

# **The Latest and Greatest:**

## Supreme Court and Lower Court Case Law Update

**Thomas D. DeCarlo, Moderator**  
Chapter 13 Trustee; Southfield, Mich.

**Hon. James D. Gregg**  
U.S. Bankruptcy Court (W.D. Mich.)  
Grand Rapids

**Hon. Mary Ann Whipple**  
U.S. Bankruptcy Court (N.D. Ohio)  
Toledo



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MGM GRAND  
DETROIT, MICHIGAN  
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**CASE LAW UPDATE**

Thomas D. DeCarlo, Esq. ©  
Office of David Wm. Ruskin, Standing Chapter 13 Trustee  
Southfield, Michigan

CASE LAW UPDATE INDEX

- I. Hot Off The Presses
- II. Cases to Watch
- III. Automatic Stay
  - A. Actions Stayed
    - §3.1 Generally
    - §3.2 Persons Protected
    - §3.3 Utilities
    - §3.4 Foreign Property
  - B. Exceptions
    - §3.5 Police Power
    - §3.6 Setoff
    - §3.7 Post-Petition Perfection of Lien
    - §3.8 Final Judgment in Dischargability Proceedings
  - C. Relief From Stay
    - §3.9 Grounds Generally
    - §3.10 Cause - Section 362(d)(1)
    - §3.11 Lack of Equity - Section 362(d)(2)(A)
    - §3.12 Necessity for Effective Reorganization - Section 362(d)(2)(B)
    - §3.13 Leases – Section 365(p)(1)
    - §3.14 Family Law Proceedings
    - §3.15 Single Asset Real Estate – Section 362(d)(3)
    - §3.16 *In Rem* Relief
    - §3.17 Burden of Proof
    - §3.18 Mootness
    - §3.19 Party Entitled to Relief From Stay
    - §3.20 Procedural Requirements
    - §3.21 Termination – Failure to Reaffirm
    - §3.22 Post-petition Default on Residential Mortgage
    - §3.23 Setoff
  - D. Violations of Automatic Stay
    - §3.24 Particular Actions - Violations
    - §3.25 Particular Actions – Not Violations
    - §3.26 Pre-petition Mortgage Escrow Claims
    - §3.27 Sanctions
  - E. Extension of Automatic Stay
    - §3.28 When Necessary
    - §3.29 Timing of Motion and Hearing
    - §3.30 Grounds for Denial
    - §3.31 Grounds for Extension
    - §3.32 Effect of Expiration of Stay
  - G. Imposition of Automatic Stay
    - §3.33 When Necessary
    - §3.34 Timing of Motion and Hearing
    - §3.35 Grounds for Denial

- §3.36 Grounds for Imposition
  - §3.37 Order Confirming No Stay in Effect
  - §3.38 Effect of Failure to Impose Stay
- H. Reinstatement of Automatic Stay
  - §3.39 Generally
  - §3.40 Procedure
- IV. Attorneys
  - A. Debt Relief Agency
    - §4.1 Generally
    - §4.2 Attorneys as Debt Relief Agency
  - B. Necessity for
    - §4.3 Corporations
    - §4.4 Individuals
    - §4.5 Partnerships
    - §4.6 Other Entities
  - C. *Pro Bono* Appointment
    - §4.7 Parties Entitled to Appointment
    - §4.8 Limitations on Appointment
    - §4.9 Termination of *Pro Bono* Appointment
  - D. Attorney Fees
    - §4.10 Generally
    - §4.11 Fee Agreement
    - §4.12 Time for Filing Application
    - §4.13 Notice
    - §4.14 Content of Application
    - §4.15 Burden of Proof
    - §4.16 Lodestar
    - §4.17 Billing Judgment
    - §4.18 Hourly Rate
    - §4.19 Clerical Services
    - §4.20 Excessive Number of Professionals
    - §4.21 Benefit to Debtors
    - §4.22 Disgorgement
    - §4.23 Res Judicata
    - §4.24 Costs
    - §4.25 Effect of Discharge
    - §4.26 Post-Petition Services
    - §4.27 Bankruptcy Court Jurisdiction to Review
    - §4.28 Fee Enhancements
  - D. *Pro Hac Vice*
    - §4.29 Grant and Withdrawal of Approval
  - E. Withdrawal as Counsel
    - §4.30 Procedure
    - §4.31 Mootness
    - §4.32 Standing to Request Withdrawal
    - §4.33 Grounds to Request Withdrawal
  - F. Professional Fees

- §4.34 Generally
  - §4.35 Limitations
  - §4.36 Retention of Professionals – Time for Application
  - §4.37 Retention of Professionals – *Nunc Pro Tunc* Approval
  - §4.38 Retention of Professionals – Standard for Approval
  - §4.39 Retention of Professionals – Disinterestedness
- G. Bankruptcy Petition Preparer
  - §4.40 Disclosure
  - §4.41 Allowable Services
  - §4.42 Compensation
  - §4.43 Disgorgement
  - §4.44 Unauthorized Practice of Law
- V. Commencing Case
  - A. Eligibility for Relief
    - §5.1 Section 109
    - §5.2 Simultaneous Estates
    - §5.3 Petition - Name of Debtor
    - §5.4 Corporate Authorization
    - §5.5 Decedent's Estate
  - B. Joint Cases
    - §5.6 Generally
  - B. Credit Counseling
    - §5.7 Failure to Obtain
    - §5.8 Exemption from Requirement
    - §5.9 Joint Petition
    - §5.10 Payment Advices
  - C. Venue
    - §5.11 Generally
    - §5.12 Domicile
    - §5.13 Location of Principal Assets
    - §5.14 Residence
    - §5.15 Principal place of business
    - §5.16 Dismissal
    - §5.17 Transfer - Venue Proper
    - §5.18 Transfer - Venue Improper
  - D. Filing Fee
    - §5.19 Failure to Pay
    - §5.20 Waiver
  - E. Means Test
    - §5.21 "Primarily Consumer Debts"
    - §5.22 Calculation of Disposable Income – Generally
    - §5.23 Calculation of Disposable Income – Income of Non-Filing Spouse
    - §5.24 Calculation of Disposable Income – Surrendered Collateral
    - §5.25 Calculation of Disposable Income – Lien Strips
    - §5.26 Calculation of Disposable Income – Automobile Ownership Expense
    - §5.27 Calculation of Disposable Income – Automobile Operating Expense
    - §5.28 Calculation of Disposable Income – Home Maintenance Expense
    - §5.29 Calculation of Disposable Income – Health Care Expenses
    - §5.30 Calculation of Disposable Income – Education Expenses

|     |       |                                                      |
|-----|-------|------------------------------------------------------|
|     | §5.31 | Calculation of Disposable Income – Housing Deduction |
|     | §5.32 | Social Security Income                               |
|     | §5.33 | Pension Income                                       |
|     | §5.34 | Disability Income                                    |
|     | §5.35 | Unemployment Income                                  |
|     | §5.36 | Railroad Retirement Income                           |
|     | §5.37 | Self- Employed Debtor                                |
|     | §5.38 | Debtor as Owner of Corporation                       |
|     | §5.39 | Household Size                                       |
|     | §5.40 | Variance From IRS Allowances                         |
|     | §5.41 | Special Circumstances                                |
|     | §5.42 | Marital Adjustment – Non-filing spouse               |
|     | §5.43 | Cases Converted From Chapter 13                      |
| D.  |       | Involuntary Petitions                                |
|     | §5.44 | Elements                                             |
|     | §5.45 | Standing to Bring                                    |
|     | §5.46 | Burden of Proof                                      |
|     | §5.47 | Sanctions                                            |
| VI. |       | Property of Estate                                   |
| A.  |       | Defined                                              |
|     | §6.1  | Generally                                            |
|     | §6.2  | Social Security Benefits                             |
|     | §6.3  | Jointly Owned Property                               |
|     | §6.4  | Property Acquired Post-Petition                      |
|     | §6.5  | Tenants by Entireties                                |
|     | §6.6  | Leaseholds                                           |
|     | §6.7  | Abandonment by Trustee                               |
|     | §6.8  | Technical Abandonment                                |
|     | §6.9  | Motion to Compel Abandonment                         |
|     | §6.10 | Effect of Abandonment                                |
|     | §6.11 | Revocation of Abandonment                            |
|     | §6.12 | Tax Refunds                                          |
|     | §6.13 | Post-Foreclosure Interests                           |
|     | §6.14 | Property Settlements                                 |
|     | §6.15 | Causes of Action                                     |
|     | §6.16 | Contract Rights                                      |
|     | §6.17 | Unrecorded Interests                                 |
|     | §6.18 | Restrictions on Alienation                           |
|     | §6.19 | Consignment Transactions                             |
|     | §6.20 | Cash Collateral and Assignment of Rents              |
|     | §6.21 | Pre-petition Transfers Generally                     |
|     | §6.22 | Fixtures and Personalty – Defined                    |
|     | §6.23 | Political Campaign Contributions                     |
|     | §6.24 | Trust Property                                       |
|     | §6.25 | Bonuses                                              |
| B.  |       | Turnover                                             |
|     | §6.26 | Generally                                            |
| C.  |       | Failure to Disclose Causes of Action                 |
|     | §6.27 | Future Prosecution Barred                            |
|     | §6.28 | Future Prosecution Not Barred                        |
| D.  |       | Section 542 Turnover Actions                         |

- §6.29 Generally
- §6.30 Defenses

- E. Sale of Assets
  - §6.31 Approval Generally
  - §6.32 Sale Free and Clear of Liens
  - §6.33 Procedure
- F. Prosecution of Pre-petition Cause of Action
  - §6.34 Role of Debtor and Trustee

VII. Exemptions

- A. Exemptible Property
  - §7.1 Time for Determining
  - §7.2 “Bankruptcy Only” Exemptions
  - §7.3 Amended Claim of Exemptions
  - §7.4 Recovery of Avoided Transfers
  - §7.5 Waiver of Exemptions
  - §7.6 Statutory Basis for Exemptions
  - §7.7 Choice of Laws
- B. Objections to Exemptions
  - §7.8 Burden of Proof
  - §7.9 Deadline for Objections
  - §7.10 Valuation of Property Claimed as Exempt
  - §7.11 Proceeds of Wrongful Conduct
  - §7.12 “In Kind” and Dollar Limitations on Exemptions
- C. Specific Property Exempt
  - §7.13 Stock Account
  - §7.14 Payments as Replacement for Lost Earnings
  - §7.15 Undisclosed Assets
  - §7.16 Homestead
  - §7.17 Motor Vehicles
  - §7.18 Unmatured Life Insurance Contracts
  - §7.19 Insurance Proceeds
  - §7.20 Annuities
  - §7.21 Employee Buyout
  - §7.22 Post-petition Assets
  - §7.23 Property Owned by Third Party
  - §7.24 Tools of the Trade
  - §7.25 Co-mingled and Segregated Funds
  - §7.26 Unemployment Compensation
  - §7.27 Retirement Accounts
  - §7.28 Inherited Retirement Accounts
  - §7.29 Tax Refunds
  - §7.30 College Savings Accounts and Student Loan Proceeds
- D. Liens Impairing Exemptions - Avoidance
  - §7.31 Procedure
  - §7.32 Grounds – Generally
  - §7.33 Liens Avoidable – Judicial Liens
  - §7.34 Liens Avoidable – Non-Possessory Non-Purchase Money
  - §7.35 Effect of Avoidance



## VIII. Claims

## A. Specific Claim Types

- §8.1 Administrative
- §8.2 Environmental
- §8.3 Secured - Generally
- §8.4 Secured – Method of Perfection
- §8.5 Secured – Description of Collateral
- §8.6 Secured – Priority of Competing Secured Claims
- §8.7 Secured – Attorney Fees
- §8.8 Secured – Interest Rate
- §8.9 Secured – Cross Collateralization
- §8.10 Injunctions
- §8.11 Income Taxes
- §8.12 Corporate Tax Liabilities
- §8.13 Pre-Petition Attorney Fees
- §8.14 Pre-petition Divorce Judgment
- §8.15 Priority – Domestic Support Obligations
- §8.16 Priority – Tax Claims
- §8.17 Priority – Perishable Agricultural Commodities Act
- §8.18 Pre-Petition versus Post-Petition Claims
- §8.19 Contingent Claims
- §8.20 Executory Contracts and Unexpired Leases – Assumed
- §8.21 Executory Contracts and Unexpired Leases – Rejected
- §8.22 Condominium and Homeowners Associations
- §8.23 Deficiency Claims
- §8.24 Insider Claims
- §8.25 Pre-petition Interest – Unsecured Claims
- §8.26 Pre-petition Escrow Balances

## B. Proof of Claim

- §8.27 Standing to File Proof of Claim
- §8.29 Contents of Proof of Claim
- §8.30 Informal Proof of Claim
- §8.31 Effect of Allowed Claim
- §8.32 Deadline for Filing Proof of Claim
- §8.33 Late Filed Proof of Claim
- §8.34 Failure to File Proof of Claim – Court Jurisdiction
- §8.35 Withdrawal of Proof of Claim

## C. Objections

- §8.36 Standing to Object
- §8.37 Procedural Requirements
- §8.38 Burden of Proof
- §8.39 Calculation of Amount of Claim
- §8.40 Grounds – Fraud on Court
- §8.41 Grounds – Failure to Attach Documents
- §8.42 Grounds – Failure to Itemize
- §8.43 Grounds – Late Filed
- §8.44 Grounds – Personally Identifiable Information
- §8.45 Grounds – Surrender in Full Satisfaction of Secured Claim
- §8.46 Grounds – Failure to Comply With Administrative Requirements
- §8.47 Grounds – Payment and Credit Bid
- §8.48 Grounds – Mortgage Fees and Charges
- §8.49 Grounds – Unconscionability
- §8.50 Equitable Subordination
- §8.51 State Law Claims

- §8.52 Insider Claims
  - §8.53 Settlement of Objections
  - §8.54 Sanctions Against Filing Creditor
  - §8.55 Effect of Order Disallowing Claim
  - §8.56 *Res Judicata* Effect of Confirmed Plan
- D. Priority of Distribution
  - §8.57 Generally
  - §8.58 Unclaimed Funds
- E. Non-Dischargability
  - §8.59 Generally
  - §8.60 Section 523(a)(1)
  - §8.61 Section 523(a)(2)
  - §8.62 Section 523(a)(3)
  - §8.63 Section 523(a)(4)
  - §8.64 Section 523(a)(5)
  - §8.65 Section 523(a)(6)
  - §8.66 Section 523(a)(7)
  - §8.67 Section 523(a)(8)
  - §8.68 Section 523(a)(9)
  - §8.69 Section 523(a)(10)
  - §8.70 Section 523(a)(11)
  - §8.71 Section 523(a)(12)
  - §8.72 Section 523(a)(13)
  - §8.73 Section 523(a)(14)
  - §8.74 Section 523(a)(15)
  - §8.75 Section 523(a)(16)
  - §8.76 Other Grounds
- E. Deadline for Objecting to Dischargability
  - §8.77 Generally
  - §8.78 Amendment of Pleadings
- IX. Chapter 7
  - A. Dismissal
    - §9.1 Bad Faith – Section 707(a)
    - §9.2 Presumed Abuse – Section 707(b)(2)
    - §9.3 “Safe Harbor” – Section 707(b)(7)
    - §9.4 Non-presumed Abuse – Section 707(b)(3)
    - §9.5 “Primarily Consumer Debts”
    - §9.6 Failure to File Documents
    - §9.7 Failure to Appear at 341 Meeting
    - §9.8 Dismissal for Cause – Procedure
    - §9.9 Voluntary Dismissal
    - §9.10 Dismissal With Prejudice to Re-Filing
    - §9.11 Filing in Violation of Bar
    - §9.12 Reinstatement of Dismissed Case
    - §9.13 Reopening Case
  - B. Conversion to Chapter 13
    - §9.14 Request of Debtor
    - §9.15 Reconversion
    - §9.16 Based on Finding of Presumed Abuse
  - C. Denial of Discharge – Grounds

- §9.17 Section 727(a)(1)
- §9.18 Section 727(a)(2)
- §9.19 Section 727(a)(3)
- §9.20 Section 727(a)(4)
- §9.21 Section 727(a)(5)
- §9.22 Section 727(a)(6)
- §9.23 Section 727(a)(7)
- §9.24 Section 727(a)(8)
- §9.25 Section 727(a)(9)
- §9.26 Section 727(a)(10)
- §9.27 Section 727(a)(11)
  
- D. Deadline for Objecting to Discharge
  - §9.28 Generally
  - §9.29 Section 727(a)(2)
  - §9.30 Extension of Time
  
- E. Parties Entitled to Object to Discharge
  - §9.31 Standing
  
- F. Discharge
  - §9.32 Timing
  - §9.33 Scope of Discharge
  - §9.34 Discharge Injunction
  
- G. Revocation of Discharge
  - §9.35 Grounds
  - §9.36 Deadline for Bringing Action
  - §9.37 Standing
  
- H. Executory Contracts and Unexpired Leases
  - §9.38 Debtor's Authority to Assume or Reject
  - §9.39 Trustee's Authority to Assume or Reject
  - §9.40 Agreements Subject to Assumption or Rejection
  - §9.41 Deadline to Assume or Reject
  - §9.42 Failure to Assume or Reject
  - §9.43 Procedural Requirements for Assumption
  
- I. Statement of Intentions – Section 521(a)(6)
  - §9.44 When Required
  - §9.45 Effect of Filing
  - §9.46 Failure to File
  
- J. Reaffirmation Agreements
  - §9.47 Time for Execution and Filing
  - §9.48 Form of Reaffirmation Agreement
  - §9.49 Motion for Approval – Represented Debtor
  - §9.50 Motion for Approval – Unrepresented Debtor
  - §9.51 Court Review – Scope
  - §9.52 Hearing Required
  - §9.53 Effect of Denial
  - §9.54 Effect of Approval
  - §9.55 Rescission of Reaffirmation Agreement
  - §9.56 Reinstatement of Rescinded Agreement
  - §9.57 Relationship to Assumed Leases

- K. Redemption
  - §9.58 Generally
  - §9.59 Value of Property Being Redeemed
  - §9.60 Enforcement of Order for Redemption
- L. Lien Strips
  - §9.61 Generally
  - §9.62 Value of Property
- M. Trustee
  - §9.63 Duty to Assemble Assets
  - §9.64 Final Report
  - §9.65 Removal of Trustee
  - §9.66 Retention of Attorney for Trustee
  - §9.67 Fees for Attorney for Trustee
- IX. Chapter 11
  - A. Disclosure Statement
    - §10.1 Requirements for Approval
  - B. Confirmation of Plan
    - §10.2 Generally
    - §10.3 Feasibility
    - §10.4 Absolute Priority Rule
    - §10.5 Best Interests of Creditors
    - §10.6 Good Faith
    - §10.7 Interest/Discount Rate
    - §10.8 Valuation
    - §10.9 Section 1111(b) Election
    - §10.10 Unfair Discrimination
    - §10.11 Effect of Confirmation
    - §10.12 Revocation of Confirmation Order
    - §10.13 Interpretation of Confirmed Plan
    - §10.14 Deadline for Objections to Confirmation
  - C. Small Business Cases
    - §10.15 Defined
    - §10.16 Time to File Plan
  - D. Single Asset Real Estate Cases
    - §10.17 Defined
    - §10.18 Time to File Plan
  - E. Individual Cases
    - §10.19 Defined
    - §10.20 Absolute Priority Rule
  - F. Sale of Assets
    - §10.21 Other than Through Confirmed Plan
    - §10.22 Pursuant to Confirmed Plan
  - G. Assumption or Rejection of Executory Contracts
    - §10.23 Definition of “Executory”
    - §10.24 Standard of Review
    - §10.25 Time for Assuming or Rejecting
    - §10.26 Right to Assume

- §10.27 Right to Assign
  - §10.28 Curing Defaults and Future Performance
  - §10.29 Non-Competition Agreements
  - §10.30 Effect of Assumption
  - §10.31 Effect of Rejection
  - §10.32 Failure to Timely Assume or Reject
- H. Liabilities of Reorganized Debtor
  - §10.33 Generally
  - §10.34 “Continuing conduct”
- I. Discharge
  - §10.35 Timing
  - §10.36 Scope of Discharge
  - §10.37 Discharge Injunction
- J. Conversion to Chapter 7
  - §10.38 On Request of Debtor
  - §10.39 On Request of Creditor
  - §10.40 On Request of United States Trustee
  - §10.41 By Court
  - §10.42 Burden of Proof
  - §10.43 Appeal
- K. Dismissal
  - §10.44 Defects in Petition
  - §10.45 Cause for Dismissal
  - §10.46 Failure to File Documents
  - §10.47 Failure to File Plan or Disclosure Statement
  - §10.48 Lack of Good Faith
  - §10.49 Voluntary Dismissal by Debtor
  - §10.50 Failure to Pay Fees and Charges
  - §10.51 Dismissal With Prejudice to Re-filing
- L. Retention and Compensation of Counsel
  - §10.52 Requirements for Retention
  - §10.53 Lack of Authorization to Retain Counsel
  - §10.54 Compensation
- XI. Chapter 12
  - A. Eligibility
  - B. Confirmation of Plan
  - C. Effect of Confirmation
    - §11.1 Generally
  - D. Modification of Order Confirming Plan
    - §11.2 Grounds Generally
  - E. Discharge
    - §11.3 Requirements Generally
    - §11.4 Time Between Cases
    - §11.5 Scope and Effect
    - §11.6 Post-Petition Taxes

- F. Dismissal
  - §11.7 Failure to Prosecute
  - §11.8 Unreasonable Delay or Gross Mismanagement of Estate - §1208(c)(1)
  - §11.9 Failure to Pay Fees or Charges - §1208(c)(2)
  - §11.10 Failure to File Plan - §1208(c)(3)
  - §11.11 Failure to Commence Timely Payments - §1208(c)(4)
  - §11.12 Denial of Confirmation - §1208(c)(5)
  - §11.13 Material Default of Confirmed Plan - §1208(c)(6)
  - §11.14 Revocation of Order of Confirmation - §1208(c)(7)
  - §11.15 Termination of Plan - §1208(c)(8)
  - §11.16 Continued Loss or Diminution of Estate - §1208(c)(9)
  - §11.17 Failure to Pay Domestic Support Obligations - §1208(c)(10)
  - §11.18 Bar to Refiling
  
- XII. Chapter 13
  - A. Eligibility
    - §12.1 Generally
    - §12.2 Section 109 - Regular Income
    - §12.3 Section 109 – Debt Limits
  
  - B. Confirmation of Plan
    - §12.4 Requirements for Confirmation Generally
    - §12.5 Projected Disposable Income – Non-Filing Spouse
    - §12.6 Projected Disposable Income – Social Security Income
    - §12.7 Projected Disposable Income – Railroad Retirement Act
    - §12.8 Projected Disposable Income – “Reasonably Necessary” Expenses
    - §12.9 Modification of Mortgage on Principal Residence
    - §12.10 Modification of Mortgage on Property Other Than Principal Residence
    - §12.11 "Cure and Reinstate"
    - §12.12 Secured Claims Generally
    - §12.13 Secured Claims – Interest Rate
    - §12.14 “Catch All” Provision in Hanging Paragraph
    - §12.15 910 Car Claims
    - §12.16 Surrender in Full Satisfaction
    - §12.17 Applicable Commitment Period
    - §12.18 Disposable Income Distinguished From Projected Disposable Income
    - §12.19 Tax Refunds as Disposable Income
    - §12.20 Ambiguous Provisions
    - §12.21 Retirement Contributions
    - §12.22 Cramdown
    - §12.23 Liquidation Analysis
    - §12.24 Liquidation Discount Rate
    - §12.25 Unfair Discrimination – Student Loans
    - §12.26 Good Faith
    - §12.27 Income Tax Claims
    - §12.28 Other Tax Claims
    - §12.29 Joint Cases – Substantive Consolidation for Plan Administration
    - §12.30 Best Interests of Creditors
  
  - C. Objections to Confirmation
    - §12.31 Procedural Requirements
    - §12.32 Standing to Object
    - §12.33 Deadline for Filing
    - §12.34 Failure to Raise Objection
    - §12.35 Burden of Proof

- D. Effect of Confirmation
  - §12.36 Generally
  - §12.37 Vesting of Property of Estate
  - §12.38 Surrender of Collateral Upon Confirmation
- E. Revocation of Order Confirming Plan
  - §12.39 Time for Bringing
  - §12.40 Grounds
- F. Modification of Order Confirming Plan
  - §12.41 Grounds Generally
  - §12.42 Grounds – Error in Order Confirming Plan
  - §12.43 Altering Treatment of Secured Creditor
  - §12.44 Surrender of Previously Retained Collateral in Full Satisfaction
- F. Modification of Plan Post-Confirmation
  - §12.45 Good Faith
  - §12.46 Change of Circumstances
  - §12.47 Reclassification of Claims
  - §12.48 Lien Stripping
  - §12.49 Disposable Income
  - §12.50 Procedural Requirements
  - §12.51 Changing Plan Length
  - §12.52 Curing Post-Petition Defaults on Secured Claims
- G. Lien Stripping
  - §12.53 Requirement for Discharge
  - §12.54 Procedure
  - §12.55 Necessary Parties
  - §12.56 Valuation and Secured Status
  - §12.57 Following Chapter 7 Discharge
- H. Discharge
  - §12.58 Requirements Generally
  - §12.59 Time Between Cases
  - §12.60 Scope and Effect
  - §12.61 Hardship Discharge
  - §12.62 Early Payoff of Plan
  - §12.63 Objections to Discharge
- I. Scope of “Super Discharge”
  - §12.64 Section 1328(a)(2)
  - §12.65 Section 1328(a)(4)
  - §12.66 Discharge Injunction
- J. Dismissal
  - §12.67 Voluntary Dismissal
  - §12.68 Failure to File Documents
  - §12.69 Payment Default
  - §12.70 ECF Deficiency
  - §12.71 Failure to Prosecute
  - §12.72 Nonpayment of Fees or Charges – Section 1307(c)(2)
  - §12.73 Failure to File Plan Timely – Section 1307(c)(3)
  - §12.74 Failure to Commence Payments – Section 1307(c)(4)
  - §12.75 Denial of Confirmation – Section 1307(c)(5)
  - §12.76 Material Default – Section 1307(c)(6)

- §12.77 Revocation of Confirmation – Section 1307(c)(7)
- §12.78 Termination of Confirmed Plan – Section 1307(c)(8)
- §12.79 Failure to File Documents – Section 1307(c)(9) and (10)
- §12.80 Failure to Pay Domestic Support – Section 1307(c)(11)
- §12.81 Bar to Refiling
- §12.82 Voluntary Dismissal

K. Borrowing Money Post-Petition

XIII. Adversary Proceedings

A. Jurisdiction

- §13.1 Dismissal of Bankruptcy Case
- §13.2 Relationship of Adversary to Bankruptcy Case
- §13.3 “Arising In”, “Arising Under” and “Related to”
- §13.4 Personal Jurisdiction Over Defendant
- §13.5 Particular Causes of Action
- §13.6 Authority of Bankruptcy Court to Enter Final Judgment

B. Venue

- §13.7 Generally
- §13.8 “Small-dollar” Venue
- §13.9 Change of Venue – Chosen Venue Proper
- §13.10 Change of Venue – Chosen Venue Improper

C. Trial

- §13.11 Generally
- §13.12 Arbitration

D. Non-Bankruptcy Actions

- §13.13 Referral to Bankruptcy Court

E. Withdrawal of Reference

- §13.14 Mandatory
- §13.15 Discretionary
- §13.16 Timing of Motion
- §13.17 Burden of Proof
- §13.18 Waiver of Right to Object
- §13.19 Stay Pending Appeal

F. Abstention and Removal

- §13.20 Actions Subject to Removal or Abstention
- §13.21 Grounds
- §13.22 Timeliness of Notice of Removal
- §13.23 Procedure

G. Remand

- §13.24 Grounds
- §13.25 Appellate Review

H. Standing to Prosecute

- §13.26 Generally
- §13.27 Intervention
- §13.28 Joinder and Severance
- §13.29 Class Actions



- I. Time for Commencement
  - §13.30 Generally
  - §13.31 Extension of Time – Granted
  - §13.32 Extension of Time - Denied
  - §13.33 Ripeness
- J. Service of Process
  - §13.34 Rule 7004
  - §13.35 Failure to Serve
- K. Parties
  - §13.36 Necessary and Indispensable Parties
  - §13.37 FDIC as Receiver
  - §13.38 Identity of Plaintiffs
- L. Pleadings
  - §13.39 Complaint
  - §13.40 Third Party Complaint
  - §13.41 Answer and Affirmative Defenses
  - §13.42 Statute of Limitations
  - §13.43 Cross Claims
  - §13.44 Motion to Dismiss
  - §13.45 Motion to Strike Pleadings
  - §13.46 Amendments to Pleadings – Generally
  - §13.47 Amendments to Pleadings – Relation Back
  - §13.48 Scheduling Order
  - §13.49 Attorney Fees as Element of Recovery
- M. Preemption
  - §13.50 Bankruptcy Preemption of State Law Causes of Action
- N. Financial Institutions Reform Recovery and Enforcement Act (FIRREA)
  - §13.51 Generally
- O. Dismissal
  - §13.52 Failure to Prosecute
  - §13.53 Voluntary Dismissal
  - §13.54 Lack of Subject Matter Jurisdiction
  - §13.55 Dismissal as Moot
  - §13.56 Dismissal by Court *Sua Sponte*
  - §13.57 Failure to Pay Filing Fee
- P. Default
  - §13.58 Generally
  - §13.59 Setting Aside
- Q. Settlement
  - §13.60 Approval by Court Required
  - §13.61 Approval by Court Not Required
  - §13.62 Standards for Approval
  - §13.63 Burden of Proof
- R. Collateral Estoppel and Res Judicata
  - §13.64 Elements
  - §13.65 Particular Claims Barred
  - §13.66 Particular Claims Not Barred

- S. *Stare Decisis*
  - §13.67 Binding Effect of District Court Decisions
- T. Judicial Estoppel
  - §13.68 Elements
  - §13.69 Particular Claims Barred
  - §13.70 Particular Claims Not Barred
- U. Equitable Estoppel
  - §13.71 Elements – Governmental Action
  - §13.72 Elements – Fraudulent Transfer
- V. Law of the Case
  - §13.73 Elements
  - §13.74 Particular Claims Barred
  - §13.75 Particular Claims Not Barred
- W. Evidentiary Issues
  - §13.76 Generally
  - §13.77 Fifth Amendment Privilege
  - §13.78 Attorney-Client Privilege
  - §13.79 Work Product Privilege
  - §13.80 Expert Witnesses
  - §13.81 Trade Secrets
  - §13.82 Hearsay – Government Reports
  - §13.83 Subsequent Remedial Measures
  - §13.84 Parol Evidence Rule
  - §13.85 Judicial Notice
- X. Discovery
  - §13.86 Generally
  - §13.87 Motion for Leave to Take Discovery
  - §13.88 Request for Admissions
  - §13.89 Interrogatories
  - §13.90 Motion to Compel
  - §13.91 Sanctions
- Y. Pre-trial Disclosures
  - §13.92 Generally
  - §13.93 Failure to Make
- Z. Summary Judgment
  - §13.94 Timing of Motion
  - §13.95 Burden of Proof
  - §13.96 Affidavits – Requirements
  - §13.97 Affidavits – Motion to Strike
  - §13.98 Presentation of Record
  - §13.99 Particular Cases – Summary Judgment Granted
  - §13.100 Particular Cases – Summary Judgment Denied
- AA. Jury Trial
  - §13.101 Actions Subject to Jury Trial
- BB. Motion for New Trial or Amendment of Judgment – Rule 9023
  - §13.102 Grounds

## §13.103 Time for Bringing

- CC. Motion for Relief From Judgment or Order – Rule 9024
  - §13.104 Grounds – Fraud, Misrepresentation or Misconduct
  - §13.105 Grounds – Mistake, Inadvertence or Surprise
  - §13.106 Grounds – Excusable Neglect
  - §13.107 Newly Discovered Evidence
  - §13.108 Void Judgment
  - §13.109 Satisfaction, Release or Discharge
  - §13.110 Other Grounds
  - §13.111 Time for Bringing Motion
- DD. Enforcement of Judgment
  - §13.112 Rate of Interest on Judgment
  - §13.113 Garnishment
  - §13.114 Statute of Limitations
- EE. Specific Causes of Action
  - §13.115 Tortious Interference with Contract
  - §13.116 Innocent Misrepresentation
  - §13.117 Punitive Damages
  - §13.118 Conversion
  - §13.119 Legal Malpractice

## XIV. Appeals

- A. Parties
  - §14.1 Standing to Appeal
  - §14.2 *In Forma Pauperis*
  - §14.3 Waiver of Right to Appeal
- B. Appellate Jurisdiction
  - §14.4 Generally
  - §14.5 Exceptions
  - §14.6 Content of Notice of Appeal
- C. Time for Filing Appeal
  - §14.7 Filing Before Order Entered
  - §14.8 Deadline for Notice of Appeal
  - §14.9 Effect of Motion for New Trial or Amendment of Judgment
  - §14.10 Motion to Leave to File Untimely Notice of Appeal
- D. Appealable Orders
  - §14.11 Finality of Order
  - §14.12 “Collateral Order” Doctrine
  - §14.13 Interlocutory Appeal
  - §14.14 Particular Orders Appealable
  - §14.15 Particular Orders Not Appealable
- E. Stay Pending Appeal
  - §14.16 Jurisdiction to Enter Stay
  - §14.17 Elements of Stay
  - §14.18 Scope of Stay
  - §14.19 Effect of Failure to Obtain Stay – Mootness
  - §14.20 Supersedeas Bond

- F. Appeal Costs
  - §14.21 Appeal Bond
  - §14.22 Taxable Costs
  - §14.23 Sanctions – Frivolous Appeal
- G. Dismissal
  - §14.24 Voluntary Dismissal
  - §14.25 On Motion by Party
  - §14.26 Dismissal by Court *Sua Sponte*
  - §14.27 Reconsideration of Dismissal
- H. Issues on Appeal
  - §14.28 Mootness
  - §14.29 Consideration by Lower Court
- I. Record on Appeal
  - §14.30 Redaction of Transcript
- J. Standards of Review
  - §14.31 Question of Law
  - §14.32 Question of Fact
- XV. Avoidable Transfers
  - A. Trustee Strong Arm Powers
    - §15.1 Trustee as Judicial Lien Creditor
    - §15.2 Trustee as Holder of Unsatisfied Execution
    - §15.3 Trustee as Bona Fide Purchaser - Generally
    - §15.4 Trustee as Unsecured Creditor
    - §15.5 Standing
    - §15.6 Defenses – Earmarking
    - §15.7 Defenses – Reasonably Equivalent Value
    - §15.8 Defenses – Stockholder Distributions
    - §15.9 Defenses – Constructive Notice
    - §15.10 Defenses - Statute of Limitations
    - §15.11 Defenses – Equitable Defenses
    - §15.12 Defenses – Solvency
  - B. Fraudulent Transfers
    - §15.13 Actual Fraud
    - §15.14 Constructive Fraud
    - §15.15 Particular Transfers Avoidable
    - §15.16 Particular Transfers Not Avoidable
    - §15.17 Defenses – Reasonably Equivalent Value
    - §15.18 Defenses – Leveraged Buyout
    - §15.19 Defenses – Wrongful Conduct of Debtor
    - §15.20 Defenses – Earmarking
    - §15.21 Defense – Prepetition Return of Money to Third Party
    - §15.22 Statute of Limitations
    - §15.23 Damages
    - §15.24 Parties Liable – Initial Transferee
  - C. Turnover of Property
    - §15.25 Generally
    - §15.26 Parties
    - §15.27 Procedure

- D. Preferences
  - §15.28 Standing to Bring Action
  - §15.29 Parties Liable for Preferential Transfer
  - §15.30 Elements
  - §15.31 Defenses – *De Minimis Transfers*
  - §15.32 Defenses – Safe Harbor – 547(c)(3)
  - §15.33 Defenses – Earmarking
  - §15.34 Defenses – Administrative Expenses
  - §15.35 Defenses – Payments for Fines and Penalties
  - §15.36 Defenses – Contemporaneous Exchange of Value
  - §15.37 Defenses – Liquidation Amount in Chapter 7
  - §15.38 Defenses – Ordinary Course of Business
  - §15.39 Defenses – Constructive Notice
  - §15.40 Particular Transfers – Avoidable
  - §15.41 Particular Transfers – Not Avoidable
  - §15.42 Procedure
- E. Post-Petition Transfers – Section 549
  - §15.43 Elements
  - §15.44 Defenses
  - §15.45 Particular Transfers Avoidable
  - §15.46 Particular Transfers Not Avoidable
- F. Reformation of Mortgage
  - §15.47 Standing
  - §15.48 Requirements
  - §15.49 Laches
- G. Effect of Avoidance
  - §15.50 Preservation for Benefit of Estate
  - §15.51 Damages
- XVI. Collateral Attack – Final Orders
  - A. Parties Bound
    - §16.1 Successor Trustee
  - B. Particular Orders
    - §16.2 Confirmation Order
    - §16.3 Sale Orders
- XVII. Closed Cases
  - A. Reopening
    - §17.1 Basis to Reopen
    - §17.2 Filing Fee
- XVIII. Post-Petition Financial Management Education
  - A. Requirement
    - §18.1 Generally
    - §18.2 Waiver of Requirement
  - B. Failure to Obtain
    - §18.3 Closing Case Without Discharge
    - §18.4 Dismissal
- XIX. Trustee

- A. Actions Against Trustee
      - §19.1 Generally
      - §19.2 Limitations
- XX. Bankruptcy Crimes
  - A. Fraud
    - §20.1 Generally
    - §20.2 Sanctions
- XXI. Personally Identifiable Information
  - A. Generally
    - §21.1 Statutory Requirements
  - B. Information Considered “Personally Identifiable”
    - §21.2 Account Numbers
  - C. Remedies
    - §21.3 Disclosure in Proof of Claim
    - §21.4 Damages
    - §21.5 Contempt
    - §21.6 Redaction from Transcript
- XXII. Real Estate Settlement Procedures Act
  - A. Generally
    - §22.1 Statutory Authority
  - B. Qualified Written Request
    - §22.2 Defined
    - §22.3 Servicer's Duty to Respond
    - §22.4 Remedies
    - §22.5 Construction With Bankruptcy Code
- XXIII. Other Current Issues
  - A. Foreclosures
    - §23.1 State Law Requirements
    - §23.2 Redemption
  - B. Specific Causes of Action
    - §23.3 Piercing Corporate Veil
    - §23.4 Continuation of Debtor
    - §23.5 Federal Tort Claims Act
    - §23.6 Injunctions and Temporary Restraining Orders
    - §23.7 Recoupment
    - §23.8 Fair Debt Collection Practices Act
    - §23.9 Truth in Lending Act
    - §23.10 Fair Credit Reporting Act
    - §23.11 Equal Credit Opportunity Act
    - §23.12 Interpleader
    - §23.13 Michigan Consumer Protection Act
  - C. Mediation
    - §23.14 When Appropriate
  - D. Expedited Hearing
    - §23.15 Procedure

- E. Disqualification of Judge
  - §23.16 Grounds
- F. Rehearing or Reconsideration
  - §23.17 Grounds Generally
  - §23.18 Clerical Error
  - §23.19 By Court *Sua Sponte*
  - §23.20 Defect in Notice
  - §23.21 Newly Discovered Evidence
  - §23.22 Time for Bringing Motion
- G. Federal Court Review of State Court Actions
  - §23.23 Limitations
- H. Discrimination
  - §23.24 Section 525
- I. Substantive Consolidation
  - §23.25 Authority to Substantively Consolidate Cases
  - §23.26 Standing to Request Substantive Consolidation
  - §23.27 Grounds for Substantive Consolidation
  - §23.28 Effect of Substantive Consolidation
- J. Duties of Debtor
  - §23.29 Duty to Cooperate with Trustee
  - §23.30 Schedules and Statements
- K. Loan Modifications
  - §23.31 Chapter 7 Proceeding
  - §23.32 Chapter 13 Proceeding
  - §23.33 Troubled Asset Relief Program (TARP)
  - §23.34 Homeowners Assistance Mortgage Program (HAMP)
  - §23.35 National Housing Act (NHA)
  - §23.36 Home Ownership Equity Protection Act (HOEPA)
- M. ECF Procedures
  - §23.37 Electronic Filing Required
  - §23.38 Electronic Filing Excused
  - §23.39 Service by ECF
- N. Habeas Corpus
  - §23.40 Authority to Issue Writ
  - §23.41 Requirements
- O. Choice of Laws and Forum Selection Clauses
  - §23.42 Foreclosure Proceedings
  - §23.43 Exemption Statutes
- P. Governmental Sovereign Immunity
  - §23.44 Waiver
- Q. Rule 2004 Examinations
  - §23.45 Generally
  - §23.46 Scope
  - §23.47 Location of Examination

XIV. Sanctions

A. Authority to Impose

- §24.1 28 USC §1927
- §24.2 Inherent Authority of Court
- §24.3 Rule 9011
- §24.4 Discharge Injunction
- §24.5 Contempt – Civil
- §24.6 Contempt - Criminal
- §24.7 Show Cause
- §24.8 Section 105 - Generally



## I. Hot off the presses

*Stern v. Marshall*, 131 S.Ct. 2594 (2011) – A return to jurisdiction 30 years after *Northern Pipeline* - Bankruptcy Court lacks jurisdiction to enter final judgments even in "core" proceeding where case is based solely on state common law cause of action, is between two private parties, does not flow from federal statutory scheme, and would not necessarily be resolved in ruling on objection to proof of claim. Creditor filed proof of claim and also filed adversary proceeding alleging that debtor defamed creditor and sought determination that debt based on defamation was not dischargeable. Debtor filed a counterclaim for tortious interference with an expected inheritance. Although counterclaim would constitute "core" proceeding as Section 157(c)(2)(C) defines any counterclaim by the estate against a person who filed a proof of claim. However, Constitutional limitations prevent Bankruptcy Court from exercising jurisdiction over "core" proceeding even where defendant arguably consented to jurisdiction by filing proof of claim and failing to contest issue prior to entry of Judgment. Article III of the Constitution vests jurisdiction solely in the District Court for actions that do not flow from the Bankruptcy Code or where are dependent for resolution on state common law and involve two private parties. Article III prevents the entry of a final, binding judgment by a bankruptcy court, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime.

Courts have already wrestled at length with the implications of, and limitations on, *Stern*. A small sample:

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

*Meoli v. Huntington National Bank*, 2011 WL 3610050 (Bankr. W.D. Mi. 2011) – Bankruptcy Court lacks jurisdiction to enter final judgment in action to recover damages for fraudulent transfers absent express consent by all parties. Final judgment awarding money damages would deprive defendant of property without due process, as judgment would not be entered by Article III judge. Bankruptcy Court must instead issue written report and recommendations and forward those to the District Court for review.

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

*In re Ambac Financial Group, Inc.*, 2011 WL 4436126 (Bankr. S.D.N.Y. 2011) - Bankruptcy Court has jurisdiction to approve compromise and settlement of claim that is property of the estate. Debtor-in-possession brought shareholder derivative action against former directors and then sought to settle those claims.

*In re Peacock*, 2011 WL 3874461 (Bankr. M.D. Fl. 2011) - Court can exercise jurisdiction over suit brought by Chapter 7 Trustee for violations of Florida Consumer Collections Practices Act. Action is only "related to" case and so is not core proceeding. As such, Court can consider and enter final judgment only with consent of parties. Defendant consented to jurisdiction in answer to complaint and by failing to raise issue until eve of trial.

*In re Olde Prairie Block Owner, LLC*, 2011 WL 3792406 (Bankr. N.D. Il. 2011) - Bankruptcy court lacks constitutional authority to enter final judgment on state law counterclaim that is not necessarily resolved in the process of ruling on the creditor's proof of claim. Creditor filed proof of claim based on debtor's failure to repay loan. Debtor filed counterclaim alleging rescission and breach of good faith. Resolution of issues

are necessarily implicated by resolution of creditor's proof of claim, allowing bankruptcy court to enter final judgment.

## II. Cases to Watch

*Baud v. Carroll*, 2011 WL 338001 (6<sup>th</sup> Cir. 2011), *cert. pending*, \_\_\_ US \_\_\_ (2011) – Section 1325(b) ties “applicable commitment period” to Current Monthly Income and not calculation of “disposable income”. Debtor who has Annualized Current Monthly Income in excess of applicable median income has an Applicable Commitment Period of 60 months regardless of whether calculated “disposable income” is positive, zero or negative.

## III. Automatic Stay

### A. Actions Stayed

#### §3.1 Generally

*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.

*Riviera Drilling & Exploration Co. v. Gunnison Energy Corp.*, 2011 WL 14461 (10<sup>th</sup> 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 (6<sup>th</sup> 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. Sumitt 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 the Debtor in property as of the commencement of the case, including all money in Debtor's checking account as of the moment of commencement. Creditor's post-petition presentment of Debtor's check (received pre-petition) did not violate Automatic Stay pursuant to 11 USC Section 362(b)(11). Creditor did not violate the automatic stay when the creditor refused to return to the Debtor the proceeds received as a result of the post-petition presentment. When the creditor lawfully presented the check and received the proceeds, the proceeds ceased to be property of estate. Therefore, creditor's refusal to return the funds did not constitute an attempt by creditor to assert dominion or control over property of estate. Correct cause of action would have been to recover proceeds as post-petition transfer pursuant to Section 549.

*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

*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 Utilities

*Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Section 366 precludes utility from terminating or refusing 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.

## §3.4 Foreign Property

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

## B. Exceptions

## §3.5 Police Power

*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 the Debtor's citations or determining damages for violation of law. Any judgment which the State may obtain, however, is collectible only in the bankruptcy proceedings.

*In re Cochran*, 2010 WL 4875919 (Bankr. M.D. Ala. 2010) - State may proceed with criminal action against debtor under § 362(b)(1) exception to automatic stay. State may treat the Debtor as it would any other criminal defendant.

*Equal Employment Opportunity Commission v. Noble Metal Processing*, 2009 WL 1868002 (E.D. Mi. 2009) – Action by EEOC to enjoin violations of Title VII and ADEA with request for reinstatement of victims of alleged discrimination and adaption of affirmative action plan in Title VII case coupled with claim for back pay constitutes exercise of EEOC's police or regulatory power which is not subject to the automatic stay until monetary claims are reduced to judgment.

*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.

**AMERICAN BANKRUPTCY INSTITUTE  
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**CASE LAW UPDATE**

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*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.

C. Relief From Stay

§3.9 Grounds Generally

*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 (10<sup>th</sup> 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 (the debtor) is not the owner of the trucks – the Borrower is the owner, subject to the perfected security interest. Cause exists to warrant modification of stay to allow creditor to repossess trucks from debtor.

*In re Greektown Holdings, LLC*, Case No. 08-53104 (Bankr. E.D. Mi. 2009) – Court granted partial relief from stay to allow City of Detroit to serve Notices of Default under Development Agreement. Court balanced the adverse impact that serving the Notices could have by causing negative publicity at a critical stage of the Chapter 11 proceeding and the triggering of cure periods that could be inimical to the confirmation process; with the possible benefit to the Debtor to find out specifically aware of any claimed defects with sufficient time to address those issues even with the running of the contractual cure period. Court ordered stay to be modified effective 60 days after the date of the order unless the Debtor voluntarily agrees to accept notice at an earlier date.

§3.10 Cause - Section 362(d)(1)

*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 the debtor, to the bankruptcy estate, and to the other creditors against the hardship to the moving party if the party is not allowed to proceed. Relevant factors include: (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with



the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; (12) the impact of the stay on the parties and the balance of harms; (13) whether the litigation involves other parties over which the bankruptcy court lacks jurisdiction; (14) whether the creditor has a probability of success on the merits; and (15) whether the interests of the debtor and the estate will be better served by resolution of threshold bankruptcy issues before addressing the forum issue. Court would lift stay to permit state court action to proceed where state court matter had been pending for more than one year prior to commencement of case and state court had substantial familiarity with the case and had entered default judgment against a co-defendant.

*Jim's Maintenance & Sons, Inc. v. Target Corporation*, 2011 WL 1206782 (10<sup>th</sup> 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 (1<sup>st</sup> 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 the debtor as a fiduciary; whether a specialized tribunal with necessary expertise exists; whether debtor's insurer has assumed full responsibility for defense; whether action primarily involves third parties; whether litigation in another form with prejudice interest of other creditors; whether judgment arising from other action would be subject to equitable subordination; whether movant's success would result in a judicial lien avoidable by the debtor; interest of judicial economy and expeditious resolution; whether parties are ready for trial in other proceeding; and the impact of the stay on the parties and the balance of the harms. Court would grant limited stay relief to permit creditor to file a third-party complaint against debtor and chapter 7 trustee to the extent that the claims are similar to counterclaims previously filed by creditor in state court action and to thereafter file a Notice of Motion to transfer entire adversary proceeding to state court. However, if notice of removal is not timely filed, stay would remain in effect as to all state court litigation.

*In re Hanlin*, 2010 WL 4008474 (Bankr. N.D. Ohio 2010) – Identified considerations for determining whether a debtor is needy include whether a debtor has an ability to repay his debtors out of future earnings include whether the debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expense can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities. Rent scheduled at \$550 per month was not unreasonable. Debtor's high transportation budget of \$450 per month supported where debtor had lengthy drive to work and also had to travel long distances for necessities such as groceries and to visit mother who was confined to nursing home. Debtor's expense for storage space was not unreasonable where debtor was required to store furniture after his divorce and relocation into a rented residence. Debtor's smoking expense of \$150 not unreasonable. Charity of \$100 per month not unreasonable particularly where employer encouraged these contributions. Amount debtor could pay in Chapter 13 would be minimal and does not raise specter of abuse.

*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 (6<sup>th</sup> 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.

### §3.11 Lack of Equity - Section 362(d)(2)(A)

*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.

### §3.12 Necessity for Effective Reorganization - Section 362(d)(2)(B)



*In re Foxland Harbor Marina, LLC*, 2010 WL 2521084 (Bankr. M.D. Tn. 2010) – Creditor seeking relief from stay bears burden of proof on lack of equity, while debtor bears burden on all other issues. Establishing that property is “necessary to an effective reorganization” requires not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect. There must be a reasonable possibility of a successful reorganization with a reasonable time. Properties were necessary to effective reorganization where properties were Debtors’ sole assets, and were to be used as an integrated development. Parcels are crucial lynchpins that bind the overall development together. Debtors have proposed a joint plan of reorganization that contemplates use of acreage as a marina and ferry point between related developments. Debtor has applied to the U.S. Army Corp of Engineers for a license to operate a marina on the property which is pending. Once granted, FHM will begin construction on Phase I (of IV) of the marina and the previously undeveloped land will become operational and income-producing. The debtor contends that the inclusion of the FHM plan to develop the marina is an important part of the overall joint operation of the reorganized debtor. Debtor demonstrated that the property is vital to the reorganization of this debtor, and that confirmation of the joint plan is a reasonable likelihood that can occur within a reasonable time.

*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 efforts would be successful or allow debtor to reorganize.

### §3.13 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.

### §3.14 Family Law Proceedings

*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.

### §3.15 Single Asset Real Estate – Section 362(d)(3)

*In re Buttermilk Towne Center, LLC*, 2010 WL 5185870 (6<sup>th</sup> 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.

§3.16 *In Rem* Relief

*In re Wesson*, Case No. 10-49061 (Bankr. E.D. Mi. 2010) – *In rem* relief is appropriate to prevent an abuse of process. *In re* 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.

§3.17 Burden of Proof

*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.

§3.18 Mootness

*In re Ulrich*, 2011 WL 3663716 (Bankr. N.D. Ohio 2011) – Once a debtor's discharge has entered, the stay is no longer in effect. Once the debtor is granted a discharge, the permanent injunction of Section 524 replaces the automatic stay of Section 362 and prevents creditors from ever collecting a discharged debt. Motion for relief filed post-discharge denied as moot.

*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.

§3.19 Party Entitled to Relief From Stay

*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 (6<sup>th</sup> 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. 2010) – 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.

### §3.20 Procedural Requirements

*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.

### §3.21 Termination – Failure to Reaffirm or Redeem

*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 the debtor would redeem the property and timely filed Motion to Redeem within time permitted, automatic stay would not terminate. Estate had not been closed and Trustee had not abandoned collateral. Creditor violated stay by repossession vehicle.

### §3.22 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.

### §3.23 Setoff

## D. Violations of Automatic Stay

### §3.24 Particular Actions - Violations

*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.

*In re Pearl Management Corp.*, Case No. 11-47422 (Bankr. E.D. Mi. 2011) – State Court Receiver appointed to take control of corporate property would be stayed by bankruptcy filing. Receiver is stayed from taking or attempting to take any action to exercise dominion or control over property of estate. An continued hearings in State Court as to Receivership roles or attempts to hold Debtor, its principals or its Bankruptcy Attorneys would be considered violations of Automatic Stay.

*Borders v. King.*, 2011 WL 3352468 (Bankr. E.D. Ky. 2011) – Automatic stay prohibits creditors from asserting fraudulent transfer actions under Section 544 and 548. Creditors have no standing to prosecute a

fraudulent transfer action in their own right and for their own benefit during a bankruptcy even if they would have had standing to do so outside of bankruptcy. The Trustee has the exclusive right to bring an action for fraudulent conveyance pursuant to 11 U.S.C. § 548 and/or § 544 during the pendency of bankruptcy proceedings.

*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.

*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.

*LaBoy v. Doral Mortgage Corp.*, 2011 WL 2119316 (1<sup>st</sup> 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.

*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.

*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 send 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.

*Henderson v. Auto Barn Atlanta, Inc.* 2011 WL 482827 (Bankr. E.D. Ky. 2011) - Seller of vehicle repeatedly violated automatic stay by threatening and intimidating debtors and thwarting any efforts by the Debtors to title the Vehicle in Kentucky, despite knowledge of the Debtors' bankruptcy. Seller repossessed vehicle once and threatened other repossessions, and vehicle subsequently disappeared from debtors' driveway. Seller threatened debtors in post-petition letters with criminal warrant. Seller admitted taking actions including hiring repossession company with full knowledge of bankruptcy filing.

*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.

*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.

*Russell v. Caffey*, Case no. 08-00450 (11<sup>th</sup> 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.

*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.

*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 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.

*In re United Robotics*, Case No. 09-50376 (Bankr. E.D. Mi. 2009) - Pre-petition creditor who held assignment of Debtor's right to receive ongoing lease payments from lease under which Debtor was lessor violated automatic stay when creditor, post-petition, made demand on lessee for payment of lease payments directly to creditor. Assignment agreement did not assign to creditor title to the lease or to future lease payments, but rather assigned future lease payments only to the extent necessary to pay the prepetition debt. Court construed "property of the estate" broadly and held that the assignment of the lease payments did not constitute an assignment of an account receivable and did not vest in creditor unencumbered title to either the lease or to the future stream of lease payments. Thus, creditor's demand that lessee make payments to creditor constituted an attempt to exert possession, custody or control over property of the estate for purposes of collecting a prepetition obligation in violation of section 362.

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

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

*Mitchell v. Home Echo Club, Inc.*, 2009 WL 1597901 (S.D. Ohio 2009) – Actions taken in violation of automatic stay are generally voidable and not void. Debtor unreasonably withheld notice of the Bankruptcy Petition and resulting Automatic Stay and the creditor would be prejudiced if the Debtor is permitted to raise the stay as a defense. Debtor cannot rely on an alleged violation of the automatic stay to invalidate the underlying action. Debtor’s failure to list plaintiff in bankruptcy schedules did not render void creditor’s post-petition filing of lawsuit to recover damages from Debtor. Subsequent dismissal of bankruptcy would permit litigation to continue even though complaint had been initially filed during period when automatic stay would otherwise have been in effect.

*Buckeye Check Cashing, Inc., v. Meadows*, 396 BR 485 (6th Cir. BAP 2008) - Property of estate consists of all legal or equitable interests of the Debtor in property as of the commencement of the case, including all money in Debtor's checking account as of the moment of commencement. Creditor's post-petition presentment of Debtor's check (received pre-petition) did not violate Automatic Stay pursuant to 11 USC Section 362(b)(11). Creditor did not violate the automatic stay when the creditor refused to return to the Debtor the proceeds received as a result of the post-petition presentment. When the creditor lawfully presented the check and received the proceeds, the proceeds ceased to be property of estate. Therefore, creditor's refusal to return the funds did not constitute an attempt by creditor to assert dominion or control over property of estate. Correct cause of action would have been to recover proceeds as post-petition transfer pursuant to Section 549.

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

*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.

### §3.25 Particular Actions – Not Violations

*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 the debtor's bankruptcy case does not violate the automatic stay. Alleged inaccuracy in claim or incompleteness of claim does not convert proof of claim into stay violation. Proper remedy is for debtor to object to claim.

*Jacks v. Wells Fargo Bank*, 2011 WL 2183979 (11<sup>th</sup> 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.

*In re Maib*, 2011 WL 1399073 (Bankr. E.D. Tn. 2011) – Creditor did not violate stay by continuing foreclosure proceedings against property in which debtor held no interest. Property was owned solely by debtor’s spouse. Foreclosure action did not seek judgment against debtor and did not impact property of estate. Stay does not affect actions that collaterally affect the debtor.

*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 68<sup>th</sup> 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.

*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.

*Riviera Drilling & Exploration Co. v. Gunnison Energy Corp.*, 2011 W 14461 (10<sup>th</sup> 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.

*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.

*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.



### §3.26 Pre-petition Mortgage Escrow Claims

*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.

### §3.27 Sanctions

*In re Dietrich*, Case No. 08-68294 (Bankr. E.D. Mi. 2011) – Standing to complain of violations of Automatic Stay is not limited to the Debtor. Creditors have standing to pursue stay violations to the extent the violation is against property of the estate as the creditors, not the Debtor, have the pecuniary interest that is affected. Stay violations were willful where debtor and ex-spouse carried out the prohibited acts with full knowledge of the bankruptcy case. Sanctions awarded to injured creditor of \$34,812 representing reasonable attorney fees and costs resulting from conduct of debtor and ex-spouse, plus punitive damages of \$10,000.00.

*In re Baer*, 2011 WL 3667511 (Bankr. E.D. Ky. 2011) – 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 reconveying property to the Debtor at any time after this date were willful and constitute a violation of the automatic stay warranting award of actual damages. Violation was not egregious, vindictive or intentionally malicious or motivated by reckless disregard of the federal

bankruptcy laws, but were instead the result of a very mistaken understanding of how those laws work. As a result, the Court finds that an award of punitive damages is not appropriate in this case.

*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 the Debtors to title the Vehicle in Kentucky, despite knowledge of the Debtors' bankruptcy; repossessing vehicle; threatening other repossessions; sending letters threatening debtors with criminal prosecution; and hiring repossession company; all with full knowledge of bankruptcy filing, violated automatic stay. Sanctions require finding both of violation of stay and that violation was willful. Creditor did not willfully violate stay where creditor neither requested nor authorized repossession company to repossess vehicle. Remaining creditor actions were willful and warranted award of actual damages plus costs and attorney fees. Attorney fees are to be determined using "lodestar" method which requires multiplication of the reasonable number of hours billed by a reasonable billing rate. The court then considers other factors that may be relevant to adjust the award up or down to achieve a reasonable result such as (1) the time and labor required by a given case; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Court awarded actual damages, fees and costs totaling \$40,047.50. Repeated violations also warranted imposition of punitive damages of \$25,000, taking into account (1) the nature of the creditor's conduct; (2) the nature and extent of harm to the debtor; (3) the creditor's ability to pay; (4) the level of sophistication of the creditor; (5) the creditor's motives; and (6) the lack of any provocation by the debtor.

*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 9<sup>th</sup> Circuit holding in *Stenberg v. Johnston*, 595 F.3d 937 (9<sup>th</sup> 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 the Debtor or Trustee or seek Bankruptcy Court intervention if Creditor believed there to be a dispute as to lawful ownership of the funds. Creditor's actions were willful where creditor refused to return money for 10 months notwithstanding demands by Debtor and the Trustee. Debtor entitled to recover actual damages consisting of attorney fees and, upon tendering of proper evidence, overdraft fees that were caused by garnishment.

*Williams v. Franklin Towers Homeowners Association*, 2010 WL 2780972 (9<sup>th</sup> 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 the Debtor and directly related to the violation are recoverable. Attorney fees for unrelated services or services in connection with non-Debtor entities are not recoverable. Attorney fees must also be reasonable when viewed from both a case specific basis and "a larger, universal perspective". Where the creditor's actions were particularly aggressive and the Debtor recovered substantial actual damages, an award of substantial attorney fees was also warranted to both compensate the Debtor and to send a message to creditors and Debtors for future cases.

#### E. Extension of Automatic Stay

##### §3.28 When Necessary

*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.

##### §3.29 Timing of Motion and Hearing

*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 the debtor for debtor has had prior case pending within the one year preceding the commencement of the current case and the debtor failed to file a motion to continue the automatic stay within 30 days as required by section 362(c)(3).

*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 30<sup>th</sup> 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.

### §3.30 Grounds for Denial

*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 duly scheduled hearing. Counsel calendared hearing for Thursday, December 26 when Thursday was, in fact, December 25 and the hearing was scheduled for December 22.

### §3.31 Grounds for Extension

### §3.32 Effect of Expiration of Stay

*Reswick v. Reswick*, 446 BR 362 (9<sup>th</sup> 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 the debtor or property of the debtor that is not property of the bankruptcy estate but continues to apply to actions against property of the estate.

*In re Robinson*, Case No. 09-13005 (Bankr. W.D. Mi. 2010) – Automatic stay terminated where debtor failed to file a motion to continue the automatic stay within 30 days as required by section 362(c)(3). Stay terminates under Section 362(c)(3) as to the debtor and as to property of the debtor, but not as to property of the estate.

## G. Imposition of Automatic Stay

### §3.33 When Necessary

*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.



- §3.34 Timing of Motion and Hearing
- §3.35 Grounds for Denial
- §3.36 Grounds for Imposition
- §3.37 Order Confirming No Stay in Effect

*Morris v. Paine*, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Section 362(c)(4)(A)(i) mandates that if a debtor has had “2 or more single or joint cases ... pending within the previous year ... that were dismissed ... the stay under subsection (a) *shall not go into effect* upon the filing of the later case.” Subsection ii provides that if a creditor requests an order confirming the automatic stay did not go into effect pursuant to Section 362(c)(4)(A)(i), “the court *shall promptly enter an order confirming no stay is in effect.*” A Bankruptcy Judge has no discretion in issuing an order. If the debtor has had 2 or more pending cases within the last year, the Judge *must* enter an order confirming no stay was in effect.

#### §3.38 Effect of Failure to Impose Stay

*In re Bates*, 446 BR 301 (8<sup>th</sup> Cir BAP 2011) – Where debtor has had two or more cases pending in year preceding commencement of current case, stay does not go into effect as to debtor or as to property of estate. Section 362(c)(4) does not limit its scope only to actions against the debtor while nonetheless protecting property of estate. In third case filed within one year, the lack of a stay is absolute. Creditors are free to pursue actions and recovery as if bankruptcy case free of any restrictions under Section 362.

#### H. Reinstatement of Automatic Stay

- §3.29 Generally
- §3.40 Procedure

*In re Robinson*, Case No. 09-13005 (Bankr. W.D. Mi. 2010) – Motion to “reinstate” the automatic stay seeks to enjoin creditor from repossessing the Car. Motion that seeks injunctive relief, other than injunctive relief expressly provided for in a reorganization plan, it is procedurally improper. Debtor seeking injunctive relief must do so through an adversary proceeding, and establish the elements of a case for injunctive relief.

### IV. Attorneys

#### A. Debt Relief Agency

- §4.1 Generally
- §4.2 Attorneys as Debt Relief Agency

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

## B. Necessity for

## §4.3 Corporations

*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.

## §4.4 Individuals

*In re Poydras*, Case No. 11-40365 (Bankr. E.D. Mi. 2011) – Spouse of deceased person lacks standing to file petition on behalf of deceased spouse. Husband’s voluntary petition filed on behalf of deceased wife dismissed.

## §4.5 Partnerships

## §4.6 Other Entities

C. *Pro Bono* Appointment

## §4.7 Parties Entitled to Appointment

*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 Debtor, and to the indigent former spouse of the Debtor regarding dischargeability of the judgment of divorce. Creditors do not qualify for participation in Court's *pro bono* program. Court lacks authority to appoint an attorney to represent a creditor on *pro bono* basis.

## §4.8 Limitations on Appointment

§4.9 Termination of *Pro Bono* Appointment

## D. Attorney Fees

## §4.10 Generally

*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 fees charged given the nature of the service, rather than presuming that a fee is reasonable simply by multiplying the rate charged by the individual who provided the service by the time spent.

*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 U.S.C. § 330.

*Weik & Associates v. Carroll*, Case no. 08-12965 (E.D. Mi. 2008) – Bankruptcy Court did not err in concluding that one half hour was generally adequate time for performing routine review of case. Court did not adopt blanket or absolute rule that Court would never approve more than 30 minutes to perform a review of the file. Court’s statement that spending more than half hour on a review would require special justification does not constitute statement that counsel can never, under any circumstances, bill more than 30 minutes in connection with a post-confirmation review.

*Weik & Associates v. Carroll*, Case no. 08-12964 (E.D. Mi. 2008) – Court correctly utilized lodestar method in suggesting guidelines by which attorney fee disputes may be resolved and the reasonableness of fees determined. Party seeking compensation carries burden to prove number of hours reasonably expended multiplied by a reasonable hourly rate. Courts “default guidelines” did not impose a blanket rule on all post-confirmation review fee petitions, but rather suggested what one would expect in the ordinary Court case in order to distinguish request that would otherwise appear “excessive, redundant, or otherwise unnecessary”. The Court did not summarily rule out any effort by Counsel to justify a greater request should the circumstances warrant.

*In re Scarlett Hotels, LLC.*, Case No. 08-8002 (6<sup>th</sup> 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 the Debtor’s estate. Services were beneficial where a potential non-dischargeable debt of over \$22,000 was reduced to \$11,000, only \$3000 of which was designated as a priority unsecured claim in Debtors Chapter 13 plan. Although Chapter 13 Plan was ultimately unsuccessful, case did forestall foreclosure action and permit Debtors to remain in their home for a significant additional period of time, thereby producing a benefit to the Debtors warranting an award of compensation. Debtors’ objection to fees because Chapter 13 Plan prepared by counsel was, in Debtors’ view, not confirmable failed to take into account the fact that the plan was confirmed, although the plan ultimately failed to be feasible. An unsuccessful outcome, without more, is not a basis to deny counsel compensation, although this fact must be taken into consideration in ascertaining the value of the legal services.

#### §4.11 Fee Agreement

*Sikes v. Mushenski*, 2011 WL 2173661 (W.D. La. 2011) – Disclosure of Compensation of Attorney for Debtor(s) is binding contract between counsel and the Debtor. Disclosure indicated that counsel agreed to accept \$4,000.00 for his services but also indicated that the \$4,000 “does not include the following service[s]: Representation of the debtor in any dischargeability action, judicial lien avoidance, relief from stay actions, other adversary proceedings, or other non-routine matters.” There were no dischargeability actions, no judicial lien avoidance, no relief from stay actions, and no other adversary proceedings. Record contained no evidence of “unusual circumstances” to support attorneys 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) (unreported decision) – 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.

#### §4.12 Time for Filing Application

*In re Alda*, 2010 WL 4924615 (6<sup>th</sup> 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.

#### §4.13 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.

*In re R & D Contracting, LLC*, Case No 02-43540 (Bankr. E.D. Mi. 2008) – Fee application denied without prejudice where application purported to require objections within 15 days. Federal Rule of Bankruptcy Procedure 2002 requires 20 days notice to Debtor and all creditors. Matrix attached to notice stated that all creditors were served by ECF when many of the creditors were not registered with ECF and did not receive notice via ECF.

#### §4.14 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 (1<sup>st</sup> 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 R & D Contracting, LLC*, Case No 02-43540 (Bankr. E.D. Mi. 2008) – Fee Application denied without prejudice where application failed to comply with requirements of Local Rule 2016-1. Application did not include paragraph numbering or formatting requirements. Fee application also failed to attach itemization of attorney time, which is required even if the fees requested are on a contingency fee basis.

*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.

#### §4.15 Burden of Proof

*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*, 08-8002 (6<sup>th</sup> Cir. BAP 2008) – Over-secured creditor seeking attorneys 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.

*Weik & Associates v. Carroll*, Case no. 08-12964 (E.D. Mi. 2008) – Court correctly utilized lodestar method in suggesting guidelines by which attorney fee disputes may be resolved and the reasonableness of fees determined. Party seeking compensation carries burden to prove number of hours reasonably expended multiplied by a reasonable hourly rate. Courts “default guidelines” did not impose a blanket rule on all post-confirmation review fee petitions, but rather suggested what one would expect in the ordinary Court case in order to distinguish request that would otherwise appear “excessive, redundant, or otherwise unnecessary”. The Court did not summarily rule out any effort by Counsel to justify a greater request should be circumstances warrant.

#### §4.16 Lodestar

*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 attorneys 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 the 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 U.S.C. Section 329 requires Court to monitor the compensation paid to debtors' attorneys and to reduce that compensation to the extent that it is unreasonable. Lodestar calculation which requires a bankruptcy court to multiply the attorney's reasonable hourly rate by the number of hours reasonably expended. Overall reasonableness of an attorney's fee depends on all relevant considerations, including (1) the time and labor required; (2) the novelty and

difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the ‘undesirability’ of the case; (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. Counsel not entitled to additional compensation where case would have been an ordinary case if not for problems that debtors' attorney created. Debtors' attorney failed to recognize that the second mortgage could be avoided; debtors' attorney should have correctly filled out the chapter 13 means test; debtor's attorney should have resolved the trustee's objection regarding the 2008 tax return more quickly; and debtors' attorney should have attended the all-important hearing on debtor's objection to proof of claim. Fees not warranted in a case where the debtors' attorney has failed to identify, or attend to, the most obvious issues in the case. Court also considered customary fee is in similar cases that includes services of the sort usually performed by debtors' attorneys in chapter 13 cases including routine objections to claims, responding to routine objections to plan confirmation, and filing amended plans. Any additional time required by this case occurred as a result of poor issue spotting, poor execution and inattention. There were no matters requiring unusual or unexpected work, difficulty or surprise.

*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 and 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.

#### §4.17 Billing Judgment

*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 nonlegal 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."

#### §4.18 Hourly Rate

*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.

#### §4.19 Clerical Services

*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.

#### §4.20 Excessive Number of Professionals

*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.

#### §4.21 Benefit to Debtors

*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 the 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.

#### §4.22 Disgorgement

*In re Harwell*, 2010 WL 4901787 (Bankr. W.D. Mi. 2010) – Disgorgement of fees warranted where attorney failed to attend first meeting of creditors and instead arranged for attorney who debtor never met to attend, coupled with attorney’s failure to supplement fee disclosure to reveal fees paid to other attorney in violation of rules against fee sharing; 2016b statement failed to disclose that counsel collected a \$150.00 fee for “service fees in conjunction with the due diligence”; 2016b statement was otherwise materially incomplete and inaccurate; and counsel never amended 2016b statement even after being advised by court that it was inadequate and inaccurate. Court ordered disgorgement of \$500.

*In re Smith*, 2010 WL 3270019 (Bankr. N.D. Ohio 2010) – Court has authority under Section 329 to determine reasonableness of compensation paid to attorney. Court has authority to order disgorgement of fees that are deemed excessive or unreasonable, although Court should not exercise that authority lightly. Services charged by a debtor’s attorney which are of poor quality and/or which do not comply with an attorney’s ethical duties are not reasonable and provide grounds for the disgorgement of fees for purposes of Section 329(b); or where debtor’s counsel does not abide the Bankruptcy Code and Rules and orders of the court. Attorney’s failure to appear at the Hearing set concerning the Dismissal of the Debtors’ case under Section 707(b) did not meet minimal professional standards. Other services performed by Attorney did meet ethical and professional standards. Partial disgorgement of fees is appropriate remedy under the circumstances.

*In re Stetler Cross Ministries, Inc.*, 2010 WL 2696769 (Bankr. W.D. Ky. 2010), *aff’d sub nom Stetler Cross Ministries, Inc. v. McDermott*, 2011 WL 1434615 (W.D. Ky. 2011) – Section 330(a)(2) and Court’s broad

and inherent authority permits bankruptcy court to order disgorgement of previously paid attorney fees where an attorney fails to satisfy the requirements of the Code and Rules. Debtor's Counsel received a \$2000 fee although counsel never filed an application to have himself or his firm retained as counsel and never filed an application for approval of compensation as required by sections 327, 330 and 331. Debtor's counsel in a Chapter 11 proceeding cannot be paid without seeking and obtaining prior court approval. There are few omissions more serious in a Chapter 11 case than the failure of a debtor's attorney to obtain court approval prior to securing payment for services rendered from a debtor's estate. Bankruptcy Code Rules strictly regulate the compensation of professionals for the purpose of preventing over-reaching. Failure to follow these rules, regardless of how *de minimis* the fee, cannot be overlooked by the Court. Further, Counsel did not place the unawarded fees in his trust account, but rather drew upon the funds, and spent them, all without Court approval. Although failure may have been inadvertent or negligent failure to disclose, the failure to seek Court approval by Debtor's counsel prior to accepting the fee and having his employment approved by the Court requires disgorgement.

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

#### §4.23 Res Judicata

*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.

#### §4.24 Costs

*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.

#### §4.25 Effect of Discharge

*In re Waldo*, Case No. 09-30969 (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.

#### §4.26 Post-Petition Services

*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.

#### §4.27 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.

#### §4.28 Fee Enhancements

*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.

#### D. *Pro Hac Vice*

##### §4.29 Grant and Withdrawal of Approval

*In re Hake*, Case No. 08-8039 (6<sup>th</sup> 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.

#### E. Withdrawal of Counsel

##### §4.30 Procedure

*JP Morgan Chase Bank, N.C.A. v. Taylor*, Case No. 10-5469 (Bankr. E.D. Mi. 2010) - Defendant's Counsel's Motion to Withdraw as counsel was not excuse for failure to timely file response to Plaintiff's

Motion got 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).

#### §4.31 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.

#### §4.32 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.

#### §4.33 Grounds to Request Withdrawal

*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 affect 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.

### F. Professional Fees

#### §4.34 Generally

*The Cadle Company II, Inc. v. Fashion Shop of Kentucky, Inc.*, Case No. 08-5633 (6<sup>th</sup> 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”.



#### §4.35 Limitations

*Stickel v. SP Acquisition, LLC*, 2008 WL 3153931 (6<sup>th</sup> 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.

#### §4.36 Retention of Professionals – 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.

#### §4.37 Retention of Professionals – *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.

#### §4.38 Retention of Professionals – Standard for Approval Generally

*Official Committee of Unsecured Creditors v. Anderson Senior Living Property, LLC*, Case No 09-8041 (6<sup>th</sup> 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.

#### §4.39 Retention of Professionals – Disinterestedness

*In re Sattler*, Case No. 10-76383 (Bankr. E.D. Mi. 2011) – Party seeking to retain real estate broker must demonstrate that broker is disinterested and does not have any adverse interest and did not hold a position as director, officer or employee of the debtor within 2 years preceding commencement of the case. Debtor was former employee of proposed Broker and evidence indicated that Broker held or had held an interest in

certain property that was averse to a claim to title that was asserted by Debtor and was the subject of pending litigation. Prior relationships between Debtor and Broker could complicate negotiations for sale of property and create at least appearance of “ulterior motive” by both Debtor and Broker. No evidence was presented that this Broker was uniquely qualified to perform the services or that other brokers were not available. Application for employment denied.

#### G. Bankruptcy Petition Preparer

##### §4.40 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.

##### §4.41 Allowable Services

*In re Amstutz*, 427 BR 636 (Bankr. N.D. Ohio 2010) – A bankruptcy petition preparer may not offer a potential bankruptcy debtor any legal advice, including whether commencing a case under chapter 7, 11, 12, or 13 is appropriate; concerning how to characterize the nature of the debtor's interests in property or the debtor's debts; or concerning bankruptcy procedures and rights. BPP committed unauthorized practice of law by counseling debtor that a Chapter 7 proceeding would be “best”; BPP categorized debts as secured or unsecured; BPP determined which property would be exempted and under what law; and BPP drafter Motion to Set Aside Judgment in connection with Order Lifting Automatic Stay. BPP required to disgorge all his fees to the UST for refund to the Debtor

*In re Payne*, 2009 WL 2985676 (Bankr. W.D. Ky. 2009) – Petition preparer is permitted to copy the written information furnished by their clients. Preparers may not advise clients as to the various remedies and procedures available. Moreover, preparers may not make inquiries or answer questions as to the completion of certain forms nor advise how to best fill out forms or complete schedules. Preparers may not engage in personal legal assistance, including correcting errors and omissions. Petition preparation does not include running a credit report for a debtor or on a debtor. Preparers do not advise clients on the appropriate statutory citation to support exemptions. At most, petition preparers are scriveners and may type only what they are told by the debtor.

##### §4.42 Compensation

*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.

#### §4.43 Disgorgement

*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.

#### §4.44 Unauthorized Practice of Law

*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 the Debtor's claimed exemptions.

## V. Commencing Case

## A. Eligibility for Relief

## §5.1 Section 109

*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.

*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.

*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 Simultaneous Estates

*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 Lizyness*, Case No. 08-68093 (Bankr. E.D. Mi. 2008) - 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 Daniel*, Case No. 08-59835 (Bankr. E.D. Mi. 2008) - Debtor may not have two Chapter 7 cases pending at same time. Second filed case dismissed where Debtor filed his first petition 15 minutes prior to filing the second petition.

*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.

#### §5.3 Petition - Name of Debtor

*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”.

#### §5.4 Corporate Authorization

*Byrd v. Arvest Bank*, Case No. 10-8071 (6<sup>th</sup> 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.

#### §5.5 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.

#### B. Joint Cases

##### §5.6 Generally

*In re Balas*, 2011 WL 2312169 (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.

*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 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.

#### C. Credit Counseling

##### §5.7 Failure to Obtain

*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. 10-71363 (Bankr. E.D. Mi. 2010) - Debtor who obtained credit counseling more than 180 days prior to commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.

*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 the debtor, a representative of the debtor, too attended 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 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 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 Brewster*, Case No. 08-61818 Bankr. E.D. Mi. 2008) - Court *sua sponte* dismissed case where credit counseling certificate filed simultaneously with petition indicated that Debtor received credit counseling 217 days prior to the commencement of the case.

*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.

*In re Littlefield*, Case No. 08-64106 (Bankr. E.D. Mi. 2008) - Debtor not eligible for relief pursuant to section 109(h)(1) where Debtor did not receive credit counseling until 16 days after bankruptcy petition filed.

*In re Rahman*, Case No. 09-47242 (Bankr. E.D. Mi. 2009) - Debtor not eligible for relief pursuant to section 109(h)(1) where Debtor did not receive credit counseling until 11 days after bankruptcy petition filed.

*In re Taylor*, Case No. 08-57720 (Bankr. E.D. Mi. 2008) - Debtor not eligible for relief pursuant to section 109(h)(1) where Debtor did not receive credit counseling until 4 days after bankruptcy petition filed.

*In re Sandhu*, Case No. 08-57203 (Bankr. E.D. Mi. 2008) - Debtor not eligible for relief pursuant to section 109(h)(1) where Debtor did not receive credit counseling until 12 days after bankruptcy petition filed.

*In re Bodiya*, Case No. 09-49230 (Bankr. E.D. Mi. 2009) - Debtor not eligible for relief pursuant to section 109(h)(1) where Debtor did not receive credit counseling until 16 days after bankruptcy petition filed.

*In re Ceshikachar*, Case No. 08-69487 (Bankr. E.D. Mi. 2009) - Court *sua sponte* dismissed case where credit counseling certificate filed with petition indicated that Debtor received credit counseling 1 year prior to the commencement of the case.

*In re Sleiman*, Case No. 09-40342 (Bankr. E.D. Mi. 2009) - Debtor not eligible for relief pursuant to section 109(h)(1) where Debtor did not receive credit counseling until 1 day after bankruptcy petition filed.

*In re Daneker*, Case No. 08-69705 (Bankr. E.D. Mi. 2008) – Debtor not eligible for relief where Debtor did not obtain credit counseling until 12 days after petition was filed.

*In re Williams*, Case No. 09-57609 (Bankr. E.D. Mi. 2009) - Debtor not eligible for relief where Debtor did not obtain credit counseling until 15 days after petition was filed.

*In re Depew*, Case No. 09-56915 (Bankr. E.D. Mi. 2009) - Debtor falsely filed Exhibit D attesting to credit counseling when Debtor had not received counseling. Debtor ordered to pay \$200 to clerk of Court as sanction for violation of Rule 9011.

*In re Harris*, Case No. 09-60790 (Bankr. E.D. Mi. 2009) – Debtor’s failure to file Certificate of Budget and Credit Counseling and signed Bankruptcy Petition Cover Sheet within time allowed required dismissal of case.

*In re Staten*, Case No. 08-60408 (Bankr. E.D. Mi. 2009) - Motion to Reopen Closed Case under Section 350(b) to file Financial Management Course Certificate denied where Debtor was not eligible to be a Debtor under Section 109(h)(1). Debtor failed to obtain pre-petition credit counseling until 3 days after case commenced.

*In re Henderson*, Case No. 09-55303 (Bankr. E.D. Mi. 2009) - Case dismissed where Debtor failed to file credit counseling certificate and failed to file Schedules D, F, G and H and Debtor's Schedules E, I and J were blank.

*In re Ahmad*, Case No. 09-45029 (Bankr. E.D. Mi. 2009) - Debtor not eligible for relief where Debtor did not obtain credit counseling until 15 days after petition was filed.

#### §5.8 Exemption from 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 the debtors requested counseling services but were unable to obtain those services within 5 days. Motion is fatally defective where it fails to provide any facts or explanation to support request.

*In re Duncan*, 418 BR 278 (8<sup>th</sup> Cir. BAP 2009) – Failure to file a certificate of exigent circumstances when seeking temporary exemption from credit briefing requirement is fatal to the request. Debtor's motion requested temporary exemption from briefing requirement, but did not contain any facts or arguments in support of that request. Burden is on debtor to describe exigent circumstances that merit a waiver of the briefing requirement, and must state that the debtors requested counseling services but were unable to obtain those services within 5 days. Motion is fatally defective where it fails to provide any facts or explanation to support request.

*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.

#### §5.9 Joint 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.

*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.

#### §5.10 Payment Advices

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

#### C. Venue

##### §5.11 Generally

*State Bank of Florence v. Miller*, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff’d* Case No. 11-8011 (6<sup>th</sup> Cir. BAP 2011) – Venue is proper in the district in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district. Venue is proper if Debtor meets any one of the four tests (domicile, residence, principal place of business or principal assets). There is a presumption that the debtor has filed in the correct district; the party objecting to venue is required, by a preponderance of evidence, to show that venue is improper.

##### §5.12 Domicile

*State Bank of Florence v. Miller*, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff’d* Case No. 11-8011 (6<sup>th</sup> Cir. BAP 2011) – Domicile is largely a matter of intention - what is the fixed location to which he intends to return when he is elsewhere? Domicile is an individual's permanent place of abode where he need not be physically present, and residence is where the individual is physically present much of the time. An individual consequently may have several residences, but only one domicile. Debtor’s testimony is relevant but not determinative, and court will also consider objective evidence that establishes the Debtor's intent such as affidavits of intention, registration for driver's licenses, opening bank accounts, addressing tax returns, motive for establishing domicile, and other physical facts evidencing that the desire to remain will not expire. Some years earlier, Debtor filed a statement with the taxing authorities in Wisconsin declaring the Wisconsin Cottage to be his principal residence and paid a lesser amount of real estate taxes in Wisconsin; Debtor previously filed a chapter 13 case in the Eastern District of Wisconsin that was later dismissed; and Debtor had not filed for the Michigan Homestead Exemption. However, evidence established that Debtor has resided within seven miles of Iron Mountain, Michigan for his entire life. The Debtor was born in Michigan. The Debtor was employed in Michigan. The Debtor's parents were Michigan

residents. The Debtor was educated in Michigan. The Debtor earned his certification as a union journeyman plumber and pipefitter in Michigan. The Debtor's stated subjective intention is overwhelmingly buttressed by the objective facts including that the Debtor offered the Wisconsin Cottage for sale and posted for sale signs on the property; all of the Debtor's real property was subject to the Bank's foreclosure except for the Michigan Cabin Property; Debtor hired contractors to substantially improve the Michigan Cabin Property, by doubling its size, adding a new roof, adding a deck, adding a generator to supply electricity, and adding a propane tank to cook food and heat the cabin; Debtor opened a bank account with the State Bank of Norway, Michigan, which he used exclusively thereafter; Debtor moved the vast majority of his personal property from the Wisconsin Cottage to Michigan, using it to furnish the Michigan Cabin Property and storing the balance in a Michigan storage facility; Debtor's dentist and doctor are both in Michigan and he regularly received his medical treatment at a hospital in Marquette, Michigan; Debtor's Wisconsin driver's license expired and Debtor immediately obtained a Michigan driver's license; all of the Debtor's vehicles were titled in Michigan; Debtor filed his 2008 state income tax return as a Michigan resident; Debtor receives most of his mail at the Michigan Cabin Property; Michigan Cabin Property has been the Debtor's address of record for the Social Security Administration and his union pension plan; and the Debtor resides approximately 50% of the time at the Michigan Cabin Property. Venue proper in the Western District of Michigan.

#### §5.13 Location of Principal Assets

*State Bank of Florence v. Miller*, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6<sup>th</sup> Cir. BAP 2011) – Alternative basis for venue is the location of the debtor's principal assets during a “longer portion of such one-hundred-eighty-day period” immediately prior to the bankruptcy filing. Debtor maintained personal and real property in both Western Michigan and Wisconsin. Value of personal property in Michigan exceeded \$100,000, while personal property in Wisconsin was worth about \$13,000.00. All of debtor's real property was owned by a Trust in which debtor was the settlor, trustee and primary beneficiary. Trust stated that it was a Michigan trust. Under Michigan law, the trust itself is a Michigan Asset. Even disregarding trust, the bulk of debtor's real property would have been located in Michigan.

#### §5.14 Residence

#### §5.15 Principal place of business

#### §5.16 Dismissal

#### §5.17 Transfer - Venue Proper

#### §5.18 Transfer - Venue Improper

### D. Filing Fee

#### §5.19 Failure to Pay

*In re Selma*, Case No. 10-53320 (Bankr. E.D. Mi. 2010) - Order to Show Cause why case should not be dismissed for failure to pay filing fee dissolved where Court entered Order allowing payment of filing fee in installments.

*In re Smith*, Case No. 10-45688 (Bankr. E.D. Mi. 2010) - Chapter 7 Case dismissed based on debtor's failure to pay filing fees in debtor's two prior cases in time permitted by Court.

*In re Price*, Case No. 10-44070 (Bankr. E.D. Mi. 2010) - Chapter 7 case reopened, discharge vacated, and case dismissed where Debtor failed to pay filing fees in two prior Chapter 7 cases notwithstanding Court's Order to pay those fees within specified time.

*In re Sinanovic*, Case No. 10-44217 (Bankr. E.D. Mi. 2010) – Case dismissed where Debtor failed to pay filing fee within time set by Order of Court and neither Debtor nor counsel appeared at hearing on Order to Show Cause.

*In re Lupu*, Case No. 10-42658 (Bankr. E.D. Mi. 2010) – Court entered Order Conditionally Dissolving Show Cause Order which required Debtor to pay balance of filing fee by date certain. Debtor failed to pay the remaining filing fee, requiring dismissal of case.

*In re Broadnax*, Case No. 09-50600 (Bankr. E.D. Mi. 2009) – Court entered Order to Show Cause directing that Debtors pay filing fee for current case plus unpaid filing fees for each of Debtors' two prior cases which were also dismissed for failure to pay filing fees, failing which the current case will also be dismissed.

*In re Young*, Case No. 09-44508 (Bankr. E.D. Mi. 2009) – Court entered Order Conditionally Dissolving Show Cause Order which required Debtor to pay balance of filing fee by date certain. Debtor failed to pay the remaining filing fee, requiring dismissal of case.

*In re McAfee*, Case No. 09-52377 (Bankr. E.D. Mi. 2009) - Debtor failed to pay filing fee and failed to comply with Order to Show Cause which required Debtor to pay filing fee in this case and in Debtor's two prior cases. Case dismissed.

*In re Aaron*, Case No. 09-53257 (Bankr. E.D. Mi. 2009) - Debtor failed to pay filing fee and failed to comply with Order to Show Cause which required Debtor to pay filing fee in this case and Debtor's prior case. Case dismissed.

#### §5.20 Waiver

*In re Field*, 2011 WL 4101075 (Bankr. W.D. Mi. 2011) – Court can reconsider Order waiving filing fee where developments in administration of case demonstrate that the waiver was unwarranted. Court would not reconsider waiver where debtor, shortly after filing, obtained new employment at \$16 per hour but job ended up being short lived because of debtor's physical condition and the debtor's budget painted a "bleak picture".

*In re McRoy*, Case No. 10-45477 (Bankr. E.D. Mi. 2010) – Debtor's letter to Court construed as Motion for Reconsideration of Order denying Debtor's Application for waiver of Chapter 7 filing fee, denied where motion failed to demonstrate palpable defect by which the Court and parties have been misled and that a different disposition of the case must result for a correction thereof. Debtor's budget reflected charitable contributions of more than \$1500 per month and Debtor's income exceeded 150% of poverty line, preventing Court from waiving filing fee.

*In re Paris*, Case No. 09-56564 (Bankr. E.D. Mi. 2009) - Court could not waive filing fee where Debtor filed Motion for Authorization to Pay Filing Fees in Installments. Request for installment payments could not be used to excuse payment of filing fees in their entirety. Motion for Authorization became moot when case dismissed for failure to pay filing fees even according to schedule proposed in Motion to Pay in Installments.

*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.

#### E. Means Test

##### §5.21 “Primarily Consumer Debts”

*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 (8<sup>th</sup> 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 is 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.

##### §5.22 Calculation of Disposable Income – Generally

*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 (6<sup>th</sup> 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 (6<sup>th</sup> 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 U.S.C. § 707(b)(2)(A)(i) and (iii). The Supreme Court in *Lanning* noted that, for above-median income debtors, the expenses included in § 707(b)(2) are included in the means test. Thus, *Lanning* recognizes that secured claims provided at § 707(b)(2)(A)(iii) are included.”

*In re Austin*, 372 B.R. 668 (Bankr.D.Vt.2007) - Debtor that is current on a secured obligation that is provided for in Form 22C, allowed as deduction regardless of whether the expense is reasonable.

*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 (7<sup>th</sup> 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”.

§5.23 Calculation of Disposable Income – Income of Non-Filing Spouse

*In re Braathun*, 2011 WL 1299605 (Bankr. S.D. Iowa 2011) – “Current Monthly Income” of a debtor does not include income of non-filing spouse except to the extent regularly contributed to the household expenses of the debtor. Allowable deductions under Section 707(b)(2)(A) are limited to those expenses actually paid by the debtor and do not include any monthly expenses or debt payments that are solely those of the non-filing spouse.

§5.24 Calculation of Disposable Income – Surrendered Collateral

*Darrohn v. Hildebrand*, Case No. 09-5499 (6<sup>th</sup> 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 the 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 the Debtor’s continuing contractual obligations remain unextinguished on the date of the bankruptcy filing; additional secured debt payments that Debtor would be required to make in Chapter 13 in order to cure the pre-petition mortgage arrears; and priority claim for real property taxes owed on property to be surrendered.

*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 (6<sup>th</sup> 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.

§5.25 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.

§5.26 Calculation of Disposable Income – Automobile Ownership Expense

*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 (6<sup>th</sup> 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 the debtor in light of brother's lack of any income.

#### §5.27 Calculation of Disposable Income – Automobile Operating Expense

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

#### §5.28 Calculation of Disposable Income – 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.

#### §5.29 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 the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family. Debtor's expenses related to operation and maintenance of swimming pool allowed as deduction where wife's chronic back problems necessitated upkeep of the pool for her continued therapy. Gym membership allowed as medical expense where debtor testified that Debtor must maintain excellent physical health for his position as a pilot, and Wife needed to exercise to keep her back healthy for her employment.

#### §5.30 Calculation of Disposable Income – Education Expenses

*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.

#### §5.31 Calculation of Disposable Income – Housing Deduction

*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*.

#### §5.32 Social Security Income

*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 Cranmer*, 433 BR 391 (Bankr. D. Utah 2010) – Social Security of debtor and non-filing spouse are excluded from calculation of CMI but must be disclosed on Schedule I and must be included in calculation Projected Disposable Income and calculating plan payment.

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

*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.

#### §5.33 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.

#### §5.34 Disability Income

*Blausey v. U.S. Trustee*, 552 F.3d 1124 (9<sup>th</sup> 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.

#### §5.35 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.

#### §5.36 Railroad Retirement Income

*In re Scholz*, 447 BR 887 (9<sup>th</sup> Cir. BAP 2011) – Railroad Retirement Act benefits, while in the nature of Social Security, are not excluded from calculation of CMI.

#### §5.37 Self-Employed Debtor

*In re Compann*, 2010 WL 4008311 (Bankr. N.D. Ga. 2010) – Section 101(10A)(B) enumerates certain categories of payments excluded from a debtor’s CMI. Business expenses are not excluded from income in Section 101(10A). Current Monthly Income is based on gross income, not net income – debtor may not deduct business or personal expenses in determining current monthly income.

*In re Weigand*, 386 BR 238 (9<sup>th</sup> Cir. 2008) – Chapter 13 debtor engaged in business may not deduct ordinary and necessary business expenses from gross receipts for the purpose of calculating CMI. Business expenses are to be subtracted from CMI when calculating “disposable income.”

*In re Sharp*, 394 BR 207 (Bankr. C.D. Ill. 2008) – In calculating “Current Monthly Income,” a self-employed debtor must use gross business income and may not deduct business expenses, even though the B22C form provides for a deduction of business expenses

*In re Arnold*, 376 BR 652 (Bankr. M.D. Tn. 2007) - Current Monthly Income is based on debtors’ average gross income over six-month period preceding petition date. Self-employed debtor is not permitted to deduct expenses, either business or personal, in calculating Current Monthly income. Official Bankruptcy Form, in allowing self-employed Chapter 13 debtors to deduct their business expenses in calculating their current monthly income (CMI), for purpose of assessing whether they were below- or above-median-income debtors, was plainly erroneous as conflicting with controlling language in bankruptcy statute.



Business expenses are properly deducted as part of the Other Necessary Expenses in calculating “Disposable Income”.

#### §5.38 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.

#### §5.39 Household Size

*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 864397 (Bankr. E.D. Va. 2011) – Courts have used three different methods of determining household size – Census Bureau “heads on beds” approach, which counts everyone who occupies a housing unit without regard to family or economic relationship; IRS “dependent” approach which counts only people who meet IRS standard as a “dependent”; and “economic unit” approach which looks at number of individuals who form an “economic unit”. Court adopted “economic unit” approach as leading to the most accurate and realistic calculation of projected disposable income given economic realities of debtor’s family. Single debtor had four kids. Kids spent, on average, 3-4 nights per week at debtor’s house. Court determined that 4 kids staying on half-week basis was equivalent of 2 kids staying “full time”. Debtor’s household consisted of three people, debtor and the equivalent of two “full time” kids.

*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 the Debtor. Adopting the Census Bureau’s definition of household, Court expressly rejected argument that “household” should include or take into account only those for whom the Debtor provides financial assistance or support. Therefore, Court concluded that “Debtors’ household” included not only Debtors, but also Debtors’ adult daughter and grandchild who also resided in their home, regardless of whether Debtors provided any support or financial assistance to their daughter and granddaughter. Court did not reach the issue of whether “household” included adult child who lived elsewhere but maintained a room and occasionally ate meals at the Debtor’s home; or the Debtor’s adult child who lived away at college but returned home for summers.

#### §5.40 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.

#### §5.41 Special Circumstances



*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 the debtor's control. Expenses incurred merely at debtor's discretion are not a ‘special circumstances’. Expenses will be “special circumstances” only if debtor had no reasonable alternative but to incur the expense and the obligation must be highly unusual, and of the type not normally encountered by most debtors. Debtors' student-loan debt does not result from unforeseen circumstances or from events beyond their reasonable control. Non-dischargability 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 the debtor's reasonable control, or result from circumstances highly unusual in character and of the type not normally encountered by most debtors. Section 707(b)(2)(B) presents two examples of “special circumstances” - (1) a serious medical condition, or (2) a call to active duty in the Armed Forces.

*In re Taylor*, 2009 WL 2872997 (Bankr. N.D. Ohio 2009) –The Code does not define “special circumstances” but does provide two examples: (1) a serious medical condition; or (2) active duty in the armed forces. To qualify as a “special circumstance”, debtor’s situation must have “traits in common” with one of these two categories. Debtor must also provide (I) documentation for such expense or adjustment to

income; and (II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable. Debtor failed to demonstrate any allowable “special circumstance” where the “special circumstance” was the failure of Debtor's former wife, to hold the Debtor harmless on the mortgage obligation on the marital residence and the former wife's subsequent Chapter 7 filing. An obligation based on a divorce agreement related to the marital homestead “can hardly be said to have, in any meaningful way, traits in common with a serious medical condition or call to active duty in the Armed Forces.” Therefore, this additional obligation, while unfortunate, does not constitute a “special circumstance” to rebut the presumption of abuse.

#### §5.42 Marital Adjustment – Non-filing spouse

*Sturm v. U.S. Trustee*, 2011 WL 2746059 (N.D. Ohio 2011) – Debtor is entitled to marital adjustment for mortgage payment made by non-filing spouse for property owned solely by the non-filing spouse. Debtor can take marital adjustment for non-filing spouse's credit card payments to the extent that the cards were used solely for the benefit of the non-filing spouse's separate expenses. To the extent the credit cards may have been used to purchase goods that benefitted the debtor, those payments are not included in the marital adjustment. If the credit cards have “mixed use”, some solely for non-filing spouse and some for the benefit of the debtor, the court must determine the respective proportions of use and allocate the marital adjustment to reflect that proportion. If the non-filing spouse is not a dependent of the debtor, then the sole expenses of the non-filing spouse are not “regularly contributed for the support of the debtor or a dependent of the debtor” as CMI is defined.

*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 nondebtor party toward household expenses of debtor. Non-debtor mortgage payments on home where debtor also resided were not expenses that were “purely personal” to the debtor.

*In re Braathun*, 2011 WL 1299605 (Bankr. S.D. Iowa 2011) – “Current Monthly Income” of a debtor does not include income of non-filing spouse except to the extent regularly contributed to the household expenses of the debtor. Allowable deductions under Section 707(b)(2)(A) are limited to those expenses actually paid by the debtor and do not include any monthly expenses or debt payments that are solely those of the non-filing spouse.

#### §5.43 Cases Converted From Chapter 13

*In re Lassiter*, 2011 WL 2039363 (Bankr. E.D. Va. 2011) – Section 707(b)(1) applies in case converted from Chapter 13. Debtors who convert their cases are deemed to have ‘filed under’ the *converted to* chapter, as of the date the original petition was filed. Provision of Section 707 that allows court to dismiss case “filed by an individual debtor under” Chapter 7 encompasses cases originally filed under Chapter 7 and those converted to Chapter 7. Debtors with income above median and who are presumptively “abusive” could re-convert or Court would dismiss case.

*In re Chapman*, 447 BR 250 (8<sup>th</sup> Cir. BAP 2011) - Section 707(b)(1) provides, in pertinent part, that: the court, . . . may dismiss a case *filed by an individual debtor under this chapter* [Chapter 7] whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter [Chapter 7]. Section 707(b)(1) identifies the type of debtor (“filed by an individual debtor”), rather than limits how the case arrived in Chapter 7. Further, limiting the abuse analysis only to individual debtors who originally “filed under” Chapter 7 would create a potential loophole for debtors to “abuse” the system by filing and failing under Chapter 13 in order to avoid the § 707(b) analysis upon conversion. Courts would be left with using “equitable powers” to curb such abuses. Cases, that were filed under Chapter 13 and later converted to Chapter 7, are considered to be “filed under” Chapter 7 for the purposes of § 707(b)(1).

## D. Involuntary Petitions

## §5.44 Elements

*Huszt v. Huszt*, 2011 WL 2745818 (E.D. Mi. 2011) – Section 303(b)(1) requires involuntary petition be signed by three entities that hold claims. Where multiple creditors hold a single claim, the creditors will be treated as single entity unless the three joint creditors also hold separate, distinct claims. Judgment that awarded damages to three parties “jointly and severally” was not readily severable and did not create three separate claims, but constituted a single claim. Therefore, three claimants were treated as a single “claim” for purposes of Section 303(b)(1).

*In re Lundeen*, Case No. 09-51277 (Bankr.S.D.Ohio 2009) – Creditor filing Involuntary petition under § 303(b) must hold a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount. If there is a legitimate legal or factual basis for the alleged debtor not to pay the claim, then the creditor is not eligible to file an involuntary petition. If there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts, then the petition must be dismissed. In deciding whether the claims of the petitioning creditors are subject to a legitimate dispute of law, and must make an inquiry sufficient to determine whether a legitimate question exists about the application of law to the undisputed facts presented. Petitioning creditors bear burden to establish a prima facie case that a bona fide dispute does not exist, by a preponderance of the evidence, at which point the burden of proof then shifts to the putative debtor to show otherwise. In light of the ambiguities and Chapter 11 Plan of related corporate defendants, there was a bona fide dispute as to whether the corporate principle was liable for the obligations owed to the Petitioning Creditors. Bankruptcy Court, and dismissing Involuntary Petition, was not ruling on the merits of the claims or making a determination as to whether the individual corporate officer was or was not liable to the Petitioning Creditors, but only that in light of the ambiguities in the confirmed Plan, there is a bona fide dispute on the issue of personal liability. Section 105 does not allow the court to contravene the express requirements of section 303 that the claims of the petitioning creditors not be subject to bona fide dispute.

*In re Fallon Luminous Products Corporation*, Case No. 09-35581 (Bankr. E.D. Tn. 2010) – Petitioning creditors bear burden of proof that debtor is generally not paying debts asked those debts become too. Creditors must show more than the existence of a few unpaid debts. Court will consider proportion of debts being paid, though in terms of proportion of number of creditors being paid and proportion of that kind of dollar value, being paid. Calculations will include creditors who are not currently pressing debtor for payment if the debts are due. Court can't conclude that a debtor is failing to pay debts as those debts come due even where debtor has failed to pay only one debt if that makes up a substantial portion of debtor's overall liability. Court will examine number of unpaid claims; amount of unpaid claims; materiality of nonpayment; and the debtor's overall conduct of financial affairs; as well as whether debtor has terminated business operations and whether past due debts are substantially large in comparison to assets. Alleged debtor had substantial past-due obligations including large judgment which was currently on appeal, alleged debtor had been having business difficulties for at least five years, and secured creditors were owed more than \$23,000,000 on which debtor had defaulted in payments. Debtor has generally not been paying debts as those debts come due sufficient to warrant entry of an order for relief under chapter 7.

## §5.45 Standing to Bring

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

confirmed Chapter 11 Plan was unclear as to whether confirmation of the Plan extinguished Debtor's personal liability.

#### §5.46 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.

#### §5.47 Sanctions

*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.

## VI. Property of Estate

### A. Defined

#### §6.1 Generally

*Rankin v. Lavan*, Case no. 09-1087 (6<sup>th</sup> 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.

*In re Mayer*, 41 BR 702 (E.D. Mi. ) – Property of Estate does not include property in which Debtor holds only legal title and not an equitable interest. Debtor does not hold any equitable interest in property debtor holds in trust for third party, such that trust property does not become property of the estate. Property held by debtor in constructive trust established prior to commencement of case constitutes trust property in which debtor holds bare legal title.

*In re Fleming*, 424 BR 795 (Bankr. W.D. Mi. 2010) – Debtor would be required to turn over to Trustee property of estate even if debtor had already divested himself of that property. Section 542 requires turnover to the Trustee of all property of the estate. Debtor's schedules did not list a potential tax refund and Debtor did not exempt any potential tax refund. When Debtor filed his tax return, it indicated a refund, which was sent directly to the debtor who then spent the money. Debtor cannot relieve himself of duty to surrender property of estate to Trustee merely by divesting himself of it.

*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 (6<sup>th</sup> Cir. 2008) – Property equitably owned by Debtor as a result of dissolution of corporation revested in corporation and removed from property of estate when corporation was lawfully reinstated. Corporation forfeited corporate privileges for failure to pay annual fees due to state. Upon forfeiture, sole shareholder and president of corporation became owner of an official title to corporate assets. Shareholder then filed proceeding under Chapter 7 but failed to list his beneficial interest in these corporate assets and beneficial assets became property of estate. When the corporation repaid outstanding fees, the corporation was restored to active status and all of its assets were reinvested in the corporation. Therefore, upon reinstatement of the corporation, shareholder no longer had any interest, equitable or legal, in the corporate assets and the corporate assets were automatically removed from Debtor's estate. Once legal and beneficial titles to the assets revested in corporation, debtor no longer had any personal title to the assets. Bankruptcy trustee cannot hold rights greater than those that could have been held by the Debtor.

*Doucet v. Drydock Coal Co.*, 397 BR 36 (Bankr. S.D. Ohio 2008) – Property of estate includes all legal or equitable interests of the Debtor in property as of the commencement of the case. If property is subject to restriction against transfer that is enforceable under state law, that restriction is equally enforceable. Restriction on stock subjecting any transfer to a right of first refusal to other shareholders does not prevent the stock from becoming property of estate, but right of first refusal will be enforceable if Trustee proposes to sell stock.

*Incline Energy, LLC v. Stice*, 2009 WL 1975038 (W.D. Ky. 2009) – Property of the estate includes all legal or equitable interests of the Debtor in property as of the commencement of the case. A pre-petition assignment of Debtor's interest in property will not divest that property from the estate if the underlying assignment is unenforceable as a matter of state law. Debtor's attempt to assign proceeds of personal injury cause of action was unenforceable as a matter of Kentucky law. Therefore, Debtor's interest in that personal injury cause of action and in the proceeds of that cause of action remained property of the estate for benefit of creditors.

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

*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 fails to redeem within the allowed time (which is 30 days after the date on which the pawn transaction is to be paid), then the pawnbroker acquires full and absolute title to the pawned goods. Where the pawn ticket identified three separate payoff dates, with each later date requiring a larger payment, the “date on which the pawn transaction is to be paid” would be the latest of the three dates. Debtor who filed Chapter 13 10 days after the third payoff date had, at the time of commencement of the case, a right to redeem post-petition, making the pawned items property of the estate. However, Section 108 extends the redemption period only for 60 days from the petition date. Therefore, Debtor could not redeem by paying over the life of the Chapter 13 Plan. Debtor given 15 days to redeem from date of Court Order, failing which ownership of the property would pass to the pawnbroker.

*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 form to perfect a lien in the item by (1) permanently recording the builder’s name, street address, city and state; and (2) filing a financing statement. Sufficiency and duration of financing statement determined by applicable state law. Name of debtor in financing statement will be sufficient if it “substantially” identifies the debtor even if it has minor errors or omissions. A financing statement that fails sufficiently to provide the name of the debtor in accordance with section 9503(1) is seriously misleading.

## §6.2 Social Security Benefits

*Carpenter v. Ries*, 614 F.3d 930 (8<sup>th</sup> 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

*Baumgart v. Laurie*, 2011 WL 3879507 (Bankr. N.D. Ohio 2011) – Section 363(h) allows sale of interest of debtor and joint tenant if (1) partition in kind of such property among the estate and such co-owners is impracticable; (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners; (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power. Trustee demonstrated existence of each element where property consisted of single family residence that cannot be partitioned; sale of undivided one-half interest would produce significantly lower price given limited market for one-half ownership of single family home; and property was not used for production of energy. However, record did not demonstrate that benefit of sale for estate would far outweigh adverse impact on joint owner as required for summary judgment.

