and reliance was proximate cause. False pretenses are implied misrepresentations intended to create false impression while false representation requires express representation. Actual fraud is defined broadly as any deceit, artifice, trick or design involving direct and active operation of the mind used to circumvent and cheat another, and is a generic term embracing all of the multifarious means which can be used to gain an advantage over another by false means or suggestions or suppression of the truth. Evidence failed to establish any false statements by Debtor to creditor. Only possible misrepresentation was when Debtor falsely advised Bank that he was president of creditor, but there was no evidence that anyone at the creditor was aware of, or relied on this statement and even if employees of creditor were aware of statement, they also would have been aware that statement was false precluding any finding of reliance. Evidence also did not support finding of fraudulent misappropriation where there was no evidence of intent. Debtor and creditor were business partners in various enterprises. While financial interrelationships between entities, including various inter-company transfers, were complex, nature of joint venture between parties indicated that transfers and payments were in the course of the operations of the joint venture and not as part of a fraudulent scheme by Debtor to defraud creditor.
- (2871) *Merritt v. Layne*, 2014 WL 4723081 (Bankr. E.D. Ky. 2014) – Plaintiff not entitled to judgment of non-dischargeability under Section 523(a)(2) where complaint did not plead sufficient facts to demonstrate fraudulent intent. Complaint alleged only that plaintiff loaned money and that defendant materially misrepresented intention and ability to repay, but did not allege any facts to support allegations. Mere failure to repay loan is not misrepresentation.
- (2872) *National Union Fire Insurance Company v. Krause*, 2014 WL 1725808 (Bankr. N.D. Ill. 2014) – Debtor's sale of property encumbered by unrecorded mortgage and retained proceeds without paying off the mortgage rendered debt non-dischargeable. Debtor sold property knowing property was encumbered yet continued to make mortgage payments to lender to conceal sale and prevent lender from exercising right to call loan upon sale. Lender demonstrated that forbearance in collection was result of fraudulent representations made when Debtor continued to make payments to conceal sale.
- (2873) *American Express Centurion Bank v. Arrington*, 2014 WL 3339599 (Bankr. N.D. Ohio 2014) – False representations include promises to pay debts when Debtor had no intention, at time promise made, of performing. Use of credit card constitutes representation that Debtor will repay credit card. Debtor used credit card to charge over \$15,000 in luxury goods over a six week time period at time when Debtor's total gross income as less than \$10,000. Debtor's lack of ability to make even the minimum payments required constituted requisite fraudulent intent that Debtor obtained funds from creditor with no intent to repay.
- (2874) *ORNL Federal Credit Union v. Hicks*, 2014 WL 2624932 (Bankr. E.D. Tn. 2014) – Action to deny discharge under Section 523(a)(2) requires proof that Debtor obtained money, property or services through material misrepresentations that Debtor knew were false or were made with gross recklessness; that Debtor intended to deceive plaintiff; that Plaintiff justifiably relied on Debtor's false statements; and that Plaintiff's reliance was proximate cause of loss. Misrepresentations are material if they contain substantial inaccuracies of the type that would generally affect a lender's decision, but are not material if the creditor knows it is false or possesses information sufficient to call into question accuracy of statement. Fraudulent intent can be inferred from totality of circumstances that lead to conclusion that it is more probably than not that the Debtor had fraudulent intent. Negligence of "dumb but honest Debtor" is not sufficient, and broken promise to pay, without more, is not sufficient unless at time debt was incurred Debtor had no intention of paying. Misrepresentation in purchase contract that Debtor had made \$100,000 down payment, standing alone, was not sufficient to evidence fraudulent intent in inducing lender to finance purchase. Evidence indicated that seller of property was indebted to buyer for \$100,000, and credit on closing statement for \$100,000 represented buyer's forgiveness of that debt as part of the purchase price for the property. There was no evidence that buyer intended not to repay loan at time loan was obtained; instead, evidence indicated that buyer intended to resell property as he had done with many other properties in the area. There also was no evidence that lender relied on mis-statement that buyer paid a \$100,000 deposit. Although lender testified that alleged deposit allowed the loan to meet the bank's 20% down payment requirement, without which the lender would have refused the loan, the evidence indicates that buyer and lender had longstanding relationship with multiple successful loan transactions, and that lender relied on appraisal made by lender's appraiser to determine that loan met 80% requirement, not based on any alleged down payment or deposit. Bank's credit memorandum indicated that lender relied on value of property and Debtor's intent to resell, and made no mention of any alleged down payment as basis for credit decision.
- (2875) *Jennings v. Bodrick*, 2014 WL 1818487 (Bankr. S.D. Ohio 2014) – Evidence supported finding that Debtor actually intended to defraud Debtor. Debtor was creditor's investment advisor. Debtor sold creditor an "investment" in a Nigerian "estate" that would yield 50% returns in 16 days. However, evidence did not support finding of justifiable reliance, where rate of return was clear red flag and creditor failed to perform even a cursory investigation of the investment, choosing instead "blind reliance" on Debtor's character and wealth. Given apparent high magnitude of risk, creditor's failure to even summarily review investment resulted in creditor's assumption of risk.

- (2876) *Altercare of Navarre Center for Rehabilitation & Nursing Care, Inc. v. Conley*, 2014 WL 1577236 (Bankr. N.D. Ohio 2014) – To except debt from discharge, plaintiff must prove that Debtor obtained money through material misrepresentation that, when made, Debtor knew was false or made with gross recklessness as to truth; that Debtor intended to deceive creditor; creditor justifiably relied on the representation; and reliance was proximate cause of loss. When addressing state of mind of Debtor, court must use subjective standard including traits such as ignorance, incompetency and ineptness, but court can also use circumstantial evidence and badges of fraud to infer subjective intent. Plaintiff's motion for summary judgment did not establish that Debtor knew statements were false or made with gross recklessness. Application for Medicare coverage asked whether Debtor was "aware of any transfer" of the applicants property and Debtor answered "no". While answer was not correct, record did not establish lack of genuine issue of material fact, where Debtor alleged that she did not know statement was false when made as creditor's representative spent only 30 minutes explaining the entire Medicare application process which was not sufficient time for "normal person" to understand all of the legal terms, or that Debtor interpreted "transfer" of property to include gift to Debtor almost 4 years earlier. Record also failed to establish fraudulent intent, which is subjective intent to mislead, deceive, manipulate or defraud rather than mere negligence. Statements involved Debtor's intent, when contract was signed, to pay for the care if Medicare declined coverage. There was no evidence that Debtor, at the time the statements were made, subjectively intended not to pay debt or that Debtor made statements knowing that she had no intention of actually complying. Further, Debtor did make substantial payments on the debt aggregating more than \$12,000 on \$29,000 debt, and there was no evidence that Debtor knew, when making the representations, that Medicare would decline coverage leaving Debtor responsible for payment. Debtor cannot fraudulently represent that she would pay when she had no reason to believe that she would ever be called on to pay. Creditor did justifiably rely on Debtor's statements. Justifiable reliance is lower standard than reasonable reliance, and person may justifiably rely even if truth or falsity of statement can be discovered through an investigation. However, creditor cannot blindly rely on misrepresentation if falsity would be patent if creditor used opportunity to make cursory investigation. Creditor had no reason to know of transfer by Medicare applicant to Debtor within 5 years of applying for Medicare coverage, such that Medicare coverage would be denied. While creditor perhaps could have discovered transfer if creditor conducted detailed investigation into applicant's financial history for the prior 5 years, creditor was under no obligation to do so where creditor had no other reason to believe that any transfer had occurred. Questions remained regarding proximate cause of loss. Although Debtor guaranteed payment if Medicare declined, evidence indicated that creditor relied on Medicare payments in normal course of business and creditor assumed that applicant would receive Medicare benefits, raising question as to whether creditor ever relied on Debtor's statements or instead on creditor's assumption that Medicare would cover treatment.
- (2877) *Hubanks v. Jouett*, 2014 WL 948517 (Bankr. N.D. Ok. 2014) – Debt resulted from false statements and misrepresentations and would be excepted from discharge. Creditor was Debtor's half-brother. While creditor was incarcerated, creditor and Debtor agreed that Debtor would receive social security disability checks for creditor and would deposit funds into account over which Debtor had check writing ability, and Debtor would hold funds for creditor. Creditor justifiably relied on Debtor's representations that Debtor would hold money for creditor's behalf in light of familial relationship, and fact that creditor had used check-writing authority to post creditor's bond and obtain release from jail. While Debtor was reassuring creditor that funds were being held, Debtor misappropriated thousands of dollars for Debtor's personal use.
- (2878) *Yoppolo v. Asbury*, 2014 WL 1323216 (Bankr. N.D. Ohio 2014) – Plaintiff must prove (1) Debtor obtained money or property through material misrepresentation that, at the time, Debtor knew was false or made with gross recklessness as to truth; (2) Debtor intended to deceive creditor; (3) creditor justifiably relied on false representation; and (4) reliance was the proximate cause of loss. False representations and false pretenses encompass statements that falsely purport to depict current or past facts, while false pretense involves implied misrepresentation or conduct intended to create and foster a false impression. Debtor induced creditor to purchase property on land contract, in part based on false statement concerning amount of outstanding mortgage. However, creditor did not present any evidence that creditor relied on any representations regarding mortgage balance where creditor never stated that she would not have entered into the land contract had she known the truth. Contractual obligation to deliver clear title when land contract was paid off was not false statement of present facts but was statement of future intention, and creditor did not present evidence that at time statement was made, Debtor had no intention of complying. Statement was, at best, breach of contract which does not amount to fraud for purposes of Section 523. Debtor's failure to provide annual statements regarding contract was not fraud where there was no proof that Debtor failed to properly credit payments. To extent that action was based on Debtor's actions post-petition in continuing to collect land contract payments but failure to pay underlying mortgage, those actions would be post-petition claims that are unaffected by bankruptcy.
- (2879) *Rambush v. Tailford*, 2014 WL 1256038 (Bankr. N.D. Ohio 2014) – To successfully sustain a nondischargeability action brought under § 523(a)(2)(A) as to false representations, a creditor must prove the following elements: (1) the Debtor obtained money through a material representation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of the loss. False pretense involves implied misrepresentation of conduct designed to create and foster a false impression, while false representation requires an express misrepresentation. Actual fraud is broader and includes any deception intentionally practiced to include another to party with property or surrender legal rights, and is measured by subjective standard that may be proven by circumstantial evidence. Fraudulent conduct must be actual and not merely implied by law. Evidence failed to support findings for non-dischargeability in building construction dispute. While there was no dispute that the construction services performed by Debtor for plaintiff had defects, evidence indicated that plaintiff knew of issues at time services were performed but insisted that construction continue without repairs or delay. There was no evidence that Debtor obtained the contract or the proceeds of the contract through any misrepresentation. Plaintiff failed to demonstrate any misrepresentation regarding Debtor's insurance, as evidence indicated that Debtor was fully insured during course of project and there was no written contract that required performance or surety bond, leaving Plaintiff unable to prove that a bond or surety was required. As to allegations that Debtors knew project failed inspection and concealed the failure, only evidence was testimony of inspector who performed

the inspection and testified that the building did pass. Although the project ultimately did not pass the final inspection, there was no evidence that Debtor knew the project would not pass but continued the construction anyway, and some of the issues that caused inspection to fail were the result of Plaintiff's own demands. While Debtor may have breached contract construct building in workmanlike manner using appropriate materials and techniques, mere breach of contract does not amount to fraud or misrepresentation.

- (2880) *Kraus Anderson Capital, Inc. v. Bradley*, 507 BR 192(6th Cir. BAP 2014) – Lender does not have affirmative duty to conduct investigation to discover fraud or misrepresentations, even if falsity could be easily discovered. Debt that resulted from settlement agreement of pre-existing loan obligation can be excepted from discharge if settlement agreement is product of fraud or misrepresentation. Debtor had purchased equipment for re-sale using lender's floor plan financing which gave lender a lien on all items purchased. Debtor knowingly lied to lender regarding which pieces of equipment had been sold prior to entering into settlement agreement, and made conscious choice to disclose some, but not all, of the sale because he did not want to make it look worse. Equipment list attached to settlement agreement affirmatively stated that Debtor has possession of equipment that Debtor had already sold; and Debtor continued to lie to lender for 18 months while Debtor continued to try to pay off the loans. Although lender made no efforts to investigate statements or to "keep tabs on" the collateral, lender could rely on Debtor's statements unless the statements were obviously false. All parties admitted that had lender been aware of true state of collateral, lender would not have entered into settlement agreement; and lender relied on oral and written statements provided by Debtor. Lender did not "shut its eyes to an obvious falsehood" and justifiably relied on statements of Debtor.
- (2881) *First Assembly of God v. Ping*, 2014 WL 988491 (Bankr. S.D. Ohio 2014) – To prevail under Section 523(a)(2)(A), creditor must prove (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. False pretenses differs from false representations as a false pretense involves a false pretense while false representation requires express representation. Church's adversary complaint against former pastor for alleged misuse of church funds for personal purposes did not allege that pastor obtained the funds through any false statement or false representation. Allegations did not indicate that Debtor obtained possession of funds directly from church members, or whether Debtor merely had access to funds that were contributed to church.
- (2882) *Bank of America, NA v. Killgrove*, 2013 WL 7018546 (Bankr. E.D. Mi. 2013), *aff'd*, 2014 WL 4187988 (E.D. Mi. 2014) – False pretenses requires conscious deceptive or misleading conduct calculated to obtain, or deprive another of, property, and includes any scam, scheme, subterfuge, artifice, deceit of chicanery to accomplish an unlawful objective. Conduct that amounts to intentional breach of contract is not false pretense or fraud. Dentist entered into loan agreement and pledged all assets of practice. After practice failed, dentist joined office of another dentist as associate. Debtor moved collateral in violation of the notice and consent provisions of the finance agreement, but there was no evidence of any scheme to accomplish any unlawful objective. When Debtor borrowed money in first instance, there was no evidence that Debtor intended, three years later, to close practice and join another practice, or that Debtor otherwise intended, at the time loan was made to violate any provisions or clause of loan documents. There was no evidence that Debtor, by moving to another practice, intended to defraud lender or to otherwise take action in bad faith, where evidence indicated that Debtor had tried multiple avenues to save failing practice and only after those efforts were unsuccessful did Debtor reluctantly close practice and join competitor.
- (2883) *Rice v. Morse*, 504 BR 462 (Bankr. E.D. Tn. 2014) – Denial of discharge of debt under Section 523(a)(2)(A) requires proof that (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. Complaint adequately stated cause of action by alleging that Debtor was principal of a residential contractor, and that Debtor represented that the deposit placed by Plaintiff would be used to build the residence that plaintiff would ultimately purchase. Debtor also alleged that he was licensed contractor as part of inducement to cause plaintiff to enter into contract and pay deposit. Debtor caused company to use deposit for purposes other than construction of home, including funding normal expenses of corporation and a sister company. Debtor knew that the statements were false when made, as Debtor had no intention of using the deposit for the construction and intended to instead use proceeds for general operating expenses; and that but for false statements, plaintiff would not have signed agreement or placed deposit.
- (2884) *Smith v. Morse*, 2014 WL 690608 (Bankr. E.D. Tn. 2014) – Section 523(a)(2)(A) requires proof that (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. Debtor induced creditor to make loan with false statement that loan would be used to build specific house on specific property which would then be sold, with Debtor and creditor splitting the profit. Instead of using the funds for the stated purpose, Debtor used the funds to pay general business debts unrelated to the project. Creditor demonstrated reliance on statements and false statements were cause of loss when specified project was later lost to construction lender from whom Debtor borrowed money without knowledge of creditor.
- (2885) *McCallum v. Pixley*, 2014 WL 288046 (Bankr. E.D. Mi. 2014) – A "true default judgment" is entitled to preclusive effect under Michigan law as to any issues that were essential to support the judgment, to same extent as if judgment had been rendered following answer and contest. State Court judgment holding Debtor liable for
- (2886) *The Peoples Bank v. Lane*, 2013 WL 6798947 (Bankr. E.D. Tn. 2013) – Plaintiff must prove that defendant obtained money, property or services through material misrepresentations that defendant knew were false or were made with gross recklessness; that defendant intended to deceive; that plaintiff justifiably relied; and that reliance was proximate cause of damages. Evidence indicated that defendant did not repay loans to plaintiff that defendant obtained by knowingly and fraudulently representing that he was authorized to pledge collateral owned by third party when defendant was not authorized to do so. Plaintiff relied on the misrepresentations in extending loan. Whether reliance was justified depends on facts and circumstances in the particular case. Justifiable reliance does not mean that reliance must rise to level of "reasonable", only that reliance was not utterly unreasonable based on information apparently to him such that the loss is

effectively plaintiff's own responsibility. Creditor may act justifiably even if investigation would have revealed falsity. Lender justifiably relied on Certificate of Limited partnership where Defendant crossed out signature line that named third party as General Partner and wrote in a new signature line that stated that Defendant was General Partner and defendant then signed and had the signature notarized; and Certificate referred to Certificate of Limited Partnership recorded in County Register of Deeds that identified defendant as General Partner. Defendant was long time customer of bank and had established himself as good customer, taking out and repaying numerous loans, and lender had no reason to doubt accuracy of statements or representations made by defendant.

- (2887) *General Motors, LLC v. Gunner*, 2013 WL 6628629 (Bankr. E.D. Mi. 2013) – False pretenses is defined as conscious deceptive or misleading conduct calculated to obtain, or deprive another of, property, and includes any scam, scheme, subterfuge, artifice, deceit or chicanery in accomplishment of an unlawful objective. False representations is defined as obtaining money or property through a material misrepresentation that, at the time, Debtor knew was false or made with gross recklessness; with intent to deceive creditor; on which creditor justifiably relied; and which was proximate cause of creditor loss. A failure to speak when one has a duty to do so can also constitute fraud. Plaintiff failed to prove either false pretenses or false representations. Debtor issued invoices to plaintiff that were correct and clear, yet plaintiff, as a result of internal errors and practices, overpaid invoices. At all times, Plaintiff's own internal records disclosed the error and all errors were directly traceable to Plaintiff's internal practices, not to any statements or representations (or silence) by Debtor. Plaintiff could prove neither fraudulent or false statements, nor reliance on any falsities where all statements made by Debtor were correct and accurate.
- (2888) *In re Krupp*, 2013 WL 5745274 (E.D. Mi. 2013) – Plaintiff must demonstrate that Debtor made material misrepresentations on which plaintiff justifiably relied, and that statements were made with intent to deceive. Evidence did not indicate either evidence to deceive or reliance where used RV was listed for sale "as is"; buyer was knowledgeable and experienced buyer of RVs, having bought and sold more than 100 of them; and buyer did no inspection other than cursory walk through during which borrower discovered various issues but did not investigate further.
- (2889) *Newell v. Skeens*, 2013 WL 5494107 (Bankr. N.D. Ohio 2013) – Plaintiff must prove the following elements by a preponderance of the evidence: (1) the Debtor obtained money or services through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. Complaint adequately stated cause of action by alleging that Debtor falsely stated that Debtor's father would pay creditor the following day for assets that Debtor purchased from creditor, and that Debtor "purposely lied" and made statements to "purposely mislead" creditor into transferring assets.
- (2890) *Lowry v. Nicodemus*, 497 BR 852 (6th Cir. BAP 2013) – Debtor entered into settlement agreement of State Court litigation either with no intent to comply or with reckless indifference. State Court litigation had been resolved with agreed order for Debtor to deliver certain specified goods having a value of \$9,386.00 to plaintiff. Debtor repeatedly refused to comply with State Court Order to deliver the items, and State Court entered additional sanctions for contempt totaling \$22,800. Entire obligation, including contempt portion, not dischargeable under Section 523(a)(2)(A). Where any portion of the debt is assessed on account of fraud, entire obligation is excepted from discharge.
- (2891) *CAN Financial Corp. v. Flood*, 2013 WL 5312396 (Bankr. S.D. Ohio 2013) – False pretense is implied misrepresentation or conduct intended to create or foster false impression. False representation is express misrepresentation. Fraud is statement or act intended to deceive. Intent to deceive must be present when loan transaction is entered into. Evidence did not support action for fraud or misrepresentation. At time Debtor borrowed money from employer to purchase company stock, he did so at the behest of the employer. Debtor agreed only that he would not sell stock for less than fair value, the loan had a term of ten years with no payments, Debtor would deliver any documents necessary for company to perfect security interest, Debtor understood risks associated with the loan, Debtor would not encumber the stock with any superior interests, and Debtor would pay any attorney fees or costs of collection. Debtor was not asked for any financial statements and evidence indicated that Debtor did not lie or fail to correct any errors. Evidence also did not indicate that Debtor, at the time the loan was made, had no intention of repaying, where Debtor had high paying, apparently stable employment with plaintiff. While Debtor did not have, at the time the loan was made, any contingent plans to deal with loan if stock prices dropped, that was not evidence that Debtor had no intention of paying loan at 10 year maturity. Debtor's use of income and assets to purchase new home and hiring of attorney for purposes of estate planning two years after loan was made did not evidence fraud because loan was not due and not in default, had 8 years remaining before payment came due, and actions were consistent with Debtor's intent to provide for family while he was employed.
- (2892) *Peoples Bank v. Lane*, 2013 WL 5219582 (Bankr. E.D. Tn. 2013) – Plaintiff must prove the Defendant obtained money, property, or services through material misrepresentations that he knew were false or he made with gross recklessness, that the Defendant intended to deceive the Plaintiff, that the Plaintiff justifiably relied on the Defendant's false representations, and that the Plaintiff's reliance was the proximate cause of its losses. False pretense involves implied misrepresentation or conduct intended to create and foster a false impression, while a false representation is an express misrepresentation. Material misrepresentations substantial inaccuracies of the type which would generally affect a lender's or guarantor's decision, but a misrepresentation that the creditor knows is false or where creditor is in possession of information to call into question accuracy of statement is not material. Debtor falsely represented his financial condition and ability to act on behalf of partnerships in entering into loan extensions where lender required additional collateral to be pledged and updated financial statements to be provided. Debtor provided personal statement that was false, and also falsely swore that Debtor had authority to pledge assets of multiple partnerships as collateral for extended loans. Record indicated that Debtor did not have authority represented and, but for false statements, lender would not have extended credit. However, lender received certificates of limited partnerships that were substantially altered on their face, raising questions as to authenticity of certificates or accuracy of representations that Debtor was general partner or had authority to pledge assets. Alterations were sufficient to raise questions of fact regarding whether lender justifiably relied on documents presented to prevent entry of summary judgment.
- (2893) *Ohio Department of Job & Family Services v. Yuppa*, 2013 WL 4854479 (Bankr. S.D. Ohio 2013) – Elements of fraudulent misrepresentation

claim under Section 523(a)(2)(A) are (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. Justifiable reliance standard is subjective basis rather than an objective one. Party is required to use senses, and cannot recover if he blindly relies upon misrepresentation where the falsity would be patently obvious if he had utilized opportunity to make cursory examination. However, party generally is under no duty to investigate for justifiable reliance to be found even if an investigation might have revealed the fraud. Debtor falsely represented to Unemployment Insurance Agency that Debtor was eligible for benefits. Debtor submitted weekly applications that certified that Debtor was not employed when Debtor was actually employed and, therefore, not eligible for benefits. Debtor intended to deceive Agency where Debtor filed at least 10 false certifications over a period of more than two months. Agency justifiably relied where administration of program required that Agency be allowed to rely on statements in applications for benefits. Agency was damaged because it paid benefits to which Debtor would not have been entitled but for the false statements in the application.

- (2894) *Vicars v. Freeman*, 2013 WL 4447007 (Bankr. E.D. Tn. 2013) – Debt can be non-dischargeable even where money flowed from creditor to third party and not to the Debtor, if the Debtor indirectly received some tangible or intangible benefit. Plaintiff who invested in corporation owned by Debtor provided sufficient indirect benefit to Debtor where infusion of cash allowed business to remain open and operating. Plaintiff's allegation that defendant fraudulently represented that money invested would be used to pay business expenses but were actually used to pay personal expenses not supported at trial, where evidence indicated that funds were used as represented to purchase inventory and tools.
- (2895) *Milam v. Mets*, 2013 WL 4710401 (Bankr. S.D. Ohio 2013) – To prevail under section 523(a)(2) for false representations, plaintiff must prove that plaintiff justifiably relied on the false statements and that the reliance was the proximate cause of loss. Plaintiff's action against construction company for falsifying lien releases did not support finding of non-dischargeability where plaintiffs admitted that plaintiffs never saw and were completely unaware of existence of lien waivers until after construction company had ceased working on plaintiff's home and after company had obtained last draw on construction loan. Plaintiffs could not demonstrate reliance on a document that plaintiffs admitted plaintiffs never saw or knew existed at the time of the transactions.
- (2896) *First National Bank v. Sierlein*, 2013 WL 4510769 (Bankr. E.D. Tn. 2013) – False pretenses involves implied misrepresentation or conduct intended to create and foster a false impression, as distinguished from a "false representation" which is an express misrepresentation, while actual fraud consists of any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another-something said, done or omitted with the design of perpetrating what is known to be a cheat or deception. Fraudulent intent can be inferred with the Debtor engaged in conduct that was somewhat blameworthy, but mere negligence is not sufficient. Intent is subjective standard focusing on the individual characteristics of the Debtor. Court can consider traditional indicia of fraud including suspicious timing of events, insolvency, transfers to family members or other insiders, as long as evidence leads to conclusion that Debtor had fraudulent intent. Party contesting discharge must also prove that party justifiably relied, based on nature of the representations and the facts and circumstances known at the time. False statements were not cause of loss where false statement were in financial statements sent to bank years after loan was made, and bank neither extended nor was asked to extend additional credit based on false statements.
- (2897) *Adamovic v. Lazarevic*, 2013 WL 3934010 (Bankr. E.D. Tn. 2013) – Action under Section 523(a)(2)(A) requires fraudulent statements on which the injured party relied. Where plaintiff cannot prove the existence of any fraudulent statements, debt is not excepted from discharge under Section 523(a)(2)(A) regardless of circumstances surrounding the transactions. Although Debtor had no authority to withdraw funds from Debtor's bank accounts and admitted that he forged sister's name to documents to close accounts. However, Debtor's actions, which may have been willful and malicious, were not the result of any fraudulent statements to sister, who was apparently unaware of the transactions, and therefore cannot be fraudulent. However, Debtor did not fraudulently obtain title to sister's home, where evidence indicated that sister transferred house to Debtor for express purpose of having Debtor assume the obligations on the home rather than foisting those obligations onto sister's children. Evidence did not support any false statements or fraudulent conduct by Debtor that induced sister to transfer title to home.
- (2898) *First Knox National Bank v. Welling*, 2013 WL 3760112 (Bankr. N.D. Ohio 2013) – To establish nondischargeability under for false pretenses or false representations, creditor must prove, (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (2) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss.
- (2899) *Kodz v. Trotter*, 2013 WL 3013339 (Bankr. M.D. Tn. 2013) – Debtor is responsible for statements made by agents in course and scope of employment or where principal accepted benefit of contract made by agent, and will be held responsible for fraudulent representations of agent even if made without authority. Debt could be held non-dischargeable where Debtor's sales representative made false representations to Plaintiff in effort to induce Plaintiff into entering into transaction. Statements that Debtor had been in business for 20 years and that Debtor had "created new markets" were clearly false when Debtor had been in business for little more than a month; and statements concerning prior sales by Debtor were false where Debtor had never sold similar items and list was instead list of prior sales by other companies nationwide. Representative also fraudulently stated that sales would be subject to reserve, that charges would be limited to \$250 per item, and that representative would contact Plaintiff on day of auction, none of which were true but all of which were made to induce Plaintiff into entering into transaction.
- (2900) *Forristall v. McCaulley*, 2013 WL 3052843 (Bankr. E.D. Mi. 2013) – Action for false pretenses or false representations requires evidence that Debtor obtained money through material misrepresentation that were known to be false or made with gross recklessness, intent to deceive, justifiable reliance, and proximate cause. Texas State Court judgment entitled to preclusive effect only to extent findings were essential to State Court judgment. State Court judgment based on unfair and deceptive practices statute did not require proof of, and court did not make any finding regarding, justifiable reliance by creditor on Debtor's representations. State statute also did not require, and State

Court did not make any findings whether, Debtor's statement were both knowing and intentional. Although State Court judgment posited possible alternative bases for entry of judgment that would have included findings of intent and reliance, those were not in fact the grounds on which the Court based its judgment and, therefore, were not essential to judgment as required to have preclusive effect.

- (2901) *Sharma v. Salcido*, Case No. 12-1302 (9th Cir. BAP 2013) – Court can issue default final judgment declaring debt to be non-dischargeable under Section 523(a)(2) where well pleaded allegations of complaint are sufficient to meet all elements of cause of action. Default entered by court established truth of all well pled allegations in complaint and court needed only to determine whether those factual allegations met requirements of Section 523. Court was not required to hold separate hearing on damages where damages had already been liquidated in agreed final judgment in State Court, as Federal court would be required to give State Court judgment preclusive effect. Complaint sufficiently alleged that Debtor falsely represented that if plaintiff would invest with him, Debtor would use money to buy homes, refurbish them, and resell at profit. Debtor made many efforts to impress plaintiff with his wealth and success and claimed to own many properties, and represented that he drove expensive cars, took lavish vacations, flew in private jets, owned multiple race horses, and was building palatial home for him, wife and two children. Representations and false image created by Debtor induced Debtor to invest. In fact, Debtor did not have any business and was running Ponzi scheme, thereby defrauding Debtor out of her investment. Debtor compounded the fraud after Plaintiff sued him in State Court, by inducing plaintiff to enter into stipulated judgment with no intent of ever performing, and by transferring assets to make it appear Debtor was insolvent and to impair any ability of plaintiff to collect.
- (2902) *Bank of Cordell v. Sturgeon*, Case No. 10-1197 (10th Cir. BAP 2013) – False representation required evidence that Debtor made false representation with intent to deceive and justifiable reliance by creditor resulting in damage. Intent to deceive can be inferred from circumstances. False pretenses are implied misrepresentations intended to create or foster false impression. False pretenses do not require express misrepresentations, and includes conduct and material omissions and include any series of events when considered collectively create a contrived or misleading understand of a transaction that causes creditor to be induced to extend money or property. Statements and actions of co-conspirator can be imputed to other participants in scheme for purposes of Section 523(a)(2). Company and Debtor orchestrated fraudulent scheme to engage in non-existent sales of collateral by Debtor to company and for company to then resell collateral and to divert proceeds of sales otherwise pledged to bank; diverted loan proceeds from purpose stated when loans obtained and used to cover personal expenses rather than to purchase new collateral; material misrepresentation as to number of cattle owned in pledging cattle as collateral for loans, thereby increasing loan amounts beyond amount collateral would support and to induce bank to allow borrower to use cattle sale proceeds otherwise pledged to bank; warranted finding of non-dischargeability of loans.
- (2903) *Advantage Windows, Inc. v. Dunn*, 2013 WL 1553007 (Bankr. E.D. Tn. 2013) – Summary judgment not warranted where evidence presented was unclear as to whether Debtor made any misrepresentations to creditor. Creditor alleged that Debtor falsely stated that Debtor had secured financing to pay for project. Documents submitted in connection with summary judgment motion were unclear as to whether Debtor had secured financing as represented, or whether Debtor secured financing only after dispute arose with creditor regarding performance under the contract.
- (2904) *Spigot Resources, Inc. v. Radow*, Case No. 12-1037 (9th Cir. BAP 2013) – Creditor must prove not only that Debtor made false representations but that representations were the proximate cause of loss. Debtor did not deny that he made false statements in connection with purchase of real property. However, damages suffered by seller did not result from those representations as the sale itself never closed and seller never lost or transferred title. Damages, to extent any occurred, resulted from litigation between seller and Debtor after transaction failed to close, and fact that Debtor recorded *lis pendens* against the property which prevented seller from selling to other purchasers.
- (2905) *Reingold v. Shaffer*, Case No. 10-1903 (9th Cir. BAP 2013) – Debt is non-dischargeable if debt results from misrepresentation, fraudulent omission or deceptive practice by Debtor; knowledge of the falsity or deceptiveness by Debtor; intent to deceive; justifiable reliance by creditor; and damage to creditor that proximately resulted from reliance on false statement or conduct. Second of two loans by creditor to Debtor held non-dischargeable. Creditor made initial \$50,000 loan to Debtor without any false statements. Shortly after creditor made the first loan, the parties entered into a Loan Agreement that called for creditor to loan an additional \$76,000 and stated that the entire \$126,000 was to be used by Debtor solely to acquire specific parcel of property. At time of Loan Agreement and second loan, Debtor had already used the prior \$50,000 for purposes other than the acquisition of the property. Further, Debtor almost immediately used the additional \$76,000 for other purposes as well, and refused to provide creditor with any information concerning efforts to acquire or rehabilitate the property and failed to provide any accountings or other financial statement concerning the funds advanced by creditor. Debtor's statements concerning the intended use of the proceeds were false when made and were known to Debtor to be false. Creditor justifiably relied where Debtor and creditor were previously acquainted, that creditor knew Debtor was contractor, and Debtor gave creditor a prospectus concerning the property before signing the loan agreement. Nothing in the record suggested that creditor had any reason to doubt Debtor's representations. Creditor's loss of amount of second loan was proximately caused by Debtor's misrepresentations, as creditor established that but for representations creditor would never have entered into second loan.
- (2906) *Wells v. Parker*, 2012 WL 7991473 (Bankr. S.D. Ohio 2012) – Promise to perform act in the future generally will not establish fraud where intervening events cause Debtor's failure to perform, unless plaintiff can demonstrate that at time promise made, defendant had no intention of complying. Promise by client to attorney that client would pay attorney when Debtor received distribution from deferred compensation fund, made to induce attorney to continue representation would not support finding of fraud as all parties knew when promise made that it was uncertain when, or if, Debtor would receive that payment. Plaintiff also failed to establish intent to deceive at time statement made. Debtor indicated that he fully intended to pay when he made the promise, and did make substantial payments on a regular basis against accrued fees, totaling approximately two-thirds of Debtor's entire paycheck until the attorney withdrew for reasons of her own. Debtor's substantial performance undercuts any argument that Debtor did not intend to honor promise when promise made. Attorney also failed to establish justifiable reliance on alleged promise, where attorney knew that possible distributions from deferred compensation funds were

neither known as to time or amount of any possible distribution.

- (2907) *Lawson v. Conley*, 2012 WL 4845854 (Bankr. S.D. Ohio 2012) – Creditor must prove that Debtor made material misrepresentations that at the time Debtor knew were false or were made with gross recklessness as to truth; that Debtor intended to deceive creditor; that creditor justifiably relied on representations; and reliance was proximate cause. Justifiable reliance does not require independent investigation, but party is required to use senses and cannot recover if he blindly relies on misrepresentation, the falsity of which would be patent upon cursory examination of facts. Creditor failed to prove any misrepresentation. Debtor approached Creditor to determine if creditor would allow Debtor to use trucks owned by creditor to run a trucking operation, in exchange for which Debtor would make payments and share profits. At time Debtor discussed possible business arrangement, evidence indicated that Debtor intended to operate business and did, in fact, operate business. Any alleged wrongful conduct occurred later, when business shut down, which could not form basis for action for misrepresentation based on statements made at outset of relationship.
- (2908) *Lehm's Omaha, LLC v. Stanley*, 2012 WL 4464559 (Bankr. S.D. Iowa 2012) – False pretenses or false representation can be based on statements made or adopted by Debtor, or by Debtor's silence where there is duty to speak or to disclose material facts. False pretenses can include "a series of events, activities or communications which, when considered collectively, create a false and misleading set of circumstances, or false and misleading understanding of a transaction, in which a creditor is wrongfully induced by the Debtor to transfer property or extend credit to the Debtor. Debtor advertised and sold equipment without disclosing that equipment was subject to perfected purchase money security interest. Debtor conveyed impression that he had ability to convey clear title to property, while knowing of existence of lien with outstanding balance. Debtor did not advise lien holder of sale and did not use proceeds of sale to pay lien or obtain release of lien. Creditor would not have purchased equipment had creditor known of liens. Creditor forced to pay off liens to retain equipment, Amount paid to lienholder established amount of damages that would be deemed non-dischargeable.
- (2909) *Advantage Bank v. Starr*, 2012 WL 4714978 (Bankr. N.D. Ohio 2012) – Creditor must prove (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. Bank failed to produce evidence of alleged false statements. Bank alleged that Debtor represented that Debtor had invested \$450,000 in business project although Debtor had, in fact, not contributed anything but had borrowed money from partner to invest into project. Bank did not ask for documents as to source of funds and did not provide any form of corroboration as to source of funds. Further, Bank knew or should have known based on financial statements provided that Debtor lacked any source of liquid assets from which \$450,000 could have been derived.
- (2910) *Tower Credit, Inc. v. Gibbon*, 2012 WL 3838650 (Bankr. M.D. La. 2012) – Creditor established that Debtor's loan application falsely stated that her only creditors were Highlands Bank and Wells Fargo Home Mortgage, when she also knew of her federal tax debt. She also misrepresented that she was receiving child support. By signing the application warranting in several places the truth of her statements, the Debtor knowingly gave false information to obtain the loan. When it is not disputed that a loan application was signed by the Debtor, then the contents of the application should, in general, be attributed to the Debtor and entitled at least to great weight, and perhaps decisive effect. Debtor's inconsistent statements about the child support payments on the loan application, on the bankruptcy schedules, at the 341 meeting and at trial evidence a reckless disregard for the accuracy of her representations and further supported a finding and conclusion that she intended to deceive the lender. Creditor justifiably relied on the Debtor's loan application based on testimony that without child support shown on application, Debtor would not have qualified; and had lender known of substantial tax debt, lender would not have entered into transaction as there was substantial risk that IRS could levy Debtor's income causing a default in payment to lender.
- (2911) *Miller v. Frazier*, Adv. No. 09-2183 (Bankr. E.D. Mi. 2012), *aff'd*, 2013 WL 3798232 (E.D. MI. 2013) – False pretenses or false representations requires proof of statement that is known to be false, is relied on by the other party, and which causes damages. Section 523(a)(2)(A) action based on fraud prevents any debt respecting property, money, services or credit that Debtor has obtained by fraud. Once it is established that specific money or property has been obtained by fraud, any debt arising from that fraud is non-dischargeable. State Court judgment established all elements of action for fraudulent misrepresentation. Debtor represented to plaintiffs that if they invested in his business, the business would grow to benefit all parties and that Debtor would work with plaintiffs to produce income and that plaintiff would share in profits generated. State Court found that at the time the statements were made, Debtor had no intention of sharing profits or giving plaintiffs an interest in the business. Debtor made representations that he knew were false with intent to deceive; plaintiffs were in fact deceived; and reliance was proximate cause of loss. Damages include amounts obtained by Debtor from plaintiffs plus "lost profits" based on Debtor's earnings from operation of the business that were not shared with plaintiffs as promised.
- (2912) *Americredit Financial Services, Inc. v. Metzger*, Adv. No. 12-3052 (Bankr. E.D. Mi. 2012) – Debtor obtained financing to purchase new automobile. Debtor made application in his own name alone, and application stated that Debtor would own the collateral and would not sell, transfer, grant a license in, lease or dispose of all or any part of the vehicle. At the time Debtor made the application and purchased the vehicle, Debtor had no intention of making payments. Debtor at all times was acting as "straw buyer" for third part. The third party took possession of the vehicle and was supposed to make all payments. Debtor did not make the first payment and immediately fell into default. Debtor's representations that he would make payments and that he would be in possession of the vehicle were false when made and were known by Debtor to be false. Fact that dealership may have known of Debtor's intent did not translate into notice to the lender and there was no evidence that lender knew anything other than that Debtor was the purchaser and would make the payments and possess the vehicle. Lender established that it would not have made the loan had it known that Debtor intended to immediately transfer the vehicle to a third party and that Debtor had no intention of ever making a payment.
- (2913) *DSC National Properties, LLC v. Johnson*, Case No. 11-105 (10th Cir. BAP 2012) – Fraud requires subjective intent to deceive. Subjective intent may be inferred from totality of circumstances, and statement made with reckless disregard for truth may, in narrow circumstances, evidence subjective intent. However, statement made by Debtor that Debtor believed to be accurate is not actionable, even if statement is

made negligently. Fraud requires that the speaker know, at the time the statement is made, that it is false; or that the speaker did not have confidence in the accuracy of the statement to the extent stated or implied; or that the speaker knows that he does not have a sufficient basis for the statement as stated or implied. Carelessness without more is not evidence of subjective intent. Evidence indicated that Debtor relied on state records in making representations concerning Debtor's water rights. Debtor relied on the same state records that his attorney had previously relied on in other transactions. Further, the title company retained by Debtor for the transaction independently reviewed the state records and confirmed Debtor's water rights. Debtor did not have any reason to believe that state records were incorrect when he made the representations. Although Debtor perhaps should have reviewed additional records beyond those of the state agency, failure to do so would be, at worst, merely negligent. Evidence indicated that Debtor genuinely, if inaccurately, believed that Debtor had the water rights at the time of the representation, defeating any inference of subjective intent to defraud.

- (2914) *Astera Credit Union v. Russell*, 463 BR 464 (Bankr. W.D. Mi. 2012) – Debtor obtained loan from credit union to purchase new vehicle. Although loan application stated that Debtor was purchasing the vehicle in her name and that she was personally responsible for payment and that Debtor was not relying on the income or assets of another person as the basis for repayment, Debtor acknowledged that at the time she obtained the loan, she had no intention of making payments and that she was purchasing the truck for her father as Debtor had better credit and that father was to make all payments. Debtor never disclosed on the loan application that Debtor would not be making payments or that Debtor had no intention of using the vehicle. Credit union established that had it known that Debtor had no intention of using or paying for the truck, it would never have agreed to extend the loan, as it was reasonable to assume a borrower will be more inclined to pay for a vehicle that borrower is actually using than to make payments on a car that is solely in a third party's control. Debtor's statements in the loan application that Debtor was the purchaser and would make the payments, made at a time when Debtor admittedly had no intention of ever making a payment, constituted material misrepresentation that was known to be false when made; was made with intent to deceive; credit union relied; and reliance was proximate cause; resulting in debt being excepted from discharge.
- (2915) *Teague v. Taylor*, 2012 WL 2325695 (Bankr. E.D. Ky. 2012) – If proceeding under a false pretenses theory, a plaintiff must prove an omission or implied misrepresentation which the defendant knowingly and willingly promoted thereby creating a misleading understanding of the transaction on the part of the plaintiff causing plaintiff to wrongfully suffer a loss. If proceeding under a false representation theory, a plaintiff must prove (1) defendant obtained money (2) through a material representation (3) that, at the time, defendant knew was false or made with gross recklessness as to its truth, (4) defendant intended to deceive plaintiff, (5) plaintiff justifiably relied on the false representation, and (6) plaintiff's reliance was the proximate cause of loss. False pretenses and false representations describe statements which falsely claim to portray current or past facts. Under both theories a plaintiff must show justifiable reliance and the reliance was the cause of the loss. Promise to take future action is not a statement of current or past fact. Debtor's promise to make payments is not a statement of future or past fact and cannot support action under Section 523(a)(2).
- (2916) *Automotive Finance Corp. v. Leonard*, 2012 WL 1565120 (Bankr. E.D. Tn. 2012) – Under “false pretenses” or “false representations”, plaintiff must allege and prove (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of the loss. As general rule, fraud by company of which Debtor is a member or for whom he guaranteed debt may not be imputed for purposes of Section 523(a)(2). Mere promise to repay or issuance of a worthless check (even with knowledge that funds are not available) without more, does not constitute fraudulent pretense or fraudulent representation for purposes of 523(a)(2). However, Debtor can be held liable if he personally participated in the fraud. Complaint that alleged only in general terms that corporation made representations, with no detail as to any alleged participation by Debtor, failed to state cause of action. Further, complaint did not allege that Debtor knowingly made the statements with intent to defraud.
- 8.177 Section 523(a)(2)(A) – Actual Fraud
- (2917) *Haire v. Padgett*, 2017 WL 3888293 (Bankr. W.D. Ky. 2017) – Section 523(a)(2)(A) will except from discharge any debt resulting from actual fraud, consisting of deception intentionally practiced to induce another to part with property or to surrender some legal right and that accomplishes that result, with intent to deceive or defraud. Creditor did not present any evidence that at time Debtor entered into lease with Creditor, that Debtor did so fraudulently. Fact that business later closed and Debtor did not make payments under lease did not imply any fraudulent statement or representation at outset of lease relationship.
- (2918) *First National Bank of Omaha v. Beller*, 2017 WL 187562 (Bankr. W.D.N.C. 2017) – Credit Card issuer that asserted that Debtor fraudulently used credit card by incurring charges knowing that Debtor lacked ability to pay cannot prevail in adversary where Debtor has credible explanation why Debtor believed he could pay card when charge incurred. Debtor used card in August and September, 2014, at time when debtor believed that he would be able to resolve his debts, and it was not until some months later that Debtor, having suffered additional financial setbacks, realized his financial situation was hopeless. While Debtor may have been overly optimistic, that does not amount to showing of fraud.
- (2919) *HST Corporate Interiors LLC v. Sherrick*, 2017 WL 2889656 (Bankr. M.D. Tn. 2017) - Section 523(a)(2)(A) requires creditor to prove that Debtor obtained money through material misrepresentation that, at the time made, Debtor knew was false or made with gross recklessness as to truth; Debtor intended to deceive creditor; creditor justifiably relied on false representations; and reliance was proximate cause of loss. Where there is evidence of “actual fraud”, false representation is not necessary element. Creditor failed to present any evidence of any material misrepresentation or any fraudulent scheme at outset of relationship between Debtors closely held corporation and Plaintiff.
- (2920) *Above-All Transportation, Inc., v. Fraher*, Case No. 16-026(1st Cir. BAP 2017) - Under Section 523(a)(2)(A), Court may deny Debtor discharge for debts obtained by false pretenses, false representations or actual fraud. False pretenses and false representations require proof that Debtor committed an act that constitutes fraud and is done with wrongful intent. Fraud can be effectuated without false representation although fraud generally requires deception or trickery. Plaintiff could not maintain action against the Debtor wife where evidence indicated

that all alleged fraudulent statements and actions were performed by Debtor husband.

