



AMERICAN
BANKRUPTCY
INSTITUTE

2019 Hon. Steven W. Rhodes Consumer Bankruptcy Conference

Annual Case Law Update

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CASE LAW UPDATE

Honorable Steven W. Rhodes
Veteran's Day Conference

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Taggart v. Lorenzen, ___ US ___, 2019 WL 2331303 (2019)

Creditor may be held in civil contempt for violating discharge order where there is no fair ground for doubt as to whether order barred creditors conduct using our objectively reasonable basis to conclude that conduct might be lawful. Violation of Discharge Injunction is not strict liability but also does not allow alleged wrongdoer to escape consequences based on unreasonable, yet sincerely held the subjective belief.

Mission Products Holdings, Inc. v. Tempnology LLC, ____ US ____, 2019 WL 2166392 (2019) –

Rejection of license agreement by Debtor/Licensor does not terminate Licensee's right to use licensed intellectual property. Rejection constitutes breach of license agreement by licensor that cannot rescind rights of non-breaching licensee.

Obduskey v. McCarthy & Holthus, ____ US ____, 139 S.Ct. 1029 2019 WL 1264579 (2019)

Fair Debt Collection Practices Act does not apply to non-judicial foreclosures, other than specific provisions of Section 1692f that prohibit unfair or unconscionable means to collect debt. Attorney, acting solely to enforce security interest, is not subject to Section 1692g(b).

In re DiStefano, Case No. 18-5001 (Bankr. W.D. Mi. 2019)

Finding of contempt requires proof that creditor deliberately acted with actual knowledge of bankruptcy case; and that creditor lacked any objectively reasonable basis to believe that conduct might be lawful. Creditor violates injunction where letters sent to Debtor that objectively have effect of coercing Debtor to pay or making demand for payment.

Roth v. Nationstar Mortgage, LLC, 935 F.3d 1270 (11th Cir. 2019)

Question is whether communication has objective effect of pressuring Debtor to pay discharged debt. Discharge injunction prevents creditor from communicating with Debtor in effort to coerce payment. Discharge injunction does not prevent Debtor from voluntarily making payments to creditors.

In re Bentley, 2019 WL 4879330 (Bankr. E.D. Ky. 2019) – Creditor does not violate discharge injunction by refusing to repossess surrendered automobile.

In re Deemer, 602 BR 770 (Bankr. M.D. Al. 2019) – Creditor violates discharge injunction where Creditor refuses to repossess surrendered vehicle or release lien, forcing Debtor to indefinitely store and retain worthless vehicle.

In re Sterling, 933 F.3d 828 (7th Cir. 2019)

Party violates discharge injunction where party has knowledge of granting of discharge and undertakes actions which willfully violate post-discharge. Although creditor did not take action to collect debt, creditor's attorney who had been pursuing collection for over 10 years (but who did not have notice of bankruptcy or discharge) continued to pursue collection resulting in Debtor's arrest.

Moore v. Automotive Finance Corp., 2019 WL 3323328 (M.D. Al. 2019)

Creditor has no obligation to continue to do business with Debtor post-discharge and does not violate discharge injunction by refusing to do so.

In re Longwell, 2019 WL 1293999 (Bankr. N.D. Ohio 2019)

Rule 3012 allows a Debtor to value a secured claim as part of the Chapter 13 Plan but requires that Plan be served on holder of claim in manner provided under Rule 7004. Creditor not properly served where Debtor served Plan on creditor 3 months after deadline to object to confirmation and confirmation hearing had passed.

In re Drobney, 583 BR 700 (Bankr. W.D. Mi. 2018)

“Federally Insured Depository Institution” includes FDIC insured institutions as defined in section 3(c)(2) of the Federal Deposit Insurance Act; and credit union insured by FCUA. Rule 7004 requires service by certified mail directed to named officer of institution; or to attorney who has already appeared in Bankruptcy case. Plan that proposed to cram down lien held by Federally Insured Depository Institution could not be confirmed where Certificate of Service indicated service by first class mail only.

In re Panek-Hortman, 593 B.R. 400 (Bankr. W.D.N.Y. 2018)

Rule 7004 requires service on insured depository institution by certified mail addressed to officer of institution. Certified mail addressed to on “Wells Fargo Bank, N.A., Attn: Timothy J. Sloan, President or CEO” but addressed “c/o” address for mortgage servicer. Debtor’s use of address in foreclosure complaint did not comply as complaint did not establish an address that would satisfy the rigid requirement of certified mail to the address of Wells Fargo.

In re Freeman, 2019 WL 5692665 (Bankr. E.D. Mi. 2019)

Section 330(a)(1) does not permit compensation to attorney for services rendered before conversion of case to Chapter 13 because Debtor's counsel is not "employed" under Section 327 or Section 1103. Section 330(a)(4)(B) allows Court in Chapter 12 or Chapter 13 to award reasonable compensation for representing Debtor's interests in case taking into account benefit and necessity of services, but that section is also limited to services in connection with the Chapter 13 phase and not including any services performed in connection with Chapter 7 phase.

Todeschi v. Juarez, 2019 WL 3943814 (9th Cir. BAP 2019)

Individual Chapter 11 Plan may be confirmed over objection of unsecured creditors only if Debtor does not retain any property of estate. Recognizing split of authority, Court concluded that absolute priority rule prohibits retention of property "under the plan" and Debtor does not retain exempt property under plan but does so under applicable exemption statutes.

Ragone v. Pizza Pan Elyria, LLC, 2019 WL 2202941 (Bankr. N.D. Ohio 2019)

Automatic stay prohibits continuation of judicial proceeding that was commenced pre-petition. Responsibility to comply with stay is placed on creditors. Debtor should not be required to take legal steps to recover property seized in violation of stay. Creditors must take necessary steps to halt or reverse any pending state Court actions or other collection efforts including garnishments, repossessions, or foreclosures

In re Fulton, 2019 WL 2521455 (7th Cir. 2019)

Creditor “exercises control over property of estate when creditor refuses to return property that creditor repossessed prepetition. Creditor must immediately return possession without requiring that Debtor bring turnover motion.

In re Newberry, 2019 WL 3857704 (Bankr. E.D. Mi. 2019)

Creditor violated stay by failing to withdraw Writ of Garnishment issued and served pre-petition but which allegedly attached to tax refund post-petition.

Wigger v. State Treasurer, 2019 WL 1757135, *rehearing denied*, 2019 WL 1975845 (Bankr. W.D. Mi. 2019)

Judicial lien is one that is obtained by judgment, sequestration or other legal or equitable process, while statutory lien arises solely by force of statute on specified conditions. Lien must be statutory or judicial and cannot be both, and depends on origin of lien. Lien is not “judicial” merely because lien may be enforced in court proceedings, but statutory lien must arise solely by statute.

Hardesty v. Horn, 2019 WL 4780759 (Bankr. S.D. Ohio 2019)

Bankruptcy Trustee steps into shoes of hypothetical bona fide purchaser of real property and is clothed with whatever legal rights a bona fide purchaser would possess under state law. Bona Fide Purchaser is one who takes in good faith, for value, without actual or constructive notice of defect. Trustee's actual knowledge of transaction does not control, as outcome is dictated by constructive notice. While unrecorded deed is effective to transfer title, unrecorded deed is not enforceable against BFP.

In re Malinowski, 2019 WL 1504392 (Bankr. N.D. Ill. 2019)

Lender may not demand provisions in Chapter 13 Plan that are not authorized by Bankruptcy Code and are in conflict with district's standard-form Plan

In re Scott, Case No. 19-10104 (Bankr. S.D. Ohio 2019)

Bankruptcy Court cannot confirm Plan that does not meet with or contains provisions that are inconsistent with mandatory requirements of Code, even in absence of objection by affected creditor. Even assuming that creditor's silence is considered acceptance under Section 1325(a)(5), provisions were at odds with mandatory requirements of confirmed plan and Court lacks discretion to confirm plan that does not comply.

Briggs v. Johns, 2018 WL 4690394 (W.D. La. 2018)

Bankruptcy Court lacks authority to sua sponte deny confirmation of Plan. *Espinosa* requirement that Court review Plan to ensure compliance with Code applies only as to self-executing provisions of Code but does not require Court to ferret out every possible objection to confirmation. Self-executing provisions are those that apply without judicial involvement.

In re Moore, 2019 WL 1868609 (Bankr. E.D. Tn. 2019)

Modification is limited to matters that arise post-confirmation and which were unseen at time of confirmation. Debtor's inheritance post-confirmation qualified as change in circumstances permitting Trustee to seek to modify plan to increase distributions to creditors. Debtor's inheritance post-petition consisted property of estate that must be accounted for in any plan modification.

In re Scholl, 2019 WL 4187699 (Bankr. S.D. Ohio 2019)

Modifying plan to require Debtors to increase payments to unsecured creditors where Debtors, during plan, received large insurance payout, did not endanger "fresh start".

Cohen v. Chernushin, 911 F.3d 1265 (10th Cir. 2018)

Debtor's death post-petition removes from property of estate any property Debtor and third party owned with rights of survivorship. Section 541 limits Estate's interest to interest Debtor had on petition date, and establishes clear cut date after which property acquired by Debtor does not become property of estate, but does not elevate Estate's interest to greater standing that Debtor had but for bankruptcy filing.

In re Jaffe, 932 F.3d 602 (7th Cir. 2019)

Tenant by entirety holds contingent future interest in property while other tenant is alive. Contingent interest is broadly considered an interest in real estate to which judgment lien could attach, even though judgment was against only one tenant.

In re Spiech Farms, LLC, 2019 WL 2913270 (W.D. Mi. 2019)

Causes of action brought by creditor against Debtor's former officers and directors for allegedly improperly diverting assets that would have been available to pay creditors was disguised action to recover fraudulent transfers or for breach of fiduciary duty that belonged to Estate. Trustee is sole party authorized to bring actions unless action is one over which creditor has exclusive right to prosecute exclusive of Debtor. If recovery of by Creditor would preclude subsequent recovery by Debtor, action is property of estate.

Church Joint Venture, LP v. Blasingame, 2019 WL 1498192 (6th Cir BAP 2019)

Pre-petition cause of action is property of Bankruptcy Estate. Whether cause of action is pre- or post-petition depends on whether pre-petition facts gave rise to pre-petition violation of Debtor's rights. Action is bankruptcy property only if Debtor suffered a pre-petition injury.

Davis v. Nasuti, Case No. 10-24836 (Bankr. N.D. Ga. 2018)

Personal injury claim is property of estate if claim is sufficiently rooted in pre-bankruptcy past. Cause of action for product liability for defective medical device arose when device implanted, even if Debtor was unaware of any issues and had no problems with device pre-petition.

Smith-Warren v. City of Sterling Heights, 2019 WL 2996182 (E.D. Mi. 2019)

Pursuing cause of action that was not disclosed as an asset in previous bankruptcy filing creates inconsistency sufficient to support judicial estoppel. All facts supporting Debtor's claims occurred prepetition but Debtor did not disclose to Bankruptcy Court any potential claims.

In re Penfound, Case No. 18-48940 (Bankr. E.D. Mi. 2018), *affd*, 2019 WL 4573841 (E.D. Mi. 2019) - Section 1325(b) prohibits Debtors from excluding post-petition voluntary retirement contributions in calculating disposable income.

Davis v. Helbling, Case No. 17-12965 (Bankr. N.D. Ohio), *appeal pending* Case No. 19-3117 (6th Cir. 2019) - Section 1325(b) prohibits Debtors from excluding post-petition voluntary retirement contributions in calculating disposable income.

In re Mrdutt, 2019 WL 2265030 (9th Cir. BAP 2019)

“Overwhelming majority” of Courts conclude that Direct pay secured claims are payments under plan for purposes of Section 1328. Debtor who has not made all direct payments has not completed payments under plan and is not eligible for discharge, even if Debtor has made all required payments to Trustee.

In re Simmons, 2019 WL 4793126 (Bankr. S.D. Ga. 2019)

Adopting minority position, Court concluded that failure to make post-petition direct mortgage payments as required by confirmed Plan. Post-petition mortgage payments paid directly by Debtor are not “payments under the Plan” and failure to make payments standing alone does not merit dismissal of case or denial of discharge. “Payments under the Plan” mean payments that Debtor is to make to Trustee.

Credit Acceptance Corporation v. Thompson, 2019 WL 4860971 (S.D. Ind. 2019)

Section 1325(a)(5)(B)(iii) does not require equal monthly installments from first month after confirmation where plan proposes to pay attorney fees in full ahead of secured claims. Section 1326(b)(1) requires payment of administrative claims “before or at the time or each payment to creditors”. Three alternative theories have developed regarding EMI. First theory is that once payments to creditor commence, payments must be EMI but EMI payments do not commence at confirmation as long as plan proposed interim adequate protection payments. Second approach holds that secured creditor is not entitled to any payment until administrative expense are paid in full, allowing accelerated payment of attorney fees before any payment to secured creditors. Third approach is that EMI must commence at confirmation, as Section 1326(b)(1) does not trump EMI creditor, and EMI requirement does not allow for post-confirmation adequate protection payments in amount less than EMI payment.

In re Shelton, 2018 WL 4404631 (Bankr. N.D. Ill. 2018)

Plan that proposed lower initial payment to secured creditors to allow counsel to be paid, with payments to secured creditors increasing after counsel's fees have been paid in full, violates requirement of equal monthly installments under Section 1325 (a)(5). Provision of Section 1326 allows for payment of attorney's fees before or at time of payment to creditors does not override equal monthly installment requirement of Section 1325(a)(5).

In re Smith, 2019 WL 417827 (Bankr. E.D. Tn. 2019)

Majority of courts conclude that expiration of stay applies only to Debtor and property of Debtor but not as to property of estate. Minority approach holds that stay terminates in all respects. Third approach terminates stay only as to continuation of proceedings commenced prior to bankruptcy that involve property of Debtor or property of estate.

Smith v. State of Maine Bureau of Revenue Services, 2018 WL 6520887 (1st Cir. 2018)

Expiration of stay terminates stay in entirety as to both Debtor and property of estate. Recognizing that majority of courts limit expiration to Debtor and not property of estate, text of statute is inartfully drafted, overall intent of Congress appears to have been to give second filers benefit stay temporarily and best way to accomplish that is to interpret Section First Modified Pre-Confirmation Chapter 13 Plan(c)(3)(A) to terminate entire stay including estate property.

Napolitano v. Rumbin, 2019 WL 3890317 (Bankr. D. Ct. 2019)

Unsecured debts discharged in prior Chapter 7 are not included in calculation of unsecured debt in subsequent Chapter 13. Non-recourse lien that survived Debtor's Chapter 7 discharge is subject to bifurcation with amount of claim in excess of value of property being deemed unsecured and not included in calculation for purpose of Debt limits. Undersecured balance of secured claim is not allowed claim in Chapter 13 where Debtor previously received discharge in prior Chapter 7.

Asset Management Holdings, LLC v. Hernandez, 754 Fed. Appx. 632 (9th Cir. 2019)

Mortgage that was included in Debtor's Chapter 7 case not counted for eligibility purposes in subsequent Chapter 13 where amount of superior liens eclipsed value of property. Ability to strip lien under Section 506 was "readily ascertainable". Wholly unsecured second mortgage discharged in prior Chapter 7 case is not counted as secured or unsecured debt for eligibility purposes.

Keates v. Bullitt County Sanitation District, 2019 WL 1965917 (Bankr. W.D. Ky. 2019)

Transfer is constructively fraudulent where Debtor received less than reasonably equivalent value and was insolvent on the date of the transfer or became insolvent as a result of the transfer. Debtor received little or no value in exchange for transfer of \$14,000 to defendant in exchange for Debtor's oral agreement to hook up sewer lines where defendant did not connect systems even though defendant had capacity to do so.

Gocha v. Downs, 2019 WL 654295 (Bankr. W.D. Mi. 2019)

Reasonably Equivalent Value is question of fact based on facts and circumstances of particular case. Debtor did not receive value in exchange for deposit of funds withdrawn from Debtor's retirement account into account owned solely by Debtor's spouse where there was no enforceable agreement between Debtor and spouse to use funds to purchase new home nor any other agreement by spouse to provide any benefit to Debtor.

Lim v. Manuel, 2019 WL 4010388 (Bankr. E. D. Mi. 2019)

Debtor's pre-petition transfer to spouse of accrued Social Security payments is potentially avoidable. Although Social Security benefits never became part of estate, transfer may nonetheless be avoidable as constructively fraudulent.

In re Marks, 2019 WL 343815 (Bankr. E.D. Mi. 2019)

When Debtor dies, only person who can appear on Debtor's behalf is official representative of probate estate. Death of Debtor post-confirmation does not require dismissal if personal representative duly appointed by probate Court substitutes in place of Debtor. Case dismissed where personal representative filed, and later withdrew, motion for substitution.

In re Schaller, Case No. 17-54117 (Bankr. E.D. Mi. 2018)

Prior to December 1, 2017, there was no basis for a Court in Chapter 13 to allow claim filed after claim bar date. Rule 3002(c)(6) added new exception where Debtor does not file a matrix identifying creditors and creditor does not have reasonable opportunity to file claim after learning of case. Creditor was not included on matrix preventing creditor from receiving timely notice, and creditor did not have reasonable opportunity to file claim before expiration of bar date. Although case pre-dated December 1, 2017, and Rule revision normally applies only to cases filed after effective date of rule, Advisory Committee notes indicated that Court had discretion to apply rule even in cases filed before December 1. Claim allowed as timely filed under Rule 3002(c)(6).

Brenner's Restoration, Inc. v. Somerville, 2019 WL 4923928 (Bankr. D. Md. 2019)

In Chapter 13, even untimely filed claim is allowed absent objection. Rule 3002(c)(6) allows Court to extend deadline before or after deadline expires if Debtor does not timely file list of creditor names and addresses required by Rule 1007(a). Creditor not entitled to extension where Debtor filed creditor list even though list admittedly did not include creditor. Creditor who did not have sufficient notice in time to file claim holds debt that is not “provided for in the plan” and is not subject to discharge under Section 1328 and may be enforced after conclusion of Chapter 13 case.

In re Vanderpol, 2019 WL 4880065 (Bankr. D. Colo. 2019)

Rule 3002(c) allows Court to extend deadline to file proof of claim if notice was insufficient because debtor did not file list of creditors names and addresses required by Rule 1007(a). If Debtor does not file matrix, case will automatically be dismissed on the 46th day post-petition which is before expiration of claims bar date. Although plain language of Rule does not apply where Debtor files incomplete matrix, “Congress must have intended” Rule to require a full and complete Matrix. Incomplete matrix does not cut off Court’s ability to extend time for Creditor who was omitted from Matrix and did not otherwise have notice of the case in time to file a Proof of Claim

In re Keokuk, 2019 WL 1531843 (Bankr. E.D. Ky. 2019)

- – Section 1325(a)(5) requires that Debtor either pay value of secured claim or surrender collateral. Lender held security interest in mobile home and real estate on which home was located. Debtor proposed to surrender mobile home and “cramdown” secured claim to value of real estate to be paid in full over the term of the Plan. Plan complied with Section 1325(a)(5)(B)(i) by providing that lender retained liens until full payment order entry of discharge; and Section 325(a)(5)(B)(ii) by providing that the value of property distributed as of effective date of the Plan was not less than allowed amount of secured claim. Debtor may distribute non-cash property to pay all allowed secured claims. Chapter 13 does not prohibit “property-for-debt” Plans. However, Plan incorrectly proposed to reduce secured claim by “replacement value” of mobile home which is value used where Debtor proposes to retain asset. Where Debtor proposes to transfer assets as partial payment, valuation must take into account liquidation value of collateral including fees related to sale and costs of ownership pending liquidation. Court denied confirmation but set matter for additional proceedings to determine value of mobile home for purposes of crediting debt under Section 506.

Touroo v. Terry, 2019 WL 2590751 (E.D. Mi. 2019)

Bankruptcy Court has discretion to allow Debtor to complete obligations after expiration of 60 month term. Section 1327 prohibits confirming Plan that runs more than 60 months but does not preclude allowing Debtor additional time to complete obligations that came due during 60 month plan. Factors to consider include whether Debtor substantially complied with plan including diligence in making payment; feasibility of completing Plan if permitted and length of time needed and amount of arrearage due; whether cure would prejudice creditors; whether debtor’s failure to complete plan is excusable rather than culpable; and availability and relative equities of other remedies such as conversion or hardship discharge.

In re Griffin, Case No. 19-0020 (Bankr. W.D. Mi. 2019)

Recognizing split of authority on whether Section 327 applies to Debtor's request to employ special (non-bankruptcy) counsel, Court concluded that under circumstances of this case Debtor's proposed employment of Special Counsel is not subject to Section 327 approval. Possibility that special counsel fees would be paid from proceeds of litigation which was property of estate did not require approval of retention in first instance. Standing to pursue cause of action in first instance was unclear and Court would not appoint counsel and perhaps implicitly determine standing of Debtor. Application clear that Debtor sought counsel to represent Debtor, not estate and not trustee; and entry of an order approving retention may cause confusion or conflict.

In re Blume, 2018 WL 5778057 (Bankr. E.D. Mi. 2018)

Recognizing split of authority on whether Section 327 applies to Debtor's request to employ special (non-bankruptcy) counsel, Court concluded that under circumstances of this case Debtor's proposed employment of Special Counsel is not subject to Section 327 approval. Debtor did not seek authority to pay, and will not pay, counsel during pendency of Chapter 13 case and will not be paying or seeking to pay counsel from any property of bankruptcy estate.

Pergament v. Brooklyn Law School, 595 BR 6 (E.D.N.Y. 2019)

Fraudulent transfer can be recovered from initial transferee without regard to transferee's good faith. Subsequent transferees are liable only to extent transferee took for value and in good faith. Initial transferee is first person or entity to exercise control over property and right to put money or property to transferee's own purpose. Transferee who is defined as one who has no dominion or control over assets and can do nothing more than transmit funds to third party is not "transferee". Tuition payments made for adult children while children could still withdraw and receive refund are not transfers to or for benefit of College. College did not acquire any interest in or right to funds until drop-add period expired. Until that point, College was holding funds for benefit of child and not for College's own account and College could not take or use funds for its own purposes until directed to do so by Parent or Child and then funds were applied directly to Child's account. College was mere conduit as to pre-paid tuition expenses. If children withdrew from College, funds would have been returned to Child who could use them as Child pleased. However, payments made after Child registered for classes and that were not refundable did not implicate "mere conduit" because College received funds for its own use and benefit.



CASE LAW UPDATE

HONORABLE STEVEN W. RHODES VETERAN'S DAY CONFERENCE

November 11, 2019



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I. Hot off the Presses

Rodriguez v. Federal Deposit Insurance Corp., 914 F.3d 1262 (10th Cir. 2019), *cert granted*, 139 S.Ct. 2778 (2019) – Whether tax refund attributable to return filed for “affiliated group” consisting of multiple corporations with common parent corporation is property of estate when parent files bankruptcy or is property of various subsidiaries included in the consolidated return pursuant to a tax allocation agreement? Tenth Circuit held that tax allocation agreement was ambiguous where agreement discussed obligation to pay taxes but did not discuss relative ownership of refunds. Court concluded that tax allocation agreement created agency relationship between parent and subsidiary resulting in tax refund attributable to actions of subsidiary to be considered property of subsidiary and not property of parent corporation’s bankruptcy estate.

Taggart v. Lorenzen, ___ US ___, 2019 WL 2331303 (2019) – Creditor may be held in civil contempt for violating discharge order where there is no fair ground for doubt as to whether order barred creditors conduct using our objectively reasonable basis to conclude that conduct might be lawful. Violation of Discharge Injunction is not strict liability but also does not allow alleged wrongdoer to escape consequences based on unreasonable, yet sincerely held the subjective belief. Civil contempt warranted where there is no fair ground for doubt as to wrongful use of conduct using object of standard. Subjective intent may be taken into consideration in determining whether party acts in bad faith, and parties good faith, while not defense to civil contempt, may help to fashion remedy.

Mission Products Holdings, Inc. v. Tempnology LLC, ___US ___, 2019 WL 2166392 (2019) – Rejection of license agreement by Debtor/Licensor does not terminate Licensee’s right to use licensed intellectual property. Rejection constitutes breach of license agreement by licensor that cannot rescind rights of non-breaching licensee. List of exceptions in Section 365(h) and (i) identifying categories where opposing party may retain contract rights notwithstanding rejection does not override main provision of Section 365 that rejection is breach. Effect of “breach” governed by applicable non-bankruptcy law.

Obduskey v. McCarthy & Holthus, ___ US ___, 139 S.Ct. 1029 2019 WL 1264579 (2019) – Fair Debt Collection Practices Act does not apply to non-judicial foreclosures, other than specific provisions of Section 1692f that prohibit unfair or unconscionable means to collect debt. Party seeking to enforce security interest is “debt collector” but Section 1692a(6) limits applicability of FDCPA for enforcement of security interests to specific provisions of Section 1692f(6). Attorney mailed borrower letter indicating that foreclosure proceedings would be brought, disclosing amount of loan, and identifying creditor, as required by applicable state law. Borrower responded with letter invoking Section 1692g(b) requirement of FDCPA that consumer disputes amount of debt. Attorney did not stop collection and instead continue with nonjudicial foreclosure action. Attorney, acting solely to enforce security interest, is not subject to Section 1692g(b) and is not required to stop collections upon receipt of dispute letter and is not liable for continuing foreclosure proceedings after receipt of dispute letter.

Henry v. Educational Financial Service, 2019 WL 5295056 (5th Cir. 2019) – Although Federal Arbitration Act requires Courts to enforce arbitration agreements, that mandate can be overridden by contrary congressional action. Whether two statutes cannot be harmonized such that one displaces other depends on statutory text, legislative history or inherent conflict between arbitration and other statute’s underlying purpose. Bankruptcy Court can refuse to enforce arbitration where proceeding is one to adjudicate statutory rights conferred by Code and not pre-petition legal or equitable rights; and where arbitration would conflict with purposes of Bankruptcy Code including centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders. Supreme Court holding in *Epic Systems* does not alter conclusion that issues regarding enforcement of discharge injunction are uniquely within Bankruptcy context and Bankruptcy Court control.

II. Cases to Watch

In re Fulton, 2019 WL 2521455 (7th Cir. 2019), *cert petition filed*, Case No. 19-357 (2019) – Creditor “exercises control over property of estate when creditor refuses to return property that creditor repossessed prepetition. Creditor must immediately return possession without requiring that Debtor bring turnover motion. Creditor must return property prior to Court determination establishing Debtor’s obligation to provide adequate protection. Circuit joined Second, Eighth and Ninth Circuits and rejected Tenth Circuit holding in *In re Cowan*, 849 F.2d 943 (10th Cir. 2019). Although creditor would be required to seek protection on expedited basis, that does not limit or modify creditors duty to immediately turn over property

Ritzen Group, Inc. v. Jackson Masonry, LLC, 906 F.3d 494 (6th Cir. 2018), *cert granted*, 139 S.Ct. 2614 (2019) – Is Order Denying Relief From Stay final, appealable order?

Rotkiske v. Klemm, 89 F.3d 422 (3d Cir. 2018), *cert granted*, 139 S.Ct. 1259 (2019) – Whether one year statute of limitations under FDCPA is subject to “discovery rule” that statute of limitations does not commence until Plaintiff knows or reasonably should know of violation?

III. Automatic Stay

A. Actions Stayed

3.1 Generally

Ragone v. Pizza Pan Elyria, LLC, 2019 WL 2202941 (Bankr. N.D. Ohio 2019) - Automatic stay prohibits continuation of judicial proceeding that was commenced pre-petition. Responsibility to comply with stay is placed on creditors. Debtor should not be required to take legal steps to recover property seized in violation of stay. Creditors must take necessary steps to halt or reverse any pending state Court actions or other collection efforts including garnishments, repossessions, or foreclosures.

In re Dougherty-Kelsay, 2019 WL 1782598 (Bankr. E.D. Ky. 2019) - When issue implicates automatic stay, Court must determine whether matter is something that would be stayed absent exception to stay; and if so, does exception exist under Section 362 or other applicable law. Debtor seeking sanctions under Section 362(k) bears burden of proof that creditor violated stay.

Cox v. Specialty Vehicle Solutions, LLC, 2017 WL 5493160 (6th Cir. 2017) – With limited exceptions, automatic stay prevents any action that could have been filed against entity to recover claims and is intended to provide Debtor with breathing spell to reorganize affairs. Action taken in violation of stay is presumptively invalid and without legal force or effect.

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.

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.

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.

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.

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 Debtor, including appeals in which 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 Debtor is the appellant or the appellee.

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.

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.

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

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.

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.

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.

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

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.

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.

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.

Buckeye Check Cashing, Inc., v. Meadows, 396 BR 485 (6th Cir. 2008) - Property of estate consists of all legal or equitable interests of 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 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.

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

NHI Reit of Tx-II, LLC v. LaSalle Group, Inc., 387 F.Supp.3d 850 (M.D. Tn. 2019) – Court may extend automatic stay to non-bankrupt co-defendants only in unusual circumstances where there is such identity between Debtor and co-defendant that Debtor may be said to be real party defendant in judgment against co-defendant will in effect be judgment or finding against Debtor. Request to extend state to non-Debtor should be filed in Bankruptcy Court as decision is best left to discretion of Bankruptcy Court. Debtor's status as sole member of another entity does not warrant extension of stay to other entity. Denial of Motion was without prejudice to moving party seeking relief from Bankruptcy Court.

Huntington National Bank v. 1973 Chris Craft Romer, 2019 WL 497683 (N.D. Ohio 2019) - Automatic stay applies only to bankruptcy Debtor and his property and does not extend to litigation against co-Debtor's or their property. Automatic stay does not apply to assets of bankrupt Debtor's subsidiary even if subsidiary is wholly-owned unless there is such identity between Debtor and subsidiary that judgment against subsidiary is effectively judgment against Debtor, for example where subsidiary has right of complete indemnification against Debtor. Although judgment against subsidiary and its property may ultimately affect the value of Debtor's estate, judgment does not violate automatic stay because it does not affect nature or extent of Debtor's interest in subsidiary. Creditor may pursue action to foreclose notwithstanding guarantors of bankruptcy filing where foreclosure was directed to assets owned by wholly-owned subsidiary.

Great Southland Ltd. v. Landash Corp., 2018 WL 3134319 (S.D. Ohio 2018) - Court has inherent authority to extend automatic stay Debtor based on need for stay; stage of litigation; whether or not party will be unduly prejudiced; whether stay will simplify issue; and whether burden of litigation will be reduced for parties and Court. Stay of District Court litigation pending completion of Chapter 7 proceedings filed by two defendants would further judicial economy where allowing case to proceed would cause difficulty in completing discovery; defendants were alleged to have participated an integrated fraudulent scheme; time-consuming disputes regarding discovery requests would be "inevitable"; unlikely that any party could fully present claims or defenses without participation of defendants who are under Bankruptcy Court protection; and if action is not stayed, Court would have to separately adjudicate claims against Debtors creating risk of inconsistent verdicts. Stay of present action avoids logistical difficulties. Prejudice to plaintiff is not undue and is outweighed by concerns for judicial economy.

Abington Emerson Capital LLC v. Adkins, 2018 WL 2454601 (S.D. Ohio 2018) – Court has inherent authority to enter stay of proceedings against non-Debtor in the interest of judicial economy. Court needs to consider need for stay; stage of litigation; whether non-moving party will be unduly prejudiced; whether stay will simplify issue; and whether burden of litigation will be reduced for parties and Court. Stay of District Court litigation pending completion of Chapter 7 proceedings filed by two defendants would further judicial economy where allowing case to proceed would cause difficulty in completing discovery; defendants were

alleged to have participated an integrated fraudulent scheme; time-consuming disputes regarding discovery requests would be “inevitable”; unlikely that any party could fully present claims or defenses without participation of defendants who are under Bankruptcy Court protection; and if action is not stayed, Court would have to separately adjudicate claims against Debtors creating risk of inconsistent verdicts. Stay of present action avoids logistical difficulties. Prejudice to plaintiff is not undue and is outweighed by concerns for judicial economy.

In re Ayoub, 2017 WL 4161110 (E.D. Mi. 2017), *appeal after remand* 2018 WL 2228174 (Bankr. E.D. Mi. 2018)– 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.

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.

Ferguson v. DirectTV, 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 was 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.

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 Debtor such that judgment against third party Defendant would in effect be judgment against Debtor; or if pending litigation against co-defendant would cause irreparable harm to Debtor, the estate, or the reorganization plan. Motion for stay failed to allege 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.

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.

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 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.

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.

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.

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. Non-bankruptcy 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.

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.

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.

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 Debtor that a judgment against the third-party defendant is in effect a judgment against 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 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.

Meoli v. Huntington National Bank, Case No. 07-80037 (Bankr. W.D. Mi. 2012) – Although defendant-bank was not 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.

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.

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

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.

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.

In re Juliao, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Section 1301 extends protections of automatic stay to co-Debtor on any consumer 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.

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).

3.4 Property of Estate

Chenault v. University of Kentucky, 2019 WL 3467952 (E.D. Ky. 2019) – Medical payments by Automobile Insurer directly to Medical Provider for health care services resulting from auto accident are not property of Bankruptcy Estate. Although Insurance Policy itself would have been property of estate, whether proceeds of insurance are property of estate is fact based on depending on whether Debtor would have had right or receive and kept proceeds. If payment cannot inure to benefit of Debtor, proceeds are not part of estate. Proceeds of casualty, collision, life and fire insurance are proceeds to which Debtor is normally entitled an which become property of estate. Payments under liability portion of policy are paid to third parties and are not proceeds to which Debtor is entitled. Proceeds covered only third-party medical expenses. Insurance policy provided for payment of benefits directly to provider and not to Debtor; and Debtor did not have authority to direct or control distribution of proceeds. Creditor did not violate stay by receiving and retaining payments from auto insurer for medical services provided.

In re Spiech Farms, LLC, 2019 WL 2913270 (W.D. Mi. 2019) – Causes of action brought by creditor against Debtor’s former officers and directors for allegedly improperly diverting assets that would have been available to pay creditors was disguised action to recover fraudulent transfers or for breach of fiduciary duty that belonged to Estate. Trustee is sole party authorized to bring actions unless action is one over which creditor has exclusive right to prosecute exclusive of Debtor. If recovery of by Creditor would preclude subsequent recovery by Debtor, action is property of estate. Complaint alleged that Debtor’s principals used Debtor as subterfuge to divert assets to related corporations to avoid paying debts and defraud creditors; that related corporation to which assets had been diverted had so disregarded corporate form as to make it a mere sham or business conduit of Debtor’s principals to divert assets; that principals used related company to protect themselves from Debtor’s impending financial failure; that Debtor funneled money into related company rather than pay suppliers; and that principal’s’ actions allowed Debtor to avoid paying creditors and to shield assets. Complaint alleged causes of action that were breaches of fiduciary duty and fraudulent transfers that fall clearly within scope of Estate property. Overlap of claims with those of estate required estate to take precedence as both Debtor and Creditor would not be permitted to recover.

Andrews v. Indirect Purchaser Class, 2019 WL 3331604 (Bankr. E.D. Mi. 2019) – Creditor’s retention of funds garnished pre-petition is not violate of stay. Funds were not property of estate at time case filed and could not be brought into estate other than by recovery as avoidable transfer.

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.

Ohio Land Management, LLC v. Chesapeake Exploration LLC, 2018 WL 4680485 (N.D. Ohio 2018) – Section 362(a)(3) prohibits any act to exercise control over property of estate. Property of estate includes all legal or equitable interest in property as of petition

date. Debtor loses right to encumber or transfer property of estate without authorization of Bankruptcy Court. Debtor's purported assignment of leasehold interest signed one day after bankruptcy petition filed violated automatic stay. Actions in violation of stay are presumptively invalid unless Court modifies stay where Debtor unreasonably withholds notice and innocent creditor would be prejudiced. Creditor-transferee did not seek relief from bankruptcy Court to have automatic stay modified. Automatic stay is not annulled merely because bankruptcy Trustee does not raise issue as to the existence of stay or claim that invalid act violated stay.

Springer RNBj RTO, LLC, 2017 WL 3575859 (Bankr. W.D. Ky. 2017) – Debtor's leasehold or rental interest is property of estate. Outright ownership of fee interest is not required for property to be property of estate protected by stay.

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.

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.

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.

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.

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.

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.

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 541(c)(2). 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.

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.

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 – Automatic Withdrawals

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.

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.

Springer v. RNBJRTO, 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.

3.6 Collection Efforts – Generally

In re Baldwin, 2019 WL 4023819 (Bankr. E.D. Ky. 2019) – Automatic Stay prohibits any act to enforce judgment obtained before commencement of case; acted to obtain possession of property of estate or exercise control over property of estate; and any act to collect, assess or recover a claim that arose before commencement of case. Creditor violated automatic stay by retaining funds that were subject to writ of garnishment where creditor's right to garnished funds had not been determined prior to commencement of bankruptcy case. Creditor's service of writ of garnishment initiates procedure by which creditor can obtain non-exempt property to pay judgment. Procedure is not complete until state Court rules on Debtor's claimed exemptions and Debtor retains interest in funds that became property of estate on petition date. Creditor had obligation to return to Debtor funds received pursuant to writ of garnishment as garnishment proceeding had not been concluded; and must take affirmative steps to stop or reverse pending garnishment including instructing garnishee to release to Debtor funds being held pursuant to writ of garnishment. Creditors remedy is to seek adequate protection under Section 363 rather than resort to non-bankruptcy remedy of possession.

In re Newberry, 2019 WL 3857704 (Bankr. E.D. Mi. 2019) – Creditor violated stay by failing to withdraw Writ of Garnishment issued and served pre-petition but which allegedly attached to tax refund post-petition. Although Debtor did not object within 14 days of service of garnishment disclosure, that did not absolutely divest Debtor of interest in refund where garnishment disclosure also provided that tax refund would not be released until 28 days after service of garnishment disclosure and Debtor filed for Bankruptcy within 28 day window. State Garnishment Statute specifically allows objections to be filed more than 14 days after service of garnishee disclosure such that expiration of 14 day objection window cannot permanently and completely cut off Debtor's rights in funds. Creditor had affirmative duty to halt or reverse collection efforts commenced pre-petition including release of garnishment. Receipt of funds and refusing to return funds to Debtor is affirmative act to control property of estate in violation of Section 362. Court ordered creditor to return garnished tax refund to Debtor and concluded that Debtor was also entitled to attorney fees and costs, with Debtor being required to file supplemental affidavit outlining amount of attorney fees and costs.

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.

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.

3.7 Causes of Action

In re Spiech Farms, LLC, 2019 WL 2913270 (W.D. Mi. 2019) – Causes of action brought by creditor against Debtor's former officers and directors for allegedly improperly diverting assets that would have been available to pay creditors was disguised action to recover fraudulent transfers or for breach of fiduciary duty that belonged to Estate. Trustee is sole party authorized to bring actions unless action is one over which creditor has exclusive right to prosecute exclusive of Debtor. If recovery of by Creditor would preclude subsequent recovery by Debtor, action is property of estate. Complaint alleged that Debtor's principals used Debtor as subterfuge to divert assets to related corporations to avoid paying debts and defraud creditors; that related corporation to which assets had been diverted had so disregarded corporate form as to make it a mere sham or business conduit of Debtor's principals to divert assets; that principals used related company to protect themselves from Debtor's impending financial failure; that Debtor funneled money into related company rather than pay suppliers; and that principal's' actions allowed Debtor to avoid paying creditors and to shield assets. Complaint alleged causes of action that were breaches of fiduciary duty and fraudulent transfers that fall clearly within scope of Estate property. Overlap of claims with those of estate required estate to take precedence as both Debtor and Creditor would not be permitted to recover.

In re Nicole Gas Production, Ltd., 2014 WL 4855005 (Bankr. S.D. Ohio 2014), *affd*, 2018 WL 1279277 (6th Cir. BAP 2018), *affd*, 2019 WL 850960 (6th Cir. 2019) – Whether cause of action belongs to Debtor and is property of estate or can instead be prosecuted

by shareholders of corporation depends on whether cause of action is “shared” between Debtor and principal. Whether action is shared turns on whether both shareholder and corporation could state claims for damages; and if recovery by either shareholder or Debtor could recover full damages. If either’s recovery would preclude other from subsequent recovery, actions are not independent but are solely property of estate. 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. While principal alleged that State law allowed direct action by shareholder, sole damage claimed was reduction in worth of corporation based solely on actions taken against Debtor. Shareholders did not allege any independent basis or any independent damages beyond those suffered by Corporation. Principal’s filing of complaint sought to exercise possession and control over cause of action.

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 not 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.

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.

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.

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.

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.

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.

Stieg v. Hanson, 2014 WL 1664275 (Bankr. S.D. Ohio 2014) – Under Ohio law, action for “concealment” is brought by person with interest in probate estate against another person suspected of concealing estate assets. Although cause of action is “quasi-criminal” in nature because action involves determination of guilt and imposition of a penalty, stay still applies to prohibit prosecution of civil action as action becomes substitute for civil action to recover money judgment. To extent relief sought is entry and enforcement of order requiring Debtor to appear for examination, propound answers to interrogatories, and account for and surrender assets and records of probate estate, matter is criminal in nature and is not stayed. However, action is not excepted from stay to extent relief sought is entry of money judgment against Debtor.

3.8 Abandoned Property

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.

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.

3.9 Utilities

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.

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.

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.

3.10 Bare Possessory Interests

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.

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.

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.

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.

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.

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.

Escobedo v. Davis, ___ WL ___ (Bankr. D. N.Mex. 2014) – Creditor sanctioned for attempt to enforce pre-petition eviction order

in violation of automatic stay.

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.

3.11 Evictions

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.

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.

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".

3.12 Evictions – Non-Residential Tenancies – Section 362(b)(10)

In re Indiana Hotel Equities, LLC, 2018 WL 3025293 (Bankr. E.D. Mi. 2018) - Section 362(b)(10) states that automatic stay does not apply to act by lesser to obtain possession of property leased to Debtor under non-residential lease if lease has been terminated by expiration of stated term of lease either prepetition or drawing case. Section 541 states that interest of Debtor under non-residential lease is not property of bankruptcy estate where lease has expired before commencement of case; or ceases to be property of the state if lease expires during pendency of case. Statutory phrase "expiration of the stated term" does not include circumstance where lease has been terminated early by lessor's exercise of great given to terminate lease upon default. State Court previously determined that lessor had properly terminated lease and as of data petition, Debtor had no right to possession of property, and Bankruptcy Court required to give preclusive effect to State Court judgment. Lessor's termination of lease does not constitute termination "at the expiration of the stated term which would trigger Section 362(b)(10) or Section 541(b)(2). Lessors Motion to

confirm that automatic stay does not apply denied without prejudice to lessor seeking relief from automatic stay under Section 362.

3.13 Evictions – Sections 362(b)(22) and 362(l)

In re Shrum, 2019 WL 1470828 (Bankr. E.D. Mi. 2019) – Section 362(a)(3) precludes actions to obtain possession of property of the estate or exercise control over property of the estate. Section 362(b)(22) creates exception to stay for landlord who, prior to petition, obtained judgment of possession. Section 362(l)(1) allows Debtor to obtain short extension of stay for 30 days if Debtor files with Petition a Certification that Debtor has right to cure under non-bankruptcy law and that Debtor has deposited with clerk of court any rent that would come due during 30 days after petition. Debtor can further extend stay under Section 362(l)(2) by filing within 30 days of petition Certification under penalty of perjury that Debtor has cured, under non-bankruptcy law, entire monetary default that gave rise to judgment of possession. Lessor can object to certification filed by Debtor under (l)(1) or (2) and court will conduct hearing to determine if certification is true. If Debtor does not file certification required under (l)(1) with the petition, then the stay does not apply and landlord can pursue possession. If Debtor files Certification Section 362(l)(3) specifies procedure for Landlord to contest certification and allows Court to consider matter on expedited basis. Stay remained in effect where Debtor filed Official Form 101A disclosing Eviction Judgment and certifying that Debtor had right to cure and had deposited rent. State Court lacks authority to determine accuracy or validity of Certification as only Bankruptcy Court can grant relief from stay. State Court and landlord violated stay when within initial 30 day window, State Court proceeded with eviction hearing. Landlord's action in seeking writ of possession notwithstanding knowledge of bankruptcy case was willful violation of stay, as landlord knew of stay and took intentional act that violated stay. Debtor seeking damages for stay violation must provide evidence of action damages beyond mere speculation, guess or conjecture, and bare statement that Debtor suffered damages without evidence will not satisfy evidentiary requirements. Only actual damages were \$200 for transcript fees paid by Debtor as result of landlord's actions. Punitive damages warranted for conduct that is egregious, vindictive or intentionally malicious, or evidence bad faith or reckless disregard of stay. Landlord's continued prosecution of eviction recklessly disregarded automatic stay. Landlord chose not to use procedures in Section 362(l)(3) to challenge Certifications and instead proceeded with eviction action. Punitive damages of \$1,000 warranted. However, stay automatically terminated after 30 days where Debtor did not file second certification under Section 362(l)(2) Debtor cured all defaults that gave rise to eviction judgment.

In re Hart, Case No. 18-43959 (Bankr. E.D. Mi. 2018) – Section 362(b)(22) excepts from automatic stay enforcement of judgment of possession of property entered before commencement of bankruptcy case. State Court properly concluded that eviction proceedings were not stayed under Section 362.

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 can 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.

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 Form 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 Form 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”.

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.

3.14 Actions by Debtor

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.

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 Debtor. Automatic stay does not apply to action where Debtor is the plaintiff seeking relief for alleged defective foreclosure sale.

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.

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.

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 Debtor.

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.

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.

3.15 Appellate Proceedings

Ridlehuber v. Snap Line Services, Inc., 594 BR 502 (Bankr. N.D. Ga. 2018) – Estate retains interest in cash bond posted in State Court incidental to appeal of pre-petition judgment if appeal is not concluded prior to commencement of case. Once appeal becomes final post-petition, if judgment is upheld then Debtor's contingent, unvested interest terminates at completion of appellate process allowing prevailing party to recover bond amount if stay has dissolved, or to seek relief from stay for cause to enforce rights to cash bond. Although prevailing party made demand for turnover of bond before appeal became final by expiration of time to file Motion for Reconsideration and violated stay in doing so, conduct did not warrant sanctions given confusion regarding when appellate process ended, unsettled law on nature of estate's interest in bond, and fact that Debtor did not file Motion for Reconsideration.

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.

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 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.

3.16 Foreign Property

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 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.

3.17 Foreign Bankruptcy Proceedings

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 extend 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.

3.18 Levy Against Trustee

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

3.19 Police Power

Federal Trade Commission v. Rensin, Case No. 17-669 (2d Cir. 2019) – Section 362(b)(4) allows governmental unit to enforce police and regulatory power including enforcement of judgment other than money judgment. Contempt Order directing that Debtor be held in course of incarceration until he pays judgment owed to FTC falls outside governmental exception and violates automatic stay. Purpose of seeking contempt order was to enforce money judgment that it previously been entered. Although FTC filed request for order of content before Debtor filed bankruptcy petition, once automatic stay was in place, District Court prohibited from

disposing of request until conclusion of Debtor's bankruptcy proceeding.

In re Fulton, 2019 WL 2521455 (7th Cir. 2019) – Section 362(b)(4) is narrowly construed to apply to enforcement of laws affecting health, welfare, morals and safety, but not regulatory laws that directly conflict with control of property by Bankruptcy Court. Whether state action falls within “police power” exception depends on whether actions which government wishes to carry out would result in economic advantage over third parties in relation to Debtor's estate and are directed at Debtor's financial obligations rather than health and safety concerns; or alternatively whether state action is principally designed to effectuate public policy. City's objective and tolling and impounding motor vehicles until debt is paid in full as attempt to satisfy that outside bankruptcy process and is not focused on promoting safety and welfare of residence. While towing and impounding may have general deterrence effect, on balance activity was exercise of revenue collection rather than police power. Significant portion of city's annual budget comes from collection of parking tickets; enforcement of parking tickets is not traditional police power function; city impounded vehicles without regard to whether violation is serious that could affect public safety versus mere failure to pay parking tickets; and ordinance adopted in 2016 to impose possessory lien was done in response to growing practice of individuals attempting to escape financial liability for immobilized or impounded vehicles. Even if impounding vehicle was exercise of police or regulatory power, city would not be permitted to enforce final determinations of liability as doing so would constitute money judgment which cannot be enforced without violating automatic stay. Although city did not pursue recovery in Court, “money judgment” is any order that identifies parties for and against whom judgment is being entered and that specifies definite and certain amount. City's administrative adjudication results in determination of final liability sufficient to constitute “money judgment”.

In re Peake, 2018 WL 3946169 (Bankr. N.D. Ill. 2018), *affirmed sub nom*, 2019 WL 2521455 (7th Cir. 2019) - Section 362(b)(4) excepts from automatic stay commencement of a continuant of action or proceeding by governmental unit to enforce police and regulatory power including enforcement of judgment other than money judgment. City impounded vehicle following administrative determination that vehicle was subject to unpaid parking tickets and resulted in final determination of liability which is equivalent of judgment. Administrative order requires payment of sum certain consisting of fines, penalties, sanctions and costs imposed by administrative order. Continued possession of vehicle constituted effort to enforce judgment that required payment of money, removing retention from “police power” exception to automatic stay. City's retention of impounded automobile for unpaid parking tickets. Passive possession without more is not “act” to continue or maintain pre-existing security interest. Court followed Seventh Circuit precedent of *Thompson v. GMAC*, 566 F.3d 699 (7th Cir. 2009) that creditor must return collateral on request of Debtor, and declined to adopt Tenth Circuit holding in *WD Equipment, LLC v. Cowen*, 849 F.3d 943 (10th Cir. 2017).

Firstenergy Solutions Corp. v. Federal Energy Regulatory Commission, 2018 WL 2315916 (Bankr. N.D. Ohio 2018) - Police Power exception to automatic stay applies to any action by a “governmental unit” to enforce police or regulatory power. “Governmental unit” includes any department, agency or instrumentality of the United States. Whether action qualifies as police or regulatory power depends on whether governmental proceeding relates primarily to protection of governments pecuniary interest or matters of public safety. Courts must also distinguish between proceedings that adjudicate private rights versus those that effectuate public policy, with those effectuating public policy being excepted from stay. Pecuniary interest test requires Court to inquire whether result would improve governments position vis-à-vis other creditors. Police Power exception to automatic stay does not permit action that serves exclusively or primarily to elevate claims of certain prepetition creditors over other creditors. FERC's actions did not serve any direct pecuniary interest of governmental agency but were attempts to give certain private creditors advantage over others by limiting Debtor's ability to reject contracts which Debtor deemed burdensome. FERC's efforts would result in Debtor being permitted to reject burdensome contracts but still being required to perform those contracts by paying ongoing obligations under those contracts, effectively nullifying rejection and providing pecuniary relief to creditors holding contracts to be rejected to disadvantage of remaining creditors. Court can use Section 105 to impose an injunction against FERC as necessary to protect court's jurisdiction and implement other Sections of Code. When considering use of power under Section 105 to enjoin administrative proceedings not otherwise stayed, Court applies standards for implementing preliminary injunction including whether movant has shown strong or substantial likelihood of success on merit; whether movant has shown irreparable injury in absence of injunction; whether issuance of preliminary injunction would cause substantial harm to others; and whether public interest would be served by issuing preliminary injunction. Irreparable harm requirement is met where action to be enjoined threatens reorganization process or impairs court's jurisdiction. Although automatic stay prevents governmental agency from taking action, Court would enter an injunction under Section 105 as additional protection of court's jurisdiction.

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*.

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.

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.

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).

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.

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.

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.

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.

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.

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 Debtor. Criminal forfeiture proceedings are part of a criminal action or proceeding against 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.

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.

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.

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 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.

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 Debtor as it would any other criminal defendant.

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 adoption 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.

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.

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.

3.20 Police Power – Suspension of Driver's License

Edwards v. City of Ferguson, 2018 WL 6920374 (Bankr. E.D. Mo. 2018) – Refusal to reinstate license suspended for unpaid files is not violation of stay. License is privilege, not property of estate, so refusal to reinstate license is not act to exercise control over estate property. Automatic stay does not discharge Debtor's obligation to pay fines. Refusal to reinstate license is not illegal

discrimination under Section 525 where refusal to reinstate license is not “solely because she is a Debtor” where city had suspended license long before bankruptcy filing when Debtor refused to pay outstanding fines. Section 525 does not cure Debtors traffic violations and does not require city to reinstate driver’s license without payment of fines. City may violate stay if it takes additional action to collect such as attempting to enforce arrest warrant.

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.

3.21 Police Power – Bad Checks

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.

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.

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.

3.22 Police Power – Parking Tickets

In re Shannon, Case No. 18-4116 (Bankr. N.D. Ill. 2018) – Passive retention of impounded automobile for unpaid parking tickets violates automatic stay. City which holds possessory lien does not qualify for Section 362(b)(3) exception to allow party to preserve lien rights as preservation of lien rights does not amount to retention of possession of Debtor’s property or give possessory lien holder right to better treatment in bankruptcy than other lienholders. City’s refusal to return car on request violated at least three provisions of automatic stay, Sections 362(a)(3); 362(a)(4); and 362(a)(6).

In re Peake, 2018 WL 3946169 (Bankr. N.D. Ill. 2018), *affirmed sub nom*, 2019 WL 2521455 (7th Cir. 2019) - Passive retention of impounded automobile for unpaid parking tickets violates Section 362(a)(3). Court followed Seventh Circuit precedent of *Thompson v. GMAC*, 566 F.3d 699 (7th Cir. 2009) that creditor must return collateral on request of Debtor, and declined to adopt Tenth Circuit holding in *WD Equipment, LLC v. Cowen*, 849 F.3d 943 (10th Cir. 2017).

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.

3.23 Police Power – Court Disciplinary Proceedings

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.

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.

3.24 Police Power – Qui Tam Actions

United States v. Kestner, 2019 WL 4038337 (M.D. Tn. 2019) - Enforcement action under False Claims Act, 31 USC Section 3729, is excepted from automatic stay under Section 362(b)(4) as governmental unit effort to enforce police or regulatory power. Whether action qualifies as police or regulatory power depends on whether enforcement action would result in pecuniary advantage to government versus other creditors of bankruptcy estate; or whether action furthers both public and private interests in private interest do not significantly outweigh public benefit. Suit undertaken principally to adjudicate private rights, with only incidental public interest in litigation, falls outside police power. Government's action to recover payments resulting from fraudulent overbilling of Medicare would not result in pecuniary advantage where government sought only to obtain entry of money judgment, not enforcement. Government does not receive any advantage over creditors or third parties merely by obtaining judgment that liquidates amount of claim as claim will be calm unsecured claim subject to Bankruptcy Court control. While that may be non-dischargeable, that does not result in pecuniary advantage as holder who may continue to enforce debts after bankruptcy does not obtain any priority of distribution in or through bankruptcy. Action to recover fraudulent Medicare payments did not seek to adjudicate private rights and was designed to effectuate public policy by deterring fraudulent billings. Government's False Claims Act falls within both definitions of "police power" and is excepted from automatic stay.

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 and action is being prosecuted by private individual as "Private Attorney General"

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 government's 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.

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.

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.

3.25 Police Power – Fraud Actions

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.

3.26 Police Power – Medicare and Medicaid

United States v. Kestner, 2019 WL 4038337 (M.D. Tn. 2019) - Enforcement action under False Claims Act, 31 USC Section 3729, is excepted from automatic stay under Section 362(b)(4) as governmental unit effort to enforce police or regulatory power. Whether action qualifies as police or regulatory power depends on whether enforcement action would result in pecuniary advantage to government versus other creditors of bankruptcy estate; or whether action furthers both public and private interests in private interest do not significantly outweigh public benefit. Suit undertaken principally to adjudicate private rights, with only incidental public interest in litigation, falls outside police power. Government's action to recover payments resulting from fraudulent overbilling of Medicare would not result in pecuniary advantage where government sought only to obtain entry of money judgment, not enforcement. Government does not receive any advantage over creditors or third parties merely by obtaining judgment that liquidates amount of claim as claim will be calm unsecured claim subject to Bankruptcy Court control. While that may be non-dischargeable, that does not result in pecuniary advantage as holder who may continue to enforce debts after bankruptcy does not

obtain any priority of distribution in or through bankruptcy. Action to recover fraudulent Medicare payments did not seek to adjudicate private rights and was designed to effectuate public policy by deterring fraudulent billings. Government's False Claims Act falls within both definitions of "police power" and is excepted from automatic stay.

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.

3.27 Police Power- Private Attorney General

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.

3.28 Criminal Restitution

Lagos v. US, 138 S.Ct. 1684 (2018) – Mandatory Victims Restitution Act, 18 USC section 3613, allows award of restitution to crime victim for lost income and necessary child care, transportation and other expenses incurred during participation in investigation or prosecution of offense or attendance at proceedings related to offense. Attorney fees incurred by victim in investigating are not recoverable. Reference in Statute to investigation and proceedings are limited to governmental investigations and proceedings.

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 government's 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.

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 Debtor without violating automatic stay.

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.

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.

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 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.

3.29 Contempt

Wohleber v. Skurko, 2019 WL 1008555 (6th Cir. BAP 2019) – Collection of property settlement is stayed by automatic stay. Property division in domestic relations case constitutes “debt” and effort to enforce property settlement constitutes attempt to collect a debt. Whether state Court action fits within exception for criminal actions is based on whether proceeding is brought to enforce criminal law or whether contempt proceeding is criminal versus civil in nature. Contempt order is not enforcement of criminal law but is proceeding to enforce judicial directive or preserve Court any. Contempt order was civil in nature where required Debtor to pay property settlement and did not contemplate monetary penalty beyond compliance with property settlement and threaten confinement subject to immediate release upon compliance with property settlement. Imprisonment subject to release upon willingness to comply or which includes purge clause is invoked as a remedy which is civil in nature Sentencing and confinement of Debtor for failure to abide by state Court order to pay property settlement is not excepted from stay as “criminal action or proceeding”. Order is not intended to preserve dignity of Court but is, instead, designed to compel payment of debt. Creditor and creditor's counsel had duty upon receiving notice of bankruptcy petition to take steps to halt or reverse any pending state Court actions or collection efforts commenced prior to filing of bankruptcy. Creditors made no effort to convince state Court that courts should not proceed with sentencing hearing.

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.

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.

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.

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

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.

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 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.

3.30 Setoff

In re Kunkel, 2018 WL 735929 (Bankr. W.D. Mi. 2018) – Court must determine whether creditor has colorable right of setoff before granting relief from stay. Credit Union had right of set off where two accounts opened by Debtor were joint with her children. Account documents listed Debtor and children as “joint party” and accounts were not fiduciary or UTMU accounts. Debtor as joint owner had full right to withdraw funds from account, giving her both control over and interest in accounts. Account agreement that created account gave Credit Union security interest in and right of offset against any account in which Debtor was joint owner. Further, MCL Section 490.361(4) creates statutory right of setoff against multi-party deposit accounts where one party owes money to Credit Union, and permits setoff to full extend of account balance. If, as Debtor contends, accounts were solely property of children, then stay relief is not necessary as Section 553 does not address setoff rights between non-Debtor and non-Debtor depository institution. Plan did not propose full repayment to Credit Union, warranting relief from co-Debtor stay, assuming that accounts belong in part to children.

In re Roberson, 2017 WL 6060598 (Bankr. N.D. Ohio 2017) – Creditor cannot setoff debt owed to Debtor that arose post-petition against pre-petition, discharged debt. Creditor, Debtor’s landlord, violated stay resulting in award of damages. Landlord purported to setoff damage award against rent owed post-petition. However, Debtor rejected the lease without assumption, rendering any rent claim an unsecured pre-petition debt that was discharged, as Debtor had no enforceable liability to Creditor, Creditor’s actions in setting off was violate of automatic stay. Creditor ordered to pay sanctions to Debtor for initial stay violation without reduction or setoff. Fact that Debtor remained in premises post-petition did not operate as assumption of lease and holdover tenant is not liable under lease merely because they wait for landlord to take steps to recover possession.

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.

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 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.

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.

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.

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.

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.

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, the only consequence would be to reduce creditor's claim in a no asset bankruptcy case.

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.

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.

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 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.

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.

In re Stiles, 2012 Bankr. LEXIS 3266 (Bankr. N.D. Ga. 2012) - IRS setoff of refund was excepted from stay.

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.

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.

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.

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 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.

Gould v. United States, 603 F.3d 1100 (9th Cir. 2010) – IRS not required to request stay relief before exercising right of set off post-petition tax refund for pre-petition liability. Section 362(b)(26) effective October 17, 2005, permits IRS to setoff without seeking stay relief.

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.

3.31 Recoupment

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.

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, Debtor's claim against the creditor and the creditors claim against Debtor reduces the balance owing. Creditor holding right of recoupment can recoup amounts owed by 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.

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.

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.

Gardner v. Recovery Services International, Inc., 585 BR 864 (Bankr. E.D. Ky. 2002) – Recoupment requires that there be mutuality of identity between parties. Payment made to "recovery agent" for disability insurance carrier to recover overpayment on disability benefits paid by disability insurance carrier did not constitute payment to "same party" where payment to Debtor was originated by disability carrier but payment by Debtor was sent to "recovery agent". Recovery agent constituted "true third party" to transaction.

3.32 Injunctive Relief

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.

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 Debtor and used 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.

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 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.

3.33 Possessory Security Interests

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.

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.

3.34 Application of Payments

Roes v. Specialized Lian Servicing, 2018 WL First Modified Pre-Confirmation Chapter 13 Plan6543 (E.D. Tn. 2018) – Creditors alleged failure to apply payments tendered by Chapter 13 Trustee as well as payments made outside of bankruptcy case is not

violation of automatic stay. Stay prohibits actions by creditors to enforce rights under loan and security documents. Failure to credit payments does not constitute violation of stay absent evidence that creditor had duty to act and that act had effective attempting to collect a debt.

3.35 Post-Petition Debts

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.

3.36 Post-Petition Perfection of Lien

Davis v. Tyson Prepared Foods, Inc., 2017 WL 2951439 (Bankr. D. Kansas 2017), *appeal pending* Case No. 17-611 (10th Cir. 2017) – Based on 10th Circuit ruling in *WD Equipment*, creditor does not violate stay by not acting. Employer held valid perfected statutory subrogation lien where lien arose post-petition automatically when workers compensation carrier (who also happened to be Debtor's employer) paid Debtor benefits under workers compensation action and Debtor then filed action against third party for negligence in causing injury in first instance. Workers Compensation Carrier did not violate stay by obtaining perfected lien as Carrier did not take any action to obtain or perfect lien, as lien arose automatically under state law. Fact that lien interfered with and sought to exercise control over property of estate did not convert lien into stay violation where Creditor did not "act" to obtain lien.

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).

Branch Banking & Trust Co. v. Construction Supervision Services, 2014 WL ____ (4th Cir. 2014) – Subcontractor's mechanic lien dated back to date on which subcontractor provided materials and supplies, giving subcontractor interest in funds received by contractor in payment for job. Subcontractor accomplished post-petition perfection within time permitted in Section 546(b) and 547(e)(2)(A).

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.

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.

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.

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 USC Section 362(b)(3) and 11 USC Section 546(b)(1)(A) even though the mortgage deeds executed by Debtors were not recorded as of the date of 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 USC Section 362(b)(3).

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.

3.37 Domestic Support Obligations

In re Dougherty-Kelsay, 2019 WL 1782598 (Bankr. E.D. Ky. 2019) – Section 362(b)(2) excepts from automatic stay action to establish or modify domestic support obligations or concerning child custody or visitation; collection of domestic support obligation from property that is not property of estate; with respect to what withholding of income that is property of estate for payment of domestic support obligation under judicial or administrative order; and interception of tax refunds for payment of domestic support obligations. State Court has concurrent jurisdiction to determine whether creditor’s proceeding in Family Court was within scope of DSO exception and can enter orders not inconsistent with terms of automatic stay. If Bankruptcy Court later concludes that action was within scope of automatic stay, determination of State Court and subsequent orders entered will be void. State Court establishment of pre-petition child support arrearage does not violate stay as order constituted “establishment” of domestic support obligation. Entry of Wage Deduction Order did not violate stay but order that Debtor pay creditor \$50 from sources other than wage withholding did violate stay as attempt to obtain payment from Debtor’s estate and creditors 3 attempts to coerce payment including text messages and request that State Court suspend visitation violated Section 362(A)(6) as attempt to collect or recover on claim that arose prepetition. Interception of tax refunds and creditors retention of proceeds within exception to automatic stay and was not limited to non-estate property. State Court finding of contempt violated stay as no exception in Section 362 permits Court to find Debtor in civil contempt for non-payment of pre-petition domestic support obligation. Finding of contempt is not establishment or modification and does not relate to collection of obligation from non-estate property, but is instead effort to coerce Debtor into paying pre-petition debt in violation of stay. Creditor’s post-petition motion for contempt also violated Section 362(a)(1) and (a)(6) as creditor was attempting to use contempt proceedings to enforce pre-petition, non-domestic support obligation.

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.

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.

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.

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.

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.

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.

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 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.