*Drown v. Dollar Bank, FSB*, 437 BR 253 (Bankr. S.D. Ohio 2010) – Property owned as of date of petition by debtor and non-filing co-owner is presumptively property of estate only to extent of debtor's interest. Property of estate would not normally include property interest of non-filing co-owner. However, if debtor and co-owner had reached an agreement prior to the commencement of the case that the co-owner would transfer the co-owner's interest to the debtor upon the happening of a specific condition, then the debtor acquired an equitable interest in the property as of the date of that agreement and, upon the occurrence of the condition, the full property interest would become property of the estate.

*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 the Debtor which becomes property of the estate. Further, one half of the funds which were deposited into the account from a separate jointly held account also became property of the Debtor and, therefore, property of the estate. Trustee could trace \$76,100 of balance of \$110,744.36 in the CMA to Debtor individually (either personal funds or one-half of funds transferred from joint account). Trustee was entitled to recover \$76,100 for benefit of estate.

*Yoppolo v. Missler*, 2009 WL 2163534 (Bankr. N.D. Ohio 2009) – Section 363(h) permits Trustee to sell Debtor’s interest in jointly owned property free and clear of interests of other owners if (1) Debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety; (2) partition in kind of such property among the estate and such co-owners is impracticable; (3) sale of the estate’s undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners; (4) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and (5) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power. Trustee bears burden of proof of each element of the sale under section 363(h). Trustee sought to sell Debtor’s remainderman interest, which would not take effect as an estate in possession until the death of the “life in being”. Trustee’s sale under section 363(h) would not result in sale of property free from the interest of the life tenant. Given the already partitioned state of title (divided between life estate and remainder interest), trustee failed to demonstrate that a partition is not practical. Trustee also failed to show that a sale of only the Debtor’s interest in property would realize significantly less for the estate as Trustee could not demonstrate that there was any prospective purchaser for property where there was no present right to possess the property and title would be subject to the interests and rights of the life tenant. Finally, Trustee failed to demonstrate that the remainderman interest could be sold for more than the proportionate amount of the lien on the property. Therefore, trustee failed to demonstrate that the benefit to the estate would exceed the harm suffered to the remainderman.

#### §6.4 Property Acquired Post-Petition

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

#### §6.5 Tenants by Entireties

*U.S. v. Barczyk*, Case No. 10-1498 (6<sup>th</sup> Cir. 2011) – United States can foreclose tax lien and sell real property owned by husband and wife as tenants in the entirety even where only one of the owners is liable for the unpaid taxes. Non-labile 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 entirety estate. Law presumes real estate acquired by husband and wife during marriage is held as entirety but presumption can be overcome by evidence that parties intended acquisition as joint tenants or as tenants in common. Mistake in deed that reflected “unmarried” when parties were admittedly married on date of deed would not overcome presumption. Reference to “rights of survivorship”, standing alone, did not defeat presumption or create clear inference that other method of ownership was intended, particularly in light of references to remainder passing on death and ownership for “their joint natural lives”.

*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 the debtor and the non-filing spouse. A tenancy by the entirety is a type of concurrent ownership in real property that is unique to married persons and is intended to protect the marital estate. Each spouse is considered to own the whole and, therefore, is entitled to the enjoyment of the entirety and to survivorship. When real property is so held as tenants by the entireties, neither spouse acting alone can alienate or encumber to a third person an interest in the fee of lands so held. Neither the husband nor the wife has an individual, separate interest in entireties property, and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other. A creditor with a judgment on a joint debt may levy upon the property itself and thus on the interests of both spouses. The debtor’s interest in that portion of entireties property reachable by joint creditors therefore is not exempt. As a result, the trustee is authorized to liquidate entireties property for the benefit of the joint creditors of the individual debtor and that debtor’s non-filing spouse. Where the value of the property at issue is less than the amount due on the first mortgage, there is no equity available to pay joint claims. Therefore, the estate has no interest in the entireties properties of the debtor and the non-filing spouse.

*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.

#### §6.6 Leaseholds

*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.

#### §6.7 Abandonment by Trustee

*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 (6<sup>th</sup> 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 (7<sup>th</sup> 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 (6<sup>th</sup> 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.

#### §6.8 Technical Abandonment

*Rankin v. Lavan*, Case no. 09-1087 (6<sup>th</sup> 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 the Debtor that is not administered at the time of closing of the case is abandoned. Abandonment occurs by operation of law when the case is closed, without the need for motion or separate Order of Court.

#### §6.9 Motion to Compel Abandonment

*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.

#### §6.10 Effect of Abandonment

*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 the debtor may have had in the property are no longer included in property of the estate. Property reverts *nunc pro tunc* to its pre-petition status as if no bankruptcy had ever been filed, and Court is divested of jurisdiction over that property. Debtor cannot abandon debtor's own interest in the property in an attempt to cut off post-petition condominium fees and assessments under Section 523(a)(16).

*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 the debtor *nunc pro tunc*, as if the debtor owned the property continuously.

#### §6.11 Revocation of Abandonment

*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 the debtor, would be the person redeeming the property. That trustee may be more likely to redeem than the debtor would have been does not change the legal rights or status of the buyer.

*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 were no 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 register 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 (6<sup>th</sup> 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 the debtor of all property not administered at the time of the closing of the case. Revocation of abandonment is governed by Rule 60(b), and is revocable in very limited circumstances such as where the trustee is given incomplete or false information of the assets by the debtor. Abandonment will not be revoked where doing so would unfairly prejudice the owner of the property. Revocation denied where case was closed after Trustee fully investigated debtor's financial affairs and filed a no-asset report. Trustee did not cite any unexpected changes in the law that would warrant reconsideration of abandonment. That successful bidder at the foreclosure sale held 2 months after abandonment bid far less than what the Trustee believed to be the true value of the property would not support revocation of abandonment.

*In re Reiman*, 431 BR 901 (Bankr. E.D. Mi. 2010) – Section 544 does not provide a procedure to revoke abandonment. As a general rule, abandonment is irrevocable. However, a Court can permit revocation of abandonment where the abandonment itself resulted from inadvertence or neglect. Revocation is authorized by Federal Rule 60(b) and request to revoke abandonment must prove one of the bases for relief under Rule 60(b). Trustee would not be permitted to revoke abandonment of real property where Chapter 7 case had been fully administered and properly closed; there had been no changes in the law after abandonment such that the Trustee would not have abandoned the property in the first instance; the Trustee performed all of his statutory duties in investigating the value of the property and, although the value of the property may ultimately turn out to be more than the Trustee perceived, the Trustee's evaluation was not the product of any mistake nor was the Trustee affirmatively misled. After abandonment, the lender conducted a foreclosure sale, at which the foreclosure bid was significantly less than what the Trustee believed the value to be. Trustee sought to revoke abandonment and sell the property, redeem the mortgage, and return the surplus profit to the unsecured creditors. Court concluded that no basis existed to revoke abandonment of a properly administered and investigated asset in a fully administered case where the Trustee's request was based solely on the fact that the property was more valuable than originally believed. The Code's strong interest in finality is respected in all cases and applies to abandonment of assets.

#### §6.12 Tax Refunds

*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 (6<sup>th</sup> Cir. BAP 2011) – 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 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.

*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 (10<sup>th</sup> 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 (7<sup>th</sup> 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.

### §6.13 Post-Foreclosure Interests

*Scott v. Bierman*, 2011 WL 1807330(4<sup>th</sup> 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.

#### §6.14 Property Settlements

*In re Mayer*, 41 BR 702 (E.D. Mi. 2011) – 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.

*In re Combs*, 2010 WL 3467730 (Bankr. E.D. Mi. 2010) - Judgment in dissolution of marriage that awarded wife "as her sole and separate property ... one-half of [the] marital interest" in debtor's pension operated to convey one half of the pension to wife even without preparation or entry of an Eligible Domestic Relations Order. One half of any funds received by debtor belong to wife and are received and held by debtor in a constructive trust for the benefit of the wife and neither the wife's one-half interest in the pension nor the funds received and held by the debtor in the constructive trust become property of the estate.

#### §6.15 Causes of Action

*Rankin v. Lavan*, Case no. 09-1087 (6<sup>th</sup> 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*, Case No. 10-11690 (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.

#### §6.16 Contract Rights

*In re Wise*, 2010 WL 3430849 (Bankr. N.D. Ohio 2010) - Chapter 7 Trustee acquires all contract rights which the debtor had as of the commencement of the case. Contract signed by debtor individually becomes property of the estate notwithstanding testimony by debtor that contract was intended to be signed by debtor's wholly-owned corporate entity with debtor signing solely in a representative capacity. Debtor executed contract in debtor's own name with no mention of or reference to any corporate entity or status of debtor as corporate officer or representative. Trustee acquired contract rights and could sell those contract rights under section 363.

#### §6.17 Unrecorded Interests

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

#### §6.18 Restrictions on Alienation

*ELM Road Development Co. v. Buckeye Retirement Co, LLC.*, 419 BR 328 (6<sup>th</sup> 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.

#### §6.19 Consignment Transactions

*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.

#### §6.20 Cash Collateral and Assignment of Rents

*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 Senior Housing Alternatives, Inc.*, 2010 WL 165991 (Bankr. E.D. Tn. 2011) – “Absolute Assignment of Leases, Rents, and Profits” that purported to be absolute and unconditional assignment of rents and income and not just as assignment as security, but then granted to the borrower the right to collect as agent for the Assignee absent default in underlying loan agreement did not divest Debtor of title to income and proceeds received post-petition. Income and right to receive income remained property of estate and constituted cash collateral subject to Section 363. Notwithstanding the representations in the Assignment, the Court would examine the transaction as a whole, which evidenced that assignment was given to secure loan obligations and not to immediately convey all right, title and interest to the Assignee.

*In re Buttermilk Towne Center, LLC*, 2010 WL 5185870 (6<sup>th</sup> 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.

#### §6.21 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.

#### §6.22 Fixtures and Personalty - Defined

*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 compliment furniture, were not fixtures. Debtor improperly removed fixtures from house that became property of estate when debtor vacated the premises.

#### §6.23 Political Campaign Contributions

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

#### §6.24 Trust Property

*Baumgart v. Laurie*, 2011 WL 3879507 (Bankr. N.D. Ohio 2011) – Property that is held by debtor as trustee is not property of the estate. Trustee’s recovery of property in adversary proceeding for fraudulent transfer precludes debtor from later arguing that property was held in trust for third person. Had property been held in trust, transfer to third party would not have been a transfer of an interest of the debtor in the property which would have precluded finding of fraudulent transfer. Judgment at least implicitly rejected argument for purposes of res judicata.

*In re Mayer*, 41 BR 702 (E.D. Mi. 2011) – Constructive trust may be appropriate where property, although not wrongfully acquired, is unconscionably retained or otherwise results in its holder's unjust enrichment. Constructive Trust normally will not be imposed when creditor has adequate remedy at law. However, where the defendant is insolvent, imposition of a constructive trust is appropriate. Constructive trust requires that the purported constructive trustee be under an equitable—and not simply legal—duty to convey the subject property. Constructive trust cannot be imposed except upon identifiable property in the possession or control of the defendant against which to impose that trust, and the trust res must be such that the beneficiary has some recognized interest.

*Fifth Third Bank v. JPMorgan Chase Bank, N.A.*, 2011 WL 30770 (W.D. Ky. 2011) - Estate includes all legal or equitable interests of the debtor in property as of the commencement of the case including any interest which a debtor retains in a trust such as a power to amend trust or to revoke a revocable trust and recover the remaining funds. When interpreting a trust agreement, a court must endeavor to determine the maker's intent from the words used within the agreement itself. Where possible, all parts of the instrument must be given effect and every part of the instrument must be read in conjunction with every other part. *Id.* 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.



## §6.25 Bonuses

*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.

## B. Turnover

## §6.26 Generally

*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.

## C. Failure to Disclose Causes of Action

## §6.27 Future Prosecution Barred

*Young v. Independent Bank*, slip op. No. 299192 (Mich. Ct. App. September 20, 2011) -the Michigan Court of Appeals affirmed dismissal of a lawsuit the plaintiff failed to schedule in her Chapter 7 bankruptcy case. Court of Appeals applied bankruptcy law and Sixth Circuit precedent that an unscheduled cause of action is not abandoned to the debtor and remains an asset of the bankruptcy estate. Thus the debtor did not have standing to pursue the lawsuit.

*Walker v. Moldex Metric, Inc.*, 2011 WL 3044529 (E.D. Tn. 2011) – Debtor has affirmative duty to disclose all assets at the time of filing a bankruptcy petition. Duty of disclosure is a continuing one, and a debtor is required to disclose all potential causes of action. Judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition. Judicial estoppel is not appropriate in cases involving conduct that amounts to mistake or inadvertence demonstrated by (1) where the debtor lacks knowledge of the factual basis of the undisclosed claims, and (2) where the debtor has no motive for concealment. Debtors barred from prosecution of cause of action where debtors did not schedule claim in Schedule B or SOFA. Debtors could not show inadvertence where litigation had been filed one month prior to commencement of the bankruptcy case. Debtors have motive to conceal as omitting lawsuit would allow debtors to discharge debts at same time seeking to recover and retain large claim. Although litigation was pending at time petition was filed, debtors made no effort to inform bankruptcy court of claims to amend schedules to disclose. First notice to bankruptcy court did not occur until after Defendant filed Motion for Summary Judgment based on judicial estoppel.

*Al-Mansoor v. Malloy*, 2010 WL 3906954 (E.D. Mi. 2010) – Debtor's failure to list cause of action in bankruptcy schedules precluded debtor or Chapter 7 Trustee from later pursuing cause of action. Debtor is judicially estopped from bringing or maintaining a suit against a defendant if: 1) the party asserting the claim is taking a position that is plainly inconsistent with its prior legal position; 2) the court accepted the previous position; and 3) the disclosure was not inadvertent. Courts strictly apply test to foreclose a party from pursuing existing claims and/or lawsuits where such matters were not disclosed during the debtor/plaintiff's pending bankruptcy. Debtor failed to initially identify and failed to amend his schedules during pendency of his bankruptcy proceeding to include this litigation as an asset and received discharge



based, at least in part, on representation that no cause of action existed. Debtor could not demonstrate “inadvertence” where Debtor had knowledge of his personal injury claims because they were pending before he filed for bankruptcy protection; and Debtor had an obvious motive for failing to disclose-wanting to keep any settlement or judgment to himself. Reliance on bankruptcy lawyer's expertise does not excuse failure to list action, particularly where Debtor made no effort to cure the omission before Defendants' motion for summary judgment was filed.

*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 estoppel 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 (6<sup>th</sup> 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 Blose*, 2009 WL 2982932 (Bankr. W.D. Ky. 2009) – A cause of action is an asset that must be scheduled pursuant to Section 521. Debtor's failure to list a cause of action amounts to an affirmative statement that no such action exists. Debtor will be judicially estopped from pursuing an undisclosed cause of action after obtaining a discharge on the basis that no such action exists. Pursuing an undisclosed cause of action creates an inconsistency sufficient to support judicial estoppel. By granting a discharge and closing this "no asset" case, this Court adopted Debtor's statement that she had no potential causes of action. Judicial estoppel does not apply where the prior inconsistent position occurred because of "mistake or inadvertence." Failure to disclose a cause of action may be deemed inadvertent where (1) the debtor lacks knowledge of the factual basis of the undisclosed claim, or (2) the debtor has no motive for concealment of the claim. Debtor testified in State Court deposition that Debtor knew of her potential claims at the time of she filed for relief under Chapter 7 and admitted that although she had spoken with an attorney prior to the filing of the bankruptcy case, she never scheduled the claim nor amended the schedules to do so post-petition. Debtor clearly had motive to conceal claim, as any post-discharge recovery would come to her rather than to the estate. Debtor's ongoing concealment also evidenced bad faith. Debtor did not disclose these claims to the Trustee or this court until after the Defendant moved for summary judgment in state court. Debtor waited over *seven years* before notifying the Trustee and the court as to her claims. Debtor did not orally notify the Trustee at the meeting of creditors or correspond with the Trustee with how to proceed with her claims. Only after Debtor realized that her state law claims were in peril did she move to reopen the case to list the lawsuit as an asset. Debtor immediately claimed the lawsuit exempt. Debtor's actions were "too little, too late". Debtor is judicially estopped from pursuing undisclosed causes of action.

*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 the Debtor has already asserted the position that no such claim exists. Judicial estoppel will not apply (1) where the Debtor lacked knowledge of the factual basis of the undisclosed claims, and (2) where the Debtor had no motive for concealment. Debtor knew of that possible action existed before filing bankruptcy where Debtor had received "right to sue" letter from EEOC prior to filing bankruptcy and filed suit only two weeks after Chapter 7 trustee discharged and case closed. Debtor has duty to review schedules and cannot rely on alleged "error of counsel" for failing to disclose asset.

## §6.28 Future Prosecution Not Barred

*Finney v. Free Enterprise System, Inc.*, 2011 WL 1157696 (W.D. Ky. 2011) – Judicial estoppel may warrant the dismissal of a plaintiff's claim if the plaintiff fails to disclose the existence of the claim to the bankruptcy court. Judicial estoppel is inappropriate in cases of conduct amounting to nothing more than mistake or inadvertence. Court must determine whether (1) debtor lacked knowledge of the factual basis of the undisclosed claims; (2) debtor had a motive for concealment; and (3) the absence of bad faith. Debtor filed suit more than three months prior to commencement of bankruptcy case. However, debtor acted quickly to amend his bankruptcy documents once problem was disclosed and record lacks evidence of bad faith. Judicial estoppel would not apply to other debtors who lacked knowledge of possible claim before receiving discharge in Chapter 7.

*Whitten v. Fred's Incorporated*, 601 F.3d 231 (4<sup>th</sup> 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 fails to disclose causes of action in bankruptcy proceedings will generally be prohibited by the doctrine of judicial estoppel from continuing to pursue those claims. Court will not permit Debtor to obtain relief in the bankruptcy Court by representing that no claims exist and then subsequently assert those claims were Debtor's own benefit in a separate proceeding. Where Debtors amended bankruptcy schedules to disclose cause of action and trustee sought to intervene in actions and to recover for benefit of creditors, Court would not apply doctrine of judicial estoppel. Claims will be pursued by bankruptcy trustees and Debtors will not improperly benefit from failure to schedule claims.

## D. Section 542 Turnover Actions

## §6.29 Generally

*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.

## §6.30 Defenses

*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.

#### E. Sale of Assets

##### §6.31 Approval Generally

*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.

##### §6.32 Sale Free and Clear of Liens

*In re Sumner Regional Health Systems, Inc.*, 2010 WL 2521081 (Bankr. M.D. Tn. 2010) – Chapter 11 debtor-in-possession, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate and can sell all a Chapter 11 debtor’s assets when a sound business purpose. Section 363 allows sale free and clear of liens, claims and encumbrances if (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) the entity holding the interest consents; (3) the interest is a lien and the price at which the property is to be sold is greater than the aggregate value of all liens on such property; (4) the interest is in bona fide dispute; or (5) the entity holding the interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. The requirements of 11 U.S.C. § 363(f) are in the disjunctive. The sale can be approved if any one of the five factors is present. Deed which contained clause that if property is sold, the assets are to be distributed to the County did not preclude sale under non-bankruptcy law, but only controlled disposition of proceeds of sale. County could be compelled to accept a money satisfaction if its interest by receiving proceeds of sale. Finally, there was a bona fide dispute concerning the legal scope and effect of the restrictive covenant in the deed.

##### §6.33 Procedure

*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.

#### F. Prosecution of Pre-petition Causes of Action

##### §6.34 Role of Trustee and Debtor

*In re Johnson*, 409 B.R. 459 (Bankr. N.D. Ohio 2009). Chapter 13 debtor was the proper party to pursue prepetition personal injury claim. Good discussion of the roles of the debtor and the Chapter 13 trustee.

## VII. Exemptions

#### A. Exemptible Property



### §7.1 Time for Determining

*In re Wengerd*, 453 BR 243 (6<sup>th</sup> 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 (10<sup>th</sup> 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.

### §7.2 “Bankruptcy Only” Exemptions

*In re Schafer*, 2011 WL 534752 (6<sup>th</sup> Cir. BAP 2011) – Bankruptcy specific exemption statute MCL 600.5451 is unconstitutional. State can enact exemption statutes that apply to all citizens in all circumstances, but cannot create special exemptions that apply only in bankruptcy. 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 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 (9<sup>th</sup> 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.

### §7.3 Amended Claim of Exemptions

*In re Rice*, 2011 WL 3290312 (Bankr. E.D. Mi. 2011) – 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.

#### §7.4 Recovery of Avoided Transfers

*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 the debtor and recovered by the trustee under section 550 and preserved under 551 cannot be exempted. Debtor not permitted to claim exemption in property where grant of a security interest in the Mobile Home was voluntary.

#### §7.5 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.

#### §7.6 Statutory Basis for Exemptions

*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.

### §7.7 Choice of Laws

*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”.

### B. Objections to Exemptions

#### §7.8 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 the debtor is not entitled to the claimed exemption.

*In re Waller*, 424 BR 306 (Bankr. S.D. Ohio 2010), *aff'd* 2010 WL 3521956 (6<sup>th</sup> 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 (10<sup>th</sup> 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.

#### §7.9 Deadline for Objections

*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) - 30 day deadline to object to claimed exemption applies only to (1) the description of the exempted property; (2) the Code provisions governing the claimed exemptions; and (3) the amount "listed in the column titled 'value of claimed exemption'. When the objection is based on other elements in that case, the debtor's market value estimation and the estate's right to retain any value in the property beyond the value of the exempted interest the thirty-day time limit does not apply.

*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 (11<sup>th</sup> 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 (6<sup>th</sup> Cir. BAP 2009) – Objections to exemptions must be filed within 30 days of conclusion of Section 341 meeting. Where trustee ended 341 meeting without a definite statement that the meeting is not concluded, the Trustee impliedly concluded the meeting. If the Trustee seeks to hold the meeting open to a future date, the Trustee must announce that before ending the meeting. Trustee's request at the Section 341 meeting that the Debtor provide additional documents and the statement that if the documents "cause[ ] me to need any further information or need to ask any further questions, I'll contact [counsel] directly. Assuming that doesn't become necessary, I'll close your file at that time." does not constitute a declaration that the Section 341 meeting is being held open. Trustee's filing of objections to exemptions more than 30 days later was untimely and objections were overruled.

#### §7.10 Valuation of Property Claimed as Exempt

#### §7.11 Proceeds of Wrongful Conduct

*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.

#### §7.12 "In Kind" and Dollar Limitations on Exemptions

*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 Sect. 2652 (2010) – Where debtor's schedule of exempt property accurately describes the asset and declares the value of the claimed exemption in that asset to be an amount within the dollar limits that the Code prescribes, an interested party is entitled to rely upon that value as evidence of the claim's validity and need not object to the exemption in order to preserve the estate's ability to recover value in the asset beyond the dollar value the debtor expressly declared exempt. If the property has a value in excess of the amount claimed, the excess must be remitted to the Trustee even if the debtor had additional unused exemptions and could have exempted the higher value. Debtor valued certain assets at \$10,718 and claimed exemptions in those assets aggregating \$10,718. Property ultimately determined to have value of \$17,200. Debtor required to account for difference. Debtor's claimed exemption of what debtor believed to be full value of assets did not make assets exempt without regard to value. Creditors and Trustee not obligated to object because assets "might" have value in excess of amount claimed in order to preserve right to recover excess value. However, where objection is readily discernable 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 (9<sup>th</sup> 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

### §7.13 Stock Account

*Segovia v. Schoenmann*, 2011 WL 52481 (9<sup>th</sup> 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.

### §7.14 Payments as Replacement for Lost Earnings

*In re Bailey*, 2011 WL 834016 (6<sup>th</sup> 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 the debtor and debtor's dependents. "Reasonably necessary" will be based on debtor's present and anticipated living expenses; present and anticipated income from all sources; age of the debtor and dependents; health of the debtor and dependents; debtor's ability to work and earn a living; debtor's job skills, training and education; debtor's other assets, including exempt assets; liquidity of other assets; debtor's ability to save for retirement; special need of debtor and dependents; and debtor's financial obligations such as alimony and support payments. Debtor's vehicle voucher not reasonably necessary where debtor, a 56 year old disabled woman, had sufficient income and assets to support herself and had a reliable vehicle that was paid for, making it unnecessary for debtor to use voucher to purchase new vehicle.

*In re Marble*, 2010 WL 3198901 (E.D. Mi. 2010) – Debtor may exempt property traceable to payments in compensation for loss of future earnings of an individual on whom the debtor is or was a dependent. Debtor must show that annuity given as part of structured settlement of Debtor’s father’s personal injury action is traceable to payment in compensation for lost future earnings of father and that Debtor is or was a dependent of Father. Annuity did not constitute payment for lost earnings of Father where only claim made



in state court litigation on behalf of Debtor was for “lost consortium” and Michigan law did not permit a third party including a child to maintain a direct action for lost wages of a third party.

*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 the Debtor exercise over the asset? If the Debtor has discretion to withdraw from the corpus, then the contract most closely resembles a nonexempt investment. Where Debtor purchased annuity from already exempt retirement funds and did so to receive greater stream of payments once Debtor reached retirement age, Court had no difficulty finding that the monthly payments to the Debtor constituted substitutes for wages, to the same extent as wages.

*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 dependants. “Reasonably necessary” depends on factors such as (1) debtor's present and anticipated living expenses; (2) debtor's present and anticipated income from all sources; (3) the age of the debtor and his or her dependants; (4) the health of debtor and his or her dependants; (5) debtor's ability to earn a living; (6) debtor's job skills, training and education; (7) debtor's other assets, including exempt assets; (8) the liquidity of these other assets; (9) debtor's ability to save for retirement; (10) the special needs of the debtor and his or her dependants; 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 (6<sup>th</sup> Cir. 2010) - Debtor's right to receive, for up to four years, tuition reimbursement up to \$15,000.00 per year, continued health care benefits, and an annual living expense stipend, which is equivalent to 50% of the participant's annualized straight-time hourly wage at the time of termination properly claimed as exempt under 11 USC Section 522(d)(11)(E) which exempts a Debtor's right to receive "payment in compensation of loss of future earnings of the Debtor or an individual of whom the Debtor is or was dependent, to the extent reasonably necessary for the support of the Debtor or a dependent of the Debtor." Section 522(d)(11)(E) does not require bodily injury as prerequisite for exemption. Section 522(d)(11)(E) exempts all compensation for loss of future earnings. Section 522(d)(11)(D) which contemplates payment on account of personal bodily injury is clearly delineated from subsection (E) by the word "or". Any limitation under Subsection (D) to personal bodily injury does not carry through to subsection (E). Debtor's termination of her employment constitutes an event that resulted in a “loss of future earnings.” The buyout was offered as compensation for such termination. It is immaterial whether the buyout was negotiated by the parties, or whether such termination was voluntary. In either case, the buyout benefit constitutes “compensation” for loss of future earnings which are properly claimed exempt under Section 522(d)(11)(E).



*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.

#### §7.15 Undisclosed Assets

*In re Waller*, 424 B.R. 306 (Bankr. S.D. Ohio 2010), *aff'd*, 2010 WL 3521956 (6<sup>th</sup> 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 the Debtor to conceal the asset. Court found no evidence of bad faith or intent to conceal. When Debtors filed case in first instance, they had a good faith belief that Debtors would not receive a tax refund as Debtor-husband had substantial periods of unemployment and had no taxes withheld for months where Debtor husband was working. "Although the better course of action would have been for the Debtors to list their potential receipt of a tax refund, there is certainly nothing in the record to suggest that either Debtor thought they were entitled to a refund when they testified at their December 15, 2008,

first meeting of creditors." The Debtors should have acted more diligently to disclose that refund once they knew they were entitled to one. "Without these amendments (to expeditiously disclose the refund once it became known), absent extraordinary circumstances as demonstrated by the Debtor, the trustee would then have sufficient basis to object to the amendment of the schedule, including any exemptions claimed in Schedule C."

*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.

#### §7.16 Homestead

*In re Wengerd*, 453 BR 243 (6<sup>th</sup> 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 (11<sup>th</sup> 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) the debtor disposed of property within the 10 years preceding the date of filing of the bankruptcy petition; (2) the property that the debtor disposed of was not exempt; (3) some of the proceeds from the sale of the nonexempt property were used to buy a new homestead, improve an existing homestead, or reduce the debt secured by an existing homestead; and (4) the debtor disposed of the nonexempt property with the intent to hinder, delay or defraud a creditor. Debtor's failure to list all assets and transactions in the schedules and statement of financial affairs was not result of debtor's attempt to defraud creditors but resulted from poor legal advice.

*In re Morgan*, 2010 WL 4922581 (Bankr. E.D. Tn. 2010) – Debtor permitted to claim homestead exemption in real property where property was purchased using funds derived by debtor's significant other through criminal activity. Trustee presented no evidence that debtor participated in or had knowledge of the criminal source of the funds when the house was purchased. Although the significant other would not have been permitted to exempt property had he filed for bankruptcy based on the criminal source of the funds, that did not preclude the debtor in this case from claiming the homestead exemption.

*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 (10<sup>th</sup> Cir. BAP 2009) – Wife and Husband owned parcel of real property on which there was a residence in which Debtor-wife resided and a separate mobile home occupied by Debtor-husband. Kansas statute permits a Debtor to exempt property in which he lives or, in the alternative, property in which the debtor's family resides. Accordingly, Husband could exempt either his one-half interest in the mobile home in which he resided, or his one half interest in the home in which his family resided, but not both. Similarly, Wife could exempt either her one-half interest in the residence where she resided with her family or her one-half interest in the mobile home where her husband resided. The exemption statutes did not permit either debtor to individually claim as exempt an interest in both properties, as each debtor is entitled to only one homestead, but a Debtor-Husband and Debtor-Wife who are separated and have separate residences can each elect their individual homestead exemption.

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

#### §7.17 Motor Vehicles

*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.

#### §7.18 Unmatured Life Insurance Contracts

*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.

#### §7.19 Insurance Proceeds

*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 (6<sup>th</sup> 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 dependant 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.

#### §7.20 Annuities

*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 the debtor is the named owner of the annuity, the annuity is not exempt from claims of debtor's creditors.

#### §7.21 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 dependants. "Reasonably necessary" depends on factors such as (1) debtor's present and anticipated living expenses; (2) debtor's present and anticipated income from all sources; (3) the age of

the debtor and his or her dependents; (4) the health of debtor and his or her dependents; (5) debtor's ability to earn a living; (6) debtor's job skills, training and education; (7) debtor's other assets, including exempt assets; (8) the liquidity of these other assets; (9) debtor's ability to save for retirement; (10) the special needs of the debtor and his or her dependents; and (11) debtor's continuing financial obligations, e.g., alimony or support payments. Court declined to reach issue of whether debtor's use of buyout funds to purchase car rendered car non-exempt where value of car was less than amount of exemptions available to debtor under subsections other than (d)(11)(E).

*In re Lewis*, 2010 WL 2813328 (6<sup>th</sup> Cir. 2010) - Debtor's right to receive, for up to four years, tuition reimbursement up to \$15,000.00 per year, continued health care benefits, and an annual living expense stipend, which is equivalent to 50% of the participant's annualized straight-time hourly wage at the time of termination properly claimed as exempt under 11 USC Section 522(d)(11)(E) which exempts a Debtor's right to receive "payment in compensation of loss of future earnings of the Debtor or an individual of whom the Debtor is or was dependent, to the extent reasonably necessary for the support of the Debtor or a dependent of the Debtor." Section 522(d)(11)(E) does not require bodily injury as prerequisite for exemption. Section 522(d)(11)(E) exempts all compensation for loss of future earnings. Section 522(d)(11)(D) which contemplates payment on account of personal bodily injury is clearly delineated from subsection (E) by the word "or". Any limitation under Subsection (D) to personal bodily injury does not carry through to subsection (E). Debtor's termination of her employment constitutes an event that resulted in a "loss of future earnings." The buyout was offered as compensation for such termination. It is immaterial whether the buyout was negotiated by the parties, or whether such termination was voluntary. In either case, the buyout benefit constitutes "compensation" for loss of future earnings which are properly claimed exempt under Section 522(d)(11)(E).

*Gold v. Lewis*, Case No. 09-1777 (6<sup>th</sup> 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".

#### §7.22 Post-petition Assets

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

#### §7.23 Property Owned by Third Party

*In re Miller*, 427 B.R. 616 (Bankr. N.D. Ohio 2010) - Wife could not claim "wild card" exemption in motor vehicle titled solely in her husband's name, even though she drove the vehicle - Ohio law only allowed exemption of the debtor's interest in property, and she had none in the vehicle.

#### §7.24 Tools of the Trade

*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.

#### §7.25 Co-mingled and Segregated 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 the debtor. Court rejected “first in-first out” method and used “lowest intermediate balance” method to determine amount of exempt funds in bank account. Debtor received \$2,886.22 in student loan funds deposited into debtor's account and debtor's balance never fell below that amount prior to garnishment by creditor. Therefore, that balance would be deemed traceable to the student loans in which debtor properly claimed exemption.

*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.

#### §7.26 Unemployment Compensation

*In re Wyman*, Case no. 10-11404 (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.

#### §7.27 Retirement Accounts

*In re Rice*, 2011 WL 3290312 (Bankr. E.D. Mi. 2011) – 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

*Willis v. Menotte*, Case No. 10-11980 (11<sup>th</sup> 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.

#### §7.28 Inherited Retirement Accounts

*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 the debtor seeks to exempt must be retirement funds; and (2) those retirement funds must be in an account that is exempt from taxation under 401, 403, 408, 408(A), 414, 457, or 501(a) of the Internal Revenue Code. Inherited IRA does not contain anyone's "retirement funds." Debtor's Mother established the retirement account, and elected her daughter



as a beneficiary of the account. Debtor's Mother intended the funds to be for her retirement. After Ms. Heffon passed away, however, the funds passed to her beneficiary. Once Mom died, the funds could no longer be classified as anyone's retirement funds - Mother had died and was incapable of retiring further or using the funds during her retirement, and Debtor was able (in fact obliged) to take distributions from the account while both of the debtors continued to work. The funds are held in anticipation of no person's retirement and do not constitute "retirement funds." They are not segregated to meet the needs of, nor distributed on the occasion of, any person's retirement.

*Chilton v. Moser*, 2011 WL 938310 (E.D. Tx. 2011) - Individual retirement account (IRA) that Chapter 13 debtor inherited prepetition from her late mother was exempt from claims of her creditors pursuant to Bankruptcy Code exemption for sums in retirement fund or account. Funds in mother's IRA represented her retirement funds prior to her death and remained "retirement funds" following their direct transfer to account established by debtor, and inherited account was exempt from taxation under Internal Revenue Code Section 408(e). Section 522 exemption is not limited to retirement funds contributed by or constituting retirement funds of the debtor, only that the funds be retirement funds that are exempt from tax under Section 408(e). Code does not draw distinction between "ordinary" IRA and "inherited" IRA in section 522.

*In re Nessa*, 426 B.R. 312 (8th Cir. 2010) - Bankruptcy Code imposes two requirements before a debtor may claim an exemption in retirement funds: (1) the amount the debtor seeks to exempt must be retirement funds, and (2) the retirement funds must be in an account that is exempt from taxation under one of the provisions of the Internal Revenue Code set forth therein. Individual retirement account (IRA) that Chapter 7 debtor inherited from her father prepetition qualified as exempt under the Bankruptcy Code's exemption for retirement funds; it was undisputed that the amounts in the father's IRA were his retirement funds prior to his death, the contents of the father's account remained, in form and substance, "retirement funds" following their direct "trustee-to-trustee" transfer to the inherited account, even though they were not debtor's own retirement funds, and debtor's inherited account was exempt from taxation under the section of the Internal Revenue Code governing individual retirement accounts.

*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).

#### §7.29 Tax Refunds

*In re Zingale*, 2011 WL 2330271 (6<sup>th</sup> Cir. BAP 2011) – 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.

## §7.30 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 the debtor. Debtor received \$2,886.22 in student loan funds deposited into debtor's account and debtor's balance never fell below that amount prior to garnishment by creditor. Therefore, that balance would be deemed traceable to the student loans in which debtor properly claimed exemption.

## D. Liens Impairing Exemptions – Avoidance

## §7.31 Procedure

*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).

## §7.32 Grounds – Generally

*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.*, 2010 WL 5420873 (Bankr. E.D. Ky. 2010) – Judicial lien on debtor's homestead is avoidable to extent lien impairs debtor's homestead exemption. Although Wife was not on deed, Wife's execution of mortgage encumbered Wife's dower interest. Therefore, debt owed to lender holding mortgage must be deducted from value of property to determine whether judgment lien impairs homestead exemption. Property valued at \$215,000 subject to first mortgage of \$228,000 left no value for judgment lien to attach to above debtors' exemption of \$20,150.00. Judgment lien avoided.

*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.

## §7.33 Liens Avoidable – Judicial Liens

*In re Railing*, 2011 WL 3321169 (Bankr. N.D. Ohio 2011) – Section 522(f)(1)(A), a debtor with an exemptible interest in property can avoid a preexisting lien interest in the property. Lien impairs exemption and can be avoided to the extent that the sum of— (i) the lien; (ii) all other liens on the property; and (iii)

the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens. Value of property was less than combined amount of exemption plus first and second mortgages, rendering judgment lien, which was subordinate to mortgages, subject to avoidance in its entirety. Judgment based on fraud is subject to avoidance of lien as Section 522 does not distinguish between types of judgments.

*Johnson v. Cach, LLC*, 2010 WL 5296944 (E.D. Mi. 2010) – Writ of Garnishment served on State of Michigan for Debtor's future tax refunds resulted in garnishment lien attaching to future tax refunds. The garnishment is perfected once the State issues a notice of garnishment on the Debtor after the refund is known, and the debtor fails to object to the garnishment within 14 days of service of that notice. After expiration of the 14 day period without an objection, title to the refund passes to the creditor. Debtor's later filing of bankruptcy does not make refund property of estate even if the state has not actually paid it to the creditor, as the creditor is solely entitled to receipt of the refund.

*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.

#### §7.34 Liens Avoidable – Non-Possessory Non-Purchase Money

*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.

#### §7.35 Effect of Avoidance

*LPP Mortgage, Ltd. v. Brinley*, 547 F.3d 643 (6<sup>th</sup> Cir. 2008) – Upon entry of order voiding judgment lien, entire unencumbered equity in property becomes property of the estate subject to Debtor's right to claim an exemption. Action to avoid judicial lien does not vest in Debtor the unimpaired title to the property free and clear of claims of the bankruptcy estate.

### VIII. Claims

#### A. Specific Claim Types

##### §8.1 Administrative

*In re Wolff*, 2010 WL 4959949 (Bankr. E.D. Tn. 2010) – Parties seeking payment of administrative expenses under Section 503(b) must prove that they are entitled to such priority treatment by a preponderance of the evidence, just as it is within the court's discretion whether to allow an administrative

expense. Claims for administrative expenses are strictly construed because priority claims reduce the funds available for creditors and other claimants. Debtor's attorney who continued to perform services for debtor post-petition not entitled to administrative claim against estate. Attorney hired by Trustee will be compensated as administrative expense, but attorney hired by debtor is not hired by Trustee and does not represent estate.

*In re Stokes*, 2010 WL 3980232 (Bankr. E.D. Tn. 2010) – Post petition property taxes held to be administrative claim in Chapter 13 case. Section 502(b)(1)(B)(i) allows administrative claim status for any taxes “incurred by the estate” whether in rem, in personam, or both, except for property taxes assessed or assessable prior to commencement of case. Taxes are deemed “incurred” when the tax liability accrues and becomes a fixed liability. Confirmation Order provided that the property would remain vested in estate. Property taxes for year in which case was filed would be pre-petition taxes as the tax obligation vested as of January 1 of that year. Taxes that accrued on January 1 of each of the three years after confirmation of the Plan constituted post-petition administrative expenses pursuant to Section 503. Had the property vested in the debtor at confirmation, the liability would have been one of the debtor's and not an administrative expense of the estate subject to the filing of a claim under Section 1305.

*Pikeville Energy Group, LLC v. Spradlin*, Case No. 09-8074 (6th Cir. BAP 2010) - Post-petition lender who failed to obtain court permission before providing financing and then repeatedly stated to the court that lender would not seek administrative expense claim estopped from administrative claim. Subsequent conversion of case to Chapter 7 does not alter conclusion that creditor's repeated statements during Chapter 11 proceeding estopped administrative claim.

*Burival v. Roehrich*, 2010 WL 2882222 (8<sup>th</sup> Cir. 2010) – Debtor who rejects unexpired lease of non-residential real property must perform all obligations arising after the date of Petition. Rent obligations that accrue between Petition and rejection of executory contract must be performed when they arise. Post-petition pre-rejection obligation is not limited to value of the estate up through the date of rejection. Unpaid rent that accrued between petition and rejection is entitled to administrative priority pursuant to Section 365(d)(3) for the full amount of the rent not paid.

*National Union Fire Insurance Co. v. VP Buildings, Inc.*, 606 F.3d 835 (6<sup>th</sup> Cir. 2010) – Section 503 affords administrative priority only for expenses that are actual and necessary costs and expenses. Expenses must arise from a post petition transaction with the debtor and must directly and substantially benefit the estate. Debtor's Workers Compensation Insurance provided that when an employee suffered a covered loss, the insurer would pay the claim and would seek reimbursement from Debtor. Employees injured during course of Chapter 11 proceeding would continue to receive benefits even after Company liquidated in Chapter 11 proceeding. Although parties agreed that the insurance benefitted the estate and that the contract between Debtor and the insurer was a post-petition contract, the claim was not “actual” and did not afford any benefit where claim consisted of a claim for reimbursement of future workers compensation benefits not actually paid during course of Chapter 11 proceeding. Expenses necessarily incurred post-confirmation are not “actual and necessary” costs of administering the estate.

*American Express Bank v. Askenaizer*, 418 BR 495 (1<sup>st</sup> Cir. BAP 2009) – Allowed claims are paid in order of distributional priority set forth in Section 726(a). Creditor seeking administrative treatment has burden of proving elements that qualify claim for that status.

*In re Black Diamond Mining Company, LLC*, Case No. 08-70066 (Bankr. E.D. Ky. 2010) – Section 503 affords administrative priority only for expenses that are actual and necessary costs and expenses. Expenses must arise from a post petition transaction with the debtor and must directly and substantially benefit the estate. Court need not reach the issue of whether wrongful termination claim would constitute “administrative expense” where terminated employee was an at will employee subject to termination for cause, no cause, or even a cause that some might view as morally indefensible. Terminated employees claim for alleged wrongful refusal to pay a bonus was not administrative claim where bonus payments that were made to other employees were both earned and accrued prepetition and, therefore, constitute prepetition unsecured claims.

*McMillan v. LTV Steel, Inc.* 555 F.3d 218 (6<sup>th</sup> Cir. 2009) – Laid off steelworker did not have administrative expense claim for pension benefits that allegedly vested prior to commencement of company’s Chapter 11 proceeding. Administrative expense claims are limited to expenses that arise from transactions with bankruptcy estate and that directly and substantially benefit the estate. Claims must arise after the Debtor filed for bankruptcy in order to be accorded administrative expense priority. Pension benefits that allegedly vested or arose prepetition cannot constitute an administrative expense. Further, “retirement benefits” as used in Section 1114(e)(2) do not include pension benefits. “Retirement benefits” include only “payments to any ... person ... for the purposes of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program” that is “maintained or established in whole or in part by the Debtor prior to filing a petition commencing a case under this title.” A pension plan, while “maintained or established” by the Debtor prior to filing, does not provide payments for medical, surgical, or hospital-care benefits as required by section 1114. Section 1114 does not apply to a program that administers only pension benefits.

*In re Tillim, LLC*, Case No. 08-42316 (Bankr. E.D. Mi. 2008) – Creditor’s Motion for Administrative Claim denied where Motion did not reflect the service on all creditors and parties in interest. Service on ECF creditors only does not constitute proper service.

*In re Plastech Engineered Products, Inc.*, Case No. 08-42417 (Bankr. E.D. Mi. 2008) – Administrative expense status is available for goods sold to the Debtor only when the goods themselves are delivered to the Debtor and not merely because the Debtor “received” the value of the goods. Within 20 days of the filing of the case, creditor sold goods to the Debtor in the ordinary course of business but shipped the goods to a third party with whom the seller had no contractual relationship. Section 503(b)(9) does not support an administrative expense status unless the Debtor actually receives the goods, not just “constructively receives” the goods.

*In re Plastech Engineered Products, Inc.*, Case No. 08-42417 (Bankr. E.D. Mi. 2008) – Section 502(d) cannot be used to disallow administrative expense claim under Section 503(b)(9), which (as amended by BAPCPA) allows administrative expense status to any claim for the value of goods received by the Debtor within 20 days prior to the filing of the case. Section 503(b)(9) as amended greatly expands the expenses of administration of the estate by sweeping in goods received prior to the commencement of the case. Section 502(d) allows a claim to be denied if the creditor received an avoidable transfer. However, the power to disallow a claim under 502(d) is limited to claims filed under Section 501 and does not allow a Court to disallow a 503(b) administrative expense claim in general and Section 503(b)(9) claims in particular.

*In re Plastech Engineered Products, Inc.*, Case No. 08-4217 (Bankr. E.D. Mi. 2009) - Administrative expenses related to lease of real property from petition date until the lease is rejected are limited to obligations that arise from and after the order for relief. Obligations that occurred pre-petition, including damages to the leased premises that occurred pre-petition, are not entitled to administrative expense status, even if the lease required the property to be maintained in good condition. Creditor is entitled to administrative expense claim for damages that occurred in the first instance on or after the petition date but not for pre-existing damages that are not repaired or remediated after the petition date. Finally, obligations that do not arise until after surrender of the property are not entitled to administrative expenses as the breach could have occurred only post-rejection.

*Zurich American Insurance Company v. Lexington Coal Co., LLC* - 536 F.3d 683 (6<sup>th</sup> Cir. 2008) - Court denied administrative expense status for claim for "estimate of deductible portion of the claims that [insurer] believes it will pay in the future for injuries that occurred during the coverage period but were not the subject of insurance claims until after confirmation" of the plan. Administrative expense claims are limited to those for actual, necessary costs and expenses of preserving estate. Potential future deductible claims would not arise until after confirmation of plan and not constitute claims or expenses of the estate.

*In re Arts Dairy, LLC*, 2009 WL 1758760 (Bankr. N.D. Ohio 2009) – Party entitled to administrative claim expense for goods sold to Debtor in ordinary course of business and received by Debtor within 20 days



prior to commencement of bankruptcy. However, party not entitled to immediate payment of that administrative expense. Chapter 11 requires only that administrative expense claims be paid in full at confirmation of the Plan. Court has discretion to order earlier payment of administrative expense claim based on analysis of prejudice to Debtor, hardship to claimant, and potential detriment to other creditors from earlier payment. Evidence failed to indicate any hardship to creditor and amount of administrative expense claim was minor compared to assets of Debtor and annual operating revenue. Immediate payment could prejudice secured creditor which holds blanket lien on all assets including cash collateral. Only source of payment of administrative expense claim would be from assets subject to security interest, and Court could not conclusively determine that remaining assets would be sufficient to pay secured claim in full.

*United Mine Workers Of America 1974 Plan and Trust v. Lexington Coal Company, LLC.*, 2008 Fed App 0018P (6<sup>th</sup> Cir BAP 2008) – To qualify as an administrative expense, the claim must be for the actual and necessary costs and expenses of preserving the estate, to facilitate the continued operation of Debtor's business by encouraging third parties to provide necessary goods and services. A debt is not entitled to administrative expense priority simply because the right to payment arose after the Debtor-in-Possession began managing the estate. A debt may qualify as an administrative expense only if it arose from a transaction with the bankruptcy estate and directly and substantially benefited the estate. Claim against Debtor resulting from withdrawal from pension plan did not occur until two years after Debtor filed Chapter 11 and after Debtor had ceased operations. The liability neither directly nor substantially benefited the estate. To be "direct" requires that the claim have an "immediate" impact on the estate free from any compromising or impairing element. To be "substantial", the benefit must be "important" or "essential". While there is no doubt that the post-petition work of Debtor's employees would be entitled to administrative status, the withdrawal liability claim does not relate directly to work performed by Debtor's employees post-petition. The existence and amount of any withdrawal liability claim is always dependent upon factors that are not directly related to the post-petition work of Debtor's employees as the amount of the withdrawal liability depends on the unfunded vested benefits at the time of the withdrawal which, in turn, is driven by a myriad of factors including interest rate assumptions, investment returns and actuarial methods. These intervening factors distinguish withdrawal liabilities from obligations such as wages that have a direct causal link to the employees' post-petition work or to normal post-petition contributions to the employee pension plan.

*Shapiro v. Meridian Automotive Systems, Inc.*, Adv. No. 08-4495 (Bankr. E.D. Mi. 2008) – Potentially preferential transfers made to a Chapter 11 Debtor during pendency of Chapter 11 case and prior to confirmation of Chapter 11 plan constituted administrative expenses of Chapter 11 estate. Transferor's failure to file an administrative claim in the Chapter 11 prior to the administrative claim bar date precluded a later action in the transferor's Chapter 7 bankruptcy proceeding to recover those transfers. Although administrative expense claims are generally limited to matters which directly and substantially benefit the estate, Courts have broadly interpreted Administrative expense claims to include claims based on tort including alleged preferential transfers. Liability on a preferential transfer claim is an ordinary cost of doing business, just as are product liability claims and claims for personal injury and, therefore, qualify as administrative expense claims which are waived if not asserted in the Chapter 11 proceeding.

## §8.2 Environmental

*US Bank, N.A. v. US Environmental Protection Agency*, 563 F.3d 199 (6<sup>th</sup> Cir. 2009) – Debtor is responsible for environmental waste releases that occurred before Debtor acquired the plant that produced the waste under statutory obligation of successor liability. Further, the asset purchase agreement by which the Debtor acquired the plant provided that Debtor expressly assumed all liabilities and obligations of the seller, which would include all environmental claims that arose under seller's control. Court may apportion environmental liability where two or more entities contribute to an environmental waste issue and the harm is divisible. Here, Debtor failed to demonstrate that its contribution to the environmental harm was divisible or could be calculated independent of the harm caused by other entities or where there was a reasonable basis to determine the contribution of separate causes to a single harm. Therefore, Debtor was fully responsible for all clean up costs, jointly and severally with other entities that also contributed to the



waste but whose contribution was not divisible. Bankruptcy Court properly allowed EPA claim for already incurred costs of clean up plus estimated future costs of clean up.

### §8.3 Secured - Generally

*In re Cashman*, 2011 WL 1565189 (Bankr. D. Hawaii 2011) – Claim against automobiles in which debtors had interest jointly with parents is secured claim even though debtors are not personally obligated on the notes. Auto loans are secured by debtor’s interest in the automobiles and that interest becomes property of the estate.

*Hardesty v. Huntington National Bank*, 2011 WL 1322880 (Bankr. S.D. Ohio 2011) – Mortgage that identified only husband as “borrower” and “mortgagor” encumbered only husband’s undivided one half interest in property owned jointly by husband and wife. Wife’s signature on bottom of mortgage did not make her a “borrower” or “mortgagor” where terms were defined solely to refer to husband.

*In re Pierson*, 447 BR 840 (Bankr. N.D. Ohio 2011) – Secured claim based on alleged assignment of future benefits under military pension not invalid where loan documents did not purport to transfer title to future benefits to creditor. Loan documents required debtor to deposit pension payments into specified bank account against which creditor held security interest. Debtor retained full control over pension including decision as to whether to deposit funds into designated account. Purported security agreement did not violate statutory prohibition against assignment of military pension. However, claim was secured solely by funds in designated account. Where account had no money in it as of date of petition, there was no collateral to secure debt and obligation is entirely unsecured.

*In re Carouthers*, 2011 WL 2181383 (Bankr. W.D. Mi. 2011) – Plan that confirmed claim of Credit Union as unsecured was binding on creditor, notwithstanding that creditor held a security interest in debtors’ vehicle. Although Debtors’ plan did not specifically name Credit Union as unsecured creditor, creditor was listed in Schedule F and plan specifically identified all creditors treated as secured, leaving Credit Union treated as unsecured creditor by implication. Credit Union failed to object to plan and plan was confirmed. Credit Union could not obtain relief from stay to assert security interest post-confirmation.

*In re Beck*, Case No. 10-64377 (Bankr. E.D. Mi. 2011) – A claim is secured only to the extent of the debtor’s interest in the property. Claim secured by Property that is not owned by the debtor is not a secured claim. Debtor’s personal liability on note that is secured by property owned by LLC is a general unsecured claim. Plan cannot be confirmed that proposes to treat debt as secured.

*Akers v. Citimortgage, Inc.*, 427 B.R. 408 (Bankr. W.D. Ky. 2010) - Properly executed mortgage or security agreement is enforceable between debtor and creditor even if not properly recorded.

*Lindsay v. Covenant Management Group, LLC*, 561 F.3d 601 (6<sup>th</sup> Cir. 2009) – Lender is not prohibited from charging interest on capitalized “discount fee” where loan agreement expressly allows interest to be charged. Although “discount fee” may arguably be treated as “pre-paid interest”, there is nothing under Michigan Law that prohibits charging interest on that fee. Further, agreement could not be usurious under Michigan law because Michigan law expressly excepts from usury concerns any loan that is more than \$100,000 and secured by property other than a principal residence. Lender also not required to apply extension fee to reduce principal where Loan Modification Agreement “plainly listed” the fee as consideration for lender’s forbearance and subordination of loan.

*Limor v. First National Bank of Woodbury*, 2009 WL 2208582 (Bankr. M.D. Tn. 2009) - Bank which held pledge of checking account to secure debt lost security interest when, after Debtor filed Bankruptcy, allowed Debtor to withdraw all money and close the account. Bank failed to exercise its right to freeze the account for purposes of setoff. Under Tennessee law, security agreement in deposit account perfected only by control of the account. Bank loses security interest when it releases the funds unless the transferee acts in collusion with the Debtor in violating the rights of the secured party.

### §8.4 Secured – Method of Perfection

*Gold v. Pasternak*, Adv. No. 11-5504 (Bankr. E.D. Mi. 2011) – Financing statement must be filed to perfect security interest in inventory. Financing statement must be filed in the name of the debtor. Financing Statement filed under name of Corporation’s “registered trade name” is not filed under Corporate name and is not sufficient under Michigan law. Registration by Corporation of Assumed Name does not make Assumed name the Corporate Name.

*Higgason v. Vanderbilt Mortgage and Finance, Inc.*, 2011 WL 4433620 (Bankr. E.D. Ky. 2011) – To perfect lien in manufactured home that is not affixed to realty, title lien statement is submitted to the county clerk of the county of the debtor's residence which will then note the security interest on the certificate of title by entering the information into State computer system and produce a certificate of title. Lien not properly perfected where lien was not noted on certificate of title prior to commencement of case. Further, even if lien had been noted, lien was not properly perfected where title lien statement was filed in county other than the one in which debtor resided. Trustee avoided lien under Section 544.

*Higgason v. HSBC/Kawasaki*, 2011 WL 3878336 (Bankr. E.D. Ky. 2011) – All-Terrain Vehicle constitutes consumer good. Purchase using HSBC credit card constituted purchase money security interest in a “consumer good” that is automatically perfected. A consumer good is anything purchased for household or personal use and that is movable on the date on which the security interest arises. Trustee could not avoid lien on ATV.

*In re Adkins*, 444 B.R. 374 (Bankr. N.D. Ohio 2011) - Under Ohio Uniform Commercial Code, creditor had no purchase money security interest in windows once they were installed in debtors' residence. Fixtures are excepted from purchase money security interest if they are ordinary building materials incorporated into improvement on land where alleged secured creditor did not hold a mortgage on the underlying realty or improvements located on the property.

*In re Boston*, 2010 WL 5128960 (Bankr. D.S.C. 2010) - Amended car loan agreement that changed material terms but did not describe collateral or contain sufficient detail to stand alone as a new security agreement was "mere modification" of original contract, not "refinancing," and was entitled to purchase money status. Debtors purchased car in September 2007, modified the contract in January of 2008, then filed Chapter 13 in December of 2009. The Amendment changed several material terms of the Contract, including the annual percentage rate of interest, the payment amount, the number of payments, the date for payment, and the maturity date of the loan but no additional funds were advanced and no new note or security agreement was executed and the Amendment did not describe or otherwise reference the collateral for the loan. Amendment was modification of the original Contract and not a new agreement resulting in continuation of original purchase money security interest in the Vehicle.

*Palmer v. Vanderbilt Mortgage and Finance, Inc.*, 2010 WL 5421148 (Bankr. E.D. Ky. 2010) – Lender’s recording of lien on mobile home with the county clerk in a county other than the county in which the debtor resided failed to comply with State law regarding perfection, leaving lien unperfected and subject to avoidance under Section 544 and Section 550.

*Keisler v. Mission Compound, LLC.*, 2010 WL 4627892 (Bankr. E.D. Tn. 2010) – Security interest in stock is created by execution of a document that purports to grant a security interest. The document does not need to be captioned “Security Agreement” or any other specific term as long as the document contains the requisite granting language. Where multiple documents are executed contemporaneously, those documents may be construed together to grant a security interest even though no one document contains the necessary granting language. The security agreement becomes perfected when the stock certificates are delivered to the secured lender. Possession of the stock certificates without a written agreement creating a security interest is ineffective to create a security interest. Where debtor pledged stock as security for loan from consortium of lenders, security interest was created and perfected as to entire consortium even though granting language identified only the “lead” lender and the stock certificates were delivered only to the lead lender. Loan documents provided that all lenders in consortium would have same rights and stand *in pari passu*, indicating intent that all lenders would benefit from security interest. Pledge and delivery to lead

lender necessarily included pledge to and for benefit of all lenders in consortium, and not just the lead lender.

*Boyd v. Direct Capital Corp.*, 2010 WL 4259981 (Bankr. W.D. Mi. 2010) – Creditor who failed to disclose lien on certificate of title to motor vehicle did not hold perfected security interest by virtue of security agreement. Security agreement was sufficient as matter of New Hampshire law to create security interest which included motor vehicle. Although Security Agreement did not expressly reference “motor vehicles” the general inclusion of “consumer goods” was sufficient as the vehicle was purchased primarily for personal, family or household use. The term “goods” is not akin to “all assets” and “all property” so as to be so generic as to be meaningless and ineffective. The latter terms are broader than the term “goods” and include both tangible and intangible property. In contrast, the term “goods” substantially narrows the universe of collateral by eliminating such common commercial collateral as “general intangibles,” “accounts,” “chattel paper,” “money” and many other important categories of collateral. In addition, unlike the words “assets” and “property,” the term “goods” is defined in the UCC. Creditor’s seizure of the automobile prior to commencement of the bankruptcy case was not conversion as creditor had a lawful right of possession as the holder of a valid security agreement.

*In re Johnson*, 2010 WL 4235399 (Bankr. E.D. Mi. 2010) - Debtor validly pledged disability benefits to secure loans prior to commencement of bankruptcy. Debtor's right to receive disability benefits is a "contract right" within the scope of the pledge as either an "account receivable" or "general intangible". Spendthrift clause that prevents assigning rights or interests is not enforceable to the extent it purports to prohibit or restrict creating of security interest in an account or general intangible. Disability benefits are not "insurance" for purposes of Article 9 of the Uniform Commercial Code as "insurance" requires payment of a premium by the insured. In this case, the premiums were paid by debtor's employer depositing funds into a self-funded trust for payment of benefits, without any insurance policy, insurance company, named insured, or premiums. ERISA does not pre-empt assignment of employee welfare benefit plan. ERISA does pre-empt assignment of pension plan only.

*Mason v. Szerwinski*, 2010 WL 3074389 (Bankr. N.D. Ohio 2010) – Whether mortgage or security interest is properly perfected depends on whether proper notice has been recorded in appropriate location as defined at state law. Documents required and location of recording depend on nature of collateral. Property generally falls into one of three categories – chattel, fixture and real property. Perfection of interest in Chattels requires filing of Financing Statement with Secretary of State. Perfection of Mortgage on real property is perfected by recording a mortgage that complies with state law in the County Register of Deeds. Perfection of a security interest in fixtures is also perfected by recording in County records. Chattels are goods that are movable. But chattels also include goods that are for temporary purposes somewhat attached to the land. “Fixtures” are goods that have become so related to particular real property that an interest in them arises under real property law and requires actual annexation to the realty or something appurtenant thereto; application to the use or purpose of that part of the realty with which it is connected, and the intention of the party making the annexation, to make the article a permanent accession to the freehold. However, if the articles which are annexed to realty become so absorbed within it by virtue of the method and degree of annexation, and their adaptability to the use of the realty, their identity as personalty may be said to be destroyed and they become fixtures, regardless of the intention of the parties. The same article may be a fixture under certain circumstances and a chattel under others. The term “fixture” and the phrase “improvement to real property” are not synonymous. A fixture is often thought of as a former chattel which, while retaining its separate physical identity, is so connected with the realty that a disinterested observer would consider it a part thereof. An improvement after being installed, loses its identity separate from the overall system or building in which it is located and becomes part of the realty. Properly recorded Mortgage that encumbered realty and all fixtures “now or hereafter” attached to the land constituted perfected lien as to later constructed cottages sufficient to defeat Trustee’s strong arm power under Section 544, where the cottage was constructed on site and never had an independent identity before it was installed on the property and had a basement making it is well-integrated with difficult to remove from the property.

#### §8.5 Secured – Description of Collateral

*In re D & L Equipment, Inc.*, Case No. 10-72623 (Bankr. E.D. Mi. 2010), *aff'd* 2011 WL 3946814 (E.D. Mi. 2011) – Financing statement must provide name of debtor; provide name of secured party or representative of secured party; and description of collateral covered. Description is sufficient if it reasonably identifies what is covered, whether by specific listing, category, or type of collateral covered. Financing statement that identified collateral as “inventory” would be sufficient to place party on notice. Recorded transfer of Financing Statement that changed identity of secured party from CIT to Wells Fargo sufficient to cause third party to inquire as to obligations owed to Wells Fargo secured by inventory, whether loans were made by CIT or by Wells after assignment of Financing Statement recorded. Reasonable person would have notice and would have duty to inquire as to exactly what inventory was covered rendering description sufficient for purposes of perfection of security interest.

#### §8.6 Secured – Priority of Competing Secured Claims

*Thomas v. Citimortgage, Inc.*, Adv. No. 11-5227 (Bankr. E.D. Mi. 2011) – Court is not bound by respective priorities of mortgages at time case filed. Creditors' post-petition subordination agreement by which second recorded mortgage was elevated over first recorded mortgage effectively adjusted priorities to reflect priorities intended by Debtor and creditors at time new first mortgage was granted.

*Fifth Third Bank v. JPMorgan Chase Bank, N.A.*, 2011 WL 30770 (W.D. Ky. 2011) – Mortgage executed by one trustee valid even where not signed by other co-trustee where trust agreement allowed either trustee to individually mortgage or encumber property.

*All Points Capital Corp. v. City of Cheyboygan*, Case No. 09-2007 (Bankr. E.D. Mi. 2010) – Court unable to determine on Summary Judgment relative priorities of secured interests where issues involved lengthy and complex series of agreements that were ambiguous on critical terms and points.

*LaSalle Bank v. Lim*, 2009 WL 2891229 (Bankr. E. D. Mi. 2009) – Mortgage recorded second in time will be granted first mortgage status where both mortgages were executed at the same time, both mortgagees were aware of the granting of the other mortgage, and the second recorded mortgage was the “purchase money” mortgage while the first recorded mortgage was a “construction loan”. Court concluded that if the construction mortgage had been granted prior to the purchase money mortgage, under Michigan law the construction mortgage would not take effect until acquisition of the property had been completed which would not occur until after the purchase money mortgage had been granted and titled vested in the purchaser. If the purchase money mortgage was granted first, that mortgage would have priority over the construction mortgage because the construction mortgagee had actual notice of the purchase money mortgage. Under either circumstance, the priority of the mortgages would not be governed by the time of recording of those mortgages.

#### §8.7 Secured – Attorney Fees

*In re Criegler*, 2011 WL 1344497 (Bankr. E.D. Ky. 2011) – Holder of property tax certificates is secured creditor. As oversecured creditor, holder is entitled to interest and reasonable attorney fees, including fees incurred both pre- and post-petition. Chapter 13 Plan that failed to treat post-petition interest and post-petition attorney fees could not be confirmed.

*In re Makris*, 2011 WL 499948 (D.N.J. 2011) – Oversecured Creditor was entitled by note to reasonable fees, including fees for litigation over whether attorney fees were appropriate—withstanding that some issues were decided adverse to creditor. Attorney fees are not denied simply because legal actions taken by secured creditor were unsuccessful. Note provided for fees related to creditor's enforcement of note to extent not prohibited by applicable law. This contractual language entitled creditor to litigation fees for all reasonable actions taken to enforce the note without cap or limitation, and including fees for litigating entitlement to and amount of fees. Fees on fees are generally allowed under fee-shifting provisions, whether those provisions arise under contract or statute. Attorneys' fees under Section 506(b) will not be denied solely because legal actions taken by a secured creditor are unsuccessful, as long as those actions were reasonable at the time taken.

*State of Montana, Department of Revenue v. Duncan*, 2010 WL 4903952 (9<sup>th</sup> Cir. 2010) – Governmental Agency holding undisputed oversecured claim not entitled to recover attorney fees paid to outside counsel where Agency also had three salaried attorneys also working on case. Work performed by outside counsel did not affect in any way the outcome of the case. Agency could not demonstrate under circumstances of case that fees incurred for outside counsel were “reasonable”.

#### §8.8 Secured – Interest Rate

*In re Meyhoeffer*, 2011 WL 2580043 (Bankr. N.D.N.Y. 2011) – Creditor who purchased property tax certificates is the holder of a tax claim pursuant to Section 511. Creditor entitled to interest at certificate rate without modification or adjustment for *Till*. Plan that proposed to modify interest rate from statutory 12% to 6% could not be confirmed.

*In re Dimery*, 2011 WL 2470057 (Bankr. N.D. Ohio 2011) – “Formula approach” adopted by Supreme Court plurality in *Till* requires court to use national prime plus appropriate “risk” factor. Sixth Circuit has indicated at least in dicta that Courts should use *Till* formula. Court used prime of 3.25% plus 2% “risk” adjustment.

*First United Sec. Bank v. Garner*, 2011 WL 93763 (M.D. Ala. 2011) - Oversecured creditor was entitled to contract rate of interest until confirmation, then prime-plus rate established by *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (May 17, 2004). Section 1325(a)(5)(B)(ii) is more specific than § 506(b) and fixes cutoff date for accrual of contract interest at effective date of plan.

*In re Blanton*, 2010 WL 4503188 (Bankr. N.D. Ohio 2010) - “Formula approach” adopted by Supreme Court plurality in *Till* requires court to use national prime plus appropriate “risk” factor. Sixth Circuit has indicated at least in dicta that Courts should use *Till* formula. Court rejected both the contract rate approach and the “prime with no risk adjustment” approach. Court used prime of 3.25% plus 2% “risk” adjustment.

#### §8.9 Secured – Cross Collateralization

*In re McGregor*, 2011 WL 2173732 (Bankr. D.S.C. 2011) – Credit Card that is cross-collateralized with loan secured by debtor’s motor vehicle is secured debt. Lien passed through Chapter 7 discharge unaffected and fully enforceable. Debt remains secured in subsequent Chapter 13 to extent of value of debtor’s vehicle and must be paid as a secured claim.

#### §8.10 Injunctions

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

#### §8.11 Income Taxes

*In re Krause*, 2011 WL 3879480 (Bankr. E.D. Tn. 2011) – IRS’s proof of claim that alleged only that debtor did not file tax returns but alleged no facts about the debtor’s income did not contain sufficient facts to support claim. Debtor acknowledged receipt of income for tax years in question but contended that debtor was not required to file returns as amount of income was insufficient to trigger requirement. IRS requirements state that person is not required to file a return if the gross income is less than the exemption amount plus basic standard deduction. IRS publication for years in question stated that a person is not required to file a return if the person is “single”, under age 65, and had gross income of less than \$8,200. Debtor’s un rebutted testimony that Debtor earned only \$7500 per year for two years in question sufficient to rebut IRS claim. Claim disallowed.



*U.S. v. Krause*, 2011 WL 1206178 (10<sup>th</sup> Cir. 2011) – Federal Tax Lien attached to property debtor fraudulently transferred prior to recording of lien. Tax lien attaches to the taxpayer's interest in property or rights to property. Under state law, transferor of property fraudulently transferred retains equitable title which is subject to attachment by creditors.

*In re Sencyszyn*, 2011 WL 500060 (E.D. Mi. 2010) – So called “straddle tax claim” for 2009 taxes constitute pre-petition claim in Chapter 13 filed in March, 2010. Although Tax Return is not due until April 15, the taxes “become payable” as of the end of the relevant tax year. Debtor can provide for treatment of this priority claim in the plan.

*In re Turner*, 420 BR 711 (Bankr. E.D. Mi. 2009) – Debtor has standing to file claim on behalf of governmental agency for pre-petition taxes if the taxing authority fails to do so. However, only governmental agency can file claim for post-petition taxes pursuant to Section 1305. Debtor filed for Chapter 13 on January 13, 2009. Tax liability for 2009 would be post-petition tax claim under Section 1305. Section 1305 provides that only the governmental agency can file a claim for taxes that “become payable” while the case is pending. Taxes do not “become payable” until April 15 of the year following the tax year. “Payable” requires that the obligation be justly due and legally enforceable. Even though the tax liability may become fixed and determinable as of January 1, the taxpayer is not actually required to pay until April 15. Section 101(5)(A) definition of “claim” does not control because Section 101(5)(A) does not require the obligation to be “payable” while Section 1305 expressly includes that requirement. Tax claim would be post-petition for which Debtor is not permitted to file a claim and the governmental agency has the option of filing the claim and participating in the estate or pursuing its collection rights outside the scope of the bankruptcy case.

*In re Wilson*, Case No. 10-45791 (Bankr. E.D. Mi. 2010) - The State's "right to payment" did not arise until April 15 and, therefore, the "claim" did not arise until April 15, well after the commencement of the cases. Section 507(a)(8) gives priority status to any claim that is measured by income for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due after three years before the date of the filing of the Petition. “Straddle” tax liabilities are “measured by income” for a tax year ending prior to the commencement of the Case - the Debtor's income in 2009 certainly predates the filing of the case in 2010. The last date on which the Debtor could timely file a return would have been April 15, 2010, a date that is after a date that was three years prior to the commencement of the. Thus, the Debtor's tax obligation for the year 2009 constituted a "priority" tax claim under Section 507. Section 502 provides that any claim that arises after commencement of the case for tax that is otherwise entitled to priority is determined and allowed as if the claim had arisen before the date of the Petition. Section 1322 requires that the Debtor's Plan provide for full payment of all allowed priority claims over the life of the Plan.

*In re Hight*, 426 BR 258 (Bankr. W.D. Mi.) *aff'd* 434 BR 505 (W.D. Mi. 2010). The State's "right to payment" did not arise until April 15 and, therefore, the "claim" did not arise until April 15, well after the commencement of the cases. Section 507(a)(8) gives priority status to any claim that is measured by income for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due after three years before the date of the filing of the Petition. “Straddle” tax liabilities are “measured by income” for a tax year ending prior to the commencement of the Case - the Debtor's income in 2009 certainly predates the filing of the case in 2010. The last date on which the Debtor could timely file a return would have been April 15, 2010, a date that is after a date that was three years prior to the commencement of the. Thus, the Debtor's tax obligation for the year 2009 constituted a "priority" tax claim under Section 507. Section 502 provides that any claim that arises after commencement of the case for tax that is otherwise entitled to priority is determined and allowed as if the claim had arisen before the date of the Petition. Section 1322 requires that the Debtor's Plan provide for full payment of all allowed priority claims over the life of the Plan. “[Sections] 502(i), 507(a)(8) and 1322(a)(2) ... establish a Congressional intent to treat taxes on income for the taxable year preceding the bankruptcy cases prepetition claims and to bring those claims into the bankruptcy plan.”

#### §8.12 Corporate Tax Liabilities



*Quiroz v. State of Michigan*, 450 B.R. 699 (Bankr. E.D. Mi. 2011) – Michigan’s Single Business Tax is an excise tax on a “per transaction” basis and is entitled to priority status under Section 507(a)(8)(E). Michigan law allows assessment of corporate taxes against corporate officers who have control or supervision of, or are responsible for paying, corporation’s taxes. Debtor, as principal of corporation, was personally responsible for payment of Corporate Single Business Tax.

*Noronha v. IRS*, 352 Fed.Appx. 18 (6th Cir. 2010). Chapter 13 debtor was a person responsible for paying corporation’s withholding taxes - she was 50% owner of the company (her husband owned the other 50%), and she was secretary-treasurer.

#### §8.13 Pre-Petition Attorney Fees

*Budzynski v. Stephens*, Case No. 10-4230 (Bankr. E.D. Mi.), *aff’d* 2010 WL 4286186 (E.D. Mi. 2010) – Attorney may assert charging lien either a general or retaining lien, which requires possession by the attorney of the money, documents or other property of the clients until the debt is paid; or a charging lien which arises of the recovery in particular litigation and attaches to the property or settlement obtained as a result of attorney services. Charging liens cannot attach to real property even where the litigation establishes title or recovers title to or possession of the property for the client absent an express agreement between the parties providing for such a lien. Attorney not entitled to charging lien for services rendered in unsuccessful Chapter 11 against rental stream produced by debtor’s rental property where debtors owned the rental property prior to the commencement of litigation. The rental property and the stream of income received from that property were not the “proceeds or property” derived by the litigation. The property and the rental stream were, at best, tangentially involved only to the extent they were included as assets in the Chapter 11.

*In re Solis*, 2010 WL 2696518 (7<sup>th</sup> Cir. 2010) – Chapter 7 Trustee has standing to object to claim by debtor’s pre-petition state court counsel for unpaid attorney fees based on contingency fee agreement. Attorney entitled to contingency calculated on amount recovered as a result of acts of attorney. Attorney is not entitled to contingency fee based on partial recovery achieved by debtor before he retained attorney.

#### §8.14 Pre-petition Divorce Judgment

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

#### §8.15 Priority – Domestic Support Obligations

*In re Nelson*, 2011 WL 1549008 (Bankr. D. Or. 2011) – Domestic support obligation is a debt owed to a spouse or former spouse that is “in the nature of alimony, maintenance, or support ... without regard to whether such debt is expressly so designated”. Factors to be considered include whether the recipient spouse actually needed spousal support at the time of the divorce which requires looking at whether there was an imbalance in the relative income of the parties at the time of the divorce; whether the obligation terminates on the death or remarriage of the recipient spouse; and whether payments are made directly to the spouse in installments over a substantial period of time; as well as the labels the parties used for the payments. Obligation to assume and pay the mortgage on the jointly owned home was not in the nature of support – marriage was short term; ex-spouse had started a business and was getting remarried and moving away; debtor had very low income the year the parties divorced; ex-spouse did not need support; parties did not intend that the assumed mortgage obligation would be support; and obligation did not terminate on the death or remarriage of ex-spouse.

*In re Fath*, Case No. 09-21637 (Bankr. E.D. Mi. 2010) – Section 507 allows priority status only for domestic support obligations, defined as obligations which is in the nature of alimony, maintenance or

support. In determining whether an obligation not specifically designated as alimony, maintenance or support will nonetheless be "in the nature of support", court will consider whether the state court or parties intended to create a support obligation; whether the obligation has the actual effect of providing necessary support; whether the obligation is excessive or unreasonable under traditional concepts of support; and if the amount is unreasonable, the extent to which the dischargability of the obligation serves the purpose of federal bankruptcy law. State court orders clearly did not award alimony to either party and court never labeled amounts owed to ex-wife as alimony, support or maintenance. Amounts owed to ex-wife were not in the nature of alimony or support and were not entitled to priority status.

*In re Westerfield*, 403 BR 545 (Bankr. E.D. Tn. 2009) – Obligation to pay home mortgage for former marital residence and to hold ex-spouse harmless constitute domestic support obligations” entitled to priority treatment. Obligation bore traditional hallmarks of support including termination on death or remarriage and ex-wife needed debtor to pay mortgage in order to allow her to remain in home. Ex-wife needed support at the time of divorce. Later change in circumstances such that ex-wife may no longer need support does not alter status of obligation as one for support, as that determination is made at the time of the dissolution of marriage. Debtor could not avoid priority status of ex-wife’s claim by allegedly surrendering his interest in the home in full satisfaction of his obligation to secured creditor.

#### §8.16 Priority – Tax Claims

*In re Sarnovsky*, 2010 WL 2679878 (Bankr. N.D. Ohio 2010) – Section 726 controls the order of priority for distribution of assets of the estate. Assets are first used to pay claims entitled to priority under section 507; then to timely file the unsecured claims; then tardily filed claims; then penalties and non-compensatory damages; then post petition interest; and, if estate assets still remain, the balance is distributed to the debtor. Debtors are not entitled to file priority claims, thereby obtaining a priority status for distribution head of remaining creditors. Debtor’s claim for prepetition taxes allegedly paid by the debtors were not entitled to priority status. Section 508(a)(8) limits priority status to claims made by a “governmental unit”, which does not include the Debtors. Further, a “claim” must be predicated upon a right to payment. The law does not recognize a party’s right to enforce a payment from himself. Thus, debtors cannot hold claims against their own bankruptcy estate. Debtors were not permitted to pay a prepetition tax liability and “step into the shoes” of the governmental unit for purposes of asserting a priority status and subverting the distributional priorities of section 726.

#### §8.17 Priority – Perishable Agricultural Commodities Act

*Thomas A. Hails Co., Inc. v. Olson*, 2010 WL 2802481 (Bankr. W.D. Mi. 2010) - Creditor holding properly perfected claim under Perishable Agricultural Commodities Act (PACA) is entitled to priority status. To hold PACA claim, creditor must give written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored. The Notice of intent to preserve trust benefits must include the statement that it is a notice of intent to preserve trust benefits and must include information which establishes for each shipment: (i) The names and addresses of the trust beneficiary, seller-supplier, commission merchant, or agent and the debtor, as applicable; (ii) The date of the transaction, commodity, invoice price, and terms of payment (if appropriate); (iii) The date of receipt of notice that a payment instrument has been dishonored (if appropriate), and; (iv) The amount past due and unpaid. Creditor's letter that "substantially complied" with PACA requirements was not sufficient to preserve PACA claim, as statute requires strict compliance.

#### §8.18 Pre-Petition versus Post-Petition Claims

*In re Beaudet*, 2011 WL 1402868 (Bankr. M.D. Tn. 2011) – “Claim” is defined broadly to include any right to payment that existed prior to commencement of case. Debtor’s obligation to pay into the escrow account

for taxes and insurance arose from pre-petition mortgage documents. Pre-petition shortfall in escrow account would be pre-petition obligation that creditor could not recover by post-petition increase in mortgage escrow requirement. Creditor could increase escrow for post-petition advances as permitted by mortgage documents.

*Maple Forest Condominium Association v. Spencer*, Case no. 10-14413 (E.D. Mi. 2011) – Post-petition obligations to pay condominium fees are not dischargeable. The obligations constitute post-petition obligations that are not encompassed within discharge under Section 1328.

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

#### §8.19 Contingent Claims

*Republic Bank & Trust Co. v. Hutchinson*, 444 BR 728 (W.D. Ky. 2011) – Chapter 7 debtor-attorney's prepetition misfiling of client's security documents gave rise to prepetition claim that was dischargeable in debtor-attorney's bankruptcy case, even though damages from debtor-attorney's conduct were contingent on unrecorded security interest losing its validity and damages were not suffered by client until after debtor-attorney received discharge. Client that lacked knowledge of its legal malpractice claim against debtor until after debtor received his Chapter 7 discharge suffered no harm, for due process purposes, from lack of knowledge of claim where debtor's case had no-asset designation.

*111 Debt Acquisition Holdings, LLC v. Six Ventures, Ltd.*, 2011 WL 383003 (6<sup>th</sup> Cir. 2011) – Loan Guarantee agreement that provided that guarantor's obligations were “not ... in any way affected by ... bankruptcy” of the corporate borrower remained fully liable for debt following bankruptcy of corporate borrower. Guarantor's unauthorized filing of bankruptcy petition on behalf of obligor was a “springing recourse event” which rendered debt fully recourse under loan agreement, and guarantors thereby became personally liable for debt under terms of guaranty of recourse obligations. Although guarantor may have lacked corporate authority to file petition on behalf of obligor without consent of other guarantor, the loan and guaranty were governing documents with respect to whether filing was springing recourse event, not obligor's internal documents, and loan agreement clearly provided that debt became fully recourse when “any Guarantor” filed a bankruptcy petition, and other guarantors' objection to filing were thus irrelevant.

*Maple Forest Condominium Association v. Spencer*, Case no. 10-14413 (E.D. Mi. 2011) – Post-petition obligations to pay condominium fees are not dischargeable. The obligations constitute post-petition obligations that are not encompassed within discharge under Section 1328.

*In re Huffy Corp.*, 424 B.R. 295 (Bankr. S.D. Ohio 2010) - Retailer had contingent, prepetition indemnity claim against Chapter 11 debtor-manufacturer, of a kind discharged in bankruptcy.

#### §8.20 Executory Contracts and Unexpired Leases – Assumed

#### §8.21 Executory Contracts and Unexpired Leases – Rejected

*Tencup Property, LLC v. Riley*, Case no. 09-065 (1<sup>st</sup> Cir. BAP 2010) - Section 365(d) imposes two obligations on a trustee with respect to unexpired nonresidential real property leases. First, § 365(d)(3) requires the trustee to perform timely all obligations required under the lease, particularly the obligation to pay rent at the contract rate until the lease is rejected, and gives the lessor an administrative claim for such amounts. Second, Section 365(d)(4) requires the trustee to decide whether to assume or reject a lease within 120 days after the entry of the order for relief. If the trustee fails to act within 120 days, the lease is deemed rejected and the trustee must immediately surrender the leasehold to the lessor. However, no provision in

the Bankruptcy Code or Rules requires the trustee to file a specific motion entitled "motion to reject." Therefore, the trustee can give notice of intent to reject a lease in another kind of formal motion, such as a sale motion or a settlement motion. The critical question is one of adequate notice — parties to the contract or lease must be given adequate notice of the proposed rejection or assumption. Court can order retroactive rejection where aggregate of facts indicates lessor had ample notice of intent to reject leases and debtor had actually vacated premises and returned premises to the landlord prior to entry of formal order rejecting lease.

#### §8.22 Condominium and Homeowners Associations

*Maple Forest Condominium Association v. Spencer*, Case no. 10-14413 (E.D. Mi. 2011) – Post-petition obligations to pay condominium fees are not dischargeable. The obligations constitute post-petition obligations that are not encompassed within discharge under Section 1328.

#### §8.23 Deficiency Claims

*State Bank of Florence v. Miller*, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6<sup>th</sup> Cir. BAP 2011) – Bank that purchased property at foreclosure sale by credit bid must credit entire amount of bid against obligation owed. Bank that inadvertently bid full amount of debt, which was more than double actual value of property, cannot escape consequences of its decision to bid. Party who overbids at foreclosure sale through its own unilateral mistake bears the consequences of its actions. Bank would not be permitted to attack its own foreclosure sale, where Bank unilaterally decided to bid full amount of debt, debtor took no part or role in foreclosure, and Bank failed to take any steps to set aside the foreclosure sale for more than one year. Bank's debt was fully satisfied by the credit bid, and Bank no longer held any debt or obligation as to debtor.

*Fifth Third Bank v. Miller*, 2011 WL 112423 (E.D. Ky. 2011) – Creditor holding deficiency claim must prove that collateral was disposed of in commercially reasonable manner. That a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner. Lender's conclusory statements reflecting a credit for the net proceeds from the sales fails to specify any further information about these net proceeds, including the amount and how these proceeds were calculated. Lender failed to provide specific information on the method, manner, time and other terms of the sales or any specific evidence regarding the reasonable commercial practices among dealers in horses, to indicate whether its actions conformed to these practices. Lender failed to submit evidence of whether efforts to prepare the horses for sale were commercially reasonable.

#### §8.24 Insider Claims

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

#### §8.25 Pre-petition Interest – Unsecured Claims

*In re Edwards*, 446 BR 276 (8<sup>th</sup> Cir. BAP 2011) – Unsecured creditor who holds state court judgment is permitted to add post-judgment interest at the applicable state rate through the filing of the Bankruptcy Petition, including interest that accrued while underlying judgment was on appeal where creditor prevailed in the appeal.

#### §8.26 Pre-petition Escrow Balances

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

## B. Proof of Claim

## §8.27 Standing to File Proof of Claim

*In re Smoak*, 2011 WL 4502596 (Bankr. S.D. Ohio 2011) – Only the real party in interest may file a claim. The party entitled to enforce the Note under applicable non-bankruptcy law is the real party in interest. Under the UCC, the holder of the Note is the party entitled to enforce it. Trustee of trust for pooled residential mortgages had standing to file proof of claim where Trustee possessed original note and note was endorsed in blank. Trustee is “holder” of note as defined in UCC. Promissory Note and Mortgage were originally in the name of Bank One. Note later transferred to JPMorgan and then from JP Morgan to Bank of New York as Trustee, with Ocwen servicing the Note at all times for each transferee. Debtor lacks standing to contest whether transfer of Note violates underlying the securitization agreements as Debtor is not a party to that agreement and as to the borrower the right to enforce a Note endorsed in blank lies with the holder.

*Jones v. Federal National Mortgage Association*, Case No. 10-1042 (Bankr. N.D. Ohio 2010) - Complaint alleging that party filing claim lacked standing stated cause of action based on alleged lack of proper endorsement of note or assignment of mortgage. Complaint sought determination that the named parties do not have an interest in the property under the facts alleged and do not have claims in the chapter 13 case. The amended complaint alleged facts regarding the note endorsements and mortgage assignments which, if accepted as true, would be sufficient to state a plausible claim that this movant does not have a lien of the property and is not entitled to enforce the note.

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

*In re Senczyszyn*, Case No. 09-49868 (Bankr. E.D. Mi. 2010) – Debtor has standing to file a proof of claim on behalf of a governmental agency for pre-petition taxes where the governmental agency fails to file a claim within the time permitted under Rule 3002. Debtor has 30 days after expiration of governmental claims bar date to file that Claim.

*In re Wells*, 407 BR 873 (Bankr. N.D. Ohio 2009) – Creditor not entitled to file claim where Promissory Note is payable to original lender and lacks any endorsement to claimant. Therefore, Note was still payable to original lender. Purported “Assignment of Promissory Note and Mortgage” was legally insufficient to transfer any interest in Note. Promissory Note can be transferred only by negotiation. Creditor does not have any interest in the Note and cannot maintain claim based on Note. Limited Power of Attorney attached to Proof of Claim which bore the name of one party but was signed by different party was ineffective. Further, Power of Attorney did not convey power to file Proof of Claim where party signing Power of Attorney was not the holder of the Promissory and so had no authority to enforce the Note in its own name.

## §8.29 Contents of Proof of Claim

*In re S&A Dennis Enterprises, Inc.*, 2011 WL 1457204 (Bankr. W.D. N.C. 2011) – Proof of claim must attach sufficient documentation to provide fair notice of the conduct, transaction and occurrences underlying the claim. Account statements are usually sufficient to satisfy most questions about the claim. If a summary is to be employed in lieu of the documents, it should supply equivalent evidentiary import. More is required than the same information contained in the claim form or petition. Conclusory allegations are insufficient. Where the claim has been assigned, either by absolute transfer or for collection purposes, the assignment documents or a summary identifying the basis and particulars of the same should be attached to the claim. Proof of claim did not comply with Rule 3001 where proof of claim only provides



the date, the creditor's name and address, an internal reference number, and an account balance. One-page summary that merely restated same information and "account open" date was insufficient to identify the claim or the claimant. Proof of claim did not describe the original cardholder agreement or provide any itemization of charges or specify whether its claim includes "interest or other charges in addition to the principal amount of the claim" or provide "itemized statement of interest or charges". claims do not provide "fair notice of the conduct, transaction and occurrences that form the basis of the claim." Without making assumptions, a person examining these claims could not ascertain whether a debt is owed or whether the claimant is the proper party to assert it. They do not substantially comply with Rule 3001 or Official Form 10. Deficiency is not basis to disallow claim. However, if objection is filed to claim, the claimant cannot rely on the claim itself but must produce affirmative evidence in support of claim.

As to the claimant's identity, the Statement of Accounts contains the briefest of assertions about the relationships: "FIA Card Services, N.A. as successor in interest to Bank of America, N.A. (USA) and MBNA America Bank, N.A. by American InfoSource L.P. as its agent." No details are provided about how FIA is a successor in interest to Bank of America or MBNA. Nor is the agency relationship between AIS and FIA described.

### §8.30 Informal Proof of Claim

*PCFS Financial v. Spragin*, Case No. 586 F.3d 450 (6<sup>th</sup> Cir. 2009) – Rule 3002 generally requires an unsecured creditor to file a proof of claim to participate in distribution in Chapter 7 case. Where creditor fails to file formal proof of claim by bar date, court can allow informal proof of claim where creditor's filing fails to adhere to the formalities of the Code but has filed papers that put all parties on notice that a claim is asserted. The proof of claim must be in writing; the writing must contain a demand by the creditor on the debtor's estate; the writing must express an intent to hold the debtor liable for the debt; the proof of claim must be filed with the bankruptcy court and allowing the claim would be equitable to allow the informal proof. Where creditor's lien is invalidated in adversary proceeding under Section 544, creditor has 30 days from the date of the judgment to file a proof of claim for the resulting unsecured debt. Creditor's unexplained and substantial delay in filing a proof of claim and the significant affect that allowing the claim would have on the distribution of the estate rendered it inequitable to allow creditor to assert informal proof of claim. Lender was sophisticated creditor with competent counsel who knew of need to file proof of claim but failed to do so in spite of repeated opportunities to do so.

### §8.31 Effect of Filed Proof of Claim

*In re Krause*, 2011 WL 3879480 (Bankr. E.D. Tn. 2011) – If a proof of claim filed by a creditor alleges facts sufficient to support the claim, it is *prima facie* valid. IRS's proof of claim that alleged only that debtor did not file tax returns but alleged no facts about the debtor's income did not contain sufficient facts to support claim. Further, debtor testified that she lacked employment for the period in question and provided an explanation about how she supported herself during this period and why she could not keep a job. Explanation sufficient to overcome any presumption of validity of IRS claim. Claim disallowed.

*In re S&A Dennis Enterprises, Inc.*, 2011 WL 1457204 (Bankr. W.D. N.C. 2011) – Noncompliance with Rule 3001 and Official Form 10 removes the presumption of validity such that the creditor bears both the burden of going forward and the burden of persuasion. If an objection is filed, and the objecting party has a reasonable basis to question the claim or the claimant, the claimant cannot simply rest upon its claim. In these circumstances, if the claimant fails to respond, the objection will be sustained.

*In re Dewberry*, 2010 WL 4882016 (Bankr. N.D. Ga. 2010) - Debtor failed to rebut *prima facie* validity of proof of claim that attached security deed and assignment, which appeared to be properly executed.

*In re Bunting*, Case No. 07-20864 (Bankr. E.D. Mi. 2010) – Proof of claim that sets for facts necessary to support claim and is in the proper form – in writing, setting forth the claim, executed by creditor, attaching writings on which the claim is based, and attaching any documents necessary to show perfection of secured claim – is entitled to presumption of correctness. Objecting party then has burden of introducing evidence sufficient to rebut presumption of validity. Review of extensive court proceedings in state court divorce



proceeding indicated that state court considered and ruled on issues presented in Debtor's objection to claim. Although Bankruptcy Court may have reached a different decision, Bankruptcy Court would not look behind state court judgment where there was ample evidence in state court record to support conclusions.

*Zino v. Baker*, 2010 WL 3155512 (11<sup>th</sup> Cir. 2010) - Bankruptcy court order allowing plaintiff's claim did not constitute a money judgment that enabled plaintiff to execute levy against assets held in trust for debtor.

#### §8.32 Deadline for Filing Proof of Claim

*In re Chaney*, 2010 WL 2925083 (Bankr. N.D. Ohio 2010) - Section 502(b)(9) precludes late filed claims in Chapter 13 proceeding. Proof of claim filed one day after bar date must be disallowed. Allegation that debtor admitted the debt and that objection was filed in "bad faith" attempt to circumvent admittedly valid claim cannot avoid late filed status of claim and claim must be disallowed.

*In re Ellison*, Case No. 09-74306 (Bankr. E.D. Mi. 2010) - Stipulation signed by debtor and creditor to allow late filed claim rejected by Court. Creditor had notice of case and failed to file claim by bar date. Allowing late filed claim would adversely affect all other unsecured creditors.

#### §8.33 Late Filed Proof of Claim

#### §8.34 Failure to File Proof of Claim – Court Jurisdiction

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

#### §8.35 Withdrawal of Proof of Claim

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

### C. Objections

#### §8.36 Standing to Object

*In re Solis*, 2010 WL 2696518 (7<sup>th</sup> Cir. 2010) – Chapter 7 Trustee has standing to object to claim by debtor's pre-petition state court counsel for unpaid attorney fees, notwithstanding that the trustee was not a party to the fee agreement; and that a portion of the fees were calculated on a partial recovery of money received by the debtor pre-petition and which never became property of the estate. Bankruptcy Trustee acts as the debtor's representative and has full standing to contest claims filed in the estate.

*In re Porrello*, Case No. 07-10053 (Bankr. N.D. Ohio 2009) – In most cases, a chapter 7 debtor lacks standing to object to a proof of claim. A debtor may file an objection to a proof of claim if: 1) there are sufficient assets to pay all administrative expenses and creditors in full; or 2) the claim involved may not be

discharged. If the debt is not discharged, the debtor becomes a party in interest as he or she would have a direct pecuniary interest in the outcome of the action. Debtor had standing to prosecute objection where Debtor was denied a general discharge and is not released from personal liability for any pre-petition obligation.

*In re Malsch*, 2009 WL 1657475 (Bankr. N.D. Ohio 2009) – Only “party in interest” has standing to object to proof of claim. Party in interest is one who has actual pecuniary interest in outcome. Debtor in Chapter 7 normally is not party in interest for purposes of objecting to claims. However, Debtor will have standing if there are sufficient assets available for distribution to pay all administrative expenses and creditors in full and objection to a proof of claim will increase the surplus available to Debtor; or Chapter 7 Debtor may object to any claim for which the underlying debt is non-dischargeable.

#### §8.37 Procedural Requirements

*In re Atkinson*, Case 04-69315 (Bankr. E.D. Mi. 2010) – Objection to Claim failed to provide proper notice where Notice of Objection stated that responses were due not later than 10 days prior to hearing. Under Local Rules effective December 1, 2010, deadline for response is not less than 7 days prior to hearing. Movant’s failure to serve Notice that complied with Local Rule required Court to overrule objection to claim without prejudice.

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

#### §8.38 Burden of Proof

*Hunsdon v. Batmanghelich*, 2010 WL 1258213 (9<sup>th</sup> Cir. 2010) – Objection to Claim overruled where objecting party failed to produce any evidence to rebut claim’s *prima facie* validity.

*American Express Bank v. Askenaizer*, 418 BR 495 (1<sup>st</sup> Cir. BAP 2009) – Rule 3001(f) provides that a proof of claim that complies with the requirements of the Rule and Official Form 10 constitutes *prima facie* validity of the claim. Burden then shifts to objecting party to provide substantial evidence in opposition to claim. At that point, burden shifts back to creditor to prove claim by preponderance of evidence. Creditor seeking administrative treatment has burden of proving elements that qualify claim for that status.

*Ward v. Pulito*, Case No. 09-1275 (9<sup>th</sup> Cir. BAP 2010) – Proof of claim filed pursuant to Section 502 is presumed valid. Objections to Proofs of Claim are limited to grounds set forth in Section 502(b). If claim does not fit within one of the exceptions in 502(b), the claim must be allowed.

*Floyd v. Bloch*, Case No. 09-20299 (5<sup>th</sup> Cir. 2010) – Claims filed by creditor who is insider of debtor will be subjected to greater scrutiny. Claim filed by debtor’s mother, supported only by affidavit signed by debtor and various handwritten notes was not sufficient to establish legally enforceable debt where claim failed to attach a written, signed copy of the alleged credit agreement and because of the age of the agreement, enforcement would be barred by state statute of frauds.

*In re Roberts*, 2009 WL 2169218 (Bankr. N.D. Ohio 2009) – Proof of claim executed and filed in accordance with bankruptcy will 3001 constitutes *prima facie* evidence of the validity and amount of the claim. Party objecting to claim must come forth with evidence to defeat a properly filed proof of claim. The evidence must be sufficient to demonstrate a true dispute and must have probative force equal to the contents of the claim. Debtor’s objection to proof of claim denied where Debtor filed objections but failed to appear at the hearing and failed to offer any evidence, testimonial or documentary, to refute the proof of claim.

*In re Wells*, 2009 WL 1872401 (Bankr. N.D. Ohio 2009) – Bankruptcy Rule 3001 requires a claim based on writing to include a copy of the writing and evidence of perfection. A proof of claim that does not attach documents necessary to support the claim is not entitled to the presumption of prima facie validity but is not, standing alone, a basis to disallow the claim. There must be an underlying factual dispute as to the validity, ownership or amount of a claim for a Court to disallow or reduce a claim. Promissory Note attached to proof of claim was payable to third party and proof of claim failed to attach proof that the Note had been endorsed to party filing proof of claim. Party filing proof of claim lacked standing to file claim.

#### §8.39 Calculation of Amount of Claim

*Barracco v. JPMorgan Chase Bank, N.A.*, 2011 WL 3329755 (E.D. Mi. 2011) – Where state court has confirmed arbitration award that determined that debtor was not indebted to creditor, Full Faith and Credit Statute, 28 USC Section 1738, requires that Bankruptcy Court honor the arbitration award.

*Jacks v. Wells Fargo Bank*, 2011 WL 2183979 (11<sup>th</sup> Cir. 2011) – Creditor's recording of fees and costs on internal records without including those fees and costs on proof of claim does not constitute basis to object to claim.

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

*In re Perkins*, Case No. 09-32328 (Bankr. E.D. Mi. 2010) - Rooker-Feldman does not preclude Bankruptcy Court from reconsidering amount of claim where State Court Judgment was a default judgment and the State Court calculations of damages appears to result from mistake. State Court Judgment contained numerous mathematical errors as result of Court's failure to calculate "cost to cover" for undelivered goods, failed to credit debtor certain amounts, and failed to account for payments made by debtor. Claim which stated amount based on erroneous state court judgment disallowed without prejudice to creditor filing amended claim to correct mathematical errors.

*MacDonald v. Gunther*, Case No. 08-8108 (6<sup>th</sup> Cir. BAP 2009) – Arbitration award confirmed by an appropriate court is entitled to same preclusive effect as would be given to a decision of that court. Res judicata and collateral estoppel prevent a party from attempting to relitigate in Federal Court matters that were or should have been advanced in the prior action. Allocation of costs and expenses of arbitration is necessarily one of the matters decided by the arbitrator. Although parties had pre-arbitration agreement concerning allocation of costs and expenses, parties failed to present that agreement to the arbitrator and the arbitrator did not award costs or expenses in the award. Creditor's claim for arbitration costs and expenses based on the pre-arbitration agreement is barred. Claim allowed for the amount awarded by the arbitration and denied as to any additional costs or expenses.

*Lindsay v. Covenant Management Group, LLC*, 561 F.3d 601 (6<sup>th</sup> Cir. 2009) – In determining validity and amount of proof of claim, Court applies applicable state law. Claim which objected to interest charged on loan discount fee would be overruled. Party's loan agreement included discount fee which Debtor elected to finance and on which Debtor agreed to pay interest. "Discount fees" are not, in and of themselves, "interest" which would be subject to Michigan law which prohibits charging interest on interest. Further, lender not required to apply extension fee as a principal reduction. The Loan Modification Agreement plainly listed the fee as consideration for lender's six-month forbearance and agreement to subordinate mortgage on Debtor's residence.

*In re Roberts*, 2009 WL 2169218 (Bankr. N.D. Ohio 2009) – Court must determine the amount of claim as of the date the petition filed in accordance with applicable state law. Proof of claim executed and filed in accordance with Bankruptcy Rule 3001 constitutes prima facie evidence of the validity and amount of the claim. Party objecting to claim must come forth with evidence to defeat a properly filed proof of claim.

The evidence must be sufficient to demonstrate true dispute and must have probative force equal to the contents of the claim.

#### §8.40 Grounds – Fraud on Court

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

#### §8.41 Grounds – Failure to Attach Documents

*Turner v. American Express Centurion Bank*, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Failure to attach documents defeats prima facie presumption of validity of claim. Without this presumption of validity, the burden of proving the existence and amount of the claim falls to the claimant; however, this initial burden is fulfilled by the presentation of any evidence of the claim. A credit card or consumer credit account creditor that attaches to its proof of claim a copy of the monthly statement generated for the debtor's account at the time of the bankruptcy filing will be entitled to prima facie status, as long as the statement evidences the debtor's name, account number, account balance as of the date of the bankruptcy filing, previous balance, finance or other charges for that period, and the annual percentage rate charged on the account. It is not necessary, however, for the creditor to attach a copy of the actual account agreement. Failure to attach documents does not create any private right of action against Creditor for alleged damages caused by failure – remedy is limited to objection to claim.

*In re Saffron*, Case No. 10-9180 (Bankr. W.D. Mi. 2011) – Proof of Claim that asserted that debtor converted assets belonging to ex-spouse failed to attach sufficient documentation to raise presumption of validity. Claim attached several pictures of various items but did not include any list or inventory of the items allegedly converted or the value of those items; and did not attach any evidence (beyond ex-spouse’s naked suspicion) that the items were converted.

*In re Stewart*, 2010 WL 3490976 (Bankr. E.D. La. 2010) – Mortgage Proof of Claim that fails to attach a copy of the note on which the claim is based fails to comply with Rule 3001 and does not constitute prima facie evidence of debt.

*In re Bunting*, Case No. 07-20864 (Bankr. E.D. Mi. 2010) – Proof of claim that sets for facts necessary to support claim and is in the proper form – in writing, setting forth the claim, executed by creditor, attaching writings on which the claim is based, and attaching any documents necessary to show perfection of secured claim – is entitled to presumption of correctness. Objecting party then has burden of introducing evidence sufficient to rebut presumption of validity.

*In re Kipling*, 2010 WL 2584191 (Bankr. E.D. Ky. 2010) – A claim asserted by a filed proof of claim is allowed unless an objection is filed and sustained. Bankruptcy Rule 3001(f) provides that a proof of claim properly filed and executed constitutes prima facie evidence of the validity and amount of the claim. An objector to the proof of claim then must produce evidence sufficient to overcome this presumption of

validity. The objector must produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. The allegations of the proof of claim are taken as true and are enough to carry over a mere formal objection without more. If those allegations set forth all the necessary facts to establish a claim and are not self-contradictory, they prima facie establish the claim. Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to the allegations of the proofs of claims themselves. But the ultimate burden of persuasion is always on the claimant. Domestic Support Creditor's Proof of Claim attached

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Statement of Account" and a listing of unspecified sums allegedly owed as "extracurricular activities"; and a list of mortgage payments allegedly paid by Creditor to the mortgage company on the former marital residence. Claim did not attach any documents showing that Debtor was obligated to pay mortgage or to reimburse claimant for any mortgage payments made by claimant. Debtor produced evidence to establish he does not owe any child support arrearage. Claimant required to supplement her documentation of the claim for the children's extracurricular activities expenses to show that they are due and owing and to establish that Debtor was obligated to make mortgage payments.

*In re Chaney*, 2010 WL 2925083 (Bankr. N.D. Ohio 2010) - Rule 3001(c) requires proof of claim based on writing to attach original or a duplicate shall be filed with the proof of claim. Debtors' petition, in combination with other relevant circumstances, provided strong evidence that the claim was enforceable against the debtor. Claim that attached only summary statement which was little more than screen shot of database would be sufficient where Debtor's schedules also listed the debt and, at least as to one creditor, also indicated that creditor held recorded final judgment. Schedules could also fill the gap in chain of assignments where schedules identify original account holder and amended claim attached proof of transfer of claim to party filing Proof of Claim.

*In re Couch*, Case No. 09-30805 (Bankr. E.D. Mi. 2010) – Creditor's Proof of Claim failed to attach sufficient documents to allow Court to determine accuracy of claim. Court provided creditor with additional time to amend the proof of claim to attach documents. Creditor failed to amend the Claim within the time permitted but did amend the claim prior to entry of an Order disallowing the claim. Court would not disallow claim by default where amended claim was filed, although untimely. Court did award Debtor attorney fees incurred as a result of Creditor's failure to timely amend.

*American Express Bank v. Askenaizer*, 418 BR 495 (1<sup>st</sup> Cir. BAP 2009) – Rule 3001(f) provides that a proof of claim that complies with the requirements of the Rule and Official Form 10 constitutes prima facie validity of the claim. Burden then shifts to objecting party to provide substantial evidence in opposition to claim. At that point, burden shifts back to creditor to prove claim by preponderance of evidence. Proof of claim that failed to attach documents and failed to itemize interest or other charges included in claim amount not entitled to prima facie validity. Creditors and the Trustee are entitled to know what charges have been assessed and the contractual basis for each.

*In re Wells*, 2009 WL 1872401 (Bankr. N.D. Ohio 2009) – Bankruptcy Rule 3001 requires a claim based on writing to include a copy of the writing and evidence of perfection. A proof of claim that does not attach documents necessary to support the claim is not entitled to the presumption of prima facie validity but is not, standing alone, a basis to disallow the claim. There must be an underlying factual dispute as to the validity, ownership or amount of a claim for a Court to disallow or reduce a claim. Promissory Note attached to proof of claim was payable to third party and proof of claim failed to attach proof that the Note had been endorsed to party filing proof of claim. Party filing proof of claim lacked standing to file claim.

#### §8.42 Grounds – Failure to Itemize Claim

*American Express Bank v. Askenaizer*, 418 BR 495 (1<sup>st</sup> Cir. BAP 2009) – Rule 3001(f) provides that a proof of claim that complies with the requirements of the Rule and Official Form 10 constitutes prima facie validity of the claim. Proof of claim that failed to attach documents and failed to itemize interest or other



charges included in claim amount not entitled to prima facie validity. Creditors and the Trustee are entitled to know what charges have been assessed and the contractual basis for each.

#### §8.43 Grounds – Late Filed

*In re Ellison*, Case No. 09-74306 (Bankr. E.D. Mi. 2010) - Stipulation signed by debtor and creditor to allow late filed claim rejected by Court. Creditor had notice of case and failed to file claim by bar date. Allowing late filed claim would adversely affect all other unsecured creditors.

*Tennessee Commerce Bank v. Cox*, Case No. 309-0410 (Bankr. M.D. Tn. 2010) - Rule 3002 permits Debtor to file Proof of Claim on behalf of creditor within 30 days after expiration of the time for filing claims. Rule 9006 may permit extension of time to file claim where failure to timely file claim is result of excusable neglect, determined by danger of prejudice to the debtor; the length of the delay and its potential impact on judicial proceedings; the reason for the delay; whether the delay was within the reasonable control of the movant; and whether the movant acted in good faith. Debtor failed to demonstrate excusable neglect where request to file claim on behalf of creditor did not occur until 18 months after her plan was confirmed and granting request would adversely impact other unsecured creditors by reducing the dividend to the remaining creditors from 13% to only 9%.

*In re Chaney*, 2010 WL 2925083 (Bankr. N.D. Ohio 2010) - Section 502(b)(9) precludes late filed claims in Chapter 13 proceeding. Proof of claim filed one day after bar date must be disallowed. Allegation that debtor admitted the debt and that objection was filed in "bad faith" attempt to circumvent admittedly valid claim cannot avoid late filed status of claim and claim must be disallowed.