- (2921) *Privatera v. Selya*, Case No. 16-9006 (1st Cir. 2017) – Denial of discharge under Section 523(a)(2)(A) and Section 523 (a)(2)(B) requires proof of knowing false misrepresentation. Failure to disclose information that was not requested is not misrepresentation where context did not require Debtor to disclose additional, on requested information. Potential lender, a friend of Debtor, requested Debtor compile a list of property “belonging” to Debtor “either by title or by physical possession”. Debtor compiled list and added cost of each item to list. However, listed not disclose that one of the assets was subject to a lien. Plaintiff’s complaint failed to state a cause of action where the complaint did not allege that the substance of the list was in any way untrue. Complaint contained no facts indicating that Debtor was obligated to tell plaintiff that asset was encumbered where list did not request disclosure of any liens and list did not represent that asset was free and clear of liens. Debtor had no obligation to reveal encumbrances when borrower did not ask Debtor to do so.
- (2922) *Federal Insurance Company v. Sorge*, Case No. 16-0168 (Bankr. E.D.N.C. 2017) – Section 523(a)(2) excepts from discharge any debt for money, property or services obtained by false pretenses, false representations were actual fraud. Complaint sufficiently alleged fraud where plaintiff alleged that defendant, plaintiff’s employee, fraudulently approved insurance claims causing plaintiff to pay excessive amounts to policyholders. Although defendant may not personally have received proceeds from fraudulent claims, complaint sufficiently alleged fraudulent conduct that resulted in damages to plaintiff.
- (2923) *Gumpher v. ECMC*, 2017 WL 187547 (Bankr. N.D. Ohio 2017) – Debtor’s action against creditor under Section 523(a)(2)(A) seeking to declare debt to be dischargeable failed to state cause of action. Section 523(a)(2)(A) contemplates an action by a creditor against a Debtor. Defendant in this case, the student loan Creditor, was not a “Debtor” in bankruptcy and, therefore, is not subject to action to determine dischargeability of debt under Section 523(a)(2)(A).
- (2924) *Kozlowski v. Unemployment Insurance Agency*, 2016 WL 6405806 (E.D. Mi. 2016) – Penalties for fraudulently obtained unemployment benefits are part of “damages” arising from fraud and are non-dischargeable under Section 523(a)(2). While penalties may also be non-dischargeable under (a)(7), sections are not mutually exclusive. Even if penalties under (a)(7) are dischargeable in Chapter 13, penalties that flow from fraud are not excepted from discharge under (a)(2) and are not dischargeable in Chapter 13.
- (2925) *Johnson v. Loomis*, 2016 WL 5940941 (Bankr. S.D. Ohio 2016) – Complaint failed to state cause of action for actual fraud based on Debtor’s alleged misuse of credit card where plaintiff voluntarily and knowingly provided information to Debtor (plaintiff’s business partner) to open credit card in Plaintiff’s name, plaintiff knew that card was being opened in his name (although he mistakenly believed that he would be a co-obligor and not the primary), and plaintiff received card statements monthly and did not open them but passed them, unopened, to Debtor. Had plaintiff opened statements he would have been aware of use of credit card for allegedly improper purposes. Losses suffered are direct result of well-intentioned but nonetheless poor judgment and do not amount to fraud. However, damages were non-dischargeable where Debtor wrongfully used plaintiff’s identification to obtain at least two additional credit cards, without plaintiff’s knowledge or authorization, then used those cards and failed to pay the balances due. Identity theft constitutes “actual fraud” for purposes of Section 523.
- (2926) *State of Michigan Unemployment Insurance Agency v. Green*, 2016 WL 4750137 (Bankr. W.D. Mi. 2016) – Overpayment of unemployment benefits is not dischargeable to extent of actual damages under Section 523(a)(2). Statutory penalties are not dischargeable under Section 523(a)(7). However, UIA administrative proceedings are not collateral estoppel and have no preclusive effect as proceedings are not “adjudicatory” in nature. Parties are not bound by agency findings in subsequent adversary proceeding. Agency administrative determination can have preclusive effect under collateral estoppel if agency process is acting in judicial capacity to resolve disputed issues of fact properly before it where parties had adequate opportunity to litigate, parties are given opportunity brief and argue facts, and parties have opportunity to seek judicial review, and where legislature intended to make determination final in absence of appeal. UIA determination is not collateral estoppel on issues decided. Although claimant has right of appeal from findings and Legislature indicated intent to make determinations of UIA final in absence of appeal, administrative process is not adjudicatory in nature and does not amount to agency acting in judicial capacity. While UIA sent inquiries to claimant during investigation, there was no hearing. Debtor was not provided opportunity to present evidence, there were no facts to identify examiner or provide qualifications. There was no indication of what standard of proof was used and no evidence that agency proceeding had any characteristic of a quasi-judicial process. Evidence presented at adversary proceeding established that Debtor obtained benefits through material misrepresentation that Debtor knew, at the time made, was false or made with gross recklessness; Debtor intended to deceive UIA; UIA justifiably relied; and reliance was proximate cause of loss through overpayment of benefits. Debtor, using the telephone system established by UIA, repeatedly failed to disclose part time employment and wages from City of Grand Rapids in applying for benefits. UIA justifiably relied where entire system was predicated on obligation of honest claimant to respond accurately. UIA was not under duty to investigate representations made and it was only after the fact that UIA discovered that Debtor was working part time and backward investigation into what had already happened did not affect ongoing representations by Debtor that he was unemployed. Totality of circumstances indicated intent to deceive. Debtor certified 102 times that he was eligible for benefits and was not working and had no employment, creating pattern of misrepresentation that supports finding that he intended to mislead. Debtor’s explanation that he was reporting as instructed by representative of the UIA lacked credibility where Debtor could not identify person who allegedly gave advice and explanations were inconsistent and contradictory. Debtor’s statement that he did not think he had to report part time employment with governmental agency also directly conflicted with written instructions and handbook provided by UIA.
- (2927) *Casab v. Grand Sky Enterprise Co., Ltd.*, Case No. 15-1378 (6th Cir. 2016) – Collateral estoppel applies in dischargeability actions where (1) same parties were involved in prior action; (2) issue was litigated and resolved in State Court proceeding; (3) party to be estopped had full and fair opportunity to litigate; and (4) state law judgment is clear, definite and unequivocal. Plaintiff and Debtor were parties to State Court action, for fraud, and action was based on same elements as elements necessary to except debt from discharge. Damages in adversary to determine debt to be non-dischargeable include all damages that flow from fraudulent conduct. Bankruptcy Court correctly held entire State Court judgment to be excepted from discharge where State Court determined that but for Debtor’s fraud, plaintiff would not have

entered into contractual relationship, and that measure of damages is amount necessary to compensate plaintiff plus attorney fees, other expenditures, and exemplary damages. All of plaintiff's damages flowed from the fraud and so all were excepted from discharge.

- (2928) *Michigan Unemployment Insurance Agency v. Kozlowski*, 547 BR 222 (Bankr. E.D. Mi. 2016), *aff'd* 2016 WL 6405806 (E.D. Mi. 2016) – Statutory penalty for fraudulent claim for benefits under Unemployment Insurance are part of damages resulting from fraud and are not dischargeable. Debt is not dischargeable beyond value of property or money received and includes all liability arising from the fraud including treble damages, attorney fees, restitution awards, and any other amount that arises out of underlying action. Although Section 523(a)(7) deals specifically with fines, penalties and forfeitures payable to and for the benefit of a governmental unit which would be dischargeable in Chapter 13, these are not dischargeable in Chapter 7. Nothing in Section 523(a)(7) indicates that it in any way limits scope of or preempts Section 523(a)(2).
- (2929) *Szachta v. Thompson*, 2016 WL 1055582 (E.D. Mi. 2016) – Actual fraud encompasses any deceit, artifice, trick, or design involving direct and active operation of the mind use to circumvent and cheat another. Fraud by one co-conspirator is imputed to other co-conspirators for purposes of non-dischargeability. Debtor was office manager and bookkeeper for attorney. Attorney engineered scheme to misappropriate client funds, and Debtor was active participant in scheme, arranging for funds from settlement of personal injury cases to be deposited to IOLTA account and then withdrawing those funds for personal use of attorney rather than delivering funds to clients. Debtor would falsely state that funds needed to be held 6 months while Debtor either already had or was in process of transferring funds to attorney's personal account or to operating account for purposes of meeting firm expenses including Debtor's payroll. Even if Debtor did not make false statements to particular client, attorney did and statements could be imputed to Debtor as co-conspirator.
- (2930) *Coolants, Plus, Inc. v. Couch*, 2016 WL 97524 (Bankr. E.D. Ky. 2016) – State Court judgment has collateral estoppel effect where parties to State Court action were same as parties in dischargeability action. State Court default judgment is final judgment for purposes of collateral estoppel where Debtor initially appeared through counsel but counsel withdrew from representation shortly before trial and Debtor did not appear at trial. Issues in State Court action were same as issues in dischargeability action where State Court made specific finding that Debtor engaged in actual fraud and false pretenses and state law requirements for fraud and false pretenses were virtually identical to elements necessary for non-dischargeability under Section 523(a)(2). State Court specifically found that Debtor acted intentionally, willfully and maliciously and that conduct caused injury when Debtor, hired to run a branch office of plaintiff, created false invoices and used those to obtain payment from company and to then create competing company and use trade secrets and confidential information to divert plaintiff's customers. Findings of State Court were necessary to resolution of State Court action where findings were central to plaintiff's causes of action and were based on same facts as alleged in adversary proceeding, and award of treble damages and attorney fees were dependent on specific finding of intentional, willful and malicious conduct.
- (2931) *Jenkins v. Schmank*, 2015 WL 4555582 (Bankr. E.D. Tn. 2015) – Actual fraud is broader than misrepresentation and includes any deceit, artifice, trick, or design involving direct and active involvement of mind used to circumvent and cheat another. Plaintiff failed to demonstrate that Debtor fraudulently induced plaintiff to invest in partnership where partnership was engaged in legitimate business developing real estate, that Debtor did not make any false statements concerning nature of project or anticipated costs to complete project, or that project failed only after lender foreclosed mortgage.
- (2932) *Michigan Unemployment Insurance Agency v. Andrews*, 2016 WL 4491731 (E.D. Mi. 2016) – Reversing the Bankruptcy Court's ruling, District Court held that penalties assessed incidental to overpayment of unemployment benefits are not dischargeable under Section 523(a)(2). While Section 523(a)(7) makes penalties owed to governmental units non-dischargeable, that does not supplant the provisions of Section 523(a)(2). Any debt that arises out of fraud is non-dischargeable, including penalties. Debtor's liability for penalties flowed directly from Debtor's fraud in obtaining unemployment in the first instance, rendering amount of unemployment and all penalties non-dischargeable under Section 523(a)(2).
- (2933) *Risk v. Hunter*, 2015 WL 4643836 (Bankr. N.D. Ohio 2015) – Actual fraud is broader than misrepresentation and encompasses any deceit, artifice, trick or design involving direct and active operation of the mind used to circumvent and cheat another. Fraudulent intent requires proof that Debtor, at time debt was incurred, did not intend to honor obligation. Debtor's subsequent conduct can help shed light on Debtor's intentions at the time of transaction. Plaintiff failed to produce any evidence that at time plaintiff and Debtor contracted for Debtor to move house, that Debtor lacked intention to perform or that Debtor made any misrepresentation that was false when made to induce plaintiff to enter into transaction.
- (2934) *Smith v. Morse*, 2015 WL 4627940 (Bankr. E.D. Tn. 2015) – Action for actual fraud is broader than misrepresentation and encompasses any deceit, artifice, trick or design involving direct and active operation of the mind used to circumvent and cheat another. Actual fraud requires deception intentionally practiced to induce another to party with property or surrender a legal right, and requires actual intent to deceive or defraud. Conflicting evidence prevented summary judgment as parties disagreed on whether fraudulent statements were made or whether there was intent to deceive, or whether transaction was business deal gone bad.
- (2935) *Cannon v. Southeast Financial Credit Union*, 2015 WL 3607299 (M.D. Tn. 2015) – Borrower's use of credit card secured by line of credit that had been previously terminated was not fraudulent. Borrower had credit card secured by line of credit. Borrower closed line of credit but lender inadvertently did not close the related credit card. Sometime later, borrower contacted lender to see if credit card was still good and was advised that it was. Borrower later used the card. When lender discovered error, lender requested, and borrower signed, third deed of trust to secure outstanding balance and card was properly closed. While use of credit card after account should have been closed may have been error, borrower did nothing to deceive lender. Borrower merely called lender to see if card was still available and received affirmative response. Borrower's statement that finding out the account was still open was "too good to be true" did not rise to the level of fraud for purposes of Section 523(a)(2).
- (2936) *Meade v. Pinkerman*, 2015 WL 2445077 (Bankr. N.D. Ohio 2015) – Fraud is generic term that embraces all the multifarious means which

human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth. No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. Actual fraud has been defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. It requires intent to deceive or defraud. Defendant engaged in intentional scheme to deprive plaintiff of business. Defendant deceitfully and intentionally induced Plaintiff into issuing stock in company to Defendant's son and created plan of action to gain a majority interest in business and to purchase company without Plaintiff's approval. Upon gaining control of business, Defendant improperly utilized the trademarks, thereby breaching the terms of licensing agreement which had never been transferred to Defendant. Defendant also ran the business into the ground, not just through mismanagement, but also through improper self-dealing.

- (2937) *Duley v. Thompson*, 2015 WL 1622053 (Bankr. S.D. Ohio 2015) – Issue preclusion, also known as collateral estoppel, applies only when the issue to be precluded was necessary to the prior judgment and was actually litigated. If prior judgment is default judgment, it must contain express findings to be given preclusive effect. To be “actually litigated” in default judgment, moving party must have submitted admissible evidence apart from the pleadings and based on evidence submitted court must make findings of fact and conclusions of law that are sufficiently detailed to support application of collateral estoppel. Complaint and judgment finding that Debtor failed to assist in creating an accounting of trust assets and recitation that certain certificates of deposit were closed and money deposited into trust checking accounts were not sufficient to sustain scienter requirement of action under Sections 523(a)(2), (4) or (6). Default judgment made no findings of fact at all, and did not establish either a breach of fiduciary duty or any other intentional misconduct beyond allegation that assets were unaccounted for, without any allegation as to whether this was result of wrongful act or mere negligence or inadvertence. While expenses may have been found to be unreasonable, that does not amount to intent to cause injury.
- (2938) *Landis v. Baker*, 2015 WL 1568377 (Bankr. W.D. Ohio 2015) – Complaint to except debt from discharge for fraud must please sufficient direct or inferential allegations respecting all material elements of claim. Complaint must have facial plausibility which requires sufficient factual content to allow court to draw reasonable inference that defendant has acted unlawfully. Complaint must be more than legal conclusions and must contain sufficient well-pled allegations that, put together, give rise to right to relief. Complaint that alleged only that State Court judgment awarded punitive damages and attorney fees was mere legal conclusion without any factual support to demonstrate that Debtor's conduct met standards for non-dischargeability. Complaint failed to indicate what if any alleged fraudulent misrepresentation was involved or whether the misrepresentation was as to Debtor's financial condition or otherwise.
- (2939) *Richardson v. Caswell*, 2015 WL 1403015 (Bankr. W.D. Ky. 2015) – State Court judgment is entitled to preclusive effect in adversary proceeding to same extent judgment would be afforded preclusive effect under applicable state law. Issue preclusion prevents parties from re-litigating issues that were actually litigated and decided in prior proceeding, and requires that prior proceeding involve same issue; issue was actually litigated, issue was actually decided. And resolution was necessary component of prior decision. State Court judgment against Debtor for fraud raised identical issue where State Court judgment expressly determined that Debtor obtained money through material misrepresentation that Debtor knew was false when made, Debtor intended to deceive creditor, creditor justifiably relied on representation, and reliance was proximate cause of loss. Debtor falsely stated that corporation was profitable, inducing creditor to invest, when Debtor knew that corporation was losing money and on verge of failing, and had creditor known of true state of corporation, creditor would not have invested.
- (2940) *Phoenix Financial Solutions, Inc. v. Williams*, 2015 WL 430242 (Bankr. N.D. Ohio 2015) – Actual fraud is deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. It requires intent to deceive or defraud. Writing bad check without more is not a representation that the check will be good or that the account on which the check is drawn has funds. As check itself is not representation, plaintiff cannot recover for actual fraud based on bad check absent some other express representation that the check would be good. Complaint that alleged that Debtor issued check and then stopped payment, without more, insufficient to maintain action for fraud.
- (2941) *DeMarco Roofing, Inc. v. Coyle*, 2014 WL 5089732 (Bankr. S.D. Ohio 2014) – Section 523(a)(2)(A) requires that Debtor “obtained” money. It is not necessary that the money gained for the direct benefit of the Debtor if the Debtor derives indirect benefit from the funds fraudulently obtained. Funds wrongfully obtained from one entity and transferred into second entity provided sufficient indirect benefit to Debtor who was majority shareholder of transferee company. Creditor must also prove that money was obtained through material misrepresentation that, at the time, Debtor knew was false or made with gross recklessness as to truth; that Debtor intended to deceive; that creditor justifiably relied; and reliance was proximate cause. False pretenses are implied misrepresentations intended to create false impression while false representation requires express representation. Actual fraud is defined broadly as any deceit, artifice, trick or design involving direct and active operation of the mind used to circumvent and cheat another, and is a generic term embracing all of the multifarious means which can be used to gain an advantage over another by false means or suggestions or suppression of the truth. Evidence failed to establish any false statements by Debtor to creditor. Only possible misrepresentation was when Debtor falsely advised Bank that he was president of creditor, but there was no evidence that anyone at the creditor was aware of, or relied on this statement and even if employees of creditor were aware of statement, they also would have been aware that statement was false precluding any finding of reliance. Evidence also did not support finding of fraudulent misappropriation where there was no evidence of intent. Debtor and creditor were business partners in various enterprises. While financial interrelationships between entities, including various inter-company transfers, were complex, nature of joint venture between parties indicated that transfers and payments were in the course of the operations of the joint venture and not as part of a fraudulent scheme by Debtor to defraud creditor.
- (2942) *Anderson v. Fisher*, 2014 WL 4494869 (6th Cir. BAP 2014) – Default judgment entered based on defendant's refusal to comply with Court Orders compelling discovery is valid final judgment for collateral estoppel and res judicata purposes. Final Judgment specifically found, based on well pled allegations in complaint, that Debtors committed negligence, fraud, conversion, negligent and intentional infliction of

emotional distress, outrageous conduct and deceit, reserving jurisdiction to award compensatory and punitive damages, sufficient to hold claims not dischargeable under Section 523(a)(A).

- (2943) *Gambino v. Koonce*, 757 F.3d 604 (7th Cir. 2014) – State Court judgment for slander of title established requisite fraudulent intent for purposes of Section 523(a)(2)(A). Action for slander of title under state law required proof that Debtor made a false and malicious publication that disparaged plaintiff's title, that plaintiff suffered injury, and that Debtor acted with malice. Malice exists if Debtor knew the statements were false or had serious doubts about truth. State Court made express findings that Debtor recorded false deeds and fraudulent leases in effort to obtain loans from financial institution under circumstances where Debtor admitted that he fabricated documents and only possible explanation for conduct was to perpetrate fraud.
- (2944) *Ferguson v. Clark*, 2014 WL 4109794 (E.D. Mi. 2014) – Conclusory statement that Debtor borrowed money with no intention of repaying loan as Debtor lacked any means to repay loan was insufficient to support cause of action under Section 523(a)(2)(A).
- (2945) *Vogt v. Hastings*, 2014 WL 2212159 (Bankr. N.D. Ohio 2014) – Letter to court construed as complaint under Section 523(a)(2) failed to state cause of action. Fraud must be pled with specificity. Letter asserted date that loan was made and amount of loan, but did not allege any facts that would establish fraud. Statements that Debtor made “no real effort to repay” and Debtor was an “able bodied man who conned me out of my savings” were not sufficient to establish anything more than breach of contract.
- (2946) *Jennings v. Bodrick*, 2014 WL 1818487 (Bankr. S.D. Ohio 2014) – Evidence supported finding that Debtor actually intended to defraud Debtor. Debtor was creditor's investment advisor. Debtor sold creditor an “investment” in a Nigerian “estate” that would yield 50% returns in 16 days. However, evidence did not support finding of justifiable reliance, where rate of return was clear red flag and creditor failed to perform even a cursory investigation of the investment, choosing instead “blind reliance” on Debtor's character and wealth. Given apparent high magnitude of risk, creditor's failure to even summarily review investment resulted in creditor's assumption of risk.
- (2947) *Old Republic National Title Insurance Co. v. Levasseur*, 2013 WL 6570917 (1st Cir. 2013) – Debtor committed fraud when Debtor accessed credit line that Debtor knew lender had inadvertently failed to close. Debtor had line of credit secured by second mortgage on Debtor's home. Debtor sold home and paid off mortgage, but lender inadvertently failed to close account. Debtor, a real estate broker, knew that the Home Equity Account should no longer be used but she continued to draw on that account. By taking two cashier's checks totaling more than \$124,000. Debtor's use of the equity line when she knew that account should have been closed constituted acting under false pretenses and with intent to defraud.
- (2948) *Tankersley v. Lynch*, 2014 WL 1096307 (Bankr. E.D. Mi. 2014) – Defensive collateral estoppel is where defendant seeks to prevent plaintiff from re-litigating an issue that the plaintiff has previously litigated unsuccessfully in another action against the same or a different party. Defensive collateral estoppel applies in non-dischargeability case and requires that the precise issue have been actually litigated and was determinative of the outcome of the prior proceeding; the prior proceeding must have resulted in a final judgment on merits; and person to be estopped must have had opportunity to fully and fairly litigate. Defensive estoppel does not require mutuality between parties as long as plaintiff had opportunity to litigate same issue in prior action. Company of which Debtor was officer as found by arbitrator to have committed breaches of statutes in connection with sale of assets, but specifically found that company did not commit fraud, which defendant contended prevented plaintiff from prevailing in action to have debt owed by Debtor held non-dischargeable as incurred by fraud. Arbitrator finding not collateral estoppel as burden of proof for fraud under state law was clear and convincing evidence, while burden under Section 523 is preponderance of evidence. Further, it was unclear whether plaintiff had opportunity to litigate issues of fraud by Debtor as arbitration was specifically limited to conduct of company and excluded any evidence regarding personal fraud of Debtor. Fact that plaintiff was compelled to arbitrate rather than to litigate also mitigated against estoppel effect, as plaintiff in arbitration proceedings did not have the full procedural opportunities that would be available in bankruptcy adversary proceeding.
- (2949) *First Assembly of God v. Ping*, 2014 WL 988491 (Bankr. S.D. Ohio 2014) – Actual fraud is defined broadly to include any deceit, artifice, trick or design involving a direct and active operation of the mind, used to circumvent and cheat another, including something said, done or omitted with the design of perpetrating a cheat or deception. Actual fraud is broader than misrepresentation that embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth including all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. Plaintiff must illustrate actual or positive fraud; fraud implied by law is not sufficient. Church's adversary complaint against former pastor for alleged misuse of church funds for personal purposes did not allege that pastor obtained the funds through fraudulent scheme or artifice. Allegations did not indicate that Debtor obtained possession of funds directly from church members, or whether Debtor merely had access to funds that were contributed to church. Fact of misappropriation, without more, is not evidence that funds were initially obtained through fraud or misrepresentations.
- (2950) *Sachan v. Huh*, Case no. 12-1633 (9th Cir. BAP 2014) – Liability imputed to principal for fraudulent actions of agent do not support claim of non-dischargeability against principal. Debtor, a real estate broker, employed a salesman who engaged in fraudulent acts without the knowledge or consent of principal. Although principal was vicariously liable for fraud of salesman under state law, that imputed liability was not sufficient to support claim under Section 523.
- (2951) *Findling v. Rapoport*, Adv. No. 11-6933 (Bankr. E.D. Mi. 2014) – Actual fraud requires that plaintiff establish existence of debt, and that debt is result of actual fraud. Establishment of debt does not require pre-petition judgment. Plaintiff failed to establish debt based on alleged conversion where property allegedly converted belonged to Debtor and not to the creditor. Debtor cannot commit conversion absent evidence that Debtor stole money or was in wrongful possession of money. Defendants did not exert control over property belonging to plaintiff. Plaintiff also failed to establish any fraudulent transfers by Debtor to defendant where plaintiff alleged such a transfer but did not present any evidence of any transfers. Plaintiff also could not prevail on fraud because there was no evidence of any representation by defendant to plaintiff on which plaintiff allegedly relied, which is predicate to any action for fraud. Fraud exists when Debtor engages in actual fraud or

scheme to deprive or cheat another of property or a legal right, and requires evidence of course of conduct intended to deceive; justifiable reliance; and proximate cause. Debtor did not commit “actual fraud” within scope of Section 523(a)(2) where Debtor’s second wife transferred all of Debtor’s money to Debtor’s second wife who then transferred money to Debtor’s mother. Evidence indicated that Debtor was paranoid about money and that he never intended to allow or cause second wife to transfer money to wife’s mother or that wife and mother somehow conspired to access Debtor’s accounts and take money. Further, expenditures of money implicated only wife, not Debtor, as wife used accounts to transfer large sums to third parties on behalf of wife only days before wife kicked Debtor out of the marital home and locked out of marital bank accounts. Transfers were part of “tug of war” as part of divorce proceedings between Debtor and second wife, and not as part of a scheme to defraud first wife. There was no evidence that Debtor was turning a blind eye to the transfers where Debtor was not engaged in transfers and had been effectively denied access to information that may have led to discovery. Further, there was no evidence that Debtor either committed or coordinated any transfers or otherwise entered into any scheme with second wife to defraud first wife; and alleged fraudulent actions of second wife of which Debtor was not aware would not be imputed to Debtor for purposes of Section 523.

- (2952) *Rice v. Morse*, 504 BR 462 (Bankr. E.D. Tn. 2014) – Denial of discharge of debt for fraud under Section 523(a)(2)(A) does not require specific statement and encompasses any intentional scheme to deprive or cheat another of property or a legal right. Complaint adequately stated cause of action by alleging that Debtor was principal of a residential contractor, and that Debtor represented that the deposit placed by Plaintiff would be used to build the residence that plaintiff would ultimately purchase. Debtor also alleged that he was licensed contractor as part of inducement to cause plaintiff to enter into contract and pay deposit. Debtor caused company to use deposit for purposes other than construction of home, including funding normal expenses of corporation and a sister company. Debtor knew that the statements were false when made, as Debtor had no intention of using the deposit for the construction and intended to instead use proceeds for general operating expenses; and that but for false statements, plaintiff would not have signed agreement or placed deposit.
- (2953) *Ohio Valley Wholesale Distributors, Inc. v. Nasir*, 2014 WL 708898 (Bankr. E.D. Ky. 2014) – State Court final judgment was collateral estoppel in action under Section 523 where final judgment expressly found that Debtor committed fraud with intent to defraud, which are same issues as are presented in action under Section 523(a)(2). Standard of proof at state law was clear and convincing evidence, which is greater burden than preponderance of evidence used in Bankruptcy cases.
- (2954) *Rakich v. Jagiello*, 2013 WL 4068466 (Bankr. E.D. Mi. 2013) – Actual fraud requires course of conduct intended to deceive, justifiable reliance, and proximate cause. Debtor fraudulently induced plaintiff to invest money with Debtor by representing that funds would be invested into corporation that would purchase and develop property in California. Once Debtor received the invested funds, Debtor transferred the majority of funds into a restaurant project that was not the one represented to Plaintiff and was not known to plaintiff. Debtor also used portion of funds to purchase two properties in Utah without permission, knowledge or consent of Plaintiff; and used the balance of the money for personal expenses. Company was created not for purposes of operating business, but as window dressing, as the entity existed only on paper and never had any assets, corporate records, bank accounts or any other substance, and corporation was essentially alter ego of principal as corporation never observed any distinctness between entity and shareholder, company never had any proper accounting or record keeping, never filed tax returns, never observed any ordinary commercial practices or maintained any business records, or otherwise never acted as ongoing business entity. Further, at time Debtor convinced plaintiff to make investment, Debtor knew that project would cost four to five times as much as the invested amount and had no other sources of funds and no other investors to make up shortfall, making it impossible to actually complete the project as represented.
- (2955) *Tillmon v. Mack*, 2013 WL 3822075 (Bankr. N.D. Ohio 2013) – Action to except debt resulting from passing of bad check from discharge falls within Section 523 (a)(2) and (a)(4) for fraud and theft. Mere issuance of check is not express or implied representation that there are sufficient funds to cover the check. When Debtor delivered the check, Debtor advised plaintiff that there were not sufficient funds to cover the check, precluding action for fraud based on the check. State Court judgment based on Ohio’s bad check statute was not collateral estoppel as Ohio law required only that the check be returned, with no requirement that the check was issued in the first instance based on fraud. Only evidence presented in State Court was the bad check and notice of dishonor. There was no evidence of intent to defraud and court did not “necessarily” reach issue of fraud in entering judgment.
- (2956) *Wilson & Muir Bank & Trust Co. v. Eifler*, 2013 WL 3300639 (Bankr. W.D. Ky. 2013) – Under “actual fraud” prong, plaintiff is not required to prove any misrepresentation. Debt will be non-dischargeable where Debtor intentionally engages in scheme to deprive or cheat another of property or legal rights. Plaintiff failed to establish that debt was incurred as result of fraud where most or all of the actions which Creditor alleges constitute fraud occurred after loans had already been extended. Section 523(a)(2) is limited to debts that are incurred by fraud. Debtor’s actions were not related to extension of credit but were actions taken after credit had already been extended. Debtor’s actions in taking additional construction draws did not evidence fraud merely because Debtor was in some financial distress at time of draws, particularly where Debtor had within the preceding four months repaid more than \$320,000 on line of credit and there was no logical reason why Debtor would have made large payments if Debtor was intending to defraud lender. Draw was within limits of credit facility and funds were used in effort to liquidate company assets and repay creditors.
- (2957) *Bank of Cordell v. Sturgeon*, Case No. 10-1197 (10th Cir. BAP 2013) – Actual fraud is separate provision within Section 523(a)(2), and occurs when Debtor intentionally engages in scheme to deprive or cheat another of property or a legal right.
- (2958) *Wells v. Parker*, 2012 WL 7991473 (Bankr. S.D. Ohio 2012) – Actual fraud is defined more broadly than either false representations or false pretenses, and is not limited to misrepresentations or omissions but encompasses any deceit, artifice, trick, or design involving active and direct operation of the mind, used to circumvent or cheat another. Critical issue is the subjective intent of the Debtor at the time the debt is incurred. Promise by client to attorney that client would pay attorney when Debtor received distribution from deferred compensation fund, made to induce attorney to continue representation would not support finding of fraud as all parties knew when promise made that it was uncertain when, or if, Debtor would receive that payment. Debtor indicated that he fully intended to pay when he made the promise,

and did make substantial payments on a regular basis against accrued fees, totaling approximately two-thirds of Debtor's entire paycheck until the attorney withdrew for reasons of her own. Debtor's substantial performance undercuts any argument that Debtor did not intend to honor promise when promise made. Attorney also failed to establish justifiable reliance on alleged promise, where attorney knew that possible distributions from deferred compensation funds were neither known as to time or amount of any possible distribution.

- (2959) *Haig v. Shart*, Case No. 12-1495 (9th Cir. BAP 2013) – Fraud of one spouse will not ordinarily be imputed to other spouse for purposes of Section 523(a)(2). Although Debtor's husband indisputably made false and fraudulent representations in connection with Debtor's horse training facility, creditor acknowledged that Debtor's spouse never directly made an false representations regarding the business transactions between plaintiff and Debtors. Marital union alone, absent some finding of partnership or agency relationship between spouses, does not constitute basis to impute fraud of one Debtor to the spouse. Fraud may be imputed under partnership or agency principles if creditor proves that spouses engaged in business transaction with intent to share profits, losses, and management and control of enterprise. If fraud is imputed under agency principals, there is no obligation to prove any knowledge of "innocent" party for purposes of imputing fraud. Evidence was unclear as to whether spouses were "partnership" where spouse prepared and mailed allegedly fraudulent statements at direction of husband; parties maintained single bank account for business which spouse maintained and spouse assisted in preparation of tax returns; spouse made handwritten notes regarding billing disputes and provided those to her husband; spouse reviewed and edited responses to those disputes; Debtor may have directed bookkeeper to ignore creditor's billing complaints; spouse may have provided advise to her husband in connection with negotiations with creditor; spouse prepared bills sent to creditor; and spouse signed letters on company letterhead regarding company business matters.
- (2960) *Ramirez-Lopez v. Cox*, 2012 WL 6681805 (Bankr. E.D.N.C. 2012) – Debtor who sold property on land contract committed fraud when Debtor failed to disclose that property was subject to an existing mortgage and failed to use proceeds of sale to pay off the lien. At the time the Debtor received the down payment and promised to deliver clean title, Debtor knew that Debtor had no ability to provide clean title because of the existing mortgage. Debtor and the purchaser were long-standing acquaintances and the purchaser spoke little English, leaving him at a disadvantage in the process. Purchaser was damaged by the amount of the down payment plus all payments made over the intervening 12 years before the first mortgage lender foreclosed after Debtor defaulted.
- (2961) *Lucas County Department of Job & Family Services v. Perrin*, 2013 WL 509130 (Bankr. N.D. Ohio 2013) – Court would afford preclusive effect to administrative order determining that Debtor received food assistance by falsely representing that Debtor and spouse did not live together. Debtor had full and fair opportunity to litigate issues at agency level and issues were actually litigated. Agency issued final order resolving issues that were core of non-dischargeability action, finding that Debtor falsely represented that he was not living with his spouse, that the Debtor knew the statement was false, that he made the statement with intent that the State rely on the statement in considering food assistance, and that the state relied on the statement as a condition of eligibility for aid.
- (2962) *Kraus Anderson Capital, Inc. v. Bradley*, 2013 WL 486789 (Bankr. N.D. Ohio 2013) – To recover under Section 523(a)(2)(A) creditor must prove Debtor obtained money or a renewal or refinancing of existing financing through a material misrepresentation, that at the time, Debtor knew was false or made with a material misrepresentation as to its truth; Debtor intended to deceive the creditor; creditor justifiably relied on the false misrepresentations; and creditor's reliance was the proximate cause of the loss. Although Debtor admitted that he lied to creditor on at least one occasion regarding sale of property, evidence did not support either intent to defraud or justifiable reliance by creditor. After Debtor executed settlement agreement, Debtor reduced overhead and let employees to and, based on history of business, expected business to improve. Money obtained from sale of equipment went to payment of rent, utilities, notes and wages on business and Debtor, after execution of settlement agreement Debtor paid creditor over \$100,000.00. Debtor did not file bankruptcy for more than 18 months after execution of settlement and only after outside economic forces caused Debtor to close business. Facts did not indicate Debtor who filed bankruptcy immediately after signing settlement indicating no actual intent to repay. Even if Debtor made misrepresentation, creditor did not justifiably rely where creditor did not investigate Debtor's creditworthiness and, even having been told (falsely) that the equipment was at another location, creditor stopped inquiry and did not make any effort to verify location of equipment.
- (2963) *Gurjal v. Kalinowski*, Adv. No. 11-6030 (Bankr. E.D. Mi. 2012) – Actual fraud does not require misleading omissions or misrepresentations, and encompasses any intentional scheme to deprive or cheat another or property or a legal right. Plaintiff must prove course of conduct intended to deceive, justifiable reliance, and proximate cause. Plaintiff sued Debtor in State Court to pierce corporate veil, alleging that Debtor as sole member of corporation comingled finances, failed to maintain corporate records, and otherwise used corporate entity as extension of personal financial accounts, had complete identity of interests with corporation to permit piercing of corporate veil to make Debtor's personal assets available to corporate creditors. State Court judgment did not establish fraud as corporate veil can be pierced either for fraud or where honoring the corporate structure would subvert justice. Absent express finding by State Court of fraud, State Court Order did not necessarily determine the issue of fraud as required for collateral estoppel.
- (2964) *Frost & Co., Inc., v. Smithey*, 474 BR 830 (Bankr. N.D. Ohio 2012) – Fraud requires that Debtor make fraudulent statements on which creditor justifiably relied. Justifiable reliance is subjective standard and requires only that creditor act appropriately according to his individual circumstances. Party can justifiably rely even where truth could have been determined with investigation, but reliance is not justified if creditor turns blind eye away from things that would clearly show that reliance was misplaced. Fraud allegedly committed by Chapter 7 Debtor in his capacity as 50% shareholder of holding company and officer both in it and in related corporate entities that it owned, in allegedly causing payments to be made from holding company's accounts for what were not legitimate corporate obligations, or in fraudulently concealing material facts as they related to business of one of the held corporations prior to its being spun off and acquired by the other 50% shareholder in holding company, was not something on which this other 50% shareholder could "justifiably rely," as required to except any resulting debt from discharge on "fraud" theory, given that he had equal access to corporate accounts, in which payments and financial information on corporations was recorded, and knew that corporations were financially distressed, yet chose to remain ignorant of matters important to continued existence of corporations that he could have easily discerned.

- (2965) *Bakdaleyeh v. Warpup*, Adv. No. 11-3041 (Bankr. E.D. Mi. 2012) – Complaint stated cause of action under Section 523 for actual fraud against Debtor-wife. Although wife was not contractor within scope of Michigan Builders Trust Fund Act, complaint sufficiently alleged that wife made independent statements regarding construction of residence; that plaintiff relied on those statements and paid money to Debtors; and that wife directly and indirectly benefitted in the form of checks written by her and by use of money to pay household expenses.
- (2966) *Hulett v. Rowe*, Adv. No. 11-4924 (Bankr. E.D. Mi. 2012) – Later default on promissory note does not evidence fraud. Debtor signed agreement to purchase business from plaintiff. Debtor paid \$20,000 down and signed a note for the balance of the purchase price to be paid over 8 years; and signed employment agreement that required Debtor to use best efforts in management of business. Debtor made payments on the note for 15 months before defaulting. Plaintiff also alleged that after defaulting, Debtor continued to represent that he would make efforts to catch up the payments. Evidence did not support finding that Debtor, at the time of execution of the promissory note, did not intend to make payments, where Debtor did make payments for 25 months before defaulting and then made periodic payments even after default. Financial information indicated that Debtor defaulted when Debtor's business declined and Debtor no longer had ability to make payments.
- (2967) *Becton, Dickinson & Co. v. Sterling*, 2012 WL 3257841 (Bankr. E.D. Mi. 2012) – Fraud includes misleading omissions and misrepresentations, but also includes intentional scheme to deprive or cheat another of property or legal right and can include "silent fraud" if defendant intended to induce reliance on non-disclosure where party had affirmative duty to disclose. Plaintiff must prove course of conduct intended to deceive; justifiable reliance; and proximate cause. Debtor did not commit fraud by retaining funds erroneously overpaid as salary. Upon receipt of first erroneous paycheck, Debtor immediately contacted payroll department in effort to correct the error. Debtor had no further duty to disclose continued errors, where employer had at least the same level of notice and knowledge based on employer's repeated efforts to correct the problem. Further, employer did not rely on any statement or omission by Debtor, where Debtor promptly advised employer of problem. Ultimate loss was caused not by Debtor but by failure of employer's third-party payroll company to properly process payroll.
- (2968) *Morsey v. Semer*, 2012 WL 2998783 (Bankr. N.D. Ohio 2012) – Plaintiff must prove (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. Debtor sold home to plaintiff. Plaintiff later discovered significant structural issues as well as extensive mold, requiring repairs that reduced home to a skeleton. Debtor knew of the defects but chose not to repair the defects, instead performing cosmetic repairs that disguised the defects. Debtor furthered fraud by signing seller disclosure statement that stated that no material defects existed in the property. Disclosure statement that falsely represented condition of property, where buyer relied on the statement, and the reliance caused damages, constitute fraud for purposes of Section 523(a)(2)(A).
- (2969) *Tweedie v. Semeniuk*, 2012 WL 2726939 (Bankr. E.D. Mi. 2012), *aff'd*, Case No. 14-12113 (E.D. Mi. 2015) – Judicially confirmed arbitration award is entitled to preclusive effect in action to except debt from discharge for false representations under Section 523(a)(2). Complaint in arbitration action alleged at least 17 separate false representations made by Debtor and alleged that representations were made with intent to deceive and that Debtor failed to disclose falsity of statements, and that based on the false representations Debtor obtained money from plaintiff. Although arbitration complaint did not specifically allege that reliance was justifiable, complaint did make sufficient factual allegations to support justifiable reliance as parties were close personal friends since childhood, spanning more than 50 years; that parties had socialized and done business together over the years; and that because of existing relationships plaintiff placed great confidence and trust in Debtor. Arbitration award also supported determination that debt was non-dischargeable based on fraudulent pretense, where award made extensive factual findings regarding Debtor's failure to disclose material information and non-disclosures at a time when Debtor knew that information would have been material to plaintiff's decision to invest in Debtor's business. Findings of fact also established that plaintiff relied on Debtor's failure to disclose; that Debtor knew and intended that plaintiff would rely; and that plaintiff advanced funds to Debtor based on Debtor's failure to disclose. Arbitrator's findings of fact established total amount of plaintiff's claim and established the amount of that total that was attributable to the false representations, and bankruptcy court was bound by that amount in entering judgment declaring debt to be non-dischargeable. Judicially confirmed arbitration award not entitled to preclusive effect in action to except debt from discharge for fraud under Section 523(a)(2). Arbitration award did not establish any fraudulent conduct by Debtor independent of misrepresentations and false pretenses. Record did not indicate that the parties litigated issue of actual fraud where findings of fact by arbitrator, while lengthy, did not address factual issues surrounding fraud claim. Factual findings were also insufficient to establish breach of fiduciary duty where factual findings did not establish that funds advanced by plaintiff were placed in trust or were intended to be placed in trust or were intended for purposes other than as an investment in business to be used in business.
- (2970) *Teague v. Taylor*, 2012 WL 2325695 (Bankr. E.D. Ky. 2012) – Allegations of fraud must include a representation that a Debtor knew was false which induced the plaintiff to act, and reliance by and an injury to the plaintiff. Alleged failure to pay debt does not constitute fraud where record lacked any evidence that Debtor made any representation concerning payment of any particular debt when Debtor and plaintiff entered into transaction.
- (2971) *Hussein v. Shugarman*, 2012 WL 2150335 (Bankr. N.D. Ohio 2012) – Confirmed arbitration award was collateral estoppel in action under Section 523(a)(2)(A) and (a)(6). Arbitration award against the Defendant, awarding the Plaintiffs compensatory damages of \$332,254.55; and punitive damages of \$191,761.01 for attorneys' fees and costs. Plaintiffs hired Debtor to build Plaintiff's new home. At end of the project, Debtor presented Plaintiffs with contractor affidavits from suppliers and subcontractors, and Plaintiff paid Debtor balance of contract price. After subcontractors and suppliers placed numerous mechanic liens on property, Plaintiffs discovered that Debtor had forged contractor affidavits for purposes of obtaining final payment without making payment to suppliers and subs. Arbitration award found that Plaintiffs paid twice to have work performed because they were forced to pay subcontractors which the Defendant failed to pay, resulting in mechanics liens. Defendant fraudulently requested and received payments from the Plaintiffs' lender. Defendant exhibited a conscious disregard for the rights of the Plaintiffs in their contractual relationship, thereby warranting an award of punitive damages. Debtor intentionally used false and

forged contractor affidavits to deceive the Plaintiffs, the Plaintiffs were deceived and damaged by the Plaintiff and Plaintiffs then had to pay the unpaid suppliers, causing Plaintiffs to pay for the same work twice, the Defendant acted with the willful intent to injure the Defendant and the Defendant acted with actual malice toward the Plaintiffs. Factual findings in confirmed arbitration award met each requirement under Section 523(a)(2)(A) for finding of actual fraud, sufficient to warrant judgment of non-dischargeability.

- (2972) *Kapetanakis v. First National Insurance Company of America*, 2012 WL 2105407 (5th Cir. 2012) – Debt owed to Surety Bond Issuer was not dischargeable under Section 523(a)(2)(A) where Debtor forged signatures of spouse, his brother and his brother's spouse as indemnitors under surety agreement, where surety company required those indemnifications before issuing the bonds to Debtor's closely held corporation. Settlement agreement and consent judgment entered in State Court did not convert non-dischargeable claim into dischargeable claim, where consent judgment was based on complaint that met all requirements for non-dischargeability. Evidence indicated that surety would not have issued bonds without the indemnity agreement signed by all shareholders and spouses of shareholders. Debtor allegedly transferred all of the corporate stock to his own name prior to signing indemnity agreement but did not inform surety of the change of stock ownership. Indemnity agreement did not require that parties signing the agreement remain shareholders and expressly stated that any new bonds would be subject to original indemnity agreement which would include liability of brother and spouses but for forged signatures. Debtor's intent to defraud could be deduced where Debtor forged signatures contemporaneously with his own, but used different cursive styles and different colored inks.
- (2973) *Farmers National Bank v. Lockridge*, 2012 WL 1969254 (Bankr. E.D. Ky. 2012) – Section 523(a)(2)(A) requires proof that Debtor obtained money through material misrepresentation that, at the time, Debtor knew was false or made with gross recklessness; intent to deceive creditor; creditor justifiably relied; and misrepresentation was proximate cause of loss. Evidence did not indicate that Debtor intended to deceive creditor. Debtor listed value of assets on financial statement based on appraisal, unaware of a second appraisal that had also been obtained that showed markedly different values. Statements by Debtor that he would use proceeds of sales commission on property to pay down loan were not false but were hopeful promises of future activity that did not come to fruition as the property was not sold and was later lost in foreclosure. Debtor genuinely believed that he would be able to sell the property for sufficient sum to cover loan as Debtor had previously been offered an amount that would have been sufficient to do so but elected not to sell at that point, and later decline in value was not anticipated.
- (2974) *Hardin v. Eason*, Case No. 11-6139 (Bankr. E.D. MI. 2012) – Section 523(a)(2) requires proof that Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; Debtor intended to deceive creditor; creditor justifiably relied on the representation; and reliance was proximate cause of loss. Plaintiff failed to evidence fraud where alleged fraudulent statements were directly contrary to statements and agreements in written contract between the parties. Plaintiff failed to demonstrate that defendant had no intention of performing pursuant to written agreement where defendant was not obligated to take any steps until certain conditions in the contract occurred and conditions never occurred through no fault of defendant.
- (2975) *Humphrey v. Morgan*, 2012 WL 1390246 (Bankr. E.D. Tn. 2012) – Section 523(a)(2) action based on false pretenses or false representations requires proof that Debtor obtained money through material misrepresentation that Debtor knew was false or made with gross recklessness; that Debtor intended to deceive creditor; that creditor justifiably relied on the false representation; and that reliance was proximate cause of loss. "Actual fraud" consists of any intentional scheme to deprive or cheat another of property or a legal right. Actual fraud is broader than misrepresentation and includes any deceit, artifice, trick or design involving direct and active operation of the mind used to circumvent and cheat another; some deception intentionally practiced to induce another to part with property or surrender some legal right and that achieves that end, and undertaken with intent to deceive or defraud. Complaint against Debtor-Husband did not state cause of action where complaint did not allege any false pretenses or false representations by Husband to creditor, where all communications with creditor were carried out exclusively by Debtor-wife. Further, complaint did not demonstrate that husband conspired with wife to perpetrate any fraud or that husband collaborated with his wife in planning or executing the fraud.
- (2976) *Tweedie v. Hermoyan*, 466 BR 348 (Bankr. E.D. Mi. 2012) – Judicially confirmed arbitration award is entitled to preclusive effect in action to except debt from discharge for false representations under Section 523(a)(2). Complaint in arbitration action alleged at least 17 separate false representations made by Debtor and alleged that representations were made with intent to deceive and that Debtor failed to disclose falsity of statements, and that based on the false representations Debtor obtained money from plaintiff. Although arbitration complaint did not specifically allege that reliance was justifiable, complaint did make sufficient factual allegations to support justifiable reliance as parties were close personal friends since childhood, spanning more than 50 years; that parties had socialized and done business together over the years; and that because of existing relationships plaintiff placed great confidence and trust in Debtor. Arbitration award also supported determination that debt was non-dischargeable based on fraudulent pretense, where award made extensive factual findings regarding Debtor's failure to disclose material information and non-disclosures at a time when Debtor knew that information would have been material to plaintiff's decision to invest in Debtor's business. Findings of fact also established that plaintiff relied on Debtor's failure to disclose; that Debtor knew and intended that plaintiff would rely; and that plaintiff advanced funds to Debtor based on Debtor's failure to disclose. Arbitrator's findings of fact established total amount of plaintiff's claim and established the amount of that total that was attributable to the false representations, and bankruptcy court was bound by that amount in entering judgment declaring debt to be non-dischargeable. Judicially confirmed arbitration award not entitled to preclusive effect in action to except debt from discharge for fraud under Section 523(a)(2). Arbitration award did not establish any fraudulent conduct by Debtor independent of misrepresentations and false pretenses. Record did not indicate that the parties litigated issue of actual fraud where findings of fact by arbitrator, while lengthy, did not address factual issues surrounding fraud claim. Factual findings were also insufficient to establish breach of fiduciary duty where factual findings did not establish that funds advanced by plaintiff were placed in trust or were intended to be placed in trust or were intended for purposes other than as an investment in business to be used in business.
- (2977) *Farmers Bank of Milton v. Roberts*, 2012 WL 1357555 (Bankr. E.D. Ky. 2012) – Debt resulting from Debtor's cosigning loan for daughter

and son-in-law can be non-dischargeable under Section 523(a)(2). Debt is non-dischargeable where debt is obtained using written financial statement that is (i) materially false; (ii) respecting Debtor's financial condition; (iii) on which the Bank reasonably relied and (iv) Debtor caused the Financial Statement to be made or published with intent to deceive. Financial statement is materially false if information influences creditor's decision to extend credit and matter is important or substantial untruth. Debtor's daughter applied for mortgage and was advised that daughter needed co-signor. Debtor agreed to co-sign loan and provided financial statement to lender. Evidence indicated that statement was false and that lender would not have extended loan had Debtor disclosed true financial condition. Lender reasonably relied on statement as credit score and information available did not provide any contradictory or conflicting information. Debtor's statement listed assets that did not exist; substantially overvalued other assets that Debtor did own; overstated Debtor's gross income by almost 50%. Debtor admitted that she knew the Bank was not going to make the loan unless she qualified as the cosigner and gave a personal guarantee because her daughter had previously filed bankruptcy and she and her husband were having problems meeting their financial obligations. At no time did Debtor inform the Bank she gifted her real property, representing her primary asset of value, to her mortgage lender as the Debtor was substantially in default on her own mortgage, thereby changing Debtor's financial condition and her ability to serve as a cosigner and guarantor.