3.38 Administrative Freeze – Financial Accounts

Wells Fargo Bank, NA, v. Weidenbenner, 2019 WL 1856276 (S.D.N.Y. 2019) - Bank does not violate automatic stay by imposing administrative freeze on receipt of notice of Chapter 7 filing where bank notified both Chapter 7 Trustee and Debtor's counsel on same day as bank implemented freeze and requested instructions from Trustee about disposition of funds from account. 10 days later, Trustee instructed bank to release funds and bank immediately released freeze. Section 542 requires entity owing debt that is property of estate to pay debt to or for benefit of Trustee. Debtors had no right to possession of funds and suffered no injury until after either Trustee abandoned property or passage of exemption deadline. Bank did not exercise control over property of estate where bank immediately sought instructions from Trustee as to disposition of property. Allowing Debtor to withdraw funds from account that constitutes property of estate would expose bank to potential liability to Trustee.

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 re-vested 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.

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.

3.39 Administrative Freeze - State Actions

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.

3.40 Final Judgment in Dischargeability Proceedings

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.

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.

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.

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.

3.41 Post-Petition Assignment of Mortgage

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.

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 Debtor or of the estate.

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.

3.42 Debtor as Witness

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.

3.43 Estoppel Against Enforcement of Stay

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.

3.44 Pending Adversary Proceedings

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.

3.45 Section 542(c) – Sale in Violation of Stay

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 estate to entity other than 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 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

3.46 Service of Motion

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.

3.47 Filing Fee

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.

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

3.48 Purpose of Stay Relief

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.

3.49 Grounds Generally

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) 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.

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.

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.

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.

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 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.

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.

Jim’s Maintenance & Sons, Inc. v. Target Corporation, 2011 WL 1206782 (1^{0th} Cir. 2011) – Bankruptcy Court has discretion to lift stay for cause to permit litigation pending in non-bankruptcy forum to continue. Stay relief appropriate to allow a creditor to establish its claims against a Debtor in other forums, particularly in forums where the bankruptcy Debtor is already a named party defendant or where the bankrupt Debtor has instituted an action against the creditor, and to protect the creditor’s right of offset against debts the bankrupt Debtor claims the creditor owes the bankrupt Debtor.

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.

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 (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.

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 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 Debtor voluntarily agrees to accept notice at an earlier date.

3.50 Effect of Confirmed Plan

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.

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.

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.

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.

3.51 Failure to Respond to Motion

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.

3.52 Failure to Conduct or Conclude Hearing

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.

3.53 Cause - Section 362(d)(1)

In re Johnson, 565 BR 835 (Bankr. S.D. Ohio 2017) – Order lifting automatic stay for purposes of allowing partnership to continue state court litigation to disassociate from partner who was Debtor in Chapter 13 necessarily permitted discovery into Debtor's misconduct both as managing partner and president of closely held corporation. Retention of jurisdiction limited to question of dischargeability of any debt that may arise from Debtor's alleged fraudulent conduct so that State Court could adjudicate claims without distinction as to whether debt was owed to partnership or to wholly-owned corporation.

In re McLain, 2019 WL 2323776 (Bankr. W.D. Mi. 2019) - "Vesting" of property as part of confirmation of Chapter 13 Plan removes property from estate and returns property to Debtor. Section 362a) prohibits commencement or continuation of action or proceeding against Debtor that was or could have been commenced before commencement of case or to recover claim against Debtor that arose before commencement of case. Claim against Debtor includes claim against property of Debtor under Section 102(2). Even though property reverted in Debtor at confirmation, stay continues to protect it. Cause existed to grant creditor relief from stay for cause to pursue potential recovery of property allegedly transferred by Debtor as personal representative of estate to Debtor personally at time when probate estate was subject to substantial creditor claims. Substantial allegations of prepetition misconduct affecting creditors of probate estate coupled with matters of comity and crucial role Probate Court plays in ensuring that fiduciaries conform to standards of trust upon which a probate system depends warranted listing of stay to allow Successor Trustee to investigate and, if warranted, take action in Probate Court.

In re Saba, 2019 WL 1385093 (Bankr. N.D. Ohio 2019) – "Cause" for lifting stay includes lack of any purpose under bankruptcy code to keep stay in place. In Chapter 7, purpose of stay is to afford Debtor discharge while allowing Trustee to administer non-exempt assets. Property owners eviction action seeking through Debtor from property did not implicate Debtor's discharge or seek claims against Debtor and Chapter 7 Trustee charged with administering estate did not oppose motion. Motion did not implicate liquidation of any assets for benefit of creditors. Debtor did not have bankruptcy purpose that would be served by keeping stay in place where Debtor was gassed of party entitled to possess property but Debtor had no independent right of possession. Property owner had right to remove Debtor from property notwithstanding alleged permission given by tenant for Debtor to remain in property.

In re Angus, 2019 WL 325807 (Bankr. W.D. Mi. 2019) – Cause exists to lift stay to allow vehicle lessor to pursue recovery where Chapter 7 Debtor's Statement of Intentions indicted that Debtor would not assume lease. However, Court would not include in Order a requirement that Debtor surrender possession. Stay relief allows creditor to pursue rights under applicable non-bankruptcy law and nothing more. Creditor could not circumvent state law rights and remedies by including requirement in Stay Lift Order that Debtor surrender possession.

In re Indiana Hotel Equities, LLC, Case No. 18-45185 (Bankr. E.D. Mi. 2018) – "Cause" exists for relief from automatic stay to allow landlord to complete eviction proceedings where prior to commencement of bankruptcy case, state Court had entered judgment declaring lease to have been validly terminated nine months prior to the bankruptcy filing and as of bankruptcy petition date, Debtor had no right to possession of property. State Court decision is binding on subsequent bankruptcy Court under Full Faith and Credit statute as well as collateral estoppel. Fact that earlier State Court judgment was on appeal did not suspend effect or enforceability of judgment or impair collateral estoppel effect where Debtor had not obtained stay of judgment pending appeal.

In re Cheerview Enterprises, Inc., Case No. 17-56162 (Bankr. E.D. Mi. 2018) – "Cause" exists for relief from automatic stay where Debtor was not currently operating business at property, leaving property unoccupied and subject to deterioration which will adversely affect the value of property; Debtor was not making adequate protection payments to mortgage holder; and Court had denied confirmation of the Plan.

In re Trammell, 2018 WL 1393738 (Bankr. E.D. Tn. 2018) – Cause is intentionally broad and flexible concept based on fact intensive inquiry and balancing of interests. Lack of adequate protection can constitute cause. Adequate protection is not exact science or require precise arithmetic computations. Court must balance all relevant factors including value of collateral, likelihood that collateral value will decline, Debtor's prospects for reorganization, Debtor's performance under a confirmed plan, if any, and balancing hardships of parties and whether creditor's collateral is being unduly jeopardized. IRS entitled to stay relief

for cause to enforce tax levy against Debtor's pension payments where Debtor has significant income yet has not paid taxes, including current estimated taxes, and has not paid other expenses although IRS voluntarily reduced levy amount to allow Debtor to pay those expenses. Court can annul stay retroactively to validate actions taken by party at time when party was unaware of bankruptcy filing, based on extraordinary circumstances such as Debtor's bad faith filing of case, director's lack of knowledge of stay, and unfair prejudice to creditor. IRS levy that commenced more than one-year pre-petition was "continuing" levy against future stream of payments from existing asset. IRS would have been entitled to stay relief at outset of case and IRS would be unduly prejudiced if stay not retroactively modified.

Baker v. Wayne County Treasurer, 2018 WL 106197 (E.D. Mi. 2018) – Section 362(d)(1) and (d)(2) are not mutually exclusive and Court can grant relief from stay for cause under (d)(1) even where stay relief not appropriate under (d)(2). Cause is broad and flexible concept that is fact-intensive and made on case-by-case basis. Cause requires bankruptcy court to balance hardships imposed on parties with eye towards overall goals of Bankruptcy Code. Bankruptcy courts have frequently held that failure to pay post-petition taxes may amount to cause. Debtor's non-payment of post-petition property taxes constituted "cause" where Debtor did not provide any method of paying post-petition taxes and Debtor had extensive history of non-payment of property taxes.

Baker v. Wayne County Treasurer, 2017 WL 6015380 (Bankr. E.D. Mi. 2017) – Stay pending appeal requires Court to balance (1) likelihood that party seeking stay will prevail on merits; (2) likelihood that moving party will be irreparably harmed; (3) prospect that others will be harmed by stay; and (4) public interest. First two factors are most important and if those two factors are decisive, Court need not consider remaining factors. Factors 1 and 2 require more than mere possibility of success or harm. Debtor did not demonstrate likelihood of success on merits of appeal lifting stay for cause. Although Debtor had equity in property and stay relief may not have been appropriate under Section 362(d)(2), Section 362(d)(1) and (d)(2) are not mutually exclusive and Court can grant relief from stay for cause under (d)(1). Failure to make plan payments, standing alone, is not cause where lack of payments is caused by circumstances beyond Debtor's control, failure to pay post-petition obligations such as post-petition property taxes can be "cause" where Debtor did not provide any method of paying post-petition taxes and Debtor had extensive history of non-payment of property taxes. Debtor also did not demonstrate irreparable harm. Threat that property will be lost to tax sales of non-residential properties, if wrongful, can be compensated by monetary award, mitigating against irreparable harm, and tax sales would not occur before March, 2018, such that any potential harm is far from imminent.

In re Jeffers, 2017 WL 2838104 (Bankr. N.D. Ohio 2017) – Entry of Judgment of divorce that grants to spouse an interest in ex-spouse's retirement plan vests in receiving spouse a property interest in retirement plan even in absence of QDRO. Property interest is not claim of creditor and is not subject to discharge. Upon entry of Divorce Decree, spouse became equitable owner of interest in retirement account and Debtor's retirement account became impressed with constructive trust for benefit of spouse, leaving Debtor with only bare legal title that does not become property of Debtor's bankruptcy estate. Section 523(a)(15) is of no effect as Section 523(a)(15) governs only "debt" owed to spouse, former, spouse or child. Spouse's interest in retirement account is property interest, not debt, and so is not impacted by Section 523(a)(15) or by Debtor's later discharge. Court would lift stay to allow State Court to enter QDRO to allow spouse control of her individual property interest in Debtor's retirement account.

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.

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.

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 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.

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.

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 First Modified Pre-Confirmation Chapter 13 Plan(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.

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.

In re Buttrill, 2016 WL 1314494 (Bankr. E.D. Tn. 2016) – Court can grant relief from or annul stay for cause. Annulment 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.

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.

In re Neirzwicki Holdings, LLC, 2015 WL 9590322 (Bankr. E.D. Ky. 2015) – Whether cause exists to lift stay to allow pre-petition litigation against Debtor to continue is determined by judicial economy, readiness of case for trial at State Court, resolution of preliminary bankruptcy matters, creditor’s chance of success on merits, and cost of defense and other potential burden to estate and impact on other creditors. Plaintiff in pre-petition litigation to enjoin Debtor’s operation of nightclub as alleged noise nuisance failed to demonstrate cause to lift stay for State Court action to continue. Debtor was a single asset real estate entity with expedited timetable for reorganizing and had placed property for sale. It was not likely that State Court could set the matter for trial before the reorganization process or sale process completed in bankruptcy court. The issues presented were complex and likelihood of success was not easily determined as evidence regarding severity of noise was mixed and evidence indicated that Debtor had materially altered the operations to decrease noise emanating from premises. Issues involved questions of local zoning, commercial

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

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; and 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.

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 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. Redemptionist 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.

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.

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.

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 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.

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.

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 lack of payments to mortgage company.

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.

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.

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 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

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.

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.

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.

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).

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.

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.

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.

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 not provided 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.

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. The Plan as confirmed provided for payment of the arrearage through the Trustee, but provided for direct payments of the ongoing mortgage by 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.\

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.

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 Debtor as a fiduciary. Chancery Court lawsuit had been pending for more than three years before 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 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 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 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 Debtor will be stayed until further order of bankruptcy court.

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.

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 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 Debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether 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 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 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.

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.

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.

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 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 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.

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 Debts out of future earnings include whether 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.

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.

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.

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.

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.

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.

3.54 Cause – Prior Stay Lift – Section 362(d)(4)

In re Wilson, 2017 WL 5054314 (Bankr. W.D. Ky. 2017) – Under Section 362(d)(4), Order Granting Relief From Stay is effective in any case filed within 2 years of the date of the Order Granting Stay Relief if the Order is recorded in compliance with applicable state law governing notices of interests or liens in real property. Stay relief granted in subsequent case where Creditor received stay relief in prior case, Creditor properly recorded Order in public records, and Debtor filed subsequent case within 2 years of prior case.

3.55 Cause – Serial Filings – Section 362(d)(4)(B)

In re Smith, 2019 WL 4897030 (Bankr. N.D. Ohio 2019) – Relief from stay warranted under Section 362(d)(1) for lack of adequate protection where property has value of \$491,000 and debt exceeded \$800,000. Relief from co-debtor stay warranted under Section 1302(c)(2) where co-debtor signed mortgage and Debtor’s income was not sufficient to fund Chapter 13 Plan and under Section 1302(c)(3) as creditor’s interest was subject to irreparable harm because no payments were being made and value of real estate was far below value. Court can grant additional *in rem* relief as to real property under Section 362(d)(4) where filing is part of scheme to hinder, delay or defraud creditors and there have been multiple filings affecting the real property. Court can infer intent to hinder, delay or defraud based on serial filing alone without need for evidentiary hearing. Case was Debtor’s third bankruptcy filing dating back to 2007 and second case since 2017. Debtor’s first case filed on eve of foreclosure sale was dismissed because Debtor did not file schedules, a plan or other required documents. Second case filed in 2017 filed on eve of foreclosure sale dismissed where debtor did not make any plan payments and Debtor voluntarily dismissed 3 months after filing. Third case filed in early 2019 dismissed because debtor did not make payments, did not file schedules, and voluntarily dismissed 6 days after filing. Three cases spanned 12 years but lasted a total of 6 months; each one stopped foreclosure sale; creditors have not received any payments in prior cases, and Debtor did not have sufficient income to make payments in current case. Debtor’s actions were consistently inconsistent with purposes of Code. Record amply demonstrated that current filing was for purposes of hindering, delaying and defrauding creditors through serial filings, warranting *in rem* relief. Creditor entitled to record Order and Order would remain in effect as to any case purporting to affect the real property and filed within 2 years after entry of Order Granting Relief From Stay.

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.

3.56 Cause – Default in Chapter 13 Payments

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”.

3.57 Cause – Lack of Adequate Protection

In re Smith, 2019 WL 417827 (Bankr. E.D. Tn. 2019) – Motion for Relief From Stay denied on preliminary basis where although Court deny confirmation of Debtors Chapter 13 Plan, Debtor had right to amend Plan and equity in property provided mortgage creditor with adequate protection.

In re Trammell, 2018 WL 1393738 (Bankr. E.D. Tn. 2018) – Cause is intentionally broad and flexible concept based on fact intensive inquiry and balancing of interests. Lack of adequate protection can constitute cause. Adequate protection is not exact science or require precise arithmetic computations. Court must balance all relevant factors including value of collateral,

likelihood that collateral value will decline, Debtor's prospects for reorganization, Debtor's performance under a confirmed plan, if any, and balancing hardships of parties and whether creditor's collateral is being unduly jeopardized. IRS entitled to stay relief for cause to enforce tax levy against Debtor's pension payments where Debtor has significant income yet has not paid taxes, including current estimated taxes, and has not paid other expenses although IRS voluntarily reduced levy amount to allow Debtor to pay those expenses. Court can annul stay retroactively to validate actions taken by party at time when party was unaware of bankruptcy filing, based on extraordinary circumstances such as Debtor's bad faith filing of case, director's lack of knowledge of stay, and unfair prejudice to creditor. IRS levy that commenced more than one-year pre-petition was "continuing" levy against future stream of payments from existing asset. IRS would have been entitled to stay relief at outset of case and IRS would be unduly prejudiced if stay not retroactively modified.

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.

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 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 Debtor to prove that the collateral at issue is not, in fact, declining in value; or demonstrate that 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.

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.

3.58 Cause – Appellate Proceedings

Clear Channel Outdoor, Inc. v. Thomas, 2018 WL 6990593 (Bankr. W.D. Tn. 2018) – Bankruptcy Court has discretion to lift automatic stay to allow parties to pursue appeal in State appellate Court involving purely state law issues. Bankruptcy Court is not reviewing or appellate Court and is not appropriate forum for reviewing, reversing, modifying or affirming State Court decisions.

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.

3.59 Cause – Arbitration Provisions

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 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.

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.

3.60 Cause – Leased Assets

In re Angus, 2019 WL 325807 (Bankr. W.D. Mi. 2019) – Cause exists to lift stay where Debtor is behind in lease payments and Debtor does not intend to retain vehicle or assume lease.

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

In re Saba, 2019 WL 1385093 (Bankr. N.D. Ohio 2019) – Relief from Stay under Section 362(d)(2) requires proof that Debtor has no equity in property and that property is not necessary for effective reorganization. Debtor acknowledged that she had no interest in property where Debtor was mere guest of lawful tenant. Property was not necessary for effective reorganization where Debtor filed Chapter 7 and was not attempting to reorganize. Property owner, as landlord, had standing to bring eviction action.

In re Angus, 2019 WL 325807 (Bankr. W.D. Mi. 2019) – Relief from stay warranted allowing Lessor to repossess leased vehicle where vehicle was true lease leaving Debtor no equity and property was not necessary for effective reorganization where Debtor did not propose to assume lease.

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 bankrupt, 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.

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) 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.

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.

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.

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.

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.

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 Debtor, the parties stipulate that 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.

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.

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.

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.

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

In re Saba, 2019 WL 1385093 (Bankr. N.D. Ohio 2019) – Relief from Stay under Section 362(d)(2) requires proof that Debtor has no equity in property and that property is not necessary for effective reorganization. Debtor acknowledged that she had no interest in property where Debtor was mere guest of lawful tenant. Property was not necessary for effective reorganization where Debtor filed Chapter 7 and was not attempting to reorganize. Property owner, as landlord, had standing to bring eviction action.

In re Cheerview Enterprises, Inc., Case No. 17-56162 (Bankr. E.D. Mi. 2018) – Section 362(d)(2) allows Court to grant relief from automatic stay where there is no equity in property for Debtor and property is not necessary for effective reorganization. Property is necessary for effective reorganization where there is reasonable possibility of successful reorganization within reasonable time. Parties conceded that first mortgage balance significantly exceeded value of property and there was 2nd, entirely unsecured, mortgage on property. Property was no longer necessary for effective reorganization where Court had already denied

confirmation of Plan, Debtor's sole asset was closed a gas station and convenience store in Chapter 11 case that had been pending for 8 months, and after denial of confirmation of Plan, Debtor no longer had any effective reorganization in prospect.

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.

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) 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.

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.

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.

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 needed 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.

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.

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. 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.

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.

3.63 Insurance Claims

In re Licking River Mining, LLC, 2016 WL 3251890 (Bankr. E.D. Ky. 2016) – Liability insurance policies owned by 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 Debtor the proceeds are property of the estate, because the proceeds are payable to 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 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 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.

3.64 Leases – Section 365(p)(1)

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.

3.65 “Strict Foreclosure”

In re Insight Terminal Solutions, LLC, 2019 WL 4640773 (Bankr. W.D. Ky. 2019) – Contract clause provided that if Borrower did not refinance within specific time, Borrower would then be foreclosed from filing bankruptcy and would surrender all collateral to lender. Although Borrower did not refinance and Lender gave notice of intent to retained pledged assets in full satisfaction under Article 9, Article 9 also provided Borrower with 20 days to file opposition to Lender's strict foreclosure. Borrower filed for bankruptcy before expiration of time to contest strict foreclosure, and assets remained property of Debtor

3.66 Expiration of Right of Redemption

In re Mapp, 2019 WL 913043 (Bankr. W.D. Ky. 2019) – Upon completion of foreclosure sale prepetition, purchaser at sale obtains equitable ownership of property subject only to Debtor's bare legal title and right of redemption. Once period for redemption expires, property is no longer property of estate. Filing of Chapter 13 petition post-sale but before expiration of redemption does not stay running of redemption period.

Schnitzel Investment v. Sorensen, Case NO. 17-1152 (9th Cir. BAP 2018) – Where state law requires a notice before borrower loses title to pawned property, property remains property of estate and is not automatically vested in pawnbroker at end of redemption where notice had not been given as of commencement of bankruptcy case. Pawnbroker's attempt to give notice after commencement of case was void as violation of automatic stay. BAP distinguished *Title Max v. Northington*, as Georgia law applicable in *Title Max* did not require notice and automatically vested title in pawnbroker at expiration of redemption rate.

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 beyond 60 days 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 Bankruptcy Court holding in *Title Max v. Northington*.

Title Max v. Northington, Case No. 16-172 (Bankr. M.D. Ga. 2016), *reversed*, Case No. 16-17467 (11th Cir. 2017) – Debtor cannot redeem pawn transaction over life of Chapter 13 case even where petition is filed before expiration of the statutory period of redemption. Under State law, any pledged collateral that is not redeemed is automatically forfeited to the pawn broker. Section 108 allows Debtor to extend redemption for 60 days post-petition but at end of redemption Debtor loses all interest in asset and asset becomes property of pawn broker and is no longer property of bankruptcy estate as Debtor is automatically divested of any

interest in asset.

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.

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.

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.

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.

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.

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.

3.67 Family Law Proceedings

In re Blume, 582 BR 178 (Bankr. E.D. Mi. 2017) – Cause existed to lift stay and allow State Court in Marriage Dissolution proceeding to determine whether constructive trust should be imposed on property of Debtor. Prior to Bankruptcy filing, State Court determined that "there may be grounds impose, and the court may in the future impose, an equitable lien" on certain real property which, if imposed, would amount to constructive trust and remove property from property of estate. Although Bankruptcy Court lacks authority to impose constructive trust, State Court can do so if (a) Bankruptcy Court grants stay relief to allow State Court to conduct additional proceedings; (b) state court decided to impose constructive trust; and (c) state court rule that effective date of constructive trust pre-dated bankruptcy filing. Denial of stay relief would prevent creditor from seeking relief as property would be liquidated by bankruptcy estate leaving creditor an entirely unsecured creditor, while allowing State Court proceedings could result in creditor being afforded fully secured status. Debtor's choice of timing of filing of bankruptcy should not deprive creditor of ability to litigate on merits and have State Court reach conclusion as to constructive trust.

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.

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.

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.

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

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.

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.

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.

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.

3.69 In Rem Relief

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.

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.

3.70 Burden of Proof

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.

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(d)(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.

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.

3.71 Mootness

Banks v. Wells Fargo Bank, NA, 2018 WL 1088072 (E.D. Mi. 2018) – Automatic Stay does not survive dismissal of bankruptcy case. Once case is dismissed, any challenge to Order Lifting Stay is moot. Debtor can appeal stay relief only if Debtor also appeals dismissal itself.

In re Odell, 2018 WL 624884 (6th Cir. BAP 2018) – Automatic Stay terminates automatically upon entry of discharge as to property that is not property of estate. Debtor's claimed homestead exemption which exceeded value of property, when final, removed homestead from property of estate. Appeal of Order Lifting Stay rendered moot by subsequent entry of discharge as stay would have terminated in any event, leaving appellate court with no effective remedy.

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.

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.

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 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.

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.

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.

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.

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.

3.72 Standing to Obtain Relief From Stay

In re Saba, 2019 WL 1385093 (Bankr. N.D. Ohio 2019) – Party seeking relief in Bankruptcy Court must demonstrate both constitutional standing and Prudential standing. Constitutional requirement is proof of injury in fact caused by or fairly traceable to some conduct or statutory prohibition, causation and redressability. Landlord had constitutional standing to bring request for relief from automatic stay to allow landlord to evict guest of tenant. Injury in fact resulted from automatic stay which prohibited landlord from pursuing eviction; causation existed because landlord could not exercise nonbankruptcy remedies because of stay; and harm was redressable because granting stay relief will remedy claimed injury. Prudential standing requires that party assert

his own legal rights or interests and cannot rest claim on legal rights or interests of 3rd parties. Moving party must also be “party in interest” to seek relief under Section 362 (d). Landlord attempting to evict guest of tenant from property owned by landlord had Prudential standing and was “party in interest” as landlord was attempting to enforce his own legal rights as property owner.

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.

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. Creditor had colorable or plausible claim to and interest in the note and mortgage for purposes of stay relief.

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.

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.

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.

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.

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.

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.

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.

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 stake 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 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

In re Kegler, Case No. 10-54465 (Bankr. E.D. Mi. 2010) – Motion for Relief From Stay denied where creditor failed to file required Statement of Corporate Ownership and corrected Motion not filed within additional time provided by Court Order to correct deficiency.

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.

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.

3.73 Conditional Relief

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.

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.

3.74 Retroactive Relief

Ohio Land Management, LLC v. Chesapeake Exploration LLC, 2018 WL 4680485 (N.D. Ohio 2018) – Section 362(a)(3) prohibits any act to exercise control over property of estate. Property of estate includes all legal or equitable interest in property as of petition date. Debtor loses right to encumber or transfer property of estate without authorization of Bankruptcy Court. Debtor's purported assignment of leasehold interest signed one day after bankruptcy petition filed violated automatic stay. Actions in violation of stay are presumptively invalid unless Court modifies stay where Debtor unreasonably withholds notice and innocent creditor would be prejudiced. Creditor-transferee did not seek relief from bankruptcy Court to have automatic stay modified. Automatic stay is not annulled merely because bankruptcy Trustee does not raise issue as to the existence of stay or claim that invalid act violated stay.

In re Fisher, Case No. 18-45089 (Bankr. E.D. Mi. 2018) – Actions taken in violation of stay are invalid and avoidable and shall be voided absent limited equitable circumstances where Debtor unreasonably withholds notice of stay and creditor would be prejudiced if Debtor raises stay as defense or to attempt to use stay unfairly as shield to avoid unfavorable result. Debtor did not list mortgage holder as creditor and mortgage holder, unaware of bankruptcy, continued to foreclose, acquired title at auction, and after expiration of redemption, sold property to third party without notice of bankruptcy filing. Debtor unreasonably withheld notice of bankruptcy from mortgage holder where Debtor who allegedly was unaware of existence of mortgage would have been able to discover existence of mortgage by either cursory review of title history or review of foreclosure notices. Bank would be prejudiced if Debtor raised stay as defense as both foreclosure and third-party sale would be unwound subjecting creditor to potential claim by purchaser.

In re Trammell, 2018 WL 1393738 (Bankr. E.D. Tn. 2018) – Cause is intentionally broad and flexible concept based on fact intensive inquiry and balancing of interests. Lack of adequate protection can constitute cause. Adequate protection is not exact science or require precise arithmetic computations. Court must balance all relevant factors including value of collateral, likelihood that collateral value will decline, Debtor's prospects for reorganization, Debtor's performance under a confirmed plan, if any, and balancing hardships of parties and whether creditor's collateral is being unduly jeopardized. IRS entitled to stay relief for cause to enforce tax levy against Debtor's pension payments where Debtor has significant income yet has not paid taxes, including current estimated taxes, and has not paid other expenses although IRS voluntarily reduced levy amount to allow Debtor to pay those expenses. Court can annul stay retroactively to validate actions taken by party at time when party was unaware of bankruptcy filing, based on extraordinary circumstances such as Debtor's bad faith filing of case, creditor's lack of knowledge of stay, and unfair prejudice to creditor. IRS levy that commenced more than one-year pre-petition was "continuing" levy against future stream of payments from existing asset. IRS would have been entitled to stay relief at outset of case and IRS would be unduly prejudiced if stay not retroactively modified.

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 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.

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.

3.75 Denial – "Unclean Hands" of Moving Party

In re Basrah Custom Design, Inc., 2019 WL 2202742 (Bankr. E.D. Mi. 2019) – In normal case, where Debtor is in possession of real property that belongs to another person and Debtor has no right of possession under applicable non-bankruptcy law, Court will grant stay relief to permit owner to prosecute eviction action inappropriate non-Bankruptcy Court. However, Court may refuse to grant stay relief where moving party has unclean hands. Moving party sought to evict Debtor to permit moving party to then use premises to operate medical marijuana dispensary in violation of federal law. Federal Court cannot be asked to enforce

protections of Bankruptcy Code to allow creditor to commit a federal crime.

3.76 Bad Faith of Lender

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.

3.77 Marshaling of Assets

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.

3.78 Procedural Requirements

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.

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.

3.79 Procedural Requirements – Withdrawal of Motion

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.

3.80 Termination – Generally

Yinghong Machine International, Ltd. V. Wholesale Equipment Company, 2015 WL 13812274 (W.D. Tn. 2015) – Unless modified by the bankruptcy court, the automatic stay remains in effect until the case is closed, dismissed and a discharge is granted or denied.

3.81 Termination – Confirmation of Chapter 11 Plan

Laying v. Rael, 2018 WL 6437559 (10th Cir. 2018) – Closing of Chapter 11 case after confirmation of Plan lifts automatic stay and allows creditors to enforce rights under confirmed Plan in non-bankruptcy forum. Bankruptcy Court Order Confirming Plan retained jurisdiction over core proceedings and matters related to bankruptcy estate, but did not divest state court of power to enforce *in rem* rights.

3.82 Termination - Dismissal and Reinstatement of Case

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.

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.

3.83 Termination – Failure to Reaffirm or Redeem

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.

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).

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.

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.

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.

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 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.

3.84 Termination – Denial of Discharge

In re Holloway, Case No. 18-51115 (Bankr. E.D. Mi. 2018) – Debtor is not eligible for discharge in Chapter 7 where Debtor received discharge in prior Chapter 7 in case commenced within 8 years before the date of filing of petition in current case. Debtor not eligible for discharge where prior case filed on August 10, 2010 and current case filed August 10, 2018, 8 years to day after Debtor filed prior Chapter 7. Automatic stay continued with respect to property of estate until property is no longer property of estate; automatic stay as to action other than action against terminates upon entry of Order Denying Discharge

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.

3.85 Post-petition Default on Residential Mortgage

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.

3.86 Post-Petition Property Taxes

Baker v. Wayne County Treasurer, 2017 WL 6015380 – Stay pending appeal requires Court to balance (1) likelihood that party seeking stay will prevail on merits; (2) likelihood that moving party will be irreparably harmed; (3) prospect that others will be harmed by stay; and (4) public interest. First two factors are most important and if those two factors are decisive, Court need not consider remaining factors. Factors 1 and 2 require more than mere possibility of success or harm. Debtor did not demonstrate likelihood of success on merits of appeal lifting stay for cause. Although Debtor had equity in property and stay relief may not have been appropriate under Section 362(d)(2), Section 362(d)(1) and (d)(2) are not mutually exclusive and Court can grant relief from stay for cause under (d)(1). Failure to make plan payments, standing alone, is not cause where lack of payments is caused by circumstances beyond Debtor's control, failure to pay post-petition obligations such as post-petition property taxes can be "cause" where Debtor did not provide any method of paying post-petition taxes and Debtor had extensive history of non-payment of property taxes. Debtor also did not demonstrate irreparable harm. Threat that property will be lost to tax sales of non-residential properties, if wrongful, can be compensated by monetary award, mitigating against irreparable harm, and tax sales would not occur before March, 2018, such that any potential harm is far from imminent.

3.87 Closing of Case Without Discharge

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.

3.88 Setoff

In re Orexigen Therapeutics, Inc., Case No. 18-10518 (Bankr. D. Del. 2018) – Section 553 preserves right of setoff for "mutual" debts. Triangular setoff, where Debtor owes creditor and is owed money by subsidiary of creditor, while recognized at state law, is not recognized under Section 553 as debts are not "mutual".

In re Kunkel, 2018 WL 735929 (Bankr. W.D. Mi. 2018) – Court must determine whether creditor has colorable right of setoff before granting relief from stay. Credit Union had right of set off where two accounts opened by Debtor were joint with her children. Account documents listed Debtor and children as "joint party" and accounts were not fiduciary or UTMU accounts. Debtor as joint owner had full right to withdraw funds from account, giving her both control over and interest in accounts. Account agreement that created account gave Credit Union security interest in and right of offset against any account in which Debtor was joint owner. Further, MCL Section 490.361(4) creates statutory right of setoff against multi-party deposit accounts where one party owes money to Credit Union, and permits setoff to full extent of account balance. If, as Debtor contends, accounts were solely property of children, then stay relief is not necessary as Section 553 does not address setoff rights between non-Debtor and non-Debtor depository institution. Plan did not propose full repayment to Credit Union, warranting relief from co-Debtor stay, assuming that accounts belong in part to children.

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.

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.

3.89 Relief From Co-Debtor Stay

In re Kunkel, 2018 WL 735929 (Bankr. W.D. Mi. 2018) – Court must determine whether creditor has colorable right of setoff before granting relief from stay. Credit Union had right of set off where two accounts opened by Debtor were joint with her

children. Account documents listed Debtor and children as “joint party” and accounts were not fiduciary or UTMU accounts. Debtor as joint owner had full right to withdraw funds from account, giving her both control over and interest in accounts. Account agreement that created account gave Credit Union security interest in and right of offset against any account in which Debtor was joint owner. Further, MCL Section 490.361(4) creates statutory right of setoff against multi-party deposit accounts where one party owes money to Credit Union, and permits setoff to full extend of account balance. If, as Debtor contends, accounts were solely property of children, then stay relief is not necessary as Section 553 does not address setoff rights between non-Debtor and non-Debtor depository institution. Plan did not propose full repayment to Credit Union, warranting relief from co-Debtor stay, assuming that accounts belong in part to children.

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.

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.

3.90 Adequate Protection Payments

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.

3.91 Administrative Claim – Insufficiency or Lack of Adequate Protection

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.

3.92 Attorney Fees - Prosecuting or Defending Motion

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.

3.93 Finality of Order for Appellate Review

Ritzen Group, Inc. v. Jackson Masonry, LLC, 2018 WL 558837 (M.D. Tn. 2018), *aff’d*, 906 F.3d 494 (6th Cir. 2018), *cert granted*, 139 S.Ct. 2614 (2019) – Order Denying Motion for Relief From Stay is final and appealable order. Appeal must be filed within 14 days of Order. Appeal filed after expiration of 14 days from entry of Order is untimely requiring dismissal of appeal.

3.94 GMAC Bankruptcy

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.

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

3.95 Grounds

Oya v. Wells Fargo, NA, 2019 WL 5390007 (9th Cir. BAP 2019) – Bankruptcy Code allows Court wide latitude in granting relief from stay including power to grant retroactive relief which validates actions that otherwise violate stay and would be void. Whether to annul stay depends on number of prior bankruptcy filings; whether repeated filings indicate intention to delay and hinder creditors; weighing of extent of prejudice to creditors or third parties if stay relief is not made retroactive, including harm to bona fide purchaser; Debtor's overall good faith based on totality of circumstances; whether creditors knew of stay but nonetheless took action, thus compounding problem; whether Debtor complied, and is complying, with Code and Rules; relative ease of restoring parties to the status quo ante; costs of annulment to Debtors and creditors; timeliness of creditor's request for annulment, or timeliness of Debtors request to set aside sale or violative conduct; whether, after learning of bankruptcy, creditors proceeded to continue violation of the stay and whether creditor moved expeditiously to gain relief; whether annulment of stay will cause irreparable injury to Debtor; and whether stay relief will promote judicial economy or other efficiencies. Annulment can have effect of validating sale or other action taken in violation of stay, or to avoid creditor liability for what otherwise would be willful violation. While creditor had actual knowledge of filing but pursued foreclosure sale amounting to willful violation, conduct of Debtor "significantly outweighs" any wrongful conduct of Creditor. Debtors defaulted on loan in 2014 and made no payments after that date. Debtors filed series of 5 prior cases, alternating individual Chapter 13 cases between Husband and Wife, all of which were dismissed for failure to file document so plan, with at least two cases filed on day before scheduled foreclosure sale. Debtor's current case was 6th filing, filed just 2 hours before scheduled foreclosure sale. Debtor called Creditor and advised that bankruptcy case had been filed but did not provide case number or identify court in which case was filed. Lender proceeded with sale notwithstanding notice of case but rescinded sale the next day. Debtor's repeat filing lacked any genuine effort to reorganize debts, were part of an intentional scheme to hinder and delay the foreclosure of the Property, and were abuse of bankruptcy process. All six cases (including current case) were dismissed for failure to file the required documents evidencing lack of any actual intent to follow through and prosecute bankruptcy case to conclusion. Petitions were filed simply to get the benefit of the automatic stay. Creditor would suffer prejudice if retroactive annulment was not granted because it would have to face § 362(k) sanctions, and Debtor should not be able to profit from bad-faith scheme. Debtor had already been restored to the status quo ante when lender rescinded sale, and annulment would now restore lender to same pre-foreclosure status quo. Debtor lived at Property for past five years without making payments, such that typical attorney's fees associated with stay motion practice would have no net. Creditor rescinded sale the next day, producing no continuing violation of stay and annulment would not cause irreparable injury to Debtor as case had been dismissed. Judicial economy and efficiency favored annulling the stay as annulment expedited resolution of Debtor's request for sanctions under Section 362.

Ohio Land Management, LLC v. Chesapeake Exploration LLC, 2018 WL 4680485 (N.D. Ohio 2018) – Actions in violation of stay are presumptively invalid unless Court modifies stay where Debtor unreasonably withholds notice and innocent creditor would be prejudiced. Creditor/transferee did not seek relief from bankruptcy Court to have automatic stay modified. Automatic stay is not annulled merely because bankruptcy Trustee does not raise issue as to the existence of stay or claim that invalid act violated stay.

Cox v. Specialty Vehicle Solutions, LLC, 2017 WL 5493160 (6th Cir. 2017) – With limited exceptions, automatic stay prevents any action that could have been filed against entity to recover claims, and is intended to provide Debtor with breathing spell to reorganize affairs. Action taken in violation of stay is invalid and without legal force or effect. However, Bankruptcy Court has authority to terminate, annul or modify stay, including power to retroactively annul stay and validate action taken when party was unaware of stay or where equitable circumstances exist including where Debtor unreasonably withholds notice of stay and creditor would be prejudiced if Debtor raises stay as defense. Equitable circumstances existed where Bankruptcy Court had lifted stay to allow non-bankruptcy litigation to proceed but was not clear whether Bankruptcy court intended to only to lift stay prospectively or to instead annul stay retroactively to allow prior litigation to continue. Plaintiff and Debtor executed Consent Order Lifting Stay with specific limitation that nay recovery be limited to insurance proceeds. Plaintiff filed action after Debtor had filed bankruptcy but had intentionally not included Plaintiff in notice and Plaintiff had no notice of bankruptcy case when he later filed lawsuit only 5 days before expiration of statute of limitations. If stay relief is prospective only, then initiation of prior lawsuit would be void and statute of limitations would have run leaving Plaintiff without remedy. If stay is annulled, Plaintiff's action filed within statute of limitations would remain viable. Action remanded to District Court for further determination as to scope of stay and applicability of equitable exception to allow case to remain pending.

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.

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 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.

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 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.

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.

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.

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.

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 ensure that the security interest, which

was valid as of the petition date, remained in force and effect.

3.96 Standing to Request

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 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.

3.97 Timing of Request to Annul

Oya v. Wells Fargo, NA, 2019 WL 5390007 (9th Cir. BAP 2019) – Creditor can obtain retroactive stay relief to avoid liability under Section 362(k) for willful violation of stay. Debtors had filed five prior Chapter 13 cases, all of which were dismissed for failure to file documents. Debtors filed the sixth petition two hours before the scheduled foreclosure sale, and called Bank representative to advise of filing. Bank continued with sale but rescinded sale the next day. Although conduct of sale was stay violation, Court was not precluded from retroactively annulling stay where Creditor was not seeking to retroactively modify stay to validate sale (relief which Court could clarify grant) but only to address Lender's alleged "willfulness".

3.98 Effect of Annulment

Oya v. Wells Fargo, NA, 2019 WL 5390007 (9th Cir. BAP 2019) – Bankruptcy Code allows Court wide latitude in granting relief from stay including power to grant retroactive relief which validates actions that otherwise violate stay and would be void. Annulment can have effect of validating sale or other action taken in violation of stay, or to avoid creditor liability for what otherwise would be willful violation. While creditor had actual knowledge of filing but pursued foreclosure sale amounting to willful violation, conduct of Debtor "significantly outweighs" any wrongful conduct of Creditor warranting retroactive relief from stay to avoid creditor liability for what otherwise would have been willful violation of stay.

E. Violations of Automatic Stay

3.99 Parties Liable

In re Caldwell, 2019 WL 5616908 (Bankr. E.D. Mi. 2019) – Individual seeking damages for violation of stay must prove: (1) actions taken were in violation of automatic stay; (2) violation was willful; (3) violation caused actual damages; and (4) there was no objectively reasonable basis to conclude that creditor's conduct might have been lawful. Creditor did not violate stay where Creditor, pre-petition, caused assets to be seized. After bankruptcy filed, Creditor did not take any action with respect to seized assets. Storage yard operation may have violated stay by refusing to return vehicle to Debtor, but there was no evidence that Storage Yard operator was acting at direction or control of Creditor. Debtor made repeated demands on Creditor but Creditor was not in possession of assets; and Debtor never made demand on Court Officer or Storage Yard operator who seized and was holding assets. Only stay violation(if any) was Storage Yard operator's refusal to return assets. Creditor's conduct was not objectively unreasonable where Creditor was not in possession or control and Creditor took no action to interfere with Debtor's ability to retake possession.

Shoemaker v. SN Servicing Corp., 2018 WL 3387361 (M.D. Tn. 2018) - Assuming that mortgage creditor did not properly credit payments received by Debtors during Chapter 13 case, subsequent servicer who did not become involved with that until more than one year after dismissal of Chapter 13 case could not be held liable for violation of stay. Servicer was not involved with Debtor at time bankruptcy was ongoing and were not involved in whatever occurred prior to bankruptcy closing. Any action that allegedly violated automatic stay was taken by someone other than defendant and any ongoing dispute regarding amount of debt is state law issue that can be resolved in State Court.

3.100 Mootness

In re Fulton, 2019 WL 2521455 (7th Cir. 2019) - Issues relating to creditor's alleged violation of automatic stay are not mooted by dismissal of underlying case. Court retains power to compensate victims for violation of automatic stay and punish violators even after conclusion of underlying bankruptcy case.

3.101 Notice of Filing

Ragone v. Pizza Pan Elyria, LLC, 2019 WL 2202941(Bankr. N.D. Ohio 2019) - Automatic stay prohibits continuation of judicial proceeding that was commenced pre-petition. Creditor violates stay where creditor, with notice, takes action that is prohibited by stay. Defendant did not establish lack of notice where defendant admitted that notice of commencement was mailed to address in which defendant's office. Defendant required to have in place procedures to ensure that bankruptcy notices sent to internally improper but otherwise valid address are forwarded in timely manner to correct person. Defendant's argument that "gatekeeper" for mail coming into central Suite did not deliver mail to defendant as defendant did not indicate any terms of lease or other steps taken by defendant to ensure that mail was correctly forwarded..

In re Alderman, 2018 WL 5797709 (Bankr. N.D. Ohio 2018) – Creditor violated stay where creditor refused to return repossessed vehicle after being notified of filing. Creditor, with full knowledge of bankruptcy, demanded payment from Debtor in exchange for return of vehicle and later sold vehicle without relief from stay. On date of filing, Debtor contacted creditor and creditor's attorney by text message, which was sufficient informal knowledge of commencement of case. On receiving notice, creditor is

required to return vehicle and restore pre-petition status quo.

In re Formosa, 2018 WL 494416 (Bankr. E.D. Mi. 2018) – Bank had no duty to conduct PACER search before commencing foreclosure sale. Rule impose on Debtor duty to provide notice to creditors. However, Code does not impose duty on Debtor beyond properly scheduling creditor in Matrix. Absent evidence that Debtor either failed to include creditor in Matrix or otherwise concealed notice of bankruptcy filing from creditor, Debtor had no affirmative duty to advise creditor of bankruptcy filing where Debtor had properly included credit in Matrix and Bankruptcy Court Clerk mailed notice to Creditor as required by Rule 2002, but between petition date and date on which creditor received notice from Clerk, creditor had conducted foreclosure sale. Fees incurred by creditor to set aside foreclosure sale were not fees to protect creditor’s interest in property but were instead expended to remedy Bank’s violation of stay.

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.

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.

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.

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.

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.

3.102 Effect of Violation

In re Dougherty-Kelsay, 2019 WL 1782598 (Bankr. E.D. Ky. 2019) – Actions taken in violation of stay are invalid and avoidable and shall be voided absent limited equitable circumstances where Debtor unreasonably withholds notice of stay and creditor would be prejudiced if Debtor is able to raise stay as defense or where Debtor is attempting to use stay unfairly as shield to avoid unfavorable result.

In re Fisher, Case No. 18-45089 (Bankr. E.D. Mi. 2018) – Actions taken in violation of stay are invalid and avoidable and shall be voided absent limited equitable circumstances where Debtor unreasonably withholds notice of stay and creditor would be prejudiced if Debtor raises stay as defense or to attempts to use stay unfairly as shield to avoid unfavorable result. Debtor did not list mortgage holder as creditor and mortgage holder, unaware of bankruptcy, continued to foreclose, acquired title at auction, and after expiration of redemption, sold property to third party without notice of bankruptcy filing. Debtor unreasonably withheld notice of bankruptcy from mortgage holder where Debtor who allegedly was unaware of existence of mortgage would have been able to discover existence of mortgage by either cursory review of title history or review of foreclosure notices. Bank would be prejudiced if Debtor raised stay as defense as both foreclosure and third-party sale would be unwound subjecting creditor to potential claim by purchaser.

Cox v. Specialty Vehicle Solutions, LLC, 2017 WL 5493160 (6th Cir. 2017) – With limited exceptions, automatic stay prevents any action that could have been filed against entity to recover claims, and is intended to provide Debtor with breathing spell to reorganize affairs. Action taken in violation of stay is invalid and without legal force or effect.

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.

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.

Kline v. Deutsche Bank National Trust Co., Case no. 11-088 (1st 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.

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.

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.

3.103 Violations – Continued Collection Efforts

In re Baldwin, 2019 WL 4023819 (Bankr. E.D. Ky. 2019) – Automatic Stay prohibits any act to enforce judgment obtained before commencement of case; acted to obtain possession of property of estate or exercise control over property of estate; and any act to collect, assess or recover a claim that arose before commencement of case. Creditor violated automatic stay by retaining funds that were subject to writ of garnishment where creditor's right to garnished funds had not been determined prior to commencement of bankruptcy case. Creditor's service of writ of garnishment initiates procedure by which creditor can obtain non-exempt property to pay judgment. Procedure is not complete until State Court rules on Debtor's claimed exemptions and Debtor retains interest in funds that became property of estate on petition date. Creditor had obligation to return to Debtor funds received pursuant to writ of garnishment as garnishment proceeding had not been concluded; and must take affirmative steps to stop or reverse pending garnishment including instructing garnishee to release to Debtor funds being held pursuant to writ of garnishment. Creditors remedy is to seek adequate protection under Section 363 rather than resort to non-bankruptcy remedy of possession.

Wohleber v. Skurko, 2019 WL 1008555 (6th Cir. BAP 2019) – Collection of property settlement is stayed by automatic stay. Property division in domestic relations case constitutes “debt” and effort to enforce property settlement constitutes attempt to collect a debt. Whether State Court action fits within exception for criminal actions is based on whether proceeding is brought to enforce criminal law or whether contempt proceeding is criminal versus civil in nature. Contempt order is not enforcement of criminal law but is proceeding to enforce judicial directive or preserve Court any. Contempt order is civil in nature where required Debtor to pay property settlement and did not contemplate monetary penalty beyond compliance with property settlement and threaten confinement subject to immediate release upon compliance with property settlement. Imprisonment subject to release upon willingness to comply or which includes purge clause is invoked as a remedy which is civil in nature. Sentencing and confinement of Debtor for failure to abide by State Court order to pay property settlement is not excepted from stay as “criminal action or proceeding”. Order is not intended to preserve dignity of Court but is, instead, designed to compel payment of debt. Creditor and creditor's counsel had duty upon receiving notice of bankruptcy petition to take steps to halt or reverse any pending State Court actions or collection efforts commenced prior to filing of bankruptcy. Creditors made no effort to convince State Court that courts should not proceed with sentencing hearing.

Labovitz v. Internal Revenue Service, 2018 WL 6990592 (Bankr. W.D. Tn. 2018) – Internal Revenue Service did not attempt or continue collection efforts merely by providing correct Social Security number for Debtor's non-filing spouse in connection with levy issued months before commencement of bankruptcy case. IRS corrected levy but took no steps to enforce levy and did not receive any funds from account since date levy was first served. Issuance of corrected levy was not attempt to collect or enforce,

but was done solely for purpose of correcting information on previously issued levy.

In re Williams, 2018 WL 6930471 (Bankr. E.D. Mi. 2018) – Creditor violated stay by sending three letters to Debtor post-petition demanding payment for pre-petition debt. Contempt is not proper remedy as contempt requires knowledge of “definite and specific order of Court” that required performance or nonperformance of a particular act and a failure to comply or perform. Violation of stay is not violation of definite and specific order of Court. Sanctions are appropriate under Section 362(k) that allows individual injured by willful violation of stay to recover actual damages including costs and attorney’s fees; and inappropriate circumstances punitive damages. “Willful violation” requires that creditor knew of stay it took intentional act in violation of stay. Only actual damages alleged in motion were attorney’s fees of \$2500. Amount requested was unreasonable in violation of Section 329 as time records itemized 6.25 hours at \$400 per hour to draft, review and add motion. Both time expended and hourly rate were on high side for consumer bankruptcy matter and were excessive. Court awarded \$1500 for attorney fees. Court would not award additional damages for “anxiety and stress” as emotional injury is not compensable under Section 362(k) absent associated financial loss. Emotional distress that is fleeting, inconsequential or insignificant is not compensable. Creditor’s actions in sending three letters demanding immediate payment and warning of potentially embarrassing calls and stating that nonpayment will result in inability to obtain future credit warranted imposition of punitive damages of \$500.

In re McCormick, 2018 WL 6787558 (6th Cir. BAP 2018) – Not all communications from creditor to Debtor are prohibited under Section 362. Communications which are designed merely to provide information and that are not coercive do not violate stay. Communications sent inadvertently that are promptly withdrawn and that do not result in damages to Debtor may constitute “technical” violation of stay but are not willful. Email from Debtor’s landlord acknowledging bankruptcy filing and inquiring about whether Debtor planned to continue to occupy leased premises did not violate stay, as email was not threatening or course of and did not seek to collect pre-petition that, but rather merely sought information concerning Debtor’s future intention. Bill from Cable provider requesting payment for cable services and equipment which was automatically generated after bankruptcy filing did not constitute violation of stay where creditor promptly told Debtor to disregard bill and confirmed that creditor was not attempting to collect debt and assisted Debtor in returning equipment at issue.

Hunsaker v. U.S., 2018 WL 4122882 (9th Cir. 2018) – IRS violated stay by sending 4 letters to Debtors post-petition threatening collection efforts including garnishment of Social Security benefits.

In re Hancock, 2018 WL 3203383 (Bankr. N.D. Ohio 2018) – Court has inherent authority and authority under Section 105 to enforce orders including imposition of sanctions. Sanctions must be imposed with restraint and discretion, and sanction must be commensurate with egregiousness of conduct. Section 362 also allows Court to impose damages for violations of automatic stay where action violated stay, action was willful, and action caused actual damages. Willfulness requires that offending party be aware of stay and took intentional actions that violated stay. Although Creditor knew that debt was discharged in 2010 bankruptcy case, Creditor was not aware that Debtor had filed second case in 2016 and efforts to collect debt during pendency of Debtor’s second case would not be willful violation of stay.

In re Stringer, 2018 WL 3006258 (Bankr. S.D. Ohio 2018) – Creditor and counsel willfully violated automatic stay by initiating garnishment and effort to collect judgment post-petition.

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. Stay violations were willful where Creditor received at least two notices from Court of filing, Debtor spoke with store manager to advise of filing, Debtor’s counsel sent certified letter to creditor and to creditor’s registered agent, and Debtor spoke with Corporate Headquarters. 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. 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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 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.

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.

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.

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.

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.

3.104 Violations – Commencement or Continuation of Foreclosure Proceedings

Ragone v. Pizza Pan Elyria, LLC, 2019 WL 2202941 (Bankr. N.D. Ohio 2019) - Automatic stay prohibits continuation of judicial proceeding that was commenced pre-petition. Responsibility to comply with stay is placed on creditors. Debtor should not be required to take legal steps to recover property seized in violation of stay. Creditors must take necessary steps to halt or reverse any pending State Court actions or other collection efforts including garnishments, repossessions, or foreclosures.

In re Formosa, 2018 WL 494416 (Bankr. E.D. Mi. 2018) – Nothing in Code or Rules requires creditor to conduct PACER search or otherwise take specific action to determine if Debtor has filed bankruptcy before conducting foreclosure sale. Fannie Mae and Freddie Mac guidelines that require creditor foreclosing insured mortgage to conduct PACER search do not have force of law. While creditor would be well advised to conduct PACER search, there is no legal duty to do so.

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.

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.

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.

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.

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.

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.

3.105 Violations – Landlord/Tenant

In re Shrum, 2019 WL 1470828 (Bankr. E.D. Mi. 2019) – Section 362(a)(3) precludes actions to obtain possession of property of

the estate or exercise control over property of the estate. Section 362(b)(22) creates exception to stay for landlord who, prior to petition, obtained judgment of possession. Section 362(l)(1) allows Debtor to obtain short extension of stay for 30 days if Debtor files with Petition a Certification that Debtor has right to cure under non-bankruptcy law and that Debtor has deposited with clerk of court any rent that would come due during 30 days after petition. Debtor can further extend stay under Section 362(l)(2) by filing within 30 days of petition Certification under penalty of perjury that Debtor has cured, under non-bankruptcy law, entire monetary default that gave rise to judgment of possession. Lessor can object to certification filed by Debtor under (l)(1) or (2) and court will conduct hearing to determine if certification is true. If Debtor does not file certification required under (l)(1) with the petition, then the stay does not apply and landlord can pursue possession. If Debtor files Certification Section 362(l)(3) specifies procedure for Landlord to contest certification and allows Court to consider matter on expedited basis. Stay remained in effect where Debtor filed Official Form 101A disclosing Eviction Judgment and certifying that Debtor had right to cure and had deposited rent. State Court lacks authority to determine accuracy or validity of Certification as only Bankruptcy Court can grant relief from stay. State Court and landlord violated stay when within initial 30 day window, State Court proceeded with eviction hearing. Landlord's action in seeking writ of possession notwithstanding knowledge of bankruptcy case was willful violation of stay, as landlord knew of stay and took intentional act that violated stay. Debtor seeking damages for stay violation must provide evidence of action damages beyond mere speculation, guess or conjecture, and bare statement that Debtor suffered damages without evidence will not satisfy evidentiary requirements. Only actual damages were \$200 for transcript fees paid by Debtor as result of landlord's actions. Punitive damages warranted for conduct that is egregious, vindictive or intentionally malicious, or evidence bad faith or reckless disregard of stay. Landlord's continued prosecution of eviction recklessly disregarded automatic stay. Landlord chose not to use procedures in Section 362(l)(3) to challenge Certifications and instead proceeded with eviction action. Punitive damages of \$1,000 warranted. However, stay automatically terminated after 30 days where Debtor did not file second certification under Section 362(l)(2) Debtor cured all defaults that gave rise to eviction judgment.

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.

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.

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”.

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

3.106 Commencement of Continuation of Other Actions

In re McLain, 2019 WL 2323776 (Bankr. W.D. Mi. 2019) – “Vesting” of property as part of confirmation of Chapter 13 Plan removes property from estate and returns property to Debtor. Section 362(a) prohibits commencement or continuation of action or proceeding against Debtor that was or could have been commenced before commencement of case or to recover claim against Debtor that arose before commencement of case. Claim against Debtor includes claim against property of Debtor under Section 102(2). Even though property reverted in Debtor at confirmation, stay continues to protect it.

Ragone v. Pizza Pan Elyria, LLC, 2019 WL 2202941 (Bankr. N.D. Ohio 2019) – Automatic stay prohibits continuation of judicial proceeding that was commenced pre-petition. Responsibility to comply with stay is placed on creditors. Debtor should not be required to take legal steps to recover property seized in violation of stay. Creditors must take necessary steps to halt or reverse any pending State Court actions or other collection efforts including garnishments, repossessions, or foreclosures.

In re Johnson, 2019 WL 1752592 (Bankr. S.D. Ohio 2019) – Plaintiff did not violate automatic stay by pursuing State Court relief where Bankruptcy Court entered interim order modifying stay to allow State Court to adjudicate and reduced to judgment all claims related to partnership proceeds from sale of real estate, partnership agreement and Ohio partnership act. Parties were free to obtain discovery regarding any non-privileged matter and to continue prosecution of State Court litigation including comprehensive remedies available under Ohio partnership act. Language in interim order did not limit creditor’s ability to obtain discovery or to investigate Debtor’s alleged misconduct. Bankruptcy Court reserve jurisdiction only to determine questions of dischargeability with State Court to adjudicate and reduce all claims to judgment without distinction. Stay remained in effect only as to attempts by creditors to execute or collect upon judgment that State Court may enter.

In re Johnson, 2018 WL 994124 (Bankr. S.D. Ohio 2018) – Arbitration Award and State Court Judgment confirming Award void where arbitration occurred after commencement to case and constituted violation of stay.

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.

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.

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.

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 USC § 548 and/or § 544 during the pendency of bankruptcy proceedings.

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.

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.

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.

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.

3.107 Exercise Control Over Estate Property – Causes of Action

In re Spiech Farms, LLC, 2019 WL 2913270 (W.D. Mi. 2019) – Causes of action brought by creditor against Debtor’s former officers and directors for allegedly improperly diverting assets that would have been available to pay creditors was disguised action to recover fraudulent transfers or for breach of fiduciary duty that belonged to Estate. Trustee is sole party authorized to bring actions unless action is one over which creditor has exclusive right to prosecute exclusive of Debtor. If recovery of by Creditor would preclude subsequent recovery by Debtor, action is property of estate. Complaint alleged that Debtor’s principals used Debtor as subterfuge to divert assets to related corporations to avoid paying debts and defraud creditors; that related corporation to which assets had been diverted had so disregarded corporate form as to make it a mere sham or business conduit of Debtor’s principals to divert assets; that principals used related company to protect themselves from Debtor’s impending financial failure; that Debtor funneled money into related company rather than pay suppliers; and that principal’s’ actions allowed Debtor to avoid paying creditors and to shield assets. Complaint alleged causes of action that were breaches of fiduciary duty and fraudulent transfers that fall clearly within scope of Estate property. Overlap of claims with those of estate required estate to take precedence as both Debtor and Creditor would not be permitted to recover.

3.108 Violations – Seizure of or Failure to Return Property

In re Caldwell, 2019 WL 5616908 (Bankr. E.D. Mi. 2019) – Individual seeking damages for violation of stay must prove: (1) actions taken were in violation of automatic stay; (2) violation was willful; (3) violation caused actual damages; and (4) there was no objectively reasonable basis to conclude that creditor’s conduct might have been lawful. Creditor did not violate stay where Creditor, pre-petition, caused assets to be seized. After bankruptcy filed, Creditor did not take any action with respect to seized assets. Storage yard operation may have violated stay by refusing to return vehicle to Debtor, but there was no evidence that Storage Yard operator was acting at direction or control of Creditor. Debtor made repeated demands on Creditor but Creditor was not in possession of assets; and Debtor never made demand on Court Officer or Storage Yard operator who seized and was holding assets. Only stay violation(if any) was Storage Yard operator’s refusal to return assets. Creditor’s conduct was not objectively unreasonable where Creditor was not in possession or control and Creditor took no action to interfere with Debtor’s ability to retake possession.

In re Baldwin, 2019 WL 4023819 (Bankr. E.D. Ky. 2019) – Automatic Stay prohibits any act to enforce judgment obtained before commencement of case; acts to obtain possession of property of estate or exercise control over property of estate; and any act to collect, assess or recover a claim that arose before commencement of case. Creditor violated automatic stay by retaining funds that were subject to writ of garnishment where creditor’s right to garnished funds had not been determined prior to commencement of bankruptcy case. Creditor’s service of writ of garnishment initiates procedure by which creditor can obtain non-exempt property to pay judgment. Procedure is not complete until State Court rules on Debtor’s claimed exemptions and Debtor retains interest in funds that became property of estate on petition date. Creditor had obligation to return to Debtor funds received pursuant to writ of garnishment as garnishment proceeding had not been concluded; and must take affirmative steps to stop or reverse pending garnishment including instructing garnishee to release to Debtor funds being held pursuant to writ of garnishment. Creditors remedy is to seek adequate protection under Section 363 rather than resort to non-bankruptcy remedy of possession.

Andrews v. Indirect Purchaser Class, 2019 WL 3331604 (Bankr. E.D. Mi. 2019) – Creditor’s retention of funds garnished pre-petition does not violate stay. Funds were not property of estate at time case filed and could not be brought into estate other than by recovery as avoidable transfer. Creditor’s retention of funds could not constitute attempt to exercise possession or control of property of estate where funds were not and had never been property of estate.

In re Fulton, 2019 WL 2521455 (7th Cir. 2019), *cert petition filed*, Case No. 19-357 (2019) – Creditor “exercises control over property of estate when creditor refuses to return property that creditor repossessed prepetition. Creditor must immediately return possession without requiring that Debtor bring turnover motion. Creditor must return property prior to Court determination establishing Debtor’s obligation to provide adequate protection. Circuit joined Second, Eighth and Ninth Circuits and rejected Tenth Circuit holding in *In re Cowan*, 849 F.2d 943 (10th Cir. 2019). Although creditor would be required to seek protection on expedited basis, that does not limit or modify creditors duty to immediately turn over property.

In re Alderman, 2018 WL 5797709 (Bankr. N.D. Ohio 2018) – Creditor violated stay where creditor refused to return repossessed vehicle after being notified of filing. Creditor, with full knowledge of bankruptcy, demanded payment from Debtor in exchange for return of vehicle and later sold vehicle without relief from stay. On date of filing, Debtor contacted creditor and creditor’s attorney by text message, which was sufficient informal knowledge of commencement of case. On receiving notice, creditor is required to return vehicle and restore pre-petition status quo.

Peterson v. Nu2u Auto World, 2018 WL 5729907 (D.N.J. 2018) - Second, Seventh, Eighth, and Ninth Circuit Courts of Appeals hold that creditor violates automatic stay by not affirmatively and immediately return qualifying property of Debtor seized pre-petition. Tenth and District of Columbia Circuit Court of Appeals find no violation of automatic stay if creditor merely maintains status quo in effect at time of petition. Court adopted minority position that passive retention for purposes of preserving status quo is not violation of stay. Section 362(a)(3) prevents “act to exercise control”, not merely exercise of already existing control. Had

Congress meant to impose affirmative duty to return property, it could have done so. Minority rule still prohibits creditors from taking post-petition action that would give them possession or control over property and allows for bankruptcy court to distribute assets to all claimants in orderly and just manner and allows damages for wrongful post-petition conduct. Debtor may move for turnover of property before a bankruptcy court that can consider creditor's defenses to turnover. Affirmative duty exists to return property where creditor makes demand such as demand for proof of insurance and Debtor complies with creditor's request.

In re Shannon, 2018 WL 4293239 (Bankr. N.D. Ill. 2018) – Passive retention of impounded automobile for unpaid parking tickets violates automatic stay. City which holds possessory lien does not qualify for Section 362(b)(3) exception to allow party to preserve lien rights as preservation of lien rights does not amount to retention of possession of Debtor's property or give possessory lien holder right to better treatment in bankruptcy than other lienholders. City's refusal to return car on request violated at least three provisions of automatic stay, Sections 362(a)(3); 362(a)(4); and 362(a)(6).

In re Peake, 2018 WL 3946169 (Bankr. N.D. Ill. 2018), *affirmed sub nom*, 2019 WL 2521455 (7th Cir. 2019) - Passive retention of impounded automobile for unpaid parking tickets violates Section 362(a)(3). Section 362(b)(3) allows creditor to take act to continue or maintain perfection of security interest and City had possessory security interest by virtue of impoundment. City's interest in the vehicle arises when the vehicle is immobilized or impounded and remains perfected by continued retention of vehicle. "Act" to maintain security interest must be single, positive, definite act such as filing financing statement. Passive possession without more is not "act" to continue or maintain pre-existing security interest. Court followed Seventh Circuit precedent of *Thompson v. GMAC*, 566 F.3d 699 (7th Cir. 2009) that creditor must return collateral on request of Debtor, and declined to adopt Tenth Circuit holding in *WD Equipment, LLC v. Cowen*, 849 F.3d 943 (10th Cir. 2017).

In re Walker, Case No. 17-33957 (Bankr. N.D. Ill. 2017) – Rejecting *Avila*, Court held that mere passive retention is generally considered in 7th Circuit as act to maintain possession of property of estate is violation of stay. Creditor holding possessory lien must turn over collateral and then seek adequate protection of creditor's interest. Exception under Section 362(b)(3) applies only to an act to maintain lien, and passive possession is not act to maintain lien. Creditor must file emergency motion to modify stay and request adequate protection if creditor wants court ruling before relinquishing possession.