*General Motors Acceptance Corporation v. Flynn*, Case No. 08-8109 and 08-8110 (6th Cir. BAP 2009) - Creditor prohibited from asserting cross-claim in adversary proceeding where the cross-claim is akin to a Proof of Claim against the Debtor and where the creditor failed to either file a timely Proof of Claim or timely obtain an order extending the time to file a claim.

*Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6<sup>th</sup> Cir. BAP 2009) – Motion to Extend proof of Claim Deadline filed almost 1 year after deadline expired denied where creditor failed to establish excusable neglect to justify any extension of the deadline.

#### §8.44 Grounds – Personally Identifiable Information

*Holloway v. Community Bank*, 2011 WL 4500042 (E.D. Tn. 2011) – Creditor's inclusion in proof of claim of social security number constituted improper disclosure of personally identifiable information as defined in Section 101(41A). However, Section 107(c) does not authorize private cause of action for disclosure and filing of claim, standing alone, does not constitute actionable invasion of privacy absent evidence of intent to convey information to public at large.

*In re Chubb*, Case No. 09-60618 (Bankr. E.D. Mi. 2010) – Utility company account number constituted "personally identifiable information" that must be redacted in proof of claim. Claim filed with full account number would be stricken and restricted from public view without prejudice to creditor filing an amended proof of claim that omitted personally identifiable information.

*Lentz v. Bureau of Medical Economics*, 405 BR 893 (Bankr. N.D. Ohio 2009) – Alleged disclosure of "personally identifiable information" is not one of enumerated grounds under 11 USC Section 502 to disallow a claim. Violation of Rule 9037 alone does not support objection to claim. Sole remedy under Rule 9037 is to redact or otherwise prevent disclosure of "personally identifiable information".

*French v. American General Financial Services*, 401 B.R. 295 (Bankr. E.D. Tn. 2009) –Disclosure of "personally identifiable information" is not a basis to disallow a proof of claim under 11 USC Section 502. Procedural violations alone are not one of the bases stated in Section 502 on which a proof of claim can be disallowed.

## §8.45 Grounds – Surrender in Full Satisfaction of Secured Claim

*In re Menden*, 2011 WL 4433621 (Bankr. N.D. Ohio 2011) – Creditor received constitutionally sufficient notice of Debtor’s Amended Chapter 13 Plan that provided for surrender of automobile in full satisfaction of debt. Service on Creditor at one of two notice addresses and electronic service on Creditor’s attorney who had filed a Notice of Appearance was sufficient to comply with Rule 2002. Even if service had not complied with Rule 2002, service on Creditor’s attorney was reasonably calculated, under all the circumstances, to apprise Creditor that its rights may be altered and to advise Creditor of opportunity to object. Confirmation of Plan was *res judicata* on surrender in full satisfaction. Creditor’s unsecured deficiency claim would be disallowed. However, Creditor would not be required to refund payments received from the Chapter 13 Trustee prior to the date on which the Proof of Claim was disallowed where Debtor waited almost three years after Trustee began distributions to file objection to claim.

*In re Finley*, 408 BR 111 (Bankr. E.D. Mi. 2009) – Debtor cannot surrender real property that is not the Debtor’s principal residence in full satisfaction of a mortgagee’s claim. A secured creditor retains the right to bifurcate the claim and to collect any deficiency as a general unsecured claim pursuant to Section 506(a) when the collateral is surrendered pursuant to section 1325(a)(5)(C). The power to “modify” pursuant to section 1322(b)(2) does not equate to “surrender in full satisfaction”.

*In re Long*, 519 F.3d 88 (6<sup>th</sup> Cir. 2009) - “Hanging paragraph” added to section 1325(a)(5) does not preclude a creditor from asserting a deficiency claim when the Debtor surrenders a vehicle purchased within 910 days of the filing of bankruptcy. The amendment of section 1325 did not change the applicability of section 506 where the vehicle is being surrendered.

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

*Wright v. Santander Consumer USA Inc. (In re Wright)*, 07-1483, 2007 WL 1892502 (7<sup>th</sup> Cir. July 2007), the 7<sup>th</sup> Circuit Court of Appeals affirmed the bankruptcy court which held that the collateral could not be surrendered in full satisfaction of the debt. The court noted that, “Article 9 of the Uniform Commercial Code plus the law of contracts entitle the creditor to an unsecured deficiency judgment after surrender of the collateral...That unsecured balance must be treated the same as other unsecured debts under the Chapter 13 plan.” The court found that the elimination of §506 through the hanging paragraph returns the parties to their contractual rights. See also, *In re Rodriguez*, Case No. 06-41999 (BAP 9<sup>th</sup> Cir. 2007); *In re Newberry*, Case No. 06-60241, 2007 WL 1308318 (Bankr. W.D. Tex. 2007).

*In re Osborn*, 07-1726, (8<sup>th</sup> Cir. February 2008), the 8<sup>th</sup> Circuit Court of Appeals reversed the bankruptcy court, which was affirmed by the Bankruptcy Appellate Panel. The bankruptcy court held that the debtor can surrender a motor vehicle purchased within 910 days of the filing date in full satisfaction of the debt and that the creditor is not entitled to an unsecured claim for the deficiency balance. The court noted that the “trend” is to allow the creditor an unsecured deficiency claim. The court of appeal stated “nothing in § 1325(a)(5) provides that [the] ‘allowed secured claim’ is satisfied by the debtor choosing the surrender option in subparagraph (C). The court found that upon surrender, the parties are left to their state-law rights. Both state law and the contract gave the creditor the right to a deficiency balance and nothing in the bankruptcy codes disallows such a claim. See also, *In re Moore*, No. 07-1315, (8<sup>th</sup> Cir. February 2008).

*DaimlerChrysler Financial Services, LLC, v. Ballard*, Case No. 07-5109 and 07-5112, (10<sup>th</sup> Cir. May 2008) - The 10<sup>th</sup> Circuit Court of Appeals overturned the decision of the Bankruptcy Appellate Panel which held that the vehicle may be surrendered in full satisfaction of the claim. The 10<sup>th</sup> Circuit Court reasoned that “the hanging paragraph does not abrogate a creditor’s right to assert a deficiency claim authorized by state law.” The court determined that §1325(a)(5)(C) simply provides for the surrender of the collateral and there is no valuation component to the surrender option as there is for in §1325(a)(5)(B).

*Tidewater Finance Company v. Kenney* - Case No. 07-1664, (4<sup>th</sup> Cir. 2008) - Fourth Circuit has joined the “growing number of circuit courts” that recognize the creditor’s right to assert an unsecured claim pursuant to state law. Once the debtor surrenders the collateral the court held the parties are left to their contractual rights according to state law. “Because §502 directs bankruptcy courts to allow claims stemming from contractual debts and neither diminishes nor disapproves of secured claims, it is evident to us that such deficiency claims must be permitted to the extent that state law allows for them.”

*In re Tyson*, Case No. 09-01179 (Bankr. W.D. Mi. 2009) - Financing of the negative equity did not destroy the purchase money security interest and that as a result, the claim could not be bifurcated into secured and unsecured portions. The hanging paragraph requires, “a purchase money security interest securing the debt that is the subject matter of the claim.” While most courts focus on the definition of purchase money security interest, this Court focused on the term “debt”. The “debt” is the right to receive payment on account of the contract, which includes the negative equity, and this “debt” is secured by a purchase money security interest in the vehicle. Accordingly, the claim could not be bifurcated.

#### §8.46 Grounds – Failure to Comply With Administrative Requirements

*O’Rourke v. United States*, 587 F.3d 537 (2d Cir. 2009) – IRS complied with administrative requirements after audit concluded that taxpayer had additional tax liability. IRS required to demonstrate that deficiency existed and that IRS mailed notice by Certified Mail identifying the taxpayer, indicating that the Commissioner has made a determination of deficiency, and specifying the taxable year and amount of the deficiency to taxpayer. IRS demonstrated mailing by reference to IRS Certified Mail Log which created presumption that the notice had been properly mailed by certified mail, notwithstanding minor defects in log.

#### §8.47 Grounds – Payment and Credit Bid

*Irwin v. Frankenmuth Credit Union*, Case No. 08-20212 (Bankr. E.D. Mi. 2009) – Debtor borrowed money from third party to repay loan from Credit Union, which resulted in loan being paid in full. Third party then threatened Credit Union with litigation when Credit Union declined to advance additional funds to Debtor, which would have been used by Debtor to generate resources to repay third party. Credit Union settled with third party and attempted to charge the cost of that settlement back against the Debtor’s account. Record failed to establish that Debtor in fact owed any money to third party and purported assignment from third party to Credit Union was not valid absent proof of underlying enforceable obligation that could be assigned.

*In re Finley*, Case No. 09-44480 (Bankr. E.D. Mi. 2010) – Credit bid at foreclosure sale for entire balance owed on notes secured by a mortgage extinguishes both note and mortgage. If mortgagee credit but it’s less than the full balance owed on the note, the beat is credited against the balance owed in the mortgagee may sue for the deficiency balance, where the mortgage or be raised as a defense that the credit bid was substantially less than the true value of the property. Proof of claim filed by mortgage holder for alleged deficiency balance would be disallowed for mortgage holder bid for amount of the note at the foreclosure sale. Creditors argument that amount bid at the foreclosure sale was “a mistake” did not alter conclusion that full credit been at share sale extinguished the balance of the note as a matter of law.

#### §8.48 Grounds – Mortgage Fees and Charges

*In re Aho*, 2009 WL 3820327 (Bankr. D. Mass. 2009) – Mortgagee claim for Auctioneer Fees unreasonable and disallowed where sale was cancelled by the bankruptcy filing. Mortgagee fee to assign the mortgage from MERS to US Bank disallowed as transfer did not benefit debtor or anybody else other than the mortgagees themselves. Title Examination fee for two owner property cut in half where property was owned solely by debtor. Unexplained line item for “professional fees” disallowed where claim provided no explanation or justification for the fees.

#### §8.49 Grounds – Unconscionability

*In re Pierson*, 447 BR 840 (Bankr. N.D. Ohio 2011) – Unconscionability requires use of a standardized contract, drafted and imposed by party of superior bargaining strength such that imposition of contract results from oppression and surprise. Surprise focuses on whether the challenged term is hidden in a prolix printed form or is otherwise beyond the reasonable expectation of the weaker party. Oppression refers not only to an absence of power to negotiate the terms of a contract, but also to the absence of reasonable market alternatives. Loan agreement made without any compelling need for loan but rather a desire of borrower to make home improvements that were not necessary and that provided borrower the opportunity to weigh options and consider other lenders did not evidence any surprise or oppression. Debtor meticulously initialed in the agreement all of the “more onerous” provisions and many of the more significant terms were in bold print or all capital letters preventing any argument of surprise. Disparity in amount received as loan versus amount that would be repaid over loan term was not evidence of unconscionability where debtor was intelligent, understood the basic transaction, and was in charge of his mental faculties and knew what he was signing. Further, after signing first loan agreement, debtor signed two later agreements, each time when debtor sought to increase the amount of the loan to complete additional home improvements.

#### §8.50 Equitable Subordination

*Antioch Company Litigation Trust v. Morgan*, 2011 WL 1670952 (Bankr. S.D. Ohio 2011) – Three part test for determining whether equitable subordination of a claim is appropriate requires (1) the claimant must have engaged in some type of inequitable conduct; (2) this misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.

*Greer v. Gateley*, 2010 WL 4817993 (Bankr. M.D. Tn. 2010) – In order for debtor to establish that equitable subordination is appropriate, debtor must allege and prove that: (1) Creditor engaged in some type of inequitable conduct, (2) the misconduct resulted in injury to the creditors of the bankrupt or conferred an unfair advantage to Creditor, and (3) the equitable subordination of Creditor claim is not inconsistent with the provisions of the Bankruptcy Code. Where Creditor is non-insider, debtor must plead and prove egregious conduct to support equitable subordination. Creditor’s actions in foreclosing mortgage after default is not type of “egregious” conduct that would support subordinating Creditor’s secured claim to the interests of either the unsecured creditors or the debtor.

*Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Court cannot subordinate debt to equity for creditors who do not file proofs of claim. Failure to file claim by bar date results in creditor not having any debt to re-characterize or debt to subordinate.

#### §8.51 State Law Claims

*In re Hardison*, 2011 WL 576066 (Bankr. M.D. Tenn. 2011) – Claim properly disallowed where State statute of limitations expired prior to commencement of case. Claim can be “revived” notwithstanding passing of statute either by expressly promising to pay the debt or by acknowledging the debt and expressing a willingness to pay it at a point after the statute of limitations expired. Partial payments made by debtor prior to expiration of limitations period does not revive claim. Debtor can be estopped from asserting limitations defense if, prior to expiration of limitations period, debtor’s statements or conduct represented that debtor would pay entire debt without the need for a lawsuit and creditor’s reliance on those statements to withhold timely filing of suit. Minimal and sporadic payments made by debtor in response to repeated harassing phone calls by creditor’s collection agent do not constitute representations that debt would be paid.

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

*Floyd v. Bloch*, 2010 WL 1141599 (5th Cir. 2010) - Basic rule in bankruptcy is that state law governs the substance of claims. Claim disallowed where creditor, who was also debtor's mother, failed to produce any documents concerning an alleged loan extended by mother more than 10 years earlier. Absent written documentation of the alleged loan, the claim was barred by the state Statute of Frauds.

*Ward v. Pulito*, Case No. 09-1275 (9<sup>th</sup> Cir. BAP 2010) – Promissory note given in contemplation of marriage that did not comply with State law requirements for a pre-nuptial agreement unenforceable. Further, Promissory note delivered in contemplation of marriage not supported by consideration where Promissory note was delivered as an inducement for recipient to accept proposal of marriage. Although the parties ultimately did get married, promises intended to induce marriage must be in the form of a pre-nuptial agreement that meets the requirements of State law to be enforceable. Representation in Promissory Note that note was given “for value received” does not bar finding that no consideration was actually received.

*In re Gregg*, 409 B.R. (Bankr. S.D. Ohio 2009). Proof of claim to recover on unjust enrichment theory was unenforceable under Ohio law, where true title holder had no knowledge that payments had been made.

*H.S. Die & Engineering, Inc. v. Ford Motor Company*, Adv. No. 09-4815 (Bankr. E.D. Mi. 2009) – Action for unjust enrichment is generally limited to situations where there is no express contract. Contract between vendor and debtor pursuant to which third party was “expected to pay” for items transferred did not create contractual relationship between vendor and third party. Vendor could maintain action for unjust enrichment against third party to whom items manufactured by Vendor had been transferred.

#### §8.52 Insider Claims

*Spradlin v. Williams*, 2010 WL 4736905 (E.D. Ky. 2010) – Claim filed by apparently controlling member of LLC in bankruptcy of LLC subjected to greater scrutiny. Claimant had controlling interest in LLC; Debtor’s affairs had been grossly mis-managed by claimant both before and after Chapter 11 filing until case converted on request of US Trustee; the Proof of Claim attached very little support; the origin of the claim itself, and the assignment to the claimant, were not properly documented and the evidence was inconsistent and contradictory; and claimant failed to list the claim in Debtor’s schedules in the first instance.

#### §8.53 Settlement of Objections

*Ames v. Rabin*, 2011 WL 1630139 (N.D. Ohio 2011) – The Federal Rules of Bankruptcy Procedure specifically grant a trustee the authority to seek a compromise or settlement of claims available to the debtor or debtors, upon motion and after notice and a hearing. The court is charged with an affirmative obligation to apprise itself of the underlying facts and to make an independent judgment as to whether the compromise is fair and equitable. In determining if a settlement is fair, the court must weigh the conflicting interests of all relevant parties, considering such factors as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors. Settlement is fair and equitable and is in the best interests of the estate where claims brought by the Trustee are plausible, but face risk that claims could be dismissed on the pending motions to dismiss, on summary judgment, or that the claims may fail at trial with no recovery for the estate. Insurance policy had a declining balance that would continue to decline as further fees and expenses are incurred, depleting the only source of payment. Trustee's determination that this settlement is in the best interest of the estate is given great weight.

*In re Bunting*, Case No. 07-20864 (Bankr. E.D. Mi. 2010) – In considering proposed settlement, Court must apprise itself of the underlying facts and make an independent judgment whether the compromise is fair and equitable. Court is not permitted to act as rubber stamp for trustee. Court must form educated estimate of complexity, expense and likely duration of any litigation, difficulties in collecting on any judgment, and other factors relevant to a full and fair assessment of the wisdom of the proposed settlement, keeping in mind the paramount interests of creditors and with a proper deference to their reasonable views. Settlement compromising creditor’s claim from \$114,083 to \$35,000 in exchange for trustee’s release of any further



claims against creditor was reasonable in light of anticipated complexity and uncertainty of further litigation, expense that would entail, and necessary delays in administration of case that would result.

*General Motors Acceptance Corporation v. Flynn*, Case No. 08-8109 and 08-8110 (6th Cir. BAP 2009) - Bankruptcy Courts have significant discretion to approve or reject proposed settlements and compromises. Court must consider probability of ultimate success and costs attendant to litigation including complexity, expense, inconvenience, delay, and the likely duration of a lawsuit and difficulties in collecting on judgment. Court improperly approved settlement that was predicated on an agreement between the Trustee and creditor regarding certain offsets notwithstanding that the Bankruptcy Court previously determined that creditor was not entitled to the offsets as a matter of law.

*Engman v. Boyd*, Case No. 1:09-cv-151 (W.D. Mi. 2008) – In determining whether to approve a proposed settlement, Bankruptcy Court must consider whether the disposition proposed is fair and equitable including whether the proposed settlement is the best alternative available to the estate under the circumstances taking into particular consideration whenever other alternatives the objecting party or parties might pose. Bankruptcy Court must consider the strength of the claim asserted, the difficulty, expense, and likelihood of success in litigation, against the benefit to the estate and creditors of settling the claim without litigation and determine whether the proposed settlement is reasonable and in the best interests of the estate. Implicit in that consideration must also be the Court's separate determination of whether the proposed disposition is consistent with the Trustee's duties as the estate fiduciary. District Court may set aside Bankruptcy Court's approval or rejection of proposed settlement only if Bankruptcy Court abused its discretion, as decision to approve a proposed settlement is bound up in the ever-changing facts and circumstances of the bankruptcy case. The Bankruptcy Court need not conclusively determine whether and to what extent the claim will be successful or whether a proposed defense may be dispositive. The Court need only apprise itself of the relevant issues and make an informed judgment on the reasonableness of the proposed settlement.

*Bailey v. White*, 2009 WL 928595 (6<sup>th</sup> Cir. 2009) - Court should approve the settlement only after a hearing "and on finding that it is fair, reasonable, and adequate." Several factors inform this inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. District Court correctly applied the seven-factor test to approve settlement that terminated medical insurance and replaced that with VBA.

*Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6<sup>th</sup> Cir. BAP 2009) – Bankruptcy Court has significant discretion to approve or disapprove a settlement with compromise. Bankruptcy Court is under affirmative duty to apprise itself of all necessary facts as to make informed and independent judgment as to whether the settlement is fair and equitable to the non-settling parties. Factors to be considered include probability of ultimate success should be claim be litigated and costs attendant to such litigation in terms of complexity, expense, inconvenience, delay and the likely duration of a lawsuit including possible difficulties of collecting on any judgment. Court must compare the terms of a compromise with the likely rewards of litigation, but is not required to conduct mini-trial when evaluating a settlement. Proponent of settlement bears burden of showing by preponderance of evidence that the proposed settlement is fair and equitable. Bankruptcy Court properly refused to approve the settlement by which defendant would have received credits far in excess of what the Bankruptcy Court concluded was the maximum which defendant could sustain in litigation. Proposed settlement which would have given defendant a credit of more than \$100,000 not fair and equitable where Bankruptcy Court had already concluded that defendant could reasonably establish a credit of only \$20,000 and had "serious doubts" that Debtor owed defendant any credit as claimed by defendant.

#### §8.54 Sanctions Against Filing Creditor

*Wells Fargo Bank, N.A. v. Stewart*, 647 F.3d 553 (5<sup>th</sup> Cir. 2011) – Debtor lacks standing to seek injunctive relief against Mortgage Creditor where Debtor failed to demonstrate any risk of future harm or injury. Debtor's objection to Creditor's Proof of Claim had already been sustained and Creditor had been

sanctioned for filing incorrect proof of claim, and there was no evidence that Creditor would attempt to file another incorrect claim. Court lacked authority to *sua sponte* impose sanctions against creditor that would have required creditor to (1) to audit every proof of claim it has filed in any case pending on or filed after April 13, 2007; (2) to provide a complete loan history on every account and to file that history with the appropriate court; and (3) to amend any proofs of claim already on file to comply correct errors or inaccuracies.

*Poteet v. eCast Settlement Corp.* 2011 WL 3626696 (Bankr. E.D. Tn. 2011) – Rule 3001 governing proofs of claim does not provide a remedy for a failure to comply with Rule 3001 and there is no basis for creating a private right of action under the rule. Remedy for the incomplete proofs of claim is to file an objection thereto, forcing the creditor to prove its claims without the benefit of Rule 3001(f).

*In re Wingerter*, 394 BR 859 (6<sup>th</sup> Cir. BAP 2008) *reversed* 594 F.3d 931 (6<sup>th</sup> Cir. 2010)– Sixth Circuit BAP dismissed appeal of Order imposing sanctions under rule 9011, finding that the appeal had become moot. Bankruptcy Court imposed sanctions against debt purchasing company for filing a proof of claim without making any investigation as to the validity or enforceability of the underlying obligation and for filing proof of claim which contained erroneous information and was incomplete and failed to attach an itemized statement of the account. Debt purchasing company stated that Asset Purchase Agreement pursuant to which company acquired debt required seller to confirm that the Debtor is in a Chapter 13 proceeding; the debt has not been disputed or discharge; the amount owed is accurate; the statute of limitations on the claim has not expired; and the debt is not fraudulent. Debt purchasing company relied on statements and warranties set forth in Asset Purchase Agreement without conducting any independent investigation of the validity or enforceability of the obligation. Bankruptcy Court concluded that debt purchasing company's procedures for filing proofs of claim did not constitute a reasonable inquiry, prior to filing, as to whether there is admissible evidence to support the claim. Debt purchasing company, before filing a proof of claim with the Bankruptcy Court, must obtain originating documentation or, when that documents are not available, a clear understanding of the nature of the original dealings that support the assertion of a claim against the Debtor. The purchaser should then attach to the proof of claim the originating documents or an affidavit explaining the nonavailability of those documents so the Debtor and other interested parties are given fair notice of the source and particulars of the claim. Bankruptcy Court did not impose monetary sanctions, as expenses incurred by debt purchasing company were deemed to be a sufficient sanction.

#### §8.55 Effect of Order Disallowing Claim

*Elkhoeiry v. Schroeder*, 2010 WL 3397471 (S.D. Ohio 2010) - Bankruptcy Court Order disallowing Proof of Claim bars any later attempt to prosecute the claim. Order Disallowing Claim required dismissal of prepetition litigation that was pending at the time of commencement of the case where prepetition litigation was based on same action as was asserted in Proof of Claim.

#### §8.56 *Res Judicata* Effect of Confirmed Plan

*In re Soboleski*, Case No. 10-46291 (Bankr. E.D. Mi. 2011) – Confirmed Plan is *res judicata* on validity of Proof of Claim filed prior to confirmation of the Chapter 13 Plan. The Court's standard Confirmation Order provides, "All filed claims to which an objection has not been filed are deemed allowed pursuant to 11 U.S.C. § 502(a) ...." Although allegations in objection to claim raised legitimate questions as to whether creditor held a valid claim, and although there is no specific rule that requires objections to claims to be brought within any specific deadline, the specific plan provision and provision of the Confirmation Order control.

### D. Priority of Distribution

#### §8.57 Generally

*Old West Annuity and Life Insurance Company v. Apollo Group*, Case No. 09-10994 (11<sup>th</sup> Cir 2010) –

*American Express Bank v. Askenaizer*, 418 BR 495 (1<sup>st</sup> Cir. BAP 2009) – Allowed claims are paid in order of distributional priority set forth in Section 726(a). Creditor seeking administrative treatment has burden of proving elements that qualify claim for that status. Creditor must demonstrate entitlement to distribution at a particular level – there is no “default” level of distribution. Creditors who refused to provide documentation to allow Trustee to ascertain nature, amount and timing of, and contractual basis for, interest and other charges would have claims subordinated to Section 726(a)(4) for payment only after full payment to allowed general unsecured creditors.

#### §8.58 Unclaimed Funds

*In re Wilkerson*, 2011 WL 3419496 (Bankr. S.D. Ohio 2011) – Unclaimed funds which were the subject of checks written prior to conversion of Chapter 13 case to one under Chapter 7, in payment to mortgagee, were not under control or possession of debtors when case was converted, given that they had been earmarked as payments to mortgagee, and thus did not have to be returned to debtors. Funds received by Chapter 13 Trustee prior to conversion are distributed by Chapter 13 Trustee as part of completing statutory obligations, even where checks issued by Trustee prior to conversion are returned to the Trustee or are cancelled by Trustee post-conversion. Funds do not become property of the Chapter 7 estate and can be distributed only to the named creditor.

*In re Nelson*, Case no. 06-6751 (Bankr. W.D. Mi. 2010) – Creditor making claim for unclaimed funds paid to Court registry at end of Chapter 13 case bears burden of making clear showing of entitlement to the funds. Secured creditor did not file proof of claim in Chapter 13 case although plan contemplated payments directly by Debtors or their son during the pendency of the Plan. Application for unclaimed funds failed to indicate whether any payments may have been made or how those funds were applied; whether the collateral had been refinanced; whether the collateral had been repossessed and, if so, whether the creditor had received any proceeds from the disposition; or whether creditor had any claim to funds paid to Chapter 13 Trustee as property of estate where plan provided for direct payment of the obligation rather than payment through the Trustee using property of the estate. Creditor’s application denied without prejudice to creditor filing new application to clearly establish entitlement to funds.

#### E. Non-Dischargability

##### §8.59 Generally

*Belfor USA Group, Inc. v. Williams*, Case no. 09-5821 (Bankr. E.D. Mi. 2011) – Plaintiff in action under Section 523 bears burden of proof by preponderance of evidence. Plaintiff failed to sustain burden where plaintiff proved only that defendant possibly received funds but did not produce evidence that defendant ever actually received funds allegedly converted or the amount of money allegedly received and retained by defendant.

*Fingerle Lumber Co. v. Boychuck*, Case No. 09-5477 (Bankr. E.D. Mi. 2010) - If debt is non-dischargeable, then interest and cost components to the debt are also non-dischargeable.

*Retz v. Samson*, Case No. 08-60023 (9<sup>th</sup> Cir. BAP 2010) – Party objecting to discharge bears burden of proving by a preponderance of the evidence that the discharge should be denied. Section 727 is to be construed liberally in favor of debtors and strictly against parties objecting to discharge.

*Pearce v. Muncey*, 2009 WL 1651451 (Bankr. E.D. Tn. 2009) – Essential element of any action to determine non-dischargability is proof of underlying debt. Plaintiff who brought action alleging misrepresentation of condition of real property could not prevail where, under State law, Plaintiff had not suffered any recoverable loss. Evidence established that property in damaged condition was worth same amount that Purchaser paid. As Purchaser received “benefit of bargain”, Purchaser suffered no recoverable damages and could not prevail in non-dischargability action as matter of law.

##### §8.60 Section 523(a)(1)

*Quiroz v. State of Michigan*, Case No. 11-4433 (Bankr. E.D. Mi. 2011) – Michigan’s Single Business Tax is an excise tax on a “per transaction” basis and is entitled to priority status under Section 507(a)(8)(E). Michigan law allows assessment of corporate taxes against corporate officers who have control or supervision of, or are responsible for paying, corporation’s taxes. Debtor, as principal of corporation, was personally responsible for payment of Corporate Single Business Taxes which is not dischargeable under Section 523(a)(1)(A).

*Storey v. United States*, 640 F.3d 739 (6<sup>th</sup> Cir. 2011) – Section 523(a)(1)(c) excepts from discharge taxes that the debtor willfully attempted to evade or defeat. Government must prove that debtor did not pay taxes and that debtor “knowingly and deliberately” sought to avoid payment. Mere non-payment, standing alone, is not sufficient. Debtor timely filed tax returns which acknowledged the obligations. Debtor’s purchase of a residence in the same year debtor stopped paying taxes did not demonstrate a voluntary or intentional choice to purchase a home rather than pay taxes, where home was not lavish or unnecessary. Government could not demonstrate that at the time debtor purchased the home, she was even aware that she would later have a tax liability. Debtor did not engage in excessive recreational, philanthropic or other discretionary activities such as expensive vacations or private school expenses.

#### §8.61 Section 523(a)(2)

*In re Damron*, 2011 WL 4442635 (Bankr. S.D. Ohio 2011) – Administrative Hearing determining that debtor fraudulently obtained workers compensation benefits was preclusive in action under Section 523(a)(2). Although only Bankruptcy Court has jurisdiction to determine dischargeability, elements of common law fraud under Ohio law are virtually identical to those necessary for a finding under Section 523(a)(2).

*Bell v. Sims*, Case no. 11-4802 (Bankr. E.D. Mi. 2011) – Fraud in the inducement requires proof of inducement but not proof of dishonest intent. Dishonest intent is essential element of action under Section 523(a)(2). Judgment for fraudulent inducement was based on elements that were not required by Section 523(a)(2). As such, judgment for fraudulent inducement was not collateral estoppels on dischargeability of debt.

*Community Federal Credit Union v. Olds*, 2011 WL 3471551 (Bankr. N.D. Ohio 2011) – Credit Union that did not reasonably rely on statements of borrower could not prevail in non-dischargeability action. Credit Union took steps to verify debtor-husband’s income but made no effort to verify debtor-wife’s income which Credit union now alleges was overstated. Debtors’ tax returns for prior two years disclosed no income for the debtor-wife. Wife had no financial background and listing of gross revenue on application did not evidence intent to defraud but were product of wife’s lack of understanding of difference between gross revenue and gross income. Wife had applied for Visa card with credit Union two months prior to applying for new loan and disclosed materially lower income on Visa application.

*King’s Welding & Fabricating, Inc. v. King*, 2011 WL 2837915 (Bankr. N.D. Ohio 2011) – Employee’s actions in engaging in competing business to perform services that employer could not or would not perform, even if proven to constitute breach of fiduciary obligation, does not amount to fraud for purposes of Section 523(a)(2).

*Atkisson v. Roberts*, 2011 WL 2652311 (Bankr. W.D. Ky. 2011) – Debtor’s use of corporate credit card was not fraudulent where Corporate officer expressly authorized that use. Debtor told corporate officer that debtor was using the corporate card for personal purposes because debtor was not drawing salary or any other income from corporate employer. Failure of business deal does not amount to fraud absent evidence that debtor never intended to comply. Creditor paid debtor’s business debts to facilitate sale of debtor’s business and investment of net proceeds into creditor’s corporation. Business’s inability to generate revenue prevented debtor from contributing funds as parties intended, but there was no evidence of any misrepresentation or fraud by debtor in commencing transaction, only a financial inability to consummate it.

*Ewers v. Cottingham*, 2011 WL 2118247 Bankr. E.D. Ky. 2011) – Debtor husband’s debt to wife’s former employer resulting from wife’s embezzlement of funds was not within Section 523(a)(2). Evidence indicated that wife embezzled funds but did not indicate that wife used any material misrepresentations to employer or that employer relied on any statements by debtor wife that produced an injury.

*Bush v. Roberts*, 2011 WL 2650254 (Bankr. W.D. Ky. 2011) – Under Section 523(a)(2)(A), creditor must prove fraud other than through a statement respecting debtor’s or insider’s financial condition. Elements are (1) the debtor obtained the money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) the creditor’s reliance was the proximate cause of the loss. Evidence failed to show that debtor induced creditor to invest in business with full intent to later exclude creditor. Debtor formed company; drafted corporate governance documents for creditor’s signature; debtor and creditor were both on the business bank accounts; creditor willingly allowed debtor to handle business aspects; creditor regularly reviewed business expenses; creditor unilaterally removed debtor from the business line of credit and then unilaterally increased the amount of the line; and debtor continued to make payments on the line of credit for two years after debtor was no longer liable on the line.

*Old Republic Title Company v. Looney*, Case No. 10-8083 (6<sup>th</sup> Cir. BAP 2011) – Pre-petition settlement agreement between Debtor and Creditor that resolved Creditor’s claim of fraud was itself a non-dischargeable obligation. Although there was no allegation of fraud in the making of the settlement agreement, Section 523(a)(2) applies to all debts that arise out of fraud. A debt embodied in a settlement of a fraud case arises out of the underlying fraud. If creditor can demonstrate that underlying debt itself was result of fraud, settlement agreement will be non-dischargeable. Debtor fraudulently obtained funds by representing to title company that there were no persons holding unpaid obligations that could be the subject of mechanics liens, inducing title company to insure title and allow closing of sale from which Debtor obtained release of personal guaranty of \$1.6 million plus a cash payment of more than \$100,000.00.

*Condidorio v. Regions Bank*, 2011 WL 1157286 (M.D. Tn. 2011) – Debtor makes or publishes financial information when the debtor provides a financial statement to a third party with the intent that it be delivered to the prospective lender. Debtor provided false financial statement to business partner with full knowledge that partner would use statement to “shop around” for loan for business. Intent to deceive can be proven by a debtor’s gross recklessness in failing to list obligations on a financial statement. Debtor was Vice President of a multi-national consulting company, signed incomplete financial statements, at best, assuming that his business partner would fill in missing information. Debtor did not check the document or ask for or keep copies of his other personal financial statements or several loan guarantees that he had previously signed, despite the significantly large amounts being guaranteed. Debtor’s blind signing, failing to check the document afterwards, and supplying of an incomplete financial statement and reckless signing of loan documents without regard for the possible negative consequences shows gross recklessness for purposes of the intent to deceive. Creditor reasonably relied on financial statement where bank followed standard practices, looked to outside sources to verify information, and had prior dealings with debtor, and there were no “red flags”.

*Kentucky Neighborhood Bank v. Ireland*, 441 BR 572 (Bankr. W.D. Ky. 2011) – Under Section 523(a)(2)(A), Creditor must prove the following elements: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representations; and (4) the creditor’s reliance was the proximate cause of the loss. Under Section 523(a)(2)(B), creditor must prove statement in writing must be materially false; respecting the debtor’s or an insider’s financial condition; reasonably relied upon by the creditor; and debtor caused statement to be made or published with intent to deceive. Discharge denied for debt obtained where financial statement: mis-represented cash values of life insurance policies in amount equal to death benefits where policies had no actual cash value; valued furnishings at retail value but gave no consideration for depreciation; listed furniture and personal property which Debtor had already disposed of. Financial statement dated only one



year before case filed indicated assets valued at more than \$1.3 million but at date of petition schedules valued assets at only \$26,000 with no explanation for substantial decline in value.

*Cole v. Wood*, Case No. 08-3202 (Bankr. E.D. Mi.), *aff'd* 2011 WL 4345286 (E.D. Mi. 2011) – Fraud requires proof of course of conduct intended to deceive, justifiable reliance and proximate cause, and requires proof of moral turpitude or intentional wrong, not merely fraud “implied in law”. Michigan’s Seller Disclosure Act requires seller of residence to make written disclosures of condition of property. Transferor is not liable for errors or inaccuracies if the error or inaccuracy was not within the personal knowledge of the transferor or was based entirely on information provided by third parties where the transferor exercised ordinary care. Evidence indicated that debtor disclosed foundation problems and stated that those problems had been addressed and cured and representations were not known to be inaccurate or false. Debtor had hired professional contractor to repair foundation and work was done more than 2 years prior to sale, and debtor had no problem with foundation after work was performed. Further, absent actual fraud, the “as is” clause in the contract reallocates risk of loss to the purchaser for conditions that are unknown.

*FIA Card Services, NA v. May*, 2011 WL 1195865 (W.D. Mi. 2011) – Creditor who filed adversary under Section 523(a)(2) liable for sanctions if action found to lack substantial justification. Sanctions can include attorney fees incurred by debtor. Section 523(a)(2)(A) requires proof that the debtor used the credit card either without any intention of paying or with gross recklessness as to ability to pay. Action lacked substantial justification where debtor used credit card while temporarily unable to work due to health issues. Debtor credibly testified that he intended to pay the credit card when he returned to work and was prevented from doing so only when unanticipated complications arose that required additional surgeries. Even while debtor was out of work for medical reasons, debtor continued to pay required minimum monthly amounts. Creditor lacked any evidence that debtor intended to defraud when the charges were made. Uncontested evidence indicated that debtor intended to pay creditor and that debtor did pay creditor until unanticipated complications from surgery rendered debtor unable to return to work.

*In re Jones*, 2011 WL 204280 (Bankr. E.D. Tn. 2011) –

*JGR Associates, LLC v. Brown*, 2011 WL 9153 (Bankr. E.D. Mi. 2011) – Actual fraud entails a course of conduct intended to deceive, justifiable reliance, and proximate cause. Justifiable reliance means that a plaintiff “is required to make an investigation of his own” “where, under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived. However, the reliance need not be reasonable and is not determined by application of a community standard to the conduct in this case. Actual Fraud can be demonstrated by circumstantial evidence not based on any one particular act or omission, but through a pattern or course of conduct.

*In re Moses*, 2010 WL 5420139 (Bankr. E.D. Tn. 2010) – Debtor’s financial statement submitted to bank in connection with loan request was a statement in writing respecting debtor’s financial condition. The financial statement was false because it included the property as an asset where debtor no longer owned the property, reported that the defendant had accounts receivable in the amount of \$472,000 that did not exist, omitted the defendant’s contingent liability on the guaranty obligation to another bank, and omitted a property tax liability in the approximate amount of \$3,245. Financial statement is “materially false” if it paints a substantially inaccurate picture of a debtor’s financial condition by misrepresenting information of the type which normally would affect the decision to grant credit. Debtor’s financial statement at issue was material because the statement represented value of property not owned by debtor and non-existent accounts receivable at more than \$400,000. Although failure to disclose small liabilities of \$3200 for unpaid property taxes would not be material because the amount was small and not yet due, the larger omissions, standing alone, rendered financial statement materially misleading. Lender must also prove that it actually relied in false statement in making determination to extend credit and that the reliance was reasonable under the facts of the case. Loans in question were made to debtor to permit debtor to purchase real estate from the bank itself. Transaction was not normal arms-length lending relationship in light of Bank’s self interest in extending the credit. Loan officer testified that decision to make loans was based on analysis of amount of debt service compared to potential lease income that debtor could derive from

properties and concluded that lease payments would more than cover required debt service. Evidence indicated that had financial statement been accurate, defendant's relationship with Bank officers, his payment history, the lease income, and the values of the various items of collateral were such that Bank would have made the secured loans to the defendant, negating element of reliance. Debtor could not escape fraudulent nature of financial statement by claiming that debtor did not understand financial statements or that he did not prepare them and "took them lightly". Debtor signed financial statements and, at a minimum, acted with gross recklessness concerning accuracy of statements, which will constitute intent to deceive for purposes of Section 523(a)(2).

*Central Bank & Trust v. Macke*, 2010 WL 5401342 (S.D. Ohio 2010) – Under Section 523(a)(2)(b), Bank must prove materially false financial statement; reasonable reliance; false statements affected borrower's financial condition; and intent to deceive. Bankruptcy Court did not clearly err in concluding that Bank did not rely on financial statements when making the loans in light of evidence that even if financial statement had been completely accurate, Bank likely would have extended the loans anyway. Further, given nature and amount of loans, Bank did not reasonably rely on financial statement where bank failed to take any action to verify any of the information on the statement. Debtor did not misrepresent purpose of loans where debtor used proceeds to pay the bills and expenses that he said he would pay when applying for loan. Although Bank did not know that work had already been performed and that bills were already due, rather than being a loan for future work, the end result was to pay the expenses represented to the bank.

*In re Oxford*, 2010 WL 5050540 (Bankr. W.D. Ky. 2010) – To except a debt from discharge under Section 523(a)(2)(A), a creditor must prove the following elements: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representations; and (4) the creditor's reliance was the proximate cause of the loss. The plaintiff need only show that the property was obtained either by false representation, false pretense or actual fraud, not a showing of all three. Fraud may be proven either by direct or circumstantial evidence. Plaintiff who made multiple loans with full knowledge of Borrower's financial difficulties and where the loans were used for the specific purpose intended did not demonstrate fraud for purposes of Section 523. Borrowers who obtained money with intent to start new business did not obtain loan fraudulently where evidence indicated that Borrower intended to start the business at time loan was extended but later did not complete the process. Failure to perform act in future is fraudulent only if Borrower had no intention of performing act at time promise was made. Debtors' "morally questionable conduct" does not rise to level of non-dischargability under Section 523(a)(2).

*Smith v. Crowley*, Case No. 09-5292 (Bankr. E.D. Mi. 2010) – Sections 523(a)(2)(A) and (B) are mutually exclusive. Section (A) is limited to actions *not* based on a statement in writing regarding debtor's financial condition, while Section (B) is limited to those actions which are based on a writing regarding debtor's financial condition. Agreement between Attorney and Client for payment of fees and later agreement to provide lien against home to secure payment of fees do not constitute statements in writing regarding client's (now debtor's) financial condition. To prevail under Section 523(a)(2)(A) for false pretenses or false representations, creditor must prove that debtor obtained money through a material misrepresentation that debtor knew was false or was made with gross recklessness; debtor intended to deceive creditor; creditor justifiably relied on the false representation; and reliance was proximate cause of loss. "Actual fraud" requires deceit, artifice, trick or design involving direct or active efforts to circumvent and cheat another person. Attorney failed to plead or prove any fraud where only basis for claim was contractual relationship with Debtor to provide a lien and Debtor's later assertion that the lien was invalid. All services were performed well prior to there being even a hint that the validity of the lien would be questioned. There was no evidence that Debtor, at the time of granting the lien, harbored any intent to obtain services with the intention of later challenging the lien. Although State Court later invalidated the lien, that was done in later proceedings begun and completed well after the attorney completed services for which the line was to secure payment.

*Ritter v. Howell*, 2010 WL 4315042 (Bankr. E.D. Ohio 2010) – State Court judgment was collateral estoppel on issue of dischargability under Section 523(a)(4) where State Court judgment expressly ruled on all of the issues necessary. State court rendered final judgment on merits of case after full and fair

opportunity to litigate the issue; the issues were actually and necessarily determined; the issue in the prior suit was identical to the issue in the present action; and the person against whom estoppel is asserted was a party to the prior action. State court determined that debtor issued a check to purchase automobile with full intent to stop payment constitute theft and evidence actual fraud sufficient for Section 523(a)(2).

*The State Bank v. Mansour*, 2010 WL 3853151 (Bankr. E.D. Mi. 2010), *aff'd* 2011 WL 1598725 (E.D. Mi. 2011) – To prevail on claim under Section 523(a)(2)(A), plaintiff must show that debtor obtained money through a material misrepresentation that debtor either knew was false or was made with reckless disregard; made with intent to deceive; creditor justifiably relied; and reliance was proximate cause of loss. Creditor bears burden of proof and debtor will receive benefit of doubt. Section 523(a)(2)(A) expressly excludes written misstatements of a debtor's financial condition, as those are covered exclusively by Section 523(a)(2)(B). Where action is based solely on alleged false financial statements, count seeking relief under (a)(2)(A) would be dismissed. Section 523(a)(2)(B) excepts debts resulting from statement in writing regarding debtor's financial condition that is materially false; on which the creditor reasonably relies; where debtor made or caused to be made with intent to deceive. Any document signed, written, adopted or used by the debtor constitutes a statement for purposes of this section. The statement will be "materially false" if it offers a substantially untruthful picture of debtor's financial condition that affects the creditor's decision to extend credit. Reasonable reliance is an objective standard, based on factors such as whether there were previous business dealings between the parties; whether there were any warnings that would alert a reasonably prudent person; whether minimal investigation would uncover the inaccuracies; and the creditor's standards and industry standards for evaluating creditworthiness. Debtor's failure to list unpaid obligation to Greektown Casino of \$70,000 constituted materially false statement on which creditor reasonably relied in extending credit sufficient to deny dischargeability of debt under Section 523(a)(2)(B). Debtor's use in 2007 financial statement of values of real property from 2005 constituted false statements in light of significant decline in real estate values. However, creditor's reliance on those values not found to be reasonable where creditor was also aware of real estate industry and expressed concerns and skepticism about debtor's ability to turn business around and survive.

*Hudson & Muma, Inc. v. Muma*, Case No. 09-5227 (Bankr. E.D. Mi. 2010) – State court judgment finding that debtor did not commit fraud was not preclusive on issue where state court used "clear and convincing evidence" standard but standard under Section 523 is "preponderance of evidence".

*PNC Bank, N.A. v. Laskey*, 2010 WL 3745655 (Bankr. N.D. Ohio 2010) – In order to sustain a cause of action under Section 523(a)(2)(A), a creditor must show, among other things, that the debtor intended to deceive the creditor. Whether a debtor possessed an intent to defraud a creditor within the scope of Section 523(a)(2)(A) is measured by a subjective standard, meaning that the debtor's personal characteristics and circumstances must be considered. Debtor's admitted use of business line of credit after debtor knew that line of credit had been closed and the use of the proceeds for personal expenses in direct violation of the terms of the line evidenced fraudulent intent. However, apparent significant gap of 6 years between last draw on line of credit and date on which debtor filed bankruptcy is inconsistent with finding of fraudulent intent. Factual issues precluded grant of summary judgment as Court needed further evidence to determine whether debtor acted with fraudulent intent.

*Daniels v. Miller*, 2010 WL 3724780 (Bankr. E.D. Ky. 2010) – Section 523(a)(2)(A) requires proof that the debt was incurred by false pretenses, a false representation, or actual fraud. State Court default judgment predicated on allegations of fraud would not have preclusive effect where State Court Judgment did not contain any findings of fact and stated only that the Debtor, "having filed no answer and made no objections in writing or in person, ... [the Court] finds that the Defendant committed fraud upon the Plaintiff" left the Bankruptcy Court with no way to determine whether the judgment of fraud was made on the merits of the case.

*Holmes Lumber & Building Center, Inc., v. Miller*, 2010 WL 3463296 (Bankr. N.D. Ohio 2010) – Forbearance agreement allegedly induced by fraud is not an "extension of credit" for purposes of Section 523(a)(2). Plaintiff also failed to prove that debtor committed fraud by consenting to Plaintiff's placing lien on property but then selling property before lien could be recorded. Although circumstances "looked bad", that does not equate to fraud in the making of the forbearance agreement.

*Hoffman v. Anstead*, 2010 WL 3489061 (Bankr. N.D. Ohio 2010) – Bankruptcy courts, pursuant to the full faith and credit principles of 28 U.S.C. Section 1738, must give the same issue preclusion effect to a state court judgment as it would be given under that state's law. Under Ohio law, judgments entered by a probate court in the state of Ohio are entitled to preclusive effect. Collateral Estoppel did not control disposition of dischargeability action where the probate court did not make any specific finding regarding the Debtor's state of mind. Probate court only went so far as to find that the Debtor removed and then failed to return items belonging to the Hoffman estate. These findings, while relevant and possibly tending to show that the Debtor acted with an intent to cause harm, could also be indicative of simple forgetfulness or ignorance-clearly nonculpable states of mind. Accordingly, the findings of the probate court are not conclusive as to the specific intent requirement of Section 523(a)(2).

*Humility of Health Partners v. Garritano*, 427 BR 602 (Bankr. N.D. Ohio 2010) – Creditor that had entered into professional medical services agreement with Chapter 7 debtor-physician pursuant to which it agreed to pay debtor a salary, in return for receipt of net profits from his medical practice, failed to establish that debtor had made any misrepresentations to convince it to enter into agreement, as required to except debt from discharge on “false pretenses, false representation or actual fraud” theory, where creditor acknowledged that debtor had provided it with all of financial records for which it asked and did not contend that those records were false

*Kelly v. Aho*, Case No. 08-3101 (Bankr. E.D. Mi. 2010) - State Court Judgment awarding Plaintiff damages for Fraud after extensive trial was collateral estoppel on all factual issues and would support entry of Judgment excepting debt from discharge. State Court found that Debtor had made fraudulent misrepresentations and committed "silent fraud" in connection with sale of real estate.

*Bank of McCreary v. Stephens*, Case No. 09-6065 (Bankr. E.D. Ky. 2010) - Debtor-husband's debt held non-dischargeable where debt arose from debtor-wife's intentional submission to Plaintiff of false invoices where evidence indicated that debtor-husband knew of wife's actions in submitting invoices and receiving payments.

*Bluegrass Stockyards of Campbellsville, LLC. v. Smith*, 429 BR 864 (Bankr. W.D. Ky. 2010) - Debtor improperly used employer's corporate accounts to purchase cattle for debtor's own use and failed to pay employer for those cattle in violation of corporate policy resulting in debt being non-dischargeable.

*Fifth Third Bank v. Alexo*, 2010 WL 3187476 (Bankr. N.D. Ohio 2010) – Section 523(a)(2)(C) creates presumption that debts owing to single creditor aggregating more than \$600 in the 90 days before the order for relief for purchase of luxury goods or services are non-dischargeable. Plaintiff still bears the initial burden of proving : (1) a consumer debt, (2) owed to a single creditor, (3) aggregating more than Six Hundred Dollars, (4) for luxury goods or services, (5) incurred by an individual debtor, (6) on or within 90 days before the filing of the petition. Party who used “convenience check” to pay off credit card owed to third party is not *per se* incurring debt for luxury goods or services and creditor offered no evidence on issue of whether debt was for luxury good. Debtor’s use of “convenience check” constitute implied representation of intent to pay at a time when Debtor had no intention of paying. Notwithstanding elements that would indicate fraud, including short time between issuing of convenience check and commencement of case and debtor’s lack of financial resources to pay the obligation when he issued the check in the first instance, Court concluded that debt was dischargeable, where debtor did not gain pecuniarily from the transaction, merely swapping one debt for another; debtor lacked sophistication; and problems occurred from debtor trying to manage too many financial obligations at the same time; and Debtor’s wife received a social security payment that was not as large as anticipated when convenience check was issued.

*Harris v. Hecker*, Case No. 09-4579 (Bankr. E.D. Mi. 2010) – Debt is non-dischargeable under Section 523(a)(2)(A) where the credit is obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting debtor’s or an insider’s financial condition. Statements respecting financial condition can be found non-dischargeable only under Section 523(a)(2)(B) and the statement must be in writing. Statements “respecting the debtor’s financial condition” are those that actually claim to state the debtor’s overall financial health, net worth or assets. Financial Statements given to induce investor to



invest in business constitute statements respecting the financial condition of debtor or an insider of debtor where debtor was 100% shareholder of business, precluding finding of non-dischargeability under Section 523(a)(2)(A). Under Section 523(a)(2)(B), debt based on statement in writing is non-dischargeable where the statement in writing is materially false and paints a substantially inaccurate picture of debtor's financial condition by misrepresenting information of a type which normally affect a decision to extend credit. Failure to disclose Bank lien on assets of businesses in which Creditor was to invest and to disclose that Debtor's stock interest in those businesses was also pledged as collateral constituted information that likely would have affected Creditor's decision to invest. Summary Judgment denied where record indicated questions of fact on reasonableness of reliance and debtor's subjective intent to deceive.

*Ojeda v. Goldberg*, 599 F.3d 712 (7th Cir. 2010) - Long term Forbearance Agreement on short term bridge loan fraudulently induced where debtor never informed the Creditor of the sale of the Debtor's business, continued to make interest payments with checks bearing the business account, and failed to inform the Creditor of a stock split for Debtor's remaining asset. Although initial loan was not obtained fraudulently, the fraudulent inducement of the forbearance agreement constitutes an extension or renewal of credit resulting in debt being non-dischargeable to the extent of the entire loan amount.

*FIA Card Services, N.A. v. May*, 2011 WL 1195865 (Bankr. W.D. Mi. 2011) – In case premised on credit card transactions, the issue is not whether the debtor an ability to repay the debt; it is whether the debtor has an intention to repay. Courts review the totality of the circumstances to determine whether a debtor subjectively intended to repay the debt when he incurred it. Debtor used credit card while on annual temporary layoff, with intent to convalesce and return to work when the temporary layoff ended in the spring was not able to return as planned when Debtor needed additional surgery and slowdown in economy extended layoff longer than historically occurred. Debtor continually made at least the minimum payments and did not purchase luxury items or live lavishly. Although Debtor ultimately proved unable to pay, inability to pay did not demonstrate lack of intent to pay under circumstances. Debt dischargeable.

*Livingston v. Transnation Title Insurance Co.*, 2010 WL 1404530 (6<sup>th</sup> Cir. 2010) – Section 523(a)(2)(A) excepts from discharge any for money, property, or an extension, renewal, or refinancing of credit to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's financial condition." "Statements respecting debtor's financial condition" would not include closing documents executed by Debtors in connection with sale of property where documents only represented that Debtors were unaware of any other encumbrances on the record title and did not list Debtors' financial obligations or document their ability to pay their creditors. As part of the refinancing transactions, Debtors' provided an owner's affidavit and affidavit of no-encumbrance as required by Title Insurer before it would insure the title to the purchasers. Affidavit was false as Affidavit did not disclose second mortgages that had not been fully satisfied. Affidavit constituted a statement in writing that did not constitute a statement of debtor's financial condition and obligation to Title Insurance company would be non-dischargeable under Section 523(a)(2)(A).

*American Express Bank v. Nguyen*, 2010 WL 2710387 (Bankr. W.D. Ky. 2010) – Under Section 523(a)(2)(A), the creditor must prove that: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. Intent to deceive or defraud the creditor is "measured by a subjective standard," and the debtor's intent is ascertained by looking at the totality of the circumstances including debtor's overall financial condition. The state of a debtor's financial condition is not a substitute for an actual finding of bad faith, and the mere inability to pay the credit card debt at the time it is incurred does not per se establish fraud absent proof that the Debtors did not have the intent to repay the debt when they incurred the charges. Factors to consider when determining whether a debtor intended to repay the debt are: (1) the length of time between the charges made and the filing of bankruptcy; (2) whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made; (3) the number of charges made; (4) the amount of the charges; (5) the financial condition of the debtor at the time the charges were made; (6) whether the charges were above the credit limit of the account; (7) whether the debtor made multiple charges on the same day; (8) whether or not the debtor was employed; (9) the debtor's prospects for employment; (10) the financial sophistication of the



debtor; (11) whether there was a sudden change in the debtor's buying habits; and (12) whether the purchases were made for luxuries or necessities. Defendants did not have the intent to repay debts where Debtor incurred 35 charges collectively over less than 60 days \$48,867.19 collectively; the charges were for purchases of expensive watches for immediate resale to fund a gambling trip from which Debtors intended to derive sufficient winnings to pay the debt; the complete absence of any payments on the charges; Debtors lack of sufficient income to service credit card debt and maintain monthly expenses; and the Defendants' relatively high level of education and financial sophistication.

*Schroeder v. Bennett*, 430 BR 463 (Bankr. N.D. Ohio 2010) – Section 523(a)(2)(A) excludes from discharge any debt which arises from a debtor's dishonest conduct. Fundamental bankruptcy policy is that only those debts which are honestly incurred may be discharged. Party seeking to have a debt held non-dischargeable bears the overall burden of persuasion to establish the applicability of the asserted statutory exception to discharge. Moving party must establish (1) the debtor made a false representation; (2) the debtor knew such representation to be false at the time they were made; (3) the representation was made with intent to deceive the creditor; (4) the creditor justifiably relied on the representation; and (5) the creditor's loss was the proximate result of the misrepresentation having been made. Failure to fulfill a promise, standing alone, is not a sufficient ground upon which to base a finding of fraudulent intent. The inquiry is whether the debtor subjectively intended to repay the debt. Court must evaluate totality of the circumstances to determine whether the debtor had the requisite fraudulent intent. Debtor induced Plaintiff to invest in Debtor's business and to convey to Plaintiff interest in that business. Debtor repeatedly failed to take the simple step of signing an operating agreement naming the Plaintiff as a part owner of the Body Mechanics. Debtor was not prevented from signing either of the operating agreements and the operating agreements were drafted by a relative of the Debtor at the direction and control of Debtor. Plaintiff frequently asked about status of operating agreements and Debtor was keenly aware of her duty to promptly sign one of the agreements. Inference of fraudulent intent may be blunted by a defendant showing that they were not an active participant in the conduct giving rise to the allegations of fraud. Debtor was not passive participant where Debtor first suggested to the Plaintiff the possibility of a business; details and implementation of this business arrangement were handled almost exclusively by the Debtor; Plaintiff's capital contributions were tendered personally to the Debtor; and Debtor undertook the task of obtaining the necessary legal documents. Court has jurisdiction to award a monetary judgment for a debt held to be non-dischargeable. Court would not award treble damages absent controlling state law permitting award of treble damages. Ohio law does permit award of attorney fees in fraud action in discretion of Court. Court would award fees where Debtor strung the Plaintiff along in this matter for a period of three years, forcing the Plaintiff to bear unnecessary legal costs. As such, the Plaintiff's request for \$4,989.98 in attorney fees will be awarded in its entirety.

*Capp Equities, LLC v. Christine*, 429 BR 882 (Bankr. W.D. Mi. 2010) – To prevail under 11 U.S.C. § 523(a)(2)(A), Plaintiff must prove by a preponderance of the evidence that: (1) each defendant obtained money through a material misrepresentation known at the time to be false or made with gross recklessness as to its truth; (2) each defendant intended to deceive the plaintiff; (3) the plaintiff justifiably relied on the false representations and; (4) the plaintiff's reliance was the proximate cause of loss. Proper measure of reliance-when a portion of a debtor's discharge is in question-is not an objective or "reasonable" standard, but a less demanding "justifiable" reliance standard. Reliance may be "justifiable" even though an investigation would have revealed the falsehoods. Justifiable reliance is not dependent upon a community standard that applies to all cases, but instead depends upon the qualities and characteristics of the particular individual who relies on the particular representation. Debtor-husband, in connection with pre-bankruptcy sale of commercial property, represented that HVAC, electrical, and plumbing systems are in good operating condition; and represented that building had no gas service because the gas bill needed to be put into purchaser's name for service to be restored. Debtor-husband further represented that there were no roof leaks when the roof was actually leaking, resulting in three apartments being uninhabitable. At closing, debtor-husband and the debtor-wife signed a closing statement listing each apartment that either produced rent or was vacant, but failed to list any reference to the vacancy of the three units which were uninhabitable. Closing statement implied that these units were occupied by paying tenants, and the debtor husband had produced written lease agreements for these three units even though the tenants had vacated the units. Although one of the units had been badly damaged by fire and rendered uninhabitable, debtor-husband represented that the fire was a small kitchen fire causing minimal damage and that there was no

reason the apartment could not be immediately rented. In fact, fire damage was so expensive that it took a full year two renovate the apartment to place it in a habitable condition. After closing, buyer discovered that building's boiler was not in working order and had not been in working order for a number of months. Boiler could not be repaired because electrical service was also deficient and needed to be repaired before boiler repairs could be undertaken. Debtor-husband knew that his statements regarding the condition of the plumbing and electrical or faults or were made with gross recklessness where debtor-husband continued to interfere with buyers attempt to inspect the utilities by falsely representing that gas service was only temporarily interrupted because of the supposedly to change the billing name and address. Debtor-husband represented both in writing in the purchase agreement and in repeated oral confirmations that all utilities were running and that boiler system had recently been replaced, leaving the false impression that the boiler was in operating condition, evidencing an intent by debtor-husband to defraud the purchaser. At closing, debtor-husband and the debtor-wife signed a closing statement listing each apartment that either produced rent or was vacant, but failed to list any reference to the vacancy of the three units which were uninhabitable. Closing statement implied that these units were occupied by paying tenants, and the debtor-husband had produced written lease agreements for these three units even though the tenants had vacated the units. Although one of the units had been badly damaged by fire and rendered uninhabitable, debtor-husband represented that the fire was a small kitchen fire causing minimal damage and that there was no reason the apartment could not be immediately rented. In fact, fire damage was so expensive that it took a full year two renovate the apartment to place it in a habitable condition. Debtor-husband also represented in purchase agreement that gross annual net income from the building exceeded \$80,000 when debtor's tax form indicated net rental of only \$26,000 for the year preceding the purchase and \$29,000 for the prior year. Documents indicated that actual gross revenue for building was only \$60,000. Purchaser-based purchase price on debtor-husbands representations concerning income and, had purchaser know the actual gross revenue, the actual purchase price would have been substantially less. Representation concerning revenue of the building was a material misrepresentation, known to be false, and made with intent to induce purchaser to acquire building. However, debtor-wife did not sign a purchase agreement and did not make any specific representations concerning annual revenue. Nondischargeable judgment entered against her husband for \$261,508 arbors and damages arising from debtor-husbands misrepresentations. Debtor-wife could not be held liable for the bulk of the misrepresentations as debtor-wife did not make any misrepresentations concerning most of the issues involved. However, non-dischargeable judgment entered against debtor-wife for \$10,075 representing damages based on closing statement which fraudulently listed apartments that were rented or vacant without disclosing vacancy of three units which were uninhabitable.

*State of Michigan v. Turner*, Case no. 09-5413 (Bankr. E.D. Mi. 2010) – Debtor's application provided to State Department of Unemployment Insurance did not constitute a statement in writing respecting Debtor's financial condition for purposes of Section 523(a)(2)(B). A statement of financial condition is one that combines entries stating income, assets and debts. Form does not have to rise to level of a Balance Sheet and Income Statement, but must contain statements of income, expenses, and related information. Section 523(a)(2)(A) requires finding of fraudulent intent. Debtor intends to deceive a creditor where the debtor makes a false representation that Debtor knows or should have known that would induce another to advance goods or services. Fraudulent intent requires actual intent to mislead, not mere negligence. Fraudulent intent can be inferred from totality of circumstances, and Court must consider whether circumstances, including debtor's conduct at the time of the representations, evidences an intent to deceive. Court could not determine on Summary Judgment whether Debtor fraudulently applied for unemployment compensation while still employed based on Debtor's affidavit that Debtor was told by employer that employer was in danger of closing and should apply for unemployment, and that employer would pay Debtor the difference between Debtor's salary and the amount of unemployment if Debtor continued to work for employer, with assurances that the arrangement was "perfectly legal". Court could not conclude as a matter of law that Debtor had requisite fraudulent intent and knowledge, or whether Debtor was honestly, if mistakenly, relying on incorrect information provided by employer.

*Hogan v. George*, Case No. 09-5065 (Bankr. E.D. Ky. 2009) – Action under Section 523(a)(2)(A) requires proof that debtor obtained money, property, services, or an extension, renewal, or refinancing of credit, by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. Creditor must prove that the debtor obtained money through a material misrepresentation that at the time the debtor knew was false or made with gross recklessness as to its truth

with intent to deceive. Creditor must prove that it justifiably relied on the false representation and that its reliance was the proximate cause of the loss.'

Justifiable reliance is a less demanding standard than reasonable reliance. State Court litigation established that Defendant's failure to list known defects in written Disclosure Form connection with sale of real property gave false information to the claimant in the course of a transaction in which the defendant had a financial interest or use of the claimant in a business transaction; that defendant was negligent in communicating the information; defendant gave information with the intent or knowing that the claimant would act or decide not to act in reliance on the information; claimant relied on the information supplied by the defendant; and reliance on the information supplied by the defendant caused damage to the claimant; supported final judgment under Section 523(a)(2)(A) as fraudulent representations and as actual fraud based on collateral estoppel.

*Mays v. Hill*, Case No. 09-6061 (Bankr. E.D. Ky. 2009) – Rule 4007 requires a complaint to determine dischargeability of debt to be filed no later than 60 days after the date set for the first meeting of creditors. However, where debt is neither scheduled nor listed, that is not discharged unless creditor acquires actual knowledge of bankruptcy and time to file a complaint to determine dischargeability under Section 523(a)(2). Where creditor was not listed and did not have actual knowledge of bankruptcy proceeding until after expiration of deadline under Rule 4007, creditor's action to determine dischargeability under Section 523(a)(2) was not time barred, even though the complaint was not filed until almost one year after the commencement of the bankruptcy case.

*Double v. Cole*, Case No. 08-3371 (Bankr. N.D. Ohio 2009) – Pre-petition contractual agreement in which debtor allegedly acknowledged his debt to the plaintiff would be dischargeable is not enforceable and will not control outcome of adversary proceeding. Agreements which purport to waive the right to a discharge to bankruptcy violate public policy, although the statements contained in the agreement may be utilized at an evidentiary hearing to determine dischargeability.

*Nehasil v. Grenier*, Case No. 09-14011 (E.D. Mi. 2010) – Complaint that does not specifically cite Section 523(a)(2)(A) nonetheless states cause of action where Complaint is predicated on State Court fraud judgment. State court judgment for fraud which required that Defendant have obtained money as a result of the fraud. State Court action for fraud required proof of (1) material misrepresentation; (2) that was false; (3) was known to be false, or made recklessly, without knowledge of truth, and as a positive assertion; (4) that was made with intention that other party should act on it; (5) that the other party acted in reliance on the statement; and (6) that the other party suffered injury. Michigan Fraud judgment is sufficient to support finding of non-dischargeability under Section 523(a)(2)(A) under doctrine of collateral estoppel.

*Budzynski v. Stephens*, Case No. 10-4230 (Bankr. E.D. Mi.), *aff'd* 2010 WL 4286186 (E.D. Mi. 2010) – To prevail in action under section 523(a)(2)(A), creditor must prove (1) debtor obtained money or services to internal misrepresentation that, at the time, debtor knew was false or made with gross recklessness; (2) debtor intended to deceive creditor; (3) creditor justifiably relied on the false representation; and (4) reliance was proximate cause of loss. Complaints must identify allegedly false statements by debtor and must allege facts to establish reliance upon representations and that reliance was cause of loss. Failure to allegations of fraud with particularity is legally insufficient. Creditors complaint that alleged only in conclusory fashion that debtor's execution of a retainer agreement constituted a representation that debtors had sufficient funds and assets to pay the fees and that debtors obtain services by means of a false representation and actual fraud has debtors had no intention to pay for services was insufficient to state cause of action.

*Sullivan v. Smith*, Case No. 10-4335 (Bankr. E.D. Mi. 2010) – Forbearance agreement executed in connection with state court litigation that provided that debt "is not dischargeable and bankruptcy based upon, among other things, they're obtaining money and extensions of credit ... based on false representations within the contemplation and meaning of 11 U.S.C. §523" was not sufficient to determine that debt was non-dischargeable. Forbearance agreement lacked any specific factual basis for any of the elements required to terminate that to be non-dischargeable under section 523(a)(2).

*Murawski v. Campbell*, Case No. 08-3178 (Bankr. E.D. Mi. 2010) – To warrant denial of discharge under §523(a)(2)(A), Plaintiff must prove (1) the debtor obtained money, property, services, or an extension of credit; (2) through a material misrepresentation; (3) that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (4) the debtor intended to deceive the creditor; (5) the creditor justifiably relied on the false representation; and (6) its reliance was the proximate cause of the loss. False representations are statements that falsely purport to depict current or past facts while false pretenses involve implied misrepresentations or conduct intended to create or foster a false impression. Actual fraud involves moral turpitude or intentional wrong, consisting of deception intentionally practiced to induce another to part with property or surrender some legal right and which accomplished the desired result. Complaint that alleged that debtor gained access to Plaintiff's property through "fraudulent trespass" and "fraudulent scheme" could constitute "fraud" for purposes of determining debt to be non-dischargeable under Section 523(a)(2)(A).

*Tomlin v. Crownover*, 2009 WL 2843370 (Bankr. E.D. Tn. 2009) – To prove a case under §523(a)(2)(A), creditor must establish: (a) the debtor obtained money by means of a materially false representation; or (b) when the debtor made the representation, the debtor (1) knew it was false or recklessly disregarded whether it was true or false; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. Mere breach of contract or breach of warranty does not constitute non-dischargeable claims. State court statement that debtor "never intended to deal fairly and in good faith" is nothing more than breach of general contractual obligation. Although State Court judgment established that debtor violated State Consumer Protection Act by making false statements regarding debtor's expertise as builder, that debtor did so with intent to deceive creditor and to cause creditor to sign contract with debtor, and that debtor intentionally "front loaded" the payments ensuring that debtor would be able to walk away from project in the middle when balance of funds remaining on contract would not be sufficient to complete project, state court action did not require finding that creditor justifiably relied on the false statements.

*Sher v. Dunbar*, Case No. DT 09-06496 (Bankr. W.D. Mi. 2010) – creditor's action to deny discharge based on alleged fraud under section 523(a)(2)(a) barred by collateral estoppel based on prior unconfirmed state arbitration conclusion that debtor did not commit fraud in underlying transaction.

*Issacs Cars, Inc. v. Woods*, 2009 WL 3561527 (Bankr. W.D. Ky. 2009) – To prevail under Section 523(a)(2)(A), plaintiff must prove (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) the creditor's reliance was the proximate cause of loss. Debtor who was "aware" of business's financial difficulties did not run business and had no knowledge that business was selling cars "out of trust". When possible sales out of trust were brought to Debtor's attention, he inquired as to the missing vehicles but took no further action based on what appeared to be plausible explanation. Although a more diligent investigation would have revealed that the vehicles were sold out of trust, Defendant did not have subjective intent to deceive Plaintiff Financing Agency.

*In re Stricker*, 2009 WL 3247171 (Bankr. W.D. Mi. 2009) – Under either Section 523(a)(2)(A) or (B), creditor must prove that debtor obtained money through a material misrepresentation that at the time the debtor knew was false or made with gross recklessness as to its truth with intent to deceive; that the creditor either justifiably or reasonably relied on the misrepresentation; and that the misrepresentation was the proximate cause of the loss. Debtors falsely stated represented to lender that Debtors intended to reside in home being financed when Debtors' intention at all times was to use the property as investment and rental property. Other misrepresentations were in documents created by mortgage broker, although Debtors "paid little or no attention to the loan application or other loan documents and either signed the documents in blank or in only a partially completed manner". Debtors' signing of documents that contained known misrepresentations for that were blank when signed satisfied element of material misrepresentation. Debtors did not intend to deceive lender. All documents were prepared by mortgage broker and Debtors believed that mortgage broker was representative of lender for originating, processing and closing loan. "[I]f a creditor's agent misleads the debtor into signing a false statement or signing a statement in blank, the element of intent is lacking." Bank did not reasonably or justifiably rely on misrepresentations where



there were substantial facts that should have alerted Bank. Mortgage broker was well known to Bank and was principal of Developer that had substantial lending relationships with Bank. Developer was also the seller of the property to the Borrowers. No employee of Bank ever met or spoke with Borrowers and all dealings were through the Mortgage Broker. “The court can only speculate why Flagstar approved a loan when its own representative in originating, documenting, and closing the loan was to receive virtually all of the loan proceeds.” Bank had originally rejected loan application and “invited” Mortgage Broker to submit an application for a lower amount. Borrowers’ incomes did not comply with Bank’s income requirements for a loan of this size. Bank relied on three fictitious “leases” provided by Mortgage Broker from which Borrowers allegedly received income. Leases were less than one page long and lacked any meaningful provisions that one would expect to find in a lease, and none of the leases listed the Debtor-Wife as a landlord although she was listed as the co-borrower and co-owner of the properties. Verification of Deposit letters allegedly from Borrowers’ Bank (but in fact created by Mortgage Broker) were suspect on their faces and Bank had ample reason to question veracity but never did. Appraisals contained inconsistent and contradictory information but were never questioned by Bank. Construction Loan Agreement and Escrow Agreement submitted by Mortgage Broker were dated over a year prior to the Loan Application. Bank ignored conditions and requirements contained in Loan Agreement and funded the loan without requiring proof of compliance. Loan Application submitted by Mortgage Broker indicated that Borrowers had another loan with Lender when Borrowers had no such relationship with Lender and had never had a loan with Lender.

*McDonald v. Morgan*, 2009 WL 2986416 (Bankr. E.D. Tn. 2009) – Section 523(a)(2)(A) excepts from discharge any debt obtained using false pretenses, a false representation or actual fraud other than a financial statement regarding debtor’s financial condition. Plaintiff must first prove that the Defendant obtained money, property, or services through material misrepresentations which he knew were false or were made with gross recklessness, that the Defendant intended to deceive the Plaintiff, that he justifiably relied upon the Defendant’s false representations, and that his reliance was the proximate cause of his loss. The misrepresentations would be material if they would generally affect a lender’s or guarantor’s decision. False representations and pretenses encompass statements that falsely purport to depict current or past facts. Fraudulent intent requires an actual intent to mislead, which is more than mere negligence. A ‘dumb but honest’ debtor does not satisfy the test. Plaintiff’s reliance must be both actual and justifiable – reliance can be justifiable even if the falsity would have been discovered on further investigation. Plaintiff and Debtor “jointly owned” a parcel of real property. Although title was in Debtor’s name alone. Debtor misrepresented to Plaintiff that Debtor intended to obtain mortgage loan of \$11,000 with intent to induce Plaintiff to allow Debtor to do so, but then obtained a mortgage loan of \$30,000. Plaintiff and Debtor had been friends for many years and Plaintiff justifiably relied on Debtor’s representations concerning the amount and purpose of the mortgage loan. Debtor obtained a second mortgage on the property without informing Debtor at all which equaled or exceeded the value of the property as a whole. Debtor induced the Plaintiff into agreeing to the first loan through misrepresentations and false pretenses and the second loan was obtained through actual fraud against the Plaintiff. The court also finds that the Defendant did so with intent to deceive and that the Plaintiff justifiably relied upon the Defendant’s representations. Plaintiff’s claim deemed non-dischargeable to the extent of one-half of the value of the property.

*Baker v. Wentland*, 2009 WL 2132639 (Bankr. N.D. Ohio 2009) - Section 523(a)(2)(A) excepts from discharge a debt for money, property, or services, obtained by false pretenses, a false representation, or actual fraud. False pretense or false representation requires (1) Debtor obtained money, property, services or credit through a material misrepresentation, either express or implied, that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) the creditor’s reliance was the proximate cause of loss. False representations and false pretenses encompass statements that falsely purport to depict current or past facts and include implied misrepresentation or conduct intended to create and foster a false impression. Actual fraud is intentional deception to induce another to part with property or to surrender some legal right and which accomplishes the end designed. Actual fraud requires intent to deceive or defraud measured by a subjective standard and must be ascertained by the totality of the circumstances of the case at hand. While a finding of fraudulent intent may be made on the basis of circumstantial evidence or from the Debtor’s “course of conduct,” if there is room for an inference of honest intent, the question of non-dischargeability must be resolved in favor of the Debtor. Debtor’s representation when hiring employee



that money withheld from employee's pay would be used to pay health insurance premium did not demonstrate false representation or actual fraud where there was no proof of falsity when made. Debtor in fact paid health insurance premiums for 25 years before starting to misappropriate funds. Debtor's later failure to disclose that the money was not being used to pay health insurance premiums constituted material misrepresentation but evidence at trial did not demonstrate any intent to deceive. Debtor made poor choices in attempt to save the Company and the employees' jobs, but for months after Plaintiff and, presumably, the other employees learned that the Company was not paying the health insurance premiums, the employees' portion of the premium continued to be withheld without complaint.

*Wegrzyn v. Burns*, 2009 WL 2044690 (Bankr. N.D. Ohio 2009) - Plaintiff must prove (1) the Debtor obtained money, property, services or credit through a material misrepresentation, either express or implied, that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) the creditor's reliance was the proximate cause of loss. The Debtor's intent to defraud a creditor is measured by a subjective standard and must be ascertained by the totality of the circumstances of the case at hand. A finding of fraudulent intent may be made on the basis of circumstantial evidence or from the Debtor's "course of conduct," as direct proof of intent will rarely be available. If there is room for an inference of honest intent, the question of non-dischargeability must be resolved in favor of the Debtor. Debt found to be non-dischargeable where Debtor requested that services be performed and misrepresented that Debtor would pay upon completion when Debtor never intended to pay for these services. Debtor knew when he ordered the services that business was struggling financially and funds were not available to satisfy the obligation to plaintiff. Debtor's statement that he was attempting to borrow the money from a credit union was not credible as Debtor's relationship with credit union was deteriorating, evidence indicated that Debtor never requested an extension of credit, and it was unlikely he would receive any extension of credit. Even if Debtor thought at the time the services were requested that he would be able to pay for the services, these services were rendered two months later, by which time Debtor's inability to pay became clear and yet Debtor failed to inform plaintiff of inability to pay constituting an implied misrepresentation that Debtor knew to be false. Even when Debtor became aware that he would not be able to pay for the service initially provided, he requested plaintiff to provide yet additional services with the additional promise that plaintiff would be paid upon completion. Debtor's course of conduct in dealing with plaintiff compels conclusion that Debtor's misrepresentations were made with intent to deceive plaintiff regarding Debtor's intent to pay for the services performed.

*Davis v. Prichard*, 2009 WL 1957741 (Bankr. E.D. Tn. 2009) - A debt is non-dischargeable when: (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of the loss. Plaintiff has the burden of proof which must be met by a preponderance of the evidence. Exceptions to discharge are to be strictly construed against the creditor. Debtor falsely represented to Plaintiff on more than one occasion that Debtor was a licensed contractor and Plaintiff would not have employed Debtor if he had known that he did not have a Tennessee contractor's license. Neither the Debtor nor his company was a licensed contractor in Tennessee; that North Carolina revoked the Debtor's contractor's license in 2002; and that the Debtor was cited in 2006 for doing work in Bristol, Virginia without a license. Further, Debtor falsely represented state of work to obtain construction draws for work not performed and where Debtor used payments for purposes other than those for which the Debtor represented. Use of construction funds for a purpose other than to pay for labor or materials on the specified project is prima facie evidence of fraud. But for Debtor's representations that he was using the draws to buy materials and pay for services, Plaintiff would not have kept paying Debtor and sustaining the losses occasioned by the Debtor's failure to use the funds to pay for those materials and supplies.

*Knoxville TVA Employees Credit Union v. Sallie*, 2009 WL 1917959 (Bankr. E.D. Tn. 2009) – Sections 523(a)(2)(A) and (a)(2)(B) are mutually exclusive. Action under Subsection A expressly excludes actions based on false representations regarding Debtor's financial condition. Subsection B is the exclusive section applicable to false statements regarding Debtor's financial condition and requires all statements regarding Debtor's financial condition to be in writing to be actionable. Oral misrepresentations of financial condition are not actionable and debt will be dischargeable. Where Debtors orally represented incomes to

lenders over the phone and then signed loan application that set forth represented income, statements were in writing sufficient to sustain action under section 523(a)(2)(B). A “statement respecting debtor’s financial condition” does not include any communication that has a bearing on Debtor’s financial position – statements are limited to those that purport to state the Debtor’s overall net worth, overall financial health or equation of assets and liabilities. Statements regarding Debtor’s income constitutes statements respecting financial condition. Debtor-wife misrepresented her income when she stated that her gross income was \$1840 per month where Debtor’s employment records did not support income more than \$1563 per month. Debtor-husband misrepresented income when he stated that his gross income was \$5,416 per month where employment records indicated that Debtor husband actually earned \$5,613.32 a month. Wife’s misrepresentation of gross monthly income was not material where discrepancy was small and was more than offset by additional amounts received by wife for child support and by additional amounts earned by husband at his employment. As financial statements accurately reflected all income of both Debtor husband and Debtor wife, debt-to-income ratios used by lender in evaluating loan would not have been adversely impacted and lender likely would have made loan. Statements which are not materially false do not support an action under section 523(a)(2)(B). As to second loan, where Debtor-husband did overstate income on loan application, lender did not rely on financial statement but obtained independent verification of Debtor’s income. Therefore, even if financial application was materially false, lender had independent knowledge of Debtor husband’s actual income when making decision to extend loan. Finally, Debtor-wife’s failure to disclose fact that she was on sick leave when applications were submitted did not evidence necessary intent to defraud creditor where Debtor-wife had been released from medical restrictions and told that she would be able to return to work approximately 9 days after submitting the loan applications. Evidence demonstrated that wife believed that she would be going back to work at any time and there would be no impact on Debtors’ ability to make loan payments. Absent requisite intent to defraud, creditor could not sustain objection to dischargeability under Section 523(a)(2)(A).

*Huntington National Bank v. Moore*, 2009 WL 1974233 (Bankr. N.D. Ohio 2009) – Section 523(a)(2)(B) applies to allegedly false representations of Debtor’s financial condition. Section 523(a)(2)(B) requires that the creditor show reasonable reliance, a higher standard than justifiable reliance, which is required for § 523(a)(2)(A). Reasonable reliance requires that the Creditor did in fact rely on the false financial statement and that reliance on that statement was objectively reasonable. Factors include (1) whether the creditor followed its established lending procedure in approving the loan; (2) whether the creditor used outside sources to verify the financial information provided by the Debtor, such as obtaining a credit report; (3) whether the creditor had a previous relationship with the Debtor; and (4) whether the writing contained any ‘red flags’ that would have alerted the creditor of potential inaccuracies in the financial information provided. Creditor who made two loans, one for \$5 million and one for \$640,000 failed to prove reasonable reliance where Creditor failed to produce evidence of inquiries made about the Debtor’s finances or credit worthiness, creditor’s standard lending policies for loans of this size, or any prior relationship between Debtor and Creditor. Only evidence was affidavit which merely stated that Creditor relied on the financial statements made by the Debtor. Creditor further failed to present any evidence that Debtor intended to mislead creditor.

*Pearce v. Muncey*, 2009 WL 1651451 (Bankr. E.D. Tn. 2009) – Section 523(a)(2)(A) requires proof that Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of the loss. In connection with sale of property, Debtor disclosed a kitchen fire and stated that all damage had been replaced but did not state that the damage extended into the attic of the house. Statement that all damage repaired was material inaccuracy that would generally affect buyer’s decision unless Buyer had actual notice of true facts. Buyer’s own inspection report noted that the Attic had suffered past fire damages provided information to Buyer rendering any alleged representation about the scope of the fire as “kitchen” immaterial. Evidence also failed to establish that Debtor made the representation either knowingly or with gross recklessness. Fire had occurred 27 years earlier when Debtor was small child, and Debtor had been told by Debtor’s father that all repairs had been made in accordance with recommendations of contractor. Plaintiff also failed to prove justifiable reliance where Buyer failed to make even cursory inspection which would have clearly indicated charred trusses in attic. Further, when Debtor disclosed kitchen fire in initial

disclosures, Buyer chose not to rely on representation but obtained independent inspection to determine true condition of house.

*Computer Business World v. Jamil*, 409 BR 866 (Bankr. E.D. Mi. 2009) - Arbitrator's decision in action that alleged fraud in the inducement against Debtor constituted determination of all issues necessary to finding of non-dischargability under Section 523(a)(2)(A). Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon. Arbitration Order stated that Debtor fabricated invoices to artificially inflate revenue and purchasing a high volume of parts at discounted prices and selling them through improper market channels; and Debtor failed to disclose these facts in order to induce reliance by purchaser of Business Assets; non-disclosure was misleading, that Debtor knew that the nondisclosure was misleading; that Plaintiff acted in reliance on the misrepresentation; and Plaintiff was damaged as a result of Debtor's failure to disclose.

*General Motors Corp. v. Heraud*, Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Section 523(a)(2)(A) is phrased in the disjunctive and lists three separate types of conduct engaged in by a Debtor that can give rise to a non-dischargeable debt: (1) false pretenses; (2) a false representation; and (3) actual fraud. Debtor received funds intended for forwarding to third-party but retained those funds. Debtor's repeated promises that the funds would be forwarded constituting statements that were either knowingly false or made with gross recklessness as to truth. Debtor made these statements in order to induce paying party to remit even more funds that were also to be turned over to third-party vendor but which Debtor also retained. Creditor justifiably relied on Debtor's representations where Debtor had previously collected \$10 million that Debtor had turned over to third-party, and creditor had no reason to believe that Debtor would not continue to act in same manner. But for continued misrepresentations, creditor would have ceased remitting payments to Debtor. Debt determined to be non-dischargeable.

*Morgan v. Mankins*, 2009 WL 1616012 (Bankr. N.D. Ohio 2009) - Debt will be excepted from discharge where debt is for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the Debtor's or an insider's financial condition. Plaintiff must prove (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of the loss. Debtor operated automobile repair shop that repaired Plaintiff's car after accident. Debtor forged Plaintiff's signature on Insurance Settlement check; falsely represented that the car had been properly repaired; and falsely stated that parts had been replaced; in order to induce Plaintiff to allow Debtor to repair vehicle. Debt arising from failure to repair vehicle non-dischargeable.

*Willens v. Bones*, Adv. No. 01-4868 (Bankr. E.D. Mi. 2009) - Creditor must prove (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. Misrepresentations regarding financial condition must be in writing to be actionable. Section 523(a)(2)(A) requires "justifiable" reliance, while Section 523(a)(2)(B) requires lesser "reasonable" reliance. Reliance 'reasonable' only if a prudent person in the creditor's position would have relied on the misrepresentation and depends on factors including (1) whether the creditor had a close personal relationship or friendship with the Debtor; (2) whether there had been previous business dealings with the Debtor that gave rise to a relationship of trust; (3) whether the debt was incurred for personal or commercial reasons; (4) whether there were any "red flags" that would have alerted an ordinarily prudent lender to the possibility that the representations relied upon were not accurate; and (5) whether even minimal investigation would have revealed the inaccuracy of the Debtor's representations. Debtor engaged in pattern of misrepresentations and failing to disclose material facts in effort to induce Plaintiff to invest in Debtor's business. Debtor intercepted as many as 40% of supplier invoices and prevented them from being entered into the company's computerized accounts payable system resulting in Company books and records reflecting financial position better than it really was. Debtor falsely stated that Company had "excellent" relationship with major customer at time when customer had restricted Company from receiving any future contracts.

Debtor failed to disclose prior conviction for embezzlement from company pension fund and use of money to improve Debtor's house. Debtor instructed in-house accountant to prepare and back-date large invoice to Debtor's best customer for materials never ordered and never manufactured or delivered, and then caused that invoice to be entered into accounting system, artificially inflating accounts receivable and told Plaintiff that Plaintiff's investment in the Company would be repaid when the customer paid this invoice. Debtor falsely represented that Company cash flow issues were caused by customer's "recent" change in timing of payments to Company when the change had occurred years earlier. However, Plaintiff did not reasonably or justifiably rely on representations. Plaintiff did not meet with either Company's outside accountant or any of Company's employees, either of which would have revealed true financial status of Company and relationship with primary customer.

*Sanderson Farms, Inc. v. Gasbarro*, 2008 WL 4764118 (6th Cir. 2008) - To prevail in action under Section 523(a)(2)(A) and Section 523(a)(6), plaintiff must prove either that the defendant intended to cause harm to the plaintiff or, alternatively, that defendant was substantially certain that the actions would cause harm to the plaintiff. Creditor proved that Debtor, while an officer of a corporation, caused the corporation to purchase goods from Creditor while simultaneously causing the corporation to transfer hundreds of thousands of dollars to Debtor's family members and to entities controlled by Debtor and his family members, leaving corporation unable to pay obligations owed to Creditor constituted sufficient evidence of "substantial certainty" that Debtor's conduct would cause harm to support cause of action under 523(a)(2)(A) and 523(a)(6).

*Whitaker v. Koenig*, 2009 WL 3241744 (Bankr. E.D. Tn. 2009) – Debtor, a construction contractor, obtained money through misrepresentation resulting in non-dischargeability of debt under section 523(a)(2)(A). Debtor requested \$60,000 payment from customer ostensibly to pay "large upcoming expenses" and "to pay for materials and/or to pay subcontractors". In fact, Debtor used all of the money for expenses attributable to construction projects unrelated to plaintiff's project. Court concluded that the Debtor's representation that the money would be used for plaintiff's project was "nothing more than a ploy" in an effort to induce plaintiff into providing Debtor with funds necessary to pay other suppliers and obligations. Plaintiff justifiably relied on the representations where plaintiff believed Debtor to be trustworthy and having substantial experience in building similar homes. Court found that "direct link" between the alleged fraud in the creation of the debt sufficient to sustain the finding of non-dischargeability.

*Morganroth & Morganroth, PLLC v. Stollman*, Adv. Case No. 08-4894 (Bankr. E.D. Mi. 2009) – Section 523(a)(2)(A) can give rise to a non-dischargeable debt based on false pretenses; a false representation; or actual fraud. "Actual Fraud" includes any deceit, artifice, trick or design involving direct or active operation of the mind, used to circumvent or cheat another. A Debtor commits "actual fraud" if he intentionally engages in scheme to deprive or cheat another of property or a legal right. A debt will be non-dischargeable based on false representations that (1) allow Debtor to obtain money, property, service or credit; (2) through a material misrepresentation; (3) that Debtor knew was false or made with gross recklessness; (4) Debtor intended to deceive creditor; (5) creditor justifiably relied; and (6) reliance was proximate cause of loss. Debtor who granted liens to Plaintiffs on her 401(k) proceeds and her Investment Accounts received and retained proceeds and instructed manager of investment accounts to liquidate assets and send directly to Debtor who then spent the money on personal bills. Debtor knew the proceeds were subject to liens yet she engaged in conduct designed to prevent Plaintiffs from receiving proceeds and concealed her receipt and disposition of funds. Debt deemed non-dischargeable based on actual fraud to extent of funds Debtor improperly withdrew from 401(k) and Investment Accounts. Debtor's repeated assurances that she would pay Plaintiffs sums owed in order to convince Plaintiffs to continue to perform services would support finding of non-dischargeability if Plaintiffs could prove that Debtor made statements knowing that Debtor either had no intention of paying or with gross recklessness as to Debtor's future actions and whether Debtor intended to deceive Plaintiffs when she made statements.

*In re Bunch*, 2009 WL 3055338 (Bankr. N.D. Ohio 2009) - A debt will be excepted from discharge if (1) the debtor obtained money through a material misrepresentation that at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of the loss. Debtors owned a construction company hired by Plaintiff to remodel Plaintiff's cabin. Debtors



induced Plaintiff to make payments on the project although Debtors failed to perform the work for which the payments applied and failed to pay materialmen and subcontractors for work that was performed. Debtors misrepresented their true financial situation to Plaintiff and failed to reveal their prior lawsuits and bankruptcy filings to the Plaintiffs. Plaintiffs justifiably relied on the Plaintiffs' misrepresentations to their detriment. Had the Plaintiffs known Debtors' true financial situation and their lack of business acumen, they never would have entrusted them with the remodel job on the cabin, nor would they have paid them such large sums in advance for work that was never performed.

§8.62 Section 523(a)(3)

*Tennessee Commerce Bank v. Cox*, Case No. 309-0410 (Bankr. M.D. Tn. 2010) - Critical factual issue under 11 U.S.C. Section 523(a)(3) is whether the plaintiff had notice or actual knowledge of the case in time to file a timely proof of claim. The debtor did not include Creditor in statements and schedules and Creditor admittedly did not have notice of the bankruptcy until well after the deadline for filing proofs of claim had expired. Debtor not permitted to file late proof of claim on behalf of Creditor and then provide for Tennessee Commerce's debt in her Chapter 13 plan to avoid consequences of failure to list in first instance.

*Mays v. Hill*, Adv. Case No. 09-6061 (Bankr. E.D. Ky. 2009) – Rule 4007 generally requires a complaint to determine dischargability of debt to be filed no later than 60 days after the date set for the first meeting of creditors. However, where debt is neither scheduled nor listed, debt is not discharged unless creditor acquires actual knowledge of bankruptcy and time to file a complaint to determine dischargability. Where creditor did not receive actual knowledge of bankruptcy case until almost one year after commencement of the case and well after the deadline to file an adversary proceeding, creditor's adversary proceeding to determine dischargability was not time-barred.

§8.63 Section 523(a)(4)

*Korte v. Brewer*, Adv. No. 11-4011 (Bankr. E.D. Mi. 2011) – Fiduciary element of section 523(a)(4) requires pre-existing express or technical trust. Complaint must allege (1) intent to create trust; (2) a trustee; (3) a trust res; and (4) a defined beneficiary. Complaint that alleged fraud but did not allege any elements of trust failed to state cause of action.

*Indianapolis Fruit Co. v. Locavore Food Distributors, Inc.*, 2011 WL 4373976 (E.D. Mi. 2011) – Individual who controls activities of Corporation that is subject to PACA trust is liable to unpaid suppliers to the extent that the assets of the Corporation are insufficient to pay the PACA trust obligations. Corporation is subject to PACA trust if Corporation purchases aggregate quantities of perishable commodities in excess of 2,000 pounds in one day. Corporation is subject to PACA trust where Corporation does not purchase 2,000 pounds from any one supplier on any day, but does purchase an aggregate 2,000 pounds from all suppliers combined in any given day.

*Tennessee Education Lottery Corp. v. Little*, 2011 WL 4344584 (Bankr. E.D. Tn. 2011) – Creditor failed to prove that debtor's non-remittance of proceeds of lottery sales constituted defalcation, where debtor testified that Lottery Tickets were not sold but were stolen by former employee before debtor could remit the proceeds to the Lottery.

*Jones v. Leedey*, 2011 WL 3678925 (Bankr. E.D. Mi. 2011) – State court judgment that contained specific finding that debtor removed and converted money from Plaintiff without proper authority or justification, the amount of \$131,489.99 was sufficient to support collateral estoppels judgment in adversary under Section 523(a)(4).

*Plasterers Local 67 Pension Fund v. Warren*, 2011 WL 240409 (Bankr. W.D. Mi. 2011) – Debtor, principal of construction company that received payment for construction services and materials but failed to use funds to pay subcontractors and suppliers, committed defalcation of funds received in pre-existing fiduciary relationship sufficient to deny discharge of debt under Section 523(a)(4). Michigan Building Contract Fund Act creates fiduciary relationship between contractor and owner as to funds paid to



contractor but that is not used to pay suppliers or subcontractors. Company received sufficient funds but used those funds to pay office and general expenses of business.

*Marshall v. Dickson & Campbell, LLC*, 2011 WL 249500 (S.D. Ohio 2011) – Debtor, an attorney, did not commit fraud or defalcation while acting in fiduciary capacity. State Court Order directing debtor to retain settlement proceeds pending resolution of an attorney fee claim by client’s former attorney did not constitute express or technical trust. Debtor did not embezzle funds because debtor did not retain the funds but instead released the funds to the client. When funds were delivered to debtor, there was a pending dispute as to ownership of the funds. Therefore, creditor could not prove that at the time the funds were paid to the debtor, the funds constituted property of the creditor as required to make claim for embezzlement.

*King’s Welding & Fabricating, Inc. v. King*, 2011 WL 2837915 (Bankr. N.D. Ohio 2011) – Employee owes fiduciary obligation to employer, the breach of which can result in the obligation being non-dischargeable.

*Ewers v. Cottingham*, 2011 WL 2118247 (Bankr. E.D. Ky. 2011) – Debtor husband’s debt to wife’s former employer from whom wife embezzled funds was not within Section 523(a)(4). Husband was not employee of employer and did not owe employer any fiduciary obligation and husband did not personally engage in any act of embezzlement or larceny.

*Bush v. Roberts*, 2011 WL 2650254 (Bankr. W.D. Ky. 2011) – Plaintiff must show that (1) the debtor was acting in a fiduciary capacity; and (2) debtor committed a defalcation while acting in such capacity. Creditor must establish the existence of a fiduciary relationship based on an express or technical trust, not merely one who fails to meet a common law fiduciary obligation. Although debtor and creditor were partners and owed each other a common law fiduciary obligation, the parties never executed any corporate governance or other documents that would create either an express or technical trust relationship.

*Old Republic National Title Insurance Co. v. Licavoli*, Case no. 08-4065 (Bankr. E.D. Mi. 2011) – President of title agency breached fiduciary obligation owed to issuer of insurance policies when President and agency failed to segregate funds payable to issuer as required by Agency Agreement. Agency Agreement created express trust relationship and Michigan law also imposes fiduciary obligation on insurance agency. Issuer’s conduct that may have been inconsistent with fiduciary relationship, such as allowing relationship to continue even though Issuer’s prior audit showed a few violations by agency, did not constitute a waiver of ongoing fiduciary obligations. Comingling of trust funds with non-trust funds does not destroy fiduciary relationship or alter status of funds as “trust funds”.

*Zeeland Lumber & Supply Co. v. Harttung*, 2011 WL 1600544 (Bankr. W.D. Mi. 2011) – Violation of Michigan Builder Trust Fund Act creates statutory trust, such that violation results in non-dischargeable debt. The *prima facie* elements under Michigan Building Contract Fund Act are: (1) the defendant is a contractor engaged in the building construction industry, (2) a person paid the contractor for labor or materials provided on the construction project, (3) the defendant retained or used those funds, or any part of those funds, (4) for any purpose other than to first pay laborers, subcontractors, and materialmen, (5) who were engaged by the defendant to perform labor or furnish material for the specific project. Debtor’s closely held corporation contracted to build a cottage and contracted with Zeeland Lumber to provide materials on the project, but did not pay for the materials. Corporation received \$197,300.00 on account of the project, and this sum constitutes the *res* of a statutory trust. Debtor as the person with authority for management and funds of the corporation was a contractor within MBTFA and is liable for failure to cause corporation to pay suppliers, rendering debtor personally liable for non-dischargeable debt.

*Messing v. Chelton*, Case no. 10-6921 (Bankr. E.D. Mi. 2011) – Section 523(a)(4) excludes from discharge debts for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny. Exception based on fraud or defalcation requires proof of a pre-existing express or technical trust that encompasses the property at issue. An express or technical trust requires (1) intent to create trust; (2) a trustee; (3) a *res*; and (4) a beneficiary. Mere contractual relationship between parties is not sufficient to establish existence of trust. Sale of option to purchase property that was subject to mortgage did not constitute embezzlement

of price of option even where sale of option may have violated terms of mortgage itself. Mortgagee still held mortgage and enforceability was not altered in any way by sale of option.

*In re Nail*, 446 BR 292 (8<sup>th</sup> Cir BAP 2011) – To except a debt for the settlement proceeds from the Debtor's discharge for defalcation while acting in a fiduciary capacity, the Creditor must prove: (1) the existence of a fiduciary relationship between the Debtor and Creditor; and (2) commission of defalcation by the Debtor in the course of that fiduciary relationship. For purposes of Section 523, a “fiduciary relationship” requires the existence of an express trust, a definition that is much more narrow than the general common law requirement for a fiduciary relationship. Mere contractual relationship between debtor and bank, where debtor was to pay certain funds to the lender in repayment of the loan, did not create express trust as to those funds when received by the debtor and so could not support a finding of non-dischargeability.

*Follett Higher Education Group, Inc. v. Berman*, 2011 WL 181482 (7<sup>th</sup> Cir. 2011) – Chapter 7 debtor did not stand in “fiduciary capacity” to creditor of his wholly-owned corporation, as that term was used in dischargeability exception, merely because corporation was allegedly insolvent, and debtor, as president and director of corporation, might have owed fiduciary duties to corporate creditors under state law. Contractual relationship between creditor and debtor’s wholly owned corporation to provide bill paying services did not create express trust where debtor’s corporation did not maintain any separate or segregated fiduciary accounts and the contracts between creditor and corporation did not require any segregation of funds. Ordinary contractual relationship between creditor and corporation does not give rise to fiduciary relationship.

*In re Harwood*, 2011 WL 1239810 (5<sup>th</sup> Cir. 2011) – Section 523(a)(4) barred discharge of obligations that result from fraud or defalcation while acting in a fiduciary capacity and includes debts arising from debtor’s acquisition or use of property that is not the debtor’s. Debtor breached fiduciary obligation to partnership in which debtor was the president and chief operating officer of limited partnership when debtor obtained loans to himself from limited partnership funds without disclosing these loans to the other partners. Office of corporate general partner owed fiduciary obligations to both the corporate general partner and to the limited partnership itself, where debtor was charged with the day to day management of the limited partnership and exercised operational control over affairs and business of partnership.

*Emergency Restoration Company v. Fiore*, Case no. 08-4685 (Bankr. E.D. Mi. 2011) – Michigan Builders Trust Fund Act requires proof that the contractor received money for labor or materials provided on a construction project but failed to use those funds to first pay laborers or materialmen who performed labor or furnished materials for the specific project. Labor or materials must be provided for a specific, identifiable project and only the funds from that specific project are impressed with the trust under MBTFA. Plaintiff failed to prove that debtor actually received payment on a specific project or that debtor failed to use those funds to pay plaintiff.

*In re Warren*, 2011 WL 240409 (Bankr. W.D. Mi. 2011) – The court must except a debt from discharge if the creditor establishes that the debt arises from “defalcation” when there is (1) a pre-existing fiduciary relationship; (2) a breach of that relationship; and (3) a resulting loss. Fiduciary relationship requires either an express or technical trust. Michigan Building Contract Fund Act establishes an express or technical trust. Individual corporate officer can be a “contractor” for the purposes of the MBCFA and therefore a “fiduciary”. Defendant on behalf of his corporation he received funds, hired subcontractors, and had sole responsibility for the administration of these funds, including who got paid and who did not. Corporation used funds for expenditures such as meals and entertainment, fuel, car repairs, car insurance and office supplies.

*JGR Associates, LLC v. Brown*, 2011 WL 9153 (Bankr. E.D. Mi. 2011) – Federal law defines ‘embezzlement’ under § 523(a)(4) as the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. A creditor proves embezzlement by showing that he entrusted his property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicated fraud. Members of LLC failed to prove that manager of LLC took possession of property of the Members. Manager may have taken possession of income and assets of the LLC, but that income and those assets were not the property of the

Plaintiffs themselves. Plaintiffs also failed to prove fraudulent intent where there were credible explanations under the management agreements why the manager may have taken the funds. Manager's conduct may ultimately have been a breach of the management agreements, but plausible explanation negated possible fraudulent intent.

*Comfort Control Supply Company, Inc. v. Hunter*, 2010 WL 3786032 (Bankr. W.D. Mi. 2010) – Section 523(a)(4) renders non-dischargeable debts resulting from fraud or defalcation while acting in a fiduciary capacity. Section 523(a)(4) requires express or technical trust resulting from the placement of specific res in the hands of the debtor. Michigan Builders Trust Fund Act imposes an express trust on any building contractor for funds paid to the contractor for the benefit of contractors, laborers, subcontractors or materialmen. To establish a cause of action based upon alleged violations of the MBTFA, a creditor-beneficiary must prove that: (1) the debtor-defendant is a contractor or subcontractor in the building construction industry; (2) a person paid the debtor for labor or materials to be used on the construction project; (3) the debtor retained or used a portion or all of the funds; (4) for any purpose other than to first pay laborers, subcontractors or material men; (5) who were engaged or hired by the debtor for the construction project. MBTFA does not apply to purchases of supplies for general use or inventory. MBTFA applies only to supplies purchased for specific project where contractor then incorporates those supplies and receives payment from the owner or contractor. Debt held non-dischargeable to extent supplier could link specific purchase to specific projects and prove that Debtor had been paid for those projects but failed to pay supplier.

*Hudson & Muma, Inc. v. Muma*, Case No. 09-5227 (Bankr. E.D. Mi. 2010) – State court judgment finding that debtor did not commit fraud was not preclusive on issue where state court used “clear and convincing evidence” standard but standard under Section 523 is “preponderance of evidence”.

*In re McDowell*, 2010 WL 3790318 (Bankr. E.D. Tn. 2010) – Section 1328(a)(2) excludes from the Chapter 13 discharge any obligation determined to be non-dischargeable under Section 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. Embezzlement requires proof that creditor entrusted his property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud. Factual findings in State Court judgment did not conclusively demonstrate that Debtor's actions were evidence of fraud. Parties entered into contractual arrangement and Debtor's actions were the result of a dispute over contractual performance and entitlement to property or proceeds of sale of property. Larceny requires actual or constructive taking away of property of another without the consent and against the will of the owner or possessor with the intent to convert the property to the use of someone other than the owner. As distinguished from embezzlement, the original taking of the property must be unlawful. Factual findings in State Court Judgment did not conclusively demonstrate larceny where Plaintiff originally delivered automobile to Defendant for Defendant to rebuild, and Defendant refused to redeliver automobile after contractual dispute arose.

*Strickfaden v. Sangal*, 2010 WL 3583427 (E.D. Mi. 2010) – Section 523(a)(4) action has three requirements: (1) fiduciary relationship; (2) breach of fiduciary duty; and (3) resulting loss. Under Michigan Builders Trust Fund Act, builder had fiduciary obligation to owner that was breached when builder collected funds for subcontractors and then failed to pay those subcontractors. However, breach did not result in damages where builder was able to provide detailed accounting of funds showing that builder spent more on the construction than owner paid builder. Although builder committed a technical breach of the trust by failing to pay all subcontractors, owner could not show damages where all of owner's money was, in fact, used for the construction.

*Holmes Lumber & Building Center, Inc., v. Miller*, 2010 WL 3463296 (Bankr. N.D. Ohio 2010) – Action under Section 523(a)(4) for fraud or defalcation while acting in fiduciary capacity requires pre-existing express trust relationship. Plaintiff failed to allege any pre-existing trust relationship where alleged defalcation arose out of a consent judgment between Plaintiff and Debtor that liquidated claim and permitted Plaintiff to record lien against property but did not require Debtor to hold property for benefit of Plaintiff.

*Hoffman v. Anstead*, 2010 WL 3489061 (Bankr. N.D. Ohio 2010) – Bankruptcy courts, pursuant to the full faith and credit principles of 28 U.S.C. Section 1738, must give the same issue preclusion effect to a state court judgment as it would be given under that state's law. Under Ohio law, judgments entered by a probate court in the state of Ohio are entitled to preclusive effect. Collateral Estoppel did not control disposition of dischargeability action where the probate court did not make any specific finding regarding the Debtor's state of mind. Probate court only went so far as to find that the Debtor removed and then failed to return items belonging to the Hoffman estate. These findings, while relevant and possibly tending to show that the Debtor acted with an intent to cause harm, could also be indicative of simple forgetfulness or ignorance-clearly nonculpable states of mind. Accordingly, the findings of the probate court are not conclusive as to the specific intent requirement of Section 523(a)(4).

*Humility of Health Partners v. Garritano*, 427 BR 602 (Bankr. N.D. Ohio 2010) – To prevail on complaint to except debt from discharge as one for Chapter 7 debtor-physician's "fraud or defalcation while acting in a fiduciary capacity," creditor that had entered into professional medical services agreement to pay debtor a fixed salary in exchange for receipt of net proceeds of his medical practice had to establish existence of some pre-existing express or technical trust between parties with respect to funds at issue. To establish "embezzlement," creditor must prove that it entrusted property to debtor, that debtor appropriated property for use other than that for which it was entrusted, and that the circumstances indicate fraud, but does not require proof of express misrepresentation or misleading omission. Though Chapter 7 debtor-physician may have breached terms of professional medical services agreement, pursuant to which creditor had agreed to pay debtor a salary in exchange for receipt of net profits from his medical practice, by taking certain deductions not authorized by terms of agreement, there was no indication of fraudulent intent on debtor's part given evidence that deductions which debtor took were consistent with manner in which he operated his practice prior to entering into professional medical services agreement with creditor. "Larceny" is the fraudulent and wrongful taking and carrying away of property of another with intent to convert such property to the taker's use without consent of the owner, and is distinguishable from "embezzlement" in that the original taking must have been unlawful. Chapter 7 debtor-physician's alleged breach of terms of professional medical services agreement, pursuant to which creditor had agreed to pay debtor a salary in exchange for receipt of net profits from his medical practice, due to debtor's failure to pay over the full share of profits to which creditor was entitled was not in nature of misappropriation of any property belonging to creditor, in which debtor did not have interest, as required to except resulting debt from discharge as one for debtor's "larceny."

*Kelly v. Aho*, Case No. 08-3101 (Bankr. E.D. Mi. 2010) - Action for defalcation requires pre-existing fiduciary obligations arising from express or technical trust. Debtor's status as real estate agent for plaintiff, although carrying certain fiduciary obligations, did not give rise to actual trust relationship.