- (2978) *Washington Mutual Bank v. Carlson*, Case No. 11-13314 (11th Cir. 2012) – Chapter 7 Debtor and her non-Debtor spouse entered into a refinancing mortgage with Washington Mutual Bank of their first mortgage. Washington Mutual Bank conditioned financing upon satisfaction of the second and third mortgages. At the closing for the refinancing mortgage, two satisfactions of mortgage were presented for the second and third mortgages, which were later discovered to be forgeries. The facts also showed that the Debtor and non-Debtor spouse gave their mortgage broker a Rolex watch before the closing, and they received an undisclosed kickback from the broker after the closing. After finding it was in third position on the property, Washington Mutual Bank suffered over \$1.1 million in losses in redeeming the property from the third mortgagor's foreclosure and satisfying the second mortgage.
- (2979) *Oster v. Clarkston State Bank*, Case No. 11-1388 (6th Cir. 2012) – Debtor obtained loans using false financial statements. Statements provided to lender indicated that Debtor and wife jointly owned \$8 million in marketable securities. In fact, Debtor had previously transferred all of these securities to wife individually and Debtor had no interest in those securities when providing statement to lender. Bank actually and reasonably relied on Debtors representations concerning ownership. Alleged discrepancy between named ownership on loan application and named ownership on account statements was not sufficient to constitute clear indication to lender that there may be issues concerning Debtor's ownership of securities or to place lender under obligation to further investigate. Debtor's actions in signing the loan application under his own name when he knew that only his spouse had an interest in the securities and permitting his accountant to provide financial statements to lender that Debtor did not review amounted to gross recklessness at a minimum, which is sufficient to establish intent to deceive.
- (2980) *Sloan Development, LLC v. Gill*, 2012 WL 909513 (Bankr. N.D. Ohio 2012) - Adversary proceeding to determine debt to be nondischargeable governed by doctrine of collateral estoppel, where State Court final judgment had previously determined that Debtor, a contractor who perform services for plaintiff, had obtained payment from plaintiff using fraudulent contractor affidavits. State Court final judgment constituted judgment on merits in the case after a full and fair opportunity to litigate the issue; the issue was actually and directly litigated; the current adversary proceeding presented issues which were identical to the issues in the State Court litigation; and the Debtor was a party to the State Court litigation. State Court final judgment establish all facts necessary to determine that obligation was obtained as a result of fraudulent activities of Debtor.
- (2981) *First Horizon Home Loan Corporation v. Apostle*, 467 BR 433 (Bankr. W.D. Mi. 2012) - Section 523(a)(2)(A) requires that Debtor obtain money through material misrepresentation that Debtor knew was false or made with gross recklessness as to truth; that the Debtor intended to deceive the creditor; that the creditor justifiably relied on the false statements; and the reliance was the proximate cause of the loss. Sellers omission from closing statement of identity of holder of mortgage constituted statement made to title company or escrow agent and not to prospective purchaser. Even if it had been reasonable to expect that the representations in the closing statement would be shared with the buyer, there was no evidence at trial that the buyers were ever aware of the contents of the closing statement or that the buyers had ever seen the closing statement. The seller never spoke to the buyer or made any other representations, either directly or indirectly which could form the basis of a claim for fraud. Evidence also indicated a lack of intent to defraud. Although seller signed the closing statement which was in accurate, there was no evidence that seller knowingly made the representation or that the omission in the closing statement was anything other than a good-faith mistake. Further, when seller discovered the error after closing, seller contacted the title insurance company and the purchaser to disclose the problem.
- (2982) *FIA Card Services, N.A. v. Muller*, 2012 WL 32570 (Bankr. E.D. Tn. 2012) – Debtor incurred more than \$85,000 in credit card debt shortly before filing, including charges and cash advances to pay other credit card debts which Debtor would then use to pay other cards, engaging in credit card “kiting”. At time Debtor incurred debts, Debtor and spouse had total income of less than \$1200 per month, which was woefully short of what would have been required even to make minimum payments on cards. Financial condition at time charges incurred were such that Debtor had no reasonable possibility to repay.
- (2983) *Forsyth v. Heinz*, 2012 WL 127536 (Bankr. E.D. Tn. 2012) – Contractor falsely represented that contractor was licensed and insured. At time of signing final contract, insurance had been cancelled for non-payment. Although contractor had previously been licensed, at time final contract signed, the license had expired and had not been renewed, and although licenses were in place before construction actually commenced, the licenses did not allow contractor to construct house with a total cost of more than \$150,000.00, yet contractor's contract with plaintiff called for a total cost of \$700,000.00. Contractor's corporate status had previously been administratively dissolved but was reinstated as part of the re-licensing process but again not until after contracts had been signed with the Plaintiff. Multiple misrepresentations created substantial inaccuracy as to qualifications of contractor that would have been material to both the owner and the construction lender. Plaintiff entitled to non-dischargeable judgment for amount spent by Plaintiff where construction services performed by Debtor were of no value; plus treble damages under Tennessee law for unfair and deceptive trade practices.

- (2984) *Cornwell Quality Tools Company v. Paavo*, 2011 WL 6780720 (E.D. Mi. 2011) – Court correctly granted summary judgment for defendant/Debtor where evidence did not indicate any misrepresentation. Evidence indicated that when parties entered into franchise agreement, Debtor in good faith fully intended to operate the business. Debtor's alleged failure to disclose transfers or to maintain proper records, while potentially leading to causes of action under Section 727, could not support Section 523 action where there was no evidence that alleged failure to disclose transfers or to maintain records had anything to do with initial decision to sell tools on credit. Debtor's listing in Bankruptcy Schedules substantial unsecured debt that was not on loan application that Debtor provided to creditor was not evidence of fraud as creditor failed to present any evidence concerning either the existence or balance on any of these undisclosed accounts as of the date on which creditor entered into agreement with Debtor.
- (2985) *Jacobs v. Versa Corp.*, Case No. 460 BR 149 (Bankr. E.D. Mi. 2011) – Section 523(a)(2)(A) requires fraud other than a statement respecting Debtor's or an insider's financial condition. Section 523(a)(2)(B) applies only to statements in writing that respect Debtor's or an insider's financial condition. Section 523(a)(2)(A) requires proof that Debtor obtained money or property through a material misrepresentation that the Debtor knew was false or was made with gross recklessness as to truth; made with intent to deceive; that the creditor justifiably relied upon; and the reliance was proximate cause of loss. Statements of financial condition are not actionable unless the statements are in writing, and reliance must be "reasonable" as opposed to merely "justifiable" under Subsection A. Statements respecting financial condition include any communication that has a bearing on Debtor's financial condition. Any communication addressing even a single asset or single liability qualifies. Business plan that represented potential corporate profits and statements by corporate president that if business was unsuccessful that president had sufficient assets to pay corporate debts constituted statements regarding financial condition of insider within scope of Section 523(a)(2). Plaintiff failed to demonstrate any written statements as required by Section 523(a)(2)(B).
- (2986) *Cole v. Wood*, 458 BR 898 (E.D. Mi. 2011) – To establish actual fraud, Plaintiff must show a course of conduct intended to deceive, justifiable reliance and proximate causation. Intent to deceive may be inferred from a reckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation. If there is room for an inference of honest intent, the question of nondischargeability must be resolved in favor of the Debtor. Plaintiff, purchaser of a home from Debtor, failed to demonstrate fraud concerning condition of foundation of property. Debtor had property repaired in 2000 and had not experienced any problems since the repairs were completed. Michigan Seller Disclosure Act requires that seller of real estate make disclosure of condition of property including whether seller aware of any settling, flooding, drainage, structural or grading problems; and that a seller disclose any pending litigation that could affect the property or the Seller's right to convey the property. Seller has a duty to disclose the condition or information to the degree indicated by the question on the disclosure form. Court may not impose on a seller a duty to disclose beyond what is plainly required by the statutory disclosure form. Seller had no duty to disclose litigation against prior owner for deficiencies in property where Seller had subsequently repaired those issues and was only seeking to recover the costs of repairs, where there was no evidence that repairs were inadequate or that Seller knew problems would recur.
- (2987) *Ohio Bureau of Workers' Compensation v. Damron*, 457 BR 662 (Bankr. S.D. Ohio 2011) – Intentional failure to disclose a material fact can constitute material misrepresentation that, at the time, Debtor knew was false or made with gross recklessness. Debtor concealed fact that she was employed during time she was receiving Workers' Compensation even though Debtor signed forms that clearly prohibited Debtor from working while receiving workers' compensation benefits. Failure to disclose employment was material to Debtor's eligibility for temporary total disability benefits and was done with intent to have Workers' Compensation Bureau rely and to continue to pay workers compensation when Debtor was not eligible. Administrative Law Judge ruling that Debtor obtained benefits through fraud sufficient to collaterally estop Debtor from rearguing issue where ALJ ruling included all findings of fact necessary for determination under Section 523(a)(2).
- (2988) *McCallum v. Pixley*, Case No. 10-6665 (Bankr. E.D. Mi. 2011) – Under Michigan Law, a "true default judgment", defined as one entered without the defendant having participated in defending the case, is entitled to preclusive effect in later action between the same parties. Court must determine what issues were "actually determined" as part of default judgment. Legal standards for judgment in Michigan for Fraud meets requirements of legal standards under Section 523(a)(2)(A). However, factual allegations in State Court Complaint, even if assumed to be true, failed to support action under Section 523(a)(2) where complaint never alleged any reasonable reliance by Plaintiff on any representation by Debtor. Allegations of complaint established that even minimal investigation would have uncovered alleged fraudulent statements, making any reliance, although actual, not reasonable as required for action under Section 523(a)(2).
- (2989) *First American Title Insurance Company v. Pazdzierz*, 2011 WL 5039867 (E.D. Mi. 2011) – Title Insurer, as assignee of claims from lender could maintain non-dischargeability action against Debtor based on Debtor's fraudulent representations to original lender from whom Title Company took assignment of claims. Debtor submitted fraudulent financial statements to lenders to obtain mortgages that were then insured by First American. Title agent that issued policies never recorded mortgages, precluding lender from foreclosing. Lender brought claims against Title Company which paid off on insurance policies and obtained assignment of claims from Lender against Debtor. Title Company had standing to pursue action under Section 523. Although basis of action would be alleged fraud of Debtor, assignment of action by Lender to Title Insurance Company did not violate Michigan prohibition against assignment of causes of action for fraud. Title Company, as assignee, could assert same cause of action as assignor could. Assignee could sustain action under Section 523(a)(2) based on misrepresentations made to creditor that induced creditor to make loan. Lack of representations to Title Company itself not fatal to action brought by Title Company as assignee.
- (2990) *Samuel J. Temperato Revocable Trust v. Unterreiner*, Case No. 11-7039 (8th Cir. BAP 2011) – False statements made to lender in loan application and security agreement do not give rise to non-dischargeability action in favor of guarantor of loan. Section 523(a)(2) requires that the Debtor obtain property or money from the creditor. Borrower made false representations to bank and obtained money from bank. Debtor did not receive any money, property or services from guarantor that could support action under Section 523(a)(2). Further, guarantee was blanket guarantee of all business debts, both current and after-extended, and had been in place for a number of years pre-dating false

statements to bank. Guarantor could not link false statements to guarantee or prove that guarantor “reasonably relied” in executing the guarantee where the statements were not made until well after the guarantor signed the guarantee.

- (2991) *Bauer v. Gilmartin*, Case No. 11-6014 (8th Cir. 2011) – Plaintiff supported action under Section 523 for fraud. Debtor made fraudulent representations concerning investment in LLC where Debtor, the managing partner of the LLC, represented that the LLC was financial sound when, in fact, the LLC was experiencing severe cost overruns and financial distress and at the same time Debtor removed \$20,000 from LLC without authorization and without informing Plaintiff. Plaintiff was unable to prove measure of damages using “benefit of bargain” test as Plaintiff could not prove whether or to what extent LLC would have been profitable but for the actions of the Debtor. Court concluded that were Plaintiff could not prove “benefit of bargain” Court could use “out of pocket” rule for determining amount of non-dischargeable claim. Court would liquidate claim amount based on funds invested following Debtor’s alleged fraudulent conduct.
- (2992) *In re Damron*, 2011 WL 4442635 (Bankr. S.D. Ohio 2011) – Administrative Hearing determining that Debtor fraudulently obtained workers compensation benefits was preclusive in action under Section 523(a)(2). Although only Bankruptcy Court has jurisdiction to determine dischargeability, elements of common law fraud under Ohio law are virtually identical to those necessary for a finding under Section 523(a)(2).
- (2993) *Bell v. Sims*, Case No. 11-4802 (Bankr. E.D. Mi. 2011) – Fraud in the inducement requires proof of inducement but not proof of dishonest intent. Dishonest intent is essential element of action under Section 523(a)(2). Judgment for fraudulent inducement was based on elements that were not required by Section 523(a)(2). As such, judgment for fraudulent inducement was not collateral estoppel on dischargeability of debt.
- (2994) *Community Federal Credit Union v. Olds*, 2011 WL 3471551 (Bankr. N.D. Ohio 2011) – Credit Union that did not reasonably rely on statements of borrower could not prevail in non-dischargeability action. Credit Union took steps to verify Debtor-husband’s income but made no effort to verify Debtor-wife’s income which Credit union now alleges was overstated. Debtors’ tax returns for prior two years disclosed no income for the Debtor-wife. Wife had no financial background and listing of gross revenue on application did not evidence intent to defraud but were product of wife’s lack of understanding of difference between gross revenue and gross income. Wife had applied for Visa card with credit Union two months prior to applying for new loan and disclosed materially lower income on Visa application.
- (2995) *King’s Welding & Fabricating, Inc. v. King*, 2011 WL 2837915 (Bankr. N.D. Ohio 2011) *aff’d* 2012 WL 3732514 (N.D. Ohio 2012) – Employee’s actions in engaging in competing business to perform services that employer could not or would not perform, even if proven to constitute breach of fiduciary obligation, does not amount to fraud for purposes of Section 523(a)(2).
- (2996) *Atkisson v. Roberts*, 2011 WL 2652311 (Bankr. W.D. Ky. 2011) – Debtor’s use of corporate credit card was not fraudulent where Corporate officer expressly authorized that use. Debtor told corporate officer that Debtor was using the corporate card for personal purposes because Debtor was not drawing salary or any other income from corporate employer. Failure of business deal does not amount to fraud absent evidence that Debtor never intended to comply. Creditor paid Debtor’s business debts to facilitate sale of Debtor’s business and investment of net proceeds into creditor’s corporation. Business’s inability to generate revenue prevented Debtor from contributing funds as parties intended, but there was no evidence of any misrepresentation or fraud by Debtor in commencing transaction, only a financial inability to consummate it.
- (2997) *Ewers v. Cottingham*, 2011 WL 2118247 Bankr. E.D. Ky. 2011), *aff’d* 2012 WL 2161623 (6th Cir. BAP 2012) – Debtor husband’s debt to wife’s former employer resulting from wife’s embezzlement of funds was not within Section 523(a)(2). Evidence indicated that wife embezzled funds but did not indicate that wife used any material misrepresentations to employer or that employer relied on any statements by Debtor wife that produced an injury.
- (2998) *Bush v. Roberts*, 2011 WL 2650254 (Bankr. W.D. Ky. 2011) – Under Section 523(a)(2)(A), creditor must prove fraud other than through a statement respecting Debtor’s or insider’s financial condition. Elements are (1) the Debtor obtained the money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) the creditor’s reliance was the proximate cause of the loss. Evidence failed to show that Debtor induced creditor to invest in business with full intent to later exclude creditor. Debtor formed company; drafted corporate governance documents for creditor’s signature; Debtor and creditor were both on the business bank accounts; creditor willingly allowed Debtor to handle business aspects; creditor regularly reviewed business expenses; creditor unilaterally removed Debtor from the business line of credit and then unilaterally increased the amount of the line; and Debtor continued to make payments on the line of credit for two years after Debtor was no longer liable on the line.
- (2999) *Old Republic Title Company v. Looney*, Case No. 10-8083 (6th Cir. BAP 2011) – Pre-petition settlement agreement between Debtor and Creditor that resolved Creditor’s claim of fraud was itself a non-dischargeable obligation. Although there was no allegation of fraud in the making of the settlement agreement, Section 523(a)(2) applies to all debts that arise out of fraud. A debt embodied in a settlement of a fraud case arises out of the underlying fraud. If creditor can demonstrate that underlying debt itself was result of fraud, settlement agreement will be non-dischargeable. Debtor fraudulently obtained funds by representing to title company that there were no persons holding unpaid obligations that could be the subject of mechanics liens, inducing title company to insure title and allow closing of sale from which Debtor obtained release of personal guaranty of \$1.6 million plus a cash payment of more than \$100,000.00.
- (3000) *Condidorio v. Regions Bank*, 2011 WL 1157286 (M.D. Tn. 2011) – Debtor makes or publishes financial information when the Debtor provides a financial statement to a third party with the intent that it be delivered to the prospective lender. Debtor provided false financial statement to business partner with full knowledge that partner would use statement to “shop around” for loan for business. Intent to deceive can be proven by a Debtor’s gross recklessness in failing to list obligations on a financial statement. Debtor was Vice President of a multi-national consulting company, signed incomplete financial statements, at best, assuming that his business partner would fill in

missing information. Debtor did not check the document or ask for or keep copies of his other personal financial statements or several loan guarantees that he had previously signed, despite the significantly large amounts being guaranteed. Debtor's blind signing, failing to check the document afterwards, and supplying of an incomplete financial statement and reckless signing of loan documents without regard for the possible negative consequences shows gross recklessness for purposes of the intent to deceive. Creditor reasonably relied on financial statement where bank followed standard practices, looked to outside sources to verify information, and had prior dealings with Debtor, and there were no "red flags".

- (3001) *Kentucky Neighborhood Bank v. Ireland*, 441 BR 572 (Bankr. W.D. Ky. 2011) – Under Section 523(a)(2)(A), Creditor must prove the following elements: (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representations; and (4) the creditor's reliance was the proximate cause of the loss. Under Section 523(a)(2)(B), creditor must prove statement in writing must be materially false; respecting the Debtor's or an insider's financial condition; reasonably relied upon by the creditor; and Debtor caused statement to be made or published with intent to deceive. Discharge denied for debt obtained where financial statement: mis-represented cash values of life insurance policies in amount equal to death benefits where policies had no actual cash value; valued furnishings at retail value but gave no consideration for depreciation; listed furniture and personal property which Debtor had already disposed of. Financial statement dated only one year before case filed indicated assets valued at more than \$1.3 million but at date of petition schedules valued assets at only \$26,000 with no explanation for substantial decline in value.
- (3002) *Cole v. Wood*, Case No. 08-3202 (Bankr. E.D. Mi.), *aff'd* 2011 WL 4345286 (E.D. Mi. 2011) – Fraud requires proof of course of conduct intended to deceive, justifiable reliance and proximate cause, and requires proof of moral turpitude or intentional wrong, not merely fraud "implied in law". Michigan's Seller Disclosure Act requires seller of residence to make written disclosures of condition of property. Transferor is not liable for errors or inaccuracies if the error or inaccuracy was not within the personal knowledge of the transferor or was based entirely on information provided by third parties where the transferor exercised ordinary care. Evidence indicated that Debtor disclosed foundation problems and stated that those problems had been addressed and cured and representations were not known to be inaccurate or false. Debtor had hired professional contractor to repair foundation and work was done more than 2 years prior to sale, and Debtor had no problem with foundation after work was performed. Further, absent actual fraud, the "as is" clause in the contract reallocates risk of loss to the purchaser for conditions that are unknown.
- (3003) *FIA Card Services, NA v. May*, 2011 WL 1195865 (W.D. Mi. 2011) – Creditor who filed adversary under Section 523(a)(2) liable for sanctions if action found to lack substantial justification. Sanctions can include attorney fees incurred by Debtor. Section 523(a)(2)(A) requires proof that the Debtor used the credit card either without any intention of paying or with gross recklessness as to ability to pay. Action lacked substantial justification where Debtor used credit card while temporarily unable to work due to health issues. Debtor credibly testified that he intended to pay the credit card when he returned to work and was prevented from doing so only when unanticipated complications arose that required additional surgeries. Even while Debtor was out of work for medical reasons, Debtor continued to pay required minimum monthly amounts. Creditor lacked any evidence that Debtor intended to defraud when the charges were made. Uncontested evidence indicated that Debtor intended to pay creditor and that Debtor did pay creditor until unanticipated complications from surgery rendered Debtor unable to return to work.
- (3004) *JGR Associates, LLC v. Brown*, 2011 WL 9153 (Bankr. E.D. Mi. 2011) – Actual fraud entails a course of conduct intended to deceive, justifiable reliance, and proximate cause. Justifiable reliance means that a plaintiff "is required to make an investigation of his own" "where, under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived. However, the reliance need not be reasonable and is not determined by application of a community standard to the conduct in this case. Actual Fraud can be demonstrated by circumstantial evidence not based on any one particular act or omission, but through a pattern or course of conduct.
- (3005) *In re Oxford*, 2010 WL 5050540 (Bankr. W.D. Ky. 2010) – To except a debt from discharge under Section 523(a)(2)(A), a creditor must prove the following elements: (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representations; and (4) the creditor's reliance was the proximate cause of the loss. The plaintiff need only show that the property was obtained either by false representation, false pretense or actual fraud, not a showing of all three. Fraud may be proven either by direct or circumstantial evidence. Plaintiff who made multiple loans with full knowledge of Borrower's financial difficulties and where the loans were used for the specific purpose intended did not demonstrate fraud for purposes of Section 523. Borrowers who obtained money with intent to start new business did not obtain loan fraudulently where evidence indicated that Borrower intended to start the business at time loan was extended but later did not complete the process. Failure to perform act in future is fraudulent only if Borrower had no intention of performing act at time promise was made. Debtors' "morally questionable conduct" does not rise to level of non-dischargeability under Section 523(a)(2).
- (3006) *The State Bank v. Mansour*, 2010 WL 3853151 (Bankr. E.D. Mi. 2010), *aff'd* 2011 WL 1598725 (E.D. Mi. 2011) – To prevail on claim under Section 523(a)(2)(A), plaintiff must show that Debtor obtained money through a material misrepresentation that Debtor either knew was false or was made with reckless disregard; made with intent to deceive; creditor justifiably relied; and reliance was proximate cause of loss. Creditor bears burden of proof and Debtor will receive benefit of doubt. Section 523(a)(2)(A) expressly excludes written misstatements of a Debtor's financial condition, as those are covered exclusively by Section 523(a)(2)(B). Where action is based solely on alleged false financial statements, count seeking relief under (a)(2)(A) would be dismissed. Section 523(a)(2)(B) excepts debts resulting from statement in writing regarding Debtor's financial condition that is materially false; on which the creditor reasonably relies; where Debtor made or caused to be made with intent to deceive. Any document signed, written, adopted or used by the Debtor constitutes a statement for purposes of this section. The statement will be "materially false" if it offers a substantially untruthful picture of

Debtor's financial condition that affects the creditor's decision to extend credit. Reasonable reliance is an objective standard, based on factors such as whether there were previous business dealings between the parties; whether there were any warnings that would alert a reasonably prudent person; whether minimal investigation would uncover the inaccuracies; and the creditor's standards and industry standards for evaluating creditworthiness. Debtor's failure to list unpaid obligation to Greektown Casino of \$70,000 constituted materially false statement on which creditor reasonably relied in extending credit sufficient to deny dischargeability of debt under Section 523(a)(2)(B). Debtor's use in 2007 financial statement of values of real property from 2005 constituted false statements in light of significant decline in real estate values. However, creditor's reliance on those values not found to be reasonable where creditor was also aware of real estate industry and expressed concerns and skepticism about Debtor's ability to turn business around and survive.

- (3007) *Kelly v. Aho*, Case No. 08-3101 (Bankr. E.D. Mi. 2010) - State Court Judgment awarding Plaintiff damages for Fraud after extensive trial was collateral estoppel on all factual issues and would support entry of Judgment excepting debt from discharge. State Court found that Debtor had made fraudulent misrepresentations and committed "silent fraud" in connection with sale of real estate.
- (3008) *Bank of McCreary v. Stephens*, Case No. 09-6065 (Bankr. E.D. Ky. 2010) - Debtor-husband's debt held non-dischargeable where debt arose from Debtor-wife's intentional submission to Plaintiff of false invoices where evidence indicated that Debtor-husband knew of wife's actions in submitting invoices and receiving payments.
- (3009) *Ojeda v. Goldberg*, 599 F.3d 712 (7th Cir. 2010) - Long term Forbearance Agreement on short term bridge loan fraudulently induced where Debtor never informed the Creditor of the sale of the Debtor's business, continued to make interest payments with checks bearing the business account, and failed to inform the Creditor of a stock split for Debtor's remaining asset. Although initial loan was not obtained fraudulently, the fraudulent inducement of the forbearance agreement constitutes an extension or renewal of credit resulting in debt being non-dischargeable to the extent of the entire loan amount.
- (3010) *FIA Card Services, N.A. v. May*, 2011 WL 1195865 (Bankr. W.D. Mi. 2011) – In case premised on credit card transactions, the issue is not whether the Debtor an ability to repay the debt; it is whether the Debtor has an intention to repay. Courts review the totality of the circumstances to determine whether a Debtor subjectively intended to repay the debt when he incurred it. Debtor used credit card while on annual temporary layoff, with intent to convalesce and return to work when the temporary layoff ended in the spring was not able to return as planned when Debtor needed additional surgery and slowdown in economy extended layoff longer than historically occurred. Debtor continually made at least the minimum payments and did not purchase luxury items or live lavishly. Although Debtor ultimately proved unable to pay, inability to pay did not demonstrate lack of intent to pay under circumstances. Debt dischargeable.
- (3011) *Livingston v. Transnation Title Insurance Co.*, 2010 WL 1404530 (6th Cir. 2010) – Section 523(a)(2)(A) excepts from discharge any for money, property, or an extension, renewal, or refinancing of credit to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the Debtor's financial condition." "Statements respecting Debtor's financial condition" would not include closing documents executed by Debtors in connection with sale of property where documents only represented that Debtors were unaware of any other encumbrances on the record title and did not list Debtors' financial obligations or document their ability to pay their creditors. As part of the refinancing transactions, Debtors' provided an owner's affidavit and affidavit of no-encumbrance as required by Title Insurer before it would insure the title to the purchasers. Affidavit was false as Affidavit did not disclose second mortgages that had not been fully satisfied. Affidavit constituted a statement in writing that did not constitute a statement of Debtor's financial condition and obligation to Title Insurance company would be non-dischargeable under Section 523(a)(2)(A).
- (3012) *State of Michigan v. Turner*, Case No. 09-5413 (Bankr. E.D. Mi. 2010) – Debtor's application provided to State Department of Unemployment Insurance did not constitute a statement in writing respecting Debtor's financial condition for purposes of Section 523(a)(2)(B). A statement of financial condition is one that combines entries stating income, assets and debts. Form does not have to rise to level of a Balance Sheet and Income Statement, but must contain statements of income, expenses, and related information. Section 523(a)(2)(A) requires finding of fraudulent intent. Debtor intends to deceive a creditor where the Debtor makes a false representation that Debtor knows or should have known that would induce another to advance goods or services. Fraudulent intent requires actual intent to mislead, not mere negligence. Fraudulent intent can be inferred from totality of circumstances, and Court must consider whether circumstances, including Debtor's conduct at the time of the representations, evidences an intent to deceive. Court could not determine on Summary Judgment whether Debtor fraudulently applied for unemployment compensation while still employed based on Debtor's affidavit that Debtor was told by employer that employer was in danger of closing and should apply for unemployment, and that employer would pay Debtor the difference between Debtor's salary and the amount of unemployment if Debtor continued to work for employer, with assurances that the arrangement was "perfectly legal". Court could not conclude as a matter of law that Debtor had requisite fraudulent intent and knowledge, or whether Debtor was honestly, if mistakenly, relying on incorrect information provided by employer.
- (3013) *Nehasil v. Grenier*, Case No. 09-14011 (E.D. Mi. 2010) *aff'd* Case No. 10-2242 (6th Cir. 2012) – Complaint that does not specifically cite Section 523(a)(2)(A) nonetheless states cause of action where Complaint is predicated on State Court fraud judgment. State Court judgment for fraud which required that Defendant have obtained money as a result of the fraud. State Court action for fraud required proof of (1) material misrepresentation; (2) that was false; (3) was known to be false, or made recklessly, without knowledge of truth, and as a positive assertion; (4) that was made with intention that other party should act on it; (5) that the other party acted in reliance on the statement; and (6) that the other party suffered injury. State Court Jury made specific findings on verdict form that Debtors had actual knowledge of material facts that Debtors did not disclose; and that purchasers of property relied on those misrepresentations when determining how much to offer for purchase of property, thereby conferring an economic benefit on Debtors based on fraudulent statements. Michigan Fraud judgment is sufficient to support finding of non-dischargeability under Section 523(a)(2)(A) under doctrine of collateral estoppel.

8.178 Section 523(a)(2)(A) -Actual Fraud in Other Transactions

- (3014) *Walker v. Vanwinkle*, 2016 WL 7443168 (Bankr. E.D. Ky. 2016) - Debtor's alleged fraudulent transfers of assets does not give rise to non-dischargeable debt to creditor who held judgment against Debtor before transfer occurred unless creditor had pre-existing interest in property transferred. Fraudulent transfer under Section 523(a)(2) requires that debt to creditor as debt was not "obtained by" fraud. Liability from Debtor to creditor flowed from contractual agreements and judgment that predated any transfers. Debt that was liquidated by the Kentucky State Court was not based on willful and malicious conduct, and only allegations in complaint for possibly willful and malicious conduct alleged events that occurred after Kentucky State Court entered judgment. Debtor as transferor is different situation than Debtor as recipient of fraudulent transfers, which can give rise to non-dischargeable debts in favor of transferor's creditors, as fraudulent transfers themselves give rise to liability to creditors in first instance.
- (3015) *Bancorpsouth v. Shahid*, Case No. 16-3009 (Bankr. N.D. Fl. 2016) – Debtor's alleged fraudulent transfers of assets does not give rise to non-dischargeable debt to creditor who held judgment against Debtor before transfer occurred unless creditor had pre-existing interest in property transferred. Fraudulent transfer under Section 523(a)(2) requires that debt to creditor as debt was not "obtained by" fraud. Liability from Debtor to creditor flowed from contractual agreements and judgment that predated any transfers. Debtor as transferor is different situation than Debtor as recipient of fraudulent transfers, which can give rise to non-dischargeable debts in favor of transferor's creditors, as fraudulent transfers themselves give rise to liability to creditors in first instance.
- (3016) *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.
- (3017) *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.
- (3018) *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). After individual suffered judgment, individual transferred assets to individual's daughter. When initial creditor pursued fraudulent transfer action against daughter, daughter filed Chapter 13. Debt from daughter to initial creditor excepted from discharge under "actual fraud" standard of Section 523(a)(2).

8.179 Section 523(a)(2)(B) – False Financial Statements

- (3019) *Prescription Supply, Inc. v. Musa*, 2017 WL 4118157 (Bankr. E.D. Mi. 2017) – Section 523(a)(2)(B) excepts from discharge any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by[] use of a statement in writing[] that is materially false; respecting the debtor's or an insider's financial condition; on which the creditor to whom the debtor is liable for such money ... reasonably relied; and that the debtor caused to be made or published with intent to deceive. Debtor's representation that business had certain accounts receivable that Debtor would cause business to transfer to creditor raised questions of fact as to whether amount of outstanding receivable was materially false. Statement is materially false if information offers a substantially untruthful picture of debtors financial condition that affects creditor's decision to extend credit. Although Debtor represented that Company had outstanding co-pays in excess of \$40,000, evidence indicated that Company did not have and did not charge co-pays. Statements were in writing and respected Company's financial status, and Debtor, as shareholder and officer of company, was insider. Creditor presented evidence that could lead trier of fact to conclude that creditor reasonably relied, which requires factual finding based on totality of circumstances. Intent to deceive does not require subjective intent to have another person rely on false information if debtor is reckless in submitting financial statements that he knows are not true.
- (3020) *National Credit Union Board v. Zovkic*, 2017 WL 1113101 (Bankr. N.D. Ohio 2017) – Section 523(a)(2)(A) and Section 523(a)(2)(B) require reliance as element of recovery. *D'Oench Duhme* doctrine and 12 USC Section 1787(p)(2) provide that no agreement is enforceable against liquidator of insolvent financial institution unless agreement is in writing and signed by representative of institution and approved by institution's board of directors and included in official records of institution. Neither *D'Oench* nor Section 1787 excuses liquidating agent from proving that institution relied on false statements for purposes of non-dischargeability.
- (3021) *National Credit Union Board v. Zovkic*, 2017 WL 1113101 (Bankr. N.D. Ohio 2017) – Section 523(a)(2)(A) requires that Debtor obtained

money through material misrepresentation that, at time made, was known to be false or was made with gross recklessness; Debtor intended to deceive; creditor justifiably relied; and reliance was proximate cause of loss. Material omission may constitute misrepresentation, as well as any fraudulent scheme to deprive another of property or legal right. Misrepresentation is material if it contains substantial inaccuracies of a type that would generally affect lender's decision. Intent requires either intent to deceive or gross recklessness and may be proven by circumstantial evidence including whether Debtor's actions were so inconsistent with self-serving statements to demonstrate that Debtor lacked intent. Reliance must be both actual and justifiable, and creditor does not have duty to investigate to discover fraud but where facts should be apparent to one of creditor's knowledge and intelligence from cursory glance, or if creditor discovers something to serve as warning of possible deception, creditor has duty to investigate further. Where officer of lender was aware of and participated in fraudulent scheme, knowledge will be imputed to lender for purposes of defeating reliance unless principal was acting as "rogue agent", engaged in fraudulent act on own account and facts to be imputed relate to that act, such as where officer uses position to loot corporate assets for own benefit. Doctrine is limited by "sole actor" doctrine where "rogue agent" so dominated and controlled the institution such that institution had no "separate mind", then officer is alter ego of principal and any malfeasance of officer will be imputed to institution. Conduct of Chief Operating Officer of institution imputed to institution where COO was authorized to make loans without consent of any board or other employee or officer of institution, effectively allowing COO to act as one person operation in making lending decisions including loans to Debtor.

- (3022) *Appling v. Lamar, Archer & Cofrin, LLP*, Case No. 16-11911 (11th Cir. 2017) - Section 523(a)(2) excepts from discharge a debt created by fraud. Where fraud involves a statement respecting Debtor's financial condition, fraudulent statement must be in writing. Oral false statements regarding Debtor's financial condition will not form basis of action under Section 523(a)(2). Statement "respecting the Debtors ... financial condition" includes any statement involving Debtor's assets, liabilities or financial condition. Statements are not limited to balance sheets, income statements or annual reports that summarize individual's financial condition. False statement regarding the existence of one asset constitutes statement a statement respecting Debtor's financial condition that must be in writing. Debtor falsely represented to creditor that Debtor was expecting tax refund and Debtor would use tax refund to pay creditors outstanding bill. Debtor's actual tax refund was significantly less than represented and Debtor used entire refund for business purposes without paying creditor. Debtor's statements regarding the existence of a tax refund constituted statements respecting Debtor's financial condition, as statements involved existence of asset. Statements were not in writing and were not actionable.
- (3023) *Security Seed & Chemical Inc. v. French*, 2016 WL 8078320 (Bankr. W.D. Ky. 2016) – Section 523(a)(2)(B) excepts from discharge any debt for money, property, services or an extension, renewal or refinancing of credit obtained by use of a statement in writing regarding Debtor's financial affairs that is materially false. Plaintiff must prove (1) Debtor obtained money or credit by use of written statement that is materially false; (2) statement must respect Debtor's or insider's financial condition; (3) statement must have been reasonably relied on by creditor; and (4) statement must have been published with intent to deceive. Statement signed by Debtor-wife that contained materially false financial information did not support nondischargeability action against Debtor-wife where wife lacked any intent to deceive. Uncontroverted evidence was that Debtor-husband was responsible for filling out loan application and there was no evidence suggesting that Debtor-wife took part in preparation of document or that she intended to deceive with false information.
- (3024) *Security Seed & Chemical Inc. v. French*, 2016 WL 8078320 (Bankr. W.D. Ky. 2016) – Section 523(a)(2)(B) excepts from discharge any debt for money, property, services or an extension, renewal or refinancing of credit obtained by use of a statement in writing regarding Debtor's financial affairs that is materially false. Plaintiff must prove (1) Debtor obtained money or credit by use of written statement that is materially false; (2) statement must respect Debtor's or insider's financial condition; (3) statement must have been reasonably relied on by creditor; and (4) statement must have been published with intent to deceive. There was no dispute that financial statement was submitted by Debtor in writing and was clearly materially false where financial statement listed liabilities of \$65,000 when liabilities were closer to \$500,000, a discrepancy which is "clearly material". Whether lender "reasonably relied" is question of fact based on whether creditor had close personal relationship or friendship with Debtor; whether there had been previous business dealings that gave rise to a relationship of trust; whether debt was incurred for personal or commercial reason; whether there were any "red flags" that would alert ordinary prudent lender to possibility that representations were not accurate; and whether even minimal investigation would have revealed inaccuracies. Fact that initial lender assigned loan to plaintiff did not remove loan from scope of Section 523 - instead, Court would test original creditor's reliance on financial statement. Lender reasonably relied on information contained in loan application as testimony established that had true financial information been disclosed, Application would have been denied at outset. Reliance on information provided was reasonable given close personal relationship between Lender and Debtor including a business relationship that had extended for several years without issue. Debt was incurred by Debtor for business reasons and nothing on Debtor's credit report was sufficiently different from information on application to raise any "red flag". Lender did perform minimal investigation and did not discover massive liabilities Debtor failed to list on loan application. Fact that Lender did not request tax returns, balance sheet or other financial documents did not render reliance unreasonable where loan was relatively small and there were prior business dealings between parties, leading Lender to believe that loan documents were reliable. In determining whether full statement was made with intent to deceive, creditor must prove that statement was either knowingly false or made so recklessly as to warrant a finding that Debtor acted fraudulently. Written financial statement requested information regarding total liabilities. Debtor instead explained that he thought the Application asked only for yearly payments. Explanation was neither credible nor plausible. Debtor was adept at debt financing in farming operations as he had done so for several years and was quite familiar with the terminology of Application. Nothing in Application suggested a request for debt payment information and clearly requested income, assets and liabilities which, per the Loan Application, was used to determine net worth. Nothing in Application suggested that providing loan payment information would calculate net worth. Debtor needed refinancing and knew if true liabilities were listed, loan application would be denied, giving Debtor every incentive to fabricate numbers. However, second obligation arising from "open account" was not excepted from discharge where there was no evidence that debt was obtained by use of false written statement or that anyone relied on statement while making decision to extend credit on open account basis. Open account credit was issued without being approved by original lender and could not have been based on loan application as loan application contain specific credit line while open account balance clearly exceeded credit

line. Further, at time of extension of open account, financial statement would have been considered “stale” rendering reliance on reasonable. Open account that was not tied to loan application and Court would not impute fraudulent intent of the original loan application to subsequent open account credit.

- (3025) *Sheen Falls Strategies, LLC v. Keane*, 2016 WL 6875879 (Bankr. N.D. Ohio 2016) – Debt based upon an oral misrepresentation of financial condition is not actionable and will be dischargeable. Statements “respecting the Debtor’s ... financial condition,” are statements concerning the Debtor’s financial condition or that actually claim to state the Debtor’s overall financial health, net worth or assets and liabilities. Debtor’s representations that that he had a confidential and highly-successful financial formula for buying and selling stock options were not related to the Debtor’s financial condition because they were not related to his overall financial health, net worth, or assets and liabilities.
- (3026) *Johnson v. Loomis*, 2016 WL 5940941 (Bankr. S.D. Ohio 2016) – Fraud regarding Debtor’s financial condition must be in writing. Debtor’s actions, while amounting to fraud, were not excepted from discharge where all representations were oral and Debtor never provided written financial information to plaintiff.
- (3027) *Georgia Department of Human Services v. Oberg*, 2016 WL 5376186 (E.D. Tn. 2016) – Statement regarding Debtor’s financial condition for purposes of Section 523(a)(2)(B) is one that involves Debtor’s overall assets, liabilities and net worth, or documents regarding Debtor’s ability to pay. Understatement of number of people in household or household composition is not statement regarding Debtor’s financial position for purposes of Section 523(a)(2)(B). To extent that statement is one regarding Debtor’s financial condition, non-dischargeability requires that Debtor receive money, property, or services by use of a statement in writing: (i) that is materially false; (ii) respecting the Debtor’s financial condition; (iii) on which the creditor reasonably relied; and (iv) that the Debtor caused to be made or published with intent to deceive. State brought action to except debt from discharge resulting from final state administrative determination that Debtor received food stamps at time when Debtor was ineligible, and ordered Debtor to repay State over \$11,000.00. Debtor admitted that she falsely represented on application for food stamps that Debtor was not working when Debtor was, in fact, gainfully employed. Statements were material as statement had tendency to influence or was capable of influencing the decision of the Agency charged with administering food stamp program, and false statement regarding Debtor’s employment or lack of employment is statement respecting financial condition or income is essential component of financial condition and cash flow is critical party of typical lender-borrower transactions and evaluation of whether Debtor can pay. Statements made on Food Stamp Renewal Forms were written statements regarding Debtor’s financial condition and included numerous questions designed to ascertain Debtor’s overall financial condition. However, mere making of false statement does not indicate that plaintiff reasonably relied. Administrative agency determination not collateral estoppel on issue of non-dischargeability. Partial summary judgment granted to extent of findings that statements were material and respected financial condition, but denied as to whether Debtor intended to defraud and whether state agency reasonably relied. Collateral estoppel requires 1) identity of parties between the two cases; 2) identity of issues between the two cases; 3) actual and final litigation of the issue occurred in the first proceeding; 4) the determination of the issue was essential to the first proceeding; and 5) the party who is being precluded had a full and fair opportunity to litigate the issue in the first proceeding.
- (3028) *Lawrence Bank v. Brent*, 2015 WL 5935820 (Bankr. S.D. Ohio 2015) – Discharge does not cover a debt to the extent it was obtained by use of a statement in writing (i) that is materially false; (ii) respecting the Debtor’s or an insider’s financial condition; (iii) on which the creditor to whom the Debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the Debtor caused to be made or published with intent to deceive. Written statement does not have to be originated by Debtor if Debtor writes, signs or adopts or uses statement Subsection (B) is mutually exclusive of Subsection (A) which renders debt non-dischargeable where misrepresentation relates to something other than Debtor’s financial condition. Subsection (B) requires that where alleged misrepresentation is based on the financial condition of Debtor, misrepresentation must be in writing. Debt cannot be excepted from discharge based solely on alleged oral misrepresentation of Debtor’s financial condition. Statements “respecting” financial condition include statements showing Debtor’s net worth as well as statements addressing asset or assets or liability or liabilities or any other communications that purport to state Debtor’s overall financial health. Certification in loan application that Debtor had sufficient funds to make any required down payment did not constitute misrepresentation where Debtor believed he was not required to make down payment, so certification of source of any down payment was pure excess. HUD closing statement is not misrepresentation because although HUD statement contemplated a down payment, there was nothing on that statement identifying the party making the down payment. Under structure of transaction, Debtor was solely to obtain credit for developer to use to build unit and developer, not Debtor, was to make all payments on credit line including final payment when unit sold. Debtor never agreed to pay down payment and nothing in HUD statement indicated that Debtor had, or would, make that payment. Confirmation letter from developer to lender stating that it had received a down payment “with respect to” Debtor’s loan was statement by developer and not Debtor and nothing in letter stated source of down payment or stated that Debtor had made that payment. Statements made by developer where Debtor was not aware of statements when made and had not authorized developer to make statements on behalf of Debtor were not misrepresentations attributable to Debtor. Debtor lacked any intent to deceive regarding down payment where evidence was undisputed that Debtor was never aware of any down payment requirement by lender and Debtor did not expect to have any out of pocket expenses for property. Down payment requirement was inserted by lender’s credit committee and information was communicated to developer but information was never communicated by bank or by developer to Debtor. Lender’s reliance was not justifiable. Justifiable reliance requires creditor to use his senses, and creditor cannot recover if he blindly relies on representation the falsity of which would have been patent to him if he used opportunity to make cursory investigation. Nothing in documents indicated that Debtor was making a down payment and bank closed transaction without verifying that down payment had been made or source of down payment. Bank deviated from internal standard practices which, if followed, would have disclosed that Debtor had not funded down payment and that down payment was funded entirely by developer.
- (3029) *Kloeber v. Montanari*, 2015 WL 603874 (Bankr. E.D. Tn. 2015) – Plaintiff must prove that Debtor obtained money, property or services based directly on false statements concerning financial condition of Debtor or an insider of Debtor that are provided to plaintiff either directly or indirectly by Debtor and that Debtor had means to repay sums, on which plaintiff justifiably relied. Plaintiff not entitled to summary

judgment where evidenced failed to demonstrate that Debtor knew any financial documents submitted to plaintiff were false or that Debtor acted with requisite intent to deceive.