In re Avila, 566 BR 558 (Bankr. N.D. Ill. 2017) – Although mere passive retention is generally considered in 7th Circuit as act to maintain possession of property of estate is violation of stay, City could retain vehicle that was impounded for unpaid parking tickets where City had only possessory lien, not consensual lien, and Section 362(b)(3) allows creditor to take action to perfect or maintain or continue perfection of lien. Had City surrendered vehicle, City would have lost lien rights and would have been unperfected creditor. City's retention of vehicle was City's only method to continue perfection of Lien. Debtor would need to file Motion for Turnover coupled with adequate protection of City Lien under Section 543 before City could be required to return vehicle.

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.

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.

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).

WD Equipment v. Cowen, 849 F.3d 943 (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.

In re Hall, 502 BR 650 (Bankr. D. Colo. 2014) – Obligation to turnover estate property under Section 542 is not self-executing. Party in possession of property of estate may retain possession without violating stay absent demand for turnover by Trustee

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.

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.

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.

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.

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 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.

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.

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.

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.

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.

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. Any 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.

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.

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.

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 Debtors to title the Vehicle in Kentucky, despite knowledge of 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.

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.

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.

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 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).

3.109 Violations – Exercise of Dominion and Control

In re Beiter, 2018 WL 4464896 (Bankr. S.D. Ohio 2018) – Creditor’s alleged misapplication of payments received from Chapter 13 Trustee pursuant to confirmed Plan does not constitute violation of stay. Property of estate includes all legal or equitable interests of Debtor in property. When Trustee distributes funds to creditor pursuant to the terms of confirmed Plan and creditor deposits funds into creditor’s own accounts, funds are no longer property of estate.

WD Equipment v. Cowen, 849 F.3d 943 (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.

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.

3.110 Violations – Sale of Property

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.

3.111 Violations – Executory Contracts and Unexpired Leases

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 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.

3.112 Violations - Domestic Relations Actions

In re Dougherty-Kelsay, 2019 WL 1782598 (Bankr. E.D. Ky. 2019) – Section 362(b)(2) excepts from automatic stay action to establish or modify domestic support obligations or concerning child custody or visitation; collection of domestic support obligation from property that is not property of estate; with respect to what withholding of income that is property of estate for payment of domestic support obligation under judicial or administrative order; and interception of tax refunds for payment of domestic support obligations. State Court has concurrent jurisdiction to determine whether creditor's proceeding in Family Court was within scope of DSO exception and can enter orders not inconsistent with terms of automatic stay. If Bankruptcy Court later concludes that action was within scope of automatic stay, determination of State Court and subsequent orders entered will be void. State Court establishment of pre-petition child support arrearage does not violate stay as order constituted "establishment" of domestic support obligation. Entry of Wage Deduction Order did not violate stay but order that Debtor pay creditor \$50 from sources other than wage withholding did violate stay as attempt to obtain payment from Debtor's estate and creditors 3 attempts to coerce payment including text messages and request that State Court suspend visitation violated Section 362(A)(6) as attempt to collect or recover on claim that arose prepetition. Interception of tax refunds and creditors retention of proceeds within exception to automatic stay and was not limited to non-estate property. State Court finding of contempt violated stay as no exception in Section 362 permits Court to find Debtor in civil contempt for non-payment of pre-petition domestic support obligation. Finding of contempt is not establishment or modification and does not relate to collection of obligation from non-estate property, but is instead effort to coerce Debtor into paying pre-petition debt in violation of stay. Creditor's post-petition motion for contempt also violated Section 362(a)(1) and (a)(6) as creditor was attempting to use contempt proceedings to enforce pre-petition, non-domestic support obligation.

Wohleber v. Skurko, 2019 WL 1008555 (6th Cir. BAP 2019) – Collection of property settlement is stayed by automatic stay. Property division in domestic relations case constitutes "debt" and effort to enforce property settlement constitutes attempt to collect a debt. Whether State Court action fits within exception for criminal actions is based on whether proceeding is brought to enforce criminal law or whether contempt proceeding is criminal versus civil in nature. Contempt order is not enforcement of criminal law but is proceeding to enforce judicial directive or preserve Court any. Contempt order was civil in nature where required Debtor to pay property settlement and did not contemplate monetary penalty beyond compliance with property settlement and threaten confinement subject to immediate release upon compliance with property settlement. Imprisonment subject to release upon willingness to comply or which includes purge clause is invoked as a remedy which is civil in nature. Sentencing and confinement of Debtor for failure to abide by State Court order to pay property settlement is not excepted from stay as "criminal action or proceeding". Order is not intended to preserve dignity of Court but is, instead, designed to compel

payment of debt. Creditor and creditor's counsel had duty upon receiving notice of bankruptcy petition to take steps to halt or reverse any pending State Court actions or collection efforts commenced prior to filing of bankruptcy. Creditors made no effort to convince State Court that courts should not proceed with sentencing hearing.

In re Schooff, 2019 WL 642840 (Bankr. E.D. Mi. 2019) – Creditor (Debtor's ex-husband) violated stay where, with knowledge of bankruptcy case, creditor sought to proceed in State Court to reduce alimony obligations and unilaterally implemented "set off" against alimony to cover what creditor contended was Debtor's share of a marital obligation. Section 362(k)(1) allows Court to award to individual injured by willful violation of stay actual damages including costs and attorney's fees and, if appropriate, punitive damages. Stay violation is willful where creditor knew of stay and committed intentional act in violation of stay but does not require proof of specific intent to violate stay. Sanctions included \$1750 to compensate Debtor for alimony she had not received because of setoff; plus attorney's fees of \$4006.25. Court reduced total amount of fees requested where creditor undeniably suffered adverse financial consequences as result of Debtor's bankruptcy filing; if creditor stops paying marital obligation, that would greatly increase debt owed in Chapter 13; time expended in researching and drafting pleadings was excessive in light of experience and billing rate of Debtor's counsel; and traveling Court appearance time reduced by 50% where Debtor's counsel's handling multiple matters before Court on same date.

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.

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.

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.

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.

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.

3.113 Violations – Taxing Authorities

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".

3.114 Violations – Administrative Actions

Edwards v. City of Ferguson, 2018 WL 3093963 (Bankr. E.D. Mo. 2018) – Refusal to reinstate license suspended for unpaid files is not violation of stay. License is privilege, not property of estate, so refusal to reinstate license is not act to exercise control over estate property. Automatic stay does not discharge Debtor's obligation to pay fines. Refusal to reinstate license is not illegal discrimination under Section 525 where refusal to reinstate license is not "solely because she is a Debtor" where city had suspended license long before bankruptcy filing when Debtor refused to pay outstanding fines. Section 525 does not cure Debtors traffic violations and does not require city to reinstate driver's license without payment of fines. City may violate stay if it takes additional action to collect such as attempting to enforce arrest warrant.

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.

3.115 Violations – Appeals

Ridlehuber v. Snap Line Services, Inc., 594 BR 502 (Bankr. N.D. Ga. 2018) – Estate retains interest in cash bond posted in State Court incidental to appeal of pre-petition judgment if appeal is not concluded prior to commencement of case. Once appeal becomes final post-petition, if judgment is upheld then Debtor's contingent, unvested interest terminates at completion of appellate process allowing prevailing party to recover bond amount if stay has dissolved, or to seek relief from stay for cause to enforce rights to cash bond. Although prevailing party made demand for turnover of bond before appeal became final by expiration of time to file Motion for Reconsideration and violated stay in doing so, conduct did not warrant sanctions given confusion regarding when appellate process ended, unsettled law on nature of estate's interest in bond, and fact that Debtor did not file Motion for Reconsideration.

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).

3.116 Violations – Contempt Proceedings

Wohleber v. Skurko, 2019 WL 1008555 (6th Cir. BAP 2019) – Collection of property settlement is stayed by automatic stay. Property division in domestic relations case constitutes "debt" and effort to enforce property settlement constitutes attempt to collect a debt. Whether State Court action fits within exception for criminal actions is based on whether proceeding is brought to enforce criminal law or whether contempt proceeding is criminal versus civil in nature. Contempt order is not enforcement of criminal law but is proceeding to enforce judicial directive or preserve Court any. Contempt order was civil in nature where required Debtor to pay property settlement and did not contemplate monetary penalty beyond compliance with property settlement and threaten confinement subject to immediate release upon compliance with property settlement. Imprisonment subject to release upon willingness to comply or which includes purge clause is invoked as a remedy which is civil in nature. Sentencing and confinement of Debtor for failure to abide by State Court order to pay property settlement is not excepted from stay as "criminal action or proceeding". Order is not intended to preserve dignity of Court but is, instead, designed to compel payment of debt. Creditor and creditor's counsel had duty upon receiving notice of bankruptcy petition to take steps to halt or reverse any pending State Court actions or collection efforts commenced prior to filing of bankruptcy. Creditors made no effort to convince State Court that courts should not proceed with sentencing hearing.

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 did not withdraw warrant or cancel 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.

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.

3.117 Violations – Obtaining, Perfecting or Recording Liens –

In re Fulton, 2019 WL 2521455 (7th Cir. 2019), *cert petition filed*, Case No. 19-357 (2019) - Section 362 does not bar act to perfect or maintain or continue perfection of interest in property subject to limitations under Section 546 and to extent act is accomplished within Section 547. Purpose was to prevent Trustee from avoiding lien of creditor when only intervening bankruptcy petition prevented creditor from perfecting or continuing perfection. Purpose is to prevent creditors from losing lien rights because of bankruptcy, not to permit creditors to retain possession of property. City's possession of impounded vehicle is one way to perfect lien but city can also perfect lien by filing notice of interest with Secretary of State and Chapter 13 Plan provides public record of secured liens such that city does not need to retain possession of vehicle to maintain perfection of lien. Possessory lien is not destroyed by involuntary loss of possession due to force compliance with bankruptcy code. If city has doubt about continuation of lien, city may seek relief from bankruptcy Court including order continuing lien on property.

Davis v. Tyson Prepared Foods, Inc., 2018 WL 5045613 (10th Cir. 2018) - Based on prior 10th Circuit holding in *WD Equipment, LLC v. Cowen*, 849 F.3d 943 (10th Cir. 2018), passive retention does not violate Section 362(a)(3) or (4). "Act" as used in statute encompasses only affirmative conduct on part of lien holder. Lien that arose post-petition by operation of law and without any affirmative act by creditor to obtain or perfect lien is valid and enforceable and does not violate automatic stay.

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).

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.

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.

3.118 Violations – Garnishments

In re Baldwin, 2019 WL 4023819 (Bankr. E.D. Ky. 2019) – Automatic Stay prohibits any act to enforce judgment obtained before commencement of case; acted to obtain possession of property of estate or exercise control over property of estate; and any act to collect, assess or recover a claim that arose before commencement of case. Creditor violated automatic stay by retaining funds that were subject to writ of garnishment where creditor's right to garnished funds had not been determined prior to commencement of bankruptcy case. Creditor's service of writ of garnishment initiates procedure by which creditor can obtain non-exempt property to pay judgment. Procedure is not complete until State Court rules on Debtor's claimed exemptions and Debtor retains interest in funds that became property of estate on petition date. Creditor had obligation to return to Debtor funds received pursuant to writ of garnishment as garnishment proceeding had not been concluded; and must take affirmative steps to stop or reverse pending garnishment including instructing garnishee to release to Debtor funds being held pursuant to writ of garnishment. Creditors remedy is to seek adequate protection under Section 363 rather than resort to non-bankruptcy remedy of possession.

In re Newberry, 2019 WL 3857704 (Bankr. E.D. Mi. 2019) – Creditor violated stay by failing to withdraw Writ of Garnishment issued and served pre-petition but which allegedly attached to tax refund post-petition. Although Debtor did not object within 14 days of service of garnishment disclosure, that did not absolutely divest Debtor of interest in refund where garnishment disclosure also provided that tax refund would not be released until 28 days after service of garnishment disclosure and Debtor filed for Bankruptcy within 28 day window. State Garnishment Statute specifically allows objections to be filed more than 14 days after service of garnishee disclosure such that expiration of 14 day objection window cannot permanently and completely cut off Debtor's rights in funds. Creditor had affirmative duty to halt or reverse collection efforts commenced pre-petition including release of garnishment. Receipt of funds and refusing to return funds to Debtor is affirmative act to control property of estate in violation of Section 362. Court ordered creditor to return garnished tax refund to Debtor and concluded that Debtor was also entitled to attorney fees and costs, with Debtor being required to file supplemental affidavit outlining amount of attorney fees and costs.

Ragone v. Pizza Pan Elyria, LLC, 2019 WL 2202941 (Bankr. N.D. Ohio 2019) - Automatic stay prohibits continuation of judicial proceeding that was commenced pre-petition. Responsibility to comply with stay is placed on creditors. Debtor should not be required to take legal steps to recover property seized in violation of stay. Creditors must take necessary steps to halt or reverse any pending State Court actions or other collection efforts including garnishments, repossessions, or foreclosures.

Easley v. Collection Service of Nevada, 910 F.3d 1286 (9th Cir. 2018) – Creditor sanctioned for willful violation of stay where Creditor did not immediately take action to stop pre-petition garnishment. Sanctions include attorney fees incurred in enforcing stay plus attorney fees incurred in appellate proceedings arising out of initial sanction award. Bankruptcy court found that creditor willfully violated stay and awarded damages and attorney fees. Debtor appealed award as insufficient. Where Debtor prevailed on appeal, Debtor entitled to additional fee award for appellate services.

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 Debtor. Creditor's refusal to release garnishment constituted continuing collection efforts against Debtor and was unjustified and willful warranting sanctions for violation of stay.

3.119 Violations – Threat of Criminal Proceeding

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.

3.120 Violations – Automobile “Kill” Switch

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 actions 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.

3.121 Violations – Ipso Facto Clause

In re Firstenergy Solutions Corp., 2019 WL 211807 (Bankr. N.D. Ohio 2019) - Automatic stay prohibits any act to terminate or modify estate interest in contractual rights. Debtor has until confirmation of Plan to assume or reject executory contract and creditor is barred by automatic stay from terminating contract. Automatic stay does not prohibit expiration of contract by stated term, but prohibits termination or modification based on insolvency or financial condition of Debtor at any time during bankruptcy case; commencement of bankruptcy case; or appointment of bankruptcy Trustee. Exception to automatic stay found in Section 556 does not allow non-Debtor to terminate contract -creditor is “forward contract merchant” defined as business consisting in whole or in part of entering into forward contracts where contracts involve commodity or similar good or service. Fact that contract defines parties as “forward contract merchant” is not binding on Court. Seller of electricity was not “forward contract merchant” where seller sold power to Debtor under contract that prohibited Debtor from purchasing more power than it consumed and prevented Debtor from reselling or attempting to resell.

3.122 Violations – Forward Contract Merchants – Section 556

In re Firstenergy Solutions Corp., 2019 WL 211807 (Bankr. N.D. Ohio 2019) - Automatic stay prohibits any act to terminate or modify estate interest in contractual rights. Debtor has until confirmation of Plan to assume or reject executory contract and creditor is barred by automatic stay from terminating contract. Automatic stay does not prohibit expiration of contract by stated term, but prohibits termination or modification based on insolvency or financial condition of Debtor at any time during bankruptcy case; commencement of bankruptcy case; or appointment of bankruptcy Trustee. Exception to automatic stay found in Section 556 does not allow non-Debtor to terminate contract -creditor is “forward contract merchant” defined as business consisting in whole or in part of entering into forward contracts where contracts involve commodity or similar good or service. Fact that contract defines parties as “forward contract merchant” is not binding on Court. Seller of electricity was not “forward contract merchant” where seller sold power to Debtor under contract that prohibited Debtor from purchasing more power than it consumed and prevented Debtor from reselling or attempting to resell.

3.123 Violations - Other Actions

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.

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.

3.124 Violations – Refusal to Comply With Contract

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.

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.

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 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.

3.125 Violations – Post-dated Checks

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

Buckeye Check Cashing, Inc., v. Meadows, 396 BR 485 (6th Cir. BAP 2008) - Property of estate consists of all legal or equitable interests of 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 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.

3.126 Violations – Loan Modifications

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.

3.127 Violations – Transfer of Claims

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.

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 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.

3.128 Violations – Failure to Return Funds

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 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.

3.129 Violations – Co-Debtor Stay

In re Tucker, Case No. 16-1127 (Bankr. N.D. Iowa 2017) – Although Section 1301 is silent on issue of sanctions for violation of Co-Debtor stay, Section 105 provides basis for Bankruptcy Court to award sanctions for violation of Co-Debtor 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 Co-Debtor 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.

3.130 Actions by Debtor

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

3.131 Inadvertent or Good Faith Actions

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.

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.

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.

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 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.

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."

3.132 Harmless Error

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.

3.133 Satisfaction of Judgments or Claims

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.

3.134 Setoff

In re Orexigen Therapeutics, Inc., Case No. 18-10518 (Bankr. D. Del. 2018) – Section 553 preserves right of setoff for "mutual" debts. Triangular setoff, where Debtor owes creditor and is owed money by subsidiary of creditor, while recognized at state law, is not recognized under Section 553 as debts are not "mutual".

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.

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 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.

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 Debtor in violating the rights of the secured party.

3.135 Actions Against Property Not Property of Estate

Chenault v. University of Kentucky, 2019 WL 3467952 (E.D. Ky. 2019) – Medical payments by Automobile Insurer directly to Medical Provider for health care services resulting from auto accident are not property of Bankruptcy Estate. Although Insurance Policy itself would have been property of estate, whether proceeds of insurance are property of estate is fact based on depending on whether Debtor would have had right or receive and kept proceeds. If payment cannot inure to benefit of Debtor, proceeds are

not part of estate. Proceeds of casualty, collision, life and fire insurance are proceeds to which Debtor is normally entitled and which become property of estate. Payments under liability portion of policy are paid to third parties and are not proceeds to which Debtor is entitled. Proceeds covered only third-party medical expenses. Insurance policy provided for payment of benefits directly to provider and not to Debtor; and Debtor did not have authority to direct or control distribution of proceeds.

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.

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.

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.

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.

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 Debtor.

3.136 Adjournment or Continuation of Foreclosure Sale

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 Debtor by preserving status quo.

Perez v. Deutsche Bank National Trust Co., Case No. 16-007 (1st Cir. BAP 2016) – Post-bankruptcy continuances of foreclosure sale do not violate stay. Continuances of sale were not designed to harass Debtor or to gain advantage in foreclosure process but were intended to preserve status quo during bankruptcy process. Continuance of foreclosure sale is not "continuation of action" as specified in Section 362 and is in fact a cessation of pending actions.

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.

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.

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.

3.137 Refusal to Extend Additional Credit

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.

3.138 Criminal Proceedings

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.

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.

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.

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.

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.

3.139 Contempt Proceedings

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.

3.140 Furnishing Information

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.

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.

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.

3.141 Filing Proof of Claim

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.

Poteet v. eCast Settlement Corp., 2011 WL 3626696 (Bankr. E.D. Tn. 2011) – Filing a proof of claim in 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.

3.142 Internal Recordkeeping

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.

3.143 Litigation – Debtor as Plaintiff

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”.

Riviera 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. 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.

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.

3.144 Post-Petition Perfection of Lien – Safe Harbor

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)

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.

3.145 Surrendered Collateral

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.

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.

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.

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 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.

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.

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.

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.

3.146 Domestic Support Litigation

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.

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.

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.

3.147 Pre-petition Mortgage Escrow Claims

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 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.

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.

3.148 Voluntary Post-Petition Transfers

In re Adams, 2018 WL 4377165 (Bankr. M.D. Ga. 2018) - Creditor does not violate stay by receiving and retaining voluntary payment by Debtor where payment is unsolicited and is made from property which is not property of estate.

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.

3.149 Administrative Closing of State Court Proceeding

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 Debtor or property of the estate to restore that property to 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.

3.150 Tax Forms

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

3.151 Sanctions – Standing to Request

In re Wagner, Case No. 17-20394 (Bankr. E.D. Mi. 2018), *aff'd*, 2019 WL 630289 (E.D. Mi. 2019) – Sanctions for violation of automatic stay are provided by Section 362(k) which allows individual to recover actual damages including costs and attorney's fees and, when appropriate, punitive damages. Chapter 13 Trustee is not "individual" within scope of Section 362(k) and lacks standing to seek award of damages incurred based on creditor's alleged violation of automatic stay. Debtor and Creditor previously reached agreement by which creditor paid damages including attorney's fees and costs (which was the most that creditor could be compelled to do) and reached settlement with United States Trustee that specifically preserved Debtor's right to recover damages.

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.

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.

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.

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.

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.

3.152 Standing to Request – "Unclean Hands"

In re Basrah Custom Design, Inc., 2019 WL 2212011 (Bankr. E.D. Mi. 2019) - Motion for Contempt for alleged violation of

stay denied where Debtor had unclean hands.

3.153 Sanctions Generally

In re Spiech Farms, LLC, 2019 WL 2913270 (W.D. Mi. 2019) – To hold party in contempt requires proof that party violated definite and specific Court order requiring party to perform or refrain from performing act, which knowledge of Court order. Automatic Stay is “Order” within scope of contempt powers. Creditors that, with knowledge of Debtor’s Chapter 7 filing, had commenced State Court action asserting general fraudulent transfer and breach of fiduciary duty claims which belonged to creditors as whole, and which were included in “property of the estate,” without first seeking to compel abandonment of claims or moving for stay relief, could be held in contempt for willfully violating automatic stay.

In re Dougherty-Kelsay, 2019 WL 1782598 (Bankr. E.D. Ky. 2019) – Section 362(k) allows Court to impose sanctions for any willful violation of stay including actual damages, costs and attorney’s fees, and in appropriate circumstances punitive damages. Actions are willful where creditor has actual notice of automatic stay and violates stay by intentional act. Willful does not require proof of specific intent to violate stay. Creditor violated automatic stay where, with full knowledge of bankruptcy, creditor made 3 attempts to collect prepetition non-domestic support obligation including filing motion for contempt in State Court which creditor refused to withdraw until after Debtor filed Motion for Sanctions. State Court ruling that actions did not constitute violation of stay did not shield creditor for liability where creditor risked that State Court determination could be voided by Bankruptcy Court. Burden is on creditor to seek ruling from Bankruptcy Court either granting relief from stay or determining that stay does not apply.

In re Schooff, 2019 WL 642840 (Bankr. E.D. Mi. 2019) – Creditor (Debtor’s ex-husband) violated stay where, with knowledge of bankruptcy case, creditor sought to proceed in State Court to reduce alimony obligations and unilaterally implemented “set off” against alimony to cover what creditor contended was Debtor’s share of a marital obligation. Section 362(k)(1) allows Court to award to individual injured by willful violation of stay actual damages including costs and attorney’s fees and, if appropriate, punitive damages. Stay violation is willful where creditor knew of stay and committed intentional act in violation of stay but does not require proof of specific intent to violate stay. Sanctions included \$1750 to compensate Debtor for alimony she had not received because of setoff; plus attorney’s fees of \$4006.25. Court reduced total amount of fees requested where creditor undeniably suffered adverse financial consequences as result of Debtor’s bankruptcy filing; if creditor stops paying marital obligation, that would greatly increase debt owed in Chapter 13; time expended in researching and drafting pleadings was excessive in light of experience and billing rate of Debtor’s counsel; and traveling Court appearance time reduced by 50% where Debtor’s counsel’s handling multiple matters before Court on same date.

In re Williams, 2018 WL 6930471 (Bankr. E.D. Mi. 2018) – Contempt is not proper remedy as contempt requires knowledge of “definite and specific order of Court” that required performance or nonperformance of a particular act and a failure to comply or perform. Violation of stay is not violation of definite and specific order of Court. Sanctions are appropriate under Section 362(k) that allows individual injured by willful violation of stay to recover actual damages including costs and attorney’s fees; and in appropriate circumstances punitive damages. “Willful violation” requires that creditor knew of stay it took intentional act in violation of stay.

In re Alderman, 2018 WL 5797709 (Bankr. N.D. Ohio 2018) – Section 362 allows Court to award actual and when appropriate punitive damages. Where stay violation is willful, award of actual damages is mandatory. Damages must be proven and reasonable. Creditor’s actions are willful where creditor knew of stay and took intentional act that violated stay. Creditor’s belief that actions were permitted does not preclude finding that violation was willful. Creditor willfully violated stay by failing to return repossessed vehicle upon being notified of bankruptcy petition; demanding payment of money in exchange for return of vehicle, and reselling vehicle notwithstanding both bankruptcy petition and Order of court directing Creditor to return vehicle.

In re Hancock, 2018 WL 3203383 (Bankr. N.D. Ohio 2018) – Court has inherent authority and authority under Section 105 to enforce orders including imposition of sanctions. Sanctions must be imposed with restraint and discretion, and sanction must be commensurate with egregiousness of conduct. Section 362 also allows Court to impose damages for violations of automatic stay where action violated stay, action was willful, and action caused actual damages. Willfulness requires that offending party be aware of stay and took intentional actions that violated stay. Although Creditor knew that debt was discharged in 2010 bankruptcy case, Creditor was not aware that Debtor had filed second case in 2016 and efforts to collect debt during pendency of Debtor’s second case would not be willful violation of stay.

In re Nicole Gas Production, Ltd., 2014 WL 4855005 (Bankr. S.D. Ohio 2014), *affd*, 2018 WL 1279277 (6th Cir. BAP 2018), *affd*, 2019 WL 850960 (6th Cir. 2019) – 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. Whether cause of action belongs to Debtor and is property of estate or can instead be prosecuted by shareholders of corporation depends on whether cause of action is “shared” between Debtor and principal. Whether action is shared turns on whether both shareholder and corporation could state claims for damages; and if recovery by either shareholder or Debtor could recover full damages. If either’s recovery would preclude other from subsequent recovery, actions are not independent but are solely property of estate. 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. While principal alleged that State law allowed direct action by shareholder, sole damage claimed was

reduction in worth of corporation based solely on actions taken against Debtor. Shareholders did not allege any independent basis or any independent damages beyond those suffered by Corporation. Principal's filing of complaint sought to exercise possession and control over cause of action.

In re Stringer, 2018 WL 3006258 (Bankr. S.D. Ohio 2018) – Creditor and counsel willfully violated automatic stay by initiating garnishment and effort to collect judgment post-petition. Violation is willful where party takes intentional act having been made aware of bankruptcy filing. Willfulness does not require specific intent to violate stay and almost any deliberate act taken with mere knowledge of bankruptcy case is interpreted to be willful violation. Creditor's good faith but mistaken belief that assets were not property of the state or that assets were not protected as Debtor did not list assets and schedules, however reasonable, has no bearing on willfulness. Debtor's actions are not defense or mitigating factor to violation of automatic stay. Sanctions included \$19,000 for attorney fees. Whether to award punitive damages depends on whether harm cause was physical or economic; whether conduct advanced indifference to or reckless disregard of rights of Debtor's; whether Debtor had financial vulnerability; whether conduct involves repeated actions; and whether harm was result of intentional malice. Creditors attorney was accomplished, experienced attorney who had previously been involved in numerous bankruptcy proceedings. Counsel statements that he believed automatic stay did not apply were disingenuous and, at best, counsel had duty to conduct research before attempting to seize Debtors assets. Debtor did not suffer physical injury but did suffer financial harm and was already operating under financial vulnerability and creditor engaged in numerous violations including filing garnishment and refusing to release garnishment; contacting Debtors publishing company to keep publisher from remaining royalties; and removal of stay Court action to Bankruptcy Court. Debtor lost home to foreclosure as result of creditors actions and lost valuable business relationship as well as suffered stress and anxiety and loss of ability to work. Creditors litigation tactics were repeated, stubborn and heavy-handed and creditor made no effort to mitigate harm to Debtor. In addition to actual damages, Court award of punitive damages of \$57,000 as a reasonable amount necessary to dissuade creditor from further violations.

In re Johnson, 2018 WL 994124 (Bankr. S.D. Ohio 2018) – Sanctions are warranted where creditor willfully violates stay. Creditor, with full and actual knowledge of bankruptcy case, nonetheless proceeded to obtain certain findings in Arbitration Award solely to establish that claim against Debtor was secured by Debtor's salary payments; procured State Court Judgment confirming Arbitration Award even after being warned multiple times that its conduct violated the stay; adamantly refusing to resolve issues by agreeing that Arbitration Award and State Court Judgment would not be used against Debtor or Bankruptcy Estate and instead inserting in proposed Order provisions under which Arbitration Award and State Court Judgment could be used against Debtor and estate; and Creditor's statements that it did not intend to violate stay were based entirely on representations of witnesses whose testimony Court did not find to be credible.

In re Formosa, 2018 WL 494416 (Bankr. E.D. Mi. 2018) – Nothing in Code or Rules requires creditor to take conduct PACER search or otherwise take specific action to determine if Debtor has filed bankruptcy before conducting foreclosure sale. Fannie Mae and Freddie Mac guidelines that require creditor foreclosing insured mortgage to conduct PACER search do not have force of law. While creditor would be well advised to conduct PACER search, there is no legal duty to do so.

In re Witham, 2017 WL 4570698 (Bankr. E.D. Ky. 2017) – Contempt is not appropriate remedy for alleged stay violation. Section 362(k) provides express right of action for damages and contains specific statutory remedy.

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.

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.

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.

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.

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 intend 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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 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.

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.

In re Galutan, Case No. 12-31837 (Bankr. E.D. Il. 2012) – Creditor violated stay by telephoning Debtor once or twice every day, although Debtor and Debtor's counsel repeatedly advised creditor of bankruptcy filing. Creditor acknowledged bankruptcy filing but contended that filing did not prohibit actions to collect debt and that "petition" was merely an "application" for bankruptcy that did not prevent collection efforts. Creditor also sent repeated written demand letters after petition date. Creditor was served with Motion for sanctions but did not respond and did not appear for the hearing on the Motion. Creditor's conduct amounted to knowing and intentional violation of stay. Sanctions included actual damages for attorney fees in enforcing the stay, plus punitive damages of \$15,000, plus an additional \$500 per day for each day on which creditor continued harassment after entry of the Order.

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.

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.

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 violate 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.

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.

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.

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 notices of levy lifted and to nominal award of \$20 for "stomach distress medication".

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.

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 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).

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.

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.

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 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.

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.

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.

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.

In re Dietrich, Case No. 08-68294 (Bankr. E.D. Mi. 2011) – Standing to complain of violations of Automatic Stay is not limited to Debtor. Creditors have standing to pursue stay violations to the extent the violation is against property of the estate as the

creditors, not 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.

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.

In re Wcislak, 446 BR 827 (Bankr. N.D. Ohio 2011) – Motion for damages for alleged violation of automatic stay dismissed following dismissal of underlying Chapter 13 case. Section 349 does not deprive Court of ability to proceed with motion after dismissal where there remains a basis for the court to adjudicate matter. Whether court retains jurisdiction is entirely discretionary with Court and is not mandatory regardless of basis of underlying action. Damages for stay violations are of the type of action for which retention of jurisdiction may be particularly appropriate. Court declined to retain jurisdiction where alleged stay violation was minor and technical, involving sending of only one letter; and Debtor's case was dismissed for willful failure to abide by orders of the Court including inability to formulate a plan, failure to make plan payments, and non-disclosure of large tax refunds.

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.

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.

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 re-conveying property to 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.

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.

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 Debtors to title the Vehicle in Kentucky, despite knowledge of 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 property; (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 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 Debtor.

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.

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.

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.

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.

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 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.

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.

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.

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.

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 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 Debtor recovered substantial actual damages, an award of substantial attorney fees was also warranted to both compensate Debtor and to send a message to creditors and Debtors for future cases.

3.154 Burden of Proof

Ragone v. Pizza Pan Elyria, LLC, 2019 WL 2202941 (Bankr. N.D. Ohio 2019) – Burden of proof in action for damages for violation of stay is preponderance of evidence that stay was violated; and violation was committed willfully; and that Debtor was injured. Damages must be proven with reasonable certainty and cannot be based on conjecture or speculation..

In re McCormick, 2018 WL 6787558 (6th Cir. BAP 2018) - Party seeking sanctions for alleged violation of stay bears burden to establish by preponderance of evidence that Debtor filed bankruptcy; Debtor was "individual" within Section 362; creditor received notice of petition; creditor's actions were in willful violation of stay; and Debtor suffered damages. Debtor's motion for sanctions denied where Debtor did not present any evidence that creditor's actions were willful violations of stay or that Debtor suffered any damages. Debtor did not offer any evidence as to conduct of one creditor; and did not introduce necessary documents as to second creditor including alleged email message that Debtor contended constituted violation of stay.

3.155 Parties Liable

In re Alderman, 2018 WL 5797709 (Bankr. N.D. Ohio 2018) – When imposing sanctions against corporate entity, Court can use civil contempt power including imposition of per diem penalties and incarceration against anyone in position to ensure that corporation makes payment. Command to corporation to act is command to those officially responsible for corporate affairs. If parties responsible prevent compliance or fail to take actions within power of corporate duties, principal is no less guilty of corporation itself and may be punished accordingly.

3.156 Sanctions – Absence of Actual Damages

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 actions 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.

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.

3.157 Sanctions – Duty to Mitigate

In re Witham, 2017 WL 4570698 (Bankr. E.D. Ky. 2017) – Where Creditor willfully violates Stay, sanctions include actual damages, including costs and attorney fees incurred as result of stay violation. However, Debtor has duty to mitigate damages. Creditor violated stay by continuing automatic debits on account of pre-petition contractual relationship between Debtor and Creditor. Stay violations were willful where Creditor received at least two notices from Court of filing, Debtor spoke with store manager to advise of filing, Debtor's counsel sent certified letter to creditor and to creditor's registered agent, and Debtor spoke with Corporate Headquarters. 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. Sanctions included \$163.90 representing amount of two wrongful debits; \$240 in lost wages for Debtor to attend Court proceedings on two separate occasions; and \$88.20 in mileage to attend Court. Sanctions also include reasonable attorney fees including fees incurred out of Court including attorney contacting creditor to demand creditor end actions that constitute stay violation. Attorney fees awarded for \$6,059.24. Although amount far exceeded amount of two unauthorized withdrawals, fees were reasonable in light of Creditor's refusal to return funds and stated intention to continue debits in the future. Debtor attempted to mitigate damages by repeatedly contacting Creditor before resorting to counsel, and Counsel continued efforts by writing letter to Creditor requesting cessation of debits and return of funds.

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.

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.

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.

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.

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.

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.

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.

3.158 Sanctions – Inadvertent or Technical Violations

In re McCormick, 2018 WL 6787558 (6th Cir. BAP 2018) – Not all communications from creditor to Debtor are prohibited under Section 362. Communications sent inadvertently that are promptly withdrawn and that do not result in damages to Debtor may constitute "technical" violation of stay but are not willful. Bill from Cable provider requesting payment for cable services and equipment which was automatically generated after bankruptcy filing did not constitute violation of stay where creditor promptly told Debtor to disregard bill and confirmed that creditor was not attempting to collect debt and assisted Debtor in returning equipment at issue.

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

3.159 Emotional Distress

In re Williams, 2018 WL 6930471 (Bankr. E.D. Mi. 2018) – Creditor violated stay by sending three letters to Debtor post-petition demanding payment for pre-petition debt. Court would not award additional damages for "anxiety and stress" as emotional injury is not compensable under Section 362(k) absent associated financial loss. Emotional distress that is fleeting, inconsequential or insignificant is not compensable.

U.S. v. Hunsaker, Case No. 16-0386 (D. Ore. 2016), *reversed*, 2018 WL 4122882 (9th Cir. 2018) – IRS violated stay by ending 4 letters to Debtors post-petition threatening collection efforts including garnishment of Social Security benefits. Section 106(a) waives sovereign immunity for violations of Section 362 to extent of damages suffered by Debtor but does not waive sovereign immunity for punitive damages. Damages for emotional distress are actual damages as to which sovereign immunity is waived, acknowledging split with *U.S. v. Torres*, 432 F.3d 20 (1st Cir. 2005). 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.

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.

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.

In re Tucker, Case No. 16-1127 (Bankr. N.D. Iowa 2017) – Although Section 1301 is silent on issue of sanctions for violation of Co-debtor stay, Section 105 provides basis for Bankruptcy Court to award sanctions for violation of Co-debtor 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 Co-debtor 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.

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.

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.

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.

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.

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 actions 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.

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.

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.

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.

3.160 Sanctions – Actual Damages

In re Newberry, 2019 WL 3857704 (Bankr. E.D. Mi. 2019) – Creditor violated stay by failing to withdraw Writ of Garnishment issued and served pre-petition but which allegedly attached to tax refund post-petition. Although Debtor did not object within 14 days of service of garnishment disclosure, that did not absolutely divest Debtor of interest in refund where garnishment disclosure also provided that tax refund would not be released until 28 days after service of garnishment disclosure and Debtor filed for Bankruptcy within 28 day window. State Garnishment Statute specifically allows objections to be filed more than 14 days after service of garnishee disclosure such that expiration of 14 day objection window cannot permanently and completely cut off Debtor’s rights in funds. Creditor had affirmative duty to halt or reverse collection efforts commenced pre-petition including release of garnishment. Receipt of funds and refusing to return funds to Debtor is affirmative act to control property of estate in violation of Section 362. Court ordered creditor to return garnished tax refund to Debtor and concluded that Debtor was also entitled to attorney fees and costs, with Debtor being required to file supplemental affidavit outlining amount of attorney fees and costs.

In re Dougherty-Kelsay, 2019 WL 1782598 (Bankr. E.D. Ky. 2019) – Once Court determines party has willfully violated stay, Court required to award sanctions in amount of Debtor’s actual damages. Debtor bears burden of proving that damages were caused by and reasonably incurred as a result of violation of stay. Debtor’s request for actual damages in amount of intercepted tax refunds denied where interception of tax refunds did not violate stay under Section 362(b)(2) exception.

In re Shrum, 2019 WL 1470828 (Bankr. E.D. Mi. 2019) – Debtor seeking damages for stay violation must provide evidence of action damages beyond mere speculation, guess or conjecture, and bare statement that Debtor suffered damages without evidence will not satisfy evidentiary requirements. Only actual damages were \$200 for transcript fees paid by Debtor as result of landlord’s actions. Punitive damages warranted for conduct that is egregious, vindictive or intentionally malicious, or evidence bad faith or reckless disregard of stay. Landlord’s continued prosecution of eviction recklessly disregarded automatic stay. Landlord chose not to use procedures in Section 362(l)(3) to challenge Certifications and instead proceeded with eviction action. Punitive damages of \$1,000 warranted.

In re Williams, 2018 WL 6930471 (Bankr. E.D. Mi. 2018) – Creditor violated stay by sending three letters to Debtor post-petition demanding payment for pre-petition debt. Contempt is not proper remedy as contempt requires knowledge of “definite and specific order of Court” that required performance or nonperformance of a particular act and a failure to comply or perform. Violation of stay is not violation of definite and specific order of Court. Sanctions are appropriate under Section 362(k) that allows individual injured by willful violation of stay to recover actual damages including costs and attorney’s fees; and in appropriate circumstances punitive damages. “Willful violation” requires that creditor knew of stay it took intentional act in violation of stay. Only actual damages alleged in motion were attorney’s fees of \$2500. Amount requested was unreasonable in violation of Section 329 as time records itemized 6.25 hours at \$400 per hour to draft, review and add motion. Both time expended and hourly rate were on high side for consumer bankruptcy matter and were excessive. Court awarded \$1500 for attorney fees. Court would not award additional damages for “anxiety and stress” as emotional injury is not compensable under Section 362(k) absent associated financial loss. Emotional distress that is fleeting, inconsequential or insignificant is not compensable. Creditor’s actions in sending three letters demanding immediate payment and warning of potentially embarrassing calls and stating that nonpayment will result in inability to obtain future credit warranted imposition of punitive damages of \$500.

In re Alderman, 2018 WL 5797709 (Bankr. N.D. Ohio 2018) – Actual damages warranted when Creditor with knowledge of stay refuses to return vehicle and instead resells vehicle. Damages included lost wages representing 8 months that Debtor was unable to work because Debtor did not have vehicle; funds spent on Uber and other alternative rides; personal belonging left in car; value of car reflected in petition less balance remaining owed to creditor; and attorney fees.

In re Johnson, 2018 WL 994124 (Bankr. S.D. Ohio 2018) – Once Court determines that stay violation was willful, award of actual damages is mandatory. Actual damages include any injury suffered by Debtor and includes costs and attorney fees incurred as result of violation.

In re Witham, 2017 WL 4570698 (Bankr. E.D. Ky. 2017) – Where Creditor willfully violates Stay, sanctions include actual damages, including costs and attorney fees incurred as result of stay violation. However, Debtor has duty to mitigate damages. Creditor violated stay by continuing automatic debits on account of pre-petition contractual relationship between Debtor and

Creditor. Stay violations were willful where Creditor received at least two notices from Court of filing, Debtor spoke with store manager to advise of filing, Debtor's counsel sent certified letter to creditor and to creditor's registered agent, and Debtor spoke with Corporate Headquarters. 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. Sanctions included \$163.90 representing amount of two wrongful debits; \$240 in lost wages for Debtor to attend Court proceedings on two separate occasions; and \$88.20 in mileage to attend Court. Sanctions also include reasonable attorney fees including fees incurred out of Court including attorney contacting creditor to demand creditor end actions that constitute stay violation. Attorney fees awarded for \$6,059.24. Although amount far exceeded amount of two unauthorized withdrawals, fees were reasonable in light of Creditor's refusal to return funds and stated intention to continue debits in the future. Debtor attempted to mitigate damages by repeatedly contacting Creditor before resorting to counsel, and Counsel continued efforts by writing letter to Creditor requesting cessation of debits and return of funds.

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.

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.

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.

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.

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.

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.

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.

3.161 Sanctions – Punitive Damages

Ragone v. Pizza Pan Elyria, LLC, 2019 WL 2202941(Bankr. N.D. Ohio 2019) – Punitive damages warranted where stay violation is willful and were actual damages would be insufficient to turn to future violations.

In re Dougherty-Kelsay, 2019 WL 1782598 (Bankr. E.D. Ky. 2019) – Court has discretion to award punitive damages if creditor willfully violates stay in manner that is egregious, vindictive or intentionally malicious. Creditor's efforts to recover \$50 in face of bankruptcy filing and Debtor's counsel's vehement opposition, including seeking contempt proceedings and failure to cease unlawful conduct until after Stay Violation Motion was filed support finding that creditor's actions were egregious, vindictive or malicious or to award of \$1000 in punitive damages.

In re Shrum, 2019 WL 1470828 (Bankr. E.D. Mi. 2019) –Landlord's action in seeking writ of possession notwithstanding knowledge of bankruptcy case was willful violation of stay, as landlord knew of stay and took intentional act that violated stay. Punitive damages warranted for conduct that is egregious, vindictive or intentionally malicious, or evidence bad faith or reckless disregard of stay. Landlord's continued prosecution of eviction recklessly disregarded automatic stay. Landlord chose not to use procedures in Section 362(l)(3) to challenge Certifications an instead proceeded with eviction action. Punitive damages of \$1,000 warranted.

In re Williams, 2018 WL 6930471 (Bankr. E.D. Mi. 2018) – Creditor violated stay by sending three letters to Debtor post-petition demanding payment for pre-petition debt. Contempt is not proper remedy as contempt requires knowledge of "definite and specific order of Court" that required performance or nonperformance of a particular act and a failure to comply or perform. Violation of stay is not violation of definite and specific order of Court. Sanctions are appropriate under Section 362(k) that allows individual injured by willful violation of stay to recover actual damages including costs and attorney's fees; and in appropriate circumstances punitive damages. "Willful violation" requires that creditor knew of stay it took intentional act in violation of stay. Creditor's actions in sending three letters demanding immediate payment and warning of potentially embarrassing calls and stating that nonpayment will result in inability to obtain future credit warranted imposition of punitive damages of \$500.

In re Alderman, 2018 WL 5797709 (Bankr. N.D. Ohio 2018) – Punitive damages are appropriate where creditor conduct is egregious, vindictive or intentionally malicious. Creditor's actions warranted punitive damages where creditor refused to return vehicle repossessed pre-petition; demanded money for return of vehicle; and then sold vehicle even after Court entered Order requiring creditor to return vehicle. Award must not be excessive and must take into account degree of reprehensibility of creditor conduct; disparity between actual and punitive damage award; and difference between punitive damages and civil penalties awarded in similar cases. Punitive damages in ratio of less than 2-to-1 compared to actual damages was reasonable and appropriate.

In re Stringer, 2018 WL 3006258 (Bankr. S.D. Ohio 2018) – Whether to award punitive damages depends on whether harm cause was physical or economic; whether conduct advanced indifference to or reckless disregard of rights of Debtor's; whether Debtor had financial vulnerability; whether conduct involves repeated actions; and whether harm was result of intentional malice. Creditors attorney was accomplished, experienced attorney who had previously been involved in numerous bankruptcy proceedings. Counsel statements that he believed automatic stay did not apply were disingenuous and, at best, counsel had duty to

conduct research before attempting to seize Debtors assets. Debtor did not suffer physical injury but did suffer financial harm and was already operating under financial vulnerability and creditor engaged in numerous violations including filing garnishment and refusing to release garnishment; contacting Debtors publishing company to keep publisher from remaining royalties; and removal of stay Court action to Bankruptcy Court. Debtor lost home to foreclosure as result of creditors actions and lost valuable business relationship as well as suffered stress and anxiety and loss of ability to work. Creditors litigation tactics were repeated, stubborn and heavy-handed and creditor made no effort to mitigate harm to Debtor. In addition to actual damages, Court award of punitive damages of \$57,000 as a reasonable amount necessary to dissuade creditor from further violations.

In re Johnson, 2018 WL 994124 (Bankr. S.D. Ohio 2018) – Punitive damages are appropriate where party willfully and knowingly violates stay and conduct is egregious, vindictive or malicious. Party against who punitive damages are sought can raise defense of reliance on counsel if (1) party made full disclosure of all pertinent facts to counsel; and (2) party relied in good faith on counsel's advice. Creditor did not present any credible evidence that attorneys advised Creditor that conduct would not violate stay and there was no evidence that Creditor actually relied on Counsel's advice in continuing arbitration and State Court proceedings post-petition. Factors to consider in determining amount include (1) nature of creditor's conduct; (2) nature and extent of harm to Debtor; (3) creditor's ability to pay; (4) level of sophistication of the creditor; (5) creditor's motives; (6) and any provocation by Debtor; and must take into account degree of reprehensibility of Creditor's conduct and disparity between harm or potential harm suffered and punitive damages awarded. Punitive damages of \$100,000 warranted where Creditor intentionally violated the automatic stay even after Debtor (1) sent Creditor cease and desist letter, (2) filed Enforcement Motion and (3) proposed resolving matter with order under which Creditor would have paid nothing in exchange for an agreement that Creditor could not use the State Court Judgment against Debtor or property of bankruptcy estate. Creditor's intentional stay violation and adamant refusal to take reasonable steps necessary to remedy the violation. Creditor conduct raised significant actual harm to Debtor who had to incur attorney fees in excess of \$400,000, and could have had significant harm to bankruptcy estate itself.

In re Witham, 2017 WL 4570698 (Bankr. E.D. Ky. 2017) – Where Creditor willfully violates Stay, sanctions include actual damages, including costs and attorney fees incurred as result of stay violation. Punitive damages are warranted where Creditor's conduct is egregious, vindictive or intentionally malicious. Culpable intent is not required where Creditor acted in bad faith or acted in reckless disregard of law. Creditor violated stay by continuing automatic debits on account of pre-petition contractual relationship between Debtor and Creditor. Stay violations were willful where Creditor received at least two notices from Court of filing, Debtor spoke with store manager to advise of filing, Debtor's counsel sent certified letter to creditor and to creditor's registered agent, and Debtor spoke with Corporate Headquarters. 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. Amount of punitive damages based on nature of Creditor's conduct; nature and extent of harm to Debtor; Creditor's ability to pay; level of sophistication of Creditor; Creditor's motives; and any provocation by Debtor. Creditor violated stay without provocation and stated intention to continue to violate stay warranting punitive damages of \$3,500.00.

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.

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.

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.

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.

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.

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.

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.

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.

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 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 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 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 set Trustee, totaling \$33,700.00, was an appropriate amount to discourage Creditor from making these “mistakes” in the future.

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 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 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 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 ensure 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.

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.

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.

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.

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.

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.

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.

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.

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".

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 did not 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.

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 relocate 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.

3.162 Sanctions - Parties Liable

Ragone v. Pizza Pan Elyria, LLC, 2019 WL 2202941 (Bankr. N.D. Ohio 2019) – Attorney may be held liable for violation of automatic stay as a result of attorney's acts or omissions on behalf of client. Defendant's assertion that actions were taken only in representative capacity to advance clients interest does not avoid personal liability for damages.

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.

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.

3.163 Sanctions – Attorney Fees

In re Newberry, 2019 WL 3857704 (Bankr. E.D. Mi. 2019) – Creditor violated stay by failing to withdraw Writ of Garnishment issued and served pre-petition but which allegedly attached to tax refund post-petition. Although Debtor did not object within 14 days of service of garnishment disclosure, that did not absolutely divest Debtor of interest in refund where garnishment disclosure also provided that tax refund would not be released until 28 days after service of garnishment disclosure and Debtor filed for Bankruptcy within 28 day window. State Garnishment Statute specifically allows objections to be filed more than 14 days after service of garnishee disclosure such that expiration of 14 day objection window cannot permanently and completely cut off Debtor’s rights in funds. Creditor had affirmative duty to halt or reverse collection efforts commenced pre-petition including release of garnishment. Receipt of funds and refusing to return funds to Debtor is affirmative act to control property of estate in violation of Section 362. Court ordered creditor to return garnished tax refund to Debtor and concluded that Debtor was also entitled to attorney fees and costs, with Debtor being required to file supplemental affidavit outlining amount of attorney fees and costs

In re Dougherty-Kelsay, 2019 WL 1782598 (Bankr. E.D. Ky. 2019) – Section 362(k) requires of award of attorney fees where creditor willfully violates stay. Section 362(k) does not specify standard by which attorney’s fees and costs are to be evaluated, but fees must be reasonable and bear reasonable relationship to amount in controversy. Fees include services rendered out-of-court as well as fees incurred in pursuing action for stay violation and to recover damages. Debtor has duty to mitigate damages because claims for fees incurred in prosecution of unnecessary motions are not recoverable. Creditor bore burden to stop collection proceeding once bankruptcy was filed. Creditor was “fanatically focused” on badgering Debtor for \$50 and Debtor litigated stay violation motion over \$50 at great expense. Record indicated that Debtor had insufficient income to meet minimal living expenses and child support obligations; she had lost her home and was living with her parents; it is about to lose her car. She cannot confirm a Chapter 13 Plan because of feasibility and because she is not paid post-petition domestic support obligations. Debtor risks going to jail, losing job, and losing ability to see children and is under great duress. At time Debtor filed Stay Violation motion, Debtor’s attorney’s fees amounted to \$4300 and creditor offered \$2500 to resolve matter. Court awarded \$4313.75 and attorney’s fees finding that any greater amount which so exceed amount in controversy as to be far outside bounds of reasonableness.

In re Williams, 2018 WL 6930471 (Bankr. E.D. Mi. 2018) – Creditor violated stay by sending three letters to Debtor post-petition demanding payment for pre-petition debt. Contempt is not proper remedy as contempt requires knowledge of “definite and specific order of Court” that required performance or nonperformance of a particular act and a failure to comply or perform. Violation of stay is not violation of definite and specific order of Court. Sanctions are appropriate under Section 362(k) that allows individual injured by willful violation of stay to recover actual damages including costs and attorney’s fees; and in appropriate circumstances punitive damages. “Willful violation” requires that creditor knew of stay it took intentional act in violation of stay. Only actual damages alleged in motion were attorney’s fees of \$2500. Amount requested was unreasonable in violation of Section 329 as time records itemized 6.25 hours at \$400 per hour to draft, review and add motion. Both time expended and hourly rate were on high side for consumer bankruptcy matter and were excessive. Court awarded \$1500 for attorney fees.

In re Witham, 2017 WL 4570698 (Bankr. E.D. Ky. 2017) – Where Creditor willfully violates Stay, sanctions include actual damages, including costs and attorney fees incurred as result of stay violation. However, Debtor has duty to mitigate damages. Creditor violated stay by continuing automatic debits on account of pre-petition contractual relationship between Debtor and Creditor. Stay violations were willful where Creditor received at least two notices from Court of filing, Debtor spoke with store manager to advise of filing, Debtor’s counsel sent certified letter to creditor and to creditor’s registered agent, and Debtor spoke with Corporate Headquarters. 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. Sanctions included \$163.90 representing amount of two wrongful debits; \$240 in lost wages for Debtor to attend Court proceedings on two separate occasions; and \$88.20 in mileage to attend Court. Sanctions also include reasonable attorney fees including fees incurred out of Court including attorney contacting creditor to demand creditor end actions that constitute stay violation. Attorney fees awarded for \$6,059.24. Although amount far exceeded amount of two unauthorized withdrawals, fees were reasonable in light of Creditor’s refusal to return funds and stated intention to continue debits in the future. Debtor attempted to mitigate damages by repeatedly contacting Creditor before resorting to counsel, and Counsel continued efforts by writing letter to Creditor requesting cessation of debits and return of funds.

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 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.

In re Tucker, Case No. 16-1127 (Bankr. N.D. Iowa 2017) – Although Section 1301 is silent on issue of sanctions for violation of Co-debtor stay, Section 105 provides basis for Bankruptcy Court to award sanctions for violation of Co-debtor 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 Co-debtor 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.

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.

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.

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.

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.

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.

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.

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).

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.

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.

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 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.

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.

3.164 Sanctions – Appellate Attorney Fees

Easley v. Collection Service of Nevada, 910 F.3d 1286 (9th Cir. 2018) – Creditor sanctioned for willful violation of stay where Creditor did not immediately take action to stop pre-petition garnishment. Sanctions include attorney fees incurred in enforcing stay plus attorney fees incurred in appellate proceedings arising out of initial sanction award. Bankruptcy court found that creditor willfully violated stay and awarded damages and attorney fees. Debtor appealed award as insufficient. Where Debtor prevailed on appeal, Debtor entitled to additional fee award for appellate services.

Weary v. Poteat, 2015 WL 4747883 (E.D. Tn. 2015), *aff'd*, 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.

3.165 Void and Voidable

Cox v. Specialty Vehicle Solutions, LLC, 2017 WL 5493160 (6th Cir. 2017) – Lawsuit filed against Debtor post-petition is violation of stay that is voidable but not necessarily void. Court can exercise discretion to retroactively annul stay for equitable reasons and allow action to remain pending.

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.

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 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.

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

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.

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.

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.

3.166 Jurisdiction

Healthcare Real Estate Partners, LLC v. Summit Healthcare REIT, Inc., 2019 WL 5382946 (3d Cir. 2019) – Action to recover damages for violation of stay under Section 362(k) exists independent of underlying bankruptcy case. Action can be brought without reopening closed or dismissed case. Joining Fourth, Fifth, Seventh and Tenth Circuit, Court held that Section 362(k) actions are separate and apart from bankruptcy case and stand on their own.

3.167 Procedural Requirements

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.

3.168 State Law Remedies

Bednar v. Pierce & Associates, PC, Case 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

3.169 When Necessary

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.

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.

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.

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.

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.

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.

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.

3.170 Timing of Motion and Hearing

In re Reed, Case No. 17-56200 (Bankr. E.D. Mi. 2018) – 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 42 days after petition date was untimely under Local Bankruptcy capital 4001-4 and 12 days after 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.

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.

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).

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 count to properly notice and conduct hearing.

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.

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.

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.

In re Robinson, 427 BR 412 (Bankr. W.D. Mi. 2010) – Automatic stay terminates with respect to Debtor and property of Debtor for Debtor has had prior case pending within the one year preceding the commencement of the current case and Debtor failed to file a motion to continue the automatic stay within 30 days as required by section 362(c)(3).

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.

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.

3.171 Timing of Motion – Negative Notice

In re Markoch, 2018 WL 1882949 (Bankr. W.D. Mi. 2018) – Debtor can file Motion to Extend Stay using Court’s negative notice provisions but runs risk that if any creditor objects, time may expire before hearing can occur. As to creditor who do not object, stay will be extended as hearing is considered “concluded” upon expiration of negative notice provision. If any party objects, as to that party Debtor may request expedited hearing keeping in mind 7-day notice requirement under Rule 9006 by filing *ex parte* request to set hearing. Absent request for special hearing Court will set hearing on next available motion day in location to which case is assigned which may or may not occur within 30-day window for concluding hearing and could result in denial of Motion as to objecting creditor if hearing cannot be scheduled within 30-day window.

3.172 Grounds for Denial

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) Debtor’s motive, (iv) how Debtor’s actions affected creditors, (v) why Debtor’s case was dismissed, (vi) the likelihood that 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.

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.

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.

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).

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.

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).

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.

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.

3.173 Grounds for Extension

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.

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 Schedule I reflects current income greater than Debtors’ income in first case when confirmed showing that Debtors’ current plan is likely to be successful.

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.

3.174 Effect of Expiration of Stay

In re Smith, 2019 WL 417827 (Bankr. E.D. Tn. 2019) – Majority of courts conclude that expiration of stay applies only to Debtor and property of Debtor but not as to property of estate. Minority approach holds that stay terminates in all respects. Third approach terminates stay only as to continuation of proceedings commenced prior to bankruptcy that involve property of Debtor or property of estate. Court adopted majority approach that stay is not terminated as to property of estate.

Smith v. State of Maine Bureau of Revenue Services, 2018 WL 6520887 (1st Cir. 2018) – Expiration of stay terminates stay in entirety as to both Debtor and property of estate. Recognizing that majority of courts limit expiration to Debtor and not property of estate, text of statute is inartfully drafted. Overall intent of Congress appears to have been to give second filers benefit of stay temporarily and best way to accomplish that is to interpret Section 362(c)(3)(A) to terminate entire stay including estate property.

In re Goodrich, Case No. 17-10500 (D. Vt. 2018) – Section 362(c)(3) is subject to at least three interpretations. Majority of courts concludes that stay terminates only as to property of Debtor but not property of estate. Minority of courts believe that stay terminates in its entirety as to repeat-filing Debtor, Debtor’s property and property of estate, but not as to Debtor’s spouse in a joint case if spouse is not repeat filing. Third interpretation results in termination of stay as to Debtor, property of Debtor and property of estate only if creditor had begun judicial proceedings before bankruptcy. Court adopted minority approach, holding that terminating stay as to Debtor, Debtor’s property and property of his estate is consistent with congressional intent because it meaningfully penalizes Debtor who files multiple bankruptcy cases without showing good cause.

In re Markoch, 2018 WL 1882949 (Bankr. W.D. Mi. 2018) – Expiration of stay terminates stay as to actions against Debtor and property of Debtor but does not terminate stay as to property of Bankruptcy Estate. Although stay expired, creditor could not proceed with foreclosure as long as subject property was property of estate.

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.

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.

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).

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.

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 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.

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.

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).

In re Magni, 2010 WL 5069553 (Bankr. D. Neb. 2010) - The stay would terminate only as to actions against Debtor or property of Debtor that is not property of the bankruptcy estate but continues to apply to actions against property of the estate.

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 Debtor and as to property of Debtor, but not as to property of the estate.

3.175 “Re-imposition” of Expired Stay

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 bank’s willful failure to abide by confirmation order.

Antal v. Carroll, 2011 WL 5008345 (E.D. Mi. 2011) – the 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

3.176 When Necessary

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.

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.

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).

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.

3.177 Timing of Motion and Hearing

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.

3.178 Grounds for Denial

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.

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.

3.179 Grounds for Imposition

3.180 Order Confirming No Stay in Effect

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).

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 Debtor has had 2 or more pending cases within the last year, the Judge *must* enter an order confirming no stay was in effect.

3.181 Effect of Failure to Impose Stay

In re Taylor, Case No. 18-44466 (Bankr. E.D. Mi. 2018) – Creditor allowed to pursue recovery and disposition of collateral after denial of Motion to Impose Stay. Stay does not arise in first instance in third filed case allowing creditor to pursue recovery against Debtor and actions against property of estate.

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).

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.

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”.

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.

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 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.

3.182 Re-imposing Stay After Grant of Stay Relief

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

3.183 Non-Applicability of Stay

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

3.184 Generally

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.

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 did not 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.

3.185 Procedure

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. *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

3.186 Dismissal of Bankruptcy Case

WD Equipment v. Cowen, 849 F.3d 943 (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.

3.187 Non-Bankruptcy Court Jurisdiction

In re Shrum, 2019 WL 1470828 (Bankr. E.D. Mi. 2019) – State Court has jurisdiction to determine whether proposed action is stayed but lacks jurisdiction to grant relief from stay. State Court lacks authority to determine accuracy or validity of Certification under Section 362(l) as only Bankruptcy Court can grant relief from stay. State Court and landlord violated stay when State Court concluded that Debtor's Certification was not sufficient and effectively lifted stay and proceeded with eviction hearing. Landlord's action in seeking writ of possession notwithstanding knowledge of bankruptcy case was willful violation of stay, as landlord knew of stay and took intentional act that violated stay.

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.

IV. Attorneys

A. Debt Relief Agency

4.1 Generally

In re Njoky, 2018 WL 3964863 (Bankr. N.D. Ohio 2018) - 11 USC Section 101(12A) defines “Debt Relief Agency” as any person who provides bankruptcy assistance to assisted person in return for payment of money or other valuable consideration, or who is bankruptcy petition preparer as defined in Section 110. Debt relief agencies are prohibited from making false or misleading statements or misrepresenting services to be provided or benefits and risks of bankruptcy proceedings, and must provide Debtors with notices and disclosures that detail different forms of bankruptcy relief, availability of credit counseling, and Debtor’s obligations after filing. Debt Relief Agency advertisements must disclose that services may relate to bankruptcy and Agency must execute written contract with Debtor within five days of first providing services. If Agency fails to comply, Court may avoid contract or agreement for services; require disgorgement of fees and charges paid and hold Agency liable for actual damages, attorneys’ fees and costs; and upon showing of intentional or continuing violations, impose injunctions or civil penalties. Evidence supported finding that HRT was Debt Relief Agency where HRT provided Debtor with bankruptcy assistance by facilitating filing skeleton petition in exchange for payment of \$600. HRT conduct violated numerous provisions of code where HRT did not inform Debtor that HRT would assist Debtor in filing for relief under Chapter 13, intentionally misled Debtor and misrepresented services it would provide and ramifications of bankruptcy filing, and HRT acted intentionally by advising Debtor that it would “save” house without informing him that he would be filing for bankruptcy and extent to which HRT took steps to prevent Debtor from ascertaining what it intended to do by rushing Debtor through signing forms and avoiding questions. Further, initial postcard from HRT to Debtor constituted advertisement that did not contain Section 528 advertising notice requirements and HRT did not execute written contract. HRT order to disgorge \$600 paid by Debtor; invalidated any contract or agreement between Debtor and HRT; and enjoined HRT from providing debt relief services in the Northern District of Ohio.

4.2 Attorneys as Debt Relief Agency

In re Denny, 2018 WL 2325772 (Bankr. E.D. Ky. 2018) – Attorney is “debt relief agency” where attorney provides legal representation to assisted person in exchange for payment of money. Attorney must provide disclosures to assisted persons and execute written contract with assisted person. Attorney must then perform all services promised to assisted person; cannot make false statements in bankruptcy filings; and may not misrepresent services attorney will provide. Attorney violated 11 USC Section 526(a)(1) by accepting payment from client to pay off Chapter 13 Plan but instead used money for attorney’s own purposes and did not provide services promised. Attorney violated Section 526(a)(2) by repeatedly misrepresenting to Court in multiple bankruptcy cases that client had signed application requesting payment of filing fee in installments and that client could not pay filing fee. Attorney did not disclose that he had received filing fee from Debtor’s but had used money for other purposes. Evidence also indicated that Debtor had not requested to pay filing fee in installments and was not aware of that option. Attorney then did not make installment payments from funds given to attorney by Debtors although attorney had received more than sufficient funds to pay filing fee. Attorney violated Section 526(a)(3) by failing to advise Debtor that case had been dismissed because attorney failed to file schedules and other required papers and never explained to clients that he was suspended from practice of law and could no longer represent Debtors in their bankruptcy cases. Attorney also misled clients when he promised to pay filing fees with money provided by Debtors had failed to do so. Attorney violated Section 527 and Section 528 where attorney did not have retainer agreements for any of his clients and notices provided to clients did not include notice and statement required by Section 527 four debt relief agency. Attorney evidenced consistent pattern of disregard for rules affecting debt relief agencies as well as Rules of Professional Conduct. Attorney order to disgorge \$4610 and was permanently disbarred from practice before Bankruptcy Court.

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

4.3 Incurring Debt Pre-Petition – Section 526

Caldwell v. Kaufman Englett & Lynd, PLLC, Case No. 16-662 (M.D. Fl. 2017), *affd*, 886 F.3d 1153 (11th Cir, 2018) – 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.