*Bluegrass Stockyards of Campbellsville, LLC. v. Smith*, Case No. 09-1022 (Bankr. W.D. Ky. 2010) - To be non-dischargeable, debt resulting from defalcation requires pre-existing fiduciary relationship. Fiduciary capacity is narrowly construed to express or technical trusts, and does not incorporate implied trusts imposed by operation of law. Although debtor was general manager of business which may have given rise to fiduciary obligations, status did not create express trust with debtor as trustee. However, fiduciary capacity is not required for debt to be non-dischargeable for embezzlement or larceny. Debtor repeatedly used corporate assets to purchase assets for debtor's own use in spite of repeated admonitions not to do so and removed corporate assets to debtor's personal property with intent to re-sell and retain the proceeds, giving rise to non-dischargeable debt for embezzlement and larceny.

*The Hanover Insurance Co., v. Dunham*, Case No. 09-2001 (Bankr. E.D. MI. 2010) – Defalcation while acting in fiduciary capacity requires pre-existing fiduciary relationship based on express or technical trust. A constructive or implied trust imposed by operation of law is not sufficient. Michigan law requires that an express trust requires an explicit declaration of trust, or circumstances that show beyond reasonable doubt a trust was intended, accompanied by a transfer of property to one for the benefit of another. Language in indemnification agreement obtained in connection with construction bonds for public works projects did not create express trust for purposes of Section 523(a)(4). Although the indemnification agreement did use the phrase "in trust", the property that would allegedly be subjected to the trust would be paid by public agencies, not the alleged creator of the trust and there was no agreement by the public agency that the funds



were to be held in trust. Indemnification agreement also referred to “all funds due” whether or not those had been actually paid, while Michigan law requires both declaration of trust and transfer of property.

*General Motors Acceptance Corp. v. Cline*, Case No. 08-8104 (6<sup>th</sup> Cir. BAP 2010) – Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted. Creditor seeking to declare debt non-dischargeable under Section 523(a)(4) must prove that he entrusted his property to the debtor, the debtor appropriated the property for use other than that for which it was entrusted, and the circumstances indicate fraud. Fraudulent intent may be proven through circumstantial evidence including suspicious timing of events, insolvency, transfer to family members or other insiders. Court must review all of the facts and circumstances surrounding the transaction and determine whether the evidence leads to the conclusion that it is more probable than not that debtor had fraudulent intent. Debtor was president of car dealership that sold the vehicles without paying the floor plan lender. Dealership transferred vehicles to family members and affiliates will shortly before dealership filed for bankruptcy without remitting any of the funds to the floor plan lender. Debtor was causing dealership to repay loans from debtor’s friends and family members and affirmatively misrepresented that dealership was paying floor plan lender when dealership was not making any payments. Debtor’s alleged motivation of survival of business did not defeat finding a fraudulent intent. Fax indicated concerted effort to liquidate large amount of inventory in abbreviated period of time, just prior to filing for bankruptcy, with our remaining any of the proceeds to floor plan lender know, warranting conclusion that death resulted from embezzlement under Section 523(a)(4).

*Ormsby v. First American Title Company*, 591 F.3d 1199 (9<sup>th</sup> Cir. 2010) - Section 523(a)(4) prevents discharge for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. Bankruptcy court is not bound by the state law definition of larceny and may follow federal common law which defines larceny as a felonious taking of another's personal property with intent to convert it or deprive the owner of the same. Theft of trade secrets and confidential and proprietary information from Debtor’s competitor company and Debtor’s actions in hiring management level employees from competitor with intent to wrongfully gain access to confidential information constituted larceny within federal definition, rendering debt non-dischargeable.

*Double v. Cole*, Case No. 08-3371 (Bankr. N.D. Ohio 2009) – Pre-petition contractual agreement in which debtor allegedly acknowledged his debt to the plaintiff would be dischargeable is not enforceable and will not control outcome of adversary proceeding. Agreements which purport to waive the right to a discharge to bankruptcy violate public policy, although the statements contained in the agreement may be utilized at an evidentiary hearing to determine dischargeability.

*Tiernan v. Dietrich*, Case No. 08-68294 (Bankr. E.D. Mi. 2010) – Phrase “while acting in a fiduciary capacity” modifies both the fraud and defalcation provisions of section 523(a)(4). Plaintiff could not prevail in action against the debtor who represented himself as a licensed attorney when debtor no longer was, where plaintiff conceded that there was no fiduciary relationship between plaintiff and debtor.

*Issacs Cars, Inc. v. Woods*, 2009 WL 3561527 (Bankr. W.D. Ky. 2009) – To prevail under Section 523(a)(4), Plaintiff must prove (1) fraud or defalcation while acting in a fiduciary capacity; or (2) embezzlement; or (3) larceny. “Fiduciary capacity” requires express trust relationship and does not extend to implied trusts which are imposed on transactions by operation of law as a matter of equity. Embezzlement required that Debtor appropriate funds for his own benefit with fraudulent intent or deceit. Larceny requires that Debtor have wrongfully and with fraudulent intent taken property from rightful owner. Debtor who was “aware” of business’s financial difficulties did not run business and had no knowledge that business was selling cars “out of trust”. When possible sales out of trust were brought to Debtor’s attention, he inquired as to the missing vehicles but took no further action based on what appeared to be plausible explanation. Although a more diligent investigation would have revealed that the vehicles were sold out of trust, Defendant did not have subjective intent to deceive Plaintiff Financing Agency.

*Fingerle Lumber Co. v. Boychuck*, Case No. 09-5477 (Bankr. E.D. Mi. 2010) – Michigan Builder Trust Fund Act (MBTFA) establishes fiduciary relationship between contractor and subcontractor and suppliers, and a failure to pay funds received by the contractor for payment to suppliers and subcontractors is a



defalcation while acting in a fiduciary capacity. Supplier who received partial reimbursement from State Builders Recovery Fund did not extinguish the debt from Contractor to Supplier, but did create right to Recovery Fund to repayment from Supplier if and when Supplier received payment. If debt is non-dischargeable, then interest and cost components to the debt are also non-dischargeable.

*Astro Building Supplies, Inc., v. Slavid*, 2010 WL 2772509 (E.D. Mi. 2010) - To find a debt non-dischargeable under § 523(a)(4) due to defalcation, Plaintiff must prove: (1) a pre-existing fiduciary relationship, (2) breach of that fiduciary relationship, and (3) a resulting loss. Fiduciary capacity requires an express or technical trust relationship arising from placement of a specific res in the hands of the debtor. A statute may create a trust if that statute: (1) defines the trust res; (2) imposes duties on the trustee; and (3) those duties exist prior to any act of wrongdoing. The Michigan Builders Trust Fund Act (MBTFA), imposes a trust with the contractor operating as the trustee, upon the funds paid by any person in connection with a building contract. When a debtor violates the MBTFA in his capacity as a contractor and fiduciary of the building contract fund, the resulting debt may be non-dischargeable. The general contractor a trustee of project funds and must pay laborers, subcontractors, and materialmen before himself, his employees and any other expenses. Plaintiff must establish that it provided supplies to the defendant contractor for use on a specific construction project, that the defendant contractor was paid by its customer for the specific construction project where those supplies were used, and that the defendant contractor failed to pass on the payment it received from that specific project to the plaintiff. It is not the mere provision of supplies to a contractor which creates a trust, it is instead the payment of funds on a specific project where those supplies were consumed which creates the trust under the MBTFA. MBTFA is not implicated unless and until Plaintiff can demonstrate that payments were received by debtor on a specific project for which it provided supplies. Plaintiff failed to identify any specific project for which it provided debtor materials, let alone a specific project for which it provided supplies and debtor also received payment. Parties merely transacted business on an open account basis and debtor failed to pay the “running balance” on that account to zero. As such, the exception set forth in the defalcation provision, 11 U.S.C. § 523(a)(4), is inapplicable.

*Patel v. Shamrock Floorcovering Services, Inc.*, 565 F.3d 963 (6<sup>th</sup> Cir. 2009) – violation of Michigan Builder Trust Fund Act constitutes “defalcation in a fiduciary capacity” resulting in debt being non-dischargeable pursuant to section 523(a)(4). Corporation obtained payments from homeowners but failed to pay suppliers for goods and services provided in connection with the improvements. After Corporation closed, the corporate principle filed for relief under Chapter 7. Court, applying state law definitions and concepts under the MBTFA, concluded that corporate officer can be held personally liable under MBTFA as a “contractor” owing a fiduciary duty to suppliers. The use of monies paid for purposes other than to pay laborers, subcontractors or materialmen constitutes defalcation under section 523(a)(4) as long as the use was not the result of mere negligence or mistake of fact. Corporate principle recklessly misallocated funds and failed to pay subcontractors where corporate accounting was “woefully inadequate”, that the business operations were “sloppy at best” and the corporate principle did not know if an overall accounting was done or how much exactly was owed to Shamrock.

*Baker v. Wentland*, 2009 WL 2132639 (Bankr. N.D. Ohio 2009) - § 523(a)(4) excepts from discharge any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. Larceny is the fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner. Larceny cannot apply where property initially comes into hands of Debtor lawfully. Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come and requires proof that creditor (1) entrusted his property to the Debtor or Debtor lawfully obtained the property, (2) the Debtor appropriated the property for a use other than that for which it was intended, and (3) the circumstances indicate fraud in fact, involving moral turpitude or intentional wrong. Creditor failed to prove fraud where Debtor's representation when hiring employee that money withheld from employee's pay would be used to pay health insurance premium there was no proof of falsity when made and Debtor in fact paid health insurance premiums for 25 years before starting to misappropriate funds. Defalcation while acting in a fiduciary capacity need not rise to the level of fraud. Defalcation includes misappropriation of funds by a fiduciary as long as the use was not the result of mere negligence or a mistake of fact. Fiduciary relationship requires a Debtor must hold funds in an express or technical trust relationship arising from

placement of a specific *res* in the hands of the Debtor. Debtor withholding funds from employee's pay for purposes of paying health insurance premiums constituted sufficient proof of a trust relationship for specific purpose rendering debt non-dischargeable pursuant to Section 523(a)(4).

*Huntington National Bank v. Moore*, 2009 WL 1974233 (Bankr. N.D. Ohio 2009) – Embezzlement is fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. Creditor can prove embezzlement by showing that he entrusted his property to the Debtor, the Debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud. Larceny is fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner. The original taking of the property must have been unlawful. Creditor failed to prove embezzlement or larceny of loan proceeds merely because money loaned to closely held corporation was used for payment of Debtor's (corporation's sole shareholder) personal expenses.

*Pearce v. Muncey*, 2009 WL 1651451 (Bankr. E.D. Tn. 2009) – Section 523(a)(4) requires preexisting fiduciary relationship; breach of that relationship; and resulting loss. Fiduciary relationship requires “express” or “technical trust” and not merely common law fiduciary relationship or “resulting” trust based on alleged wrongful act. Purchase and Sale agreement between seller and buyer of property does not create fiduciary relationship sufficient to support action under 523(a)(4).

*General Motors Corp. v. Heraud*, Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Section 523(a)(4) allows debt resulting from embezzlement to be non-dischargeable. “Embezzlement” is fraudulent appropriation of property which has been entrusted to person for specific purpose but party instead misappropriates property for use other than that for which it was entrusted. Debtor lawfully received funds from Creditor for payment to third party vendor, but retained those funds for own purposes, constituting embezzlement sufficient to deny dischargeability of debt.

*Morganroth & Morganroth, PLLC v. Stollman*, Adv. Case No. 08-4894 (Bankr. E.D. Mi. 2009) – Debts resulting from “defalcation while acting in fiduciary capacity” are non-dischargeable. Plaintiff must prove (1) pre-existing fiduciary relationship; (2) breach of that relationship; and (3) resulting loss. Section 523(a)(4) requires express or technical trust arising from placement of specific *res* in the hands of the Debtor for the benefit of a definite beneficiary. A “constructive” or “resulting” trust is not sufficient. Plaintiffs failed to demonstrate any intent to create a trust, a trustee, a *res* or a definite beneficiary. Debtor's actions in obtaining, using and concealing proceeds that were encumbered by security interests may constitute breach of contract but does not support an express trust relationship. Section 523(a)(4) also excepts from discharge debts resulting from embezzlement or larceny. Embezzlement requires fraudulent appropriation of property by person to whom property was lawfully entrusted. Court adopted narrow definition of property and held that interfering with a security interest was not embezzlement because the money on which Plaintiffs' held liens was property of the Debtor, not Plaintiffs'. One cannot embezzle property for which the person is the lawful owner. Larceny is actual or constructive taking of property without the consent of and against the will of the owner or possessor with intent to convert property. Debtor's actions in disposing of property that was subject to Plaintiffs' lien did not constitute larceny. Debtor was the owner of the funds involved. Further, Debtor did not wrongfully take the proceeds – Debtor was entitled to the proceeds, subject only to Plaintiffs' security interests.

#### §8.64 Section 523(a)(5)

*Dinicola v. Slimak*, 2011 WL 3759468 (Bankr. N.D. Ohio 2011) – Guardian ad litem fees for debtor's children are non-dischargeable under Section 523(a)(5). “Domestic Support Obligation” is one that is owed to or recoverable by governmental unit or specified person; in the nature of support; arising from agreement or court order; and not assigned to a governmental unit. Guardian ad litem has relationship with debtor; obligation to pay GAL fees arose from Court Order; and debt had not been assigned. GAL services were “in the nature of support of the debtor's children throughout the debtor's divorce proceeding” to bring the obligation within the scope of non-dischargeable DSO.

*In re Fath*, Case No. 09-21637 (Bankr. E.D. Mi. 2010) – "Domestic support obligation" is an obligation which is in the nature of alimony, maintenance or support. Alimony and support are given broad constructions to promote congressional policy that favors enforcement of obligations for spousal and child support. In determining whether an obligation not specifically designated as alimony, maintenance or support will nonetheless be "in the nature of support", court will consider whether the state court or parties intended to create a support obligation; whether the obligation has the actual effect of providing necessary support; whether the obligation is excessive or unreasonable under traditional concepts of support; and if the amount is unreasonable, the extent to which the dischargability of the obligation serves the purpose of federal bankruptcy law. State court orders clearly did not award alimony to either party and court never labeled amounts owed to ex-wife as alimony, support or maintenance. Amounts owed to ex-wife were not in the nature of alimony or support.

*Reissig v. Gruber*, 2010 WL 2756762 (Bankr. N.D. Ohio 2010) - A discharge does not discharge an individual debtor from any debt for a domestic support obligation. A domestic support obligation" is defined under 11 U.S.C. § 101 of the Bankruptcy Code as a debt that accrues before, on, or after the date of the order for relief that is in the nature of alimony, maintenance, or support of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated. Award of attorney fees made in connection with an order entered in a domestic matter constitutes an obligation in "the nature of support." The attorney fees were awarded in a proceeding concerning the health and welfare of the Parties' children; and the award of attorney fees was done for the express purpose of compensating the Plaintiff for the Defendant's improper litigation tactics which forced the Plaintiff to expend resources unnecessarily-resources which would have been available to support the children. Federal bankruptcy law controls determination of obligation's status as "support". Debtor's obligation to pay ex-spouse's attorney directly would not remove obligation from status of "support" although Ohio law defined support as only those obligations paid through the office of child support. Direct payments to the creditor, although removing the obligation from the state definition of "support", did not alter the status for purposes of Section 523(a)(5).

*Kassicieh v. Battisti*, 425 B.R. 467 (Bankr. S.D. Ohio 2010) – A domestic support obligation is one owed to or recoverable by a spouse, former spouse or child of the debtor or the child's parent, legal guardian or responsible relative. As part of custody dispute, Court appointed guardian ad litem to act as representative of the minor child. Court ordered that each party was fully responsible for the guardian ad litem fees. Courts have adopted three different approaches to determine if a debt is payable to one of the defined classes: (1) the "plain-meaning" approach, holding that the dischargability of the debt turns on whether it is payable to or recoverable by a person or entity described in section 101(14A); (2) the view that, if a debt is in the nature of support, it is non-dischargeable even if payable directly to a third party and even if the debtor's spouse, former spouse or parent of the child would not be financially harmed if the debtor discharged the obligation; and (3) a more limited approach that requires some ongoing liability of the debtor's spouse, former spouse, or parent of the debtor's child on the support obligation owing to a third party (so that its non-payment might have a financial impact on those parties) before it may be excepted from discharge. Court declined to reach ultimate issue as State Court had not determined the amount of the guardian ad litem fees or how those fees would be apportioned.

*Cheatham v. Cheatham*, 2009 WL 2827951 (Bankr. N.D. Ohio 2009) - An award that is designated as support by the state court and that has the indicia of a support obligation is conclusively presumed to be a support obligation by bankruptcy courts in the Sixth Circuit. Indicia of support include but are not necessarily limited to, (1) a label such as alimony, support, or maintenance in the decree or agreement, (2) a direct payment to the former spouse, as opposed to the assumption of a third-party debt, and (3) payments that are contingent upon such events as death, remarriage, or eligibility for Social Security benefits. Debtor's obligation to make payments on secured debts are not "support obligations". The payments are not to the spouse but are to the lenders directly; the obligations do not terminate on the death, remarriage or eligibility of the spouse for Social Security; Debtor was required to obtain the release of the secured claims within two years regardless of any other change or lack of change in the status of either party; and the Judgment of Dissolution had another paragraph expressly titled "spousal support" that established a direct payment obligation that terminates on the death of either party or the remarriage of the spouse. Debtor's

obligation to pay the mortgage and home equity line on the former marital homestead was not an obligation for support or maintenance that would be non-dischargeable under Section 523(a)(5).

§8.65 Section 523(a)(6)

*Hoffman v. Anstead*, 448 BR 202 (Bankr. N.D. Ohio 2011) – Debtor’s actions in removing property from home of former live in partner prior to partner’s death was based on debtor’s reasonable belief that property belonged to debtor and that he had right to remove property. However, after live in partner died and executors obtained restraining order precluding removal of additional items until ownership could be determined, debtor’s continued removal of property constituted willful and malicious injury.

*Marshall v. Dickson & Campbell, LLC*, 2011 WL 249500 (S.D. Ohio 2011) – Debtor, an attorney, caused willful injury by releasing proceeds of litigation to client notwithstanding Court Order for debtor to hold proceeds pending state court determination of amount owed to client’s prior attorney. Debtor intentionally released funds with actual knowledge of both a dispute as to ownership and a state court order precluding distribution. Evidence indicated that debtor either intended to cause harm to prior attorney or that action in releasing funds was aware that the release of the funds would cause harm to the creditor.

*King’s Welding & Fabricating, Inc. v. King*, 2011 WL 2837915 (Bankr. N.D. Ohio 2011) – Employee’s actions in engaging in competing business to perform services that employer could not or would not perform, even if proven to constitute breach of fiduciary obligation, does not amount to willful and malicious injury for purposes of Section 523(a)(4). No indication that employee’s actions were done with intent to harm employer, where employer could not or would not perform the work done by the competing business.

*Stephens v. Morrison*, 450 B.R. 734 (Bankr. W.D. Tn. 2011) – Willful and malicious injury requires proof of intent to cause harm, not merely proof of act that produced harm and did so with conscious disregard of duties or without just cause or excuse. Debtor’s obligation to homeowner non-dischargeable where debtor obtained funds from homeowner for purposes of performing improvements to homeowner’s property but used those funds for another purpose. Funds were given to debtor specifically for work to be done on homeowner’s property and not for other business purposes or debts of debtor.

*Ewers v. Cottingham*, 2011 WL 2118247 Bankr. E.D. Ky. 2011) – Debtor husband liable to wife’s former employer from whom wife embezzled funds. To hold husband for wife’s embezzlement, Plaintiff had to prove that husband had knowledge of wife’s embezzlement and that husband participated in a scheme to convert plaintiff’s money. Husband and wife had a combined yearly salary of no more than \$105,000, yet their annual expenditures were, at the height of their spending, as large as four times that amount. Debtors shared joint bank accounts into and from which many of these funds flowed. Husband not only had access to those accounts to determine what funds were flowing in and out of them, but also that he from time to time wrote checks and made deposits. Husband signed tax returns, corresponded with the IRS over tax liens, and signed the paperwork indicating their financial status for the loan for their new home. Husband was also involved in several key financial decisions including the purchase of his new Jeep Commander that required a down payment of \$9,717.00 plus sixty months of payments at \$666.72 plus major interior and exterior renovations on home in an amount in excess of \$40,000. Husband had knowledge of the \$30,000 loan to purchase a new home and participated in a \$30,000 spending spree for home improvements. Considering (1) the significant disparity between the Debtors’ income and expenses, a disparity that continued to increase over the course of the embezzlement; (2) Husband’s access to and participation in the family’s finances; (3) the cost of the home improvements; and (4) Husband’s knowledge that Patricia had recently pled guilty to embezzling funds from her prior employer, husband could not reasonably have believed that they were living within their means. Husband’s use and enjoyment of the embezzled funds rises to the level of the “willful” and “malicious” conduct contemplated by § 523(a)(6).

*Bush v. Roberts*, 2011 WL 2650254 (Bankr. W.D. Ky. 2011) – Creditor must prove that debtor actually intended injury to occur, not just that debtor intended an action that resulted in an injury. Breakdown of business relationship including creditor’s removal of debtor’s name from business accounts and line of credit. Debtor continued to make payments on line even after he was no longer legally obligated to do so.



Debtor believed the money he drew from the business equaled his 40% share of the commissions generated, consistent with the agreed upon business structure. No proof that debtor either intended to divert money with specific intent to cause harm or that debtor took more money from business than debtor was permitted to do under the partnership agreements.

*Gomez v. Carmona*, Case no. 08-2075 (Bankr. E.D. Mi. 2011) – Plaintiff’s claim held non-dischargeable under Section 523(a)(6). Claim arose out of sexual harassment and hostile work environment. Debtor’s actions in creating hostile work environment and in pressuring Plaintiff into sexual relationship under threat of loss of employment were “willful and malicious acts” sufficient to support a finding of non-dischargability.

*Emergency Restoration Company v. Fiore*, Case no. 08-4685 (Bankr. E.D. Mi. 2011) – Willful and malicious injury requires intent to cause consequences or belief that consequences are substantially certain and no just cause or excuse. Injury must itself be intentional and deliberate, not just that act is intentionally taken and happens to cause injury. Plaintiff failed to prove that debtor received money on behalf of plaintiff or that debtor failed to turn over money to plaintiff. At most, evidence indicated a breach of contract which will not support action under Section 523(a)(6).

*JGR Associates, LLC v. Brown*, 2011 WL 9153 (Bankr. E.D. Mi. 2011) – Under Section 523(a)(6), a debt “for a willful and malicious injury by the debtor to another entity or to the property of another entity” is not dischargeable. Willful” means that a debtor must “intend the consequences of an act or believe that the consequences are substantially certain to result. “Malice” means without just cause or excuse or acting in conscious disregard of one’s duties. Although Plaintiffs may have demonstrated that manager of LLC wrongfully removed funds from the LLC, there was no evidence that manager did so with the intent of causing injury to the members of the LLC.

*In re Oxford*, 2010 WL 5050540 (Bankr. W.D. Ky. 2010) – Section 523(a)(6) excludes from discharge those injuries which are both willful and malicious. A “willful” injury is a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. The debtor must actually intend the injury caused, not merely intend the act that causes the injury. Debtor’s failure to repay loans does not constitute an “intentional act” and does not produce an “intentional injury”. Debtors’ “morally questionable conduct” does not rise to level of non-dischargability under Section 523(a)(2).

*Morris v. Paine*, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Debtor’s complaint sought judgment against the Bankruptcy Judges and Trustees in Tennessee pursuant to Section 523(a)(6). Section 523(a)(6) is an action available to creditors to deny the dischargability of specific claims. Debtor lacks standing to bring actions under this section.

*Hudson & Muma, Inc. v. Muma*, Case No. 09-5227 (Bankr. E.D. Mi. 2010) – State Court Judgment for misappropriation of trade secrets not entitled to preclusive effect where State Court Judgment did not require finding of either willfulness or malice as required for non-dischargability under Section 523(a)(6).

*H. Park Partners, LLC v. Frick*, 427 BR 627 (Bankr. N.D. Ohio 2010) – Lack of direct involvement by debtor in destruction of property does not preclude finding that debt is non-dischargeable where debtor instructed third parties to remove property from premises and to cause damage to and destruction of remaining property. Although debt will not be found to be non-dischargeable where damages result from conduct of third party, where third party was hired by and was acting at direction of debtor, actions were willful and malicious for purposes of Section 523(a)(6).

*Construction Design and Management, Inc. v. Reveiz*, 2010 WL 3631541 (Bankr. E.D. Tn. 2010) – In order to be successful under Section 523(a)(6), the Plaintiff must prove the existence of a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury and that the Defendant either desired to cause the consequences of his actions or believed with reasonable certainty that such consequences would occur. That a reasonable debtor ‘should have known’ that his conduct risked injury to others is simply insufficient. Instead, the debtor must ‘will or desire harm, or believe injury is substantially certain to occur as a result of his behavior. Acts of conversion may serve the basis for a determination of non-



dischargability under Section 523(a)(6). Debtor hired contractor to construct condominium project, to be financed through construction loan from bank to Debtor. Debtor drew funds from construction loan but did not pay contractor. Contractor failed to prove non-dischargability where contractor did not have any interest in the construction loan funds and was not party to construction loan agreement. Rather, all funds from construction loan were advanced to Owner generally and not for any specific project. At most, Owner breached contract between Owner and Contractor for payment of expenses, but breach of contract is not sufficient for willful and malicious injury. Further, contractor was aware that Owner was receiving draws and that Owner had used portions for other projects without protest and without contacting construction lender about non-payment of draws. Owner's actions in receiving construction loan draws and not paying contractor was not "malicious" as owner had agreed to or acquiesced in that conduct.

*Phillips v. Weissert*, Case No. 09-8032 (6th Cir. BAP 2010) - Actions in accusing individual of rape and in pursuing those charges found by Bankruptcy court to constitute malicious prosecution constitute willful and malicious injury for purposes of Section 523(a)(6). Bankruptcy Court's factual findings that it was more than likely that the rape did not occur and that Debtor's actions caused person to be wrongfully prosecuted and imprisoned for rape were supported by evidence in the record and would not be disturbed on appeal.

*Fairdale Area Community Ministries, Inc. v. Hollingsworth*, 2010 WL 3447590 (Bankr. W.D. Ky. 2010) – For the discharge exception under Section 523(a)(6) to apply, a debtor must: (1) will or desire harm; or (2) believe injury is substantially certain to occur as a result of his behavior. State Court Judgment for conversion constituted collateral estoppel on issues pertaining to dischargability under Section 526(a)(6) where state court found not only that Hollingsworth converted Ministries property, but that he also intended to interfere with Ministries' possession.

*Holmes Lumber & Building Center, Inc., v. Miller*, 2010 WL 3463296 (Bankr. N.D. Ohio 2010) – Section 523(a)(6) does not apply to debts discharged in Chapter 13 unless Debtor seeks hardship discharge. Where Debtor was not seeking hardship discharge, Section 523(a)(6) could not form basis of action to except debt from discharge.

*Hoffman v. Anstead*, 2010 WL 3489061 (Bankr. N.D. Ohio 2010) – Bankruptcy courts, pursuant to the full faith and credit principles of 28 U.S.C. Section 1738, must give the same issue preclusion effect to a state court judgment as it would be given under that state's law. Under Ohio law, judgments entered by a probate court in the state of Ohio are entitled to preclusive effect. Collateral Estoppel did not control disposition of dischargability action where the probate court did not make any specific finding regarding the Debtor's state of mind. Probate court only went so far as to find that the Debtor removed and then failed to return items belonging to the Hoffman estate. These findings, while relevant and possibly tending to show that the Debtor acted with an intent to cause harm, could also be indicative of simple forgetfulness or ignorance-clearly non-culpable states of mind. Accordingly, the findings of the probate court are not conclusive as to the specific intent requirement of Section 523(a)(6).

*Humility of Health Partners v. Garritano*, 427 BR 602 (Bankr. N.D. Ohio 2010) –Injury must be both "willful" and "malicious" for a debt to be excepted from discharge as one for debtor's "willful and malicious injury." "Willful" injury is one that is done voluntarily, intentionally or deliberately - debtor must desire to cause consequences of his act or believe that those consequences are substantially certain to result from it "Malicious" injury is one that is done in conscious disregard of one's duties or without just cause or excuse. Chapter 7 debtor-physician's failure to pay over what were admittedly the net proceeds of his medical practice, to which creditor that paid him his salary was entitled pursuant to terms of professional medical services agreement between them, under circumstances in which debtor must have realized that his breach of terms of agreement would injure creditor, and without any explanation or excuse for his actions, was in nature of "willful and malicious injury," within the meaning of dischargability exception. However, underpayments resulting from improper deductions taken by debtor, which, while not permitted under terms of professional medical services agreement, were consistent with how he had previously operated his practice, were not shown to have been withheld with intent to injure, as required to except debtor's debt for any such underpayment from discharge on "willful and malicious injury" theory.

*Kelly v. Aho*, Case No. 08-3101 (Bankr. E.D. Mi. 2010) - Section 523(a)(6) requires injury that is both willful and malicious. Willful means acting with intent to cause injury, not just action that produces injury. Malicious means lack of any just cause or excuse or in conscious disregard of one's duties. Alleged misrepresentations to purchasers of homes to be constructed about construction delays are not sufficient to prove that debtor intended actions to cause harm or that actions were taken in conscious disregard of debtor's duties. Award of punitive damages in action for fraud, standing alone, is not sufficient to support finding of willful and malicious under Section 523(a)(6).

*Guerra & Moore, Ltd. V. Cantu*, 2010 WL 3059175 (5<sup>th</sup> Cir. 2010) – Section 523(a)(6) excepts from discharge any debt incurred for willful and malicious injury by the debtor to another entity. “Willful and malicious” is a unitary concept such that an injury is “willful and malicious” where there is either an objective substantial certainty of harm or a subjective motive to cause harm. Merely because a tort is classified as intentional does not mean that any injury caused by the tortfeasor is willful absent an objective substantial certainty of harm or a subjective motive to cause harm that established a “willful and malicious injury.” Tortious “interference” by itself, a sufficient “injury”. Party alleging tortious interference must prove four elements to sustain its claim: (1) that a contract subject to interference exists; (2) that the alleged act of interference was willful and intentional; (3) that the willful and intentional act proximately caused damage; and (4) that actual damage or loss occurred. Intentional interference does not require intent to injure, only that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it. State Court judgment against Debtor for tortious interference would not render judgment non-dischargeable absent proof of either subjective intent to cause harm or objective “substantial certainty” of harm.

*Tennessee Commerce Bank v. Detweiler*, 2010 WL 2756759 (Bankr. N.D. Ohio 2010) – Section 523(a)(6) excepts a debt from discharge only where the debt results from intentional and malicious conduct. Debtor’s action in selling personal property that was subject to a security interest without remitting the proceeds to the secured creditor is no *per se* willful and malicious absent proof that by selling property, Debtor intended to cause injury to secured creditor. Debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6). Although knowingly disposing of a secured creditor’s collateral will deprive the creditor of substantial rights that are fundamental to the debtor-creditor relationship is a perceptible and known injury that is “substantially certain” to cause harm to the creditor, Section 523(a)(6) requires more. Debtor was engaged in business at the time of the disposition. Debtor testified that he intended to remain in business and to use proceeds generated through business to continue to make payments to creditor. Debtor’s later default did not result in the debt being non-dischargeable.

*West Michigan Community Bank v. Wierenga*, 2010 WL 2403373 (Bankr. W.D. Mi. 2010) – To except a debt from discharge under discharge exception for willful and malicious injury, creditor must prove three elements: (1) the debtor's actions caused injury to the property of another entity, (2) the debtor's actions were willful, and (3) the debtor's actions were malicious. Kitchen cabinets, bathroom fixtures, interior doors, plumbing and carpet were “fixtures” under Michigan law such that title to the items passed to the bank at the time of the foreclosure sale. Items will be “fixtures” if the items were annexed or attached to the realty, adapted to the use of the realty, and were intended to be permanently affixed to the property. Debtor’s removed kitchen cabinets, bathroom fixtures, light fixtures, interior doors plumbing and carpeting after debtors lost the house at foreclosure sale but during the statutory redemption. Debtor-husbands removal of improvements from the property with intent to sell those improvements and a time when debtor-husband knew that the property had been sold at foreclosure sale and was owned by the bank constitutes intent to remove improvements with full knowledge that removal of improvements would reduce the value of property, amounting to willful act for purposes of section 523(a)(6). Malice does not require any ill will or specific intent to do harm, only to do an act without just cause or excuse, but that is beyond negligence or recklessness. Debtor-husbands statement that he thought he owned the improvements constituted a mistake of law which is not sufficient to counter the clear intent to remove and sell the bank’s property. Loss resulting from debtor-husband’s actions in removing the items would be non-dischargeable. However, loss would not be non-dischargeable as to debtor wife were evidenced failed to establish that debtor wife participated in the removal and disposition of the property and were all of the evidence offered pointed to debtor-husband engaging in the willful and malicious acts without the involvement of debtor-wife.

*Baker v. Simerson*, Case No. 08-2107 (Bankr. E.D. Mi. 2009) - Willful and malicious injury requires deliberate or intentional injury, not merely a deliberate act that leads to injury. There must be intentional act intended or substantially certain to cause injury and a desire to cause injury and done with a conscious disregard of one's duties or without just cause or excuse, but does not require ill will. Debt resulting from automobile accident was dischargeable where Debtor's conduct, driving at a high rate of speed through a busy area, was certainly negligent, but there was no evidence of any intent to cause harm to anyone, much less the Plaintiff specifically. Debtor's failure to maintain insurance is a violation of law, but lack of insurance does not prove intent to cause harm.

*Hogan v. George*, Case No. 09-5065 (Bankr. E.D. Ky. 2009) – Action under Section 523(a)(6) requires that debt arise from willful and malicious injury. Debt must result from conduct that is both willful and malicious. Willfulness requires intent to cause injury, not merely intentional act that results in injury. Breach of contract will not support finding under Section 523(a)(6) unless defendant intended to cause harm by breaching contract. State Court litigation that permitted finding based on finding of “willful *or* malicious” could not support entry of judgment based on collateral estoppel, as State Court did not find that actions were both willful and malicious.

*Ormsby v. First American Title Company*, 591 F.3d 1199 (9<sup>th</sup> Cir. 2010) – Section 523(a)(6) prevents discharge for willful and malicious injury by the debtor to another entity or to the property of another entity. Willfulness requires that Debtor intend the consequences of the act, not simply the act itself; or the injury must be substantially certain to occur as a result of debtor's actions. Malicious requires a wrongful act, done intentionally, which necessarily causes injury, and is done without just cause or excuse. Debtor's theft of trade secrets and confidential information of competitor and hiring management level employee of competitor expressly for purpose of gaining access to competitor's trade secrets and confidential information were actions that were substantially certain to cause injury to competitor and were done with no just cause or excuse. Debtor's actions were willful and malicious sufficient to be non-dischargeable.

*Musilli v. Droomers*, 2010 WL 2222806 (6<sup>th</sup> Cir. 2010) – Section 523(a)(6) excepts a debt from discharge where the debtor intended to cause harm or believed that injury is substantially likely to occur as a result of his behavior. Nondischargability required deliberate or intentional injury, not just an intentional act that causes injury. Debtor who pre-petition transferred money in willful disobedience of State Court Order and knowingly and intentionally transferred money and assets to themselves and others that Debtor knew would injure State Court Plaintiff violated Section 523(a)(6). State Court action found Debtor in criminal contempt of court based on transfers. Contempt penalty constitutes a non-dischargeable willful-and-malicious injury as a matter of law.

*Double v. Cole*, Case No. 08-3371 (Bankr. N.D. Ohio 2009) – Pre-petition contractual agreement in which debtor allegedly acknowledged his debt to the plaintiff would be dischargeable is not enforceable and will not control outcome of adversary proceeding. Agreements which purport to waive the right to a discharge to bankruptcy violate public policy, although the statements contained in the agreement may be utilized at an evidentiary hearing to determine dischargeability.

*Murawski v. Campbell*, Case No. 08-3178 (Bankr. E.D. Mi. 2010) – Complaint to deny discharge in Chapter 13 proceeding which referenced Section 523(a)(6) would be treated as action to deny discharge of debt under Section 1328(a). Although Section 1328(a) does not incorporate Section 523(a)(6) as debt which is not dischargeable in Chapter 13, the similarity of the statutory language between Section 523(a)(6) and Section 1328(a)(4) is sufficient to allow the Court to consider the dischargeability of the debt under standards set forth in Section 1328(a)(4). Section 1328(a)(4) excepts from discharge any debt for damages awarded in a civil action arising from personal injury caused by willful *or* malicious injury, which is a lower standard than Section 523(a)(6) which requires willful *and* malicious injury, but does require that the damages be “awarded”. Jury verdict that determined liability and damages for assault and battery would be “award” even though bankruptcy petition prevented State Court from entering judgment based on the verdict. Section 1328(a)(4) does not require that “award” be reduced to an enforceable judgment.

*In re Merena*, Case No. 08-1342 (9<sup>th</sup> Cir. BAP 2009) – Under Section 523(a)(6), aggrieved party must present evidence that the debtor: (a) willfully injured the creditor or the creditor's property, not merely a

deliberate or intentional act that leads to injury; and (b) the injury was malicious, constituting a wrongful act, done intentionally, which necessarily causes injury, and is done without just cause or excuse.

*Tomlin v. Crownover*, 2009 WL 2843370 (Bankr. E.D. Tn. 2009) – To prove a case under §523(a)(6), creditor must establish that debtor willfully and maliciously caused injury. Conduct must be deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Lack of justification or excuse for debtor's actions is not enough to prove willful and malicious conduct. Willfulness requires more than proof that debtor should have known his decision and actions would put plaintiff at risk. Creditor must show by preponderance of evidence that debtor intended his actions aimed debtor either intended actions to cause injury or debtor believe the injury was substantially certain to follow. "Malicious" standard requires a lack of justification to support the actions. State court award of treble damages under State Consumer Protection Act does not satisfy standard of willful and malicious as state court act requires only that debtor intended to take the action that does not require that debtor intended to cause harm. State court finding that debtor breached covenant of good faith did not constitute intent to cause harm but merely amounts to a breach of contract or breach of warranty.

*Sher v. Dunbar*, Case No. DT 09-06496 (Bankr. W.D. Mi. 2010) – creditor's action to deny discharge based on alleged fraud under section 523(a)(2)(a) barred by collateral estoppel and judicial estoppel based on prior unconfirmed state arbitration conclusion that debtor did not commit fraud in underlying transaction.

*Issacs Cars, Inc. v. Woods*, 2009 WL 3561527 (Bankr. W.D. Ky. 2009) – To prevail under Section 523(a)(6), Plaintiff must prove that Debtor intended to take act that cause harm and did so with intent to cause harm. Debtor who was "aware" of business's financial difficulties did not run business and had no knowledge that business was selling cars "out of trust". When possible sales out of trust were brought to Debtor's attention, he inquired as to the missing vehicles but took no further action based on what appeared to be plausible explanation. Although a more diligent investigation would have revealed that the vehicles were sold out of trust, Defendant did not have subjective intent to harm Plaintiff Financing Agency.

*Baker v. Wentland*, 2009 WL 2132639 (Bankr. N.D. Ohio 2009) - Section 523(a)(6) renders non-dischargeable a debt for willful and malicious injury by the Debtor to another entity or to the property of another entity. Plaintiff must prove by a preponderance of the evidence that the injury from which the debt arises was both willful and malicious and that injury itself was intentional, not just that the injury results from an intentional act. Debtor must either desire to cause the harm or believe that harm is substantially certain to result for injury to be willful and malicious. Malicious requires proof that Debtor acted with deliberate malevolence or that Debtor acted in conscious disregard of duty. Debtor's use of funds withheld from employees for payment of business expenses rather than for the purpose for which they were withheld without just cause or excuse constitutes willful and malicious injury caused by Defendant to extent of funds withheld. However, unpaid medical expenses as a result of Defendant failing to pay the employee health insurance premium did not constitute non-dischargeable debt where Plaintiff has failed to show that Debtor intended the economic injury sustained by Plaintiff or that it was substantially certain to follow from her decision to pay other business expenses instead. There was no evidence that Debtor was aware of the fact that Plaintiff was ill or had been diagnosed with cancer before the employee health insurance plan was cancelled. While it was certainly foreseeable that the Company's employees could incur medical expenses after the health insurance was cancelled, foreseeability does not equate with substantial certainty.

*Huntington National Bank v. Moore*, 2009 WL 1974233 (Bankr. N.D. Ohio 2009) – Section 523(a)(6) requires the Debtor have acted willfully and maliciously. Injury must be deliberate or intentional, and not merely a deliberate or intentional act that leads to injury. Debtor's alleged use of materially false financial statements to obtain loans does not constitute intent to willfully or intentionally cause injury.

*Pearce v. Muncey*, 2009 WL 1651451 (Bankr. E.D. Tn. 2009) – Section 523(a)(6) requires that Debtor act with the intent to cause injury, not merely that the Debtor acted intentionally but without intent to cause harm. Debtor must desire to cause the consequences of act or believe that the consequences are substantially certain to result. Debtor did not act with intent to cause harm by allegedly failing to disclose



full extent of fire damage when Debtor disclosed fire and accurately disclosed damage that Debtor was aware of but was not aware of additional non-disclosed damage.

*General Motors Corp. v. Heraud*, Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Debt that results from "willful and malicious injury" will be non-dischargeable. Creditor must prove that Debtor desired to cause the consequences of the act or belief that the consequences were substantially certain to result; and (2) no just cause or excuse. Non-dischargeability under Section 523(a)(6) requires deliberate or intentional injury, not merely deliberate or intentional act that leads to injury. Debtor who received \$18 million from Creditor to be paid to vendor instead retained funds acted with conscious disregard for contractual duties without justification and with certainty that actions would cause harm to Creditor. Debt non-dischargeable under Section 523(a)(6).

*Sanderson Farms, Inc. v. Gasbarro*, 2008 WL 4764118 (6th Cir. 2008) - To prevail in action under Section 523(a)(6), plaintiff must prove either that the defendant intended to cause harm to the plaintiff or, alternatively, that defendant was substantially certain that the actions would cause harm to the plaintiff. Creditor proved that Debtor, while an officer of a corporation, caused the corporation to purchase goods from Creditor while simultaneously causing the corporation to transfer hundreds of thousands of dollars to Debtor's family members and to entities controlled by Debtor and his family members, leaving corporation unable to pay obligations owed to Creditor constituted sufficient evidence of "substantial certainty" that Debtor's conduct would cause harm to support cause of action under 523(a)(6).

*JP Morgan Chase Bank v. Zwosta*, 2008 Fed App 0016P (6<sup>th</sup> Cir. BAP 2008) – Debtor's use of money which was subjected to a perfected security interest to instead pay trust fund tax liabilities owed to IRS was not *per se* a willful and malicious injury to the secured creditor which would render the obligation non-dischargeable. Although Creditor had a perfected security interest in the funds which was superior to any claim of the IRS, whether the Debtor's action in paying those funds to the IRS caused any injury to the secured creditor and, if so, whether the injury was both "willful" and "malicious" presented questions of fact which was not appropriate for summary judgment.

*Whitaker v. Koenig*, 2009 WL 3241744 (Bankr. E.D. Tn. 2009) – To prevail under section 523(a)(6), plaintiff must prove existence of a deliberate intentional injury, not merely a deliberate or intentional act that leads to injury. To be "willful", Debtor must "will or desire harm, or believe injury is substantially certain to occur as a result of his behavior". Bankruptcy Court is required to look into Debtor's mind subjectively in order to determine whether Debtor intended to cause the consequence of his act or believe that the consequences were substantially certain to result. "Malicious" does not require "ill will or specific intent to do harm", but does require more than mere negligence. Debtor, a building contractor, falsely represented to customer that money advanced by customer to Debtor would be used to pay for expenses related to customer's construction. Instead, Debtor used all of the money to pay bills and expenses on projects entirely unrelated to customer's project. Court concluded that Debtor acted "willfully" because at the time Debtor obtained the payment from the customer, Debtor did not intend to use it for the purposes represented to customer, evidencing an intent to convert those funds to Debtor's own use or with a substantial certainty that conversion of those funds would result from Debtor's act. Court found Debtor's actions to be "malicious" because Debtor undertook them "in conscious disregard of these duties to" his customer with no just cause or excuse.

*Morganroth & Morganroth, PLLC v. Stollman*, Adv. Case No. 08-4894 (Bankr. E.D. Mi. 2009) – Section 523(a)(6) excepts from discharge debts resulting from "willful and malicious injury". "Willful" requires desire to cause consequences or knowledge that consequences are substantially certain. "Malicious" means no just cause or excuse. However, "malicious" does not require ill-will or evil intent. Section 523(a)(6) requires deliberate or intentional injury, not just intentional conduct that leads to injury. Conversion, if willful and malicious, constitutes injury to property within scope of Section 523(a)(6). Debtor's actions in obtaining and spending money that was subject to a lien in favor of Plaintiffs, done with full knowledge of Debtor that the money was subject to liens, constituted willful act of conversion of funds. Debtor's only excuse for conduct was she needed the proceeds to pay her own expenses does not constitute just cause or excuse for wrongful conduct. Section 523(a)(6) also supports a finding of non-dischargeability based on a "willful and deliberate breach of contract" accompanied by an "intention to cause economic injury".



Debtor's actions evidence a willful and deliberate breach of contract accompanied by aggravating circumstances. Plaintiffs could have exercised rights and seized all proceeds before they were disbursed. Instead, Debtor convinced Plaintiffs not to do so by giving them liens on the proceeds, and then obtained, used and concealed her use of the proceeds in complete disregard for Plaintiffs' interests in the proceeds. Debtor's act of misappropriating the funds for the express purpose of preventing Plaintiffs from enforcing their liens constitutes aggravating circumstances that elevate Debtor's conduct beyond mere breach of contract leaving resulting debt non-dischargeable to extent of proceeds Debtor wrongfully obtained.

§8.66 Section 523(a)(7)

*In re Browning*, 449 BR 902 (Bankr. W.D. Ky. 2011) – Restitution Order entered in connection with criminal conviction is not dischargeable. Debtor's obligation to pay restitution to clerk of court for benefit of victim constitutes fine, penalty or forfeiture payable to and for the benefit of a governmental unit, even if the funds may ultimately be redirected by the clerk of court to the crime victim.

*In re Love*, 442 BR 868 (Bankr. M.D. Tn. 2011) – Costs associated with multiple hearings before State Board of Professional Responsibility arising out of series of disciplinary proceedings against debtor are dischargeable. Costs related to disciplinary proceeding are not in the nature of a fine, penalty or forfeiture, but are attempt to recover costs and expenses incurred by State Disciplinary body, thereby constituting compensation for actual pecuniary loss. State cannot attempt to recover these discharged expenses and may not hold debtor's law license "hostage" until these expenses are paid.

*State of Michigan v. Turner*, Case no. 09-5413 (Bankr. E.D. Mi. 2010) – Section 523(a)(7) exempts from discharge debt that constitutes a fine, penalty or forfeiture, but not compensation for actual pecuniary loss. Debt must arise as a punishment or sanction for some type of wrongdoing and must be payable to a governmental unit and for the benefit of a governmental unit. Debtor's wrongful receipt of unemployment benefits required Debtor to repay amount of benefits wrongfully received in the amount of \$8,000 plus penalties of \$32,000.00. Although \$8,000 constituted compensation for the actual pecuniary loss represented by the overpayment, the additional \$32,000 was a penalty that was non-dischargeable. Non-dischargeable status of penalty does not depend on dischargeability or non-dischargeability of underlying obligation. Penalty is non-dischargeable even if the damages for the underlying conduct are discharged.

§8.67 Section 523(a)(8)

*Pietras v. U.S. Department of Education*, 2011 WL 4352381 (Bankr. N.D. Ohio 2011) – Debtors who co-signed student loans for daughter did not demonstrate undue hardship sufficient to warrant discharge of student loan obligations. Debts constitute "student loan debts" even if the debtor was not the student such that liability of co-signor is still non-dischargeable under Section 523(a)(8) absent showing that (1) the debtor cannot maintain, based on current income and expenses, a minimal standard of living if forced to repay the loan; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and (3) the debtor has made good faith efforts to repay the student loan. Debtors' budget showed areas where significant reductions including \$200 per month for time share payments; \$225 for cell phones including \$70 per month for adult daughter; and \$150 for cable television. Budget also proposed to pay \$600 per month for home maintenance that included financing for new flooring and carpet. Even if those expenses were reasonable, the financing would soon be paid off, freeing a substantial sum each month that could then be used to pay down the student loans. Although Debtors had chronic medical conditions, there was no correlation between those conditions and inability to pay student loan debt where Debtors had income of \$60,000 per year derived solely from governmental benefits that were not likely to be changed or reduced. Although Debtors may not have had sufficient income to repay the loans in full, Debtors' failure to fulfill either of the first two conditions rendered this point moot. Further, debtors never made any attempt to repay these student loans, which evidences a lack of good faith in seeking to discharge the debt. While the lack of any meaningful attempt by a debtor to repay a student-loan obligation does not necessarily operate as an absolute bar to a finding of good faith, a viable reason needs to be established for the lack of any meaningful repayment. Debtors, despite having the financial ability to make at least partial payments on student-loan obligations,

directed their financial resources to nonessential expenditures and never sought any deferment or alternative payment option.

*Nixon v. Key Education Resources*, 453 BR 311 (Bankr. S.D. Ohio 2011) – Student loan debt is nondischargeable unless the debtor can demonstrate that: (1) the debtor cannot maintain, based on current income and expenses, a minimal standard of living if forced to repay the loan; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and (3) the debtor has made good faith efforts to repay the student loan. Minimal standard of living in modern American society includes shelter that must be furnished, maintained, kept clean, and free of pests; basic utilities such as electricity, water, and natural gas, water for drinking, and telephones; food and personal hygiene products plus clothing and footwear; vehicles, insurance, tags, gasoline, routine maintenance and unexpected repairs; health insurance or have the ability to pay for medical and dental expenses; small amounts of life insurance or other financial savings for burials and other final expenses; and some small diversion or source of recreation, even if it is just watching television or keeping a pet. Debtor's diligent search for employment indicated that debtor had attempted to maximize her income. Debtor's house payment, although perhaps a little more than "normal" would not be significantly reduced if debtor sold the house and rented, with the debtor saving at most \$100 to \$200 per month. Even reducing debtor's expenses to minimal standard of living, expenses would still exceed income. However, circumstances did not indicate "certainty of hopelessness" as debtor was young and well educated and could obtain employment in the future. Using IBR calculator indicated that based on projected income which debtor could obtain in reasonably near future, debtor could afford to repay \$10,000 per year until debtor turned 61 years old, which would produce total payments to \$210,000.00 including principal and interest. Evidence indicated debtor's good faith efforts to repay where debtor attempted to repay loan and made payments for long period, even though debtor declined to participate in IBR or ICP program Debtor's student loan not discharged to the extent of \$210,000 but sums in excess of \$210,000 are discharged.

*Goodman v. U.S. Department of Education*, 2011 WL 2084191 (Bankr. N.D. Ohio 2011) – To prevail on complaint to except student loan debt from discharge, debtor must prove: (1) that, based on current income and expenses, debtor cannot maintain a "minimal" standard of living for himself and his dependents if forced to repay loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for significant portion of loan repayment period; and (3) that debtor has made good faith efforts to repay loans. "minimal standard of living" requires debtor to make some major sacrifices, both personal and financial, with respect to current style of living. "Additional circumstances," requires circumstances that indicate a certainty of hopelessness, not merely a present inability to fulfill financial commitment of student loans and must be beyond debtor's control and not caused by debtor's "free choice". Debtors inability to repay their student loans while still maintaining minimal standard of living resulted chiefly from size of their family and their many dependent children. State of affairs not likely to persist for significant portion of loan repayment period as two of debtors' children would reach age of majority within one year, and that all but two children would become emancipated within next nine years; debtor-wife would also be able to work full time when two youngest children entered school; and debtors experienced an increase in their monthly income while case was pending. Chapter 7 debtor-husband's decision not to participate in the income contingent repayment plan (ICRP) or income-based repayment plan (IBRP) for satisfaction of student loan debt demonstrated his lack of good faith.. Chapter 7 debtor-wife's decision not to participate in the income contingent repayment plan (ICRP) or income-based repayment plan (IBRP) coupled with her failure to make even a single payment on student loans for past 15 years indicated lack of good faith.

*Matthews v. Educational Credit Management Corp.*, 2011 WL 197835 (E.D. Ky. 2011) – Debtor seeking a partial discharge of student loans due to "undue hardship" must prove: (1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

*Bronsdon v. Educational Credit Management Corp.*, 435 BR 791 (1<sup>st</sup> Cir. BAP 2010) – "Undue hardship" requires evidence that (1) debtor's past, present, and reasonably reliable future financial resources; (2) his

and his dependents' reasonably necessary living expenses; and (3) other relevant facts or circumstances unique to the case, prevent him from paying the student loans in question while still maintaining a minimal standard of living, even when aided by a discharge of other prepetition debts. Court rejected additional prong of *Brunner* test that debtor show "good faith efforts to repay" as inconsistent with undue hardship standard of Section 523(a)(8). Debtor's failure to seek Income Contingent Repayment Plan is not per se fatal to debtor's argument of "undue hardship" even if ICRP would have required \$0 payment for the foreseeable future.

*Kennedy v. Access Group Loan Servicing*, 2011 WL 87242 (Bankr. E.D. Tn. 2011) – Undue hardship requires that (1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans. While a minimal standard of living does not mandate that a debtor live in poverty to qualify for a discharge of their student-loan obligation, it does mean that the debtor is expected to do some financial belt-tightening and forego amenities to which he may have become accustomed. A debtor earning a modest income and living on an unbalanced budget with no unnecessary or frivolous expenses may be discharged based upon an undue hardship, expenditures of items such as internet, cell phones, cable or satellite television, gym or other memberships, and cigarettes are generally unnecessary to maintain a minimum standard of living and the failure to minimize or eliminate these expenditures may not demonstrate a good-faith effort to minimize expenses. Debtor, a licensed attorney, did not have any medical, physical or mental disabilities and had not made reasonable efforts to maximize her income, where she worked only 35 hours per week and billed only 11 and debtor had not sought income from any source other than her own law practice.

*Gibson v. ECMC*, Case No. 09-80199 (Bankr. W.D. Mi. 2010) – *Brunner* test for discharging student loans requires (1) debtor cannot maintain, based on current income and expenses, a minimal standard of living for debtor and dependants if required to repay loan; (2) additional circumstances exist that indicate that the current state of affairs is likely to continue for a significant portion of the repayment period for the student loans; and (3) debtor has made a good faith effort to repay loans. Debtor was well-educated 34 year old woman with no physical or mental impairment and with a history of stable full-time employment. Debtor voluntarily left her prior employment and debtor's prospects for future employment and increased in income were good. Debtor's expenses could be reduced by eliminating dining out and debtor's children would be emancipated in the immediate future, all of which would create disposable income that could be used to service student loan debt. Debtor failed to evidence good faith by refusing to avail herself of income contingent repayment programs. Debtor's statements that she considered ICF as "arbitrary" and that she should be permitted to enjoy a middle class lifestyle before having to make payments to the student lender constituted unreasonable refusal to pursue available programs.

*Hart v. ECMC*, 438 B.R. 406 (E.D. Mi. 2010) - *Brunner* test for discharging student loans requires (1) debtor cannot maintain, based on current income and expenses, a minimal standard of living for debtor and dependants if required to repay loan; (2) additional circumstances exist that indicate that the current state of affairs is likely to continue for a significant portion of the repayment period for the student loans; and (3) debtor has made a good faith effort to repay loans. First element requires proof that debtor is actively minimizing expenses while maximizing income. Debtor's proposed retention of cell phones, cable, internet and recreational expenses totaling \$255 per month are not required to maintain minimal standard of living. Debtor also failed to maximize income, where debtor, an experienced legal secretary, made no effort to approach law firms, went on only one interview, and contacted only a few attorneys with whom debtor had prior employment relationships. During the 16 months from the end of debtor's prior employment and the date of trial on the adversary proceeding, debtor made no attempt to contact other law firms or otherwise seek employment. Debtor's household had income of \$39,000 which is more than double the poverty line for a family of 2. Debtor's Chapter 13 Plan had only 2 years remaining, at the end of which Debtor would have an additional \$490 available to make payments to the student lender and Debtor had built into her Chapter 13 budget extra money for unexpected expenses including \$200 per month for transportation where neither debtor nor her husband worked plus \$75 per month for auto maintenance. Debtor failed to demonstrate good faith where debtor failed to make any effort to qualify for any student loan programs

including Income Contingent Repayment programs which would reduce payments to only \$120 per month, an amount that would be easily paid with adjustments to debtor's household budget.

*Cekic-Torres v. Access Group, Inc.*, Case No. 09-3098 (Bankr. N.D. Ohio 2010) – Undue hardship requires debtor to show (1) That the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) The additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; (3) That the debtor has made good faith efforts to repay the loans. Debtor's sole source of income for her and two children was \$1600 per month from disability. Interest only payments on Debtor's \$100,000 student loan obligation would be \$600 per month, leaving debtor unable to provide even a minimal standard of living. Debtor owned four parcels of real property – her residence and three other parcels that debtor indicated were acquired in her name as an accommodation for relatives who were unable to obtain credit in their own names. Court concluded that these properties did not provide a viable means to pay the student loans where the properties were fully encumbered by mortgages leaving no equity for payment of the student loan debt and debtor intended to surrender these properties to the relatives who occupied those properties. Debtor's disability was likely to persist for the foreseeable future, where it was the result of diabetes and non-healing and infectious leg wounds, and debtor was morbidly obese leaving debtor unable to sit in a normal chair or to move around without a cane. Debtor had made a good faith effort to repay although debtor had never made any payments, where financial position and precipitous decline in health right after graduation prevented Debtor from ever having a meaningful opportunity to repay.

*Gorosh v. Posner*, 2010 WL 3489951 (Bankr. E.D. Mi. 2010) - Co-signor of debtor's student loans who, post-petition, paid off those loans not entitled to except debt from discharge. Plaintiff was not a lender, a governmental unit or a non-profit institution.

*Jackson v. Sallie Mae*, Case No. 09-5593 (Bankr. E.D. Mi. 2010) – Debtor could not maintain minimum standard of living if debtor is required to repay loans. Debtor was unemployed with total income of only \$725 per month and debtor had minimized expenses as far as possible and had no discretionary expenses such as cable TV. Although Debtor was only 26 years old, debtor had made every effort to obtain new employment without success. Even if Debtor were able to gain employment, that likely would be at a rate of \$10 to \$15 per hour and there is no reasonable likelihood that her rate of pay would increase significantly over time, while her expenses certainly will increase given "bare bones" nature of current expenses. Given Debtor's financial position, there is no basis to believe that failure to pay the student loans is the result of bad faith. Court can discharge a portion of the student loans. Court found that debtor will be able to pay \$100 per month starting in December, 2012 when debtor's housing expense stops, at which point there will remain 132 months on the student loan. Debtor therefore to pay \$13,200.00 including all interest, penalties and other charges. Any amount in excess of \$13,200 is discharged.

*Marshall v. Student Loan Corp.*, Case No. 09-1106 (Bankr. S.D. Ohio 2010) - Undue hardship requires: (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist which suggest that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans. Debtor was 56 year old woman who was primary care giver for disabled husband. Debtor had been laid off from prior employment and had been unable to find new employment although applying at more than 100 possible employers, at least partly because of Debtor's need for flexible work schedule because of husband's disability. Total household income consisted of husband's disability of \$1442 per month. Debtor was dependent on daughter to provide place to live. Even without a rent payment, debtor had "negative" income of \$404.00 per month. Largest expense was \$580 for health insurance. There did not appear any reasonably likelihood that debtor's situation would change as husband's condition was likely to deteriorate. Under Income Based Repayment plan, debtor's payment would still be \$0. Even if IBR would produce minimal payment, that is not a part of the test for undue hardship that would prevent discharge of student loan. Debtor's refusal to participate in the IBR may be probative to her intent to repay her loan, it is not a per se indication of lack of good faith. However, under circumstances of this case, Debtor's refusal did not defeat discharge of debt where there was no likelihood that debtor would ever be able to meet expenses and



possible trigger of IBR if debtor obtained even part time employment would severely jeopardize debtor's ability to meet day-to-day living expenses.

*Russell v. U.S.*, 2010 WL 2545182 (Bankr. N.D. Ohio 2010) – Standard of “undue hardship” applies to potential dischargability of the student loan obligation of nonstudent co-obligor. Undue hardship requires (1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for [himself] and [his] dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans. Good faith standard requires debtor to act in good faith. Debtor’s commencement of bankruptcy proceedings while the loans are not yet in repayment status is not, without more, a lack of good faith which would preclude the discharge of the student loans.

*Walker v. Sallie Mae Servicing Corp.*, Case No. 09-6022 (8<sup>th</sup> Cir. BAP 2010) – Discharge Order does not include discharge of student loan unless debtor affirmatively secures a hardship determination. Action to determine dischargability of student loan can be brought at any time prior to or after entry of discharge order and closed case may be reopened without payment of a filing fee if necessary. Entry of Discharge Order does not constitute finding that repayment would not pose undue hardship so as to prevent post-discharge action to determine hardship. Court should consider circumstances as they exist at time of adversary proceeding to determine discharge, even if those circumstances have changed significantly since entry of the discharge. Court will apply totality of circumstances test and will consider past, present and reasonably reliable future financial resources, necessary living expenses, and other relevant facts and circumstances. Debtor bears burden of proof of undue hardship. If debtor’s financial resources are sufficient to cover payment of student loan debt while allowing a minimal standard of living, the student loan debt will not be discharged. Debtor is not entitled to hardship discharge if results from self-imposed limitations or if Debtor is eligible for Income Contingent Repayment Program. Court approved hardship discharge where Debtor and her husband, post-discharge, incurred \$48,000 second mortgage to add a porch to the home and where husband purchased “fully loaded Chevy Suburban” at a cost of \$40,000.00, finding that particular circumstances of this family including special needs children rendered expenses reasonable. Even without those expenditures, Debtor and husband had monthly net income that exceeded monthly budget (\$4700.00 per month without the second mortgage and car or \$6,000 with the second mortgage and car versus income of \$4355.00 per month), resulting in Debtor’s inability to maintain even a minimal standard of living if Debtor is required to repay student loans.

*Gibson v. AES U.S. Department of Education Edusrv National Collegiate Trust*, Case No. 09-50813 (Bankr. E.D. Ky. 2010) – to discharge student loans, Debtor must prove (1) that debtor cannot maintain, based on current income and expenses, a minimal standard of living if forced to pay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment of the student loans; and (3) that the debtor has made good-faith efforts to repay the loans. Debtor must show circumstances that indicate the certainty of hopelessness, not a mere present inability to fulfill the financial commitment. Student loans would not be discharged where debtor demonstrated that debtor could not maintain a minimal standard of living if forced to pay the loans as her expenses exceed your income. However, debtor has not shown a certainty of hopelessness as the debtor had stable employment and may continue to receive raises in her current employment or find a better paying job. Debtor was only 26 years old with college degree. Although debtor had learning disabilities, those disabilities were controlled with proper medication.

*Cassim v. Educational Credit Management Corp.*, 2008 Fed. App. 0019P (6<sup>th</sup> Cir. 2008) – Debtor’s complaint to determine dischargability of student loan was not premature and would not be dismissed on grounds of ripeness merely because complaint was brought before Debtor received discharge in underlying Chapter 13 proceeding. Federal Rule of Bankruptcy Procedure 4007 allows a complaint to determine the dischargability of a debt to be filed by a Debtor at any time. Nothing in the Federal Rules prohibit creditor from filing student loan adversary proceeding before completion of Chapter 13 plan. Contingency of Debtor’s ultimate discharge does not create a constitutional ripeness impediment to Bankruptcy Court’s resolution of adversary proceeding. Requiring Debtor to wait until completion of Chapter 13 case would deprive Debtor of opportunity to pay non-dischargeable student loan debt through Chapter 13 plan and



would unnecessarily delay “fresh start”. Whether or not Debtor has completed Chapter 13 plan does not significantly advance Court’s ability to deal with the legal issues presented.

§8.68 Section 523(a)(9)

*In re Henney*, 2011 WL 1642853 (W.D. Mi. 2011) - Federal court applying section 523(a)(9) should adopt the definition of “intoxication” or “intoxicated” which is supplied by the relevant State’s law. At time of accident, Michigan law defined intoxicated as a blood alcohol level of .10 grams or more per 100 milliliters of blood. It is not sufficient to prove that he debtor was operating the vehicle after consuming alcohol. Court must find that debtor was operating a motor vehicle while intoxicated. Evidence indicated that at no time did Debtor have a blood alcohol at or in excess of .10 legal standard. Violation of State Zero Tolerance law for persons under age 21 is not relevant as that statute does not attempt to define “intoxicated” and intoxication is not an element of an action for violation of statute. Evidence failed to establish that Debtor was operating a vehicle while actually impaired and evidence was disputed as to whether any alleged intoxication was the proximate cause of accident. Case remanded to bankruptcy court for further proceedings.

§8.69 Section 523(a)(10)

*McDermott v. Chapman*, Case No. 09-14461 (Bankr. N.D. Ohio 2010) – United States Trustee lacks standing to bring action to declare debts non-dischargeable as debts that could have been listed but were not listed in debtor’s prior bankruptcy filing. However, United States Trustee has standing to pursue a declaratory judgment regarding the effect of any discharge in the present case on debts that were scheduled or could have been scheduled in the Debtor’s 2006 bankruptcy case as part of the United States Trustee’s responsibility to protect the public interest and ensuring that cases are conducted according to law. Court in prior case issued Order Denying Debtor a discharge pursuant to Sections 727(a)(4) and (a)(8). Therefore, any debts that debtor that were or could have been scheduled in debtor’s prior case would not be discharged in debtor’s current case.

§8.70 Section 523(a)(11)

§8.71 Section 523(a)(12)

§8.72 Section 523(a)(13)

*Baker v. Wentland*, 2009 WL 2132639 (Bankr. N.D. Ohio 2009) - Criminal restitution debt for misapplication of health insurance premiums, a violation of 18 U.S.C. § 669(a), is non-dischargeable under § 523(a)(13).

§8.73 Section 523(a)(14)

§8.74 Section 523(a)(15)

*Murtha v. Spencer*, 2011 WL 4101092 (Bankr. W.D. Mi. 2011) – State Court Judgment of Divorce and subsequent orders of state court established that obligations from debtor to ex-spouse constituted debtors incurred between spouses incurred in the course of a divorce or separation within the scope of Section 523(a)(15). State Court Judgment determined all of the issues required in determining dischargeability of debt and collaterally estopped debtor from contesting issue.

*Bevins v. Ballard*, 2011 WL 2133529 (Bankr. E.D. Ky. 2011) – To be excepted from discharge under this provision, the debt must: (1) be to a spouse, former spouse or child of the debtor; (2) not be of the type described Section 523(a)(5), which excepts domestic support obligations; and (3) have been incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court. Debtor’s failure to comply with Property Settlement that required the Debtor to refinance the debt or to otherwise cause real property to be removed as security for the loan and failure to hold ex-

spouse harmless on other debt and to indemnify ex-spouse for attorneys' fees and costs due to the Debtor's failure to abide by the terms of the agreement are debts owed under the Property Settlement that are not a domestic support obligations and are also excepted from the Debtor's discharge pursuant to § 523(a)(15).

*Reissig v. Gruber*, 2010 WL 2756762 (Bankr. N.D. Ohio 2010) - Debtor's obligation to pay ex-spouse's attorney fees is non-dischargeable obligation. A debt will be excepted from discharge under Section 523(a)(15) when: (1) the debt in question is to a spouse, former spouse or child of the debtor; (2) the debt is not a support obligation of the type described in § 523(a)(5); and (3) the obligation was incurred during the course or in connection with a separation agreement, divorce decree or other order of a court of record. Attorney fees awarded in post-dissolution proceedings constitute and award "in connection with" the divorce decree.

*Dunne v. Lind*, 2010 WL 1462504 (Bankr. W.D. Mi. 2010) – Divorce decree that required Wife to pay her student loans on which Husband was co-borrower created obligation that would be non-dischargeable in Wife's subsequent Chapter 7 proceeding under Section 523(a)(15). Debt was "incurred ... in the course of a divorce or divorce decree" notwithstanding that underlying student loan substantially pre-dated divorce action. Wife's acknowledgement and commitment to pay debtor in the divorce proceeding resulted in new, legally enforceable obligation owed to Husband. Although Decree did not contain "hold harmless" clause, that is not a requirement under Section 523(a)(15).

*Cheatham v. Cheatham*, 2009 WL 2827951 (Bankr. N.D. Ohio 2009) - An obligation to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit is non-dischargeable. A Debtor's ability to pay is no longer an issue to consider in determining whether the obligation is non-dischargeable. Plaintiff must establish that (1) the debt in question is to a spouse, former spouse or child of the debtor; (2) the debt is not a support obligation of the type described in § 523(a)(5); and (3) the obligation was incurred in a separation agreement, divorce decree or other order of a court of record. BAPCPA added as a condition of non-dischargeability that the debt be "to a spouse, former spouse or child of the debtor". The fact that the debt is paid to a third party does not mean that the debt is not owed to the Plaintiff. A "claim" under the Bankruptcy Code is broadly construed to include any equitable or legal right to payment. The Final Judgment of Dissolution required Debtor to hold Plaintiff harmless from the mortgage and home equity line obligations. If Debtor defaults, the Creditor can pursue the Plaintiff, at which time the "hold harmless" provision would take effect. Therefore, the ex-spouse holds a contingent and unliquidated claim for bankruptcy purposes, making the underlying obligation one owed "to" the ex-spouse.

#### §8.75 Section 523(a)(16)

*Maple Forest Condominium Association v. Spencer*, 2010 WL 3909985 (Bankr. E.D. Mi. 2010) – Section 523(a)(16) applies only in Chapter 7 cases. Chapter 13 discharge includes obligations for post-petition association fees and expenses unless Chapter 13 discharge is "hardship" discharge.

*In re Williams*, Case No. 08-71337 (Bankr. E.D. Mi. 2010) – 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). Upon abandonment, whatever legal or equitable interests the debtor may have had in the property are no longer included in property of the estate. Property reverts *nunc pro tunc* to its pre-petition status as if no bankruptcy had ever been filed, and Court is divested of jurisdiction over that property.

#### §8.76 Other Grounds

*Hall v. Little*, 2011 WL 3471481 (Bankr. E.D. Ky. 2011) – Section 523(a)(19) makes non-dischargeable a debt that results from violation of federal securities laws; or is for common law fraud, deceit or manipulation in connection with purchase or sale of security *and* results from a judgment, order or settlement. Judgment arising out use of real estate is not a "securities" action within the scope of Section 523(a)(19).

E. Deadline for Objecting to Dischargeability

§8.77 Generally

*In re Ulrich*, 2011 WL 3663716 (Bankr. N.D. Ohio 2011) – Adversary proceeding to declare debt non-dischargeable under Section 523(a)(2), (4) and (6) must be filed within 60 days of date first set for First Meeting of Creditors. An request for extension must be made before deadline expires. Section 105 does not authorize or empower Court to extend time to file adversary complaint where deadline has already expired. Jurisdiction over actions under 523(a)(2)(4) and (6) is vested exclusively in Bankruptcy Court. Party cannot seek to have state court determine dischargeability under these three specific sub-sections.

*Wahrman v. Bajas*, 443 BR 768 (Bankr. E.D. Mi. 2011) – Bankruptcy Court lacks authority to extend time to file complaints for non-dischargeability where request for extension is filed after deadline had already expired.

*Pierson v. Sherwin*, Case No. 10-6481 (Bankr. E.D. Mi. 2010) – Complaint under Section 523 filed 4 days after deadline must be dismissed. Plaintiff's alleged confusion about the correct filing deadline is not grounds for late filing. Plaintiff failed to allege that the "mistake" was caused in any way by either the debtor or the court and Plaintiff admitted receiving the Notice of Commencement that stated the deadline. Although Court can extend deadline for waiver, equitable tolling or estoppel, Plaintiff failed to set forth any factual basis to support any extension of the deadline. Any request to extend the deadline must be made before the deadline expires, but Plaintiff did not file any Motion to Stipulation before deadline expired.

*In re Lockhart*, Case No. 09-68234 (Bankr. E.D. Mi. 2010) - Deadline to file complaints objecting to discharge of debt under Section 523 can be extended only on motion or stipulation filed before deadline expires. Stipulation for extension of deadline filed after expiration of initial deadline denied.

§8.78 Amendment of Pleadings

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

**IX. Chapter 7**

A. Dismissal

§9.1 Cause and Bad Faith – Section 707(a)

*In re Edwards*, Case no. 10-65835 (Bankr. E.D. Mi. 2011) – Lack of good faith constitutes "cause" for dismissal. Factors for "good faith" include whether debtor reduced creditors to a single creditor in the months before filing; debtor failed to make lifestyle adjustments or continued to live lavish lifestyle; debtor filed case in response to judgment or collection action with intent to avoid single, large debt; debtor made no effort to repay; unfairness of discharging debts in Chapter 7; debtor is paying insiders; schedules inflate

expenses to disguise financial well being; debtor transferred assets; debtor is overutilizing protections of bankruptcy to the unconscionable detriment of creditors; debtor employed deliberate and systematic pattern of evading single major creditor; debtor failed to make candid and full disclosures; debts are modest in relation to assets and income; and multiple bankruptcy filings or other procedural gymnastics. Debtor lacked requisite honesty where debtor's schedules and Form B22 substantially understated income and claimed as "household" parents and brother who did not live with debtor; debtor materially understated balance in bank account, listing balance on Schedule B of \$10 where debtor had more than \$5200 in that account shortly before filing; debtor gave mother \$5200 shortly before filing because "mother has a gambling problem so mother gives debtor money to hold for mother" but transfers were not disclosed in schedules of SOFA; debtor provided copies of tax returns to the creditor and the trustee but failed to disclose that those returns were not actually filed with the IRS or that debtor had not filed tax returns for some years pre-petition; debtor materially undervalued her automobile, listing it at \$3,225 when value was at least \$8,000; and debtor testified at 2004 exam that debtor "gave" her 1997 Mercedes to a "friend" named Gary whose last name and address debtor did not know.

*In re Drewek*, Case No. 11-42763 (Bankr. E.D. Mi. 2011) – Bankruptcy is designed to help the honest but unfortunate debtor. There is no constitutional right to a bankruptcy discharge. Section 707(a) lists three non-exclusive reasons for dismissal. Court may also dismiss for lack of good faith even though not expressly listed as basis for dismissal under Section 707. Factors include: debtor has only a single creditor; debtor failed to make lifestyle adjustments and continued to live expansive lifestyle; debtor filed in response to a judgment or pending litigation to avoid a single large debt; debtor made no effort to repay debt; use of Chapter 7 would be unfair; debtor has resources to pay debts; debtor is paying debts to insiders at expense of arms-length creditors; schedules inflate expenses to disguise financial well-being; debtor transferred assets; debtor is over-utilizing protections of code to the unconscionable detriment of creditors; debtor has engaged in persistent pattern to evade major creditor; debtor failed to make candid and full disclosure; debts are modest in relation to assets and income; and multiple bankruptcy filings or other procedural "gymnastics". Debtor filed bankruptcy to avoid large judgment creditor that resulted from debtor's embezzlement of trust fund established for debtor's son over which debtor was the trustee. Judgment accounted and related charges owed to State totaled 94% of debtor's total debt. Other than this judgment, debtor had less than \$2,300 of unsecured debt. Debtor made no effort to pay judgment between entry and filing of petition. Discharge in bankruptcy would be contrary to purposes of code, as debtor is attempting to discharge large judgment that arose out of debtor's misappropriation of funds. Debtor's embezzlement of funds from legally incapacitated son's account left son financially unable to bring non-dischargability action. Allowing case to proceed would reward debtor for stealing from her own son. Debtor failed to make full and complete disclosures where debtor's schedules did not account for \$90,000 that she took from the trust account, and schedules listed personal property worth \$3,000 and only \$9.12 in the bank.

*In re Rahim*, 2010 WL 5128944 (Bankr. E.D. Mi. 2010), *aff'd*, 449 BR 527 (E.D. Mi. 2011) – Debtor who is neither "needy" nor "unfortunate" is not entitled to relief under Chapter 7. Debtors had extraordinary budget of more than \$500,000 per year, and could easily provide for meaningful repayment to creditors in Chapter 11 proceeding. Debtor lacked good faith by failing to undertake any "belt tightening" whatsoever. Fact that debtor's debt was primarily non-consumer debt did not prevent dismissal under Section 707(a).

*In re Mohr*, 425 B.R. 457 (Bankr. S.D. Ohio 2010) – Court may dismiss case for "bad faith" in both consumer and business debt cases. Bad faith dismissal should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct or gross negligence. Debtors' alleged ability to pay is not a primary consideration under Section 707(a). Post-petition ability to repay debts, while relevant to good faith, does not, standing alone, support a dismissal under § 707(a) without the presence of other misconduct.

## §9.2 Presumed Abuse – Section 707(b)(2)

*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.

*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. When pension was included in calculation, Debtor was “above median” and had Disposable income sufficient to create presumption of abuse.

*In re Pollinghorn*, 2010 WL 3463431 (Bankr. N.D. Ohio 2010) – Debtors would not be able to rebut presumption of abuse based on post-petition changes in debtors’ financial situation. Means test is snapshot of financial situation on petition date. Post-petition changes to income and expenses or debtor’s future intentions, while relevant under Section 707(b)(3), are not taken into consideration in determine abuse under Section 707(b)(2). Debtors’ disposable income on Means test was \$1,722.00, well above abuse threshold of \$195.42. Debtors not permitted to deduct monthly payments for student loans or monthly payments on retirement loans to rebut presumption. Means test formula lists and limits deductible expenses without regard to reality of debtor’s financial situation. Means test is Congressional determination of allowable expenses for Chapter 7 debtor. Nothing in means test makes student loans or retirement loans deductible for purposes of Section 707(b)(2). Presumption can be rebutted only by limited “special circumstances” listed in Section 707(b)(2)(B)(i), consisting of (1) a serious medical condition; or (2) a call or order to active duty in the Armed Forces or circumstances beyond the debtor’s reasonable control, or result from circumstances highly unusual in character and of the type not normally encountered by most debtors. Student loans and retirement loans are common in bankruptcy cases and are not the types of “highly unusual circumstances” required by Section 707(b)(2). Further, even if these payments are deducted, Debtors still have Net Monthly Income on the Means test of \$822 per month, which is still above abuse presumption threshold.

*In re Smith*, 2010 WL 3270019 (Bankr. N.D. Ohio 2010) – Case dismissed as presumptively abusive where B22A indicated monthly disposable income of \$3,544.00, well above presumptive threshold of \$182.50.

*In re Taylor*, 2009 WL 2872997 (Bankr. N.D. Ohio 2009) – Section 707(b)(2) is a mechanical formula for assessing the existence of abuse. If a debtor’s income exceeds “necessary” expenses by an amount set by statute, a presumption that the debtor is abusing the bankruptcy process will arise. Debtor’s income is defined in Section 101(10A). The ‘means test’ also prescribes in exacting detail what expenses of a debtor will be allowed as a charge against income. If the ‘means test’ results in a presumption of abuse, the Court must dismiss the debtor’s bankruptcy case unless the debtor is able to rebut the presumption according to Section 707(b)(2)(B)(i). The Code does not define “special circumstances” but does provide two examples: (1) a serious medical condition; or (2) active duty in the armed forces. To qualify as a “special circumstance”, debtor’s situation must have “traits in common” with one of these two categories. Debtor must also provide (I) documentation for such expense or adjustment to income; and (II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable. Debtor failed to demonstrate any allowable “special circumstance” where the “special circumstance” was the failure of Debtor’s former wife,

to hold the Debtor harmless on the mortgage obligation on the marital residence and the former wife’s subsequent Chapter 7 filing. An obligation based on a the 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. Debtor given opportunity to convert case to Chapter 13, failing which case will be dismissed as presumptively abusive.

### §9.3 “Safe Harbor” – Section 707(b)(7)



*In re Braathun*, 2011 WL 1299605 (Bankr. S.D. Iowa 2011) – Safe harbor under Section 707(b)(7) requires inclusion of current monthly income for non-filing spouse where the debtor and non-filing spouse are neither separated nor living apart at the time of commencement of the case. If Debtor’s annualized CMI and non-filing spouse’s annualized CMI combined exceed applicable median income, case is subject to possible dismissal under section 707(b)(2).

#### §9.4 Non-presumed Abuse – Section 707(b)(3)

*In re Ryan*, Case no. 10-69825 (Bankr. E.D. Mi. 2011) – Court will consider (1) whether case was filed in bad faith; or (2) whether the totality of circumstances indicates abuse. Debtors’ 401-k loans would be paid off in 33 months, leaving 27 months for those funds to be dedicated to plan payments. Debtors would not be permitted to deduct tuition and child care expenses that are incurred solely for debtor to attend college, as doing so would force creditors to subsidize debtors’ expenses designed to enhance future earnings. Debtors deducted \$1200 for housing expense even though debtors did not have that expense as debtors were living in the home pending foreclosure proceedings. Scheduled, but non-existent, expense would be available to repay creditors at least through the expiration of redemption. Debtors receive significant tax refunds, more than \$3,000 for the last tax year, that would also be available in Chapter 13. Totality of circumstances indicated that debtors could reduce expenses and produce dividend of at least 15% and as much as 30% to unsecured creditors, resulting in Chapter 7 proceeding being dismissed as abusive.

*In re Groscost*, 2011 WL 4498871 (Bankr. N.D. Ohio 2011) – Honest debtor can have case dismissed where debtor’s pre-bankruptcy conduct was unreasonable. Debtor voluntarily quit job after 32 years of employment, spent his savings including lengthy trip to California to walk on the beach and meet interesting people, accumulated significant credit card debt, used credit card cash advances to purchase car and motorcycle he later had to sell when he ran out of money, allowed home to fall into foreclosure, and continuously believed that debtor would win lottery to solve all financial problems, and used one credit card to pay another until he ran out of available credit. Debtor made no effort to obtain new employment or to otherwise repay debt or stem accumulation of more debt while unemployed. “Debtor created his own misfortune. The gross indifference Debtor exhibited cannot be condoned. This is not a single instance of poor judgment, it is a pattern of persistently inexplicable judgment with the cumulative effect of willful blindness. While Debtor might not have been dishonest in the sense of inaccuracy or concealment, he was not dealing with creditors candidly. He was not even candid with himself. Rewarding him with a discharge would be an abuse of the bankruptcy system.” Evidence indicated that while debtor could not presently make payments on a Chapter 13 plan, in another year debtor would start to receive pension and had finally obtained job paying \$1500 per month which would allow Debtor to make payments and make at least some effort to pay something on his debt.

*In re Duncan*, Case No. 10-72730 (Bankr. E.D. Mi. 2011) – Court considers totality of circumstances, including ability to repay debts from future earnings; whether debtor has stable source of income; whether debtor is eligible for Chapter 13; whether there are state remedies that could ease debtor’s financial predicament; whether relief can be obtained through private negotiations; and whether expenses can be reduced without depriving debtor of adequate food, clothing, shelter and necessities. Voluntary contributions to retirement plans are not *per se* unreasonable and must be examined on case-by-case basis looking to amount of existing retirement savings; debtor’s age and time left until retirement; annual income and overall budget; amount of monthly contributions; and needs of dependents. Debtor was 42 years old and would likely retire in 20 years. Even reducing debtor’s 401-k contributions by half would allow debtor to accumulate significant retirement savings while still paying 50% of unsecured debt. Further, debtor could strip second mortgage in Chapter 13, further freeing up substantial income. Debtors were not “needy” and could, with adjustments to expenses, pay significant portion of unsecured debt.

*In re Edwards*, Case no. 10-65835 (Bankr. E.D. Mi. 2011) – Court must review totality of circumstances to determine whether debtor is honest and needy. Honesty requires that debtor’s relationship with creditors has been honorable and non-deceptive. Needy requires that debtor’s financial predicament warrants discharge of debts in exchange for liquidation of assets. Factors include whether debtor has ability to repay debts from future income; whether debtor has stable source of future income; whether debtor is eligible for relief under Chapter 13; whether there are state remedies available to ease debtor’s financial issues;

whether relief can be obtained through private negotiations with creditors; and whether expenses can be reduced without depriving debtor of adequate food, shelter and clothing. Debtor lacked requisite honesty where debtor's schedules and Form B22 substantially understated income and claimed as "household" parents and brother who did not live with debtor; debtor materially understated balance in bank account, listing balance on Schedule B of \$10 where debtor had more than \$5200 in that account shortly before filing; debtor gave mother \$5200 shortly before filing because "mother has a gambling problem so mother gives debtor money to hold for mother" but transfers were not disclosed in schedules of SOFA; debtor provided copies of tax returns to the creditor and the trustee but failed to disclose that those returns were not actually filed with the IRS or that debtor had not filed tax returns for some years pre-petition; debtor materially undervalued her automobile, listing it at \$3,225 when value was at least \$8,000; and debtor testified at 2004 exam that debtor "gave" her 1997 Mercedes to a "friend" named Gary whose last name and address debtor did not know.

*Calhoun v. United States Trustee*, 2011 WL 1651228 (4<sup>th</sup> Cir. 2011) – Debtor had ability to repay creditors warranting dismissal for abuse. Debtors had been in pre-petition debt counseling arrangement in which debtors were paying more than \$2,000 per month for 22 months, evidencing substantial disposable income. Debtor had not had any sudden illness or calamity. Budget of more than \$7,000 for two people bordered on extravagant and left ample room for reduction. Debtors budgeted \$930 per month for food and had significant expenses for cable, internet, laundry and dry cleaning and could not justify an excessive transportation expense. Even without considering husband's social security income, debtors had ability to pay substantial dividend to unsecured creditors.

*In re Smith*, 447 BR 832 (Bankr. N.D. Ohio 2011) – Debtors' schedules revealed sufficient income to make pay reasonable dividend to unsecured creditors, where debtors' expenses included \$250 per month for cell phone and internet expense with no evidence to support reasonableness or that expense could not be reduced; and debtors' proposed expense of \$500 per month for child care did not appear reasonable and debtors failed to provide evidence that less expensive alternatives were not available.

*In re Hoke*, 447 BR 835 (Bankr. N.D. Ohio 2011) – For purposes of an ability to pay analysis under § 707(b)(3), a debtor's disposable income is defined generally as that income received by a debtor which is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor. Court is not required to accept at face value the financial figures put forth by the debtor but may make downward adjustments in a debtor's expenses where it is determined that such expenses are not reasonably necessary; or may impute income to the debtor when it would be equitable to do so such as when the debtor is voluntarily underemployed. Budget of \$6,067.65 was unreasonable for family of two people. Court would add back debtors' voluntary 401-k contributions totaling over \$600 per month where debtors are young and in good health and there was no evidence of any exigency such as health or impending retirement. Proposed expenditures of \$220 for cell phones and \$133 for "cable, phone and internet" are not reasonably necessary and are excessive where there are less expensive alternatives. Insurance premium of \$3,400 for home insurance was unreasonable and excessive absent evidence that adequate insurance cannot be obtained at a lesser cost. Budgeted transportation expense of \$800 per month was almost double the allowance under Section 707(b)(2) and was unreasonable and excessive and could be reduced. Further, debtors proposed to retain a 2007 Mustang, a luxury item for which the expenditures are not reasonably necessary. Debtors failed to produce evidence of requisite "belt tightening" or that they could not adjust expenses to produce meaningful dividend to unsecured creditors in Chapter 13.

*In re Briggs*, 2010 WL 4272585 (Bankr. N.D. Ohio 2010) – Income received by debtor from State Pension is included for purposes of determining abuse under Section 707(b)(3). Although pension income is exempt from reach of creditors, Section 707 does not distinguish between exempt and non-exempt sources for purposes of determining whether filing is abusive. Debtor's ability to pay their debts is an important and often dispositive component when assessing whether a debtor's case should be dismissed for abuse based upon the 'totality of the circumstances'. When Debtor's pension income was included, Debtor had between \$500 and \$600 per month available to pay creditors which would produce meaningful dividend to unsecured creditors whose claims totaled only \$45,000.00.

*In re Stampeley*, 437 BR 825 (Bankr. E.D. Mi. 2010) – Chapter 7 case is subject to dismissal where debtor can pay meaningful dividend to creditors in Chapter 13 case. Where married debtor files individually, court calculates disposable income on debtor's family budget including income and expenses of non-debtor spouse. Failure to do so would leave debtor's unsecured creditors to subsidize spouse's expenses. Household expenses should be allocated between debtor and spouse based on proportionate income. Debtor who earned 66% of the household income would be allocated 66% of household expenses plus any sole expenses such as car payment and car insurance for debtor's car. Those expenses are then deducted from debtor's income to determine if debtor could produce a meaningful dividend to unsecured creditors. Although Debtor's Schedule J indicated total disposable income of only \$165, allocation of expenses produced excess income of debtor of \$802 which would produce 100% dividend to unsecured creditors. Permitting debtor to allocate more than her proportionate share of income to the household expenses would unfairly prejudice debtor's creditors and would amount to a "gift" by debtor to her non-filing spouse.

*In re Beckett*, 2010 WL 3894429 (Bankr. N.D. Ohio 2010) – Debtor was not "needy" for purposes of Section 707(b)(3) where debtor admittedly had had \$400 per month of disposable income that could be paid to creditors. Debtor and her allegedly estranged husband (with whom debtor still resided) enjoyed substantial lifestyle, with annual gross income of more than \$104,000 per year. Even if husband's income is not considered, debtor still has income of more than \$49,000, which exceeded the state median income for a household of one person. Debtor would not be permitted to deduct expenses paid for non-debtor spouse or emancipated child where the person has the financial means to support themselves. Debtor will not be permitted to use Chapter 7 as means to divert financial resources away from creditors and to family members. Evidence indicated that non-filing spouse had more than sufficient income to pay his own expenses and that debtor's 26 year old son was "perfectly capable of supporting himself". Debtor also not permitted to deduct student loan debt payments as Code does not authorize special or preferred treatment of those obligations absent "exceptional circumstances" where (1) there existed a large student-loan obligation which, given its non-dischargeable character, would continue to increase in principal during the duration of a Chapter 13 plan; and (2) as compared to the student-loan obligations, the distribution to the debtor's other unsecured creditors would be minimal under a Chapter 13 plan – circumstances not present in this case.

*In re Jackson*, 2010 WL 3743878 (Bankr. N.D. Ohio 2010) – Court can dismiss case under Section 707(b)(3) based on finding either that debtors are not "needy" or that debtors have demonstrated a lack of honesty in dealing with creditors and financial affairs. Debtors were clearly "needy" where Debtors had a modest income and faced a mountain of debt and had no ability to fund a chapter 13 plan that would result in a meaningful repayment to creditors; and debtors' situation would soon become more difficult after the termination of Mrs. Jackson's spousal support from her prior marriage. Case would be dismissed for lack of honesty where record demonstrated history of spending far in excess of their income. The debtors' bank statements show that their monthly spending outstripped their income by almost \$1,500 per month in the months leading up to the petition date. Much of the spending has been on luxuries, especially eating out; and the debtors' spending actually accelerated in the month following the petition date suggesting that the debtors failed to embrace a new attitude of financial responsibility as a result of filing for bankruptcy. Fact that debtors were funding this lifestyle by borrowing from relatives and by diverting "excess" portions of student loans and from other unsustainable sources merely confirmed that debtors were living beyond means.

*In re Slone*, 2010 WL 3767317 (Bankr. N.D. Ohio 2010) – Ability to repay their unsecured debts, is a prime and often dispositive consideration when determining whether, under the "totality of the circumstances" standard of Section 707(b)(3)(B), a case should be dismissed for abuse. Court will not conclude that debtor is needy and worthy of a discharge where disposable income permits liquidation of consumer debts with relative ease. Court must scrutinize a debtor's expenses, and make downward adjustments where necessary, so as to ensure that the debtor's expenses are reasonable, and a court may impute income to the debtor when it would be equitable to do so such as when the debtor is voluntarily underemployed. Absent unique circumstances, Court will not permitted debtors to expense payments made to repay loans taken against employer-sponsored benefit plans. Debtor is generally not allowed debtors to make voluntary contributions to retirement accounts. Debtor is not permitted to expense student-loan payment as doing so would permit debtor to prefer one creditor over another, similarly situated, creditor. Single debtor with no dependents failed to demonstrate that expense for life insurance was reasonable;

\$225 per month to insure auto worth only \$10,000 was excessive; \$60 per month for snow removal and \$60 per month for lawn care was excessive as debtor would not be required to pay for both in the same month and expense appeared double counted; debtor received tax refunds each year between \$2,000 and \$3,000, indicating that debtor was “overpaying” her tax obligations by \$200 per month; Debtor has stable employment, with a meaningful level of income; the Debtor appeared to be in good health; and there was no evidence that the Debtor was forced to file bankruptcy because of unforeseen or catastrophic events and Debtor’s need for relief resulted from a long and continuous accumulation of consumer debts. After making adjustments to income and expenses, Debtor had sufficient resources to make an attempt to repay creditors.

*In re Seiler*, Case no. 09-37252 (Bankr. N.D. Ohio 2010) – In determining whether case should be dismissed for lack of honesty or good faith, Court must determine from the totality of the circumstances whether debtor is merely seeking an advantage over his creditors, or instead is honest in the sense that his relationship with his creditors has been marked by essentially honorable and undeceptive dealings. Factors that may be relevant include: (1) the debtor's good faith and candor in filing schedules and other documents, (2) whether the debtor has engaged in "eve of bankruptcy purchases," and (3) whether he was forced into Chapter 7 by unforeseen or catastrophic events. Inadvertent errors in bankruptcy schedules, including failure to disclose in Statement of Financial Affairs Question 18 of a business in which Debtor-husband was an officer or director; failure to disclose in Schedule B Debtor-Husband’s ten percent interest in that business; or Debtor-Wife’s interest in a 401-k pension plan. Debtor-Husband’s president of the company was disclosed in Schedule I and Schedule I included Debtor-Wife’s 401(k) plan loan payment, leading to conclusion that omissions were inadvertent rather than intentional. Court can also dismiss under Section 707(b)(3) where the debtor the ability to repay debts out of future earnings and whether the debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities. Debtor’s ability to maintain retirement loan repayments depends on whether these savings are reasonably necessary for maintenance or support of debtor or debtor’s dependants, based on (1) the debtor's age and time left until retirement; (2) the amount of the debtor's existing retirement savings; (3) level of yearly income; (4) overall budget; (5) amount of monthly contributions; (6) needs of any dependents; and (7) other constraints that make it likely that retirement contributions are reasonably necessary expenses for this particular debtor. Debtors were in their mid-50s; Debtor-wife had accumulated retirement savings of approximately \$60,000, less the amount owed on her loan of \$30,000; Debtor-husband had no retirement savings; Debtors owned their home, in which they have no equity at this time, and real estate used in the family business. Debtor-wife’s monthly 401(k) plan loan payment is approximately 4.5% of Debtors' income, which amount is not unreasonable. Given Debtors' ages and minimal retirement savings, the modest amount being paid by Wife as a repayment of her 401(k) plan loan was a reasonably necessary expenditure. However, Debtors’ budget continued to include ownership and insurance expenses on real property and a boat that the debtors had already surrendered; overstated debtors’ ongoing mortgage payment by more than \$100; debtors paid for both cable and satellite television, one of which would not be reasonably necessary; debtors’ food budget of \$1200 for family of 5 could be reduced; and Debtor-Wife’s 401k loan would be paid during pendency of Chapter 13 which would free up additional money for plan payments. Debtors has ability to make meaningful distributions to creditors, resulting in cause for dismissal under Section 707(b)(3).

*In re Meyers*, Case No. 09-77897 (Bankr. E.D. Mi. 2010) – Factor most applicable to analysis is whether Debtor’s expenses can be significantly reduced without depriving her of adequate food, clothing, shelter and other necessities. Reasonableness of 401-k contributions must be determined with reference to amount of existing retirement savings; debtor’s age and time left until retirement; annual income and overall budget; amount of monthly contributions; and needs of dependents. Court would disallow 401-k deduction where debtor increased contribution on eve of bankruptcy in an effort to facilitate early retirement and debtor had second pension provided directly by employer as well as social security benefits that, combined, would permit debtor to adequately fund her retirement. Further, Debtor’s Amended Schedule J significantly increased expenses over those disclosed in original Schedule J, and Debtor’s budget showed many expenses that could be reduced including telephone (\$231); and recreation at \$150 that was patently



unreasonable. Telephone expense should not exceed \$100 and recreation should not exceed \$20. Debtor should not deduct for both cell phones and a home phone, and debtor is not permitted to deduct costs of cell phones provided for 58 year old sister and 47 year old brother. The balance of increased expenses lacked credibility including medical expenses (increased from \$180 to \$450) and transportation (increased from \$250 to \$550). Debtor is not permitted to deduct costs of automobiles owned and driven by brother and sister, neither of whom work. Debtor not permitted to deduct payments made to friend of brother in repayment of loan to brother and is not permitted to deduct expense of sister's storage unit. Debtor's home maintenance reduced from \$200 to \$100 where debtor failed to account for excessive home maintenance expense. With these deductions, debtor could pay over 70% to unsecured creditors, making Chapter 7 abusive under Section 707(b)(3).

*In re Roach*, Case No. 09-76184 (Bankr. E.D. Mi. 2010) - Where court already concluded that Chapter 7 was abusive under Section 707(b)(2), it is unnecessary for court to consider dismissal under Section 707(b)(3). Court noted that under Chapter 13 debtor could pay 401-k loan in full which would create disposable income that could be used to pay over \$50,000 to creditors.

*In re McPhail*, 2010 WL 3463438 (Bankr. N.D. Ohio 2010) – A determination that abuse has occurred can be predicated on either a lack of honesty or a lack of need. In determining whether a debtor is honest, courts should determine if the debtor is merely seeking an advantage over his creditors, or instead is 'honest' in the sense that his dealings with creditors have been marked by essentially honorable and undeceptive dealings. Factors to be considered in determining whether a debtor is honest include the debtor's good faith and candor in filling out schedules and other documents, whether the debtor has engaged in "eve of bankruptcy" purchases, and whether the debtor was forced into chapter 7 by unforeseen or catastrophic events. Debtors' course of conduct leading up to their bankruptcy demonstrates dishonesty as that term is used in bankruptcy law. This was the debtors' second bankruptcy and debtors knew the consequences of irresponsible financial management. Nevertheless, they used no less than 27 credit cards and accumulated over \$100,000 in unsecured debt to live, in debtor's own words, "beyond their means." Debtors either knew or should have known that repayment would be impossible and that they would be back in bankruptcy. Debtors were attempting to take advantage of their creditors and were dishonest as that term is used in bankruptcy law. Debtor-husband's job loss did not alter this conclusion as the debtors were already in over their heads before Debtor-husband lost his job. Although Debtors argue that they ceased using credit cards in July of 2008, Debtors made *no* effort on any of the eleven pages of creditors comprising Schedule F to indicate the dates on which they incurred their unsecured debts. The debtors' omission of the dates on which their unsecured debts were incurred is equivalent to an affirmative statement that they do not know when the debts were incurred. Omission was not inadvertent because debtors clearly had some knowledge of the date on which their debts were incurred because they testified they were incurred before July of 2008 and debtors also had a motive to conceal the dates on which their debts were incurred. Debtors also failed to demonstrate need for relief where Debtors proposed to pay second mortgage that could be stripped in Chapter 13; Debtors would not be permitted to pay student loans directly which would reduce expenses by that amount; Court would not allow debtors to deduct cost of cell phones where debtors also had home phone; debtors would not be permitted to retain motorcycle with payment of \$150 per month in Chapter 13; Debtors would be able to spread out debt to IRS to reduce monthly payment and increase amount available for other creditors; and Debtors could modify or strip down claims secured by debtors' automobiles thereby reducing the amount of the monthly payments.

*In re Lapke*, 428 B.R. 839 (8<sup>th</sup> Cir. BAP 2010) – Debtor's case would be dismissed for substantial abuse where case was filed immediately following dismissal of prior case filed by debtor and wife where prior filing was found to be abuse and debtor had no change in financial circumstances since dismissal of prior case. Second case was merely attempt to circumvent prior court ruling that debtor chose not to appeal.

*In re McClellan*, 428 B.R. 737 (Bankr. N.D. Ohio 2010) - Debtor's ability to repay debts, for purposes of determining whether Chapter 7 case should be dismissed for abuse based on the totality of the circumstances, is normally ascertained by reference to the amount of disposable income that debtor has available and whether that income could adequately fund a Chapter 13 plan, with "disposable income" defined generally as that income received by debtor which is not reasonably necessary to be expended for the maintenance or support of debtor or dependent of debtor. For purposes of determining whether debtor



has disposable income that could adequately fund Chapter 13 plan, such that debtor's Chapter 7 case should be dismissed for abuse under the totality of the circumstances, the reasonable necessity of an expense is determined by first looking to whether the expenditure serves a valid household purpose, and, if it does, whether the amount of the expenditure is appropriate. Bankruptcy law does not require that a debtor live a monastic lifestyle, and a debtor is not expected to live in poverty to pass scrutiny where motion to dismiss is brought on grounds that case is abuse of Chapter 7 under the totality of the circumstances, but Debtor is required to do some financial belt-tightening, and may be required to forgo amenities to which they had been accustomed. Debtors' budget failed to demonstrate requisite belt tightening where: Debtors continued to make monthly payments on retirement plan loan where both debtors were relatively young and had ample time to accumulate additional resources for retirement; Debtors' monthly student-loan payments could not be charged against their "disposable income" in determining whether debtors could adequately fund Chapter 13 plan where debtors offered no justification as to why their student loan obligations should be accorded priority over their other unsecured debts; Debtors allocation of \$700 per month for transportation, excluding debt payment, was excessive where neither debtor was required to travel frequently as part of employment; Debtors included expense of \$600.00 per month for telephone, cellular telephone, cable television, and internet service, and costs incurred by debtor beyond that required to obtain a basic level of service will not be considered reasonably necessary; Debtors' claimed monthly expenses of \$1,200.00 for food and \$225.00 for clothing were excessive for family with two young children; and Debtors failed to document either existence or reasonableness of \$470.00 monthly expense for automobile insurance.

The primary factor in deciding whether a debtor is needy is whether the debtor can repay his debts out of his future earnings. Other factors the court may consider include whether the debtor enjoys a stable source of income, whether the debtor's expenses can be reduced, and whether the debtor's financial situation is the result of an unforeseen catastrophic event.

*In re Scarberry*, 428 B.R. 403 (Bankr. N.D. Ohio 2010) - Chapter 7 case filed by debtors who were not forced into bankruptcy by unforeseen circumstances, and whose annual income of roughly \$90,000 was about \$10,000 in excess of median income for family of five in Ohio, would be dismissed, based on totality of circumstances of debtors' financial situation, as "abuse" of provisions of that chapter, where debtors, even though their budgeted expenses in amount of \$1,200 per month for food and \$277 for monthly telephone service did not reveal an appropriate attempt at belt-tightening, still disclosed modest monthly surplus that could be used to pay creditors. While Chapter 7 debtor is not required to live in poverty, he may still be required to engage in some good, old-fashioned belt tightening to avoid having case dismissed as abusive based on totality of circumstances of his financial situation.

*In re Speith*, 427 B.R. 621 (Bankr. N.D. Ohio 2010) - Chapter 7 case filed by debtors that claimed to have disposable income of just \$75.57 per month available for payment of unsecured claims would be dismissed, based on totality of circumstances of their financial situation, as abuse of provisions of that chapter, where debtors' budgeted expenses included monthly payment of \$328.84 on loan from debtor-husband's employee retirement plan, a loan that was essentially owed to debtor-husband himself and that should not be repaid at unsecured creditors' expense; debtors' budgeted expenses also included car loan expense of which they would soon be relieved when car loan was paid off; and where income claimed by debtors did not include tax refunds that they historically received, in amount of around \$2,800 per year. After appropriate adjustments were made, it was clear that debtors, whose yearly income exceeded median level for debtors in Ohio, had ability to repay at least a portion of their secured debt out of future income.

*In re Smith*, 2010 WL 3270019 (Bankr. N.D. Ohio 2010) – Whether a debtor has the ability to repay their unsecured debts has developed to become a prime, and often dispositive consideration when determining whether, under the 'totality of the circumstances' standard of Section 707(b)(3)(B), a case should be dismissed for abuse. A court would not be justified in concluding that a debtor is needy and worthy of discharge, where his disposable income permits liquidation of his consumer debts with relative ease. Debtor's Schedules J disclosed that debtors had more than \$1300 in monthly disposable income after payment of expenses, while Chapter 13 plan could produce 100% dividend over 60 months with payments of only \$670 per month. Both debtors had steady employment and, although neither of them indicated any

risk of diminution in salary, there was ample room to absorb any possible diminution over the life of a Chapter 13 plan.

*In re Hicks*, Case No. 09-68742 (Bankr. E.D. Mi. 2010) – Court must determine whether debtor has been “honest” in dealings with creditors; and “needy” in the sense that the financial predicament warrants discharge in exchange for liquidation of assets. Factors to determine “need” include debtor’s ability to pay debts out of future earnings; whether debtor has stable source of future income; whether debtor is eligible to file Chapter 13; availability of state remedies that can ease financial predicament; possibility of private negotiations with creditors; and whether expenses can be reduced significantly without depriving debtor of adequate food, clothing or shelter. “Need” is not demonstrated when Debtor is paying child support obligation and other obligations of Debtor’s unemployed non-filing spouse for which debtor is not liable. Debtor is not able to discharge individual debts while maintaining payments on debts for which debtor is not obligation. Debtor’s redirection of \$225 per month that was allocated in budget for payment of non-filing spouse’s expenses, standing alone, would produce meaningful dividend to debtor’s creditors, rendering case abusive.

*In re Rooney*, 2010 WL 2630245 (Bankr. N.D. Ohio 2010) – Court may dismiss a Chapter 7 petition if granting of relief would be an abuse of the provisions of Chapter 7. Court is required to consider (A) whether the debtor filed the petition in bad faith; or (B) the totality of the circumstances of the debtor’s financial situation demonstrates abuse. Factors relevant to determining whether a debtor is “needy” include the ability to repay debts out of future earnings; whether the debtor enjoys a stable source of future income; whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code; whether there are state remedies with the potential to ease his financial predicament; the degree of relief obtainable through private negotiations; and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities. Court must determine whether there would be sufficient income in excess of reasonably necessary expenses to fund a Chapter 13 plan. Debtors made meaningful efforts to decrease their expenses by surrendering both the Olympic Drive rental property, a camper and two vehicles, but Debtors’ \$3,851 budgeted monthly housing expense is excessive where the payment was interest only on a \$510,000 construction loan for their home that has matured and is in default. Debtors have not made a payment on the mortgage for over a year, so this budgeted amount is not presently an expense they are actually paying and relief from the automatic stay has already been granted. Debtors’ uncompleted home that secures the loan is valued at sixty percent of the amount owed on the mortgage debt and Debtors estimate that they will have to expend another \$25,000 in order to complete the home. Debtors have continued to pour money into the property at the expense of unsecured creditors. They may not continue to do so while seeking a discharge of their unsecured debt as the ultimate subsidy of construction of the home. Debtors’ Amended Schedule J also includes other expenses related to the property, such as at least a portion of the \$400 in budgeted taxes, and \$300 a month in budgeted maintenance costs. Alternative housing can be obtained and that Debtors can thereby significantly reduce their overall housing expenses to make funds available to pay their unsecured creditors. Non-dischargability of a student loan is not, without more, a basis to permit a debtor to treat the student loan creditor more favorably than other unsecured creditors. Debtors’ budget includes a monthly expense of \$1,600 for payment of Debtor-husband’s student loans which could be ratably distributed among Debtors’ unsecured creditors to produce a significant distribution to those creditors. Debtors both enjoy stable employment and regular income. Debtors’ eligibility for adjustment of their debts through Chapter 13 is unclear but may still pursue relief through Chapter 11.