- (3030) *Phoenix Financial Solutions, Inc. v. Williams*, 2015 WL 430242 (Bankr. N.D. Ohio 2015) – Section 523(a)(2)(B) excepts from discharge debts that result from the use of a statement in writing(i) that is materially false; (ii) respecting the Debtor's or an insider's financial condition; (iii) on which the creditor to whom the Debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the Debtor cause to be made published with intent to deceive. A writing is materially false if it paints a substantially inaccurate picture of a Debtor's financial condition by misrepresenting information of the type which normally would affect the decision to grant credit. A check does not make any representations, and therefore cannot make misrepresentations. Debt resulting from “bad check” not excepted from discharge as check could not be a materially false writing.
- (3031) *Ritter v. Smith*, 2014 WL 4702610 (Bankr. E.D. Mi. 2014) – Section 523(a)(2)(B) requires proof that Debtor obtained money, property or an extension or renewal or refinancing of credit through the use of a materially false statement in writing that concerns the financial condition of Debtor or an insider; reasonable reliance by creditor on financial statement; and intent by Debtor to deceive. Financial statement is “materially false” where the information presents a substantially untruthful picture of the financial condition of the Debtor that affects the creditor's decision to extend credit. Financial statement that showed \$90,000 in accounts receivable presented fact issue where financial statement issued 6 months later showed no accounts receivable and neither Debtor nor the business to which the accounts were owed could demonstrate any basis for the reduction and the company continued to experience cash flow problems during the same time. Corporate balance sheet, profit and loss statement and accounts receivable aging summaries related to overall financial condition of corporation owned by Debtor and into which Debtor convinced creditor to invest. Intent to deceive is present where Debtor had actual intent to deceive or where Debtor recklessly submits financial statements that he knows are not true. Statements in financial documents were sufficient to create issue of fact as to whether statements were made by Debtor with intent to deceive.
- (3032) *Jennings v. Bodrick*, 2014 WL 1818487 (Bankr. S.D. Ohio 2014) – Phrase “respecting Debtor's financial condition is narrowly interpreted to mean statements regarding Debtor's overall net worth, asset or liabilities. Investment information provided by Debtor to creditor pertained to investment and involved statements of financial condition of third parties that were not statements of Debtor's financial condition. Further, Section 523(a)(2)(B) require finding or reasonable reliance, which is greater than justifiable reliance and depends on (1) whether creditor had close personal relationship or friendship with Debtor; (2) whether there were previous business dealings between the parties; (3) whether the debt was incurred for personal or commercial reasons; (4) whether there were red flags that would alert ordinarily prudent person to possibility that representations were not accurate; and (5) whether even minimal investigation would have revealed inaccuracy of statements. evidence did not support finding of justifiable reliance, where there was no close personal relationship between Debtor an creditor. The parties had no prior business relationships, and rate of return was clear red flag the falsity of which would have been revealed with even minimal investigation. Debtor sold “investments” in Nigerian promissory notes that purported to pay 50% interest in two weeks.
- (3033) *Kraus Anderson Capital, Inc. v. Bradley*, 507 BR 192(6th Cir. BAP 2014) – Lender does not have affirmative duty to conduct investigation to discover fraud or misrepresentations, even if falsity could be easily discovered. Debt that resulted from settlement agreement of pre-existing loan obligation can be excepted from discharge if settlement agreement is product of fraud or misrepresentation. Debtor had purchased equipment for re-sale using lender's floor plan financing which gave lender a lien on all items purchased. Debtor knowingly lied to lender regarding which pieces of equipment had been sold prior to entering into settlement agreement, and made conscious choice to disclose some, but not all, of the sale because he did not want to make it look worse. Equipment list attached to settlement agreement affirmatively stated that Debtor has possession of equipment that Debtor had already sold; and Debtor continued to lie to lender for 18 months while Debtor continued to try to pay off the loans. Although lender made no efforts to investigate statements or to “keep tabs on” the collateral, lender could rely on Debtor's statements unless the statements were obviously false. All parties admitted that had lender been aware of true state of collateral, lender would not have entered into settlement agreement; and lender relied on oral and written statements provided by Debtor. Lender did not “shut its eyes to an obvious falsehood” and justifiably relied on statements of Debtor.
- (3034) *Kelly v. Merrill*, Case no. 13-1370 (9th Cir. BAP 2014) – Lender did not reasonably rely on false financial statement provided by guarantor of loan. Statement was not signed and not dated. Lenders were sophisticated parties, yet lenders did not insist on signed or dated financial statement and made no effort to verify information, some of which was obviously false and raised red flags. While Section 523 does not impose strict duty on lender to investigate financial information, information was sufficiently suspect that a reasonably prudent person would have investigated further yet lenders did not make any attempt to verify even a single item on the financial statement.
- (3035) *AFF Ohio, LLC v. Jelinger*, 2014 WL 996466 (Bankr. N.D. Ohio 2014) – Section 523(a)(2)(B) excepts from discharge any debt for money, property, services, or an extension, renewal or refinancing of credit, if obtained by use of statement in writing that is materially false with regard to Debtor's or insider's financial condition; on which the creditor reasonably relied; made by the Debtor with intent to deceive. Complaint alleged fraudulent statements in bankruptcy petition and schedules. Creditor could not have relied on allegedly false statements in bankruptcy pleadings in extending loan some years prior.
- (3036) *Park National Bank v. Shiling*, 2013 WL 4039417 (Bankr. N.D. Ohio 2013) – Plaintiff seeking to except debt from discharge under Section 523(a)(2)(B) must prove that debt was obtained by use of statement in writing that is materially false, respecting Debtor's or insider's financial condition, on which the creditor reasonably relied, and that Debtor made or caused to be made with intent to deceive. Whether creditor's reliance is reasonable depends on (1) whether the creditor had a close personal relationship or friendship with the Debtor; (2) whether there had been previous business dealings with the Debtor that gave rise to a relationship of trust; (3) whether the debt was incurred for personal or commercial reasons; (4) whether there were any “red flags” that would have alerted an ordinarily prudent lender to the possibility that the representations relied upon were not accurate; and (5) whether even minimal investigation would have revealed the inaccuracy of the Debtor's representations. Reasonableness requirement will bar recovery by creditor only where circumstances are such that asserted reliance was so unreasonable as to negate existence of actual reliance. Previous business relationship, in which plaintiff lent money

to Debtor which Debtor repaid substantially ahead of the due date, established relationship of trust on which plaintiff could rely. Plaintiff did not have any contradictory information when making credit decision. Although plaintiff's employee filled out application, Debtor signed that application and knew of purpose for which it was created. While plaintiff could have easily requested pay stubs or other documentation that could have revealed overstatement of income, nothing in the circumstances of the case would alert plaintiff to need to request that documentation.

- (3037) *First Knox National Bank v. Welling*, 2013 WL 3760112 (Bankr. N.D. Ohio 2013) – Discharge does not cover a debt to the extent it was obtained by the use of a statement in writing (i) that is materially false; (ii) respecting the Debtor's or an insider's financial condition; (iii) on which the creditor to whom the Debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the Debtor caused to be made or published with intent to deceive. Plaintiff failed to prove that Debtor misrepresented ownership of assets where bank loaned money to purchase equipment but did not show that the sale ever occurred or that Debtor ever stated that he actually owned the equipment. The contract had questionable dates raising questions about whether the Debtor ever owned the equipment or whether the plaintiff loaned money to purchase the equipment. Bank's inadvertent assumption that Debtor owned the equipment when bank knew from proposed contract for purchase was not misrepresentation by Debtor. Evidence also did not clearly demonstrate reliance where Debtor alleged that bank representatives was aware of true status of Debtor's financials. Alleged overstatement of values of assets in financial statement was not sufficient where bank failed to produce any evidence of any alleged inaccuracy instead relying on allegations that Debtor was a "bad person".
- (3038) *Davenport v. Frontier Bank*, Case No. 12-14069 (11th Cir. 2013) – Debtor submitted false financial statement that failed to disclose large tax liabilities or liabilities to Austrian bank when Debtor applied for \$3 million loan. Plaintiff must also prove "reasonable reliance" as element of action under Section 523(a)(2)(B). Reasonableness of reliance depends on circumstances of particular case, including whether there had been prior business dealings with the Debtor that gave rise to relationship of trust; whether there were "red flags" that would alert ordinary prudent lender to possibility of misrepresentations or inaccuracies; and whether even minimal investigation would have revealed inaccuracies. Bank reasonably relied on financial statement and questioned Debtor about those statements. For example, while the Austrian Bank loan had been previously listed, Debtor did not list it on the current statement. When questioned, Debtor stated (falsely) that the debt had been settled. Bank took into account Debtor's education, training and experience as CPA and attorney and Debtor's general reputation in the community. Although Bank did not request copies of tax returns, there was no obligation to do so where it was not bank's regular practice to do so and bank did not have any indication that reviewing tax returns would disclose any necessary information.
- (3039) *Lucas County Department of Job & Family Services v. Perrin*, 2013 WL 509130 (Bankr. N.D. Ohio 2013) – Section 523(a)(2)(B) requires statement in writing regarding Debtor's financial condition. Debtor's false statement that Debtor did not reside with his wife made in connection with an application for food assistance was not statement concerning Debtor's financial condition.
- (3040) *Sheehan & Assoc., PLLC v. Lowe*, 2012 WL 366596 (Bankr. E.D. Mi. 2012) – Complaint that failed to identify any written statement respecting Debtor's financial condition that creditor allegedly relied upon fails to state cause of action under Section 523(a)(2)(B).
- (3041) *Advantage Bank v. Starr*, 2012 WL 4714978 (Bankr. N.D. Ohio 2012) – Creditor must prove that Debtor used statement in writing that was materially false; that respected the Debtor's or an insider's financial condition; that the creditor reasonably relied; and that Debtor caused to be made or published with intent to deceive. Financial statements that listed major assets including Debtor's home and investment account were materially false as both assets were owned by a revocable trust and not by Debtor. Reasonable reliance is higher standard than justifiable reliance, and depends on (1) Whether the creditor had a close personal relationship or friendship with the Debtor; (2) whether there had been previous business dealings with the Debtor that gave rise to a relationship of trust; (3) whether the debt was incurred for personal or commercial reasons; (4) whether there were any "red flags" that would have alerted an ordinarily prudent lender to the possibility that the representations relied upon were not accurate; and (5) whether even minimal investigation would have revealed the inaccuracy of the Debtor's representations. Bank did not demonstrate reasonable reliance where bank made no independent inquiries as to accuracy of financial statements, where financial statements themselves contained some inconsistencies. Substantial changes in Debtor's financial statements from first statement to second and third statements including inconsistent values of assets constituted "red flags" that should have caused bank to investigate. Bank also failed to conduct any investigation into alleged receivables which, given the speculative nature, require some inquiry to determine validity. Bank did not have long term prior relationship with Debtor and to extent relationship had existed, it was difficult and lacking in trust. Total loan amount was large - \$975,000 – which should have caused more investigation. Bank did not present evidence of its lending policies or those of the industry as a whole to determine if Bank's actions were reasonable. Bank must also establish intent to deceive, either by showing that Debtor intended the statement to be false of that statement was grossly reckless as to truth. Omissions and errors did not evidence intent to deceive. Listing of assets as owned by Debtor when those were actually owned by Debtor's revocable trust did not indicate intent to deceive. At most, those were evidence of poor business acumen and errors.
- (3042) *Tower Credit, Inc. v. Gibbon*, 2012 WL 3838650 (Bankr. M.D. La. 2012) – Creditor established that Debtor's loan application falsely stated that her only creditors were Highlands Bank and Wells Fargo Home Mortgage, when she also knew of her federal tax debt. She also misrepresented that she was receiving child support. By signing the application warranting in several places the truth of her statements, the Debtor knowingly gave false information to obtain the loan. When it is not disputed that a loan application was signed by the Debtor, then the contents of the application should, in general, be attributed to the Debtor and entitled at least to great weight, and perhaps decisive effect. Debtor's inconsistent statements about the child support payments on the loan application, on the bankruptcy schedules, at the 341 meeting and at trial evidence a reckless disregard for the accuracy of her representations and further supported a finding and conclusion that she intended to deceive the lender. Creditor justifiably relied on the Debtor's loan application based on testimony that without child support shown on application, Debtor would not have qualified; and had lender known of substantial tax debt, lender would not have entered into transaction as there was substantial risk that IRS could levy Debtor's income causing a default in payment to lender.
- (3043) *Adamovic v. Lazarevic*, 2012 WL 4483901 (Bankr. E.D. Tn. 2012) – Under Section 523(a)(2)(B), plaintiff must prove that Debtor made a statement in writing or that another made a statement that Debtor adopted or used. Financial statement is any statement representing Debtor's

net worth, overall financial health, or ability to generate income so as to enable an accurate assessment of creditworthiness, and may include loan applications. Financial statement does not need to be formal statement and may not need to be signed by Debtor. Statement does not have to be created by Debtor, where Debtor had statement created or allowed it to be published. Plaintiff failed to present any evidence of existence of financial statement, much less a false or fraudulent statement. Court seeking relief under Section 523(a)(2)(B) dismissed.

- (3044) *Farmers National Bank v. Lockridge*, 2012 WL 1969254 (Bankr. E.D. Ky. 2012) – Section 523(a)(2)(B) requires that Debtor publish statement of Debtor's financial condition that is knowingly false or made with gross recklessness and with intent to deceive creditor. Debtor listed value of assets on financial statement based on appraisal, unaware of a second appraisal that had also been obtained that showed markedly different values. Statements by Debtor that he would use proceeds of sales commission on property to pay down loan were not false but were hopeful promises of future activity that did not come to fruition as the property was not sold and was later lost in foreclosure. Debtor genuinely believed that he would be able to sell the property for sufficient sum to cover loan as Debtor had previously been offered an amount that would have been sufficient to do so but elected not to sell at that point, and later decline in value was not anticipated.

8.180 Section 523(a)(2) – Cash Advances

- (3045) *FIA Card Services v. Wagner*, 2012 WL 1605945 (Bankr. N.D. Ohio 2012) – Section 523(a)(2)(C) creates presumption of fraud in favor of the creditor where Debtor obtains more than \$875 in cash advances from a single creditor in the 70 days preceding petition date. Debtor must then produce evidence that debt was not incurred in contemplation of bankruptcy and, therefore, was not fraudulent. Complaint sufficiently alleged that Debtor obtained cash advances in excess of \$875. Debtor's answer admitted that she obtained advances but alleged that she did so only until she could obtain assistance in setting up payment plans. Debtor consulted with credit counseling service and was advised for the first time that she lacked sufficient income to make a payment arrangement. Debtor's answer was sufficient to create factual issue preventing entry of summary judgment in favor of creditor.

8.181 Section 523(a)(2)(C) – Credit Card Debt

- (3046) *Discover Bank v. Ferguson*, Adv. No. 11-5854 (Bankr. E.D. Mi. 2012) – Debt was not within scope of Section 522(a)(2)(C) where credit card was used more than a year prior to commencement of case and the relevant charge was posted to the account more than 200 days pre-petition. Debtor used the card to repair Debtor's vehicle. When Debtor received the statement, Debtor disputed the charge. Over the next 7 months, creditor at various times credited Debtor's account and on other occasions credited the account. The last adjustment was on September 10, when creditor charged Debtor's account. More than 200 days later, Debtor filed for relief. Adversary proceeding alleged that the Debtor incurred the debt on December 30, which was within the 90 day framework, relying on what turned out to be an inaccurate transaction record. Upon dismissal of complaint, Debtor entitled to recover attorney fees and costs pursuant to Section 523(d). Section 523(d) requires showing that Debtor was defendant in adversary proceeding under Section 523(a)(2) requesting that the debt be excepted from discharge; that the debt was a consumer debt; and that the debt was ultimately discharged. Creditor then bears burden of proving that position was substantially justified or that special circumstances exist to make award of fees unjust. Plaintiff's good faith reliance on its own, faulty business records was not justified; and Debtor's alleged concealment of errors in plaintiff's records was not special circumstance.

8.182 Section 523(a)(3)

- (3047) *Markley v. Department of Treasury, Internal Revenue Service*, 2017 WL 456416 (Bankr. N.D. Ohio 2017) - Exclusive remedy for violation of discharge injunction is action for contempt. Contempt requires proof that defendant violated definite and specific order of Court requiring defendant to perform or refrain from performing particular act with knowledge of Court Order. Whether Creditors actions filing to discharge injunction depended on whether taxes at issue were discharged in first instance. Claim for unpaid taxes in Chapter 13 proceeding was not discharged because Internal Revenue Service did not have notice of bankruptcy case and time to file proof of claim. Section 523(a)(3) provides that a debt is not discharged if the creditor did not discover the bankruptcy case and time to file a proof of claim. Debtor listed IRS tax liability and schedules at address which is not IRS designated address under Rule 5003(e). IRS did not obtain actual knowledge until more than two years after expiration of the claims bar date, at a time when IRS could not timely file a proof of claim. Fact that IRS later filed and then withdrew untimely filed proof of claim does not convert that into dischargeable debt where IRS did not have opportunity to timely file claim in first instance.
- (3048) *Citizens Insurance v. Harris*, Case No. 16-10428 (E.D. Mi. 2016) – Creditor bears burden of showing that creditor did not receive notice in time to file claim and that debt would have not been dischargeable under Section 523(a)(2), (4), or (6). Bankruptcy Noticing Center (BNC) sent notice of Debtor's case to law firm representing Citizens in pending litigation, which constitutes proper notice to the creditor. Creditor's assertion that Law Firm did not receive notice insufficient to rebut presumption of receipt where only affidavit filed was of one attorney at the firm states that he did not receive the notice and that he was unable to locate the notice. Simple affidavit was insufficient to rebut presumption of receipt. Party did not submit affidavits of any other member of the firm although the notice was addressed to firm generally and not to specific attorney. Affidavit failed to present any evidence no how mail is handled and routed. Creditor did not present any evidence from any other creditor to establish a lack of notice that would support rebuttal of inference. Evidence was sufficient only to establish that named affiant did not receive notice, but did not establish that some other person that the firm did not receive the notice.
- (3049) *Coolants, Plus, Inc. v. Couch*, 2016 WL 97524 (Bankr. E.D. Ky. 2016) – Section 523(a)(3) discharges unsecured debt unless creditor did not have actual notice of proceeding in time to file proof of claim and claim is one that would be non-dischargeable under Section 523(a)(2), (4) or (6). Debtor did not dispute that Debtor did not schedule creditor or contest creditor's assertion that creditor lacked notice. Claim was non-dischargeable where issues that would be dispositive under Sections 523(a)(2), (4) and (6) were fully determined in pre-bankruptcy State Court judgment. State Court judgment has collateral estoppel effect where parties to State Court action were same as parties in dischargeability action. State Court default judgment is final judgment for purposes of collateral estoppel where Debtor initially appeared through counsel but counsel withdrew from representation shortly before trial and Debtor did not appear at trial. Issues in State Court action

were same as issues in dischargeability action where State Court made specific finding that Debtor engaged in actual fraud and false pretenses and state law requirements for fraud and false pretenses were virtually identical to elements necessary for non-dischargeability under Section 523(a)(2). State Court judgment also demonstrated that debt was not dischargeable under Section 523(a)(6) which requires showing that Debtor intended his actions and that Debtor either intended to cause harm or knew that injury to creditor was substantially certain, and that Debtor acted without just cause or excuse. State Court specifically found that Debtor acted intentionally, willfully and maliciously and that conduct caused injury when Debtor, hired to run a branch office of plaintiff, created false invoices and used those to obtain payment from company and to then create competing company and use trade secrets and confidential information to divert plaintiff's customers. Findings of State Court were necessary to resolution of State Court action where findings were central to plaintiff's causes of action and were based on same facts as alleged in adversary proceeding, and award of treble damages and attorney fees were dependent on specific finding of intentional, willful and malicious conduct. However, State Court judgment failed to contain sufficient findings for non-dischargeability under Section 523(a)(4) where judgment did not establish fiduciary relationship between Debtor and plaintiff for embezzlement, or that Debtor's conduct rose to level of embezzlement or larceny.

- (3050) *Walker v. Federal Insurance Company*, 2015 WL 9491181 (Bankr. N.D. Ohio 2015) – Section 523 discharges unscheduled debt unless creditor lacked notice or knowledge of bankruptcy case in time to file adversary to except debt from discharge and debt is one that fits within Section 523(a)(2), (4) or (6). Creditor lacked notice where creditor was not scheduled or included in matrix and received no notifications from Court or from Debtor's counsel and Debtor presented no evidence that creditor had actual or constructive knowledge of bankruptcy case. Debt fell within Section 523(a)(4) where Debtor, while working at senior health care facility, used funds in residents' reimbursement accounts for her own purposes. Funds were in accounts for benefit of residents and not Debtor. Debtor covered up the missing funds by manipulating or forging the general ledger and records of the residents' accounts. Debtor's actions constituted embezzlement as property was entrusted to Debtor for a particular purpose, Debtor used those funds for purposes other than for which funds were entrusted, and circumstances indicated fraud evidenced by manipulation of accounts.
- (3051) *In re Saputo*, Case No. 10-51920 (Bankr. E.D. Mi. 2015) – Motion to reopen case to add omitted creditor denied where Chapter 7 was "no asset" case in which no claims bar date was established. Reopening case would serve no useful purpose and underlying debt has already been discharged.
- (3052) *In re Wilcox*, 2015 WL 1851356 (Bankr. W.D. Mi. 2015) – Section 523(a)(3) discharges even creditors without notice in no asset cases. However, creditor's claim is not discharged if claim would have been excepted from discharge had creditor had proper notice. While action under Section 523(a)(6) must be brought within 60 days of date first set for the 341 meeting, there is no corresponding deadline for actions under Section 523(a)(3) even where underlying basis for non-dischargeability is Section 523(a)(6). Complaint filed in State Court after entry of discharge, seeking to recover for malicious prosecution and fraud, sufficiently stated cause of action that would allow State Court to exercise concurrent jurisdiction to determine whether Debtor's actions fell within scope of Section 523(a)(6).
- (3053) *In re Wilson*, Case No. 13-41923 (Bankr. E.D. Mi. 2014) – Court normally will not re-open case to address dischargeability of omitted creditor. However, where creditor arguably asserted a claim that could fall within scope of Section 523(a)(6), court would reopen case at request of Debtor for purposes of allowing Debtor or creditor to file adversary to determine whether debt is excepted from discharge.
- (3054) *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).
- (3055) *Yoppolo v. Asbury*, 2014 WL 1323216 (Bankr. N.D. Ohio 2014) – Section 523(a)(3) excepts from discharge an unscheduled debt where the creditor does not have notice of bankruptcy in time to file objection to discharge and the debt is one that falls under Sections 523(a)(2), (4) or (6). Deadline for filing actions under Section 523(a)(2), (4) or (6) is generally sixty days after date first set for meeting of creditors, and creditors are entitled to no less than 30 days' notice of the deadline. Plaintiff must show that debt was not included in bankruptcy schedules such that she did not receive formal notice in time to file adversary complaint; and that plaintiff holds debt specified under Sections 523(a)(2), (4) or (6), not merely that debt may fit within under Sections 523(a)(2), (4) or (6).
- (3056) *Lampe v. Kash*, 735 F.3d 942 (6th Cir. 2013) – Notice for purposes of the bankruptcy code and due process requires notice that is reasonably calculated to reach opposing party before opposing party is deprived of property. Notice of bankruptcy filing mailed to creditor's counsel was not reasonably calculated to reach creditor where creditor and attorney terminated relationship more than 8 years earlier. Debt owed to creditor was not discharged as creditor did not have notice of the case in time to file proof of claim, where evidence indicated that creditor was unaware of bankruptcy case until after case had closed and Debtor first provided effective notice only when creditor began proceedings to renew judgment.
- (3057) *Hawthorn v. Petty*, 2013 WL 1896261 (8th Cir. BAP 2013) – If creditor is not provided notice of filing in time to file adversary under Sections 523(a)(2), (4) or (6), then there is no subsequent deadline imposed to bring action. Debtor failed to give creditor notice of filing until after deadline had expired. Creditors filed adversary proceedings 64 days later. BAP ruled that adversary was by definition timely. Lack of notice to creditor in time to file adversary precluded Debtor for seeking to dismiss later filed adversary as untimely.
- (3058) *First Place Bank v. Casino Concepts by Design, Inc.*, 2013 WL 3351572 (Mi. App. 2013) – Bankruptcy Code requires Debtor to schedule all parties to whom debts are owed. Section 523(a)(3) excepts from discharge any Debtor that is not listed or scheduled in time to permit the creditor to file claims or actions under Section 523(a)(2), (4) or (6). Debtor acknowledged that schedules did not list creditor and that creditor did not have notice of case within times set forth in Section 523(a)(3) but contended that as a "no asset" case debt was discharged. Court rejected Sixth Circuit holding in *Madaj* and adopted holding in *Colonial Surety* that there is no exception in Section 523(a)(3) based on whether the bankruptcy case as an asset or a no-asset case. Debtor bears burden for re-opening bankruptcy case to add creditor if Debtor wants debt to be declared discharged.

- (3059) *Gonsalves v. Belice*, Case No. 11-048 (1st Cir. BAP 2012) – Creditor stated “plausible cause of action” where Debtor knowingly listed an incorrect address for creditor in the schedules and matrix, such that all of the mail from the court including the notice of commencement were mis-directed.
- (3060) *Seibert v. Horton*, Adv. No. 11-6651 (Bankr. E.D. Mi. 2012) - Unscheduled debt is generally dischargeable in no asset chapter 7 case. However, unscheduled debt that is not otherwise non-dischargeable under section 523(a)(2), (4), or (6), is not automatically discharged if the potential creditor did not have knowledge of the bankruptcy case. Unscheduled creditor did not violate discharge injunction by filing post discharge State Court complaint alleging nondischargeable debt based on alleged theft of money. If proven, debt would be nondischargeable under section 523(a)(6) notwithstanding the general discharge for otherwise unscheduled debts.
- (3061) *Tennessee Commerce Bank v. Cox*, Case No. 309-0410 (Bankr. M.D. Tn. 2010) - Critical factual issue under 11 U.S.C. Section 523(a)(3) is whether the plaintiff had notice or actual knowledge of the case in time to file a timely proof of claim. The Debtor did not include Creditor in statements and schedules and Creditor admittedly did not have notice of the bankruptcy until well after the deadline for filing proofs of claim had expired. Debtor not permitted to file late proof of claim on behalf of Creditor and then provide for Tennessee Commerce's debt in her Chapter 13 plan to avoid consequences of failure to list in first instance.
- (3062) *Mays v. Hill*, Adv. Case No. 09-6061 (Bankr. E.D. Ky. 2009) – Rule 4007 generally requires a complaint to determine dischargeability of debt to be filed no later than 60 days after the date set for the first meeting of creditors. However, where debt is neither scheduled nor listed, debt is not discharged unless creditor acquires actual knowledge of bankruptcy and time to file a complaint to determine dischargeability. Where creditor did not receive actual knowledge of bankruptcy case until almost one year after commencement of the case and well after the deadline to file an adversary proceeding, creditor's adversary proceeding to determine dischargeability was not time-barred.

8.183 Section 523(a)(4) – Larceny

- (3063) *Cowin v. Countrywide Home Loans, Inc.*, Case No. 15-20600 (5th Cir. 2017) – Larceny is defined as fraudulent and wrongful taking of property of another with intent to convert it to taker's use and intent to permanently deprive owner of property. Evidence supported finding that Debtor, as part of a conspiracy, committed acts designed to deprive Plaintiff of its interest in proceeds of sale of property by engineering scheme to cause funds to be distributed to entity related to Debtor. Further, even if Debtor did not himself commit larceny, intent and actions of co-conspirators will be imputed to Debtor. Evidence clearly demonstrated that even if Debtor did not personally commit larceny, actions of co-conspirators as part of scheme to deprive Plaintiff of sale proceeds would be imputed to Debtor. Section 523(a)(4) requires only that debt result from larceny and that Debtor be obligated to pay debt, not that Debtor personally committed larceny. As member of conspiracy that obtained funds, Debtor is personally liable for damages caused by actions of conspiracy.
- (3064) *Initial Investments, Inc. v. Woodford*, 2016 WL 7191534, *rehg denied*, ___ WL ___ (Bankr. E.D. Mi. 2016) – Larceny requires that the Debtor unlawfully take and carry away of property of another with intent to convert such property to the taker's use without the consent of the owner. Although Debtor breached contract that required Debtor to turn over to plaintiff proceeds received from insurance company to pay plaintiff for work done, there was no evidence that checks from insurance company or proceeds of those checks were property of the Plaintiff or that Debtor intended to convert the property where Debtor was acting under good faith, if erroneous, belief that plaintiff had not completed all work to required specifications. Debtor's actions in refusing to turn over proceeds amounted to breach of contract but did not constitute larceny.
- (3065) *Johnson v. Loomis*, 2016 WL 5940941 (Bankr. S.D. Ohio 2016) – Debtor committed larceny when he used plaintiff's identification without plaintiff's knowledge or consent to open two credit cards in plaintiff's name, then used the cards and failed to pay the charges. Larceny is defined as fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner and includes credit card identity theft.
- (3066) *Cardwell v. Hester*, 2016 WL 5922307 (Bankr. W.D. Ky. 2016) – Larceny requires proof that a) the Debtor has wrongfully appropriated funds or property of another for Debtor's own benefit, and (b) he did so with fraudulent intent or deceit. Larceny does not require a pre-existing fiduciary relationship. Evidence indicated that Debtor committed larceny when he entered a store owned by Plaintiff an defendant jointly and removed funds from the safe. Funds belonged to the store or to Plaintiff and Debtor had no right to or interest in the funds, and Debtor admitted wrongfully removing funds for the store without the consent of plaintiff.
- (3067) *Coolants, Plus, Inc. v. Couch*, 2016 WL 97524 (Bankr. E.D. Ky. 2016) – State Court judgment has collateral estoppel effect where parties to State Court action were same as parties in dischargeability action. State Court default judgment is final judgment for purposes of collateral estoppel where Debtor initially appeared through counsel but counsel withdrew from representation shortly before trial and Debtor did not appear at trial. However, State Court judgment failed to contain sufficient findings for non-dischargeability under Section 523(a)(4) where judgment did not establish fiduciary relationship between Debtor and plaintiff for embezzlement, or that Debtor's conduct rose to level of embezzlement or larceny.
- (3068) *Phi Air Medical, LLC, v. Holskey*, 2016 WL 616985 (Bankr. W.D. Ky. 2016) – Larceny is defined as the wrongful taking of property from its owner with fraudulent intent, but does not require any fiduciary capacity or relationship. Debtor incurred medical transport charge. Provider submitted invoices to Debtor's insurer. Insurer issued check to Debtor as partial reimbursement of expenses with directions for Debtor to pay provider directly. Instead, Debtor took money and used for personal and household purposes. Debtor knew that the funds belonged to the provider and that he had no right to retain or use the funds. Debtor's actions evidenced a wrongful taking of the funds with fraudulent intent or deceit.
- (3069) *Meade v. Pinkerman*, 2015 WL 2445077 (Bankr. N.D. Ohio 2015) – Larceny is fraudulent and wrongful taking and carrying away of property

of another with intent to convert the property without consent of owner. Larceny can include intangible property and intellectual property as well as tangible property. After Debtor fraudulently obtained control of Plaintiff's business, Debtor made no attempt to transfer license agreement with licensor and wrongfully and intentionally used trademarks that were licensed to Plaintiff thereby converting the license and trademark agreements to Debtor's use, and Debtor then used plaintiff's name and account with supplier to obtain products without paying for those products, thereby fraudulently and wrongfully obtaining use of Plaintiff's credit.

- (3070) *Accounting/Tax Pros, LLC v. Schwartz*, 2015 WL 1407380 (Bankr. M.D. Tn. 2015) – Larceny is actual or constructive taking of property of another without consent and against will of owner or possessor, with intent to convert property to one's own use. Debtor must act wrongfully and with fraudulent intent. Intent is determined on subjective basis, taking into account all of the circumstances. Contract between Debtor and plaintiff was poorly written, leaving it ambiguous as to when title to assets transferred or Debtor's rights in the event of default. While evidence was in dispute, it was possible to reach inference that Debtor did not have fraudulent intent when Debtor declared plaintiff to be in breach of contract and retaken and resold assets that Debtor previously sold to plaintiff.
- (3071) *Malinowski v. Whisman*, Case No. 14-2041 (Bankr. E.D. Mi. 2015) – Larceny requires a wrongful taking of property with intent to convert the property to the person's own without the knowledge or consent of the owner. Defendant had no direct knowledge of mother's wrongful conduct. Debtor was as young as 15 years old and estranged from mother, and was residing with father. Neither amount of transfers nor nature of transfers would raise suspicion and involved airfare to allow Debtor come home from college to attend a funeral, and purchase of a used automobile for defendant to use at college. There was insufficient evidence to link defendant to mother's wrongful actions.
- (3072) *Phoenix Financial Solutions, Inc. v. Williams*, 2015 WL 430242 (Bankr. N.D. Ohio 2015) – Larceny is the fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner. Evidence was insufficient to establish that Debtor committed larceny when he issued check on which Debtor later stopped payment.
- (3073) *Merritt v. Layne*, 2014 WL 4723081 (Bankr. E.D. Ky. 2014) – Plaintiff not entitled to judgment of non-dischargeability under Section 523(a)(4) where complaint failed to allege existence of actual or technical trust between parties pursuant to which Debtor was to hold property solely for benefit of plaintiff, and there was no evidence that plaintiff entrusted funds to Debtor for specific purpose but that Debtor fraudulently used funds for Debtor's own purposes as necessary to establish embezzlement; and complaint admitted that plaintiff willingly gave money to Debtor precluding finding of larceny. Rather, complaint alleged only that plaintiff made loan to Debtor to enable Debtor to purchase truck, and that Debtor thereafter failed to repay loan.
- (3074) *Yoppolo v. Asbury*, 2014 WL 1323216 (Bankr. N.D. Ohio 2014) – Larceny requires fraudulent and wrongful taking and carrying away of property of another with intent to convert the property to the taker's use without consent of owner, and is generally considered synonymous with theft. Payments made by creditor to Debtor pursuant to land contract did not amount to obtaining money by larceny. While creditor may have thought that Debtor would use payments by creditor to make payments on underlying mortgage, there was no evidentiary basis for that understanding. There was no testimony that Debtor and creditor ever discussed the issue and nothing in the land contract required application of payments in any particular manner.
- (3075) *Bank of America v. Killgrove*, 2013 WL 7018546 (Bankr. E.D. Mi. 2013), *aff'd*, 2014 WL 4187988 (E.D. Mi. 2014) – Larceny requires a wrongful taking of property from its rightful owner. Debtor cannot commit larceny where the property in question already belonged to Debtor. Collateral for loan was already property of the Debtor. Debtor could not have committed larceny when Debtor later transferred title to the collateral to third party.
- (3076) *First National Bank v. Sierlein*, 2013 WL 4510769 (Bankr. E.D. Tn. 2013) – Larceny differs from embezzlement as larceny requires that initial acquisition itself be wrongful, while embezzlement requires that original acquisition be lawful but that property later be wrongfully retained.
- (3077) *Robinson v. Robinson*, 2012 WL 4715093 (Bankr. N.D. Ohio 2012) – Larceny is defined as “the fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner. Because the misappropriated funds at issue were lawfully obtained by Debtor when Plaintiff entrusted the funds to Debtor, claim sounds in embezzlement rather than larceny.
- (3078) *Dean v. Hunter*, 2012 WL 4343869 (Bankr. E.D. Tn. 2012) – Debtor, a building contractor, committed larceny when Debtor removed building materials from Plaintiff's property that plaintiff had paid for in connection with construction contract between Plaintiff and Debtor. State Court judgment in favor of Plaintiff supported finding of larceny. Although judgment did not state that Debtor acted fraudulently or intentionally, State Court award of punitive damages supported finding of intent where state law required showing of actual malice for an award of punitive damages.
- (3079) *Hulett v. Rowe*, Adv. No. 11-4924 (Bankr. E.D. Mi. 2012) – Plaintiff's action against Debtor for alleged diversion of corporate assets failed to evidence any damages based on that alleged diversion. Only damages suffered by plaintiff resulted from Debtor's failure to pay promissory note by which Debtor purchased business from plaintiff. Damages for failure to installments on promissory note does not equate to larceny for purposes of non-dischargeability. Plaintiff did not offer any evidence of any particular asset that was allegedly converted or taken or the value of any such asset. Absent evidence of damages from the alleged larceny independent of damages for breach of the promissory note, judgment would be entered in favor of Debtor.
- (3080) *Ewers v. Cottingham*, 2011 WL 2118247 Bankr. E.D. Ky. 2011) *aff'd* 2012 WL 2161623 (6th Cir. BAP 2012) – Debtor husband's debt to wife's former employer from whom wife embezzled funds was not within Section 523(a)(4). Husband was not employee of employer and did not owe employer any fiduciary obligation and husband did not personally engage in any act of embezzlement or larceny.

- (3081) *HST Corporate Interiors LLC v. Sherrick*, 2017 WL 2889656 (Bankr. M.D. Tn. 2017) - Debt resulting from embezzlement is not dischargeable under Section 523(a)(4). Embezzlement requires proof that property of creditor was entrusted to Debtor; Debtor appropriated property for use other than that for which it was entrusted; and circumstances indicate fraud or deceit. Evidence indicated that Debtor embezzled funds where Debtor acted as contractor for government project with plaintiff Corporation being retained to perform and coordinate all work on project. When payments were received by Debtor from government agency, Debtor knew that Debtor was not entitled to keep entire amount yet Debtor made no effort to advise plaintiff when payments were received or to forward payments owed to plaintiff for services performed. Debtor instead used funds to pay overdue personal income taxes, corporate payroll taxes and insurance penalties. Debtor delayed distributing funds to plaintiff and concealed the fact that plaintiff had received funds from government agency until after vast majority of funds had been expended for Debtor's personal obligations. Debtor's diversion of funds constituted embezzlement resulting in debt being nondischargeable.
- (3082) *Allen v. Smith*, 2017 WL 1399685 (Bankr. M.D. Tn. 2017) – Section 523(a)(4) except debt from discharge based on fraud or defalcation while acting in fiduciary capacity; or embezzlement or larceny whether or not acting in a fiduciary capacity. Fraud or defalcation requires proof of pre-existing fiduciary relationship; breach of fiduciary relationship; and resulting loss. Fiduciary capacity requires express or technical trust including intent to create trust; Trustee; trust res; and definite beneficiary. Creditor's investment of funds into Corporation at behest of Debtor did not create actual or technical trust sufficient to support a finding of fraud or defalcation.
- (3083) *Townsel v. Recon Management Group, LLC*, 2017 WL 1130094 (E.D. Mi. 2017) - Collateral estoppel warranted determination of debt as nondischargeable where State Court Complaint that gave rise to default judgment incorporated elements of embezzlement referenced in State Court criminal conviction and State law elements of embezzlement for purposes of criminal proceeding were same as definition of embezzlement under bankruptcy code.
- (3084) *Poole v. Batson*, 2017 WL 788307 (Bankr. M.D. Tn. 2017) – Section 523(a)(4) excepts from discharge debts resulting from embezzlement or larceny. Embezzlement and larceny do not require fiduciary capacity. Embezzlement is defined as fraudulent appropriation of property by person to whom property has been entrusted, and requires proof that property of Creditor was entrusted to Debtor, that Debtor appropriate property for use other than that for which it was entrusted, and circumstances indicate fraud. Plaintiffs hired Debtors, a building contractor, to build project for plaintiffs and plaintiffs entrusted funds to Debtors for purposes related to that construction. Funds were used for purposes other than construction where Debtors used money for other business expenses unrelated to plaintiffs construction. Debtors knew that Debtors were having cash difficulties when they took the retainer and knew that plaintiffs understood that retainer would be used solely for construction of plaintiff's project. Debtors use of funds for other purposes constitutes embezzlement for purposes of Section 523(a)(4).
- (3085) *Federal Insurance Company v. Sorge*, Case No. 16-0168 (Bankr. E.D.N.C. 2017) – Section 523(a)(4) excepts from discharge Debtor resulting from embezzlement. Embezzlement does not require fiduciary relationship. Embezzlement requires that creditor entrusts money or property to Debtor, Debtor appropriates money or property for use other than that for which it was entrusted, and circumstances indicate fraud. Complaint did not contain sufficient facts to establish embezzlement. Complaint contained conclusory statements that defendant, an employee of plaintiff, committed embezzlement by approving fraudulent insurance claims but did not allege any factual basis to support the allegations.
- (3086) *Contemporary Imports, Inc. v. Morrow*, 2017 WL 122981 (Bankr. E.D. Tn. 2017) – Section 523(a)(4) allows court to except from discharge any debt for fraud or defalcation while acting in fiduciary capacity, or for embezzlement or larceny. Embezzlement means fraudulent appropriation of property by person to whom property has been entrusted or into whose hands it has lawfully come, but person uses or appropriates property for purpose other than that for which it was entrusted. Creditor must prove (1) that he entrusted property to Debtor; (2) that Debtor appropriated property for purpose other than that for which it was entrusted and (3) circumstances indicate fraud. Debtor embezzled proceeds of sale of automobile. Automobile was owned by Plaintiff and was entrusted to Debtor's company solely for repair, after which the vehicle was to be returned to a vehicle auctioneer. Instead, Debtor's company sold vehicle to third party, signed bill of sale to third party identifying Debtor's company as the owner, Debtor took the buyer's trade-in vehicle and cash for the full purchase price, and deposited check into company bank account. Debtor never disclosed to creditor that she had sold vehicle or made any attempt to provide accounting of proceeds and creditor did not discover sale until months later, long after sale had completed and Debtor had used proceeds for personal and business expenses.
- (3087) *Initial Investments, Inc. v. Woodford*, 2016 WL 7191534 (Bankr. E.D. Mi. 2016) – Embezzlement is fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has unlawfully come and requires a showing of wrongful intent. Debtor did not embezzle money when Debtor received check from insurance company payable to both Debtor and plaintiff/contractor, but sent check back and received replacement check payable only to Debtor. Debtor did not receive or retain proceeds of check payable to Plaintiff and Debtor and so could not have embezzled those proceeds. Debtor could not embezzle proceeds of replacement check as check was payable to Debtor alone. Plaintiff had no interest in that check or its proceeds and Debtor cannot embezzle property to which Debtor is the owner.
- (3088) *Sheen Falls Strategies, LLC v. Keane*, 2016 WL 6875879 (Bankr. N.D. Ohio 2016) – Embezzlement is fraudulent appropriation of property by person to whom property has been entrusted or into whose hands it has lawfully come where person then appropriates property for use other than that for which it was entrusted, and the circumstances indicate fraud. Embezzlement requires fraud in fact involving moral turpitude or intentional wrongdoing, for the purpose of permanently depriving another of his property. Debtor embezzled money when Debtor knew that the purpose of the loan was only for business, but he never used the money for its intended purpose. Instead, the Debtor spent the money on personal expenses. The circumstances of the loan also indicate fraud. The Debtor purposefully deprived creditor of its property when he solicited the loan where Debtor did not intend to use the loan for business purposes and Debtor lacked the intent to repay the loan.

- (3089) *Monson v. Galaz*, Case No. 15-14939 (11th Cir. 2016) – Action under Section 523(a)(4) requires evidence that Debtor wrongfully took or retained assets of a third party with fraudulent intent. Evidence did not demonstrate that borrower wrongfully absconded with lender's property where Debtor believed that Debtor's company owned equipment and that lender did not hold valid security interest as Debtor never signed the financing statement. Although Debtor may have been incorrect regarding ownership and validity of security interest, Debtor held good faith belief that equipment belonged to his company free and clear of any liens, and Debtor did not commit embezzlement by removing assets and equipment from company and transferring those assets to new company to open business in different location rather than return assets to lender to liquidate after default.
- (3090) *Johnson v. Loomis*, 2016 WL 5940941 (Bankr. S.D. Ohio 2016) – Debt not excepted from discharge for embezzlement where the obligations were loans between friends and were understood as such. Fact that Debtor may have not used funds wisely does not convert loan proceeds into embezzled property.
- (3091) *Cardwell v. Hester*, 2016 WL 5922307 (Bankr. W.D. Ky. 2016) – Embezzlement requires that (a) Debtor appropriate funds for his own benefit, and (b) with fraudulent intent or deceit. Evidence indicated that Debtor embezzled funds when he entered a store owned by Plaintiff an defendant jointly and removed funds from the safe. Funds belonged to the store or to Plaintiff and Debtor had no right to or interest in the funds, and Debtor admitted wrongfully removing funds for the store without the consent of plaintiff.
- (3092) *Federal Insurance Company v. Woods*, 2016 WL 4991514 (Bankr. W.D. Ky. 2016) – Cause of action barred where court action was not brought until after statute of limitations expired. Under Kentucky law, statute began to run on date on which embezzlement was, or reasonably could have been discovered. Plaintiff admitted that embezzlement was discovered in 2010 but State Court action was not commenced until 2015.
- (3093) *Smith v. Morse*, 2016 WL 3092630 (Bankr. E.D. Tn. 2016) – Embezzlement requires that creditor entrust property to Debtor, Debtor appropriates property for purpose other than that for which it was entrusted, and circumstances indicate fraud. Creditor who made loan to Debtor did not "entrust" Debtor with property of creditor, as creditor retained right to repayment and funds given to Debtor were no longer creditor's property at time Debtor used funds and funds did not have specific limitation on how funds could be used.
- (3094) *Szachta v. Thompson*, 2016 WL 1055582 (E.D. Mi. 2016) – Embezzlement requires that plaintiff entrusted funds to Debtor; that Debtor appropriated funds for purpose other than that for which it was entrusted; and circumstances indicate fraud. Debtor was office manager and bookkeeper for attorney. Attorney engineered scheme to misappropriate client funds, and Debtor was active participant in scheme, arranging for funds from settlement of personal injury cases to be deposited to IOLTA account and then withdrawing those funds for personal use of attorney rather than delivering funds to clients. Settlement funds were entrusted to attorney, not office manager. Absent fiduciary relationship resulting from entrustment to Debtor, plaintiff could not prevail against Debtor for embezzlement, even if office manager was active co-conspirator in wrongful removal and transfer of funds.
- (3095) *Coolants, Plus, Inc. v. Couch*, 2016 WL 97524 (Bankr. E.D. Ky. 2016) - State Court judgment has collateral estoppel effect where parties to State Court action were same as parties in dischargeability action. State Court default judgment is final judgment for purposes of collateral estoppel where Debtor initially appeared through counsel but counsel withdrew from representation shortly before trial and Debtor did not appear at trial. State Court specifically found that Debtor acted intentionally, willfully and maliciously and that conduct caused injury when Debtor, hired to run a branch office of plaintiff, created false invoices and used those to obtain payment from company and to then create competing company and use trade secrets and confidential information to divert plaintiff's customers. However, State Court judgment failed to contain sufficient findings for non-dischargeability under Section 523(a)(4) where judgment did not establish fiduciary relationship between Debtor and plaintiff.
- (3096) *Phi Air Medical, LLC, v. Holskey*, 2016 WL 616985 (Bankr. W.D. Ky. 2016) – Embezzlement is the wrongful appropriation of funds for person's own benefit done with fraudulent intent. Debtor incurred medical transport charge. Provider submitted invoices to Debtor's insurer. Insurer issued check to Debtor as partial reimbursement of expenses with directions for Debtor to pay provider directly. Instead, Debtor took money and used for personal and household purposes. Debtor knew that the funds belonged to the provider and that he had no right to retain or use the funds. Debtor's actions evidenced a wrongful taking of the funds with fraudulent intent or deceit.
- (3097) *Walker v. Federal Insurance Company*, 2015 WL 9491181 (Bankr. N.D. Ohio 2015) – Section 523 discharges unscheduled debt unless creditor lacked notice or knowledge of bankruptcy case in time to file adversary to except debt from discharge and debt is one that fits within Section 523(a)(2), (4) or (6). Creditor lacked notice where creditor was not scheduled or included in matrix and received no notifications from Court or from Debtor's counsel and Debtor presented no evidence that creditor had actual or constructive knowledge of bankruptcy case. Debt fell within Section 523(a)(4) where Debtor, while working at senior health care facility, used funds in residents' reimbursement accounts for her own purposes. Funds were in accounts for benefit of residents and not Debtor. Debtor covered up the missing funds by manipulating or forging the general ledger and records of the residents' accounts. Debtor's actions constituted embezzlement as property was entrusted to Debtor for a particular purpose, Debtor used those funds for purposes other than for which funds were entrusted, and circumstances indicated fraud evidenced by manipulation of accounts.
- (3098) *Jenkins v. Schmank*, 2015 WL 4555582 (Bankr. E.D. Tn. 2015) – Embezzlement is defined as fraudulent appropriation of property by person to whom such property has been entrusted or into whose possession it has lawfully come, but that is used for purpose different than that for which it was entrusted. Advance by plaintiff was non-dischargeable where Debtor induced plaintiff to advance another \$23,000 under representation that funds would be used for project but Debtor immediately withdrew \$11,500 for personal expenses. Debtor knew that funds were to be used for project and intentionally diverted funds for payment of personal expenses.
- (3099) *Smith v. Morse*, 2015 WL 4627940 (Bankr. E.D. Tn. 2015) – Embezzlement is fraudulent appropriation of property by person to whom the property has been entrusted or into whose hands it has lawfully come, and the person appropriates property for use other than that for which

it was entrusted under circumstances that indicate fraud. Creditor must prove (1) that he entrusted his property to the Debtor (2) that Debtor appropriated the property for a use other than that for which it was entrusted, and (3) that circumstances indicate fraud. Fraud requires element of moral turpitude or intentional wrong. Conflicting factual evidence prevented court from granting summary judgment. Although parties agreed that plaintiff gave defendant \$100,000, parties disagreed on purpose of the funds.