4.4 Duties of Attorney as DRA

In re Freeman, 2018 WL 4362045 (Bankr. E.D. Mi. 2018) – Section 526(a)(1) prohibits attorney from failing to perform any service that attorney informed Debtor would be provided in connection with the case. Section 526(a)(3) states that attorney shall not misrepresent to any Debtor directly or indirectly affirmatively or by material omission with respect to services that attorney will provide. Debtor’s counsel’s failure to file protective proof of claim for mortgage creditor was not violation of Section 526(a)(1) or (3) where Debtor did not identify any specific agreement, other document or conversation in which attorney stated that he would file protective claim. Generalized description of “legal services” in Rule 2016 disclosure was not sufficient to find that attorney either informed or represented that he would file protective claim. Section 526(c)(2)(A) allows Court to award sanctions if attorney intentionally or negligently failed to comply with any provision of Section 526. Absent proof of underlying violation of either Section 526(a)(1) or (3), there was no basis for award of fees under Section 523(c)(2)(A). Section 526(c)(2)(C) allows Court to award fees if counsel intentionally or negligently disregards material requirements of Code or Rules. Section 501 permitted, but did not require, counsel to file proof of claim which is insufficient to demonstrate intentional or negligent disregard of Code and Rules. While it may not have been reasonable for attorney not to file proof of claim for mortgage company where essential purpose for filing case was to cure mortgage arrearage, that does not amount to intentional or negligent disregard of Code or Rules. Section 526(c)(5)(B) provides for civil penalty if Court finds that attorney intentionally violated Section 526 or engaged in clear and consistent pattern or practice of violating Section. Counsel’s services, although potentially unreasonable, did not violate any subsection of Section 526 rendering Section 526(c)(5)(B) inapplicable. Essence of complaint was not that attorney did not do something he said he would do or that was required by law, but only that he did not file protective claim at earlier point in case causing mortgage company to not receive disbursements otherwise earmarked by Plan. While attorney’s delay may have violated recognized standard of acceptable professional practice or care for bankruptcy attorney in local community, that is not sufficient to impose sanctions under Section 526.

In re Denny, 2018 WL 2325772 (Bankr. E.D. Ky. 2018) – Attorney is “debt relief agency” where attorney provides legal representation to assisted person in exchange for payment of money. Attorney must provide disclosures to assisted persons and execute written contract with assisted person. Attorney must then perform all services promised to assisted person; cannot make false statements in bankruptcy filings; and may not misrepresent services attorney will provide. Attorney violated 11 USC Section 526(a)(1) by accepting payment from client to pay off Chapter 13 Plan but instead used money for attorney’s own purposes and did not provide services promised. Attorney violated Section 526(a)(2) by repeatedly misrepresenting to Court in multiple bankruptcy cases that client had signed application requesting payment of filing fee in installments and that client could not pay filing fee. Attorney did not disclose that he had received filing fee from Debtor’s but had used money for other purposes. Evidence also indicated that Debtor had not requested to pay filing fee in installments and was not aware of that option. Attorney then did not make installment payments from funds given to attorney by Debtors although attorney had received more than sufficient funds to pay filing fee. Attorney violated Section 526(a)(3) by failing to advise Debtor that case had been dismissed because attorney failed to file schedules and other required papers and never explained to clients that he was suspended from practice of law and could no longer represent Debtors in their bankruptcy cases. Attorney also misled clients when he promised to pay filing fees with money provided by Debtors had failed to do so. Attorney violated Section 527 and Section 528 where attorney did not have retainer agreements for any of his clients and notices provided to clients did not include notice and statement required by Section 527 four debt relief agency. Attorney evidenced consistent pattern of disregard for rules affecting debt relief agencies as well as Rules of Professional Conduct. Attorney order to disgorge \$4610 and was permanently disbarred from practice before Bankruptcy Court.

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 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.

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.

4.5 Sanctions

In re Denny, 2018 WL 2325772 (Bankr. E.D. Ky. 2018) – Attorney is “debt relief agency” where attorney provides legal representation to assisted person in exchange for payment of money. Attorney must provide disclosures to assisted persons and execute written contract with assisted person. Attorney must then perform all services promised to assisted person; cannot make false statements in bankruptcy filings; and may not misrepresent services attorney will provide. Attorney violated 11 USC Section 526(a)(1) by accepting payment from client to pay off Chapter 13 Plan but instead used money for attorney’s own purposes and did not provide services promised. Attorney violated Section 526(a)(2) by repeatedly misrepresenting to Court in multiple bankruptcy cases that client had signed application requesting payment of filing fee in installments and that client could not pay filing fee. Attorney did not disclose that he had received filing fee from Debtor’s but had used money for other purposes. Evidence also indicated that Debtor had not requested to pay filing fee in installments and was not aware of that option. Attorney then did not make installment payments from funds given to attorney by Debtors although attorney had received more than sufficient funds to pay filing fee. Attorney violated Section 526(a)(3) by failing to advise Debtor that case had been dismissed because attorney failed to file schedules and other required papers and never explained to clients that he was suspended from practice of law and could no longer represent Debtors in their bankruptcy cases. Attorney also misled clients when he promised to pay filing fees with money provided by Debtors had failed to do so. Attorney violated Section 527 and Section 528 where attorney did not have retainer agreements for any of his clients and notices provided to clients did not include notice and statement required by Section 527 four debt relief agency. Attorney evidenced consistent pattern of disregard for rules affecting debt relief agencies as well as Rules of Professional Conduct. Attorney order to disgorge \$4610 and was permanently disbarred from practice before Bankruptcy Court.

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.

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.

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. Pro Bono Appointment

4.6 Parties Entitled to Appointment

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.

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.

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 entitled to appointed counsel.

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.

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 Debt, and to the indigent former spouse of 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.

4.7 Limitations on Appointment

4.8 Termination of *Pro Bono* Appointment

C. Necessity for

4.9 Corporations

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.

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.

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.

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.

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.

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.

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.

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.

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.

4.10 Individuals

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.

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.

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

4.11 Partnerships

4.12 Minors and Guardians

D. C.-B. v. Brooks, Case No 18-80031 (Bankr. W.D. Mi. 2018) – Rule 1017 incorporating Federal Rule 17 allows guardian to bring action on behalf of minor. Parent is guardian who may sue as minor’s representative. Guardian is not required to obtain court permission. However, Guardian is not party and cannot represent ward without counsel. Cause of action belongs to child and not parent.

4.13 Conservatorship

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.

4.14 Trusts

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.

4.15 Decedent’s Estates

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.

D. Attorney Fees

4.16 Generally

In re Morse, 2019 WL 1567755 (Bankr. N.D. Ohio 2019) – Application for compensation denied where application sought compensation equal to total “no look” fee for life of case by case did not produce confirmed Plan. Case converted before confirmation rendering presumptive no-look Chapter 7 the more appropriate. Case was straightforward. Debtor did not have any real property and no unusual personal property. Debtor had only to secured debts and no priority debt and propose nominal distribution to unsecured creditors. Nothing in case required unusual outlay of time, knowledge or skill and would not have prevented counsel from accepting other cases. Amount requested was not commensurate with results where Chapter 13 case did not produce confirmed Plan and lasted less than one year before conversion.

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.

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.

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.

In re McLean Wine Co., Inc., 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – Awards of fees are governed by 11 USC § 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 Debtor's estate, or services that were not necessary to the administration of the estate.

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.

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.

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.

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".

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.

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.

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.

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.

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.

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.

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 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.

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".

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.

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 USC § 330.

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.

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 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 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.

4.17 Jurisdiction of Bankruptcy Court

In re Beavers, 2019 WL 2754472 (Bankr. N.D. Ohio 2019) - Bankruptcy Court retains jurisdiction to review attorney’s fees following dismissal of bankruptcy case. Decision on attorney fees is part of original proceeding. Dismissal does not abrogate Bankruptcy Court statutorily impose duty to review and approve fees.

4.18 Choice of Laws

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.

4.19 Duty of Court

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.

4.20 Standing to Oppose Retention

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.

4.21 Standing to Object to Fee Application

In re White, Case No. 13-21977 (Bankr. E.D. Mi. 2018) – Standing requires actual or threatened injury from conduct or course of action; injury can be traced to challenged conduct; and injury may be redressed by favorable decision. Debtor-husband does not have standing to oppose Trustee’s request for sanctions against Debtor-wife’s attorney (who did not also represent Debtor-husband). Any fees recovered from wife’s counsel will not impact bankruptcy as fees would d be paid from non-estate assets.

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.

4.22 Conversion from Chapter 7 to Chapter 13

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.

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.

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.

4.23 Chapter 13 – “No Look” Fees

In re Beavers, 2019 WL 2754472 (Bankr. N.D. Ohio 2019) – Attorney fees are presumptively calculated using “Lodestar” method. However, Court may also adopt presumptively reasonable fee arrangement and routine bankruptcy cases which allows attorney to avoid providing documentation to Court for services rendered and will allow Court to approve attorney fees without itemization of services. If case is dismissed prior to confirmation, attorney is not entitled to full no-look fee. No-look fee arrangement does not preclude attorney from seeking additional fees by filing fee application. Court approved application for full no-look amount following dismissal of case as application exceeded amount which Debtor reasonably expected to pay where retainer agreement specified that no look fee amount would cover fees for normal and customary services rendered in Chapter 13 cases for entire case. Fee agreement reserved right for counsel to seek additional compensation for “novel, complex or non-routine matters”. Case did not present novel, complex or non-routine matters and provision in fee agreement potentially allowing for greater fees did not constitute client consent to pay for unlimited additional work. Debtor did not expect to pay for costly representation when signing initial fee agreement and there was no indication that Debtor consented to pay additional fees as case became more complicated. Debtor should not be blindsided by large bill for additional, unanticipated work unless counsel obtained Debtor's agreement to pay for additional work.

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.

4.24 Chapter 13 – Advancement of Costs

McBride v. Riley, 923 F.3d 433 (5th Cir. 2019) – Reversing Bankruptcy Court, Circuit ruled that Bankruptcy Court is not precluded as matter of law from approving reimbursement of filing fees and costs advanced by counsel pre-petition. Administrative expenses are generally those that arise from post-petition transaction with estate rather than Debtor personally; and that directly benefit estate. Filing fee, credit counseling fee and credit report fees advanced by counsel pre-petition are all personal, pre-petition obligations of Debtor that were not necessary for preservation of estate as at time fees were advanced, estate did not exist. Fees only served Debtor's administrative obligations under Code and did not maintain or add value to estate. However, Court could include in compensation awarded under Section 330 the costs advanced but is not required to do so. Section 330 defines compensation broadly enough to include reimbursement of expenses advanced. Court has discretion, if it deems appropriate, to reimburse pre-petition expenses, but is not required to do so.

4.25 Fee Agreement

In re Beavers, 2019 WL 2754472 (Bankr. N.D. Ohio 2019) – Attorney fees are presumptively calculated using “Lodestar” method. However, Court may also adopt presumptively reasonable fee arrangement and routine bankruptcy cases which allows attorney to avoid providing documentation to Court for services rendered and will allow Court to approve attorney fees without itemization of services. If case is dismissed prior to confirmation, attorney is not entitled to full no-look fee. No-look fee arrangement does not preclude attorney from seeking additional fees by filing fee application. Court approved application for full no-look amount following dismissal of case as application exceeded amount which Debtor reasonably expected to pay where retainer agreement specified that no look fee amount would cover fees for normal and customary services rendered in Chapter 13 cases for entire case. Fee agreement reserved right for counsel to seek additional compensation for “novel, complex or non-routine matters”. Case did not present novel, complex or non-routine matters and provision in fee agreement potentially allowing for greater fees did not constitute client consent to pay for unlimited additional work. Debtor did not expect to pay for costly representation when signing initial fee agreement and there was no indication that Debtor consented to pay additional fees as case became more complicated. Debtor should not be blindsided by large bill for additional, unanticipated work unless counsel obtained Debtor's agreement to pay for additional work.

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.

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.

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.

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.

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.

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.

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.

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.

In re Slabbinick, 2012 WL 5386677 (Bankr. E.D. Mi. 2012) – Unbundling services into pre- and post-petition services does not per se violate Michigan ethical limitations or result in post-petition fee agreement being avoidable under Section 329. Section 329 does not apply to post-petition fee agreements. Attorney had a fee agreement for pre-petition services that specified exactly what services would be provided and the fee for those services, and specified that attorney would not perform any services post-petition without a new fee agreement. Pre-petition fee agreement made it clear that Debtors were not required to hire attorneys for post-petition services and that attorney’s agreement to perform pre-petition services was not conditional on agreement to perform post-petition services. Michigan Ethical Rules allow fee agreement to limit services to be performed as long as client consents with adequate consultation. Unbundling must not undermine attorney’s ability to provide competent representation, defined as the ability to assist Debtor in obtaining discharge and retention of exempt property. Some requirements can be performed prior to commencement of case, such as preparation of documents. However, Section 523(a)(4) also requires Debtor to cooperate with the

trustee and to surrender property of the estate to the trustee, both of which are necessarily post-petition requirements. Section 343 requires Debtor to testify at meeting pursuant to Section 341, Section 727 imposes multiple requirements relating to Debtor's conduct and duties in order to obtain discharge, again which are by definition post-petition services. Alternative to split representation may be hiring of petition preparer or *pro se* filing, either of which provides worse representation that Debtors will have even if services are unbundled. While ethical rules require competent representation, rules do not require that attorney represent Debtor in all matters necessary to obtain objectives, and Debtor will be better service to have at least some assistance prior to petition than if Debtor is entirely unrepresented. Debtors states that they believed Attorney adequately advised and counseled Debtors concerning limitations of representation and potential consequences if Debtors choose to proceed without an attorney and that they understood that they would be required to obtain counsel subsequent to filing and that attorneys adequately advised them of legal options as it relates to bankruptcy case. However, Debtors belief that consultation was adequate is not sufficient. Attorneys must also prove that the consultation was, in fact adequate to constitute "informed consent" on such items as consequences of failing to file documents; consequences of dismissal and serial filings; consequences of failure to attend 341 meeting; that failure to cooperate with trustee could result in loss of discharge. Court afforded attorney opportunity to provide additional affidavits concerning consultation to allow court to determine whether Debtors acted with "informed consent".

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," 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 Debtor's petition from taking any steps to collect this debt from Debtor under Section 362(a). Any act to collect this prepetition debt—even just asking Debtor to pay it—violates the automatic stay that went into effect when Debtor filed for relief under Chapter 7. As 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".

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.

Sikes v. Mushenski, 2011 WL 2173661 (W.D. La. 2011) – Disclosure of Compensation of Attorney for Debtor(s) is binding contract between counsel and 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 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.

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.

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.

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.

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.

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.

4.26 Unbundling of Services

In re Hazlett, 2019 WL 1567751 (Bankr. D. Utah 2019) – Attorney can “unbundle” proceedings in Chapter 7 by executing one fee agreement to prepare and file bare-bones petition; and allowing client to proceed pro se, hire another lawyer, or retain initial lawyer after filing of case. Fee agreement provided multitude of disclosures, explanations and warnings regarding fee arrangement, bankruptcy process and possible use of third-party to collect payments. Lawyer provided written information and instructions including 50 paragraphs of disclosures and explanations. Debtor agreed to bifurcated arrangement and paid nothing before filing. After filing, client retained a lawyer to complete Chapter 7 proceeding which preceded uneventfully and resulted in discharge. Court denied US Trustee’s Motion to cancel fee arrangement and require attorney to disgorge holding that bifurcated fee arrangements provided affordable legal services in Chapter 7 cases and were not per se prohibited by bankruptcy code and do not per se implicate ethical issues and are not per se unfair. Attorney must ensure that Debtor has sufficient disclosures to make informed decisions as to risks and benefits and has reasonable basis to employ bifurcated fee arrangement where client is unable to pay full retainer prior to bankruptcy filing. Process did not harm Debtor and facilitated Debtor’s ability to afford legal counsel. Fees must be reasonable but not necessarily identical to fee that client would pay upfront as long as pricing differential is based on reasonable and quantifiable factors and must not include cost of prepetition services. Counsel’s fee was \$2000 and lawyer’s time record indicated that lodestar fee would have been \$2200.

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 than Debtors will have even if services are unbundled. While ethical rules require competent representation, rules do not require that attorney represent Debtor in all matters necessary to obtain objectives, and Debtor will be better served to have at least some assistance prior to petition than if Debtor is entirely unrepresented. Debtors state 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”.

In re Wright, 2018 WL 4211570 (Bankr. N.D. Ok. 2018) – Factoring of attorney fee receivable constitutes fee sharing that must be disclosed. Attorney used bifurcated retention process by which attorney was retained at nominal fee to prepare skeleton petition, pre-petition credit counseling, and credit report. After Debtor filed Debtor had option to retain counsel, retain other counsel, or proceed pro se. If Debtor retained counsel, counsel would bill Debtor for post-petition work and then sell receivable for 75% of face amount. Factoring constitutes fee sharing that was not disclosed in Rule 2016 disclosure in violation of Section 349. Attorney

ordered to disgorge all fees paid by Debtor including fees retained by factoring company and not actually received by Debtor.

4.27 Rule 2016 Disclosure

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.

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.

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.

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.

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.

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.

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.

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.

4.28 Necessity for Court Approval – Payment Directly by Debtor

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.

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.

4.29 Fees Paid by Third Party

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.

4.30 Counsel for Debtor Not in Possession

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 against 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.

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.

4.31 Special Counsel for Debtor – Chapter 11

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 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 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.

4.32 Special Counsel for Debtor – Chapter 13

In re Griffin, Case No. 19-0020 (Bankr. W.D. Mi. 2019) - Recognizing split of authority on whether Section 327 applies to Debtor's request to employ special (non-bankruptcy) counsel, Court concluded that under circumstances of this case Debtor's proposed employment of Special Counsel is not subject to Section 327 approval. Possibility that special counsel fees would be paid from proceeds of litigation which was property of estate did not require approval of retention in first instance. Standing to pursue cause of action in first instance was unclear and Court would not appoint counsel and perhaps implicitly determine standing of Debtor. Application clear that Debtor sought counsel to represent Debtor, not estate and not trustee; and entry of an order approving retention may cause confusion or conflict.

In re Blume, 2018 WL 5778057 (Bankr. E.D. Mi. 2018) – Recognizing split of authority on whether Section 327 applies to Debtor’s request to employ special (non-bankruptcy) counsel, Court concluded that under circumstances of this case Debtor’s proposed employment of Special Counsel is not subject to Section 327 approval. Debtor did not seek authority to pay, and will not pay, counsel during pendency of Chapter 13 case and will not be paying or seeking to pay counsel from any property of bankruptcy estate.

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.

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.

4.33 Fee Sharing

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 in formal or ad hoc relationships tent 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.

4.34 Fee Sharing – Factoring

In re Wright, 2018 WL 4211570 (Bankr. N.D. Ok. 2018) – Factoring of attorney fee receivable constitutes fee sharing that must be disclosed. Attorney used bifurcated retention process by which attorney was retained at nominal fee to prepare skeleton petition, pre-petition credit counseling, and credit report. After Debtor filed Debtor had option to retain counsel, retain other counsel, or proceed pro se. If Debtor retained counsel, counsel would bill Debtor for post-petition work and then sell receivable for 75% of face amount. Factoring constitutes fee sharing that was not disclosed in Rule 2016 disclosure in violation of Section 349. Attorney ordered to disgorge all fees paid by Debtor including fees retained by factoring company and not actually received by Debtor.

4.35 Time for Filing Application

In re Ray, 2019 WL 2866562 (Bankr. W.D. Mi. 2019) – Counsel’s application for compensation, filed after Debtor made last Chapter 13 Plan payment and after Chapter 13 Trustee filed Notice of Final Cure and had distributed all funds on hand untimely. Trustee had no funds available to pay fees and plan had already run 60 months precluding modification to pay fees. Even if modification would be possible, it would not be fair to Debtor to remain under Court and Trustee tutelage because counsel did not timely file fee applications.

In re Cooper, 2018 WL 3202996 (Bankr. E.D. Mi. 2018) - Neither Section 330 nor Rule 2016 sets deadline by which the application must be filed. Application filed three days after Debtor voluntarily dismissed Chapter 13 case was timely. Attorney required to seek dismissal promptly upon Debtor's request rendering it impractical for attorney to request attorney fees before seeking dismissal and Attorney must place Debtor's interest above his own pecuniary interest preventing counsel from delaying dismissal merely to obtain payment. Fees requested were reasonable for services rendered constituted appropriate administrative expense of Chapter 13 estate.

Howard v. Derham-Burk, 2018 WL 2107787 (9th Cir. BAP 2018) - Attorney fees for services incurred during the course of Chapter 13 case that remain unpaid as of entry of discharge are discharged under Section 1328. After Debtor received discharge, attorney filed fee application primarily related to services in connection with Notice of Final Cure, and sought to recover fees directly from Debtor outside bankruptcy. Plan provided for payment of attorney's fees and costs as administrative expenses over life of Plan and included supplemental fees and expenses for services through term of Chapter 13 case. Although services did not relate to ongoing performance under Plan, services were necessary to ensure that lender did not undermine Debtor's ability to obtain fresh start. Attorney could have modified Plan to arrange for and obtain compensation by alternate means before entry of discharge but did not do so. Although Debtor is not prevented from voluntarily paying approved fees, Counsel cannot require Debtor to make payments on discharged administrative expense claim.

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.

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.

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.

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.

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 Debtor in advance of hearing on confirmation of plan.

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.

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.

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.

4.36 Time for Filing Application – Pre-Confirmation

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.

In re Williams, Case No. 16-46249 (Bankr. E.D. Mi. 2016) - Fee application filed in 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.

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.

4.37 Paralegal and Paraprofessional Services

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.

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.

4.38 Disinterestedness

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 drink 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.

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 Debtor/client and the third party payor; (2) 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 Debtor/client; (4) the contractual arrangement concerning fees must be fully disclosed to the court at the outset of the bankruptcy retention; and (5) 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.

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.

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 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, 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.

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.

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.

4.39 Notice

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.

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.

4.40 Content of Application

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.

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.

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.

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.

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.

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.

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.

4.41 Burden of Proof

McGraw-Hill Companies v. Griffin, 2018 WL 4039302 (W.D. Ky. 2018) – Party requesting award of attorney fees bears burden to establish entitlement to award and document appropriate hours expended and hourly rate. Applicant must maintain billing records in manner that will enable Court to identify distinct claims and calculate appropriate fee.

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.

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.

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."

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.

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.

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

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.

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.

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.

4.42 Lodestar

Sicherman v. World Auto Network, Inc., 2019 WL 4741674 (Bankr. N.D. Ohio 2019) – Lodestar requires Court to multiple number of hours reasonably spend times reasonable hourly rate. Court can adjust amount based on time and labor involved; novelty and difficulty of questions involved; professional skill required to perform tasks; attorney's inability to accept other cases; fees customarily charged; amount involved and results obtained; any necessary time limitations; nature and length of attorney/client relationship; experience, reputation and ability of attorney; and whether fee is contingent or fixed. If Court adjusts lodestar, Court is required to provide clear explanation of reasoning.

In re The Village Apothecary, Inc., Case No. 18-11932 (E.D. Mi. 2019) – Bankruptcy Court must at minimum calculate the lodestar amount by multiplying reasonable hourly rate times reasonable number of hours. Once calculated, Court may exercise discretion to consider other factors such as novelty and difficulty of issues, special skills of counsel, results obtained, and whether fees are commensurate with fees for similar professionals in non-bankruptcy cases in the local area. To some extent factors are redundant

because lodestar already requires *reasonable* hourly rate time *reasonable* number of hours. Bankruptcy Court abused discretion but not conducting lodestar inquiry amounting to application of improper legal standard and produces result that is arbitrary and unreviewable. Bankruptcy Court's reduction in fees for Chapter 7 Trustee based solely on court's view that award that equaled more than half of estate assets was unreasonable amounted to setting maximum amount for fees.

In re Anthony, 2019 WL 1567752 (Bankr. N.D. Ohio 2019) – Starting point for determining reasonableness is reasonable time spent multiplied by reasonable hourly rate. Resulting calculation subject to adjustment based on time and labor expended; novelty or difficulty of issues; requisite skill; preclusion of other employment; customary fees; risk incurred; time limitation; amount involved and results obtained; experience, reputation and ability of counsel; desirability of case; nature and length of case; and results obtained in similar cases. Counsel's application for compensation denied where case was not involved, did not require unusual time or labor, presented no novel or difficult legal or factual issues, required nominal bankruptcy skills, did not preclude other employment, involve no unusual risk, and there were no other special facts that created time limitations. Amount involved was typical but results were not typical where case did not complete and was converted less than halfway into Plan term. Case achieved poor result which, while not necessarily attorneys fault, is substantial consideration. Amount sought exceeded norm in community and exceeded both not justified by results and amount actually received in similar cases.

In re Frame, 2019 WL 480271 (Bankr. N.D. Ohio 2019) – Section 329 allows for reasonable compensation starting with reasonable time spent times reasonable hourly rate, and then adjusted based on requisite time and labor; novelty and difficulty of issues; requisite skill; preclusion of other employment; customary fee; risk incurred; time limitations; amount involved and results obtained; experience, reputation and ability of counsel; desirability of case; nature and length of case; and results obtained in similar cases. Time expended was excessive where Counsel prepared and billed for six separate Chapter 13 Plans including three that included minor changes resolvable through agreed orders. Filing multiple amended plans results in increase in billable time and expenses. Amendment that moved creditor from one class to another was result of counsel's error as initial classification was clearly incorrect. Second Amended Plan added previously omitted secured creditor and indicated intent to strip lien although schedules did not support lien strip. Third plan changed payment amounts; fourth plan reduced percentage to unsecured creditors; and fifth plan change monthly payment to secured creditor.

In re White, Case No. 13-21977 (Bankr. E.D. Mi. 2018) – Court is required to evaluate request for attorney fees to be recovered as sanction using lodestar method, determining reasonable hourly rate and reasonable number of hours expended. Court approved Trustee's attorney fee request other than 5 entries that were not related to sanctionable conduct.

McGraw-Hill Companies v. Griffin, 2018 WL 4039302 (W.D. Ky. 2018) – Lodestar calculation carries "strong presumption" of reasonable fee. Lodestar calculation takes into account time and labor required; novelty and difficulty of questions; skill requisite to perform legal services properly; preclusion of other employment due to acceptance of case; customary fees; whether fee is fixed or contingent; time limitations imposed by client or circumstances; amount involved and results obtained; experience, reputation and ability of attorneys; "undesirability" of case; nature and length of professional relationship; and awards and similar cases. Counsel adequately supported hourly rates and provided detailed record of time expended and fees incurred as well as case line which Court awarded comparable fees. Amount of fees is not limited by gross amount of recovery and there is no requirement that amount of attorney fees be proportional to amount of underlying award of damages.

In re Hager, 2018 WL 3641860 (Bankr. W.D. Mi. 2018) – Section 330(a)(4) allows award of attorney fees using lodestar analysis tempered by common sense and experience. Factors to be considered include time spent; rates charged; whether services were necessary for administration of estate or were beneficial at time services were rendered; whether time expended is commensurate with complexity, importance and nature of services; whether person is board certified; and whether compensation is reasonable based on customary compensation charged by comparably skilled non-bankruptcy professionals. Court can also consider whether case presented novel or difficult questions; whether employment precluded acceptance of other employment; whether fee is fixed or contingent; time limitations imposed by client and circumstances; amount of money involved and results obtained; lack of desirability of case; and length and nature of professional relationship with client. Creditor's "contribution" to case which creditor contended contributed to confirmation of Plan was not benefit for which creditor could receive compensation as cost of administration, and legal fees that creditor's repeated filings precipitated substantially undermined any alleged contribution. Circumstances of case indicated that Debtor's counsel's fees were reasonable particularly where counsel needed to proceed especially carefully given substantial objections filed by creditor which required Trustee to interview Debtor's ex-husband and take additional steps to investigate medical condition of Debtor's adult son. Hours were necessary to comply with obligations under Rule 9011 and must be compensated in order to avoid penalizing otherwise diligent counsel.

Schwab, Inc. v. Huntington National Bank, 2018 WL 1305422 (Bankr. N.D. Ohio 2018) – Lodestar requires Court to multiply time reasonably expended and reasonable hourly rate. Reasonable hourly rate is based on prevailing market rate in relevant community. When out-of-area attorney agrees to represent party in out-of-town lawsuit "relevant community" is legal community within court's territorial jurisdiction and "prevailing market rate" is rate which lawyers of comparable skill and experience reasonably command within venue of court of record, rather than foreign counsel's typical charge for work performed within geographical area wherein he maintains Attorney rate of up to \$760.00 per hour did not reflect a reasonable hourly rate for the Canton, Ohio market. Ohio State Bar Association's "The Economics of Law Practice in Ohio in 2013" and affidavit from attorney

with over forty years in Canton, Ohio, supported a rate of \$250.00 to \$270.00.

In re Hager, 2017 WL 6803551 (Bankr. W.D. Mi. 2017) – Section 330(a)(4) allows award of attorney fees using lodestar analysis tempered by common sense and experience. Factors to be considered include time spent; rates charged; whether services were necessary for administration of estate or were beneficial at time services were rendered; whether time expended is commensurate with complexity, importance and nature of services; whether person is board certified; and whether compensation is reasonable based on customary compensation charged by comparably skilled non-bankruptcy professionals. Court can also consider whether case presented novel or difficult questions; whether employment precluded acceptance of other employment; whether fee is fixed or contingent; time limitations imposed by client and circumstances; amount of money involved and results obtained; lack of desirability of case; and length and nature of professional relationship with client. Attorney properly staffed matter, delegating matters to lower hourly rate paralegals when appropriate. Confirmation of Chapter 13 Plan took longer than normal because confirmation required multi-hour evidentiary hearing. Plan provided benefit to Debtor and creditors by providing greater dividend than would have been the case had Debtor filed Chapter 7, and services were reasonable when viewed at time services performed and in end did produce confirmed plan. While creditor initially successfully opposed confirmation, that did not require denial of fees or subordination of fees to creditor's claim.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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 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.

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.

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.

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 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.

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.

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.

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.

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.

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.

Grine v. Chambers, 2010 WL 3910144 (Bankr. N.D. Ohio 2010) – Attorney's requested hourly rate of \$250 was not reasonable when viewed in light of prevailing rate in the relevant market-i.e., 'the rate that is customarily paid in the community to attorneys of reasonably comparable skill, experience, and reputation.' The relevant market is "the venue of the court of record," rather than the "geographical area wherein [counsel] maintains his office and/or normally practices. Hourly rate reduced to \$200 per hour where hourly rates in area generally ranged between \$125 and \$225 per hour and services were straightforward and routine. Court would reduce time by hours that did not relate to claims or that were excessive under the circumstances. Fee request of \$1,972 reduced to \$565.

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.

In re Gaylord Hardware, LLC., Case No. 09-24018 (Bankr. E.D. Mi. 2010) – Lodestar is calculated by multiplying reasonable hourly rate times reasonable number of hours expended. Compensation is not appropriate merely because the time recorded was actually expended, as billable hours do not necessarily translate into compensable hours. Court would reduce hours spent where the amount spend on the described entries was excessive; hours spent where the description was not sufficient to substantiate the time charged; time entries for services curing deficiencies in counsel's own work; and clerical entries. Hourly rate for associate with less than one year experience of \$235 was excessive and reduced to \$175.00. Counsel not entitled to compensation for services rendered after it became apparent that Debtor would not be able to perform financially.

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.

In re Budzinski, 2010 WL 2925088 (Bankr. N.D. Ohio 2010) – 11 USC 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 second mortgage could be avoided; Debtors' attorney 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 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.

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".

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.

4.43 Reasonableness

Sicherman v. World Auto Network, Inc., 2019 WL 4741674 (Bankr. N.D. Ohio 2019) – Total fees charged overall were not reasonable. Plaintiff's lead counsel filed initial fee application seeking \$5,500. Counsel later amended the application to more than \$40,000.00. Counsel did not have prior experience in litigation consumer bankruptcy actions and spent more time than necessary to get up to speed than would have been the case for experienced counsel. Plaintiff rejected early settlement offer that would have eliminated 3 years of litigation and attendant attorney fees, and actual recovery was 60%-80% less than Trustee projected in obtaining approval to retain counsel in first instance.

In re Fanning, 2019 WL 2179734 (Bankr. W.D. Ok. 2019) – Court has independent duty to determine reasonableness of fees requested. Court is not bound by fee agreement between attorney and client and even flat fee arrangements must be evaluated for reasonableness based on time expended. Court will take into account time and labor required; novelty and difficulty of issues involve; skill requisite to perform legal services; preclusion of other employment; customary fee; whether fee is fixed or contingent; time limitations imposed by client or circumstances; amount involved and results obtained; experience, reputation and ability of attorney; undesirability of case; nature and length of professional relationship; and awards in similar cases. Debtor did not present any testimony that flat fee of \$1400 was unreasonable notwithstanding that flat fee exceeded hourly rate times hours expended. Although creditor's initial Proof of Claim did not attach detailed time records, records were not required unless party in interest file timely objection at which point creditor would be required to produce time records. Counsel tracked services being performed but did not maintain increments of time on contemporaneous basis. Lack of contemporaneous time records does not bar recovery

but Court may adjust fees where reconstructed time records involve estimates of time expended. “Block billing” by which lawyer enters total daily time spent without itemizing time on specific task does not preclude recovery. However, Court can adjust compensation to recognize imprecise nature of timekeeping practice.

In re Hackney, 2018 WL 2228175 (Bankr. N.D. Ohio 2018) - Section 329 permits disgorgement of fees to extent compensation exceeds reasonable value of services performed, considering nature, extent and value of services and other relevant factors. Evidence indicated that counsel services did not warrant any compensation. Counsel filed case for above-median Debtors but did not file response to United States Trustee’s Motion to Dismiss for presumed abuse resulting in dismissal of case by default. Hourly rate of counsel is intended to reflect quality of representation. Counsel’s efforts in case were inadequate where failing to defend Motion to Dismiss negative any other work counsel did in filing bankruptcy case because it resulted in dismissal of case leaving Debtor’s unable to obtain benefit of discharge or fresh start. Further, services were not reasonably likely to produce benefit to Debtor or state where counsel’s actions resulted in dismissal of case. Counsel ordered to disgorge all fees received in connection with case.

In re Allison, 2018 WL 388910 (Bankr. W.D. Mi. 2018) – Section 330 allows Court to award reasonable compensation to Debtor’s attorney for representing Debtor’s interests based benefit and necessity of services; time spent; rates charged; whether services were necessary to administration of estate and beneficial at time performed; whether time charged is reasonable given complexity, importance, and nature of problem or task addressed; whether person is board certified; whether compensation is reasonable based on customary charges by comparable professionals; novelty and difficulty of issues; special skills of counsel; and results obtained. Burden of proof is on applicants every dollar of professional fees is one dollar less available for payment of creditors. Local Fee Guidelines have presumptive reasonable charges and presumptive reasonable hourly rates, but these are neither guaranteed minimums nor ceilings, and attorney can request hourly rate that exceeds presumptive amount. Hourly rate of \$300, while exceeding Guidelines, reasonable where attorneys had extensive experience and reputation for high level practice; attorneys were board certified; attorneys attended numerous local, regional and national educational seminars and frequently participate in seminars as panelists, volunteering time to improve level of practice within District.

In re Andresiak, 2017 WL 6884378 (Bankr. W.D. Mi. 2017) – A professional seeking compensation in Chapter 13 case bears burden of proving that compensation is reasonable. Section 330(a)(6) permits a professional to seek compensation for reasonable time spent preparing a fee application but Attorney may not bill time for sake of billing time. Charge of 1 hour of time to prepare fee application unreasonable. Case was not complex, fees sought totaled \$493.32 including \$220 for preparation of fee application, application was form that Applicant uses in all cases and lacked any narrative, and case was not complex and application not detailed. Court’s own observations in other cases support .5 hours for preparing fee application in the market area.

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.

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 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.

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.

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 Debtor in advance of hearing on confirmation of plan.

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.

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.

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.

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.

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 workflow 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.

In re Clinksdale, 2015 WL 196409 (Bankr. W.D. Mi. 2015) – Under § 330(a), court may award “reasonable compensation to Debtor's attorney for representing the interests of Debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to 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.

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.

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.

4.44 Billing Judgment

Sicherman v. World Auto Network, Inc., 2019 WL 4741674 (Bankr. N.D. Ohio 2019) – Court may adjust amount to account for amount involved and results obtained. Initial application to employ counsel projected recovery between \$25,000 and \$50,000 with anticipated fees of \$10,000 to \$20,000. Actual recovery was only \$9,996. While fees need not bear direct relationship to total amount of settlement, discrepancy between estimated value and ultimate resolution relevant in determining fees. Settlement amount was 60% - 80% lower than projected value of case, warranting 70% reduction in total fees based on results obtained.

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.

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.

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.

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.”

4.45 Time Entries

United States v. Provider Services, Inc., 2019 WL 2422422 (S.D. Ohio 2019) – Party seeking attorney fees has burden to document appropriate hours expended and must submit evidence that enables Court to determine that hours were actually and reasonably expended. Relevant inquiry is whether reasonable attorney would have believed work to be reasonably expended at point in time when work was performed. If documentation is inadequate, Court may reduce award accordingly. Court would not reduce attorney fee award based on speculation that attorneys time-keeping program caused overbilling. Counsel's time records supported award of compensation were counsel reviewed over 4 million documents and approximately 100 days indicating that document review was “brisk”. Counsel may have completed review more efficiently by using more targeted search terms, but Court would not

substitute its judgment for that of counsel given complex nature of case. Billing entries cannot be vague, but do not need to be “explicitly detailed” and will not be considered in vacuum. Billing entries described in sufficient detail work performed particularly when viewed in context.

In re Fanning, 2019 WL 2179734 (Bankr. W.D. Ok. 2019) – Court has independent duty to determine reasonableness of fees requested. Court is not bound by fee agreement between attorney and client and even flat fee arrangements must be evaluated for reasonableness based on time expended. Court will take into account time and labor required; novelty and difficulty of issues involve; skill requisite to perform legal services; preclusion of other employment; customary fee; whether fee is fixed or contingent; time limitations imposed by client or circumstances; amount involved and results obtained; experience, reputation and ability of attorney; undesirability of case; nature and length of professional relationship; and awards in similar cases. Debtor did not present any testimony that flat fee of \$1400 was unreasonable and court’s time records include total charges of \$1705. Although creditor’s initial Proof of Claim did not attach detailed time records, records were not required unless party in interest file timely objection at which point creditor would be required to produce time records. Counsel tracked services being performed but did not maintain increments of time on contemporaneous basis. Lack of contemporaneous time records does not bar recovery but Court may adjust fees where reconstructed time records involve estimates of time expended. “Block billing” by which lawyer enters total daily time spent without itemizing time on specific task does not preclude recovery. However, Court can adjust compensation to recognize imprecise nature of timekeeping practice.

In re Frame, 2019 WL 480271 (Bankr. N.D. Ohio 2019) – Section 329 allows for reasonable compensation starting with reasonable time spent times reasonable hourly rate, and then adjusted based on requisite time and labor; novelty and difficulty of issues; requisite skill; preclusion of other employment; customary fee; risk incurred; time limitations; amount involved and results obtained; experience, reputation and ability of counsel; desirability of case; nature and length of case; and results obtained in similar cases. Time expended was excessive where Counsel prepared and billed for six separate Chapter 13 Plans including three that included minor changes resolvable through agreed orders. Filing multiple amended plans results in increase in billable time and expenses. Amendment that moved creditor from one class to another was result of counsel’s error as initial classification was clearly incorrect. Second Amended Plan added previously omitted secured creditor and indicated intent to strip lien although schedules did not support lien strip. Third plan changed payment amounts; fourth plan reduced percentage to unsecured creditors; and fifth plan change monthly payment to secured creditor

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.

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.

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 \$28,000 plus discharge of unsecured debt. Fee award of \$10,000 reasonable for services in light of benefit received and normal and customary fees.

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.

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.

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.

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.

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 entirely 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

4.46 Allocation of Time Between Causes of Action

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.

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.

4.47 Hourly Rate

Sicherman v. World Auto Network, Inc., 2019 WL 4741674 (Bankr. N.D. Ohio 2019) – Applicant must provide adequate documentation to warrant hourly rates charged. Fee application billed attorneys at \$475. While firm itself was experienced, there was no indication of reputation, experience or ability of particular lawyers, preventing award of fees at higher rate. Hourly rate reduced to \$250 per hour.

Frank v. Fife, 2019 WL 4254751 (Bankr. E.D. Mi. 2019) - Section 1927 allows Court to sanction attorney or other person admitted to conduct cases who multiplies proceedings unreasonably and vexatiously in amount to appropriately compensate opposing party for excess costs, expenses and attorney fees reasonably incurred. Hourly rates are determined by rates normally charged within appropriate locality. Attorney's fees for attorneys in Livingston County range from \$200-\$317 per hour, while Michigan bankruptcy practitioners charge between \$200 and \$510 per hour. Hourly rate would be limited to \$160 per hour as amount actually charged by counsel although reasonable hourly rate would have been significantly higher as statute requires reimbursement of expenses incurred, not expenses which potentially could have been incurred.

United States v. Provider Services, Inc., 2019 WL 2422422 (S.D. Ohio 2019) - Court has broad discretion to determine reasonable hourly rate defined as one that attracts competent counsel but avoids producing windfall. Court will consider prevailing market rate in relevant community which is generally jurisdiction in which case is tried. "Out-of-town specialist" rule allows Court to depart from general rule when good faith effort does not identify local counsel competent to handle proceedings. Rule does not apply where competent local counsel is readily available and Court will hold out-of-town counsel to local rates.

Stifel Financial Corp. v. Iannarino, 2019 WL 2051695 (S.D. Ohio 2019) - Average hourly rate of \$425 within range of reasonableness where two attorneys who worked on matter each had 25 years' experience in the third attorney had 10 years' experience. Rate was reasonable for experienced counsel in commercial litigation.

In re Lane, 2018 WL 4941105 (Bankr. W.D. Ky. 2018) – Fee application identified person performing services as "WPH" but fee application did not list either attorney or paralegal with initials WPH, leaving Court unable to determine propriety of hourly rate or compensation for services. Attorney given 10 days to submit Amendment to Application to explain entry.

In re Hackney, 2018 WL 2228175 (Bankr. N.D. Ohio 2018) - Section 329 permits disgorgement of fees to extend compensation exceeds reasonable value of services performed, considering nature, extent and value of services and other relevant factors. Evidence indicated that counsel services did not warrant any compensation. Counsel filed case for above-median Debtors but did not file response to United States Trustee's Motion to Dismiss for presumed abuse resulting in dismissal of case by default. Hourly rate of counsel is intended to reflect quality of representation. Counsel's efforts in case were inadequate where failing to defend Motion to Dismiss negative any other work counsel did in filing bankruptcy case because it resulted in dismissal of case leaving Debtor's unable to obtain benefit of discharge or fresh start. Further, services were not reasonably likely to produce benefit to Debtor or state where counsel's actions resulted in dismissal of case. Counsel ordered to disgorge all fees received in connection with case.

In re Allison, 2018 WL 388910 (Bankr. W.D. Mi. 2018) – Section 330 allows Court to award reasonable compensation to Debtor's attorney for representing Debtor's interests based benefit and necessity of services; time spent; rates charged; whether services were necessary to administration of estate and beneficial at time performed; whether time charged is reasonable given complexity, importance, and nature of problem or task addressed; whether person is board certified; whether compensation is reasonable based on customary charges by comparable professionals; novelty and difficulty of issues; special skills of counsel; and results obtained. Burden of proof is on applicants every dollar of professional fees is one dollar less available for payment of creditors. Local Fee Guidelines have presumptive reasonable charges and presumptive reasonable hourly rates, but these are neither guaranteed minimums nor ceilings, and attorney can request hourly rate that exceeds presumptive amount. Hourly rate of \$300, while exceeding Guidelines, reasonable where attorneys had extensive experience and reputation for high level practice; attorneys were board certified; attorneys attended numerous local, regional and national educational seminars and frequently participate in seminars as panelists, volunteering time to improve level of practice within District.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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 where rates were reasonable by standards of rates customarily paid in the Detroit market for comparable attorneys.

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.

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.

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.

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.

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.

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.

4.48 Hours Expended

Sicherman v. World Auto Network, Inc., 2019 WL 4741674 (Bankr. N.D. Ohio 2019) – Court must determine whether lawyer used poor judgment, spending too many hours on some part of case or charged for services that were excessive, redundant or otherwise unnecessary. Court may reduce hours compensated where time spent was not necessary. Court reduced hours claimed where early in litigation Defendant made settlement offer that trustee did not accept or reject, resulting in expenditure by attorney for trustee of several unnecessary hours on motion to enforce settlement and motion to accept settlement, neither of which were filed. Claims were not novel or particularly difficult and given self-professed expertise of trustee’s attorney, case should not have been difficult to litigate. Charge of 12 hours at \$475 per hour to draft complaint was excessive where complaint was straightforward and given hourly rates charged, attorney should have been able to complete work in far fewer hours. Fees cut 50% to reflect reasonable time spent.

Stifel Financial Corp. v. Iannarino, 2019 WL 2051695 (S.D. Ohio 2019) – Counsel entitled to compensation only four hours expended on matter in question. Counsel entitled to compensation in action to collect on outstanding promissory note for filing of complaint, service, prejudgment attachment and default interest. Entries that do not directly relate to those matters including drafting of correspondence to third parties, coordination was city, post-service examination of social media accounts and various telephone conferences are not properly compensable.

In re Good, 2018 WL 3025290 (Bankr. E.D. Mi. 2018) – Services are compensable only to extent that at times services were performed there was reasonable basis to believe that services would produce benefit to Debtor, creditors or the estate. Services expended in filing and prosecuting adversary proceeding were not unreasonable where, at time of commencement of adversary, counsel reasonably believe that services could produce benefit, although adversary was ultimately dismissed without recovery. Adversary proceeding brought an effort to discharge two loans which were Debtors largest debts and dismissal of adversary was result, in part, of changes in Debtor’s financial condition after adversary had commenced. Attorney filed adversaries proceeding because client wanted to address student loans and there was no precedent within district to allow creditor to handle student loans in Chapter 13 proceedings other than as general unsecured claim. Debtor had no other viable option to deal with student loans, particularly in light of Debtor’s advanced age and other personal and financial considerations. Although adversary proceeding was “long shot”, faced with no other viable option, it was not unreasonable for Debtor to take chance rather than resign herself to fact that when she finishes Chapter 13 case, she will be 71 years old and will owe more than \$200,000 in student loans. Compensation should not be awarded when facts show that counsel is “tilting at windmills” but services in this case had some reasonable likelihood of producing benefit to Debtor and may still have value going forward depending on outcome of Debtor’s application for income-based repayment program or possible Plan modification.

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 LOCAL BANKRUPTCY RULE 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.

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.

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 participating and detailed specific issues discussed.

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 reasonable 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 workflow 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.

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 Debtors or the opposing party for time spent "learning the office billing system".

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.

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.

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.

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.

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.

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.

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.

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.

4.49 Clerical Services

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

In re Gaylord Hardware, LLC., Case No. 09-24018 (Bankr. E.D. Mi. 2010) – Compensation is not appropriate for clerical entries.

4.50 Excessive Number of Professionals

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 workflow 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.

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.

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.

4.51 Benefit to Debtors or Estate

In re Schaller, 2019 WL 460302 (Bankr. E.D. Mi. 2019) – Section 330 allows compensation for services necessary to administration or beneficial at time services were rendered toward completion of case. In Chapter 13, compensation may also include benefit and necessity of services to Debtor and effect of services on bankruptcy estate, bankruptcy case and Debtor. Counsel not entitled to compensation for defending Motion for Sanctions which sought relief only against counsel and not against bankruptcy estate or Debtor. Fees were not necessary to administration of case and did not provide any benefit to estate or Debtor as all fees were incurred solely to benefit third-party. Both Rule 9011 and 28 USC Section 1927 draw distinction between client and attorney. Rule 9011 Authorizes Court to impose sanctions against attorneys, law firms, or parties. 28 USC Section 1927 permits Court to assess sanctions only against attorney and not against party.

In re Hunt, 2018 WL 4092038 (Bankr. W.D. Mi. 2018) – Court can award compensation to Debtor's counsel to represent the interest of Debtor, not necessarily interest of estate, if services are in connection with bankruptcy case, beneficial, necessary to Debtor, and subject to usual standards for reviewing professional fees. Court will not award compensation for assisting Debtor's parents and Limited Liability Company owned by Debtor's parents in purchasing building. Fees included assistance to non-Debtor individuals and to artificial, non-Debtor entities. Although acquisition of property by Debtor's parents may indirectly benefit Debtor by allowing company in which Debtor was 50% member to reduce rent, potential financial benefit to Debtor is contingent upon company's success. Court does not award compensation merely because services benefit Debtor unless services also have nexus to bankruptcy proceedings. Services in connection with obtaining Bankruptcy Court approval for Debtor to execute guarantee agreement in connection with sale of property produced some possible benefit to Debtor and constituted legal services in connection with bankruptcy case where confirmed Plan required Court approval, warranting compensation for those services. However, balance of services involving representation of other entities in real estate transaction, while potentially benefiting

Debtor, were not performed in connection with bankruptcy case and, therefore, are not compensable.

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.

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 \$28,000 plus discharge of unsecured debt. Fee award of \$10,000 reasonable for services in light of benefit received and normal and customary fees.

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.

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.

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 Debtors nor the estate received any benefit and fees would make already failing case even more deficient and incapable of successful completion.

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.

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 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.

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.

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.

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 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.

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.

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.

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.

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.

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.

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.

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.

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 Debtor would not be able to perform financially.

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.

4.52 Fee Application – Time for Preparing

In re Arens, 2018 WL 4092040 (Bankr. W.D. Mi. 2018) – While counsel is entitled to compensation for preparing fee application, cost of filing application is not reasonable where cost exceeds amount of requested self. Counsel filed fee application seeking \$4.50 in legal services for which counsel charge \$120 of paralegal time plus \$23.22 for postage and copying. Fee application seeking \$4.50 in fees and \$120.84 and costs – at cost of \$143.22 to prepare and file fee application – contravenes statute and spirit of rules requiring denial of application.

In re Parker, Case No. 10-34607 (Bankr. E.D. Mi. 2018) - Time spent preparing fee application is compensable based on reasonable amount of time expended. There is no limit on amount of fees as Sixth Circuit has abrogated 5% rule and instead adopted reasonable fee standard.

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.

4.53 “Fees on Fees”

Lowe v. Ransier, 2018 WL 1279277 (6th Cir. BAP 2018) – Court can award fees for prosecuting fee application where request is based on Court’s contempt power rather than Section 330. Court’s authority to fashion remedy for contempt includes broad ability to not only coerce compliance but to compensate party harmed. Court’s power to sanction arises from inherent authority of court as well as Section 105. “American Rule” that provides that parties bear own attorney fees does not prevent award of attorney fees in contempt action as award is not based on “prevailing party” but is based on Court’s inherent authority to sanction contemptuous conduct. Bankruptcy Court’s 50-page order amply supported award of attorney fees in excess of \$90,000 resulting from contemptuous conduct.

In re Hungry Horse LLC, 2017 WL 4174359 (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.

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.

In re Rose, 2016 WL 6993738 (Bankr. W.D. Mi. 2016) – *Asarco* precludes award of attorney fees for time spent 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 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.

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 amount of bill but over detail in the description of services rendered.

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.

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.

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.

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.

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.

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.

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 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.

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).

4.55 Sanctions and Disgorgement

In re Dawood, Case No. 19-48945 (Bankr. E.D. Mi. 2019) – Section 329(b) affords Court discretion to require disgorgement of pre-petition retainer where retainer exceeds reasonable value of services. Disgorgement not warranted in Chapter 13 case dismissed pre-confirmation where Counsel performed substantial work for Debtor in compressed time period; services were necessary and beneficial to Debtor at time performed; and services provided significant value to Debtor. Although Court ultimately dismissed case, dismissal was not foregone conclusion when services were provided. And Debtor, who would benefit from disgorgement, actively opposed any disgorgement.

In re Freeman, 2018 WL 4362045 (Bankr. E.D. Mi. 2018) – Bankruptcy Court can order disgorgement of previously paid fees under Section 329 where fees awarded exceed reasonable value of services provided. Compensation paid to counsel exceeded reasonable value of services where purpose of filing Chapter 13 proceeding was to cure default in mortgage; attorney solicited Debtor as client specifically to save property from foreclosure; and Debtor hired attorney specifically to take that action. However, attorney did not file proof of claim for mortgage company resulting in funds that should have been paid to mortgage company being paid instead to unsecured creditors. Had counsel timely filed proof of claim, mortgage company would have received benefit of Plan and counsel would have earned fee paid in connection with Chapter 13 case. However, delay in filing proof of claim resulted in Trustee disbursing funds to unsecured creditors placing Debtors far worse off than Debtors were when case filed in first instance. Case stayed foreclosure sale but Debtors were 11 months more behind on their mortgage, Plan was running beyond 60 month confirmed Plan term, and Plan would not succeed in saving property from foreclosure. By not filing protective proof of claim, attorney effectively destroyed any value of case. If Debtors are able to be successful in completing Plan, it will not be as a result of attorney's services. Services had no value such that Court would order disgorgement of entire fee paid to attorney for Chapter 13 case.

In re Hackney, 2018 WL 2715054 (Bankr. N.D. Ohio 2018) – Bankruptcy Court ordered disgorgement of fees paid to attorney for Chapter 7 Debtor where attorney did not respond to United States Trustee's Motion to Dismiss. Evidence did not support attorney's argument that attorney was instructed by Debtor not to respond to Motion and conflicted with counsel's argument at the Bankruptcy Court that counsel had zealously and fairly represented Debtor in defending Motion.

Briggs v. Reed, Case No. 17-1143 (8th Cir. 2018) - Bankruptcy Court has jurisdiction to enter sanctions for contempt where party deliberately makes deceptive and misleading representations to Court. Bankruptcy Court ordered counsel to disgorge all fees received in bankruptcy case. Counsel represented to Bankruptcy Court that counsel received no fees and worked for free. Counsel did not produce documentation to support counsel's allegations and Court concluded that counsel made deliberately deceptive and misleading representations to Court and imposed sanctions including barring counsel from Bankruptcy Court for six months. Bankruptcy Court, as Article I Court, has jurisdiction to impose sanctions where matter at issue stems from bankruptcy itself. Bankruptcy Court sanctions based on earlier order calling for disgorgement. All sanctions orders flowing from disgorgement "arose in" bankruptcy case and did not implicate common-law claim.

In re Hackney, 2018 WL 2228175 (Bankr. N.D. Ohio 2018) - Section 329 permits disgorgement of fees to extend compensation exceeds reasonable value of services performed, considering nature, extent and value of services and other relevant factors. Evidence indicated that counsel services did not warrant any compensation. Counsel filed case for above-median Debtors but did not file response to United States Trustee's Motion to Dismiss for presumed abuse resulting in dismissal of case by default. Hourly rate of counsel is intended to reflect quality of representation. Counsel's efforts in case were inadequate where failing to defend Motion to Dismiss negative any other work counsel did in filing bankruptcy case because it resulted in dismissal of case leaving Debtor's unable to obtain benefit of discharge or fresh start. Further, services were not reasonably likely to produce benefit to Debtor or state where counsel's actions resulted in dismissal of case. Counsel ordered to disgorge all fees received in connection with case.

In re Smith, 2018 WL 1942176 (N.D. Ohio 2018) – Bankruptcy Court has discretion to order disgorgement of fees where services provided are not commensurate with fees charged. Attorney has obligation to determine when client was granted previous discharge before filing the Chapter 7 petition, yet attorney did not review PACER which would have disclosed prior filing only 7 years before commencing current case. Attorney received eleven Notices of Filing Deficiencies including Notices for Filing Deficiencies on Motion for stay pending appeal, none of which were addressed. Counsel's repeated errors forced four-month delay in resolving Motion to Vacate Discharge that was admittedly erroneously entered. Disgorgement Order was not product of mistake and would not produce miscarriage of justice.

In re Campbell, 2017 WL 5289545 (Bankr. W.D. Mi. 2017) – Attorney ordered to disgorge all fees received in connection with Chapter 13 case. History of case indicated overall lack of attention, plan drafting errors, and communication errors that were largely attorney's fault. Chapter 13 case dismissed before confirmation causing Debtor to lose house in foreclosure which was

point of Chapter 13 case in first instance. Attorney ordered to disgorge all fees received and cancel retainer agreement, preventing attorney from attempting to collect from Debtor directly.

Maikie 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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 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.

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.

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.

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 Debtors whereby they could seek additional legal advice, and they did not consent, in writing, to acceptance of this potential conflict.

4.56 Res Judicata

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.

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.

4.57 Costs

McGraw-Hill Companies v. Griffin, 2018 WL 4039302 (W.D. Ky. 2018) – Basic rule for what costs may be taxed and federal courts is contained in 28 USC Section 1920 which allows taxation of fees for clerk and Marshall; fees for printed or electronically recorded transcripts necessarily obtained; fees and disbursements for printing and witnesses; fees for exemplification and costs for making copies of materials where copies are necessarily obtained; docketing fees under 28 USC Section 1923; and compensation of court-appointed experts, interpreters and interpretation services. However, where statute specifically provides for recovery of full costs, Court may award both "taxable" and "non-taxable" costs. Fees for hosting database for maintaining of Electronically Stored Information recoverable where Statute on which complaint was based allowed recovery of "quote full costs", even if costs of maintaining database may not have been taxable in different contexts.

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.

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.

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.

In re Smith, 2011 WL 2293261 (Bankr. N.D. Ohio 2011) – Court cannot award reimbursement of expenses without itemized statement of expenses.

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.

4.58 Travel Time

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.

4.59 Overhead

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.

4.60 Effect of Discharge

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.

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.

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.

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.

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.

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.

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.

4.61 Post-Petition Services

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.

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.

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*.

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.

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.

4.62 Bankruptcy Court Review

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.

4.63 Fee Enhancements

United States v. Provider Services, Inc., 2019 WL 2422422 (S.D. Ohio 2019) – Fee enhancement is available only in rare cases of exceptional success and is appropriate only where adjustment is necessary or case is pathbreaking and of great social import, when counsel establishes new cause of action, or when litigation results in change in jurisprudence of issues litigated. Court will consider time and labor required; novelty and difficulty of questions; skill requisite to perform legal services; preclusion of other employment; customary fees; whether fee is fixed or contingent; time limitations imposed by client or circumstances; amount involved and results obtained; experience, reputation and ability of attorneys; undesirability of case; nature and length of professional relationship with client; and awards in similar cases. Counsel not entitled to fee enhancement where counsel achieved positive result on difficult facts due to competent representation, but result was not so exceptional as to render fee enhancement necessary.

H.D.V. Greektown, LLC v. City of Detroit, 2019 WL 2246176 (6th Cir. 2019) – Court has discretion to award fee enhancement under exceptional circumstances where lodestar calculation does not adequately take into account factors that may properly be considered. However, adjustments to lodestar should be made only under rare and exceptional circumstances. Mere delay resulting from cities bankruptcy filing is not exceptional circumstance where attorneys had opportunity to challenge confirmation of bankruptcy Plan but instead decided to wait until after Plan was confirmed and then seek relief in District Court. Further, enhancement of attorney fees would diminish ability of other creditors to receive payments under confirmed Plan and would disrupt “equality of distribution” which is hallmark of bankruptcy code. Counsel’s vague assertion that but for fee enhancement, no capable attorney would undertake similar representation did not include specific evidence such as surveys, affidavits or statistics to buttress vague forecast. Lower Court’s denial of fee enhancement and conclusion that case was not exceptional was not abuse of discretion.

Gordon v. Dadante, 2018 WL 3544901 (N.D. Ohio 2018) - Court has discretion to award “fee enhancement” where due to receiver’s efforts creditors received a distribution of 110% of claimed amounts. Receiver’s efforts produced unprecedented results in unwinding complex Ponzi scheme requiring extensive knowledge of securities regulations, real estate, banking, tax and contract law, and issues were particularly complex regarding inherent difficulty in selling large volumes of thinly traded stock. Fast work by receiver prevented brokerage firms from calling margin debt and liquidating stock at depressed prices. Receiver retain tax professionals to obtain tax refunds for bilked investors. Receiver accomplish results in face of constant and needless extensive opposition by many investors. Receiver spent 12 years working on case and overcoming obstacles, demonstrating ample skill and labor and efficient time management. Results achieved, described as “critical factor” weighed heavily in favor of additional compensation where Ponzi investors received 110% of amount invested. Receiver fees to date totaled \$8 million. 25% contingency fee based on amounts recovered would total more than \$12 million. Further, receiver was billing at excessively low hourly rate warranting 30% increase in producing additional compensation of \$1,200,000.

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.

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.

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.

4.64 Surcharge

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.

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 Debtor or that Creditors encouraged the performance of services, as

Debtor and the Applicant ultimately bear responsible for deciding what actions to pursue.

4.65 Voluntary Reduction

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.

4.66 Contingency Fees

In re Wyman, 2019 WL 4635577 (Bankr. E.D. Mi. 2019) – Section 328 allows Trustee to retain counsel with approval of court. Court may pre-approve fee arrangement if Motion for Appointment specifically requests fee pre-approval; Court’s Order approving retention addresses reasonableness of fee; and Motion or Order specifically refers to Section 328. Application sought pre-approval of one-third contingency fee where Motion clearly requested approval of contingency fee and Order for retention included this amount. Contingency fee for services in avoidance action measured by amount received by Estate for subsequent sale of recovered property. Attempt to use “value” rather than actual sale price is speculative. Attorney disbarred or otherwise terminated for cause before completing contingency fee services is no longer entitled to compensation using contingency fee calculation and instead will be compensated on quantum meruit basis to calculate reasonable value of services, taking into account professional standing and experience of attorney; skill, time and labor involved; amount in question and results achieved; difficulty of case; expenses incurred, and nature and length of relationship between attorney and client. In any event, amount of recovery must not exceed “capped” amount determined under contingency fee calculation.

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.

4.67 “End of Case” Issues

In re Ray, 2019 WL 2866562 (Bankr. W.D. Mi. 2019) – Counsel’s application for compensation, filed after Debtor made last Chapter 13 Plan payment and after Chapter 13 Trustee filed Notice of Final Cure and had distributed all funds on hand untimely. Trustee had no funds available to pay fees and plan had already run 60 months precluding modification to pay fees. Even if modification would be possible, it would not be fair to Debtor to remain under Court and Trustee tutelage because counsel did not timely file fee applications.

Howard v. Burk, 2018 WL 2107787 (9th Cir. BAP 2018) – Attorney’s fees remain subject to Bankruptcy Court approval and constitute administrative expenses as long as fees are incurred while “representing the interests of Debtor in connection with the bankruptcy case”. Counsel’s fees for services rendered after Notice of Final Cure and before entry of discharge constitute administrative expenses that are discharged. Although Plan cannot be modified, Debtor retained option of making additional Payments to Trustee to be used to pay outstanding attorney fees. Further, under Local Rules, attorney could receive direct payments from Debtor if Debtor requested Court authorization for direct payments made before entry of discharge. After entry of discharge, Court could not “except” Debtor from discharge or provide any means by which attorney could legally compel payment of outstanding fees.

In re Kulbatsky, Case No. 10-66164 (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.

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.

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.

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.

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.

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.

4.68 Attorney for Chapter 7 Trustee

Sicherman v. World Auto Network, Inc., 2019 WL 4741674 (Bankr. N.D. Ohio 2019) – Attorney for Trustee not entitled to compensation spent before entry of Order Approving Retention of Counsel.

In re Wyman, 2019 WL 4635577 (Bankr. E.D. Mi. 2019) – Section 328 allows Trustee to retain counsel with approval of court. Court may pre-approve fee arrangement if Motion for Appointment specifically requests fee pre-approval; Court's Order approving retention addresses reasonableness of fee; and Motion or Order specifically refers to Section 328. Application sought pre-approval of one-third contingency fee where Motion clearly requested approval of contingency fee and Order for retention included this

amount. Contingency fee for services in avoidance action measured by amount received by Estate for subsequent sale of recovered property. Attempt to use “value” rather than actual sale price is speculative. Attorney disbarred or otherwise terminated for cause before completing contingency fee services is no longer entitled to compensation using contingency fee calculation and instead will be compensated on quantum meruit basis to calculate reasonable value of services, taking into account professional standing and experience of attorney; skill, time and labor involved; amount in question and results achieved; difficulty of case; expenses incurred, and nature and length of relationship between attorney and client. In any event, amount of recovery must not exceed “capped” amount determined under contingency fee calculation.

In re Bartlett, 2018 WL 4521227 (Bankr. D. Mas. 2018) – Section 326 does not preclude award of compensation to Chapter 7 Trustee where case converts to Chapter 13 before Trustee collects assets or makes distributions. Section 326 limits Trustee compensation in case under Chapter 7. Once case is converted, Case is no longer “under Chapter 7” and is not subject to limitation under Section 326. Trustee and counsel for Trustee entitled to compensation under Section 330. Court awarded Trustee and counsel \$12,000 for time expended investigating Debtor’s potentially nonexempt assets before Debtor convert case to Chapter 13.