*In re Green*, 2010 WL 2521077 (Bankr. S.D. Ohio 2010) – Section 707(b)(2)(D) exemption from “any form of means testing” exempts member of National Guard or Reserves from means testing under Section 707(b)(2) but does not exempt debtor from Section 707(b)(3) dismissal based on totality of circumstances. An ability to pay argument under § 707(b)(3) is a continuation of pre-BAPCPA law and is not a means test any more than pre-BAPCPA § 707(b) was a means test. Section 707(b)(3) serves a different purpose than Section 707(b)(2), and is designed to avoid abuse of provisions of Chapter 7 case where presumption of abuse does not arise under Section 707(b)(2) and is not a means test.

*In re Gilmore*, 2010 WL 2342441 (Bankr. N.D. Ohio 2010) – A determination of abuse can be predicated on either a lack of honesty or a lack of need. In determining whether a debtor is honest, courts should

determine if the debtor is merely seeking an advantage over his creditors, or instead is honest in the sense that his dealings with creditors have been marked by essentially honorable and undeceptive dealings. Factors include the debtor's good faith and candor in filling out schedules and other documents, whether the debtor has engaged in "eve of bankruptcy" purchases, and whether the debtor was forced into chapter 7 by unforeseen or catastrophic events. The primary factor in deciding whether a debtor is needy is whether the debtor can repay his debts out of his future earnings. Courts will dismiss cases of debtors who can make substantial payment to their general unsecured creditors in a chapter 13 plan considering whether the debtor enjoys a stable source of income, whether the debtor's expenses can be reduced, and whether the debtor's financial situation is the result of an unforeseen catastrophic event. Debtors ran up a large amount of debt and then intentionally decreased their present income and dramatically increased their expenses by debtor-wife returning to school resulting in both a loss of income and substantial expenses for Debtor-wife's schooling. Debtors have over \$1000 per month in child care costs as a direct result of debtor-wife returning to school and the debtors' educational expenses wipe out any recovery by the unsecured creditors. Debtors' second mortgage could be stripped as completely unsecured in a chapter 13 plan which would substantially increase debtors' projected disposable income. Debtors failed to sacrifice cell phones where evidence did not suggest a special need for cell phones and the debtors have a working ground line. Debtors could propose a chapter 13 plan that pays their general unsecured creditors at least a 20% dividend over 36 months. Debtors' ability to pay a meaningful dividend to their general unsecured creditors impels the conclusion that their case be dismissed or converted to a chapter 13. Debtors' dishonesty in failing to list their student loans debts on their bankruptcy petition also supports conversion or dismissal. Although Debtor-husband suffered unexpected job loss, the debtors were likely to find themselves in financial trouble sooner or later because of their reckless borrowing habits and sudden increases in child care and education expenses. Debtors' Chapter 7 petition constituted abuse under Section 727(b)(3).

*In re Rodger*, Case No. 09-61845 (Bankr. E.D. Mi. 2009) – Inquiry is totality of circumstances. An important factor is whether or not the debtors can pay their debts out of future earnings, although that alone is not a sufficient basis on which to dismiss for abuse. Debtors who filed jointly were separated although no divorce proceedings had been filed. Proper analysis is to consolidate separate Schedules I and J to determine whether filing may be abusive. Although Debtor-husband had large mortgage payment (in excess of \$3,000 per month) and testified that he had not made up his mind whether to retain house or surrender and look for less expensive housing, Court would consider full mortgage payment in determining whether Debtors had excess available income, and would not base conclusion on possibility that Husband would later obtain less expensive housing. Debtor-wife was employed by Detroit School District and was facing downward adjustments in her income. Debtors' combined Schedules J did not indicate that expenses can be significantly reduced. While Debtors enjoy apparently stable sources of income and are otherwise eligible for chapter 13 relief, the facts considered as a whole do not demonstrate abuse.

*In re McGowan*, Case No. 09-19075 (Bankr. N.D. Ohio 2010), *aff'd sub nom McGowan v. McDermott*, 445 BR 821 (N.D. Ohio 2011) – Section 707(b)(3) permits the court to dismiss a case for "abuse" where the presumption of abuse does not arise under Section 707(b)(2). "Cause" can be found either by bad faith of the debtor or by a totality of the circumstances. Under totality of circumstances, Court must determine more than just whether the debtor can pay his debts from disposable income. Court must also consider whether debtor enjoys stable source of income, whether debtor is eligible for relief under Chapter 13, whether there are non-bankruptcy state court remedies that could provide relief, possibility of relief through private negotiations, and whether expenses can be reduced without depriving debtor of adequate food, clothing, shelter and other necessities. In reviewing expenses, Court must scrutinize Debtor's claimed expenses and make downward adjustments where appropriate. Debtor need not live in poverty, but Code does contemplate some level of sacrifice to obtain relief. Debtor's monthly expenses included \$2450 for college tuition of debtor's two children; \$220 for books; \$626 for student loan repayments; \$498 for food for Debtor's two children at school; and \$433 for a 401-k loan payment. Court has consistently disallowed expenses for adult children – while admirable, payment of those expenses is not proper in considering Debtor's disposable income. Student loan payments will not be considered in calculating disposable income as a debtor is not permitted to prefer one creditor over another and student loan debts are not entitled to superiority over other unsecured creditors. Debtor amended Schedule J on eve of hearing to further decrease disposable income by increasing mortgage payment based on a 15 year amortization although Debtor's mortgage amortized over 30 years and Debtor had never made the higher payment.

Debtor's property valued at \$380,000 had two mortgages totaling \$540,000, with payments totaling at least \$2210 per month, or more than double the IRS National Standard of \$1080.00. Married Debtors had joint income of \$130,000 and there was no indication that Debtors' income was unstable. Totality of circumstances evidenced "abuse" for purposes of section 707(b)(3).

*In re Kelly*, Case No. 09-21440 (Bankr. N.D. Ohio 2010) – Section 707(b)(3) permits the court to dismiss a case for "abuse" where the presumption of abuse does not arise under Section 707(b)(2). "Cause" can be found either by bad faith of the debtor or by a totality of the circumstances. Under totality of circumstances, Court must determine more than just whether the debtor can pay his debts from disposable income. Court must also consider whether debtor enjoys stable source of income, whether debtor is eligible for relief under Chapter 13, whether there are non-bankruptcy state court remedies that could provide relief, possibility of relief through private negotiations, and whether expenses can be reduced without depriving debtor of adequate food, clothing, shelter and other necessities. In reviewing expenses, Court must scrutinize Debtor's claimed expenses and make downward adjustments where appropriate. Debtor need not live in poverty, but Code does contemplate some level of sacrifice to obtain relief. Debtors cannot rely on alleged student loan payments as evidence of lack of ability to pay, as student loans are not entitled to priority treatment under Chapter 13. Although Debtors have large mortgage on house that is now underwater, there was no evidence that Debtors incurred the debt in bad faith or with the intent to file bankruptcy. However, Debtors traded in two relatively new automobiles only 4 months prior to filing, which impaired Debtors' ability to repay creditors and would decrease funds available in a Chapter 13 plan; Debtors intended to retain those vehicles at a monthly expense of \$817 per month while seeking to discharge unsecured debt in excess of \$134,000.00; and Debtors' tax refunds alone could produce 24% dividend to unsecured creditors over the life of a Chapter 13 plan. Court can consider impact of future tax refunds where those refunds are reasonably expected to continue in the future. Debtors testified that they had received tax refunds consistently for the past few years and could not dispute presumption that refunds would continue in the future. Court dismissed case for "abuse".

*In re Srikantia*, 2009 WL 3495998 (Bankr. N.D. Ohio 2009) – Debtor's case can be dismissed for abuse upon either bad faith (i.e. lack of honesty) or where the totality of the circumstances of the debtor's financial situation demonstrates abuse (i.e. want of need), even in absence of presumption of abuse under Section 707(b)(2). Court will consider "totality of circumstances" including whether debtor's disposable income permits liquidation of his consumer debts with relative ease; whether the debtor enjoys a stable source of future income; whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code; whether there are state remedies with the potential to ease his financial predicament; the degree of relief obtainable through private negotiations; and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities. Court must scrutinize those provided expenses and make downward adjustments where necessary as Bankruptcy Code envisions some sacrifice on the debtor's part in granting him relief. Case dismissed as abusive where Debtor had been gainfully employed as a full-time college professor for eight years, earning (even without including his non-filing spouse's income) a gross salary in excess of \$100,000 per year. Although Debtor testified that he expected his income to decrease, it would not drop below his "base" salary of \$68,000.00. Debtor could trim budget – food expense of \$700 for two people and transportation of \$359 per month were excessive. Budgeted expenses for child's art and music lessons and summer camps, such expenses are, in and of themselves, unreasonable as was expense of \$100 per month for "books and CDs". Debtor could reduce or eliminate several expenses without depriving Debtor or dependant of necessities which would permit Debtor to provide at least some payment to unsecured creditors.

*Moutousis v. United States Trustee*, Case No. 08-14268 (E.D. Mi. 2009) – Debtors are entitled to evidentiary hearing on Motion of United States Trustee to dismiss for abuse under Section 707(b)(3). Abuse does not require finding of "bad faith" or "dishonesty" by Debtors. Bankruptcy Court must examine totality of circumstances. Dismissal based on a single factor – the size of Debtors' mortgage payment – fails to take into account totality of circumstances. Debtors' ability to pay a substantial portion of unsecured claims is a primary and potentially dispositive factor, but ability to pay standing alone is not conclusive. Debtors must be provided the opportunity to present evidence concerning whether the Debtors are "needy" such as whether their disposable income permits payment of consumer debts with relative ease; whether Debtors have stable sources of future income; whether Debtors are eligible for relief under Chapter



13; whether there are State Court remedies available if the case is dismissed; the degree of relief obtainable through private negotiations; and whether expenses can be reduced significantly without depriving Debtors of adequate food, clothing, shelter and necessities.

*In re Ramlow*, 2009 WL 2601256 (Bankr. N.D. Mi. 2009) – Congressional policy is to encourage debtors to repay their debts. A debtor’s ability to repay is a significant, and often dispositive, factor in determining whether under the totality of the circumstances case should be dismissed. Debtor’s ability to repay is determined by “disposable income” defined as income received by the debtor but not reasonable necessary for the maintenance of support of debtor or debtor’s dependents. The United States Trustee claimed that Debtor’s expenses were overstated by the amount of a student loan payment, a garnishment and Debtor’s 401-k contribution. Debtor asserted that her income was about to be reduced by a reduction in child support and that debtor had back tax liabilities that Debtor had to pay. Court concluded that even allowing for the adjustments put forth by Debtor, Debtor had ability to pay up to \$24,000 to unsecured creditors through a Chapter 13 Plan. Even where Debtor has ability to pay a substantial amount of debt, Court must still consider totality of circumstances. Debtor’s financial difficulties stem from a recent divorce, a factor that was beyond Debtor’s control. Debtor’s expenses are in line with a reasonable budget for a family of three people and Debtor has made a good faith effort to minimize her expenses. Debtor does not appear to be misusing the Bankruptcy process or using money for luxury goods. Debtor’s only asset was a car valued at \$700.00, and a minimal amount in her 401-k, approximately \$3,000.00. Debtor has substantial non-dischargeable student loan debt and a large amount of unsecured debt, meaning that the percentage distribution in a Chapter 13 would be minimal at best. Based on the totality of circumstances, Debtor is not seeking to take advantage of her creditors. Debtor appeared to be an honest person trying to honestly handle unexpected financial difficulties.

*In re Goble*, 401 BR 261 (Bankr. S.D. Ohio 2009) – Although Debtor qualified for relief under Means Test, case would be dismissed for Abuse under Section 707(b)(3). Debtor was single and had stable income. Debtor surrendered her home and had substantial reduction in housing expenses resulting in disposable income on Schedules I and J in excess of \$850 per month. For purposes of Section 707(b)(3), Court would focus on realities of Debtor’s circumstances as they exist at the time and as they would change over life of Chapter 13 Plan. Debtor has ability to pay substantial portion of debts out of disposable income.

*In re Osting*, 2009 WL 2611222 (Bankr. N.D. Mi. 2009) – “Abuse” can be based on either lack of honesty or want of need. Factors to consider include the ability to repay debts which alone can be sufficient to find abuse under certain circumstances; whether debtor is eligible for relief under Chapter 13; whether there are state remedies that could ease his financial predicament; degree of relief available through private negotiations; and ability to reduce expenses without depriving debtor of adequate food, clothing, shelter and other necessities. Debtor’s expenses included over \$1,000 for a house owned by Debtor’s wife as a rental property from which Debtor derived no income. Debtor’s unsecured creditors cannot fairly be expected to shoulder the burden of that property. Debtor was also paying \$900 per month for a 401-k loan repayment. Contributions to a retirement plan depend on (1) the debtor’s age and time left until retirement; (2) the amount of the debtor’s existing retirement savings; (3) level of yearly income; (4) overall budget; (5) amount of monthly contributions; (6) needs of any dependents; and (7) other constraints that make it likely that retirement contributions are reasonably necessary expenses for this particular debtor. Debtor’s repayment of 401-k loan was not reasonably necessary where Debtor had income significantly above State median and had accumulated over \$200,000 in his 401-k. Debtor is only 52 years old and has no intention of retiring in the near future, allowing at least 10 more years to save for retirement. Debtor’s debt rendered Debtor ineligible for Chapter 13 but could obtain relief under Chapter 11. Filing abusive where Debtor (1) has stable, regular income; (2) he has the ability to significantly reduce his expenses without depriving himself or his dependents of any necessity; (3) although his financial circumstances are structured in a manner that results in his ineligibility for Chapter 13 relief, he has other alternatives available, including converting to a Chapter 11 case; and (4) Debtor has the ability to repay a meaningful portion of his unsecured debt.

*In re Phillips*, 2009 WL 3019815 (Bankr. S.D. Ohio 2009) – Above median income Debtor who “passes” means test may still have case dismissed under Section 707(b)(3) if the Court finds the filing to be “abusive”. Court will determine ability to pay based on Debtor’s financial condition as disclosed on



Schedules I and J as they exist and as they are likely to change over course of Chapter 13 case. Debtor enjoyed relatively high and stable income and was paying \$436 per month to repay 401-k loans that would be paid off between 7 and 36 months into plan, allowing Debtor to increase Plan payments and produce 30% payment to unsecured creditors.

*Long v. Smith*, 2009 WL 1924791 (Bankr. E.D. Tn. 2009) - Section 707(b)(3) allows parties in interest to seek dismissal of a case if granting relief would be an abuse of the Bankruptcy Code. Plaintiff must prove three elements: (1) the Debtor is an individual; (2) the debts are primarily consumer debts; and (3) granting relief to the Debtor under Chapter 7 would be a “substantial abuse.” Court must look at the totality of the circumstances and whether the Debtor is seeking an advantage over creditors or is “honest” and “needy” warranting the discharge of debts in exchange for liquidation of assets. Court may find substantial abuse if a Debtor has acted dishonestly or is not financially needy such that a discharge is warranted. Plaintiff’s complaint which listed eight specific expenditures which if determined to be unreasonable or excessive, sufficient to state claim under Section 707(b).

*In re Kunkelman*, 2009 WL 2824871 (Bankr. N.D. Ohio 2009) – Under Section 707(b)(3), court must determine whether Debtor filed in bad faith or whether the totality of circumstances of debtor’s financial situation indicates “abuse”. Debtor’s ability to pay unsecured debts is the prime, and often dispositive, consideration under the totality of circumstances test. Dismissal for “abuse is intended to uphold creditors’ interests in obtaining repayment where such repayment would not be a burden.” Court must look to “disposable income” defined as the income received by debtor which is not reasonably necessary for the maintenance or support of debtor or debtor’s dependents. Court will generally not permit debtors to deduct allocations made for retirement savings such as 401-k contributions. However, Court will allow those deductions if debtor is near retirement age and has minimal savings for retirement; or where there are issues of debtor’s health. Court concluded that debtor was younger and in good health and so retirement contributions would not be deducted for purposes of determining disposable income. The resulting disposable income would allow debtor to pay debtor’s debts in full over 60 months through a Chapter 13 plan. A debtor with an ability to repay 100% of their unsecured obligations through a Chapter 13 plan will necessarily find it very difficult to justify their need for relief under Chapter 7 of the Bankruptcy Code. Ability to pay will not dictate finding of abuse if other considerations mitigate against dismissal. However, no such circumstances exist in this case.

*In re Pandl*, 407 B.R. 299 (Bankr. S.D. Ohio 2009). Chapter 7 case filed by debtors whose housing expense was 1.75 times that allowed by IRS guidelines was abusive.

#### §9.5 “Primarily Consumer Debts”

*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 Braathun*, 2011 WL 1299605 (Bankr. S.D. Iowa 2011) – Section 707(b)(1) permits the court to dismiss a case where the debtor has primarily consumer debts. “Consumer debts” are those incurred primarily for family or household purposes. Although debtor’s petition indicated that debts were primarily consumer debts, evidence failed to demonstrate that debts were “primarily” consumer debts where it appeared that debtor’s largest debt, his home mortgage, was taken out for purposes of funding debtor’s business operations and expenses. Motion to Dismiss denied where U.S. Trustee did not carry burden of proving that Debtor’s debts are primarily consumer debts.

*In re Lapke*, 428 B.R. 839 (8<sup>th</sup> Cir. BAP 2010) - Funds obtained by debtor to finance or refinance his home constituted “consumer debt”. Loans represented claims against debtor’s property and, as such, were claims against debtor; debtor intended to obtain funds from lender to finance or refinance his home; the debts were incurred, whether by debtor or his wife or both of them, for personal, family, or household purposes; and, in debtor’s prior, joint Chapter 7 case, he and his wife included the subject loans as their consumer debt

*In re Mohr*, 425 BR 457 (Bankr. S.D. Ohio 2010) – Debtor had primarily non-consumer debts precluding dismissal under Section 707(b)(2). Debtors were lessors of commercial property. Debtors scheduled the obligation at the full balance owed on the lease, resulting in Debtors’ business debts exceeding consumer debts. United States Trustee argued that liability on commercial lease would be limited by Section 502(b)(6) and, as capped, resulted in Debtors’ consumer debts exceeding business debts. Court concluded that threshold inquires such as eligibility must consider debts as they existed at the moment of filing and not after a subsequent hearing. Congress and rule makers intended that the matter be decided early in a case prior to the litigation and other contested processes that determine ultimate debt levels. Court found no evidence that Debtors had improperly manipulated amount of debt or that Debtors otherwise acted in bad faith in scheduling liability. Further, Section 502(b)(6) is not an automatic determination of the amount of a claim. Section 502(b)(6) is only a limitation on the claim amount – the actual effect of Section 502(b)(6) depends on multiple facts that occur after the filing of the case and, in particular, the filing of a claim by the landlord and an objection to that claim. Because the § 502(b)(6) cap is only activated by optional and unpredictable post-petition bankruptcy events, the court concludes it is not appropriately applied to threshold inquires that are focused on the initial schedules and the calculation of debt existing on the date of the bankruptcy filing.

*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.

#### §9.6 Failure to File Documents

*In re Dedvukaj*, Case No. 10-75109 (Bankr. E.D. Mi. 2010) – Case dismissed for failure to file proper petition where name on petition did not match debtor’s name inputted by Debtor’s counsel; and debtor failed to file Petition Cover Sheet and Statement of Social Security Number within time permitted by Rule 1007/

*In re Farah*, Case No. 10-70577 (Bankr. E.D. Mi. 2010) - Debtor failed to serve on the Matrix an Amended Bankruptcy Petition Cover Sheet, an Amended Petition, and a Notice stating that the only debtor was the individual and this was not a joint filing within time required by Order of Court mandated dismissal.

*In re Davis*, Case No. 10-70480 (Bankr. E.D. Mi. 2010) - Case dismissed where Debtor failed to timely file Matrix and other documents and failed to file a Motion for Extension of Time until after deadline expired. Motion for extension of time was untimely and failed to demonstrate good cause.

*In re Akpabio*, Case No. 10-70057 (Bankr. E.D. Mi. 2010) - Case dismissed where Debtor failed to timely file Schedules and Statement of Financial Affairs and failed to file a Motion for Extension of Time until 7 days after deadline expired. Motion for extension of time was untimely and failed to demonstrate good cause.

*In re White*, Case No. 10-64239 (Bankr. E.D. Mi. 2010) - Motion to Extend Time to File Documents that requested "a little more time" denied as being too vague in stating the relief requested. Case had already been pending for more than 30 days including more than two weeks after Motion filed, but no completing documents had been filed. Case dismissed.

*In re Henderson*, Case No. 09-56172 (Bankr. E.D. Mi. 2009) - Case dismissed when Debtor failed to file a voluntary petition and instead filed only Schedule I. Section 301 requires that a case be commenced by the filing of a Voluntary Petition. "[A]bsent the filing of a voluntary petition, no bankruptcy case is commenced."

*In re Parent*, Case No. 09-55888 (Bankr. E.D. Mi. 2009) - Case was dismissed because counsel failed to file required documents within 15 days of the petition date. "Any neglect or mistake by Debtor's counsel, such as that alleged in the Motion, is generally attributable to the Debtor, for purposes of determining whether any such neglect or mistake was excusable ...." Local Rule 1007-1 which provides for automatic dismissal for failure to timely file documents does not conflict with Section 707 provision that case can be done "only after notice and a hearing". Requirement of Local Rule that documents be filed within 15 days does not conflict with Section 521(i)(1) which provides for mandatory automatic dismissal after 45 days as nothing in Section 521 precludes dismissal sooner than 45 days.

*In re Ayres*, Case No. 08-59822 (Bankr. E.D. Mi. 2008) - Court dismissed Debtor's case where Debtor's counsel "for some reason" failed to sign the Statement of Social Security Number as required by ECF Procedure 11(d)(1).

*In re Haines*, Case No. 09-42613 (Bankr. E.D. Mi. 2009) - Case properly dismissed where Debtor failed to file Schedules and other documents within time permitted.

#### §9.7 Failure to Appear at 341 Meeting

*Dunn v. Rund*, Case No. 09-1176 (6<sup>th</sup> Cir. BAP 2010) – Section 707(a) permits dismissal of a Chapter 7 Case "for cause". Section 707 lists types of conduct that would constitute cause, but the list is not exclusive. Cause for dismissal is determined first by whether the asserted cause is contemplated by a specific provision of Chapter 7, in which case the conduct cannot constitute cause under Section 707. If the asserted cause is not contemplated by a specific code provision, then the Court must determine whether the conduct rises to "cause" sufficient to warrant dismissal.

#### §9.8 Dismissal for Cause – Procedure

*Dunn v. Rund*, Case No. 09-1176 (6<sup>th</sup> Cir. BAP 2010) – Section 707(a) and Rule 1017 allow dismissal only after notice and a hearing. Adequate notice and adequate opportunity for hearing are flexible concepts that depend on the circumstances of the case. Notice must be reasonably calculated to apprise interested parties of the pendency of the action and to afford them an opportunity to present objections; and must provide a reasonable time for those interested to make an appearance. First Meeting of Creditors notice did not warn of possible dismissal for failure to appear, and notice of adjourned First Meeting stated only that if Debtor failed to dismiss, the Trustee may file a Motion to Dismiss. Neither notice indicated that dismissal could occur without a Motion being filed or another hearing set. Failure to give notice was harmless error, however, where Debtor had filed own Motion to Voluntarily Dismiss, and dismissal on request of Trustee provided same relief that debtor had sought on her own behalf.

#### §9.9 Voluntary Dismissal

*In re Knibbe*, Case No. 10-14592 (Bankr. W.D. Mi. 2011) – Debtor's letter to court failed to establish cause for dismissal under Section 707. Debtor who voluntarily seeks Chapter 7 protection has no right to dismiss merely because debtor may have to surrender valuable assets to the Chapter 7 Trustee. Debtor's statement that he "no longer consent[s] to, or accept[s] the court[']s authority" is not a basis for dismissal.

*In re Arquette*, 2010 WL 2465233 (Bankr. N.D. Ohio 2010) – Debtor does not have the right to dismiss chapter 7 case. Chapter 7 case may be dismissed only “for cause”, unlike corresponding dismissal provision in chapter 13 which permits a debtor to voluntarily dismiss at any time. Court will deny requests to voluntarily dismiss chapter 7 case where creditors have been or will be prejudiced by dismissal; or when property has been or will be obtained by the trustee that will satisfy at least part of debtor’s obligations. Court will deny debtor’s request to voluntarily dismiss where debtor intends to refile and list post petition debts, as that action would cause prejudice to creditors. Debtor who incurred potential post petition court liability would not be permitted to voluntarily dismiss chapter 7 were stated intention was to refile another chapter 7 to include the post petition tort claim.

*In re Williams*, Case No. 10-58654 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Dismiss denied without prejudice where debtor failed to attach required 21 day Notice of the Motion and a certificate of service showing that the 21 day notice and the Motion were served on the Trustee and all creditors.

*In re Fink*, 2009 WL 2823734 (Bankr. N.D. Ohio 2009) – Debtor has no right to voluntarily dismiss Chapter 7 Case. Court will dismiss Chapter 7 only for “cause” demonstrated by movant. Court must consider interests of both Debtor and creditors, and a Motion to Dismiss is to be denied if voluntary dismissal would prejudice creditors. Debtor’s post-petition inheritance would constitute property of the estate that would provide material recovery to unsecured creditors, which constitutes grounds to deny Motion. Debtor failed to demonstrate any detailed or concrete plan to satisfy creditors outside of bankruptcy. Debtor’s schedules indicate that Debtor had no other non-exempt assets and current income from unemployment that was not sufficient to cover day-to-day living expenses. Court has no reason to believe that inheritance would be voluntarily used to pay creditors.

*In re Tomek*, Case No. 07-32621 (Bankr. E.D. Mi. 2009) (unreported decision) - Debtor's Motion to Dismiss his Chapter 7 case conditionally granted. Debtor failed to disclose multiple assets and failed to disclose the transfer of \$14,000 in motor vehicles to Debtor's wife immediately preceding filing bankruptcy. Creditor and the Trustee filed Section 727 Complaints to deny the discharge. Creditor also filed a Section 523 action to have its debt declared non-dischargeable based on fraud. At some point, a "White Knight" purchased all of the claims against the estate. Debtor then sought to dismiss the case, and the purchasing "creditor" joined in that request. The Court noted that voluntary dismissal of a Chapter 7 proceeding is permitted unless "plain legal prejudice" to creditors would result. As the only creditor joined in this request, dismissal would not result in prejudice to the creditors. However, prejudice would result to the Trustee as the Trustee had expended a "significant amount of time and effort" to investigate, market and liquidate assets of the Debtor. Further, Section 105 allows the Court to enter additional orders to protect the purposes of the bankruptcy code. The Court made the dismissal of the case conditional on Debtor's reimbursement of the Trustee, Attorney for the Trustee, and the Broker hired by the Trustee to liquidate assets.

#### §9.10 Dismissal With Prejudice to Re-filing

*In re Drewek*, Case No. 11-42763 (Bankr. E.D. Mi. 2011) – Section 349 allows court to dismiss bankruptcy case with prejudice. “Cause” can include bad faith, egregious behavior, contumacious actions, or abuse of bankruptcy process. Debtor’s case dismissed where debtor embezzled funds from incapacitated son’s trust account over which debtor served as trustee, dismissed with prejudice. Filing was bad faith abuse of bankruptcy process.

*In re Carter*, Case No. 08-70934 (Bankr. E.D. Mi. 2009) - Debtor's case dismissed for failure to pay filing fee. Case was Debtor's 6th case in which Debtor had failed to pay filing fee. Court entered Order to Show Cause directing that Debtor pay filing fee in instant case and also pay outstanding filing fees from prior cases totaling \$1,055.00 or case would be dismissed with prejudice. Debtor failed to comply with Order to Show Cause and case dismissed with 180 day bar.

#### §9.11 Filing in Violation of Bar

*In re Ervin*, Case No. 10-50129 (Bankr. E.D. Mi. 2010) - Debtor prohibited from filing another petition either personally or by any other person on her behalf for two years unless Debtor is represented by counsel. Debtor's second petition filed one day before entry of Order dismissing prior case with 2 year bar was "inconsistent" with Order of dismissal, mandating dismissal of the second case.

*In re Rush*, Case No. 10-55737 (Bankr. E.D. Mi. 2010) – Debtor prohibited for filing another petition jointly or individually without an attorney for period of 180 days. Debtor's filing 175 days after entry of order dismissed by Court *sua sponte*.

*In re Nln*, Case No. 09-43126 (Bankr. E.D. Mi. 2009) – Case filed in violation of bar to refiling dismissed by Court *sua sponte*.

*In re Green*, Case No. 08-63810 (Bankr. E.D. Mi. 2008) - Debtor's first case dismissed with prejudice to Debtor filing another petition for 180 days. Debtor filed a new petition within the prejudice period. Court dismissed second case *sua sponte* as filed in violation of 180 day bar.

#### §9.12 Reinstatement of Dismissed Case

*Smith v. Silverman*, 2011 WL 1901040 (2d Cir. 2011) – Court would not reinstate dismissed case to permit debtor to file action against chapter 7 trustee and trustee's attorney for failure to pursue assets. Underlying claims were entirely without merit, such that reopening case would be futile effort. Chapter 7 trustee is immune from suit for personal liability for acts taken as a matter of business judgment in acting in accordance with statutory or other duty or complying with orders of Court. Trustee's decision not to pursue actions were well within scope of business judgment.

#### §9.13 Reopening Case

*Republic Bank & Trust Co. v. Hutchinson*, 444 BR 728 (W.D. Ky. 2011) – Court has jurisdiction to reopen closed Chapter 7 case to administer previously undisclosed asset. Creditor has standing to request reopening if creditor can prove existence of unadministered asset.

### B. Conversion to Chapter 13

#### §9.14 Request of Debtor

*In re Tufano*, 2011 WL 1473384 (Bankr. M.D. Pa. 2011) – Debtor in Chapter 7 does not have absolute right to convert case to proceeding under Chapter 13. Motion to Convert is to be determined by reference to "totality of circumstances" which would support dismissal under Section 1307, including (i) whether the debtor is seeking to convert to chapter 13 in good faith (including a review of facts such as the timing of the motion to convert; the debtor's motive in filing the motion; and whether the debtor has been forthcoming with the bankruptcy court and creditors); (ii) whether the debtor can propose a confirmable chapter 13 plan; (iii) the impact on the debtor of denying conversion weighed against the prejudice to creditors caused by allowing conversion; (iv) the effect of conversion on the efficient administration of the bankruptcy estate; and (v) whether conversion would further an abuse of the bankruptcy process. Debtors acted on advice of counsel in transferring residence from husband's name alone to name of husband and wife. Debtors properly disclosed existence of home. Debtors failed to list the transfer on Statement of Financial Affairs and when asked at the 341 meeting whether they had transferred any assets, Debtors denied any transfers, as instructed by bankruptcy counsel. Debtors did not conceal assets and generally attempted to cooperate with the Trustee and filed various amendments through new counsel that appeared to be good faith attempt to correct deficiencies and inaccuracies in original documents. There was no evidence of any other pre-petition misconduct, the debtors acted quickly to correct issues, and no creditor opposed conversion or sought relief from stay. Motion to convert filed in good faith and case converted.

*In re Hoskins*, Case No. 08-62613 (Bankr. E.D. Mi. 2009) – Order Converting Case to Chapter 13 vacated. Debtor filed Notice of Motion but failed to file Certificate of Service evidencing timely notice on all creditors and parties in interest.



*In re Chirri*, Case No. 08-61120 (Bankr. E.D. Mi. 2008) – Motion to Convert Case from Chapter 7 to Chapter 13 denied without prejudice where Notice of Motion referenced “Motion to Waive Debtor’s Appearance at 341 First Meeting of Creditors” and purported to require objections to be filed within 15 days. Notice period for Motion to Convert from Chapter 7 to Chapter 13 is 20 days.

#### §9.15 Reconversion

*In re Gaines*, Case No. 04-63830 (Bankr. E.D. Mi. 2008) – Case which has previously been converted from Chapter 13 to Chapter 7 cannot be re-converted to Chapter 13. Section 706(a) permits conversion from Chapter 7 to Chapter 13 only “if the case has not been converted under section ... 1307 ....” Court lacks authority to re-convert case from Chapter 7 to Chapter 13. Section 706(d) only limits when a case may be converted if otherwise permitted, but does not override express prohibition against re-conversion found in 706(a).

#### §9.16 Based on Finding of Presumed Abuse

*Advanced Control Systems, Inc. v. Justice*, 2011 WL 1843404 (8<sup>th</sup> Cir. 2011) – Court finding that Chapter 7 would be presumptively abusive under Section 707(b)(2) can either dismiss case or, with the consent of the debtor, convert the case to Chapter 13. Case originally filed as Chapter 13 and converted after debtor could not confirm plan. In Chapter 7, Court found relief would be abusive under Section 707(b) and, with the consent of the debtor and over the objection of a creditor, ordered the case re-converted to Chapter 13. Although debtor cannot voluntarily convert a Chapter 7 to a Chapter 13 if the case has been previously converted from Chapter 13 to Chapter 7, Section 707(b)(1) does not limit the Court’s ability to order conversion where conversion is in the best interests of creditors, even though the debtor must consent to that conversion. Consent to the Court’s Order of conversion is not the equivalent of voluntary conversion.

### C. Denial of Discharge – Grounds

#### §9.17 Section 727(a)(1)

*In re Liberator Technologies, LLC*, Case No. 08-41376 (Bankr. E.D. Mi. 2010) - corporate debtor is not entitled to a discharge. Creditor’s objection to Chapter 7 Trustees Report of No Distribution would be sustained to the extent the report indicated that the trustee sought discharge of claims.

#### §9.18 Section 727(a)(2)

*Midwest Community Federal Credit Union v. Olds*, 2011 WL 3471551 (Bankr. N.D. Ohio 2011) – Minor understatement of balance in bank account, stated as \$700 when balance was actually \$1600, was not evidence of fraud absent explanation by Credit Union of timing of deposits and withdrawals, where it was possible that debtor had written checks or made withdrawals that had not posted to credit union records as of the petition date.

*Newton v. Sims*, 2011 WL 2619106 (Bankr. E.D. Tn. 2011) – Section 727(a)(2) provides a mechanism for creditors to deal with abusive debtor. Section 727(a)(2)(A) requires proof that the debtor disposed of, transferred, or concealed property within one year of filing of bankruptcy petition with intent to either hinder or delay or defraud creditors by disposing of her property. Badges of fraud include: (1) the lack of adequate consideration for the transfer; (2) the family, friendship, or close relationship between the parties; (3) the retention of possession, benefit, or use of the property in question by the debtor; (4) the financial condition of the party sought to be charged prior to and after the transaction in question; (5) the conveyance of all of the debtor’s property; (6) the secrecy of the conveyance; (7) the existence or cumulative effect of a pattern or series of transactions or course of conduct after incurring of debt, onset of financial difficulties, or pendency or threat of suit by creditors; (8) the general chronology of events and transactions under inquiry; (9) whether the transfer was conducted at arm’s length; (10) whether the debtor was aware of the existence of a significant judgment or over-due debt; (11) whether a creditor was in hot pursuit of its judgment or claim and whether the debtor knows this; and (12) the timing of the transfer relative to the

filing of the petition. Pre-petition, debtor sold her residence and attempted to purchase a new one, but could not obtain financing. Debtor transferred proceeds of sale (\$150,000) to son. Son purchased new residence in his own name, using \$150,000 as downpayment and obtaining mortgage for balance of price. Court found that transfer was not done for improper purpose or with goal of removing funds from debtor's estate. After transfer and purchase of home, debtor continued to pay creditors for at least 8 months until debtor could no longer afford payment as she had not obtained new employment.

*Barbacci v. Ungar*, 2011 WL 2711374 (Bankr. N.D. Ohio 2011) – To succeed in denial of Debtor's discharge for concealment, Trustee must show both the concealment of property of the estate or of the debtor and Debtor's subjective intent to hinder, delay or defraud Trustee through the concealment. Debtor who owned two corporations through which debtor operated chiropractic office did not conceal equipment as schedules listed equipment with no detailed listing. Schedules were unclear as to whether equipment was owned by debtor personally or by corporations, and Trustee acknowledged this uncertainty even prior to the first meeting of creditors. Confusion and possible overlap of ownership was apparent from the start of the case. Transfer of equipment from one corporation to another, both controlled by debtor, could not constitute transfer under Section 727 as debtor did not own the assets allegedly transferred. Debtor provided detailed list of equipment at or prior to the 341 meeting and walked through the corporate offices with the Trustee to show the location of the equipment.

*Barcume v. Fox*, Case no. 09-3514 (Bankr. E.D. Mi. 2011) – Section 727(a)(2) requires proof of a transfer or concealment; by the debtor; within one year pre-petition; and with actual intent to hinder, delay or defraud. Intent can be proven by references to "badges of fraud". Debtor's sale of an asset, concealment of income by depositing business income into personal account, and transfer of title to a motor vehicle (while retaining possession) evidenced transfers within one year of petition. Evidence failed to demonstrate requisite intent where debtor testified that she sold business because it was failing and on verge of closing and where price was determined based on good faith estimate of value of equipment. Debtor had long history of using personal accounts to collect receivables and pay business and personal obligations and did not evidence new course of action designed to hinder creditors. Debtor fully disclosed all accounts including accounts that debtor had previously closed and the use of her personal account for business purposes. Transfer of vehicle title was done pursuant to properly perfected security interest when debtor became unable to repay loan.

*Holmes Lumber & Building Center, Inc., v. Miller*, 2010 WL 3463296 (Bankr. N.D. Ohio 2010) – Section 727(a) does not apply to case pending under Chapter 13 and cannot be used to deny discharge. Discharges in Chapter 13 are controlled by Section 1328.

*Laughlin v. Noveau Body and Tan, LLC.*, 602 F.3d 417 (5th Cir. 2010) - Section 727(a)(2) denies a debtor a discharge if the debtor transferred, removed or mutilated property within one year before the filing of the petition. A "transfer" includes each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with-(i) property; or (ii) an interest in property. Debtor's pre-petition renunciation of inheritance is not a transfer for purposes of Section 727. Renunciation of inheritance acts as if the person renouncing predeceased the decedent, such that the party renouncing the property never acquired any interest in the property. Because the debtor never acquired any interest in the property by virtue of the renunciation, the renunciation cannot constitute a transfer of the debtor's interest for purposes of Section 727.

*McDermott v. Wallace*, 2010 WL 2696790 (Bankr. N.D. Ohio 2010) – Section 727(a)(2) encompasses two elements: (1) a disposition of property, such as concealment, and (2) a subjective intent on the debtor's part to hinder, delay, or defraud a creditor through the act of disposing of the property. Evidence supported finding that Debtor concealed or disposed of property prior to the commencement of the case to hinder, delay or defraud creditors. Debtor was managing partner of a business. Debtor was stealing money from the Business and made improper charges against the business accounts in connection with the debtor's side business as a youth baseball coach. An inventory of the business inventory revealed that \$26,000 in merchandise was missing. Debtor transferred \$12,190 dollars in ATM and counter check withdrawals from the business without any clear business purpose. Debtor misappropriated \$23,100 of business income over

a 2 month period. Debtor maintained a separate bank account into which debtor made several suspicious deposits consisting of checks written to the business.

*Jahn v. Fleming*, 2010 WL 2803631 (Bankr. E.D. Tn. 2010) – Section 727(a)(2)(A) requires 1) a disposition of property, such as concealment, and 2) a subjective intent on the debtor's part to hinder, delay or defraud a creditor through the act of disposing of the property. Party objecting to discharge bears burden of proof on all elements. Intent can be established through circumstantial evidence including (i) the lack of adequate consideration for the transfer; (ii) the family, friendship, or close relationship between the parties; (iii) the retention of possession, benefit, or use of the property in question by the debtor; (iv) the financial condition of the party sought to be charged prior to and after the transaction in question; (v) the conveyance of all of the debtor's property; (vi) the secrecy of the conveyance; (vii) the existence or cumulative effect of a pattern or series of transaction or course of conduct after incurring of debt, onset of financial difficulties, or pendency or threat of suit by creditors; and (viii) the general chronology of events and transactions under inquiry. Debtor did not transfer automobile with intent to hinder or delay creditors where Debtor's home needed new roof and Debtor had been advised that homeowners insurance would be cancelled unless repairs were completed. Debtor sold automobile and used proceeds to pay roofing contractor. Debtor disclosed sale of automobile in schedules and Debtor's decision to liquidate debtor's only asset of sufficient value to pay for repairs did not evidence requisite intent.

*Retz v. Samson*, 606 F.3d 1189 (9<sup>th</sup> Cir. BAP 2010) – Party seeking denial of discharge under § 727(a)(2) must prove (1) a disposition of property, such as transfer or concealment, and (2) a subjective intent on the debtor's part to hinder, delay or defraud a creditor through the act [of] disposing of the property. Debtor's intent need not be fraudulent to meet the requirements of § 727(a)(2) – discharge will be denied if the debtor intended to hinder or delay a creditor. Factors include (1) a close relationship between the transferor and the transferee; (2) that the transfer was in anticipation of a pending suit; (3) that the transferor Debtor was insolvent or in poor financial condition at the time; (4) that all or substantially all of the Debtor's property was transferred; (5) that the transfer so completely depleted the Debtor's assets that the creditor has been hindered or delayed in recovering any part of the judgment; and (6) that the Debtor received inadequate consideration for the transfer. Complicated scheme whereby Debtor transferred house to Debtor's brother valued at \$220,000 for a price of \$160,000 where the purchase agreement was signed within one year preceding the commencement of the case, Debtor was in poor financial condition and Debtor was involved in state court litigation at the time of the sale. Sale had been approved by State Court presiding over litigation, but State Court had not been advised that the purchaser was Debtor's brother or that the price paid was \$60,000 less than appraised value.

*Retz v. Samson*, 606 F.3d 1189 (9<sup>th</sup> Cir. BAP 2010) – Discharge can be denied under Section 727(a)(2)(B) where the debtor transfers or conceals property of the estate after the date of filing the petition. Debtor held a 6% interest in a family corporation. After Debtor filed for bankruptcy, the corporation sold all of its assets to Debtor's mother in exchange for a promissory note payable over 30 years. Court denied discharge where it appeared that at least one of the purposes of the transfer was to insulate the property from Debtor's creditors and Debtor participated in the transaction without disclosing the proposed transaction to the Trustee who, as a result of the petition, held the 6% ownership stake.

*Coady v. D.A.N. Joint Venture III, L.P.*, 588 F.3d 1312 (11<sup>th</sup> Cir. 2009) – To successfully object to a discharge under § 727(a)(2)(A), a creditor must establish (1) that the act complained of was done within one year prior to the date the petition was filed, (2) with actual intent to hinder, delay, or defraud a creditor, (3) that the act was that of the debtor, and (4) that the act consisted of transferring, removing, destroying, or concealing any of the debtor's property. Debtor who worked for company wholly owned by Debtor's spouse without compensation wrongfully diverted the fruits of his labor to increase the value of his wife's businesses and then used business assets to support his personal lifestyle. Debtor was the sole person actually and actively involved in the business and its success depended solely on his continued efforts. Debtor devoted time and talents to increasing the business value, but whatever increase in equity came about through his labor that value would be protected from his creditors, while being available for his benefit or to fulfill his legal obligations of support for his family. Debtor used business accounts for personal purposes as well as providing support for wife in lieu of regular compensation for his services. Through this arrangement, Debtor acquired and concealed an equitable interest in his wife's business. This

equitable interest would have become property of the estate under Section 541. Section 727(a)(2) requires either a transfer or a concealment of assets. Debtor's failure to schedule the equitable interest constituted "concealment". Although concealment began many years prior to the bankruptcy petition, Section 727(a)(2) would apply to "continuing concealment" where debtor keeps assets out of creditor's reach for more than one year before petition was filed, in order to prevent debtor from receiving benefit of wrongful conduct.

*Montedonico v. Beckham*, 2009 WL 1726526 (6<sup>th</sup> Cir. BAP 2009) – Discharge denied under Section 727(a)(2) and (a)(4). Schedules and Statement of Financial Affairs failed to list income of \$47,000 received in the 7 months prior to the filing of the petition; gambling losses in excess of \$16,000 in the year prior to the filing; additional checks to or withdrawals from ATMs located at various casinos in Mississippi in excess of \$37,000 during the year prior to the filing; failure to list any antiques even though Debtor spent over \$3600 at antique stores in the year prior to the filing and over \$800 in the 45 days prior to the filing; failed to disclose Debtor's ownership interest in real estate located in Oklahoma or any leases related to that property or any income derived from that property, although her tax returns listed rental income for the prior calendar year; failed to disclose a pending EEOC claim against her former employer; Debtor's status as executrix and beneficiary of the estate of Debtor's deceased mother and receipt of rental income from property included in her mother's estate; property allegedly held by other people located at Debtor's residence; Debtor's ownership interest in a Kubota Tractor, Great Bend Loader, Tufline Box Blade and New Woods Mower; the post-petition sale of the Kubota Tractor, Great Bend Loader, Tufline Box Blade and New Woods Mower for \$12,000, with the proceeds routed through Debtor's daughter and two of Debtor's neighbors so the proceeds could not be tracked. Debtor compounded her non-disclosure by willfully failing and refusing to cooperate in discovery in the adversary proceeding. Court concluded that Debtor clearly, repeatedly and knowingly concealed assets and misrepresented her financial situation in her bankruptcy case through multiple material omissions and misrepresentations justifying denial of discharge under Section 727(a)(2)(A) and (B). Further, Debtor's false statement about Debtor's income, gambling losses, and interests Debtor held in real and personal property justified denial of discharge under Section 727(a)(4)(A). "The bankruptcy Court found it incredulous that the Debtor did not know the statements to be false and simply forgot that she received income of \$197,000 in the year preceding the bankruptcy, or that she spent nearly \$800 in antiques stores in the 45 days immediately preceding the filing of her case."

*Morgan v. Mankins*, 2009 WL 1616012 (Bankr. N.D. Ohio 2009) - Action under Section 727(a)(2) must be premised on conduct that occurred either within one year of the date that the Debtor filed his bankruptcy petition, or while the Debtor's bankruptcy case was pending. Debtor's alleged actions in March, 2007, would not support 727(a)(2) action for bankruptcy filed November, 2008.

*D.A.N Joint Venture, III, L.P. v. Shekerjian*, Adv. No. 08-4838 (Bankr. E.D. Mi. 2009) – To deny discharge under section 727(a)(2)(A), plaintiff must prove that better disposed of or concealed property and that Debtor had a "subjective intent" to hinder, delay or defraud creditors. Section 727(a)(2)(B) requires proof that Debtor transferred, removed, destroyed, mutilated or concealed property of bankruptcy estate with actual intent to hinder, delay or defraud creditors or an officer of the state and where the transfer, removal, destruction, mutilation or concealment occurred after the petition date. Plaintiff's complaint that alleged that Debtor failed to disclose ownership interest in at least two corporations, at least one of which was formed by the Debtor after the commencement of Debtor's Chapter 11 case but before conversion to Chapter 7 and that Debtor failed to disclose income received from those corporations stated claims under section 727(a)(2)(A) and (B).

*General Motors Corp. v. Heraud*, Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Debtor's intent to hinder, delay or defraud can be based on circumstantial evidence or inferred from Debtor's conduct. Even one wrongful act can be sufficient, although continuing pattern is stronger indication of wrongful intent. Debtor's contract with Plaintiff required Debtor to collect sums from Plaintiff and use those to pay obligations to third party vendor on Plaintiff's behalf. Debtor's actions in transferring, disposing of or concealing up to \$1.8 million and then concealing that by refusing to provide accounting notwithstanding State Court Order to do so; refusing to disclose disposition of funds under oath; and refusing to provide written answers to discovery in adversary proceeding constituted violations of Section 727(a)(2) compelling denial of discharge.



## §9.19 Section 727(a)(3)

*General Electric Capital Corp. v. Wickard*, 2011 WL 3348094 (Bankr. W.D. Mi. 2011) – To receive discharge, Debtor must produce records that provide enough information to allow creditors to ascertain debtor's financial condition and track financial dealings with substantial completeness and accuracy for reasonable period. Although debtor produces large volume of documents, the documents were deficient in material ways including transfers of assets to and between insider-companies; promissory notes held by debtor; and other actions of debtor designed to place assets beyond reach of creditors after judgment had been entered by state court. Information that was provided appeared unreliable and inaccurate in material respects and failed to provide sufficient information to explain other items. Debtor was sophisticated businessman holding degree in accounting and was familiar with accounting practices, balance sheets and other financial statements. "Profound gaps" in records warranted denial of discharge.

*Barbacci v. Ungar*, 2011 WL 2711374 (Bankr. N.D. Ohio 2011) – Delay in producing records will not support denial of discharge under Section 727(a)(3) where records were ultimately produced. Delay in production is not the same as concealment.

*Stephens v. Morrison*, 2011 WL 2144577 (Bankr. W.D. Tn. 2011) – Section 727(a)(3), does not require perfect, or even necessarily complete, records. Debtor must provide enough information to ascertain the debtor's financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present. Objecting party must demonstrate that debtor failed to maintain and preserve adequate records leaving it impossible to ascertain his financial condition and material business transactions. Court can consider the Debtor's education, business experience, sophistication, or any other relevant factor. Debtor would not be denied discharge where debtor produced bank statements for his business account that show every transaction into and out of those accounts for the covered months and debtor provided copies of the receipts for materials he alleges he used. Debtor failed to produce several records. First, although he transferred money back and forth between the 2625 Account, the 6163 Account and his savings account at First Bank, Morrison failed to produce copies of the bank statements for the 6163 Account and the savings account for the entire June 2006 through February 2008 time period. Plaintiff did not present any evidence to the Court that debtor failed to comply with the standard for record keeping for independent home improvement contractors similar in size to debtor's business.

*Settembre v. Fidelity & Guarantee Life Insurance Co.*, 2011 WL 1750295 (W.D. Ky. 2011) – Debtor's record must not be (a) chaotic or incomplete, (b) in such a condition that a creditor is required to speculate as to the financial history or condition of the debtor, or (c) in such a condition that a creditor is compelled to organize and reconstruct the debtor's business affairs. Records must be such that a third party such as a trustee or creditor could determine from those records what was happening in the debtor's business which is an objective standard. A sophisticated debtor is generally held to a higher level of accountability in record keeping, and the more complex the debtor's financial situation, the more numerous and detailed the debtor's financial records should be. Debtor was a sophisticated business person at trial. Debtor was college-educated and worked in the insurance industry for over thirty years, during the majority of his career in managerial-level positions. He was 50% owner of his company and held the position of chairman and president/CEO. Debtor and his company borrowed \$500,000 from Life Event Advantage Division of Life Insurance Company of the Southwest; \$200,000 from Fidelity & Guaranty Life Insurance Company; \$800,000 from Reliastar; \$200,000 from the Hartford; and \$1,000,000 from National City Bank, all over a 3-year time period. Debtor maintained only one bank account in the business name which he used for both business and personal expenses; he kept no ledgers; sources of many deposits could not be identified; many checks were made out to debtor personally with no notation as to how the money was spent; various wire transfers contained no notation concerning the purpose for the transfer of funds; debtor produced no records concerning his brokerage account and produced some but not all tax returns for the years 2000 through 2005, mostly unsigned and unsupported by documentation. Debtor's financial records were not sufficient to allow creditors or the Trustee to gain an accurate understanding of debtor's financial affairs, warranting denial of the discharge.



*Michael v. Michael*, 2010 WL 2942625 (Bankr. N.D. Ohio 2010) – In order to sustain an action to deny a debtor's discharge under Section 727(a)(3), one of two conditions must be first shown to exist: (1) the debtor failed to keep or preserve any recorded information, including books, documents, records, and papers; or (2) the debtor, or someone acting for the debtor, committed an act of destruction, mutilation, falsification, or concealment of any recorded information, including books, documents, records, and papers. After the party objecting to discharge has shown that either or both of the initial conditions to sustain an action under Section 727(a)(3) are met, the objecting party must then go on to show that the lack of financial records makes it impossible to ascertain the debtor's financial condition. Section 727(a)(3) does not impose upon a debtor an obligation to keep and preserve financial records forever, but only imposes upon a debtor a duty to keep and preserve financial records for a reasonable period of time, with two years having been used as a minimum point of reference. Failure to keep records or destruction of records will not defeat a discharge if the debtor's act or failure to act was justified under all of the circumstances of the case. However, the Bankruptcy Code imposes a positive duty on a debtor to keep and maintain books and records related to their financial affairs. Section 727(a)(3) permits denial of discharge where the failure to adequately keep and preserve business records makes it impossible to ascertain the debtor's financial condition and the debtor is unable to sufficiently justify the lack of records. A debtor who owns and/or controls numerous business entities and engages in substantial financial transactions and who fails to maintain recorded information related to those entities and transactions establishes a *prima facie* case for an action to deny discharge as there is a natural inference arises that the person is attempting to obfuscate his financial dealings. Discharge would be denied for sophisticated debtor who failed to maintain any records and could not produce check registers or a simple accounting ledger of any kind regarding any of his businesses; and Debtor had not filed tax returns for many or all of the most recent tax years. Defendant's lack of intent to cause harm and lack of any wrongful intent are not relevant as Section 727(a)(3) does not require intent on the part of a debtor to hide or conceal financial information or an intent to defraud a particular creditor or trustee. Standard for inadequacy or lack of financial records is an objective one, focusing on whether others in like circumstances would ordinarily keep financial records.

*Astro Building Supplies, Inc., v. Slavik*, 2010 WL 2772509 (E.D. MI. 2010) - Section 727(a) (3) operates to deny a debtor a discharge where the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case. As a precondition to discharge debtors must produce records which provide creditors with enough information to ascertain the debtor's financial condition and track his financial dealings with substantial accuracy for a reasonable period past to present to give creditors complete and accurate information concerning the status of the debtor's affairs and financial history and to test the completeness of the disclosure requirements to a discharge. Plaintiff is not entitled to perfect, or even necessarily complete, records, but enough information to ascertain the debtor's financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present. Plaintiff must establish a *prima facie* case showing the Debtor failed to keep adequate records. General allegations that debtor failed to maintain specific records but did not detail those records or explain how those records would more accurately detail debtor's financial condition was not sufficient to support action under Section 727. Debtor's relationship with Plaintiff was one based on open account and Plaintiff had no reasonable expectation that Debtor would maintain each and every project file showing where specific supplies were delivered or how those supplies were paid for as Plaintiff had no right to payment from any specific job or source.

*General Motors Corp. v. Heraud*, Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Denial of discharge appropriate where Debtor fails to provide trustee and creditors with sufficient information to ascertain Debtor's financial condition and track financial dealings with substantial completeness and accuracy for a reasonable period past to present. Debtor's refusal to produce any documents related to business or financial condition based on alleged Fifth Amendment grounds constituted basis to deny discharge.

*Kappell v. Bunch*, 2009 WL 3055338 (Bankr. E.D. Ky. 2009) – Discharge will be denied under Section 727(a)(3) where the Debtor concealed, destroyed, mutilated, falsified or failed to keep or preserve any recorded information, including books, documents, records and papers from which the Debtors' financial condition or business transactions may be ascertained, unless such act or failure to act was justified under

the circumstances of the case. Debtor has duty to maintain sufficient records to allow Trustee and creditors to trace Debtor's financial history for a reasonable period, past to present. Once it is determined that a debtor's records are inadequate, the burden is on the debtor to establish any justification for it. Discharge would be denied where Debtors had no business records whatsoever, including bank accounts making it impossible to trace any of Debtors' business activities through their own records. Debtors' income tax records did not accurately reflect the fact that \$100,000 passed through their hands on the Plaintiffs' job. Debtors' Schedules that indicated only \$207 of income for 2007 were simply not credible. Debtor-Wife's testimony that she had fallen off a ladder and suffered a closed head injury that caused her to forget things was not credible. Debtors owned and operated a construction business. Debtor wife bid every job for the business including determining what materials would be used, the cost of the materials and how long the job would last. On the Plaintiffs' job, Mrs. Bunch had the bid figured in detail to the penny. Debtors also had two prior bankruptcy filings, which would have alerted them to need for accurate record keeping.

*Corcoran v. Kind*, Adv. No. 06-3231 (Bankr. E.D. Mi. 2008) - Pro Se Debtor denied a discharge where Debtor failed to keep adequate records of the Debtor's financial affairs. Trustee demonstrated by preponderance of evidence that Debtor failed to keep records of a type "kept by a reasonably prudent Debtor with the same occupation, financial structure, education and experience. ... Where Debtors are sophisticated in business, and carry on a business involving significant assets, creditors have an expectation of greater and better record keeping." Debtor failed to list her ownership interest in various limited liability companies and corporations and failed to provide documents to the trustee. Debtor "at best, failed to keep or preserve recorded information ... or, at worst, concealed this information". Debtor did not produce basic records including listing of tenants, addresses, and basic lease terms. Trustee ultimately obtained some of these documents from third parties, and some were never located at all. Debtor who was "generally knowledgeable" about business and had post-high school education could not assert reliance on accountant or attorney to escape Debtor's duty to provide records and information.

*Roberts v. Debusk*, 2009 WL 1256891 (E.D. Tn. 2009) - Section 727(a)(3) prohibits discharge if the Debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the Debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case. The adequacy of records is determined on a case-by-case basis, considering Debtor's occupation, financial structure, education, experience, sophistication and any other circumstances that should be considered in the interest of justice. Debtor's failure to produce records from Debtor's business constituted failure to produce records from which to ascertain his financial status. Debtor's claim that a computer virus had destroyed many of the records of the business did not excuse failure to produce records where Debtor was articulate and sophisticated, having started an internet marketing business in 2004. Debtor could be expected to maintain better records of his business, as well as a backup system of some sort. Debtor's failure to keep any backup whatsoever was not justified. Further, records produced were inconsistent making it impossible to reconcile financial information. Debtor's failure to produce various records and inconsistencies in those records produced do not inspire confidence as to whether Debtor's banking and credit card statements tell the full story of Debtor's financial status.

*Corcoran v. Powell*, Adv. No. 08-3100 (Bankr. E.D. Mi. 2009) - Section 727(a)(3) requires Debtor to provide enough information to ascertain the Debtor's financial condition and to track finances with substantial accuracy for a reasonable period in the past to the present. Intent is not an element of a 727(a)(3) exception to discharge. Debtor in her Schedules and Statement of Financial Affairs were wrong and failed to disclose Debtor's interest in various businesses. Debtor misstated the details of the sale of one of Debtor's businesses including amount of sale, and nature of the assets transferred was incorrect. Debtor's statements regarding the pre-petition payment to judgment creditor were incorrect, creating impression that potential preference action existed when payment was actually made by someone other than the Debtor. Debtor belatedly produced a number of documents to the Plaintiff but did not correct or amend the schedules and statement of financial affairs. Debtor failed to retrieve books and records from third parties. Trustee should not have to guess as to the nature, extent, and value of the Debtor's assets.

#### §9.20 Section 727(a)(4)

*U.S. Trustee v. Waits*, 2011 WL 4015680 (Bankr. E.D. Ky. 2011) – To prevail, the United States Trustee must prove, by a preponderance of the evidence: (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) the statement materially related to the bankruptcy case. Statements under oath as defined in Section 727(a)(4)(A) include testimony given by a debtor at the first meeting of creditors, in a deposition, or in a 2004 examination, as well as statements made by a debtor in the schedules and statement of financial affairs and includes both affirmative false statements and omissions. Debtor's failure to volunteer information to correct a misstatement by Debtor's counsel at the first meeting is not a statement under oath by the debtor, particularly where there was no direct question asked or pending when or after the misstatement was made. Debtor's statement in Schedules that tax refund belonged solely to the non-filing spouse, while inaccurate, did not indicate that statement was knowingly or fraudulently made or made with reckless indifference. Debtor's accountant testified that debtor's statement was correct from an accounting standard and Debtor's overall approach to management of business coupled with troubled marriage and later separation adequately explained debtor's ignorance. For purposes of Section 727(a)(4)(D), Trustee must prove by a preponderance of the evidence that (1) the Debtor or someone whose conduct for which the Debtor is legally responsible; (2) knowingly and fraudulently; (3) withheld recorded information including books, documents, records and papers; (4) relating to the Debtor's "property or financial affairs"; (5) from an officer of the estate entitled to possession of it under title 11. Debtor did not fail to turnover books and records where debtor turned over only the first two pages of his tax return but then submitted the complete return upon request by the Trustee.

*General Electric Capital Corp. v. Wickard*, Case No. 08-80498 (Bankr. W.D. Mi. 2011) – Plaintiff must prove that debtor made statement under oath that debtor knew was false, and was made willfully and with intent to defraud. Debtor failed to disclose ownership interest in several companies. Debtor did not deliberately undervalue ownership interest in disclosed company where debtor used different method to measure value than debtor used in financial statements given prior to commencement of bankruptcy and there was no evidence of actual value to resolve conflict or determine which value was correct. Debtor failed to disclose receipt of payments on promissory notes in Statement of Financial Affairs and indicated that Debtor had stopped receiving those payments long before commencement of case, where evidence indicated that debtor continued to receive those payments up to and after commencement of case. Debtor's alleged payment of proceeds of promissory notes to lender also was not disclosed in Statement of Financial Affairs even though money was paid to debtor and debtor later determined to pay proceeds to creditor. Debtor also failed to disclose ownership of various businesses in Statement of Financial Affairs Question 18 and continued to deny ownership even though documents introduced in evidence clearly established ownership. Evidence established that magnitude of deficiencies were not the product of mere inadvertence, but inferentially could only result from intent to deceive.

*Midwest Community Federal Credit Union v. Olds*, 2011 WL 3471551 (Bankr. N.D. Ohio 2011) – Knowing and fraudulent requirement of Section 727(a)(4) means debtor either acted with intent to defraud, by making material representation known to be false; or by statement made in reckless disregard of truth. Statements are "material" if they bear a relationship to debtor's business or estate, or concern discovery of assets, business dealings, or existence and disposition of property. Debtor's inconsistent statements of value of automobile will not support finding of fraud where credit union did not produce evidence of actual value of vehicle. Prior financial statements do not evidence fraud where statements of income in SOFA relate to different financial years than those set forth in the financial statements; and discrepancy could be result of lack of debtor's financial sophistication and confusion between gross revenue of business and gross income of debtor. However, debtor's representation in statement filed pursuant to Section 521(a)(1)(B)(iv) that debtor was unemployed would warrant denial of discharge where debtor owned and operated own business and continued to operate business even post-petition. Debtor clearly had knowledge of business and knowledge of falsity of statement in affidavit.

*Newton v. Sims*, 2011 WL 2619106 (Bankr. E.D. Tn. 2011) – Pre-petition, debtor sold her residence but was unable to obtain mortgage to purchase new one. Debtor gave proceeds of sale (\$150,000) to her son who purchased a new home in his name alone, using the \$150,000 as the downpayment and obtaining mortgage for the balance. Debtor did not disclose the transfer of the \$150,000 to son in her SOFA. Defendant knowingly made false statements in her statements and schedules by failing to disclose the

Purchase Agreement and the \$145,000.00 transfer to her son and that she did so with the requisite intent to justify a denial of her discharge. Transfer of \$145,000.00 eight months prior to filing for bankruptcy was a material transaction involving the Defendant's assets. Defendant's attorney had been informed about the details of the condominium purchase by the Defendant. When questioned at trial as to why debtor did not disclose these transactions, the Defendant testified that she "never thought of it." Defendant is not an unsophisticated debtor. From 2002 to 2007, she was a sales associate with a large, private real estate company in New Jersey. For sixteen years prior to her work in real estate, the Defendant was the administrator for a church in the New Jersey town where she resided. Although Debtor was aware that the Trustee was concerned by and questioning these omissions when he filed a motion to extend the time to file an objection to her discharge, Defendant did not file an Amended SOFA until more than four months after her meeting of creditors, twenty days after her 2004 examination and two days after the Plaintiff filed the Complaint initiating this adversary proceeding. Defendant's failure to amend in light of the Plaintiff's pursuit of information and subsequent filing of this adversary proceeding evidences bad faith or, at a minimum, a reckless indifference for the truth, which provides the foundation and justification for a denial of her discharge.

*Barbacci v. Ungar*, 2011 WL 2711374 (Bankr. N.D. Ohio 2011) – Section 727(a)(4) requires proof that 1) the debtor made a statement under oath; 2) the statement was false; 3) the debtor knew the statement was false; 4) the debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Debtor's failure to list two corporate entities owned by debtor in Schedule B was not concealment where Debtor did disclose those two entities in the Statement of Financial Affairs, and Trustee went letter to Debtor prior to First Meeting inquiring about those two entities. Debtor's alleged undervaluation of household goods did not evidence fraudulent intent where debtor valued assets at \$2500 and Trustee's appraisal indicted \$10,000.00. Debtor testified truthfully at the 341 meeting that no item was worth more than \$1,000, and all amounts listed in Trustee's appraisal are well within the allowed exemptions. To prevail under subsection (a)(4)(D), Trustee must prove ) the debtor withheld documents relating to the debtor's property or financial affairs; 2) in connection with a case; 3) from an officer of the estate entitled to possession; 4) and such withholding was [done] knowingly and fraudulently. Debtor's ongoing willingness to produce information combined with confusion regarding whether debtor's two wholly owned corporations would also file bankruptcy indicted that debtor did not fraudulently withhold information.

*McDermott v. Edwards*, 2011 WL 2619193 (Bankr. E.D. Ky. 2011) – Debtor's attempt to mislead creditors by deliberately undervaluing assets constitutes fraudulent statements in violation of Section 727(a)(4). Debtor improperly used lower tax assessed values for real estate when Debtor had recent appraisals that showed much higher values and where Debtor had represented much higher values only 6 months pre-petition.

*Silagy v. Dupal*, 2011 WL 2213975 (Bankr. N.D. Ohio 2011) – Court can deny a discharge when "the debtor knowingly and fraudulently, in or in connection with the case ... made a false oath or account." Trustee must establish 1) the debtor made a statement under oath; 2) the statement was false; 3) the debtor knew the statement was false; 4) the debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Debtor failed to schedule a personal injury action although Debtor had commenced personal injury litigation only two weeks prior to filing bankruptcy; and debtor repeatedly disclaimed any interest in any personal injury action during the First Meeting of Creditors.

*Kentucky Neighborhood Bank v. Ireland*, 441 BR 572 (Bankr. W.D. Ky. 2011) – Plaintiff must show by a preponderance of the evidence that the debtor knowingly and fraudulently, in or in connection with the case made a false oath or account. Evidence did not support fraud regarding valuation of debtor's closely held corporation where the Chapter 7 Trustee investigated and did not contest the value. Although corporation owned real property worth \$100,000, other business difficulties could have rendered debtor's ownership interest worthless which supported debtor's statement of value of \$0. Debtor's actions in significantly reducing income for the 6 months prior to filing evidenced intent to manipulate income to avoid means test for above-median debtor; and substantial reductions in asset values from prior financial statement issued one year prior to filing which listed assets of over \$1 million versus bankruptcy documents which listed



assets totaling only \$26,000; were both troublesome, court would rely on trustee's inaction regarding assets and value and the liberal construction of discharge in rejecting creditor's claims under Section 727(a)(4).

*Barcume v. Fox*, Case no. 09-3514 (Bankr. E.D. Mi. 2011) – Section 727(a)(4) requires a false statement or omission in the schedules or a false statement by the debtor at an examination in the course of the case. Plaintiff must prove that: (1) the debtors made a statement under oath; (2) the statement was false; (3) the debtors knew the statement was false; (4) the debtors made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. Even if all elements are supported, debtor will still receive discharge if debtor has credible explanation for omission or misstatement. Debtor's schedules and statements misrepresented payment received for sale of vehicle; failed to disclose a transfer of another motor vehicle; failed to disclose the existence of a lien on a third motor vehicle. Defendant's failure to list vehicles were the result of inadvertence or mistake where debtor misunderstood information requested or applicability of questions to debtor's financial affairs.

*Tower Credit, Inc. v. Davis*, 2011 WL 1396851 (Bankr. M.D. La. 2011) – To prevail on discharge objection creditor must prove that: (1) the debtors made a statement under oath; (2) the statement was false; (3) the debtors knew the statement was false; (4) the debtors made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. Debtor's statement in the means test form that she was unmarried was incorrect where debtor was married, although she had been separated for some time; and means test failed to include income information for husband was material as it related to the bankruptcy case and to the eligibility of debtor for relief under Section 707(b)(2). However, statements were not made with fraudulent intent as debtor relied on advice of counsel after advising that she and her husband were on bad terms and not living together. Debtor's counsel erroneously prepared means test form that says "unmarried" and did not include husband's income, although schedules reflected that debtor was separated.

*US Trustee v. Eerdmans*, Case No. 09-80456 (Bankr. W.D. Mi. 2011) – Section 727(a)(a)(A) requires proof that the debtor knowingly and fraudulently made a false oath or account. Plaintiff must prove (1) debtor made a statement under oath; (2) the statement was false; (3) debtor knew the statement was false; (4) debtor made the statement with fraudulent intent; and (5) statement related materially to bankruptcy case. Unrepresented Debtor did not knowingly make false statement when he included name of estranged wife as Joint Debtor where Debtor and wife had substantial joint debt and Debtor did not sign or attempt to sign wife's name to petition. Debtor, relying on unwise and incomplete advice from an attorney who did not actually represent debtor, mistakenly believed that debtor had to list wife as joint debtor because debtor and wife had joint debts. Debtor also testified at the First Meeting of Creditors that petition was drafted by attorney but later stated that he could not recall whether attorney drafted petition or whether Debtor did while discussing issues with attorney. Evidence indicated that numerous documents were faxed between debtor and attorney on the evening before the petition was filed and attorney admitted that he assisted in the drafting, even if the debtor actually prepared the physical document. Debtor's misstatement about attorney's role in preparing petition was a statement under oath related materially to the bankruptcy case, Court could not conclude that statement was knowingly or intentionally false or made with fraudulent intent.

*In re Fries*, 2010 WL 3700205 (Bankr. W.D. Ky. 2010) – Creditor failed to state cause of action under Section 727(a)(4) where all allegedly wrongful conduct occurred prior to commencement of case. Section 727(a)(4) is limited to fraudulent actions in connection with the case, which excludes pre-petition conduct as a matter of law.

*McDermott v. Wallace*, 2010 WL 2696790 (Bankr. N.D. Ohio 2010) – Section 727(a)(4) allows the Court to deny a discharge where the debtor makes a statement under oath that is false where the debtor knew the statement was false, maybe statement with fraudulent intent, any statement relating materially to the bankruptcy case. A statement is "material" if it bears a relationship to the debtor's business transactions or estate, or concerns discovery of assets, business dealings, or existence and disposition of property. Section 727(a)(4) will not deny a debtor a discharge if the false information is the result of mistake or inadvertence. Debtor's discharge denied where bankruptcy petition and schedules signed under oath were false with regard to his interest in his IRA, his interest in a business, and his interest in his counterclaims pending in state court at the time of commencement of the bankruptcy case. Debtor knew about the omitted assets at



the time Debtor commenced the case and certainly knew about these assets when his *amended* schedules were filed following the meeting of the creditors. Debtor omitted his interests in the business and his counterclaim with the intent of avoiding inquiries into his underhanded business dealings. Debtor's omissions were clearly material because they relate to the discovery of assets of the estate.

*Jahn v. Flemings*, 2010 WL 2803631 (Bankr. E.D. Tn. 2010) – The five elements which the Plaintiff must prove in an action under Section 727(a)(4) are: 1) the debtor made a statement under oath; 2) the statement was false; 3) the debtor knew the statement was false; 4) the debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Debtor made false statements under oath when Debtor's Schedules and Statement of Financial Affairs failed to disclose loan repayments to Debtor's mother made two days before Debtor signed the Statements and Schedules as required in Statement of Financial Affairs Question 3. Debtor also failed to disclose three additional payments to creditors which should have been listed in the responses to her statement of financial affairs and is designed to help a trustee discover avoidable transfers. Debtor omitted a \$1000 cash payment to the roofing contractor and two payments exceeding \$600 to the roofing supplier totaling \$1584.23. Trustee had strong circumstantial evidence that the debtor knew that the statements were false: Debtor is a finance manager; debtor provided a copy of her own checkbook register showing careful accounting of her transactions; Debtor produced the cash tickets and invoices from the creditors; Debtor was able to reconstruct the payments down to the penny for trial; Debtor discussed the payments while preparing the schedules, but did not disclose the payment to her mother; Debtor repaid her mother in cash on the night she sold her car; Debtor did not claim that she was rushed to file or that the omission was a mistake or that he forgot about the transfer; Debtor was carefully rationing her cash proceeds up to the day she filed and even planning in advance for electronic deductions from her bank account to insure that she paid what she wanted to. Debtor knew that she had paid her mother, an insider, within a year of her filing and that it should have been listed on the schedule. Fraudulent intent involves a material representation that the debtor knows to be false, or an omission that the debtor knows will create an erroneous impression. A reckless disregard as to whether a representation is true will also satisfy the intent requirement but fraudulent intent will not be found if false information is the result of mistake or inadvertence. The omission of all transfers to creditors in the statement of financial affairs leaves impression that there are no avoidance actions to investigate, and if appropriate, pursue. Circumstantial evidence supported finding that omissions were intentional: the party who received the transfer which she omitted was her mother; the transfer was all in cash; the mother-daughter relationship; the debtor's serious financial condition; her mother's limited financial resources; the debtor's course of conduct after the onset of financial difficulties in picking and choosing which creditors would be paid and which discharged; the omission of the loan payment; and the proximity of the payment to the filing are all badges of fraud. Debtor's belated disclosure of the transfers does not insulate Debtor from denial of discharge. While a debtor who fully discloses his property transactions at the first meeting of creditors or who mistakenly or inadvertently give false information and who seek to amend their schedules or report omissions prior to or during the meeting of creditors are not perceived as possessing the requisite intent. Debtors who disclose only when confronted by the trustee may be found to possess that intent. Debtor has never claimed that the omission was the result of mistake or inadvertence, other than her comment at trial that she did not think that the transfer to her mother "counted." The debtor did not claim mistake at the meeting of creditors. She showed no confusion about whether she was repaying a loan to her mother when confronted by the trustee about where she deposited the proceeds of the Camaro sale. Debtor has not tried to make a correction. Debtor's testimony at the creditor's meeting was not made as a pre-emptive correction of an inadvertent omission but only in response under oath to direct questioning by the trustee. The debtor's disclosures came when she was faced with telling the truth or making additional false oaths. The information about the timing of the repayment to her mother was only disclosed when the trustee asked about whether Mrs. Flemings was listed as a creditor when he followed up on the issue of the proceeds of the Camaro sale. The debtor's first responses at the creditors meeting left the trustee with the impression that she had only failed to list a creditor and never amend her schedules to accurately reflect her prepetition payments to creditors. Transfer will be material if it 'bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property. Materiality does not mean that a significant amount of money is involved; only that the subject matter of the false oath bears a relationship to the bankrupt's estate or concerns the discovery of assets, business dealings, or the existence or disposition of property. The concealment of a potential preference action clearly bears a relationship to the bankrupt's estate. Failure to disclose minimal

or even worthless assets constitutes material omissions that can preclude discharge. Trustee and the creditors should be able to rely on accurate schedules and a complete statement of financial affairs. Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight

*Retz v. Samson*, Case No. 08-60023 (9<sup>th</sup> Cir. BAP 2010) – Discharge can be denied under Section 727(a)(4)(A) where the debtor knowingly and fraudulently, in or in connection with the case, made a false oath or account. Plaintiff must show (1) the debtor made a false oath in connection with the case; (2) the oath related to a material fact; (3) the oath was made knowingly; and (4) the oath was made fraudulently. Debtor's schedules and Statement of Financial Affairs were substantially incomplete when filed and Debtor admitted he knew they were incomplete and made no effort to even read them before they were filed. Debtor's schedules omitted valuable watches, a bank account, a 1984 Cadillac, a 2002 Audi purchased through TCI, and the sale of a helicopter and hangar. Statement of Financial Affairs Questions 3 and 10 failed to list multiple transfers pre-petition including prepayment of Debtor's home mortgage with the proceeds from the sale of his helicopter and hangar just before he petitioned for bankruptcy; at least two prepetition transactions involving Debtor's father, a check for \$38,287.30; and a check to in the amount of \$12,181.00; a series of transfers in September 2003 from Debtor's credit cards to a corporation owned and operated by the Debtor's family, totaling approximately \$160,000. Debtor was unable to explain where \$80,000 he received from the corporation shortly before filing. These omissions were material because they bore relationships to debtor's business transactions and concern the discovery of assets, business dealings and the disposition of debtor's property and detrimentally affect case administration. Evidence supported finding that omissions were deliberate and knowingly where Debtor deliberately and consciously signed the Schedules and SOFA knowing that they were incomplete. Fraudulent intent requires a pattern of falsity, reckless indifference to and disregard of the truth, and demonstrated by a course of conduct. Intent is usually proven by circumstantial evidence or by inferences drawn from the debtor's conduct. Reckless indifference or disregard for the truth may be circumstantial evidence of intent, but is not sufficient, alone, to constitute fraudulent intent. A debtor who in good faith acts in reliance on the advice of his attorney generally lacks the intent required to deny him a discharge of his debts. Advice of counsel is not a defense when the erroneous information should have been evident to the debtor. Debtor cannot escape a finding of fraudulent intent by his reliance on the advice of his counsel where Debtor signed the Schedules and SOFA without reading them and where the significant number of falsehoods and omissions, together with the failure to amend the Schedules and SOFA in the three years between the petition and trial, evidenced fraudulent intent.

*In re Merena*, Case No. 08-1342 (9<sup>th</sup> Cir. BAP 2009) – Debtor who knowingly and fraudulently makes false oath or account in the course of a bankruptcy case can be denied a discharge. A false statement or omission in schedules or statement of financial affairs can constitute a false oath. Plaintiff seeking to deny discharge must prove by a preponderance of evidence that debtor made a false statement or omission regarding a material fact and did so knowingly and fraudulently. A false statement that has no impact on the bankruptcy is not material and does not provide grounds for denial of discharge under section 727. Debtor's failure to list three pending actions (a divorce action, a cohabitate abuse proceeding, and a custody proceeding); two payments to her divorce attorney aggregating \$6500; a resulting credit balance in debtor's account at her law firm; and certain items of personal property (including a Roth IRA for \$380, a 19 inch television, a laptop computer and an iPod) about which debtor later informed the trustee and amended her schedules, with results of the debtor's misunderstanding as debtor believed she needed to only list actions that have a financial impact on her or the bankruptcy case. The chapter 7 trustee stated that while the lawsuits should have been listed, they were not particularly important because they did not involve claims that belong to the bankruptcy estate and could not generate any recovery for creditors. Debtor's failure to list miscellaneous items of personal property with your result of a mere oversight and the debtor's valuation of her automobile appeared reasonable after inspection of the vehicle and consulting blue book values. Debtor's failure to disclose a prepetition sale of a condominium was done "out of ignorance" and the trustee was fully aware of the sale of the condominium notwithstanding its omission but deemed the sale to be insignificant. Debtor was ultimately forthcoming about all needed assets and she promptly amended her schedules to correct omissions. Although debtor's schedules contained a number of omissions, there was no proof that the omissions were done knowingly or with fraudulent intent or that any

of the omissions were material where all of the omitted assets had little value and no impact on bankruptcy case.

*General Motors Corp. v. Heraud*, Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Discharge will be denied where Debtor knowingly and fraudulently makes a false oath or account. Plaintiff must prove 1) the Debtor made a statement under oath; 2) the statement was false; 3) the Debtor knew the statement was false; 4) the Debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Failure to fully provide all information required in Schedules or Statement of Financial Affairs is sufficient to deny discharge. Debtor's Statement of Financial Affairs grossly understated Debtor's income and failed to disclose that Debtor was entitled to large tax refund that Debtor ultimately received post-petition. Debtor also caused large sums to be transferred from one wholly owned corporation into other wholly owned corporations for purpose of purchasing CDs for Debtor's benefit. When asked about these transfers, Debtor falsely denied that transfers had occurred. Debtor's numerous false statements established intent to deceive sufficient to deny discharge.

*Montedonico v. Beckham*, 2009 WL 1726526 (6<sup>th</sup> Cir. BAP 2009) – Discharge denied under Section 727(a)(2) and (a)(4). Schedules and Statement of Financial Affairs failed to list income of \$47,000 received in the 7 months prior to the filing of the petition; gambling losses in excess of \$16,000 in the year prior to the filing; additional checks to or withdrawals from ATMs located at various casinos in Mississippi in excess of \$37,000 during the year prior to the filing; failure to list any antiques even though Debtor spent over \$3600 at antique stores in the year prior to the filing and over \$800 in the 45 days prior to the filing; failed to disclose Debtor's ownership interest in real estate located in Oklahoma or any leases related to that property or any income derived from that property, although her tax returns listed rental income for the prior calendar year; failed to disclose a pending EEOC claim against her former employer; Debtor's status as executrix and beneficiary of the estate of Debtor's deceased mother and receipt of rental income from property included in her mother's estate; property allegedly held by other people located at Debtor's residence; Debtor's ownership interest in a Kubota Tractor, Great Bend Loader, Tuflin Box Blade and New Woods Mower; the post-petition sale of the Kubota Tractor, Great Bend Loader, Tuflin Box Blade and New Woods Mower for \$12,000, with the proceeds routed through Debtor's daughter and two of Debtor's neighbors so the proceeds could not be tracked. Debtor compounded her non-disclosure by willfully failing and refusing to cooperate in discovery in the adversary proceeding. Court concluded that Debtor clearly, repeatedly and knowingly concealed assets and misrepresented her financial situation in her bankruptcy case through multiple material omissions and misrepresentations justifying denial of discharge under Section 727(a)(2)(A) and (B). Further, Debtor's false statement about Debtor's income, gambling losses, and interests Debtor held in real and personal property justified denial of discharge under Section 727(a)(4)(A). "The bankruptcy Court found it incredulous that the Debtor did not know the statements to be false and simply forgot that she received income of \$197,000 in the year preceding the bankruptcy, or that she spent nearly \$800 in antiques stores in the 45 days immediately preceding the filing of her case."

*Kappell v. Bunch*, 2009 WL 3055338 (Bankr. E.D. Ky. 2009) – Discharge will be denied under Section 727(a)(4)(A) where Debtors made (1) a statement under oath; (2) that was false; (3) that Debtors knew was false when made; (4) that Debtors fraudulently intended to make the statement; and (5) the statement was materially related to the bankruptcy case. The false statement may include either a statement or omission in the Schedules. Intent includes a statement made with reckless disregard for the truth. The statement is material if it relates to Debtor's business transactions or concerns discovery of assets. Debtors' Statements, sworn to under oath, failed to list multiple assets including a couch, tools for the business, insurance policies, home furnishings and a mule and were either intentionally false or were made with reckless disregard for the truth.

*Long v. Smith*, 2009 WL 1924791 (Bankr. E.D. Tn. 2009) - Denial of discharge under § 727(a)(4) requires proof that the Defendant made a statement under oath which was false, that Debtor knew the statement was false when made, that Debtor made the statement with fraudulent intent, and that the statement materially related to Debtor's bankruptcy case. Both affirmative false statements and omissions fall within the scope of § 727(a)(4)(A), and statements are material if related to a Debtor's business enterprises or transactions, the bankruptcy estate, the discovery of assets, and/or the existence and disposition of property, as are matters pertinent to the discovery of assets. Complaint that alleged that the Defendant made false

statements at meeting of creditors and in statements and schedules concerning residence, the ownership of horses and movable horse partitions, testimony concerning the payment of debts, involvement in a state Court lawsuit, and monthly living expenses sufficient to state claim which, if proven, would result in denial of discharge.

*Morgan v. Mankins*, 2009 WL 1616012 (Bankr. N.D. Ohio 2009) - Action under Section 727(a)(4) must be based on conduct that occurred within context of bankruptcy case. Debtor's alleged action in forging Plaintiff's signature on check and misrepresentations regarding repairs to Plaintiff's automobile had nothing to do with bankruptcy case where bankruptcy not filed until more than one year later.

*Roberts v. Debusk*, 2009 WL 1256891 (E.D. Tn. 2009) – Discharge will be denied where Debtor knowingly and fraudulently makes a false oath or account. Plaintiff must prove 1) the Debtor made a statement under oath; 2) the statement was false; 3) the Debtor knew the statement was false; 4) the Debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Whether Debtor's failure to list gambling losses was intentional or only result of mistake or inadvertence is question of fact for Bankruptcy Court and will be reversed only if "clearly erroneous". Gambling losses were material as those losses bore a "relationship to debtor's bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property". Debtor intentionally failed to list gambling losses on Statement of Financial Affairs, Debtor testified at Section 341 Meeting that losses were \$10,000, and Debtor later admitted actual losses of \$25,000 to \$40,000.

*D.A.N Joint Venture, III, L.P. v. Shekerjian*, Adv. No. 08-4838 (Bankr. E.D. Mi. 2009) – To deny a discharge under section 727(a)(4)(A), plaintiff must prove that Debtor knowingly made materially false statements under oath. Section 727(a)(4)(A) encompasses both affirmative false statements and omissions, and includes statements and schedules which are executed under oath and penalty of perjury as well as testimony given at meeting of creditors. Complaint that alleged that schedules omitted creditor who was owed in excess of \$2.5 million pledged sufficient facts to state a claim under section 727(a)(4)(A).

#### §9.21 Section 727(a)(5)

*Retz v. Samson*, Case No. 08-60023 (9<sup>th</sup> Cir. BAP 2010) – Party objection to discharge under Section 727(a)(5) must demonstrate: (1) debtor at one time, not too remote from the bankruptcy petition date, owned identifiable assets; (2) on the date the bankruptcy petition was filed or order of relief granted, the debtor no longer owned the assets; and (3) the bankruptcy pleadings or statement of affairs do not reflect an adequate explanation for the disposition of the assets. Once the creditor has made a prima facie case, the debtor must offer credible evidence regarding the disposition of the missing assets. Debtor's substantial omissions from Schedules and Statement of Financial Affairs, included valuable watches, a bank account, a 1984 Cadillac, a 2002 Audi purchased through TCI, and the sale of a helicopter and hangar; multiple transfers pre-petition including prepayment of Debtor's home mortgage with the proceeds from the sale of his helicopter and hangar just before he petitioned for bankruptcy; at least two prepetition transactions involving Debtor's father, a check for \$38,287.30; and a check to in the amount of \$12,181.00; and a series of transfers in September 2003 from Debtor's credit cards to a corporation owned and operated by the Debtor's family, totaling approximately \$160,000. Debtor was unable to explain where \$80,000 he received from the corporation shortly before filing. Debtor went on a spending spree just before filing for bankruptcy to benefit both himself and his wholly owned corporation, purchasing computers, office furniture, servers, luxury cars, a helicopter and hangar, and making gambling trips where he lost thousands of dollars. Debtor stated that he did not know where excess loan proceeds and credit card funds purportedly used to effect these purchases went. Debtor failed to explain how the Trustee should have found the relevant information, if Debtor himself was unable to discover it in the 28,000-plus pages of records he provided to the Trustee. "In the end, there simply is no basis in the voluminous but nevertheless woefully incomplete record before the bankruptcy court from which anyone could explain satisfactorily Retz's deficiency of assets to meet his liabilities. Retz certainly has not done so."

*General Motors Corp. v. Heraud*, Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Discharge can be denied where Debtor fails to satisfactorily explain loss of assets or deficiency of assets to meet liabilities. Section



727(a)(5) is "broad enough" to include any unexplained disappearance or shortage of assets. Although Debtor diverted \$1.8 million, Debtor was unable to explain how any of that money was used or why Debtor lacked sufficient assets to pay liabilities. Debtor's vague answers and refusal to explain based on assertion of Fifth Amendment privilege sufficient to deny discharge.

*Corcoran v. Powell*, Adv. No. 08-3100 (Bankr. E.D. Mi. 2009) - Discharge will be denied under Section 727(a)(5) if Debtor fails to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the Debtor's liabilities." There is no requirement of malicious intent or scienter and it does not matter under Section 727(a)(5) how the loss or deficiency occurred. Section 727(a)(5) is simply concerned with the adequacy of the Debtor's explanation. Trustee must show that the Debtor had a cognizable ownership interest in a specific asset, and that Debtor's interest existed at a time not too far removed from when the petition was filed. Debtor must then satisfactorily explain the loss. Debtor failed to account for her assets. Debtor held herself out as being a competent tax preparer and bookkeeper since the early 1980's and holds an associate's degree and has undoubtedly gained decades of experience in the financial sector.

*Roberts v. Debusk*, 2009 WL 1256891 (E.D. Tn. 2009) – Discharge will be denied where Debtor could not explain disposal of loan proceeds of \$69,000. An unexplained disposition of loan proceeds constitutes a failure to explain any loss of assets or deficiency of assets to meet liabilities.

#### §9.22 Section 727(a)(6)

*U.S. Trustee v. Waits*, 2011 WL 4015680 (Bankr. E.D. Ky. 2011) – Section 727(a)(6) requires more than a failure to comply with a court order and requires a "refusal" to comply. Debtor explained that failure to initially provide complete copy of tax return was due to misunderstanding that he needed to provide only the return, but not the schedules and statements attached to the return. When debtor learned that he needed to provide complete return, he did so.

*Standiferd v. US Trustee*, 2011 WL 1368779 (10<sup>th</sup> Cir. 2011) – Debtor's refusal to obey court order while in Chapter 13 can bar subsequent discharge after conversion to Chapter 7. Debtor willfully refused to comply with terms of Order Confirming Chapter 13 Plan that required Debtor to keep Trustee apprised of ongoing financial condition including monthly operating reports and copies of tax returns. The Chapter 13 Confirmation Order is a "lawful order of Court" for purposes of Section 727(a)(6). Bankruptcy Code is not designed to allow a Chapter 13 debtor to avail himself of the Code's protections, willfully disobey the bankruptcy court's confirmation order by concealing post-petition income increases that could otherwise be used to pay creditors, and then, once his misconduct is discovered, convert his case to Chapter 7 in order to obtain a guaranteed discharge of his debts.

#### §9.23 Section 727(a)(7)

#### §9.24 Section 727(a)(8)

*In re Thompson*, Case no. 09-44770 (Bankr. E.D. Mi. 2011) – Conversion from Chapter 13 to Chapter 7 does not constitute new commencement date. Debtor who obtained discharge in Chapter 7 and within 8 years filed case under Chapter 13 not eligible for discharge in second case after case was converted to Chapter 7. Debtor could not seek successive Chapter 7 discharges in cases filed within 8 years regardless of which chapter cases were commenced.

*In re Skinner*, 2010 WL 3469993 (Bankr. S.D. Miss. 2010) – Conversion from Chapter 13 to Chapter 7 does not constitute new date of commencement of case for purposes of Section 727(a)(8). Debtor filed Chapter 13 less than 8 years after petition in prior Chapter 7 that produced discharge. Debtor then converted case to Chapter 7 just over 8 years following commencement of the prior Chapter 7. Section 727 precludes discharge in Chapter 7 case where case is commenced within 8 years of commencement of prior Chapter 7. Section 348 provides that the date of the petition is unaffected by conversion of the case. Section 727(a)(8) measures only time from petition to petition and chapters under which discharges are sought, and not the particular chapter under which either case was filed.



*In re Nicholson*, 2011 WL 1789965 (Bankr. D. Colo. 2011) – Conversion from Chapter 13 to Chapter 7 does not constitute new date of commencement of case for purposes of Section 727(a)(8). Debtor filed Chapter 13 less than 8 years after petition in prior Chapter 7 that produced discharge. Debtor then converted case to Chapter 7 just over 8 years following commencement of the prior Chapter 7. Section 727 precludes discharge in Chapter 7 case where case is commenced within 8 years of commencement of prior Chapter 7. Section 348 provides that the date of the petition is unaffected by conversion of the case. Section 727(a)(8) measures only time from petition to petition and chapters under which discharges are sought, and not the particular chapter under which either case was filed.

*United States Trustee v. Stone*, Case No. 09-32346 (Bankr. N.D. Ohio 2009) – Section 727(a)(8) is designed to prevent creation of serial debtors who would otherwise seek Chapter 7 relief every time they found themselves unable to repay their debts. Eight year interval prescribed by section 727(a)(8) is measured from petition to the petition. The date of entry of the discharge in the first case is not relevant. Debtor's first petition was filed on September 28, 2001. Debtor's second case, filed April 13, 2009, was filed within the eight year time period proscribed by section 727(a)(8). Although debtor's first case was filed at a time when Section 727(a)(8) contained a six-year limitation, the applicable provision of section 727 is governed by the date on which debtor filed the most recent case in which debtor now seeks a discharge. Although debtor may have had an expectation in 2001 that she would again be eligible for bankruptcy relief in six years, debtor derived no substantive right from expectancy and is subject to the eight-year limitation period of Section 727(a)(8) in effect on the date of debtor's second bankruptcy petition.

*In re Johnson*, Case No. 05-73633 (Bankr. E.D. Mi. 2009) – Chapter 7 petition filed less than 6 years after commencement of prior case in which Debtors received discharge – Debtors not entitled to discharge in this pre-BAPCPA case. Court also extended stay as to property of estate but terminated stay for all other purposes.

*In re Phelps*, Case No. 09-63000 (Bankr. E.D. Mi. 2009) - Debtor-wife's discharge denied in joint Chapter 7 case where Debtor-wife received discharge in case commenced within 8 years before the commencement of instant case.

*In re Dawson*, Case No. 06-42140 (Bankr. E.D. Mi. 2009) – Debtor denied discharge in Chapter 13 proceeding where Debtor received discharge in prior chapter 7 filed less than 4 years prior to the Order for Relief in the Chapter 13 Case.

*In re Smith*, Case No. 08-70461 (Bankr. E.D. Mi. 2009) – Case reopened by Court *sua sponte* and discharge vacated where Debtors had previously filed a petition under Chapter 7 and that prior case was still pending. Discharge in this case would be vacated as Debtors received discharge in the prior, simultaneously pending case.

#### §9.25 Section 727(a)(9)

*In re Ward*, 2010 WL 4922713 (Bankr. E.D. Mi. 2010) – Section 727(a)(9) precludes the discharge of a Debtor if he obtained a Chapter 13 discharge within the preceding six years unless the Chapter 13 case either paid 100% of allowed unsecured claims or both paid 70% of those claims and the plan was proposed in good faith and constituted the Debtor's best effort. Debtor not entitled to discharge where debtor's prior Chapter 13 case provided for only a 36 month plan term. Although Chapter 13 plan yielded 76% to unsecured creditors, creditors would have done significantly better had the plan term been 60 months. Debtor's plan term of only 36 months was not debtor's "best efforts" for purposes of Section 727(a)(9).

*In re French*, Case No. 08-67234 (Bankr. E.D. Mi. 2009) - Pre-BAPCPA case - Debtor who filed Chapter 7 less than 6 years after filing prior Chapter 13 case entitled to discharge under Section 727 where record indicated that Debtor paid at least 70% of allowed unsecured claims.

*White v. Lewis*, Case No. 04-60231 (E.D. Mi. 2008) – Section 727(a)(9) precludes the discharge of a Debtor if he obtained a Chapter 13 discharge within the preceding six years unless the Chapter 13 case either paid 100% of allowed unsecured claims or both paid 70% of those claims and the plan was proposed in good faith and constituted the Debtor’s best effort. Section 727(a)(9) does not apply where the prior Chapter 13 case was dismissed prior to entry of a discharge. Section 727(a)(9) is not jurisdictional. Even if Debtor’s Chapter 7 occurred within six years of the discharge in the Chapter 13 case, creditor’s failure to assert this issue until after entry of the discharge in the Chapter 7 precluded creditor from attacking or attempting to void the Chapter 7 discharge.

§9.26 Section 727(a)(10)

§9.27 Section 727(a)(11)

*In re DeRoche*, Case No. 10-41072 (Bankr. E.D. Mi. 2010) – Court unable to exempt debtor from completing post-petition Financial Management Course. Motion did not allege that debtor was unable to complete the course because of any incapacity or disability and debtor was not on active military duty in a combat zone. Debtor left for Iraq a month after commencing case under Chapter 7 but failed to take Course in that time, and Debtor failed to demonstrate why he could not take course by telephone or internet while in Iraq.

#### D. Deadline for Objecting to Discharge

§9.28 Generally

*Five Star Laser, Inc. v. Height*, Case No. 10-6125 (Bankr. E.D. Mi. 2010), *aff’d* 2011 WL 1480265 (E.D. Mi. 2011) – Rule 4007 requires complaints objecting to discharge or dischargeability to be filed within 60 days of the date first set for the meeting of creditors. Deadline is not jurisdictional and court can consider deadline to be “equitably tolled” where creditor establishes lack of actual notice of filing requirement, lack of constructive knowledge of filing requirement, diligence in pursuing one’s rights, absence of prejudice to the debtor, and plaintiff’s reasonableness in remaining ignorant of requirements. Court would not equitably toll deadline where creditor’s failure to act was not due in any way to any improper conduct of debtor and creditors were fully aware of all relevant facts well before date set for the first meeting of creditors. Adjournments of the meeting of creditors is not basis to equitably toll that deadline. Court can also extend deadline for “equitable estoppel” where creditor can establish that failure to timely commence adversary was due to improper conduct on debtor’s part. Debtor did not misrepresent scope of extension of deadline where stipulation and order expressly limited extension to the Trustee only. Adversary case dismissed where Creditor failed to obtain extension of deadline before expiration of deadline.

*White v. Lewis*, Case No. 04-60231 (E.D. Mi. 2008) – Deadline for complaint objecting to discharge is 60 days after the first date set for the First Meeting of Creditors. Rule 4004 permits the Court, for cause, to extend the time for filing a complaint as long as the Motion for Extension is filed before the time has expired. Creditor’s Motion to Extend deadline denied where creditor had filed another adversary proceeding in a timely manner and creditor failed to seek discovery before the deadline passed through a Rule 2004 exam either in the main case or through discovery in the pending adversary case.

*In re Caldwell*, Case No. 08-61418 (Bankr. E.D. Mi. 2009) - Creditor's Motion to Reopen Case or Declare that Debt Owed to [Creditor] is Not Discharged" denied where case had been closed prior the filing of the Motion. Before Court can consider merits of Motion, creditor must file Motion to Reopen case and must pay the \$260 filing fee. Court will consider merits of motion only if and when creditor pays the requisite filing fee.

§9.29 Section 727(a)(2)

*Coady v. D.A.N. Joint Venture III, L.P.*, 588 F.3d 1312 (11<sup>th</sup> Cir. 2009) –Debtor’s failure to schedule the equitable interest constituted “concealment”. Although concealment began many years prior to the bankruptcy petition, Section 727(a)(2) would apply to “continuing concealment” where debtor keeps assets

out of creditor's reach for more than one year before petition was filed, in order to prevent debtor from receiving benefit of wrongful conduct.

*Morgan v. Mankins*, 2009 WL 1616012 (Bankr. N.D. Ohio 2009) - Action under Section 727(a)(2) must be premised on conduct that occurred either within one year of the date that the Debtor filed his bankruptcy petition, or while the Debtor's bankruptcy case was pending. Debtor's alleged actions in March, 2007, would not support 727(a)(2) action for bankruptcy filed November, 2008.

#### §9.30 Extension of Time

*In re Ulrich*, 2011 WL 3663716 (Bankr. N.D. Ohio 2011) – Rule 4004(a) requires discharge to be entered no later than 60 days after date first set for Section 341 meeting. An request for extension must be made before deadline expires. Section 105 does not authorize or empower Court to extend time to file adversary complaint where deadline has already expired.

*In re Burrow*, Case no. 10-65846 (Bankr. E.D. Mi. 2011) – Stipulation to extend time to file Section 727 complaint rejected by Court where stipulation was not filed with Court until after deadline to file complaints had expired. Rule 4004 requires any request to extend the deadline to be filed prior to expiration of deadline. Court lacks jurisdiction to extend deadline where motion is not timely filed.

*Five Star Laser, Inc. v. Height*, Case No. 10-6125 (Bankr. E.D. Mi. 2010) –Stipulated Orders that extended deadlines for Section 523 and 727 actions between Debtor and Trustee and that were expressly limited to the Trustee only did not extend deadline for creditors to commence adversary proceedings. Although Orders extending the deadlines may extend to creditor other than the moving party when surrounding circumstances indicate that a general extension was intended, where the extension is expressly limited to the Trustee, extension does not apply to creditor body as a whole. Court can consider deadline to be “equitably tolled” where creditor establishes lack of actual notice of filing requirement, lack of constructive knowledge of filing requirement, diligence in pursuing one’s rights, absence of prejudice to the debtor, and plaintiff’s reasonableness in remaining ignorant of requirements. Court would not equitably toll deadline where creditor’s failure to act was not due in any way to any improper conduct of debtor and creditors were fully aware of all relevant facts well before date set for the first meeting of creditors. Adjournments of the meeting of creditors is not basis to equitably toll that deadline. Court can also extend deadline for “equitable estoppel” where creditor can establish that failure to timely commence adversary was due to improper conduct on debtor’s part. Debtor did not misrepresent scope of extension of deadline where stipulation and order expressly limited extension to the Trustee only. Adversary case dismissed where Creditor failed to obtain extension of deadline before expiration of deadline.

*In re Lockhart*, Case No. 09-68234 (Bankr. E.D. Mi. 2010) - Deadline to file complaints objecting to discharge can be extended only on motion or stipulation filed before deadline expires. Stipulation for extension of deadline filed after expiration of initial deadline denied.

*In re Abulabon*, Case no. 10-48427 (Bankr. E.D. Mi. 2010) – Deadline to file complaints objecting to discharge can be extended only on motion or stipulation filed before deadline expires. Stipulation for extension of deadline filed 30 days after expiration of initial deadline denied.

#### E. Parties Entitled to Object to Discharge

##### §9.31 Standing

*Mapley v. Mapley*, 2010 WL 3702366 (Bankr. E.D. Mi. 2010) - Plaintiff whose debt has been determined non-dischargeable under Section 523 lacks standing to prosecute action under Section 727. Plaintiff would suffer no injury if debtor receives discharge. No party who would be affected by discharge is party to adversary. Under circumstances, there is no live case or controversy as required for subject matter jurisdiction.

*D.A.N Joint Venture, III, L.P. v. Shekerjian*, Adv. No. 08-4838 (Bankr. E.D. Mi. 2009) –Party’s standing to object to discharge is dependent upon party having claim against the Debtor. Promissory notes executed in favor of financial institution were later assigned to plaintiff. Plaintiff did not have and could not produce original notes. Lack of possession of original notes does not preclude plaintiff from enforcing notes if plaintiff can establish that financial institution demonstrated that it was in possession of the notes and entitled to enforce the notes prior to the transfer of the notes to the Plaintiff.

#### F. Discharge

##### §9.32 Timing

*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 Slack*, Case No. 09-42599 (Bankr. E.D. Mi. 2009) - Motion to delay entry of discharge denied as moot. Debtor sought to delay discharge to allow Debtor time to enter into reaffirmation agreement with creditor. Record reflected that Debtor and creditor entered into reaffirmation agreement and agreement was filed with Court prior to entry of discharge. Therefore, Debtor's Motion to delay discharge was rendered moot.

##### §9.33 Scope of Discharge

*In re Burkpile*, 2010 WL 3501814 (Bankr. N.D. Ohio 2010) – Discharge is not a magic wand that, with a wave, makes contracts disappear. The discharge injunction prevents the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset any such debt as a personal liability of the debtor. A Claim, is a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured. Discharge does not affect *in rem* rights as those proceedings cannot result in personal liability of the debtor. Debtors can also be permissibly drawn into post-discharge lawsuits when the debtor's liability can serve as the basis for indemnification by or recovery against a third party, including suits seeking insurance indemnification or enforcement of third-party guaranties.

*In re Scales*, Case No. 09-58926 (Bankr. E.D. Mi. 2010) – Discharge includes unscheduled creditors in a "no asset" case where the Court does not set a bar date for filing of claims, to the same extent as the claim would have been discharged had the claim been scheduled.

*In re Lyons*, Case No. 07-43761 (Bankr. E.D. Mi. 2009) - Discharge includes all claims owed to scheduled creditors that were owed as of the date of the Petition, not just the specific claims that may have been referenced in the Schedules. Discharge also discharges even unscheduled creditors in a "no asset" case where the Court does not set a bar date for filing of claims, to the same extent as it would have been had the claim been scheduled.

*In re Williams*, Case No. 08-41485 (Bankr. E.D. Mi. 2010) - Discharge includes all claims owed to scheduled creditors that were owed as of the date of the Petition, not just the specific claims that may have been referenced in the Schedules. Discharge also discharges even unscheduled creditors in a "no asset" case where the Court does not set a bar date for filing of claims, to the same extent as it would have been had the claim been scheduled.

*Walker v. Sallie Mae Servicing Corp.*, Case No. 09-6022 (8<sup>th</sup> Cir. BAP 2010) – Discharge Order does not include discharge of student loan unless debtor affirmatively secures a hardship determination. Entry of

Discharge Order does not constitute finding that repayment would not pose undue hardship so as to prevent post-discharge action to determine hardship.

*Dalvit v. United Airlines, Inc.*, Case No. 08-1283 (10<sup>th</sup> Cir. 2009) – Claims for equitable relief are dischargeable if they can be reduced to a monetary obligation, including equitable claims that have alternative remedy involving right to payment. Equitable remedies, such as requests for prospective injunctions, are not discharged if the claim is not reducible to a monetary obligation. Employee's complaint to require employer to remove disciplinary actions and notes from personnel files does not have monetary equivalent and so is not discharged.

*Hamilton v. Herr*, 540 F.3d 367 (6th Cir. 2008) - Rooker-Feldman doctrine prevents Federal Court from looking behind state Court judgment and acting as "super-appellate Court" for matters within the State Court jurisdiction. However, effect of discharge in bankruptcy is entirely federal matter, and State Court lacks jurisdiction to enforce a claim that has been discharged in Bankruptcy. Therefore, Rooker-Feldman does not preclude Bankruptcy Court from entering orders to enforce discharge. "State Courts are allowed to construe the discharge in bankruptcy, but what they are not allowed to do is construe the discharge incorrectly, because an incorrect application of the discharge order would be equivalent to a modification of the discharge order. Similarly, the state-Court judgment in the case at hand would constitute a modification of the discharge in bankruptcy only if the debt was actually discharged pursuant to the bankruptcy Court's discharge order." Action remanded to the bankruptcy Court to determine whether the debt was discharged. If the debt was discharged, then the state-Court judgment was a modification of the discharge order and is void ab initio. If the debt was not discharged pursuant to the bankruptcy Court's discharge order, then the state-Court judgment was not a modification of the discharge order and the Rooker-Feldman doctrine would bar federal-Court jurisdiction.

*In re Hann*, 2009 WL 2872813 (E.D. Mi. 2009) - State's continuation of forfeiture proceedings constituted exercise of its police powers furthers important state policy against criminal conduct. State enforcement of police power does not violate discharge injunction as State action is not one to collect or recover debt but rather is enforcement of State criminal law.

*In re Price*, Case No. 05-53137 (Bankr. E.D. Mi. 2008) - Motion to Reopen Chapter 7 Proceeding to Allow Filing of Amended Schedule to List Pre-Petition Debt denied as unnecessary. Debtor's Chapter 7 case was discharged and closed as a "no asset" case. As such, even unscheduled debts are discharged just as if it had been properly scheduled in the first instance.

*In re Caldwell*, Case No. 08-61418 (Bankr. E.D. Mi. 2009) - Creditor's Motion to Reopen Case or Declare that Debt Owed to [Creditor] is Not Discharged" denied where case had been closed prior the filing of the Motion. Before Court can consider merits of Motion, creditor must file Motion to Reopen case and must pay the \$260 filing fee. Court will consider merits of motion only if and when creditor pays the requisite filing fee.