- (3100) *Meade v. Pinkerman*, 2015 WL 2445077 (Bankr. N.D. Ohio 2015) – Embezzlement requires that Debtor lawfully come into possession of property for specific purpose and that Debtor appropriate property for use other than that for which it was intended, under circumstances that sound in fraud. Plaintiff failed to demonstrate embezzlement where Debtor fraudulently came into possession of stock of business in first instance. Plaintiff cannot be said to have entrusted property to Debtor where property was obtained in first instance by wrongful conduct.
- (3101) *Duley v. Thompson*, 2015 WL 1622053 (Bankr. S.D. Ohio 2015) – Issue preclusion, also known as collateral estoppel, applies only when the issue to be precluded was necessary to the prior judgment and was actually litigated. If prior judgment is default judgment, it must contain express findings to be given preclusive effect. To be “actually litigated” in default judgment, moving party must have submitted admissible evidence apart from the pleadings and based on evidence submitted court must make findings of fact and conclusions of law that are sufficiently detailed to support application of collateral estoppel. Complaint and judgment finding that Debtor failed to assist in creating an accounting of trust assets and recitation that certain certificates of deposit were closed and money deposited into trust checking accounts were not sufficient to sustain scienter requirement of action under Sections 523(a)(2), (4) or (6). Default judgment made no findings of fact at all, and did not establish either a breach of fiduciary duty or any other intentional misconduct beyond allegation that assets were unaccounted for, without any allegation as to whether this was result of wrongful act or mere negligence or inadvertence. While expenses may have been found to be unreasonable, that does not amount to intent to cause injury.
- (3102) *Malinowski v. Whisman*, Case No. 14-2041 (Bankr. E.D. Mi. 2015) – Embezzlement requires proof of fraudulent appropriation of property by person to whom such property has been entrusted or into whose hands it has lawfully come. Defendant had no direct knowledge of mother’s wrongful conduct. Debtor was as young as 15 years old and estranged from mother, and was residing with father. Neither amount of transfers nor nature of transfers would raise suspicion and involved airfare to allow Debtor come home from college to attend a funeral, and purchase of a used automobile for defendant to use at college. There was insufficient evidence to link defendant to mother’s wrongful actions.
- (3103) *Kloeber v. Montanari*, 2015 WL 603874 (Bankr. E.D. Tn. 2015) – Embezzlement is fraudulent appropriation of property to whom the property has been entrusted or into whose hands the property has lawfully come. Plaintiff must prove both that creditor entrusted property to Debtor and that Debtor appropriated property to own use under circumstances indicating fraud. Fraud must be fraud in fact, not merely implied or constructive fraud. Court would not draw negative inference regarding intent based solely on Debtor’s assertion of Fifth Amendment privilege. Plaintiff did not establish that Debtor committed embezzlement where plaintiff established that Debtor’s withdrawals from company were in breach of forbearance agreement but did not establish fraud in fact or wrongful intent.
- (3104) *Go Wireless, Inc. v. Lehrmitt*, 2015 WL 351211 (Bankr. W.D. Ky. 2015) – Final Judgment entered by State Court entitled to preclusive effect to same extent as judgment would be afforded by court in which judgment was initially entered. Judgment by default is just as conclusive as any other judgment and is entitled to preclusive effect and binds bankruptcy court in later dischargeability proceeding. State Court judgment conclusively established every fact to support finding that debt was incurred by fraud while acting in fiduciary capacity. Debtor’s request that court disregard preclusive effect because Debtors are elderly, without significant assets or recourses, and care for special needs child and have health issues, unavailable as equitable determination would insert conditions into Section 523 that are not present in the statute.
- (3105) *Merritt v. Layne*, 2014 WL 4723081 (Bankr. E.D. Ky. 2014) – Plaintiff not entitled to judgment of non-dischargeability under Section 523(a)(4) where complaint did not allege that plaintiff entrusted funds to Debtor for specific purpose but that Debtor fraudulently used funds for Debtor’s own purposes as necessary to establish embezzlement.
- (3106) *City of Kentwood v. Salmon*, Case no. 14-80016 (Bankr. W.D. Mi. 2014) – State Court criminal conviction and Judgment of criminal restitution established all elements to except debt from discharge. Undisputed facts established in criminal proceeding established that Debtor embezzled funds from her employer that were transferred to her care in her duties as employee. Employer had superior right to the funds and Debtor obviously and intentionally interfered with that right by misappropriating the funds.
- (3107) *Altercare of Navarre Center for Rehabilitation & Nursing Care, Inc. v. Conley*, 2014 WL 1577236 (Bankr. N.D. Ohio 2014) – Embezzlement requires wrongful appropriation or use of property that has been entrusted to Debtor. Power of Attorney from grandmother to Debtor placed Debtor in control of grandmother’s property for use and benefit of Debtor. If Debtor misuse that property, then Debtor may have committed embezzlement as to grandmother. Creditor of grandmother could not bring action against Debtor for embezzlement of grandmother’s property merely because transfers removed assets that could otherwise have been used to pay creditor. Embezzlement must be direct relationship between Debtor and alleged victim of embezzlement.
- (3108) *Yoppolo v. Asbury*, 2014 WL 1323216 (Bankr. N.D. Ohio 2014) – Embezzlement requires fraudulent appropriation of property entrusted to person who then uses property for purposes other than that for which it was entrusted. One cannot embezzle property that one owns. Payments made by creditor to Debtor pursuant to land contract did not amount to obtaining money by embezzlement where money was not paid to Debtor for any particular purpose. While creditor may have thought that Debtor would use payments by creditor to make payments on underlying mortgage, there was no evidentiary basis for that understanding. There was no testimony that Debtor and creditor ever discussed the issue and nothing in the land contract required application of payments in any particular manner.
- (3109) *Kraus Anderson Capital, Inc. v. Bradley*, 507 BR 192(6th Cir. BAP 2014) – Embezzlement requires that property be entrusted to Debtor or that Debtor have lawfully acquired property; that Debtor appropriated property for a use other than that for which the property was intended;

and circumstances indicate fraud. Debtor cannot embezzle property that Debtor actually owns. Debtor's sale of collateral and retention of proceeds not "embezzlement" as lien creditor did not hold title to or any right to possess either the property or the proceeds, as both the property and the proceeds belonged to the Debtor, subject to lender's security interest. Mere security interest does not rise to level of ownership for purposes of embezzlement.

- (3110) *Liggett v. Schwartz*, 2014 WL 1028960 (E.D. Mi. 2014), *aff'd*, 2015 WL 4478033 (6th Cir. 2015) – Embezzlement requires fraudulent appropriation of property by person to whom the property has been entrusted or into whose hands it has lawfully come, where person then appropriates property for use other than that for which it was entrusted, under circumstances that indicate fraud. Debtor's use of property that is encumbered by interest of third party is generally a breach of contract and not embezzlement. Divorce judgment that awarded Wife a 50% interest in Husband's IRA did not convert IRA from property of Husband into property of Wife. Further, at no point did Wife entrust property to Husband. Husband cannot embezzle property that was Husband's property in the first instance.
- (3111) *First Assembly of God v. Ping*, 2014 WL 988491 (Bankr. S.D. Ohio 2014) – Embezzlement requires fraudulent appropriation of property by person into whose hands the property had been entrusted or to whom it has lawfully come. Creditor must prove that he entrusted property to Debtor and that Debtor appropriated property for use other than that for which it was entrusted under circumstances indicating fraud. Complaint that alleged conclusion that Debtor fraudulently converted Church funds but did not allege any facts suggesting entrustment of funds, or purpose for which funds were entrusted, or any facts that would demonstrate that the appropriation was done fraudulently, failed to state claim on which relief could be granted.
- (3112) *Bank of America v. Killgrove*, 2013 WL 7018546 (Bankr. E.D. Mi. 2013), *aff'd*, 2014 WL 4187988 (E.D. Mi. 2014) – Embezzlement requires that person unlawfully hold or misuse property of third party. Debtor cannot embezzle property that Debtor already owns. Debtor's use of collateral and disposition of that collateral is not embezzlement as Debtor owned the assets subject only to creditor's security interest. Further, there was no evidence that lender "entrusted" Debtor with loan proceeds, and proceeds belonged solely to Debtor upon disbursement by lender.
- (3113) *Rice v. Morse*, 504 BR 462 (Bankr. E.D. Tn. 2014) – Embezzlement requires the fraudulent appropriation of property by a person to whom the property has been entrusted or into whose hands it has lawfully come. Embezzlement requires proof that creditor entrusted property to the Debtor and that Debtor appropriated property for own use or use other than that for which it was entrusted, under circumstances indicating fraud. Fraud requires moral turpitude or intentional wrong, such as taking was done with fraudulent intent, and can be shown by circumstantial evidence. Complaint sufficiently alleged action for embezzlement. Plaintiff paid Debtor, a contractor, a deposit specifically to be used to construct home. Debtor did not use the funds for that purpose but instead used them for his own purposes including payment of operating expenses for Debtor's business and a sister company. Debtor diverted the money without plaintiff's knowledge or consent and had no intention of using the funds for construction of plaintiff's home as contracted.
- (3114) *Smith v. Morse*, 2014 WL 690608 (Bankr. E.D. Tn. 2014) – Embezzlement requires fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. A creditor proves embezzlement by showing that he entrusted his property to the Debtor, the Debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud. Fraud required is "fraud in fact, involving moral turpitude or intentional wrong, that Debtor had fraudulent intent in taking creditor's property, and encompasses any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another. Fraud does not require misrepresentation or misleading omissions, although misrepresentations, omissions and concealments are circumstances that evidence fraud. Creditor established embezzlement where Debtor borrowed money from creditor for purposes of building custom home that would be sold, with Debtor and creditor to split the profit. Debtor did not use the money to build the home but instead used the loan to pay general business debts and obligations. Debtor misrepresented the purpose of the loan and never intended to use the loaned funds for the stated purpose." However, creditor failed to sustain action against Debtor-wife where there was no evidence that wife took money, knew of loan, or received any benefit from loan.
- (3115) *General Motors, LLC v. Gunner*, 2013 WL 6628629 (Bankr. E.D. Mi. 2013) – Embezzlement requires the creditor have entrusted property to Debtor, Debtor's appropriation of property for Debtor's own use, and circumstances indicating fraud. Debtor properly issued correct and accurate invoices to Plaintiff which, due to internal processing errors, overpaid. Funds are not "entrusted" merely because the funds represent an overpayment. Payments made with "no strings attached" are not entrusted to Debtor for any agreed upon purpose. Further, payments were not made for a purpose other than intended by Plaintiff, as Plaintiff intended that funds be used for payment of invoices, and were actually applied for that purpose.
- (3116) *Bank of America v. Armstrong*, Case No. 13-6013 (8th Cir. BAP 2013) – Debtor committed embezzlement when Debtor received insurance proceeds from loss of property and used proceeds to pay personal expenses. Lender had security interest in the insurance proceeds and was named as the loss payee. Debtor had no right to receive the proceeds and when Debtor retained proceeds without forwarding those to the lender, Debtor wrongfully exercised dominion and control over lender's property.
- (3117) *Vicars v. Freeman*, 2013 WL 4447007 (Bankr. E.D. Tn. 2013) – Embezzlement is fraudulent appropriation of property by person to whom property has been entrusted or into whose hands the property has lawfully come. Creditor must show that property was entrusted to Debtor, that Debtor appropriated the property for purposes other than that for which it was entrusted, and the circumstances indicate fraud. President and majority shareholder did not embezzle corporate funds by having corporation pay mortgage on Debtor's home, where mortgage was taken out for purposes of generating capital to invest in the business. Payments by corporation on mortgage were legitimate payments of business expenses attributable to the loan. Use by Debtor and Debtor's father (also an employee of business) of trucks was not embezzlement where evidence indicated that Debtor and father drove trucks for business purposes including deliveries to customers, a normal and reasonable business expense and function. Creditor failed to demonstrate that payments by company on Debtor's personal credit cards was embezzlement where evidence indicated that credit cards in Debtor's name were used for corporate expenses and purposes. Debtor's salary

did not constitute embezzlement where, Debtor would occasionally receive more in a specific week than the annual salary prorated over 52 weeks, where Debtor never received more than the agreed upon annual salary in any given year. Payment of Debtor's home phone and internet expenses was not embezzlement where evidence indicated that Debtor often worked from home in the evenings and on weekends and used cell phones to stay in contact with customers and suppliers and for other business purposes. Checks written to IRS were payments of payroll taxes for which corporation and Debtor were jointly liable. As such, payments were for obligations owned by corporation which did not constitute embezzlement. Miscellaneous expenditures made by Debtor's father, while arguably improper, were not made by Debtor and were not authorized by Debtor, such that Debtor could not be held liable for misappropriation.

- (3118) *First National Bank v. Sierlein*, 2013 WL 4510769 (Bankr. E.D. Tn. 2013) – Embezzlement is defined as the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. Embezzlement requires proof of intentional wrong, not mere implied or constructive fraud. Debtor embezzled proceeds of casualty insurance that Debtor was required to maintain by terms of mortgage. After fire destroyed building, insurance company erroneously sent proceeds to Debtor rather than mortgagee as loss payee. However, lender could not maintain action because, after error was discovered, insurer sent second payment to bank to pay off loan. As such, while Debtor embezzled money in which bank had lien, bank did not suffer any actionable harm or damage. Insurance company was entitled to determination that debt was not discharged. Debtor received money from Insurance company and wrongfully retained the funds, entitling insurance company to have debt declared non-discharged.
- (3119) *Kraus Anderson Capital, Inc. v. Bradley*, 2013 WL 486789 (Bankr. N.D. Ohio 2013) – To prevail on claim of embezzlement, creditor must prove that (1) he entrusted his property to the Debtor or Debtor lawfully obtained the property, (2) the Debtor appropriated the property for a use other than that for which it was intended, and (3) the circumstances indicate fraud. Debtor did not embezzle proceeds of sale of equipment where security agreement allowed Debtor to sell equipment in ordinary course of business and sale appeared to be in ordinary course. Evidence also did not indicate fraud as Debtor intended to pay creditor and did make substantial payments after sale of equipment.
- (3120) *Lawson v. Conley*, 2012 WL 4845854 (Bankr. S.D. Ohio 2012) – Embezzlement is fraudulent appropriation of property by person to whom such property has lawfully come or to whom property has been lawfully entrusted. Embezzlement is proven by showing that: 1) the creditor entrusted his property to the Debtor, 2) the Debtor appropriated the property for a use other than that for which it was entrusted, and 3) the circumstances indicate fraud. Creditor owned trucks prior to commencement of business relationship with Debtor. As part of business relationship, creditor contributed trucks to business that Debtor was to operate, using the trucks, pursuant to agreement with Debtor to operate business and share profits. Creditor entrusted separate truck to Debtor by parking truck on Debtor's property for purposes of storage. Debtors deprived creditor of ownership and possessory rights in trucks by transferring titles and later disposing of the trucks in a manner inconsistent with the purposes for which the trucks were entrusted in the first instance. Although there was no evidence of any fraudulent intent at the time of entrustment, Debtors committed fraud by fabricating outstanding mechanic's bills in name of non-existent Company and using the fabricated bills filed a mechanics lien and unclaimed motor vehicle affidavit with state, thereby allowing Debtors to gain title to vehicles. Debtors then sent false and misleading notices to creditor that did not comply with statutory requirements in effort to defeat creditor's right to contest title transfer. Method of transfer established fraudulent intent to deprive creditor of title to trucks, leaving debt non-dischargeable.
- (3121) *Robinson v. Robinson*, 2012 WL 4715093 (Bankr. N.D. Ohio 2012) – Embezzlement is defined as fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. Embezzlement differs from larceny in that the embezzler's initial acquisition of the property is lawful. Creditor must prove that (1) he entrusted his property to the Debtor or Debtor lawfully obtained the property, (2) the Debtor appropriated the property for a use other than that for which it was intended, and (3) the circumstances indicate fraud. Evidence indicated that Plaintiff entrusted funds to Debtor with intent that Debtor hold funds for benefit of Plaintiff, and that Debtor used a portion of the funds for purposes other than that for which they were entrusted by using funds to pay for improvements to Debtor's home without permission. However, circumstances did not indicate fraud. Fraud requires moral turpitude or intentional wrong, for purpose of permanently depriving another of his property. Evidence indicated that Debtor did not intend to permanently deprive plaintiff of funds. Before Debtor used funds, he had been preapproved for a home equity loan subject to an adequate appraisal when home was completed and that Debtor intended to repay the funds when he received the loan. Downturn in housing market resulted in denial of loan that prevented repayment of funds. Mere negligence, even if characterized as gross negligence, is not the same thing as fraud. While Defendant had no authority to use the funds as he did, he did not have fraudulent intent to take money without repaying it. Debtor in good faith but erroneously believed that he was going to obtain the loan money to replace the funds used by him.
- (3122) *Dean v. Hunter*, 2012 WL 4343869 (Bankr. E.D. Tn. 2012) – Debtor, a building contractor, committed larceny when Debtor removed building materials from Plaintiff's property that plaintiff had paid for in connection with construction contract between Plaintiff and Debtor. Even if materials had properly come into Debtor's possession as the contractor performing the construction, Debtor's action in removing the materials constituted embezzlement. State Court judgment in favor of Plaintiff supported finding of embezzlement. Although judgment did not state that Debtor acted fraudulently or intentionally, State Court award of punitive damages supported finding of intent where state law required showing of actual malice for an award of punitive damages.
- (3123) *Frost & Co., Inc. v. Smithey*, 474 BR 830 (Bankr. N.D. Ohio 2012) – To prevail on complaint to except debt from discharge as one for Debtor's embezzlement: (1) creditor must have entrusted his property to Debtor; (2) Debtor must have appropriated the property for use other than that for which it was entrusted; and (3) the circumstances must indicate fraud. Chapter 7 Debtor, in his capacity as 50% shareholder of holding company and officer both in it and in related corporate entities that it owned, committed embezzlement of corporate funds as against other 50% shareholder where Debtor wrongfully used corporate funds to pay \$24,994.36 for personal legal services, \$8,856.76, for country club membership, and \$7,120.00 for painting work at Debtor's home.
- (3124) *Dantone v. Dantone*, 477 B.R. 28 (6th Cir BAP 2012) – Embezzlement requires proof that plaintiff entrusted property to Debtor; Debtor appropriated property for use other than that for which it was entrusted; and circumstances indicate fraud or deceit. Michigan judgment for statutory conversion established that plaintiff entrusted property to Debtor and that Debtor appropriated property for purpose other than that

for which it was entrusted. However, State Court complaint did not allege any indicia of fraud and indicia of fraud is not element of statutory conversion. Final Judgment in State Court awarding damages for statutory conversion was not collateral estoppel in action under Section 523(a)(4) because one necessary element under Section 523(a)(4) was not necessary or essential to State Court judgment.

- (3125) *Hulsing Hotels Tennessee, Inc. v. Steffner*, 2012 WL 3563978 (Bankr. E.D. Tn. 2012) – Creditor failed to demonstrate any property interest in property allegedly embezzled. Debtor caused LLC to engage in various loans and other inter-company transfers with sister corporation. Funds and property allegedly transferred were not those of creditor nor did creditor have any interest in those assets. Creditor, as creditor of LLC, did not have specific right to or interest in any particular piece of corporate property or corporate asset.
- (3126) *Schofield v. Prentice*, 2012 WL 3564020 (Bankr. E.D. Mi. 2012) – Plaintiff failed to demonstrate that Debtor embezzled funds of Plaintiff. Debtor was principal of corporation that owed money to Plaintiff. Debtor allegedly embezzled funds belonging to corporation and used those for Debtor's personal use. Plaintiff did not demonstrate any interest in funds embezzled and failed to join the corporate entities involved which is required for derivative action.
- (3127) *Automotive Finance Corp. v. Leonard*, 2012 WL 1565120 (Bankr. E.D. Tn. 2012) – Embezzlement requires fraudulent appropriation of property by a person to whom the property has been entrusted or into whose hands it has lawfully come. A Debtor cannot embezzle his own property for purposes of a § 523(a)(4) embezzlement action, even if a creditor has a security interest in that property. Debtor who allegedly sold inventory without remitting payments to floor plan lender did not embezzle, as the assets being sold and the proceeds of those sales belonged to Debtor and not to creditor.
- (3128) *Humphrey v. Morgan*, 2012 WL 1390246 (Bankr. E.D. Tn. 2012) – Embezzlement requires fraudulent appropriation of property by a person to whom the property has been entrusted or into whose hands it has lawfully come. Creditor must prove that he entrusted property to Debtor; that Debtor appropriate the property for a use other than that for which it was entrusted; and that the circumstances indicate fraud. "Fraud" requires some element of moral turpitude or intentional wrong and is much broader than just misrepresentations or misleading statements, although misrepresentations or omissions can be relevant to illuminate fraudulent intent. Complaint failed to state cause of action against Debtor-husband where complaint alleged that creditor entrusted property to Debtor-wife.
- (3129) *Bello Paradiso, LLC v. Hatch*, 465 BR 479 (Bankr. W.D. Mi. 2012) - Plaintiff who conspired with Debtor to engaging alleged fraudulent scheme to obtain property from third-party could maintain action against Debtor to have debt declared nondischargeable where Debtor misappropriated funds provided by plaintiff to Debtor for use in the underlying fraudulent scheme. Plaintiff and Debtor conspired to wrongfully obtained jewelry from third-party jewelry manufacturer which Debtor would then sell to plaintiff. Under manufactures standard wholesale agreement, plaintiff was not allowed to purchase jewelry directly from manufacturer, a restriction which was known to both plaintiff and Debtor. Instead, plaintiff the Debtor enter it into transaction were plaintiff would provide funds to Debtor for purpose of acquiring jewelry (which Debtor could properly acquire under the manufactures standard wholesale agreement) and the Debtor would then forward the jewelry to the plaintiff. Debtor obtained funds from plaintiff but did not use those funds for purchase of jewelry as acquired. Although underlying scheme was, itself, fraudulent, nature of underlying scheme did not provide a defense to plaintiff's action to declare obligation from Debtor to plaintiff nondischargeable based on embezzlement and conversion.
- (3130) *Jones v. Leedey*, 2011 WL 3678925 (Bankr. E.D. Mi. 2011) – State Court judgment that contained specific finding that Debtor removed and converted money from Plaintiff without proper authority or justification, the amount of \$131,489.99 was sufficient to support collateral estoppel judgment in adversary under Section 523(a)(4).
- (3131) *Ewers v. Cottingham*, 2011 WL 2118247 Bankr. E.D. Ky. 2011) *aff'd* 2012 WL 2161623 (6th Cir. BAP 2012) – Debtor husband's debt to wife's former employer from whom wife embezzled funds was not within Section 523(a)(4). Husband was not employee of employer and did not owe employer any fiduciary obligation and husband did not personally engage in any act of embezzlement or larceny.

8.185 Section 523(a)(4) – Bad Check

- (3132) *Tillmon v. Mack*, 2013 WL 3822075 (Bankr. N.D. Ohio 2013) – Action to except debt resulting from passing of bad check from discharge falls within Section 523 (a)(2) and (a)(4) for fraud and theft. Delivery of check without sufficient funds in account is not necessarily fraud. Theft requires some fraudulent and wrongful taking and carrying away of property with intent to convert property without consent of the owner. Embezzlement similarly requires showing of fraud. Debtor delivered check to plaintiff and advised plaintiff that there were not sufficient funds in the account, precluding finding of fraud in passing of check in first instance.

8.186 Section 523(a)(4) – Defalcation

- (3133) *HST Corporate Interiors LLC v. Sherrick*, 2017 WL 2889656 (Bankr. M.D. Tn. 2017) - Section 523(a)(4) results in debt being nondischargeable if debt results from fraud or defalcation while acting in fiduciary capacity. Fiduciary capacity requires pre-existing fiduciary relationship; breach of that relationship; and resulting loss. Debt not excepted from discharge where relationship between Debtor and creditor was arm's-length business relationship and did not involve any express or technical trust relationship or the placement of any specific property in hands of Debtor.
- (3134) *Allen v. Smith*, 2017 WL 1399685 (Bankr. M.D. Tn. 2017) – Section 523(a)(4) except debt from discharge based on fraud or defalcation while acting in fiduciary capacity; or embezzlement or larceny whether or not acting in a fiduciary capacity. Fraud or defalcation requires proof of pre-existing fiduciary relationship; breach of fiduciary relationship; and resulting loss. Fiduciary capacity requires express or technical trust including intent to create trust; Trustee; trust res; and definite beneficiary. Creditor's investment of funds into Corporation at behest of Debtor did not create actual or technical trust sufficient to support a finding of fraud or defalcation.
- (3135) *Process Engineering Associates, LLC v. Smith*, 2017 WL 685111 (Bankr. E.D. Tn. 2017) – Section 523(a)(4) exempts from discharge a debt

resulting from defalcation while acting in fiduciary capacity. Amount of nondischargeable debt includes actual damages plus interest at the applicable judgment rate. Payments made by Debtor prior to commencement of bankruptcy case are applied according to applicable state law. Creditor properly applied payments made by Debtor to interest accruing on State Court, Judgment. As amounts paid by Debtor did not cover full interest accrual, amount of debt determined to be nondischargeable included principal amount of debt plus all unpaid interest.

- (3136) *Federal Insurance Company v. Sorge*, Case No. 16-0168 (Bankr. E.D.N.C. 2017) – Section 523(a)(4) excepts from discharge Debtor resulting from defalcation while acting in fiduciary capacity. Term “fiduciary” is more narrowly construed than under state law and requires express or technical trust that predates alleged defalcation. Although employee under state law owes fiduciary duty to employer, that fiduciary duty is not sufficient for purposes of Section 523.
- (3137) *Initial Investments, Inc. v. Woodford*, 2016 WL 7191534 (Bankr. E.D. Mi. 2016) – Defalcation while acting in a fiduciary capacity require preexisting fiduciary relationship in the form of an express trust or technical trust; a breach of that fiduciary relationship; and resulting loss. An express trust requires (1) intent to create a trust; (2) a trustee; (3) a trust res; and (4) a definite beneficiary. Work authorization between Debtor and Contractor to perform work to be paid by Debtor’s insurance company did not create “trust” as Work Authorization did not state any intent to create a trust, did not have any designated trust res, and did not designate a beneficiary. Authorization required Debtor to pay for services provided and to endorse insurance payments received by Debtor to Plaintiff or fork performed, and Debtor clearly breached that agreement by retaining and not turning over insurance proceeds, but that is not sufficient to establish express trust relationship. Even if trust relationship exists, defalcation requires that Debtor knows that conduct is wrongful and reckless at a level of criminality. Debtor did not turn over proceeds because Debtor believed that work had not been performed in satisfactory manner and that Plaintiff was not owed the invoiced amount. While Debtor may have been incorrect in her conclusions, that did not alter fact that Debtor held sincere belief that money was not owed, such that Debtor’s conduct did not rise to level of wrongful or reckless.
- (3138) *Johnson v. Loomis*, 2016 WL 5940941 (Bankr. S.D. Ohio 2016) – Claim for non-dischargeability for defalcation denied where evidence did not indicate any fiduciary relationship between parties. There was no proof of any trust relationship between parties. At most, parties were friends and loans were product of plaintiff’s desire to remain active after retirement by providing voluntary services to Debtor’s business, neither of which gives rise to express or technical trust relationship.
- (3139) *Cardwell v. Hester*, 2016 WL 5922307 (Bankr. W.D. Ky. 2016) – Exception for discharge for “fraud or defalcation” requires a pre-existing express or technical trust between plaintiff and defendant which defendant then violated by taking property or money for purposes inconsistent with the trust relationship. Plaintiff and Defendant were business partners but there was no express or technical trust relationship between them precluding recovery under Section 523(a)(2) for fraud or defalcation.
- (3140) *Federal Insurance Company v. Woods*, 2016 WL 4991514 (Bankr. W.D. Ky. 2016) – Fraud or defalcation requires proof of fiduciary relationship between Debtor and creditor. Fiduciary capacity for purposes of non-dischargeability requires express or technical trust, and does not extend to implied trusts that arise by operation of law as matter of equity. Although Debtor, as employee of company, had ability to have checks issued by company, that did not create express or technical trust relationship such that Debtor’s wrongful issuance of checks to himself is not fraud while acting in fiduciary capacity.
- (3141) *Szachta v. Thompson*, 2016 WL 1055582 (E.D. Mi. 2016) – Defalcation requires (1) pre-existing fiduciary relationship; (2) breach of that relationship; and (3) resulting loss. Fiduciary capacity is narrowly defined as express or technical trust resulting from placement of specific res in hands of Debtor with intent to create trust with Debtor as trustee. Debtor was office manager and bookkeeper for attorney. Attorney engineered scheme to misappropriate client funds, and Debtor was active participant in scheme, arranging for funds from settlement of personal injury cases to be deposited to IOLTA account and then withdrawing those funds for personal use of attorney rather than delivering funds to clients. Settlement funds constituted trust but attorney, not office manager, was trustee. Michigan rules of professional conduct impose duty on attorney to safeguard funds. Debtor, as office manager, did not owe fiduciary duty to clients and so debt resulting from misappropriation by attorney, even if Debtor was active participant and co-conspirator, did not constitute defalcation by Debtor.
- (3142) *United Fire & Casualty Co. v. Eldridge*, 2015 WL 5996417 (Bankr. E.D. Ky. 2015) – Complaint is fatally defective where there is no debt to be excepted from discharge. Debtor’s obligation to plaintiff was discharged in prior bankruptcy case. Debtor’s second bankruptcy filing 10 years later did not revive debt for purposes of determining dischargeability even where Debtor’s schedules in the second case listed the debt as undisputed and non-contingent.
- (3143) *Jenkins v. Schmank*, 2015 WL 4555582 (Bankr. E.D. Tn. 2015) – Section 523(a)(4) requires pre-existing fiduciary relationship; breach of that relationship; and resulting loss. Whether fiduciary relationship exists is matter of state law. Under state law, members of partnership owe fiduciary obligation to other partners regarding assets and funds of partnership. Debtor obtained money from partner based on representation that funds would be used for business but instead Debtor used half of the funds for payment of personal expenses in violation of terms of partnership agreement. Debtor’s use of funds constituted defalcation for purposes of Section 523.
- (3144) *Cornerstone Industries Corp v. Kaufman*, 2015 WL 4692569 (Bankr. W.D. Ky. 2015) – Collateral estoppel prevents defendant from relitigation factual elements of non-dischargeability claims. Issue preclusion requires four components: (1) identity of issues; (2) a final decision or judgment on the merits, (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a prior losing litigant. Defalcation requires express or technical trust where one party places specific res in hands of Debtor. Fiduciary relationship alone is not enough, and agent-principal relationship is insufficient to meet “fiduciary” standard. State Court judgment was not collateral estoppel where state law definition of fiduciary duty was broader than Section 523(a)(4) as it included not only actual trust relationships but fiduciary relationship between director or managing officer and corporation and stockholders.
- (3145) *Malinowski v. Whisman*, Case No. 14-2041 (Bankr. E.D. Mi. 2015) – “Fiduciary Relationship” requires express or technical trust, consisting of an intent to create a trust; a trustee; a trust res; and a definite beneficiary. Plaintiff did not establish trust relationship with Debtor where

Plaintiff's trustee was defendant's mother, not defendant. Although mother unquestionably breached fiduciary duty by using trust assets for her own purpose, including gifts to defendant, those transfers did not themselves place defendant in position of "trustee" of express trust. Absent a trust relationship between Plaintiff and defendant, Plaintiff could not state cause of action for fraud or defalcation. Evidence also failed to demonstrate that defendant acted with requisite intent. Defalcation requires an intentional wrong, or that the trustee consciously disregards or is willfully blind to a risk that his conduct will turn out to violate fiduciary duty. Risk must be of such a nature and degree that considering nature and purpose of fiduciary's conduct and circumstances known to him, conduct involves gross deviation from standard of conduct that law abiding person would observe in similar situation. Defendant had no direct knowledge of mother's wrongful conduct. Debtor was as young as 15 years old and estranged from mother, and was residing with father. Neither amount of transfers nor nature of transfers would raise suspicion and involved airfare to allow Debtor come home from college to attend a funeral, and purchase of a used automobile for defendant to use at college.

- (3146) *Merritt v. Layne*, 2014 WL 4723081 (Bankr. E.D. Ky. 2014) – Plaintiff not entitled to judgment of non-dischargeability under Section 523(a)(4) where complaint failed to allege existence of actual or technical trust between parties pursuant to which Debtor was to hold property solely for benefit of plaintiff.
- (3147) *Herbert v. Hesse*, 2014 WL 4536273 (Bankr. S.D. Ohio 2014) – Complaint adequately alleged cause of action against Debtor, principal of defunct corporation, for failing to fund retirement plan. Company withheld 3% of employee's pay for contribution to benefit plan but did not actually make the contributions. Record was not sufficiently developed to allow court to determine whether Debtor's control over corporation and over retirement plan were sufficient to allow court to hold Debtor personally responsible. However, to extent contract between employee and corporate entity required entity to also make matching contributions, complaint failed to allege any fiduciary obligation between company and employee or between Debtor and employee, where obligation was merely contractual in nature.
- (3148) *Auto-Owners Insurance Company v. Fitzgerald*, 2014 WL 1117090 (Bankr. N.D. Ohio 2014) – Whether conduct of Debtor amounts to defalcation is based on subjective standard, whether the conduct was intentionally wrong to involved bad faith, moral turpitude or immoral conduct; or where conduct was equivalent to conscious disregard of a substantial and unjustifiable risk that conduct will violate fiduciary duty. Mere negligence or recklessness is not sufficient. State Court findings that Debtor's conduct as fiduciary for decedent's estate was not sufficient to prove mental state. State Court findings that Debtor did not fulfill duties and engaged in self-dealings and wasted assets by keeping estate open for Debtor's personal benefit did not demonstrate requisite mental state where state law did not required proof of bad faith or culpability. Debtor was not professional and had no special knowledge regarding or experience in dealing with probate matters and Debtor was represented by competent counsel. Debtor's allegations that he followed instructions of attorneys and probate court and never instructed attorney to do work for his personal benefit presented sufficient disputed issues of material fact to preclude summary judgment.
- (3149) *Liggett v. Schwartz*, 2014 WL 1028960 (E.D. Mi. 2014) – Defalcation requires pre-existing fiduciary relationship, breach of that relationship, and resulting loss. Fiduciary capacity must be express or technical and does not encompass constructive or implied or resulting trusts. Divorce decree that awarded Wife a 50% interest in Husband's IRA was not express or technical trust. At best, decree created constructive trust which will not support determination of non-dischargeability under Section 523(a)(4).
- (3150) *First Assembly of God v. Ping*, 2014 WL 988491 (Bankr. S.D. Ohio 2014) – Fiduciary capacity results from express or technical trusts, where the parties have intent to create trust, there is a designated trustee and trust res, and a designated beneficiary. Fiduciary capacity can also arise from relationships established by law as long as the relationship existed prior to the alleged wrongdoing. Conclusory statement in adversary complaint that Church Pastor was "acting as a fiduciary for [the church] pursuant to his position as Pastor" was not sufficient as the conclusion failed to allege any factual basis for the statement and the complaint otherwise alleged only an employer-employee relationship which does not constitute fiduciary relationship.
- (3151) *Great American Insurance Company v. Poynter*, 459 BR 679 (Bankr. W.D. Ky. 2011), *aff'd* 2012 WL 4959566 (E.D. Ky. 2012), *aff'd* 2013 WL 4779583 (6th Cir. 2013) – Fraud or defalcation while acting in fiduciary capacity requires failure to produce funds entrusted to fiduciary but does not necessarily require proof of fraud, embezzlement or misappropriation. Defalcation must occur in course of express or technical trust arising from placement of specific res in hands of Debtor. Indemnity agreement between contractor's sole owner and issuer of payment and performance bond created trust where agreement stated that funds received under construction contract were trust funds, identified the beneficiaries of the trust funds, and designated the company and its principal as trustees. Debtor breached fiduciary obligation by receiving funds for bonded construction projects and used funds to pay lender and Debtor's former company rather than paying job creditors and suppliers.
- (3152) *Auto Owners Insurance Company v. Fitzgerald*, 2013 WL 4853316 (Bankr. N.D. Ohio 2013) - Plaintiff must establish (1) a pre-existing fiduciary relationship, (2) a breach of that relationship, and (3) resulting loss. Debtor must have held funds in a trust for the benefit of a third party to pursuant to an express or technical trust relationship arising from placement of a specific res in the hands of the Debtor. Debtor's status as personal representative of decedent's estate created the requisite technical trust as specific assets (the estate) were placed in hands of Debtor for administration for benefit of heirs. State Court surcharge order established that Debtor engaged in self-dealing causing a loss to estate. State Court judgment concluded that Debtor was removed as administrator for failing to follow the Probate Court's order to distribute estate proceeds to the rightful heir of the decedent; Debtor had a conflict of interest in that he claimed a right to the proceeds of the decedent's estate; Debtor had a duty to avoid self-dealing and is responsible for attorney fees and expenses paid by the estate that relate to his personal claims; Debtor did little to administer the estate and kept the estate open for his own personal benefit in pursuing his claim to estate assets; the majority of attorney fees incurred by the beneficiary of the estate and ordered by the court to be paid from estate proceeds would not have been incurred but for Debtor's self-dealing; and the majority of the reasonable and necessary services of successor administrator were the result of Debtor failing to complete his duties as administrator rather than concentrating on advancing his own claims to the estate proceeds. Probate Court concluded that Debtor did not fulfill duties as administrator in accordance with his oath, engaged in self-dealing and caused a waste of estate assets and entered judgment in favor of the successor administrator of the estate and against Debtor

in the amount of \$148,029.76. However, State Court record was insufficient to establish that any defalcation met the subjectively reckless standard established in *Bullock*. While conduct may have been objectively reckless, non-dischargeability turns on Debtor's subjective state of mind, which was not sufficiently demonstrated in the record.

- (3153) *State Farm Fire & Casualty Co. v. Murphy*, 2013 WL 1759555 (Bankr. E.D. Mi. 2013) – Sixth Circuit law requires actions by trustee to be objectively reckless. Mere negligence or mistake of fact by the trustee is not sufficient to constitute defalcation. State Court removal of trustee and appointment of replacement trustee did not, in itself, establish that original trustee had acted in objectively reckless manner. Record was insufficient to determine whether Debtor had committed defalcation in light of contradictory evidence that Debtor did the best job she could and that any distributions from the trust were made to third parties solely at the direction of the beneficiary of the trust.
- (3154) *Bullock v. BankChampaign*, 133 S. Ct. 1754 (2013) - Defalcation under Section 523(a)(4) requires element of intent or scienter on part of Debtor who allegedly committed defalcation. Defalcation requires culpable state of mind involving knowledge or, or gross recklessness in respect to, the improper nature of the fiduciary behavior. While conduct may have been "objectively reckless", that is not sufficient for purposes of defalcation under Section 523(a)(4). Record was insufficient for court to determine whether trustee's conduct met "scienter" standard where evidence indicated that trustee engaged in self-dealing by taking loans from trust assets but then repaying those loans with interest at market rate. Case remanded for further proceedings.

8.187 Section 523(a)(4) – Builders Trust Fund Act

- (3155) *Iverson's Building Supply Company, Inc. v. Brown*, Case No. 15-3149 (Bankr. E.D. Mi. 2016) – Defalcation requires proof that Debtor misappropriated money or property entrusted to him as fiduciary. Fiduciary relationship must be express or technical trust and must pre-date debt that is at issue. Michigan Builders Trust Fund ACT (MBTFA) creates fiduciary relationship between contractor and subcontractors, suppliers and laborers, that requires Contractor to use all funds received from owner to first to pay subcontractors, materialmen and laborers. Debtor violated MBTFA and breached fiduciary obligation to supplier when Debtor used portion of proceed paid to contractor for purposes other than payment of suppliers, subcontractors and laborers. Evidence indicated that Debtor received payments totaling \$23,5028 and paid subcontractors, materialmen and laborers \$19,965.70. Debt to unpaid supplier is non-dischargeable to extent of \$3,536.38 that Debtor received from owner but did not use to pay MBTFA beneficiaries. Balance of unpaid amount owed to supplier is dischargeable as Debtor did not receive, and could not have committed defalcation of, any remaining amounts.
- (3156) *Shears v. Vestal*, Adv. No. 12-80330 (Bankr. W.D. Mi. 2014) – Debtor's violation if Michigan Builders Trust Fund Act does not automatically establish level of scienter or intent required to except debt from discharge after Supreme Court's decision in *Bullock v. BankChampaign*, 133 S. Ct. 1754. Plaintiff bringing action under Section 523(a)(4) must prove more than the fact that the Debtor received funds for purposes of performing construction but did not use those funds to pay materialmen and suppliers. Plaintiff must also prove that Debtor knew that his conduct was improper or that Debtor disregarded a substantial and unjustifiable risk that conduct would breach fiduciary duty. Evidence indicated that Debtor had good faith basis to believe that he had right to retain "security deposit" after Plaintiff cancelled the contract where contract terms indicated that if Plaintiff breached the agreement, Debtor could retain the deposit as liquidated damages. Further, Debtor contacted his attorney who advised Debtor that Debtor had right to retain funds. While Debtor's interpretation of contract may have been incorrect, giving rise to debt between Debtor and Plaintiff, good faith interpretation of contract, bolstered by opinion of counsel, did not support finding of intentional wrongdoing or conduct that created substantial risk of breach of duty.
- (3157) *Bakdaleyeh v. Warpup*, Adv. No. 11-3041 (Bankr. E.D. Mi. 2012) – Plaintiff's complaint under Michigan Builders Trust Fund Action against Debtor-wife dismissed where complaint did not establish that wife agreed to perform or oversee building activities. Although Debtor-wife may have been signatory on business bank account, that status without more did not trigger MBTFA.
- (3158) *Astro Building Supplies, v. Slavik*, 2011 WL 6157348 (6th Cir. 2011) – Michigan Builders Trust Fund Act requires proof that the contractor received money for labor or materials provided on a construction project but failed to use those funds to first pay laborers or materialmen who performed labor or furnished materials for the specific project. Labor or materials must be provided for a specific, identifiable project and only the funds from that specific project are impressed with the trust under MBTFA. Plaintiff could not prevail under MBTF where evidence did not indicate that materials had been sold to Debtor for a specific project. Instead, evidence indicated that materials were generally sold to Debtor on an open account, which is not sufficient to support non-dischargeability.
- (3159) *Zeeland Lumber & Supply Co. v. Harttung*, 2011 WL 1600544 (Bankr. W.D. Mi. 2011) – Violation of Michigan Builder Trust Fund Act creates statutory trust, such that violation results in non-dischargeable debt. The *prima facie* elements under Michigan Building Contract Fund Act are: (1) the defendant is a contractor engaged in the building construction industry, (2) a person paid the contractor for labor or materials provided on the construction project, (3) the defendant retained or used those funds, or any part of those funds, (4) for any purpose other than to first pay laborers, subcontractors, and materialmen, (5) who were engaged by the defendant to perform labor or furnish material for the specific project. Debtor's closely held corporation contracted to build a cottage and contracted with Zeeland Lumber to provide materials on the project, but did not pay for the materials. Corporation received \$197,300.00 on account of the project, and this sum constitutes the *res* of a statutory trust. Debtor as the person with authority for management and funds of the corporation was a contractor within MBTFA and is liable for failure to cause corporation to pay suppliers, rendering Debtor personally liable for non-dischargeable debt.
- (3160) *Emergency Restoration Company v. Fiore*, Case No. 08-4685 (Bankr. E.D. Mi. 2011) – Michigan Builders Trust Fund Act requires proof that the contractor received money for labor or materials provided on a construction project but failed to use those funds to first pay laborers or materialmen who performed labor or furnished materials for the specific project. Labor or materials must be provided for a specific, identifiable project and only the funds from that specific project are impressed with the trust under MBTFA. Plaintiff failed to prove that Debtor actually received payment on a specific project or that Debtor failed to use those funds to pay plaintiff.
- (3161) *Comfort Control Supply Company, Inc. v. Hunter*, 2010 WL 3786032 (Bankr. W.D. Mi. 2010) – Section 523(a)(4) renders non-

dischargeable debts resulting from fraud or defalcation while acting in a fiduciary capacity. Section 523(a)(4) requires express or technical trust resulting from the placement of specific res in the hands of the Debtor. Michigan Builders Trust Fund Act imposes an express trust on any building contractor for funds paid to the contractor for the benefit of contractors, laborers, subcontractors or materialmen. To establish a cause of action based upon alleged violations of the MBTFA, a creditor-beneficiary must prove that: (1) the Debtor-defendant is a contractor or subcontractor in the building construction industry; (2) a person paid the Debtor for labor or materials to be used on the construction project; (3) the Debtor retained or used a portion or all of the funds; (4) for any purpose other than to first pay laborers, subcontractors or material men; (5) who were engaged or hired by the Debtor for the construction project. MBTFA does not apply to purchases of supplies for general use or inventory. MBTFA applies only to supplies purchased for specific project where contractor then incorporates those supplies and receives payment from the owner or contractor. Debt held non-dischargeable to extent supplier could link specific purchase to specific projects and prove that Debtor had been paid for those projects but failed to pay supplier.

- (3162) *Strickfaden v. Sangal*, 2010 WL 3583427 (E.D. Mi. 2010) – Section 523(a)(4) action has three requirements: (1) fiduciary relationship; (2) breach of fiduciary duty; and (3) resulting loss. Under Michigan Builders Trust Fund Act, builder had fiduciary obligation to owner that was breached when builder collected funds for subcontractors and then failed to pay those subcontractors. However, breach did not result in damages where builder was able to provide detailed accounting of funds showing that builder spent more on the construction than owner paid builder. Although builder committed a technical breach of the trust by failing to pay all subcontractors, owner could not show damages where all of owner's money was, in fact, used for the construction.
- (3163) *Fingerle Lumber Co. v. Boychuck*, Case No. 09-5477 (Bankr. E.D. Mi. 2010) – Michigan Builder Trust Fund Act (MBTFA) establishes fiduciary relationship between contractor and subcontractor and suppliers, and a failure to pay funds received by the contractor for payment to suppliers and subcontractors is a defalcation while acting in a fiduciary capacity. Supplier who received partial reimbursement from State Builders Recovery Fund did not extinguish the debt from Contractor to Supplier, but did create right to Recovery Fund to repayment from Supplier if and when Supplier received payment. If debt is non-dischargeable, then interest and cost components to the debt are also non-dischargeable.
- (3164) *Astro Building Supplies, Inc., v. Slavid*, 2010 WL 2772509 (E.D. Mi. 2010) – To find a debt non-dischargeable under § 523(a)(4) due to defalcation, Plaintiff must prove: (1) a pre-existing fiduciary relationship, (2) breach of that fiduciary relationship, and (3) a resulting loss. Fiduciary capacity requires an express or technical trust relationship arising from placement of a specific res in the hands of the Debtor. A statute may create a trust if that statute: (1) defines the trust res; (2) imposes duties on the trustee; and (3) those duties exist prior to any act of wrongdoing. The Michigan Builders Trust Fund Act (MBTFA), imposes a trust with the contractor operating as the trustee, upon the funds paid by any person in connection with a building contract. When a Debtor violates the MBTFA in his capacity as a contractor and fiduciary of the building contract fund, the resulting debt may be non-dischargeable. The general contractor a trustee of project funds and must pay laborers, subcontractors, and materialmen before himself, his employees and any other expenses. Plaintiff must establish that it provided supplies to the defendant contractor for use on a specific construction project, that the defendant contractor was paid by its customer for the specific construction project where those supplies were used, and that the defendant contractor failed to pass on the payment it received from that specific project to the plaintiff. It is not the mere provision of supplies to a contractor which creates a trust, it is instead the payment of funds on a specific project where those supplies were consumed which creates the trust under the MBTFA. MBTFA is not implicated unless and until Plaintiff can demonstrate that payments were received by Debtor on a specific project for which it provided supplies. Plaintiff failed to identify any specific project for which it provided Debtor materials, let alone a specific project for which it provided supplies and Debtor also received payment. Parties merely transacted business on an open account basis and Debtor failed to pay the “running balance” on that account to zero. As such, the exception set forth in the defalcation provision, 11 U.S.C. §523(a)(4), is inapplicable.
- (3165) *Patel v. Shamrock Floorcovering Services, Inc.*, 565 F.3d 963 (6th Cir. 2009) – violation of Michigan Builder Trust Fund Act constitutes “defalcation in a fiduciary capacity” resulting in debt being non-dischargeable pursuant to section 523(a)(4). Corporation obtained payments from homeowners but failed to pay suppliers for goods and services provided in connection with the improvements. After Corporation closed, the corporate principle filed for relief under Chapter 7. Court, applying state law definitions and concepts under the MBTFA, concluded that corporate officer can be held personally liable under MBTFA as a “contractor” owing a fiduciary duty to suppliers. The use of monies paid for purposes other than to pay laborers, subcontractors or materialmen constitutes defalcation under section 523(a)(4) as long as the use was not the result of mere negligence or mistake of fact. Corporate principle recklessly misallocated funds and failed to pay subcontractors where corporate accounting was “woefully inadequate”, that the business operations were “sloppy at best” and the corporate principle did not know if an overall accounting was done or how much exactly was owed to Shamrock.