In re Parker, Case No. 10-34607 (Bankr. E.D. Mi. 2018) - Attorney for Chapter 7 Trustee entitled to reasonable compensation for actual and necessary services and reimbursement of actual and necessary costs. Court is prohibited from allowing compensation for unnecessary duplication of services; or services that were not (a) reasonably likely to benefit Debtor’s estate or (b) necessary to administration of case. Further, services are compensable only to extent that services were for performance of services as attorney or accountant for estate and not performance of Trustee duties generally performed by Trustee without assistance of counsel. Trustee duties defined in Section 704 include collecting and reducing to money property of estate; being accountable for property of estate; investigating financial affairs of Debtor; examining proofs of claim and objecting as appropriate; and furnishing information as requested by interested parties. Related duties include services related to sale of assets; examination of Debtor’s record; routine telephone calls and correspondence; preparing application for employment of professional; and acting as liaison with special counsel. Services for receipt and review of documentation from special counsel; correspondence regarding special counsel to be employed; receipt of notice of hearing; receipt of correspondence regarding settlement; drafting correspondence to creditor regarding potential claim; preparation of application to employ special counsel; general correspondence regarding case; correspondence regarding settlement value of case; receipt of documents regarding class action suit; receipt and review of closing statement; receipt and review of order; and correspondence regarding estate tax returns constitute services to be performed by Trustee which are not compensable. Charge of 2.5 hours for time spending attending hearing on objection to exemptions was not reasonable where actual hearing did not occur that day as case was called and parties agreed on record to adjourn the hearing date. Trustee’s services in drafting affidavit of disinterestedness, objection and brief to exemptions, reviewing amended schedules, reviewing response to objection, correspondence with Debtor’s attorney regarding settlement of objection to exemptions, drafting stipulation and order; drafting and revising motion compromise; reviewing release and indemnity agreement; corresponding with Debtor’s counsel regarding order; reviewing objection to claim; and researching whether claim was valid required skills of attorney beyond scope of Trustee’s ordinary duties and are compensable. Typographical error regarding date on which hearing was held did not render time non-compensable where time entry reflected hearing that was held and there was no separate time request for preparing for hearing on date hearing was actually held. Analysis begins with lodestar method by multiplying reasonable hourly rate by number of hours reasonably expended which Court can then exercise discretion to adjust based on novelty and difficulty of issues; special skills of counsel; results obtained; and whether fee awarded is commensurate with fees for similar professional services in not bankruptcy cases. Time spent drafting fee application is compensable based on reasonable amount of time expended. There is no limit on amount of fees as Sixth Circuit has abrogated 5% rule and instead adopted reasonable fee standard.

In re Ward, 2017 WL 6205378 (Bankr. M.D. Tn. 2017) – Trustee permitted to retain own firm as counsel but must provide clear itemization of services performed to ensure that Trustee and Firm are not being compensated for same time expended. Trustee and Attorney should file separate itemizations and must maintain separate records and provide clear, concise, separate and distinct documentation to justify fees. Services performed by Trustee in role as Trustee are not compensable to Attorney for Trustee. Firm not entitled to compensation where Trustee retained outside counsel and then retained own firm to supervise outside counsel as retention of Trustee’s firm merely built in second layer of expenses that was unnecessary as Trustee could adequately supervise outside counsel without need to retain Trustee’s own firm.

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 against 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.

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.

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.

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.

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.

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.

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.

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.

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.

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 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, 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 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 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.

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.

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 USC § 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.

4.69 Effect of Order Awarding Compensation

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 Debtor, leaving the balance to be paid by Trustee

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*

4.70 Grant and Withdrawal of Approval

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.

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

4.71 Procedure

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.

JP Morgan Chase Bank, N.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.

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.

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.

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).

4.72 Mootness

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.

4.73 Standing to Request Withdrawal

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.

4.74 Grounds to Request Withdrawal

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.

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.

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.

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.

4.75 Death or Incapacity of Counsel

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.

4.76 Disqualification of Counsel

McClarty v. Wise, Case No. 18-4131 (Bankr. E.D. Mi. 2018) - Michigan Rules of Professional Conduct 1.7(a) and 1.10 preclude counsel from engaging in representation where doing so is adverse to interest of another client. Conflict is not waivable by consent and any belief that attorney may have that representation will not adversely affect relationship with other client was not reasonable belief. Counsel for Debtor could not represent counsel for defendant in adversary proceeding in same bankruptcy case as doing so would present conflict of interest.

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.

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.

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 counsel themselves. Conflict, if any, would be personal to the defendant and defendant believed that continued representation was in best interest of defendant.

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.

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.

In re Ralph Roberts Realty, Inc., Case No. 12-53023 (Bankr. E.D. Mi. 2013) – Creditor counsel disqualified from adversary proceeding where counsel represented 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 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 Debtor and the principal of 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

4.77 Generally

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.”

4.78 Limitations

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.

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.

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.

4.79 Retention of Professionals – Standing to Request

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.

4.80 Time for Application

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

4.81 Retention of Professionals – Salaried Employees

In re Butterfliez 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.

4.82 Retention of Professionals – *Nunc Pro Tunc* Approval

In re Campbell, 2019 WL 2866745 (Bankr. W.D. Ky. 2019) - Section 327 and Section 1107 permit Debtor-in-possession to retain counsel subject to approval of Bankruptcy Court. Court will interfere with choice only in rarest cases where proposed attorney has actual conflict of interest or where estate would not be served by Debtor-in-possession’s choice. Counsel must not hold interest that is adverse to estate and counsel must be disinterested. Code does not define “actual conflict”. Courts apply factual analysis to determine whether actual conflict of interest exists. Proposed counsel’s prior representation of non-Debtor’s spouse and corporation in part owned by Debtor did not present actual conflict of interest. However, application filed 4 months after commencement of case would not be granted *nunc pro tunc* where there was no reason set forth for counsel’s untimely application. Application would be approved as of date of filing of application.

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 USC § 327 which is designed to ensure that a “screening process” is used to ensure the neutrality of the professional hired to represents an estate’s interest. This screening process is most effective when performed at the outset of the bankruptcy case.

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.

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.

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.

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.

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.

In re Greektown Holdings, LLC., Case No. 08-53104 (Bankr. E.D. Mi. 2010) - Section 327 and Section 1107 require prior court approval before a trustee or Debtor in possession retains property appraiser. Bankruptcy Rule 2014 allows *nunc pro tunc* approval only if exceptional circumstances unique to the particular case are present. Applicant must satisfactorily explain failure to receive prior judicial approval and the services must have been beneficial to the bankruptcy estate. Mere negligence is not an exceptional circumstance justifying retroactive retention. Proposed appraiser had extensive experience in Chapter 11 proceedings and was fully aware of need for prior court approval. Although court approval likely would have been granted had application been timely filed, that is not sufficient to warrant *nunc pro tunc* relief. Further, the parties failed to act diligently in seeking approval and waited more than 10 months after appraisals were performed before seeking approval. Failure to obtain prior

approval was result of negligence, inattention or inadvertence on the part of a combination of sophisticated parties, and does not rise to level of exceptional circumstance.

4.83 Retention of Professionals – Standard for Approval Generally

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.

4.84 Retention of Professionals –Ethical Limitations

4.85 Retention of Professionals – Disinterestedness

In re Dungey, Case No. 16-21600 (Bankr. E.D. Mi. 2017) – Chapter 13 Trustee has standing to seek approval of retention of appraiser where Trustee disputed creditor’s claimed value of motor vehicle to be retained in Chapter 13 Plan. Plan proposed to pay secured claim in full. Trustee objected, alleging that value of vehicle was less than amount owed and that claim was not protected by 910 day provision of Section 1325 as loan was not purchase money but was cross-collateralized credit card debt. Creditor did not oppose Application to retain appraiser (which was done *ex parte* with consent of the United States Trustee), Creditor opposed payment of \$200 appraiser fee, contending that Creditor would have agreed to reduce its claim had Trustee requested. However, Creditor had notice that Trustee disputed value and yet did not make any attempt to amend claim to reduce secured valuation until after Trustee hired appraiser and incurred administrative expense.

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.

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.

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 of 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.

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.

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 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.

4.86 Retention of Professionals – Failure to Obtain Court Authorization

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.

4.87 Attorney as Agent

In re Sterling, 933 F.3d 828 (7th Cir. 2019) – Party violates discharge injunction where party has knowledge of granting of discharge and undertakes actions which willfully violate post-discharge injunction. Creditor had actual knowledge of discharge order. Although creditor did not take action to collect debt, creditor’s attorney who had been pursuing collection for over 10 years (but who did not have notice of bankruptcy or discharge) continued to pursue collection resulting in Debtor’s arrest. Although creditor took no action that violated discharge order, creditor is responsible for acts of attorney under principal/agency law. Attorney could not be held liable for violation of discharge injunction. Although knowledge of agent is imputed to principal resulting in client having “knowledge” of counsel’s actions for purposes of liability, reverse is not true – knowledge of principal is not imputed to agent for purposes of determining whether agent willfully violated discharge order.

H. Ethical Issues

4.88 Conflict of Interest

Peterson v. Sanches, 2019 WL 3822315 (Bankr. N.D. Il. 2019) – Attorney for Debtor in Chapter 7 is not disqualified from representing defendants in subsequent avoidance actions if lawyer was not representing Debtor at time transactions in question took place. Debtor’s former counsel appeared as counsel for multiple defendants but not as counsel for any insiders. Attorney for Chapter 7 Debtor owes no duty to Trustee or estate, but only duty to Debtor to assist it in carrying out limited duties related to Trustee.

McClarty v. Wise, Case No. 18-4131 (Bankr. E.D. Mi. 2018) - Michigan Rules of Professional Conduct 1.7(a) and 1.10 preclude counsel from engaging in representation where doing so is adverse to interest of another client. Conflict is not waivable by consent and any belief that attorney may have that representation will not adversely affect relationship with other client was not reasonable belief. Counsel for Debtor could not represent counsel for defendant in adversary proceeding in same bankruptcy case as doing so would present conflict of interest.

4.89 Reliance on Advice of Counsel

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.

4.90 Diligence

In re Karipides, 2018 WL 5099658 (Bankr. N.D. Ohio 2018) - Counsel has ethical duty to represent Debtor with diligence. Lack of responsiveness is inconsistent with duty to respond to inquiries made by Debtor in furtherance of administration of case; and obligation to be available to respond to Debtor’s questions throughout life of Plan. Absence of specific pecuniary harm does not prevent Court from imposing sanctions. Counsel received “no-look” fee for Chapter 13 case which contemplates counsel will be responsive to Debtor’s inquiries. Counsel failed to provide services that meet these expectations such that the “no-look” fee results in windfall to counsel. Counsel’s lack of diligence resulted in counsel not earning full no-look fee where counsel’s actions evidenced delays, multiple deficiencies and lack of responsiveness. Court ordered reduction in counsel’s compensation by \$500.

4.91 Duty to Communicate With and Advise Client

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.

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.

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.

4.92 Filing for Improper Purpose

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.

4.93 Communication with Clients

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.

4.94 Candor to Court

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.

4.95 “Stand In” or Substitute Attorneys

In re D’Arta, Case No. 18-10524 (Bankr. S.D.N.Y. 2018) – Attorneys practicing before Bankruptcy Court on ethical obligations to clients in must not use “appearance counsel” as way of “passing the buck” on those obligations. Counsel filed a petition for Debtor but did not appear to represent Debtor at Section 341, instead sending “appearance counsel” is not hired by Debtor, but hired on behalf of Debtor’s counsel even though “appearance counsel” was not employed at Debtor’s counsel’s firm. During questioning at Section 341, appearance counsel was not at all familiar with Debtor’s case and could not provide any assistance in answering questions or explaining information to Trustee. Chapter 7 Trustee at conclusion of Section 341 meeting told appearance counsel to have Debtor’s counsel file amendments to correct errors in schedules and rescheduled Section 341 meeting requiring 2nd trip downtown for disabled Debtor. Neither appearance counsel nor Debtor’s counsel made any attempt to follow up with Debtor to amend schedules or correct information previously presented. At adjourned Section 341 meeting, Debtor’s counsel again did not appear and sent different appearance counsel who indicated she had never met Debtor and had no information concerning issues relating to Debtor’s filings. Debtor testified at 2nd Section 341 meeting that schedules were still incorrect, that counsel did not advise Debtor that counsel would not appear at the Section 341 meeting, that Debtor’s counsel did not obtain Debtor’s consent to file amended schedules, and that counsel affixed copy of Debtor’s signature from different document to amended schedules. Counsel required to return to Debtor 100% of fees paid as counsel did not adequately represent client either in documents filed or at Section 341 meeting. Debtor’s counsel’s conduct violated Rules of Professional Responsibility as counsel did not obtain Debtors informed consent for use of appearance counsel and failed to ensure that appearance counsel was adequately prepared. Use of appearance counsel is problematic as appearance counsel is unfamiliar with case and pleadings and usually have not met Debtor and appear not having ever seen the file and with no authority to act on behalf of Debtor and even simplest situations. Court

expressed intent to be exceedingly vigilant and to consult with all bankruptcy judges in district concerning possible bar of use of appearance counsel.

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.

4.96 Suspension and Disbarment

In re Denny, 2018 WL 2325772 (Bankr. E.D. Ky. 2018) – Bankruptcy Court can take into consideration Rules of Professional Conduct in determining appropriate sanctions. Attorney repeatedly mishandled client funds in violation of Rule 1.5 where attorney did not maintain escrow account for legal fees; does not maintain ledger or other financial records system to manage client funds; and repeatedly pocketed client funds intended to pay filing fees. Attorney violated duty of candor to Court in violation of Rule 3.3 by making false statements and documents filed on behalf of clients including representing that clients had requested payment of filing fees in installments when clients were unaware of and never requested that relief and, instead, had provided funds to attorney to pay filing fees in full prior to commencement of representation. Attorney did not competently represent clients as required by Rule 1.1 where attorney did not file bankruptcy petition promised for one client; allowed at least one other case to be dismissed for failure to file schedules and necessary documents; and did not pay filing fees although clients had provided sufficient prepetition funds to pay filing fees resulting in multiple cases being dismissed. Bankruptcy Court has inherent power to issue sanctions as well as authority under Section 105 and Section 526. Attorney evidenced consistent pattern of disregard for rules affecting debt relief agencies as well as Rules of Professional Conduct. Attorney order to disgorge \$4610 and was permanently disbarred from practice before Bankruptcy Court.

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.

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.

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.

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.

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.

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.

I. Bankruptcy Petition Preparer

4.97 Defined

In re Njoky, 2018 WL 3964863 (Bankr. N.D. Ohio 2018) - Section 110 defines “bankruptcy petition preparer” as person other than attorney or employee of attorney who prepares for compensation petition or other documents for filing by Debtor in connection with bankruptcy case. BPP must include information identifying preparer on every document for filing. Petition, schedules, statement of intention, statement of financial affairs, and verification of creditor matrix are separate documents, each of which may give rise to separate violation. BPP must also file a fee declaration with any documents it prepares on Debtor’s behalf.

4.98 Disclosure

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.

4.99 Allowable Services

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.

In re Hutchinson, 2013 WL 639051 (Bankr. E.D. Mi. 2013), *aff’d* 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.

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 Debtor and providing the forms to 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.

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 Debtor’s interests in property or Debtor’s debts; or concerning bankruptcy procedures and rights. BPP committed unauthorized practice of law by counseling Debtor that a Chapter 7 proceeding would be “best”; BPP categorized debts as secured or unsecured; BPP determined which property would be exempted and under what law; and BPP drafted Motion

to Set Aside Judgment in connection with Order Lifting Automatic Stay. BPP required to disgorge all his fees to the UST for refund to Debtor.

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 Debtor.

4.100 Compensation

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.

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.

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.

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.

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.

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.

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.

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.

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.

4.101 Disgorgement

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.

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.

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.

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.

4.102 Sanctions

In re Njoky, 2018 WL 3964863 (Bankr. N.D. Ohio 2018) – Section 110 Allows Court to punish violations of Section 110 by fine of up to \$500 per violation, to be tripled if BPP fails to inform Debtor that Debtor is filing for bankruptcy or does not identify itself on forms prepared. Company qualified as BPP because it and agents were non-attorneys that prepared documents subsequent filed with Court. BPP did not identify itself on petition, schedules or verification of matrix, did not provide Debtor with copies of forms of prepared, and did not file require disclosure of receipt of compensation. BPP also did not inform Debtor that Debtor was filing for bankruptcy and did not identify itself on any of the forms repaired, triggering Section 101 provision for tripling of damages. BPP committed five separate \$500 violation subject to tripling resulting in total finest \$7500 plus \$2000 in statutory damages as conduct as BPP was deceptive and fraudulent.

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.

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.

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 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.

Sullivan v. McDermott, 2013 WL 639051 (Bankr. E.D. Mi. 2013), *aff'd*, 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.

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

and was not harmed by filing, actions did cause Plaintiff to lose benefit of mortgage modification agreement that had been proposed by mortgage company that would have lowered payments and allowed Plaintiff to stay in home. Mortgage modification had real value as it would have saved Plaintiff \$75,000 in mortgage payments. Court determined that actual value of lost modification to Plaintiff was \$10,000 and awarded damages in that amount.

4.103 Unauthorized Practice of Law

Fitzpatrick v. Law Solutions Chicago, LLC, 2018 WL 1413180 (E.D. Tn. 2018) – Person engages in unauthorized practice of law where person not licensed to practice offers legal advice to party. Complaint sufficiently stated cause of action where complaint alleged that non-attorney defendants, staff members of Defendant Law Firm by (1) advising Debtor as to what Chapter of bankruptcy to file under including requirements for Chapter 7 relief and later advising that Debtor must file Chapter 13 bankruptcy petition; (2) advising Debtor that she should file bankruptcy case; (3) advising Debtor that she would be able to keep her truck through bankruptcy; (4) soliciting Debtor to use UpRight Law's services for filing bankruptcy case; (5) soliciting and negotiating fee for the representation of Debtor; and (6) soliciting and advising that she would have no problem filing a bankruptcy case. Attorney licensed exclusively Illinois committed unauthorized practice of law by advising clients who lived in state of Tennessee by (1) advising and soliciting Debtor to cease making payments to unsecured creditors prior to filing for bankruptcy; (2) advising and soliciting Debtor on the effect of dischargeability on pre-petition debt; (3) advising and soliciting Debtor on tactics and techniques to defend against a pending Tennessee state law case brought by a creditor; (4) advising and soliciting Debtor as to what Chapter of the United States Bankruptcy Code under which she should seek relief; and (5) advising and soliciting that Debtor would have no problem filing a Chapter 7 bankruptcy petition. However, complaint did not state cause of action where Law Firm already refunded all fees paid and Plaintiffs did not allege any other damages flowing from UPL.

Farinash v. UpRight Law, LLC, 2017 WL 5499714 (Bankr. E.D. Tn. 2017) – Person engages in unauthorized practice of law where person is not duly licensed, or where association or corporation engages in practice of the law or law business. Private cause of action exists for person who suffers loss as result of unauthorized practice of law, including treble any actual damages sustained and treble any amount paid by the person, and Court can issue orders and injunctions to restrain, prevent and remedy violations of this chapter. Complaint alleged that Defendant, a non-attorney, committed unauthorized practice of law by (1) negotiating fee for representation of Debtors; (2) advising Debtors as to what chapter of Bankruptcy Code under which Debtors should seek relief; (3) advising Debtors that they could not regain possession of vehicle repossessed more than ten days previously; (4) advising Debtors of the amount of chapter 13 payment; (5) advising Debtors not to pay mortgage company to stop pending foreclosure; (6) advising Debtors that their house was not up for sale; (7) advising Debtors how long bankruptcy would stay on credit report; (8) directly soliciting Debtors to retain UpRight Law by negotiating fee for representation; (9) directly soliciting Debtors to hire UpRight Law for bankruptcy filing; (10) directly soliciting Debtors hire UpRight Law by advising them concerning ability to reacquire possession of repossessed vehicle; (11) directly soliciting Debtors to hire UpRight Law by advising them of chapter 13 payment amount; (12) directly soliciting Debtors to hire UpRight Law by advising Debtors not to pay mortgage company to stop pending foreclosure; (13) directly soliciting Debtors to hire UpRight Law by advising them that their house was not up for sale. Defendant's questions about Debtors' debts exceeded mere gathering information when Defendant advised Debtors that there was no point in paying the past due amount on mortgage and that Debtors would have to file chapter 13 because real property taxes were owed, as evaluation of course Debtors should pursue would require knowledge comparative benefits and limitations of automatic stay and extent of cure provisions; and provided specific information concerning amount of Chapter 13 Plan payment which required analysis of sections 1322 and 1325. Complaint alleged that incomplete and inaccurate information was provided, that alternative legal actions were not taken in reliance on advice, and taking different action may have produced different result.

In re Hutchinson, 2013 WL 639051 (Bankr. E.D. Mi. 2013) – Petition preparer 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.

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.

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 Debtor's claimed exemptions.

V. Commencing Case

A. Eligibility for Relief

5.1 Section 109 – Generally

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.

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

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

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.

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 Prior Voluntary Dismissal

In re Wallace, Case No. 18-31841 (Bankr. E.D. Mi. 2019) – Section 109(g)(2) requires dismissal of case if Debtor voluntarily dismissed prior case following request for relief from stay and new case is filed within 180 days of prior dismissal. Section 109 is clear statutory mandate without condition. Identity of party seeking stay relief in prior case is irrelevant and fact that creditor seeking dismissal in current case was not creditor who sought stay relief in prior case did not avoid mandatory dismissal. Debtor in first case sought stay relief to proceed with litigation in state court. Debtor later voluntarily dismissed first case and sought to file new case within 180 days. Debtor’s second petition barred by Section 109(g)(2).

In re Carter, Case No. 18-10069 (E.D. Mi. 2018) – Section 109(g)(2) requires dismissal where Debtor has previously voluntarily dismissed bankruptcy case after creditor sought relief from automatic stay and new cases filed within 180 days of dismissal of prior case. There is no temporal requirement or limitation under Section 109. Fact that first case was dismissed 2 years after creditor sought relief from automatic stay does not alter effective Section 109. Fact that prior Motion for Relief had been resolved well before case had been dismissed does not alter bar under Section 109(g)(2) to refiling within 180 days. Bankruptcy Court erred in holding that Section 109 (g) did not require dismissal where there was significant time gap between creditors request for relief from stay and ultimate voluntary dismissal as there is no causal link or connection between the request for stay relief and the dismissal. Dismissal does not “follow” motion for relief but motion for relief happens to pre-date dismissal. Case reversed and remanded to Bankruptcy Court for entry of Order dismissing case.

In re Turner, 2018 WL 1914691 (Bankr. E.D. Mi. 2018) – Section 109(g)(2) requires dismissal of case where prior case was voluntarily dismissed after request for relief from stay. In prior case, Debtor and Creditor entered stipulated order modifying stay. Debtor later voluntarily dismissed and sought to refile within 180 day window. Dismissal is mandatory and it is irrelevant whether there is causal link between filing of stay relief in prior case and later voluntarily dismissal, and regardless of Debtor’s good faith.

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. 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 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.

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.

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.

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.

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 operated as 180 day bar to re-filing from date of dismissal.

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.

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.

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.

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.

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.

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.

In re Riekens, 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.

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.

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.

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.

5.5 Simultaneous Estates

In re Spaccarotella, Case No. 18-47919 (Bankr. E.D. Mi. 2018) – Debtor may not have two bankruptcy cases pending in same time. Where Debtor’s prior Chapter 7 proceeding remained open, Debtor’s subsequently filed Chapter 13 case must be dismissed.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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*.

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.

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.

5.6 Improper Purpose

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.

5.7 Marijuana Assets

In re Basrah Custom Design, Inc., 2019 WL 2202742 (Bankr. E.D. Mi.), *rehearing denied*, 2019 WL 2521122 (Bankr. E.D. Mi. 2019) - Debtor cannot be in bankruptcy where Debtor is violating Controlled Substances Act 21 USC Section 856. CSA prohibits opening, leasing, renting, using or maintaining premises for purposes of manufacturing, distributing or using control substances; or managing or controlling anyplace as owner, lessee, agent, employee, occupant and knowingly or intentionally renting, leasing or profiting from facility used for purpose of manufacturing stirring or distributing controlled substance. Debtor in violation of CSA although Debtor had no involvement in marijuana business where Debtor leased premises to tenant specifically for purposes of operating state authorized medical marijuana dispensary.

In re Way to Grow, Inc., 597 BR 111 (Bankr. D. Colo. 2018) - Chapter 11 case dismissed where Debtors involved sale of equipment for indoor hydroponic and gardening related supplies. Although Debtor's had no direct or indirect interest in or involvement with any marijuana business, Debtor's acknowledge that hydroponic gardening equipment may be used for many types of crops but future business expansion was tied to cannabis industry. CSA prohibits any person from possessing or distributing any equipment, product or material which may be used to manufacture controlled substance knowing, intending or having reasonable cause to believe that it will be used to manufacture controlled substance. Debtors knew they were selling products to customers who do and will use products to manufacture marijuana and Debtor's tailored business to cater to those needs. Cause existed to dismiss case under Section 1112(b).

Olson v. Van Meter, Case No. 17-1168 (9th Cir. BAP 2018) – Bankruptcy Court erred in *sua sponte* dismissal of Debtor's Chapter 13 case merely

because tenant operated marijuana dispensary in commercial property owned by Debtor. Debtor's proposed Chapter 13 Plan filed to stop foreclosure of commercial real property did not violate Section 1325(a)(2) merely because one tenant in commercial property operated marijuana dispensary. Evidence indicated that Debtor, a 92-year-old woman, was not involved in day-to-day operations of property. Debtor's son acted as manager of property and executed lease with tenant to operate dispensary. the Plan provided for sale of property within six months of confirmation with funds to be used to pay all claims in full; and Debtor filed Motion to Sell property under Section First Modified Pre-Confirmation Chapter 13 Plan and to reject lease with dispensary. Bankruptcy Court did not articulate legal basis for dismissal or make factual findings to support dismissal. Chapter 13 Trustee would not be administering proceeds of any illegal business as Plan did not propose to use rents and income from property for Chapter 13 Plan payments but instead paid all rents and income to mortgage holder for payment of adequate protection under valid assignment of rents. Bankruptcy Court made no findings that Debtor's conduct violated Control Substances Act and there was no evidence that Debtor knowingly and intentionally allowed property to be used for purpose of distributing drugs. Fact that marijuana had some incidental connection to Chapter 13 case did not mandate dismissal under Section 1307.

Geiger v. Cook Investments NW, SPNWY, LLC, Case No. 17-5516 (W.D. Wa. 2017) – Debtor who owned commercial facility that was leased to third party who operated facility as state-licensed grower of marijuana. the Plan rejected lease with third party and presented plan based entirely on non-marijuana related income. When Court is presented with an undisputed, known criminal violation, Court cannot ignore violation and fail to consider whether Court is confirming plan premised on illegal behavior, but Court is not required to dismiss case where Plan did not contemplate continued illegal behavior or any income derived from illegal behavior.

Arenas v. United States Trustee, 535 BR 845 (10th Cir. BAP 2015) - Chapter 7 case filed by marijuana grower and wife dismissed. Although Debtor's were licensed to grow and dispense medical marijuana case must be dismissed. Although activities were illegal under state law, they violated CSA and bankruptcy Trustee could not administer marijuana assets including plants and building as doing so would violate CSA.

In re Rent-Rite Super Kegs West, Ltd., 484 BR 799 (Bankr. D. Colo. 2012) - Chapter 11 case dismissed for cause where Debtor derived roughly 25% of revenues from leasing warehouse space to tenant engaged in business of growing marijuana. Although Debtor was not directly or indirectly involved in marijuana growing operation, Debtor's knowing the lease of property to tenant involves continuing violation of CSA even though activity was arguably illegal under state law and even though Debtor was never charged or prosecuted and federal prosecutors generally exercise prosecutorial discretion to decline to seek indictments under CSA where activity is legal under state law.

5.8 Petition Generally

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.

5.9 Petition – Execution by Holder of Power of Attorney

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.

5.10 Petition - Name of Debtor

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.

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”.

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.

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.

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.

In re Xclusive, Case No. 10-78256 (Bankr. E.D. Mi. 2011) – Petition must be filed using Debtor's legal name. Other names are to be included in “All Other Names” box on petition. Case dismissed where Debtor filed under assumed or fictitious name “XCLUSUVE”.

5.11 Petition – Lack of Original Signature

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.

5.12 Corporate Authorization

Sino Clean Energy, Inc. v. Seiden, Case No. 17-15316 (9th Cir. 2018) – Prior Corporate Board of Directors lacked standing to file voluntary bankruptcy petition on behalf of Corporation where prior Board had been removed by State Court Receiver and replaced prior Board with Receiver as sole director. Corporations later attempt to reconstitute Board invalid as only State Court Receiver had power to reconstitute Board. Members of former Board were not members of Board of Directors “then in office” and therefore were not authorized to file bankruptcy petition. Receiver’s actions did not constitute unlawful denial of Corporate right to file bankruptcy altogether as Corporation was and remained fully able to file for bankruptcy had Board of Directors authorized filing.

Franchise Services of North America, Inc. v. U.S. Trustee, Case No. 18-60093(5th Cir. 2018) - Bankruptcy Court must dismiss bankruptcy petition filing was not authorized in accordance with corporate charter. Corporate charter required majority of all classes of equity, voting separately, to approve bankruptcy filing. Corporation filed bankruptcy petition without holding a vote of shareholders, arguing that creditor who also control preferred stock would “feel” attempt to file bankruptcy. “Blocking provision” that permitted creditor or equity holder to prevent bankruptcy filing was not invalid, even where creditor and equity holder were same party. Court left door open for case where exercise of “blocking provision” was merely ruse to force Debtor to pay debt. If Corporation believes that shareholder is violating fiduciary obligation, Corporation’s remedy is in State Court, not circumventing filing requirements of the Bankruptcy Code.

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.

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.

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.

5.13 Decedent’s Estate

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.

5.14 Trusts

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.

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).

5.15 Chapter 12 – “Family Farmer

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 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 reseeding 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.

In re Perkins, 2016 WL 8078319 (Bankr. W.D. Ky. 2016), *affd*, 2018 WL 1279252 (6th Cir. BAP 2018) - 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.

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 Debtor and spouse, and 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.

5.16 Tax Returns – Section 521(e)(2)

In re Mitchell, Case No. 17-68428 (Bankr. N.D. Ga. 2018) – Section 521(e)(2)(A)(i) requires Debtor to submit to Trustee tax return for most recent tax year ending before commencement of the case and for which tax return was filed. Debtor's most recent tax year for which return was filed was 2007, as Debtor had no taxable income from 2008 to 2014 and so was not required to file return; and Debtor's taxable income for 2015 and 2016 was below threshold. Court would not dismiss case where last required return was 10 years old, Debtor did not recall who prepared return, and return from 2007 would not have any pertinent information. Even if Debtor's income for 2016 was high enough to require return, Debtor not required to turnover return that had not been filed as Section 521 is limited to tax year "for which a ... return was filed".

B. Joint Cases

5.17 Same Sex Couple

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.

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.

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.

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.

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

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 Civil Union

In re Simmons, Case No. 18-3147 (Bankr. N.D. Ill. 2018) – Couple’s “Certificate of Civil Union” created relationship which was substantively same as marriage under State law, authorizing parties to file Joint Petition. Section 109 and Section 302 allow joint filing of Debtor and Debtor’s spouse but does not define “spouse”. Under applicable State law, parties to Civil Union have same legal obligations, responsibilities, protections and benefits as those given to married persons. Although Federal Government treats Civil Unions differently from marriages, different treatment by Federal Government is not relevant to nature of relationship under State law; and status is not altered by fact that other states may not recognize or give validity to State Civil Union. Court declined to make determination whether Civil Union has the same social meaning as marriage.

5.20 Effect

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 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 Co-debtor. 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.

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.

5.21 Improper Joinder

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.

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. Venue

5.22 Generally

In re Skelton, 2018 WL 1054099 (Bankr. N.D. Ga. 2018) – 28 USC Section 1408 requires case to be filed in district where Debtor has domicile, residence, principal place of business, or principal assets. Case filed in improper venue must be transferred or dismissed.

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.

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 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.

5.23 Domicile

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.

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 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. Debtor was born in Michigan. Debtor was employed in Michigan. Debtor's parents were Michigan residents. Debtor was educated in Michigan. Debtor earned his certification as a union journeyman plumber and pipefitter in Michigan. Debtor's stated subjective intention is overwhelmingly buttressed by the objective facts including that Debtor offered the Wisconsin Cottage for sale and posted for sale signs on the property; all of 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 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 Debtor's address of record for the Social Security Administration and his union pension plan; and Debtor resides approximately 50% of the time at the Michigan Cabin Property. Venue proper in the Western District of Michigan.

5.24 Location of Principal Assets

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.

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 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.

5.25 Residence

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.

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.

5.26 Principal Place of Business

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.

5.27 Location of Claim or Property

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

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.

5.28 Affiliate Venue

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.

5.29 Default Venue

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.

5.30 Dismissal – Venue Improper

In re Skelton, 2018 WL 1054099 (Bankr. N.D. Ga. 2018) – 28 USC Section 1406 requires Chapter 13 case filed in improper venue to be dismissed or transferred to proper venue but Court cannot retain case where venue improper.

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.

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*.

5.31 Transfer - Venue Proper – Interests of Justice

In re Hanson, 2019 WL 3330405 (Bankr. E.D. Tn. 2019) – 28 USC Section 1412 allows Court to transfer venue in interest of justice of for convenience of parties. Court will consider (1) proximity of creditors to court; (2) proximity of Debtor to court; (3) proximity of necessary witnesses; (4) availability of process to compel attendance of uncooperative or unwilling witnesses; (5) location of assets; (6) location of relevant documents or records; (7) accessibility to sources of proof; (8) relative financial means of the parties; (9) locus of operative facts and events giving rise to the action; (10) each forum's familiarity with governing law; (11) economical and efficient administration of estate; (12) deference and weight accorded to Debtor's choice of forum; and (13) trial efficiency, fairness, and interests of justice based on a totality of circumstances. Debtor initially filed Chapter 11 in North Carolina and after plan was confirmed and substantially consummated, transferred case to Tennessee. Debtor sought to transfer case back to North Carolina. Court will afford Debtor's request significant deference where Debtor returned to and live in North Carolina to repair property after Hurricane Florence. Debtor had serious medical issues and was being treated in North Carolina and travel to Tennessee as difficult. While transfer to North Carolina would necessitate travel by Secured Creditor's counsel to attend hearing, parties agreed that Plan had been substantially consummated, that there were no significant bankruptcy matters anticipated, and that the parties would work out remaining issues by telephone. Creditors holding liens on Tennessee properties were being paid and would have recourse in Tennessee State Court of Debtor defaults. To extent future proceedings involve construction or modification of Plan, North Carolina Court that confirmed Plan in best position to address those matters. Debtors' return to North Carolina as full-time residents and their intent to remain there, Debtor's choice of forum, the status of the performance of the plan, and Debtors' potential need to pursue claims and causes of action related to their North Carolina residence make Eastern District of North Carolina more convenient for Debtors and transfer is not unduly prejudicial to Tennessee creditor. Transfer also in best interest of justice as North Carolina Bankruptcy Court that confirmed the plan is best positioned to interpret its own confirmation order.

Domain Protection, LLC v. Sea Wasp, LLC, 2018 WL 5809298 (N.D. Tx. 2018) – General Transfer of Venue Statute, 28 USC Section 1404(a), allows Court to transfer civil action to any district where it might have been brought, for convenience of parties and witnesses, in interest of justice. The bankruptcy change-of-venue statute, 28 USC Section 1412, permits court to transfer case or proceeding under title 11 to district court for another district, in interest of justice or for convenience of parties. General statute applies to any civil action, while bankruptcy statute applies only to case or proceeding under title 11; general statute authorizes a change only to district or division where case might have been brought, while the bankruptcy statute has no similar limitation; and general statute requires showing of convenience of parties *and* interest of justice, while the bankruptcy statute requires convenience of parties *or* interests of justice, not both. Bankruptcy statute allows transfer of both core and non-core proceedings. Litigation between two non-Debtor entities conceivably could have effect on bankruptcy case allowing transfer to District Court in District in which bankruptcy proceeding was pending. Receiving District Court could refer matter to Bankruptcy Court and Bankruptcy Judge was in better position to evaluate potential impact on bankruptcy case. Transfer also warranted under general statute as venue would have been proper in District in which bankruptcy was pending even absent bankruptcy case, and transfer was in interests of justice as bankruptcy court was more familiar with the facts of the case.

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.

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 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.

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".

5.32 Transfer - Venue Proper – Convenience of Parties

In re Hanson, 2019 WL 3330405 (Bankr. E.D. Tn. 2019) – 28 USC Section 1412 allows Court to transfer venue in interest of justice or for convenience of parties. Court will consider (1) proximity of creditors to court; (2) proximity of Debtor to court; (3) proximity of necessary witnesses; (4) availability of process to compel attendance of uncooperative or unwilling witnesses; (5) location of assets; (6) location of relevant documents or records; (7) accessibility to sources of proof; (8) relative financial means of the parties; (9) locus of operative facts and events giving rise to the action; (10) each forum's familiarity with governing law; (11) economical and efficient administration of estate; (12) deference and weight accorded to Debtor's choice of forum; and (13) trial efficiency, fairness, and interests of justice based on a totality of circumstances. Debtor initially filed Chapter 11 in North Carolina and after plan was confirmed and substantially consummated, transferred case to Tennessee. Debtor sought to transfer case back to North Carolina. Court will afford Debtor's request significant deference where Debtor returned to and live in North Carolina to repair property after Hurricane Florence. Debtor had serious medical issues and was being treated in North Carolina and travel to Tennessee as difficult. While transfer to North Carolina would necessitate travel by Secured Creditor's counsel to attend hearing, parties agreed that Plan had been substantially consummated, that there were no significant bankruptcy matters anticipated, and that the parties would work out remaining issues by telephone. Creditors holding liens on Tennessee properties were being paid and would have recourse in Tennessee State Court of Debtor defaults. To extent future proceedings involve construction or modification of Plan, North Carolina Court that confirmed Plan in best position to address those matters. Debtors' return to North Carolina as full-time residents and their intent to remain there, Debtor's choice of forum, the status of the performance of the plan, and Debtors' potential need to pursue claims and causes of action related to their North Carolina residence make Eastern District of North Carolina more convenient for Debtors and transfer is not unduly prejudicial to Tennessee creditor. Transfer also in best interest of justice as North Carolina Bankruptcy Court that confirmed the plan is best positioned to interpret its own confirmation order.

Wellgen Standard, LLC v. Maximum Legal Holdings, LLC, 2019 WL 1890589 (M.D. Tn. 2019) – 28 USC Section 1404 allows court to transfer venue for convenience of witnesses and parties or in interests of justice. Courts consider relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses, the possibility of a view of the premises, if relevant; and all other practical problems that make trial easy, expeditious and inexpensive. Factors relating to the public interest include local interest in having localized disputes decided at home; the administrative difficulties resulting from court congestion; and interest in having a trial of a diversity case in a forum familiar with law that will be applied. Courts are also to give some weight to the plaintiff's choice of forum. All elements of transaction occurred in California, loan documents were executed in California, majority of Defendant's employees are located in California and facts underlying lawsuit have no connection to Tennessee. Only basis for venue in Tennessee is forum selection clause, enforcement of which depends on whether the clause was obtained by fraud, duress, or other unconscionable means; (2) whether the designated forum would ineffectively or unfairly handle the suit; and (3) whether the designated forum would be so seriously inconvenient that requiring the party opposing application of the clause to litigate there would be unjust or unreasonable. Forum selection clause would not bind individual defendants and designated forum was so seriously inconvenient that requiring defendant to litigate in Tennessee would be unreasonable.

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 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.

5.33 Transfer – Forum Selection Clauses

Wellgen Standard, LLC v. Maximum Legal Holdings, LLC, 2019 WL 1890589 (M.D. Tn. 2019) – 28 USC Section 1404 allows court to transfer venue for convenience of witnesses and parties or in interests of justice. Courts consider relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses, the possibility of a view of the premises, if relevant; and all other practical problems that make trial easy, expeditious and inexpensive. Factors relating to the public interest include local interest in having localized disputes decided at home; the administrative difficulties resulting from court congestion; and interest in having a trial of a diversity case in a forum familiar with law that will be applied. Courts are also to give some weight to the plaintiff's choice of forum. All elements of transaction occurred in California, loan documents were executed in California, majority of Defendant's employees are located in California and facts underlying lawsuit have no connection to Tennessee. Only basis for venue in Tennessee is forum selection clause, enforcement of which depends on whether the clause was obtained by fraud, duress, or other unconscionable means; (2) whether the designated forum would be ineffectively or unfairly handle the suit; and (3) whether the designated forum would be so seriously inconvenient that requiring the party opposing application of the clause to litigate there would be unjust or unreasonable. Forum selection clause would not bind individual defendants and designated forum was so seriously inconvenient that requiring defendant to litigate in Tennessee would be unreasonable.

Bolling v. Prospect Funding Holdings, LLC, 2019 WL 1858506 (6th Cir. 2019) - 28 USC Section 1404 Allows Court, for convenience of parties and witnesses and in interest of justice to transfer action to any other District Court division or it might have been brought or to any district or division to which all parties consent. Court should consider convenience of parties and potential witnesses, public interest, and whether transfer is in interest of justice. Where contract contains forum-selection clause, *forum non conveniens* allows Court to enforce forum-selection clause by declining to exercise jurisdiction even where jurisdiction is appropriate. Court should uphold forum-selection clause absent strong showing that clause was obtained by fraud, duress or unconscionable means; that designated forum would be ineffective or unfair; or designated forum would so seriously inconvenience party that requiring suit to be heard there would be unjust. Where parties have forum-selection clause, plaintiff's initial choice of forum is entitled to no weight and plaintiff must show why Court should not transfer case to selected forum.

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.

5.34 Transfer - Venue Improper

D. Credit Counseling

5.35 Deadline to Obtain

In re Wilson, 2018 WL 528 88 90 (Bankr. N.D. Ohio 2018) – Debtor "substantially complied" with requirement for credit counseling. Evidence indicated that Debtor completed counseling prior to commencement of case but Debtor was unable to obtain certificate of completion due to record-keeping error by credit counseling provider. Section 521 requires only that Debtor certify that Debtor has completed course but does not require certificate that Debtor actually received prepetition counseling. Evidence indicated that Debtor obtained prepetition counseling and filed Section 521 certificate describing services received. Evidence did not warrant dismissal of case where record included no indication that Debtor filed case in bad faith; Debtor filed Section 521 certification asserting that Debtor received prepetition counseling only to later discover that credit counseling agency did not properly record completion of counseling; and that Debtor took all reasonable steps to comply with statutory requirement. Debtor's Section 521 certification confirmed that Debtor received counseling within 180 days prior to commencement of the case and record provided no indication that any party would be prejudiced by allowing case to proceed. Case presented "unique" equitable factors where Debtor had done her best to comply with requirements including actually receiving counseling.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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).

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.

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.

5.36 Obtaining by Agent for Debtor

In re Heim, 2019 WL 236231 (Bankr. N.D. Ohio 2019) – Credit counseling course requirement cannot be delegated to agent. Debtor not eligible where credit counseling certificate indicated that course was completed by Debtor’s non-filing spouse through a Power of Attorney. Although Debtor was currently incarcerated, there was no indication that Debtor was unable to complete requirement because of incapacity, disability or active military duty where there was no evidence that Debtor was unable to participate in a telephone or Internet briefing.

In re Mackey, 565 BR 238 (Bankr. E.D.N.Y. 2017) – 28 CFR Section 58.22(o) promulgated by the Office of the United States Trustee permits credit counseling to be obtained by third party acting as Debtor’s legal representative as long as the Briefing Certificate sets forth the name of the legal representative and legal capacity of that representative. Briefing Certificate did not meet requirements where Briefing was obtained by incarcerated Debtor’s wife who held valid power of attorney but Certificate indicated that Briefing was completed by Debtor, and did not indicate that Briefing was completed by wife acting under specified legal capacity.

5.37 Failure to Obtain

Marshall v. McCarty, 2019 WL 960366 (8th Cir. BAP 2019) – Debtor not eligible where Debtor checked box on Petition indicating that Debtor obtained pre-petition credit counseling but did not present any evidence that she had actually done so. Debtor did not file certificate of completion, certification of exigent circumstances, or request for waiver. Certificate finally filed by Debtor dates 4 weeks after petition was filed.

In re Tucker, Case No. 17-56842 (Bankr. E.D. Mi. 2018) – Case dismissed with one year bar to re-filing where Debtor obtained credit counseling one day after filing 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.

In re Adkins, Case No. 17-57069 (Bankr. E.D. Mi. 2018) – Case dismissed with one year bar to re-filing where Debtor obtained credit counseling six days after filing 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.

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.

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.

In re Elliott, Case No. 15-45740 (Bankr. E.D. Mi. 2015) – Case dismissed where Debtor obtained counseling three days after petition filed.

In re Cicchelli, Case no. 15-51553 (Bankr. E.D. Mi. 2015) – Case dismissed where credit counseling completed one day after petition filed.

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.

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).

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).

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).

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

In re Weikert, Case No. 12-45454 (Bankr. E.D. Mi. 2012) – Case dismissed where credit counseling obtained 7 days post-petition.

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.

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.

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.

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.

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.

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.

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*.

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*.

In re Lowry, Case No. 10-71First Modified Pre-Confirmation Chapter 13 Plan (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*.

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.

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*.

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*.

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*.

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*.

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*.

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*.

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*.

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).

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*.

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*.

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*.

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 Debtor, a representative of 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.

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*.

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*.

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*.

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).

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).

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.

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.

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.

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.

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.

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.

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).

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.

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.

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.

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.

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*.

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.

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.

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.

5.38 Waiver of Requirement

In re Mackey, 565 BR 238 (Bankr. E.D.N.Y. 2017) – Motion to Excuse Compliance with Section 109 briefing requirement denied as Motion alleged only that Debtor was incarcerated, and incarceration is not “disability” within scope of Section 109(h).

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.

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.

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.

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.

In re Gordon, 2012 WL 975423 (Bankr. W.D. Ky. 2012) - Debtor who was incarcerated is not "disabled" and so is not entitled to waiver of credit counseling requirement.

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.

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).

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 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.

5.39 Exigent Circumstances

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.

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 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.

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.

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 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.

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.

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”.

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.

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.

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.

5.40 Equitable Exception

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.

5.41 Pay Advices

Community Bank v. Riffle, 2010 WL 3079307 (2d Cir. 2010) - Under 11 USC 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 Debtor from any employer of 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.

E. Filing Fee

5.42 Failure to Pay

In re Hayes, 2018 WL 1276737 (Bankr. W.D. Mi. 2018) – Non-payment of fees within time allowed by Court constitutes "cause" for dismissal. Court would not dismiss case and Debtor allowed additional time to pay fee where Debtor participated in chapter 7 in good faith; complied with duties under Section 521; attended Section 341 meeting; chapter 7 trustee filed Report of No Distribution; no creditor objected to discharge or filed action to declare debt non-dischargeable; and all aspects of Debtor's case have been successfully completed with payment of filing fee only remaining impediment to Debtor receiving a discharge of nearly \$30,000 in unsecured debt. If Debtor does not pay fee within extended time, case would be closed without discharge.

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.

Baird v. Ammiyurd, 2017 WL 430772 (S.D. Ohio 2017) – Plaintiff cannot pay Court filing fee with "promissory note" that plaintiff created himself.

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.

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.

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.

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.

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.

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.

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.

5.43 Waiver

In re Holyfield, Case No. 19-48658 (Bankr. E.D. Mi. 2019) – 28 USC Section 1930 allows Court to waive filing fee if Debtor’s income is less than 150% of the official income poverty line. Although Debtor’s 5 most recent pay stubs would put Debtor over the limit, consideration of the last 10 pay stubs puts Debtor below the limit. Court concluded that most appropriate basis was to use all stubs, covering 20 weeks of employment, rendering debtor eligible for waiver of filing fee.

In re Downey, 2019 WL 1559869 (Bankr. N.D. Ohio 2019) – Waiver of filing fee not appropriate where Debtor has ability to pay fees using tax refunds. Although Debtor’s budget showed nominal disposable income before tax refunds, tax refunds created additional disposable income equivalent to more than \$600 per month which would allow payment of filing fees. Applications to waive filing fee or determined at time cases filed. Debtor’s alleged subsequent change in circumstances does not justify waiver of filing fee even if change circumstances would later have supported waiver.

Moore v. Council, 2018 WL 3150677 (E.D. Ky. 2018) – *In forma pauperis* status requires affidavit stating that Plaintiff is unable to pay filing fees while still providing for necessities of life. Motion granted where Plaintiff’s affidavit reflected on cash, no bank account, and sole asset is automobile worth \$1,000.00.

In re Hayes, 2018 WL 1276737 (Bankr. W.D. Mi. 2018) – 28 USC Section 1930(f)(1) allows Court to waive Chapter 7 filing fee if Debtor is individual with income that is less than 150% of poverty line and Debtor is unable to pay filing fee in installments. Bankruptcy Court should not be closed to those who cannot afford filing fee, but waiver should take into account impact on Bankruptcy administration as waiver of filing fee deprives Chapter 7 Trustee of compensation for administration of estate and deprives Court of revenue that congress intended be used to fund operations. Whether Debtor has ability to pay filing fee in installments depends on potential discrepancies between Debtor’s application and schedules; collateral sources of income from which filing fee may be paid; excessive or unreasonable expenses; whether Debtor agreed to pay portion of attorney’s fee after filing case; whether Debtor has property from which filing fee could be paid; Debtor’s historical spending of disposable income; and whether Debtor’s current or anticipated income or expenses are result of temporary or extraordinary circumstances. Payment to attorney of standard fee does not prevent Court from waiving fee but is one fact to be considered. Debtor not eligible for waiver of filing fee where, post-petition, Debtor received tax refund more than \$7500, providing funds for payment of fees; Debtor’s Schedules indicated that Debtor had disposable income between \$85 per month and \$136 per month that could be used to pay fee; and Debtor’s counsel received full fee normally charged for Chapter 7 case, without reduction. Attorney did not reduce fee to assist Debtor in paying filing fee; Debtor did not contact Legal Aid who may have represented Debtor for no charge; Debtor did not seek out other counsel who may have reduced fees; and case was straightforward, no asset case with no complicated turnover, exemption or discharge issues. Debtor did not provide adequate explanation for using meager resources to pay attorney full fee while seeking waiver of filing fee. Denial of Motion does not mandate dismissal but does constitute “cause” on which Court may base dismissal. Court allowed Debtor additional time to pay fee where Debtor participated in chapter 7 in good faith; Debtor complied with duties under Section 521; attended Section 341 meeting; chapter 7 trustee filed a Report of No Distribution; and all aspects of Debtor’s case have been completed with payment of filing fee only remaining impediment to Debtor receiving a discharge of nearly \$30,000 in unsecured; provided that if fee is not paid within extended time, case would be closed without discharge.

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.

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.

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.

In re McMcann, 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.

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.

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.

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 Debtor made in the motion that the refund had been spent. Refund would have provided sufficient funds to pay filing fee.

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 Debtor’s budget painted a “bleak picture”.

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).

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

5.44 “Primarily Consumer Debts”

Aspen Skiing Co. v. Cherrett, 873 F.3d 1060 (9th Cir. 2017) – Whether debts are “primarily consumer” depends on primary purpose for which debt was incurred. Residential mortgages are normally, but not exclusively, consumer debts. Debtor’s multiple motives in incurring debt required Court to engage in factual, rather than legal, inquiry. Standard of review of Bankruptcy Court decision is clear error, not *de novo*.

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.

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 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 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 filed 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.

Bushkin v. Singer, Case No. 15-1285 (9th Cir. BAP 2016) – Whether debt is consumer debt as defined in Section 101(8) depends on purpose 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.

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).

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.

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.

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.

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.

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.

5.45 Calculation of Current Monthly Income – Timing

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.

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 that Debtor had earned during the relevant 6 month time period.

5.46 Calculation of Disposable Income – Generally

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 non-filing spouse’s pay rather than Debtor and Debtor’s non-filing spouse’s actual tax liability. Debtor and Debtor’s non-filing 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.

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.

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”.

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.

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”.

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 USC § 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.”

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.

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).

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.

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”.

5.47 Calculation of Disposable Income – Allowances

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 Debtor incurs an expense, then Debtor can deduct entire applicable amount under Local or National Standard.

5.48 Calculation of Disposable Income – Surrendered Collateral

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.

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.

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 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.

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.

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 Debtor’s continuing contractual obligations remain unextinguished on the date of the bankruptcy filing.

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 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.

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.

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.

5.49 Calculation of Disposable Income - Lien Strips

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”.

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.

5.50 Calculation of Disposable Income – Automobile Ownership Expense

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

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.

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.

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 Debtor in light of brother’s lack of any income.

5.51 Calculation of Disposable Income – Automobile Operating Expense

In re Addison, Case No. 16-74856 (Bankr. E.D. N.Y. 2018) – Single Debtor allowed to deduct operating expense for two automobiles even where Debtor is single and has no dependents. Nothing in Internal Revenue Code IRS Promulgated National and Local Standards limits single Debtor to just one deduction. While IRS Handbook limits deduction, Code incorporates Standards, not Handbook.

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.

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.

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.

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.

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.

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.

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.

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).

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.

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 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.

5.52 Calculation of Disposable Income – Automobile Title Liens

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”.

5.53 Home Maintenance Expense

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.

5.54 Calculation of Disposable Income – Health Care Expenses

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 Debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of 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.

5.55 Calculation of Disposable Income – Health Savings Account

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.

5.56 Calculation of Disposable Income – Education Expenses

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 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.

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.

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.

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.

5.57 Calculation of Disposable Income – Housing Deduction

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.

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.

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*.

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.

5.58 Calculation of Disposable Income – Retirement Loan Repayment

In re Miner, 2017 WL 1011419 (Bankr. W.D. La. 2017) – Debtor with outstanding 401-k loan permitted to continue repayments while in Chapter 13 but must increase plan payments when loan is paid off. Debtor permitted to continue 401-k contributions but at reduced rate, not to exceed 3% of gross income. Debtor could not continue to contribute at higher amount and “offset” contributions against Wife’s Social Security income as Wife has on legal right to contribute to Husband’s 401-k account.

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.

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.

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.

5.59 Calculation of Disposable Income – Child Care Expenses

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.

5.60 Expense Reimbursements

In re Maxton, Case No. 17-13169 (Bankr. D. Mass. 2018) – 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. Although Form 122A-1 calls for “gross wages, salary, tips, bonuses, overtime and commissions”, Section 101(10A) defines Current Monthly Income more broadly. Where official form and Code are in conflict, code controls. Although expense reimbursements are neither stable nor regular, Current Monthly Income is not limited to “stable and regular” income but includes all income. Plain language of code requires employer-paid reimbursements to be included in calculation.

In re Wenzel, 2015 WL 1087409 (Bankr. N.D. Ohio 2015) – Debtor’s calculation of CMI incorrectly omitted \$400 per month received by Debtor from employer to reimburse transportation expenses, and incorrectly omitted include bonus that Debtor received in prior 6 months where Debtor received similar bonuses in 5 of past 19 years at same employer.

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.

5.61 Profit Sharing and Bonus Income

In re Maxton, Case No. 17-13169 (Bankr. D. Mass. 2018) – Profit sharing and “attendance lump-sum payment” received within six months prior to commencement of case included in calculation of Current Monthly Income.

In re Wenzel, 2015 WL 1087409 (Bankr. N.D. Ohio 2015) – Debtor’s calculation of CMI incorrectly omitted \$400 per month received by Debtor from employer to reimburse transportation expenses, and incorrectly omitted include bonus that Debtor received in prior 6 months where Debtor received similar bonuses in 5 of past 19 years at same employer.

5.62 Social Security Income

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”. the 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.

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.

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.

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.

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.

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.

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.

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.

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.

Mains v. Foley, 2011 WL 2160890 (Bankr. W.D. Mi. 2011), *aff'd*, 2012 WL 612006 (W.D. Mi. 2012) – 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.

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.

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.

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).

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 USC § 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 USC § 407(a). Good faith under Section 1325(a)(3) does not compel a Debtor to include Social Security income on Schedule I.

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.

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.

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 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.

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 Debtor to cover household expenses. Debtor must include the social security received by grandparents and contributed to household expenses in determining CMI.

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.

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.

5.63 Pension Income

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.

5.64 Veteran's Disability Benefits

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.

5.65 Veteran's Voluntary Separation Incentive Payments

In re Hewitt, 2017 WL 371916 (Bankr. S.D. Ill. 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.

5.66 Private Disability Income

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.

5.67 Foster Care Income

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.

5.68 Adoption Assistance Payments

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

5.69 Unemployment Income

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.

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.

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.

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.

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.

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.

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.

5.70 Railroad Retirement Income

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.

5.71 Projected Disposable Income – Firefighters Retirement

In re Charron, 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.

5.72 Projected Disposable Income – Civil Service Retirement System

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. Child Support Income

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.

5.73 “In Kind” Income

In re Perez, 2016 WL 3230662 (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.

5.74 Self-Employed Debtor

In re Kuwik, 511 BR 696 (Bankr. N.D. Ga. 2014) – Self-employed Debtor must use gross business income in calculating whether Debtor has CMI in excess of applicable median income.

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.

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

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.

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 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 result in 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.

5.75 Debtor as Owner of Corporation

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.

5.76 Compensation for “Wrongful Incarceration”

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.

5.77 Household Size

In re Wolstad, Case No. 18-41153 (W.D. Wash. 2018) – Court adopted “economic unit” test for determining whether person was member of household for means test purposes. After discussing three alternative methods – Census bureau “heads on beds”; IRS definition of “dependent” and “Economic Unit test that requires financial relationship between people living in Debtor's residence – Court settled on Economic Unit test as most realistic. Where Debtor had child who lived with him part time and Debtor paid child support and medical insurance, child was part of Debtor's “economic unit” and so was member of household notwithstanding only part-time residence. Child was economically dependent on Debtor and spent more than *de minimus* time with Debtor. Court specifically rejected “fractional child” which divides child into fractional units depending on how many days child actually resides with Debtor and concluded that counting part time resident as “full time” household member was better approach.

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 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 Debtor; degree of financial support provided to Debtor by the individual; extent to which individual and Debtor share income and expenses; extent to which there is joint ownership or property; 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 Debtor’s contemplation of bankruptcy such as an application for a residential loan or governmental assistance, which includes 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 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 Debtor, usually should be excluded from 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.

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.

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.

In re Johnson, 2013 WL 1344561 (Bankr. M.D.N.C. 2013) – Debtor could not include child who lived away at college and who had part time job sufficient to pay her rent, food and utilities in apartment she shared with other students. Younger daughter also was member of household where she lived in a dorm and all of her college expenses including room and board were covered by scholarships. Applying economic unit test of household, court concluded that older daughter was financially independent while Debtor provided significant assistance to younger child in from of additional spending money, transportation costs, insurance, medical expenses, and cell phones. Youngest daughter stayed in Debtor’s home several nights per month during which Debtor provides food and groceries for daughter to take back to school.

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

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 from 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.

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.

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 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 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 Debtor’s home; or Debtor’s adult child who lived away at college but returned home for summers.

5.78 Variance From IRS Allowances

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.

5.79 Special Circumstances

In re Beigley, 2018 WL 3031097 (Bankr. W.D. Ky. 2018) – Debtor can rebut presumption of abuse by showing special circumstances. Section 707(b)(2) includes examples of special circumstances such as serious medical condition or call to active duty in Armed Forces, but examples are not limiting. Courts have found other examples of special circumstances including high commuting costs, increased price of gas, additional housing expenses, costs of separate household; and maintaining swimming pool. Determination of whether particular circumstances “special” is made on a

case-by-case basis. Student loans may qualify as special circumstances taking into consideration Debtors modest lifestyle; situation where Debtors are not wholly responsible for financial situation such as lost jobs; Debtor who obtain student loan debt for others; or circumstances arising after origination of student loan. Where Debtors live lavish lifestyles, incurred large mortgages beyond ability to pay, purchase expensive automobiles, student loan expenses not special circumstance. Evidence indicated that Debtor's student loans constitute special circumstances where Debtors lived modest lifestyle, financial situation was attributable to other parties, decreased income was due to factors beyond control, and some of student loan debt was for minor child. Debtor's did not purchase large mortgage and did not purchase expensive luxury automobiles. However, even allowing student loan payments as special circumstances does not reduce Debtors disposable income sufficiently such that Debtor's disposable income multiplied by 60 would be less than 25% of unsecured claims. Debtor's did not sufficiently rebut presumption of abuse requiring dismissal of case.

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 non-filing spouse's pay rather than Debtor and Debtor's non-filing spouse's actual tax liability. Debtor and Debtor's non-filing 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.

In re Fudge, 2016 WL 285449 (Bankr. E.D. Mi. 2016) – Special circumstances are those that put a strain on 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 Debtor necessitated decision to incur loans in first instance

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.

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.

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.

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.

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.

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 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.

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).

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 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.

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 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.

5.80 Marital Adjustment – Non-filing spouse

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.

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 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.

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.

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.

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.

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.

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 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 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 Debtor, then the sole expenses of the non-filing spouse are not “regularly contributed for the support of Debtor or a dependent of Debtor” as CMI is defined. *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.

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 Debtor.

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 Debtor. Allowable deductions under Section 707(b)(2)(A) are limited to those expenses actually paid by Debtor and do not include any monthly expenses or debt payments that are solely those of the non-filing spouse.

5.81 Cases Converted From Chapter 13

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.

In re Lassiter, 2011 WL 2039First Modified Pre-Confirmation Chapter 13 Plan (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.

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 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).

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

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.

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

5.83 Section 521 Generally

In re Jones, 2019 WL 4593388 (S.D. Ohio 2019) – Bankruptcy Court properly dismissed case on Motion of Trustee where Debtor’s schedules were incomplete, inaccurate and not factually correct; and Debtor did not produce information requested by Trustee on numerous occasions.

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.

5.84 Duty to File Schedules

In re Jones, 2019 WL 4593388 (S.D. Ohio 2019) – Bankruptcy Court properly dismissed case on Motion of Trustee where Debtor’s schedules were incomplete, inaccurate and not factually correct; and Debtor did not produce information requested by Trustee on numerous occasions.

In re Prather, 2019 WL 3714971 (6th Cir. BAP 2019) - Chapter 7 Petition dismissed where Debtor did not timely file schedules. Debtors alleged in nonreceipt of Deficiency Notice was not basis to set aside dismissal order where item was properly mailed creating presumption that item was received. There was no evidence that clerk’s office received notice returned by United States Postal Office as undeliverable and there was no other evidence supporting Debtor’s assertion that she did not receive Deficiency Notice.

5.85 Amendments to Schedules – Continuing Duty to Disclose

Davis v. Fiat Chrysler Automobiles U.S. LLC, 2018 WL 4026445 (6th Cir. 2018) - Debtor in Chapter 13 proceeding has ongoing duty to disclose potential causes of action including causes of action that arise post-petition. Debtor’s nondisclosure of potential claim that arose during bankruptcy proceeding renders claim susceptible to dismissal for judicial estoppel.

Silva v. Pro Transport, Inc., 2018 WL 3801663 (11th Cir. 2018) – Debtor in Chapter 13 has ongoing duty to disclose potential causes of action. Debtor in Chapter 13 has concurrent standing with Chapter 13 Trustee to pursue legal claim. Nondisclosure of claim in bankruptcy case may result in dismissal for judicial estoppel.

Corradi v. Lane Funeral Homes, Inc., 2017 WL 6055231 (Bankr. N.D. Ohio 2017) – Debtor in Chapter 13 has duty to disclose all assets and liabilities. Disclosure obligation is at very core of bankruptcy process and meeting obligation is part of price paid for discharge. Debtor breached duty to disclose by answering “none” when asked in Schedules to list all claims and lawsuits, when Debtor had already filed EEOC complaint alleging employment discrimination.

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 the 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.

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 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.

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) – 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.

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.

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.

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.

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.

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.

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.

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

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

5.87 Elements

In re Mercury Data Systems, Inc., 2018 WL 2970720 (Bankr. E.D. Ky. 2018) – Involuntary petition requires signature by 3 or more entities holding claims that are not contingent as to liability or subject to bona fide dispute aggregating at least \$15,775. Involuntary petition signed by requisite number of creditors holding non-contingent, undisputed claims aggregating more than requisite amount properly commenced and Order for Relief appropriately entered. Debtor could not use Section 707(a) an effort to circumvent Order for Relief where evidence of bad faith as basis for cause under Section 707 was identical to the bad faith defensive Section 303. Court will allow non-petitioning creditor opportunity to raise argument that he could not raise prior to entry of Order for Relief, but involuntary Debtor who had ample opportunity to defend against Order for Relief and did not do so in timely manner through its own fault is not entitled to 2nd chance.

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 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.

Huszti v. Huszti, 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).

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 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.