*Travelers Indemnity Co. v. Bailey*, 129 Sect. 2195 (2009) - Chapter 11 Plan confirmed that required Insurance Company to contribute to Debtor's "Personal Injury Settlement Trust" in exchange for release of claims based on Debtor's insurance policies cut off not only causes of action against Insurer under terms of insurance policies themselves, but also cut off state Court actions that alleged that Insurer violated State Consumer Protection statutes based on Insurer's administration of the insurance policies and handling of claims made prior to confirmation of the Plan. Allegations that Insurer violated state law by influencing Debtor's purported failure to disclose knowledge about asbestos hazards; Insurer defended Debtor; Insurer advanced the state of the art defense; and Insurer coordinated Debtor's national defense effort. Direct action claims were inextricably intertwined with Insurer's long relationship as Debtor insurer.

*Beal Bank, SSB v. Prince*, 2009 WL 2584769 (Bankr. M.D. Tn. 2009) – Creditor found to be in contempt of court for misapplying mortgage payments received post-discharge and wrongfully foreclosing on Debtor's home. To prevail in civil contempt action, Plaintiff must prove that Defendant violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order. In the context of the discharge injunction, this means that the debtor



must demonstrate that the defendant (i) violated the discharge injunction (and thus the order granting the discharge) and (ii) did so with knowledge that the injunction was in place. At conclusion of Chapter 13 Case, Court entered order finding that Debtor's long term debt was current and defaults cured. Following discharge, Debtor missed some payments and Creditor foreclosed. Creditor later determined that payments had been misapplied during and following Chapter 13 and that mortgage was actually current. Court: (1) reinstated the Princes' mortgage in the stipulated, agreed upon amount of \$33,729.82 effective as of October 1, 2009; and (2) awards compensatory damages to the Prince's in the form of forgiving their payment of \$198 (in rent or mortgage payment) from November 7, 2005 through September 30, 2009, and an additional \$2,000.00 for their time and inconvenience in dealing with the defendants mistakes.

*Hunt v. LAJ, Inc.*, 424 BR 340 (Bankr. E.D. Tn. 2009) – A State Court Judgment that purports to modify the discharge is void *ab initio*. However, where State Court Judgment is based on a debt that was not discharged, then the State Court Judgment is not void and the *Rooker-Feldman* doctrine prevents Federal Court review of the State Court Judgment. Debtor defaulted under the confirmed Chapter 11 Plan and the creditor obtained a judgment in State Court. Debtor sought injunction in Bankruptcy Court claiming that Creditor was attempting to recover the entire claim and not just that portion of the claim that Debtor was to pay pursuant to the confirmed Chapter 11 Plan. Confirmation of the Plan discharged the pre-petition liability and replaced that with a “new” claim based on the treatment in the confirmed Plan. Creditor's action to recover amounts owed under the confirmed Plan did not constitute attempt to collect discharged debt, but only debt owed pursuant to the confirmed Plan as to which the discharge injunction did not apply. *Rooker-Feldman* would bar any effort by Debtor to dispute in the Bankruptcy Court the amount properly owed to Creditor pursuant to the confirmed Plan where the action had already been brought in and ruled on by State Court.

#### §9.34 Discharge Injunction

*In re Ulrich*, 2011 WL 3663716 (Bankr. N.D. Ohio 2011) – Bankruptcy Court retains jurisdiction following discharge for purposes of enforcing discharge injunction.

*Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Once an order granting a discharge is entered, Section 524(a) gives rise to an injunction against an act, to collect, recover or offset any debt discharged under Section 727 as a personal liability of the debtor. Creditors who have willfully violated the discharge injunction are in contempt of the court that issued the discharge order. Adversary Proceeding that sought to impose private cause of action dismissed as Section 524 does not create a private right of action for damages.

*In re Baer*, 2011 WL 3667511 (Bankr. E.D. Ky. 2011) – Creditor did not violate discharge injunction by repossession collateral post-discharge. Creditor's lien rights survive bankruptcy and as long as creditor effects in rem relief only with no attempt to impose in personam liability on debtor, creditor's actions are not barred by discharge injunction.

*In re Schultz*, Case No. 11-0045 (Bankr. W.D. Mi. 2011) – Discharge operates to preclude efforts to collect against third party based on writ of garnishment. However, discharge does not preclude action against third party based on third party's own misconduct independent of actions of debtor or obligation of debtor to creditor.

*Bar Plan Mutual Insurance Company v. Guarino-Sanders*, 201 WL 52418 (W.D. Ky. 2011) – Discharge in bankruptcy voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged and operates as injunction as against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset such debt as a personal liability of the debtor. Case commenced against debtor prior to commencement of bankruptcy case dismissed with prejudice after discharge entered.

*Plan Administrator for the Bail & Rice, Inc., Profit Sharing Plan v. Gail & Rice, Inc.*, 2011 WL 110904 (E.D. Mi. 2011) – Discharge under Section 524 discharges debtor's personal liability for debt but does not extinguish the debt itself. Creditor can proceed against debtor for pre-petition debt as long as creditor does

not seek to hold debtor personally liable, including an action to liquidate debt of debtor for purposes of collecting from third party.

*LaVoie v. LaVoie*, 2011 WL 2464169 (Bankr. W.D. Mi. 2011) – Bankruptcy Court has jurisdiction to consider adversary proceeding for violation of discharge injunction. Action is core proceeding as it involves administration of the case and is an action created or determined by a provision of Title 11.

*Buke, LLC v. Eastburg*, 447 BR 624 (10<sup>th</sup> Cir. BAP 2011) – Bankruptcy Court has discretion to modify discharge injunction to allow state court litigation to liquidate amount of claim that is alleged in Bankruptcy Adversary Proceeding to be non-dischargeable. Although Bankruptcy Court has exclusive jurisdiction to determine dischargeability under Section 523(a)(2), (4) and (6), State Court has concurrent jurisdiction to determine amount of the debt allegedly non-dischargeable. Bankruptcy Court can, but is not required to, liquidate debt as part of dischargeability proceeding. Debt that is subject to adversary proceeding is “presumptively dischargeable” and, therefore, is included within the discharge injunction unless and until a final judgment of non-dischargeability is entered. Whether or not the validity and extent of a debt is better litigated in the bankruptcy court or the state court is left to the bankruptcy court's discretion based on judicial economy and efficiency; the burden and expense to the parties; whether there are additional integral parties to the state court action over which the bankruptcy court does not have jurisdiction; the right to a jury trial in state court; whether the state court proceeding negatively impacts the bankruptcy estate; and whether the state court proceeding would impair a debtor's reorganization efforts.

*In re Johnson*, 2010 WL 4235399 (Bankr. E.D. Mi. 2010), *aff'd* 2011 WL 1983339 (E.D. Mi. 2011) – Lien survives bankruptcy and is unaffected by discharge. Lender does not violate discharge injunction by making reasonable and non-coercive inquiries regarding validity of lien or status of underlying collateral. Lender is not required to prove validity of lien in order to take actions that attempt to determine validity and extent of lien. Creditor who held alleged security interest in annuity did not violate discharge injunction by contacting annuity company to inquire about status of annuity and amounts remaining to be paid under annuity.

*Small v. University of Kentucky Federal Credit Union*, 2011 WL 1868839 (Bankr. E.D. Ky. 2011) – Creditor who correctly reported to credit bureaus a pre-petition charge off of an account is under no duty to correct or update that information, unless the creditor's actions are in furtherance of effort to collect discharged debt. However, a coercive motive may be inferred if the debtor contacts the creditor and asks that the information be corrected. Creditor who does not take any action to collect discharged debt and who was never contacted by debtor about the information in the credit report did not violate discharge injunction by failing to unilaterally take steps to correct the information.

*In re Reuss*, 2011 WL 1522333 (Bankr. W.D. Mi. 2011) – Discharge injunction prevents any attempt to collect or recover on discharged obligation. Discharge releases personal liability only and secured creditor's rights in the collateral pass through and survive the bankruptcy. Upon termination of the automatic stay, secured creditor can take any appropriate action to enforce the lien as long as the creditor does not pursue *in personam* relief against the debtor. Correspondence from creditor to debtor's counsel asking about the debtor's intentions regarding the property was not attempt to enforce personal liability but was “courtesy and convenience” to determine whether debtor intended to keep or surrender property. Reasonable and non-coercive communications to debtor or counsel directed toward enforcement of secured lien do not violate discharge injunction.

*Lassiter v. Moser*, Case No. 09-8067 (6<sup>th</sup> Cir. BAP 2010) – Creditor's commencement of litigation in state court following entry of discharge violated discharge injunction and subjected creditor to sanctions for contempt. Although creditor argued in response to Motion for Contempt that state court action was intended to be limited to post-petition actions by debtor, complaint itself encompassed actions that occurred pre-petition and which were discharged. All events on which creditor based complaint occurred pre-petition, even if the harm and damages continued post-petition, resulting in discharge of obligations.

*In re Johnson*, 2010 WL 4235399 (Bankr. E.D. Mi. 2010) - Alleged violation of discharge injunction does not create private right of action under Section 524, but can warrant imposition of compensatory damages

for civil contempt. Creditor's efforts to enforce security interest following discharge does not violate discharge injunction. Debtor validly pledged disability benefits to secure loans prior to commencement of bankruptcy. Debtor's right to receive disability benefits is a "contract right" within the scope of the pledge as either an "account receivable" or "general intangible". Spendthrift clause that prevents assigning rights or interests is not enforceable to the extent it purports to prohibit or restrict creating of security interest in an account or general intangible. Disability benefits are not "insurance" for purposes of Article 9 of the Uniform Commercial Code as "insurance" requires payment of a premium by the insured. In this case, the premiums were paid by debtor's employer depositing funds into a self-funded trust for payment of benefits, without any insurance policy, insurance company, named insured, or premiums. ERISA does not pre-empt assignment of employee welfare benefit plan. ERISA does pre-empt assignment of pension plan only.

*In re Burkepile*, 2010 WL 3501814 (Bankr. N.D. Ohio 2010) – Discharge is not a magic wand that, with a wave, makes contracts disappear. Defendant in action brought by Debtor does not violate discharge injunction by seeking to enforce forum selection clause in contract nor in attempting to assert right of setoff that would not result in affirmative liability of the debtor.

*In re Morris*, 430 B.R. 824 (Bankr. W.D. Tenn. 2010) - Suit against debtor as nominal defendant in order to recover from insurance company did not violate the discharge injunction. While there would be some burden on the debtor – in attending depositions and trial – those were not burdens alleviated by the discharge injunction.

*In re Lipa*, Case No. 04-74608 (Bankr. E.D. Mi. 2010) – Pre-petition open ended personal guarantee of corporate open account is contingent claim that is discharged in its entirety. Guarantee does not survive bankruptcy even to the extent of post-bankruptcy purchases by corporation. Creditor's attempt to collect on guarantee for corporate debts incurred post-discharge violated discharge injunction.

*Kovacs v. U.S.*, 2010 WL 2944048 (7<sup>th</sup> Cir. 2010) – IRS willfully violated discharge injunction by pursuing collection of discharged taxes. 26 USC Section 7433(e) provides exclusive remedy for IRS violation of discharge injunction. Bankruptcy Code does not provide alternative basis for recovery. Section 7433 has two year statute of limitations running from the date on which the taxpayer had a reasonable opportunity to discover all elements of the cause of action. Debtor had reasonable opportunity to discover all elements when IRS sent notices of intent to levy after entry of the discharge. Later violations may constitute new violations but will not save prior violations under "continuing wrong" theory.

*Bowen v. Mountain Commerce Bank*, 2010 WL 2430777 (Bankr. E.D. Tn. 2010) – Discharge injunction prohibits creditors from taking any action to collect a discharge the debt. Complaint for damages for alleged violation of discharge injunction did not allege that bank acted or failed to act in an attempt to collect a discharge debt, which is an essential element of a discharge violation. Reporting of credit information about a debtor or refusing to remove credit information posted about a debtor does not constitute an act to collect the debt in violation of a discharge injunction absent evidence to establish a link between the act of reporting and the collection or recovery of the discharge debt. Creditor's refusal to update the status of a debt on a credit report after a request has been made by the debtor can constitute a discharge injunction if the creditor deliberately refuses to change reporting of debts from "past due or owing, charged off as bad debt" rather than "discharged in bankruptcy" notwithstanding request by debtor to update credit report. Debtor's complaint alleged only that bank failed to remove a negative reference from a credit bureau without alleging that bank did so with the intent to course the debtor to pay obligation. Complaint failed to identify in any respect what the debtor's claim the bank reported on a credit report; failed to attach a copy of the offensive report; and referred merely to "negative reference" without providing any factual explanation for the allegations.

*Beaumont v. Dept. of Veteran Affairs*, 586 F.3d 776 (10<sup>th</sup> Cir. 2009) – Veterans Affairs did not violate Discharge injunction by withholding from post-discharge veteran benefits amounts to recover pre-petition benefit overpayments. "Recoupment" is an equitable doctrine in bankruptcy that allows one party to a transaction to withhold funds due another party where the debts arise out of the same transaction. Recoupment is an equitable exception to the discharge injunction and allows a party to recover a pre-petition debt out of payments owed to the debtor post-petition. Obligation to repay arises from the same

transaction where both debts must arise out of a single integrated transaction so that it would be inequitable for the debtor to enjoy the benefits of that transaction without also meeting its obligations. Court must examine the equities of the case, and determine whether the claims are so closely intertwined that allowing the debtor to escape its obligation would be inequitable.

*Dalvit v. United Airlines, Inc.*, Case No. 08-1283 (10<sup>th</sup> Cir. 2009) – Court refused to decide whether discharge injunction is jurisdictional, such that a court lacks jurisdiction to address claims that were subject to the discharge; or merely an affirmative defense that must be plead or is waived.

*Saleh v. Bank of America, N.A.*, Case No. 08-36592 (Bankr. S.D. Ohio 2010) – Discharge Injunction does not stay actions against third party co-obligors. Discharge Injunction 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 discharge in principal's bankruptcy case.

*In re Waldo*, 417 BR 854 (Bankr. E.D. Tn. 2009) – Attorney “willfully” violated discharge injunction by depositing post-petition checks for payment or unpaid attorney fees in Chapter 7 case after entry of discharge. Unpaid balance of attorney fees in Chapter 7 case were dischargeable debt and debtor's obligation to pay those fees terminated upon entry of discharge. Attorney liable for sanctions for violation of Section 524, 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 Greenspan*, Case No. 07-10774 (Bankr. N.D. Ohio 2010), *aff'd*, Case No. 10-8019 (6<sup>th</sup> Cir. BAP 2011) – Creditor violated discharge injunction filing two state court lawsuits against debtors in an attempt to collect a discharged debt. Although Discharge injunction provides no private right of action for violation, Court can award sanctions for contempt of court. Sanctions awarded in the amount of \$12,510.00 representing attorney fees incurred in defending state court litigation on behalf of debtors. Court denied additional fees incurred in defending non-debtor co-defendants in state court litigation. Extraordinary amount of fees appropriate given creditor's persistence in pursuing the state court litigation, his opposition to the motion to reopen Chapter 7 case, his opposition to the debtors' request for a show cause order, and his position that the dispute be resolved through an evidentiary hearing.

#### G. Revocation of Discharge

##### §9.35 Grounds

*In re Ocheltree*, 2011 WL 4368718 (Bankr. N.D. Ohio 2011) – Section 727(d) outlines four specific foundations supporting revocation: (1) the discharge was obtained by debtor's fraud, (2) the debtor knowingly and fraudulently failed to account to the estate for after-acquired estate property, (3) the debtor disobeyed a court order or did not respond to a material question, and (4) the debtor did not cooperate in a 28 U.S.C. § 586(f) audit. Revoking a discharge for missing a reaffirmation deadline is not one of the foundations, nor does the conduct rise to the level of the bad action underpinning revocation.

*Thunberg v. Wallick*, Case No. 10-1705 (1<sup>st</sup> Cir. 2011) – Discharge revoked where debtor acquired property that was property of the estate and knowingly and fraudulently failed to report the acquisition of or entitlement to property of the estate or to surrender the property to the trustee. Debtor falsely represented that a stream of future payments from debtor's pre-petition divorce proceedings were secured by liens and that proceeds were being paid to secured creditors, when only a portion of those proceeds were secured and debtor was retaining the other portion. Debtor also accelerated payments by private agreement with his ex-wife without advising the trustee, thereby allowing debtor to take possession of property that should have been paid to the trustee; debtor then used the money which was property of estate for debtor's own purposes; and the liens on which debtor relied to shelter the funds had not been properly perfected. Debtor was culpable in permitting attorney to make incorrect statements to court and allowed Court and trustee to believe incorrect understanding of facts.

*In re Harris*, Case No. 05-46057 (Bankr. E.D. Mi. 2010) – Discharge vacated where Debtor, after receiving discharge in Chapter 7, converted case to Chapter 13.

*In re Scott*, Case No. 07-45854 (Bankr. E.D. Mi. 2009) - Court *sua sponte* vacated discharge where debtor received Chapter 7 discharge in prior case filed 7 years prior. Court could not determine whether debtor was eligible for discharge in this case, vacated discharge and set hearing to show cause.

*In re Cooper*, Case No. 10-48370 (Bankr. E.D. Mi. 2010) – Chapter 7 discharge vacated, and case dismissed where Debtor failed to pay filing fees as required by Order Approving Payment of Filing Fee in Installments. Debtor paid only a portion of the fees as required. Court's entry of discharge was error and was inconsistent with prior Order of Court.

*In re Price*, Case No. 10-44070 (Bankr. E.D. Mi. 2010) - Chapter 7 case reopened, discharge vacated, and case dismissed where Debtor failed to pay filing fees in two prior Chapter 7 cases notwithstanding Court's Order to pay those fees within specified time.

*Swope v. Scott*, 2009 WL 2877080 (Bankr. N.D. Ohio 2009) – Discharge will be revoked pursuant to Section 727(a)(3) where Debtor fails to obey a lawful order of the court, other than an order to respond to a material question or to testify. Court ordered Debtor to account for tax refund that Debtor improperly retained by paying Trustee \$1,535.78 per month for 10 months. Debtor allegedly paid only \$100.00. However, Trustee failed to accompany Motion for Summary Judgment with any affidavit or other evidence to support allegations. Motion for Summary Judgment denied without prejudice.

#### §9.36 Deadline for Bringing Action

#### §9.37 Standing

*In re Ocheltree*, 2011 WL 4368718 (Bankr. N.D. Ohio 2011) – Court lacks jurisdiction to revoke discharge for purposes of allowing parties to enter into reaffirmation agreement. Section 727 governs revocation of discharge, and allows relief only at request of creditor, trustee or United States Trustee. Debtor lacks standing to request revocation of discharge.

### H. Executory Contracts and Unexpired Leases

#### §9.38 Debtor's Authority to Assume or Reject

*In re English*, Case No. 07-55986 (Bankr. E.D. Mi. 2008) – Assumption of leases by Debtor in Chapter 7 controlled by 11 USC Sections 365(p)(1) and (p)(2). Debtor is permitted to assume lease of personal property in Chapter 7 only if the lease is rejected or not timely assumed by the Chapter 7 trustee, at which point the leased property ceases to be property of the estate. If Debtor then assumes the lease, then the liability is assumed by the Debtor and not by the estate. Debtor's assumption of a lease of personal property does not require Court approval as it neither affects property of the estate nor creates any obligation of or claim against estate.

*In re Houvener*, Case No. 09-42209 (Bankr. E.D. Mi. 2009) - Debtor's "Lease Assumption Agreement" is invalid and unenforceable where the Agreement was executed by Debtor and Lessor before the Chapter 7 Trustee rejected the lease or the lease was deemed rejected. Debtor is not authorized to assume a lease as long as the lease is property of the estate, and Debtor and Lessor did not enter into new assumption agreement after Lease deemed rejected.

#### §9.39 Trustee's Authority to Assume or Reject

*Vashino v. Lykins Enterprises, Inc.*, 2011 WL 166241 (Bankr. E.D. Ky. 2011) – Section 365(a) provides a trustee or debtor in possession may assume or reject an executory contract or unexpired lease subject to court approval.

*In re Lykins Enterprises, Inc.*, 2011 WL 61174 (Bankr. E.D. Ky. 2011) – Section 365 gives Debtor-in-Possession right to assume or reject executory contracts or unexpired leases.



## §9.40 Agreements Subject to Assumption or Rejection

*Vashino v. Lykins Enterprises, Inc.*, 2011 WL 166241 (Bankr. E.D. Ky. 2011) – In order to ascertain the available rights and remedies following assumption or rejection under 365(a), the determination must first be made whether the agreement is an executory contract or an unexpired lease. Whether agreement is “unexpired lease” is matter of federal law as impacted by state law principals. To create the relationship of landlord and tenant it should appear from the agreement that one party intends to dispossess himself of the premises and the other party intends to enter and occupy the premises in a manner that the first party had the right to do. language chosen by the parties, including identifying themselves as “landlord” and “tenant,” is given great weight, although not solely determinative. The written agreement of the parties is a lease designed to provide the Plaintiff possession of the real property on which the convenience store is located to the exclusion of the Debtor.

*In re Lykins Enterprises, Inc.*, 2011 WL 61174 (Bankr. E.D. Ky. 2011) – Whether agreement is lease versus purchase is determined by Federal law. Debtor entered into long term lease with Defendant by which Defendant took control of the property and operated a gas station and convenience store is determined by federal law, informed by general state law principals. Agreement was lease subject to assumption or rejection where documents retained to debtor a right to take possession if Defendant breached the lease; Defendant was responsible for all utilities and maintenance; and Defendant had to maintain insurance as directed by Debtor.

## §9.41 Deadline to Assume or Reject

*Cousins Properties, Inc. v. Treasure Isles HC, Inc.*, Case no. 10-8075 (6<sup>th</sup> Cir. BAP 2011) – Deadline to assume lease of non-residential real property under Section 365 is satisfied upon debtor filing a motion to assume the lease. Section 365 does not require entry of the order allowing assumption prior to expiration of deadline to assume or reject.

*In re Caster*, 2010 WL 4274583 (Bankr. N.D. Ohio 2010) – In Chapter 7 proceeding, unexpired lease must be assumed within 60 days of the order for relief (as may be extended by Order of Court) or the lease is deemed rejected by operation of law. Conversion of case from Chapter 7 to Chapter 11 after expiration of 60 day period to assume does not permit debtor to later assume lease.

## §9.42 Failure to Assume or Reject

*In re Caster*, 2010 WL 4274583 (Bankr. N.D. Ohio 2010) – Assumption of lease requires assumption of lease on the terms of the lease with no variation. Debtor who attempted to assume lease but to change term of purchase option from “payment in full at exercise” to payment over life of Chapter 11 Plan did not assume lease in unaltered form. Debtor’s purported assumption was invalid resulting in automatic lease rejection 60 days after order for relief.

## §9.43 Procedural Requirements for Assumption

*Thompson v. Credit Union Financial Group*, 2011 WL 2604823 (W.D. Mi. 2011) – Section 363(p) allows debtor to assume lease if Trustee does not do so. However, assumption of lease is not automatic or implied. Lease is assumed only upon entry of an Order of the Court permitting the assumption. Debtor’s retention of the leased property and continued payment on the lease does not constitute “implied assumption” of lease. Where debtor, post-discharge, stops paying on the unassumed lease, Creditor may not pursue *in personam* recovery against debtor. Remedy is limited to repossession and disposition of the collateral. Debtor’s personal liability on the unassumed lease was discharged.

## I. Statement of Intentions – Section 521(a)(6)

## §9.44 When Required

*Maple Forest Condominium Association v. Spencer*, 2010 WL 3909985 (Bankr. E.D. Mi. 2010) – Section 521(a)(2), which requires debtor to file statement of intention with respect to property that secures a claim, and Section 521(a)(6), which requires debtor to perform the stated intentions within specified time, apply only in Chapter 7 proceeding. Sections 521(a)(2) and (a)(6) cannot form the basis of an action against a debtor in Chapter 13 as a matter of law.

§9.45 Effect of Filing

§9.46 Failure to File

J. Reaffirmation Agreements

§9.47 Time for Execution and Filing

*In re Ocheltree*, 2011 WL 4368718 (Bankr. N.D. Ohio 2011) – Court would not revoke discharge merely to allow parties to avoid time requirements of Rule 4008 which requires approval of reaffirmation agreement prior to entry of discharge.

*In re Reed*, Case No. 10-66892 (Bankr. E.D. Mi. 2010) – Section 524(c) requires that reaffirmation agreement be made before discharge is entered. Rule 4008 requires reaffirmation agreement to be filed with Court no later than 60 days after date first set for the meeting of creditors. Rule 4008 allows time to be extended, but only on Motion filed before time originally expires. Reaffirmation agreement admittedly not signed by creditor until after discharge entered was not enforceable. Further, reaffirmation agreement not filed with court before expiration of deadline nor was timely motion for extension filed. Even had reaffirmation agreement been executed before discharge, agreement would have been unenforceable based on failure to timely file with court.

*In re Tabche*, Case No. 10-49603 (Bankr. E.D. Mi. 2010) - Approval of Reaffirmation Agreement denied where reaffirmation agreement not signed or filed prior to entry of discharge as required by Section 727 and no Motion to Extend Time filed before entry of discharge.

*In re McGhee*, Case no. 09-72091 (Bankr. E.D. Mi. 2010) – Approval of Reaffirmation Agreement denied where reaffirmation agreement not signed prior to entry of discharge as required by Section 727; and Reaffirmation Agreement not filed with Court within 60 days of First Meeting of Creditors as required by Rule 4008.

*In re Wonfor*, Case no. 09-63612 (Bankr. E.D. Mi. 2010) – Reaffirmation agreement is not enforceable unless made before the granting of the discharge under Section 727. Motion to Reopen Case to allow filing of Reaffirmation Agreement stated date on which Debtor executed agreement but did not state date on which creditor executed the agreement. Debtor permitted to supplement record to show date on which creditor signed to permit Court to determine whether reaffirmation agreement could be approved and therefore whether re-opening case would produce any benefit to debtor or creditor.

*In re Schulte*, Case No. 09-71367 (Bankr. E.D. Mi. 2010) – Section 542(c)(1) prohibits enforcement of a reaffirmation agreement unless the agreement is made before the entry of the discharge. Reaffirmation agreement signed by creditor six days after entry of discharge is not enforceable. Motion to extend deadline can be granted only if discharge has not already been entered. Motion for Extension of Time filed after entry of discharge is untimely and must be denied.

*In re Gabbard*, Case No. 05-40949 (Bankr. E.D. Mi. 2010) – Rule 4004 allows extension of time to file reaffirmation agreement only if motion is filed before a discharge has been granted. Even if court could extend time to file reaffirmation agreement, reaffirmation agreement cannot be approved where the reaffirmation agreement itself was not signed until after entry of the discharge.

*Pickrel v. Household Realty Corp.*, 2010 WL 2301190 (Bankr. N.D. Ohio 2010) – Reaffirmation agreement signed prior to entry of discharge but not filed with Court until after discharge is binding and

enforceable reaffirmation agreement. Section 524(c)(3) does not impose time limit for filing, and only requires that agreement be “timely” filed and without regard to whether a discharge has been entered. As long as the reaffirmation agreement is executed prior to entry of discharge, Code does not impose time limit to file and there is no prohibition against filing timely executed reaffirmation agreement after entry of discharge. Filing with Court is condition of enforcement of agreement, but not of validity of agreement.

*In re Pohorecki*, 2010 WL 2926199 (Bankr. N.D. Ohio 2010) - Rule 4008 requires reaffirmation agreement to be filed within 60 days of meeting of creditors. Rule 4008 also allows court to enlarge time to file reaffirmation agreement where reaffirmation agreement was signed 7 days after Rule 4008 deadline but was fully executed and filed with the court before entry of the discharge.

*In re Taylor*, 09-61344 (Bankr. E.D. Mi. 2009) - Reaffirmation agreement must be signed prior to entry of the discharge. Any alleged reaffirmation agreement signed after entry of discharge is unenforceable as a matter of law. Reaffirmation Agreement must be filed with the Court not later than 60 days after the date first set for the Meeting of Creditors. Court can extend time to file Reaffirmation Agreement on Motion filed before the discharge is entered. Court would not approve reaffirmation agreement where debtor signed one day after entry of discharge and creditor signed 13 days after entry of discharge; and neither Reaffirmation Agreement nor Motion to Extend Time for Filing were filed until after entry of discharge.

*In re Owens*, Case No. 09-35753 (Bankr. E.D. Tn. 2010) – Motion to Set Aside Discharge and Extend Time to File Reaffirmation Agreements denied. Section 524(c)(1) requires reaffirmation agreements to be made prior to discharge. Reaffirmation agreements entered into after the entry of a discharge are unenforceable and of no legal significance. Bankruptcy Code does not permit “setting aside” of a discharge other than by revoking discharge, and only the US Trustee, Bankruptcy Trustee or a creditor can request revocation and only where the debtor obtained the discharge by fraud or knowingly failed to report or turnover property of the estate, refused to comply with a valid court order, or failed to run over documents to the US Trustee. Court does not have equitable power to vacate a discharge for purpose of entering reaffirmation agreement. Rule 4008 requires reaffirmation agreements to be filed within 60 days of the First Meeting of Creditors and allows an extension of that deadline only on motion filed before the entry of a discharge.

*In re Piontek*, Case No. 09-70632 (Bankr. E.D. Mi. 2010) – Motion to Extend Time for Filing Reaffirmation Agreement denied where reaffirmation agreement was not returned to creditor until after entry of the discharge. Deadline for filing reaffirmation agreement is 60 days after completion of 341 Meeting pursuant to Rule 4008. Court can extend time to file reaffirmation agreement only if the discharge has not been granted. Once discharge granted, court lacks authority to extend time to file reaffirmation agreement. Further, reaffirmation agreement is not enforceable where agreement was not signed until after discharge granted pursuant to Section 524. As there could be no enforceable reaffirmation agreement, no purpose would be served by extending the time to file the agreement even if the court had authority to do so.

*In re Richards*, Case No. 05-85572 (Bankr. E.D. Mi. 2009) - Reaffirmation agreement must be signed and filed with the Court prior to entry of the discharge. Any alleged reaffirmation agreement signed after entry of discharge is unenforceable as a matter of law.

*In re Bennett*, Case No. 07-60111 (Bankr. E.D. Mi. 2009) - Debtor's Motion to Reopen Case to approve reaffirmation agreement denied where motion failed to demonstrate that reaffirmation agreement was signed prior to the entry of a discharge. No purpose would be served in reopening case where there can be no enforceable reaffirmation agreement.

*In re Hall*, Case No. 08-54354 (Bankr. E.D. Mi. 2009) - Case would not be reopened to permit Debtor to seek Court approval of reaffirmation agreement. Court had previously entered discharge and closed case. Motion to Reopen indicated that reaffirmation agreement was signed after entry of the discharge. Section 524 requires approval of a reaffirmation agreement prior to entry of discharge. There could be no enforceable reaffirmation agreement and, therefore, no purpose would be served by reopening case.

*In re East*, Case No. 09-51865 (Bankr. E.D. Mi. 2009) - Motion to Approve Reaffirmation Agreement filed 5 days after entry of discharge denied. Reaffirmation Agreement must be signed prior to entry of Discharge. While Reaffirmation Agreement indicated that Debtor signed 5 days prior to discharge, Creditor's signature is undated and fax header on document indicates that creditor did not sign until same day as Motion to Approve filed. Reaffirmation Agreement not signed by all parties until after Discharge entered is unenforceable.

#### §9.48 Form of Reaffirmation Agreement

*In re Williams*, Case No. 10-45234 (Bankr. E.D. Mi. 2010) – Reaffirmation Agreement that indicated that account was in default would not be approved absent a waiver of default by the creditor or submission of a new reaffirmation agreement with a new payment schedule that indicates debtors are not in default for failing to make payments.

*In re Hayes*, Case No. 10-57345 (Bankr. E.D. Mi. 2010) – Reaffirmation Agreement stricken where both sections of Part IV were signed by attorney. One part states that a presumption of undue hardship exists, while second part states that no presumption of undue hardship exists, creating internal inconsistency.

*In re Strathres*, Case No. 10-55413 (Bankr. E.D. MI. 2010) - Court denied approval of reaffirmation agreement there Agreement did not contain adequate description of repayment schedule. Reaffirmation agreement failed to provide the term over which the payments would be made and indicated that payments would be \$275.33 per month for 0 months.

*In re Blackstock*, Case No. 09-68632 (Bankr. E.D. Mi. 2010) – Court denied approval of reaffirmation agreement there Agreement did not contain adequate description of repayment schedule. Although Reaffirmation Agreement indicated that payment could vary from month to month, Agreement must disclose at least an approximate current monthly payment amount and the next monthly payment due date.

*In re Bennett*, Case No. 07-60111 (Bankr. E.D. Mi. 2009) - Reaffirmation agreement must be signed by both parties before the entry of a discharge to be enforceable.

*In re East*, Case No. 09-51865 (Bankr. E.D. Mi. 2009) - Motion to Approve Reaffirmation Agreement signed by creditor 5 days after entry of discharge denied. Reaffirmation Agreement must be signed prior to entry of Discharge. While Reaffirmation Agreement indicated that Debtor signed 5 days prior to discharge, Creditor's signature is undated and fax header on document indicates that creditor did not sign until same day as Motion to Approve filed. Reaffirmation Agreement not signed by all parties until after Discharge entered is unenforceable.

#### §9.49 Motion for Approval – Represented Debtor

*In re Beckett*, Case No. 10-72900 (Bankr. E.D. Mi. 2011) – Motion to approve “corrected” reaffirmation agreement denied as unnecessary where creditor is Credit Union rendering Section 524(m)(1) inapplicable and debtor was represented by an attorney during the negotiation of the Reaffirmation Agreement.

*In re Parker*, Case No. 10-66294 (Bankr. E.D. Mi. 2010) – Court approval not required for Reaffirmation Agreement where creditor is Credit Union rendering Section 524(m)(1) inapplicable and debtor was represented by an attorney during the negotiation of the Reaffirmation Agreement.

*In re Fox*, Case No. 08-45081 (Bankr. E.D. Mi. 2009) – Court denied motion for approval of reaffirmation agreement as unnecessary where Debtor’s attorney signed the reaffirmation agreement certifying that it did not impose an undue hardship despite presumption of undue hardship because the Debtor’s monthly expenses were \$431 greater than their monthly income. Section 524(m)(1) does not require affirmative approval of a reaffirmation by the Court where Debtor’s counsel certifies no undue hardship, even where a presumption of undue hardship arises. Section 524(m)(1) requires only that the Court review the reaffirmation agreement where there is a presumption of undue hardship. Section 524(m)(1) allows the

Court to set a hearing to consider approval of the reaffirmation agreement but requires a hearing only if the Court intends to disapprove of the reaffirmation agreement.

*Ford Motor Credit Co. v. Morton*, 410 BR 556 (6<sup>th</sup> Cir. BAP 2009) – Bankruptcy Court may not disapprove an attorney certified reaffirmation agreement solely because the Court believes reaffirmation is not in the best interest of the Debtor. The “best interest” requirement is limited to cases involving a Debtor who is not represented by an attorney. Court may review reaffirmation agreements signed by represented Debtor only where a presumption of undue hardship exists, as determined by comparison of Debtor’s monthly income and monthly expenses. If there is no presumption of undue hardship, Court lacks authority to deny reaffirmation agreement for represented Debtor.

#### §9.50 Motion for Approval – Unrepresented Debtor

*In re Johnson*, Case No. 08-49859 (Bankr. E.D. Mi. 2009) – Court denied unrepresented Debtor’s Motion for Approval of reaffirmation agreement based on the amount of the debt, the range of potential value of the collateral securing the debt, the nature and amount of Debtor’s income and expenses, the understanding of the Debtor as to the meaning and effect of a reaffirmation, the risks attendant to the reaffirmation and finding that approving the reaffirmation would impose an undue hardship. Court further ordered that although the reaffirmation agreement is denied, Debtor may remain in possession of the real property that is the subject of the reaffirmation agreement and continue periodic payments under the loan and applicable agreements, and mortgagee is prohibited from exercising its rights and remedies including foreclosure unless Debtor defaults in the future.

*In re Weinstein*, Case No. 08-55319 (Bankr. E.D. Mi. 2008) - Court denied unrepresented Debtor’s motion for approval of reaffirmation agreement based on the amount of the debt, the range of potential value of the collateral securing the debt, the nature and amount of Debtors income and expenses, the understandings of the Debtor is to the meaning and effect of a reaffirmation, the risks attendant to the reaffirmation and finding that approving the reaffirmation would impose an undue hardship.

*In re Hitchcock*, Case No. 09-50130 (Bankr. E.D. Mi. 2009) - Court denied approval of Reaffirmation Agreement where Debtor appeared to be in default at time approval sought and Debtor unable to obtain from creditor a waiver of the default or a new Reaffirmation Agreement that indicated Debtor was not in default and provided new payment schedule.

#### §9.51 Court Review - Scope

*In re Fox*, Case No. 08-45081 (Bankr. E.D. Mi. 2009) –Section 524(m)(1) requires only that the Court review the reaffirmation agreement where there is a presumption of undue hardship. Section 524(m)(1) allows the Court to set a hearing to consider approval of the reaffirmation agreement but requires a hearing only if the Court intends to disapprove of the reaffirmation agreement.

*Ford Motor Credit Co. v. Morton*, 410 BR 556 (6<sup>th</sup> Cir. BAP 2009) – Bankruptcy Court may not disapprove an attorney certified reaffirmation agreement solely because the Court believes reaffirmation is not in the best interest of the Debtor. The “best interest” requirement is limited to cases involving a Debtor who is not represented by an attorney. Court may review reaffirmation agreements signed by represented Debtor only where a presumption of undue hardship exists, as determined by comparison of Debtor’s monthly income and monthly expenses. If there is no presumption of undue hardship, Court lacks authority to deny of reaffirmation agreement for represented Debtor.

#### §9.52 Hearing Required

*In re Parker*, Case No. 10-66294 (Bankr. E.D. Mi. 2010) – Court approval not required for Reaffirmation Agreement where creditor is Credit Union rendering Section 524(m)(1) inapplicable and debtor was represented by an attorney during the negotiation of the Reaffirmation Agreement.



*In re Fox*, Case No. 08-45081 (Bankr. E.D. Mi. 2009) – Section 524(m)(1) allows the Court to set a hearing to consider approval of the reaffirmation agreement where presumption of undue hardship exists, but requires a hearing only if the Court intends to disapprove of the reaffirmation agreement.

#### §9.53 Effect of Denial

*In re Johnson*, Case No. 08-49859 (Bankr. E.D. Mi. 2009) – Court denied unrepresented Debtor’s Motion for Approval of reaffirmation agreement. Court further ordered that Debtor may remain in possession of the real property that was the subject of the reaffirmation agreement and continue periodic payments under the loan and applicable agreements, and mortgagee is prohibited from exercising its rights and remedies including foreclosure unless Debtor defaults in the future.

#### §9.54 Effect of Approval

*Pickrel v. Household Realty Corp.*, 2010 WL 2301190 (Bankr. N.D. Ohio 2010) – Properly signed reaffirmation agreement becomes fully enforceable once filed with Court. Creditor action in foreclosing on reaffirmed debt and later suit to collect deficiency did not violate Discharge injunction.

#### §9.55 Rescission of Reaffirmation Agreement

*Pickrel v. Household Realty Corp.*, 2010 WL 2301190 (Bankr. N.D. Ohio 2010) – Debtors’ execution of second reaffirmation agreement that made minimal changes to first reaffirmation agreement did not constitute rescission of first agreement. Rescission requires debtor to give notice of rescission to creditor. Although no particular form of notice is required, notice should adequately convey to creditor the debtor’s intent to no longer be bound. Debtors’ execution of a second reaffirmation agreement does not indicate intent to no longer be bound by reaffirmation agreement. Code does not prohibit modification or properly executed reaffirmation agreement and modification does not operate as rescission or revocation. Substance of reaffirmation agreements was virtually identical and second reaffirmation agreement made only one minor change to one term of the first agreement. Debtor’s argument that second reaffirmation agreement was not enforceable as the agreement was filed 4 days after the deadline under Rule 4008. However, Section 524(c)(3) does not impose time limit for filing, and only requires that agreement be “timely” filed and without regard to whether a discharge has been entered. As long as the reaffirmation agreement is executed prior to entry of discharge, Code does not impose time limit to file and there is no prohibition against filing timely executed reaffirmation agreement after entry of discharge.

#### §9.56 Reinstatement of Rescinded Agreement

*In re Slack*, Case No. 09-42599 (Bankr. E.D. Mi. 2009) – Stipulation to Reinstate Reaffirmation Agreement would not be approved by Court. While Code permits a Debtor to rescind a reaffirmation agreement, nothing in the Code permits a Debtor to later “withdraw” that rescission and reinstate the reaffirmation agreement. Denial was without prejudice to parties to prepare and submit a new reaffirmation agreement as long as that could be done prior to entry of discharge.

#### §9.57 Relationship to Assumed Leases

*In re Thompson*, 2010 WL 4259959 (Bankr. W.D. Mi. 2010) – Section 524(c) does not apply to post-discharge lease assumption agreements. Section 365(p)(2)(C) allows parties to enter into lease assumption agreements post-discharge, with the resulting agreement being treated as post-petition obligation as to which neither automatic stay nor discharge injunction applies. Lease assumption is not subject to procedural requirements for reaffirmation agreements under Section 524(c).

*In re Jackson*, Case No. 06-44335 (Bankr. E.D. Mich.) The requirements of § 524(c) do not apply to leases assumed in Chapter 7 cases pursuant to §365(p). The bankruptcy court found that a lease assumed under §365(p) does not require a reaffirmation agreement. The court noted that §365(p) does not specifically mention any of the rights and disclosures required under §524. The court noted that §362(h)(1)(A) differentiates reaffirmation agreements and lease assumptions

*In re Gundy*, Case No. 07-57777, (Bankr. E.D. Mich. 2008) - §11 USC 365(p) creates a specific type of agreement, similar to but not actually a reaffirmation agreement, which allows a debtor to assume a lease of personal property. To assume the lease, the court determined the parties need only comply with 11 USC 365(p).

*In re Murray*, Case No. 08-67847 (Bankr. E.D. Mich. 2009).

#### K. Redemption

##### §9.58 Generally

*In re Pearsall*, 2010 WL 3607421 (Bankr. N.D. Ohio 2010) – Section 722 permits redemption only when the underlying debt is otherwise dischargeable. Court could not decide Debtor's Motion to Redeem while creditor's adversary proceeding to have debt excepted from discharge was pending.

*In re LeFlore*, Case No. 04-64226 (Bankr. E.D. MI. 2010) - Motion to Redeem Automobile denied without prejudice where Motion failed to state a definite and specific amount to be paid. Statement that the amount would be "the amount owing pursuant to the Chapter 13 Trustee's records" was too uncertain to permit court to approve redemption.

##### §9.5 Value of Property Being Redeemed

*In re Gehring*, 2011 WL 2619552 (Bankr. N.D. Ohio 2011) – Standard form "Condition Report" is "particularly unhelpful" in valuing the vehicle to be redeemed. Form does not indicate particular "trim level" which can significantly impact valuation. Form has "check boxes" for features, some, many or all of which may be standard features depending on the trim level and would be already included in the valuation rather than "add ons". Form indicates that the person noting the condition of the vehicle may or may not have actually viewed the vehicle and if not, fails to identify the person who provided the information. Proper redemption value in this case will be the value that most closely approximates the selling price a retailer dealer would charge for a similar vehicle using retail price of a like vehicle to be the starting point. Helpful and necessary information is: (1) year, (2) model, (3) trim, (4) options, (5) mileage, (6) condition, and (7) the basis, e.g. inspection or third party report, upon which the person makes the evaluation. Lender's appraisal was more accurate as person actually viewed the vehicle and attached photographs; and appraisal more accurately reflected both Edmunds and NADA values, adjusted for repairs needed to the vehicle.

*In re Provost*, Case No. 10-61226 (Bankr. E.D. Mi. 2010) – Valuation for purposes of redemption is based on replacement value of the property as of the date of the petition without deduction for costs of sale or marketing, and based on price retail merchant would charge for property consideration age and condition of the property at the time of valuation. Debtor's Appraiser who actually drove the vehicle in a road test was more thorough than Creditor's appraiser who asked dealers for "asking price" and adjusted for mileage and condition of vehicle. Debtor's Appraiser's figure held to be the redemption price.

*In re Pearsall*, 2010 WL 3607421 (Bankr. N.D. Ohio 2010) – An individual debtor may redeem consumer goods from a lien securing a dischargeable consumer debt, if the property is exempt under § 522 or has been abandoned under § 554, by paying the lienholder in full at the time of redemption the amount of the "allowed secured claim" that is secured by the collateral. The value of the collateral (and the amount of the secured claim) shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use on a plan affecting such creditor's interest. Where debtor proposes to redeem and retain, value is the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined. Debtor's purchase price of the vehicle was relevant where debtor purchased the car only one month prior to filing bankruptcy, leading to conclusion that property is worth closer to purchase price than significantly deflated opinion offered by debtor. Purchase price would be discounted by expenses for recondition and prospective repair costs as those would not been needed to put the car in its current

condition and those items were all performed when debtor purchased the car and court would further reduce value slightly in light of additional mileage since debtor purchased the vehicle.

*In re Pharr*, Case No. 10-47531 (Bankr. E.D. Mi. 2010) – Valuation for purposes of redemption is date of Order for Relief. Creditor is not permitted to challenge the value based on debtor’s alleged failure to maintain or repair the vehicle pre-petition. Even if debtor had contractual obligation to maintain vehicle and breached that obligation, operative issue is condition of property on date of petition regardless of how or why it came to be in that condition. For redemption of vehicle, starting point is either NADA Official Used Car Guide or Kelley Blue Book or some combination of the two. Either party is then free to present additional expert evidence. “Private Party Value” is not proper standard as Section 721 requires “the price a retail merchant would charge”. Kelley Blue Book retail value assumes “excellent” condition. For vehicle in less than excellent condition, court would start with “Retail” value and subtract estimated costs of repair and allowances for overall condition of vehicle.

#### §9.60 Enforcement of Order for Redemption

*In re Rose*, 2010 WL 3733858 (Bankr. N.D. Ohio 2010) – Creditor held in contempt of court where creditor refused to cancel lien of record and surrender title to debtor upon tender of court determined redemption amount. Court has broad discretion to award sanctions including damages and attorney fees in contempt action. Court awarded damages measured by lost income of debtor having to attend hearing on contempt motion and attorney fees incurred by debtor in attempt to obtain compliance with court order. Court further ordered creditor to satisfy lien and surrender title without debtor being required to pay previously determined redemption amount and authorized debtor to obtain clean title if creditor continued to refuse to comply. To the extent additional sanctions including attorney fees exceed redemption amount, court would offset the redemption amount against those sanctions to avoid “double recovery”.

#### L. Lien Strips

##### §9.61 Generally

*Dhillon v. JP Morgan Chase Bank*, 2011 WL 2134051 (Bankr. S.D. Ill. 2011) – Under the rationale set forth in *Dewsnup* and subsequent cases, the Court need only determine whether the defendant’s claim in the instant case is “allowed” under § 502 and is “secured” by a valid lien. Fact that lien is second mortgage that is entirely unsecured because property is worth less than amount owed on superior lien does not render second mortgage subject to lien strip.

*Cushion v. Pines Investment Co.*, Case No. 10-6604 (Bankr. E.D. Mi. 2011) – Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.

*Stewart v. Citifinancial, Inc.*, Case No. 10-6713 (Bankr. E.D. Mi. 2010) - Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.

*Champney v. Comerica Bank*, Case No. 10-6841 (Bankr. E.D. Mi. 2010) - Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.

*Hares v. Sage Financial Ltd.*, 2010 WL 2834150 (Bankr. S.D. Ohio 2010) - Debtors cannot strip lien in Chapter 7 proceeding. Section 506 is limited to property in which the estate has an interest. Debtors claimed as exempt any equity in the property and no party objected to the exemption. Further, Chapter 7 trustee had filed Report of No Assets resulting in abandonment of the property by the estate. Even if property was still property of estate, Supreme Court decision in *Dewsnup* prohibits lien strip in Chapter 7 proceeding. Creditor’s failure to file a proof of claim does not affect the property interest created by a lien. Attempt to strip lien did not distinguish case from *Dewsnup* merely because the debtors in *Dewsnup* were attempting to decrease the value of the secured claim of the mortgage holder, while Debtors in this case

were attempting to completely avoid Defendant's lien. Following *Dewsnup*, Sixth Circuit in *Talbert* prohibited Chapter 7 debtor's attempt to wholly unsecured lien.

§9.62 Value of Property

M. Trustee

§9.63 Duty to Assemble Assets

§9.64 Final Report

*In re Fontenot*, Case No. 08-60654 (Bankr. E.D. Mi. 2009) - Trustee's Final Report could not be approved where Final Report was not accompanied by correct 20 Day Notice. Notice of Final Report stated that parties had 20 days from August 12 to object, but Final Report and Notice were not filed with the Court until August 23. Notice failed to provide 20 days notice from date of filing Final Report as required.

§9.65 Removal of Trustee

*In re Alexander*, 2011 WL 3626420 (Bankr. W.D. Ky. 2011) – Debtor’s Motion to Appoint New Trustee denied where, even if basis for removing current trustee was shown, appointing new Trustee would be futile act. Trustee abandoned cause of action against debtor’s prior counsel. Debtor failed to take any action to prosecute that cause of action until after statute of limitations expired. Debtor then filed Motion to Appoint New Trustee to prosecute action. Upon abandonment, claim ceased to be property of estate. Therefore, even if new trustee was appointed, that trustee would lack ability to prosecute claim or to otherwise exercise control over property that is not property of estate.

*Shapiro v. French*, Case No. 09-14179 (E.D. Mi. 2010) – Chapter 7 Trustee properly removed in light of conflict of interest in investigating and determining whether to pursue possible claims against himself and his law firm. Trustee failed to investigate whether Trustee was negligent in handling accounting malpractice adversary case and in failing to investigate potentially avoidable insider transfers. Allegations would have warranted investigation by neutral and disinterested party. Section 324 authorizes Court to remove trustee for “cause”, such as (but not limited to) incompetence, misconduct in office, conflict of interest or other violations of fiduciary duties. Trustee’s conflict of interest in investigating and pursuing claims against himself and his firm warrant removal.

§9.66 Retention of Attorney for Trustee

§9.67 Fees for Attorney for Trustee

*In re McKenzie*, 2011 WL 1549433 (Bankr. E.D. Tn. 2011) - 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.

X. Chapter 11

A. Disclosure Statement

§10.1 Requirements for Approval

*In re Midtown Development Group, Inc.*, Case No. 11-41301 (Bankr. E.D. Mi. 2011) – Approval of Disclosure Statement denied where Disclosure Statement failed to contain section that defined capitalized and abbreviated terms; did not define groups of claims that are not subject to classification or eligible to vote; did not identify each holder of an administrative claim or priority claims; did not define classes of claimants subject to classification or state treatment of claims in each class; did not identify each secured

creditor or disclose property securing claim, amount of claim, or valuation of collateral; did not provide education and background of proposed manager of reorganized debtor; did not provide adequate information on factors leading up to commencement of case, stating only that “ongoing litigation with the first mortgage holder” was the cause; and did not provide any financial information or projections for the three years pre-petition, post-petition to date, or projections over period covered by Plan.

*In re Colbert*, Case No. 10-65635 (Bankr. E.D. Mi. 2010) – Approval of amended Disclosure Statement denied where statement incorrectly identified the debtor; failed to state the balance due to counsel; failed to correct designations of sub-paragraphs to account for paragraphs added and deleted; failed to provide proper treatment of secured tax claims; left ambiguous the treatment of the mortgage claim on debtor’s residence; incorrectly designated classes of creditors; failed to properly account for claims in the liquidation analysis; mis-stated the effect of confirmation; and contained numerous typographical errors.

*In re Parr*, Case No. 10-53782 (Bankr. E.D. Mi. 2011) – Court denied approval of disclosure statement where statement was not properly formatted; failed to provide separate sections dealing with various types of creditors; did not define creditors not subject to classification; did not provide educational and work background for debtor; did not identify all potential fraudulent transfer or preference actions or indicate whether debtor would pursue those actions; failed to accurately list all assets in liquidation analysis; did not identify any guaranteed debt or any guarantor of any debt; debtor’s plan was unclear as to whether the plan was a reorganization or a liquidating plan; debtor failed to attach any financial summaries or projections; voting procedures contained typographical and substantive errors; and misstated effect of confirmation of plan.

*ASAP Express & Logistics, Inc.*, Case no. 10-67609 (Bankr. E.D. Mi. 2011) – Court denied approval of disclosure statement where statement incorrectly defined classes that were impaired; incorrectly stated the status of retirement plans; failed to provide information on background of debtor’s principal; did not indicate whether there were cash collateral orders or post-petition financing or the status of those; did not accurately outline the risks, conditions and assumptions of the liquidation analysis; did not state future compensation for debtor’s principal; did not clearly indicate treatment to priority creditors; erroneously referred to Class III as “Class II”; failed to indicate that general unsecured claims would be paid pro rata; failed to identify executor contracts or state whether those contracts would be assumed or rejected; and had inconsistent references to the effective date of the plan.

*In re Lupini*, Case No. 10-40958 (Bankr. E.D. Mi. 2010) – Court denied approval of disclosure statement where disclosure statement failed to define groups of claimants that are not subject to classification and are not entitled to vote and failed to state treatment of their claims, including administrative claims of counsel and accountant; failed to define each class of claimants and state the treatment of each class, including a descriptive name of the class, the name of the persons or entities in that class, the amount of the claim of each person or entity, the nature of the claim, the total amount of claims in the class, the treatment proposed, or whether the class is impaired or unimpaired; lumped all secured claims into one class rather than separately classifying and treating each; disclosure statement failed to identify post-petition transfers outside the ordinary course of business; failed to state debtor’s salary or fringe benefits, if any; failed to provide any information concerning cash collateral and post-petition financing; failed to identify any potential claims and causes of action including claims against insiders and avoidance actions including the value of any expected recovery and expected costs of litigation; failed to state debtor’s salary and fringe benefits post-confirmation; and contained incorrect explanation of voting procedures and effect of confirmation.

*In re Latimer*, Case No. 09-56866 (Bankr. E.D. Mi. 2010) – Court denied approval of disclosure statement where Disclosure statement had inconsistent statements regarding the operation or termination of debtor’s business and sources of income; failed to identify the holders of Priority Tax Claims and the estimated amount of each claim; improperly listed priority tax claims as secured, rather than unsecured claims; failed to identify any basis for any secured treatment of any tax claim and the identity of any taxing authority holding any tax lien; failed to separately classify any tax lien claims that may exist; contained inconsistent numbering of consecutive classes; improperly lumped all secured claims into one class rather than separately classifying each claim; included provisions relating to “entities” where debtors are individuals;



incorrectly included references to Chapter 13 rather than Chapter 11; failed to identify any potential claims and avoidance actions or to estimate their values; failed to separately identify administrative claims or clearly state the amount of those claims including priority tax claims; attached only 2 years' pre-petition financial statements where 3 years are required; failed to attach financial performance during Chapter 11 proceedings; disclosure statement and plan contained numerous typographical errors; plan and disclosure statement are not paginated; disclosure statement incorrectly defined the effective date of the plan. Debtor ordered to file amended plan and disclosure statement to correct problems and provide a redline version of the amended plan and disclosure statement directly to chambers.

*In re 2 Day's Child Learning Center, Inc.*, Case no. 10-46276 (Bankr. E.D. Mi. 2010) – Court denied approval of disclosure statement where disclosure statement failed to include full corporate name in the caption; failed to define terms; fails to identify groups of claimants that are not subject to classification and not entitled to vote; failed to include a separate section defining classes of claims and the treatment of each class; failed to indicate which class or classes were impaired; failed to threat a claim of the IRS, a claim of the Michigan Department of Treasury and a claim of the Michigan Unemployment Insurance Agency in separate classes; disclosure statement contained numerous typographical errors; and failed to contain class of equity holders, failed to provide any treatment for those holders and failed to specify that equity will be terminated at confirmation; and failed to identify who currently owns the debtor and who will own the debtor after confirmation and whether existing shareholders will retain any interest. Disclosure statement identified person who will be president of reorganized debtor but failed to provide any information concerning person's background, relationship with Debtor, whether person is currently receiving salary from Debtor, and what person's fringe benefits will be. Disclosure statement failed to provide detailed history of Debtor's financial problems and instead used vague and general statements. Disclosure Statement failed to provide full amount of priority and administrative claims and failed to provide summaries for the 3-year prepetition period in the same format as it uses for the financial projections; failed to include complete language regarding voting process; and incorrectly described the effects of confirmation. Debtor ordered to file amended plan and disclosure statement to correct problems and provide a redline version of the amended plan and disclosure statement directly to chambers.

*In re Latimer*, Case No. 09-56866 (Bankr. E.D. Mi. 2010) – Court denied approval of disclosure statement where disclosure statement was internally inconsistent regarding Debtor's future business operations; failed to identify entities holding priority tax claims; failed to identify creditors holding secured claims including taxing authorities; incorrectly denominated subparagraphs leading to confusion and ambiguity; put all secured claims into one class rather than separate classes as creditors held distinct interests; included language peculiar to corporate reorganization while Debtor was an individual; contained various references to Chapter 13, not Chapter 11; failed to identify any possible avoidance actions or to estimate values; failed to identify all holders of administrative claims or to estimate amount of those claims; failed to provide financial summaries for three years pre-petition; failed to attach proforma financials for duration of proposed plan; and misstated the effective date of the plan. Debtor ordered to file amended plan and disclosure statement to correct problems and provide a redline version of the amended plan and disclosure statement directly to chambers.

*In re Kay Bee Kay Properties, LLC.*, Case No. 09-52889 (Bankr. E.D. Mi. 2009) – Court denied approval of disclosure statement where Debtor failed to include separate section in plan to define groups of administrative claimants as those claimants are not subject to classification and are not eligible to vote and failed to state treatment under plan; Plan failed to define classes of claims subject to classification and treatment; Plan contained incorrect references to Section 503; Plan incorrectly referred to claims as "priority" when claims not entitled to priority treatment; Plan incorrectly effect of discharge and was unclear as to whether confirmation of plan would work to discharge non-debtor third parties; Disclosure Statement failed to provide information on education of proposed officer of reorganized debtor and compensation and fringe benefits paid to or to be paid to proposed officer; and Disclosure Statement had various typographical errors and references. Debtor ordered to file amended plan and disclosure statement to correct problems and provide a redline version of the amended plan and disclosure statement directly to chambers.

*In re Big Bear Creek Estates, LLC*, Case No. 09-60195 (Bankr. E.D. Mich. 2009) – Court would not grant preliminary approval of disclosure statement where headings and language or disclosure statement were inaccurate regarding creditor rights to vote, failed to clearly identify classes which are impaired, failed to disclose grounds to avoid allegedly avoidable transfers, failed to properly identify or treat equity holders and claims of insiders, and failed to state effect of confirmation on rights and interests of insiders or obligations of insiders to contribute additional capital. Debtor ordered to file amended plan and disclosure statement to correct problems and provide a redline version of the amended plan and disclosure statement directly to chambers.

*In re Electric Stick, Inc.*, Case No. 09-67103 (Bankr. E.D. Mi. 2010) – Court would not grant preliminary approval of disclosure statement where neither the plan nor the disclosure statement stated the amount of administrative claims; disclosure statement failed to indicate amount of profits that had been distributed to the corporate principles for the three years prior to the filing of the petition; the disclosure statement failed to provide at least an estimate of what the compensation of the principles would be over the five-year term of the plan; disclosure statement failed to state the amount of adequate protection payments and continuing terms of agreement with DTE energy; debtor failed to provide summaries of details of cash collateral and post-petition financing orders or, if no such orders have been entered, the debtor must state that no such orders have been entered; disclosure statement failed to accurately describe the effect of confirmation using the language mandated by the court. Debtor ordered to file amended plan and disclosure statement to correct problems and provide a redline version of the amended plan and disclosure statement directly to chambers.

*In re Mayapple, LLC*, Case No. 09-65996 (Bankr. E.D. Mi. 2009) – Debtor's Pre-petition Plan and Disclosure statement deficient: (1) insufficient identification of entities, principals and individuals involved in management, development and construction of Debtor's operations and any relationships with Debtor or its principals; (2) insufficient details of post-petition construction and financing including identity of financiers and relationship to Debtor and its principals; (3) insufficient details of ownership and acquisition of property being developed by Debtor and, if Debtor is not the owner, details agreements between Debtor and owners; (4) insufficient information on current agreements with primary Lender; (5) insufficient details of contracts with various entities and City of Troy; (6) insufficient details concerning expected length of plan, scheduled completion of development of project, projected sales of lots and units, and pro forma projections showing income, expenses and payments to be made under the Plan. Debtor has option of expediting process by serving supplemental disclosure statement to address deficiencies which Court will consider to determine adequacy.

*In re Riverside Commons Limited Partnership*, Case No. 09-40177 (Bankr. E.D. Mi. 2009) – Court refused to approve disclosure statement where plan itself failed to demonstrate confirmability. Debtor's Plan failed to provide for proper treatment of priority tax claims and priority wage claims and contained various typographical errors and internal inconsistencies. Court directed Debtor to file amended combined plan and disclosure statement and also deliver a red-line copy directly to the Court showing the changes made.

*In re Ciciovean*, Case No. 08-53411 (Bankr. E.D. Mi. 2008) – Approval of disclosure statement denied where Plan had inconsistent designations of various sections; plan failed to properly (separately) classify secured claims; Plan failed to specify whether value of property to be surrendered to secured creditors was worth more or less than debt; Plan had inconsistent treatment of claims within class of secured claims; Plan had no page numbers; Classes of secured claims failed to identify collateral; Disclosure statement did not provide information regarding salary and fringe benefits paid to Debtors; Disclosure statement failed to provide any background information on Debtors; Disclosure statement failed to explain cause of Chapter 11 filing; Disclosure statement contained unclear and inconsistent statements regarding pending litigation; Liquidation analysis omits assets owned by Debtors; Liquidation analysis fails to state assumptions or explain risks and conditions of valuations; Disclosure statement fails to state whether Debtors have claims against anyone else; Financial summaries in Disclosure statement do not provide meaningful information for three years pre-petition, post-petition to date, or projections for the period of the plan; DIP reports attached to Disclosure statement included information only for Debtor-Wife; Disclosure statement referenced non-existent section in plan on confirmation; Disclosure statement incorrectly stated effect of confirmation of plan; Plan called for inconsistent payments (monthly in one place, quarterly in another);

Plan fails to specify date on which payments to unsecured creditors will commence and conclude; Plan fails to state that unsecured creditors are impaired; Plan and Disclosure Statement contained multiple typographical errors; Plan incorrectly stated that upon confirmation Debtors would be discharged.

*In re Keisler*, 2009 WL 1851413 (Bankr. E.D. Tenn. 2009) – Adequacy of disclosure statement requires sufficient information to allow hypothetical creditor or interest holder to make informed judgment about plan. Adequacy of information is left to discretion of Bankruptcy Court in light of the circumstances of the case. Factors generally include (1) the circumstances that gave rise to the filing of the bankruptcy petition; (2) a complete description of the available assets and their value; (3) the anticipated future of the Debtor; (4) the source of the information provided in the disclosure statement; (5) a disclaimer, which typically indicates that no statements or information concerning the Debtor or its assets or securities are authorized, other than those set forth in the disclosure statement; (6) the condition and performance of the Debtor while in Chapter 11; (7) information regarding claims against the estate; (8) a liquidation analysis setting forth the estimated return that creditors would receive under Chapter 7; (9) the accounting and valuation methods used to produce the financial information in the disclosure statement; (10) information regarding the future management of the Debtor, including the amount of compensation to be paid to any insiders, directors, and/or officers of the Debtor; (11) a summary of the plan of reorganization; (12) an estimate of all administrative expenses, including attorneys' fees and accountants' fees; (13) the collectability of any accounts receivable; (14) any financial information, valuations or *pro forma* projections that would be relevant to creditors' determinations of whether to accept or reject the plan; (15) information relevant to the risks being taken by the creditors and interest holders; (16) the actual or projected value that can be obtained from avoidable transfers; (17) the existence, likelihood and possible success of non-bankruptcy litigation; (18) the tax consequences of the plan; and (19) the relationship of the Debtor with affiliates. Primary concern in evaluating disclosure statement is not whether plan is feasible or in best interests of creditors. Statement in disclosure statement that there was a disagreement concerning valuation of certain assets sufficient to constitute adequate information. Disclosure statement not required to state that competing plans have been filed.

*In re Little Rock Baptist Charity Care Center, Inc.*, Case No. 08-69445 (Bankr. E.D. Mi. 2009) - Disclosure Statement not approved where treatment of creditors unclear; Debtor mis-identified Michigan Department of Treasury as "State of Michigan"; amount set for various claims did not match amounts stated on Proofs of Claim; Disclosure Statement contained various typographical errors; various Exhibits were mislabeled or were inconsistent with text of Disclosure Statement itself. Debtor given opportunity to amend Disclosure Statement and Plan and to provide a "red line" version to the Court.

*In re Somerset 2002, LLC*, Case No. 09-45162 (Bankr. E.D. Mi. 2009) - Disclosure Statement not approved where Classes were unclear as to which creditor was in which class; Disclosure Statement was internally inconsistent and had numerous mistakes and inconsistencies including claim amounts; Liquidation Analysis was inconsistent with text of Disclosure Statement; Disclosure Statement incorrectly stated effect of confirmation as Disclosure Statement stated that confirmation would constitute full settlement with creditors but Plan was a liquidating claim pursuant to which claims and interests are not discharged; Disclosure Statement stated that upon sale of property all claims would be paid in full but anticipated sale price was less than claims filed; Disclosure Statement did not contain any information regarding background of principal of business or on principal's salary or benefits received pre-petition; Disclosure Statement referred to non-existent paragraphs and sections; Disclosure Statement erroneously referred to post-confirmation operations of business where Plan was liquidating plan and there would be no continued operations; Disclosure Statement failed to itemize administrative claims; and Disclosure Statement provided that administrative expenses would be paid on effective date but sale of property was not scheduled until 6 months later and Debtor had no other assets from which to pay administrative expenses. Debtor given opportunity to amend Disclosure Statement and Plan and to provide a "red line" version to the Court.

*In re Whyco Finishing Technologies, LLC.*, Case No. 08-69940 (Bankr. E.D. Mi. 2009) - Unsecured Creditor's Committee Disclosure Statement disapproved. Disclosure Statement failed to define "Effective Date" leaving it impossible to determine who would control business post-confirmation. Committee given opportunity to amend Disclosure Statement and Plan and to provide a "red line" version to the Court.

*In re Whyco Finishing Technologies, LLC.*, Case No. 08-69940 (Bankr. E.D. Mi. 2009) - Debtor's Disclosure Statement disapproved. Disclosure Statement lacked information regarding claims allegedly filed by secured creditor but allowed in significantly lower amount; Plan contained inconsistent provisions regarding payment of secured claims; Disclosure Statement contained no information on post-petition transfers outside ordinary course of business; Disclosure Statement incorrectly described effects of confirmation. Debtor given opportunity to amend Disclosure Statement and Plan and to provide a "red line" version to the Court.

*In re Laser Fab, Inc.*, Case No. (Bankr. E.D. Mi. 2009) - Approval of Disclosure Statement denied. Disclosure statement failed to contain full name of Debtor; failed to provide estimate of administrative claims; Disclosure Statement contained inconsistent statements on which classes were impaired; Disclosure Statement lacked any information on who would run business after confirmation; Disclosure Statement contained ambiguous and confusing references to various individuals; and Disclosure Statement failed to contain any information concerning an auction of certain assets including any information on the date, time and place of any scheduled auction. Debtor given opportunity to amend Disclosure Statement and Plan and to provide a "red line" version to the Court.

## B. Confirmation of Plan

### §10.2 Generally

*In re Southland Investments, Inc.*, 2009 WL 1971439 (Bankr. E.D. Tn. 2009) - Feasibility is of Chapter 11 Plan is factual question dependent upon a determination of the reasonable probability of payment. Chapter 11 plan is not required to guarantee success, but it must present reasonable assurance of success. Plan must provide a realistic and workable framework for reorganization. A plan of reorganization which does not reasonably articulate an adequate means by which it is to be implemented and simply requires the creditors and Courts to rely upon the 'honesty and good intentions' of the Debtor is an insufficient basis to satisfy creditors, Courts or the standards imposed by the Bankruptcy Code. Court is required to scrutinize Debtor's proposed plan payments in light of projected income and to determine whether it is likely the Debtor will be able to make the payments required by the plan. Court should consider (1) adequacy of the capital structure; (2) earning power of the business; (3) economic conditions; (4) ability of management; (5) probability of the continuation of the same management; and (6) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan. Debtor's Plan not feasible where only sources of plan funding were two unwritten leases where tenants could simply vacate the premises leaving Debtor without rental income. Without written commitments provided by lessees, Debtors projected income is speculative, particularly where one of the tenants has already expressed maintenance issues with the building. Further, both tenants have made irregular payments both before and during tendency of bankruptcy case. Without consistent and full payments by tenants, Debtor does not have revenue to fund Chapter 13 plan. Further, Debtor has not been current on property taxes, has not maintained insurance and has allowed corporate status to be administratively dissolved for failure to pay franchise taxes. Confirmation denied.

*In re Hurricane Memphis, LLC*, 405 BR 616 (Bankr. W.D. Tn. 2009) - Plan needs to demonstrate reasonable assurance of success using a realistic and workable framework, determined with reference to (1) the adequacy of the capital structure; (2) the earning power of the business; (3) economic conditions; (4) the ability of management; (5) the probability of the continuation of the same management; and (6) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan. Debtor's Plan was not feasible where success depended on tenant who did not demonstrate any reasonable assurance that it was commercially viable. Subtenant had no "working capital" and "Business Plan" and had not obtained backing of any potential investor. Financial projections put forth by Debtor were not derived from realistic and reasonable assumptions, but were nothing more than visionary scheme that promises creditors more than the Debtor can possibly attain after confirmation.



*General Electric Credit Equities, Inc. v. Brice Road Developments, LLC.*, 2008 Fed. App. 0012P (6<sup>th</sup> Cir. BAP 2008) – Bankruptcy Court’s determination of appropriate discount rate and conclusion as to the value of the property will not be reversed where record indicated that bankruptcy Court considered all relevant evidence in reaching a conclusion as to value and the value reached by bankruptcy Court was within the range of opinions and evidence offered. Feasibility does not require that the plan guarantees success, but plan must present reasonable assurance of success. A relatively low threshold of proof is used for feasibility so long as adequate evidence supports the finding of feasibility. Bankruptcy Court found that Debtor’s assumptions underlying the plan are reasonable and in many instances more conservative than those even of the objecting creditor. Court’s conclusion that the plan was feasible was not clearly erroneous and would be affirmed. Plan was not fair and equitable to creditor where plan failed to account for creditor’s exercise of its section 1111(b)(2) election.

### §10.3 Feasibility

*In re Hockenberry*, 2011 WL 4441582 (Bankr. S.D. Ohio 2011) – Individual Debtor’s Chapter 11 Plan was not feasible where debtor lacked income to fund plan unless debtor’s non-filing spouse, a 65 year old school teacher, contributed her income to the plan. Key element of feasibility is whether there is a reasonable probability [that] the provisions of the Plan can be performed. Debtor failed to produce any evidence that spouse agreed to contribute income or that spouse had the ability to continue to do so over the life of the plan.

*In re Fairvue Club Properties, LLC.*, 2010 WL 4501959 (Bankr. M.D. Tn. 2010) - Court will confirm a Chapter 11 case only if confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless liquidation or reorganization is proposed in the plan. The plan need only present a reasonable assurance of success by sufficiently establishing a realistic and workable framework for reorganization. Relevant factors are: (1) the adequacy of the capital structure; (2) the earning power of the business; (3) economic conditions; (4) the ability of management; (5) the probability of the continuation of the same management; and (6) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan. Debtor’s Plan was not feasible where it required annual gross revenue of \$2 million but debtor’s experts testified that debtor had never historically achieved that amount. Creditor’s expert presented evidence of revenues at comparable facilities and estimated stabilized cash flows at closer to \$300,000 to \$500,000. The debtors were unable to prove that their projections are anything more than an unrealistic plan that has little or no chance of success.

*LaBankoff v. United States Trustee*, Case No. 09-1300 (9<sup>th</sup> Cir. BAP 2010) - Debtor’s failure to confirm a plan within time set by Court at prior status conference permits conversion pursuant to Section 1112(b)(4) for failure to file or confirm a plan within the time fixed by Order of Court. Court had warned Debtor at prior status conference that reorganization would not be possible if funded solely by speculative recoveries from unfiled lawsuits or the “illusory” possibility of sale of patent rights, yet debtor filed proposed plan primarily based on these sources of income. Court correctly concluded that debtor could not realistically effectuate a plan as the funding sources were “not available or were illusory”. No lawsuits had been filed to recover these on these alleged lawsuits and Debtor had not shown that he had patent rights or that these rights, if they did exist, were marketable or could be liquidated without extended delay.

*General Electric Credit Equities, Inc. v. Brice Road Developments, LLC.*, 2008 Fed. App. 0012P (6<sup>th</sup> Cir. BAP 2008) –Feasibility does not require that the plan guarantees success, but plan must present reasonable assurance of success. Plan must provide a realistic and workable framework for reorganization. Factors to consider include adequacy of capital structure; earning power of business; economic conditions; the ability of management; probability of the continuation of the same management; and any other related matter which determines the prospects of a sufficiently successful up a ration to enable performance of the provisions of the plan. A relatively low threshold of proof is used for feasibility so long as adequate evidence supports the finding of feasibility. Debtor’s assumptions underlying the plan were reasonable and in many instances more conservative than those even of the objecting creditor.



*In re Southland Investments, Inc.*, 2009 WL 1971439 (Bankr. E.D. Tn. 2009) - Feasibility is of Chapter 11 Plan is factual question dependent upon a determination of the reasonable probability of payment. Chapter 11 plan is not required to guarantee success, but it must present reasonable assurance of success. Plan must provide a realistic and workable framework for reorganization. A plan of reorganization which does not reasonably articulate an adequate means by which it is to be implemented and simply requires the creditors and Courts to rely upon the 'honesty and good intentions' of the Debtor is an insufficient basis to satisfy creditors, Courts or the standards imposed by the Bankruptcy Code. Court should consider (1) adequacy of the capital structure; (2) earning power of the business; (3) economic conditions; (4) ability of management; (5) probability of the continuation of the same management; and (6) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan. Debtor's Plan not feasible where only sources of plan funding were two unwritten leases where tenants could vacate the premises leaving Debtor without income and tenants have history of irregular payments both before and during bankruptcy case. Debtor has not been current on property taxes, has not maintained insurance and has allowed corporate status to be administratively dissolved for failure to pay franchise taxes. Confirmation denied.

*In re Hurricane Memphis, LLC*, 405 BR 616 (Bankr. W.D. Tn. 2009) - Plan which called for assumption of lease of real estate and then subleasing of premises to new entity not confirmable where feasibility of plan depended entirely on Debtor's ability to sublet premises and subtenant's ability to pay rent. Potential tenant was to be new entity consisting of reorganized Debtor and unidentified future capital investors of unknown numbers. Subtenant's ability to pay rent depended on ability to meet requirements to operate successful night club. Subtenant had not lined up any of the funds necessary for the improvement of the property or to cover initial operating and promotional costs. Although plan needs to demonstrate only reasonable assurance of success using a realistic and workable framework, determined with reference to (1) the adequacy of the capital structure; (2) the earning power of the business; (3) economic conditions; (4) the ability of management; (5) the probability of the continuation of the same management; and (6) any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan. Financial projections put forth by Debtor were not derived from realistic and reasonable assumptions, but were nothing more than visionary scheme that promises creditors more than the Debtor can possibly attain after confirmation.

#### §10.4 Absolute Priority Rule

*In re Shap, LLC*, 2011 WL 2679118 (Bankr. E.D. Mi. 2011) – Debtor could not confirm plan that proposed to cram down unsecured creditors where debtor had only one creditor and that that creditor had already stated that it would vote to reject the plan. Debtor could not obtain consent of impaired unsecured creditor class which prevents debtor from cramming down where debtor proposed to retain debtor's interest in property.

#### §10.5 Best Interests of Creditors

*In re Hockenberry*, 2011 WL 4441582 (Bankr. S.D. Ohio 2011) – Best Interests of Creditors test under Section 1129(a)(7) requires Court to discount future stream of payments to creditors to determine whether present value exceeds anticipated liquidation value of debtor's estate under Chapter 7.

#### §10.6 Good Faith

#### §10.7 Interest/Discount Rate

*In re Hockenberry*, 2011 WL 4441582 (Bankr. S.D. Ohio 2011) – Court rejected Federal Judgment Rate as appropriate discount rate in determining whether Plan met Best Interests of Creditors standard. Current Judgment rate was so low that it would not compensate creditors even for the current rate of inflation. Proper discount rate for insolvent Chapter 11 debtor must also take into account risks inherent in waiting to receive payment. Plan that proposed to use Judgment Rate did not comply with Section 1129(a)(7) and could not be confirmed.

*In re Mace*, WL 284435 (Bankr. M.D. Tn. 2011) – *Till* requires Court to begin by looking at national prime rate and then to adjust according to the greater risk sometimes posed by a bankrupt debtor. Court found that no adjustment was necessary where creditor was fully secured, debtor had never missed a payment, and the plan was feasible. Creditor's risk of spreading payments over 20 year amortization rather than shorter term was fairly compensated by interest at prime rate without adjustment.

*General Electric Credit Equities, Inc. v. Brice Road Developments, LLC.*, 2008 Fed. App. 0012P (6<sup>th</sup> Cir. BAP 2008) – In determining an appropriate discount rate, the current market rate will apply where an “efficient market” exists. If there is no “efficient market”, the formula approach endorsed in *Till* is to be used. The creditor bears the burden to demonstrate that a higher rate than proposed by the Debtor is appropriate. Court must consider the priority of the lien securing loans; whether there exists an open, well-developed market for loans of the kind between the Debtor and secured creditor; the type of collateral loss; equality, age, and life expectancy of the collateral; short or long-term nature of the proposed term of the loan; and the amount financed. Based on the evidence presented, bankruptcy Court correctly concluded that Debtor's proposed interest rate of 6% was appropriate.

#### §10.8 Valuation

*In re Avalanche, LLC.*, Case No. 09-34010 (Bankr. E.D. Mi. 2010) - Section 506 requires value to be determined in light of the purpose of the value and the proposed disposition or use of the property. Debtor's proposed continued use of the property as an ice rink and related facility precluded use of comparables for light industrial property. Although valuation as an ice rink may be problematic given the lack of comparables, appraiser could use the income or replacement cost methods to provide estimate; or given the limited nature of the market, could use comparable sales even from distant locations.

*General Electric Credit Equities, Inc. v. Brice Road Developments, LLC.*, 2008 Fed. App. 0012P (6<sup>th</sup> Cir. BAP 2008) – Bankruptcy Court's conclusion as to the value of the property will not be reversed where record indicated that Court considered all relevant evidence in reaching a conclusion as to value and the value was within the range of opinions and evidence offered.

#### §10.9 Section 1111(b) Election

*General Electric Credit Equities, Inc. v. Brice Road Developments, LLC.*, 2008 Fed. App. 0012P (6<sup>th</sup> Cir. BAP 2008) – Creditor electing treatment under Section 1111(b)(2) must receive a stream of payments at least equal to the present value of the collateral and in an amount equal to at least in the total amount of the creditor's claim. Thus, creditor with a total claim \$16,500,000 secured by property valued at \$10,500,000 must receive payments (1) with a present value of at least \$10,500,000; and (2) totaling at least \$16,500,000. Although plan provided for cash payments with a present value of \$10,500,000, the plan did not provide that deferred cash payments to creditor will total at least \$16,500,000.

#### §10.10 Unfair Discrimination

*In re Mace*, 2011 WL 284435 (Bankr. M.D. Tn. 2011) – “Cram down” of dissenting class under Section 1129(b)(1) requires that plan not unfairly discriminate against similarly situated creditors. To determine if discriminatory treatment is “unfair”, courts consider (1) whether the discrimination is supported by a reasonable basis; (2) whether the debtor can confirm and consummate a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) how the class that is being discriminated against is treated. Creditor who held “bundled investment property loan” secured by multiple parcels of investment properties was not “similarly situated” with creditor who held mortgage on single piece of rental real estate. Further, even if the creditors were similarly situated, the discrimination would not be unfair. Discrimination has reasonable basis given significant differences in the nature of the collateral; discriminatory treatment was proposed in good faith and not for purposes of punishing creditor or for purposes of manipulating voting; and creditor was being offered same treatment as other creditors holding similar “bundled investment” loans.

#### §10.11 Effect of Confirmation Order

*Electric Reliability Council of Texas, Inc. v. May*, Case No. 08-40890 (5<sup>th</sup> Cir. 2010) – Confirmation of Plan replaces pre-petition obligations with restructured debt arrived at in the plan. Discharge does not eliminate pre-petition debts, but it effects an injunction against enforcement of pre-petition rights, and each claimant is given a new enforceable obligation based on treatment in plan. Pre-confirmation injunction against Creditor drawing on letter of credit for payment of pre-petition invoices did not enjoin Creditor from drawing on letter of credit for post-confirmation defaults under confirmed plan.

*Ohio Truck & Trailer, Inc. v. Level Propane Gases, Inc.*, - 422 BR 93 (6<sup>th</sup> Cir. BAP 2010) – Confirmation of plan under Section 1141 binds all parties to terms of plan. Confirmation Order is res judicata on all issues raised or that could have been raised in confirmation proceedings. Issues regarding alleged fraud in the confirmation process or leading up to confirmation are issues that were or should have been raised in confirmation process. Issues of fraud raised by Creditor after confirmation were substantially the same as were raised prior to confirmation.

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

#### §10.12 Revocation of Confirmation Order

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

#### §10.13 Interpretation of Confirmed Plan

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

#### §10.14 Deadline for Objections to Confirmation

#### C. Small Business Cases

#### §10.15 Defined

*In re Maxx Towing, Inc.*, Case No. 09-70719 (Bankr. E.D. Mi. 2011) – Debtor indicated on petition that debtor was “small business” and had not amended petition to change status and has not previously argued that debtor is not small business. Under Rule 1020(a), the status of the case as a small business is as stated in the debtor’s statement unless an interested party objects or the debtor timely amends the designation. Debtor did not change designation and no party objected to designation. Case would be treated as small business.

*LaBankoff v. United States Trustee*, Case No. 09-1300 (9<sup>th</sup> Cir. BAP 2010) – Debtor failed to demonstrate that Chapter 11 was “small business case” as defined in Section 101(51D). Debtor’s petition stated that his debts were “primarily consumer debts” and that he was not a small business debtor as defined in Section 101(51D). Debtor’s later request to be treated as small business would not be approved where there was no evidence that Debtor’s statements in the initial petition were incorrect. Debtor’s primary debts were the mortgage on debtor’s residence, “unquestionably” a consumer debt; and \$107,000 of miscellaneous unsecured debt although Debtor later asserted that only \$14,000 of that debt pertained to his “business” of inventing.

#### §10.16 Time to File Plan

*In re Maxx Towing, Inc.*, Case No. 09-70719 (Bankr. E.D. Mi. 2011) – Section 1121(e)(2) requires plan to be filed within 300 days of order for relief. Plan must be confirmed within 45 days of plan filing unless time is extended under Section 1121(e)(3) which requires showing by preponderance of evidence that court will confirm plan within reasonable time, new deadline is imposed when extension is granted, and order extending deadline is signed before prior deadline expires. Case would not be dismissed even where plan not confirmed within deadline where plan was timely filed and the parties including the UST stipulated to multiple adjournments of a hearing to determine value of real property which was essence of Chapter 11 plan. Any delays were not the result of failure to prosecute and were with the consent of interested parties. Section 1121(a)(3) does not mandate dismissal for failure to confirm plan within 45 days under the circumstances of this case.

*LaBankoff v. United States Trustee*, Case No. 09-1300 (9<sup>th</sup> Cir. BAP 2010) – Section 1121(e) grants exclusivity to small business for 180 days from the petition date, but does not establish a date by which the debtor must file a plan or obtain confirmation. Section 105 permits the Court to set a shorter time within which Debtor must file a plan or face dismissal. Court Order setting deadline of 120 days to file and confirm a plan did not violate Section 1121(e) as that section was not a guarantee of a minimum time to file or confirm, only a grant of exclusivity.

#### D. Single Asset Real Estate Cases

##### §10.17 Defined

*In re Spencer Creek Properties*, 2010 WL 4280420 (Bankr. M.D. Tn. 2010) - “Single asset real estate” means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental. Debtor owned 25 vacant residential building lots in high-end residential community. Debtor developed the community including sidewalks, common areas, street lights, sign posts, streets, electric, telephone, cable water and sewer and then undertook to sell the lots. Debtor’s real property constituted a “single property or project” and sales of the lots constituted Debtor’s sole source of income. Debtor’s activities related to the property were largely passive, as debtor did not operate any business on the property and the sale of the property was debtor’s sole revenue stream. Although debtor may have performed incidental activities such as mowing the grass, some marketing activities, and other operational activities, these activities would not be expected to generate any substantial revenues. Debtor’s ownership of the property was largely a passive act with revenues to be derived solely from the property itself. Debtor was “Single Asset Real Estate” case within meaning of Section 101(51B).

##### §10.18 Time to File Plan

## E. Individual Cases

## §10.19 Defined

## §10.20 Absolute Priority Rule

*In re Lindsey*, 2011 WL 344465 (Bankr. E.D. Tn. 2011) – Majority of courts hold that individual Chapter 11 Plan is still subject to absolute priority rule. BAPCPA addition of Section 1129(b)(2)(B)(ii) which requires debtor to commit 100% of disposable income did not eliminate absolute priority rule from individual Chapter 11. Incorporation of Section 1115 only allows debtor to retain property acquired post-petition free of absolute priority rule. Section 1115 does not remove from absolute priority rule property owned by debtor pre-petition. Plan that provided for debtor to retain pre-petition assets while paying dissenting classes less than the full amount of claims was not fair and equitable and could not be confirmed.

*In re Maharaj*, 2011 WL 1753795 (Bankr. E.D. Va. 2011) – Individual Chapter 11 Plan is still subject to absolute priority rule. BAPCPA addition of Section 1129(b)(2)(B)(ii) which requires debtor to commit 100% of disposable income did not eliminate absolute priority rule from individual Chapter 11. Incorporation of Section 1115 only allows debtor to retain property acquired post-petition free of absolute priority rule. Section 1115 does not remove from absolute priority rule property owned by debtor pre-petition. Court could not confirm plan that proposed to retain debtor's pre-petition homestead where unsecured creditors did not accept plan, as retention would violate absolute priority rule by permitting debtor to retain property while impairing dissenting class of unsecured creditors.

## F. Sale of Assets

## §10.21 Other than Through Confirmed Plan

*In re Bazzi*, Case No. 09-77600 (Bankr. E.D. Mi. 2010) – Chapter 11 Debtor's Motion to Approve Sale of Assets rendered moot when case was converted to Chapter 7 before Court could hold hearing. Denial of Motion did not prejudice Chapter 7 Trustee's right to pursue the sale if the Trustee wished to do so.

*Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S.Ct. 2326 (2008) - Section 1146 permits sale of property without payment of "stamp tax or similar tax" only pursuant to the terms of a confirmed plan. Sale of all or substantially all of Debtor's assets as a Section 365 Sale is not a sale pursuant to a confirmed plan and cannot be exempted from payment of stamp or similar tax.

## §10.22 Pursuant to Confirmed Plan

## G. Assumption or Rejection of Executory Contracts

## §10.23 Definition of "Executory"

*In re KY USA Energy, Inc.*, 2010 WL 4923644 (Bankr. W.D. Ky. 2010) - Generally accepted definition of an executory contract is a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other. The trial court should work backward from an examination of the purposes to be accomplished by rejection and, if they have been accomplished, then the contract cannot be said to be executory. It does not include a contract fully performed by one of the parties. Party judicially admitted in its Complaint against Debtor that party fully completed its obligations compelling holding that agreement was not executory.

## §10.24 Standard of Review

## §10.25 Time for Assuming or Rejecting



*In re Caster*, 2010 WL 4274583 (Bankr. N.D. Ohio 2010) – Unexpired lease of personal property must be assumed within 60 days of order for relief or lease is deemed rejected by operation of law. Assumption of lease requires assumption of lease on the terms of the lease with no variation. Debtor who attempted to assume lease but to change term of purchase option from “payment in full at exercise” to payment over life of Chapter 11 Plan did not assume lease in unaltered form. Debtor’s purported assumption was invalid resulting in automatic lease rejection 60 days after order for relief.

*Tencup Property, LLC v. Riley*, Case no. 09-065 (1<sup>st</sup> Cir. BAP 2010) - Section 365(d)(4) requires the trustee to decide whether to assume or reject a lease of non-residential real property within 120 days after the entry of the order for relief. If the trustee fails to act within 120 days, the lease is deemed rejected and the trustee must immediately surrender the leasehold to the lessor. However, no provision in the Bankruptcy Code or Rules requires the trustee to file a specific motion entitled “motion to reject.” Therefore, the trustee can give notice of intent to reject a lease in another kind of formal motion, such as a sale motion or a settlement motion. The critical question is one of adequate notice — parties to the contract or lease must be given adequate notice of the proposed rejection or assumption. Court can order retroactive rejection where aggregate of facts indicates lessor had ample notice of intent to reject leases and debtor had actually vacated premises and returned premises to the landlord prior to entry of formal order rejecting lease.

*In re Greektown Holdings, LLC*, Case No. 08-53104 (Bankr. E.D. Mi. 2008) – Creditor’s Motion to Compel assumption of construction contract denied. Section 365(d)(2) permits Debtor to assume or reject executory contract up to date of confirmation of plan. Court has discretion to accelerate deadline to assume or reject. Court must balance interests of contracting party against interests of Debtor and the estate. Burden is on creditor to justify shortening of time. Creditor’s concerns about Debtor’s ability to pay for future construction as payments come due is not sufficient reason to accelerate deadline, where Debtor has made each post-petition payment in a timely manner and has already cured all pre-petition payment defaults. Contract scheduled to be fully complete in near future, at which time assumption or rejection becomes unnecessary, as opposed to typical executor contract that extends well beyond normal plan confirmation. Creditor will have administrative expense status for any post-petition construction payments, eliminating the need for accelerated assumption and creditor retains its full lien rights pending assumption. Benefit to creditor of early assumption outweighed by potential harm to Debtor.

#### §10.26 Right to Assume

*Ohio Skill Games, Inc. v. Pace-O-Matic, Inc.*, 2010 WL 2710522 (Bankr. N.D. Ohio 2010) – Debtor may assume Executory Contract even if Contract is not assignable pursuant to applicable non-bankruptcy law. Assumption by the Debtor maintains the parties relationship under the Agreement and does not require the other party to the contract to accept performance from an unknown third party when it contracted for those services from Debtor. Purported pre-petition termination of agreement does not preclude assumption where contract allowed termination only for “material defaults”. Court concluded that alleged pre-petition defaults either did not exist in fact or were not material to permit termination of agreement. Further, certain defaults such as a failure to maintain sufficient inventory were disputed and, in any event, could be easily rectified. Although non-debtor party alleged that there were sums due and owing pre-petition, party failed to produce evidence of the amount allegedly owed, preventing Court from finding either that default was material or that debtor lacked ability to either cure or provide assurance of prompt cure.

#### §10.27 Right to Assign

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

#### §10.28 Curing Defaults and Future Performance

*Ohio Skill Games, Inc. v. Pace-O-Matic, Inc.*, 2010 WL 2710522 (Bankr. N.D. Ohio 2010) – Section 365 prohibits assumption of executory contract unless party seeking to assume cures all defaults, or provide adequate assurance of a prompt cure; (2) compensates, or provide adequate assurance of such compensation will be made, to a party who has suffered an “actual pecuniary loss;” and (3) provide adequate assurance of future performance.

#### §10.29 Non-Competition Agreements

*In re Houston*, Case No. 09-10769 (Bankr. W.D. Ky. 2009) – Section 365 permits a debtor to assume or reject an executory contract. An executory contract is one under which the obligations of both parties are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the other party's performance. Whether a party's nonperformance of the remaining obligations under a contract would constitute a material breach is a factual question resolved through application of state law. Executory contract must be accepted or rejected as a whole. Debtor's request to reject only the portion of the agreement that includes the executory contract is not permitted.

#### §10.30 Effect of Assumption

*In re Caster*, 2010 WL 4274583 (Bankr. N.D. Ohio 2010) – Unexpired lease of personal property must be assumed within 60 days of order for relief or lease is deemed rejected by operation of law. Assumption of lease requires assumption of lease on the terms of the lease with no variation. Debtor who attempted to assume lease but to change term of purchase option from “payment in full at exercise” to payment over life of Chapter 11 Plan did not assume lease in unaltered form. Debtor's purported assumption was invalid resulting in automatic lease rejection 60 days after order for relief.

#### §10.31 Effect of Rejection

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

#### §10.32 Failure to Timely Assume or Reject

### H. Liabilities of Reorganized Debtor

#### §10.33 Generally

*In re Travel Agent Com'n Antitrust Litigation*, 583 F.3d 896 (6<sup>th</sup> Cir. 2009) – Successfully reorganized debtor under the Bankruptcy Code is liable for any independent conduct that arises after the confirmation of its bankruptcy plan. Debtor receives a “fresh start” but not a continuing license to violate the law”.

#### §10.34 “Continuing conduct”

*In re Travel Agent Com'n Antitrust Litigation*, 2009 WL 3151315 (6<sup>th</sup> Cir. 2009) – Reorganized Airline cannot be held liable for alleged antitrust violations where decision to not pay travel agent commissions was one made by pre-petition debtor and was only “continued” by reorganized debtor. Continuation of pre-petition policy did not constitute “overt act” by reorganized debtor that would constitute violation of anti-trust laws.

### I. Discharge

#### §10.35 Timing

#### §10.36 Scope of Discharge

## §10.37 Discharge Injunction

*In re Easter Seals Tennessee, Inc.*, 201 WL 1884169 (Bankr. M.D. Tn. 2011) – Creditor did not violate discharge injunction by maintaining two separate ledgers, one for contractual obligation and one reflecting reduced secured claim pursuant to confirmed plan. Creditor did not violate discharge injunction by inadvertently referencing contractual ledger when contacted by debtor for payoff. Debtor immediately realized quoted payoff was erroneous and lender immediately transferred debtor to bankruptcy department for correct payoff. Creditor never demanded payment of amount in excess of payoff under plan and never took steps to collect a discharged debt.

## J. Conversion to Chapter 7

## §10.38 On Request of Debtor

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

## §10.39 On Request of Creditor

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

## §10.40 On Request of United States Trustee

*In re Wilderness Crossings, LLC*, Case No. 09-14547 (Bankr. W.D. Mi. 2010) – Section 1112(b)(1) allows the court to convert or dismiss a case in the best interests of creditors and the estate upon cause shown, unless the Court also finds unusual circumstances that make conversion or dismissal not in the best interests of creditors or the estate. Once “cause” is found, conversion or dismissal is mandatory unless Court specifically identifies “unusual circumstances”.

*In re Westgate Properties, Ltd.*, 2010 WL 2802511 (Bankr. N.D. Ohio 2010) – Section 1112(b)(1) permits court to dismiss or convert a case for cause based on best interests of creditors and the estate. Debtor's

failure to provide information to the United States Trustee until the eve of the Hearings held on Dismissal or Conversion, and even then the information was not complete; and Debtor's failure to file schedules and statement of financial affairs until the day of the hearing held to Dismiss or Convert; constituted cause.

*In re Oakland Hills Land Development, LLC*, Case No. 10-56463 (Bankr. E.D. Mi. 2010) - Debtor's ongoing mis-management warranted conversion of case to Chapter 7. Debtor's representative failed to appear for the First Meeting of Creditors without any reasonable explanation or grounds, particularly where Court had repeatedly warned Debtor's counsel of the date and time for the First Meeting and where companion case was also dismissed for failure of the representative to appear for the First Meeting of Creditors in that case. Court concluded that conversion, rather than dismissal, was in the best interests of creditors.

*LaBankoff v. United States Trustee*, Case No. 09-1300 (9<sup>th</sup> Cir. BAP 2010) - Section 1112(b)(1) requires conversion or dismissal if cause is established absent unusual circumstances specifically identified by the court that establish that the requested conversion is not in the best interests of creditors and the estate; or if (1) there is a reasonable likelihood that a plan will be confirmed within a reasonable time, (2) the "cause" for dismissal or conversion is something other than a continuing loss or diminution of the estate coupled with a lack of reasonable likelihood of rehabilitation; and (3) there is reasonable justification or excuse for a debtor's act or omission and the act or omission will be cured in a reasonable time. Debtor's failure to confirm a plan within time set by Court at prior status conference permits conversion pursuant to Section 1112(b)(4) for failure to file or confirm a plan within the time fixed by Order of Court. Court had warned Debtor at prior status conference that reorganization would not be possible if funded solely by speculative recoveries from unfiled lawsuits or the "illusory" possibility of sale of patent rights, yet debtor filed proposed plan primarily based on these sources of income. Court correctly concluded that debtor could not realistically effectuate a plan as the funding sources were "not available or were illusory". Debtor made no showing that there were unusual circumstances presented in his case that should justify not converting the case. In addition, the bankruptcy court determined that there was no reasonable possibility that Debtor could confirm a plan in a reasonable time.

#### §10.41 By Court

*LaBankoff v. United States Trustee*, Case No. 09-1300 (9<sup>th</sup> Cir. BAP 2010) – Court has authority to *sua sponte* convert case under Section 105(a).

*Mitan v. Duval*, 2009 WL 2059737 (6th Cir. 2009) - Bankruptcy Court has authority to *nunc pro tunc* convert case from Chapter 11 to Chapter 7 to prevent fraud or abuse of the bankruptcy system. Retroactive conversion does not violate Rule 2002(a)(4) which requires 20 days notice of the hearing, - retroactive relief dating back prior to the commencement of the 20 day notice period is appropriate as long as 20 days notice of the hearing itself is provided. Section 105 empowers Court to retroactively convert a case under "very absurd facts" where failure to do so would reward fraud and non-cooperation by Debtor. Case "full of extraordinary circumstances warranting equitable relief", warranted conversion *nunc pro tunc*. Apparent lack of assets or possible insolvent estate, standing alone, does not prohibit conversion rather than dismissal.

#### §10.42 Burden of Proof

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

lenders that would permit new lender to acquire secured debt at substantial discounts and to also pay outstanding IRS obligations. Proposed transaction would reduce debt load by more than \$1 million, or approximately one-third of total debt which will provide substantial assistance to debtor.

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

#### §10.43 Appeal

*In re Fleurantin*, Case no. 09-4376 (3d Cir. 2011) - Order converting case from 13 to 7 is final and appealable. Court lacked jurisdiction over appeal of conversion order where debtor waited until court ultimately dismissed Chapter 7 case to file appeal. Appeal of final order must be filed within time permitted in Rule 8002(a)

#### K. Dismissal

#### §10.44 Defects in Petition

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

#### §10.45 Cause for Dismissal

*Estate of Gray v. McDermott*, 2011 WL 946729 (E.D. Mi. 2011) – Court properly dismissed case *nunc pro tunc* at request of creditor where debtor was not eligible for relief under Chapter 11 in the first instance.

*In re SI Grand Traverse, LLC*, 450 BR 703 (Bankr. W.D. Mi. 2011) – 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 Shap, LLC*, 2011 WL 2679118 (Bankr. E.D. Mi. 2011) – Cause exists for dismissal where debtor cannot confirm plan. Debtor had only one creditor that rejected plan and indicated that creditor would always vote to reject plan, precluding confirmation unless debtor left creditor's interest unimpaired, which debtor could not feasibly do. Case dismissed where sole asset of debtor was substantially overencumbered and conversion would produce no benefit to creditors or the estate.

*In re Morris*, 2010 WL 3943927 (Bankr. M.D. Tn 2010) – Once 'cause' for dismissal is established, Court must dismiss case unless evidence shows "unusual circumstances" that demonstrate that dismissal or conversion is not in the best interests of creditors; or that debtor demonstrates that failure is reasonably justified and will be cured and there is a reasonable likelihood that the debtor will be able to propose and confirm a plan in a reasonable time. Individual debtor who failed to obtain pre-petition credit counseling was not eligible for relief. Dismissal for cause warranted.

*In re Wahlie*, 2009 WL 1758747 (Bankr. N.D. Ohio 2009) – Case may be dismissed for cause pursuant to Section 1112(b) based on continued loss or diminution of estate assets coupled with absence of reasonable



likelihood of reorganization. Reasonably likelihood of reorganization turns on whether Debtor will be able to stem losses and place business back on solid footing within reasonable time. Individual Debtors in Chapter 11 case have used all income to pay day-to-day living expenses not allowing for funding of plan. Chapter 11 had been pending 2 years and Debtors used only bare minimum of resources to pay debts while paying debts of third-party family members. Debtors have allowed estate to diminish by failing to pursue collection of accounts receivable in excess of \$750,000. Debtors were in no position to confirm a Plan. Debtors failed to act in good faith by failing to disclose transactions with business entity in which Debtors were sole shareholders; provided inconsistent and contradictory financial records; and failed to file adequate and complete DIP operating reports.

#### §10.46 Failure to File Documents

*In re New Clinton Auto Service, Inc.*, Case No. 10-74966 (Bankr. E.D. Mi. 2010) – Case dismissed for failure to file Balance Sheet, Cash Flow Statement, Income Tax Return and Statement of Operations as required by Section 1116(1).

*In re S & V Investment, LLC*, Case no. 10-74968 (Bankr. E.D. Mi. 2010) – Case dismissed for failure to file Balance Sheet, Cash Flow Statement, Income Tax Return and Statement of Operations as required by Section 1116(1).

*In re Morris*, 2010 WL 3943927 (Bankr. M.D. Tn 2010) – Section 112(b)(4) permits court to dismiss case for unexcused failure to satisfy timely any filing or reporting requirement and failure to pay any fees or charges. Individual debtor 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 Rita Franchise Corporation*, Case No. 10-51895 (Bankr. E.D. Mi. 2010) - Case dismissed for failure to file Bankruptcy Petition Cover Sheet and Statement of Corporate Ownership.

*In re Gaglio PR Cement Corporation*, Case No. 10-49416 (Bankr. E.D. Mi. 2010) - Case dismissed for failure to file Balance Sheet, Cash Flow Statement, Income tax Return and Statement of Operations.

#### §10.47 Failure to File Plan or Disclosure Statement

*In re Ciciovean*, Case No. 08-53411 (Bankr. E.D. Mi. 2008) – Debtor's failure to file an acceptable disclosure statement and plan notwithstanding Court's Order to Show Cause resulted in dismissal of case. Court gave Debtor until specific date to file Motion to Convert and a 20-day notice of the Motion. On the last date afforded by the Court, Debtor filed a Motion to Convert but provided only a 15-day notice. Debtor's failure to file the required motion and notice resulted in dismissal of the case without further notice or hearing.

*In re Woodward Gardens, LLC*, Case No. 09-41069 (Bankr. E.D. Mi. 2009) - Case dismissed where Debtor failed to file Plan or Disclosure Statement within deadline set in Court's Order Establishing Deadlines and Procedures. Section 105 grants authority to Court to dismiss case *sua sponte* to prevent an abuse of the process. Section 1112 requirement that any request must be made by party in interest does not limit Court's authority under Section 105.

#### §10.48 Lack of Good Faith

*In re 15375 Memorial Corporation*, 589 F.3d 605 (3d Cir. 2009) –

#### §10.49 Voluntary Dismissal by Debtor

*In re Taj Graphics Enterprises, LLC*, Case No. 09-72532 (Bankr. E.D. Mi. 2010) – Debtor's request for voluntary dismissal must be brought by Motion specifically seeking that relief. Request for dismissal buried in Debtor's response to Creditor's Motion to Dismiss is insufficient to support dismissal. Request for dismissal denied without prejudice.

## §10.50 Failure to Pay Fees and Charges

*In re Morris*, 2010 WL 3910222 (Bankr. N.D. Ohio 2010) – Failure to pay required fees is basis for dismissal under Section 1112(b)(1)(K). Court can extend time to pay filing fees in a total of no more than 4 installments and for a period not to exceed 180 days for cause. Case dismissed where debtor failed to make payments required by application to pay filing fee in installments and debtor failed to make quarterly fees to US Trustee.

## §10.51 Dismissal With Prejudice to Re-filing

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

## L. Retention and Compensation of Counsel

## §10.52 Requirements for Retention

*In re Ortega*, 2011 WL 3810287 (Bankr. W.D. Ky. 2011) – Court lacked authority to approve retention *nunc pro tunc*. Although case had been heavily litigated and counsel had performed extensive services, counsel failed to demonstrate any extraordinary circumstances that would warrant late filing of Application for retention. Although Court would certainly have approved retention had application been timely filed, Court cannot grant the Application and make it effective as to the date of the filing of the Petition absent extraordinary circumstances. Application for Retention would be approved effective with date of filing of Application only.

*In re Sausa*, Case no. 10-55640 (Bankr. E.D. Mi. 2011) – Sections 327 and 330 and Federal Rule 2014 require counsel for Debtor in Chapter 11 to have retention approved by the Court. Where approval is not obtained, court can grant approval on a *nunc pro tunc* basis under “exceptional circumstances”. Counsel failed to obtain approval over long period of time notwithstanding several “milestones” which should have alerted Counsel to need to seek approval for retention. *Nunc pro tunc* application for retention and Counsel's fee application both denied in their entirety.

## §10.53 Lack of Authorization to Retain Counsel

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

#### §10.54 Compensation

*In re USHC, LLC*, 2011 WL 4448607 (Bankr. W.D. Ky. 2011) – Application for retention of counsel with requirement for debtor to establish fee escrow fund from post-petition earnings denied. Whether Court would approve post-petition fee escrow account depends on (1) whether case was unusually large one in which an exceptionally large amount of fees would accrue monthly; (2) whether waiting an extended period for payment would place undue hardship on counsel; (3) whether counsel could respond to any reassessment of fee; and (4) whether fee retainer procedure itself was subject of noticed hearing prior to any payment thereunder.

*In re Stetler Cross Ministries, Inc.*, 2010 WL 2696769 (Bankr. W.D. Ky. 2010), *aff’d sub nom Stetler Cross Ministries, Inc. v. McDermott*, 2011 WL 1434615 (W.D. Ky. 2011) – Section 330(a)(2) and Court’s broad and inherent authority permits bankruptcy court to order disgorgement of previously paid attorney fees where an attorney fails to satisfy the requirements of the Code and Rules. Debtor’s Counsel received a \$2000 fee although counsel never filed an application to have himself or his firm retained as counsel and never filed an application for approval of compensation as required by sections 327, 330 and 331. Debtor’s counsel in a Chapter 11 proceeding cannot be paid without seeking and obtaining prior court approval. There are few omissions more serious in a Chapter 11 case than the failure of a debtor’s attorney to obtain court approval prior to securing payment for services rendered from a debtor’s estate. Bankruptcy Code Rules strictly regulate the compensation of professionals for the purpose of preventing over-reaching. Failure to follow these rules, regardless of how *de minimis* the fee, cannot be overlooked by the Court. Further, Counsel did not place the unawarded fees in his trust account, but rather drew upon the funds, and spent them, all without Court approval. Although failure may have been inadvertent or negligent failure to disclose, the failure to seek Court approval by Debtor’s counsel prior to accepting the fee and having his employment approved by the Court requires disgorgement.