8.188 Section 523(a)(4) – PACA Claims

- (3166) *S&H Packing & Sales Co. v. Tanimura Distributing, Inc.*, Case No. 14-56059 (9th Cir. 2017) – PACA creates statutory trust that protects growers from not being paid by giving producers rights a head of accounts receivable financing. True sale of accounts receivable precludes farmers from recourse under PACA against purchaser of receivables. Court must determine whether true sale of receivables actually occurred and whether sales were commercially reasonable. Court noted split between prior 9th Circuit precedent and decisions in other Circuits that have considered issue and suggested 9th Circuit needed *en banc* review to reconcile split. Other Circuits focus on whether sale transferred risk from original lender to “receivable purchaser” in determining whether transaction was true sale versus secured lending relationship.
- (3167) *R.A.M Produce Distributors, LLC v. Cipriano*, 2015 WL 3441212 (E.D. Mi. 2015) – Action against principal of corporation that purchased perishable agricultural products is action for breach of fiduciary duty owed by principal of purchaser to seller under PACA, to hold and preserve statutory trust assets for benefit of seller. Action by seller against principal is not action to collect debt as the debt runs from the purchaser corporation to the seller, and there was no personal guarantee or undertaking by principal to pay debt. Statute of Limitations is state law limitations period for actions for breach of fiduciary duty. Action against principal to except debt from discharge untimely where

action not brought until after state statute of limitations expired on actions for breach of fiduciary duty, even if statute of limitations on collection of underlying debt itself has not expired.

- (3168) *Indianapolis Fruit Co. v. Locavore Food Distributors, Inc.*, 2011 WL 4373976 (E.D. Mi. 2011) – Individual who controls activities of Corporation that is subject to PACA trust is liable to unpaid suppliers to the extent that the assets of the Corporation are insufficient to pay the PACA trust obligations. Corporation is subject to PACA trust if Corporation purchases aggregate quantities of perishable commodities in excess of 2,000 pounds in one day. Corporation is subject to PACA trust where Corporation does not purchase 2,000 pounds from any one supplier on any day, but does purchase an aggregate 2,000 pounds from all suppliers combined in any given day.
- (3169) *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.

8.189 Fiduciary Relationship

- (3170) *Thomas v. Covey*, Case No. 16-3108 (Bankr. E.D. Mi. 2017) – Exception to discharge for fraud or defalcation requires fiduciary capacity in for of express or technical trust; breach of that fiduciary relationship; and resulting loss. Express trust requires intent to create trust; trustee; trust res; and definite beneficiary. Once Plaintiff establishes existence of trust and that defendant is trustee, burden shifts to defendant to prove that defendant acted in good faith and made full disclosures of all facts and that defendant has accounted for all trust assets received. Defalcation occurs when trustee misappropriates or fails to properly account for trust funds and requires conduct that fiduciary knows is improper or is reckless to extend that criminal law treats conduct as intentional, and includes conduct where fiduciary consciously disregards or is willfully blind to substantial and unjustifiable risk that conduct will prove to violate fiduciary duty. Debtor was personal representative of decedent's estate, creating necessary fiduciary relationship. To extent Debtor owed money to estate based on loans from decedent to Debtor during decedent's lifetime, those loans did not amount to any unusual amounts incurred or owed to father's estate. However, loans from father to Debtor's son would have been collected by Debtor as amounts were owed for rent incurred by son in residing with decedent yet Debtor failed to make any effort to collect that amount while disbursing more than this amount to Son as directed in decedent's will. Debtor also breached fiduciary duty by withdrawing more than \$16,000 from estate after State Court had appointed special Personal Representative to take over estate administration without notifying special PR or obtaining consent to withdraw funds allegedly to reimburse Debtor for expenses incurred in administration of estate.
- (3171) *HST Corporate Interiors LLC v. Sherrick*, 2017 WL 2889656 (Bankr. M.D. Tn. 2017) - Section 523(a)(4) results in debt being nondischargeable if debt results from fraud or defalcation while acting in fiduciary capacity. Fiduciary capacity requires pre-existing fiduciary relationship; breach of that relationship; and resulting loss. Debt not excepted from discharge where relationship between Debtor and creditor was arm's-length business relationship and did not involve any express or technical trust relationship or the placement of any specific property in hands of Debtor.
- (3172) *Allen v. Smith*, 2017 WL 1399685 (Bankr. M.D. Tn. 2017) – Section 523(a)(4) except debt from discharge based on fraud or defalcation while acting in fiduciary capacity; or embezzlement or larceny whether or not acting in a fiduciary capacity. Fraud or defalcation requires proof of pre-existing fiduciary relationship; breach of fiduciary relationship; and resulting loss. Fiduciary capacity requires express or technical trust including intent to create trust; Trustee; trust res; and definite beneficiary. Creditor's investment of funds into Corporation at behest of Debtor did not create actual or technical trust sufficient to support a finding of fraud or defalcation.
- (3173) *Federal Insurance Company v. Sorge*, Case No. 16-0168 (Bankr. E.D.N.C. 2017) – Section 523(a)(4) excepts from discharge Debtor resulting from defalcation while acting in fiduciary capacity. Term "fiduciary" is more narrowly construed than under state law and requires express or technical trust that predates alleged defalcation. Although employee under state law owes fiduciary duty to employer, that fiduciary duty is not sufficient for purposes of Section 523.
- (3174) *Johnson v. Loomis*, 2016 WL 5940941 (Bankr. S.D. Ohio 2016) – Claim for non-dischargeability for defalcation denied where evidence did not indicate any fiduciary relationship between parties. There was no proof of any trust relationship between parties. At most, parties were friends and loans were product of plaintiff's desire to remain active after retirement by providing voluntary services to Debtor's business, neither of which gives rise to express or technical trust relationship.
- (3175) *Federal Insurance Company v. Woods*, 2016 WL 4991514 (Bankr. W.D. Ky. 2016) – Fiduciary capacity for purposes of non-dischargeability requires express or technical trust, and does not extend to implied trusts that arise by operation of law as matter of equity. Although Debtor, as employee of company, had ability to have checks issued by company, that did not create express or technical trust relationship such that Debtor's wrongful issuance of checks to himself is not fraud while acting in fiduciary capacity.
- (3176) *Cora v. Jahrling*, 2016 WL 1073240 (7th Cir. 2016) – Former client's malpractice recovery against former attorney who filed for bankruptcy was excepted from discharge as defalcation while acting in fiduciary capacity. Defalcation requires culpable state of mind involving knowledge of or gross recklessness with respect to improper nature of fiduciary behavior. Conduct must be such that fiduciary knows it to be improper or fiduciary consciously disregards or is willfully blind to substantial and unjustifiable risk that conduct will violate fiduciary duties. Attorney's conduct in representing client who could not speak English and with whom attorney could not communicate except through counsel for adverse party, allowing sale of house that did not include material conditions that client requested and at "bargain basement" price utterly failed to meet any standard of conduct of attorney and was so basic and risk of harm so obvious that

attorney must have known risk to client yet proceeded despite risks. While breach of rules of professional conduct, alone, is not enough to constitute defalcation, rules of professional conduct are relevant.

- (3177) *Szachta v. Thompson*, Case No. 15-4775 (E.D. Mi. 2016) – Defalcation requires (1) pre-existing fiduciary relationship; (2) breach of that relationship; and (3) resulting loss. Fiduciary capacity is narrowly defined as express or technical trust resulting from placement of specific res in hands of Debtor with intent to create trust with Debtor as trustee. Debtor was office manager and bookkeeper for attorney. Attorney engineered scheme to misappropriate client funds, and Debtor was active participant in scheme, arranging for funds from settlement of personal injury cases to be deposited to IOLTA account and then withdrawing those funds for personal use of attorney rather than delivering funds to clients. Settlement funds constituted trust but attorney, not office manager, was trustee. Michigan rules of professional conduct impose duty on attorney to safeguard funds. Debtor, as office manager, did not owe fiduciary duty to clients and so debt resulting from misappropriation by attorney, even if Debtor was active participant and co-conspirator, did not constitute defalcation by Debtor.
- (3178) *Rose v. Friendly Finance Co.*, 2016 WL 98597 (S.D. Ohio 2016) – Fiduciary relationship requires a special relationship where one party reposes trust and special confidence in other party and there is resulting position of superiority or influence. Single party's belief that special relationship exists is not sufficient, and relationship of Debtor and creditor is not sufficient to create fiduciary position. Contract that allowed lender to force place insurance if borrower failed to maintain insurance did not create fiduciary relationship as contract specifically allowed lender to insure its interests without being required to insure borrower's interest.
- (3179) *Duley v. Thompson*, 2015 WL 1622053 (Bankr. S.D. Ohio 2015) – Issue preclusion, also known as collateral estoppel, applies only when the issue to be precluded was necessary to the prior judgment and was actually litigated. If prior judgment is default judgment, it must contain express findings to be given preclusive effect. To be "actually litigated" in default judgment, moving party must have submitted admissible evidence apart from the pleadings and based on evidence submitted court must make findings of fact and conclusions of law that are sufficiently detailed to support application of collateral estoppel. Complaint and judgment finding that Debtor failed to assist in creating an accounting of trust assets and recitation that certain certificates of deposit were closed and money deposited into trust checking accounts were not sufficient to sustain scienter requirement of action under Sections 523(a)(2), (4) or (6). Default judgment made no findings of fact at all, and did not establish either a breach of fiduciary duty or any other intentional misconduct beyond allegation that assets were unaccounted for, without any allegation as to whether this was result of wrongful act or mere negligence or inadvertence. While expenses may have been found to be unreasonable, that does not amount to intent to cause injury.
- (3180) *Landis v. Baker*, 2015 WL 1568377 (Bankr. W.D. Ohio 2015) – Complaint to except debt from discharge for fraud must please sufficient direct or inferential allegations respecting all material elements of claim. Complaint must have facial plausibility which requires sufficient factual content to allow court to draw reasonable inference that defendant has acted unlawfully. Complaint must be more than legal conclusions and must contain sufficient well-pled allegations that, put together, give rise to right to relief. Complaint that alleged only that State Court judgment awarded punitive damages and attorney fees was mere legal conclusion without any factual support to demonstrate that Debtor's conduct met standards for non-dischargeability. Complaint failed to allege any facts that would support finding that Debtor was fiduciary or that there was any actual trust existing or the placing of any specific res in hands of Debtor to be held in trust for plaintiff.
- (3181) *Malinowski v. Whisman*, Case No. 14-2041 (Bankr. E.D. Mi. 2015) – "Fiduciary Relationship" requires express or technical trust, consisting of an intent to create a trust; a trustee; a trust res; and a definite beneficiary. Plaintiff did not establish trust relationship with Debtor where Plaintiff's trustee was defendant's mother, not defendant. Although mother unquestionably breached fiduciary duty by using trust assets for her own purpose, including gifts to defendant, those transfers did not themselves place defendant in position of "trustee" of express trust. Absent a trust relationship between Plaintiff and defendant, Plaintiff could not state cause of action for fraud or defalcation.
- (3182) *Ritter v. Smith*, 2014 WL 4702610 (Bankr. E.D. Mi. 2014) – "Fiduciary relationship" must pre-exist filing of bankruptcy case and requires express or technical trust arising from placement of specific res in hands of Debtor with intent to create a trust and with a definite beneficiary. Fiduciary capacity does not mean failure to meet common law fiduciary relationship. While officers and directors of corporation owe fiduciary duties to shareholders, that does not place officers and directors in position of "trustee" for purposes of Section 523(a)(2). Alleged use by corporation to pay salaries to certain shareholders for work that was not performed was not breach of fiduciary duty to other shareholders for purposes of holding debt to be non-dischargeable.
- (3183) *Merritt v. Layne*, 2014 WL 4723081 (Bankr. E.D. Ky. 2014) – Plaintiff not entitled to judgment of non-dischargeability under Section 523(a)(4) where complaint failed to allege existence of actual or technical trust between parties pursuant to which Debtor was to hold property solely for benefit of plaintiff.
- (3184) *Jennings v. Bodrick*, 2014 WL 1818487 (Bankr. S.D. Ohio 2014) – Fraud or defalcation in fiduciary capacity requires pre-existing, express or technical trust, not a trust arising by operation of law out of the very act of wrongdoing. While creditor may have believed Debtor to be trustworthy and successful, that does not constitute fiduciary relationship between Debtor, a financial advisor; and creditor who relied on Debtor's investment advice.
- (3185) *Altercare of Navarre Center for Rehabilitation & Nursing Care, Inc. v. Conley*, 2014 WL 1577236 (Bankr. N.D. Ohio 2014) – Fiduciary relationship requires express or technical trust with intent to create a trust, a defined trustee, a defined res, and a definite beneficiary. Breach requires more than a normal fiduciary breach, and must indicate bad faith, moral turpitude, or immoral conduct or intentional wrong, such as conduct that fiduciary knows is improper or is criminally reckless such as willful blindness to substantial and unjustifiable risk that conduct will result in breach of duty. Debtor owed fiduciary responsibility to her grandmother but did not owe fiduciary duty to nursing home that provided care to grandmother. Creditor (nursing home) could not boot strap fiduciary obligation owed by Debtor to grandmother for care of grandmother into fiduciary relationship between Debtor and creditor. Fiduciary obligation must be one between Debtor and creditor directly.
- (3186) *Hubanks v. Jouett*, 2014 WL 948517 (Bankr. N.D. Ok. 2014) – Debt resulted defalcation while acting in fiduciary capacity. Creditor was

Debtor's half-brother. While creditor was incarcerated, gave Debtor a power of attorney to manage creditor's financial affairs. Power of Attorney created fiduciary relationship that required Debtor to act solely for creditor's benefit. Debtor breached fiduciary duty by withdrawing thousands of dollars from creditor's accounts and using those to pay personal expenses.

- (3187) *Yoppolo v. Asbury*, 2014 WL 1323216 (Bankr. N.D. Ohio 2014) – Section 523(a)(4) requires that fraud or defalcation occur within scope of fiduciary capacity. Fiduciary relationship must be actual trust for benefit of creditor, not merely resulting trust or trust implied by law, and requires intent to create trust, trustee, trust res, and definite beneficiary. Land contract between Debtor and creditor did not create express trust. Nothing in the land contract required Debtor, the land contract vendor, to use proceeds paid by creditor for any specific purpose.
- (3188) *Liggett v. Schwartz*, 2014 WL 1028960 (E.D. Mi. 2014) – Defalcation requires pre-existing fiduciary relationship, breach of that relationship, and resulting loss. Fiduciary capacity must be express or technical and does not encompass constructive or implied or resulting trusts. Divorce decree that awarded Wife a 50% interest in Husband's IRA was not express or technical trust. At best, decree created constructive trust which will not support determination of non-dischargeability under Section 523(a)(4).
- (3189) *Rice v. Morse*, 504 BR 462 (Bankr. E.D. Tn. 2014) – Complaint failed to allege actual or technical trust for purposes of exception from discharge under Section 523(a)(4). Trust requires actual or technical trust, and does not have to be in writing, as long as there is (1) a trustee who holds trust property and who is subject to the equitable duties to deal with it for the benefit of another, (2) a beneficiary to whom the trustee owes the equitable duties to deal with the trust property for his benefit, and (3) identifiable trust property. Contract did not require Debtor to hold funds in trust or escrow, and expressly called for funds to be released to Debtor. There was no indication in contract that trust relationship was contemplated or that plaintiff was intended as beneficiary, as funds were turned over to Debtor without express condition or restriction in the contract between the parties.
- (3190) *Cameron v. Thomas*, 2014 WL 509327 (Bankr. E.D. Tn. 2014) – Fiduciary capacity requires express or technical trusts, not merely those resulting from wrongful conduct. Actions constitute defalcation as a result of embezzlement or misappropriation, or a failure to properly account for the entrusted funds. Power of attorney given to Debtor for purposes of paying bills and taxes and ultimately used to transfer title to real property was sufficient to constitute "trust" where State Court judgment had previously determined that power of attorney created a "confidential relationship". Fact that State Court did not impose punitive damages did not preclude claim of defalcation where punitive damages required the "most egregious of wrongs" where defendant acted intentionally, fraudulently, maliciously or recklessly, and must be proved by clear and convincing evidence. For purposes of Section 523(a)(4), defalcation does not require malice or intentional fraud, but only knowledge of or gross recklessness in respect to the improper nature of the fiduciary behavior, and must be proved only by preponderance of evidence. Although only Debtor-Wife was named in Power of Attorney, Plaintiff could maintain action against Debtor-Husband if Plaintiff could prove that Husband acted in concert with Wife to commit wrongful acts sufficient to impute wrongful conduct to him.
- (3191) *Great American Insurance Company v. Poynter*, 459 BR 679 (Bankr. W.D. Ky. 2011), *aff'd* 2012 WL 4959566 (E.D. Ky. 2012), *aff'd* 2013 WL 4779583 (6th Cir. 2013) – Fraud or defalcation while acting in fiduciary capacity requires failure to produce funds entrusted to fiduciary but does not necessarily require proof of fraud, embezzlement or misappropriation. Defalcation must occur in course of express or technical trust arising from placement of specific res in hands of Debtor. Indemnity agreement between contractor's sole owner and issuer of payment and performance bond created trust where agreement stated that funds received under construction contract were trust funds, identified the beneficiaries of the trust funds, and designated the company and its principal as trustees. Debtor breached fiduciary obligation by receiving funds for bonded construction projects and used funds to pay lender and Debtor's former company rather than paying job creditors and suppliers.
- (3192) *Auto Owners Insurance Company v. Fitzgerald*, 2013 WL 4853316 (Bankr. N.D. Ohio 2013) - Plaintiff must establish (1) a pre-existing fiduciary relationship, (2) a breach of that relationship, and (3) resulting loss. Debtor must have held funds in a trust for the benefit of a third party to pursuant to an express or technical trust relationship arising from placement of a specific res in the hands of the Debtor. Debtor's status as personal representative of decedent's estate created the requisite technical trust as specific assets (the estate) were placed in hands of Debtor for administration for benefit of heirs.
- (3193) *Vicars v. Freeman*, 2013 WL 4447007 (Bankr. E.D. Tn. 2013) – Fiduciary relationship for purposes of Section 523(a)(4) requires preexisting express or technical trust and does not include constructive trusts. Under Tennessee law, Debtor as president and majority owner of corporation owed fiduciary obligation to corporation and to minority shareholders. However, fiduciary obligation alone is not sufficient to constitute an express or technical trust arising from the placement of a specific res in the hands of the Debtor, nor was there any specific trustee or beneficiary. Debtor's alleged wrongful removal of assets from corporation, while perhaps a breach of Debtor's fiduciary obligations, did not breach any express or technical trust for purposes of Section 523(a)(4).
- (3194) *Adamovic v. Lazarevic*, 2013 WL 3934010 (Bankr. E.D. Tn. 2013) – Defalcation requires (1) a pre-existing fiduciary relationship, (2) a breach of that relationship, and (3) resulting loss. A fiduciary relationship requires an express or technical trust; an intent to create a trust; a trustee; trust res; and a definite beneficiary. The trust can be either written or oral as long as the evidence establishes a trustee who holds identifiable property in trust for a defined beneficiary to whom the trustee owes fiduciary duties. Evidence did not establish any express or technical trust. Evidence indicated that when terminally ill sister gave her assets to her brother, she did so only asking the brother to "take over" the assets. There was no evidence that sister intended brother to take property as trustee for benefit of Debtor's children or that the brother accepted that position. Deed from sister to brother did not mention trustee. Although children may have assumed that transfer was in trust for their benefit, evidence did not establish any trust relationship.
- (3195) *Robinson v. Robinson*, 2012 WL 4715093 (Bankr. N.D. Ohio 2012) – For purposes of Section 523(a)(4), trust relationship must be express or technical. Although written trust agreement is not required, Plaintiff must evidence intent to create a trust; a trustee; and a definite beneficiary. Power of attorney, standing alone, does not create trust relationship. Evidence indicated existence of express trust. Plaintiff transferred personal injury settlement funds to Debtor with understanding that Debtor was to hold funds for benefit of and at the direction of

Plaintiff. Evidence also demonstrated that Debtor breached fiduciary duty by using funds for personal use without consent of Plaintiff. Plaintiff suffered damages when Debtor was unable to repay funds. Plaintiff entitled to judgment holding debt to be non-dischargeable. Court could also enter money judgment in connection with actions to except debts from discharge. Evidence indicated that Debtor took \$43,000 from account. However, Debtor later used personal funds for Plaintiff's personal expenses and is entitled to credit for those amounts. Plaintiff failed to support award of punitive damages where plaintiff did not present evidence that Debtor acted with fraudulent intent to permanently deprive Plaintiff of funds. Punitive damages are warranted only where facts show actual malice was intended. Actual malice requires (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. Possibility, or even probability, of harm is not sufficient. Attorney fees are not awardable as there is no statute or contractual provision that would support award of attorney fees and no basis in Bankruptcy Code for award of fees in Section 523 action.

- (3196) *Adamovic v. Lazarevic*, 2012 WL 4483901 (Bankr. E.D. Tn. 2012) – Fiduciary relationship requires express or technical trust, which requires intent to create trust; a trustee; a specific trust res; and a definite beneficiary. Trust agreement does not have to be written or formal document, but trust relationship must pre-date conduct complained of. Constructive Trust implied at law based on alleged wrongful conduct is not sufficient to support relief under Section 523(a)(4). However, power of attorney, without more, is not sufficient to create trust relationship.
- (3197) *Oak Street Funding, LLC v. Blair*, 2012 WL 4506913 (Bankr. E.D. Tn. 2012) – Complaint stated cause of action for defalcation while acting in fiduciary capacity. Complaint adequately alleged existence of actual trust relationship. Security Agreement between parties imposed on Debtor's company a trust duty to hold Insurance Policy Commissions in trust after a default. Complaint alleged that Company failed to meet the minimum annualized sale commissions and that the Plaintiff terminated the Company's right to "sweepback" excess cash after the payment was made. Credit Agreement prohibited redirection of commissions and that Debtor redirected the commissions and that she used the money for the Agency's rent and her personal expenses. Commissions were to be segregated in the Deposit Account for the benefit of Plaintiff and were available to the Agency only after certain conditions were met.
- (3198) *First American Title Insurance Company v. Gaskill*, 2012 WL 4457738 (Bankr. W.D. Mi. 2012) – Section 523(a)(4) requires a pre-existing fiduciary relationship; a breach of that relationship; and a resulting loss. Fiduciary relationship requires express or technical trust that results from specific property being placed in hands of Debtor. Michigan law creates an express fiduciary trust relationship between insurance agency and underwriter. Title Agency had fiduciary relationship with Title Insurer. Title Agency, through its president, agreed to receive premiums for insurance policies written by Agency for policies issued by underwriter and to remit to underwriter the appropriate amount of the premium. Corporate Officers and Directors will also be deemed fiduciaries if they personally cause the Agency to fail to remit premiums. Individual Debtor in this case did not have fiduciary relationship with underwriter. Although a 50% shareholder of the Agency, Debtor had very limited relationship with underwriter. Debtor was not signatory to Agency Agreement between Agency and Underwriter. Debtor did not personally guaranty any obligations of Agency to Underwriter. Debtor played no role whatsoever in failure to remit premiums. Debtor handled real estate closings and turned over funds to Agency President who was to remit premiums to Underwriter. Underwriter dealt solely with President and not with Debtor. Debtor had no involvement in financial dealings of business until after President left town, at which time it was discovered that President had embezzled Agency funds. Status of Debtor as Vice-President and Treasurer of Agency and as insurance agent under Michigan Law, without more, did not result in requisite fiduciary relationship. Even if Debtor was fiduciary, evidence did not support finding of defalcation by Debtor, which required embezzlement or misappropriation by a fiduciary or failure to properly account for funds. Defalcation requires that Debtor be "objectively reckless" in failing to properly account for or allocate funds. Debtor's actions were not objectively reckless. Agency President, and not Debtor, caused and controlled Agency's failure to remit premiums. Division of duties between Debtor and President were reasonable and losses resulted from President's embezzlement of funds, not any actions of Debtor. Although Debtor perhaps could have been more informed about Agency's financial situation, it was not objectively reckless for Debtor to rely on President to properly manage funds where Debtor did not have any reason to suspect that President was embezzling funds rather than using funds to pay corporate debts.
- (3199) *Frost & Co., Inc. v. Smithey*, 474 BR 830 (Bankr. N.D. Ohio 2012) – Existence of fiduciary relationship is one of federal, not state, law. Exception to discharge requires express or technical trust, arising from placement of specific res in hands of Debtor. Chapter 7 Debtor, in his capacity as 50% shareholder of holding company and officer both in it and in related corporate entities that it owned, did not stand in express trust relationship to his fellow officer and other 50% shareholder, as required for debt that arose from Debtor's alleged misapplication of corporate funds to be excepted from discharge on "fiduciary defalcation" theory.
- (3200) *Hulsing Hotels Tennessee, Inc. v. Steffner*, 2012 WL 3563978 (Bankr. E.D. Tn. 2012) – Fiduciary capacity requires pre-existing fiduciary relationship; breach of that relationship; and resulting loss. Fiduciary relationship requires express or technical trust arising from placing of specific res in hands of Debtor. Statute which makes officers and directors of corporation "fiduciaries" for benefit of corporate creditors did not create fiduciary relationship sufficient for Section 523(a)(4). Tennessee Revised Limited Liability Company Act did not express intent to create an express or technical trust relationship between a limited liability company and its creditors. No language establishes a trust res in the dissolved company's assets or requires that those assets be held as a trust fund. Similarly, no statute imposes fiduciary obligations on a party, notwithstanding the specified distribution scheme.
- (3201) *Becton, Dickinson & Co. v. Sterling*, 2012 WL 3257841 (Bankr. E.D. Mi. 2012) – Fiduciary capacity is narrowly defined as express or technical trust relationship arising from placement of a specific res in hands of Debtor. Debtor's receipt of salary in excess of correct amounts did not constitute defalcation in fiduciary capacity. Debtor's employer did not entrust Debtor with any specific res as required for trust relationship. Debtor was not "trustee" and was never designated as trustee. Mere status of Debtor as employee, without more, does not create trust relationship between employer and employee.
- (3202) *Schofield v. Prentice*, 2012 WL 3564020 (Bankr. E.D. Mi. 2012) – Fiduciary relationship requires existence of express or statutory trust. Plaintiff failed to demonstrate fiduciary relationship merely because Debtor was an owner and manager of businesses in which part owner.

- (3203) *Tweedie v. Semeniuk*, Case No. 10-5605 (Bankr. E.D. Mi. 2012) – Absent evidence of pre-existing express or technical trust relationship, plaintiff cannot prevail under Section 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity. State arbitration award demonstrated that while plaintiff invested in Debtor's business, there was no agreement that funds invested would be placed in trust or used for a specific purpose, rather than being invested for general business use.
- (3204) *Automotive Finance Corp. v. Leonard*, 2012 WL 1565120 (Bankr. E.D. Tn. 2012) – Defalcation in a fiduciary capacity requires proof of pre-existing express or technical trust coupled with either a misappropriation of funds or a failure to account for funds. Floor plan finance agreement that required amount received from disposition of inventory to be held and paid to creditor established a subject matter for the trust and a beneficiary for whom the trust was created. However, the floor plan agreement did not specify the nature of the interests held by the beneficiary or any manner for the implementation and administration of the alleged trust. Floor plan financing is contractual relationship that does not constitute "trust". Debtor who allegedly sold inventory without remitting funds did not commit defalcation while in fiduciary capacity.
- (3205) *Humphrey v. Morgan*, 2012 WL 1390246 (Bankr. E.D. Tn. 2012) – Fraud or defalcation by fiduciary requires pre-existing fiduciary duty; breach of that duty; and resulting loss. "Fiduciary relationship" requires express or technical trust and does not encompass a common law fiduciary relationship. Ordinary agent-principal relationships, while involving fiduciary obligations, is insufficient to establish the type of fiduciary duty contemplated by Section 523(a)(4). Trust relationship requires intent to create a trust; a trustee; a trust res; and a definite beneficiary. Complaint against Debtor-husband did not demonstrate existence of pre-existing trust relationship between creditor and husband. Debtor-wife held a power of attorney and accepted appointment as a representative of creditor, potentially creating a fiduciary obligation between Debtor-wife and creditor, but evidence indicated that Debtor-husband never signed either the power of attorney or any acceptance of appointment, precluding finding of trust relationship between Debtor-husband and creditor.
- (3206) *Tweedie v. Hermoyan*, 466 BR 348 (Bankr. E.D. Mi. 2012) – Absent evidence of pre-existing express or technical trust relationship, plaintiff cannot prevail under Section 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity. State arbitration award demonstrated that while plaintiff invested in Debtor's business, there was no agreement that funds invested would be placed in trust or used for a specific purpose, rather than being invested for general business use.
- (3207) *Korte v. Brewer*, Adv. No. 11-4011 (Bankr. E.D. Mi. 2011) – Fiduciary element of section 523(a)(4) requires pre-existing express or technical trust. Complaint must allege (1) intent to create trust; (2) a trustee; (3) a trust res; and (4) a defined beneficiary. Complaint that alleged fraud but did not allege any elements of trust failed to state cause of action.
- (3208) *Tennessee Education Lottery Corp. v. Little*, 2011 WL 4344584 (Bankr. E.D. Tn. 2011) – Creditor failed to prove that Debtor's non-remittance of proceeds of lottery sales constituted defalcation, where Debtor testified that Lottery Tickets were not sold but were stolen by former employee before Debtor could remit the proceeds to the Lottery.
- (3209) *Plasterers Local 67 Pension Fund v. Warren*, 2011 WL 240409 (Bankr. W.D. Mi. 2011) – Debtor, principal of construction company that received payment for construction services and materials but failed to use funds to pay subcontractors and suppliers, committed defalcation of funds received in pre-existing fiduciary relationship sufficient to deny discharge of debt under Section 523(a)(4). Michigan Building Contract Fund Act creates fiduciary relationship between contractor and owner as to funds paid to contractor but that is not used to pay suppliers or subcontractors. Company received sufficient funds but used those funds to pay office and general expenses of business.
- (3210) *Marshall v. Dickson & Campbell, LLC*, 2011 WL 249500 (S.D. Ohio 2011) – Debtor, an attorney, did not commit fraud or defalcation while acting in fiduciary capacity. State Court Order directing Debtor to retain settlement proceeds pending resolution of an attorney fee claim by client's former attorney did not constitute express or technical trust. Debtor did not embezzle funds because Debtor did not retain the funds but instead released the funds to the client. When funds were delivered to Debtor, there was a pending dispute as to ownership of the funds. Therefore, creditor could not prove that at the time the funds were paid to the Debtor, the funds constituted property of the creditor as required to make claim for embezzlement.
- (3211) *King's Welding & Fabricating, Inc. v. King*, 2011 WL 2837915 (Bankr. N.D. Ohio 2011) *aff'd* 2012 WL 3732514 (N.D. Ohio 2012) – Employee owes fiduciary obligation to employer, the breach of which can result in the obligation being non-dischargeable.
- (3212) *Ewers v. Cottingham*, 2011 WL 2118247 (Bankr. E.D. Ky. 2011) *aff'd* 2012 WL 2161623 (6th Cir. BAP 2012) – Debtor husband's debt to wife's former employer from whom wife embezzled funds was not within Section 523(a)(4). Husband was not employee of employer and did not owe employer any fiduciary obligation and husband did not personally engage in any act of embezzlement or larceny.
- (3213) *Bush v. Roberts*, 2011 WL 2650254 (Bankr. W.D. Ky. 2011) – Plaintiff must show that (1) the Debtor was acting in a fiduciary capacity; and (2) Debtor committed a defalcation while acting in such capacity. Creditor must establish the existence of a fiduciary relationship based on an express or technical trust, not merely one who fails to meet a common law fiduciary obligation. Although Debtor and creditor were partners and owed each other a common law fiduciary obligation, the parties never executed any corporate governance or other documents that would create either an express or technical trust relationship.
- (3214) *Old Republic National Title Insurance Co. v. Licavoli*, Case No. 08-4065 (Bankr. E.D. Mi. 2011) – President of title agency breached fiduciary obligation owed to issuer of insurance policies when President and agency failed to segregate funds payable to issuer as required by Agency Agreement. Agency Agreement created express trust relationship and Michigan law also imposes fiduciary obligation on insurance agency. Issuer's conduct that may have been inconsistent with fiduciary relationship, such as allowing relationship to continue even though Issuer's prior audit showed a few violations by agency, did not constitute a waiver of ongoing fiduciary obligations. Comingling of trust funds with non-trust funds does not destroy fiduciary relationship or alter status of funds as "trust funds".

- (3215) *Messing v. Chelton*, Case No. 10-6921 (Bankr. E.D. Mi. 2011) – Section 523(a)(4) excludes from discharge debts for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny. Exception based on fraud or defalcation requires proof of a pre-existing express or technical trust that encompasses the property at issue. An express or technical trust requires (1) intent to create trust; (2) a trustee; (3) a res; and (4) a beneficiary. Mere contractual relationship between parties is not sufficient to establish existence of trust. Sale of option to purchase property that was subject to mortgage did not constitute embezzlement of price of option even where sale of option may have violated terms of mortgage itself. Mortgagee still held mortgage and enforceability was not altered in any way by sale of option.
- (3216) *In re Nail*, 446 BR 292 (8th Cir BAP 2011) – To except a debt for the settlement proceeds from the Debtor's discharge for defalcation while acting in a fiduciary capacity, the Creditor must prove: (1) the existence of a fiduciary relationship between the Debtor and Creditor; and (2) commission of defalcation by the Debtor in the course of that fiduciary relationship. For purposes of Section 523, a “fiduciary relationship” requires the existence of an express trust, a definition that is much more narrow than the general common law requirement for a fiduciary relationship. Mere contractual relationship between Debtor and bank, where Debtor was to pay certain funds to the lender in repayment of the loan, did not create express trust as to those funds when received by the Debtor and so could not support a finding of non-dischargeability.
- (3217) *Follett Higher Education Group, Inc. v. Berman*, 2011 WL 181482 (7th Cir. 2011) – Chapter 7 Debtor did not stand in “fiduciary capacity” to creditor of his wholly-owned corporation, as that term was used in dischargeability exception, merely because corporation was allegedly insolvent, and Debtor, as president and director of corporation, might have owed fiduciary duties to corporate creditors under state law. Contractual relationship between creditor and Debtor's wholly owned corporation to provide bill paying services did not create express trust where Debtor's corporation did not maintain any separate or segregated fiduciary accounts and the contracts between creditor and corporation did not require any segregation of funds. Ordinary contractual relationship between creditor and corporation does not give rise to fiduciary relationship.
- (3218) *In re Harwood*, 2011 WL 1239810 (5th Cir. 2011) – Section 523(a)(4) barred discharge of obligations that result for fraud or defalcation while acting in a fiduciary capacity and includes debts arising from Debtor's acquisition or use of property that is not the Debtor's. Debtor breached fiduciary obligation to partnership in which Debtor was the president and chief operating officer of limited partnership when Debtor obtained loans to himself from limited partnership funds without disclosing these loans to the other partners. Office of corporate general partner owed fiduciary obligations to both the corporate general partner and to the limited partnership itself, where Debtor was charged with the day to day management of the limited partnership and exercised operational control over affairs and business of partnership.
- (3219) *In re Warren*, 2011 WL 240409 (Bankr. W.D. Mi. 2011) – The court must except a debt from discharge if the creditor establishes that the debt arises from “defalcation” when there is (1) a pre-existing fiduciary relationship; (2) a breach of that relationship; and (3) a resulting loss. Fiduciary relationship requires either an express or technical trust. Michigan Building Contract Fund Act establishes an express or technical trust. Individual corporate officer can be a “contractor” for the purposes of the MBCFA and therefore a “fiduciary”. Defendant on behalf of his corporation he received funds, hired subcontractors, and had sole responsibility for the administration of these funds, including who got paid and who did not. Corporation used funds for expenditures such as meals and entertainment, fuel, car repairs, car insurance and office supplies.
- (3220) *JGR Associates, LLC v. Brown*, 2011 WL 9153 (Bankr. E.D. Mi. 2011) – Federal law defines “embezzlement” under § 523(a)(4) as the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. A creditor proves embezzlement by showing that he entrusted his property to the Debtor, the Debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicated fraud. Members of LLC failed to prove that manager of LLC took possession of property of the Members. Manager may have taken possession of income and assets of the LLC, but that income and those assets were not the property of the Plaintiffs themselves. Plaintiffs also failed to prove fraudulent intent where there were credible explanations under the management agreements why the manager may have taken the funds. Manager's conduct may ultimately have been a breach of the management agreements, but plausible explanation negated possible fraudulent intent.
- (3221) *Hudson & Muma, Inc. v. Muma*, Case No. 09-5227 (Bankr. E.D. Mi. 2010) – State Court judgment finding that Debtor did not commit fraud was not preclusive on issue where State Court used “clear and convincing evidence” standard but standard under Section 523 is “preponderance of evidence”.
- (3222) *In re McDowell*, 2010 WL 3790318 (Bankr. E.D. Tn. 2010) – Section 1328(a)(2) excludes from the Chapter 13 discharge any obligation determined to be non-dischargeable under Section 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. Embezzlement requires proof that creditor entrusted his property to the Debtor, the Debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud. Factual findings in State Court judgment did not conclusively demonstrate that Debtor's actions were evidence of fraud. Parties entered into contractual arrangement and Debtor's actions were the result of a dispute over contractual performance and entitlement to property or proceeds of sale of property. Larceny requires actual or constructive taking away of property of another without the consent and against the will of the owner or possessor with the intent to convert the property to the use of someone other than the owner. As distinguished from embezzlement, the original taking of the property must be unlawful. Factual findings in State Court Judgment did not conclusively demonstrate larceny where Plaintiff originally delivered automobile to Defendant for Defendant to rebuild, and Defendant refused to redeliver automobile after contractual dispute arose.
- (3223) *Holmes Lumber & Building Center, Inc., v. Miller*, 2010 WL 3463296 (Bankr. N.D. Ohio 2010) – Action under Section 523(a)(4) for fraud or defalcation while acting in fiduciary capacity requires pre-existing express trust relationship. Plaintiff failed to allege any pre-existing trust relationship where alleged defalcation arose out of a consent judgment between Plaintiff and Debtor that liquidated claim and permitted Plaintiff to record lien against property but did not require Debtor to hold property for benefit of Plaintiff.

- (3224) *Hoffman v. Anstead*, 2010 WL 3489061 (Bankr. N.D. Ohio 2010) – Bankruptcy courts, pursuant to the full faith and credit principles of 28 U.S.C. Section 1738, must give the same issue preclusion effect to a State Court judgment as it would be given under that state's law. Under Ohio law, judgments entered by a probate court in the state of Ohio are entitled to preclusive effect. Collateral Estoppel did not control disposition of dischargeability action where the probate court did not make any specific finding regarding the Debtor's state of mind. Probate court only went so far as to find that the Debtor removed and then failed to return items belonging to the Hoffman estate. These findings, while relevant and possibly tending to show that the Debtor acted with an intent to cause harm, could also be indicative of simple forgetfulness or ignorance-clearly nonculpable states of mind. Accordingly, the findings of the probate court are not conclusive as to the specific intent requirement of Section 523(a)(4).
- (3225) *Humility of Health Partners v. Garritano*, 427 BR 602 (Bankr. N.D. Ohio 2010) – To prevail on complaint to except debt from discharge as one for Chapter 7 Debtor-physician's "fraud or defalcation while acting in a fiduciary capacity," creditor that had entered into professional medical services agreement to pay Debtor a fixed salary in exchange for receipt of net proceeds of his medical practice had to establish existence of some pre-existing express or technical trust between parties with respect to funds at issue. To establish "embezzlement," creditor must prove that it entrusted property to Debtor, that Debtor appropriated property for use other than that for which it was entrusted, and that the circumstances indicate fraud, but does not require proof of express misrepresentation or misleading omission. Though Chapter 7 Debtor-physician may have breached terms of professional medical services agreement, pursuant to which creditor had agreed to pay Debtor a salary in exchange for receipt of net profits from his medical practice, by taking certain deductions not authorized by terms of agreement, there was no indication of fraudulent intent on Debtor's part given evidence that deductions which Debtor took were consistent with manner in which he operated his practice prior to entering into professional medical services agreement with creditor. "Larceny" is the fraudulent and wrongful taking and carrying away of property of another with intent to convert such property to the taker's use without consent of the owner, and is distinguishable from "embezzlement" in that the original taking must have been unlawful. Chapter 7 Debtor-physician's alleged breach of terms of professional medical services agreement, pursuant to which creditor had agreed to pay Debtor a salary in exchange for receipt of net profits from his medical practice, due to Debtor's failure to pay over the full share of profits to which creditor was entitled was not in nature of misappropriation of any property belonging to creditor, in which Debtor did not have interest, as required to except resulting debt from discharge as one for Debtor's "larceny."
- (3226) *Kelly v. Aho*, Case No. 08-3101 (Bankr. E.D. Mi. 2010) - Action for defalcation requires pre-existing fiduciary obligations arising from express or technical trust. Debtor's status as real estate agent for plaintiff, although carrying certain fiduciary obligations, did not give rise to actual trust relationship.
- (3227) *Bluegrass Stockyards of Campbellsville, LLC. v. Smith*, Case No. 09-1022 (Bankr. W.D. Ky. 2010) - To be non-dischargeable, debt resulting from defalcation requires pre-existing fiduciary relationship. Fiduciary capacity is narrowly construed to express or technical trusts, and does not incorporate implied trusts imposed by operation of law. Although Debtor was general manager of business which may have given rise to fiduciary obligations, status did not create express trust with Debtor as trustee. However, fiduciary capacity is not required for debt to be non-dischargeable for embezzlement or larceny. Debtor repeatedly used corporate assets to purchase assets for Debtor's own use in spite of repeated admonitions not to do so and removed corporate assets to Debtor's personal property with intent to re-sell and retain the proceeds, giving rise to non-dischargeable debt for embezzlement and larceny.
- (3228) *The Hanover Insurance Co., v. Dunham*, Case No. 09-2001 (Bankr. E.D. MI. 2010) – Defalcation while acting in fiduciary capacity requires pre-existing fiduciary relationship based on express or technical trust. A constructive or implied trust imposed by operation of law is not sufficient. Michigan law requires that an express trust requires an explicit declaration of trust, or circumstances that show beyond reasonable doubt a trust was intended, accompanied by a transfer of property to one for the benefit of another. Language in indemnification agreement obtained in connection with construction bonds for public works projects did not create express trust for purposes of Section 523(a)(4). Although the indemnification agreement did use the phrase "in trust", the property that would allegedly be subjected to the trust would be paid by public agencies, not the alleged creator of the trust and there was no agreement by the public agency that the funds were to be held in trust. Indemnification agreement also referred to "all funds due" whether or not those had been actually paid, while Michigan law requires both declaration of trust and transfer of property.
- (3229) *General Motors Acceptance Corp. v. Cline*, Case No. 08-8104 (6th Cir. BAP 2010) – Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted. Creditor seeking to declare debt non-dischargeable under Section 523(a)(4) must prove that he entrusted his property to the Debtor, the Debtor appropriated the property for use other than that for which it was entrusted, and the circumstances indicate fraud. Fraudulent intent may be proven through circumstantial evidence including suspicious timing of events, insolvency, transfer to family members or other insiders. Court must review all of the facts and circumstances surrounding the transaction and determine whether the evidence leads to the conclusion that it is more probable than not that Debtor had fraudulent intent. Debtor was president of car dealership that sold the vehicles without paying the floor plan lender. Dealership transferred vehicles to family members and affiliates will shortly before dealership filed for bankruptcy without remitting any of the funds to the floor plan lender. Debtor was causing dealership to repay loans from Debtor's friends and family members and affirmatively misrepresented that dealership was paying floor plan lender when dealership was not making any payments. Debtor's alleged motivation of survival of business did not defeat finding a fraudulent intent. Fax indicated concerted effort to liquidate large amount of inventory in abbreviated period of time, just prior to filing for bankruptcy, with our remaining any of the proceeds to floor plan lender know, warranting conclusion that death resulted from embezzlement under Section 523(a)(4).
- (3230) *Ormsby v. First American Title Company*, 591 F.3d 1199 (9th Cir. 2010) - Section 523(a)(4) prevents discharge for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. Bankruptcy court is not bound by the state law definition of larceny and may follow federal common law which defines larceny as a felonious taking of another's personal property with intent to convert it or deprive the owner of the same. Theft of trade secrets and confidential and proprietary information from Debtor's competitor company

and Debtor's actions in hiring management level employees from competitor with intent to wrongfully gain access to confidential information constituted larceny within federal definition, rendering debt non-dischargeable.