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 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

5.88 Procedure

In re Mercury Data Systems, Inc., 2018 WL 2970720 (Bankr. E.D. Ky. 2018) – Involuntary petition commenced by filing a petition having requisite number of signatures signed by creditors asserting that they have non-contingent, undisputed claims exceeding statutory requirement. Petitioning creditors must then serve involuntary summons on Debtor in manner provided for under Bankruptcy Rule 7004. Involuntary Debtor has 21 days after service of summons to contest involuntary petition. If petition is not timely contrary, Court shall enter order for relief. Debtor precluded from contesting involuntary petition based on bad faith and alleged invalidity of petitioning creditor claims are waived if not raised within 21 days answer period. Order for Relief is conclusive determination of Debtor's status and res judicata as between actual parties to proceedings as to all facts and subsidiary questions of law on which Order is based.

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.

5.89 Credit Counseling – Section 109(h)

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

5.90 Two Party Disputes

Wilk Auslander LP v. Murray, Case No. 17-1272 (2d Cir. 2018) - Involuntary Bankruptcy Petition is not appropriate remedy into-party dispute where creditor as adequate remedies available under state law. Court *sua sponte* dismissed petition as abuse of discretion where there were no competing creditors, no creditor community to protect, no need for *pari passu* distributions and creditor was merely attempting to use enforcement remedy not available under state law. Dismissal better advanced Debtors interests, further the interest of Bankruptcy Court and public, and did not substantially prejudice creditor. Misuse of Bankruptcy Code need not rise to level of bad faith before amounting to cause for dismissal.

5.91 Petitioning Creditors

Popular Auto, Inc. v. Reyes-Colon, 2019 WL 1785039 (1st Cir. 2019) – Involuntary petition must be signed by three or more creditors where Debtor has 12 or more creditors. Court may not disregard numerosity requirement based on “special circumstances” even if Debtor has defrauded creditors. Debtor responded to involuntary petition by attaching report listing 20 to creditors. Once Debtor's produced list of 12 or more creditors, burden fell on petitioning creditor to prove that Debtor had fewer than 12 or to have additional creditors joint petition. Debtor's alleged pre-petition scheme to defraud creditors did not create equitable exception to three petitioning creditor rule as Court may not contravene specific statutory provision by exercising equitable or inherent power. Exercise of equitable jurisdiction would plainly contravene Section 303 if it bypassed numerosity requirements.

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.

In re Zenga, 2017 WL 167908 (6th Cir. BAP 2017) - 11 USC Section 303 requires that involuntary petition be signed by three or more petitioning 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.

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.

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 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 Debtor not paying the debt. Court does not need to resolve dispute, it is sufficient that 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.

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 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.

5.92 Debts Subject to Bona Fide Dispute

In re Buckeye Activeware, LLC, 2018 WL 4202029 (Bankr. N.D. Ohio 2018) – Petitioning Creditor must hold debt that is not subject to bona fide dispute. If there is genuine issue of material fact that bears on Debtor’s liability or meritorious contention as to application of law to undisputed facts, debt is subject to bona fide dispute and petition must be dismissed. Court is not to resolve genuine issues of fact or law, but only to determine whether issues exist. Petitioning creditor must first establish prima facie case that no bona fide dispute exists. Burden then shifts to Debtor to present evidence demonstrating that bona fide dispute does exist. Neither Debtor’s subjective intent nor Debtor’s subjective belief is sufficient to meet burden. Petitioning creditors claim was subject to bona fide dispute where there were genuine issues of material fact and unresolved legal issues regarding Alleged Debtor’s potential liability. Parties disputed factual basis underlying creditors assertion of debt and both parties submitted affidavits presented dramatically different accounts of what occurred.

State of Montana Department of Revenue v. Blixseth, Case No. 13-1324 (D. Nev. 2017) – Creditor cannot be petitioning creditor in involuntary case if any portion of debt is not subject to bona fide dispute. Although Debtor and Creditor agreed to validity of majority of claim, Debtor had good faith bona fide dispute as to one portion of claim. As entire claim was not undisputed, Creditor not eligible to sign involuntary petition.

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 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.

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.

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 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.

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.

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 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.

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 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.

5.93 Not Generally Paying Debts as They Come Due

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 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.

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 Debtor has been unable to meet large debts; any reduction in Debtor's assets; and 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.

5.94 Secured Versus Unsecured Creditors

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.

5.95 Eligible for Relief Under Chapter in Which Involuntary Petition Filed

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.

5.96 Burden of Proof

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.

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.

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.

5.97 Sanctions

US Bank, NA v. Rosenberg, Case No. 18-1249 (3d Cir. 2018) – Punitive damages awarded against petitioning creditors under Section 303 are not subject to set off against the obligations owed by Debtor to petitioning creditors. Rule 69 specifies that State proceedings apply for enforcement of

money judgment. Under applicable State law, set off is equitable right addressed to sound discretion of Court. Allowing creditors to offset would frustrate fundamental purpose of Section 303 to deter bad faith filings.

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 Debtor.

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.

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.

Rosenberg v. DVI Receivables, XIV, LLC, 2012 WL 3990725 (Bankr. S.D. Fl. 2012) – An award of fees and costs, pursuant to 11 USC § 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 Debtor; and (3) 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.

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.

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 Debtor. Creditor's allegation that Debtors were dishonest in pre-petition dealings with creditors was not sufficient to overcome presumption.

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.

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.

5.98 Damages Caused to Third Parties – Preemption

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.

5.99 Conversion to Chapter 11

In re Mercury Data Systems, Inc., 2018 WL 2970720 (Bankr. E.D. Ky. 2018) – Section 706(a) generally allows conversion from Chapter 7 in Debtor's discretion. Court may deny conversion if cause exists to convert or dismiss had case been filed under Chapter 11 in first instance or where denial of conversion prevents abuse of process. Debtor bears burden to prove that it has not previously converted, is eligible for relief under Section 109, and conversion will achieve purpose permitted by Bankruptcy Code. Once Debtor makes prima facie showing, burden shifts to creditor to prove conversion is not justified, considering whether Debtor is seeking to convert in good faith; whether Debtor can propose confirmable Plan; impact of denying conversion weighed against prejudice to creditors caused by conversion; effective conversion on an efficient administration of estate; and whether conversion would further abuse of bankruptcy process. Motion to Convert denied where Debtor's principal had abrogated management responsibilities for a number of months and blamed others for corporations failure to pay expenses which was principal's primary responsibility; principal made no effort to address companies cash needs or secure additional funding to allow completion of companies only viable product; principal did not ensure that company filed all required tax returns; principal presented unreasonable project completion data and presented unrealistic and unworkable budget.

I. Notice

5.100 Known Creditors

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.

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 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.

5.101 Unknown Creditors

Monson v. City of Detroit, 2019 WL 1057306 (E.D. Mi. 2019) – "Known" creditors are entitled to actual notice of bankruptcy proceeding, while "unknown creditors" may be notified by publication. Known creditors are those whose claims or identities are "readily ascertainable" by Debtor such that Debtor, through reasonably diligent effort could discover creditor's claim. Reasonably diligent effort does not require impracticable or extended searches but rather focuses on Debtor's own books and records looking to whether Debtor has something in its possession such as demand for payment or some communication with Debtor regarding existence of claim. Potential claim must be more than merely foreseeable. Although plaintiff's potential claim against City for alleged wrongful arrest may have been foreseeable, when City filed bankruptcy, plaintiff did not have legal claim as plaintiff's conviction was still valid. Although plaintiff was working to overturn conviction which may someday result in plaintiff bringing claim against City, plaintiff never made demand on City for payment or send communication regarding potential existence of future claim. Constructive notice used in City's bankruptcy proceeding were sufficient for due process purpose.

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.

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 creditor is *unknown* to 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.

5.102 Domestic Support Creditors

Pate v. Tow, 2019 WL 1771957 (5th Cir. 2019) - Custodial parent of Debtor's child is not "creditor" and does not hold "claim" for child support where under state law state agency has sole authority to collect money from Debtor and Debtor is required to make all child support payments to state

disbursement unit rather than directly to custodial parent. “Claim” requires legally enforceable right to payment. Creditors did not hold enforceable right to payment has right belonged exclusively to state child support enforcement agency. Custodial parent not entitled to priority claim where state agency did not file proof of claim within time permitted under Section 726(a)(1). Late filed claim would be allowed only as tardily filed priority claim under Section 726(a)(2) or as general unsecured claim under Section 726(a)(3), in either event custodial parent would not receive payment from bankruptcy estate. Code of provided no basis to extend deadline for custodial parent as custodial parent was not entitled to either notice of commencement of case or notice of Trustee’s final report.

5.103 Service by ECF

Cyrnek v. Oliva, 2018 WL 5279493 (Bankr. N.D. Ill. 2018) - Bankruptcy Rules 4001 and 4003 contain specific requirements for sufficient service. Rule 4007(c) does not provide specific requirements for service of Motions to Extend Time to file objections to dischargeability. Motion for Extension of Time does not require service consistent with Rule 7004. Motion to Extend must comply with service requirements of Rule 7005 and must be served only on opposing counsel. Where party is represented by attorney, electronic service on attorney is sufficient and is complete on transmission. Electronic service provides notice to defendant’s attorney sufficient to meet due process requirements.

VI. Property of Estate

A. Defined

6.1 Generally

In re Brown, 2019 WL 2070730 (Bankr. C.D. Ill. 2019) – Nature and extent of Debtor’s interest in property and governed by state law. Bankruptcy Code provisions are expansive but do not expand rights of Chapter 7 Trustee beyond those rights held by Debtor as of petition date. If Debtor has rights in property prepetition, presence of contingencies does not defeat estates claim to property but where Debtor, on petition date, has only potential rights that are not certain to arise and that do not become enforceable, if at all, until after bankruptcy, property interest is mere “expectancy” that does not become property of estate regardless of whether property interest may be said to be “related to” in pre-bankruptcy passed. Debtor’s employment bonus, revocable at employer’s discretion until actually paid, is mere expectancy where bonus was not paid and not guaranteed as of petition date. Debtor’s subsequent receipt of bonus does not make bonus property of bankruptcy estate.

Schnitzel Investment v. Sorensen, Case No. 17-1152 (9th Cir. BAP 2018) – Where state law requires a notice before borrower loses title to pawned property, property remains property of estate and is not automatically vested in pawnbroker at end of redemption where notice had not been given as of commencement of bankruptcy case. Pawnbroker’s attempt to give notice after commencement of case was void as violation of automatic stay. BAP distinguished *Title Max v. Northington*, as Georgia law applicable in *Title Max* did not require notice and automatically vested title in pawnbroker at expiration of redemption rate.

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.

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.

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*.

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.

Title Max v. Northington, Case No. 16-172 (Bankr. M.D. Ga. 2016), *reversed*, Case No. 16-17467 (11th Cir. 2017) – Debtor cannot redeem pawn transaction over life of Chapter 13 case even where petition is filed before expiration of the statutory period of redemption. Under State law, any pledged collateral that is not redeemed is automatically forfeited to the pawn broker. Section 108 allows Debtor to extend redemption for 60 days post-petition but at end of redemption Debtor loses all interest in asset and asset becomes property of pawn broker and is no longer property of bankruptcy estate as Debtor is automatically divested of any

interest in asset.

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.

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.

In re Stewart, 2013 WL 5592899 (Bankr. E.D. Mi. 2013) – Whether and to what extent a party has an interest in property is determined by applicable non-bankruptcy law. Personal property of Debtor/tenant did not become property of landlord where none of the conditions of lease providing to transfer of title had occurred. Debtor did not abandon leased premises when Debtor closed business, as evidence indicated that Debtor did not intent to abandon. Closing of business, without more such as surrendering keys, is not abandonment. Debtor had superior property rights to personal property than did lessor, the lender who foreclosed after the lessor defaulted on the mortgage, or the purchaser from the lender after foreclosure. Creditors committed conversion of property by refusing to return property to Debtor upon demand.

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.

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 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.

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.

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.

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.

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 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.

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.

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.

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 Debtor.

Doucet v. Drydock Coal Co., 397 BR 36 (Bankr. S.D. Ohio 2008) – Property of estate includes all legal or equitable interests of 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.

Incline Energy, LLC v. Stice, 2009 WL 1975038 (W.D. Ky. 2009) – Property of the estate includes all legal or equitable interests of 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.

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.

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 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).

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.

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 does not 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.

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.

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.

H.S. Die & Engineering, Inc. v. Ford Motor Company, Adv. No. 09-4815 (Bankr. E.D. Mi. 2009) – Michigan Moldbuilders Lien Act and Michigan Special Tools Lien Act permit the manufacturer of a die, mold or from to perfect a lien in the item by (1) permanently recording the builder's name, street address, city and state; and (2) filing a financing statement. Sufficiency and duration of financing statement determined by applicable state law. Name of Debtor in financing statement will be sufficient if it "substantially" identifies Debtor even if it has minor errors or omissions. A financing statement that fails sufficiently to provide the name of Debtor in accordance with section 9503(1) is seriously misleading.

6.2 Social Security Benefit.

Berg v. Social Security Administration, 900 F.3d 864 (9th Cir. 2018) – Social Security Benefits accrue on a monthly basis regardless of what benefits are actually paid. Under Social Security Act, Debtor is entitled to disability insurance for each month beginning with the first month after waiting. Social Security Act provides that would benefit recipient has been overpaid, recovery shall be made by decreasing benefit payments unless recipient is without fault in incurring overpayment and adjustment or recovery would defeat purposes of Social Security Act or would violate equity and good conscience. Set off for over payment of benefits did not occur as lump-sum reduction when SSA reduced to Debtors first retroactive benefit payment as sums represented by retroactive payment included benefits which had accrued over a number of months. SSA had accrued overpayments as of the 90 days prior to Debtor's bankruptcy petition totaling \$19,400, while Debtor on 90th a prepetition was entitled to only \$17,385, an amount insufficient to cover the obligation owed to SSA. SSA actual exercise of right of set off 80 days later by reducing Debtor's initial disbursement check was avoidable as preferences only to extent that Debtor, by date of exercise of setoff, was owed less than entire amount of set off, leaving SSA with no insufficiency.

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.

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

Cohen v. Chernushin, 911 F.3d 1265 (10th Cir. 2018) – Debtor's death post-petition removes from property of estate any property Debtor and third party owned with rights of survivorship. Debtor's interest in property is determined by State law. Although Section 541 limits Estate's interest to interest Debtor had on petition date, and establishes clear cut date after which property acquired by Debtor does not become property of estate, provision does not elevate Estate's interest to greater standing than Debtor had but for bankruptcy filing. Debtor and spouse owned second home as joint tenants with rights of survivorship. When Debtor passed away post-petition, Debtor's interest in property passed immediately to surviving spouse by operation of law, and Estate no longer had interest in property. Trustee lacked ability after death of Debtor to sell Debtor's interest in property as Debtor no longer had interest that was property of estate. Rule 1016 which allows case to continue following death of Debtor does not alter substantive rights of bankruptcy estate. "Transfer" to spouse was not governed by or limited by Section 363 as that section applies onto to sales of estate interest by Trustee, not transfers by operation of State law. Strong Arm powers under Section 554 did not allow Trustee to avoid transfer to spouse as Section 544 allows trustee to avoid status of creditors, and spouse was not creditor of estate and there was no "transfer" to be avoided as at death Debtor's interest in property ceased to exist and Spouse retained her interest in entire property. Trustee could not assert status as hypothetical lien creditor of Debtor as applicable state law specified that upon death of one joint owner, any liens that may have existed on interest of deceased tenant terminate and co-owner becomes owner free and clear. Trustee could not avoid lien and bona fide purchaser as there was no transfer to avoid.

Peet v. Checkett, Case No. 15-2040 (8th Cir. 2016) – Filing of bankruptcy by one joint tenant with right of survivorship does not terminate joint tenancy. When other joint tenant passes away during bankruptcy case, estate becomes vested with entire property under survivorship clause. Joint tenancy requires unity of interest title, time and possession. Language in *Harris v. Viegelahn* that

filing “immediately transferred” Debtor’s assets to bankruptcy estate does not actually transfer anything and unities of title and time remain as if bankruptcy case never occurred.

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.

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.

Rhiel v. Central Mortgage Co., 2014 WL 8276561 (Bankr. S.D. Ohio 2014) – Section First Modified Pre-Confirmation Chapter 13 Plan 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 any 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.

Baumgart v. Laurie, 2011 WL 3879507 (Bankr. N.D. Ohio 2011) – Section First Modified Pre-Confirmation Chapter 13 Plan 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.

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 Debtor upon the happening of a specific condition, then 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.

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.

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.

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 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 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.

Yoppolo v. Missler, 2009 WL 2163534 (Bankr. N.D. Ohio 2009) – Section First Modified Pre-Confirmation Chapter 13 Plan 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 First Modified Pre-Confirmation Chapter 13 Plan. 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 First Modified Pre-Confirmation Chapter 13 Plan 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 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 Bond.

Gold v. Demeter, 2015 WL 6437654 (Bankr. E.D. Mi. 2015) – Treasure bonds jointly owned by Debtor and third party are presumptively by both parties. However, where equitable interests exist, court can impose constructive or resulting trust on bonds and proceeds. Requirements of Code of Federal Regulations that states that registration of bonds is conclusive of ownership is not controlling and does not apply to proceeds after bonds are liquidated. Funds used to purchase bonds were provided exclusively by mother from her separate funds and not from any funds or property of Debtor. After mom liquidated bonds, she placed funds in her bank account. Treasury regulations do not undercut conclusion that Debtor did not own any of the funds used to purchase bonds and so bonds were sole property of mom notwithstanding named ownership on face of bonds themselves.

6.5 Community Property.

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.

In re Scholl, 2019 WL 4187699 (Bankr. S.D. Ohio 2019) – Insurance policies payable to Debtor are property of estate and inure to benefit of all creditors. Debtors’ casualty insurance policy on Debtors’ rental property that was in place when petition filed became property of estate. When property burned down during Chapter 13 case, proceeds of policy also became property of estate. Debtors can use proceeds only with Court approval. Section 1303 and Section 363(b)(1) read in concert, allow Debtor after notice and hearing to use property of estate other than in ordinary course of business, but ability is tempered by provision of Chapter 13 that require Debtor to comply with all provisions of Chapter 13.

Martinez v. OGA Charles, LLC, 901 F.3d 599 (5th Cir. 2018) – Proceeds of Debtor’s General Liability Policy are property of bankruptcy estate where claims against policy exceed aggregate policy limits. Debtor was bus operator involved in an accident that resulted in 9 fatalities. Before bankruptcy, some of the victims settled with insurer for amounts that would exhaust policy limit. Victims who had not settled filed involuntary bankruptcy petition and bankruptcy judge and joined carrier from paying out any insurance proceeds. Recognizing that insurance policies themselves are generally property of estate as distinguished from insurance proceeds, result is different where policy limit is insufficient to cover competing claims. Debtor does not have right to pocket proceeds of insurance policy or to use proceeds as Debtor sees fit, as proceeds must be set aside for allocation between multiple claimants.

CMH Liquidating Trust v. National Union Fire Insurance Co. of Pittsburgh, Case No. 14-2082 (Bankr. E.D. Mi. 2018) (proceedings after remand) – D&O insurance policy is property of Bankruptcy Estate where policy was purchased, and majority of facts and events occurred prior to filing Chapter 11 petition. D&O policy is executory contract as both sides have affirmative duties to perform, failure of which would constitute breach. Section 365 prohibits termination or modification of executory contract based solely on insolvency or financial condition of Debtor; commencement of bankruptcy case; or appointment of trustee. Insurer obligated to provide coverage where policy allowed Insurer to terminate coverage at end of policy term only if Insurer purchased “tail liability” coverage, and Insurer did not do so Policy continued in effect and could not be terminated without violating Section 365.

In re Licking River Mining, LLC, 2016 WL 3251890 (Bankr. E.D. Ky. 2016) – Liability insurance policies owned by 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.

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.

Chenault v. University of Kentucky, 2019 WL 3467952 (E.D. Ky. 2019) – Medical payments by Automobile Insurer directly to Medical Provider for health care services resulting from auto accident are not property of Bankruptcy Estate. Although Insurance Policy itself would have been property of estate, whether proceeds of insurance are property of estate is fact based on depending on whether Debtor would have had right or receive and kept proceeds. If payment cannot inure to benefit of Debtor, proceeds are not part of estate. Proceeds of casualty, collision, life and fire insurance are proceeds to which Debtor is normally entitled an which become property of estate. Payments under liability portion of policy are paid to third parties and are not proceeds to which Debtor is entitled. Proceeds covered only third-party medical expenses. Insurance policy provided for payment of benefits directly to provider and not to Debtor; and Debtor did not have authority to direct or control distribution of proceeds.

In re Chinn, 2018 WL 5780555 (Bankr. W.D. Tn. 2018) – Insurance policies owned by a Debtor are property of bankruptcy estate. Insurance proceeds of policies owned by Debtor usually do not become property of estate unless policy limits are insufficient to cover multitude of tort claims. Distinguishing *Martinez v. OGA Charles, LLC*, 901 F.3d 599 (5th Cir. 2018), Court concluded that proceeds of insurance were not property of estate where proceeds were claimed by only single plaintiff and no objecting party offered theory pursuant to which it would have claim against insurance policy. Case did not present threat of “siege of tort claimants” that could overwhelm Debtor’s estate.

Martinez v. OGA Charles, LLC, 901 F.3d 599 (5th Cir. 2018) – Proceeds of Debtor’s General Liability Policy are property of bankruptcy estate where claims against policy exceed aggregate policy limits. Debtor was bus operator involved in an accident that resulted in 9 fatalities. Before bankruptcy, some of the victims settled with insurer for amounts that would exhaust policy limit. Victims who had not settled filed involuntary bankruptcy petition and bankruptcy judge and joined carrier from paying out any insurance proceeds. Recognizing that insurance policies themselves are generally property of estate as distinguished from insurance proceeds, result is different where policy limit is insufficient to cover competing claims. Debtor does not have right to pocket proceeds of insurance policy or to use proceeds as Debtor sees fit, as proceeds must be set aside for allocation between multiple claimants.

In re Licking River Mining, LLC, 2016 WL 3251890 (Bankr. E.D. Ky. 2016) – Liability insurance policies owned by 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 Debtor the proceeds are property of the estate, because the proceeds are payable to 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 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 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.

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.

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.

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

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 Insurance Proceeds – GAP Insurance

In re Doud, 2018 WL 3098687 (Bankr. E.D. Ky. 2018) - GAP insurance proceeds are not property of estate where finance contract executed prior to commencement of case named Debtor as beneficiary on insurance and Debtor simultaneously assigned Debtor's right to GAP insurance to lender. Upon execution of assignment, Debtor no longer had any interest in the potential GAP insurance payout. Fact that secured creditors lien had been avoided as not properly perfected did not alter conclusion as lender's claim to funds was not in capacity as secured creditor but in capacity is asking me of Debtor's beneficial interest in GAP policy.

6.10 Property Acquired Post-Petition

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 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.

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.

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.

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

Williamson v. Hall, Case No. 08-088 (10th Cir. BAP 2009) – 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.

6.11 Pre-Petition Causes of Action

Credit Bureau Systems, Inc. v. Elam, 2019 WL 5089532 (Bankr. E.D. Tn. 2019) – Pre-Petition causes of action become property of Bankruptcy estate and Chapter 7 Trustee has sole standing to prosecute. Abandonment of cause of action by Trustee returns cause of action to Debtor individually and restores Debtor's standing to prosecute.

Bush v. Nathan, 2019 WL 4416313 (E.D. Mi. 2019) – Debtor’s prepetition cause of action for employment discrimination is property of estate subject to administration and settlement by Chapter 7 Trustee.

White v. Gaffney, 2019 WL 2752085 (Bankr. D. Mass. 2019) - Whether cause of action is prepetition property is estate with only Trustee having standing to prosecute; or post-petition property of Debtor depends on when under state law Debtor acquired “property interest” defined as when Debtor could have first initiated cause of action to recover. Court rejected “sufficiently rooted in the pre-bankruptcy past” test announced by United States. Court in *Segal v. Rochelle*, 382 US 375 (1966) as based on Bankruptcy Act. Section 521 of Bankruptcy Code superseded “sufficiently rooted” test to limit property of estate to only property interest that existed at time petition is filed. Section 521 reference to “as of the commencement of the case” operates as temporal cutoff without reference to whether property interest is integral to with Debtors fresh start or sufficiently rooted in prepetition events. Cause of action becomes property of estate only if Debtor has legally cognizable interest in cause of action which requires that resulting harm occurred prepetition. If Debtor suffered no prepetition harm, Debtor had no legally cognizable interest as of petition date and cause of action would not pass to Chapter 7 estate. Debtor’s awareness or knowledge of potential claim is not dispositive. Debtor’s bankruptcy attorney advised Debtor pre-petition to transfer property to trust in which Debtor’s two children and son-in-law were beneficiaries. Debtor then filed Chapter 7 bankruptcy and Trustee commenced adversary against trust to recover property. Debtor then sued lawyer who gave advice regarding transfer for malpractice. Court concluded that while Debtor was aware of and had knowledge of potential malpractice claims as of petition date, Debtor did not suffer harm until after Trustee filed adversary proceeding to recover transferred property. Debtor’s malpractice claim had not accrued prepetition as Debtor could not, as of petition date, have brought malpractice action as Debtor had not yet suffered harm. Debtor had standing to pursue claim free and clear of claims of bankruptcy estate.

Harris v. Wells Fargo Bank, NA, 2019 WL 2319529 (W.D. Tn. 2019) - Debtor filed voluntary petition under Chapter 7 at which point in time any interest which Debtor may have had in the cause of action transferred to and became property of bankruptcy estate and only bankruptcy estate has standing to bring claims.

In re Brown, 2019 WL 2070730 (Bankr. C.D. Ill. 2019) – Nature and extent of Debtor’s interest in property and governed by state law. Bankruptcy code provisions are expensive but do not expand rights of Chapter 7 Trustee beyond those rights held by Debtor as of petition date. If Debtor has rights in property prepetition, presence of contingencies does not defeat estates claim to property but where Debtor, on petition date, has only potential rights that are not certain to arise and that do not become enforceable, if at all, until after bankruptcy, property interest is mere “expectancy” that does not become property of estate regardless of whether property interest may be said to be “related to” in pre-bankruptcy passed. Debtor’s employment bonus, revocable at employers discretion until actually paid, is mere expectancy where bonus was not paid and not guaranteed as of petition date. Debtor’s subsequent receipt of bonus does not make bonus property of bankruptcy estate.

Church Joint Venture, LP v. Blasingame, 2019 WL 1498192 (6th Cir BAP 2019) – Pre-petition cause of action is property of Bankruptcy Estate. Whether cause of action is pre- or post-petition depends on whether pre-petition facts gave rise to pre-petition violation of Debtor’s rights. Action is bankruptcy property only if Debtor suffered a pre-petition injury. Claim against attorney for alleged pre-petition malpractice not property of Bankruptcy Estate where harm suffered was denial of discharge. Injury occurred when discharge denied which was post-petition, even if factual underpinnings are pre-petition.

Soares v. Boyd, 2019 WL 1119353 (E.D. Ky. 2019) – Pre-petition cause of action is property of bankruptcy estate. Whether cause of action is pre-petition, Court must determine when cause of action arises. Prepetition conduct or facts alone will not root claim in past. Complaint alleged that defendant did not make contractually required payments but did not state specifically when payments were due or whether payments were “pre-petition”.

In re Nicole Gas Production, Ltd., 2014 WL 4855005 (Bankr. S.D. Ohio 2014), *affd*, 2018 WL 1279277 (6th Cir. BAP 2018), *affd*, 2019 WL 850960 (6th Cir. 2019) – Whether cause of action belongs to Debtor and is property of estate or can instead be prosecuted by shareholders of corporation depends on whether cause of action is “shared” between Debtor and principal. Whether action is shared turns on whether both shareholder and corporation could state claims for damages; and if recovery by either shareholder or Debtor could recover full damages. If either’s recovery would preclude other from subsequent recovery, actions are not independent but are solely property of estate. 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. While principal alleged that State law allowed direct action by shareholder, sole damage claimed was reduction in worth of corporation based solely on actions taken against Debtor. Shareholders did not allege any independent basis or any independent damages beyond those suffered by Corporation. Principal’s filing of complaint sought to exercise possession and control over cause of action.

Pasley v. Biggs, 2019 WL 328725 (Bankr. W.D. Ky. 2019) – Pre-petition cause of action belongs to Chapter 7 estate unless Trustee abandons claim. Prior to abandonment, only Chapter 7 Trustee has standing to prosecute. On abandonment, right to prosecute reverts in Debtor free and clear of claims of estate.

Tricoche v. Autoglassnow ,LLC, 2018 WL 7272063 (W.D. Tn. 2018) – Pre-petition claims are property or bankruptcy estate that only Chapter 7 trustee may pursue. Fact that Debtor did not know of legal basis for claim or that Debtor was unaware that claim belongs to Estate does not alter fact that claim belongs to estate and only Trustee has standing to pursue. Claim for FLSA violation for non-payment of overtime accrue on date on which employee is paid less than amount owed. Claims arising from pay dates that occurred pre-petition and are pre-petition claims that only Trustee can pursue, while claims that arise from post-petition paydays are post-petition claims that Debtor can pursue.

Cox v. Sitel Operating Corporation, 2018 WL 4102838 (E.D. Tn. 2018) – Chapter 7 Trustee had authority, with Bankruptcy Court approval to retain counsel to prosecute non-bankruptcy cause of action. At time Debtor filed Chapter 7 case, Debtor was plaintiff in FLSA action. Action became property of bankruptcy estate upon filing of Chapter 7 petition and Bankruptcy Trustee became proper party in interest. Bankruptcy Court approved Trustee’s request to retain Debtor’s pre-bankruptcy counsel to continue representation. Trustee’s proposed retention of Debtor’s counsel was within Trustee’s discretion and allowed case to continue seamlessly, avoiding potential attorney liens being placed on settlement and additional attorney fees which would result from retention of new counsel at midpoint of non-bankruptcy litigation.

Weakley v. Eagle Logistics, 894 F.3d 1244 (11th Cir. 2018) – Pending lawsuits and potential claims are property of bankruptcy estate that must be disclosed. Nondisclosure resulted in dismissal of nonbankruptcy litigation for judicial estoppel where facts indicated that nondisclosure was intended by Debtor to make mockery of judicial system.

Bowling v. Ryder Logistics, Inc., 2018 WL 1157549 (E.D. Ky. 2018) - Upon filing of bankruptcy petition, all pre-petition causes of action become property of estate and only Bankruptcy Trustee has standing to pursue recovery. Later closing of case did not result in abandonment of cause of action where Debtor did not disclose existence of cause of action. Section 554 provides for abandonment at closing of case of scheduled assets; or if Trustee affirmatively abandons claim by giving notice of proposed abandonment. Although Trustee may not have shown interest in pursuing claim once Trustee discovered claim, that does not constitute abandonment. Dismissal of bankruptcy case does not restore Debtor’s ability to prosecute case as dismissal does not render prior bankruptcy proceeding void *ab initio*. Cause of action remained property of bankruptcy estate. Debtor had no standing to pursue recovery. Case dismissed for lack of subject matter jurisdiction.

Meyer v. Timothy E. Baxter & Associates, PC, 2018 WL 1858182 (E.D. Mi. 2018) – Standing requires prosecution of action by real party in interest. Upon filing of bankruptcy petition, Debtor’s property including existing causes of action becomes property of bankruptcy estate. Debtor thereafter has no standing to pursue causes of action as only Bankruptcy Trustee is empowered to do so. If Debtor claims cause of action as exempt and no party objects, exemption re-vests cause of action in Debtor and cause of action is no longer property of estate. Debtor had standing to prosecute action where Debtor listed cause of action in bankruptcy schedules, claimed cause of action as exempt and no party objected. Fact that Bankruptcy Court Order closing case was not entered until after commencement of this case did not affect Debtor’s standing.

Camfoi Master LDC v. Spradlin, 2017 WL 4478332 (E.D. Ky. 2017), *appeal dismissed*, 2018 WL 776339 (6th Cir. 2018) – Causes of action are property of the estate and may be brought exclusively by Trustee if Debtor could have raised estate claim as of moment of commencement of bankruptcy case. If cause of action does not explicitly or implicitly allege harm to Debtor, cause of action could not have been asserted by Debtor as of commencement of case and is not property of the state. If facts demonstrate that both Debtor and creditor could assert state law claims, cause of action is property of the state that can be brought solely by Trustee if recovery by either creditor or Debtor in state Court would preclude other party from subsequent recovery. If each party has independent claim for damages, claims are independent and creditor can maintain cause of action. If recovery by one party precludes recovery by second party, claims are not independent and by default claims become exclusive property of Trustee in bankruptcy. Action against Board of Directors for breach of fiduciary duty asserted actions that could be brought by either creditor or Debtor. However, if both Debtor and creditor are permitted to prosecute cause of action, potential for double recovery was undeniable as any recovery by creditor would offset Debtors ability to recover. Allowing creditor to proceed with individual claims would be contrary to equitable distribution scheme of Code by depriving Trustee of assets that could be used to pay claims. Alleged injury suffered by creditor-plaintiff was no different than injuries than those suffered by all creditors as breach of fiduciary duty injured all creditors. Separate lawsuit by creditor would impermissibly interfere with Trustee’s claims were creditor and Trustee would be competing for same pool of recovery.

Corradi v. Lane Funeral Homes, Inc., 2017 WL 6055231 (Bankr. N.D. Ohio 2017) – Debtor in Chapter 13 has duty to disclose all assets and liabilities. Disclosure obligation is at very core of bankruptcy process and meeting obligation is part of price paid for discharge. Debtor breached duty to disclose by answering “none” when asked in Schedules to list all claims and lawsuits, when Debtor had already filed EEOC complaint alleging employment discrimination.

Bell v. Sammy Berezna & Co., 2017 WL 6276467 (M.D. Tn. 2017) – On filing for relief under Chapter 7, all pre-petition causes of action become property of bankruptcy estate and right to pursue causes of action vest solely in trustee, such that Debtor has no standing to pursue recovery. Trustee would be substituted for Debtor in litigation pending prior to commencement of case.

Newman v. University of Dayton, 2017 WL 4919225 (S.D. Ohio 2017), *aff’d*, 751 Fed. Appx. 809 (6th Cir. 2018) – Civil cause of action is asset that must be disclosed in bankruptcy schedules. Duty to disclose is continuing one and Debtor is required to disclose all potential causes of action.

McDermott v. Kerr, 2017 WL 3880875 (Bankr. N.D. Ohio 2017) – Pre-petition causes of action, whether meritorious or not, belong to Bankruptcy Estate. Filing of Bankruptcy case divest Debtor of right to pursue causes of action and vests right solely in Trustee for benefit of estate.

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.

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.

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.

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.

Camaj v. US Bank, NA, 2016 WL 11472337 (E.D. Mi. 2016) – Causes of action based on alleged pre-petition violations of RESPA, TILA, wrongful foreclosure and quiet title became property of bankruptcy estate upon commencement of case. Debtor lacks standing to bring claims. Trustee is proper party in interest to assert claims.

McCray v. Wells Fargo Bank, N.A., Case No. 14-03445 (D. Md. 2015), *aff'd*, 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.

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.

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.

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.

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 of 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.

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.

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.

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.

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.

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.

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 First Modified Pre-Confirmation Chapter 13 Plan and only purchaser thereafter had standing to pursue recovery.

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.

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.

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.

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.

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.

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.

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.

Willess v. U.S., Case No. 13-6159 (10th Cir. 2014) – Debtor lacked standing to appeal dismissal of personal injury action where Debtor filed bankruptcy after date on which injury occurred and cause of action became property of estate. Only the Chapter 7 Trustee has standing to pursue recovery of cause of action that accrued prior to commencement of case where cause of action has not been abandoned.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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 Debtor has enough information to suggest that it may have a possible claim.

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.

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.

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.

In re Fritzsch Custom Builders, LLC, 474 BR 515 (Bankr. S.D. Ohio 2012) – Cause of action against Debtor’s insurer for breach of duty to defend litigation based on alleged encroachment of easement was property of Chapter 7 estate. Attorney who represented Debtor in action against insurance company is third party beneficiary of insurance policy and was not entitled to be paid from proceeds of litigation absent court approval.

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.

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.

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.

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.

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.

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.

6.12 Pre-Petition Causes of Action – Product Liability

In re Davis, 2018 WL 3629896 (Bankr. E.D. Tn. 2018) – Action is “Property of estate” where cause of action is sufficiently rooted in pre-bankruptcy past and entangled with Debtor's ability to make fresh start. All causes of action that hypothetically could have been brought pre-petition are property of estate even if Debtor was unaware of claim or where post-petition damages were incurred. Claim must be at least “minimally actionable” by date of bankruptcy petition. Product liability cause of action predated bankruptcy case where manufacture and surgical implantation of defective product occurred prior to commencement of bankruptcy case. However, as of petition date, Debtor had not suffered any injury such that as of petition date, Debtor did not have minimally actionable product liability action. Following *Segura*, where Debtor had suffered no adverse effects related to device until four years post-petition and there was no evidence that Debtor actually suffered any physical injury prior to petition date, cause of action was not sufficiently rooted in pre-petition past to constitute property of estate.-

Davis v. Nasuti, Case No. 10-24836 (Bankr. N.D. Ga. 2018) – Personal injury claim is property of estate if claim is sufficiently rooted in pre-bankruptcy past. Cause of action for product liability for defective medical device arose when device implanted, even if Debtor was unaware of any issues and had no problems with device pre-petition. Discovery is not relevant to when cause of action arises, but ties only to Statute of Limitations. One year after Debtor filed Chapter 7, device broke, and Debtor made claim against manufacturer which settled for \$147,000. Proceeds of settlement were property of estate which must be turned over to Trustee for distribution. Compare *Mendelsohn v. Ross*, 251 F. Supp. 3d 518 (E.D.N.Y. 2017) reaching contrary conclusion involving same medical device.

Mendelsohn v. Ross, 251 F. Supp. 3d 518 (E.D.N.Y. 2017) – Whether cause of action is property of Chapter 7 estate depends on whether cause of action is sufficiently rooted in pre-bankruptcy events. Cause of action based on failed medical device was post-petition even though medical device was implanted and all facts giving rise to cause of action occurred pre-petition. Cause of action does not arise until Debtor knows of cause of action, which occurred when device failed post-petition. Settlement proceeds of claim against manufacturer were not property of estate as settlement was proceed of post-petition asset. Compare *Davis v. Nasuti*, Case No. 10-24836 (Bankr. N.D. Ga. 2018) reaching contrary conclusion involving same medical device

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.

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.

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.

6.13 Post-Petition Causes of Action

United States v. Tangipahoa Parish School Board, 766 Fed. Appx. 38 (5th Cir. 2019) - Chapter 13 Debtors unscheduled False Claim Act action that arose years after confirmation but while Chapter 13 case remained pending was property of estate. Debtor judicially estopped from maintaining False Claims Act and retaliation claims where Debtor had continuing obligation to reveal causes of action even though property vested in Debtor at confirmation. Grant of discharge was reliance on inconsistent positions and motive to deceive would be inferred because Court may have required increased payments or other remedies had action been revealed.

White v. Gaffney, 2019 WL 2752085 (Bankr. D. Mass. 2019) - Whether cause of action is prepetition property is estate with only Trustee having standing to prosecute; or post-petition property of Debtor depends on when under state law Debtor acquired “property interest” defined as when Debtor could have first initiated cause of action to recover. Court rejected “sufficiently rooted in the pre-bankruptcy past” test announced by United States. Court in *Segal v. Rochelle*, 382 US 375 (1966) as based on Bankruptcy Act. Section 521 of Bankruptcy Code superseded “sufficiently rooted” test to limit property of estate to only property interest that existed at time petition is filed. Section 521 reference to “as of the commencement of the case” operates as temporal cutoff without reference to whether property interest is integral to with Debtors fresh start or sufficiently rooted in prepetition events. Cause of action becomes property of estate only if Debtor has legally cognizable interest in cause of action which requires that resulting harm occurred prepetition. If Debtor suffered no prepetition harm, Debtor had no legally cognizable interest as of petition date and cause of action would not pass to Chapter 7 estate. Debtor’s awareness or knowledge of potential claim is not dispositive. Debtor’s bankruptcy attorney advised Debtor pre-petition to transfer property to trust in which Debtor’s two children and son-in-law were beneficiaries. Debtor then filed Chapter 7 bankruptcy and Trustee commenced adversary against trust to recover property. Debtor then sued lawyer who gave advice regarding transfer for malpractice. Court concluded that while Debtor was aware of and had knowledge of potential malpractice claims as of petition date, Debtor did not suffer harm until after Trustee filed adversary proceeding to recover transferred property. Debtor’s malpractice claim had not accrued prepetition as Debtor could not, as of petition date, have brought malpractice action as Debtor had not yet suffered harm. Debtor had standing to pursue claim free and clear of claims of bankruptcy estate.

Loggins v. Costco Wholesale Corporation, 2019 WL 2203120 (W.D. Tn. 2019) – Cause of action that accrues after Debtor files a petition under Chapter 7 is not property of bankruptcy estate. Judicial estoppel requires that party assert contrary position under oath in prior proceeding and that prior proceeding was accepted by Court. Debtor’s cause of action for alleged wrongful termination not barred by judicial estoppel where Debtor filed for relief under Chapter 13 and converted case to Chapter 7 more than 3 years before conduct on which Debtor based cause of action occurred. Although Chapter 7 bankruptcy was still pending when cause of action accrued, there was no dispute that claim accrued after Debtor filed for bankruptcy and Debtor pursuing claims would not be inconsistent with position in prior bankruptcy case.

Church Joint Venture, LP v. Blasingame, 2019 WL 1498192 (6th Cir BAP 2019) – Pre-petition cause of action is property of Bankruptcy Estate. Whether cause of action is pre- or post-petition depends on whether pre-petition facts gave rise to pre-petition violation of Debtor’s rights. Action is bankruptcy property only if Debtor suffered a pre-petition injury. Claim against attorney for alleged pre-petition malpractice not property of Bankruptcy Estate where harm suffered was denial of discharge. Injury occurred when discharge denied which was post-petition, even if factual underpinnings are pre-petition.

Tricoche v. Autoglassnow ,LLC, 2018 WL 7272063 (W.D. Tn. 2018) – Pre-petition claims are property or bankruptcy estate that only Chapter 7 trustee may pursue. Fact that Debtor did not know of legal basis for claim or that Debtor was unaware that claim belongs to Estate does not alter fact that claim belongs to estate and only Trustee has standing to pursue. Claim for FLSA violation for non-payment of overtime accrue on date on which employee is paid less than amount owed. Claims arising from pay dates that occurred pre-petition and are pre-petition claims that only Trustee can pursue, while claims that arise from post-petition paydays are post-petition claims that Debtor can pursue.

Tujague v. The Castro Family Trust, LLC, 2018 WL 4896896 (Bankr. S.D. Ohio 2018) – Party seeking preliminary injunction must prove substantial likelihood or probability of success on merits; threat of irreparable harm; whether issuance of injunction would cause substantial harm to others; and whether public interest would be served by granting injunction. Court may not issue preliminary injunction where there is no likelihood of success on merits; and irreparable injury must be likely to occur. Cause of action to recover fraudulent transfers belongs to bankruptcy estate and Trustee has sole right to pursue recovery unless cause of action is abandoned, or estate settles or releases cause of action. Derivative standing may be available to creditor if demand was made on Trustee to act; Trustee declined; colorable claim exists which would benefit estate; and Trustee’s inaction was abuse of discretion. Creditor lacks standing to maintain action where bankruptcy estate had not abandoned or released cause of action and there was no evidence that Trustee delegated authority to plaintiff.

Silva v. Pro Transport, Inc., 2018 WL 3801663 (11th Cir. 2018) – Debtor in Chapter 13 has ongoing duty to disclose potential causes of action. Debtor in Chapter 13 has concurrent standing with Chapter 13 Trustee to pursue legal claim. Nondisclosure of claim in bankruptcy case may result in dismissal for judicial estoppel.

Holcomb v. Altgen, Case No. 17-1268 (9th Cir. BAP 2018) – Cause of action is not property of Chapter 7 estate where cause of action arose after case had been converted to Chapter 7. Suit against Debtor’s counsel for malpractice alleged that counsel did not bring facts to attention of Bankruptcy Court that would have blocked Trustee’s sale of property and allowed Debtor time to sell property for considerably more. Cause of action arose post-conversion and amounted to suit against counsel acting as Chapter 7 private attorney.

Newman v. University of Dayton, 2017 WL 4919225 (S.D. Ohio 2017), *aff’d*, 751 Fed. Appx. 809 (6th Cir. 2018) – Civil cause of action is asset that must be disclosed in bankruptcy schedules. Duty to disclose is continuing one and Debtor is required to disclose all potential causes of action.

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 do not disclose assets prior to confirmation and then be rewarded by having undisclosed property “vest” in Debtor free of Estate.

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.

Sikirica v. Harber, 553 BR 522 (Bankr. W.D. Pa. 2016) – Product liability claim for defective medical device does not accrue until device fails. Claim not property of estate even where all operative facts occurred prior to petition but device did not fail until after Debtor commenced Chapter 7. Cause of action rises when Debtor suffered damages and had manifestation of injury.

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

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 does not 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.

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.

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.

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.

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.

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.

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.

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.

6.14 Pre-petition Casualty Insurance Proceeds

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.

6.15 Post-Petition Property – Insurance Proceeds

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.

In re Howard, Case No. 07-3910 (Bankr. M.D. Fl. 2014) – Section 1306 sweeps into property of estate any property that would have been property of Chapter 7 estate including property described in Section 541(a)(5) even if required more than 180 days post-petition. Life insurance proceeds received when Debtor's spouse passed away one year into Chapter 13 case constituted property of estate that should have been disclosed. However, nondisclosure did not warrant denial of discharge or dismissal of case where

Debtor promptly informed counsel that spouse had died and that Debtor had received life insurance proceeds and inquired from counsel as to how to proceed, and counsel advised that Debtor did not need to report spouse's death or receipt of proceeds because proceeds were not property of estate. Debtor's failure to notify Court of spouse's death and receipt of proceeds were in good faith reliance on the attorney's advice and did not constitute bad faith attempt to conceal information.

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.

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.

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.

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.

6.16 Post-Petition Equity

Wilson v. Rigby, 909 F.3d 306 (9th Cir. 2018) – Post-petition appreciation in asset belongs to estate even if Debtor has exempted all equity in property as of petition date. On filing of case, property became vested in estate and estate is entitled to all proceeds, products, offspring, rents or profits including post-petition appreciation. Debtor cannot amend exemptions post-petition to exempt post-petition equity as value of property and value of exemption is determined as of petition date.

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.

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.

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.

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 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.

6.17 Probate Estates

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.

6.18 Tenants by Entireties

In re Jaffe, 932 F.3d 602 (7th Cir. 2019) – Tenant by entirety holds contingent future interest in property while other tenant is alive. Contingent interest is broadly considered an interest in real estate to which judgment lien could attach, even though judgment was against only one tenant. However, while state law defined one tenant's interest as contingent future interest, state law did not provide basis to exempt that contingent future interest. Although Debtor's entireties interest in property could be exempted, when Debtor's spouse passed away post-petition and Debtor's contingent future interest ripened, lien of pre-petition creditor attached to property. Debtor could not exempt contingent future interest so could not avoid fixing of judicial lien on contingent future interest (or lien on property that ripened when spouse passed away) allowing judgment creditor to enforce lien against one-half of property that Debtor acquired at spouse's passing.

Corcoran v. Holley, 2018 WL 5318223 (E.D. Mi. 2018) (appeal after remand) – Trustee cannot offset exemptions to pay administrative expenses. Debtors properly asserted tenants in the entireties exemption as to residence. If trustee liquidates asset, trustee must turnover to Debtors 100% of the proceeds remaining after payment of valid liens. Trustee, with Debtors' consent, sold property and remitted to Debtors all proceeds remaining after payment of liens and costs of sale including trustee administrative fee. Trustee required to turn over all proceeds after payment of liens including amounts paid to broker for commission and amount paid for closing costs of sale plus any commission retained by trustee. Fact that estate is administratively insolvent does not excuse trustee's obligation to turn over all proceeds after payment of liens.

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.

Holley v. Corcoran, 2016 WL 6211975 (6th Cir. 2016), *opinion on remand*, Case No. 12-33873 (Bankr. E.D. Mi. 2017) – Michigan law protects 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 redesignated 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. Debtors 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.

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.

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-liaible 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.

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".

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.

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”.

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 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. 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 Debtor and the non-filing spouse.

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.

6.19 Partnership Interests

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 partners’ 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.

6.20 Corporations and LLCs

LaGroux v. Allcare Medical Services, LLC, 2019 WL 3933797 (Bankr. N.D. Ohio 2019) – Chapter 7 Trustee becomes owner of Debtor’s LLC interest to extent interest existed on petition date. Where Debtor, prepetition, with a true from LLC, Debtor no longer had any rights to operate, manage or control business or affairs of LLC and otherwise gave up any noneconomic interest in LLC, leaving Debtor with only economic interest at time of filing.. Trustee assumed Debtor’s interest. Trustee had no right to exercise right of first refusal where Debtor previously withdrew from LLC prior to decision by separate member to sell that member’s interest as a right to exercise right of first refusal was predicated on Debtor being member of LLC at time of sale. Debtor resigned his LLC interest before other member elected to sell leaving Debtor with no right to be afforded opportunity to purchase other member’s interest. However, Debtors interest remained is subject to right of first refusal in favor of other members who remained members of LLC on terms set forth in LLC Operating Agreement.

Pasley v. Keats, 2019 WL 3559624 (6th Cir. BAP 2019) – Debtor’s membership interest in LLC becomes property of bankruptcy estate and allows Chapter 7 Trustee to exercise all rights and powers that Debtor has under membership documents. Debtor was sole member of LLC allowing Trustee to exercise all rights and powers including sale of property of LLC. Debtor lacked standing to oppose sale of property by estate as sale would not generate assts in excess of liabilities or create any surplus that would benefit

Debtor Standing requires pecuniary interest in outcome of sale motion, and must constitute more than theoretical change of surplus but that surplus is reasonable possibility.

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.

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.

In re Talbut, 2016 WL 937373 (Bankr. N.D. Ohio 2016) – Section First Modified Pre-Confirmation Chapter 13 Plan 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.

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.

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.

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.

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.

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.

In re Hopkins, Case No. 10-13592 (Bankr. W.D. Mi. 2012) – Estate's interest where Debtor was sole member of LLC is 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.

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.

Zeh v. Orthodontic Centers of America, Inc., 2013 WL 5966784 (W.D. Ky. 2013) – *Ipso Facto* clause in settlement agreement in pre-petition litigation was ineffective to cut off Debtor's rights to enforce contract in bankruptcy. Settlement agreement obligated Zeh to pay OCI and provided that if either party seeks relief under the Bankruptcy Code, the other party would be relieved from any further obligations under the settlement agreement. Court rejected Zeh's contention that after OCI filed Chapter 11, he was no longer required to make payments under the settlement agreement pursuant to the *ipso facto* clause. Section 541(c)(1) expressly precludes enforcement of any clause that operates as a modification, forfeiture or termination of Debtor's interest in property merely because Debtor filed bankruptcy. Clause purported to terminate or forfeit Debtor's right to enforce settlement agreement in the event of bankruptcy and was unenforceable to defeat Debtor's claim for payment.

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.

6.21 Stock and Corporate Ownership Interests

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.

6.22 Leaseholds

Nathan v. Minardi, 2017 WL 5903457 (E.D. Mi. 2017) – Constructively fraudulent transfer requires proof of transfer by Debtor of interest in property; within 2 years pre-petition; for which Debtor received less than reasonably equivalent value; and Debtor was insolvent when transfer was made. Landlord's acquisition of improvements constructed by Debtor at end of lease did not constitute transfer by Debtor of interest in improvements. Lease provisions stated that any improvements constructed by Debtor become part of the premises and remain thereon at termination of lease. Improvements remained property of Debtor on construction as lease provided for improvements to "become" part of premises at termination of lease, not at any earlier date. Rights remaining in parties at termination of lease do not constitute "transfer" of any interest in property, but rather a termination of any possessory right. One lease terminated, Debtor had no rights left to transfer because right to use and possess property expired leaving Debtor with nothing to convey.

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.

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.

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.

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.

6.23 Life Estates

Church Joint Venture, LP v. Blasingame, 2018 WL 2084789 (6th Cir. BAP 2018), *aff'd* 2019 WL 1466949 (6th Cir. 2019) – Property held in trust established by Debtor's mother with Trust instrument allowing Debtors to reside in property does not create legal life estate that is property of estate. Scope of Debtor's interest is governed by trust instrument as reflecting intent of settlor. Transaction designed to place Residence in trust to allow Settlor's family right to live there. Trust instrument designed to ensure that Settlor's children and grandchildren did not lose family home; trust instrument contained "spendthrift provisions" which

indicated intent that Debtors did not have legal title; provision that Debtor “shall be permitted to reside” in the property for life did not grant Debtors right to do anything other than reside on property, and prohibited Debtor from renting property to someone else. Nothing in Trust agreement devised any legal title to property. Trust agreement imposed duties on Trustee rendering trust “active” and fully enforceable. Debtors did not hold any legal interest in property that would be subject to turnover. At most, Debtor held equitable right to reside in property without any ability to dispose of property, mortgage property, rent property or otherwise encumber property, and solely as beneficiary of trust.

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.

6.24 Tax Refunds Generally

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

6.25 Tax Refund – Non-Filing Spouse

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.

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.

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.

6.26 Post-Foreclosure Interests

In re Mapp, 2018 WL 6519358 (Bankr. W.D. Ky. 2018) – Property is not property of bankruptcy estate where foreclosure sale had completed prior to filing of bankruptcy petition. Post-foreclosure, Debtor retains bare legal title coupled with right of redemption that is property of estate. However, right of redemption does not allow Debtor to reverse acceleration or cure default. Right of redemption does not prevent title from passing. Automatic stay does not prevent toll running of statutory period of redemption. Expiration of redemption terminated any residual claim Debtor had to property.

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.

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.

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.

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.

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.

6.27 Right of Redemption Following Foreclosure

In re Mapp, 2019 WL 913043 (Bankr. W.D. Ky. 2019) – Upon completion of foreclosure sale prepetition, purchaser at sale obtains equitable ownership of property subject only to Debtor's bare legal title and right of redemption which becomes property of estate protected by automatic stay until right of redemption expires under applicable state law. Once period for redemption expires, property is no longer property of estate. Filing of Chapter 13 petition post-sale but before expiration of redemption does not stay running of redemption period.

In re Mapp, 2018 WL 6519358 (Bankr. W.D. Ky. 2018) – Property is not property of bankruptcy estate where foreclosure sale had completed prior to filing of bankruptcy petition. Post-foreclosure, Debtor retains bare legal title coupled with right of redemption that is property of estate. However, right of redemption does not allow Debtor to reverse acceleration or cure default. Right of redemption does not prevent title from passing. Automatic stay does not prevent or toll running of statutory period of redemption. Expiration of redemption terminated any residual claim Debtor had to property.

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.

6.28 Property Settlements

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.

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.

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.

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 Debtor in the constructive trust become property of the estate.

6.29 Pre-Petition Alimony and Support Awards

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 Debtor"

for purposes of Section 541(a)(1).

6.30 Titled Assets – Generally

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.

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.

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.

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.

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.

6.31 Titled Assets – Auction Sales

In re Mapp, 2018 WL 6519358 (Bankr. W.D. Ky. 2018) – Property is not property of bankruptcy estate where foreclosure sale had been "gaveled down" prior to filing of bankruptcy petition. Post-foreclosure, Debtor retains bare legal title coupled with right of redemption that is property of estate. However, right of redemption does not allow Debtor to reverse acceleration or cure default. Right of redemption does not prevent title from passing. Automatic stay does not prevent toll running of statutory period of redemption. Expiration of redemption terminated any residual claim Debtor had to property.

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 Dixon, 2015 WL 1803924 (Bankr. E.D. 2015) – Evidence indicated that auction sale was concluded and buyer took possession of motorcycle and the auctioneer provided signed bill of sale to buyer prior to commencement of bankruptcy case. However, seller had not executed either an application for title or an assignment of certificate of title within meaning of MCL 257.233 prior to commencement of bankruptcy case. As such, title had not transferred and Debtor still had legal title to motorcycle as of filing of petition, and later execution or certificate of title violated stay.

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.

6.32 Bank Accounts Generally

Feldman v. People First Federal Credit Union, 2019 WL 2067360 (Bankr. E.D. Pa. 2019) – Funds withdrawn from retirement account pre-petition and deposited into attorney trust account for purposes of paying mortgage creditor constituted property of estate where funds were still in attorney trust account as of petition date. Although funds were withdrawn from retirement account for specific purpose of paying identified creditor and funds were actually used post-petition to pay that creditor, funds were not “earmarked” so as to prevent funds from being property of estate where funds were derived from Debtor’s own investment account and were not proceeds of loan made by 3rd party specifically to allow Debtor to satisfy claim of specific creditor.

6.33 Jointly Owned Bank Accounts

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.

6.34 Contract Rights

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.

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.

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.

U.S. v. Kurlemann, 708 F.3d 722 (6th Cir. 2013) – Real estate option contract is legal interest in property that must be disclosed and that becomes property of estate. Debtor’s failure to disclose option contract committed bankruptcy fraud by failing to disclose material assets.

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.

In re Wise, 2010 WL 3430849 (Bankr. N.D. Ohio 2010) - Chapter 7 Trustee acquires all contract rights which 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 First Modified Pre-Confirmation Chapter 13 Plan.

6.35 Contract Deposits

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 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.

6.36 Land Contract Interests

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.

6.37 Easements

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.

6.38 Accounts Receivable

Baumgart v. Ptacek, 2019 WL 4049842 (Bankr. N.D. Ohio 2019) – Debtor's Estate is no larger or smaller than assets Debtor has under applicable law. Trustee's right to any property settlement payments due Debtor are based on whatever rights Debtor had to receive payments. Final Judgment of Divorce required ex-husband to pay Debtor \$150,000 representing interest in Debtor-husband's business. Evidence indicated that ex-husband's business mailed Debtor a check for \$150,000 which Debtor received and endorsed. Debtor's choice after receipt of check to return money to ex-husband did not reinstate obligation as “receivable”. Once Debtor received payment, what Debtor chose to do with proceeds was entirely within control of Debtor. Further, State Court entry of consent judgment in domestic action that acknowledged that ex-husband had satisfied entire spousal support obligation left Trustee with no right of recovery. State Court judgment was entitled to both res judicata and collateral estoppel effect precluding later litigation by same parties or privies arising out of transaction that was subject to and prevents same parties or privies from relitigating facts or issues that were fully litigated in prior action. Ohio law gives preclusive effect to consent judgment to same extent as judgment entered on merits in full adversarial proceeding. Only remaining obligation was unpaid promissory note signed by ex-husband as part of divorce to which Trustee was entitled to enforce.

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.

6.39 Intellectual Property

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.

6.40 Internet Domain Name

LaGroux v. Allcare Medical Services, LLC, 2019 WL 3933797 (Bankr. N.D. Ohio 2019) – To extent Debtor holds equitable interest in domain names, those domain names become property of Chapter 7 estate. Evidence indicated that domain names were not required for Debtor personally, but were acquired on behalf of LLC leaving Debtor with bare legal title that does not become property of bankruptcy estate. Purchase and renewal costs for domain names were nominal, between \$7 and \$14 per name; Debtor provided password to domain names to officers of LLC; Debtor did not disclose domain names in schedules or at Section 341 meeting; first mention of Debtor's alleged interest in domain names occurred seven months post-petition when Debtor amended schedules. Debtor did not use domain names for personal use where names were and continue to be used exclusively by LLC; and Debtor testified that he believed domain names were property of LLC and not his own.

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.

6.41 Commission Income

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.

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.

6.42 Unrecorded Interests

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.

Ray v. Durkop, 2010 WL First Modified Pre-Confirmation Chapter 13 Plan2155 (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.

6.43 Marital Property

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.

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).

In re Kooi, 2016 WL 1128485 (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.

6.44 Equitable Interests

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.

6.45 Trust Property – Generally

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. PACA trust extends to all assets of Commodity purchaser and is "floating" lien that covers all perishable agricultural commodities received in all transactions, all inventory of food or other products derived from perishable agricultural commodities, and all food or products derived therefrom and include all assets purchased using proceeds of sale of PACA commodities including buildings and equipment. Burden is on PACA purchaser (the PACA Trustee) to demonstrate which assets of Trustee are subject to PACA trust and those which were neither PACA assets or purchased with proceeds of sales of PACA assets and if Trustee cannot segregate, then all assets owned by PACA Trustee are considered assets subject to PACA Trust. 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 First Modified Pre-Confirmation Chapter 13 Plan. 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.

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.

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 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.

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.

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 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 Debtor when the deposited check bounced, and the funds in the trust account were the proceeds of this "loan" and belonged to Debtor.

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.

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.

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 Debtor in the property which would have precluded finding of fraudulent transfer. Judgment at least implicitly rejected argument for purposes of res judicata.

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.

Fifth Third Bank v. JPMorgan Chase Bank, N.A., 2011 WL 30770 (W.D. Ky. 2011) - Estate includes all legal or equitable interests of 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.

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

In re Culane, 2019 WL 1005823 (Bankr. E.D. Mi. 2019) – Section 521(c)(2) excludes from property of estate Debtor's interest in ERISA qualified pension Plan. Exemption does not require that employer have opened specific account for pension benefit administration, only that Debtor have a beneficial interest in an ERISA qualified Trust. Debtor does not lose exemption merely because employer has not funded pension Plan account. Court would not determine whether and to what extent Debtor has ERISA rights, only to state that to the extent rights exist, they are not property of bankruptcy estate and cannot be seized by or for benefit of creditors.

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.

6.47 Express Trusts – Spendthrift Provisions

Church Joint Venture, LLP v. Blasingame, 2019 WL 1466949 (6th Cir. 2019) – Self-settled trust, where Debtor is settlor, sole beneficiary and sole Trustee cannot be used to shield assets from creditors. However, spendthrift provision of trust is not disqualified where there are trustees or beneficiaries in addition to Debtor. Residential Trust created by Debtor identified multiple trustees and multiple beneficiaries and provided trustees with broad discretion to carry out trust obligations. Trust agreement provided that beneficiaries were not permitted to sell or encumber their beneficial interests and that trust property and income could not be subject to claims of creditors of beneficiaries. Debtors retained beneficial interest in property of trust were trust provided that Debtor's would be permitted to reside in property for their lifetimes, but that Debtors otherwise did not have any powers or authorities and specifically restricted right to encumber. Debtor's beneficial interest did not involve full enjoyment and use of property which is essential to creation of life estate. Trust imposed minimal duties which are sufficient to prevent Trustee from being deemed "dry trust" under which legal title would pass to beneficiaries. Trust agreement reserved to Trustee full authority over property subject only to Debtors limited right to reside.

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.

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.

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.

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 o 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.

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.

Meoli v. Thrun, Case No. 13-80072 (Bankr. W.D. Mi. 2013) – Section 541(c)(2) excludes from property of the estate any property that is subject to a restriction on transfer of a beneficial interest in a trust that is enforceable under applicable non-bankruptcy law. Inquiry is three part test: does 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.

6.48 Resulting Trusts and Estate Planning Devices

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.

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.

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.

6.49 Child Support

In re Rush, 582 BR 729 (Bankr. E.D. Tn. 2018) – Back child support is not property of Custodial Parent’s bankruptcy estate. Section 541(b)(1) excludes any power Debtor may exercise solely for benefit of third party; and Section 541(d) excludes property in which Debtor has only legal title but no equitable interest. Child support payments are intended solely for benefit of child, although custodial parent can decide how funds are used. Child support payments are held in constructive trust solely for benefit of child. Fact that child attained majority post-petition does not alter conclusion as property of estate in Chapter 7 is determined as of petition date.

6.50 Power Exercisable for Benefit of Third Party

In re Vess, 2018 WL 722408 (Bankr. N.D. Ohio 2018) – Property of the bankruptcy estate does not include any power that Debtor “may exercise solely for the benefit of an entity other than Debtor. Debtor’s powers as trustee, to the extent exercisable for Debtor’s own benefit are property of bankruptcy estate. Trust not property of Debtor’s estate where although trust was self-settled, Debtor was not trustee and trust was irrevocable, leaving Debtor with no power other than to name beneficiaries to take after Debtor’s death. Any power that Debtor can exercise to appoint beneficiaries to take effect after Debtor’s death, constituting a power exercisable for benefit to third parties only, are not property of estate. Debtor’s interest in trust property as beneficiary was property of estate including Debtor’s right to live in home that was Debtor’s principal residence although owned by Trust itself.

6.51 Recovered Property

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 reverted 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.

6.52 Returned Funds

In re Zimpher, 2019 WL 4747657 (Bankr. N.D. Ohio 2019) – Funds returned to Trustee as property of Bankruptcy Estate subject

to Chapter 7 distribution priorities under Section 726. Section 502(e) allows claims for reimbursement only under certain circumstances and generally must be asserted by an entity that is liable with Debtor – that is, a co-debtor. Section 509 defines co-debtor which, while broadly construed, does not include Debtor as a co-debtor. Creditor is subrogated to Creditor's claim only where subrogee pays or discharges debt for which another is liable, and not for payment of one's own debts. Debtor cannot use Section 509 or subrogation to file a claim on behalf of Debtor merely because Debtor paid a claim post-petition. There was no basis for Debtor to assert claim to level higher than Debtor's right to recover excess funds under Section 726(a).