## XI. Chapter 12

- A. Eligibility
- B. Confirmation of Plan
- C. Effect of Confirmation

#### §11.1 Generally

*In re Richard*, Case No. 07-51319 (Bankr. E.D. Mi. 2009) – Specific treatment of particular creditor in confirmed Chapter 12 Plan controls general provisions of same plan to the extent of any inconsistency. Where plan contained general statement that upon confirmation all existing defaults will be cancelled and obligations deemed current but also provided that one specific creditor would be paid according to the loan documents including default interest charges, lender did not violate confirmed plan or automatic stay by continuing to charge interest at the default rate.

- D. Modification of Order Confirming Plan

## §11.2 Grounds Generally

## E. Discharge

## §11.3 Requirements Generally

## §11.4 Time Between Cases

## §11.5 Scope and Effect

## §11.6 Post-Petition Taxes

*U.S. v. Dawes*, 2011 WL 2450930 (10<sup>th</sup> Cir. 2011) – Tax liabilities incurred post-petition are non-dischargeable priority obligations of debtors. Debtor’s post-petition sale of assets produced capital gains on which debtor must pay taxes.

## F. Dismissal

## §11.7 Failure to Prosecute

## §11.8 Unreasonable Delay or Gross Mismanagement of Estate - §1208(c)(1)

## §11.9 Failure to Pay Fees or Charges - §1208(c)(2)

## §11.10 Failure to File Plan - §1208(c)(3)

*Pertuset v. American Savings Bank*, Case no. 10-8024 (6<sup>th</sup> Cir. BAP 2010) – Section 1221 requires a plan to be filed within 90 days of the date of the Order for Relief. Case dismissed where Debtors failed to file plan by deadline and when Debtors did file a “plan” more than 45 days late, the plan failed to comply with any of the requirements of Chapter 12.

## §11.11 Failure to Commence Timely Payments - §1208(c)(4)

## §11.12 Denial of Confirmation - §1208(c)(5)

## §11.13 Material Default of Confirmed Plan - §1208(c)(6)

## §11.14 Revocation of Order of Confirmation - §1208(c)(7)

## §11.15 Termination of Plan - §1208(c)(8)

## §11.16 Continued Loss or Diminution of Estate - §1208(c)(9)

*Pertuset v. American Savings Bank*, Case no. 10-8024 (6<sup>th</sup> Cir. BAP 2010) – Debtor’s plan failed to evidence confirmability where plan hinged on collection of alleged maritime judgment lien. Alleged lien had already been avoided by Bankruptcy Court in Alabama and both the legitimacy and collectability of the lien were highly dubious. Debtor largely earned income from harvesting timber from land owned by third parties. Debtor sold timber on the open market with not guarantees of minimum prices and based on recent sales, Debtor admitted he did not have sufficient income to fund a plan.

## §11.17 Failure to Pay Domestic Support Obligations - §1208(c)(10)

## §11.18 Bar to Refiling

**XII. Chapter 13**

## A. Eligibility

## §12.1 Generally

*In re Executive Business Corporation*, Case No. 08-46714 (Bankr. E.D. Mi. 2008) - Corporation is not eligible for relief under Chapter 13.

## §12.2 Section 109 – Regular Income

*In re Lovell*, 444 BR 367 (Bankr. E.D. Mi. 2011) – Debtor did not have “regular income” where debtor was unemployed and relied entirely on spouse for funds to make plan payments, where debtor’s spouse was also debtor in separate Chapter 13 case. While support from non-filing spouse constitutes regular income as long as history of regularity and stability is provided, debtor’s spouse in Chapter 13 is required to commit 100% of disposable income to funding spouse’s own plan. Therefore, spouse did not have any income that could be given to debtor to fund her chapter 13 plan and debtor lacked “regular income” for purposes of Chapter 13 eligibility.

## §12.3 Section 109 – Debt Limits

*In re Hurtt*, 2011 WL 1576085 (Bankr. E.D. Ky. 2011) – Court should first examine debtor’s schedules to determine eligibility. Review is not limited to Schedule D, and court can consider all schedules as well as summary of schedules. Where schedules showed deficiency balances on secured claims that exceed unsecured debt limits, debtor is not eligible and case must be dismissed. Obligation is not “secured” for purposes of eligibility if the collateral belongs to third party and not to debtor.

*In re Croney*, 2011 WL 1656371 (Bankr. W.D. Wa. 2011) – For purposes of eligibility, debtor’s unconditional personal liability of corporate obligation is liquidated unsecured debt. Unconditional guarantee did not require lender to pursue recovery of collateral or take other collection actions against corporate borrower before pursuing guarantor rendering guarantor liable for full balance of loan. Collateral pledged by corporate borrower did not convert claim into secured claim as to debtor where there was no property of the debtor pledged as collateral.

*In re Schumacher*, Case No. 10-57196 (Bankr. E.D. Mi. 2010) – Undersecured portions of secured claims and wholly undersecured claims are treated as unsecured claims for purposes of Section 109 eligibility. Although lien strip will not be final and effective until plan completion, Section 506 limits value of secured portion of claim to value of property. Any excess obligation is unsecured in determining eligibility.

*In re Perkins*, 2009 WL 2983034 (Bankr. N.D. Ohio 2009) – Eligibility depends on noncontingent, unliquidated unsecured debts “on the date of the filing of the petition.” Chapter 13 eligibility should normally be determined by the debtor’s schedules, checking only to see if the schedules were made in good faith. The schedules (1) are the starting point of the eligibility inquiry, but may also be the ending point under certain circumstances; (2) the word “normally” used with respect to reliance on schedules implies exceptions for the proper application of a court’s discretion so long as the determination focuses on determining debts “on the date of filing,” and (3) eligibility determination should not depend on the claims allowance process or turn into separate satellite litigation that dominates and delays the Chapter 13 proceedings. The Court must make an independent determination apart from Debtor’s schedules whether debts are contingent and unliquidated, particularly where Debtor’s schedules list every debt as contingent and unliquidated. Secured debt is treated as unsecured to the extent the claims exceed the collateral value. Claims based on mortgages and consensual secured lending arrangements are not contingent or unliquidated. Debtor’s personal liability for corporate debts will be contingent if there is no personal guarantee and no pre-filing determination of personal liability. However, personal liability premised on a personal guarantee is not contingent. Personal credit card debt is not contingent or unliquidated just because items were purchased for Debtor’s business. Debtor’s unsecured debt exceeded limits of Section 109 requiring dismissal of Debtor’s Chapter 13 Petition.



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

## B. Confirmation of Plan

### §12.4 Requirements for Confirmation Generally

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

*In re Peckens-Schmidt*, 2010 WL 2851520 (Bankr. W.D. Mi. 2010) – Court cannot confirm plan that does not comply, in all respects, with requirements of Code and Rules. Court would not confirm Plan that proposed to strip unsecured second mortgage without adversary proceeding under Rule 7001. Court would not ignore Congress's decision to require an adversary proceeding as a prerequisite to avoiding or invalidating liens or other interests in property, simply because it is expedient or because the creditor has not objected or filed a proof of claim. Bankruptcy courts are not licensed to disregard the Federal Rules of Bankruptcy Procedure or to turn a blind eye to the procedural shortcuts. Plan failed to comport with the United States Bankruptcy Code and the Bankruptcy Rules and could not be confirmed even absent objection from affected creditor or the Chapter 13 Trustee.

### §12.5 Projected Disposable Income – Non-Filing Spouse

*In re Stampley*, 2010 WL 4235317 (Bankr. E.D. Mi. 2010) – Where married debtor files individually, court calculates disposable income on debtor's family budget including income and expenses of non-debtor spouse. Failure to do so would leave debtor's unsecured creditors to subsidize spouse's expenses. Household expenses should be allocated between debtor and spouse based on proportionate income. Debtor who earned 66% of the household income would be allocated 66% of household expenses plus any sole expenses such as car payment and car insurance for debtor's car. Those expenses are then deducted from debtor's income to determine plan payment. Although Debtor's Schedule J indicated total disposable income of only \$165, allocation of expenses produced excess income of debtor of \$802 which would produce 100% dividend to unsecured creditors. Permitting debtor to allocate more than her proportionate share of income to the household expenses would unfairly prejudice debtor's creditors and would amount to a “gift” by debtor to her non-filing spouse.

### §12.6 Projected Disposable Income – Social Security 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 Mains*, 2011 WL 2160890 (Bankr. W.D. Mi. 2011) – Debtor who receives Social Security Income is required to include that income in determining projected disposable income under Section 1325(b). Exclusion of Social Security from calculation of CMI does not remove that income from consideration of Debtor's good faith and must be considered with the rest of Debtor's circumstances to determine if Debtor sincerely intends to repay creditors.

*Baud v. Carroll*, 2011 WL 338001 (6<sup>th</sup> 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 Herrmann*, 2011 WL 576753 (Bankr. D.S.C. 2011) - Above-median-income debtor's failure to list his ongoing receipt of Social Security income in Schedule I resulted in Debtor's plan lacking good faith. Debtor contended that social security income is not subject in any way to the bankruptcy case, does not have to be disclosed, and can be applied or used by the debtor for any purpose, including savings or luxury items, without implication of the good faith or confirmation standards. Court stated that Section 521(a)(1)(B) requires a debtor to file a schedule of current income without limitation or exclusion. Although Section 101(10A) excludes Social Security income for purposes of calculating "disposable income", no exclusion for social security income is provided in § 521(a)(1)(B). Means test does not override Section 521(a)(1)(B) requirement to report current income and current expenses. Debtor's failure to include Social Security income on Schedule I would result in the spouse assuming a disproportionate share of the household expenses, by allowing one spouse to effectively shield income from the payment of those expenses and forcing the other spouse to absorb those expenses. Section 521 and good faith require the disclosure of all income, including Social Security income, on Schedule I.

*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 U.S.C. § 407 are two separate federal statutes, each more specific than § 1325(a)(3) with respect to SSI benefits. Section 1325(a)(3) does not include reference § 407 which § 407(b) requires in order to limit or otherwise modify § 407(a)'s prohibition against the operation of any bankruptcy law against SSI. Trustee's good faith objection on the basis of SSI cannot be sustained without running afoul of 42 U.S.C. § 407(a). Good faith under Section 1325(a)(3) does not compel a debtor to include Social Security income on Schedule I.

*In re Thompson*, 2010 WL 3583400 (8<sup>th</sup> Cir. BAP 2010) - Trustee's objection based on good faith overruled. Debtor received, but did not schedule, Social Security income. Forcing a debtor to include Social Security income would permit Section 1325(a)(3)'s general concept of "good faith" to control and "render meaningless" Section 1325(b)'s calculation of "ability to pay".

#### §12.7 Projected Disposable Income – Railroad Retirement Act

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

#### §12.8 Projected Disposable Income – "Reasonably Necessary" Expenses

*In re VanDyne*, 2011 WL 3664551 (Bankr. N.D. Ohio 2011) – Although IRS Standards are not dispositive, they do provide evidence of reasonableness. Debtor failed to produce evidence that expenditures for items such as food (\$700); clothing (\$100); "husband's bills" (\$562); recreation (\$150); and cigarettes (\$300); which produced a total expense for these items that exceeded IRS standards, was reasonable and would be disallowed to the extent beyond IRS standard. Utility expense disallowed to extent in excess of IRS standard where debtor did not provide any evidence of reasonableness of higher amount. Transportation expense of \$650 reasonable where debtor and non-filing spouse had daily commutes that totaled over 300 miles per day.

*Dow Chemical Employees Credit Union v. Collins*, 2011 WL 2746210 (E.D. Mi. 2011) –Chapter 13 debtor does not have unbridled discretion to carve out for himself and his family whatever lifestyle he may choose, but must instead undergo a degree of belt-tightening. An unreasonably large amount devoted to discretionary expenses is not allowed under the Bankruptcy Code in determining "disposable income." Bankruptcy courts are regularly confronted with deciding whether or not a debtor's expenses are excessive or unreasonable and generally bankruptcy courts are not to substitute their values for those of the debtor. A court should question a debtor's judgment when: (1) the debtor proposes to use income for luxury goods or services; (2) the debtor proposes to commit a clearly excessive amount to non-luxury goods or services; (3) the debtor proposes to retain a clearly excessive amount of income for discretionary purposes; (4) the debtor proposes expenditures that would not be made but for a desire to avoid payments to unsecured creditors; and (5) the debtor's proposed expenditures as a whole appear to be deliberately inflated and unreasonable. Married debtor with non-filing spouse and three children that included \$300 per month for recreation and \$300 per month for non-filing spouse's cigarettes where budget overall was not extravagant or luxurious.

*In re Joest*, 2011 WL 1043559 (Bankr. N.D.N.Y. 2011) – For above median debtor, reasonably necessary expenses are controlled solely by Section 707(b)(2) without regard to separate inquiry as to the reasonable necessity of a specific expense under Section 1325(b)(2). Debtor, a single woman, sought to deduct the ownership expense for debtor's two financed automobiles. Trustee argued that it was not "reasonably necessary" for a single debtor to retain two financed automobiles. Court stated that Section 707(b) deduction for automobile ownership expense was not tied to household size, but was limited only to two automobiles on which debtor was making payments. "Plain meaning" of 1325(b) and 707(b) allows for two ownership expense deductions as long as debtor has actual payments on two vehicles, without regard to whether it was reasonably necessary for debtor to retain both vehicles.

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

*In re Cash*, Case No. 10-58607 (Bankr. E.D. Mi. 2011) – Debtor's Plan failed to commit 100% of debtor's disposable income where debtor proposed to retain and pay \$450 per month vehicle payment for car driven by 19 year old grandson while plan proposed 60 month term yielding no dividend to unsecured creditors. Disposable income is income received by the debtor which is not reasonably necessary for maintenance of

debtor or a dependent of debtor. Unsecured creditors are not required to bear burden of debtor's moral obligation to provide college education for children or grandchildren. Further, evidence did not indicate that grandson was actually a dependent of debtor, and at most grandson was only "partially" dependent on debtor. Confirmation denied.

*In re Lofty*, 437 BR 578 (Bankr. S.D. Ohio 2010) – Section 1325 permits debtor to deduct expenses reasonably necessary for support of debtor or a dependent of debtor. Payment of mortgage, insurance and expenses for home owned by debtors but occupied by debtor's adult son and grandson are not reasonably necessary expenses where property does not produce any income. Debtors' efforts to assist son are "noble" but neither son nor grandson are dependents of debtors. "Dependent" requires more than a moral obligation for support. Party will be "dependent" only where there is some legal obligation for support. Debtors did not schedule son and grandson on Schedule I as dependents and Debtors did not claim son and grandson on Tax Returns as dependents.

#### §12.9 Modification of Mortgage on Principal Residence

*Flickinger v. Americhoice Fed. Credit Union*, 2010 WL 4923933 (Bankr. M.D. Pa. 2010) - Existence of co-obligors did not forfeit protection from modification in § 1322(b)(2). Co-obligors did not grant security interest in collateral. Debtors failed to demonstrate that U.C.C.-1 filings executed prior to security interest in residence were related to mortgage note. Questions of fact about U.C.C. filings prevented judgment as matter of law.

*In re Lopez*, 2010 WL 4875884 (Bankr. N.D. Cal. 2010) Security interest that included all easements, appurtenances, and fixtures, now or hereafter part of the property did not forfeit protection from modification in § 1322(b)(2). Additional collateral was of little or no independent value.

*Shirk v. JPMorgan Chase Bank, N.A.*, \_\_\_\_\_ (Bankr. S.D. Ohio 2010) – Antimodification provision of Chapter 13, which prevents debtor from modifying rights of creditor whose claim is secured solely by interest in real property that is debtor's principal residence, is applicable to mortgage loans secured by interest in debtor's principal residence irrespective of whether holder of that secured claim when Chapter 13 petition is filed originated the loan or acquired it through assignment; key to applicability of provision is whether claimant holds a security interest in debtor's principal residence, and nature of transaction by which claimant acquired this security interest is irrelevant. 11 U.S.C.A. § 1322(b)(2).

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

cured as of the date of the trustee's motion: and, upon discharge, the claimholder shall treat the mortgage as fully reinstated according to its original terms and fully current as of the date of the trustee's notice. Plan provision requiring notice of post-petition fees and expenses and payment changes is a permissible procedural mechanism to assist in the administration of the Case and is not an impermissible mortgage modification. A plan provision requiring mortgage creditors to distinguish and apply payments on prepetition arrearages and on ongoing continuing mortgage payments does not improperly modify mortgage creditors' rights; such a plan requirement simply restates the statutory scheme for curing mortgage arrears. Plan does not impermissibly modify the mortgage and complies with Section 1325. Plan confirmed.

#### §12.10 Modification of Mortgage on Property Other Than Principal Residence

*Pawtucket Credit Union v. Picchi*, 448 BR 870 (1<sup>st</sup> Cir. BAP 2011) – Anti-modification provision of Section 1322(b)(2) does not prevent modification of mortgage on duplex even where debtor occupied one side of the property. Anti-modification provision applies only when the collateral is exclusively debtor's principal residence, not when the property merely includes the debtor's principal residence.

*In re Starks*, 2011 WL 248521 (Bankr. E.D. Ky. 2011) – Mobile home that had active certificate of motor vehicle title and had not been affixed to real estate constituted personal property on which the secured claim would be modified.

*In re Colbourne*, Case No. 10-983 (Bankr. M.D. Fl. 2010) - Debtor's Motion to Value Secured Claims in Chapter 13 denied where Debtor had previously obtained discharge in Chapter 7 and was not eligible for discharge in Chapter 13. Claims secured by non-residential real property and motor vehicle could not be permanently modified absent a discharge, as any modification would not have any binding effect following the conclusion of the Chapter 13 Plan.

#### §12.11 "Cure and Reinstate"

*Deutsche Bank v. Tucker*, 621 F.3d 460 (6th Cir. 2010) - Section 1322(e) allows debtor to cure defaults determined in accordance with the underlying agreement and applicable non-bankruptcy law. "Default" includes all fees and costs allowed under the parties' agreement even when the claim is otherwise undersecured.

#### §12.12 Secured Claims Generally

*In re Cashman*, 2011 WL 1565189 (Bankr. D. Hawaii 2011) – Claim against automobiles in which debtors had interest jointly with parents is secured claim even though debtors are not personally obligated on the notes. Auto loans are secured by debtor's interest in the automobiles and that interest becomes property of the estate. Chapter 13 Plan can treat secured debts even where debtors have no personal liability on the claim.

*In re Mullins*, 2011 WL 1791090 (Bankr. S.D. Ohio 2011) – The doctrine of collateral estoppel applies in Ohio when a fact or issue (1) was actually and directly litigated in the prior action; (2) was passed upon and determined by a court of competent jurisdiction; and (3) when the party against whom collateral estoppel is asserted was a party to the prior action. State Court Judgment foreclosing judicial lien and decreeing that all other liens are extinguished collaterally estopped mortgage creditor from asserting secured status in Chapter 13 proceeding. Debtor's Plan failed to comply with Section 1325(a)(5) where plan purported to treat judicial lien creditor as unsecured claim.

*Bank of the Prairie v. Picht*, 428 B.R. 885 (10<sup>th</sup> Cir. BAP 2010) – Debtors with no personal liability on mortgage as a result of prior Chapter 7 could not discharge mortgage by paying only value of property as of the date of the petition, where that value was far less than the balance owed. Lack of personal liability does not alter amount of claim, and Section 1325(a)(5) requires payment of the full amount determined under applicable non-bankruptcy law. Debtors could not bifurcate claim into "secured" portion and unsecured portion pursuant to Section 506 and pay only the secured portion, as Section 1325 refers to amounts due



under applicable non-bankruptcy law preventing use of Section 506 to bifurcate and reduce amount of secured claim.

#### §12.13 Secured Claims – Interest Rate

*In re Dimery*, 2011 WL 2470057 (Bankr. N.D. Ohio 2011) – “Formula approach” adopted by Supreme Court plurality in *Till* requires court to use national prime plus appropriate “risk” factor. Sixth Circuit has indicated at least in dicta that Courts should use *Till* formula. Court used prime of 3.25% plus 2% “risk” adjustment.

*First United Sec. Bank v. Garner*, 2011 WL 93763 (M.D. Ala. 2011) - Oversecured creditor was entitled to contract rate of interest until confirmation, then prime-plus rate established by *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (May 17, 2004). Section 1325(a)(5)(B)(ii) is more specific than § 506(b) and fixes cutoff date for accrual of contract interest at effective date of plan.

*In re Blanton*, 2010 WL 4503188 (Bankr. N.D. Ohio 2010) – Section 1325(a)(5) requires secured creditors to receive interest to account for the time value of money. “Formula approach” adopted by Supreme Court plurality in *Till* requires court to use national prime plus appropriate “risk” factor. Sixth Circuit has indicated at least in dicta that Courts should use *Till* formula. Court rejected both the contract rate approach and the “prime with no risk adjustment” approach. Interest rate must be based on prime rate plus adjustment for risk, which normally will be 1% - 3%. Interest rate fixed at 5.25% representing prime of 3.5% plus 1.75% for risk, which falls near middle of risk range. Creditor produced no evidence that circumstances of case were exceptional or that deviation from formula was appropriate.

#### §12.14 “Catch All” Provision in Hanging Paragraph

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

#### §12.15 910 Car Claims

*In re Howard*, 597 F.3d 852 (7th Cir. 2010) - Car finance company had purchase money security interest in full amount of claim, including negative equity from trade in.

*In re Dale*, 528 F.3d 568 (5<sup>th</sup> Cir. 2009) – Financing of negative equity does not defeat status of security interest as “purchase money”. Purchase money includes the price paid and all value given to enable the debtor to acquire the vehicle. Negative equity, gap insurance and extended warranties are properly considered expenses incurred by the creditor in connection with the purchaser’s acquisition of an interest in the vehicle.

*AmeriCredit Financial Services v. Penrod*, 636 F.3d 1175 (9<sup>th</sup> Cir. 2010), *cert denied*. – Negative equity included in car loan is not part of the purchase money financing for purposes of the hanging paragraph. The payment of Debtor’s remaining debt on her 1999 Ford Explorer is the payment of an antecedent debt, not an expense incurred in buying the new vehicle. Negative equity on Debtor’s Ford Explorer was not sufficiently connected to the purchase of the Ford Taurus to establish a purchase-money security interest. A seller or lender can obtain a purchase money security interest only for new value, and closely related costs. Old value simply does not fit within that rubric. Negative equity charges related to Penrod’s 1999 Ford Explorer would not qualify as new value under 11 U.S.C. § 547(a)(2). Broad language is employed to encompass third party financing, not to expand the scope of purchase money security interests.

*In re Allen*, Case No. 09-13560 (Bankr. M.D. Tn. 2010) – New loan obtained by Debtor to “roll up” three pre-existing automobile loans into a single loan transaction destroyed loan’s status as “purchase money security interest” removing loan from scope of “hanging paragraph”. Consolidation loan did not make it possible to obtain a vehicle or other personal property as the Debtor already owned those assets. The fact that the loans that were re-financed and “rolled up” were themselves purchase money security interests did not convert refinance transaction into purchase money loan.

*Nouvelle Credit Corp. v. Westfall*, 599 F.3d 498 (6<sup>th</sup> Cir. 2010) – Negative equity rolled into financing does not destroy “purchase money security interest” for purposes of the “hanging paragraph”. Uniform Commercial Code defines “purchase money security interest” as all consideration paid for the acquisition of the car and is not limited to new or additional value. Financing will be “purchase money” if the underlying obligation (1) was all or part of the price of the collateral; and (2) value given to enable the debtor to acquire rights in or the use of the collateral.

*Shaw v. Aurgroup Financial Credit Union*, 552 F.3d 447 (6<sup>th</sup> Cir. 2009) – Chapter 13 plan improperly attempted to bifurcate purchase money claim of creditor that had provided financing within 910 days prior to commencement of Chapter 13 case to allow Debtor to purchase a motor vehicle. So-called “hanging paragraph” requires that purchase money security interest secured by a motor vehicle purchased within 910 days of the filing of the case must be treated as entirely secured and either paid in full with interest or Debtor must surrender the property, unless the creditor accepts contrary treatment, either expressly or by a failure to object.

*In re Thompson*, 2009 WL 1758757 (Bankr. N.D. Ohio 2009) – “Hanging paragraph” applies only to purchase money security interests whether collateral consists of automobile or “other thing of value”. Motor vehicle cannot be “other thing of value” for purposes of avoiding restriction that vehicle has been purchased for personal use of Debtor. Debtor’s plan that “crammed down” car secured by non-purchase money security interest confirmed.

*In re Tyson*, Case No. 09-01179 (Bankr. W.D. Mi. 2009). Financing of the negative equity did not destroy the purchase money security interest and that as a result, the claim could not be bifurcated into secured and unsecured portions. The hanging paragraph requires, “a purchase money security interest securing the debt that is the subject matter of the claim.” While most courts focus on the definition of purchase money security interest, this Court focused on the term “debt”. The “debt” is the right to receive payment on account of the contract, which includes the negative equity, and this “debt” is secured by a purchase money security interest in the vehicle. Accordingly, the claim could not be bifurcated.

*In re Hingiss*, 2010 WL 4941622 (Bankr. E.D. Wi. 2010) – Court can use equitable tolling to prevent circumvention of 910 Claim based on prior bankruptcy filing. Debtor filed a Chapter 13 case within 910 days of acquiring the vehicle. Debtor confirmed a plan that treated the claim as fully secured and provided for full payment of the claim. Court dismissed the case 9 days after confirmation on a Trustee Affidavit of Default. Three months later, Debtor filed another Chapter 13. This second case was filed beyond 910 days and the debtor sought to cram down the car. The Court found that the debtor had not acted in bad faith in the dismissal – the debtor lost his job right after confirmation and it took a couple months to find a new one. Equitable tolling extends the statute of limitations period where it is equitable to do so on a case-by-case basis. Equitable tolling does not assume any blameworthy conduct by the defendant. The 910 day lookback would be extended by the number of days that passed in the prior Chapter 13 case, resulting in the claim being non-modifiable under the infamous “hanging paragraph”.

#### §12.16 Surrender in Full Satisfaction

*In re Menden*, 2011 WL 4433621 (Bankr. N.D. Ohio 2011) – Creditor received constitutionally sufficient notice of Debtor’s Amended Chapter 13 Plan that provided for surrender of automobile in full satisfaction of debt. Service on Creditor at one of two notice addresses and electronic service on Creditor’s attorney who had filed a Notice of Appearance was sufficient to comply with Rule 2002. Even if service had not complied with Rule 2002, service on Creditor’s attorney was reasonably calculated, under all the circumstances, to apprise Creditor that its rights may be altered and to advise Creditor of opportunity to object. Confirmation of Plan was *res judicata* on surrender in full satisfaction. Creditor’s unsecured deficiency claim would be disallowed. However, Creditor would not be required to refund payments received from the Chapter 13 Trustee prior to the date on which the Proof of Claim was disallowed where Debtor waited almost three years after Trustee began distributions to file objection to claim.

*AmeriCredit Financial Services, Inc. v. Tompkins*, 604 F.3d 753 (2<sup>d</sup> Cir. 2010). Creditor could maintain unsecured claim for deficiency not satisfied by surrender and sale of “910 vehicle”.

*In re Long*, 519 F.3d 88 (6<sup>th</sup> Cir. 2009) - “Hanging paragraph” added to section 1325(a)(5) does not preclude a creditor from asserting a deficiency claim when the Debtor surrenders a vehicle purchased within 910 days of the filing of bankruptcy. The amendment of section 1325 did not change the applicability of section 506 where the vehicle is being surrendered.

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

*In re Finley*, 2009 WL 2185547 (Bankr. E.D. Mi. 2009) – Debtor cannot surrender real property that is not the Debtor’s principal residence in full satisfaction of a mortgagee’s claim. A secured creditor retains the right bifurcate the claim in to collect any deficiency is a general unsecured claim pursuant to section 506(a) when the collateral is rendered pursuant to section 1325(a)(5)(C). The power to “modify” pursuant to section 1322(b)(2) does not equate to “surrender in full satisfaction”.

*Wright v. Santander Consumer USA Inc.*, 2007 WL 1892502 (7<sup>th</sup> Cir. 2007) - Collateral cannot be surrendered in full satisfaction of the debt. Article 9 of the Uniform Commercial Code plus the law of contracts entitle the creditor to an unsecured deficiency judgment after surrender of the collateral that must be treated the same as other unsecured debts under the Chapter 13 plan.

*In re Osborn*, 07-1726, (8<sup>th</sup> Cir. 2008) - Creditor is allowed an unsecured deficiency claim after surrender of collateral. Section 1325(a)(5) does not require that the ‘allowed secured claim’ be satisfied by the surrender option in subparagraph (C). Upon surrender, the parties are left to their state-law rights including creditor’s right to a deficiency balance and nothing in the bankruptcy codes disallows such a claim.

*DaimlerChrysler Financial Services, LLC, v. Ballard*, Case No. 07-5109 and 07-5112, (10<sup>th</sup> Cir. May 2008) - Vehicle cannot be surrendered in full satisfaction of the claim. The hanging paragraph does not abrogate a creditor’s right to assert a deficiency claim authorized by state law. Section 1325(a)(5)(C) simply provides for the surrender of the collateral and there is no valuation component to the surrender option as there is for in Section 1325(a)(5)(B).

*Tidewater Finance Company v. Kenney*, Case No. 07-1664, (4<sup>th</sup> Cir. June 2008) – Vehicle cannot be surrendered in full satisfaction of the debt. Growing number of circuit courts recognize the creditor retains right to assert an unsecured claim pursuant to state law. Once the debtor surrenders the collateral the court held the parties are left to their contractual rights according to state law. Section 502 directs bankruptcy courts to allow claims stemming from contractual debts and neither diminishes nor disapproves of secured claims, deficiency claims must be permitted to the extent that state law allows for them.

#### §12.17 Applicable Commitment Period

*Baud v. Carroll*, 2011 WL 338001 (6<sup>th</sup> Cir. 2011) – Section 1325(b) ties “applicable commitment period” to Current Monthly Income and not calculation of “disposable income”. Debtor who has Annualized Current Monthly Income in excess of applicable median income has an Applicable Commitment Period of 60 months regardless of whether calculated “disposable income” is positive, zero or negative.

*In re Tennyson*, 611 F.3d 873 (11<sup>th</sup> Cir. 2010) - Applicable commitment period is temporal, establishing the minimum length of the plan, and not merely a multiplier. Above median debtor must propose 60-month plan unless paying 100% dividend. Linking “applicable commitment period” to “disposable income” would leave “applicable commitment period” an indeterminate term in light of *Lanning* approach that “projected disposable income” can vary based on multitude of factors. In order for “applicable commitment

period" to have any definite meaning, its definition must be that of a temporal term derived from Section 1325(b)(4) and independent of Section 1325(b)(1).

*Yoshikawa v. Carroll*, Case No. 10-11701 (E.D. Mi. 2011) – Citing Sixth Circuit Decision in *Baud*, Debtor with above median CMI has 60 month Applicable Commitment Period regardless of positive or negative disposable income.

*In re Wolkens*, Case No. 10-40184 (Bankr. E.D. Mi. 2010) – Above Median Income Debtor with no disposable income does not have an applicable commitment period and so can confirm plan that runs less than 60 months without paying all claims in full, relying on District Court opinion in *In re Baud*, 415 BR 291 (Bankr. E.D. Mi. 2010).

*Whaley v. Tennyson*, 2010 WL 2793941 (11<sup>th</sup> Cir. 2010) – Above median income debtor must be in plan for minimum of five years. “Plain language” of statute indicates that Applicable Commitment modifies “period” which is a measure or duration of time. Applicable Commitment Period as measure of time does not render Section 1322(d) limit useless as 1325(b) sets a minimum period at 5 years unless all unsecured claims are paid in full in a shorter time, while Section 1322(d) sets only a maximum length. To read applicable commitment period as temporal only would render 1325(b)(4)(B) superfluous. Although *Lanning* does not directly address issue, *Lanning* does state that Section 1325 formula does not exist in a vacuum. Applicable Commitment Period must have an existence independent of 1325(b) calculation of disposable income; otherwise, applicable commitment period would not have a fixed or definable meaning. Congressional intent also indicates that Applicable Commitment Period is temporal, as Congress intended to require debtors to repay creditors the maximum amount they can afford.

*In re Compann*, 2010 WL 4008311 (Bankr. N.D. Ga. 2010) – Applicable Commitment Period is determined by Current Monthly Income as defined in Section 101(10A). Debtor who has CMI above the applicable median has a 60 month ACP regardless of amount of “disposable income” as calculated on Means Test form. Self-employed debtor must calculate CMI using gross income, which will then determine ACP and plan length. Debtor is permitted to deduct business expenses only after CMI is determined to calculate Disposable Income.

*In re Weigand*, 386 BR 238 (9<sup>th</sup> Cir. 2008) – Chapter 13 debtor engaged in business may not deduct ordinary and necessary business expenses from gross receipts for the purpose of calculating CMI. Business expenses are to be subtracted from CMI when calculating “disposable income.” Debtor with Current Monthly Income above median has 60 month Applicable Commitment Period.

*In re Carpenter*, 2009 WL 1636246 (Bankr. E.D. Tn. 2009) - For above-median Debtor, “applicable commitment period” is temporal and not monetary or mathematical. Above median Debtor must be in plan for full 60 months unless plan proposes 100% dividend to creditors in shorter time. “Applicable Commitment Period” is not just part of mathematical equation. Fact that Debtor could pay to unsecured creditors an amount equal to 60 times calculated “disposable income” does not excuse requirement that Debtor commit all projected disposable income over 60 month plan term. Phrase “applicable commitment period” is composed of terminology that is not defined in the Code. Dictionary definitions of “Applicable” (defined as “fit or suitable for its purpose; appropriate”); “commitment” (defined as “the committing of oneself to a particular course of conduct”); and “period” (defined as “a length of time”) lead to conclusion that “applicable commitment period,” is the length of Debtor’s Chapter 13 Plan.

*Baud v. Carroll*, 2009 WL 2876899 (E.D. Mi. 2009) reversed *Baud v. Carroll*, 2011 WL 338001 (6<sup>th</sup> Cir. 2011) – Section 1325(b) ties “applicable commitment period” to Current Monthly Income and not calculation of “disposable income”. Debtor who has Annualized Current Monthly Income in excess of applicable median income has an Applicable Commitment Period of 60 months regardless of whether calculated “disposable income” is positive, zero or negative.

*Hildebrand v. Petro*, 2008 Fed. App. 0015P (6<sup>th</sup> Cir. BAP 2008) – “Projected Disposable Income” is not based on a mechanical application of the provisions of Sections 1325(b)(1) and (2). Section 1325(b)(2) defines “disposable income” as “current monthly income” less specific expenses enumerated in Section

707(b)(2)(A) and (B). “Disposable income” is a backward looking determination based on the six months preceding the commencement of the bankruptcy case. “Projected” disposable income requires an examination of future events and factors likely to be in operation through the projection period. Section 1325(b)(1) requires an analysis of projected disposable income “as of the effective date of the plan”. Therefore, the inquiry must focus on the reality of the Debtor’s income and expenses as a confirmation as disclosed on Debtor’s Schedules I and J. Although Debtors “disposable income” calculation resulted in negative income, Schedules I and J indicated that Debtors had total monthly net income of \$1386.33. Section 1325(b)(1) would require Debtor to make monthly payments in the amount of \$1386.33 in order to pay 100% of Debtor’s “projected disposable income”.

*In re Dotson*, 2009 WL 11586554 (Bankr. N.D. Ohio 2009) – “Applicable commitment period” is a measure of time and not a multiplier or element in mathematical formula. Applicable Commitment Period for debtor with Current Monthly Income above the applicable median income Debtor is 60 months. Therefore, Plan must either provide a term of 60 months or must pay not less than 100% to all creditors in a shorter time. Plan which proposed 36 month term with no dividend to unsecured creditor failed to comply with Section 1325 and could not be confirmed.

#### §12.18 Disposable Income Distinguished From Projected Disposable Income

*In re Aldridge*, 2011 WL 3889246 (Bankr. W.D. Ohio 2011) – Projected Disposable Income is calculated based on Means Test and Form B22C. Where debtors could not dispute math in calculations and could not point to any “known or virtually certain” changes sufficient to overcome statutory presumption of disposable income, debtors required to pay Disposable Income as calculated in B22C to unsecured creditors. Where debtors indicated that the “simply cannot pay” that amount into the plan, confirmation denied and case dismissed as any attempt to amend the plan would be futile.

*Baud v. Carroll*, Case No. 09-10673 (E.D. Mi. 2009) – Debtors with above median income but who have no “disposable income” as calculated pursuant to section 1325 are not required to be in a 60 month Chapter 13 plan. Because the Debtors have no “projected disposable income” as calculated on the Form B22C, the “applicable commitment period” requirement “does not come into play”. “Projected disposable income” is determined using a “formulaic approach” for above median Debtors. Projected disposable income is based on “current monthly income” as defined in section 101(10A) less “amounts reasonably necessary to be expended” as determined in accordance with section 707(b)(2)(A) and (B), to create “presumptive” projected disposable income. Thus, Debtors whose calculation of Monthly Disposable Income using the form B22C produced a negative number presumptively did not have “projected disposable income” merely because Schedule I exceeded Schedule J by \$400 per month. Burden is then upon objecting party to rebut presumption that Debtor’s “disposable income” as shown on form B22C does not reflect Debtor’s true “projected disposable income”. Positive net income shown on Schedules I and J is not sufficient to rebut presumption of form B22C’s accuracy, absent additional evidence demonstrating that Debtor’s pre-bankruptcy average income and expenses have improved recently in any material aspect. The fact that Debtor’s Schedules I and J indicate that Debtor has ability to pay more of their unsecured debts does not overcome the fixed formulas for identifying Debtors who can afford to repay their debts as “very clearly” established by Congress. As presumption of negative disposable income was not rebutted, Debtors were not subject to minimum “applicable commitment” and could confirm a plan which proposed only a 36 month plan term notwithstanding status of Debtors as “above median income” Debtors.

*Hildebrand v. Thomas*, 395 BR 914 (6<sup>th</sup> Cir. BAP 2008) – The calculation of “disposable income” under Section 707 does not control the calculation of “projected disposable income” for purposes of section 1325(b)(1)(B). “Projected disposable income” is forward-looking and must be based on anticipated income over the life of the plan. “Projected disposable income” under Section 1325(b)(1)(B) will match “disposable income” under Section 1325(b)(2) if the Debtor’s income and expenses remained consistent from a date six months prior to filing through the effective date of the plan. However, where Debtor’s income or expenses have changed, the amount available for unsecured creditors from “projected disposable income” may be more or less than that reflected as “Monthly Disposable Income” on the form B22C. Thus, Debtor’s intention to surrender collateral in a Chapter 13 will not affect the calculation of “disposable income” but will affect the calculation of “projected disposable income” as that will no longer include a



deduction for the secured claim which Debtor intends to surrender, even though the Debtor was able to take that deduction under the means test. Court cannot confirm a plan that fails to contribute 100% Debtor's "projected disposable income".

*In re Petro*, 395 BR 369 (6<sup>th</sup> Cir. BAP 2008) - The calculation of "disposable income" under Section 707 does not control the calculation of "projected disposable income" for purposes of section 1325(b)(1)(B). "Projected disposable income" is forward-looking and must be based on anticipated income over the life of the plan. "Projected disposable income" under Section 1325(b)(1)(B) will match "disposable income" under Section 1325(b)(2) if the Debtor's income and expenses remained consistent from a date six months prior to filing through the effective date of the plan. However, where Debtor's income or expenses have changed, the amount available for unsecured creditors from "projected disposable income" may be more or less than that reflected as "Monthly Disposable Income" on the form B22C. Thus, Debtor's intention to surrender collateral in a Chapter 13 will not affect the calculation of "disposable income" but will affect the calculation of "projected disposable income" as that will no longer include a deduction for the secured claim which Debtor intends to surrender, even though the Debtor was able to take that deduction under the means test. Court cannot confirm a plan that fails to contribute 100% Debtor's "projected disposable income".

*In re Dotson*, 2009 WL 11586554 (Bankr. N.D. Ohio 2009) – "Projected disposable income" is not synonymous with "disposable income". "Projected disposable income" is based on Debtor's Schedule I and Schedule J. Although Debtor's Means Test indicated that Debtor had negative disposable income, Debtor's Schedules I and J indicated that Debtor had "monthly net income" of \$350.00. Debtor's Chapter 13 Plan failed to commit 100% of Debtor's "projected disposable income" could not be confirmed over objection of the Chapter 13 Trustee or unsecured creditors.

#### §12.19 Tax Refunds as Disposable Income

*In re Barbutes*, 2010 WL 3522420 (Bankr. E.D. Mi. 2010) – Debtor's future tax refunds are generally considered "disposable income" that must be contributed to the plan funding. Debtor's testimony that debtors "tried not to owe" at tax time and lack of any proof that future refunds were needed for the "maintenance or support" of the debtors rendered tax refunds disposable income. Plan that failed to commit 100% of future tax refunds could not be confirmed.

#### §12.20 Ambiguous Provisions

*In re Robbins*, 426 B.R. 265 (Bankr. W.D. Mich. 2010) - Proposed Chapter 13 Plan was neither clear nor feasible, warranting denial of confirmation without prejudice to amendment. On one hand, the Plan provided that all unsecured creditors will receive a 100% dividend, but on the other hand, it also provided that Sallie Mae will receive a *pro rata* distribution with other unsecured creditors *and* payments after the Plan's repayment period ends. The notion that Sallie Mae's payment rights will continue is inconsistent with the proposition that all unsecured creditors (of whom Sallie Mae is the largest) will receive a 100% dividend. If the Plan's dividend were truly *pro rata*, Sallie Mae would receive about 96 percent of each month's plan payment, and the other unsecured creditors would receive roughly 4 percent, which results in other unsecured creditors receiving far less than the 100% dividend the Debtor's Plan promises.

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

#### §12.21 Retirement Contributions

*Burden v. Seafort*, 437 BR 204 (6<sup>th</sup> Cir. BAP 2010) - Debtor who pays off 401-k loan during pendency of case, amount of loan payment becomes additional disposable income that must be contributed to the plan. Debtor who was not contributing to a 401-k or other retirement plan prior to commencement of case is not

permitted to commence those contributions post-petition for purposes of determining disposable income. However, debtor who was making contributions prior to commencement of the case would be permitted to continue to do so and to deduct the amounts of those contributions in determining disposable income.

*In re Smith*, 2010 WL 2400065 (Bankr. N.D. Ohio 2010) – In determining disposable income for purposes of Chapter 13, debtor’s contributions to voluntary retirement plan are excluded. Prior to the enactment of the Bankruptcy Abuse and Consumer Protection Act of 2005 (“BAPCPA”), most courts took a dim view of 401(k) contributions. Courts reasoned that such contributions compromised the tradeoff of temporary maximum repayment for permanent debt relief on which chapter 13 is premised. BAPCPA added section 541(b)(7), which excludes from property of the estate any amount withheld by an employer from the wages of employees for payment as contributions to an employee benefit plan that is subject to title I of the Employee Income Security Act of 1974 except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2). Debtors’ contributions to 401(k) plans are excluded from the debtors’ disposable income. However, debtor’s “eve of bankruptcy” decision to commence or increase the amount of the contribution can still be considered in determining debtor’s good faith or lack of good faith. Good-faith serves as a backstop against debtors who attempt to exploit Code provisions at the expense of bankruptcy policies including fairness to unsecured creditors. Further, section 541 limits reference to section 1325(b)(2) and does not exclude retirement contributions in determining good faith under section 1325(a)(3). Relevant factors include whether the debtor increased his contribution on the eve of bankruptcy, the amount of any such increase, the financial planning justification for any such increase, and the amount of the debtor’s 401(k) contributions relative to the distribution to unsecured creditors. Such considerations prevent the good faith argument from becoming the last refuge of scoundrels for rogue creditors wishing to object to everything. Debtors’ plan is proposed in bad faith where debtor increased his 401(k) contribution by five times on the eve of filing bankruptcy to a level far beyond what was typical for him; the increase reduced the distribution to unsecured creditors by more than half; and debtors presented no financial-planning justification for the increase. Debtors’ 401(k) contributions went far beyond reasonably measured retirement planning and are unfair to unsecured creditors.

#### §12.22 Cramdown

*In re Thorpe*, 2011 WL 671935 (Bankr. E.D. Ky. 2011) – Debtor’s interest in mobile home that debtor was leasing on lease-purchase was property of estate. Debtor cannot cram down secured obligation on which debtor is not liable. Debtor leased a mobile home with option to purchase. At the time, Debtor’s seller was indebted to creditor and creditor held properly perfected security interest in the mobile home. Debtor could not cram down secured claim absent privity with the creditor. Debtor could not cram down the lease-purchase because Section 365 requires leases to be assumed or rejected in toto, and does not allow modification or alteration as part of assumption process.

*Reinhardt v. Vanderbilt Mortgage and Finance, Inc.*, 563 F.3d 558 (6<sup>th</sup> Cir. 2009) – Anti--modification provision of Section 1322(b)(2) does not prohibit cramdown of lien which is secured by both real estate and the unattached mobile home located on that real estate. Section 1322(b)(2) prohibits only cram down of a security interest in real property that is the Debtor’s principal residence. Section 1322 contains two requirements: the property be real property; and the real property be the Debtor’s principal residence. If the claim does not pertain to “real property” it does not matter whether the claim is on the “Debtor’s principal residence”. Although the mobile home was located on the real property, the mobile home which constituted the Debtor’s principal residence was unattached personal property. As the creditor’s lien was secured by property other than in real property constituting the Debtor’s principal residence, section 1322(b)(2) did not prohibit the modification or cram down of that security interest.

#### §12.23 Liquidation Analysis

*In re Sharp*, 394 BR 207 (Bankr. C.D. Ill. 2008) – Court must perform a hypothetical analysis to determine what, if anything, a Chapter 7 trustee would be able to distribute to unsecured creditors if a debtor’s estate were liquidated. To accomplish that analysis, the value of a debtor’s non-exempt property must first be determined. That value is then reduced by (i) the administrative expenses of a Chapter 7 case, including the costs of sale of the non-exempt property, (ii) the amount of all lien claims that would be enforceable against

the non-exempt property in the Chapter 7 case, and (iii) the amount of priority claims allowable under Chapter 7 which would be paid with sale proceeds before a distribution to unsecured creditors. What remains is the minimum amount that must be paid to unsecured creditors through the Chapter 13 plan to meet the requirement of Section 1325(a)(4). Trustee's reliance on old depreciation schedules to suggest that the price paid years ago for items is determinative of their value today is misplaced. Although more than \$12,000 was spent since 2002 for business equipment, it is doubtful that items such as a cellular telephone purchased in 2005 for \$61 or a shop vacuum purchased in 2006 for \$52 would retain much value. Court must also deduct expense of liquidating these items or the other administrative costs of a Chapter 7 case. Trustee failed to present any evidence that Chapter 7 trustee would pursue the Debtor's assets because the value of the assets would have to be four to five times greater than what the Debtor estimates in order for a Chapter 7 trustee to liquidate the assets, pay the Debtor his exemption, pay the costs of sale and other Chapter 7 expenses, and still have something meaningful to distribute to unsecured creditors.

#### §12.24 Liquidation Discount Rate

*First United Sec. Bank v. Garner*, 2011 WL 93763 (M.D. Ala. 2011) - Oversecured creditor was entitled to contract rate of interest until confirmation, then prime-plus rate established by *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (May 17, 2004). Section 1325(a)(5)(B)(ii) is more specific than § 506(b) and fixes cutoff date for accrual of contract interest at effective date of plan.

*In re Villegas*, 09-41394 (Bankr. E.D. Mi. 2009) – The interest rate to be used to for purposes of Section 1325(a)(4) is determined according to *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). Plan that proposed interest to unsecured creditors at Federal Judgment rate of 0.43% could not be confirmed over objection of creditor or Chapter 13 Trustee (citing *In re Hoskins*, 2009 WL 1139407 (Bankr. N.D. W. Va. 2009).

#### §12.25 Unfair Discrimination – Student Loans

*In re Mason*, 2011 WL 2198345 (Bankr. N.D. W. Va. 2011) – Nature of student loan debts is different than other unsecured debts as student loan debts are generally excepted from any future discharge. Allowing separate classification and treatment is more consistent with Congressional policy as (1) a debtor will not be afforded a fresh start in bankruptcy if the debtor is defaulting on student loan payments over the term of a 3–5 year plan; (2) strong public policy supports the repayment of educational loans; (3) Congress prefers Chapter 13 over Chapter 7, and debtors in Chapter 7 fare better with making post-bankruptcy payments on student loan debts because a Chapter 7 debtor will not have been in forced default of student loan obligations for 3–5 years; and (4) other unsecured creditors in Chapter 13 are not harmed by the preferential treatment for student loan debt because unsecured creditors must receive a return in Chapter 13 that is equivalent to what they would receive in Chapter 7 pursuant to 11 U.S.C. § 1325(a)(4). To support separate classification, Debtor must be able to articulate a reason why the discriminatory treatment is being proposed, and be able to demonstrate that a lesser discriminatory means of treatment is not advisable. Court would not confirm Debtor's plan that paid 72% of student loan debts, while making an 8% distribution to other unsecured creditors where Debtor did not show why a 62% or 52% payment to the student loan creditors and higher payment to unsecured creditors would not be appropriate.

*In re Slone*, 2010 WL 3767317 (Bankr. N.D. Ohio 2010) – Debtor is not permitted to expense student-loan payment as doing so would permit debtor to prefer one creditor over another, similarly situated, creditor. Nondischargeability of a student loan is not, without more, a basis to permit a debtor to treat the student loan creditor more favorably than other unsecured creditors.

*In re Rooney*, 2010 WL 2630245 (Bankr. N.D. Ohio 2010) – Nondischargeability of a student loan is not, without more, a basis to permit a debtor to treat the student loan creditor more favorably than other unsecured creditors. Congress specified the types of unsecured claims that should be treated more favorably than others in Section 507. Non-dischargeable student loan debts are not among those specified in § 507. To treat certain unsecured creditors more favorably simply because they hold a nondischargeable claim would elevate such claims to a priority status that was not intended by Congress.

*In re Parrott*, Case No. 09-15726 (Bankr. E.D. Tn. 2009) – Debtor’s Chapter 13 Plan that sought to cure defaults on student loans and to pay the loans in full as long term debt unfairly discriminated against remaining unsecured creditors. The authority to treat an unsecured debt as a long-term debt is neither expressly nor logically an exception from the statutory rule that classifying unsecured claims cannot unfairly discriminate against any of the classes. Treating the student loan debts more favorably does not aid the debtors’ performance of the plan or otherwise provide a possible benefit for the other unsecured creditors. The classification is intended to reduce the balances due on the student loan debts after the debtors complete the plan. This will benefit the debtors because the unpaid balances can be discharged only if the debtors can prove that paying the debts would be an undue hardship. Attempting to pay more on the student loan debts is good planning for the debtors’ benefit with no benefit for the other unsecured creditors.

#### §12.26 Good Faith

*In re Lofty*, 437 BR 578 (Bankr. S.D. Ohio 2010) – In determining good faith, court will look at both pre-petition conduct and circumstances surrounding Chapter 13 filing based on totality of circumstances. Debtors’ plan lacked good faith where debtors owned two parcels of real property that were occupied by their adult children while debtors themselves occupied an expensive and depreciating motor home. Debtors could sell motor home and move into one of residences, thereby using payments to build equity and reduce living expenses. Further, debtors’ plan proposed to retain property in which adult son and grandson resided but with debtors making mortgage payments plus paying taxes, insurance and maintenance totaling \$3,000 per month. By paying the costs related to the housing of their son and grandson from their projected disposable income, the Debtors are choosing to support family members at the expense of the nonpriority unsecured creditors. That support impacts the amount of the Debtors’ payments to unsecured creditors and is inconsistent with the requirement that a plan be proposed in objective good faith. Even if debtors’ son was a dependent, debtors failed to demonstrate why suitable housing could not be obtained for less than \$3,000 per month to free up money for payment to unsecured creditors. Debtors proposed to retain two parcels of real estate and a Motor Home for themselves and their immediate family, plus a separate vehicle, while only paying a 7% dividend to nonpriority unsecured creditors. Debtors sought to retain the Motor Home, continue spending the winter months in a warmer climate and support their immediate family without considering other viable options.

*In re McDonald*, 437 BR 278 (Bankr. S.D. Ohio 2010) – Good faith is defined by factual inquiry. Court must ultimately determine whether the debtor’s plan, given his or her individual circumstances, satisfies the purposes undergirding Chapter 13: a sincerely-intended repayment of pre-petition debt consistent with the debtor’s available resources. Sixth Circuit uses twelve-part test to determine whether a debtor’s Chapter 13 plan was proposed in good faith: (1) the amount of the proposed payments and the amount of the debtor’s surplus; (2) the debtor’s employment history, ability to earn and likelihood of future increase in income; (3) the probable or expected duration of the plan; (4) the accuracy of the plan’s statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court; (5) the extent of preferential treatment within classes of creditors; (6) the extent to which secured claims are modified; (7) the type of debt sought to be discharged and whether any such debt is non-dischargeable in Chapter 7; (8) the existence of special circumstances such as inordinate medical expenses; (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act; (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; (11) the burden which the plan’s administration would place upon the trustee; and, (12) whether the debtor is attempting to abuse the spirit of the Bankruptcy Code. Debtors’ plan not proposed in good faith even where plan committed 100% of debtors’ disposable income, where plan proposed to retain a \$365,000 house with about \$358,000 in secured debt attached to it having mortgage payments of \$2,750 per month; two vehicles with secured debt totaling \$53-54,000 with monthly payments totaling \$1,182 (with the payment on one vehicle, acquired shortly before filing, of \$835 per month); a Harley Davidson motorcycle free and clear of liens that has not been sold; debtors had combined monthly gross income of approximately \$19,000, and are proposing to pay either a 0% dividend or a minimal dividend to non-priority unsecured creditors. Plan would reaffirm the secured debt on the Debtors’ high-end home and cars and the tax liability for which Husband is personally obligated, at the expense of the Debtors’ non-priority unsecured creditors who receive nothing.



*In re Predragovic*, 2010 WL 3239360 (Bankr. N.D. Ohio 2010) – Good faith requires a review of the totality of the circumstances, including: (1) the debtor's income; (2) the debtor's living expenses; (3) the debtor's attorney's fees; (4) the expected duration of the Chapter 13 plan; (5) the sincerity with which the debtor has petitioned for relief under Chapter 13; (6) the debtor's potential for future earning; (7) any special circumstances, such as unusually high medical expenses; (8) the frequency with which the debtor has sought relief before in bankruptcy; (9) the circumstances under which the debt was incurred; (10) the amount of payment offered by debtor as indicative of the debtor's sincerity to repay the debt; (11) the burden which administration would place on the trustee; and (12) the statutorily-mandated policy that bankruptcy provisions be construed liberally in favor of the debtor. Allowance or disallowance of expenses on the means test is not determinative of good faith. Complying with the means test does not mean that any combination of expenses that leads to an equal or better financial number being paid to creditors is acceptable. Debtor's actual expenses for vehicle ownership and operating expenses were significantly less than the allowances shown on the means test, yet Debtor attempted to use IRS allowances, rather than actual expenses, to calculate a plan payment. Debtor used actual expenses for food and other expenses that far exceeded amount of IRS allowances for those items, thus using IRS standards when those exceeded actual but used actual when those were higher than IRS standards

*In re Smith*, 2010 WL 2400065 (Bankr. N.D. Ohio 2010) - The debtor bears the burden of demonstrating good faith. Bankruptcy court must ultimately determine whether the debtor's plan, given his or her individual circumstances, satisfies the purposes undergirding Chapter 13: a sincerely-intended repayment of pre-petition debt consistent with the debtor's available resources. Debtor's "eve of bankruptcy" decision to commence or increase the amount of the contribution can still be considered in determining debtor's good faith or lack of good faith. Good-faith serves as a backstop against debtors who attempt to exploit Code provisions at the expense of bankruptcy policies including fairness to unsecured creditors. Further, section 541 limits reference to section 1325(b)(2) and does not exclude retirement contributions in determining good faith under section 1325(a)(3). Relevant factors include whether the debtor increased his contribution on the eve of bankruptcy, the amount of any such increase, the financial planning justification for any such increase, and the amount of the debtor's 401(k) contributions relative to the distribution to unsecured creditors. Such considerations prevent the good faith argument from becoming the last refuge of scoundrels for rogue creditors wishing to object to everything. Debtors' plan is proposed in bad faith where debtor increased his 401(k) contribution by *five times* on the eve of filing bankruptcy to a level far beyond what was typical for him; the increase reduced the distribution to unsecured creditors by more than half; and debtors presented no financial-planning justification for the increase. Debtors' 401(k) contributions went far beyond reasonably measured retirement planning and are unfair to unsecured creditors.

#### §12.27 Income Tax Claims

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

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

#### §12.28 Other Tax Claims



*In re Pierrotti*, 645 F.3d 277 (5<sup>th</sup> Cir. 2011) – Chapter 13 Plan can treat IRS secured claim over life of plan, but Section 1325(b)(5) does not allow debtor to reclassify IRS lien as “long term debt” on which the last payment would be due after expiration of the plan. IRS secured claim must be paid in full over term of plan unless IRS agrees to contrary treatment.

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

#### §12.29 Joint Cases – Substantive Consolidation for Plan Administration

*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.

#### §12.30 Best Interests of Creditors

*Meredith v. Weigl*, 2011 WL 2321884 (Bankr. S.D. Ga. 2011) – Section 1325(a)(4) requires that plan provided dividend to unsecured creditors in amount not less than what would be paid in Chapter 7. Plan must include value of avoidable pre-petition transfers in determining “best interests”. Plan could not be confirmed where plan failed to account for value of property transferred within one year prior to filing for no consideration.

### C. Objections to Confirmation

#### §12.31 Procedural Requirements

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

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

#### §12.32 Standing to Object

*State Bank of Florence v. Miller*, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6<sup>th</sup> Cir. BAP 2011) – Bank lacked standing to object to confirmation where Bank purchased property at foreclosure sale by credit bid for the entire amount of bid. Bank’s debt was fully satisfied by the credit bid, and Bank no longer held any debt or obligation as to debtor.

#### §12.33 Deadline for Filing

*In re DuPuis*, Case No. 07-64523 (Bankr. E.D. Mi. 2008) - Objection to confirmation denied as untimely where Objection not filed until 7 months after confirmation of plan.

*In re Ramsey*, 2009 WL 3245303 (Bankr. M.D. Tn. 2009) – Creditor objected to Plan claiming that terms of Plan constituted improper modification of mortgage creditor's rights in violation of Section 1322(b)(2). Plan terms required Creditor to (1) apply the payments received from the trustee on pre-confirmation arrearages (defined as all sums included in the allowed proof of claim plus any post-petition pre-confirmation payments due) only to such arrearages; (2) deem the mortgage obligation as current at confirmation such that future payments, if made pursuant to the plan, shall not be subject to late fees, penalties or other charges; (3) provide at least 60 days written notice to the trustee, the debtors and the attorney for the debtors of any changes in the interest rate for any nonfixed rate or any adjustable rate mortgages or any change in the property taxes and/or the property insurance premiums and the effective date of any such adjustment; and (4) notify the trustee, the debtors and attorney for the debtors, in writing, of any protective advances or other charges incurred by the claimholder, pursuant to the mortgage agreement, within 60 days of making such protective advance or other charges. The Plan further required the Trustee to (1) make monthly ongoing mortgage payments commencing with the later of the month of confirmation or the month in which a proof of claim itemizing the arrears is filed by such claimholder; (2) file a motion and notice consistent with LBR 9013-1 no later than 60 days prior to the anticipated last payment under the plan, requesting the court find that the trustee has complied with the plan to maintain mortgage payments and to cure the pre-confirmation default and providing that if the claimholder asserts that the mortgage obligation is not contractually current at the time of the trustee's motion, then the claimholder shall, within 30 days of receipt of the motion, file a Statement of Outstanding Obligations, clearly itemizing all outstanding obligations it contends have not been satisfied as of the date of the Statement failing which the trustee shall submit an order declaring the mortgage current and all arrearages cured as of the date of the trustee's motion; and, upon discharge, the claimholder shall treat the mortgage as fully reinstated according to its original terms and fully current as of the date of the trustee's notice. Plan provision requiring notice of post-petition fees and expenses and payment changes is a permissible procedural mechanism to assist in the administration of the Case and is not an impermissible mortgage modification. A plan provision requiring mortgage creditors to distinguish and apply payments on prepetition arrearages and on ongoing continuing mortgage payments does not improperly modify mortgage creditors' rights; such a plan requirement simply restates the statutory scheme for curing mortgage arrears. Plan does not impermissibly modify the mortgage and complies with Section 1325. Plan confirmed.

#### §12.34 Failure to Raise Objection

*In re McDonald*, 437 BR 278 (Bankr. S.D. Ohio 2010) – Trustee's failure to object to confirmation under Section 1325(a)(9) and Section 1308 based on debtors' failure to file tax returns due for prior 4 years coupled with Trustee's failure to produce evidence of non-compliance left Court with no basis to deny confirmation on that issue. Trustee failed to meet initial burden of proof of non-compliance.

#### §12.35 Burden of Proof

*In re McDonald*, 437 BR 278 (Bankr. S.D. Ohio 2010) – The objecting party has the initial burden to produce evidence in support of an objection. The Debtors have the ultimate burden of proof to show the requirements of 11 U.S.C. Section 1325 have been met.

*In re Predragovic*, 2010 WL 3239360 (Bankr. N.D. Ohio 2010) – Debtor bears burden of Proof on objection to confirmation.

#### D. Effect of Confirmation

#### §12.36 Generally

*In re Smoak*, 2011 WL 4502596 (Bankr. S.D. Ohio 2011) – Terms of confirmed plan are binding on all creditors provided in the plan. If creditor believes that plan terms are ambiguous or otherwise objectionable, creditor must raise issue before confirmation. Creditor failed to object to Plan that proposed to reduce principal balance on residential mortgage, reduce interest rate, and provide for 10 year amortization with 5 year balloon, could not later object to validity of terms.

*Wahrman v. Bajas*, 443 BR 768 (Bankr. E.D. Mi. 2011) – Creditor cannot raise “bad faith” in obtaining confirmation of plan where alleged “bad faith” is based on pre-confirmation conduct.

*In re Carouthers*, 2011 WL 2181383 (Bankr. W.D. Mi. 2011) – Plan that confirmed claim of Credit Union as unsecured was binding on creditor, notwithstanding that creditor held a security interest in debtors’ vehicle. Although Debtors’ plan did not specifically name Credit Union as unsecured creditor, creditor was listed in Schedule F and plan specifically identified all creditors treated as secured, leaving Credit Union treated as unsecured creditor by implication. Credit Union failed to object to plan and plan was confirmed. Credit Union could not obtain relief from stay to assert security interest post-confirmation.

*United Student Aid Fund v. Espinosa*, 130 S.Ct. 1367 (2010) – Order Confirming Chapter 13 Plan is binding on all creditors and parties with notice. Order is not void for purposes of Rule 60 merely because Plan as confirmed contained provisions that are otherwise prohibited by Bankruptcy Code or other applicable law. Due process requires notice “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Fact that actual notice was provided through service of plan rather than service of adversary proceeding was procedural defect that did not alter validity of notice itself. Given the Code’s clear and self-executing requirement for an undue hardship determination, the Bankruptcy Court’s failure to find undue hardship before confirming Espinosa’s plan was a legal error. But the order remains enforceable and binding where the creditor had notice of the error and failed to object or timely appeal. Bankruptcy Court has independent duty, even absent an objection by a party in interest, to insure that the plan complies with the requirements of Section 1325 before confirming the plan. However, Court’s confirmation of a plan that does not comply with Section 1325 does not prevent the plan as confirmed from being binding on all parties with notice, even where plan itself clearly violates some statutory provision.

*U.S. v. De Kellis*, 2010 WL 3521916 (E.D. Ca. 2010) – *Espinosa* has no effect on dischargeability of student loan debt in Chapter 7. Although debtor filed Chapter 7 at a time when private student loans were dischargeable and scheduled those loans with proper notice, entry of Chapter 7 discharge did not operate as finding of dischargeable nature of student loans. Unlike *Espinosa*, which involved a plan, a confirmation hearing, and a confirmation order, Debtor’s Chapter 7 discharge did not preclude collection of non-dischargeable student loans.

*In re Armstrong*, 434 BR 120 (Bankr. S.D.N.Y. 2010) – Mortgage creditor’s unsecured proof of claim for entire mortgage balance not affected by confirmation of Plan. Prior to commencement of case, lender foreclosed mortgage, but there were no bids at the scheduled foreclosure sale. Debtor’s Plan stated that debtor intended to surrender the property but did not object to proof of claim. After creditor had been paid in full and case discharged, debtor brought action to recover payments from creditor to the extent of the value of the property “surrendered”. Court concluded that debtor failed to object to proof of claim or to take any action until after case had been concluded, and that plan’s statement that debtor “intended to surrender” the property was insufficient notice to the mortgage company that the property was actually surrendered and neither divested debtor of title to the property nor cut off the mortgage company’s right to a deficiency judgment. “*Espinosa* is distinguishable because that case did not address the questions of a vague and ambiguous plan, or dueling characterizations of a debt as secured or unsecured. Further, Rule 60(b) is not at issue in this case. Indeed, the Court follows *Espinosa* because it holds the Debtors to their plan--the plan provides for payment of allowed unsecured claims, Trustco had an allowed unsecured claim because the Debtors did not object to the proof of claim, and the surrender provision is vague and was never consummated.”

*In re Wright*, 2010 WL 3522231 (Bankr. S.D. In. 2010) – Debtor’s plan proposed student loan discharge by declaration. Creditor did not object to confirmation and Trustee objected on different grounds but did not assert this issue. After confirmation, Supreme Court issued *Espinosa*, and Trustee filed Motion to Set Aside Confirmation Order as result of “mistake”. Court denied Motion as Trustee and creditors had full and proper notice of the offending provision and failed to object. Failure to object when the grounds are known or readily discernable is not a “mistake” for purposes of setting aside confirmation order.

*In re Westerfield*, 403 BR 545 (Bankr. E.D. Tn. 2009) – Debtor’s Chapter 13 plan, upon confirmation, becomes binding on all creditors and parties named or treated in the plan. Debtor’s Chapter 13 plan would not alter status of ex-wife’s Domestic Support Obligation claim from priority to unsecured where plan did not expressly state that confirmation would work such a change in status. Dissolution of Marriage decree required debtor to hold ex-wife harmless from the secured claims on the marital homestead. Debtor could not avoid that obligation by proposing a plan to surrender the home. Although plan clearly contemplated that debtor would not make further payments on the house, that did not constitute “clear notice” that debtor was attempting to avoid domestic support obligation and was not sufficient to alter status of DSO claim.

*In re McLemore*, 426 B.R. 728 (Bankr. S.D. Ohio 2010) - Creditor, a tax certificate purchaser entitled to 18% interest by statute, was bound by res judicata effect of debtor’s confirmed Chapter 13 Plan which called for Till interest in its claims. Chapter 13 debtor’s confirmed plan was binding on tax claims purchaser, notwithstanding that this treatment allegedly conflicted with provision of the Bankruptcy Code dealing with tax claims. Tax claims purchaser, to extent that it believed it was protected from modification of interest rate, should have objected to plan at confirmation hearing.

*Blevins v. National City Bank*, Case No. 09-3205 (Bankr. E.D. Mi. 2010) - Confirmation of Chapter 13 Plan is binding upon debtor and all creditors where Debtor’s plan specifically treated Bank’s second mortgage as allowed secured claim, debtor prohibited from attempting, postconfirmation, to “strip” second mortgage as entirely unsecured.

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

#### §12.37 Vesting of Property of Estate

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

#### §12.38 Surrender of Collateral Upon Confirmation

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

### E. Revocation of Order Confirming Plan

#### §12.39 Time for Bringing

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

#### §12.40 Grounds

*Wahrman v. Bajas*, 443 BR 768 (Bankr. E.D. Mi. 2011) – Court can revoke confirmation order obtained through fraud. Creditor must prove: (1) that the debtor made a representation regarding compliance with Section 1325 which was materially false; (2) that the representation was either known by the debtor to be false, or was made without belief in its truth, or was made with reckless disregard for the truth; (3) that the representation was made to induce the court to rely upon it; (4) that the court did rely upon it; and (5) that as a consequence of such reliance, the court entered confirmation.

F. Modification of Order Confirming Plan

§12.41 Compliance With Code Generally

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

§12.42 Grounds – Error in Order Confirming Plan

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

§12.43 Altering Treatment of Secured Creditor

§12.44 Surrender of Previously Retained Collateral in Full Satisfaction

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

F. Modification of Plan Post-Confirmation

§12.45 Good Faith

*In re Walpole*, 2010 WL 2696847 (Bankr. N.D. Ohio 2010) – Section 1329 requires that all modifications be proposed in good faith. Debtor’s request to modify a plan to retain the proceeds of an asset which debtor had failed to disclose in the first instance lacked good faith. At the time of commencement of debtor’s case, debtor owned a life estate in property owned by debtor’s mother. Debtor failed to disclose that life estate or the value of that life estate in debtors schedules and failed to include the value of that life estate in the Plan’s liquidation analysis, resulting in confirmation of a plan that failed to pay creditors the actual liquidation value of the debtor’s estate. After debtor’s mother died, debtor requested court permission to sell the property and to retain a portion of the proceeds. Had debtor’s mother not died while the case was open, court may never have discovered debtor’s omission and debtors may have pocketed 100% of the value of the property after receiving a discharge on underfunded plan. Allowing debtors to profit from the sale of a hidden asset would be “patent bad faith”. Further, expenses for which debtors sought to use proceeds were included within the range anticipated by debtor’s budget such that debtors failed to demonstrate any need for the proceeds to pay these expenses.



## §12.46 Change of Circumstances

*In re VanDyne*, 2011 WL 3664551 (Bankr. N.D. Ohio 2011) – Trustee's Plan Modification based on Debtor's Amended Schedules I and J filed after confirmation is exception from general *res judicata* effect of confirmed plan. Trustee could not have known at the time of confirmation that debtor's post-confirmation schedules would show significant changed income and expenses.

*Storey v. Pees*, Case No. 07-8049 (6<sup>th</sup> Cir. BAP 2008) – Trustee's Motion to Modify confirmed plan based on pre-confirmation miscalculation of plan length would be denied. Under section 1327, a confirmation order is *res judicata* and not subject to collateral attack. Section 1329 permits the plan to be modified for one of four specific reasons. Section 1329 sets no standard as to when a post confirmation modification is permitted. Section 1327 precludes modification of a confirmed plan under section 1329 to address issues that were or could have been decided at the time the plan was originally confirmed. Modification under section 1329 is limited to matters that arise post confirmation and is based on the premise that, during the life of the plan, circumstances may change, and parties should have the ability to modify the plan accordingly. Trustee would not be permitted to modify plan to address an issue that could have been decided at confirmation had the trustee or an unsecured creditor with an allowed claim objected.

## §12.47 Reclassification of Claims

*Charlick v. Community Choice Credit Union*, Case No. 444 B.R. 762 (Bankr. E.D. Mi. 2011) – Debtor could not modify plan post-confirmation to change status of second mortgage from secured to general unsecured. Section 1329 lists matters that can be the subject of a post-confirmation plan modification. Classification of claims is not included, and classification is *res judicata* pursuant to Section 1327.

*Blevins v. National City Bank*, Case No. 09-3205 (Bankr. E.D. Mi. 2010) - Confirmation of Chapter 13 Plan is binding upon debtor and all creditors where Debtor's plan specifically treated Bank's second mortgage as allowed secured claim, debtor prohibited from attempting, postconfirmation, to "strip" second mortgage as entirely unsecured. Section 1329 limits postconfirmation plan modification to four specific circumstances. Debtor's attempt to reclassify Bank's claim from secured to unsecured is an impermissible extension of the four enumerated modification rights under section 1329 and would violate *In Re Nolan* and *Storey v. Pees*.

*In re Miller*, Case No. 06-32425 (Bankr. S.D. Ohio 2010) - Post-confirmation Proof of Claim filed by First Mortgage holder that indicated that Second Mortgage was entirely unsecured not basis to modify plan to change treatment of second mortgage from secured to unsecured. Prohibition against modifying confirmed plan to reclassify secured claim applies equally to real property and vehicle financing claims.

*In re Crisp*, 2010 WL 2465446 (Bankr. W.D. Tn. 2010) – Debtor cannot modify confirmed plan to reclassify secured claim as unsecured following post-confirmation repossession and sale of vehicle. Section 1329 limits plan modifications to (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; (2) extend or reduce the time for such payments; (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or (4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance. Section 1329 does not expressly allow the debtor to alter, reduce or reclassify a previously allowed secured claim. Claim is not subject to reclassification merely because Debtor was involuntarily dispossessed of property rather than a post-confirmation voluntary surrender. Allowing Debtor to reclassify secured claim would impermissibly allow him to shift the burden of depreciation to the creditor.

*In re Enders*, Case No. 308-04229 (Bankr. M.D. Tenn., 2010) – Plan modification approved to surrender debtor's residence, reduce plan payment, and disallow mortgage claim. Debtor's plan provided for retention of mortgage, payment of ongoing mortgage payment, and cure of pre-petition arrears. One year later, mortgage company provided notice that the ongoing mortgage payment increased from \$1756.00 per month to \$2275.00 per month. Debtor responded by filing modification seeking to surrender house as

debtor could no longer afford the required plan payment. Mortgage company did not object to the plan modification. Trustee objected citing *Nolan*, 232 F.3d 528 (6<sup>th</sup> Cir. 2000) that claim confirmed as secured must remain secured even after post-confirmation surrender of collateral. Court distinguished *Nolan* as involving depreciating automobile, not real estate; and that *Nolan* involved unsecured deficiency balance on secured claim. In this case, there was no indication of any deficiency and mortgage holder did not oppose modification that allowed mortgage holder to file unsecured deficiency claim.

#### §12.48 Lien Stripping

*Charlick v. Community Choice Credit Union*, 444 B.R. 762 (Bankr. E.D. Mi. 2011) – Section 1327 precludes attempt to modify plan post-confirmation to strip a claim that was treated as secured in plan as proposed. Valuation of property and status of lien as potentially entirely unsecured are issues that are or could have been raised at confirmation, precluding later attempt to modify plan to strip allegedly wholly unsecured second mortgage.

#### §12.49 Disposable Income

*In re Crim*, 2011 WL 863452 (Bankr. M.D. Tenn. 2011) - Disposable income test is not applicable to plan modification. A proposed modified plan should satisfy the general requirements for confirmation such as the good faith requirement, the “best interest of creditors” test, and the feasibility test. Section 1329 does not incorporate the “projected disposable income” test, as set forth in § 1325(b). Income and expenses are not calculated according to the method provided by § 1325(b) but are based debtor's actual income and expenses at the time of the proposed modification are used to determine whether the payments should be adjusted. However, this does not provide debtor with *carte blanche* on expenses, and Court must still determine the reasonableness and necessity of expenses in the context of sustaining the basic needs of the debtor and dependents, and must still balance interests of debtors and creditors. Debtor's motion to modify confirmed plan, reducing distribution to unsecured creditors from 100% to 30%, while maintaining private school tuition payments, was granted. Testimony demonstrated that \$500 tuition cost was reasonable and necessary for chronically ill child for whom no public school option was available.

#### §12.50 Procedural Requirements

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

#### §12.51 Changing Plan Length

*In re Buck*, 2010 WL 5463063 (Bankr. N.D. Ga. 2010) - Applicable Commitment Period is determined at the petition date based entirely on pre-petition income. Following confirmation of 60 month plan, debtor-husband lost his job. As a result, although CMI at the commencement of the case rendered debtors “above median”, updated income dropped the debtors into the “below median” category. Debtors sought to modify the plan to reduce the term from 60 months to 36 months, arguing that the changed circumstances should no longer obligate them to a 60 month term. The Court rejected the attempt to shorten the plan term, holding that the “applicable commitment period” is determined by debtors’ CMI which is entirely “pre-petition focused”.

*In re Grutsch*, 2011 WL 2600638 (Bankr. D. Kn. 2011) – Provisions of Section 1325(b) do not apply to plan modifications. Debtor who was originally above median and had plan confirmed with 60 month term and who later retired and had reduction in income could modify plan to shorten term to 36 months as long as modification complied with good faith requirement. Disposable income and applicable commitment period provisions of Section 1325(b) do not apply to plan modifications.

*In re Heideker*, 2011 WL 2432913 (Bankr. M.D. Fl. 2011) – Applicable Commitment Period applies to plan modifications. Debtors with above median income cannot modify confirmed plan to less than 60 months unless modification also commits 100% dividend.

#### §12.52 Curing Post-Petition Defaults on Secured Claims

*In re Long*, 2011 WL 2881243 (Bankr. W.D. Mi. 2011) – Debtor cannot modify plan to cure post-petition defaults on home mortgage loan under cure-and-maintain plan. Section 1322(b)(2) precludes modification of mortgage secured solely by debtor's residence. Section 1322(b)(5) permits debtor to cure pre-petition defaults on home mortgage. Section 1329 permits modification only to (1) increase or reduce amount to be paid a particular class of claims provided for under the plan; (2) extend or reduce the time within which to pay a particular class of claims provided for under the plan; (3) adjust amounts to be paid a particular claimant in order to account for other payments received by the creditor outside of the plan; and (4) reduce plan payments to reflect increases in health insurance premiums. Even if Section 1322(b)(5) allows cure of post-petition defaults in mortgage payments, Section 1329 cannot modify the terms of the mortgage to allow post-petition payments to be restructured over the objection of the creditor. Court cannot use equitable power to override specific limitations found in Section 1329. Post-confirmation amendment process under Section 1329 does not permit Debtors a second chance to use Chapter 13 as a means to alter what otherwise are Cendant's rights under its agreement to foreclose on its mortgage.

#### G. Lien Stripping

#### §12.53 Requirement for Discharge

*Fisette v. Keller*, 2011 WL 3795138 (8<sup>th</sup> Cir. BAP 2011) – Debtor can strip off wholly unsecured mortgage even in cases where debtor is not eligible for discharge. Strip is effective upon completion of obligations under plan and is not contingent on discharge.

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

*In re Fair*, 2011 WL 1486021 (E.D. Wis. 2011) – Section 506 permits debtor to strip entirely unsecured junior lien even if debtor is not eligible for discharge. Section 1325(a)(5) requirement that creditor retain lien until discharge does not apply as Section 1325(a)(5) applies only to secured creditor. Where there is no value to support the claim, the claim is unsecured pursuant to Section 506 and restrictions of Section 1325(a)(5) do not apply.

*In re Davis*, 2011 WL 1460433 (Bankr. D. Md. 2011) – Wholly unsecured lien may be stripped even if debtor is not eligible for discharge. In Chapter 13 cases, a debtor's ability to strip off an unsecured junior mortgage lien is governed by two Bankruptcy Code provisions; Sections 506 and 1322(b). Court adopted minority position that right to strip wholly unsecured lien is arises from Section 506 and is not dependent on discharge under Section 1325 and 1328. Plan that proposes to strip second lien following Chapter 7 in which debtor's personal liability was extinguished is not *per se* bad faith.

*In re Gerardin*, Case no. 10-16511 (Bankr. S.D. Fl. 2011) – Lien may not be stripped if debtor is not eligible for discharge. Section 1325 requires that the lender retain its lien until either paid in full per applicable non-bankruptcy law or the debtor receives a discharge.

*In re Grignon*, 2010 WL 5067440 (Bankr. D. Or. 2010) - Debtor not eligible for discharge because of § 1328(f) can strip off wholly unsecured junior mortgage when current Chapter 13 case is filed in good faith. Nothing in the Code prohibits a debtor who is ineligible for a Chapter 13 discharge from filing a Chapter 13 case or prohibits such a debtor from stripping off a wholly unsecured lien.

*In re Colbourne*, Case No. 10-983 (Bankr. M.D. Fl. 2010) - Debtor's Motion to Value Secured Claims in Chapter 13 denied where Debtor had previously obtained discharge in Chapter 7 and was not eligible for discharge in Chapter 13. Claims secured by non-residential real property and motor vehicle could not be permanently modified absent a discharge, as any modification would not have any binding effect following the conclusion of the Chapter 13 Plan.

*In re Coryell*, Case No. 09-54760 (Bankr. E.D. Mi. 2009) – Debtor can strip wholly unsecured second mortgage even where Debtor is not eligible for a discharge. There is no requirement that a discharge be received in order to strip a second mortgage. However, property cannot vest free and clear at confirmation but must remain property of the estate until plan completion.

#### §12.54 Procedure

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

*In re Peckens-Schmidt*, 2010 WL 2851520 (Bankr. W.D. Mi. 2010) – Court would not confirm Plan that proposed to strip unsecured second mortgage without adversary proceeding under Rule 7001. Court would not ignore Congress's decision to require an adversary proceeding as a prerequisite to avoiding or invalidating liens or other interests in property, simply because it is expedient or because the creditor has not objected or filed a proof of claim. Bankruptcy courts are not licensed to disregard the Federal Rules of Bankruptcy Procedure or to turn a blind eye to the procedural shortcuts. Plan failed to comport with the United States Bankruptcy Code and the Bankruptcy Rules and could not be confirmed even absent objection from affected creditor or the Chapter 13 Trustee.

*In re Ruhstaller*, Case No. 09-18376 (Bankr. S.D. Ohio 2010) – Plan that clearly stated that Bank's second mortgage would be stripped based on a lack of equity above the amount owed on the First Mortgage could be confirmed and lien stripped. Sixth Circuit does not require adversary proceeding and that unsecured mortgage can be stripped by plan confirmation without a separate motion to value property. Lien is avoided pursuant to section 1327(c) which is effective upon plan confirmation with no other requirements. Although filing a Motion may be better practice, it is not required by the Code.

*In re Rader*, Case No. 08-67718 (Bankr. E.D. Mi. 2009) - Motion to strip lien denied without prejudice. Action to strip lien must be prosecuted by adversary proceeding unless the affected creditor stipulates to the relief requested.

#### §12.55 Necessary Parties

*Strausbough v. Co-Op Services Credit Union*, 426 BR 243 (Bankr. E.D. Mi. 2010), *aff'd sub. nom In re Tomasi*, Case no. 10-11609 (E.D. Mi. 2010) – An individual debtor can avoid a junior lien on real property owned as tenants by the entirety. Under § 506(a) each secured claim is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property. A bankruptcy estate's interest in entirety property is in whatever equity is available in the entirety property that can be liquidated for the benefit of the joint creditors of the debtor and the non-filing spouse. Where there are no joint creditors or where there is no equity in the property over and above senior liens and encumbrances, the estate does not acquire any interest in the property on which a secured claim can be based. In this case, there is no dispute that the value of the property is less than the balance owed on the first mortgage, leaving no equity available to pay joint claims and leaving the estate with no interest in the entirety property. Because the bankruptcy estate has no interest in the entirety property, the second mortgage holder has no interest in the estate's interest in the property and the second mortgage holder's claim is not an allowed secured claim.

## §12.56 Valuation and Secured Status

*Thomas v. Citimortgage, Inc.*, Adv. No. 11-5227 (Bankr. E.D. Mi. 2011) – Court is not bound by respective priorities of mortgages at time case filed. Creditors' post-petition subordination agreement by which second recorded mortgage was elevated over first recorded mortgage effectively adjusted priorities to reflect priorities intended by Debtor and creditors at time new first mortgage was granted. After implementation of subordination agreement, second recorded mortgage attained first priority and could no longer be stripped in Chapter 13.

*Kessler v. Bank of America*, Case No. 10-5933 (Bankr. E.D. Mi. 2011) – Bank's appraisal did not support alleged value where appraiser either did not observe or did not adjust for conditions at property that would adversely affect value including a sagging roof that needed to be replaced; a broken central air conditioning unit; a driveway in need of repaving; three broken cement window sills; and a defective sewer line that needed replacing. Bank's appraiser also limited "comparables" to non-HUD owned properties, which are known to be distressed sales of properties often in very poor condition and instead limited comps to non-distress sales with no reflection of distressed properties in the area which would further depress sales and prices. Debtor's appraiser was both a licensed appraiser and active real estate broker and had practical experience that, combined with deficiencies in Bank's appraisal, tipped the balance in favor of Debtor's appraiser, concluding that property was worth less than balance owed on first mortgage.

*Siler v. Citibank, NA*, Case No. 09-6926 (Bankr. E.D. MI. 2010) – In lien strip action, court is not required to determine actual value of property, but only to determine whether value is greater or lesser than balance owed on superior liens and mortgages. Court would discount opinion of appraiser that was based solely on distressed sales as failing to take into account factors such as home condition, location, number of comparable homes on market in neighborhood where property located. All four comparables in Debtor's appraiser's report were distress sales with no adjustments for condition while evidence was that at least two of the properties were in significantly worse condition than debtor's home. Proper valuation must take into account all types of sales (distressed and non-distressed), and other factors. Debtor whose appraisal was based solely on distressed sales failed to meet burden of proof in adversary to strip lien.

*In re Kattouah*, Case No. 09-53287 (Bankr. E.D. Mi. 2010) – Court discounted value determined by appraiser where appraiser assumed that value of property stated in loan application was correct and discounted the value based on that application. Although evidence supported assumed decrease in value of 5% per year, Appraiser failed to independently determine correct starting value. Debtor's Appraisal was more accurate where that appraisal began with an independent valuation as of the application date, although that value was significantly lower than the value stated by borrower in the application. Court concluded that valuation for mortgage application purposes was not done for the same purpose as the appraisal for bankruptcy purposes, particularly where it has become "fairly well documented" that prior to 2007 valuations in connection with mortgage applications were routinely inflated.

*In re Ruhstaller*, Case No. 09-18376 (Bankr. S.D. Ohio 2010) – Whether mortgage is secured is determined by Section 506. Claim is secured if value of collateral exceeds claims of senior encumbrances. Section 506 allows value to be determined in conjunction with "any hearing" on a plan affecting the creditor's interest, including confirmation of proposed Chapter 13 Plan. Debtor is not required to file separate Motion under Rule 3012 to determine value. Debtor testified that property was worth only \$150,000 and Debtor's appraiser testified that the value was \$159,000.00. Bank failed to present any evidence of value and first mortgage debt exceeded \$167,000.00, leaving Bank entirely unsecured.

## §12.57 Following Chapter 7 Discharge

*In re Gerardin*, Case no. 10-16511 (Bankr. S.D. Fl. 2011) – Lien may not be stripped if debtor is not eligible for discharge. Section 1325 requires that the lender retain its lien until either paid in full per applicable non-bankruptcy law or the debtor receives a discharge.



*In re Grignon*, 2010 WL 5067440 (Bankr. D. Or. 2010) - Debtor not eligible for discharge because of § 1328(f) can strip off wholly unsecured junior mortgage when current Chapter 13 case is filed in good faith. Nothing in the Code prohibits a debtor who is ineligible for a Chapter 13 discharge from filing a Chapter 13 case or prohibits such a debtor from stripping off a wholly unsecured lien.

*In re Colbourne*, Case No. 10-983 (Bankr. M.D. Fl. 2010) - Debtor's Motion to Value Secured Claims in Chapter 13 denied where Debtor had previously obtained discharge in Chapter 7 and was not eligible for discharge in Chapter 13. Claims secured by non-residential real property and motor vehicle could not be permanently modified absent a discharge, as any modification would not have any binding effect following the conclusion of the Chapter 13 Plan.

*In re Coryell*, Case No. 09-54760 (Bankr. E.D. Mi. 2009) – Debtor can strip wholly unsecured second mortgage even where Debtor is not eligible for a discharge. There is no requirement that a discharge be received in order to strip a second mortgage. However, property cannot vest free and clear at confirmation but must remain property of the estate until plan completion.

## H. Discharge

### §12.58 Requirements Generally

### §12.59 Time Between Cases

*In re Squeo*, Case No. 10-73733 (Bankr. E.D. Mi. 2010) – Debtor not eligible for discharge under Section 1328 where debtor had filed petition for relief in Chapter 13 less than 4 years after date of petition in prior Chapter 7 proceeding.

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

### §12.60 Scope and Effect

*Murawski v. Campbell*, Case No. 08-3178 (Bankr. E.D. Mi. 2010) – Discharge pursuant to section 1328 does not discharge debts within specific sections of section 523 including debts for restitution were damages awarded in a civil action against the debtor as a result of a willful or malicious injury by the debtor that causes personal injury to an individual.

### §12.61 Hardship Discharge

*In re Hughes*, Case No. 06-49561 (Bankr. E.D. Mi. 2010) – Hardship discharge under Section 1328(b) requires proof that debtor's failure to complete the payments required by the plan results from circumstances for which the Debtor should not be held accountable; value was of the effective date of the plan of property actually distributed is not less than what would have been paid had case been commenced under Chapter 7; and modification of the plan is not practicable. To prove that failure to make payments is not something for which the Debtor should be held accountable, Debtor should produce evidence that economic circumstances occasioning loss of employment were not foreseeable at time of confirmation; the exact skills and abilities of the Debtor; availability or lack of availability of employment in the same or comparable area in light of skills and abilities of Debtor; efforts of debtor to obtain employment; availability to debtor of any other type of employment and efforts to obtain employment. Court found that unemployment alone may be sufficient grounds for hardship discharge and expressly rejected requirement

of “catastrophic circumstances”, but Debtor failed to present any evidence of ability or efforts to find new employment.

#### §12.62 Early Payoff of Plan

*In re Smith*, 2011 WL 2343895 (Bankr. M.D. Fl. 2011) – Debtor permitted to pay off plan prior to expiration of applicable commitment period by lump sum that is sufficient to meet dividend required by confirmed plan. Debtor’s Motion stated in bold, capital letters that the relief requested may deprive creditors of a potentially higher dividend if the debtor’s income increased in the future provided sufficient notice to creditors of the effect of the early payoff. Court approved modification over objection of Chapter 13 Trustee where no creditor objected and “by their silence, essentially voted with their wallets and opted to receive immediate payment.”

#### §12.63 Objections to Discharge

*Wahrman v. Bajas*, 443 BR 768 (Bankr. E.D. Mi. 2011) – Creditor cannot seek to deny discharge under Section 727 while case is pending in Chapter 13. Adversary dismissed without prejudice to refile if and when case is ever converted to Chapter 7.

#### I. Scope of “Super Discharge”

#### §12.64 Section 1328(a)(2)

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

#### §12.65 Section 1328(a)(4)

*Murawski v. Campbell*, Case No. 08-3178 (Bankr. E.D. Mi. 2010) – Complaint to deny discharge in Chapter 13 proceeding which referenced Section 523(a)(6) would be treated as action to deny discharge of debt under Section 1328(a). Although Section 1328(a) does not incorporate Section 523(a)(6) as debt which is not dischargeable in Chapter 13, the similarity of the statutory language between Section 523(a)(6) and Section 1328(a)(4) is sufficient to allow the Court to consider the dischargeability of the debt under standards set forth in Section 1328(a)(4). Section 1328(a)(4) excepts from discharge any debt for damages awarded in a civil action arising from personal injury caused by willful *or* malicious injury, which is a lower standard than Section 523(a)(6) which requires willful *and* malicious injury, but does require that the damages be “awarded”. Jury verdict that determined liability and damages for assault and battery would be “award” even though bankruptcy petition prevented State Court from entering judgment based on the verdict. Section 1328(a)(4) does not require that “award” be reduced to an enforceable judgment.

*Waag v. Permann*, 418 BR 373 (8<sup>th</sup> Cir. BAP 2009) – Section 1328(a)(4) does not require existence of prepetition judgment for willful or malicious injury to be excepted from discharge. Use of word “awarded” is yet not used to denote “past tense” but rather is a limiter on “restitution” and “damages”. As long as damages are, at some point, “awarded”, those damages will be nondischargeable even if those damages are not awarded until after entry of the discharge in bankruptcy.

#### §12.66 Discharge Injunction

*Kowall v. GMAC Mortgage, LLC*, Case no. 10-3221 (Bankr. E.D. Mi. 2011) – Section 524(a)(2) injunction replaces automatic stay as to actions to collect debts from debtor personally. Section 524 does not contain a private cause of action, but Court can enforce discharge injunction through contempt. Contempt requires proof that defendant violated a specific order with knowledge of the order allegedly violated. Complaint failed to state cause of action where complaint failed to allege either that the debtor received a discharge or that the creditor had knowledge of the discharge. Contempt appropriate where actions are intended to coerce payments and not where actions have some other, lawful purpose. Creditor’s action in reporting loan

to credit reporting agency is not inherently action to collect debt. Debtor failed to allege that creditor reported loan information for improper purpose or that creditor had taken any action designed to coerce payment with no lawful purpose.

#### J. Dismissal

##### §12.67 Voluntary Dismissal

*Jacobsen v. Moser*, Case No. 09-40023 (5<sup>th</sup> Cir. 2010) – Debtor does not have absolute right to dismiss Chapter 13 where debtor has acted in bad faith and has abused the bankruptcy process. Debtor's schedules failed to list multiple parcels of real estate in which Debtor had an interest and Debtor was attempting to sell at least one parcel without disclosing the parcel or the transaction to the court or creditors; failed to disclose multiple transfers that occurred pre-petition including quit claiming away property to family members; the omission of six rental properties or the income received; and a business venture in Oslo, Norway operated by Debtor's cousin. Request to dismiss would be denied and case converted.

##### §12.68 Failure to File Documents

*In re Souders*, Case No. 10-68760 (Bankr. E.D. Mi. 2010) - Letter requesting additional time to file documents denied for failure to demonstrate good cause.

*In re Tudgay*, Case No. 10-43763 (Bankr. E.D. Mi. 2010) – Debtor's failure to file schedules, means test form, Statement of Financial Affairs and a Chapter 13 Plan by deadline established by court required dismissal.

*In re Chavis*, Case No. 06-59328 (Bankr. E.D. Mi. 2009) - Debtor's failure to file amendments by the time ordered by Court resulted in dismissal of case where Order provided that if Debtor failed to file the required amendments "the Court may dismiss this case without further notice or hearing."

*In re Richards*, Case No. 03-47950 (Bankr. E.D. Mi. 2008) - Debtor's failure to file and serve a proposed plan modification and file amended Schedules as Ordered by Court within the deadline prescribed resulted in dismissal of case.

*In re Noell*, Case No. 06-49184 (Bankr. E.D. Mi. 2008) - Debtor's failure to file and serve a proposed plan modification and file amended Schedules as Ordered by Court within the deadline prescribed resulted in dismissal of case.

*In re Rice*, Case No. 08-71658 (Bankr. E.D. Mi. 2009) - Debtor's failure to file Adversary Proceeding to strip second mortgage within the deadline prescribed by the Court resulted in dismissal of case.

*In re Mitanoski*, Case No. 08-49612 (Bankr. E.D. Mi. 2009) – Debtor's failure to file and serve proposed plan modification and Amended Schedules within time prescribed by Court Order resulted in dismissal of case.

##### §12.69 Payment Default

*In re Camacho*, Case No. 08-59975 (Bankr. E.D. Mi. 2008) - Confirmation of Chapter 13 Plan denied and case dismissed where Debtor failed to appear for either the status conference or the contested confirmation hearing and failed to provide any proof that Debtor had mailed payments to the Trustee that had not yet posted on the Trustee records.

*In re McMahon*, Case No. 07-62863 (Bankr. E.D. Mi. 2008) - Case properly dismissed where Debtor did not cure the default in payments in a timely manner as required by the Trustee's Notice of Default.

*In re Camacho*, Case No. 08-59975 (Bankr. E.D. Mi. 2008) - Confirmation of Chapter 13 Plan denied and case dismissed where Debtor failed to provide any proof that Debtor had mailed payments to the Trustee that had not yet posted on the Trustee records.

## §12.70 ECF Deficiency

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

## §12.71 Failure to Prosecute – Section 1307(c)(1)

*DeVito v. Pees*, Case No. 09-8072 (6<sup>th</sup> Cir. BAP 2010) – Section 1307 permits court to dismiss case for “unreasonable delay that is prejudicial to creditors.” Repeated delays in confirmation process on case that was not complex causing case to remain unconfirmed after more than one year did not warrant dismissal. Although delays may have been unreasonable, delays were not prejudicial where Debtors were making all plan payments and had paid in a total of over \$20,000.00. No creditors appeared at the confirmation hearings to oppose further adjournments. Burden of dismissal would fall disproportionately on creditors who would be deprived of their pro-rata share of funds on hand.

*In re Camacho*, Case No. 08-59975 (Bankr. E.D. Mi. 2008) - Confirmation of Chapter 13 Plan denied and case dismissed where Debtor failed to appear for either the status conference or the contested confirmation hearing and failed to provide any proof that Debtor had mailed payments to the Trustee that had not yet posted on the Trustee records.

*In re Thornton*, Case No. 08-64703 (Bankr. E.D. Mi. 2009) - Case dismissed at confirmation hearing because Debtor failed to appear at the confirmation hearing and failed to give the Chapter 13 Trustee copies of tax returns making it impossible to complete the § 341 meeting of creditors on two different occasions.

## §12.72 Nonpayment of Fees or Charges – Section 1307(c)(2)

## §12.73 Failure to File Plan Timely – Section 1307(c)(3)

## §12.74 Failure to Commence Payments – Section 1307(c)(4)

## §12.75 Denial of Confirmation – Section 1307(c)(5)

*In re Aldridge*, 2011 WL 3889246 (Bankr. W.D. Ohio 2011) – Debtors’ case dismissed where debtors could not confirm plan and given debtors’ financial condition any further effort to amend would be futile.

## §12.76 Material Default – Section 1307(c)(6)

*In re Morrison*, 2010 WL 4929604 (Bankr. E.D. Okla. 2010) - Default in payment of post-petition taxes was not cause for conversion to Chapter 7 when debtors were not in material default under confirmed plan and conversion was not in best interest of creditors. Debtors were 25 months into 60-month plan, were current in plan payments and were making progress paying prepetition taxes. Debtors were in default of post-petition taxes and were ordered to pay post-petition taxes, to remain current on post-petition taxes, and to timely file post-petition tax returns while case was pending.

## §12.77 Revocation of Confirmation – Section 1307(c)(7)

## §12.78 Termination of Confirmed Plan – Section 1307(c)(8)

## §12.79 Failure to File Documents – Section 1307(c)(9) and (10)

## §12.80 Failure to Pay Domestic Support – Section 1307(c)(11)

## §12.81 Bar to Refiling

*In re Mallory*, 2011 WL 338826 (S.D. Tex. Feb. 2, 2011) - Dismissal with prejudice to refile for 180 days was appropriate when debtor refused to make payments to Trustee for three months, causing \$19,000 delinquency in payments where debtor did so to prevent distributions to creditor whose standing the debtor contested. Proper remedy for disputed claim is to object to claim, not refusal to abide by plan. Willful nature of plan default warranted strong sanction of dismissal with prejudice. Under section 105(a), the bankruptcy court has the ability to make any order that was appropriate for enforcing or implementing the court's orders or rules, and the judge could raise the issue *sua sponte*. Section 349(a) would normally limit the judge to dismissing without prejudice, but Debtor's willful refusal to make a plan payment as required by the court and the court's rules constituted basis to dismiss case with prejudice pursuant to 11 U.S.C. Sections 109(g) and 349(a).

*In re Rush*, Case No. 10-55737 (Bankr. E.D. Mi. 2010) – Debtor prohibited for filing another petition jointly or individually without an attorney for period of 180 days. Debtor's filing 175 days after entry of order dismissed by Court *sua sponte*.

*Cusano v. Gene Klein*, 2010 WL 2593921 (6<sup>th</sup> Cir. BAP 2010) – Court properly dismissed Chapter 13 Petition barring debtor from re-filing for two years and limiting the effective of the automatic stay should debtor file any future voluntary petition. Debtor and Creditors had been engaged in extensive state court litigation which Debtor lost. Debtor engaged in serial Chapter 13 filings with no attempt to actually reorganize affairs but instead in attempt to hinder and delay Creditor's collection efforts. Debtor's third Chapter filing resulted in Debtor's filing numerous motions and adversary proceedings which produced an Order directing one Defendant to turn over \$2,300 to Debtor but otherwise denying Debtor any relief. Debtor's schedules in third Chapter 13 case were materially inaccurate including failing to list a potential legal malpractice claim on which Debtor filed a complaint in State Court only one month after the petition date and in which Debtor sought damages in excess of \$400,000.00; and failed to disclose receipt of funds that were subject to Creditor's lien. Debtor failed to appear at the first meeting of creditors and failed to produce documents are ordered by the Court including Debtor's prior tax returns. After Creditor filed a Motion to Convert Case to Chapter 7, Debtor sought to voluntarily dismiss. Court concluded that Debtor's Notice of Voluntary Dismissal did not terminate the Court's jurisdiction and that although Debtor had a right to dismiss the Chapter 13, Court could impose conditions and limitations on that dismissal if Debtor acts in bad faith. Serial filings are not necessarily dispositive of bad faith, but serial filings and voluntary dismissals are evidence of bad faith, particularly where the filings occur on the eve of a significant event such as foreclosure or creditor examination in aid of execution. Court has jurisdiction to impose bar to re-filing. Section 109 allows 180 day bar, but does not limit court's ability to impose longer bar if appropriate. Section 105 and Section 349 allow Court to enter such orders as may be appropriate to protect the authority of the court including bars to re-filing and limitations on the automatic stay in future bankruptcy cases.

#### §12.82 Voluntary Dismissal

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

#### K. Borrowing Money Post-Petition

### XIII. Adversary Proceedings

#### A. Jurisdiction

#### §13.1 Dismissal of Bankruptcy Case



*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.

*Clarke v. Shofner*, 2011 WL 3511524 (Bankr. E.D. Tn. 2011) – Adversary proceeding is normally dismissed when underlying case is dismissed, as bankruptcy court jurisdiction depends on proceeding's nexus to the underlying bankruptcy case. However, dismissal is not mandatory and court can retain jurisdiction for good cause. Court should consider judicial economy; whether the court has previously ruled on significant issues; whether dismissal would be unfair to one party; and general deference to state court to determine state court causes of action. Adversary proceeding to determine validity and priority of competing liens would be dismissed where court had not ruled on any significant issues, parties had not engaged in any meaningful discovery, and issues presented were entirely state law based.

*Brown v. First State Bank Mortgage Company*, Case No. 10-4004 (Bankr. E.D. Mi. 2010) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case was dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 157(b)(1).

*Taunt v. Jamil*, Case No. 09-6571 (Bankr. E.D. Mi. 2010) – Plaintiff cannot voluntarily dismiss adversary proceeding merely by Notice of Voluntary Dismissal once Defendant has filed an Answer. Federal Rule of Civil Procedure 41(a) requires either a stipulation of dismissal or an Order of Dismissal.

*Taunt v. Shaytoa*, Case No. 09-6547 (Bankr. E.D. Mi. 2010) – Plaintiff cannot voluntarily dismiss adversary proceeding merely by Notice of Voluntary Dismissal once Defendant has filed an Answer. Federal Rule of Civil Procedure 41(a) requires either a stipulation of dismissal or an Order of Dismissal.

*Dye-Shelman v. Wells Fargo Bank*, Adv. No. 08-4902 (Bankr. E.D. Mi. 2008) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case was dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 157(b)(1).

*Huffman v. Chase Home Finance, LLC*, Adv. No. 09-4155 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case is dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

*Nathan v. Hendricks*, Adv. No. 08-4273 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case is dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

*Kyewski v. Countrywide Home Loans*, Adv. No. 09-4292 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case is dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

*Daniel v. LaSalle Bank*, Adv. No. 08-5276 (Bankr. E.D. Mi. 2008) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case dismissed after adversary complaint filed.

Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 157(b)(1).

*Huston v. First Mariner Bank*, Adv. No. 09-4178 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case is dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

*McDermott v. Harajli*, Adv. No. 09-5031 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where the main case was dismissed after the adversary complaint was filed. Dismissal of the underlying case resulted in no case pending under Title 11, depriving court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

### §13.2 Relationship of Adversary to Bankruptcy Case

*Meoli v. Huntington National Bank*, 2011 WL 3610050 (Bankr. W.D. Mi. 2011) – Bankruptcy Court lacks jurisdiction to enter final judgment on contract and tort claims absent consent of parties. Only Article III Court can enter final judgment on claims based on state law, even where claims are raised as part of claims resolution process and the party against whom recovery is sought has filed proof of claim.

*Gilchrist v. Bank of America National Association*, Adv. No. 09-4411 (Bankr. E.D. Mi. 2009) – Court lost jurisdiction over adversary proceeding when Bankruptcy Trustee abandoned underlying causes of action. After abandonment, case no longer involved property of the estate and did not raise issues created by Bankruptcy Code, as it asserts only state law claims. No cause of action remained that would have effect on bankruptcy estate. As such, adversary proceeding no longer arose under Title 11; no longer arose in a case under Title 11; and no longer was related to case under Title 11 as required by 28 USC Sections 1134, 157(a) and 157(b)(1).

*Doucet v. Drydock Coal Co.*, 2009 WL 1687775 (6<sup>th</sup> Cir. BAP 2009) – Trustee has standing and Court has jurisdiction over action brought by Trustee concerning administration of estate, determination of validity, priority or extent of liens, and other proceedings affecting liquidation of estate. Debtor's argument that restrictive legend on stock prevented Trustee from obtaining an interest in stock does not affect standing of Trustee to bring action to determine whether stock is property of estate.

*Lewis v. McClatchey*, 2009 WL 1372945 (Bankr. S.D. Ohio 2009) - Bankruptcy Court lacks jurisdiction over litigation between two parties neither of whom are the debtor and that does not involve property of estate.

*Allard v. Coenen*, 419 BR 21 (Bankr. E.D. Mi. 2009) – Chapter 7 Trustee had standing to maintain adversary proceeding arising out of alleged violations of ERISA. Although cause of action under ERISA belongs to the Pension Plan and not to the Corporation itself, the Chapter 7 Trustee overseeing the liquidation of the Debtor-Corporation could bring the adversary and the Court would have jurisdiction as “related to” the administration of the bankruptcy estate. BAPCPA expressly amended Section 704 to require that where the Debtor was an administrator of an ERISA plan, the Chapter 7 Trustee must perform the obligations of a plan administrator. Although Congress did not amend the provisions of 28 USC Sections 1334 and 157 which control the Court's jurisdiction, the Court concluded that dismissal of this case was not required notwithstanding that the cause of action alleged was entirely non-bankruptcy in origin and the “proper plaintiff” – the pension plan – was not a debtor in bankruptcy. The claims being pursued were not property of the bankruptcy estate and none of the recovery would be property of the estate or benefit creditors of the debtor. The actions would be non-core proceedings even though Section 704(a)(11) would appear to require the Trustee to pursue those actions. However, the Court would have “related to” jurisdiction as the outcome of the adversary proceeding could conceivably have an effect on the estate being administered in bankruptcy where the Trustee reasonably advanced, and in the future likely would reasonably advance, funds of the bankruptcy estate to pay (a) attorney fees, accountant fees, and expenses for performing the Trustee's duty to administer the ERISA Plan, not including the prosecution of this adversary proceeding; and (b) attorney fees, expert witness fees, and other litigation expenses relating

to this adversary proceeding; and to the extent the Trustee is successful in recovering on these claims for the ERISA Plan, the Plan will reimburse the bankruptcy estate for the fees and expenses the estate has advanced which would ultimately affect distribution to creditors of the bankruptcy estate by the extent to which the ERISA Plan reimburses the bankruptcy estate for the fees and expenses the estate has paid to enable the Trustee to administer the Plan, including prosecution of this adversary proceeding.

### §13.3 “Arising In”, “Arising Under” and “Related to”

*Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Action for contempt based on alleged violation of discharge injunction is clear “core” proceeding over which Court has subject matter jurisdiction. Count of complaint based on alleged violation of 42 USC Section 1983 for alleged violation of debtor’s civil rights was non-core and, because action could have no effect on either the estate or administration of the case, action was not “related to”. Court lacks subject matter jurisdiction over Section 1983 claim as claim is one that can be heard only by Article III judge.