- (3231) *Double v. Cole*, Case No. 08-3371 (Bankr. N.D. Ohio 2009) – Pre-petition contractual agreement in which Debtor allegedly acknowledged his debt to the plaintiff would be dischargeable is not enforceable and will not control outcome of adversary proceeding. Agreements which purport to waive the right to a discharge to bankruptcy violate public policy, although the statements contained in the agreement may be utilized at an evidentiary hearing to determine dischargeability.
- (3232) *Tiernan v. Dietrich*, Case No. 08-68294 (Bankr. E.D. Mi. 2010) – Phrase “while acting in a fiduciary capacity” modifies both the fraud and defalcation provisions of section 523(a)(4). Plaintiff could not prevail in action against the Debtor who represented himself as a licensed attorney when Debtor no longer was, where plaintiff conceded that there was no fiduciary relationship between plaintiff and Debtor.
- (3233) *Issacs Cars, Inc. v. Woods*, 2009 WL 3561527 (Bankr. W.D. Ky. 2009) – To prevail under Section 523(a)(4), Plaintiff must prove (1) fraud or defalcation while acting in a fiduciary capacity; or (2) embezzlement; or (3) larceny. “Fiduciary capacity” requires express trust relationship and does not extend to implied trusts which are imposed on transactions by operation of law as a matter of equity. Embezzlement required that Debtor appropriate funds for his own benefit with fraudulent intent or deceit. Larceny requires that Debtor have wrongfully and with fraudulent intent taken property from rightful owner. Debtor who was “aware” of business’s financial difficulties did not run business and had no knowledge that business was selling cars “out of trust”. When possible sales out of trust were brought to Debtor’s attention, he inquired as to the missing vehicles but took no further action based on what appeared to be plausible explanation. Although a more diligent investigation would have revealed that the vehicles were sold out of trust, Defendant did not have subjective intent to deceive Plaintiff Financing Agency.
- (3234) *Baker v. Wentland*, 2009 WL 2132639 (Bankr. N.D. Ohio 2009) - § 523(a)(4) excepts from discharge any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. Larceny is the fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner. Larceny cannot apply where property initially comes into hands of Debtor lawfully. Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come and requires proof that creditor (1) entrusted his property to the Debtor or Debtor lawfully obtained the property, (2) the Debtor appropriated the property for a use other than that for which it was intended, and (3) the circumstances indicate fraud in fact, involving moral turpitude or intentional wrong. Creditor failed to prove fraud where Debtor's representation when hiring employee that money withheld from employee's pay would be used to pay health insurance premium there was no proof of falsity when made and Debtor in fact paid health insurance premiums for 25 years before starting to misappropriate funds. Defalcation while acting in a fiduciary capacity need not rise to the level of fraud. Defalcation includes misappropriation of funds by a fiduciary as long as the use was not the result of mere negligence or a mistake of fact. Fiduciary relationship requires a Debtor must hold funds in an express or technical trust relationship arising from placement of a specific *res* in the hands of the Debtor. Debtor withholding funds from employee's pay for purposes of paying health insurance premiums constituted sufficient proof of a trust relationship for specific purpose rendering debt non-dischargeable pursuant to Section 523(a)(4).
- (3235) *Huntington National Bank v. Moore*, 2009 WL 1974233 (Bankr. N.D. Ohio 2009) – Embezzlement is fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. Creditor can prove embezzlement by showing that he entrusted his property to the Debtor, the Debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud. Larceny is fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner. The original taking of the property must have been unlawful. Creditor failed to prove embezzlement or larceny of loan proceeds merely because money loaned to closely held corporation was used for payment of Debtor's (corporation's sole shareholder) personal expenses.
- (3236) *Pearce v. Muncey*, 2009 WL 1651451 (Bankr. E.D. Tn. 2009) – Section 523(a)(4) requires preexisting fiduciary relationship; breach of that relationship; and resulting loss. Fiduciary relationship requires “express” or “technical trust” and not merely common law fiduciary relationship or “resulting” trust based on alleged wrongful act. Purchase and Sale agreement between seller and buyer of property does not create fiduciary relationship sufficient to support action under 523(a)(4).
- (3237) *General Motors Corp. v. Heraud*, Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Section 523(a)(4) allows debt resulting from embezzlement to be non-dischargeable. “Embezzlement” is fraudulent appropriation of property which has been entrusted to person for specific purpose but party instead misappropriates property for use other than that for which it was entrusted. Debtor lawfully received funds from Creditor for payment to third party vendor, but retained those funds for own purposes, constituting embezzlement sufficient to deny dischargeability of debt.
- (3238) *Morganroth & Morganroth, PLLC v. Stollman*, Adv. Case No. 08-4894 (Bankr. E.D. Mi. 2009) – Debts resulting from “defalcation while acting in fiduciary capacity” are non-dischargeable. Plaintiff must prove (1) pre-existing fiduciary relationship; (2) breach of that relationship; and (3) resulting loss. Section 523(a)(4) requires express or technical trust arising from placement of specific *res* in the hands of the Debtor for the benefit of a definite beneficiary. A “constructive” or “resulting” trust is not sufficient. Plaintiffs failed to demonstrate any intent to create a trust, a trustee, a *res* or a definite beneficiary. Debtor's actions in obtaining, using and concealing proceeds that were encumbered by security interests may constitute breach of contract but does not support an express trust relationship. Section 523(a)(4) also excepts from discharge debts resulting from embezzlement or larceny. Embezzlement requires fraudulent appropriation of property by person to whom property was lawfully entrusted. Court adopted narrow definition of property and held that interfering with a security interest was not embezzlement because the money on which Plaintiffs' held liens was property of the Debtor, not Plaintiffs'. One cannot embezzle property for which the person is the lawful owner. Larceny is actual or constructive taking of property without the consent of and against the will of the owner or possessor with intent to convert property. Debtor's actions in disposing

of property that was subject to Plaintiffs' lien did not constitute larceny. Debtor was the owner of the funds involved. Further, Debtor did not wrongfully take the proceeds – Debtor was entitled to the proceeds, subject only to Plaintiffs' security interests.

8.190 Section 523(a)(5)

- (3239) *Vander Roest v. Vander Roest*, 2017 WL 2627914 (Bankr. W.D. Mi. 2017) – “Anti-Bankruptcy Clause” in judgment of divorce that purports to convert property settlement into nondischargeable alimony in the event one party files for bankruptcy does not automatically render obligations nondischargeable or deprive Bankruptcy Court of authority to determine dischargeability of obligation. Although state courts enjoy concurrent jurisdiction to determine dischargeability, there is no authority to determine dischargeability in advance of any bankruptcy filing. Whether obligation is property settlement or support is not determined by label applied by State Court, although Bankruptcy Court will consider label such as alimony, support or maintenance specified in the decree as well as whether the obligation is paid directly to the former spouse as opposed to assumption of third-party debt and whether payments are contingent upon events such as death, remarriage or eligibility for Social Security. Judgment of Divorce specify that neither party would be entitled to alimony and instead allocated debts and included “hold harmless” clause. Obligation was nonmodifiable, not extendable and nonreviewable and is measured by unpaid obligations under hold harmless clauses rather than any showing of need or capacity to pay. Obligations did not terminate upon death or remarriage of either party, evidencing intent to create property settlement. Judgment of Divorce specify that payments would not be taxable to the recipient and not deductible by the payer, further intending that payments were in the nature of property settlement, because under Internal Revenue Code, alimony payments are deductible on payer's return and taxable to payee. Judgment of Divorce reference obligation as “alimony in gross” which is termed generally used for division of property rather than support. Obligation constituted property settlement under 11 USC Section 523(a)(15) which is dischargeable in Chapter 13 if Debtor confirms a Plan and makes all required payments.
- (3240) *Zadeh v. Nelson*, 2016 WL 6783267 (Bankr. E.D. Ky. 2016) – State Courts have concurrent jurisdiction with Bankruptcy Courts to determine whether debt is excepted from discharge under Section 523(a). State Court had previously determined on multiple occasions that obligation owed by Debtor to creditor was not DSO. Action brought in Bankruptcy Court seeking to except debt from discharge blocked by *Rooker-Feldman* as any judgment by Bankruptcy Court would necessarily amount to Federal Court review of State Court judgment.
- (3241) *Missouri v. Spencer*, 550 BR 766 (8th Cir. BAP 2016) – Holder of non-dischargeable DSO claim cannot violate discharge injunction by seeking, after discharge in Chapter 13, recovery of unpaid support obligations. Creditor filed claim in bankruptcy case and Debtor objected., Court entered order sustaining objection and reducing amount of allowed claim, and Chapter 13 plan then paid that claim as allowed in full. Post-discharge, creditor sought to collect that portion of the debt that was disallowed by the Bankruptcy Court and Debtor sought sanctions for violation of discharge injunction. Court concluded that because debt (to whatever extent it existed) was excepted from discharge, creditor's action could not as a matter of law violate discharge injunction. Court did not address *res judicata* effect of prior Court Order as that was not within scope of relief requested by Debtor.
- (3242) *Grant v. Granader*, 2016 WL 5936797 (6th Cir. 2016) – Bankruptcy Court did not abuse discretion in denying Motion to Reopen Chapter 7 case more than 3 years after entry of discharge. Although plaintiff sought determination that particular debt was excepted from discharge as Domestic Support Obligation, evidence indicated that debt at issue was neither incurred in connection with divorce decree or in course of divorce proceeding, but was promissory note from trust in which Debtor had no interest to creditor, and Debtor was not party to transfer.
- (3243) *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.
- (3244) *Valdivia v. Hawk*, 2016 WL 39912029 (E.D. Mi. 2016) – Creditor lacks standing to bring action to except debt from discharge where debt is statutorily excepted from discharge without need for adversary. Debtor's obligations to ex-spouse were non-dischargeable under Section 523(a)(5 and (a)(15). Debtor conceded that debts were non dischargeable. Plaintiff lacked standing to bring action as court lacked power to grant any effective relief. Court could, at best, rule that debts were non-dischargeable but as that result followed as matter of law and court decree could not add to or increase remedy available to plaintiff. Default judgment against Debtor void for lack of jurisdiction where plaintiff lacked standing to bring action in first instance.
- (3245) *Rismiller v. Schweitzer*, 2015 WL 5918031 (Bankr. N.D. Ohio 2015) – Property settlement awards are discharged in Chapter 13 if Debtor receives full discharge under Section 1328(a). However, property settlement awards are not discharged in Chapter 13 if Debtor receives hardship discharge under Section 1328(b). Dischargeability or non-dischargeability is self-executing depending on which type of discharge is granted. Whether obligation is support or property settlement depends on whether debt is owed to or recoverable by former spouse, is in the nature of support, and was established by separation or divorce decree. Debtor's obligation to pay joint mortgage debt is “claim” of spouse as spouse would have right under “hold harmless” provision of decree to recover from Debtor if spouse is required to pay mortgage payment, giving rise to contingent claim. Whether obligation is in nature of support where the decree does not designate it as such depends on whether the State Court or parties intended to create a support obligation; whether the obligation has the actual effect of providing necessary support; if the first two conditions are satisfied, whether the obligation is so excessive as to be unreasonable under traditional concepts of support; to the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purposes of federal bankruptcy law. Court will look to traditional state law indicia of support including (1) a label such as alimony, support, or maintenance in the decree or agreement, (2) a direct payment to the former spouse, as opposed to the assumption of a third-party debt, and (3) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits; as well as disparity in earning power of parties, need for economic support and stability, presence of minor children, marital fault, evidence of negotiations or understandings as to intended purpose of assumption of debt. Court could not determine on summary judgment whether Debtor's assumption of mortgage

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

- (3246) *In re Kinsey*, 2015 WL 5675586 (Bankr. E.D. Tn. 2015) – There is no deadline for filing adversary proceeding to determine dischargeability of debt under Section 523(a)(5). However, Court has authority to impose one to facilitate orderly case administration.
- (3247) *Liggett v. Schwartz*, 2015 WL 4478033 (6th Cir. 2015) – Divorce decree that awarded wife one-half of retirement account had contract right to recover one-half of the account that was non-dischargeable under Section 523(a)(15). Award constituted property settlement but there was no evidence that settlement was intended to act as alimony or support. Husband’s failure to transfer funds amounted to breach of contract and could not constitute conversion as a matter of law.
- (3248) *Read v. Read*, 2015 WL 3918137 (Bankr. E.D. Tn. 2015) – Domestic support obligation is one owed to spouse or former spouse or child that accrues before, on or after date of bankruptcy filing and is nature of alimony, maintenance or support. Payments defined in divorce judgment as “alimony” undoubtedly fall within scope of “domestic support obligation”.
- (3249) *Michigan Department of Human Services v. Marks*, Case No. 15-80301 (Bankr. W.D. Mi. 2015) – Debtor’s alleged fraudulent obtaining of Supplemental Nutrition Assistance program benefits is not “domestic support obligation” even if benefits are based on representation of household income. However, Debtor’s misrepresentation of Debtor’s income for purposes of obtaining benefits constitutes fraud that would be excepted from discharge under Section 523(a)(2).
- (3250) *In re Cummings*, 2014 WL 7202109 (Bankr. W.D. Mi. 2014) – Obligation is in the “nature” of support if State Court Order labels it as alimony, support or maintenance; payment is directly to spouse rather than assumption of third party debt; and payments are contingent on events such as death, remarriage, or eligibility for social security. Award that meets these indicia are conclusively presumed to be support and bankruptcy court will not second guess State Court determination. Mediation award met qualifications as support where award specifically awarded “spousal support” and included explanation as to why award was support; payment was directly to Debtor and not to third party nor was award in any way conditioned on or linked to any obligation to pay third party. Payments were contingent as payments continued only until a specified total was reached or until the death of the payee. While bankruptcy court can evaluate reasonableness of support payment amounts, court would do so only if Debtor demonstrates an inability to make the required payments in light of Debtor’s circumstances. Debtor did not show requisite hardship where Debtor continued to pay \$600 per month on mortgage on cottage and Debtor paid his attorney over \$22,000 to fight frivolous State Court proceedings. Debtors also purchased two new vehicles on eve of filing bankruptcy, while evidence indicated that both Debtors were retired and could share one vehicle. Award of attorney fees to creditor’s attorney as part of domestic proceeding also qualified as support. Mediation Award included attorney fees as part of “support”. Debtor’s conduct was vindictive, spiteful and dilatory and impaired creditor’s ability to earn a living; and creditor had no resources from which to pay attorney fees. Money was to be paid directly to Debtor and not to the attorney and the obligation was contingent on either full payment or death of the creditor.
- (3251) *In re Ballinger*, 2013 WL 6383011 (Bankr. E.D. Ark. 2013) – Debtor’s husband’s obligation to pay child support to husband’s children did not constitute non-dischargeable debt as to Debtor. Debtor was not responsible for payment of support to husband’s ex-spouse and claim cannot qualify as domestic support.
- (3252) *In re Willis*, 2014 WL 231982 (Bankr. S.D. Al. 2014) – Child support obligation owed to more recent ex-wife was not excepted from discharge in bankruptcy filed by Debtor’s first ex-wife. Second wife received child support allegedly from funds that ex-husband should have used to pay child support to first ex-wife. When second ex-wife filed bankruptcy, first ex-wife filed claim asserting that second ex-wife was based on use of money that should have been paid to first ex-wife but instead was paid to second ex-wife. Debt not excepted from discharge under Section 523(a)(5) because there was no familial connection between the two ex-spouses.
- (3253) *Bendetti v. Guinness*, 2014 WL 177247 (9th Cir. BAP 2014) – Status of creditor as spouse, former spouse or child of Debtor is prerequisite to except debt from discharge. Debtor and her husband were liable for attorney fees owed to Husband’s former spouse for costs of divorce. The lack of any familial connection between Debtor and creditor prevented debt from being within scope of Section 523(a)(5). Court noted that cases that extended scope to persons other than the spouse, former spouse or child involved debts that flowed to the benefit of a member of the listed classes, or where the discharge would adversely affect explicitly covered family members. Debt to spouse’s former spouse was not one that would flow to Debtor’s family member and did not adversely affect Debtor’s family member. Debt was not excepted from discharge.
- (3254) *Hamilton v. Kyer*, 2013 WL 3877897 (Bankr. N.D. Ohio 2013) – Whether obligation is in the nature of support, alimony or maintenance depends on traditional state law indicia such as label used by State Court; direct payment to the spouse as opposed to assumption of obligation owed to third party; and payments that are contingent on some event such as death, remarriage or eligibility for Social Security. Obligation was not in nature of support where obligation was in section of Settlement Agreement titled “Division of Property” and not section titled “Spousal Support”. Parties knew how to designate obligation as spousal support. Obligation was to pay debt to third party for lien secured by automobile that was retained by Debtor, and not an obligation to pay the spouse although the spouse was jointly liable on the debt. Debtor’s obligation to pay was not contingent but was unconditional obligation of Debtor to pay the debt until the lien was paid in full.
- (3255) *In re Owsley*, 2013 WL 2352604 (Bankr. E.D. Tn. 2013) – Section 350 allows court to reopen case to administer assets, to accord relief to the Debtor, or for other cause. Reopening case grants no relief. Court should only reopen case where moving party demonstrates compelling reason to do so. The longer the time between closing and the motion to reopen, the more compelling the reason must be. Court should not reopen case where court cannot grant effective relief to moving party. Pre-BAPCPA version of Section 523(a)(5) allowed for discharge of domestic support obligations only where the debt, while denominated as child support, was in fact not such; or where the debt had been assigned to an entity other than a governmental entity Debtor’s pre-petition child support obligation had been assigned to the state for

purposes of recovering amounts advanced to former spouse constituted obligation assigned to governmental unit that was not dischargeable. Treatment of obligation as unsecured in confirmed plan did not make debt dischargeable at end of Plan. Personal liability for unpaid child support is unaffected by discharge in Chapter 13 case. Nothing in the plan purported to determine dischargeability of debt. Plan merely addressed how debt would be paid during term of plan. Court would not reopen case for purposes of allowing Debtor to bring contempt action against State where debt had not been discharged and State actions were, therefore, not violation of discharge injunction. Reopening would be futile act as Debtor was not entitled to any relief.

- (3256) *In re Ashby*, 2013 WL 149947 (Bankr. W.D. Ky. 2013) – Ex-husband’s Obligation to pay “Consulting fees” to ex-wife constituted support and was not dischargeable under Section 523(a)(5). During marriage, parties jointly owned business. As part of divorce, husband was awarded ownership and was required to pay ex-wife a consulting fee of \$33,800 per year until ex-wife became eligible for social security. Other than consulting fee, decree stated that “Neither party shall be responsible to the other for payment of maintenance.” Testimony established that consulting fee was to be paid in lieu of maintenance and was structured as consulting fee for tax purposes. Fee would continue until ex-wife became eligible for social security and was intended to allow wife to maintain standard of living. Statement in decree that neither party was obligated for support did not prevent court from looking behind language to actual intent of parties.
- (3257) *Rugiero v. Dinardo*, 2012 WL 4800059 (6th Cir. 2012) – Attorney fee award to child’s parent arising out of custody action is non-dischargeable domestic support obligation. Award was made directly to parent, constituted a “debt” and was established by Court Order. Fact that parents were never married is irrelevant to outcome as Section 523(a)(5) focuses on whether award was to “parent” without limitation or regard to marital status. In determining whether award is “support” court will consider label assigned by State Court and whether the award is denominated support or maintenance; whether payment is direct to recipient rather than payable to third party; and whether payment is contingent on events such as remarriage or death. State Court considered relative capacities of parties to pay fees and determined that recipient lacked ability to pay fees. Proceedings in case involved welfare of children and affordability of attorney fees was considered and necessary to allow parties to advance positions in domestic support action. Total award was not excessive or unreasonable and record indicated that State Court made painstaking review of fee request before entering award.
- (3258) *Taylor v. Taylor*, Case No. 11-103 (10th Cir. BAP 2012) – Obligation owed to Debtor’s ex-spouse arising out of ex-spouse’s overpayment of support is not “support obligation” within Section 523(a)(5). Domestic Support Obligation under Section 523(a)(5) must be owed to spouse, former spouse; be in the nature of support or alimony; and must be established as part of a separation agreement, divorce decree, or property settlement agreement. Although obligation itself arose out of payment of a Domestic Support Obligation, the debt resulting from the overpayment did not retain that same character where there was no evidence that ex-spouse had any need for support or that court intended repayment to constitute support. Obligation to pay alimony was to terminate when spouse co-habited. Spouse (now Debtor) began to cohabit but did not disclose this to either her ex-spouse or to the court, resulting in continued payments of alimony to which Debtor was not entitled.
- (3259) *In re Peake*, 2012 WL 3262747 (Bankr. E.D. Mi. 2012) – Chapter 7 discharge does not discharge obligations for alimony, support or maintenance. Obligation will constitute support only if parties intended to create a support obligation; obligation must have actual effect of providing necessary support; court must determine if obligation is so excessive as to be unreasonable; and if amount is unreasonable, amount is dischargeable to the extent necessary to serve purposes of bankruptcy code. Although judgment expressly waived any rights to support, judgment provided for property settlement that stated that property settlement was to provide Wife “with support and maintenance in lieu of direct alimony, this obligation is determined to be nondischargeable in bankruptcy”. Wife testified that Debtor took most of the furniture, appliances and household goods when he moved out, and wife considered award to be support to allow her to purchase new furnishings and to repair damages to home caused by Debtor. Award had actual effect of support as Wife continued to pay mortgage on marital home and utility expenses while Debtor was living in home during course of divorce, and Wife, living elsewhere, had to pay her own living expense in addition. Once Wife returned home, she had to purchase items to replace those taken by Debtor. Money awarded by State Court had actual effect of providing support. Amount was not unreasonable or excessive given Wife’s expenses and need to replace items taken by Debtor and repair damages caused by Debtor.
- (3260) *Baer v. Cabrian*, 2012 WL 1430934 (Bankr. E.D. Ky. 2012) – State Court has concurrent jurisdiction with Bankruptcy Court to determine dischargeability of debt under Section 523(a)(5). Adversary proceeding dismissed where Bankruptcy Court had already abstained from ruling on issue pursuant to 28 USC Section 1334 to allow parties to proceed in State Court.
- (3261) *In re Lee*, 465 BR 469 (Bankr. W.D. Ky. 2012) - Debtor’s obligation to pay ex-spouses attorney fees incurred in divorce constituted “domestic support obligation” that is excepted from automatic stay. Ex-spouses action in obtaining an award of attorney fees in the domestic relations action did not violate automatic stay. Further, domestic Court Order requiring Debtor to pay \$1506 per month “toward his share of the marital debts” also constituted award of support as award was intended to assist ex-wife with payment of monthly household obligations and, therefore, entry of order was also excepted from automatic stay.
- (3262) *In re Phile*, 490 BR 250 (Bankr. S.D. Ohio 2011) – Chapter 13 plan that provided that Debtor’s obligation to former spouse would be deemed to not constitute a domestic support obligation and would be discharged at end of plan could not be confirmed. Dischargeability of obligation could not be established through plan confirmation process, but required adversary proceeding.
- (3263) *Rugiero v. Dinardo*, 2012 WL 4800059 (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. Orders to reimburse creditor for attorney fees was debt owed to or recoverably by a child or parent and that is in the nature of support and established by order of court. Fact that Debtor was never married to creditor does not change nature of obligation as one for child support. Section 101(14A) does not require marriage as condition of DSO. State Court Order established that reimbursement was intended as support and took into consideration relative financial positions of the parties.

- (3264) *Hollington v. Ruf*, Case No. 10-8086 (6th Cir. BAP 2011) – Debtor’s obligation to pay third party obligations are non-dischargeable. The precedent, *Gibson v. Gibson*, 219 BR 195 (6th Cir. BAP 1998), although pre-BAPCPA, is still good law. Divorce obligation that required Debtor to pay private school tuition for children is not dischargeable.
- (3265) *Dinicola v. Slimak*, 2011 WL 3759468 (Bankr. N.D. Ohio 2011) – Guardian ad litem fees for Debtor’s children are non-dischargeable under Section 523(a)(5). “Domestic Support Obligation” is one that is owed to or recoverable by governmental unit or specified person; in the nature of support; arising from agreement or Court Order; and not assigned to a governmental unit. Guardian ad litem has relationship with Debtor; obligation to pay GAL fees arose from Court Order; and debt had not been assigned. GAL services were “in the nature of support of the Debtor’s children throughout the Debtor’s divorce proceeding” to bring the obligation within the scope of non-dischargeable DSO.
- (3266) *In re Fath*, Case No. 09-21637 (Bankr. E.D. Mi. 2010) – “Domestic support obligation” is an obligation which is in the nature of alimony, maintenance or support. Alimony and support are given broad constructions to promote congressional policy that favors enforcement of obligations for spousal and child support. In determining whether an obligation not specifically designated as alimony, maintenance or support will nonetheless be “in the nature of support”, court will consider whether the State Court or parties intended to create a support obligation; whether the obligation has the actual effect of providing necessary support; whether the obligation is excessive or unreasonable under traditional concepts of support; and if the amount is unreasonable, the extent to which the dischargeability of the obligation serves the purpose of federal bankruptcy law. State Court Orders clearly did not award alimony to either party and court never labeled amounts owed to ex-wife as alimony, support or maintenance. Amounts owed to ex-wife were not in the nature of alimony or support.
- (3267) *Reissig v. Gruber*, 2010 WL 2756762 (Bankr. N.D. Ohio 2010) – A discharge does not discharge an individual Debtor from any debt for a domestic support obligation. A domestic support obligation” is defined under 11 U.S.C. § 101 of the Bankruptcy Code as a debt that accrues before, on, or after the date of the order for relief that is in the nature of alimony, maintenance, or support of such spouse, former spouse, or child of the Debtor or such child’s parent, without regard to whether such debt is expressly so designated. Award of attorney fees made in connection with an order entered in a domestic matter constitutes an obligation in “the nature of support.” The attorney fees were awarded in a proceeding concerning the health and welfare of the Parties’ children; and the award of attorney fees was done for the express purpose of compensating the Plaintiff for the Defendant’s improper litigation tactics which forced the Plaintiff to expend resources unnecessarily-resources which would have been available to support the children. Federal bankruptcy law controls determination of obligation’s status as “support”. Debtor’s obligation to pay ex-spouse’s attorney directly would not remove obligation from status of “support” although Ohio law defined support as only those obligations paid through the office of child support. Direct payments to the creditor, although removing the obligation from the state definition of “support”, did not alter the status for purposes of Section 523(a)(5).
- (3268) *Kassicieh v. Battisti*, 467 B.R. 445 (Bankr. S.D. Ohio 2012), *aff’d* Case No. 12-8015 (6th Cir. BAP 2012) – A domestic support obligation is one owed to or recoverable by a spouse, former spouse or child of the Debtor or the child’s parent, legal guardian or responsible relative. As part of custody dispute, Court appointed guardian ad litem to act as representative of the minor child. Court Ordered that each party was fully responsible for the guardian ad litem fees. Courts have adopted three different approaches to determine if a debt is payable to one of the defined classes: (1) the “plain-meaning” approach, holding that the dischargeability of the debt turns on whether it is payable to or recoverable by a person or entity described in section 101(14A); (2) the view that, if a debt is in the nature of support, it is non-dischargeable even if payable directly to a third party and even if the Debtor’s spouse, former spouse or parent of the child would not be financially harmed if the Debtor discharged the obligation; and (3) a more limited approach that requires some ongoing liability of the Debtor’s spouse, former spouse, or parent of the Debtor’s child on the support obligation owing to a third party (so that its non-payment might have a financial impact on those parties) before it may be excepted from discharge. Fees are non-dischargeable DSO where the payment was in nature of support, even if payable to person who is outside statutory list of persons to whom a DSO may be owed and even though no listed person is jointly liable with the Debtor for payment of fees. Services of guardian ad litem protect child and have effect of providing support.
- (3269) *Cheatham v. Cheatham*, 2009 WL 2827951 (Bankr. N.D. Ohio 2009) – An award that is designated as support by the State Court and that has the indicia of a support obligation is conclusively presumed to be a support obligation by bankruptcy courts in the Sixth Circuit. Indicia of support include but are not necessarily limited to, (1) a label such as alimony, support, or maintenance in the decree or agreement, (2) a direct payment to the former spouse, as opposed to the assumption of a third-party debt, and (3) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits. Debtor’s obligation to make payments on secured debts are not “support obligations”. The payments are not to the spouse but are to the lenders directly; the obligations do not terminate on the death, remarriage or eligibility of the spouse for Social Security; Debtor was required to obtain the release of the secured claims within two years regardless of any other change or lack of change in the status of either party; and the Judgment of Dissolution had another paragraph expressly titled “spousal support” that established a direct payment obligation that terminates on the death of either party or the remarriage of the spouse. Debtor’s obligation to pay the mortgage and home equity line on the former marital homestead was not an obligation for support or maintenance that would be non-dischargeable under Section 523(a)(5).

8.191 Section 523(a)(5) – Delinquency Proceedings

- (3270) *Rivera v. Orange County Probation Department*, Case No. 13-1476 (9th Cir. BAP 2016) – Costs incurred by county for support of Debtor’s son while in juvenile detention is not “domestic support obligation” and is not excepted from discharge. Section 101(14A) specifically includes in definition of Domestic Support Obligation any obligation owed to a governmental unit, which allows government to recover temporary child or spousal aid payments, foster care, wardship, residential treatment centers, or expenses incurred for child’s benefit in divorce and custody proceedings. However, 101(14A) does not include payments that are outside the governmental family support infrastructure such as charges incurred while juvenile is involuntarily detained. Expenses incurred by County were not intended as family support but were incurred as part of and incidental to larger government purpose of promoting public safety and reducing crime through

corrections efforts. Purpose of detention was to enforce criminal law, not to support family. Expenses were incurred by public safety agency and provision of food and clothing was incidental to incarceration, and objective was not to place child in place of wholesome upbringing but to enforce criminal law.

- (3271) *Ferguson v. Genesee County Circuit Court*, Case No. 14-3192 (Bankr. E.D. Mi. 2015) – Section 101(14A) defines domestic support obligation as one owed to or recoverable by spouse, former spouse or child or a governmental unit; in the nature of alimony, maintenance or support; and established or subject to establishment by Court Order or by determination made in accordance with applicable non-bankruptcy law. Debtor's two children were removed from home on delinquency petition. State Court later determined that Debtor had financial ability to reimburse court for costs of care. As of the petition date, Debtor owed \$69,000 in costs. Costs were owed to a governmental unit as determined by Court Order. Costs were awarded for purpose of providing maintenance and support of children while placed outside Debtor's home and were expressly intended to pay costs of care and service to child. Debts were established by Court Orders in accordance with Michigan law. Debts were payable directly to county and were not assigned. Debts meet definition of domestic support obligation which is excepted from discharge under Section 523(a)(5).

8.192 Section 523(a)(5) – Hold Harmless Clause

- (3272) *Carter v. Carter*, 2017 WL 1327720 (Bankr. W.D. Ohio 2017) – Domestic Support Obligations are nondischargeable in Chapter 13 pursuant to 11 USC Section 523(a)(5). "Domestic Support Obligation" is debt owed to former spouse that is in nature of alimony, maintenance or support without regard to whether the debt is expressly designated. If marital debt is not expressly designated as alimony, maintenance or support, Court will consider (1) whether parties or Court intended to create support obligation; (2) whether obligation will have actual effect of providing support; (3) if first 2 conditions are satisfied, Court must determine if obligation is so excessive as to be unreasonable under traditional concepts of support; and (4) if amount is unreasonable, obligation is dischargeable to extent necessary to serve a purpose of federal bankruptcy law. In determining whether provision of State Court decree providing for one spouse to assume marital debt and hold non-Debtor spouse harmless on the post-dissolution monthly mortgage payments constituted support obligation, Court will consider (1) label such as alimony, support or maintenance in decree or agreement; (2) direct payment to former spouse as opposed to Assumption of third-party debt; (3) payments that are contingent upon death, remarriage or eligibility for Social Security; (4) nature of obligations assumed; (5) structure and language of parties agreement or courts decree; (6) whether other lump-sum or periodic payments were also provided; (7) length of marriage; (8) age, health and work skills of parties; (9) whether obligation terminates on death or remarriage of parties; (10) adequacy of support absent debt assumption; and (11) evidence of negotiations or other understandings as to intended purposes of assumption of debt. Debtor's obligation to assume mortgage debt did not provide for direct payment to non-filing spouse but instead reflect assumption of debt with obligation to pay mortgage company directly. Obligation to pay mortgage did not terminate upon death or remarriage, was not labeled alimony, maintenance or support, was located in Section of dissolution decree entitled "Division of Property and Debts," and section entitled "Spousal Maintenance" provided that non-Debtor did not ask for spousal maintenance and was not awarded spousal maintenance. Courts that have held that assumption of mortgage debt on principal residence constituted support obligation did so in context where non-Debtor remained in marital residence and Debtor's obligation to pay mortgage was means of providing shelter that spouse and children could not otherwise afford. In this case, property was retained by Debtor and non-Debtor and children did not remain in marital residence. Post-dissolution proceedings in State Court further supported conclusion where Court issued Order that to the extent non-Debtor made payments against mortgage after dissolution of marriage, then upon sale of property non-Debtor would be entitled to recover those amounts from proceeds of sale or, if sale or disposition results in deficiency, Debtor's share of deficiency would be increased to reflect the amount of payments made by non-Debtor post-dissolution. Debtor's obligation to hold non-Debtor harmless on any post-decree monthly mortgage payments is dischargeable as property settlement, not support or maintenance.

8.193 Section 523(a)(6)

- (3273) *Jacques v. Hose*, 2017 WL 83351 (Bankr. N.D. W.Va. 2017) – Section 523(a)(6) will support exception to discharge for debt incurred where Debtor intentionally acts knowing that consequences of act are certain or substantially certain. State Court judgment against Debtor arising from wrongful death as result of Debtor shooting third party non-dischargeable where State Court Judgement stated that Debtor intentionally shot and killed decedent, and that Debtor evidenced criminal indifference to civil obligations and willfully disregarded rights of decedent. Debtor lacked any justification for actions as determined by State Court Criminal conviction for voluntary manslaughter in which Court considered and rejected Debtor's assertion of self-defense.
- (3274) *Cowin v. Countrywide Home Loans, Inc.*, Case No. 15-20600 (5th Cir. 2017) – Section 523(a)(6) excepts from discharge any debt for willful and malicious injury. Evidence supported finding that Debtor, as part of a conspiracy, committed acts designed to deprive Plaintiff of its interest in proceeds of sale of property by engineering scheme to cause funds to be distributed to entity related to Debtor, amounting to willful and malicious injury. However, actions of co-conspirators cannot result in debt being non-dischargeable under Section 523(a)(6) unless evidence indicates that Debtor personally committed willful and malicious act. Section 523(a)(6) requires proof of a willful and malicious injury by the Debtor, preventing imputation of actions of co-conspirators for purposes of determining willful and malicious.
- (3275) *Community Financial Services Bank. v. Edwards*, 2017 WL 3037451 (Bankr. W.D. Ky. 2017) – Section 523(a)(6) requires proof of a willful and malicious injury to Plaintiff or property of Plaintiff. Debtor must intend the act and must also intend to cause consequences of act or must know that consequences are substantially certain. Where Debtor converts creditor's collateral, "willfulness" can be indirectly established by showing that Debtor knew of creditor's lien rights and knew that conduct would cause injury to those rights. Debtor's response that he did not read loan document and did not know that loan documents contained security interest rejected as Debtor was quite adept at financing business ventures and had filled out several loan applications in the past including prior floor plan financing arrangements with other lenders, and Debtor was sophisticated businessman with College Degree in business Management. Even if Debtor did not read documents, under the law he is presumed to know the contents of the documents signed with Creditor if he was given opportunity to read documents and was not prevented from doing so because of language incapacity or fraud. As experienced businessman, Debtor knew that

sale of collateral without remitting payments to floor plan lender would have natural consequence of injuring Creditor, and Debtor admitted that he sold collateral without remitting proceeds to Creditor, establishing willful injury. Injury was also malicious where Debtor's actions evidenced a conscious disregard for his duties under loan documents. Malicious does not require ill will or specific intent to harm, but only deliberate disregard of creditor's rights. Malice is inferred when Debtor sells collateral "out of trust" and fails to remit proceeds to lender. However, there was no evidence that Debtor-wife was aware of Creditor's rights where Debtor-wife did not sign any of the financing documents other than a personal guarantee and there was no evidence that Debtor-wife knew that funds being used to pay household expenses were proceeds of collateral that should have been remitted to Creditor. Debtor-wife's action in writing checks for business were intentional, there was no evidence of any willful intent to cause injury to Creditor.

- (3276) *HST Corporate Interiors LLC v. Sherrick*, 2017 WL 2889656 (Bankr. M.D. Tn. 2017) - Debt may be excepted from discharge under Section 523(a)(6) if debt is for willful and malicious injury by Debtor to another entity or property of another entity. Debtor must have acted with intention to cause consequences of act or believe that consequences were substantially certain. It is not sufficient that Debtor should have known that conduct wrist injury to others or that Debtor acted in reckless disregard of creditors interests. Creditor did not show that Debtor maliciously intended to cause harm to creditor. Although Debtor's conduct ultimately resulted in damage to plaintiffs economic interest, there was no showing that Debtor intended to cause harm at time when Debtor received payments from third-party but failed to remit those payments to plaintiff.
- (3277) *Trost v. Trost*, 2014 WL 1891354 (Bankr. W.D. Mi. 2014), *aff'd*, Case No. 16-8024 (6th Cir. BAP 2017) – Collateral estoppel requires that the same issue was actually and necessarily adjudicated in prior proceedings. There was no question that prior litigation determined that Debtor had converted property belonging to plaintiff. Although final judgment did not use phrase "willful and malicious", factual findings in final judgment sufficiently established factual predicate to mandate finding that Debtor's conversion of plaintiff's property was willful. Plaintiff owned the assets in question, and all parties knew that plaintiff owned the assets. Despite that knowledge, Debtor took, and retained the assets following repeated requests by plaintiff to return the assets. Debtor's actions could not be "unwitting" or "unintentional" and was substantially certain to cause injury, meeting "willful" standard of Section 523(a)(6). Factual findings in prior judgment also established that Debtor took and retained plaintiff's property without cause or excuse, fulfilling "malicious" requirement. Prior Court Judgment awarding plaintiff \$108,797.06 is non dischargeable under Section 523(a)(6).
- (3278) *Dardinger v. Dardinger*, 2017 WL 1406453 (Bankr. S.D. Ohio 2017) – Ohio Courts give preclusive effect to prior judgment if (1) there is a Final Judgment on merits in previous case after full and fair opportunity to litigate; (2) issue was actually and directly litigated and necessary to Final Judgment; (3) issue in present suit is identical to issue in prior suit; and (4) party to be estopped was party or in privity with party in prior action. State Court judgment against defendant entitled to preclusive effect in action to deny discharge under Section 523(a)(6) for willful and malicious injury. On at least 37 separate occasions, defendant used a spy camera to surreptitiously video record plaintiff in various stages of undress in her bedroom, bathroom and other private areas of family residence. After plaintiff referred matter to police, defendant made numerous contacts with plaintiff, threatening to cut her off financially and to use media to "ruin" plaintiff's life. Defendant pled guilty and was convicted of illegal use of minor in nudity oriented material, a fifth degree felony. Defendant also assaulted plaintiff by grabbing her arm, twisting it behind her back and slamming her into a wall, amounting to assault and battery under state law. State Court concluded that defendant's conduct was done knowing and intentionally and was done willfully and maliciously and without just cause, warranting award of actual damages of \$104,200, punitive damages of \$1,850,000, and attorney's fees of \$651,400. All issues necessary for determination of dischargeability under Section 523(a)(6) were actually and necessarily litigated as State Court necessarily had to find that Debtor engaged in certain conduct that would be willful and malicious. State Court received evidence from a number of sources and issued specific findings and conclusions to establish that Debtor rises from conduct that was willful and malicious.
- (3279) *Allen v. Smith*, 2017 WL 1399685 (Bankr. M.D. Tn. 2017) – Section 523(a)(6) renders that nondischargeable or dead results from willful and malicious injury by Debtor to another entity. Actor must desire to cause consequences of act or believe that consequences were substantially certain to result from it, requiring more than that a reasonable Debtor should have known that conduct wrist injuries. Conduct was also be more culpable than reckless disregard of economic interest and expectancies. Although Debtor's conduct was willful as Debtor intentionally diverted funds which creditor intended to invest into business for payment of Debtor's own personal expenses, but Debtor's conduct was motivated solely by maintaining his lifestyle without any thought to the consequences of his action as to creditor such that conduct, while willful, was not malicious.
- (3280) *Roe v. Boland*, 2017 WL 2312854 (Bankr. N.D. Ohio 2017) – Section 523(a)(6) requires that Debtor have committed an act with an intent to injure and not merely an act done intentionally that causes injury. Debtor must desire consequences of act or believe that consequences are substantially certain to result from it. Debtor was convicted of knowingly manipulating images of real children to superimpose pictures into child pornography. However, there was no evidence that Debtor ever disseminated or distributed pictures and Debtor testified that he created images in his role as a consultant and courtroom proceedings to demonstrate ease with which images can be combined in such a way that it cannot be easily determined. Absent evidence contradicting Debtor's testimony why he downloaded innocent images and altered them for courtroom demonstrations, there was no evidence that Debtor actually intended to cause harm or knew that harm was substantially certain to occur.
- (3281) *Marketgraphics Research Group, Inc. v. Berge*, 2017 WL 1214461 (M.D. Tn. 2017) – Section 523(a)(6) requires that Debtor acted "willfully and maliciously". After Supreme Court decision in *Kawaauhua v. Geiger*, 523 US 57 (1998), "but willful and malicious" should be construed as a single test, rather than considering "willful" and "malicious" as separate elements. Conduct is "willful and malicious" where Debtor intended to cause consequences of act or believe that consequences were substantially certain to result from it. "Willful and malicious" no longer requires consideration of whether Debtor's conduct was "without just cause or excuse" as long as Debtor intended consequences of act. Bankruptcy Court holding that Debtor did not act maliciously applied incorrect standard for determining whether conduct was malicious. However, factual findings supported Bankruptcy Court's conclusion that Debtor did not intend to cause injury as required for action to be

“willful and malicious”. Bankruptcy Court’s incorrect definition of “malicious” was harmless error.

- (3282) *Poole v. Batson*, 2017 WL 788307 (Bankr. M.D. Tn. 2017) – Section 523(a)(6) excepts from discharge any debt resulting from willful and malicious injury by Debtor to another entity or property of another entity. Conduct must be both willful and malicious, such that actor must desire to cause consequences of act or believed that consequences are substantially certain. It is not sufficient that Debtor “should have known” that conduct may cause injury, and conduct must be more culpable than mere recklessness. Lack of excuse or justification, without more, does not make debt nondischargeable. Evidence did not support finding that Debtor, a builder, maliciously intended to harm plaintiffs by obtaining “retainer” on signing of contract. Debtor was known for doing excellent work and Debtor credibly testified that Debtor intended to finish the project. Although Debtor may have intentionally misled plaintiff and converted money, there is no evidence that Debtor intended to fail to complete project or cause harm or otherwise acted maliciously
- (3283) *Smith v. McCants-Johnson*, 2017 WL 835165 (Bankr. N.D. Ohio 2017) –
- (3284) *HLJ Industries, Inc. v. Roy*, 2017 WL 377930 (Bankr. E.D. Ky. 2017) - Section 523(a)(6) excepts from discharge any debt for willful and malicious injury by Debtor to another entity or property of another entity. Injury must be both “willful” and “malicious”. “Willful” requires that Debtor intended to cause the consequences of the act or believed that consequences were substantially certain and is akin to an intentional, rather than negligent or reckless tort. Act is “malicious” if undertaken in conscious disregard of one’s duties or without just cause or excuse, but does not require ill will or specific intent to do harm. Creditor failed to produce evidence that Debtor intentionally manipulated corporate assets and financials so as to cause Corporation to default on loan. Evidence indicated that Debtor expended significant resources and pursued several reasonable paths an effort to save business, but business lost largest client and suffered other operational challenges that ultimately caused business to fail. Creditor did not present any evidence that Debtor benefitted in any tangible way from failure of business or foreclosure of senior lien held by SBA or that Debtor was wrongfully attempting to acquire assets. While Creditor, a former owner of the business, may have considered it unreasonable to operate business differently than Creditor did, that does not establish that Debtor willfully and maliciously injured creditors interests.
- (3285) *Walker v. Vanwinkle*, 2016 WL 7443168 (Bankr. E.D. Ky. 2016) - Debtor’s alleged fraudulent transfers of assets does not give rise to non-dischargeable debt to creditor who held judgment against Debtor before transfer occurred unless creditor had pre-existing interest in property transferred. Fraudulent transfer under Section 523(a)(6) requires that debt to creditor was result of willful and malicious conduct. Liability from Debtor to creditor flowed from contractual agreements and judgment that predated any transfers. Debtor as transferor is different situation than Debtor as recipient of fraudulent transfers, which can give rise to non-dischargeable debts in favor of transferor’s creditors, as fraudulent transfers themselves give rise to liability to creditors in first instance.
- (3286) *Monson v. Galaz*, Case No. 15-14939 (11th Cir. 2016) – Action under Section 523(a)(6) requires evidence that injury was both willful and malicious. Injury is willful where Debtor commits intentional act the purpose of which is to cause injury or which is substantially certain to cause injury. Act is malicious if it is willful and without just cause or is excessive but does not require proof of personal hatred, spite or ill-will. Debtor committed willful and malicious act by absconding with equipment that was subject to security interest and using that equipment to open new business after creditor had called loan and demanded turnover of collateral for liquidation. Fact that Debtor’s actions also amounted to breach of contractual provisions requiring Debtor to surrender collateral did not preclude finding of willful and malicious as Debtor’s breach of contractual obligation was certain to cause injury even absent separate tortious conduct. Debtor knew that lender claimed security interest in collateral, although Debtor doubted validity of that interest as Debtor never signed financing statement, and with full knowledge of lender’s claimed security interest he retrieved equipment from storage, relocated equipment to different part of state, and used it to open new business, all without consent or notice to creditor, Debtor’s actions in disposing of collateral with knowledge of security interest is willful and malicious act.
- (3287) *Bancorpsouth v. Shahid*, Case No. 16-3009 (Bankr. N.D. Fl. 2016) – Debtor’s alleged fraudulent transfers of assets does not give rise to non-dischargeable debt to creditor who held judgment against Debtor before transfer occurred unless creditor had pre-existing interest in property transferred. Fraudulent transfer under Section 523(a)(6) requires that debt to creditor was result of willful and malicious conduct. Liability from Debtor to creditor flowed from contractual agreements and judgment that predated any transfers. Debtor as transferor is different situation than Debtor as recipient of fraudulent transfers, which can give rise to non-dischargeable debts in favor of transferor’s creditors, as fraudulent transfers themselves give rise to liability to creditors in first instance.
- (3288) *Jennings v. Bodrick*, 2016 WL 6216099 (Bankr. S.D. Ohio 2016) – Willful and malicious injury required that Debtor take action intending to cause injury or under circumstances where Debtor believed that injury was substantially certain to occur. Focus is on subjective intent of Debtor to cause harm. Deliberate act that causes injury is not sufficient absent evidence that injury was intended. A Debtor must also have acted in conscious disregard of duties or without just cause or excuse. Prior ruling in Adversary proceeding that “Debtors intended to defraud [Plaintiff]” not entitled to preclusive effect where prior adversary to except debt from discharge under Section 523(a)(2) resulted in judgment in favor of Debtor. Finding of final judgment has collateral estoppel effect only if finding was actually litigated and was necessary to outcome in prior case. Judgment in prior case concluded that even if Debtors intended to defraud creditor, creditor did not reasonably or justifiably rely on statements. Finding that Debtor intended to defraud in no way affected court’s determination of dischargeability of debt and, therefore, was not “necessary” to the outcome for purposes of collateral estoppel.
- (3289) *Johnson v. Loomis*, 2016 WL 5940941 (Bankr. S.D. Ohio 2016) – Exception from discharge requires that claim result from willful and malicious conduct. Action is willful where Debtor either intended the consequences of his act or where consequences were substantially certain. Debtor willfully and maliciously caused harm to plaintiff by obtaining loans from plaintiff for specific business purposes, but Debtor instead used loans to fund personal lifestyle constituting willful and malicious conduct. Debtor committed willful and malicious act when he used plaintiff’s identification without plaintiff’s knowledge or consent to open two credit cards in plaintiff’s name, then used the cards and failed to pay the charges. Defendants used Plaintiff’s personal financial information to open two credit cards, without Plaintiff’s

knowledge and consent and concealed the existence of the accounts by directing all monthly billing statements in Plaintiff's name to Defendants' home.