6.53 Constructive Trusts

In re Blume, 582 BR 178 (Bankr. E.D. Mi. 2017) – Property that is subject to constructive trust does not become property of bankruptcy estate. Debtor holds bare legal title while equitable title is in beneficiary of constructive trust. Cause existed to lift stay and allow State Court in Marriage Dissolution proceeding to determine whether constructive trust should be imposed on property of Debtor. Prior to Bankruptcy filing, State Court determined that “there may be grounds impose, and the court may in the future impose, an equitable lien” on certain real property which, if imposed, would amount to constructive trust and remove property from property of estate. Although Bankruptcy Court lacks authority to impose constructive trust, State Court can do so if (a) Bankruptcy Court grants stay relief to allow State Court to conduct additional proceedings; (b) state court decided to impose constructive trust; and (c) state court rule that effective date of constructive trust pre-dated bankruptcy filing. Denial of stay relief would prevent creditor from seeking relief as property would be liquidated by bankruptcy estate leaving creditor a n entirely unsecured creditor, while allowing State Court proceedings could result in creditor being afforded fully secured status. Debtor's choice of timing of filing of bankruptcy should not deprive creditor of ability to litigate on merits and have State Court reach conclusion as to constructive trust.

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.

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.

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.

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.

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

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

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.

6.54 Constructive Trust – QDRO

In re Jeffers, 2017 WL 2838104 (Bankr. N.D. Ohio 2017) – Entry of Judgment of divorce that grants to spouse an interest in ex-spouse's retirement Plan vests in receiving spouse a property interest in retirement Plan even in absence of QDRO. Property interest is not claim of creditor and is not subject to discharge. Upon entry of Divorce Decree, spouse became equitable owner of interest in retirement account and Debtor's retirement account became impressed with constructive trust for benefit of spouse, leaving Debtor with only bare legal title that does not become property of Debtor's bankruptcy estate. Section 523(a)(15) is of no effect as Section 523(a)(15) governs only "debt" owed to spouse, former, spouse or child. Spouse's interest in retirement account is property interest, not debt, and so is not impacted by Section 523(a)(15) or by Debtor's later discharge. Court would lift stay to allow State Court to enter QDRO to allow spouse control of her individual property interest in Debtor's retirement account

6.55 Possessory Liens

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.

6.56 Restrictions on Alienation

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.

6.57 Consignment Transactions

TSA Stores, Inc. v. Sport Dimension, Inc., 2019 WL 1590531 (Bankr. D. Del. 2019) – Consignor must file UCC-1 financing statement to perfect interest in consigned goods. UCC Section 9-102 defines consignment transaction as someone delivers goods to merchants for sale where merchant is not generally known to be substantially engaged in selling goods of others. UCC does not control if creditors generally know that retailer is substantially engaged in selling consigned goods, or that lender holding competing security interest knew that retailer selling specific consignor's goods. Lender knew that Debtor was engaged in consignment transactions but retailer was not substantially engaged where only 14% of sales represent consigned goods. Substantially engaged generally requires 20% or more of sales of consigned products. Further, there was no evidence that lender knew that retailer selling specific consignor's consigned goods. Neither prong of Section 9-102 were fulfilled to except transactions from scope of Article 9. UCC treats consignment as purchase money security interest which is afforded priority over pre-existing financing if the holder of purchase money security interest sends authentication notification to holder of conflicting security interest. Consignor did not give notice to term lender whose identity and address were listed in prior UCC filings. Consignor's failure to satisfy notice requirements of Section 9-324, term loan lenders had priority over consignor.

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.

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.

6.58 Cash Collateral Generally

In re Lexington Hospitality Group, LLC, 2017 WL 5035081 (Bankr. E.D. Ky. 2017) – Debtor may not use cash collateral unless either entity that has interest in cash collateral consents or court authorizes use. Creditor opposing use of cash collateral must prove that it has perfected security interest in cash collateral and if cash collateral includes post-petition property that interest falls within exception under Section 552. “Cash collateral” is defined as cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest under Section 552(b) whether existing before or after commencement of case. Section 552(a) generally excludes from security interest property acquired after commencement of case but excepts (1) proceeds; and (2) rents and hotel revenue. Mortgage creates a lien on Hotel including interests in leases and rents. Security Agreement defined “Collateral” as all assets including accounts, general intangibles and payment intangibles. Creditor filed a Financing Statement generally sufficient to perfect its interest in personal property under the Uniform Commercial Code. Hotel Room revenues are personal property and are not considered “rents” but are proceeds derived from granting license to hotel guests to use property for designated time. Cash transactions, defined as those in which hotel guest pays cash for room, does not create receivable or account to which security interest can attach. For credit card transactions, hotel’s right to payment from credit card company is payment intangible. Creditor did not have perfected security interest in general intangibles or payment intangibles where Financing Statement describes collateral but did not include either general intangibles or payment intangibles in assets covered. Reference in Financing Statement to “all asset” was not sufficient to include general or payment intangibles. Proceeds from restaurant operations on property did not extend to post-petition revenues as Section 552 as restaurants are not “public facilities” that are associated with a hotel, like swimming pools, banquet rooms or conference centers. Also, restaurants are generally open to the public, and are not limited to parties paying for the privilege to use the space and revenues are from sales and not from inventory that is encumbered by security interest and is not considered proceed of collateral.

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.

6.59 Cash Collateral and Assignment of Rents – Defined

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.

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), *cert denied*, 2018 WL 2876736 (2018) – 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).

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.

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.

In re Williams, Case No. 10-70559 (Bankr. E.D. Mi. 2011) – Proceeds of disposition of collateral constitutes cash collateral for purposes of Section First Modified Pre-Confirmation Chapter 13 Plan. 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.

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.

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 First Modified Pre-Confirmation Chapter 13 Plan. 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.

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.

6.60 Assignment of Rents – Effect of Perfection

WBCMT 2003-C9 Island Living, LLC v. Swan Creek Limited Partnership, 2018 WL 3006264 (6th Cir. 2018) - Implementation of assignment of rents irrevocably transfers title to rents to lender. Borrower not entitled to return of funds held by receiver following foreclosure where debt owing to lender had not been satisfied in full. Proceeds belong to lender to extent necessary to satisfy debt.

Town Center Flats, LLC v. ECP Commercial II, LLC, 2017 WL 1573827 (6th Cir. 2017), *cert denied*, 2018 WL 2876736 (2018) – 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.

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.

6.61 Cash Collateral - Adequate Protection

In re Tevoortwis Dairy, LLC, 2019 WL 4164862 (Bankr. E.D. Mi. 2019) – Section 363 requires Court to restrict use of cash collateral as needed to provide creditor with “adequate protection” of creditor’s lien. Section 361 defines methods of providing adequate protection to include cash payments to extent that use of cash collateral decreases value of collateral; additional or replacement line to extent use of cash collateral decreases value of lien; or grant of other relief such as administrative expenses status such that creditor will receive “indubitable equivalent” of lien. Amount of adequate protection should not substantially exceed amount to which creditor is entitled. Lender held lien on all livestock and products including dairy cattle and milk production. Proposal to grant Creditor lien on future crop production to permit debtor to use current revenues from cattle sales and milk production did not provide indubitable equivalent where Debtor did not propose to provide ongoing information regarding status of growing crops; any anticipated harvest date; and Debtor’s financial projections were disputed and Debtor should retain independent financial expert to produce reliable financial statements. Court granted Debtor’s Motion only for limited time to give parties and Court opportunity monitor production and cash collateral usage.

In re Williams, Case No. 10-70559 (Bankr. E.D. Mi. 2011) – Proceeds of disposition of collateral constitutes cash collateral for purposes of Section First Modified Pre-Confirmation Chapter 13 Plan. 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.

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.

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 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.

6.62 Cash Collateral – Casualty Insurance Proceeds

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 First Modified Pre-Confirmation Chapter 13 Plan 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.

6.63 Cash Collateral – PACA and other Trust Property

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. PACA trust extends to all assets of Commodity purchaser and is "floating" lien that covers all perishable agricultural commodities received in all transactions, all inventory of food or other products derived from perishable agricultural commodities, and all food or products derived therefrom and include all assets purchased using proceeds of sale of PACA commodities including buildings and equipment. Burden is on PACA purchaser (the PACA Trustee) to demonstrate which assets of Trustee are subject to PACA trust and those which were neither PACA assets or purchased with proceeds of sales of PACA assets and if Trustee cannot segregate, then all assets owned by PACA Trustee are considered assets subject to PACA Trust. 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 First Modified Pre-Confirmation Chapter 13 Plan. 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.

6.64 Cash Collateral – Payment of Professional Fees

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 Debtor's request for use of cash collateral, and (3) whether 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.

6.65 Cash Collateral – Effect of Confirmation of Plan

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

6.66 Assignment of Rents – Perfection and Enforcement

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.

6.67 Appellate Bond

Ridlehuber v. Snap Line Services, Inc., 594 BR 502 (Bankr. N.D. Ga. 2018) – Estate retains interest in cash bond posted in State Court incidental to appeal of pre-petition judgment if appeal is not concluded prior to commencement of case. Once appeal becomes final post-petition, if judgment is upheld then Debtor’s contingent, unvested interest terminates at completion of appellate process allowing prevailing party to recover bond amount if stay has dissolved, or to seek relief from stay for cause to enforce rights to cash bond. Although prevailing party made demand for turnover of bond before appeal became final by expiration of time to file Motion for Reconsideration and violated stay in doing so, conduct did not warrant sanctions given confusion regarding when appellate process ended, unsettled law on nature of estate’s interest in bond, and fact that Debtor did not file Motion for Reconsideration.

6.68 Bare Possessory Interests

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.

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.

Escobedo v. Davis, ___ WL ___ (Bankr. D.N. Mex. 2014) – Creditor sanctioned for attempt to enforce pre-petition eviction order in violation of automatic stay.

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.

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.

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.

6.69 Incomplete Transfers

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.

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.

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.

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 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.

6.70 Pre-petition Transfers Generally

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.

6.71 Pre-petition Attorney Fee Retainers

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.

6.72 Fixtures and Personality – Defined

In re James Medical Equipment, Ltd., 2019 WL 2724332 (Bankr. W.D. Ky. 2019) – “Trade fixtures” are articles annexed by lessee to real estate to eat lessee in carrying on trade or business. Trade fixtures, although annexed to real estate, do not become property of landlord but remain property of lessee such that lessee may remove equipment at end of lease term. Debtor permitted to reject real estate lease under Section 365 and, as part of rejection, to remove liquid oxygen tanks plus plumbing and electrical equipment used in connection with tanks.

Edmonton State Bank v. Smith, 2017 WL 6372471 (Bankr. W.D. Ky. 2017), *Motion to Amend or Make Additional Findings denied*, 2018 WL 1466080 (Bankr. W.D. Ky. 2018) – Whether improvements to property were fixtures, and as such included in mortgage on property, depends on whether improvements were permanent improvements or were movable farm equipment. Improvement is fixture where it is annexed either constructively or actually to property; is adapted to use of the property to which it is connected so as to materially affect use of improvement; and intentionally made permanent part of property. Barns constructed by landowner were fixtures where barns were actually annexed to property by posts with rebar connected to concrete foundation in one case and by wooden posts which sat atop piers on two-foot-deep concrete foundation on the other and enormous weight and size of barns for all practical purposes affixed them to the realty. Destruction of the pole barns materially affected the value of Tobacco Farm where barns were used to store and cry tobacco for marketing and loss of barns significantly reduced suitability of property for tobacco farming. Barns were intended to be a permanent part of Farm as method of construction including use of the pole barn nails and concrete foundations established that barns were not meant to be dismantled and removed and attempt to do so would have destroyed structures and would not have been economically feasible.

US Bank, NA v. Barbee, 2011 WL 6141648 (6th Cir. BAP 2011) – Property interests are created and defined by state law. In Kentucky, manufactured home is personality for which certificate of title is issued in which lien may be perfected solely by notation on certificate of title. State law does allow for conversion of mobile home into fixture by filing an affidavit of conversion, or by creditor obtaining pre-petition State Court judgment converting mobile home to improvement to real property, on which lien would be mortgage recorded in appropriate public records. Debtors did not file affidavit and creditor did not avail itself of option to seek State Court declaration, leaving mobile home “personalty” for purposes of perfection. Lien not recorded on certificate of title could be avoided as unperfected security interest under Section 544.

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.

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.

6.73 Contingent and Future Interests

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.

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.

6.74 Season Tickets

In re Anderson, Case No. 17-30898 (Bankr. N.D. In. 2017) – Season tickets to Notre Dame football are assets that become property of estate on filing. Debtor could not exempt tickets as tangible personal property. While physical tickets are tangible, tickets represent right to attend event which is inherently intangible. Value is not inherent in physical paper, but in ability to use tickets for admission to event.

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).

6.75 Political Campaign Contributions

In re Chambers, 2011 WL 2144558 (Bankr. N.D. Ga. 2011) – “Property of estate” is broad, sweeping in all rights Debtor had as of moment of petition. Section 541(a) does not alter the pre-petition interest 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.

6.76 Bonuses and Severance Pay

In re Burciaga, 597 BR 426 (Bankr. N.D. Ill. 2019) – Whether income received post-petition is property of estate depends on whether income was sufficiently rooted in pre-bankruptcy past and so little entangled with ability to make fresh start. Portion of

Severance Pay rooted in pre-bankruptcy past where Debtor was presented with Separation Agreement and offer of Severance Pay prior to commencement of bankruptcy case, even if Severance Agreement was not executed until post-petition. However, Severance Agreement contained numerous post-petition requirements which Debtor must meet in order to continue to receive Severance Pay, including numerous affirmative acts including assisting former employer with transition of duties; cooperation defense or prosecution of lawsuits or investigations; returning company property and complying with confidentiality and noncompete restrictions. While mere requirement to abstain from action with no affirmative obligations may not be sufficient to remove Severance Pay from property of estate, Debtor's obligations went beyond mere abstention. Court required to allocate severance pay based on value of affirmative acts which Debtor is required to perform post-petition. Court allocated severance pay on 50/50 basis given hybrid nature of severance pay and fact that Debtor's post-petition obligations could last four years.

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.

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.

6.77 Encumbered Property

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.

6.78 Proceeds and Products

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.

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.

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.

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

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.

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.

6.80 Mineral Interests and Rights

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.

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.

6.81 Civil Forfeiture

United States v. Sixty-Six Thousand Three Hundred Sixty-Nine Dollars in US Currency, 2019 WL 3003687 (E.D. Mi. 2019) – Bankruptcy Trustee collaterally estopped in making claim to funds in forfeiture proceeding where Court previously concluded that as of Petition date, Debtor had no right, title or interest in the funds and so Trustee had no right to funds. Court in prior proceeding held that funds were not property of bankruptcy estate, depriving Trustee of standing to make claim in forfeiture.

Sweet v. United States, 2018 WL 3574721 (E.D. Mi. 2018) - Service of arrest warrants for two bank accounts as part of civil forfeiture proceeding placed bank accounts in Attorney General’s custody and control. Service of warrants effected seizure of property by government leaving Debtor no legal or equitable right in seized property and no authority to use, sell or lease seized property. Seized accounts are not property of bankruptcy estate as they were seized by government long before bankruptcy proceeding was filed.

6.82 Criminal Forfeiture

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”.

6.83 Equitable Distribution and Marital Interests

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.

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.

6.84 Health Savings Accounts

Leitch v. Christians, 494 BR 91 (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.

6.85 Inheritance

In re Moore, 2019 WL 1868609 (Bankr. E.D. Tn. 2019) – Recognizing split of authority, Court adopted majority position that property to which Debtor in Chapter 13 became entitled to inherit more than 180 days after commencement of case is property of estate. Section 541 contains general definition of property including 180 day limitation, but Section 1306 is more specific, targeted to Chapter 13, recognizes long-term commitment of Chapter 13, and does not include temporal limitation.

In re Stillwagon, Case No. 10-12289 (Bankr. M.D. Fl. 2014) – Property that Debtor becomes entitled to inherit during pendency of Chapter 13 case is property of estate. Section 1306 extends 180-day time limit under Section 541 for duration of Chapter 13 case. Section 348 provides that if case is converted from Chapter 13 to Chapter 7 in bad faith, property of Chapter 13 estate becomes property of Chapter 7 estate even if property would not have been in Chapter 7 estate in first instance. Debtor did not convert case in bad faith for purpose of Section 348 where purpose was to keep inherited property from reach of creditors. There was no evidence that Debtor filed Chapter 13 in deliberate abuse of process such as intention to convert asset that as of petition date Debtor expects to acquire. Debtor did not know at outset of Chapter 13 case that she would receive inheritance; mother was in good health until shortly before she died, more than 34 months into Debtor’s Chapter 13 case; and there was no evidence that Debtor filed Chapter 13 with intent to game system by later converting to Chapter 7.

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.

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 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.

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.

6.86 Inheritance – Disclaimers

Hayduk v. Burke, 2018 WL 5472002 (Bankr. E.D. Tn. 2018) - validly executed disclaimer of interest applies retroactively effective as of the date of death. Debtor disclaimed interest in state pre-petition such that divestment of property interest occurred prior to bankruptcy estate gaining any interest in right to disclaim. Bankruptcy Trustee cannot recover property that Debtor would have obtained but for execution of disclaimer. Disclaimer cannot be “fraudulent conveyance” as disclaimer did not result in any transfer of property of Debtor. Disclaimer of inheritance allows interest to pass as if person disclaiming had predeceased decedent. Any portion of estate that Debtor stood to inherit vested directly in next named beneficiaries with movant not holding any legal or equitable interest in probate estate. Whether disclaimer was properly executed at state law is matter for determination by State Probate Court and fall squarely within probate exception to federal jurisdiction. To extent complaint sought to invalidate disclaimer, case dismissed for lack of federal jurisdiction.

6.87 Pre-Petition Garnishment

In re Baldwin, 2019 WL 4023819 (Bankr. E.D. Ky. 2019) – Automatic Stay prohibits any act to enforce judgment obtained before commencement of case; acted to obtain possession of property of estate or exercise control over property of estate; and any act to collect, assess or recover a claim that arose before commencement of case. Creditor violated automatic stay by retaining funds that were subject to writ of garnishment where creditor's right to garnished funds had not been determined prior to commencement of bankruptcy case. Creditor's service of writ of garnishment initiates procedure by which creditor can obtain non-exempt property to pay judgment. Procedure is not complete until state Court rules on Debtor's claimed exemptions and Debtor retains interest in funds that became property of estate on petition date. Creditor had obligation to return to Debtor funds received pursuant to writ of garnishment as garnishment proceeding had not been concluded; and must take affirmative steps to stop or reverse pending garnishment including instructing garnishee to release to Debtor funds being held pursuant to writ of garnishment. Creditors remedy is to seek adequate protection under Section 363 rather than resort to non-bankruptcy remedy of possession.

Dougherty v. Security Credit Union, 2019 WL 2529362 (Bankr. E.D. Mi. 2019) – Section 542 allows Court to order turnover of property of estate. Funds were not property of estate where funds were garnished by creditor during period where bankruptcy case was dismissed. Chapter 13 case dismissed at expiration of Plan as Debtor had not completed plan. Creditor began garnishing following dismissal. Chapter 13 reinstated 9 months later and creditor stopped garnishment. Although Chapter 13 sweeps into property of estate all property acquired after commencement of Chapter 13 case, Section 1306 could not sweep in property acquired while case was dismissed and that did not constitute property of Debtor no date of reinstatement. Debtor's interest in garnished funds terminated automatically when funds were delivered to garnish creditor. Reinstatement of case does not have retroactive effect as to property of estate

6.88 Marshalling of Assets

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.

6.89 After Confirmation of Chapter 13 Plan – Generally

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 do not disclose assets prior to confirmation and then be rewarded by having undisclosed property “vest” in Debtor free of Estate.

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, First Modified Pre-Confirmation Chapter 13 Plan 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 Debtor the right to use and possess property of the estate, but the property itself remains property of the estate.

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.

6.90 After Confirmation of Chapter 13 Plan - Personal Injury Proceeds

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 do not disclose assets prior to confirmation and then be rewarded by having undisclosed property “vest” in Debtor free of Estate.

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.

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.

6.91 After Confirmation of Chapter 13 Plan – Life Insurance Proceeds

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.

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.

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.

6.92 After Confirmation of Chapter 13 Plan – Inheritance

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.

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.

In re Stillwagon, 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".

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.

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.

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.

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.

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.

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.

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.

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.

6.93 After Confirmation of Chapter 13 Plan – Casualty Insurance

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.

6.94 Stay Violations – Chapter 13

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.

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.

6.95 Conversion From Chapter 13 to Chapter 7

In re Stillwagon, Case No. 10-12289 (Bankr. M.D. Fl. 2014) – Property that Debtor becomes entitled to inherit during pendency of Chapter 13 case is property of estate. Section 1306 extends 180-day time limit under Section 541 for duration of Chapter 13 case. Section 348 provides that if case is converted from Chapter 13 to Chapter 7 in bad faith, property of Chapter 13 estate becomes property of Chapter 7 estate even if property would not have been in Chapter 7 estate in first instance. Debtor did not convert case in bad faith for purpose of Section 348 where purpose was to keep inherited property from reach of creditors. There was no evidence that Debtor filed Chapter 13 in deliberate abuse of process such as intention to convert asset that as of petition date Debtor expects to acquire. Debtor did not know at outset of Chapter 13 case that she would receive inheritance; mother was in good health until shortly before she died, more than 34 months into Debtor's Chapter 13 case; and there was no evidence that Debtor filed Chapter 13 with intent to game system by later converting to Chapter 7.

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.

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 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.

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 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.

6.96 *Ipsa Facto* Clauses

In re Firstenergy Solutions Corp., 2019 WL 211807 (Bankr. N.D. Ohio 2019) - Automatic stay prohibits any act to terminate or modify estate interest in contractual rights. Debtor has until confirmation of Plan to assume or reject executory contract and creditor is barred by automatic stay from terminating contract. Automatic stay does not prohibit expiration of contract by stated term, but prohibits termination or modification based on insolvency or financial condition of Debtor at any time during bankruptcy case; commencement of bankruptcy case; or appointment of bankruptcy Trustee. Exception to automatic stay found in Section 556 does not allow non-Debtor to terminate contract -creditor is "forward contract merchant" defined as business consisting in whole or in part of entering into forward contracts where contracts involve commodity or similar good or service. Fact that contract defines parties as "forward contract merchant" is not binding on Court. Seller of electricity was not "forward contract merchant" where seller sold power to Debtor under contract that prohibited Debtor from purchasing more power than it consumed and prevented Debtor from reselling or attempting to resell.

CMH Liquidating Trust v. National Union Fire Insurance Co. of Pittsburgh, Case No. 14-2082 (Bankr. E.D. Mi. 2018) (proceedings after remand) – D&O insurance policy is property of Bankruptcy Estate where policy was purchased, and majority of facts and events occurred prior to filing Chapter 11 petition. D&O policy is executory contract as both sides have affirmative duties to perform, failure of which would constitute breach. Section 365 prohibits termination or modification of executory contract based solely on insolvency or financial condition of Debtor; commencement of bankruptcy case; or appointment of trustee. Insurer obligated to provide coverage where policy allowed Insurer to terminate coverage attend of policy term only if Insurer purchased "tail liability" coverage, and Insurer did not do so Policy continued in effect and could not be terminated without violating Section 365.

CMH Liquidating Trust v. National Union Fire Insurance Co. of Pittsburgh, Case No. 16-14434 (E.D. Mi. 2017) - Code provisions voiding "Ipsa 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 Debtor. There is no authority for proposition that clause is unenforceable only if it applies to entire contract.

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.

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).

B. Turnover

6.97 Generally

Zellers v. DiPaolo, 2019 WL 469366 (Bankr. N.D. Ohio 2019) – Section 542 requires, with specifically enumerated exceptions, party holding valuable property of Debtor's estate is not exempt to return property over to Trustee. Court can order turnover of property by third party only where property is "undisputedly" property of estate. Funds were not property of estate where funds were received by Debtor's principal from lessor of property owned by Debtor, and funds received by Debtor's "sister" Corporation from Lessor as extension fee for second property lease. Debtor was never in possession of funds and never had ownership interest in funds. Transfers occurred prior to filing of bankruptcy petition. Absent some other action to bring property back into estate, there was no basis to order turnover of funds.

In re Dawson, Case No. 16-4923 (Bankr. W.D. Mi. 2018) – Fact that documents in possession of Debtor's counsel for which Trustee sought to compel turnover may potentially be useful in subsequent, as yet unfilled litigation is not defense to turnover of documents. Pre-suit discovery is not anathema in bankruptcy proceedings and Section 542 necessarily contemplates pre-suit discovery to some extent.

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.

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 USC § 407 and Bank had contractual right of setoff exercised by the Bank at a time when there was no bankruptcy proceeding.

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.

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.

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.

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 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.

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 First Modified Pre-Confirmation Chapter 13 Plan 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.

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.

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.

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.

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.

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.

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.

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.

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 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.

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.

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.

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.

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.

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 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 Debtor's "possession, custody or control" during the case, and, pursuant to Bankruptcy Code Section 542, 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.

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.

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.

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.

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.

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.

6.98 Turnover – Procedure

In re Hall, 502 BR 650 (Bankr. D. Colo. 2014) – Obligation to turnover estate property under Section 542 is not self-executing. Party in possession of property of estate may retain possession without violating stay absent demand for turnover by Trustee.

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.

6.99 Turnover – Tax Refunds

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.

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.

6.100 Excusal – State Court Receiver

In re Packard Square, LLC, 2017 WL 4570699, *rehearing denied*, 2017 WL 6508970 (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 or 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. In determining whether to excuse turnover, Court will consider likelihood of reorganization; probability that funds required for reorganization will be available; whether there are instances of mis-management by Debtor; whether turnover would injure creditors; whether Debtor will use turned over property for benefit of creditors; whether there are avoidance issues raised because receiver does not possess avoidance power; and fact that automatic stay deactivated custodial relationship. Where receiver was appointed by State Court, Court will also consider length of time that receiver has been in place and what, if anything receiver has done. Paramount concern, however, is interests of creditors and if evidence indicates creditors would be better service by allowing state court receiver to remain in possession, Court will excuse turnover. Court would leave receiver in place and dismiss case where there was state court receiver 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. Debtor lacks any resources to complete project leaving State Court receivership as most viable option. Leaving receiver in place also avoids delays in turning control over to Debtor. Issues regarding actions of Receiver can be best adjudicated in State Court that appointed receiver and State Court has extensive supervisory authority over receiver. To ensure that Debtor does not attempt to circumvent Court ruling, dismissal would be with prejudice to Debtor seeking further relief for two years, to give state court receivership time to conclude.

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 he 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.

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.

6.101 Property in Possession of Custodian

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.

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 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.

6.102 Defenses

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.

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.

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.

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.

Newman v. Schwartzer, 487 BR 193 (9th Cir BAP 2013) – The fact that 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 Debtor's "possession, custody or control" during the case, and, pursuant to Bankruptcy Code Section 542, 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.

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.

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 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 Debtor.

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.

6.103 Refusal to Turnover - Sanctions

In re Madden, 2017 WL 5514351 (Bankr. W.D. Mi. 2017) – Contempt power ensures that judicial mandates are authoritative and not advisory. Court held Debtors in contempt where Debtors repeatedly refused to comply with turnover orders. Court provided Debtors with one last chance to turnover assets before issuing arrest warrants.

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.

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.

In re Starr, 2012 WL 2921375 (Bankr. N.D. Ohio 2012) – Trustee's proposed sale pursuant to Section First Modified Pre-Confirmation Chapter 13 Plan 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 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.

C. Failure to Disclose Causes of Action

6.104 Future Prosecution Barred – Judicial Estoppel

United States v. Tangipahoa Parish School Board, 766 Fed. Appx. 38 (5th Cir. 2019) - Chapter 13 Debtors unscheduled False Claim Act action that arose years after confirmation but while Chapter 13 case remained pending was property of estate. Debtor judicially estopped from maintaining False Claims Act and retaliation claims where Debtor had continuing obligation to reveal causes of action even though property vested in Debtor at confirmation. Grant of discharge was reliance on inconsistent positions and motive to deceive would be inferred because Court may have required increased payments or other remedies had action been revealed.

Taylor v. Council on Quality & Leadership, 2018 WL 2269919 (W.D. Tn 2019) - Judicial estoppel prohibits party from asserting one position; obtaining relief based on that asserted position; and then attempting to assert contrary position. Plaintiff asserted to Bankruptcy Court that plaintiff had no pending or potential causes of action in either initial or amended pleading although Debtor had filed an EEOC charge during pendency of bankruptcy case. Bankruptcy Court adopted contrary position by confirming Chapter 13 Plan that did not contemplate contingent employment dispute. Omission was not result of mistake or inadvertence because plaintiff had knowledge of claim by virtual filing EEOC charge and had motive to conceal claim as it is always in Chapter 13 Debtor's best interest to minimize income and assets. Debtor could not establish lack of bad faith by arguing she did not know she was required to disclose dispute or that she consulted with employment attorney who advised her she was under no obligation to disclose dispute.

Williamson v. USF Holland, LLC, 2019 WL 1354267 (E.D. Mi. 2019) – Judicial estoppel precludes prosecution of cause of action where Debtor does not disclose cause of action thereby asserting position in the non-bankruptcy litigation that is contrary to one asserted in bankruptcy proceedings; where Bankruptcy Court adopted contrary position; and where omission was not result of mistake or inadvertence. Whether omission is result of mistake or inadvertence depends on whether Debtor lacked knowledge of factual basis of undisclosed claims; whether Debtor had motive for concealment; and whether evidence indicates absence of bad faith, focusing on Debtor's attempts to advise Bankruptcy Court of omitted claim. Reliance on erroneous advice of counsel is generally not defense to judicial estoppel as client chooses his attorney and is bound by ask or omissions of attorney. Clients prepetition disclosure of claim to bankruptcy counsel followed by counsel's failure to advise Bankruptcy Court may be good reason not to apply judicial estoppel or evidence indicates that Debtor had no independent reason to know of duty to disclose and upon learning of duty to disclose took prompt and effective actions to disclose cause of action to Bankruptcy Court. Debtor informed bankruptcy counsel of pending claim prior to commencement of case, but counsel stated that Debtor did not need to disclose claim has no lawsuit had been filed. However, Debtors response to bankruptcy schedules question concerning existence of contingent claims erroneously stated that Debtor did not have such claims when Debtor knew or should have known of the existence of claims and Debtor had filed EEOC complaint prior to bankruptcy filing. Post-petition, Debtor filed multiple amendments to schedules and multiple amended Chapter 13 plans it did not at any point disclose existence of cause of action prior to confirmation of Debtors Chapter 13 Plan. Even after Debtor was advised by non-bankruptcy counsel of importance of amending schedules to disclose, Debtor did not effectively follow-up with bankruptcy counsel to ensure that proper amendments were filed. Debtor knew that he was required to sign documents related to amended schedules but did not sign any documents or present any evidence that Debtor reviewed amended schedules although Debtor had at least three months after being advised by non-bankruptcy counsel before Plan was confirmed. While omission was in large part fault of bankruptcy counsel, Debtor should have done more to ensure disclosure.

Taylor v. DLI Properties, LLC, 2019 WL 1057 First Modified Pre-Confirmation Chapter 13 Plan (E.D. Mi. 2019) – Judicial estoppel is equitable doctrine to prevent party from prevailing in one phase of case and then asserting contrary position at later phase, but will be applied cautiously to avoid impinging on truth seeking function of court. Judicial estoppel is appropriate in bankruptcy where Debtor asserted position that is contrary to one asserted under oath in bankruptcy proceeding; Bankruptcy court adopted contrary position either as preliminary matter or as part of final disposition; and failure to disclose is not result of mistake or inadvertence, taking into account whether Debtor lacked knowledge of factual basis of claims, whether Debtor had motive to conceal, and whether there is absence of bad faith. First prong clearly satisfied where Debtor had filed litigation in United States District Court one year prior to filing Bankruptcy case yet Debtor did not disclose litigation in Schedules or Statement of Financial Affairs, asserting position that no claims existed. Second prong met where Bankruptcy court adopted Debtor's assertions of no causes of action by entering Discharge in Chapter 7 proceeding. Third prong met where Debtor undeniably had actual knowledge of factual basis of claim because litigation was ongoing; in between meeting of creditor and final decree, Debtor was deposed; Debtor included medical bills arising out of underlying matter in bankruptcy schedules. Debtor had motive to conceal because if

claim became part of bankruptcy estate, proceeds would go to creditor rather than Debtor, and bankruptcy petitioner always has interest in minimizing assets. Debtor can avoid judicial estoppel by taking swift measures to re-open case and amend schedules. Efforts made to advise bankruptcy court only after dispositive motion is filed alleging judicial estoppel generally cuts in favor of bad faith. Debtor sought to re-open case only after Motion to Dismiss was filed. Debtor made no attempt to notify Trustee or Bankruptcy court other than by filing Motion to Reopen. Single effort was not “constant affirmative actions” needed to demonstrate good faith. Actions were also ineffective where amendment did not reflect estimated value of claim, where amended schedules valued claim at \$75,000 but complaint sought damages in excess of \$195,000 in medical expenses alone. Debtor listed other lawsuits in SOFA but not this one and this was Debtor’s second bankruptcy case providing Debtor with additional information and knowledge of duty to disclose. Debtor’s subjective “misunderstanding of law is not defense where Debtor was aware of factual basis for claims but did not disclose.

Newman v. University of Dayton, 2017 WL 4919225 (S.D. Ohio 2017), *affd*, 751 Fed. Appx. 809 (6th Cir. 2018) – Judicial estoppel requires (1) Plaintiff asserting position that is contrary to one that asserted under oath in bankruptcy proceedings; (2) Bankruptcy Court adopted contrary position; and (3) Plaintiff’s omissions resulted from mistake or inadvertence, based on whether: (a) Plaintiff lacked knowledge of factual basis of undisclosed claims; (b) Plaintiff had motive for concealment; and (3) evidence indicates absence of bad faith. Plaintiff judicially estopped from bringing action alleging employment discrimination where Plaintiff never disclosed in Chapter 13 Bankruptcy case that he was employed and instead repeatedly stated in bankruptcy filings including Chapter 13 Plan, First Amended Plan, Second Amended Plan and Third Amended Plan that he was unemployed, disabled and had no income of any type, although at all times Plaintiff was employed as an adjunct professor of law and business. Order Confirming Plan required Plaintiff to notify Court if Plaintiff’s employment changed, but Plaintiff never notified Court or Trustee that he was working. Plaintiff later sought to modify Plan but did not disclose employment or income. Plaintiff made affirmative statements in Bankruptcy proceeding under oath regarding lack of employment that were directly contrary to assertions in employment discrimination suit. Bankruptcy Court relied on representations when confirming Plan and in approving Plan Modification. Plaintiff’s alleged depression and use of anti-depressants did not excuse Plaintiff’s duty to disclose in Bankruptcy case, as there was no indication that alleged depression was so severe that Plaintiff could not understand duty to disclose where Plaintiff was simultaneously employed as adjunct professor. Alleged reliance on counsel’s advice that Plaintiff did not have to disclose income because he was not full-time employee of University was insufficient as Plaintiff should have recognized that declarations signed and filed with Court falsely stated that Plaintiff “has earned no income in at least the last six months” and listed occupation as “disabled”. Plaintiff’s repeated statements in Bankruptcy Schedules that Plaintiff was unemployed estopped Plaintiff from maintaining cause of action premised on Plaintiff’s employment.

Tricoche v. Autoglassnow, LLC, 2018 WL 7272063 (W.D. Tn. 2018) – judicial estoppel results where party asserts position that is contrary to one asserted under oath in prior proceeding; prior court adopted contrary position; and omission is not result of mistake or inadvertence. Debtor did not list claims against prior employer for violation of Fair Labor Standards Act and did not update disclosures during case. Bankruptcy Court adopted Debtor’s assertions that Debtor had no causes of action by entering discharge. Whether mistake is inadvertent turns on whether Debtor lacked factual knowledge of basis of claim; whether Debtor had motive to conceal; and whether evidence indicates bad faith. Debtor knew of factual basis where Debtor filed initial complaint during pendency of Chapter 7 case. Debtor had motive to conceal to allow Debtor to pursue claims without relinquishing proceeds to estate, particularly where Debtor disclosed some pending litigation but did not disclose the FLSA claim. Debtor’s alleged reliance on advice of counsel who allegedly said that the claims did not need to be disclosed was not sufficient. Debtor is bound by acts and omissions of attorney, and Debtor did not make any effort to amend schedules or advise Court or Trustee.

Howard v. Wells Fargo Home Mortgage, Inc., 2018 WL 3743976 (S.D. Ohio 2018) – Judicial estoppel prevents party from prevailing in one phase of case on an argument and then relying on contradictory argument to prevail in another phase. In context of bankruptcy proceeding, judicial estoppel bars party from asserting position that is contrary to one party asserted under oath in prior proceeding where prior Court adopted contrary position, but is not appropriate where conduct amounts to mistake or inadvertence. Debtor did not list pending litigation in Debtor’s Chapter 13 bankruptcy petition even though Debtor had filed prior litigation two years earlier. Debtor received discharge in Chapter 13. If Debtor prevailed in current litigation, Debtor would not be required to share damages recovered with creditors. Debtor’s omission of litigation constitute statement under oath under penalty of perjury and is tantamount to representation that claims do not exist. Debtor gained advantage of silence by nondisclosure of pending litigation in bankruptcy case, barring Debtor from continuing prosecution of litigation.

Mullins v. Jake Sweeney Automotive, 2018 WL 1565605 (S.D. Ohio 2018) – Judicial estoppel prevents party from prevailing in one phase of case on argument and then relying on contradictory argument to prevail in another phase. Doctrine bars prosecution where (1) Debtor assumed a position contrary to one asserted under oath; (2) bankruptcy court adopted 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. Whether omission is result of mistake or inadvertence depends on Debtor’s good faith in making accurate and timely disclosures, the extent and effectiveness of efforts to correct omission. Belated disclosure for filed only after Defendant filed Motion for Summary Judgement is not good faith. Debtor in Chapter 13 has continuing duty to disclose causes of action that accrue after commencement of case. Approximately one year after confirmation of Plan, Debtor was terminated and bought wrongful termination suit against employer. Although Debtor allegedly advised Bankruptcy counsel, no amended pleadings were filed, and the matter was not brought to the attention of the Chapter 13 Trustee or the Court until after Defendant filed Motion for Summary Judgment based on non-disclosure. Fact that Bankruptcy Case later dismissed for lack of Plan payments Bankruptcy Court accepted Debtor’s position that Debtor did not have any causes of action when Court confirmed Plan and extend stay and later approved two Plan modifications filed by Debtor.

Corradi v. Lane Funeral Homes, Inc., 2017 WL 6055231 (Bankr. N.D. Ohio 2017) – Debtor in Chapter 13 has duty to disclose all assets and liabilities. Disclosure obligation is at very core of bankruptcy process and meeting obligation is part of price paid for discharge. Debtor breached duty to disclose by answering “none” when asked in Schedules to list all claims and lawsuits, when Debtor had already filed EEOC complaint alleging employment discrimination. Judicial estoppel applies where Debtor assumed position in prior action that is contrary to assertions in current action; Bankruptcy Court accepted assertion either as preliminary matter of part of final disposition; and omission did not result from mistake or inadvertence. Debtor attempted to assert contrary position where Debtor represented to Bankruptcy Court that he had no potential actions yet later filed suit for damages. Bankruptcy Court accepted representations by confirming Chapter 13 Plan. Whether omission is result of inadvertence or mistake depends on whether: (1) Debtor lacked knowledge of factual basis of the undisclosed terms; (2) Debtor had motive for concealment; and (3) evidence indicates absence of bad faith including Debtor’s attempts to advise bankruptcy court of omitted claim. Debtor had knowledge of the factual basis for instant claim when he filed Chapter 13 Petition and Chapter 13 Plan. Reliance on bankruptcy attorney does not excuse initial omission. Fact that Debtor’s Chapter 13 Plan proposed 100% repayment creditors does not demonstrate lack of motive to conceal was had Debtor properly disclosed, Plan would have required payment of interest on unsecured claims while Plan proposed payment of principal only. Record did not demonstrate adequate attempts to advise Bankruptcy Court where EEOC complaint was pending on petition date, plaintiff confirmed Plan, but did not advise Bankruptcy Court until 6 months post-petition and even then only after Defendant filed Motion to Dismiss based on Judicial Estoppel. While Debtor may not have willfully and knowing omitted instant claim from bankruptcy proceedings, Debtor was aware of action against Defendant, but did not disclose existence of lawsuit to the United States Bankruptcy Court although Debtor sought and obtained legal representation, and filed action.

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.

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.

Rizka v. State Farm Fire & Casualty Co., 2017 WL 1First Modified Pre-Confirmation Chapter 13 Plan891 (6th Cir. 2017) – Debtor judicially estopped from claiming damages against homeowner’s 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 owned 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.

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.

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

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 does not 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.

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.

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.

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 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.

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. the 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.

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.

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.

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.

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.

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.

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 Debtor.

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 the 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.

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.

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.

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.

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 Debtor and remains an asset of the bankruptcy estate. Debtor did not have standing to pursue the lawsuit.

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 Debtor lacks knowledge of the factual basis of the undisclosed claims, and (2) where 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.

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 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.

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.

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 estopped Debtor from attempting to assert those claims to set off against claims owed by Debtor.

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.

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.

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.

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.

In re Blöse, 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) Debtor lacks knowledge of the factual basis of the undisclosed claim, or (2) 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.

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.

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 Debtor has already asserted the position that no such claim exists. Judicial estoppel will not apply (1) where Debtor lacked knowledge of the factual basis of the undisclosed claims, and (2) where 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.

6.105 Future Prosecution Not Barred

Jones v. DTE Energy Corporate Services, LLC, Case No. 16-11112 (Wayne County Cir. Ct. 2018) – Debtor’s initial failure to disclose pending employment discrimination lawsuit in bankruptcy schedules warranted dismissal based on judicial estoppel. However, shortly after Court dismissed case, Debtor filed motion to reopen bankruptcy case and properly disclosed cause of action. Court granted rehearing and set aside prior Order of dismissal to provide Debtor and Bankruptcy Trustee with opportunity to prosecute cause of action.

Coleman v. Parallon Enterprises, Inc., 2017 WL 4349161 (M.D. Tn. 2017) – Judicial estoppel precludes assertion of later claim where party does not disclose cause of action in bankruptcy case and receives relief based on representation through reduction of debts to creditors or entry of discharge. Although Debtor had clear duty to disclose in bankruptcy filing pending claim for employment discrimination yet failed to do so, Debtor did not obtain any relief based on that omission where Bankruptcy case was dismissed prior to entry of discharge or confirmation of Plan.

Slater v. U.S. Steel Corp., 891 F.3d 1329 (11th Cir. 2018) – 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.

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.

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.

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.

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.

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.

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.

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 Debtor was not required to disclose causes of action that accrued, for the first time, post-petition.

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.

Rizka v. State Farm Fire & Casualty Co., 2014 WL 3123681 (E.D. Mi. 2014) – Insurer not entitled to summary judgment on judicial estoppel grounds where there were disputed issues of fact concerning timing of Debtor's acquisition of interest in insured property. Debtor's bankruptcy schedules filed in 2011 stated that Debtor owned no real property and minimal personal property. Two years later, Debtor filed an insurance claim for damages resulting from fire at Debtor's home. Insurer alleged that Debtor's insurance claim was barred by judicial estoppel as Debtor did not disclose any interest in the real or personal property. Debtor filed opposing affidavit that alleged that Debtor did not acquire interest in the property until after the bankruptcy discharge and that Debtor did not make any omissions or misstatements in the bankruptcy documents. District court unable to resolve conflicting testimony as part of summary judgment motion.

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.

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.

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.

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.

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.

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.

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.

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 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 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.

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 does not 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.

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.

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 does not 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. Sale or Lease of Assets

6.106 Approval Generally

Mission Product Holdings, Inc. v. Old Cold, LLC, 879 F.3d 376 (1st Cir. 2018), Petition for Certiorari Docketed, ____ US ____ (June 12, 2018) – Section First Modified Pre-Confirmation Chapter 13 Plan(m) renders moot any challenge where sale is to good faith purchaser and is not stayed prior to consummation. Sale to company owned by insiders of Debtor is not per se bad faith but does require heightened level of scrutiny. Bankruptcy Court found no evidence of fraud or collusion. Debtor's marketing efforts were sufficient and appropriate and there was no evidence that insider attempted to exert influence over Debtor after insider resigned from Debtor's management committee before launching bid to purchase assets. Stalking horse bid was negotiated by counsel and issues regarding stalking horse bid funding were resolved prior to auction as purchaser was entitled to credit bid and purchaser's bid was superior to Appellant's. Purchase was for “value” where purchaser bought at fairly conducted auction and paid auction price which is sufficient evidence of value. Fact that purchaser knew that unsuccessful bidder Planned to appeal is not type of adverse claim that would defeat good faith status. Fact that Court in approving sale waived stay and allowed immediate closing did not circumvent Appellant's right to appeal under Section First Modified Pre-Confirmation Chapter 13 Plan where Rule 6004(h) allows Court to waive stay; Debtor repeatedly gave notice that it needed to close sale immediately and advised that it would seek to have Court waive stay; Debtor had good faith reasons for immediate closing; and Appellant did not object to or request other relief from Bankruptcy Court to preserve right to appeal under Section First Modified Pre-Confirmation Chapter 13 Plan(m).

In re Cooper, 2018 WL 4565150 (S.D.N.Y. 2018) – Appeal of sale of asset is moot under Section First Modified Pre-Confirmation Chapter 13 Plan(m) where transferee purchased in good faith even if purchaser closed with knowledge of pending appeal. Good faith includes more than just sale free from fraud, collusion or bad faith or that purchaser have knowledge of adverse claims. Trustee's transfer of cause of action to Defendants in exchange for release of Defendant claims against Estate is sale of property. Purchaser is “transferee” as defined in Section 101(43). Defendants-purchasers did not act in good faith where Defendants were aware of long detailed knowledge of adverse claims of third parties to which Defendants themselves were targets. Defendants had participated in discovery and doubtlessly analyzed merits of disputed causes of action.

Junk v. CitiMortgage, Inc., 2014 WL 2985937 (Bankr. S.D. Ohio 2014) – Approval of Section First Modified Pre-Confirmation Chapter 13 Plan 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.

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.

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.

6.107 Sale Free and Clear of Liens or Interests

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.

In re Talbut, 2016 WL 937373 (Bankr. N.D. Ohio 2016) – Section First Modified Pre-Confirmation Chapter 13 Plan 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.

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.

Higgason v. Brown, 2014 WL 24040 (Bankr. E.D. Ky. 2014) – Section First Modified Pre-Confirmation Chapter 13 Plan 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.

In re Scott, 2013 WL 4498987 (Bankr. E.D. Ky. 2013) – Section First Modified Pre-Confirmation Chapter 13 Plan(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 First Modified Pre-Confirmation Chapter 13 Plan(f)(5). However, sale can occur under Section First Modified Pre-Confirmation Chapter 13 Plan(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.

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.

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.

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 First Modified Pre-Confirmation Chapter 13 Plan 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 USC § First Modified Pre-Confirmation Chapter 13 Plan(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.

6.108 Procedure

In re Taj Graphics Enterprises, LLC, 2019 WL 1768364 (Bankr. E.D. Mi. 2019) – Rule 2002 requires notice and approval of lease or sale of property outside ordinary course of business. Sale or lease without notice is independent basis to set aside sale or lease and transaction may be set aside and treated as voidable at option of person who did not receive notice.

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.

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.

6.109 Objections

Parks Legacy v. Nathan, Case No. 18-11586 (E.D. Mi. 2018) – Party lacked standing to object to sale or to appeal sale order where Bankruptcy Court previously entered Order determining that Party had no interest in assets being sold and party did not appeal that order.

In re Underwood, 583 BR 438 (Bankr E.D. Mi. 2018) – Standing requires pecuniary interest in disposal of assets. Debtor lacks standing object to sale where sale will not produce sufficient funds to pay claims in full and produce surplus. Even if property sold for price that Debtor alleged was fair market value, rather than lower price proposed by Trustee, sale would not produce sufficient funds to pay all claims in full or produce surplus.

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.

E. Abandonment by Trustee

6.110 Procedure

Blasingame v. Bedwell, 2019 WL 1592593 (6th Cir. BAP 2019) - Chapter 7 Trustee has discretion to abandon property of estate including causes of action that are inconsequential value or benefit. Court will defer to Trustee’s judgment and place burden on party opposing abandonment to prove benefit to estate and abuse of Trustee’s discretion. Opposing party must show some likely benefit to estate, not mere speculation about possible scenarios that could produce benefit. Abandonment will be approved by Court where it Trustee made business judgment in good faith on some reasonable basis. Trustee abandonment of personal property worth approximate \$200,000 affirmed by Court where any amount received from liquidation of personal property would be

consumed by administrative costs plus IRS priority tax lien of \$300,000, thereby producing no benefit to unsecured creditors.

Bell v. Sammy Bereznac & Co., 2017 WL 6276467 (M.D. Tn. 2017) – On filing for relief under Chapter 7, all pre-petition causes of action become property of bankruptcy estate and right to pursue causes of action vest solely in trustee, such that Debtor has no standing to pursue recovery. Trustee would be substituted for Debtor in litigation pending prior to commencement of case. Trustee has right to compromise causes of action as well as abandon those that are of inconsequential benefit to estate.

In re Mejia, Case No. 16-11019 (Bankr. S.D.N.Y. 2017) – Trustee’s announcement of intent to abandon is not abandonment and does not remove property from estate. Section 554 includes four steps that must be completed before property is abandoned – trustee’s statement that property has no value and should be abandoned and that trustee intended to abandon did not fulfill requirements of Section 554.. Once property is abandoned, Debtor can sell property but until property is abandoned, Debtor cannot assert control over property by attempting to sell.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

6.111 Implied Abandonment – Undisclosed Assets

Bowling v. Ryder Logistics, Inc., 2018 WL 1157549 (E.D. Ky. 2018) - Upon filing of bankruptcy petition, all pre—petition causes of action become property of estate and only Bankruptcy Trustee has standing to pursue recovery. Later closing of case did not result in abandonment of cause of action where Debtor did not disclose existence of cause of action. Section 554 provides for abandonment at closing of case of scheduled assets; or if Trustee affirmatively abandons claim by giving notice of proposed abandonment. Although Trustee may not have shown interest in pursuing claim once Trustee discovered claim, that does not constitute abandonment. Dismissal of bankruptcy case does not restore Debtor’s ability to prosecute case as dismissal does not render prior bankruptcy proceeding void *ab initio*. Cause of action remained property of bankruptcy estate. Debtor had no standing to pursue recovery. Case dismissed for lack of subject matter jurisdiction.

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.

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.

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.

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.

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 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.

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 Debtor can move to reopen case to administer.

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.

In re Reiman, 2010 WL 2802675 (Bankr. E.D. Mi. 2010) – Section 554(c) provides that any property scheduled by 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.

6.112 Implied Abandonment - Disclosed Assets

In re Morris, 2018 WL 1321343 (Bankr. N.D. Ohio 2018) – Section 554 provides that property can be abandoned in three different ways. Section 554(a) allows the trustee to obtain order abandoning property that is either burdensome to estate or of inconsequential value; and Section 554(b) allows party in interest to request that court order trustee to abandon property. Section 554(a) and (b) require Motion and opportunity to be heard before property can be declared abandoned. Section 554(c) provides for “implied abandonment” of any property scheduled and not administered at time of closing of a case and is effective without notice and a hearing, occurring automatically at the closing of case. Additional distributions from probate estate received after discharge and after case closed were not property of estate as right to additional distribution was abandoned by closing of case. Debtor’s Schedule B disclosed Debtor’s right to receive distributions from Mother’s estate in unknown amount; and Debtor filed separate inventory of all assets in estate. Trustee filed final report that indicated Trustee had receive distributions from estate, and case then closed. Probate administrator later advised Trustee that Debtor had right to one additional distribution from estate and Trustee reopened case to administer additional proceeds. Trustee’s final report indicated that the inheritance was fully administered, essentially valuing any remaining inheritance valueless. Right to further distributions was abandoned when case closed and became property of Debtor. Although Trustee may not have been aware of value of potential additional distributions, Trustee was aware of right to receive additional distributions and abandoned that right by filing final report.

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.

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.

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.

6.113 “Delayed” Abandonment

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

6.114 Motion to Compel Abandonment

First Volunteer Bank v. Ortlepp, 2019 WL 2488125 (Bankr. M.D. Tn. 2019) – Court may order Trustee to abandon any property that is burdensome or inconsequential value and benefit to estate. Issue is whether there is reason that estate’s interest in property should be preserved or whether property is so worthless and burdensome that it should be removed from estate. Creditor held perfected security interest leaving no equity in collateral such that collateral was of inconsequential benefit to estate and must be abandoned.

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.

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.

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.

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.

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.

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.

6.115 Effect of Abandonment

Credit Bureau Systems, Inc. v. Elam, 2019 WL 5089532 (Bankr. E.D. Tn. 2019) – Pre-Petition causes of action become property of Bankruptcy estate and Chapter 7 Trustee has sole standing to prosecute. Abandonment of cause of action by Trustee returns cause of action to Debtor individually and restores Debtor's standing to prosecute.

White v. Corcoran, Case No. 17-13810 (E.D. Mi. 2018) – Abandonment of asset by Chapter 7 Trustee does not resurrect claims that have previously been settled by Chapter 7 Trustee. Bankruptcy Court approved the settlement of litigation between Trustee and Creditor which included Trustee voluntarily dismissing pending state Court action. Trustee later abandoned all assets of estate. Abandonment of state law claim did not revive claim or otherwise alter validity of previous dismissal of action.

Bell v. Sammy Bereznac & Co., 2017 WL 6276467 (M.D. Tn. 2017) – On filing for relief under Chapter 7, all pre-petition causes of action become property of bankruptcy estate and right to pursue causes of action vest solely in trustee, such that Debtor has no standing to pursue recovery. Trustee would be substituted for Debtor in litigation pending prior to commencement of case.

In re White, Case No. 13-21977 (Bankr. E.D. Mi. 2017) – Abandonment of asset by Chapter 7 Trustee returns asset to Debtor in condition it exists as of date of abandonment. Chapter 7 Trustee settled cause of action against lender and dismissed State Court action with prejudice. When Trustee later abandoned that cause of action, abandonment effectively conveyed nothing as cause of action had already been dismissed. Court lacked authority to Order State Court to set aside dismissal of State Court action where action was properly dismissed by Trustee at point when cause of action was property of estate.

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.

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. 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. Sale proceeds were not recoverable as “products “ or “proceeds” because Chapter 7 estate acquires only “products” and “proceeds” of property of estate and at time excess proceeds were generated by sale, property had already been abandoned and was no longer property of estate.

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.

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.

In re Williams, Case No. 08-71337 (Bankr. E.D. Mi. 2010) – Upon abandonment, whatever legal or equitable interests 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).

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.

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 Debtor *nunc pro tunc*, as if Debtor owned the property continuously.

6.116 Revocation of Abandonment

In re Morris, 2018 WL 1321343 (Bankr. N.D. Ohio 2018) – Section 554(c) allows for revocation of abandonment for reason that constitutes grounds for relief under Rule 60 - (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or misconduct by opposing party; (4) judgment is void; (5) judgment has been satisfied, released, or discharged; was based on earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. Trustee’s requests to revoke abandonment, filed more than one year after closing of case, was untimely as Rule 60(b)(1) Motion must be filed within one year of order to be reconsidered. Rule 60(b)(5) and (6) are not subject to one-year limit but still must be filed within reasonable time and focus on events subsequent to case closure and extent to which equity favors or disfavors revocation. Unanticipated increase in value of asset does not warrant revocation of abandonment given importance of finality and certainty.

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.

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 Debtor, would be the person redeeming the property. That trustee may be more likely to redeem than Debtor would have been does not change the legal rights or status of the buyer.

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).

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.

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.

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.

In re Pioch, Case No. 08-61473 (Bankr. E.D. Mi. 2010) - Section 544 provides for automatic abandonment to 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 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.

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. Code's strong interest in finality is respected in all cases and applies to abandonment of assets.

VII. Exemptions

A. Exemptible Property

7.1 Generally

Earl v. Lund Cadillac, LLC, Case No. 15-1693 (D. Ariz. 2016), *aff'd*, Case No. 16-16428 (9th Cir. 2017) – 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.

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

Redstone Federal Credit Union v. Brown, 2019 WL 582459 (N.D. Al. 2019) – Exemptions are determined by law in effect on petition date, not date on which underlying debt was incurred.

Wilson v. Rigby, 909 F.3d 306 (9th Cir. 2018) – Post-petition appreciation in asset belongs to estate even if Debtor has exempted all equity in property as of petition date. On filing of case, property became vested in estate and estate is entitled to all proceeds, products, offspring, rents or profits including post-petition appreciation. Debtor cannot amend exemptions post-petition to exempt post-petition equity as value of property and value of exemption is determined as of petition date.

In re Ward, 2018 WL 6822274 (Bankr. E.D.N.Y. 2018) – Whether property qualifies for homestead exemption is determined as of petition date. Under “snapshot rule”, all exemptions are determined at time bankruptcy petition is filed and does not change due to subsequent events. Where Debtor owns multiple properties, Debtor must show that Debtor owned and occupied property as homestead as of petition date meaning actual physical occupancy on regular basis which is more regular than at any other location and with intent to reside although intention need not be long-term.. Fact that Debtor may later intend to establish residence elsewhere does not defeat claim of homestead in first instance. Debtor signed contract for sale of homestead prior to filing bankruptcy but filed before the sale closed. There was no dispute that Debtor resided in the property as Debtor’s homestead as a petition date. Trustee’s attempt to impose “permanency” requirement could not override plain language of statute that does not require proof of intent to reside permanently but only requires proof of ownership and occupancy as of petition date. If property is properly claimed as exempt, proceeds received from voluntary sale during pendency of case remained exempt; subsequent sale does not change status of property as exempt. Once determined to be exempt, Section 522(c) provides that exempt property is not liable during or after case for any prepetition debt. Attempt to recapture proceeds of sale would effectively render exempt property liable for payment of claims.

Corcoran v. Holley, 2018 WL 5318223 (E.D. Mi. 2018) (appeal after remand) – Trustee cannot offset exemptions to pay administrative expenses. Debtor properly asserted tenants in the entireties exemption as to residence. If trustee liquidates asset, trustee must turnover to Debtors 100% of the proceeds remaining after payment of valid liens. Trustee, with Debtors’ consent, sold property and remitted to Debtors all proceeds remaining after payment of liens and costs of sale including trustee administrative fee. Trustee required to turn over all proceeds after payment of liens including amounts paid to broker for commission and amount paid for closing costs of sale plus any commission retained by trustee. Fact that estate is administratively insolvent does not excuse trustee’s obligation to turn over all proceeds after payment of liens.

In re Awayda, 2017 WL 4684997 (Bankr. D.C. Il. 2017) – Right to claim exemption is determined by “snapshot” at time of filing of case. Assets that are exempt as of date of petition do not lose exempt status based on post-petition events. Cash received from Debtor’s pre-petition sale of home 3 months earlier was exempt where state law allowed cash to remain exempt for 6 months for purchase of new home. While Debtor did not purchase new home and had no intention of purchasing new home on petition date, as of petition date cash proceeds were still exempt. Later expiration of time within which funds could be reinvested or lose exempt status did not alter fact that funds were exempt on petition date.

In re Dinoto, Case No. 14-59127 (Bankr. E.D. Mi. 2017) – Property claimed by Debtor as exempt tenancy in entireties does not lose exempt status where Debtor and spouse divorce after commencement of bankruptcy case.

In re Mickens, 2017 WL 4767771 (Bankr. W.D. Mi. 2017), *affirmed*, 589 BR 594 (W.D. Mi. 2018) – Section 522(g) allows Debtor to exempt property that is recovered by Trustee if initial transfer by Debtor was not voluntary or involved concealment of property. 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. However, property as a whole was already property of estate and avoidance of entireties status did not amount to “recovery” of property. Recovery requires bringing into estate property that was not property of estate as of commencement of case, either by avoiding transfer of title held by third party or by avoiding lien and preserving lien for benefit of estate, effectively bringing into estate the lien itself. Accordingly, Debtors could exempt property even after entireties was avoided as there was on “recovery” of property and as such Section 522(g) did not apply.

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.

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).

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.

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.

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.

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.

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.

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.

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 Debtor's interest in life insurance contracts as long as the policy beneficiary is a spouse, child or other dependent of 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.

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.

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.

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.

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.

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.

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.

Leicht v. Anspach, 475 BR 612 (Bankr. S.D. Ohio 2012) – Exemptions are determined as of the date of the bankruptcy filing.

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.

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.

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.

Williamson v. Hall, Case No. 08-088 (10th Cir. BAP 2009) – Homestead exemption is determined as of the date of the bankruptcy petition.

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

In re Jaffe, 932 F.3d 602 (7th Cir. 2019) – Tenant by entirety holds contingent future interest in property while other tenant is alive. Contingent interest is broadly considered an interest in real estate to which judgment lien could attach, even though judgment was against only one tenant. However, while state law defined one tenant's interest as contingent future interest, state law did not provide basis to exempt that contingent future interest. Although Debtor's entireties interest in property could be exempted, when Debtor's spouse passed away post-petition and Debtor's contingent future interest ripened, lien of pre-petition creditor attached to property. Debtor could not exempt contingent future interest so could not avoid fixing of judicial lien on contingent future interest (or lien on property that ripened when spouse passed away) allowing judgment creditor to enforce lien against one-half of property that Debtor acquired at spouse's passing.

In re Trentman, 2018 WL 4090507 (Bankr. N.D. Ohio 2018) – Debtor must have interest in property to claim exemption. Debtor-wife's does not have interest in Federal Income Tax Refund where Debtor-husband was sole wage earner and Debtor-wife did not have any income. Tax refund entirely attributable to wages earned by Debtor-husband constitutes sole property of Debtor-husband. Fact that Debtors filed joint tax returns does not convert Debtor-husband's tax refund into joint asset. While Debtor-wife impacted eligibility for certain deductions and credits, refund was exclusively return of portion of Debtor-husband's withheld earnings. Debtor-wife's claimed exemption in tax refunds overruled.

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.

In re Harris, Case No. 13-First Modified Pre-Confirmation Chapter 13 Plan95 (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.

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.

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

Jubber v. Bird, 577 BR 365 (10th Cir. BAP 2017) – Debtor does not need equity to claim exemption in homestead. Trustee cannot sell homestead where secured debts exceed total value of property unless Trustee proposes to pay exemption in full. Trustee not entitled to fees for services in attempting to sell homestead where Trustee did not also propose full payment of exemption, such that services did not produce and could not produce any benefit to the estate.

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.

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.

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.

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.

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

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.

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.

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”.

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*.

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.

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.

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.

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.

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

In re Clark, 2018 WL 3357401 (Bankr. W.D. Ky. 2018) – Debtor’s right to amend exemptions is limited where Debtor acts in bad faith, conceals property or amendment results in prejudice to creditors. Prejudice requires that amendment impair Trustee and diligent administration of estate such as showing harm to litigating posture of parties in interest. If parties would have taken different action or suit different positions had exemptions been claimed earlier and interest of those parties is detrimentally affected by timing of amendment, then prejudice is sufficient to deny amendment. Debtor did not act in bad faith and did not prejudice creditors or Trustee where Debtor initially claimed exemption in Debtor’s residence. During pendency of case, secured creditor obtained relief from automatic stay as Debtor lacked any equity in property. Debtor amended exemption to delete homestead exemption and increase wildcard exemption under Section 522(d)(5) as to Debtor’s other assets. Trustee’s objection to amended claimed exemptions overruled.

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. Trustee may have other remedies such as revocation of discharge or potential avoidance of transfer, disallowance of exemptions is not option.

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.

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.

Earl v. Lund Cadillac, LLC, Case No. 15-1693 (D. Ariz. 2016), *aff'd*, Case No. 16-16428 (9th Cir. 2017) – 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.

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) – 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.

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.

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.

In re Pratts, 2015 WL 3484286 (Bankr. D.P.R. 2015) – Court cannot deny Debtor's claimed exemptions on basis of bad faith.

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.

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.

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 had 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.

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.

In re Gilliam, 479 BR 768 (Bankr. E.D. Tenn. 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".

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.

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.

In re Stiltner, 2012 WL 1805423 (Bankr. E.D. Tenn. 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 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. 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.

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.

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.

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.

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.

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.

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.

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.

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 Amended Exemptions – Reopened Case

Mendoza v. Montoya, 2019 WL 442380 (10th Cir. BAP 2019) - – Rule 1009 allows Debtor to amend exemptions at any time until the case is closed. Debtor may amend exemptions freely as a matter of course in both open and reopened cases without showing of good cause or excusable neglect for not claiming exemption at earlier stage of case. Rule 1009 reference to “before the case is closed” did not create specific time period for amendments that would require excusable neglect under Rule 9006. Debtors have right to amend schedules without limitation in any case that is open, regardless of whether case has been open since petition was

filed or has been reopened after closing.