- (3290) *Cardwell v. Hester*, 2016 WL 5922307 (Bankr. W.D. Ky. 2016) – Section 523(a)(6) requires proof that Debtor intended to cause harm or that harm was substantially certain to occur as result of behavior. Debtor's actions in removing money and property for store co-owned by plaintiff and defendant and using those funds a property for Debtor's own benefit constituted willful and malicious act, as harm to store and plaintiff from loss of funds was either intended or substantially certain and Debtor had no right or legal justification for stealing the funds. However, to extent Debtor removed property that belonged to him or to family members and not to the store, any removal of those items by Debtor would not be wrongful as Debtor had a superior right of possession. Funds taken from safe were not non-dischargeable but property allegedly removed was not excepted from discharge.
- (3291) *Trentadue v. Zimmerman*, 2016 WL 4163586 (Bankr. N.D. Ohio 2016) – A debt for willful and malicious injury by the Debtor to another entity or to the property of another entity is not dischargeable. Willful requires deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury, including circumstances where (i) the actor desired to cause the consequences of the act or (ii) the actor believed that the given consequences of his act were substantially certain to result from the act. Malicious means in conscious disregard of one's duties or without just cause or excuse but does not require ill-will or specific intent. Prior State Court judgment in favor of plaintiff and against Debtor that awarded actual but not punitive damages was not collateral estoppel on issues of willful or malicious. 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. While State Court action resulted in final judgment and action was indisputably between same parties, fact that plaintiff sought punitive damages but none were awarded is insufficient absent evidence that plaintiff actually sought punitive damages and that court specifically refused to award them coupled with finding of fact that would negate later finding that actions were willful and malicious. Further, denial of punitive damages is not collateral estoppel because State Courts impose higher burden of proof for punitive damages of clear and convincing than the preponderance of evidence required by Section 523 such that issue of willful and malicious was not "actually litigated".
- (3292) *Federal Insurance Company v. Woods*, 2016 WL 4991514 (Bankr. W.D. Ky. 2016) – Section 523(a)(6) requires proof that action was willful, defined as deliberate or intentional injury, not merely intentional act that causes harm. Malicious means done without just cause or excuse or done in conscious disregard of duties but does not require ill will or specific intent to do harm. Debtor admitted that he knowingly made false statements to induce company to issue checks to him with intent to use proceeds for personal use, and Debtor acted with intent to defraud in order to steal company money, rendering debt nondischargeable under Section 523(a)(6).
- (3293) *Estate of Jackson v. Hardaway*, 2016 WL 5799623 (Bankr. E.D. Mi. 2016) – Willful and malicious injury requires that Debtor intended to take action and intended to cause injury or believed that injury was substantially certain to occur; and that action was taken in disregard of one's duties or without cause or excuse. Criminal conviction for voluntary manslaughter following Debtor's shooting and killing of Plaintiff was not entitled to collateral estoppel effect. Collateral estoppel requires a final judgment in action between same parties where issue was actually litigated and necessarily determined. Mutuality of parties is essential as there must be mutuality of estoppel effect. Criminal conviction was undoubtedly a final judgment but did not involve same parties as dischargeability action. Parties to criminal conviction were Debtor and the State of Michigan, while parties to the adversary are Debtor and the Estate of the decedent. Absent mutuality of estoppel, conviction lacked any collateral estoppel effect in favor of either Debtor or plaintiff. Evidence indicate, and Debtor did not deny, that Debtor intended to harm decedent when Debtor shot him 5 times. Debtor claimed that the shooting was legally justified as he was acting in self-defense, which permits person to use deadly force if person believes his own life is in danger. Facts indicated that while decedent started the altercation and actually shot Debtor first, decedent then dropped his gun and was running away when Debtor shot him twice in the back, inflicting the fatal wounds. Court abstained from further rulings on liability and damages, as State Court where wrongful death action was pending was better forum to determine issues, with Court finding only that to extent decedent's estate prevails in State Court wrongful death action, any award that State Court may order will survive discharge.
- (3294) *Abraham v. Palmer*, 2016 WL 4544432 (Bankr. N.D. Ohio 2016) – Court can deny discharge under Section 523(a)(6) where Debtor commits willful and malicious injury to person or property of another. Willful requires that action amount to intentional tort, not merely negligence or recklessness, such that Debtor takes action intending to cause injury, not merely that Debtor intentionally acts in such a way as to cause injury. Injury is malicious if act is taken in conscious disregard of one's duties or without just cause. Cause of action for defamation under state law required proof that Debtor made false statement of fact; about plaintiff; published without privilege to third parties; with fault or at least negligence on part of Debtor; and statement was either defamatory per se or caused special harm. State law cause of action for invasion of privacy requires that one party places another before the public in false light that would be highly offensive to reasonable person and that actor had knowledge of or acted in reckless disregard of the falsity of the publicized information and the false light in which other would be placed. Statements must be both false and material – privacy is not invaded by disclosure of unimportant false statements, even if made deliberately. Intentional infliction of emotional distress requires conduct so outrageous in character and so extreme as to be beyond all possible bounds of decency and is atrocious and intolerable, and requires proof that defendant intended to cause serious distress; defendant's conduct was extreme and outrageous; and defendant's conduct was proximate cause of emotional distress. Statements made by Debtor at public zoning meeting regarding plaintiff's conduct were made in response to and were responsive to question. Debtor's failure to later clarify statements demonstrates that Debtor made false statements but does not prove that statements were made willfully and maliciously or that statements were made in extreme and outrageous manner.
- (3295) *Westbury Village Association v. Zweifel*, 2016 WL 4371828 (Bankr. S.D. Ohio 2016) – Sanctions for contempt for violation of State Court Order are not automatically excepted from discharge. Damages caused by reckless or negligent conduct do not fall within Section 523(a)(6). Section 523(a)(6) requires proof that Debtor either desired to cause consequence of act or believes that injury was substantially certain to

occur; and that actions were taken without any legal justification. Inquiry focuses on Debtor's state of mind. While Court can consider circumstantial evidence that tends to establish what Debtor must have actually intended, fact that Debtor should have known the consequences of actions is not sufficient. Collateral estoppel requires that same issue have been decided in prior litigation. Under State law, finding of civil contempt did not require proof of purposeful, willful or intentional violation of prior order, and "good faith" is not defense. Section 523(a)(6) requires higher burden, to show intentional and willful conduct. As State Court found that Debtor's actions were intentional but did not make, and was not required to make, finding of intentional or willful in finding of civil contempt, finding of contempt was not collateral estoppel on dischargeability under Section 523.

- (3296) *Elkins v. Benner*, 2016 WL 3648633 (Bankr. E.D. Mi. 2016) – Attorney's failure to pay "referral fee" per agreement with referring attorney was non-dischargeable debt. Attorney who owed referral fee received recovery from litigation but rather than paying share to referring attorney, attorney spent money on his own expenses plus expenses of clients, friends, employees and at least one other attorney. Debtor's actions constitute conversion of proceeds where Debtor wrongfully and knowingly exerted control and possession over money that was owed to referring attorney.
- (3297) *Hoewischer v. White*, 2016 WL 3517480 (Bankr. S.D. Ohio 2016) – Section 523(a)(6) requires a deliberate and intentional injury, not just intentional conduct that causes injury, such that actor intended consequences of act not merely act itself or there was objective certainty of harm. Focus is on Debtor's state of mind. Act must also be malicious, lacking just cause or excuse. Debtor's actions constituted willful and malicious where Debtor intentionally uploaded nude pictures of plaintiff to "revenge porn" webpage. State Court judgment had collateral estoppel effect on issues where State Court determined that (1) Debtor intended to cause emotional distress or knew or should have known that his conduct would result in serious emotional distress to plaintiff; (2) Debtor's conduct was outrageous and extreme beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community; and (3) Debtor's conduct was the proximate cause of plaintiff's psychic injury. State Court awarded damages under a claim for invasion of privacy finding that Debtors conduct was "outrageous, intentional, and highly offensive". State Court concluded that Debtor acted intentionally as act of posting pictures could not be done accidentally and was done where harm was certain to occur and Debtor had no legitimate purpose in posting pictures, but instead possessed subjective intent to cause harm. Collateral estoppel applies where State Court has entered final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; issue was actually and directly litigated in the prior suit and was necessary to the final judgment; issue in the present suit is identical to the issue in the prior suit; and party against whom estoppel is sought was a party or in privity with a party to the prior action. Collateral estoppel applies to default judgment where judgment is based on more than just an unverified complaint, and is supported by admissible evidence apart from pleadings, and State Court, based on evidence submitted, actually makes findings of fact and conclusions of law sufficiently detailed to support application of collateral estoppel such that later court can determine that State Court actually decided merits of the case and later court has reliable way of knowing decision was on merits. Debtor had actual notice of State Court matter inducing hearing on damages constituting full and fair opportunity to participate in litigation; fact that Debtor chose not to appear does not constitute lack of a full and fair opportunity to litigate. State Court action necessarily decided "willful and malicious" as State Court required plaintiff to testify and provide admissible evidence in support of claim and State Court then specifically found that conduct was "outrageous, intentional and offensive" as necessary for state law claims for intentional infliction of emotional distress and for invasion of privacy. Finding of malice was also required as predicate to award of \$100,000 punitive damages. Issues in State Court action were identical to those in adversary proceeding where standards applied by State Court for willfulness were identical to standards required under Section 523.
- (3298) *Smith v. Morse*, 2016 WL 3092630 (Bankr. E.D. Tn. 2016) – Section 523(a)(6) requires proof that Debtor acted deliberately and with intent to cause injury, and not merely that Debtor acted intentionally and act happened to cause injury, such that Debtor either desires to cause consequences of act or that consequences are substantially certain to result from it; and that Debtor acted in conscious disregard of duties or without just cause or excuse. Although creditor intended investment to be used for specific purpose, nothing in promissory note limited use of funds for that sole purpose. Fact that Debtor later used funds for personal use was important to finding that Debtor commixed fraud, but did not raise actions to level of willful and malicious.
- (3299) *Hagmaier v. Cooley*, Case No. 15-1214 (W.D. Ok. 2016) – In dicta, court held that creditor's proof that Debtor raped her was not sufficient for purposes of willful and malicious injury, absent evidence that rapist intended to cause injury or at least believed it was substantially certain to occur. Court would not presume willful and malicious intent and creditor's attorney utterly failed to submit any evidence that Debtor disliked or hated creditor or believed consequence of acts were substantially certain to occur and cause injury.
- (3300) *Irvin v. Faller*, 2016 WL 1068940 (Bankr. W.D. Ky. 2016) – Willful means that Debtor took intentional act with intent to cause injury, not merely that Debtor took intentional act that caused injury. Malicious means conscious disregard for duties or without just cause, but does not require ill-will or specific intent to do harm. Collateral estoppel applies where same parties or their privies litigated issues in State Court that produced final decision; identity of issues that were actually litigated and determined; that issues were necessarily determined as part of resolution of State Court matter; and the party to be estopped had full and fair opportunity to litigate. State Court judgment holding Debtor liable for defamation lacked preclusive effect where judgment established that Debtor intentionally published statement but there was no evidence of finding that statement was published with intent to cause harm or with knowledge of falsity. Fact that State Court found Debtor liable for libel per se did not, in itself, meet required mental state for willful and malicious, as libel per se did not require knowledge that statement was false when made. Further, there was no evidence that Debtor intended to cause injury, rather than to make intentional statement that incidentally caused injury, and intent to cause injury is not element of state law action for defamation per se. However, State Court judgment for abuse of process required finding of "ulterior motive or purpose" and "willful act in use of process that was not proper in the regular course of the proceeding". Judgment specifically required finding that defendant acted willfully and maliciously in filing action solely for purpose of harassing and annoying and without any good faith purpose.
- (3301) *HLJ Industries, Inc. v. Roy*, 2016 WL 1126272 (Bankr. E.D. Ky. 2016) – Discharge exception requires an injury resulting from conduct

that is both willful and malicious. Act must be done with intent to cause injury—and not merely acts done intentionally that cause injury. Debtor must have desired to cause the consequences of his act, or believed that the consequences are substantially certain to result from it. Malicious injury occurs ‘when a person acts in conscious disregard of duties or without just cause or excuse but does not require a determination of ill-will or specific intent. Complaint sufficiently stated cause of action by alleging that Debtor engineered scheme to cause plaintiff to sell business to entities controlled by Debtor with the full intent of defaulting on payment obligations, allowing purchaser to cause primary lender to foreclose and to have related entity repurchase assets free and clear of purchase money security interest extended by plaintiff. Actions were willful in effort to obtain control of assets of plaintiff and were known or substantially certain to cause harm to plaintiff by deprivation of assets and payment for purchase of assets.

- (3302) *Sequatchie Mountain Creditors v. Detweiler*, 2016 WL 321037 (Bankr. N.D. Ohio 2016) – Section 523(a)(6) requires that Debtor both willfully and maliciously cause injury. Allegations that Debtor convinced plaintiffs to purchase undeveloped lots knowing that development would fail did not prove that Debtor knew or intended to cause harm to plaintiffs from start of project, where evidence indicated that Debtor continued development activities long after purchasers bought lots and it was not until much later that development became infeasible.
- (3303) *Szachta v. Thompson*, 2016 WL 1055582 (E.D. Mi. 2016) – Willful and malicious injury requires that action taken be intentional and done with intent to cause consequences of act, not merely intentional act that produces consequence. Malicious requires that act be in disregard of duties or without justification. Conversion can constitute action within Section 523(a)(6) if willful and malicious – conversion which is innocent or technical or done with honest but mistaken belief that Debtor could take funds, would not be excepted from discharge. Debtor was office manager and bookkeeper for attorney. Debtor and attorney conspired to obtain funds from settlement of client personal injury claims and to divert those to the personal benefit of Debtor and attorney while misleading clients about status and whereabouts of settlement funds amounting to deliberate and intentional deprivation of plaintiff of settlement funds.
- (3304) *Kearns v. Havlovic*, 2016 WL 938427 (Bankr. E.D. Tn. 2016) – Section 523(a)(6) requires proof of deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury; and that Debtor either desired to cause the consequences of his act or believed with reasonable certainty that such consequences would occur. Unless the Debtor desires to cause the consequence of his act or believes that consequences are substantially certain to result, he has not committed willful and malicious injury. That Debtor should have known that conduct risked injury to others is not sufficient. State Court judgment for malicious prosecution and abuse of process established all facts necessary for finding of non-dischargeability. Collateral estoppel applies where (1) A final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (2) The issue must have been actually and directly litigated in the prior suit and must have been necessary to the final judgment; (3) The issue in the present suit must have been identical to the issue involved in the prior suit; and (4) The party against whom estoppel is sought was a party or in privity with a party to the prior action. State Court action was between Debtor and plaintiff and State Court action resulted in valid final judgment. Whether action raised issues which are identical to those in adversary proceeding depends on whether same facts and evidence would sustain both causes of action. If actions require different facts or different proofs, judgment in first action is not bar to second action. Court must compare factual findings made in prior action and determine whether those findings would have been sufficient to sustain decision that Debtor’s conduct rose to standard of Section 523. Ohio law provides claim for abuse of process where (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. Ohio law recognizes cause of action for malicious prosecution where (1) malicious institution of prior proceedings against the plaintiff by defendant; (2) lack of probable cause for the filing of the prior lawsuit; (3) termination of the prior proceedings in plaintiff’s favor; and (4) seizure of plaintiff’s person or property during the course of the prior proceedings. Proceedings differ as abuse or process connotes use of process properly initiated for improper purpose, while malicious prosecution relates to malicious institution of lawsuit which one has no reasonable chance of winning. Jury interrogatories established all facts necessary for finding under Section 523(a)(6). Jury specifically found that Debtor acted with malice, which under Ohio law requires intentional act designed to cause injury. Jury also found that Debtor acted in bad faith, which requires finding that Debtor knowingly took action for improper purpose. Once claim determined to be non-dischargeable, entire claim, including punitive damages and attorney fees, are excepted from discharge, as all fees arose from Debtor’s intentional conduct.
- (3305) *All American Insurance Company v. Taylor*, 2016 WL 828335 (Bankr. N.D. Ohio 2016) – Section 523(a)(6) requires proof that Debtor acted with intent to cause injury or that injury was substantially certain to occur, not merely that Debtor intentionally acted in way that caused injury. Evidence was insufficient to support summary judgment where Debtor, in effort to commit suicide, intentionally crashed car into guardrail on hope that he would be ejected from car and killed, but instead Debtor proceeded through guardrail and crashed into plaintiff’s insured’s building. Record left genuine issues of fact as to whether defendant intended to hit building where Debtor’s affidavit stated only that drove a dead end street a high rate of speed but lacked any intent to hit anything other than the guardrail but ended up hitting building. Record was unclear as to when Debtor lost consciousness or whether Debtor had any opportunity to avoid building after striking guardrail.
- (3306) *Phi Air Medical, LLC, v. Holskey*, 2016 WL 616985 (Bankr. W.D. Ky. 2016) – Section 523(a)(6) requires proof that Debtor commit an intentional act with intent that act cause harm. Fact that act caused harm is not sufficient absent proof that Debtor intended harm to result or that harm was substantially certain to result. Debtor incurred medical charges and invoices were submitted to insurer. Insurer send check to Debtor with instructions to remit proceeds to provider. Instead, Debtor retained and used proceeds for personal items. Debtor’s actions in retaining funds rather than remitting funds to provider was intentional act done without justification and actions necessarily caused, or was substantially certain to cause, harm to provider. Evidence indicated that Debtor spent proceeds when he was aware that he did not own the proceeds and had been reminded many times from multiple sources that he did not own the proceeds.
- (3307) *In re Chaban*, 2016 WL 354308 (S.D. Mi. 2016) – State Court sanction award against attorney for frivolous litigation is non-dischargeable in attorney’s subsequent Chapter 7 proceeding. Although attorney was not “party” in State Court proceeding, attorney was sufficiently

involved to warrant giving sanction order collateral estoppel effect. Attorney had opportunity to litigate sanction issue before State Court and failed to prevail in that litigation or the subsequent appeal.

- (3308) *Credit Acceptance Corp. v. Collins*, 2016 WL 406223 (Bankr. E.D. Mi. 2016) – Debtor’s sale of motor vehicle that Debtor knew to be subject to security interest without paying lien and without consent of lienholder constituted willful and malicious injury. Debtor knew when he sold vehicle that it was subject to lien and sale itself was voluntary and knowing act. Act was malicious as Debtor lacked any justification for selling vehicle that was encumbered without taking steps to pay off lien or obtain consent of lienholder to transfer. Balance owed to creditor was not dischargeable under Section 523(a)(6).
- (3309) *Juett v. Casciano*, 2016 WL 105926 (6th Cir. BAP 2016) – Debtor’s action in punching plaintiff in the face constituted an act intended to cause injury. Although Debtor may not have intended specific injury that resulted (a cracked orbital bone), Debtor did intent to punch plaintiff in the nose which would necessarily result in injury. Whether punch was malicious depends on whether Debtor had legal justification or excuse. Self-defense can negate finding of malice. Bankruptcy court failed to analyze issue of self-defense requiring remand for further proceedings.
- (3310) *Cosby v. Baltrip*, Case No. 15-4594 (Bankr. E.D. Mi. 2015) – Section 523(a)(6) excepts debts from discharge that result from willful and malicious injury to another entity. Injury must be both willful, defined as conduct intended to cause injury or actions such that consequences are substantially certain, and must be more than intentional act that causes injury; and malicious which requires that action be without just cause or excuse. Complaint based on auto accident that caused death of Debtor’s husband, at best, stated cause of action for negligence which is not sufficient for purposes of Section 523(a)(6).
- (3311) *In re Chaban*, Case No. 15-11879 (E.D. Mi. 2015) – Sanctions imposed by court for contempt are excepted from discharge where State Court characterized Debtor’s conduct as willful and malicious conduct leading to vexatious litigation. Debtor’s actions were beyond the scope of reasonable representation of client and was in conscious disregard of duties as an attorney and without just cause or excuse. Effects of vexatious actions constitute injury for which damages are not dischargeable.
- (3312) *CMCO Mortgage, LLC v. Hill*, 2015 WL 6685347 (Bankr. W.D. Ky. 2015) – Collateral estoppel applies in nondischargeability action where State Court judgment establishes that issue in bankruptcy case is same as issue in prior State Court action; issues were actually litigated and actually decided; and were necessary to court’s judgment. State Court judgment established that Debtor misappropriated trade secrets and that Debtor’s action were willful, intentional, in bad faith, egregious, and done with malice; that Debtor’s actions caused a willful and malicious injury to plaintiff; that Debtor’s actions also constituted fraud and defalcation while acting in a fiduciary capacity given Debtor’s intentional misrepresentations made to conceal his wrongful actions from plaintiff, and Debtor’s failure to meet fiduciary obligations to plaintiff; and that Debtor intended the consequences of actions, including the destruction of plaintiff’s internet division and actions were done in reckless disregard of plaintiff’s economic interests and expectancies. Issues were actually litigated where, although judgment was ultimately entered by default, Debtor had substantially participated in underlying action but then decide to abandon his defense. Judgment established that all issues were actually decided and that decisions were necessary in order to hold Debtor liable under asserted theories. Debtor’s alleged lack of notice of State Court’s intention to enter default did not obviate collateral estoppel effect of Judgment as Debtor’s remedy would lie in State Court. As long as State Court judgment remained valid, judgment entitled to preclusive effect.
- (3313) *Morris v. Charron*, 2015 WL 7739233 (Bankr. WD. Mi. 2015), *rehearing denied*, 2015 WL 7709308 (Bankr. W.D. Mi. 2015) – Section 523(a)(6) requires proof that Debtor intended to cause injury or acted in such a way as to believe that injury is substantially certain to result. Mere intentional act that causes injury is insufficient, although injury that results does not need to be exact injury intended. Action is malicious when taken without just cause or excuse or in conscious disregard of duties, but does not require ill will or spite. Examples of debts that are non-dischargeable include intentional infliction of emotional distress, malicious prosecution, conversion, assault, false arrest, intentional libel, and deliberate vandalizing of property, as well as contempt penalty imposed by court. Principals of collateral estoppel apply if issues in dischargeability action were actually raised and litigated in prior court in action involving same parties and prior court entered judgment based on those issues with party to be estopped having had a full and fair opportunity to litigate the issues. Fact that state law would have permitted court to enter contempt sanctions without proof that conduct was willful or malicious did not deprive judgment of collateral estoppel effect where findings in judgment went well beyond minimal standards imposed by state law and amply demonstrated that conduct met higher standard of willful and malicious. State Court Order finding Debtor to be in contempt of court amply supported finding that debt was non-dischargeable. Debtor had full knowledge of entry of Court Order enjoining corporate defendant from transferring assets and knowingly and intentionally engaged in scheme to cause corporation to transfer assets in direct violation of Court Order. Court made extensive findings regarding Debtor’s knowledge of the existence, terms and duration of the injunction and described Debtor’s conduct as “textbook” example of contempt of court. State Court award to Plaintiff of attorney fees and costs incurred as a result of Debtor’s violation of injunction constituted damages for purposes of Section 523(a)(6). Actual injury to person or physical property is not required where conduct led directly to actual loss with contempt award designed to indemnify the injured party from harm resulting from contemptuous conduct.
- (3314) *Jackson v. Spencer*, 2015 WL 6162945 (Bankr. W.D. Mi. 2015) – Principals of collateral estoppel and res judicata apply in bankruptcy cases to extent prior court made findings of fact that apply to issues. Collateral estoppel does not apply where underlying judgment is on appeal but lower court findings are still binding as res judicata unless underlying judgment is reversed. State Court judgment established facts to find that debt was not dischargeable. Debt must be both willful and malicious to be excepted from discharge. Willfulness requires deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury, such that Debtor desired to cause the consequences of his act, or the consequences were substantially certain to result. Injury is “malicious” when a Debtor acts in conscious disregard of duties or without just cause or excuse but does not require ill-will or specific intent to do harm. State Court concluded that Debtor had engaged in “brazen” conversion of creditor’s money when Debtor induced creditor to give Debtor funds for Debtor to make specific investments on behalf of creditor and Debtor instead used money for Debtor’s personal bills and expenses. Debtor knew that taking

funds was in direct contravention of instructions provided by creditor when funds were provided and Debtor knew that consequences of diverting creditor's retirement funds for Debtor's personal use was substantially certain to cause harm to creditor and did, in fact, cause harm as Debtor never returned funds to creditor. Debtor acted maliciously as Debtor disregarded duties with no cause or excuse when Debtor promised to invest funds in certain way and then immediately used them for personal expenses.

- (3315) *Yeager v. Wilmers*, 2015 WL 5579440 (Bankr. S.D. Ohio 2015) – Willful and malicious injury requires that Debtor act with intent to cause injury or acts in manner that is substantially certain to cause injury; and that Debtor's conduct be in conscious disregard of one's duties or without just cause. State Court judgment finding Debtor liable for battery was not collateral estoppel in dischargeability action where element of battery at state law required intent to cause harmful or offensive conduct and that in fact produced harmful or offensive conduct but did not require finding that Debtor acted willfully or maliciously. Bankruptcy court findings of fact following de novo hearing supported holding of non-dischargeability where Debtor caused injury by assaulting plaintiff outside a bar, causing plaintiff to fall to the ground. Fact that Debtor was not convicted of crime was irrelevant given different burdens of proof. While evidence indicated that Debtor may not have intended conduct to cause specific harm that resulted, evidence indicated that Debtor intended to cause some harm, and it is not required that Debtor intend to cause the precise injury that resulted.
- (3316) *Jenkins v. Schmank*, 2015 WL 4555582 (Bankr. E.D. Tn. 2015) – Conduct is willful where Debtor intends to cause harm to plaintiff, not merely because Debtor took intentional action that happened to cause harm or where consequences were substantially certain to occur. Action is malicious where the Debtor acts in conscious disregard of duties or without just cause of excuse. Willfulness is generally proved by showing that Debtor committed wrongful act; that Debtor did so intentionally; that act necessarily caused injury; and there was on just cause or excuse for actions. Debtor did not willfully cause loss of investment by plaintiff in partnership as there was no evidence that business failed as a result of Debtor's actions or inactions, or that Debtor intended to cause harm to plaintiff resulting from failure of business. Debtor causes willful and malicious injury by convincing plaintiff to invest additional funds into business and then withdrawing those funds for personal expenses, and then engaging in conduct designed to cover up and conceal withdrawal. Actions were taken in direct violation of plaintiff's rights under partnership agreement and in direct violation of Debtor's obligations under partnership agreement/
- (3317) *Risk v. Hunter*, 2015 WL 4643836 (Bankr. N.D. Ohio 2015) – Conduct to except debt from discharge must be both willful and malicious and resulting debt must not be subject to valid defense. Willful requires intentional injury, not just intentional conduct that leads to injury, and requires proof that Debtor intended consequence of act or knew that consequence was substantially likely. Malicious requires conscious disregard of duties or lacking just cause or excuse, but does not require specific intent or ill will. Issue preclusion applies in dischargeability actions and prevents re-litigation of issues that were already fully and fairly litigated in another forum. Estoppel requires (1) party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (3) issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and (4) issue must have been identical to the issue involved in the prior suit. State Court judgment established that plaintiff was the owner of steel beams that were wrongfully cut up and taken by Debtor. Issue of ownership and Debtor's actions in cutting up and removing beams were specifically litigated in State Court action that resulted in damage award to plaintiff. However, State Court judgment did not establish that Debtor acted willfully and maliciously where judgment did not make specific findings and issues of willful and malicious were not specific elements of State Court action.
- (3318) *Cornerstone Industries Corp v. Kaufman*, 2015 WL 4692569 (Bankr. W.D. Ky. 2015) – Collateral estoppel prevents defendant from re-litigation factual elements of non-dischargeability claims. Issue preclusion requires four components: (1) identity of issues; (2) a final decision or judgment on the merits, (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a prior losing litigant. State Court judgment preclusive on dischargeability of debt where jury instructions specifically required finding that Debtor's actions were willful and malicious and Jury Verdict specifically found that Debtor aided and abetted an individual in breaching fiduciary duty, that Debtor knew that the conduct was a breach of that duty, and that Debtor assisted in carrying out the breach. Verdict From also found that Debtor's actions were malicious or without justification. Jury also found Debtor acted reprehensibly enough to warrant award of punitive damages.
- (3319) *Smith v. Morse*, 2015 WL 4627940 (Bankr. E.D. Tn. 2015) – Debt is non-dischargeable if it results from willful and malicious conduct. Willful means intentional voluntary or deliberate, and requires acts done with intent to cause injury. Debtor must either intend consequence of act or know that consequences are substantially certain to result from it. Malice requires that act be done in conscious disregard of duties of without just cause or excuse and must be more than mere negligence, but does not require proof of ill will or specific intent. Factual disputes prevented entry of summary judgment where parties agreed that plaintiff loaned defendant \$100,000 but disputed purpose of loan.
- (3320) *Chudzinski v. Hanif*, 2015 WL 1981518 (Bankr. E.D. Mi. 2015) – Prior State Court default judgment was collateral estoppel as to dischargeability of debt for willful and malicious conduct. Conversion gives rise to non-dischargeability where conversion is both willful and malicious. State Court complaint adequately alleged that Debtor intentionally and without justification excluded plaintiff from business, establishing pattern of conduct that could lead only to plaintiff's exclusion and loss of business interest. Complaint specifically alleged that Debtor unlawfully and intentionally converted membership interest for his own benefit causing damages to Plaintiff. Default judgment established all well pled facts which met standard for finding of non-dischargeability. Fact that State Court did not award treble damages did not negate finding that actions were willful and malicious as treble damages are purely discretionary, and lack of award did not negate fact that State Court specifically found that Debtor had willfully and maliciously converted Plaintiff's membership interest. State Court judgment also collaterally estopped issue of damages. Although complaint contained multiple counts, some of which were dischargeable and some not, judgment awarded only single lump sum amount. Entire amount non-dischargeable as judgment for fraud, standing alone, would have supported entire amount of judgment. If trial court rests judgment on two grounds, each of which is adequate to support entire award, judgment is conclusive on to both counts.

- (3321) *Duley v. Thompson*, 2015 WL 1622053 (Bankr. S.D. Ohio 2015) – Issue preclusion, also known as collateral estoppel, applies only when the issue to be precluded was necessary to the prior judgment and was actually litigated. If prior judgment is default judgment, it must contain express findings to be given preclusive effect. To be “actually litigated” in default judgment, moving party must have submitted admissible evidence apart from the pleadings and based on evidence submitted court must make findings of fact and conclusions of law that are sufficiently detailed to support application of collateral estoppel. Complaint and judgment finding that Debtor failed to assist in creating an accounting of trust assets and recitation that certain certificates of deposit were closed and money deposited into trust checking accounts were not sufficient to sustain scienter requirement of action under Sections 523(a)(2), (4) or (6). Default judgment made no findings of fact at all, and did not establish either a breach of fiduciary duty or any other intentional misconduct beyond allegation that assets were unaccounted for, without any allegation as to whether this was result of wrongful act or mere negligence or inadvertence. While expenses may have been found to be unreasonable, that does not amount to intent to cause injury.
- (3322) *Accounting/Tax Pros, LLC v. Schwartz*, 2015 WL 1407380 (Bankr. M.D. Tn. 2015) – Willful and malicious injury requires Debtor act with intent to cause consequences of act or that consequences are substantially certain to result. Malicious injury requires intent to cause harm, not merely intent to take action that causes harm. It is not sufficient that a reasonable person should have known that conduct risked injury; Debtor must will or desire harm. Where contract between plaintiff and Debtor was poorly written and ambiguous as to Debtor’s rights to retake assets in event of default by plaintiff, Debtor’s actions in retaking possession and reselling assets did not demonstrate requisite intent, even if Debtor’s subjective belief in right to do so was later determined incorrect.
- (3323) *Truban v. Draise*, 2015 WL 757485 (Bankr. S.D. Ohio 2015) – Plaintiff failed to meet burden to prove willful and malicious injury. Plaintiff and Debtor became engaged and bought home. Although plaintiff thought property would be titled in joint names, Debtor caused property to be titled solely in her name. After parties separated, plaintiff discovered that he was on the title. However, because plaintiff did not show that entire relationship was sham or that defendant entered into relationship with the intent of obtaining funds and property from plaintiff, evidence did not support finding of willful and malicious.
- (3324) *Kloeber v. Montanari*, 2015 WL 603874 (Bankr. E.D. Tn. 2015) – Plaintiff must prove deliberate or intentional injury, not just intentional conduct that causes injury; and that Debtor intended to cause the consequences of action or knew with reasonable certainty that injury would result. Act must also be willful which requires act undertaken with intent to cause injury. Summary judgment not appropriate where record did not establish Debtor’s subjective intent to cause harm.
- (3325) *Go Wireless, Inc. v. Lehrmitt*, 2015 WL 351211 (Bankr. W.D. Ky. 2015) – Final Judgment entered by State Court entitled to preclusive effect to same extent as judgment would be afforded by court in which judgment was initially entered. Judgment by default is just as conclusive as any other judgment and is entitled to preclusive effect and binds bankruptcy court in later dischargeability proceeding. State Court judgment conclusively established every fact to support finding that debt was incurred by willful and malicious action. Debtor’s request that court disregard preclusive effect because Debtors are elderly, without significant assets or recourses, and care for special needs child and have health issues, unavailable as equitable determination would insert conditions into Section 523 that are not present in the statute.
- (3326) *Ritter v. Smith*, 2014 WL 4702610 (Bankr. E.D. Mi. 2014) – Willful and malicious injury requires proof that Debtor took action with intent to cause harm. Plaintiff did not present any evidence that Debtor, in convincing plaintiff to invest in business, intended to cause plaintiff to lose substantial part of that investment.
- (3327) *McClendon v. Springfield*, 765 F.3d 501 (5th Cir. 2014) – Debt arising out of claim of defamation is excepted from discharge as willful and malicious. Debtor claimed that statements were made in honest but mistaken belief that statements were true, and honest but mistaken belief, even if negligent, does not rise to level of willful. Further, Debtor claimed that good faith, if mistaken belief negated any intent to cause injury as Debtor could not have intended injury nor would Debtor have known that injury was substantially certain. Court rejected Debtor’s testimony as unbelievable and found as matter of fact that Debtor knew statements were false when made. Statements to third persons accusing another of a crime create objective substantial certainty of harm to that person absent extenuating circumstances. Debtor’s statements were intended to or were substantially certain to cause harm to plaintiff.
- (3328) *MarketGraphics Research Group, Inc. v. Berge*, 2014 WL 4929423 (Bankr. M.D. Tn. 2014) – Action under Section 523(a)(6) requires proof that Debtor acted with intent to cause injury (willfully) and that Debtor did so without just cause or in conscious disregard of duties (malice). Whether final judgment has preclusive effect depends on whether findings of State Court raise same issues as are raised in subsequent litigation. Prior court judgment for Tennessee Consumer Protection Act is not preclusive under Section 523(a)(6) where state statute required finding that defendant willfully or knowingly violated statute but did not require finding of malice and district Court Order did not include findings of malice. Judgment for copyright violation also was not preclusive in later Section 523(a)(6) action where statute required proof that Debtor copied protectable elements of the work. District Court found that Debtor’s infringement was willful but did not include any finding of malice. Finally, judgment against Debtor for violation of federal Anticybersquatting act was not preclusive where statute did not require finding of either intent to cause harm or malice, instead requiring finding of bad faith intent to profit and there were no findings of fact in district court judgment of either willfulness or malice.
- (3329) *First Financial Bank v. Jutte*, 2014 WL 4851822 (Bankr. N.D. Ohio 2014) – Sale of collateral and failure to remit proceeds is not per se debt within scope of Section 523(a)(6). While sale may constitute state law conversion, Section 523(a)(6) also requires proof that Debtor sold collateral with willful intent to cause harm to lender, either by showing that borrower intended to cause harm or that consequences were substantially certain to occur; and that borrower acted with no legal justification or in conscious disregard of duties. Complaint alleged only that Debtor transferred collateral and refused to remit proceeds, which is not sufficient to show that actions were either willful or malicious.
- (3330) *Merritt v. Layne*, 2014 WL 4723081 (Bankr. E.D. Ky. 2014) – Plaintiff not entitled to judgment of non-dischargeability under Section 523(a)(6) where complaint failed to allege that Debtor borrowed money from plaintiff with intent to cause willful and malicious injury to

plaintiff and there was no evidence of any intent to cause harm.

- (3331) *Hall v. Carter*, 2014 WL 4187123 (Bankr. E.D. Tn. 2014) – Whether Debtor had requisite intent to cause harm is peculiarly factual dispute that must be determined at trial, with the trier of fact having the opportunity to hear testimony, observe the demeanor of the witnesses, and to evaluate overall credibility of the evidence. Court would not determine whether Debtor had requisite intent on Summary Judgment.
- (3332) *Ferguson v. Clark*, 2014 WL 4109794 (E.D. Mi. 2014) – Plaintiff's failure to respond to request for admissions that stated that plaintiff admit that plaintiff did not suffer any personal injury or bodily injury and that only injury was result of non-payment of loans established these facts for purposes of summary judgment. Admissions directly refuted element of cause of action under Section 523(a)(6) that injury cause personal injury or property damages, entitled defendant to judgment as a matter of law.
- (3333) *Sailor Music v. Walker*, Case no. 14-6012 (8th Cir. BAP 2014) – Pre-petition civil judgment against Debtor for copyright infringement is willful and malicious injury that is excepted from discharge under Section 523(a)(6). Debtor, as manager of bar, caused bar to play music and to present musical performances, including music that was copyrighted. Debtor did not obtain a license to use or play the music. ASCAP, the license holder, repeatedly contacted Debtor in effort to either cause Debtor to obtain license or to cease playing the copyrighted materials. Debtor, as manager, had obligation to ensure all required licenses were obtained yet failed to do so, such that Debtor's continued use of music was "willful" even without the multiple contacts by ASCAP, leading to conclusion that Debtor was willfully ignoring copyright laws. Actions were malicious as Debtor's use of music without license was intended to cause harm by using the copyrighted materials without paying royalties. Debtor knew or should have known that natural consequence of failure to obtain license would be financial harm to the copyright holders and Debtor intended to cause that harm by evading license requirements.
- (3334) *National Union Fire Insurance Company v. Krause*, 2014 WL 1725808 (Bankr. N.D. Ill. 2014) – Debtor's sale of property encumbered by unrecorded mortgage and retained proceeds without paying off the mortgage rendered debt non-dischargeable. Debtor sold property knowing property was encumbered yet continued to make mortgage payments to lender to conceal sale and prevent lender from exercising right to call loan upon sale. Sale of property and retention of proceeds constituted conversion and Debtor's actions to conceal sale for over three years were substantially certain to cause harm to lender.
- (3335) *City of Kentwood v. Salmon*, Case no. 14-80016 (Bankr. W.D. Mi. 2014) – State Court criminal conviction and Judgment of criminal restitution established all elements to except debt from discharge. Undisputed facts established in criminal proceeding established that Debtor embezzled funds from her employer that were transferred to her care in her duties as employee. Employer had superior right to the funds and Debtor obviously and intentionally interfered with that right by misappropriating the funds, and did so intentionally and without legal justification.
- (3336) *Dunn v. Campbell*, 2014 WL 2722755 (Bankr. W.D. Ky. 2014) – State Court judgment was res judicata on issues relating to willful and malicious conduct of Debtor. State Court jury expressly found that Debtor committed conversion when Debtor sold motorcycle for \$18,000 but then refused to transfer the title to the purchaser. Issue of conversion was actually and necessarily litigated and decided by State Court. State Court judgment established that Debtor violated a restraining order and that Debtor acted in willful and malicious manner. Debtor cannot use Section 523(a)(6) adversary to relitigate issues of liability and damages that were previously considered and ruled upon by State Court.
- (3337) *In re Wilcox*, 2014 WL 2208893 (Bankr. W.D. 2014) – Section 523(a)(6) is not self-executing. Creditor alleging that debt is excepted from discharge as willful and malicious injury must bring adversary proceeding within time permitted in rules or debt is discharged. Creditor violated discharge injunction in continuing collection against Debtor. While creditor may have been able to except debt under Section 523(a)(6), creditor failed to bring action and debt was discharged.
- (3338) *Jennings v. Bodrick*, 2014 WL 1818487 (Bankr. S.D. Ohio 2014) – Even if proven, debt that would be excepted from discharge under Section 523(a)(6) in Chapter 7 is not excepted from discharge in Chapter 13. Adversary proceeding to except claim from discharge in Chapter 13 case failed to state cause of action.
- (3339) *Wolfe v. Pugh*, 2014 WL 1873417 (Bankr. E.D. Tn. 2014) – Complaint failed to state cause of action for damages resulting from dog bite where plaintiff conceded that dog's attack was not willful or malicious attempt by Debtor to cause harm. While action may have been negligent, absent evidence of intent to cause injury, complaint would be dismissed.
- (3340) *Bowe v. Kilmartin*, 508 BR 35 (Bankr. W.D. Ky. 2014) – Arbitration award that has been confirmed by State Court is valid final judgment for purposes of collateral estoppel. However, award did not collaterally estop Debtor in action under Section 523(a)(6) where award was based solely on Debtor's guilty plea to a misdemeanor charge of simple assault and did not make specific findings either that Debtor acted with intent to cause harm or that actions were malicious as required by Section 523(a)(6), where simple assault can include behavior undertaken purposely, knowingly or recklessly, and simple recklessness is insufficient to except debt from discharge as willful and malicious.
- (3341) *Duree v. Dunn*, 2014 WL 1612232 (Bankr. E.D. Ky. 2014) – Section 523 excepts from discharge any debt resulting from willful and malicious injury. Complaint must establish that plaintiff sustained an injury, that the injury was caused by Debtor, and that injury was both willful and malicious. Debtors' filing suit against former attorney for malpractice, while an intentional act, was not willful or malicious in absence of allegations that filing was intended to, or did, cause loss of clients, future income, embarrassment or emotional distress absent evidence that Debtor knew action was frivolous and filed it solely to embarrass attorney. Fact that attorney may have defenses to action does not make malpractice action "willful" and "malicious".
- (3342) *Yoppolo v. Asbury*, 2014 WL 1323216 (Bankr. N.D. Ohio 2014) – Willful and malicious injury requires proof that Debtor desired to cause consequence of act or believed that consequences of act were substantially certain; and that Debtor acted without just cause or excuse, although it does not require finding of ill-will. Although land contract vendor was ultimately unable to deliver clear title at end of land

contract, there was no evidence that Debtor intended, when contract was entered into, to cause harm to creditor/vendee. Further, there was no evidence that Debtor's actions were malicious, where there was no evidence that Debtor knew of statutory prohibition against holding a land contract that had a balance due that was less than the underlying mortgage, or that Debtor acted in conscious disregard of that duty. Debtor's conduct was, at most, breach of contract which is not "willful and malicious injury".

- (3343) *Bowe v. Kilmartin*, 2014 WL 1281488 (Bankr. W.D. Ky. 2014) – Guilty plea to simple assault and arbitration award based on guilty plea did not establish that Debtor's conduct was willful and malicious. Under state law, simple assault could be predicated on mere recklessness, and record did not contain any findings that Debtor intended to cause a harmful or offensive contact with Plaintiff.
- (3344) *Old Republic National Title Insurance Co. v. Levasseur*, 2013 WL 6570917 (1st Cir. 2013) – Debtor committed willful and malicious acts when Debtor accessed credit line that Debtor knew lender had inadvertently failed to close. Debtor had line of credit secured by second mortgage on Debtor's home. Debtor sold home and paid off mortgage, but lender inadvertently failed to close account. Debtor, a real estate broker, knew that the Home Equity Account should no longer be used but she continued to draw on that account. By taking two cashier's checks totaling more than \$124,000. Debtor's use of the equity line when she knew that account should have been closed constituted was objectively wrongful amounting to willful and malicious.
- (3345) *Kraus Anderson Capital, Inc. v. Bradley*, 507 BR 192(6th Cir. BAP 2014) – Debtor's sale of assets "out of trust" and contrary to floor plan agreement creates nondischargeable debt under Section 523(a)(6). Debt is not dischargeable if debt results from willful and malicious injury. Debtor must intend consequences of an act, not merely the act itself – that is, Debtor must desire to cause consequences of act or know that consequences are substantially certain to result. Debtor's actions in selling collateral and not remitting proceeds to lender as required constituted willful and malicious injury. Debtor knew of creditor's lien rights and knew that sale and retention of proceeds would cause injury to those rights, yet intentionally disposed of collateral and retained proceeds. Parties intended that as collateral is sold, proceeds would be used to pay down debt owed to lender, but Debtor instead used proceeds for different use. Fact that different use was business use did not change fact that proceeds were used for purpose other than that for which they were intended. Debtor's actions were malicious as Debtor acted in knowing disregard of creditor's rights. Debtor's testimony that he intended to repay the loans "eventually" did not prevent finding that Debtor's actions in first instance were willful. Lack of specific intent to cause harm or ill will does not defeat fact that Debtor wrongfully retained proceeds.
- (3346) *Hunter v. Lake Cumberland Regional hospital, LLC*, 2014 WL 1159674 (E.D. Ky. 2014) – Creditor seeking to oppose discharge under Section 523(a)(6) must bring action to declare debt excepted from discharge. Section 523(a)(6) is not "self-executing". District Court in which underlying litigation was pending lacked jurisdiction to determine whether debt was dischargeable under Section 523(a)(6) as action must be brought as adversary proceeding in bankruptcy court. Absent issuance of a judgment by Bankruptcy Court excepting debt from discharge, any attempt to prosecute that claim in district court is barred by discharge injunction and would be dismissed.
- (3347) *Smith v. LeGare*, 2014 WL 1168899 (Bankr. N.D. Ohio 2014) – Injury is willful where actor desires to cause consequences of act or where consequences of act are substantially certain to occur. Malicious means in conscious disregard of one's duties or without just cause or excuse, although it does not require either ill-will or specific intent. Debtor's obligations to ex-girlfriend were result of willful and malicious conduct, where Debtor deliberately punched ex-girlfriend in face and body several times and broke several televisions in the home. Debtor acted after becoming angry when ex-girlfriend attempted to break off relationship and did so in anger and without just cause or excuse.
- (3348) *Davis v. Music*, 2014 WL 1089849 (Bankr. N.D. Ohio 2014) – State Court judgment can be collateral estoppel on issues in adversary proceeding as long as the State Court judgment is a final judgment on the merits; issue was actually and directly litigated and was necessary to final judgment; issue in the present case is identical to issue in prior action; and party to be estopped was a party or was in privity with a party to the prior action. State Court action which sought damages for both negligence and for intentional tort of assault was entitled to collateral estoppel effect although judgment did not clearly indicate on which theory judgment was based. Punitive damage award demonstrated element of maliciousness where state law allows punitive damages for either intentional tort or negligence accompanied by malice. Trial transcripts established willfulness as testimony indicated that Debtor caused harm after Debtor became intoxicated and belligerent and then punched Plaintiff in the face twice and jumped on him before being pulled off. There was no suggestion that punches were accidental or any dispute that punches were intentional, and Debtor intended to cause injury by punching Plaintiff and did so in anger and without just cause, as Debtor's own testimony established that plaintiff did nothing to provoke assault. Voluntary intoxication alone does not negate willful and malicious elements of Debtor's actions, particularly where there was no evidence that defendant lacked the mental capacity to cause harm.
- (3349) *Goaz v. Rolex Watch USA, Inc.*, Case No. 13-10282 (5th Cir. 2014) – Knowingly selling merchandise bearing counterfeit trademarks necessarily causes injury to the trademark. Debtor's actions were willful as injury was intended or substantially certain, and malicious as Debtor knew items were counterfeit and lacked any justification for sale.
- (3350) *Liggett v. Schwartz*, 2014 WL 1028960 (E.D. Mi. 2014) – Willful and malicious requires that Debtor intend to cause injury or knew injury was substantially certain to occur, and done without legal justification or conscious disregard of duties. Creditor's contention that ex-husband willfully and maliciously concealed and misrepresented IRS barred by collateral estoppel where State Court judgment that awarded wife 50% interest in IRA had made factual finding Husband had not acted intentionally or willfully and, at worst, has just forgotten about existence of IRA. State Court found that Husband had not intentionally hidden IRA, that any failure to disclose IRA was result of error, and Husband promptly disclosed existence when he discovered it. Husband's actions were, at worst, negligent or accidental, a finding that precludes any finding of willful or malicious.
- (3351) *Brown v. Ausley*, 2014 WL 1044252 (Bankr. W.D. Tn. 2014) – Judgment against Debtor was collateral estoppel for purposes of Section 523(a)(6) if findings of fact in State Court judgment established each element of non-dischargeability action. While State Court judgment established most of the elements of action, State Court did not decide, and did not need to decide under state law, whether Debtor's actions