In re Palmer, Case No. 12-33124 (Bankr. E.D. Mi. 2018) – Rule 1009 allows Debtor to amend exemptions at any time until case is closed. Rule 9006 allows Court to extend any time in court's discretion where failure to act was result of excusable neglect. Rule 1009 does not require automatic rejection of amendment in re-opened case, nor do rules allow amendments freely to be made in re-opened case. Result allows Court to avoid harsh result of prohibiting amendment outright while requiring Debtor to justify late filing.

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. If case is reopened after closing, courts have adopted three different interpretations of Rule 1009. One interpretation is that Rule 1009 prohibits amending exemptions in reopened cases. A second interpretation allows amendments freely as a matter of course in both open and reopened cases. The third line conditions right to amend after reopening on showing that failure to amend before case closed is due to excusable neglect. Court adopted third interpretation, finding that second interpretation renders rule's limitation on closing case illusory. Rule 9006 allows court to extend deadline to take any act if failure to act within time permitted is result of excusable neglect. Debtor did not offer any evidence to show excusable neglect to allow Debtor to exempt proceeds of pre-petition personal injury action where Debtor did not disclose cause of action at any time before Trustee filed report of no distribution and Court closed case. Debtor offered no justification why Debtor did not properly disclose cause of action when required or any attempt to amend Schedules or disclose and exempt cause of action until after cause of action was discovered by US Trustee and Court reopened case to allow Trustee to administer cause of action.

7.8 Recovery of Avoidable Transfer – Section 522(g)

In re Andrews, 2019 WL 4780445 (Bankr. S.D. Ohio 2019) - Funds recovered from avoidance of preferential transfer under Section 550 become property of bankruptcy estate that must be distributed to holders of allowed claims, subject to Debtor's rights to claim the avoided funds as exempt. State law allowed Debtor to exempt 75% of wages. Creditor pre-petition garnished the 25% nonexempt portion of wages. Trustee did not recover funds which Debtor could have exempted had transfer not occurred as Debtor already exempted full 75% of allowable wages. Portions recovered by Trustee were non-exempt portion of Debtor's earnings and Debtor lacked any other basis to claim exemption for 25% of wages that were otherwise non-exempt.

In re Dawson, 2018 WL 6492698 (Bankr. W.D. Mi. 2018) – Debtor's pre-petition cause of action for alleged malpractice by Debtor's counsel is property of estate to which trustee succeeds as of petition. Trustee could use Section 522(g) defeat Debtor's amended claimed exemption where there was no asset that Debtor ever transferred which is focus of statutory text. Debtor did not "transfer" any right in malpractice action and Trustee did not recover right to prosecute malpractice action from any third party, such that Section 522(g) did not apply.

Hagan v. Mickens, 2018 WL 3913760 (W.D. Mi. 2018), *affirmed*, 589 BR 594 (W.D. Mi. 2018) – Bankruptcy Court avoidance of transfer by which Debtors, on eve of filing, deeded home from Debtors as joint tenants to Debtors as tenants in entirety restored property to joint tenants status allowing Debtors to amend exemptions. Debtors would not be permitted to assert entireties exemptions even where entirety status existed as a bankruptcy petition where Bankruptcy Correlator avoided transfer that created entireties estate. Avoidance of entireties estate does not destroy Debtor's ability to claim any exemption, but limits exemption rights to those which existed as of transfer had not occurred in first instance. Although Section 522 (g) prevents Debtor from claiming exemption in property that was recovered by Trustee, under facts of this case, there was no recovery that would allow Trustee to invoke Section 522 as avoidance of transfer that created entireties interest did not bring any new property into estate, but merely reclassify title to existing property. Debtor's properly amended schedules to claim individual homestead exemptions using Michigan Exemption statute, with remaining equity above exempt amount available for unsecured creditors.

Sharp v. Gold, 2018 WL 2064083 (Bankr. E.D. Mi. 2018) – Section 522(g) does not permit Debtor to claim exemption in property recovered through successful prosecution of fraudulent transfer where initial transfer is either a voluntary transfer by Debtor or was concealed by Debtor. Court not required to find both voluntary transfer and concealment. Transfer was not concealed because Debtor listed transfer on schedules, but transfer was voluntary prohibiting Debtor from asserting exemption. Avoidance of transfer under Section 544, Section 548 and Section 550 constitutes "recovery" of property that triggers Section 522(g).

In re Sharp, 2018 WL 1089598 (E.D. Mi. 2018) – Section 522(g) allows Debtor to exempt property recovered by Trustee only if initial transfer by Debtor was neither voluntary nor concealed. Debtor not permitted to exempt home where Debtor transferred home to mother prior to commencement of case. Debtor's motive for transfer – to allow Debtor to obtain homeowners insurance – did not alter fact that transfer was voluntary. Trustee's objections to Debtor's amended claimed exemptions sustained.

In re Mickens, 2017 WL 4767771 (Bankr. W.D. Mi. 2017), *affirmed*, 589 BR 594 (W.D. Mi. 2018) – Section 522(g) allows Debtor to exempt property that is recovered by Trustee if initial transfer by Debtor was not voluntary or involve concealment of property. Transfer of property from Debtor- spouses as joint tenants to tenants by entirety was avoidable fraudulent transfer as transfer adversely affected rights of individual creditors. However, property as a whole was already property of estate and avoidance of entireties status did not amount to "recovery" of property. Recovery requires bringing into estate property that was not property of estate as of commencement of case, either by avoiding transfer of title held by third party or by avoiding lien and preserving lien for benefit of estate, effectively bringing into estate the lien itself. Accordingly, Debtors could exempt property even after entireties was avoided as there was on "recovery" of property and as such Section 522(g) did not apply.

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.

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 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 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.

In re Harris, Case No. 13-First Modified Pre-Confirmation Chapter 13 Plan95 (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.

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.

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.

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.

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 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 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 Debtor explained Debtor's options and solicited his agreement. Employer did not exert any pressure on Debtor to sign, and 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.

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).

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 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.

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.

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.

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 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.

7.9 Waiver of Exemptions

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.

7.10 Statutory Basis for Exemptions

Yerian v. Webber, 2019 WL 2610751 (11th Cir. 2019) - State Law may create exemptions which overlap with but which are discrete from federal exemptions under Section 522. Although Debtor's IRA may have been operated consistent with the requirements of an exemption under Section 522, IRA not exempt under applicable state law where Debtor did not maintain IRA in accordance with governing Plan.

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.

7.11 Applicable Law

In re Felix, 2017 WL 320828 (Bankr. S.D. Ohio 2017), *aff'd*, 2018 WL 1659585 (Bankr. 6th Cir. 2018) – 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, if new domicile is not obtained. Domicile differs from residence as residence is place of habitation, and Debtor can have different domicile than 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 house in Maryland which Debtors intended to maintain. As of petition date, Debtors wanted to move to Maryland. Debtors owned a 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. Debtors attempted at trial to contend that Debtors intended all along to stay in Ohio but change of testimony appeared to result from Trustee's successful avoidance of IRS liens on home in Ohio, which created substantial equity. Once Debtors became aware of invalidity of IRS liens, Debtors changed previously professed housing plans which was mere tactic to shield valuable asset, rather than valid assertion of domicile. Bankruptcy Court's conclusion that domicile was in Maryland at time of filing for more than 730 days pre-petition such that Maryland, not Ohio law, applied, was not clearly erroneous. Debtors' attempt to claim homestead under Ohio law disallowed.

7.12 Extra-territorial Application

Sheehan v. Ash, Case No. 17-1867 (4th Cir. 2018) – If Debtor resided in multiple states in 730 days preceding filing, Section 522 requires Debtor to take exemption from state where he resided for 180 days prior to the 730 day window. Debtor moved from Louisiana to West Virginia 4 months prior to filing. Debtor claimed exemptions under Louisiana law. Trustee argued that Debtor could not use Louisiana law for property in West Virginia arguing that there is presumption against extraterritoriality which precludes giving extraterritorial effect to any state law. Court rejected argument, noting that if Debtor was limited to using Louisiana law and could apply that only to property in Louisiana, Debtor would effectively be not denied exemptions as Debtor had no property in Louisiana but would not be able to rely on "hanging paragraph" that if applicability of Section 522 renders

Debtor unable to claim any exemptions, Debtor can use federal exemptions, as Debtor would be able to use Louisiana exemptions in Louisiana, even though Debtor did not actually have property in Louisiana. Instead, Court would adopt state-specific approach to determine whether there is principle of applicable state law that would bar out-of-state Debtors from using exemptions. As Louisiana law did not limit applicable exemptions is solely to property located in Louisiana, Debtor could use Louisiana exemptions to exempt property in West Virginia.

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.

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.

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.

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.

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.

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”.

7.13 Disposition of Property Post-Petition – Effect on Exemptions

Lowe v. DeBerry, 844 F.3d 526 (5th Cir. 2018) – Chapter 7 Debtor does not lose exemption in home where Debtor sells property after filing but does not reinvest proceeds in another home within 6 month window allowed by state law.

In re Awayda, 2017 WL 4684997 (Bankr. D.C. Il. 2017) – Right to claim exemption is determined by “snapshot” at time of filing of case. Assets that are exempt as of date of petition do not lose exempt status based on post-petition events. Cash received from Debtor’s pre-petition sale of home 3 months earlier was exempt where state law allowed cash to remain exempt for 6 months for purchase of new home. While Debtor did not purchase new home and had no intention of purchasing new home on petition date, as of petition date cash proceeds were still exempt. Later expiration of time within which funds could be reinvested or lose exempt status did not alter fact that funds were exempt on petition date.

Bellinger v. Buckley, Case No. 17-0068 (D. Md. 2017), *affd*, Case No. 17-2138 (4th Cir. 2018) – 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.

Hawk v. Engelhart, Case No. 15-914 (S.D. Tx. 2016), *aff’d*, 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.

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

7.14 Jurisdiction – Mootness

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 Debtor holds a cognizable interest in the asset.

7.15 Standing to Object

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, the Plan had not yet been confirmed and creditor's claim had not yet been paid and there was no guarantee that the 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.

7.16 Burden of Proof

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 Debtor is not entitled to the claimed exemption.

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.

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.

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.

7.17 Deadline for Objections

Lee v. Field, Case No 15-17451 (9th Cir. 2018) – Adversary complaint seeking to avoid transfer of property from Debtor to Debtor and his wife as fraudulent and seeking turnover of property constituted objection to Debtor's claimed exemption as tenants by the entirety where adversary complaint was filed within 30 days of creditors meeting as required by Section 522(l) and Rule 4003. Rule 4003 proscribes no particular form for objections to exemptions and adversary complaint gave more than adequate notice that Trustee objected to claimed exemption where relief in adversary proceeding and objection to exemption were inextricably intertwined.

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.

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.

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.

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 Debtor lacked a colorable statutory basis for claiming the exemption.

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.

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.

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.

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.

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.

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.

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.

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, 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).

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.

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.

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 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.

7.18 Deadline for Objections – Fraud

Moyer v. Rosich, 2018 WL 1614214 (Bankr. W.D. Mi. 2018) – Rule 4003(b)(1) imposes short and unforgiving 30-day deadline for "garden variety" objection to exemptions. Rule 4003(b)(2) allows objection at any time prior to one year after closing of case if Debtor fraudulently asserted claim of exemption. Rule 4003(b)(2) does not create independent grounds for objecting to exemption and objection must be based on some other provision of the Bankruptcy Code or State Law that limits exemptions. Objecting party show that facts do not support the claim of exemption and that Debtor knew, at the time Debtor claimed exemption, that facts did not support that claim, and that Debtor subjectively intended to deceive trustee and creditors. Although Debtor's ability to claim exemption resulted from fraudulent transfer of asset in first instance, Debtor did not "fraudulently" assert exemption where Debtor accurately described interest in Bankruptcy Schedules as Debtor's principal residence; accurately listed interest as of petition date as tenants in entireties; and claimed exemption under applicable state law. While creation of exemption itself may have been fraudulent transfer, there was no indication that claimed exemption itself was fraudulent. Further, Court had previously entered Order disallowing exemption to extent of joint claims and Debtor paid joint claims consistent with that Order. Prior Order had preclusive effect where it had not been set aside, preventing Trustee from now arguing that property was not entireties property entitled to exemption.

7.19 Generally

In re Dawson, 2018 WL 6492698 (Bankr. W.D. Mi. 2018) – Court may not refuse to honor exemption absent valid statutory basis to do so. Evidence indicated that although prior counsel may have concealed or refused to turn over documents, Trustee was aware of possible cause of action at least by Section 341 meeting and Trustee made demand on prior counsel for specific, targeted documents. There was no evidence that Debtor caused prior counsel to withhold information or documents. Alleged concealment by Debtor's prior counsel of Debtor's pre-petition cause of action for alleged malpractice by prior counsel is not precluded by applicable statutes. Objection to Exemption overruled as Debtor had statutory basis to claim exemption under Section 522.

7.20 Valuation of Property Claimed as Exempt

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.

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.

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.

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.

7.21 Conversion of Non-Exempt Into Exempt Property

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.

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.

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 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 Debtor could not have exempted if 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.

7.22 Proceeds of Wrongful Conduct

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.

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.

7.23 Waiver

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.

7.24 Collateral Estoppel

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.

7.25 Equitable Estoppel

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.

7.26 "In Kind" and Dollar Limitations on Exemptions

Wilson v. Rigby, 909 F.3d 306 (9th Cir. 2018) – Post-petition appreciation in asset belongs to estate even if Debtor has exempted all equity in property as of petition date. On filing of case, property became vested in estate and estate is entitled to all proceeds, products, offspring, rents or profits including post-petition appreciation. Debtor cannot amend exemptions post-petition to exempt post-petition equity as value of property and value of exemption is determined as of petition date.

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.

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.

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.

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 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.

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 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.

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).

In re Reilly, 130 S.Ct. 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 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 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.

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.

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.

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

7.27 Social Security

Lim v. Manuel, 2019 WL 4010388 (Bankr. E.D. Mi. 2019) – Debtor’s right to receive accrued, lump sum Social Security benefits are automatically excluded from property of estate under 42 USC Section 407.

United States v. Taalib-Din, 2017 WL 3447903 (E.D. Mi. 2017) – Debtor’s right to Social Security payments does not constitute property of estate. Government’s action in setting off against future Social Security benefits does not constitute act to obtain possession of property of estate or property from estate or to exercise control over property of estate.

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.

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.

7.28 Stock Account

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.

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.

7.29 Payments as Replacement for Lost Earnings

Bush v. Nathan, 2019 WL 4416313 (E.D. Mi. 2019) – Section 522(d)(11)E allows Debtor to exempt Debtors right to receive or property traceable to payment in compensation for loss of future earnings. Exemption applies to discrete, some certain payments to compensate for Debtor's loss of future earnings. Debtor's prepetition employment discrimination suit did not seek damages for lost future earnings. Debtor's employment discrimination suit sought only recovery of wages earned through her period of unemployment but did not include any damages that would occur in the future.

In re Williams, Case No. 16-16621 (Bankr. S.D. Fl. 2018) – NFL player's benefits from settlement with NFL for CTE is exempt as disability income under Sections 522(d)(10). Although benefits resulted from settlement of lawsuit, recovery is not ordinary tort claim. Looking at overall structure of settlement indicates that benefits are undeniably indicative of disability policy.

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

Merillat v. Miller, 2014 WL 1846105 (E.D. Mi. 2014) – Debtor's attempt to claim marital home and interest in funds received divorce proceedings did not constitute replacement for lost earnings. Exemption does not arise from some undocumented promise to "take care of" someone for life, and not related to any specific incident that caused loss of future earning ability. While Section 522(d)(11)(E) may not apply only to tort liability, this cannot be expanded to include any payments made to Debtor for any purpose whatsoever that are entirely distinct from any specific loss of future earnings.

In re Sizemore, 2013 WL 6328160 (Bankr. E.D. Ky. 2013) – Insurance proceeds are exempt under Section 522(d)(11)(E) only to extent proceeds from policy on life of ex-husband replaced funds that Debtor would have received from ex-husband, where there was no link between ex-husbands death and Debtor's ability to work. Only possible expectation of payment from ex-husband's income would be limited to ex-husband's share of obligations imposed under marital settlement agreement which totals \$10,000.00. For purposes of Section 522(d)(11)(E), Debtor could qualify as "dependent" as Debtor had previously been married to decedent and was defined while married as dependent, and nothing in Section 522(d)(11)(E) requires that Debtor be dependent at time insurance is received. Debtor could exempt \$10,000 as proceeds to replace funds to be paid by ex-husband but remaining \$90,000 was not exempt and must be remitted to trustee for distribution to creditors.

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.

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 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.

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 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.

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.

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 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 Debtor and dependents; health of 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.

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 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.

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.

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 Debtor exercise over the asset? If 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 Debtor constituted substitutes for wages, to the same extent as wages.

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 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 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).

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 Debtor or an individual of whom Debtor is or was dependent, to the extent reasonably necessary for the support of Debtor or a dependent of 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).

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.

7.30 Undisclosed Assets

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 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.

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.

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.

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.

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 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 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." 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 Debtor, the trustee would then have sufficient basis to object to the amendment of the schedule, including any exemptions claimed in Schedule C."

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.

7.31 Homestead

Advance Credit, Inc. v. Gamboa, 2019 WL 3917180 (11th Cir. 2019) – Homestead exemption includes any property actually used by Debtor as a residence regardless of whether property contains permanent structure. Fact that Debtors trailer in which he resided in which was located on property violated County ordinances against temporary structures and agricultural zoning, alleged violation of County code does not preclude status of property as homestead. Although property was classified as agricultural for tax purposes and Debtor may need to request reclassification of property containing residence, which would have effect of increasing property taxes, zoning classification does not affect Debtor's right to homestead exemption. So long as Debtor actually lived on property claimed as exempt, non-exempt tree-house or tent would establish requisite degree of permanency. Debtor owned no other real property and intended trailer to be permanent residence

In re Montgomery, 2019 WL 3298790 (Bankr. S.D. Ohio 2019) – Under Ohio law, Debtor seeking to claim homestead exemption must show interest in property that is used by Debtor or dependent as residence. Debtor lived in camper parked on real property owned by Debtor. Debtor purchased property to be near family that live across road and camper is hooked up to water and electric supply. Camper is parked adjacent to house located on property and owned by Debtor and occupied by Debtor's grandson, grandsons fiancé and child. Debtor is permitted to enter house at will, use house for meals, laundry and showers, and sleeps on couch when necessary. Debtor has access to and uses all structures, on wheels or not, that sit on property. Property constitutes Debtor's "residence" for purposes of homestead.

In re Ward, 2018 WL 6822274 (Bankr. E.D.N.Y. 2018) – Whether property qualifies for homestead exemption is determined as of petition date. Under "snapshot rule", all exemptions are determined at time bankruptcy petition is filed and does not change due to subsequent events. Where Debtor owns multiple properties, Debtor must show that Debtor owned and occupied property as homestead as of petition date meaning actual physical occupancy on regular basis which is more regular than at any other location and with intent to reside although intention need not be long-term. Fact that Debtor may later intend to establish residence elsewhere does not defeat claim of homestead in first instance. Debtor signed contract for sale of homestead prior to filing bankruptcy but filed before the sale closed. There was no dispute that Debtor resided in the property as Debtor's homestead as a petition date. Trustee's attempt to impose "permanency" requirement could not override plain language of statute that does not require proof of intent to reside permanently but only requires proof of ownership and occupancy as of petition date. If property is properly claimed as exempt, proceeds received from voluntary sale during pendency of case remained exempt; subsequent sale does not change status of property as exempt. Once determined to be exempt, Section 522(c) provides that exempt property is not liable during or after case for any prepetition debt. Attempt to recapture proceeds of sale would effectively render exempt property liable for payment of claims.

In re Roos, 2018 WL 4471013 (Bankr. E.D. Tn. 2018) – Property held by two unmarried individuals as joint tenants with rights of survivorship can be claimed as exempt in bankruptcy case of either of them. Existence of survivorship clause does not limit Debtor's right to use and possess property even to exclusion of other joint tenant, giving Debtor sufficient present interest in property used as homestead for exemption purposes.

Woodward v. Schwartz, Case No. 337984 (Mi. Ct. App. April 17, 2018) – Michigan Compiled Laws Section 600.6023(3) allows a surviving spouse to assert exemption in the family homestead if the owner of the homestead passes away. However, Section 600.6023(3) does not apply if the surviving spouse is the owner of a homestead in his or her own right. Husband could not assert homestead on behalf of deceased spouse where prior to spouse's death, property was owned by Debtor and spouse jointly and upon death, Debtor became sole owner. At all times, Debtor owned an undivided interest in the residence precluding application of Section 600.6023(3).

In re Vess, 2018 WL 722408 (Bankr. N.D. Ohio 2018) – Homestead requires that Debtor have sufficient interest in property at issue and must occupy or use property as residence, determined as of petition date. Interest is broader than ownership and interest can be less than fee simple ownership such as property that is subject to ongoing state probate proceedings if Debtor's interest in estate as pf date of death, or where property is titled in name of self-settled trust. However, Debtor does not have interest in property owned by LLC even where Debtor is sole member. Although trust was self-settled, Debtor was not trustee and trust was

irrevocable, leaving Debtor no power or control over trust assets. Entire property cannot be claimed as exempt as Debtor does not have interest in entire property. But Debtor can claim as exempt Debtor's interest in the property as beneficiary under the trust and an interest remaining after Debtor's death or any power that Debtor can exercise to appoint beneficiaries to take effect after Debtor's death, constituting a power exercisable for benefit to third parties only, are not property of estate.

In re Hewitt, Case No. 16-11240 (Bankr. D. Vt. 2017) – Debtor cannot claim exemption in home where home is owned by Limited Liability Corporation and not by Debtor. Debtor's ownership of the LLC coupled with payment of all expenses and occupancy of property did not give Debtor equitable interest in property that was recognizable as homestead.

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.

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.

In re Felix, 2017 WL 320828 (Bankr. S.D. Ohio 2017), *aff'd*, 2018 WL 1659585 (6th Cir. BAP 2018) – 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.

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.

Earl v. Lund Cadillac, LLC, Case No. 15-1693 (D. Ariz. 2016) *aff'd*, Case No. 16-16428 (9th Cir. 2017) – 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.

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.

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.

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.

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.

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.

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.

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.

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).

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

In re Young, 2012 WL 1717868 (Bankr. E.D. Tn. 2012) – Homestead exemption applies as against real property owned by 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 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.

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.

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 Debtor's did not use the vacant lot for any commercial purpose.

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.

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.

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.

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.

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.

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) Debtor disposed of property within the 10 years preceding the date of filing of the bankruptcy petition; (2) the property that 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) 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.

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 Debtor in this case from claiming the homestead exemption.

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.

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 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.

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 Debtor are not sufficient to establish “constructive possession”. Debtor must present external circumstances that demonstrate that it would be realistic to expect that 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”.

7.32 Homestead – Limitation Under Section 522(o)

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.

7.33 Homestead – Limitation Under Section 522(p)

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.

7.34 Homestead – Limitation Under Section 522(q)

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 arising 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.

7.35 Redemption Rights

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.

7.36 Life Estate

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.

7.37 Inheritances

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.

7.38 Trust – Beneficial Interest

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.

7.39 Marital Property

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).

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.

7.40 Household Goods

In re Parks, 2018 WL 6603722 (Bankr. Ks. 2018) – Gift cards are essentially cash and cannot be exempted as household goods. Exemption for furnishings, equipment and supplies, including food, fuel and clothing is not so broad as to encompass cash or cash equivalents. Cards could be redeemed only at issuing retailer, cards could be used by anyone in possession and cards are routinely traded on a secondary market.

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.

7.41 Motor Vehicles

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.

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".

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.

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.

7.42 Wearing Apparel

In re Medina, Case No. 17-18090 (Bankr. N.D. Ill. 2017) – Exemption for "wearing apparel" includes Wedding and Engagement rings as long as Debtor is still married to person who gave the rings. Debtor not entitled to claim exemption following divorce. Opinion touched on but did not decide whether rings would remain exempt if Debtor is widowed rather than divorced, or whether exemption would reach engagement and wedding rings purchased after marriage.

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".

7.43 Unmatured Life Insurance Contracts

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.

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.

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.

7.44 Pre-Petition Causes of Action

In re Dawson, 2018 WL 6492698 (Bankr. W.D. Mi. 2018) – Debtor’s pre-petition cause of action for alleged malpractice by Debtor’s counsel is property of estate to which trustee succeeds as of petition. Trustee could use Section 522(g) defeat Debtor’s amended claimed exemption where there was no asset that Debtor ever transferred which is focus of statutory text. Debtor did not “transfer” any right in malpractice action and Trustee did not recover right to prosecute malpractice action from any third party, such that Section 522(g) did not apply.

7.45 Wrongful Death and Bodily Injury Claims

In re Weatherspoon, 2019 WL 4233799 (Bankr. S.D. Ohio 2019) – Ohio Statute Section 2329.66 (which is identical to 11 USC Section 522(d)(11)(B)) permits Debtor to exempt payments made on account of wrongful death or bodily injury of individual on whom Debtor was dependent, to extent reasonably necessary for support of Debtor or dependent of Debtor. Whether individual is “dependent” is based on whether Debtor relied on other person for support for necessities of life including necessary services that reduce expenses dependent would otherwise incur. Debtor claims exemption is presumed to be dependent and objecting creditor bears burden to produce evidence to rebut presumption. Debtor was not “dependent” of Debtor’s deceased father where Debtor had asserted in connection with Debtor’s father’s wrongful death claim that Debtor did not consider himself to be financially dependent and Debtor’s testimony at the Section 341 Meeting that Debtor was not financially dependent. Although Debtor’s father worked in convenience store owned by Debtor, Debtor had employees who would have been able to perform those services and Debtor did not rely on father to provide services to convenience store. Debtor did not rely on father for transportation where Debtor had his own vehicle and did not rely on father to provide childcare services or cash to provide childcare services because Debtor did not need childcare services. Debtor did not rely on father to provide shelter. While Debtor’s father provided some financial assistance, that assistance would have gone to pay for fathers living expenses as father was residing with Debtor; and for some time, Debtor was paying rent using gross income generated by convenience store. Debtor did not rely on father to provide food assistance and fathers financial condition was such that father was unable to support Debtor financially.

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

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 Debtor receives, how many accidents or incidents occurred which caused Debtor to suffer personal bodily injuries, or how many different parts of 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.

7.46 Life Insurance Policy

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 Debtor’s interest in life insurance contracts as long as the policy beneficiary is a spouse, child or other dependent of 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.

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 Debtor’s interest in life insurance contracts as long as the policy beneficiary is a spouse, child or other dependent of 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.

7.47 Insurance Proceeds

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 husband's creditors and a joint creditor of husband and wife, but could not be used to pay claims of wife individually.

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).

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.

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.

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.

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.

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.

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 Debtor was a dependent of the decedent; to the extent reasonably necessary for the support of Debtor or any dependent of 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.

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.

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".

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.

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.

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.

7.48 Pet Insurance

In re Hill, 594 BR 418 (Bankr. D. Az. 2018) – State law allowed Debtor to exempt all money arising for claim for damage to exempt property and all proceeds of fire or other insurance on any exempt property. Prior to petition date, Debtor's pet required medical care covered by Pet Health Insurance. Post-petition, Debtor received reimbursement for the insurance of \$7400. Pet was properly disclosed in Schedule A/B and exempted in Schedule C. Proceeds of insurance constituted insurance on exempt property that could be fully exempted, even if proceeds exceeded actual value of pet itself. Insurance proceeds can exceed economic benefit of property insured particularly where value of property to Debtor bears no relationship to economic value of property. Fact that Debtor received proceeds post-petition and paid proceeds to friend who loaned money to Debtor to pay for treatment in first instance did not defeat exemption as rights to exempt proceeds arose on Petition date. Funds when received were exempt and Debtor was free to use proceeds as Debtor pleased.

7.49 Health Savings Accounts

Mooney v. Webster, 2015 WL 853898 (M.D. Ga. 2015) – HSA is trust exclusively for paying health care expenses but which Debtor can freely access for other purposes subject to tax penalty. HSA is not exempt. HSA is not substitute for wages and is not social security benefit, unemployment compensation, public assistance benefit, veteran's benefit, disability, illness or unemployment benefit, alimony, support or maintenance, payments under pension or annuity, or payment from IRA. HSA is not payment on account of disability, illness or unemployment.

Leitch v. Christians, 494 BR 91 (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, 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.

7.50 Annuities

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.

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.

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.

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”.

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 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.

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 Debtor was a dependent of the decedent; to the extent reasonably necessary for the support of Debtor or any dependent of 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).

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 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.

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 to 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.

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.

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.

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 Debtor is the named owner of the annuity, the annuity is not exempt from claims of Debtor's creditors.

7.51 Employee Buyout

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 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 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).

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 Debtor or an individual of whom Debtor is or was dependent, to the extent reasonably necessary for the support of Debtor or a dependent of 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).

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”.

7.52 Post-petition Assets

Williamson v. Hall, Case No. 08-088 (10th Cir. BAP 2009) – 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.

7.53 Property Owned by Third Party

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.

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

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.

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 Debtor's interest in property, and she had none in the vehicle.

7.54 Dower Interests

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.

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.

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.

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.

7.55 Tools of the Trade

In re MacMillan, 2015 WL 148339 (Bankr. D. Ks. 2015) – Website and digital images constitute tools of the trade subject to exemption.

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.

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.

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.

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.

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.

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.

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.

7.56 Fuel and Provisions – MCL 600.5451(1)(b)

In re Barlow, Case No. 17-48802 (Bankr. E.D. Mi. 2017) – Cash in bank constitutes "fuel and provisions" for purposes of exemptions permitted under Section 600.5451, at least where amount of cash is nominal. Court upheld claimed exemption of \$400 concluding that *de minimus* amount needed to buy groceries, food, clothing, utilities, etc., is exempt as Debtors in 2017 do not store more than 6 months of provisions.

7.57 Entireties Property

In re Jaffe, 932 F.3d 602 (7th Cir. 2019) – Tenant by entirety holds contingent future interest in property while other tenant is alive. Contingent interest is broadly considered an interest in real estate to which judgment lien could attach, even though judgment was against only one tenant. However, while state law defined one tenant's interest as contingent future interest, state law did not provide basis to exempt that contingent future interest. Although Debtor's entireties interest in property could be exempted, when Debtor's spouse passed away post-petition and Debtor's contingent future interest ripened, lien of pre-petition creditor attached to property. Debtor could not exempt contingent future interest so could not avoid fixing of judicial lien on contingent future interest (or lien on property that ripened when spouse passed away) allowing judgment creditor to enforce lien against one-half of property that Debtor acquired at spouse's passing.

In re Dinoto, Case No. 14-59127 (Bankr. E.D. Mi. 2017) – Property claimed by Debtor as exempt tenancy in entireties does not lose exempt status where Debtor and spouse divorced after commencement of bankruptcy case.

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, but transfer did adversely affect creditors of one Debtor solely, as transfer removed from reach of individual creditors property that would have been available as joint tenancy that would not be available as tenants in the entireties. Whether transfer was for reasonably equivalent value is viewed from standpoint of creditors and issue is whether transfer placed property out of reach of creditors. Transfer of property from joint tenants to tenants in the entireties placed property beyond reach of each Debtor's individual creditors, diminishing the assets that those creditors could reach, constituting fraudulent transfer.

Bellinger v. Buckley, Case No. 17-0068 (D. Md. 2017), *aff'd*, Case No. 17-2138 (4th Cir. 2018) – 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.

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.

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.

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.

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.

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.

7.58 Co-mingled and Segregated Funds

Lim v. Manuel, 2019 WL 4010388 (Bankr. E. D. Mi. 2019) – Debtor’s pre-petition transfer to spouse of accrued Social Security payments is potentially avoidable. Although Social Security benefits never became part of estate, transfer may nonetheless be avoidable as constructively fraudulent. Question depends on whether transferred funds were intended to be used for Debtor’s care and were needed to provide for Debtor’s maintenance, as opposed to being outright gift to Debtor’s spouse. Record was not sufficient for summary judgment purposes where there was genuine issue of material fact whether transferred funds were used for Debtor’s basic care or maintenance or constituted a gift which would be avoidable. Fact that Debtor’s spouse co-mingled funds with her own funds does not defeat exempt status if funds remain readily available and have not been converted into some other permanent investment. If funds were used or intended to be used for Debtor’s care and maintenance, funds would retain statutory protection as long as funds are readily traceable.

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.

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.

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 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.

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.

7.59 Salary and Bonuses

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. 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.

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.

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.

7.60 Vacation Pay

Burciaga v. Moglia, 2019 WL 2341126 (Bankr. E.D. Ill. 2019) - Accrued and unpaid vacation pay not exempt under state law that limits deduction order for wages, salary, commissions or bonuses to 15% of gross amount paid. State law reference to “deduction order” was not broad enough to create exemption for purposes of bankruptcy.

7.61 Garnishment Limitations

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.

7.62 Consumer Credit Protection Act

In re Larkins, 2012 WL 1378470 (Bankr. N.D. Ohio 2012) – State statute that prohibited creditor from garnishing or levying on disposable earnings up to 75% of amount of earnings did not protect Debtor’s right to receive a bonus. Under CCPA, earnings are defined as periodic payments of compensation, not necessarily every asset that is 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.

7.63 Unemployment Compensation

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.

7.64 Workers Compensation

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.

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.

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.

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 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.

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.

7.65 Retirement Accounts

Feldman v. People First Federal Credit Union, 2019 WL 2067360 (Bankr. E.D. Pa. 2019) – Funds withdrawn from retirement account pre-petition and deposited into attorney trust account for purposes of paying mortgage creditor constituted property of estate where funds were still in attorney trust account as of petition date. Debtor's claimed exemption under Section 522(d)(12) could not encompass funds withdrawn from account prior to commencement of case.

In re Chaudury, 2018 WL 671118 (Bankr. M.D. Tn. 2018) – Debtor's interest in IRA is presumptively exemptible. Code defines as exempt any retirement account that qualifies for favorable tax treatment, looking to Internal Revenue Code to determine if IRA is "qualified". Transacting in IRA that does not cause IRA to lose favorable tax treatment does not render IRA nonexempt. Funds withdrawn from IRA do not lose exempt status if funds are redeposited into same or another qualified account or fund within 60 days of withdrawal. Debtor who was over age 59½ withdrew funds from account and used funds to purchase home. Debtor then put a mortgage on the home and obtained proceeds which Debtor put back into the IRA. Under IRS rules, Debtor not required to replace withdrawn funds with identical funds and can do annual withdrawal for personal use as long as funds are redeposited into same or other qualified account within 60 days. To extent Debtor redeposited funds (from mortgage transaction) back into IRA, withdrawal did not destroy "qualified" nature of IRA or prevent Debtor from exempting IRA.

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).

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.

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.

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.

In re Banks, 2014 WL 180693 (Bankr. C.D. Il. 2014) – Money transferred from Debtor's retirement account into bank account where it was co-mingled with non-exempt funds lost their exempt status.

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 Debtor was a dependent of the decedent; to the extent reasonably necessary for the support of Debtor or any dependent of 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).

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.

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.

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.

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 USC 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 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.

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.

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.

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.

7.66 Retirement Accounts – Prohibited Transactions

Yerian v. Webber, 2019 WL 2610751 (11th Cir. 2019) - State Law may create exemptions which overlap with but which are discrete from federal exemptions under Section 522. State law required IRA to be operated in manner consistent with governing instruments that can impose additional requirements that go beyond the Internal Revenue Code. Debtor’s exemption under state law denied where Debtor engaged in self-dealing which, while not itself a violation of Internal Revenue Code, was violation of governing documents which precluded Debtor from claiming IRA as exempt under state law. Although Debtor’s IRA may have been operated consistent with the requirements of an exemption under Section 522, IRA not exempt under applicable state law where Debtor did not maintain IRA in accordance with governing Plan.

Chorches v. Xiao, 592 BR 258 (Bankr. D. Conn. 2018) – 522(d)(12) allows a Debtor to exempt retirement funds in fund or account that is exempt from taxation under Internal Revenue Code. Plan is exempt for taxation if either(a) it has received favorable termination under Internal Revenue Code Section 7805 and determination is in effect as of petition date; or(b) if there has not been a favorable determination, there has not been prior determination that Plan does not qualify and that either (i) Plan is in substantial compliance or (ii) Debtor is not responsible for failure to be in compliance. IRS Determination Letter that focuses on form of Plan does not constitute determination that Plan qualifies or the terms of Plan have been followed and are not entitled to preclusive

effect. Further, even if Plan receives favorable determination, once changes are made to Plan, Plan is no longer protected by determination. Plan was not in substantial compliance where Plan was not intended to be permanent; minimum participation requirements under Internal Revenue Code Section 401(a)(26) were not met; exclusive benefit requirements and nondiscrimination requirements under Section 401(a)(2) and (a)(4) were not fulfilled; and Plan was not operated in accordance with its terms. Plan failures were not technical bridges before operational failures constituting substantial violations of qualification requirements for Plan rendering Debtor's interest in Plan non-exempt.

Daniels v. Agin, Case No 12-2376 (1st Cir. 2013) – Lack of 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.

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.

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.

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.

7.67 Employee Benefit Plan

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.

7.68 Inherited Retirement Accounts

In re Clark, 2019 WL 1905178 (Bankr. N.D. Ohio 2019) – Funds received by Debtor as a result of Debtor being named as beneficiary on Debtor's sister's retirement account and paid filing Debtor's sister's death are not exempt retirement funds as funds were not contributions made by Debtor and Debtor's right to withdraw funds from IRA is not dependent on illness disability death of retirement or age. Although transfer from pension Plan to IRA was direct rollover, distributions did not amount to rollover of contributions made by Debtor. Further, funds were rolled into inherited IRA which cannot be claimed as exempt as distributions from IRA are not contingent upon illness, disability, death, retirement or age. However, funds exempt under state statute which allows Debtor to exempt interest in any assets held an individual retirement account that decedent directly or indirectly left to or for benefit of Debtor. Statute was intended to encompass alternative retirement devices including distributions from Debtor's sister's pension Plan rolled over into inherited IRA. Statute is not limited to Debtor's rights or interests that are themselves in inherited IRA, but includes any asset held in an inherited individual retirement account.

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.

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.

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 Debtor. Funds in plan lost retirement attributes by being liquidated through the probate estate.

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.

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.

In re Taber, 2011 WL 4048521 (Bankr. N.D. Ohio 2011) – Ohio law allowed Debtor to exempt inherited IRA.

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.

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 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 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.

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 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.

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 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.

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.

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.

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).

7.69 Retirement Accounts – Marital Settlement Agreement

Lerbakken v. Sieloff & Associates, PA, 2018 WL 4996146 (8th Cir. BAP 2018) - Interest in IRA or 401(k) acquired by Debtor as part of marital Settlement is not exempt. Exemption under Section 522(b)(3)(C) is limited to individuals who create or contribute funds to retirement account. Retirement funds obtained or received by other means do not meet definition. Interest held by Debtor resulting from nothing more than property settlement rather than Debtor's retirement contributions.

7.70 Retirement Accounts – QDRO and QRBCO

Lerbakken v. Sieloff & Associates, PA, 2018 WL 4996146 (8th Cir. BAP 2018) - Interest in IRA or 401(k) acquired by Debtor as part of QDRO is not exempt. Exemption requires (1) that account can be “retirement funds” and (2) retirement funds be in account that is exempt from taxation under specified provision of Internal Revenue Code. “Retirement funds” are defined as sums of money set aside for a day individual stops working. Analysis is not case-by-case, fact-intensive examination into whether Debtor actually Plan to use funds for retirement purposes but is instead objective question as to whether account is one set aside for a day when Debtor stops working. Exemption under Section 522(b)(3)(C) is limited to individuals who create or contribute funds to retirement account. Retirement funds obtained or received by other means do not meet definition. Interest held by Debtor resulting from nothing more than property settlement rather than Debtor's retirement contributions.

In re Jeffers, 2017 WL 2838104 (Bankr. N.D. Ohio 2017) – Entry of Judgment of divorce that grants to spouse an interest in ex-spouse's retirement plan vests in receiving spouse a property interest in retirement plan even in absence of QDRO. Property interest is not claim of creditor and is not subject to discharge. Upon entry of Divorce Decree, spouse became equitable owner of interest in retirement account and Debtor's retirement account became impressed with constructive trust for benefit of spouse, leaving Debtor with only bare legal title that does not become property of Debtor's bankruptcy estate. Section 523(a)(15) is of no effect as Section 523(a)(15) governs only “debt” owed to spouse, former, spouse or child. Spouse's interest in retirement account is property interest, not debt, and so is not impacted by Section 523(a)(15) or by Debtor's later discharge. Court would lift stay to allow State Court to enter QDRO to allow spouse control of her individual property interest in Debtor's retirement account.

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.

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).

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.

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.

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.

7.71 Section 529 Educational Savings Plans

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.

7.72 Inherited 529 Plans

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.

7.73 Tax Refunds

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.

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 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.

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.

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.

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.

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.

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.

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.

7.74 College Savings Accounts and Student Loan Proceeds

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 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.

7.75 Spousal Support, Child Support and Separate Maintenance

In re Rush, 582 BR 729 (Bankr. E.D. Tn. 2018) – Property of the estate does not include any power Debtor may exercise solely for benefit of individual other than Debtor or any property in which Debtor holds only legal title without equitable interest. Past due and accrued child support payments payable to Debtor are for the benefit of her children and held by Debtor in constructive trust for children. Fact that children are past age of majority and no longer entitled to prospective child support or that the Back Child Support is being paid directly to Debtor does not make accrued child support property of estate.

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.

In re Kooi, 2016 WL 1128485 (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.

In re Stookey, 2015 WL 5056905 (Bankr. N.D. Ohio 2015) – Ohio law allows exemption of right to receive support, allowance or other maintenance to extent reasonably necessary to support person or dependent of person. Provision of divorce decree requiring husband to pay wife \$10,000 was in section defined as property settlement and was outside of two clearly defined sections dealing with spousal and child support. Payment did not appear to be for sustenance or support of former spouse and none of the statutory factors for determining support were used or reflected as the basis for the award. Property settlement was not within scope of exemption for support.

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.

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.

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.

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.

7.76 Property In Possession Of Custodian or Receiver

In re Briar Hill Foods, LLC., 2017 WL 4404274 (Bankr. N.D. Ohio 2017) – Where State Court receiver is appointed prior to commencement of bankrupt case, Section 543 allows Court to excuse obligation of receiver to turnover property to Debtor. However, excusal of turnover does not vest in receiver powers normally reserved to Debtor-in-Possession. On request of Debtor joined by major secured creditor, Court would excuse turnover and allow receiver to maintain possession and management of property and would allow receiver to market property but receiver lacked authority to exercise powers of DIP and specifically could not sell property or seek approval of court to sell property, as only DIP has authority under Code to propose sale

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 turn over 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.

7.77 Exemptions – Contract Rights

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.

7.78 Exemptions – Season Tickets

In re Anderson, Case No. 17-30898 (Bankr. N.D. In. 2017) – Season tickets to Notre Dame football are assets that become property of estate on filing. Debtor could not exempt tickets as tangible personal property. While physical tickets are tangible, tickets represent right to attend event which is inherently intangible. Value is not inherent in physical paper, but in ability to use tickets for admission to event.

7.79 Tracing of Proceeds of Exempt Asset

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.

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.

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.

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.

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 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.

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.

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

7.80 Procedure

In re Wigger, 2019 WL 4267726 (Bankr. W.D. Mi. 2019) – Avoidance of lien impairing exemption requires that lien be judicial lien; lien must attach to Debtor’s property; and lien must impair exemption to which Debtor is otherwise entitled. Lien impairs exemption to extent that lien plus all other liens plus exempt amount exceeds value of property. State lien for reimbursement of costs of incarceration is judicial lien. Debtor’s IRA valued at \$84,850 fully exempt allowing avoidance of entire lien. Lien against Judgment held by Debtor against third party partially avoidable where judgment had value of \$24,601; State lien as \$12,300; and Debtor exempted \$13,100. Allowing exemption left \$11,501 of non-exempt equity to which lien attached and could not be avoided.

Woodward v. Schwartz, Case No. 337984 (Mi. Ct. App. April 17, 2018) – Judicial Lien is not automatically avoided upon entry of discharge. Party seeking to avoid lien must institute adversary proceeding, failing which lien passes through bankruptcy intact.

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 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.

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.

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).

7.81 Service of Motion

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 Post 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.

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.

7.82 Grounds – Generally

Mintz v. CitiBank, NA, 2018 WL 4008362 (Bankr. N.D. Ohio 2018) – Lien is avoidable under Section 522(f) where lien impairs exemption and is judicial lien. Lien impairs exemption to extent that some of the lien plus all other liens on property plus amount of exemption exceeds value of Debtor’s interest in property. Fact that Debtor has no equity over and above superior liens does not prevent lien from being avoided.

Woodward v. Schwartz, Case No. 337984 (Mi. Ct. App. April 17, 2018) – Party cannot avoid Judicial Lien where Debtor did not claim property as exempt. Debtor could not avoid judicial lien on homestead where Debtor’s Schedule C value Debtor’s interest in homestead at \$0.00 and claimed \$0.00 as exempt value. Lien could not impair exemption or value of plaintiff exemption was \$0.00.

In re Blankenship, 2018 WL 1357360 (Bankr. W.D. Ky. 2018) – Section 522(f) allows a Debtor to avoid judicial lien on Debtor’s interest in property to the extent lien impairs exemptions. Debtor cannot avoid lien where judgment is solely against non-filing spouse and does not impair Debtor’s interest in property or exemptions.

In re Vanwinkle, 2017 WL 4457413 (Bankr. E.D. Ky. 2017) – Section 522(f) allows Debtor to avoid judicial lien, other than lien that secures debt under Section 523(a)(15) to extent that lien, plus all other encumbrances on the property plus Debtor’s allowable exemption exceed total value of property. Court not bound to accept values set out in parties’ appraisals and may form own opinion based on testimony and appraisals. Court concluded that Debtor’s appraised value was too low where value fell below mid-point of what Debtor’s appraiser contended were “most applicable” value and “lowest” value. Debtor is charged with full value of property owed as tenant by entireties with spouse as each tenant is viewed as owning entire estate from time of creation of entireties. Where judicial lien attaches to two separate parcels, degree of impairment is determined on parcel-by-parcel basis. Creditor held judgment totaling \$87,000.00. Lien partially avoided as to Parcel A where total lien plus encumbrances plus exemption exceeded value of property by \$55,000; but was not avoidable at all against Parcel B where value of Parcel B exceeded all encumbrances including full amount owed on judgment lien. If two parcels were considered as whole in dealing with judgment lien that encumbered both, parcels would have had combined value of \$482,000 less encumbrances of \$431,183, less total exemptions of \$3310.78, leaving total value in excess encumbrances of \$47,500, rendering judgment lien as not avoidable as not impairing exemptions on either property.

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.

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).

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).

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 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 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.

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.

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.

In re Bonds, 2014 WL 1796691 (Bankr. E.D. La. 2014) – Debtor can bifurcate partially secured lien and avoid wholly unsecured secured by liens on Debtor's automobile. Section 522(f) 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.

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.

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.

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.

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.

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 Debtor and did not either require Debtor to use specific amount on any particular asset or limit purposes for which exemption was claimed.

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.

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.

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”.

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.

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.

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.

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.

7.83 Valuation

In re Vanwinkle, 2017 WL 4457413 (Bankr. E.D. Ky. 2017) – Section 522(f) allows Debtor to avoid judicial lien, other than lien that secures debt under Section 523(a)(15) to extent that lien, plus all other encumbrances on the property plus Debtor's allowable exemption exceed total value of property. Court not bound to accept values set out in parties' appraisals and may form own opinion based on testimony and appraisals. Court concluded that Debtor's appraised value was too low where value fell below mid-point of what Debtor's appraiser contended were “most applicable” value and “lowest” value. Debtor is charged with full value of property owed as tenant by entireties with spouse as each tenant is viewed as owning entire estate from time of creation of entireties. Where judicial lien attaches to two separate parcels, degree of impairment is determined on parcel-by-parcel basis. Creditor held judgment totaling \$87,000.00. Lien partially avoided as to Parcel A where total lien plus encumbrances plus exemption exceeded value of property by \$55,000; but was not avoidable at all against Parcel B where value of Parcel B exceeded all encumbrances including full amount owed on judgment lien. If two parcels were considered as whole in dealing with judgment lien that encumbered both, parcels would have had combined value of \$482,000 less encumbrances of \$431,183, less total exemptions of \$3310.78, leaving total value in excess encumbrances of \$47,500, rendering judgment lien as not avoidable as not impairing exemptions on either property.

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*.

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.

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.

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.

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.

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.

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.

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.

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.

7.84 Joint Ownership

In re Jaffe, 932 F.3d 602 (7th Cir. 2019) – Tenant by entirety holds contingent future interest in property while other tenant is alive. Contingent interest is broadly considered an interest in real estate to which judgment lien could attach, even though judgment was against only one tenant. However, while state law defined one tenant's interest as contingent future interest, state law did not provide basis to exempt that contingent future interest. Although Debtor's entireties interest in property could be exempted, when Debtor's spouse passed away post-petition and Debtor's contingent future interest ripened, lien of pre-petition creditor attached to property. Debtor could not exempt contingent future interest so could not avoid fixing of judicial lien on contingent future interest (or lien on property that ripened when spouse passed away) allowing judgment creditor to enforce lien against one-half of property that Debtor acquired at spouse's passing.

William F. Sandoval Irrevocable Trust v. Taylor, 899 F.3d 1126 (10th Cir. 2018) – In evaluating potential lien avoidance of jointly owned property where only one owner files bankruptcy, impairment calculation uses value of other liens on property corresponding to Debtor's percentage of ownership rather than full amount of lien. Calculation begins with value of Debtor's interest in property and subtracts percentage of other liens, not total lien amount, joining First, Third and Ninth Circuits.

In re Healey, 2017 WL 4838557 (Bankr. E.D.N.Y. 2017) – When considering Motion to Avoid Liens on property owned as tenants by entireties where only one joint owner files, proper method is to determine full value of property; subtract all unavoidable liens to determine full equity in property; then subtract Debtor's homestead exemption. Judgment lien attaches to extent of any remaining equity.

In re Vanwinkle, 2017 WL 4457413 (Bankr. E.D. Ky. 2017) – Section 522(f) allows Debtor to avoid judicial lien, other than lien that secures debt under Section 523(a)(15) to extent that lien, plus all other encumbrances on the property plus Debtor's allowable exemption exceed total value of property. Court not bound to accept values set out in parties' appraisals and may form own opinion based on testimony and appraisals. Court concluded that Debtor's appraised value was too low where value fell below mid-point of what Debtor's appraiser contended were "most applicable" value and "lowest" value. Debtor is charged with full value of property owed as tenant by entireties with spouse as each tenant is viewed as owning entire estate from time of creation of entireties. Where judicial lien attaches to two separate parcels, degree of impairment is determined on parcel-by-parcel basis. Creditor held judgment totaling \$87,000.00. Lien partially avoided as to Parcel A where total lien plus encumbrances plus exemption exceeded value of property by \$55,000; but was not avoidable at all against Parcel B where value of Parcel B exceeded all encumbrances including full amount owed on judgment lien. If two parcels were considered as whole in dealing with judgment lien that encumbered both, parcels would have had combined value of \$482,000 less encumbrances of \$431,183, less total exemptions of \$3310.78, leaving total value in excess encumbrances of \$47,500, rendering judgment lien as not avoidable as not impairing exemptions on either property.

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.

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.

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).

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).

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.

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 Debtor is the judgment Debtor.

7.85 Trust Property

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.

7.86 Property Owned by LLC

In re Hewitt, Case No. 16-11240 (Bankr. D. Vt. 2017) – Section 522(f) requires property to be exempt before lien can be avoided. Debtor cannot claim exemption in home where home is owned by Limited Liability Corporation and not by Debtor. Debtor's ownership of the LLC coupled with payment of all expenses and occupancy of property did not give Debtor equitable interest in property that was recognizable as homestead. Debtor could not avoid judicial lien that attached to property owned by LLC.

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.

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

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.

In re Vess, 2018 WL 722408 (Bankr. N.D. Ohio 2018) – Homestead requires that Debtor have sufficient interest in property at issue and must occupy or use property as residence, determined as of petition date. Interest is broader than ownership and interest can be less than fee simple ownership such as property that is subject to ongoing state probate proceedings if Debtor’s interest in estate as pf date of death, or where property is titled in name of self-settled trust. However, Debtor does not have interest in property owned by LLC even where Debtor is sole member. Although trust was self-settled, Debtor was not trustee and trust was irrevocable, leaving Debtor no power or control over trust assets. Entire property cannot be claimed as exempt as Debtor does not have interest in entire property. But Debtor can claim as exempt Debtor’s interest in the property as beneficiary under the trust and an interest remaining after Debtor’s death or any power that Debtor can exercise to appoint beneficiaries to take effect after Debtor’s death, constituting a power exercisable for benefit to third parties only, are not property of estate.

7.87 Liens Avoidable – Judicial Liens

Wigger v. State Treasurer, 2019 WL 1757135, *rehearing denied*, 2019 WL 1975845 (Bankr. W.D. Mi. 2019) – Judicial lien is one that is obtained by judgment, sequestration or other legal or equitable process, while statutory lien arises solely by force of statute on specified conditions. Lien must be statutory or judicial and cannot be both, and depends on origin of lien. Lien is not “judicial” merely because lien may be enforced in court proceedings, but statutory lien must arise solely by statute. State Correctional Facility Reimbursement Act lien is judicial lien and not statutory lien where lien does not arise solely from operation of statute and requires judicial intervention before lien arise. SCFRA provides that lien does not arise unless Attorney General conducts investigation and determines that Debtor has sufficient assets to cover at least 10% of cost of care and AG then obtains order from Circuit Court order imposing lien. SCFRA lien is avoidable judicial lien to extent lien impairs exemptions.

In re Hodgins, 2019 WL 1211574 (Bankr. E.D. Mi. 2019) – Judicial lien is one obtained by judgment, levy, sequestration or other legal or equitable process or proceeding. “Security interest” is lien created by agreement. Consensual lien created by execution of contract granting security interest is not “judicial lien” merely because lien is perfected by recording of UCC-1 in public records.

Mintz v. CitiBank, NA, 2018 WL 4008362 (Bankr. N.D. Ohio 2018) – Judicial lien impairs exemption to extent that some of the lien plus all other liens on property plus amount of exemption exceeds value of Debtor’s interest in property. Lien impaired Debtor’s homestead exemption where property had total value of \$147,500 encumbered by first mortgage plus exemptions plus lien to be avoided aggregating \$470,059.51. Total of liens minus value of property resulted in “impairment” in excess of \$300,000, far in excess of the amount of the lien to be avoided resulting in the total avoidance of the judgment lien.

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.

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).

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).

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.

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.

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.

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.

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.

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.

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.

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 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.

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.

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.

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.

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.

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 Debtor could claim if there were no liens on the property exceeds the value that 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.

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.

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 Debtor could claim if there were no liens on the property; exceeds the value that 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.

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 Debtor after the refund is known, and 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).

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.

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.

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.

7.88 Liens Avoidable – Non-Possessory Non-Purchase Money

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.

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.

7.89 Liens Not Avoidable – Statutory Liens

Wigger v. State Treasurer, 2019 WL 1757135 (Bankr. W.D. Mi. 2019) – Judicial lien is one that is obtained by judgment, sequestration or other legal or equitable process, while statutory lien arises solely by force of statute on specified conditions. Lien must be statutory or judicial and cannot be both, and depends on origin of lien. Lien is not “judicial” merely because lien may be enforced in court proceedings, but statutory lien must arise solely by statute. State Correctional Facility Reimbursement Act lien is judicial lien and not statutory lien where lien does not arise solely from operation of statute and requires judicial intervention before lien arise. SCFRA provides that lien does not arise unless Attorney General conducts investigation and determines that Debtor has

sufficient assets to cover at least 10% of cost of care and AG then obtains order from Circuit Court order imposing lien. SCFRA lien is avoidable judicial lien to extent lien impairs exemptions.

In re Howe, 2018 WL 3025316 (Bankr. N.D. Ohio 2018) – Section 522(f)(1)(A) allows a Debtor to avoid a judicial lien or a judgment lien that impairs exemptions. Mechanics lien filed against Debtor’s residence is statutory lien that is not subject to avoidance. Lien is not judicial lien as lien is not obtained by judgment, levy, sequestration or other legal or equitable proceeding; but is one that arises as a matter of statute. Initiation of foreclosure does not convert lien into avoidable judicial lien as commencement of foreclosure proceeding does not change inherent character of lien.

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.

7.90 Judgment Arising Out of Mortgage Foreclosure

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.

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.

7.91 Effect of Avoidance

LPP Mortgage, Ltd. v. Brinley, 547 F.3d 643 (6th Cir. 2008) – Upon entry of order voiding judgment lien, entire unencumbered equity becomes property of estate subject to Debtor’s right to claim exemption. Action to avoid judgment lien does not vest in Debtor unimpaired title to property free and clear of claims of Bankruptcy Estate.

E. Effect of Claimed Exemptions

7.92 Generally

Moyer v. Rosich, Case No. 15-80203 (Bankr. W.D. Mi. 2018) – Allowance of claimed exemption does not remove property from estate unless property is abandoned or administered. Following *Schwab v. Reilly*, 560 US 770 (2010) Court could not have approved sale of fully-exempted kitchen equipment if allowance of exemption resulted in property no longer constituting property of estate.

In re Wigger, 2018 WL 2759385 (Bankr. W.D. Mi. 2018) – Rule 4003 allows creditors and other interested parties 30 days after conclusion of Section 341 Meeting of Creditors to object to exemptions. Debtor’s claimed exemptions do not become final until expiration of time to object under Rule 4003. Debtor’s attempt to invalidate lien as impairing exemptions premature where deadline to object to exemptions has not expired and at least one creditor filed objections to exemptions.

Meyer v. Timothy E. Baxter & Associates, PC, 2018 WL 1858182 (E.D. Mi. 2018) – Standing requires prosecution of action by real party in interest. Upon filing of bankruptcy petition, Debtor’s property including existing causes of action becomes property of bankruptcy estate. Debtor thereafter has no standing to pursue causes of action as only Bankruptcy Trustee is empowered to do so. If Debtor claims cause of action as exempt and no party objects, exemption re-vests cause of action in Debtor and cause of action is no longer property of estate. Debtor had standing to prosecute action where Debtor listed cause of action in bankruptcy schedules, claimed cause of action as exempt and no party objected. Fact that Bankruptcy Court Order closing case was not entered until after commencement of this case did not affect Debtor’s standing.

In re Odell, 2018 WL 624884 (6th Cir. BAP 2018) – Automatic Stay terminates automatically upon entry of discharge as to property that is not property of estate. Debtor’s claimed homestead exemption which exceeded value of property, when final, removed homestead from property of estate. Appeal of Order Lifting Stay rendered moot by subsequent entry of discharge as stay would have terminated in any event, leaving appellate court with no effective remedy.

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.

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.

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.

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.

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.

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.

Hawk v. Engelhart, Case No. 15-914 (S.D. Tx. 2016), *aff'd*, 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 proceeds withdrawn from IRA to Trustee for distribution to creditors.

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.

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.

7.93 Student Loans

Schatz v. Access Group, Inc., 602 BR 411 (1st Cir. BAP 2019) – Exemptions are intended to protect property from creditors and exempt property is not liable for payment of any prepetition debt. For student loans, Section 522(c)(4) expressly provides that exempt property is liable for pre-petition debts that arise from fraud in connection with student loans. Absent evidence of fraud in connection with student loans, student loan creditor cannot seek to require Debtor to liquidate exempt property or otherwise use exempt property to pay student loans.

7.94 Trustee's Power to Sell Exempt Assets

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.

7.95 Setoff and Exempt Assets

US v. Copley, Case No. 16-207 (E.D. Va. 2018) – Debtor’s right to exempt tax refund trumped government right of setoff against unpaid liabilities. Refund became property of estate for bankruptcy filed in 2014 because Debtor’s right to refund vested on December 31, 2013/ although Section 553 provides that nothing in Code other than sections 362 and Section First Modified Pre-Confirmation Chapter 13 Plan affect any right of creditor to offset, Section 553 permits, but does not mandate, that Bankruptcy Court approve right of setoff. Because refund was property of estate, IRS could not unilaterally take property from bankruptcy estate by exercising right of set off and Bankruptcy Court did not abuse equitable discretion in holding that IRS right of set off gave way to Debtor’s claimed exemption.

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.

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.

7.96 Exemptions and Non-dischargeable Claims

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.

7.97 Value of Claimed Exemption – Appreciation in Value

Woodward v. Schwartz, Case No. 337984 (Mi. Ct. App. April 17, 2018) - Debtor is permitted to exempt value of Debtor’s interest in personal residence. Debtor’s schedule C listed the value of Debtor’s residence at \$0.00 and claimed \$0.00 as the value of the exemption pursuant to Section 522. Debtor’s right to exempt the value limited to \$0.00 with any equity remaining being held nonexempt. Creditor holding nondischargeable judgment did not violate stay or impair Debtors exemption by executing on homestead as Debtor had not claimed any value in homestead to be exempt.

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 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.

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.

7.98 Surcharge of Exempt Property

Corcoran v. Holley, 2018 WL 5318223 (E.D. Mi. 2018) – Trustee cannot offset exemptions to pay administrative expenses. Debtors properly asserted tenants in the entirety exemption as to residence. If trustee liquidates asset, trustee must turnover to Debtors 100% of the proceeds remaining after payment of valid liens and joint debts. Trustee, with Debtors’ consent, sold property and remitted to Debtors all proceeds remaining after payment of liens and joint debts and costs of sale including trustee administrative fee. Trustee required to turn over all proceeds after payment of liens and joint debts including amounts paid to broker for commission and amount paid for closing costs of sale plus any commission retained by trustee. Fact that estate is

administratively insolvent does not excuse trustee's obligation to turn over all proceeds after payment of liens.

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.

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.

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.

Malley v. Agin, Case No. 11-2042 (1st Cir. 2012) – Section 105 allows Court to surcharge otherwise exempt property where Debtor conceals in assets resulting in loss of assets to estate. Debtor sold marital residence shortly before filing and represented that all funds had gone to his ex-wife. Trustee later determined that Debtor received \$25,000 of proceeds but did not list funds. By time Trustee discovered concealment, Debtor had spent funds and money was no longer available for turnover to Trustee. Court ordered that Debtor's exempt assets be surcharged to extend needed to allow Trustee to recover concealed funds. Relief necessary to vindicate Section 521 which required honest disclosure of assets.

7.99 Post-Petition Debts

In re Wigger, 2019 WL 4267726 (Bankr. W.D. Mi. 2019) – Property exempted is not liable during or after the case for any claim that arose pre-petition other than tax debts or to the extent Creditor holds non-avoidable lien. "Claim" is construed to its broadest available definition and requires nothing more than an enforceable obligation even if contingent, unliquidated or disputed. State Court Order that sought to freeze Debtor's IRA for payment of present and future costs of incarceration including unmatured, unliquidated and contingent costs constituted enforceable obligation. Creditor could proceed only to extent Creditor held valid, non-avoided pre-petition lien.

VIII. Claims

A. Specific Claim Types

8.1 Administrative – Generally

McBride v. Riley, 923 F.3d 433 (5th Cir. 2019) – Reversing Bankruptcy Court, Circuit ruled that Bankruptcy Court is not precluded as matter of law from approving reimbursement of filing fees and costs advanced by counsel pre-petition. Administrative expenses are generally those that arise from post-petition transaction with estate rather than Debtor personally; and that directly benefit estate. Filing fee, credit counseling fee and credit report fees advanced by counsel pre-petition are all personal, pre-petition obligations of Debtor that were not necessary for preservation of estate as at time fees were advanced, estate did not exist. Fees only served Debtor's administrative obligations under Code and did not maintain or add value to estate. However, Court could include in compensation awarded under Section 330 the costs advanced but is not required to do so. Section 330 defines compensation broadly enough to include reimbursement of expenses advanced. Court has discretion, if it deems appropriate, to reimburse pre-petition expenses, but is not required to do so.

In re Roberts, 2018 WL 2392147 (Bankr. N.D. Ohio 2018) – Administrative expense is appropriate for appraiser hired by Chapter 13 Trustee in connection with dispute regarding valuation of real property. Debtor proposed valuation of \$38,000 while Court concluded that property was valued at \$50,000, thereby increasing Chapter 7 liquidation value. Appraiser's charge of \$310.36 was reasonable and services were actual and necessary.

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.

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.

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.

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.

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 Debtor-in-possession as opposed to the preceding entity (or, alternatively, that the claimant gave consideration to 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.

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.

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.

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”.

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.

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.

In re Halabu, Case No. 11-59449 (Bankr. E.D. Mi. 2012) – Under Section 503 as amended by BAPCPA, property taxes for which