*McKinstry v. Sergeant*, 442 B.R. 567 (E.D. Ky. 2011) – Causes of action assigned to liquidating trustee based on pre-bankruptcy actions that purportedly led to bankruptcy filing were “related to” bankruptcy for purposes of jurisdiction. “Related to” jurisdiction exists even after confirmation of Chapter 11 Plan where claims were based on pre- and mid-bankruptcy conduct and were specifically reserved to the liquidating trustee in the confirmed plan. Actions would be referred to bankruptcy court for further proceedings.

*Uber v. Nelnet, Inc.*, 443 BR 500 (Bankr. S.D. Ohio 2011) – Core proceedings include: 1) those “arising under title 11” such as causes of action created or determined by a statutory provision of the Bankruptcy Code; and 2) “arising in” proceedings which are those that, by their very nature, could arise only in bankruptcy cases. A bankruptcy court is vested with full judicial power to hear and decide core proceedings pursuant to 28 U.S.C. § 157(b)(1). A non-core proceeding is one that does not invoke a substantive right created by federal bankruptcy law and is one that could exist outside of ... bankruptcy but may still be related to bankruptcy if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy or could alter the debtors’ rights, liabilities, options or freedom of action. Bankruptcy court has jurisdiction to hear non-core but “related to” proceedings, its powers are limited to submission of proposed findings of fact and conclusions of law to the district court for de novo review. Debtor’s complaint against student lender for declaratory relief regarding amounts accruing post-petition on non-dischargeable loan exceeds court’s jurisdiction. All issues arise under non-bankruptcy law and outcome will not have any impact on administration of debtor’s case. However, Court does have jurisdiction to determine whether creditor properly accounted for all sums paid to it through the Chapter 13 plan as efforts to collect sums paid through plan would constitute violation of terms of confirmed plan.

*LaVoie v. LaVoie*, 2011 WL 2464169 (Bankr. W.D. Mi, 2011) – Bankruptcy Court has jurisdiction to consider adversary proceeding for violation of discharge injunction. Action is core proceeding as it involves administration of the case and is an action created or determined by a provision of Title 11.

*McTevia & Associates, LLC v. United States Debt Recovery III, LP*, 446 BR 808 (E.D. Mi. 2011) – Bankruptcy Court retains jurisdiction post-confirmation of Chapter 11 plan to resolve disputes concerning claims that were included in confirmed plan. Creditor’s claim was traceable to terms of confirmed plan that called for collection of assets by liquidating trustee and payment to creditor. As long as bankruptcy case remained open post-confirmation, Bankruptcy Court retained jurisdiction to enforce terms of plan. Action asserting breach of contract arising out of confirmed plan is core proceeding. Once bankruptcy case is closed, however, Court would lose jurisdiction over actions and parties would be left to non-bankruptcy remedies for breach of the confirmed plan.

*Swain v. U.S.*, 2010 WL 3832046 (Bankr. E.D. Mi. 2010) – Court has subject matter jurisdiction over actions that arise in, arise under or are related to a case under Title 11. “Arising under Title 11” refers to the bankruptcy petition itself under Sections 301, 302 and 303. “Arising Under” refers to those proceedings that involve a cause of action created or determined by a statutory provision of Title 11 and could arise only in bankruptcy. “Related to” means that the outcome of the proceeding could conceivably have an effect on the estate being administered. Debtor’s action to determine validity, priority and extent

of Debtor's liability to the Internal Revenue Service was statutory proceeding under the Internal Revenue Code and, at best, is "related to". However, action could not have any impact on the bankruptcy case where the parties already stipulated that to the extent liability existed, it was non-dischargeable; and only issue remaining was whether there was a liability. Outcome of litigation was immaterial as the case involved an insolvent estate and the existence and amount of the debt, admitted to be non-dischargeable, could not in any way impact the administration of the estate or the validity or scope of the discharge. Case dismissed.

*Baker v. Simpson*, 2010 WL 2977329 (2d Cir. 2010) – Action for legal malpractice, conversion, negligence, fraud and intentional misrepresentation brought by Debtor against former bankruptcy counsel was constituted action "arising in" the bankruptcy case over which Bankruptcy court had exclusive jurisdiction. The fact that the "origin" of the claims was found in state law is not dispositive where claims that appear to be based in state law are really an extension of the proceedings already before the bankruptcy court. Professional malpractice claims alleged were "inseparable from the bankruptcy context and that the doctrine of permissive rather than mandatory abstention applied.

#### §13.4 Personal Jurisdiction Over Defendant

*Steed v. Buckalew*, 2009 WL 3493597 (Bankr. E.D. Tn. 2009) – Personal jurisdiction is a three-part test, requiring (1) proper service, (2) subject matter jurisdiction, and (3) consistency with other legal limits on the exercise of jurisdiction. Mailing of Complaint by First Class Mail sufficient under Federal Rules of Bankruptcy Procedure, even if State law where Defendant resides does not permit service by mail. To determine whether Defendant has sufficient minimum contacts with the forum, in a "federal question" case the issue focuses on whether the Defendant had minimum contacts with the United States as a whole, not whether the Defendant had minimum contacts with the particular state in which the federal court sits. Defendant who resided in Florida indisputably had minimum contacts with the United States and could be sued in Tennessee Bankruptcy Court in action under Section 548.

*Simon v. ASIMCO Technologies, Inc.*, 410 BR 765 (Bankr. E.D. Mi. 2009) – Court can assert personal jurisdiction over defendant only to the extent due process permits. Non-resident defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; the cause of action must arise from the defendant's activities there; and the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. Corporate Defendant's actions in convening board meetings in the United States at which affairs of company were decided constitutes "purposeful availment" of rights and privileges of conducting business in United States. Complaint alleged causes of action based expressly on policies approved and enacted at board meeting alleged sufficient causal connection between actions and forum to support jurisdiction and creates sufficient nexus between action and forum to make exercise of jurisdiction reasonable.

#### §13.5 Particular Causes of Action

*Rhiel v. Central Mortgage Company*, 444 BR 871 (Bankr. S.D. Ohio 2011) – Court lacked jurisdiction over third party complaint filed by property owner against notary public for failing to properly notarize and record deed. Although defective deed allowed Trustee to recover property in action against owner, owner's negligence action against notary was not core matter and did not involve debtor or property of the estate. District Court can exercise "supplemental jurisdiction" pursuant to 28 USC Section 1367 over claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. Bankruptcy Courts may lack authority to exercise supplemental jurisdiction as Section 1367 refers to "district court". Assuming Bankruptcy Court could do so, Court declined to exercise supplemental jurisdiction where claims raised novel issues of state law regarding liability of notary public or closing

agent to purchaser on “third party beneficiary” theory. Exercising supplemental jurisdiction would not materially aid the disposition of the case as the case would be within court’s “related to” jurisdiction, requiring court to issue report and recommendations to District Court which would delay resolution; and it is possible that defendant would have right to jury trial at state law which Bankruptcy Court lacks authority to conduct.

*Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Count of complaint based on alleged violation of 42 USC Section 1983 for alleged violation of debtor’s civil rights was non-core and, because action could have no effect on either the estate or administration of the case, action was not “related to”. Court lacks subject matter jurisdiction over Section 1983 claim as claim is one that can be heard only by Article III judge.

*Harker v. Countrywide Homes, Inc.*, 2010 WL 3908978 (S.D. Ohio 2010) – Section 105 does not authorize private right of action against non-party creditor. Trustee could not use Section 105 as basis for action against mortgage creditor based on alleged misrepresentations by creditor that it owned Debtor’s note and mortgage. Trustee cannot maintain declaratory relief action against creditor where all other substantive counts of complaint have already been dismissed. Action for injunctive relief to enjoin creditor from (i) misrepresenting to Bankruptcy Courts, bankruptcy trustees, and creditors of estates that it is a creditor of the debtors’ bankruptcy estates and that it is the holder of notes or mortgages on real estate of the debtors on the date of debtors’ bankruptcy petitions; (ii) misrepresenting to Bankruptcy Courts, bankruptcy trustees, and creditors of estates the true holder of the notes and related mortgages; (iii) failing to disclose that the true holder failed to properly record or did not timely record assignments of the mortgages, in the land records of the proper governmental office in the state in which the real property covered by the mortgage is situated; (iv) filing pleadings, motions, or any other filings in any court containing any such misrepresentations; and (v) requiring Countrywide to correctly represent the true chain of ownership of notes and related mortgages to Bankruptcy Courts, bankruptcy trustees, and creditors of estates dismissed where Trustee had adequate remedies in ability to object to proof of claim and to bring action under Rule 9011.

#### §13.6 Authority of Bankruptcy Court to Enter Final Judgment

*Chernich v. Cayo*, 2011 WL 1596228 (Bankr. W.D. Mi. 2011) – Action by Trustee to recover pre-petition accounts receivable owed to debtor is a state law cause of action over which Court has only “related to” jurisdiction. As matter is not “core proceeding”, Court lacks jurisdiction to enter final judgment. Court would instead issue Report and Recommendation on Plaintiff’s Motion for Default Judgment for District Court review.

#### B. Venue

##### §13.7 Generally

##### §13.8 “Small-dollar” Venue

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

##### §13.9 Change of Venue – Chosen Venue Proper



*In re Barnes*, Case No. 10-55870 (Bankr. E.D. Mi. 2010) - Debtors' unopposed Motion to Transfer Venue denied where Motion failed to demonstrate that transfer was in the interest of justice or for the convenience of the parties as required by 28 USC Section 1412.

*Steed v. Buckalew*, 2009 WL 3493597 (Bankr. E.D. Tn. 2009) – In determining whether to change venue “in the interest of justice” under Section 1404 and Section 1412, Court must consider (1) convenience of witnesses; (2) availability of judicial process to compel the attendance of unwilling or uncooperative witnesses; (3) location of the relevant documents or records, and the relative ease of access to sources of proof; (4) residence and convenience of the parties; (5) relative financial means of the parties; (6) locus of the operative facts and events that gave rise to the dispute or lawsuit; (7) each forum's familiarity with the governing law; (8) the deference and weight accorded to the plaintiff's choice of forum; and (9) trial efficiency, fairness, and the interests of justice based on the totality of the circumstances. Defendant's conclusory assertion that the witnesses to the transaction were located in Florida not sufficient to overcome presumption that action filed in correct venue should remain in that venue, where Defendant failed to identify these witnesses or provide sufficient information to allow court to determine what and how important their testimony may be. Defendant's argument that documents related to transaction were located in Florida insufficient where Defendant failed to explain why documents could not be copied, mailed, e-mailed, faxed or otherwise sent to Tennessee. Although all events pertaining to transfers occurred in Florida and transferred property largely remained in Florida, all documents relating to transfers and items of personal property involved could be easily relocated to Tennessee. Plaintiff's choice of venue is entitled to great deference and will be rejected only where another venue is clearly preferable. Leaving case in Tennessee would further judicial economy and efficiency where similar preference actions were already pending in Tennessee and Court was familiar with Debtor and other underlying issues.

#### §13.10 Change of Venue – Chosen Venue Improper

#### C. Trial

##### §13.11 Generally

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

##### §13.12 Arbitration

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

#### D. Non-Bankruptcy Actions

##### §13.13 Referral to Bankruptcy Court

*McKinstry v. Sergeant*, 442 B.R. 567 (E.D. Ky. 2011) – District Court considering removal of action to bankruptcy court must first determine whether District Court has jurisdiction over action. If Court lacks jurisdiction, case cannot be referred even with consent of opposing party. Causes of action assigned to liquidating trustee based on pre-bankruptcy actions that purportedly led to bankruptcy filing were “related to” bankruptcy for purposes of jurisdiction. “Related to” jurisdiction exists even after confirmation of Chapter 11 Plan where claims were based on pre- and mid-bankruptcy conduct and were specifically reserved to the liquidating trustee in the confirmed plan. Actions would be referred to bankruptcy court for further proceedings.

*U.S. v. Vestal*, 2011 WL 1627985 (N.D. Ohio 2011) – District Court would not refer to Bankruptcy Court action to determine tax liabilities. Connection to bankruptcy case was tangential where bankrupt party was potential claimant to assets of taxpayer depending on amount of tax liability as ultimately determined. Bankruptcy Trustee had already abandoned the possible claim and the Bankruptcy Court had granted stay relief to allow case to proceed at District Court. Action was not core proceeding in bankruptcy case, particularly in light of trustee abandonment of asset and outcome of District Court proceeding could not have any effect on or relate to the bankruptcy case.

*Omega Consulting v. Kirwood General Hospital*, Case No. 10-13231 (E.D. Mi. 2011) – 28 USC Section 157(a) permits District Court to refer any or all proceedings relating to a bankruptcy case to the Bankruptcy Court for disposition. Bankruptcy Court has jurisdiction to determine whether matter is “core” or “non-core”. Matter referred to Bankruptcy Court to determine whether Creditor’s attempt to garnish unclaimed funds remaining from liquidation of debtor constitutes core proceeding and, if so, may supervise the distribution of those funds. Bankruptcy Court also has jurisdiction to determine whether creditor’s actions violated automatic stay and to interpret and enforce its own orders. Even if dispute is not “core” proceeding, it is an action to obtain unclaimed funds that could conceivably have an effect on the bankruptcy case, giving Bankruptcy Court jurisdiction as matter is “related to” bankruptcy case.

*McKinstry v. Sergeant*, 2011 WL 94606 (E.D. Ky. 2011) – Before District Court can consider referring matter to Bankruptcy Court, District Court must first determine whether bankruptcy court can exercise jurisdiction over the referred matter. Although Bankruptcy Court can determine whether the matter is core or non-core, that does not relieve District Court of obligation to determine jurisdiction in the first instance. “Related to” is a broad grant of jurisdiction. Bankruptcy Court has jurisdiction as the causes of action all arise out of the confirmed Chapter 11 plan and were prosecuted by the liquidation trust named in the Plan and in which the Plan vested the causes of action. Bankruptcy jurisdictional statute does not distinguish between pre- and post-confirmation jurisdiction. Although Bankruptcy Court may be more reluctant to exercise jurisdiction post-confirmation, that decision is prudential, not jurisdictional.

*Omega Tool Corp v. Alix Partners, LLP.*, 2009 WL 1868410 (E.D. Mi. 2009) – District Court has authority to refer litigation pending in District Court based on diversity jurisdiction to Bankruptcy Court where matter in controversy is “related to” a pending Chapter 11. A civil proceeding is related to bankruptcy if the outcome of that proceeding *could conceivably have any effect* on the bankruptcy estate. A case between two non-Debtor parties is “related to” a bankruptcy proceeding when the outcome of the case may increase or decrease claims against the Debtor. Action brought against Debtor’s principals is attempt to recover from defendants the same damages that constitute the claim against the estate. Therefore, any recovery would reduce the claims against the Debtor and make more funds available for distribution to other creditors. Further, recovery by plaintiff could result in indemnification claims by defendants against Debtor thereby creating new unsecured claim affecting distributions to creditors. Court is not required to determine whether there are ground to later withdraw the reference before granting a Motion to Refer the case to the Bankruptcy Court in the first instance. Motions to Withdraw the Reference are to be considered only after the controversy has been referred.

#### E. Withdrawal of Reference

##### §13.14 Mandatory

*Antiock Company Litigation Trust v. Morgan*, Case No. 09-3409 (Bankr. S.D. Ohio 2010) – A motion to withdraw the reference is mandatory if the District resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce. Withdrawal is mandatory only mandatory when “substantial and material” consideration of non-Bankruptcy Code law is necessary for the resolution of a case or proceeding. The application of established federal law to particular facts has been determined to not constitute a “significant and material” application. Adversary proceeding involving ERISA did not require mandatory withdrawal of the reference. Bankruptcy Court would not be addressing novel issues of law and would be merely applying existing law to new facts. Although the specific facts are complex the applicable law is settled.

*In re Matheson Industries, Inc.*, 408 B.R. 888 (E.D. Mich. 2009). Creditor, who was defendant in an adversary proceeding initiated by the Chapter 7 trustee, moved to withdraw the reference and move the dispute to the district court. The district court held that the allegations of bid rigging and other interference with the auction of injection molding machines that creditor neglected to perfect a security interest in, did not require mandatory withdrawal of reference, nor was permissive withdrawal of the reference granted. So, the adversary proceeding remained with the bankruptcy court.

*Lewis v. Negri Bossi USA, Inc.*, Case No. 09-11623 (E.D. Mi. 2009) – Withdrawal of reference is mandatory when resolution of proceeding requires consideration of both Bankruptcy Code and other laws of the United States. Complaint alleging that defendant attempted to improperly “chill” bidding at bankruptcy auction and that defendant attempted to control property of estate are actions based on Bankruptcy Code and do not require consideration of antitrust restrictions under Sherman Act. Plaintiff’s decision to include in complaint only “core” matters in effort to ensure case remained in Bankruptcy Court did not constitute “forum shopping” but was an election of causes of action.

*Angelucci v. Farmers Bank & Trust Co.*, 2009 WL 798805 (E.D. Ky. 2009) – Withdrawal of reference is mandatory when resolution of the case will require substantial and material consideration of non-Bankruptcy Code statutes.

*Stevenson v. Polymerica, Ltd.*, 2009 WL 230598 (E.D. Mi. 2009) – Withdrawal of reference mandatory under 28 USC Section 157 where resolution of case requires consideration of both Bankruptcy Code and other laws of the United States regulating organizations of activities affecting interstate commerce. Mandatory withdrawal requires that substantial and material consideration of non-bankruptcy law will be required in the proceeding and that a resolution would require “significant interpretation” of non-Bankruptcy law. Mandatory withdrawal denied where consideration of underlying action will require “some consideration” but not “substantial and material” consideration of non-Bankruptcy law.

*Anderson v. Countrywide Home Loans, Inc.*, 395 BR 7 (E.D. Mi. 2008) – Court not required to withdraw reference in action brought by Debtor for violation of automatic stay and alleged violations of Home Owner’s Loan Act (12 USC Section 1461 *et seq*) and Real Estate Settlement Procedures Act (12 USC Section 2601 *et seq*). “Substantial and material” standard excludes from mandatory withdrawal cases involving “straightforward application of a federal statute to a particular set of facts”. Non-Bankruptcy law will be implicated in the decision but will not be “substantial and material” as the claims are primarily Bankruptcy law related, based on alleged violations of automatic stay and discharge injunction.

*Prince v. Countrywide Home Loans, Inc.*, 2008 WL 4572545 (E.D. Tn. 2008) – Withdrawal of reference is mandatory only when “substantial and material” consideration of non-Bankruptcy law is necessary to determine outcome. That Bankruptcy Court may have to “consider” non-bankruptcy statutes is not enough for mandatory withdrawal. Plaintiff’s claims based on Real Estate Settlement Procedures Act and Fair Debt Collection Practices Act involve matters routinely considered by Bankruptcy Courts. Statutes do not require specialized expertise that Bankruptcy Court lacks and record does not demonstrate that resolution of claims will require “substantial and material” consideration of RESPA and FDCPA in comparison to the other claims in made in the Bankruptcy Court. Judicial economy and orderly administration of dispute best served by Bankruptcy Court continuing to administer the entire case.

#### §13.15 Discretionary

*Welch v. Gordulic*, 2011 WL 2490943 (N.D. Ohio 2011) – District court should consider whether the proceeding is non-core and, thus, whether the bankruptcy court has jurisdiction to hear it; the goals of promoting uniformity in bankruptcy administration, reducing forum shopping and confusion; and expediting the bankruptcy process as well as whether a jury demand has been made. Trustee alleged that the adversary proceeding is a core proceeding, an allegation admitted by Defendant in his answer. Even if the proceeding were non-core, judicial economy weighed against withdrawal where case proceeded in bankruptcy court for six months prior to the filing of the motion to withdraw the reference and case continued to proceed through bankruptcy court for an additional year after the filing of the motion. Bankruptcy court was far more familiar with the issues in the adversary proceeding. Allowing bankruptcy court to proceed promoted uniformity in bankruptcy administration and reduced forum shopping where the adversary proceeding represented the only hope creditors had for realizing a distribution on their claims.

*Antiock Company Litigation Trust v. Morgan*, Case No. 09-3409 (Bankr. S.D. Ohio 2010) – In determining cause for discretionary withdrawal of the reference, a district court can consider promoting uniformity in bankruptcy administration, reducing forum shopping and confusion, fostering the economic use of the debtors' and creditors' resources, and expediting the bankruptcy process. District Court will not withdraw reference at early stage of proceedings based merely on a demand for a jury trial. Bankruptcy courts cannot conduct a jury trial without the consent of all the parties but Bankruptcy Court can preside over matter until it is ready for trial, at which point the reference can be withdrawn for purposes of the trial only. Court will not exercise discretion to withdraw reference at early stage of proceeding where the complaint contains both core and non-core causes of action. Court can delay withdrawing the reference until the time of trial. Judicial economy does not support permissive withdrawal of the reference at the pre-trial stage of this litigation even where adversary proceeding bears “limited commonality” to other actions already pending at District Court where there was no evidence that leaving proceedings in two different courts would cause harm or result in duplicate discovery or pre-trial proceedings.

*Ormsby v. First American Title Company*, 591 F.3d 1199 (9<sup>th</sup> Cir. 2010) – District Court properly withdrew reference of Motion to Tax Attorney Fees arising out of appeal of judgment of non-dischargability. Withdrawal of reference supported by judicial economy.

*Steed v. Knox Forex Group, LLC*, 2009 WL 2929424 (Bankr. E.D. Tn. 2009) – District Court may withdraw reference for “cause”. Permissive withdrawal of reference is not intended to be an escape hatch from Bankruptcy Court, and the reference will be withdrawn only for a compelling cause. Court should consider whether the matter at issue is a “core” proceeding; judicial economy; promotion of uniformity in bankruptcy administration; reduction in forum shopping; conservation of creditor and Debtor resources; expediting the bankruptcy process; and a jury demand. Core proceedings are less likely to be withdrawn as core proceedings invoke substantive rights created by bankruptcy law. Defendant’s demand for a jury trial weighs heavily in favor of withdrawing the reference. Demand for a jury trial, standing alone, constitutes sufficient “cause” to withdraw the reference. Defendant is entitled to jury trial on action to recover fraudulent transfers as long as Debtor has preserved the right by making a timely demand for a jury trial and defendant has not filed any claims against the bankruptcy estate.

*Lewis v. Negri Bossi USA, Inc.*, Case No. 09-11623 (E.D. Mi. 2009) – Withdrawal of reference is permissive for “cause” based on (1) whether the claim is core or non-core, (2) most efficient use of judicial resources, (3) delay and costs to the parties, (4) uniformity of bankruptcy administration, (5) prevention of forum shopping, and (6) other related factors. Claims asserted by Plaintiff were predicated on Sections 362 and 363 of the Bankruptcy Code and constituted “core” proceedings. Efficiency of administration improved by allowing matter to remain in Bankruptcy Court which has more familiarity with facts and issues. Plaintiff’s decision to include in complaint only “core” matters in effort to ensure case remained in Bankruptcy Court did not constitute “forum shopping” but was an election of causes of action.

*Omega Tool Corp v. Alix Partners, LLP.*, 2009 WL 1868410 (E.D. Mi. 2009) – District Court can withdraw reference for “cause” based on (1) whether the claim is core or non-core, (2) most efficient use of judicial resources, (3) delay and costs to the parties, (4) uniformity of bankruptcy administration, (5) prevention of forum shopping, and (6) other related factors. Non-core proceeding with jury demand does



not make future withdrawal of reference inevitable. District Court must consider (1) whether the case is likely to reach trial, (2) whether protracted discovery with Court oversight will be required, and (3) whether the bankruptcy Court has familiarity with the issues presented.

*Polar Molecular Corp. v. Petroleum Enhancer, LLC*, 2009 WL 902080 (E.D. Mi. 2009) – Reference of adversary proceeding to Bankruptcy Court would be withdrawn where there was already pending before the District Court another adversary for which the reference had been withdrawn, there was substantial similarity of facts between the two adversaries, and judicial efficiency and economy would be promoted by consolidating the two pending adversaries through the close of discovery.

*Angelucci v. Farmers Bank & Trust Co.*, 2009 WL 798805 (E.D. Ky. 2009) – District Court can withdraw the reference of either a core or a non-core proceeding. Withdrawal of reference is discretionary for cause shown on timely motion. “Cause” includes (1) judicial economy, (2) uniformity in bankruptcy administration, (3) reducing forum shopping and confusion, (4) fostering economical use of the Debtor's and creditor's resources, (5) expediting the bankruptcy process, and (6) the presence of a jury demand.

*Silverman & Morris, PLLC v. Uniform Color Company Services, LLC*, 2009 WL 365650 (E.D. Mi. 2009) – District Court has discretion to withdraw reference for “cause”. “Cause” includes right to a jury trial and efficient use of judicial resources. Core proceeding does not deprive defendant of right to jury trial under Seventh Amendment.

*Dirt Road Enterprises, LLC v. Equilon Enterprises, LLC*, 2009 WL 248489 (S.D. Ohio 2009) – Court should withdraw reference only in extraordinary, unusual, or compelling circumstances. Court will consider whether the proceeding is core or non-core; whether it is legal or equitable in nature; the efficient use of judicial resources; prevention of forum shopping; and the effect of the ruling on uniformity in administering bankruptcy law. Demand for a jury trial weighs in favor of withdrawal because bankruptcy Courts cannot hear jury trials without the consent of the parties.

*Anderson v. Countrywide Home Loans, Inc.*, 395 BR 7 (E.D. Mi. 2008) – Court would not exercise discretion to withdraw reference in action based on alleged violations of Automatic Stay and Discharge Injunction as well as Home Owner's Loan Act (12 USC Section 1461 *et seq*) and Real Estate Settlement Procedures Act (12 USC Section 2601 *et seq*). Matters are within the special expertise of the Bankruptcy Court; claims are all core proceedings; plaintiff does not allege any state law claims; and judicial economy will be served by leaving matter with Bankruptcy Court which is already familiar with the matters presented.

*Burgess v. Lee Acceptance Corp.*, 2008 WL 4388270 (E.D. Mi. 2008) – Permissive withdrawal requires consideration of (1) whether the claim is core or non-core; (2) what is the most efficient use of judicial resources; (3) what is the delay and what are the costs to the parties; (4) what will promote uniformity of bankruptcy administration; (5) what will prevent forum shopping; and (6) other related factors.

*Gold v. Dobday Manufacturing Co., Inc.*, 2008 WL 4239146 (E.D. Mi. 2008) – Although 28 USC Section 157(d) permits Court to withdraw reference, Congress intended that Bankruptcy Courts hear and adjudicate bankruptcy matters. Demand for jury trial may constitute “cause” for withdrawal.

*McClatchey v. Nicole Energy Marketing, Inc.*, 2009 WL 1416056 (S.D. Ohio 2009) – Permissive withdrawal requires “compelling or extraordinary circumstances” which require the District Court to take such an extraordinary step. Court to consider factors including whether the withdrawal would contravene the goal of uniformity and efficiency in the administration of bankruptcy law; whether withdrawal would allow a dissatisfied litigant to engage in forum shopping; whether the parties' resources would be unnecessarily expended if the matter were withdrawn; and whether the withdrawal would facilitate the bankruptcy process. Court denied request for permissive withdrawal where Chapter 11 Trustee had pending liquidating plan that could resolve all issues between parties, and Trustee had negotiated sale of major assets of Debtor that could result in transfer of fraudulent transfer claims to creditors which would substantially alter causes of action.



*Fokkena v. Countrywide Home Loans, Inc.*, 2008 WL 3932153 (N.D. Ohio 2008) – Permissive withdrawal of reference based on non-exclusive list of factors including judicial economy; uniformity in bankruptcy administration; reducing forum shopping and confusion; conserving Debtor and creditor resources; expediting the bankruptcy process; whether a party has requested a jury trial; and whether the proceeding is core or non-core. If one or more of these factors exist, the District Court has discretion to withdraw the reference. District Court would not withdraw reference where Motion for Sanctions was based on abusive actions before the Bankruptcy Court; the claim implicates the inherent powers of Bankruptcy Court; Bankruptcy Court was more familiar with the issue making the matter more efficiently handled by the Bankruptcy Court; Bankruptcy Court will be in a better position to gauge the propriety of the allegedly improper filings; and Motion to Withdraw Reference filed in response to an adverse party's motion for sanctions raising forum shopping concerns. Court would not withdraw reference in action seeking sanctions against creditor for filing proof of claim where creditor failed to ensure the accuracy of its filings. Creditor filed proof of claim and objected to confirmation although Debtor did not own the property which was the subject of creditor's mortgage.

#### §13.16 Timing of Motion

*Steed v. Knox Forex Group, LLC*, 2009 WL 2929424 (Bankr. E.D. Tn. 2009) – Court would withdraw the reference where trial was imminent and granting the motion would not be premature or inconsistent with interest of judicial economy.

*Omega Tool Corp v. Alix Partners, LLP.*, 2009 WL 1868410 (E.D. Mi. 2009) – Court will not withdraw reference based on jury demand at early stages of case as Bankruptcy Court can consider and make recommendations on dispositive motions based on proposed findings of fact and conclusions of law, which could obviate jury trial demand. Withdrawal of reference based on jury demand becomes appropriate only if and when the case becomes “trial ready”.

*Polar Molecular Corp. v. Petroleum Enhancer, LLC*, 2009 WL 902080 (E.D. Mi. 2009) – Reference of adversary proceeding to Bankruptcy Court would be withdrawn where there was already pending before the District Court another adversary for which the reference had been withdrawn, there was substantial similarity of facts between the two adversaries, and judicial efficiency and economy would be promoted by consolidating the two pending adversaries through the close of discovery.

*Angelucci v. Farmers Bank & Trust Co.*, 2009 WL 798805 (E.D. Ky. 2009) – Motion to withdraw reference premature where Bankruptcy Court had not determined whether case was core or non-core; Bankruptcy Court authorized to decide dispositive motions subject to the parties' rights to appeal as parties had consented to Court's exercise of jurisdiction over non-core matters; and pending demand for jury trial did not compel withdrawal of reference until it appeared case would actually proceed to trial. Judicial economy and uniformity would be furthered by allowing case to remain in Bankruptcy Court as case had been pending in the Bankruptcy Court for more than a year; Bankruptcy Court was more familiar with the parties, their claims, and the substantive law; resolution of the adversary proceeding would affect priority of liens in the Chapter 7 proceedings; removing case would waste the parties' resources, the resources of both Courts, and would unnecessarily slow the bankruptcy process; and timing of request to withdraw the reference indicated intent to shop for a more favorable forum.

*Silverman & Morris, PLLC v. Uniform Color Company Services, LLC*, 2009 WL 365650 (E.D. Mi. 2009) – Although Bankruptcy Court could manage all pre-trial matters and the District Court could reconsider withdrawing the reference when the case is ready for trial, District Court found that judicial economy would be better served by withdrawing reference now rather than reconsider the issue later.

*Dirt Road Enterprises, LLC v. Equilon Enterprises, LLC*, 2009 WL 248489 (S.D. Ohio 2009) – District Court would deny motion to withdraw without prejudice where the Bankruptcy Court was better suited to conduct the pretrial proceedings; adversary proceedings were complex; underlying bankruptcy proceedings have been pending for more than one year; adversary proceedings have been pending for approximately six months; Bankruptcy Court had adjudicated dismissal motions and was more familiar with case; and

resolution of the adversary proceedings will affect the bankruptcy. Parties could renew Motion to Withdraw Reference once there is an imminent trial date.

*Stevenson v. Polymerica, Ltd.*, 2009 WL 230598 (E.D. Mi. 2009) – “Better and normal practice” is to deny without prejudice motion for withdrawal of reference made early in the case so that the Bankruptcy Court may manage the pre-trial phase of the litigation. Withdrawal may be revisited when the case is ready for trial.

*Gold v. Dobday Manufacturing Co., Inc.*, 2008 WL 4239146 (E.D. Mi. 2008) – Demand for jury trial may constitute “cause” for withdrawal; however withdrawal of the reference is premature at early stage of litigation. Better practice is to allow Bankruptcy Court to manage pre-trial phase of litigation with District Court to reconsider withdrawal of reference when case is ready for trial.

#### §13.17 Burden of Proof

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

#### §13.18 Waiver of Right to Object

*Hagan v. Okony*, 2008 WL 4722747 (W.D. Mi. 2008) – Failure to object to Court’s Report and Recommendation on Motion to Withdraw Reference constitutes waiver of any further review by District Court. District Court will adopt Report and Recommendation without further consideration or argument. Bankruptcy Court entered report recommending that reference be withdrawn as matter was non-core and Bankruptcy Court could not enter a final judgment. Defendant failed to respond to the Complaint and a default had been entered. Withdrawal of reference appropriate for purposes of allowing District Court to enter Final Default Judgment.

#### §13.19 Stay Pending Appeal

*Antioch Company Litigation Trust v. Morgan*, Case No. 09-3409 (Bankr. S.D. Ohio 2010) – Appeal of Order Denying Motion to Withdraw Reference does not divest Bankruptcy Court of jurisdiction. Bankruptcy Court may stay proceedings during pendency of appeal if moving party can show (1) the likelihood that the pending motion to withdraw will be granted (i.e. likelihood of success on the merits); (2) that the movant will suffer irreparable harm if the stay is denied; (3) that the non-movants will not be substantially harmed by the stay; and (4) the public interest will be served by granting the stay. Movant failed to demonstrate that District Court would withdraw reference in the early stages of litigation and failed to demonstrate irreparable harm based solely on allegation that Bankruptcy Court may overstep jurisdictional bounds. Stay of proceedings would only delay Plaintiff’s attempt to collect funds on behalf of creditors and would result in harm to Plaintiff with no corresponding benefit to the defendants. Denial of stay furthers public interest in efficient and expeditious resolution of pending litigation without unnecessary delay.

#### F. Abstention and Removal

#### §13.20 Actions Subject to Removal or Abstention

*In re T.S.P. Inc.*, 2011 WL 1431473 (Bankr. E.D. Ky. 2011) – 28 USC Section 1441 allows a case to be removed to Bankruptcy Court only if the action is a civil action brought in state court. Administrative proceedings such as proceedings before Kentucky Department of Labor for alleged safety violations is not a civil action brought in state court and cannot be removed to Bankruptcy court. Section 1452 permits the debtor to remove to Bankruptcy Court any civil action except for tax court proceedings, actions by governmental units to enforce police or regulatory powers, or action over which the district court would not have jurisdiction. Administrative proceedings are not “civil actions” and cannot be removed under Section 1452.

*Essek v. Vanderbilt Mortgage, Inc.*, 2011 WL 97716 (E.D. Ky. 2011) – Court would abstain in action against mortgage lender based on foreclosure proceedings where those proceedings remained pending and ongoing in State court. District Court's involvement would unnecessarily interfere with ongoing state judicial proceedings.

*McKibben v. Fair Finance Company*, Case no. 10-50494 (Bankr. N.D. Ohio 2010) – State Court litigation subject to removal to bankruptcy court pursuant to Section 1441 and 1452. Bankruptcy Court is not required to have had original jurisdiction over the case as long as case relates to a proceeding under Title 11 to support removal under Section 1452. Case is “related to” if the outcome of the proceeding could conceivably have some effect on the bankruptcy estate. State court litigation against Debtor would affect estate as any award to the plaintiffs in that action would necessarily diminish the funds available for the remaining creditors. Court would not abstain or remand where abstention would cause delay of administration of estate; the issues presented were analogous to issues routinely covered in bankruptcy cases; Bankruptcy Court was capable of adjudicating the issues presented; and case was related to bankruptcy based on the possible impact on creditors.

*In re Michigan Tractor and Machinery Co. v. Red Top Rentals, Inc.*, Adv. Case No. 09-5064 (Bankr. E.D. Mi. 2010) – 28 U.S.C. Section 1452 allows removal of any claim or cause of action if the district court has jurisdiction over the action under Section 1334. Section 1134 lists four types of matters over which the district court has jurisdiction: (1) “cases under title 11,” (2) “proceedings arising under title 11,” (3) proceedings “arising in” a cause under title 11, and (4) proceedings “related to” a case under title 11. A civil proceeding is “related to” the bankruptcy if the outcome of that proceeding that could conceivably have any effect on the estate being administered, or if the outcome could alter the debtor's rights, liabilities, options or freedom of action. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact upon the bankruptcy estate – certainty, or even likelihood, of such an impact is not a requirement. Civil action against corporate debtor's president based on president's personal guarantee is “related to” the bankruptcy estate. Corporate president is listed as co-debtor on other corporate obligations and, to extent that creditor recovers against president, that recovery will reduce creditor's claim against assets of the bankruptcy estate.

#### §13.21 Grounds

*IRS v. Hayes*, 2011 WL 2490945 (E.D. Mi. 2011) – IRS failed to demonstrate basis for permissive abstention to allow proceedings to be heard in Tax Court. Co-obligor had already defaulted in the collection proceedings, eliminating any concerns about comity. Judicial economy would be promoted by allowing matter to proceed in Bankruptcy Court.

*In re T.S.P. Co., Inc.*, 2011 WL 1431473 (Bankr. E.D. Ky. 2011) – 28 USC Section 1334(c)(2) requires court to which action has been removed to abstain if (1) the case is based on a state law claim or cause of action which, although related to a title 11 case, did not arise under Title 11 or out of a Title 11 case; (2) the case could not have been commenced in Federal court absent the fact of a bankruptcy petition; and (3) if the case were commenced in State court, it could be timely adjudicated. Action pending before state department of labor for alleged safety violations did not meet diversity requirements and did not raise federal question, precluding Federal court from exercising jurisdiction; and state administrative proceeding afforded timely resolution of issues presented. Court would mandatorily abstain from proceeding.

*Willis v. Chase Home Finance, LLC.*, 2010 WL 3430712 (N.D. Ohio 2010) – *Younger* doctrine requires Federal Court to abstain where there are pending state court proceedings that implicate an important state interest and the state proceedings afford an adequate opportunity to raise federal questions. Pending State court foreclosure action precluded Federal Courts from asserting jurisdiction in an action for loan fraud, illegal foreclosure or breach of loan modification where issues could be adequately raised in State Court proceedings.

*Baker v. Simpson*, 2010 WL 2977329 (2d Cir. 2010) – Mandatory abstention applies when a proceeding based upon a state law claim or state law cause of action is “related to” a case under Title 11 but does not arise under or arise in a case under Title 11. A proceeding “arising in” Title 11 is one that is not based on

any right expressly created by Title 11, but nevertheless, would have no existence outside of the bankruptcy. Action for legal malpractice, conversion, negligence, fraud and intentional misrepresentation brought by Debtor against former bankruptcy counsel was constituted action “arising in” the bankruptcy case. The “appellant's relationship with all appellees arose only in connection with his Title 11 proceeding. Bankruptcy Court has the ability to review the conduct of attorneys who are appointed by the court to aid a person in need of counsel in a proceeding pursuant to Title 11. Professional malpractice claims alleged were “inseparable from the bankruptcy context and that the doctrine of permissive rather than mandatory abstention applied.

*In re Mayer*, Case No. 09-60536 (Bankr. E.D. Mi. 2010) – Permissive abstention is proper where: (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. §1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted “core” proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of the bankruptcy court's docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial; (12) the presence in the proceeding of non-debtor parties; and (13) any other significant factors. Court would not abstain from dispute over whether State Court Divorce judgment created constructive trust in specific assets for payment of Debtor's attorney fees. Bankruptcy Court could adjudicate related state law claims; issues involved necessarily impacted on administration of estate including possible preference litigation; resolution in State Court would necessarily result in further proceedings in Bankruptcy Court, resulting in duplication of judicial effort and expense; Bankruptcy Court can efficiently handle the issues presented; the only non-debtor parties in the State Court are the creditors who have actively participated in the Bankruptcy proceeding; no party demanded a jury trial and there would be no right to a jury trial if the matter were returned to State Court; and there are no unusual or significant factors that would indicate that abstention would produce better or more efficient result.

*LaBankoff v. GMAC Mortgage, LLC.*, Case No. 09-1294 (9<sup>th</sup> Cir. BAP. 2010) – A bankruptcy court may abstain from hearing an adversary in the interests of justice or in the interest of comity with State courts or respect for State law. Permissive abstention is proper where: (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. §1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted “core” proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of the bankruptcy court's docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of non-debtor parties. Court properly abstained where all allegations in the complaint were “non-core” and arose entirely from pre-bankruptcy conduct and claims were principally state law claims that could have been pursued in state court and three of four plaintiffs and at least two defendants were neither debtors nor creditors in the bankruptcy case.

*In re Porrello*, Case No. 07-10053 (Bankr. N.D. Ohio 2009) – Bankruptcy courts have the authority to abstain from hearing matters that may be heard in state court within sound discretion of the bankruptcy judge and can be raised sua sponte. A Court will consider (1) the effect on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted ‘core’ proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with



enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties. Court would abstain from ruling on Debtor's objection to Claim Debtor will not receive a general discharge in bankruptcy and the outcome of the objection would have no effect on the efficient administration of the Debtor's estate; the lack of other pending bankruptcy matters combined with the presence of a related fraud claim proceeding pending in state court; Debtor's estate has been fully administered by the case trustee; and the relief sought herein is truly a matter rooted in state law. Court remanded the Debtor's Objection to Claim to the appropriate state court for its consideration and determination.

*Lone Star Fund V (U.S.), L.P. v. Barclays Bank Plc*, 594 F.3d 383 (5th Cir. 2010) – Court can remove non-bankruptcy case to federal court pursuant to 28 USC Sections 1334(b) and 1452(a) where the underlying action is “related to” a pending bankruptcy proceeding. “Related to” jurisdiction includes any litigation where the outcome could alter, positively or negatively, the debtor's rights, liabilities, options, or freedom of action or could influence the administration of the bankrupt estate. An indemnification provision in which the bankrupt debtor agrees to indemnify one party to a transaction is a sufficient nexus to allow removal of action between other party to transaction and unrelated third party. Mortgage company originated loans and sold loans to buyer, with agreement to indemnify buyer from any losses on mortgages that defaulted. Buyer in turn sold the mortgages to third party with similar indemnification provision. When mortgages defaulted, third party sued buyer on indemnification provision. Buyer removed action to Federal Court where the underlying bankruptcy case was pending. To the extent Buyer was liable to third party on its indemnification provision, Buyer would have corresponding claim against debtor. Therefore, claims of third party against Buyer were sufficiently “related to” bankruptcy to support removal.

*MR Crescent City, LLC., v. Draper*, 588 F.3d 822 (4<sup>th</sup> Cir. 2009) – 28 USC Section 1447(c) permits imposition of legal fees against a party who removed a case from state court to federal court if the federal court later remands the case to the state court. Section 1447(c) authorizes recovery of fees only from party who caused case to be removed, and does not create personal liability of attorney for party who filed removal petition. Section 1447 does not repeal “American Rule” presumption that each party to litigation bears its own fees and costs or that only parties to proceeds can be held responsible for payment of legal fees. Fee shifting statutes must be construed narrowly and will not be construed to include awarding fees against counsel for a represented party absent clear indication that Congress intended that result.

*Collins & Aikman Litigation Trust v. Detkowski*, 2009 WL 1469630 (E.D. Mi. 2009) - Action for personal injury or death – 28 USC Section 157(b)(5) requires that the action be tried either in the District Court where the bankruptcy case is pending or in the District Court where the claim arose, as determined by the District Court where the bankruptcy case is pending. Section 157 does not prohibit the District Court from abstaining entirely in favor of pending State Court suit as provided in 28 USC Section 1334(c)(1). Factors to determine whether abstention is appropriate include (i) whether the District Court's exercise of jurisdiction will result in piecemeal litigation, with the pending personal injury suit going forward as to other non-Debtor parties who cannot be transferred out of the jurisdiction they are now in, (ii) whether issues of state law are predominant, (iii) considerations of judicial economy, (iv) effect of abstention on the efficient administration of the bankruptcy estate, and (v) the degree of relatedness of the personal injury suit to the bankruptcy case. Abstention is appropriate where State Court personal injury action includes claims against non-Debtor defendants that could not be transferred and which would require personal injury suit to be tried twice in different Courts; state issues predominate in personal injury action with federal law playing no role whatsoever; State Court suit has progressed through the pre-trial phase and is now ready for trial; and there is no reason to believe that the claims against Debtor could not be tried in a similarly expeditious manner. Alleged increased cost to Debtor of litigating in State Court not sufficient to overcome factors that support abstention where State Court is still proximate to and is actually located in same District as bankruptcy case and Debtor failed to produce any evidence that litigating in State Court would actually be significantly more expensive than doing so in District Court.

*Commonwealth of Kentucky v. Young Oil Corp.*, 2009 WL 1475512 (E.D. Ky. 2009) – Action by governmental unit to enforce police or regulatory power is not subject to removal to either Bankruptcy



Court or District Court after the defendant files for bankruptcy protection. Action by governmental unit to enforce State Securities Act is not adjudication of private right but is effectuation of public policy precluding removal to Federal Court. Action must be remanded to Kentucky Court.

#### §13.22 Timeliness of Notice of Removal

*Michigan Tractor and Machinery Co. v. Red Top Rentals, Inc.*, Adv. Case No. 09-5064 (Bankr. E.D. Mi. 2010) – 28 U.S.C. Section 1446 requires notice of removal of a civil action or proceeding to be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. If civil action was initiated before commencement of the bankruptcy case, a party has 90 days after the bankruptcy petition is filed to seek removal if the State court proceeding is “related to” the bankruptcy proceeding. A civil proceeding is “related to” the bankruptcy if the outcome of that proceeding that could conceivably have any effect on the estate being administered, or if the outcome could alter the debtor’s rights, liabilities, options or freedom of action. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact upon the bankruptcy estate – certainty, or even likelihood, of such an impact is not a requirement. Civil action against corporate debtor’s president based on president’s personal guarantee is “related to” the bankruptcy estate. Corporate president is listed as co-debtor on other corporate obligations and, to extent that creditor recovers against president, that recovery will reduce creditor’s claim against assets of the bankruptcy estate. Thus, corporate president had 90 days from commencement of the bankruptcy case to seek removal under section 1452 and Federal Rule 9027.

#### §13.23 Procedure

*In re T.S.P. Co., Inc.*, 2011 WL 1431473 (Bankr. E.D. Ky. 2011) – A party removes a case under 28 U.S.C. § 1441 by taking three procedural steps: (1) filing a notice of removal in the federal court; (2) filing a copy of this notice in the state court; and (3) giving prompt written notice to all adverse parties. Once these steps are taken, removal is effective and the state court “shall proceed no further unless and until” the federal court remands the matter. Although underlying action was not properly removable under 28 USC Sections 1441 or 1442, the notice of removal nonetheless divested state tribunal of jurisdiction and action should not have proceeded.

*McKibben v. Fair Finance Company*, Case no. 10-50494 (Bankr. N.D. Ohio 2010) – State Court litigation subject to removal to bankruptcy court pursuant to Section 1441 and 1452. Section 1441 requires the joinder or consent of all co-defendants to a Notice of Removal. Failure to obtain consent mandates that court deny removal of action to Bankruptcy Court. However, Section 1452(a) provides a separate basis to remove action that is “related to” a bankruptcy case without the consent of all co-defendants.

*Mills v. Ellis*, 2010 WL 3218590 (Bankr. N.D. Ohio 2010) – Rule 9027 requires that the party filing Notice of Removal promptly serve the Notice of Removal on all parties to the removed action. Mailing a copy of the State Court Notice of Filing Notice of Removal is not the same as serving a copy of the Notice of Removal itself. Service of the notice of removal alerts parties in the removed case to the change of court, as well as starts the clock for filing a motion to remand or to respond to the complaint if time remains to do so. Further, the Notice of Removal was not accompanied by any pleading which would have placed issue of non-dischargability before the Bankruptcy Court. Remedy for failure to promptly serve Notice of Removal is to remand case to court from which it was removed.

#### G. Remand

#### §13.24 Grounds

*Mills v. Ellis*, 2010 WL 3218590 (Bankr. N.D. Ohio 2010) – Rule 9027 requires that the party filing Notice of Removal promptly serve the Notice of Removal on all parties to the removed action. Mailing a copy of the State Court Notice of Filing Notice of Removal is not the same as serving a copy of the Notice of Removal itself. Remedy for failure to promptly serve Notice of Removal is to remand case to court from which it was removed.

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

#### §13.25 Appellate Review

*Auto Owners Insurance v. Rossi*, 444 BR 170 (6<sup>th</sup> Cir. CAP 2011) – Order remanding case to state court from which it was removed is not appealable order pursuant to 28 USC Section 1447(d). Whether Bankruptcy Court correctly stated that it lacked subject matter jurisdiction as basis for remand, Order of Remand was not reviewable to determine whether Bankruptcy Court's conclusion of jurisdiction was correct.

#### H. Standing to Prosecute

#### §13.26 Generally

*Borders v. King.*, 2011 WL 3352468 (Bankr. E.D. Ky. 2011) – Creditors have no standing to prosecute a fraudulent transfer action in their own right and for their own benefit during a bankruptcy even if they would have had standing to do so outside of bankruptcy. The Trustee has the exclusive right to bring an action for fraudulent conveyance pursuant to 11 U.S.C. § 548 and/or § 544 during the pendency of bankruptcy proceedings.

*Rankin v. Lavan*, Case no. 09-1087 (6<sup>th</sup> Cir. 2011) – Debtor's undisclosed claim of ownership of real property was not disclosed in bankruptcy schedules, became property of estate on filing of case. Absent abandonment, only the Trustee has standing to pursue claims based on failed purchase and sale of real estate where all elements of action arose prior to commencement of case. Adversary proceeding prosecuted by Debtor post-petition properly dismissed as Debtors lacked standing to pursue action.

*Lincoln Electric Company v. Manahan*, 2011 WL 3516201 (N.D. Ohio 2011) – Causes of action for alleged fraudulent transfers by debtor constitute property of estate. Actions are not individual as to any creditor but constitute actions which benefit creditor body as a whole.

*Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – Borrower has standing to challenge foreclosure as long as action is brought before expiration of redemption period. Complaint contesting foreclosure sale filed 7 days before sale date timely filed. Subsequent expiration of redemption does not render action moot.

*In re Ferrette*, 2011 WL 940409 (E.D. Mi. 2011) – Adversary proceeding challenging validity of foreclosure sale dismissed where sale occurred prior to commencement of bankruptcy case. After the property had been sold at the sheriff's sale, debtor lost his opportunity to obtain any relief from the bankruptcy court to void the sale or extend the redemption period.

*Lessl v. CitiMortgage, Inc.*, 2011 WL 4351673 (E.D. Mi. 2011) – Owner may hold over after foreclosure sale by advertisement and contest validity of sale in summary proceeding for possession. However, Court will not overturn foreclosure sale absent strong showing of fraud or irregularity.

*Nett v. Wells Fargo Home Mortgage, Inc.*, 2011 WL 1519166 (E.D. Mi. 2011) – Owner retains standing to contest validity of foreclosure sale even after redemption period has run. Owner can challenge foreclosure validity as part of summary eviction proceedings or as part of separate proceeding.

*IRS v. Hayes*, 2011 WL 2490945 (E.D. Mi. 2011) – Debtor has standing to bring adversary against IRS to determine amount of tax debt and to recover potential overpayment. Debtor has “clear interest” in issues relating to the scope of the discharge. Tax debts were admittedly non-dischargeable, so amount of tax debt directly impacted the discharge. Fact that any money recovered as overpayments would be property of estate and would be distributed to creditors did not deprive debtor of standing as outcome is “clearly related” to the administration of the estate.

*JGR Associates, LLC v. Brown*, 2011 WL 9153 (Bankr. E.D. Mi. 2011) – “Standing” for purposes of adversary proceeding requires “Article III” Standing, which requires that the action directly affect a right or the pecuniary interest of the plaintiff. Standing also requires “prudential” standing, which requires that only the “real party in interest” bring the adversary. A person with Article III standing may still lack prudential standing. Defendant’s claim that plaintiff was not real party in interest must be timely raised or will be waived. Defendant’s assertion that plaintiff was not real party in interest, not made until first day of trial, was untimely.

*Morris v. Paine*, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Court can dismiss action where complaint fails to assert a private right of action, as complaint fails to state a cause of action pursuant to Rule 12(b)(6).

*Harker v. Countrywide Homes, Inc.*, 2010 WL 3908978 (S.D. Ohio 2010) – Section 105 does not authorize private right of action against non-party creditor. Trustee could not use Section 105 as basis for action against mortgage creditor based on alleged misrepresentations by creditor that it owned Debtor’s note and mortgage. Trustee cannot maintain declaratory relief action against creditor where all other substantive counts of complaint have already been dismissed. Action for injunctive relief to enjoin creditor from (i) misrepresenting to Bankruptcy Courts, bankruptcy trustees, and creditors of estates that it is a creditor of the debtors’ bankruptcy estates and that it is the holder of notes or mortgages on real estate of the debtors on the date of debtors’ bankruptcy petitions; (ii) misrepresenting to Bankruptcy Courts, bankruptcy trustees, and creditors of estates the true holder of the notes and related mortgages; (iii) failing to disclose that the true holder failed to properly record or did not timely record assignments of the mortgages, in the land records of the proper governmental office in the state in which the real property covered by the mortgage is situated; (iv) filing pleadings, motions, or any other filings in any court containing any such misrepresentations; and (v) requiring Countrywide to correctly represent the true chain of ownership of notes and related mortgages to Bankruptcy Courts, bankruptcy trustees, and creditors of estates dismissed where Trustee had adequate remedies in ability to object to proof of claim and to bring action under Rule 9011.

*Spradlin v. Baker*, 2010 WL 2612585 (Bankr. E.D. Ky. 2010) – Creditor has standing to pursue recovery under Section 547 where funds that would be recovered would not be exempt and would be available for distribution to creditors.

*Moses v. Howard University Hospital*, Case No. 08-7087 (D.C. Cir. 2010) – The trustee, as the representative of the bankruptcy estate, is the real party in interest, and is the only party with standing to prosecute causes of action belonging to the estate once the bankruptcy petition has been filed. The commencement of Chapter 7 bankruptcy extinguishes a debtor’s legal rights and interests in any pending litigation, and transfers those rights to the trustee, acting on behalf of the bankruptcy estate. An outstanding legal claim that is abandoned by the trustee reverts back to the original debtor-plaintiff. Whatever interest passed to the trustee when Debtor filed for Chapter 7 bankruptcy was extinguished when Trustee abandoned the cause of action in this case. At that point, the Debtor re-acquired standing to prosecute the action as if the bankruptcy had never been filed.

*Countrywide Home Loans v. Dickson*, 427 BR 399 (6<sup>th</sup> Cir. BAP 2010), *aff'd* 2011 WL 3768684 (6<sup>th</sup> Cir. 2011) – Debtor has direct and derivative standing to pursue action under Section 522(h) and Sections 544 and 547 where the creditor obtained the judgment lien during the preference period. Court has equitable power to allow Debtor to pursue avoidance actions where the Trustee fails or refuses to do so. Chapter 13 Trustee typically lacks resources to pursue avoidance action and lacks ability to sell assets to fund a war chest for litigation.

*Kirschner v. KPMG, LLP.*, 590 F.3d 186 (2d Cir. 2009) – State law governs whether of corporate insiders can be computed to Corporation which would result in trustee for debtor corporation lacking standing to recover against third parties for damages to creditors. Corporate insiders engaged in complicated structure which resulted in completion of corporate assets and expense of creditors. After Corporation filed bankruptcy, Liquidating Trustee sought to bring actions against corporate insiders, professionals and advisers for fraud, breach of fiduciary duty and malpractice. District Court concluded that Bankruptcy Trustee lacked standing to seek recovery on behalf of debtor company against third parties for injuries incurred by the misconduct of debtor's controlling managers. "Adverse-interest" exception will prevent imputation of insiders conduct to Corporation only where the corporate officers have "totally abandoned" the corporation's interests and the insiders are acting entirely for their own benefit. District court concluded that at first interest exception applies only where insiders intended to benefit only themselves and that corporation was harmed by the scheme, not nearly that corporate management did not intend to benefit the company under circumstances where the company may have received some incidental benefit. The Second Circuit, noting that the controlling issues were once purely of New York State Law, certified the issues to the New York Court of appeals for further proceedings.

*Gilchrist v. Bank of America*, Adv. No. 09-4411 (Bankr. E.D. Mi. 2009) - Adversary proceeding commenced by Debtor while case pending under Chapter 13 becomes property of estate upon conversion to Chapter 7. Debtors did not claim any exemption in the causes of action and the Chapter 7 trustee has not abandoned the causes of action. Only the Chapter 7 trustee may prosecute the claim(s), and Debtors' continuing prosecution of these claims would violate the automatic stay.

*Hyundai Translead, Inc. v. Johnson Truck & Trailer Repair, Inc.*, 555 F.3d 231 (6<sup>th</sup> Cir. 2009) - Bankruptcy Code permits the Court to grant derivative standing to creditors to pursue avoidance claims on behalf of the Estate where the Chapter 7 Trustee declines to do so. Section 544's reference to authorizing the trustee to pursue avoidance actions does not limit the Court's equitable or statutory ability to permit creditors to act in place and stead of the Trustee where that is in the best interests of the estate. Derivative standing is equally available in Chapter 7 and Chapter 11 cases. To support derivative standing, party moving for derivative standing must show that: (1) a demand was made on the trustee (or Debtor-in-possession) to act, (2) the trustee (or Debtor-in-possession) declined, (3) a colorable claim exists that would benefit the estate, and (4) the trustee's (or Debtor-in-possession's) inaction was an abuse of discretion.

*Casden v. Burns*, 2009 WL 103620 (6<sup>th</sup> Cir. 2009) - Shareholder lacked standing to pursue action against former officers and directors of corporation for breach of fiduciary duty where approval of corporation's Chapter 11 plan cancelled corporate stock and extinguished shareholder's right to bring derivative claims. Purported deprivation of shareholder rights does not convert a derivative claim into a direct claim. The incidental loss of shareholder rights does not constitute an injury that is distinct from the harm suffered by all shareholders. Alleged loss of shareholder rights would not give rise to a direct individual action.

*Brennan v. Slone*, 2008 WL 4569946 (6<sup>th</sup> Cir. 2008) - Chapter 7 Trustee had standing to pursue fraudulent transfer against transferee where property transferred was subject to a security interest in favor of third party and as part of transfer the secured party released the security interest. Trustee's efforts to recover fraudulently transferred assets was not action taken merely to enforce the rights of one creditor (in which case the Trustee would lack standing) but was effort to preserve rights of estate and of creditors as a whole. If property transferred was over-encumbered such that any recovery would benefit only the secured creditor then the Trustee would lack standing as the recovery, if any, would benefit only the secured creditor. But where the secured creditor voluntarily released the security interest at the time of the transfer, any property recovered would be for benefit of estate and creditors.

*Wuliger v. Manufacturers Live Insurance Company*, 567 F.3d 787 (6th Cir. 2009) - Constitutional requirements for standing require plaintiff to show: (1) it has suffered injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) injury is fairly traceable to challenged action of defendant; and (3) it is likely, as opposed to merely speculative, that injury will be redressed by favorable decision. Plaintiff must also satisfy three prudential standing requirements: (1) plaintiff must assert his own legal rights and interests, without resting claim on rights or interests of third parties; (2) claim must not be generalized grievance shared by large class of citizens; and (3) in statutory cases, plaintiff's claim must fall within zone of interests regulated by statute in question.

#### §13.27 Intervention

*Matthews v. Educational Credit Management Corp.*, 2011 WL 836925 (E.D. Ky. 2011) – Assignee of guarantor of student loan debt had sufficient interest to support intervention in action to determine dischargeability under Section 523. Intervenor demonstrated timely request to intervene; guarantor had substantial legal interest in case; applicant's ability to protect interests would be impaired if intervention was denied; and applicant's interests were not otherwise adequately represented. Primary lender's status as defendant in case did not provide adequate representation of guarantor who held distinct interests, particularly where primary lender defaulted by failing to respond to adversary complaint.

*Bailey v. White*, 2009 WL 928595 (6<sup>th</sup> Cir. 2009) – Federal Rule of Civil Procedure 24(a) requires party seeking to intervene to demonstrate (1) application is timely; (2) applicant must have substantial legal interest in the subject matter of the action; (3) applicant's ability to protect that interest must be impaired if intervention is not granted; and (4) parties already present in the action do not adequately represent applicant's interest. District Court properly denied motion to intervene as untimely where action had been pending for 17 months including litigation over preliminary injunction, class certification and discovery. Proposed intervenors knew about their interests in the case before the complaint was filed and had adequate opportunity to participate in fairness hearing and review documents voluntarily produced by the parties. Court will consider 5 factors in determining whether request for intervention is timely: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

#### §13.28 Joinder and Severance

*Sequatchie Mountain Creditors v. Detweiler*, 2011 WL 3471519 (Bankr. N.D. Ohio 2011) – Joinder is controlled by Federal Rule of Civil Procedure 20, incorporated by Federal Rule of Bankruptcy Procedure 7020, which requires that proposed added plaintiffs must assert right to relief jointly or severally or arising out of same transaction or occurrence and issues of law and fact would be common. Plaintiffs failed to demonstrate that the claims of the proposed new plaintiffs were the same as the existing plaintiffs, where the claims turned on when each plaintiff learned of the land for sale, whether timber rights were involved, and whether the purchased was financed.

*Smith-Boughan, Inc., v. Sun Bank*, 2009 WL 2901521 (Bankr. N.D. Ohio 2009) – Joinder of parties is appropriate where Plaintiff's causes of action arise out of the same transaction or occurrence when the likelihood of overlapping proof and duplication in testimony indicates that separate trials would result in delay, inconvenience, and added expense to the parties and to the Court. Court has discretion to sever properly joined parties for convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. Severance is not favored and will not be granted where the risks of prejudice and confusion are outweighed by other factors including the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources. Action by Plaintiff for breach of construction contract against Defendant-Contractor was substantially related to Plaintiff's claims against Bank that was holding retainage to be paid under the contract. If proceeds are severed, Bank could assert Plaintiff's failure to complete construction as a defense to the "retainage" action, thereby requiring Plaintiff



to try the contract issues twice. Duplicate trials would be inefficient and expensive as the contract issues will involve fact-intensive, complex construction litigation which the court believes would impose a tremendous burden on both Plaintiff and its witnesses if litigated in two separate forums and would create a meaningful risk of inconsistent adjudications.

#### §13.29 Class Actions

*Bent v. ABMD, Ltd.*, 2010 WL 4780776 (Bankr. S.D. Ohio 2010) – Bankruptcy Court can certify class where proponent establishes (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Proponent must also certify that action complies with Rule 23(b). Key elements to defining a class include: (1) specifying a particular group that was harmed during a particular time frame, in a particular location, in a particular way, and (2) facilitating a court's ability to ascertain its membership in some objective manner. Class of plaintiffs defined as those working for Defendant within specific time frame sufficiently definite. 293 total affected class members met the “numerous” requirement. Alleged mass layoffs in violation of WARN act constituted sufficient commonality and resulted in class representatives having claims that are typical of all members of the class. Class representatives qualified to act as none had any interest that was adverse to the interests of the class itself. The questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy

*Wilborn v. Wells Fargo Bank, N.A.*, Case no. 09-20415 (5<sup>th</sup> Cir. 2010) – Bankruptcy Court can certify class action under 28 USC Section 157 and 1334, where class certification otherwise complies with Federal Rule 23. Rule 23(b)(3) requires the court to find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Court must assess how the matter will be tried on the merits, by identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class. Court must determine whether proposed classes are sufficiently cohesive to warrant adjudication by representation in light of the relevant claims, defenses, facts, and substantive law presented in the case. Plaintiffs' complaint is based on the claim that for each named plaintiff and each unnamed class member Wells Fargo impermissibly charged post-petition fees and costs without obtaining approval from the bankruptcy court, as purportedly required by Title 11 and the Federal Rules of Bankruptcy Procedure failed to demonstrate required predominance or superiority, particularly with respect to damages. Court also concluded that there was a substantial split between the Bankruptcy Courts as to whether a secured creditor is required to obtain approval under Section 506 and Rule 2016 before assessing contractually allowed fees. Although all members of the putative class were debtors in bankruptcy, the cases of the individual named plaintiffs varied from debtor to debtor and illustrated the many underlying circumstances of the charges that would need to be considered. The circumstances surrounding the charging of fees require an individual assessment of the claims. The bankruptcy court cannot require Wells Fargo to simply disgorge all fees that were not previously approved because it is evident that there has been a wide “array of charges tailored” to each individual debtor. The differing circumstances of the debtors render the reasonableness of the individual charges a fact-specific inquiry rather than a class-oriented decision. The rulings of different bankruptcy judges during their cases may affect the computation of allowable charges by Wells Fargo.

#### I. Time for Commencement

#### §13.30 Generally

*Alfes v. Educational Credit Management Corp.*, 2011 WL 3795107 (Bankr. E.D. Mi.) *aff'd* 2011 WL 3651319 (E.D. Mi. 2011) – Amended complaint dates back to date of initial complaint as long as claim arises out of same transaction, conduct or occurrence. Although amended complaint added new theory of liability, it was premised on the same facts and debtor had full notice of the allegations based on the initial

complaint. Debtor was unable to demonstrate any prejudice by allowing amended complaint filed only one day after filing of initial complaint, before debtor took any action in response.

*In re Rutherford*, 427 BR 656 (Bankr. S.D. Ohio 2010) – Court would deem complaint timely filed although Complaint was filed in main case and not as separate adversary and creditor failed to pay the requisite filing fee. Creditor's attorney was obviously unfamiliar with administrative procedures for electronic case filing (ECF) in the Southern District of Ohio would be afforded opportunity to re-docket non-dischargability complaint in separate adversary proceeding and to pay required filing fee, so that creditor's non-dischargability claims could be decided on merits.

*Probuild Company, LLC. v. Doria*, Case No. 10-11914 (E.D. Mi. 2010) – Rules 4007 and 9006 govern time for filing adversary complaint objecting to dischargability of debt. Where 60-day deadline to file adversary falls on weekend or legal holiday, deadline to file adversary is extended to first business day thereafter.

#### §13.31 Extension of Time – Granted

#### §13.32 Extension of Time – Denied

*JP Morgan Chase, NA v. Harris*, Case No. 10-6706 (Bankr. E.D. Mi. 2011) – Rule 4007 which requires adversary proceedings under Section 523(a)(2), (4) and (6) to be filed within 60 days of 341 meeting is statute of limitations that is not jurisdictional and may be extended or waived and is subject to equitable tolling. Plaintiff failed to demonstrate cause to extend time to file Adversary proceeding where parties previously stipulated to one extension of time to a date specific and creditor did not file adversary proceeding until one day after expiration of agreed upon extension. Equitable tolling requires (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing creditor's rights; (4) absence of prejudice to defendant; and (5) plaintiff's reasonableness in remaining ignorant of filing requirement. Parties were aware of and had discussions about looming deadline but did not have any agreement about further extensions. Plaintiff had ample notice of deadline and opportunity to act either by filing complaint or by filing motion seeking additional extension. Failure to file based on counsel's calendar error is not "excusable neglect" that would form basis to extend time to file adversary complaint.

*In re McConkey*, 2011 WL 1436431 (Bankr. D. Md. 2011) – Rule 4007 which requires adversary proceedings under Section 523(a)(2), (4) and (6) to be filed within 60 days of 341 meeting is statute of limitations that is not jurisdictional and may be extended or waived and is subject to equitable tolling. In order to establish equitable tolling, Plaintiff must show that failure to file a complaint within the time provided was the result of (1) extraordinary circumstances, (2) beyond Plaintiff's control or external to Plaintiff's own conduct, (3) that prevented Plaintiff from filing on time. Errors of counsel that prevent timely filing are neither extraordinary or external. Complaint was not timely filed because Plaintiff's counsel was unfamiliar with the Rules and so was not aware of need to file the complaint within 60 days. Creditor's Motion for Relief From Stay filed to permit state court litigation to proceed did not constitute Motion for Extension of Time to file adversary proceeding where the motion did not allege that Plaintiff was attempting to have debt declared non-dischargeable.

*Guillen v. Wilson*, Adv. No. 06-4608 (Bankr. E.D. Mi. 2009) - Creditor's Motion for Extension of Time to file documents in connection with an adversary proceeding objecting to the dischargability of certain debts denied as moot as the adversary proceeding had been dismissed before the Motion was filed.

#### §13.33 Ripeness

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

## J. Service of Process

## §13.34 Rule 7004

*IRS v. Hayes*, 2011 WL 2490945 (E.D. Mi. 2011) – Federal Rule of Civil Procedure 4(e) governs service within the United States, and allows service by delivery to the individual's dwelling or usual place of abode. Debtor's temporary employment outside of the United States did not alter status of debtor's home in Michigan as his "usual place of abode". Debtor's wife was someone of suitable age who resided at the same premises; debtor listed the property as his residence in his Chapter 7 bankruptcy schedules; and debtor claimed an exemption under U.S.C. § 522(d)(1), for the property.

*American Home Mortgage Servicing, Inc. v. Johnson*, 2011 WL 2115652 (E.D. Ky. 2011) – Rule 7004 governs services of process in adversary proceedings. It permits service by first class mail upon a corporation by mailing a copy of the summons and complaint to the attention of an officer or any other agent authorized by appointment or by law to receive service of process. Request for Notices filed in main Bankruptcy Case stating that notice should be directed to an appointed agent for service of process does not supersede Rule 7004. Summons addressed to Corporate President at correct corporate address constitutes proper service even if person served and address used differed from that in the Request for Notice.

*PNC Mortgage v. Rhie*, 2011 WL 1043949 (S.D. Ohio 2011) – Rule 7012 requires that if a complaint is duly served, a defendant to serve a responsive pleading within 30 days after issuance of summons. If summons is not properly served, defendant has no obligation to respond and court cannot enter default based on failure to respond. Service by mail on a corporation must be addressed to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. Complaint mailed to the attention of "Officer, Managing or General Agent" without specific name of person to be served did not comply with Rule 7004. Although defendant undisputedly received notice, that was not sufficient to cure defective service.

*In re Miller*, Case no. 06-32425 (Bankr. S.D. Ohio 2010) - Contested matter must be served in the same manner as a summons under Rule 7004. When service is to be made on an "insured depository institution," Rule 7004(h) requires service by certified mail addressed to an officer of the institution. Debtors' post-confirmation plan modification was not properly served where certificate of service acknowledging service on FDIC insured depository institution at three somewhat different addresses, only by regular mail and without direct service on any individual, officer or specific department. Order Modifying Plan based on defective service vacated pursuant to Rule 60(b).

*LaBankoff v. GMAC Mortgage, LLC.*, Case no. 09-1294 (9<sup>th</sup> Cir. BAP 2010) – Service on an attorney for a party is not sufficient service in an adversary proceeding. Rule 7004(b)(3) requires service by mail to the attention of an officer, managing or general agent, or any other agent authorized by appointment or by law to receive service. Without proof that the attorney has been designated as agent to accept process, service on the attorney is not sufficient. The party effectuating service bears the burden of proof that the person served is authorized to accept service. Attorney can become an implied agent for service where the attorney repeatedly represented that client in the underlying bankruptcy case, and where the totality of the circumstances demonstrates the intent of the client to convey such authority, based on extensive involvement in the underlying bankruptcy proceeding coupled with evidence that the Attorney previously had been served with papers in the bankruptcy proceeding on behalf of the client without objection and the party's acknowledgement that the attorney acts as general counsel and is regularly and routinely consulted on bankruptcy matters. Attorney whose only connection with bankruptcy case was filing of Notice of appearance 18 days before the alleged service evidenced no intent of the client to appoint the attorney as an agent for service.

*Sims v. US Bank Home Mortgage*, Adv. No. 08-5066 (Bankr. E.D. Mi. 2008) - Service failed to comply with Bankruptcy Rule 7004(b)(3) where Plaintiff mailed summons and complaint to corporation but failed to specify any particular, named individual who is an officer, managing or general agent, or agent authorized to receive service.

*Steed v. Buckalew*, 2009 WL 3493597 (Bankr. E.D. Tn. 2009) –Mailing of Complaint by First Class Mail sufficient under Federal Rules of Bankruptcy Procedure, even if State law where Defendant resides does not permit service by mail.

*Duetsche Bank National Trust Company v. Rogan*, 2009 WL 3415462 (E.D. Ky. 2009) –Service of Complaint by mail must be addressed to the attention of an officer, managing or general agent, or to any other agent authorized by appointment or law to receive service of process. Creditor’s Proof of Claim which listed “Bankruptcy Department” as agent for receipt of all notices regarding Bankruptcy Case constituted “appointment” for purposes of service of complaint. Mailing of complaint to a department other than that specified in the Proof of Claim did not constitute proper service of the complaint rendering default judgment void for lack of personal jurisdiction.

#### §13.35 Failure to Serve

*LaBankoff v. GMAC Mortgage, LLC.*, Case no. 09-1294 (9<sup>th</sup> Cir. BAP 2010) – Court disregarded Supplemental Certificate of Service and concluded that defendant had not been properly served where the Court record reflected that Plaintiff had never filed the “Supplemental Certificate” and Plaintiff’s own Motion for Default referenced earlier date on which proper service had not been made and failed to reference alleged later, proper service.

*Galloway v. Reis*, Case No. DT 09-10374 (Bankr. W.D. Mich. 2010) – Personal service of Summons and complaint on defendant ineffective where personal service occurred 39 days after summons issued. Rule 7004(e) required service within 10 (now 14) days after issuance of summons. After expiration of time to serve, Summons became stale and could not confer personal jurisdiction. Service of summons by mail ineffective where Plaintiff timely mailed summons to Defendant but failed to mail a copy to debtor’s counsel as required by Rule 7004(g). Service by mail does not require proof of receipt by debtor, but does require mailing to debtor and, if represented by counsel, to debtor’s counsel. Service of process is means by which Court acquires personal jurisdiction – Court must insist on strict compliance with service requirements.

*Greenhill v. Beneficial Michigan, Inc.*, Adv. No. 08-5668 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed where Plaintiff had three chances to properly serve Defendant with the adversary but failed to do so and offered no excuse or explanation for failure.

*Simon v. ASIMCO Technologies, Inc.*, Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Federal Rule of Civil Procedure, incorporated through Bankruptcy Rule 7012, allows for service of an adversary proceeding complaint on corporation by first class mail addressed to the attention of an officer, managing or general agent, or other agent authorized by appointment or applicable law to receive service. Service properly made on person identified on defendant’s website as “CEO” notwithstanding assertion by defendant that party had resigned as CEO prior to the date on which service was made. However, certificate of service failed to show service on individual defendant – court lacked jurisdiction over individual defendant.

#### K. Parties

##### §13.36 Necessary and Indispensable Parties

*Lyon v. Rappaport*, 2011 WL 652744 (6<sup>th</sup> Cir. BAP 2011) – Sixth Circuit has three-step analysis to determine whether a case should proceed in the absence of a particular party. Court must first determine whether person is necessary to the action. If so, the court must determine whether the party is within the Court’s jurisdiction. Finally, the court must determine whether equity and good conscience would permit case to proceed or whether the missing party is indispensable. Case should be dismissed only if party is indispensable and is beyond the jurisdiction of the court or cannot be joined without destroying subject matter jurisdiction. Party was not indispensable where full relief would be afforded among the parties without the joinder of the additional party. Defendant’s potential liability for fraudulent transfers was independent of any potential liability of any third party not joined in the suit as defendant was individually responsible for any damages the plaintiff may recover. However, omitted party was necessary and could be

joined without destroying court's jurisdiction. Proper course of action is not to dismiss case, but to order joinder of necessary party.

#### §13.37 FDIC as Receiver

*Shirk v. JPMorgan Chase Bank, N.A.*, \_\_\_\_\_ (Bankr. S.D. Ohio 2010) – Creditors of financial institution that has been placed in receivership by FDIC are required to comply with administrative claims process of FIRREA. Creditor not permitted to assert claims against the bank that assumed the failed bank's assets as result of FDIC receivership. Negligence, misrepresentation, and Truth in Lending Act (TILA) claims which mortgage borrowers sought to assert against successor-in-interest to original mortgage lender, which had acquired their loan from the FDIC after original lender was placed in FDIC receivership, were subject to jurisdictional bar of FIRREA, and could not be pursued in federal court absent exhaustion of borrowers' administrative remedies; claims were all based upon acts or omissions of original mortgage lender.

*Jahn v. Bedford Consulting Group, LLC.*, 2010 WL 3632147 (Bankr. E.D. Tn. 2010) – Trustee could not institute action to recover fraudulent transfers against Federally Insured Depository Institution after institution had been taken over by FDIC as receiver. Pursuant to provisions of Financial Institutions Reform, Recovery and Enforcement Act of 1999, exclusive jurisdiction of all claims against failed institution must be brought through FIRREA administrative proceedings.

#### §13.38 Identity of Plaintiffs

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

### L. Pleadings

#### §13.39 Complaint

*Lyon v. Rappaport*, Case No. 10-8059 (6<sup>th</sup> Cir. 2011) – Action to recover fraudulent transfer under Section 548 must be pled with specificity. Complaint that failed to plead factual basis for every element of cause of action would be dismissed. Mere “formulaic recitation” of elements of statute is insufficient.

*Morris v. Paine*, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Rule 9 requires that complaint alleging fraud or mistake must state with particularity circumstances constituting fraud or mistake. Plaintiff must, at a minimum, allege the time, place and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud. Debtor's complaint very generally alleged that the three Bankruptcy Judge defendants tried to play a game of “bait and switch” by constantly having a judge who was not assigned to his bankruptcy case hear a particular matter; and that the defendants conspired against him to deprive him of his property by confirming no automatic stay was in effect when his prior chapter 13 case was filed. Debtor did not plead fraudulent allegations with any specificity as to date, time, place, etc.. Even if he had, claims of the judges playing “bait and switch” with him are wholly without merit. A bankruptcy judge in one judicial district is not prohibited from hearing another case in that same district. Section 362(c)(4)(A)(i) mandates that if a debtor has had “2 or more single or joint cases ... pending within the previous year ... that were dismissed ... the stay under subsection (a) *shall not go into effect* upon the filing of the later case.” Subsection ii provides that if a creditor requests an order confirming the automatic stay did not go into effect pursuant to § 362(c)(4)(A)(i), “the court *shall promptly enter an order confirming no stay is in effect.*” A Bankruptcy Judge has no discretion in issuing said order. If the debtor has had 2 or more pending cases within the last year, the Judge *must* enter an order confirming no stay was in effect. Defendants' simply did what the Bankruptcy Code dictated they must do.



*Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894 (M.D. Tn. 2009) - Although a complaint need not plead detailed factual allegations, those allegations must be enough to raise a right to relief above the speculative level. The factual allegations must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief. Although Federal Rule of Civil Procedure 8 establishes a "liberal system of notice pleading, plaintiff's must plead more than labels and conclusions, or a formulaic recitation of the elements of a cause of action.

*D.A.N. Joint Venture, III, LP v. Shekerjian*, Adv. No. 08-5724 (Bankr. E.D. Mi. 2009) – In evaluating Motion to Dismiss, Court views complaint in light most favorable to plaintiff. Court must review allegations in complaint without reference to extrinsic evidence. Complaint to deny discharge under Section 727(a)(2)(A) requires disposition or concealment of property and subjective intent to hinder or delay creditors. Allegations that Debtor failed to list numerous corporate entities in schedules and pattern of shifting assets state cause of action. Action under Section 727(a)(2)(B) requires transfer, removal, destruction, mutilation or concealment of property with actual intent to hinder or delay creditors after the Petition date. Allegations that Debtor formed entities post-petition but pre-conversion and failed to disclose those entities as assets constituted concealment sufficient to survive Motion to Dismiss. Action under Section 727(a)(4)(A) requires statement under oath that was false, made with knowledge of falsity and that materially affected bankruptcy case and includes both false statements and omissions. Allegation that Debtor owed creditor in excess of \$2.5 million but creditor was not included in schedules sufficient to survive Motion to Dismiss.

#### §13.40 Third Party Complaint

*Swain v. Swain*, 2010 WL 2812727 (Bankr. N.D. Ohio 2010) – Defendant in adversary proceeding can file third party complaint to join non-parties where proposed third party defendant is jointly liable with main defendant or where third party defendant may have derivative liability. Third-party defendant's liability must be derivative and must flow to the third-party plaintiff; mere liability by the third-party defendant to the main plaintiff will not suffice. Third-party practice usually involves claims in the nature of contribution, indemnity, and subrogation. Third party complaint not proper merely because claims arise out of same transaction where third party liability is independent of primary action. Third party complaint dismissed where allegations, if true, would make third party defendant liable directly to the primary defendant; outcome of main action does not drive outcome of third party action; and defendant could maintain direct action against third party defendant in unrelated adversary proceeding. Plaintiff's main action was for non-dischargability under Section 523(a)(2). Nothing in the third party complaint could leave the third party defendants secondarily liable to debtors.

#### §13.41 Answer and Affirmative Defenses

*Bondi v. Bank of America*, 2011 WL 135825 (2d Cir. 2011) – *In par delicto* defense is available as defense to action brought by Trustee to same extent it would have been available had action been brought directly by debtor prior to commencement of bankruptcy case. Trustee's status as Trustee does not insulate Trustee from Debtor's prior conduct, and Trustee steps into shoes of debtor in all actions and is subject to same defenses. *In pari delicto* prevents a party from suing others for a wrong in which the party itself participated.

*Unencumbered Assets Trust v. JP Morgan Chase Bank*, 2011 WL 1397813 (S.D. Ohio 2011) – *In pari delicto* defense can be raised against a bankruptcy trustee to the same extent that the defense could have been raised against the debtor. *In pari delicto* defense is available only when: (1) the plaintiff bears at least substantially equal responsibility for the wrongs he seeks to redress, and (2) preclusion of suit would not significantly interfere with the purposes of the law or harm the public interest. Substantially equal responsibility requires plaintiff to be an active, voluntary participant in the unlawful activity that is the subject of the suit. Unless the degrees of fault are essentially indistinguishable or the plaintiff's responsibility is clearly greater, the *in pari delicto* defense should not be allowed, and the plaintiff should be compensated. Corporate debtor was entirely controlled by principals who used corporate debtor to perpetuate massive fraud and to loot corporate assets. Interests of corporate debtor and principals were so closely aligned and principals exercised such high degree of control as to warrant imputation knowledge of

principals to corporate debtor. Chapter 7 Trustee could not recover damages from defendant where defendant participated in allegedly fraudulent scheme masterminded and implemented by debtor's principals as principals, and by extension corporate debtor, bore substantially equal responsibility for the losses.

*Gordon v. Ameriquest Mortgage Corp.*, 2011 WL 1659873 (Bankr. N.D. Ga. 2011) – Affirmative defenses must be pled with same specificity as is required of complaint itself. The Court decisions in *Iqbal* and *Twombly* are equally applicable to affirmative defenses. Affirmative defenses stated as summary conclusions with no statement of the factual basis for the defense would be stricken.

*Phillips v. Deutsche National Trust*, Case No. 09-6109 (Bankr. N.D. Ohio 2010) - Answer to complaint must be filed within 30 days unless the court sets a different time. Court can extend the time even after the time has expired if the failure to file the answer in a timely manner is caused by inadvertence, mistake, or careless, as well as by intervening circumstances beyond the party's control." In determining whether neglect is excusable the Court should consider 'all relevant circumstances including the danger of prejudice, the length of the delay, the reason for the delay, and whether the movant acted in good faith. Court would extend time to file answer where it is unlikely that the plaintiffs would be prejudiced by allowing the defendants to respond as evidenced by the plaintiffs' reluctance to prosecute their case. Further, parties were involved in settlement discussions and, at one time, believed that the case would settle.

*Hunts with Double Indoor, LLC, v. Daniel A. Peyerck Living Trust*, Case No. 10-4525 (Bankr. E.D. Mi. 2010) – Michigan Statute of Frauds prohibits promise made to creditor to pay debts owed by third party unless the promise is in writing and signed by the party agreeing to make the payments. However, Statute of Frauds does not apply where third party assured debtor directly that third party would pay debtor's obligations. A promise to pay the debts of another does not fall within the Statute of Frauds when the promise is made directly to the debtor rather than to a creditor. Therefore, the oral promise made to the debtor that third party would pay debtor's debts is enforceable as long as the promising party received consideration for the promise.

*General Motors Acceptance Corporation v. Flynn*, Case No. 08-8109 and 08-8110 (6th Cir. BAP 2009) - Trustee's complaint is not subject to affirmative defenses which are based on the pre-petition conduct of the Debtor. Defenses of waiver, estoppel, laches, setoff, accord and satisfaction, and negligence, all based on Debtor's pre-petition conduct did not bind the Trustee as Trustee lacked privity with the Debtor and the defenses constitute defenses personal to the Debtor.

*Gold v. Deloitte & Touche, LLP*, 2009 WL 1738465 (E.D. Mi. 2009), *aff'd*, 2010 WL 3782187 (6<sup>th</sup> Cir. 2010) – Cause of action for professional negligence is governed by state law. Negligence requires (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. Proof of causation requires both cause in fact and legal, or proximate, cause. When a number of actors contribute to produce an injury, one actor's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in producing the injury. Where evidence indicated that nobody relied on audit report prepared by defendants, plaintiff could not maintain cause of action for professional negligence. Further, plaintiff cannot recover where defendant's alleged negligence prevented third parties from learning about, and stopping, improper transactions of which plaintiff was fully aware.

#### §13.42 Statute of Limitations

*Brandt v. Weyant*, 2010 WL 3719102 (Bankr. M.D. Tn. 2010) – Provision of Servicemembers' Civil Relief Act that period of service "may not" be included in computing time is discretionary and does not mandate extension of statute of limitations in action brought by soldier. Although Plaintiff was a life-long member of the armed forces and was currently on active duty, nothing indicated that Plaintiff's status as active duty in any way precluded or inhibited Plaintiff from prosecuting action. Plaintiff failed to present sufficient evidence of hardship to warrant invocation of discretionary extension of statute of limitations.

*Torrez v. Eley*, Case No. 09-1464 (10th Cir. 2010) – Court can dismiss case on grounds of statute of limitations on Motion to Dismiss where time frames appearing on the face of the complaint make it clear

that the right sued upon has been extinguished. Plaintiff's complaint demonstrated that Plaintiff waited 6 years to bring malpractice action against Bankruptcy Trustee. Trial Court properly granted Rule 12(b)(6) motion to dismiss where complaint conclusively demonstrated that statute of limitations had long since expired.

*Gold v. Deloitte & Touche, LLP*, 2009 WL 1664583 (E.D. Mi. 2009) – Cause of action for “aiding and abetting breach of fiduciary duty” is subject to three-year statute of limitations under Michigan law because it is a common law Court claim. Claim barred by statute of limitations where bankruptcy petition filed March 28, 2003 but adversary complaint not filed until March 31, 2006.

#### §13.43 Cross Claims

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

#### §13.44 Motion to Dismiss

*Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Plaintiff's failure to establish jurisdiction in Complaint is basis to dismiss adversary complaint. However, that Complaint alleges as basis for jurisdiction an inapplicable statute does not mandate dismissal where factual allegations of complaint are sufficient to demonstrate existence of jurisdiction. Action for contempt based on alleged violation of discharge injunction is clear “core” proceeding over which Court has subject matter jurisdiction. Failure to cite specific statute on which claim is based is not fatal defect where factual allegations are sufficient to apprise defendant of substance of action. Complaint for violation of automatic stay failed to state cause of action where complaint alleged that debt was included in bankruptcy and defendant continued efforts to collect, but did not allege that defendant knew either of commencement of bankruptcy case or existence of automatic stay.

*Anthony v. Miller*, 2011 WL 3585603 (Bankr. N.D. Ohio 2011) – Motion to Dismiss under Rule 12(b)(6) for failure to state cause of action must be made either in separate pleading before a responsive pleading is filed or in the initial responsive pleading. Motion to Dismiss filed well after Defendant filed answer to complaint was untimely and must be denied, even where based on failure to plead fraud with specificity as required by Rule 9. However, Court exercised inherent authority to require pro se plaintiff to file amended complaint where “complaint” in the form of letter initially mailed to court was unfocused and request for relief was not tied to any Code provision and was unclear as to whether Plaintiff sought relief against both debtors or only one of the two.

*Morris v. Paine*, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Case will be dismissed where Complaint based on statutes that did not provide for private right of action. 18 USC Section 1346 (defining criminal violation for fraud), 18 USC Section 1918 (sedition) and 10 U.S.C. Section 333 (insurrection) are criminal statutes for which no private right of action exists. Action under 42 USC Section 2000d is one for discrimination in state and local government programs. Bankruptcy Judges and Trustees are not within the scope of defendants defined in Section 2000d and Debtor's prior bankruptcy filings did not constitute the receipt of federally provided financial assistance which is required under Section 2000d. Eleventh Amendment creates protection for state from Federal interference, but does not provide any independent basis for action by private individual.

*Spradlin v. Baker*, 2010 WL 2612585 (Bankr. E.D. Ky. 2010) – Rule 12(b)(6) made applicable in bankruptcy by Federal Rule of Bankruptcy Procedure 7012(b), is for failure to state a claim upon which relief can be granted. Complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. The complaint must possess enough heft to show that the pleader is entitled to relief. Court, in determining such a motion must

presume that the factual allegations of the complaint are true and all reasonable inferences are to be made in favor of the nonmoving party. The purpose of a motion to dismiss is to assess the legal sufficiency of a complaint, not to judge the weight of evidence which might be offered in its support. Court does not have to accept every allegation in the complaint as true in assessing its sufficiency nor sweeping and unwarranted averments of fact or legal conclusions, deductions or opinions couched as factual allegations. Motion to Dismiss denied where Plaintiff alleged that Defendant agreed to limit exemptions and Defendant did not counter the Plaintiff's declaration and defendant produced no other challenge to the sufficiency of the Complaint.

*Swanigam v. Northwest Airlines, Inc.*, 2010 WL 2465387 (W.D. Tn. 2010) - Motion to dismiss for failure to state a claim only tests whether a cognizable claim has been pled. Court can dismiss meritless cases which would otherwise waste judicial resources and result in unnecessary discovery. Complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief and it must provide the defendant with fair notice of what the plaintiff's claim is and the grounds upon which it rests. Complaint must provide more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Complaint must have a factual foundation, and the mere possibility that a plaintiff might later establish some set of undisclosed facts to support recovery is insufficient to survive a 12(b)(6) challenge. Court must accept as true all factual allegations in the complaint and construe them in the light most favorable to the plaintiff. Only well-pleaded facts must be taken as true, and the court need not accept legal conclusions or unwarranted factual inferences. Where parties rely on materials outside the pleadings, Court has discretion to treat Motion as Motion for Summary Judgment under Rule 56.

*Bowen v. Mountain Commerce Bank*, 2010 WL 2430777 (Bankr. E.D. Tn. 2010) - Moving party in a Rule 12(b)(6) Motion has the burden of proving that no claim exists. Complaint is to be liberally construed, but must more than bare assertions or legal conclusions. Factual allegations in the complaint must be presumed to be true, and reasonable inferences must be made in favor of the nonmoving party but court need not accept unwarranted factual inferences. Complaint must present enough facts to state a claim to relief that is plausible on its face. Claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not a "probability requirement," but requires more than a sheer possibility that a defendant has acted unlawfully. Complaint for damages for alleged violation of discharge injunction did not allege that bank acted or failed to act in an attempt to collect a discharge debt, which is an essential element of a discharge violation. Complaint alleged that bank had been paid in full during debtor's chapter 13 proceeding, leaving no debt left owing for the bank to collect and preventing finding that conduct of which debtors complained was an attempt by the bank to collect a debt. Reporting of credit information about a debtor or refusing to remove credit information posted about a debtor does not constitute an act to collect the debt in violation of a discharge injunction absent evidence to establish a link between the act of reporting and the collection or recovery of the discharge debt. Creditor's refusal to update the status of a debt on a credit report after a request has been made by the debtor can result in a discharge injunction if creditor deliberately refuses to change reporting of debts from "past due or owing, charged off as bad debt" rather than "discharged in bankruptcy" notwithstanding request by debtor to update reports. Debtor's complaint fails to state cause of action where complaint alleged only that bank failed to remove a negative reference from credit bureau without providing any details explaining the allegations and failed to contain anything more than "unadorned, the-defendant-unlawfully-harmed-me" accusations. Complaint failed to identify in any respect what the debtor's claim the bank reported on a credit report; failed to attach a copy of the offensive report; and referred merely to "negative reference" without providing any factual explanation or support for the allegations.

*Smith v. Bluegrass Mortgage*, 2010 WL 2368279 (Bankr. E.D. Ky. 2010) – A complaint is subject to dismissal if it fails to allege a required element which is necessary to obtain relief sought or if a bar to relief is apparent from the face of the complaint. The court's task under Rule 12(b)(6) is then to determine the sufficiency, and not the merits, of the Complaint. To survive a motion to dismiss, complaint does not need detailed factual allegations. However, plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. Court, in determining such a motion must presume that the factual allegations of the complaint are true and



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

*Maxus Capital Group, LLC. v. Uhrich*, Case No. 09-8047 (6<sup>th</sup> Cir. BAP 2010) – In deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court will construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff. Dismissal is proper only when it appears beyond doubt that plaintiff can prove no set of facts in support of a claim for relief. Court is not required to accept unwarranted legal conclusions or factual allegations. Action to revoke confirmation order must allege sufficient facts to demonstrate that confirmation was obtained based on a representation or intentional omission by the plan proponent regarding one or more of the elements of Section 1129; that was materially false; that was either known to be false or was made with reckless disregard for the truth; intended for the Court to rely on; that the Court did rely on; and that as a consequence the Court entered a confirmation order. Allegations that officers and insiders of Debtor deliberately undervalued assets and financial documents were fully considered and rejected by the Bankruptcy Court in numerous collateral actions during course of Chapter 11 case. As the Bankruptcy Court has previously rejected the allegations of fraud prior to confirmation, another rejection of the same allegations in connection with confirmation does not support finding that Court was misled or that the Court relied on the misrepresentations. Further, Party failed to appeal confirmation order and so was barred by finality of Order and could not collaterally attack validity of the Order.

*Nehasil v. Greiner*, 430 BR 446 (E.D. Mi. 2010) – Rule 12(b)(6) allows court to dismiss complaint that fails to state claim upon which relief can be granted. Court can determine whether Plaintiff is entitled to legal relief assuming every allegation in the complaint is true, and will all inferences construed most favorably to Plaintiff. Complaint must contain either direct or inferential allegations regarding all material elements of cause of action. Complaint cannot rely on mere labels or conclusions and must be more than a formulaic recitation of elements of cause of action. Complaint must contain sufficient factual allegations to state a claim that is plausible on its face. Federal Rule 9 requires fraud to be plead with particularity, although state of mind such as malice, intent and knowledge may be plead generally. Complaint that specifically referred to state court fraud judgment is sufficient to provide Defendant with full understanding of Section 523 complaint. Complaint that does not specifically cite Section 523(a)(2)(A) nonetheless states cause of action where Complaint is predicated on State Court fraud judgment. State court judgment for fraud which required that Defendant have obtained money as a result of the fraud.

*Budzynski v. Stephens*, Case No. 10-4230 (Bankr. E.D. Mi.), *aff’d* 2010 WL 4286186 (E.D. Mi. 2010) – When addressing a motion to dismiss under rule 12, court should construe complaint in light most favorable to plaintiff, accepting all factual allegations as true. Court is not required to accept legal conclusions where unwarranted factual inferences is true. Court should determine whether complaint contains either direct or influential allegations respecting material elements of claim.

*Torrez v. Eley*, Case No. 09-1464 (10<sup>th</sup> Cir. 2010) – Court can dismiss case on grounds of statute of limitations on Motion to Dismiss where time frames appearing on the face of the complaint make it clear that the right sued upon has been extinguished. Plaintiff’s complaint demonstrated that Plaintiff waited 6 years to bring malpractice action against Bankruptcy Trustee. Trial Court properly granted Rule 12(b)(6) motion to dismiss where complaint conclusively demonstrated that statute of limitations had long since expired.



*Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894 (M.D. Tn. 2009) - In deciding a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court will "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." The Federal Rules of Civil Procedure require only that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." The court must determine only whether "the claimant is entitled to offer evidence to support the claims," not whether the plaintiff can ultimately prove the facts alleged. It may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Challenges to the merits of a plaintiff's claim should be "dealt with through summary judgment under Rule 56." To survive a motion to dismiss, factual allegations must be enough to raise a right to relief above the speculative level - a well-pleaded complaint may proceed, even if it appears "that a recovery is very remote and unlikely. Complaint that is nothing more than conclusions is not entitled to the assumption of truth. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

*D.A.N. Joint Venture, III, LP v. Shekerjian*, Adv. No. 08-5724 (Bankr. E.D. Mi. 2009) – In evaluating Motion to Dismiss, Court views complaint in light most favorable to plaintiff. Court must review allegations in complaint without reference to extrinsic evidence. Complaint to deny discharge under Section 727(a)(2)(A) requires disposition or concealment of property and subjective intent to hinder or delay creditors. Allegations that Debtor failed to list numerous corporate entities in schedules and pattern of shifting assets state cause of action. Action under Section 727(a)(2)(B) requires transfer, removal, destruction, mutilation or concealment of property with actual intent to hinder or delay creditors after the Petition date. Allegations that Debtor formed entities post-petition but pre-conversion and failed to disclose those entities as assets constituted concealment sufficient to survive Motion to Dismiss. Action under Section 727(a)(4)(A) requires statement under oath that was false, made with knowledge of falsity and that materially affected bankruptcy case and includes both false statements and omissions. Allegation that Debtor owed creditor in excess of \$2.5 million but creditor was not included in schedules sufficient to survive Motion to Dismiss.

#### §13.45 Motion to Strike Pleadings

*Smith v. Bluegrass Mortgage*, 2010 WL 2368279 (Bankr. E.D. Ky. 2010) – Complaint objecting to debtor's discharge would be stricken where debtor was a Corporation and would not be entitled to a discharge as a matter of law.

*Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6<sup>th</sup> Cir. BAP 2009) – Motion to strike affirmative defenses are disfavored as resolution requires Court to evaluate legal merits of a defense before the factual background of the case is fully developed. Court can strike affirmative defense that is legally insufficient, immaterial, impertinent or scandalous. A defense is legally insufficient if it cannot succeed under any circumstances; immaterial if it bears no essential or important relationship to the primary claim for relief; impertinent if it contains statements that do not pertain to or are unnecessary to the issues in question; and scandalous if they improperly cast a derogatory light on the opposing party. Bankruptcy trustee is not in privity with the Debtor and the alleged wrongdoing of the Debtor cannot be imputed to the trustee or serve as a defense against the trustee's fraudulent transfer claim. Court properly struck defenses that were based on alleged fraudulent conduct of Debtor, estoppel, waiver and negligence of the Debtor and its employees as those defenses attempted to impermissibly attribute to the trustee the wrongdoing of the Debtor. Defenses of accord and satisfaction and set off are not defenses to a fraudulent transfer action. Laches defense struck where trustee brought avoidance action more than one year after case commenced but within time permitted under section 546(a).

#### §13.46 Amendments to Pleadings - Generally

*Appalachian Oil Co., Inc. v. Kentucky Lottery Corp.*, 2011 WL 3742045 (Bankr. E.D. Tn. 2011) – Leave to amend should be freely granted, absent evidence of undue delay, bad faith or dilatory motive, undue prejudice to opposing party, or futility of amendment. Proposed amendment is futile if it would not withstand Motion to Dismiss under Rule 12(b)(6).

*Sequatchie Mountain Creditors v. Detweiler*, 2011 WL 3471519 (Bankr. N.D. Ohio 2011) – After responsive pleading is filed, complaint may add new parties only by filing amended complaint. Court will freely grant leave where justice requires, based on factors such as undue delay, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to opposing party, and futility of amendment. Motion to amend complaint to add 64 new plaintiffs denied where litigation had been ending for 21 months and defendant assumed that all of the plaintiffs who would be participating had joined litigation. Joinder would also be inconsistent with requirement of Federal Rule of Civil Procedure 20, incorporated by Federal Rule of Bankruptcy Procedure 7020, which requires that proposed added plaintiffs must assert right to relief jointly or severally or arising out of same transaction or occurrence and issues of law and fact would be common. Plaintiffs failed to demonstrate that the claims of the proposed new plaintiffs were the same as the existing plaintiffs, where the claims turned on when each plaintiff learned of the land for sale, whether timber rights were involved, and whether the purchased was financed.

*Imagepoint, Inc. v. GM-DI Leasing Corp.*, 2010 WL 3037436 (Bankr. E.D. Tn. 2010) - Leave to amend should be freely given when justice so requires. Courts should consider undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of the amendment. Amendment will be “futile” if no set of facts can be proved that would constitute a valid and sufficient claim. Amendment was not “unduly delayed” where adversary complaint was filed while case was pending in Chapter 11 and was later converted to Chapter 7, Amended Complaint was filed less than one year after commencement of the case; discovery was still pending; Trustee has not previously requested leave to amend; Chapter 7 case had large number of complex proceedings pending at the time of the Trustee's appointment. Even if delay is “unjustified” leave to amend will not be denied where delay was not intended to harass or causes any ascertainable prejudice to the party opposing the motion. To determine “prejudice”, court will consider whether the assertion of the new claim or defense would require the opponent to expend significant additional resources to conduct discovery and prepare for trial; significantly delay the resolution of the dispute; or prevent the plaintiff from bringing a timely action in another jurisdiction. Record did not demonstrate prejudice where discovery was still ongoing and there was no assertion that the addition of these new claims will delay the scheduled trial. Allowing amendment would be more economical and efficient than a new action. Both the old and the new claims arise out of the same agreements and overlap with respect to the setoff contentions.

*Dottore v. National Staffing Services, LLC*, 2010 WL 2891705 (N.D. Ohio 2010) – Decision to permit amendments is within the discretion of the court. A court may deny a motion to amend on the basis of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, or futility of the proposed amendment. Delay alone-regardless of length-is an insufficient basis for a court to deny an otherwise appropriate motion for leave to amend where delay is not intended to harass and does not cause any ascertainable prejudice. Prejudice depends on whether the amendment would 1) require the opposing party to expend significant additional resources to conduct discovery and prepare for trial; 2) significantly delay the resolution of the dispute; or 3) prevent the plaintiff from bringing a timely action in another jurisdiction. Discovery taken in case provided clear notice that Plaintiff had some sort of fraud action against Defendant and allegations of fraud were largely based on same allegations as initial complaint, precluding any finding of prejudice and amendment would not require expenditure of significant additional resources as Defendant had already engaged in discovery relevant to fraud claim.

*Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894 (M.D. Tn. 2009) - After responsive pleadings are filed, a party may amend its complaint only with leave of court or with written consent of opposing counsel. Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading should be freely given “when justice so requires.” Leave should be given unless there is a showing of undue delay, bad faith or dilatory motive on the part of the moving party, undue prejudice to the non-moving party, or futility of the proposed amendment. Motion for Leave to Amend granted where Defendant failed to demonstrate that amendments would be “futile” or that claim would be subject to dismissal if asserted in the Amended Complaint.

*Winget v. JP Morgan Chase Bank*, 537 F.3d 565 (6<sup>th</sup> Cir. 2008) – District Court is not required to grant leave to amend the complaint where the Court reaches the legal conclusion that the proposed amendment would not survive a motion to dismiss. Further, District Court is not required to grant leave to amend where the party has failed to seek leave to file an amendment. District Court is not required to grant leave to amend where plaintiff failed to file amended complaint until after District Court entered final judgment dismissing the case.

*Lewis v. McClatchey*, 2009 WL 1607773 (S.D. Ohio 2009) – Although Motion for Leave to Amend should be freely granted when justice requires, Court may deny leave to amend in cases of bad faith, dilatory motive, or undue prejudice to opposing party. Motion for Leave to Amend denied where motion was not made until three months after case was dismissed; new claims bore no connection to claims asserted originally; proposed amendment involved claims against two entities that were not parties to the suit; and proposed amendment failed to state claim upon which relief could be granted rendering proposed amendment futile.

#### §13.47 Amendments to Pleadings – Relation Back

*Krupski v. Costa*, 130 S.Ct. 2485 (2010) – Rule 15(c) has three requirements before an amended complaint, including against a newly named defendant, can relate back to the original complaint. First, the claims must have arisen out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; second, the newly added defendant must have received such notice of the action that it will be not be prejudiced in defending on the merits; and third, the newly added defendant knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

*DeGirolamo v. Quarry Golf Club, LLC*, 2011 WL 4372699 (Bankr. N.D. Ohio 2011) – Proposed Amended Complaint demonstrated sufficient relationship to original Complaint for purposes of relating back where Amended Complaint was based on web of interrelated transactions and each transaction involved the same players and property. Proposed added party knew or should have known that Trustee was asserting claims based on transactions in which proposed party was involved and that but for information not originally known by the Trustee the party would have been named in the first instance. Party to be added failed to demonstrate any prejudice beyond conclusory statement that the party would be prejudiced. Party was represented by same attorney and had same business address and same managing member as other parties already in case.

*Appalachian Oil Co., Inc. v. Kentucky Lottery Corp.*, 2011 WL 3742045 (Bankr. E.D. Tn. 2011) – Leave to amend cannot be granted if statute of limitations has expired after filing of initial complaint, unless amendment relates back to date of original complaint. To relate back, amendment must assert claim or defense that arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading. If the facts in the original complaint put the defendant on notice that it could be called to answer for the allegations in the amended complaint, the amended complaint will date back. Original complaint alleged preferential transfer when Debtor allegedly paid same invoice twice. Amended complaint to include set off based on double payment was within same facts as Defendant already knew Debtor complained of double payment under different legal theory. However, proposed amendment to add cause of action for post-petition transfers would not date back ad nothing in the original complaint related to any transaction or transfer that occurred post-petition. As original complaint was based exclusively on pre-petition facts and allegations, amended complaint that would not date back to the extent it now sought to recover post-petition transfers.

*In re Fries*, 2010 WL 3700205 (Bankr. W.D. Ky. 2010) – Creditor not permitted, after deadline for filing non-dischargability actions, to amend otherwise timely filed Complaint under Section 727 to add non-dischargability count under Section 523(a)(4), even if Section 523(a)(4) action was premised on same set of facts. Action under Section 523 has gross differences as to the type, measure and burden of proof, as well as differing legal effects on the debtors should judgment be entered in favor of the plaintiff.

*Jahn v. Bedford Consulting Group, LLC*, 2010 WL 3632147 (Bankr. E.D. Tn. 2010) – Amended Complaint will not relate back to original filing where amended complaint adds new parties not named in complaint originally filed. Complaint that corrects mis-identification of party will relate back, but not one that adds entirely new party.

*Stevenson v. Daudlin*, Case No. 10-5075 (Bankr. E.D. Mi. 2010) – Amended pleading dates back where the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. Amended complaint would not date back and would be untimely where original complaint sought to deny discharge under Section 727(a)(4)(D) for failure to produce documents, while amended complaint would seek to deny discharge based on alleged false statements and omissions under Section 727(a)(4)(A) that were discovered once documents requested were provided. Causes of action had different bases and relied on proof of different allegations.

*Dottore v. National Staffing Services, LLC*, 2010 WL 2891705 (N.D. Ohio 2010) – Amended Complaint that arises out of same conduct, transaction or occurrence set forth or attempted to be set forth in original pleading dates back to filing of pleading being amended. Where complaint was timely filed within Statute of Limitations, amended complaint filed after Statute expired would date back and be deemed timely where amendment arose out of the same conduct, transaction and occurrence set forth in the original complaint and contained much of the same language as the original claim.

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

#### §13.48 Scheduling Order

*Lawyers Title Insurance Company v. McKenzie*, Adv. No. 08-4641 (Bankr. E.D. Mi. 2009) - Court refused to approve Parties Stipulation to Modify Scheduling Order to extend time to file dispositive motions and to adjourn Final Pretrial and Trial dates. Parties seeking to modify Scheduling Order must demonstrate good cause. Agreement of the parties, without more, does not constitute "cause".

#### §13.49 Attorney Fees as Element of Recovery

*Antioch Company Litigation Trust v. Morgan*, 2011 WL 1670952 (Bankr. S.D. Ohio 2011) – Plaintiff's claim for attorney fees from defendant must be plead as a separate count in the complaint and not as an adjunct to another substantive count. Court for fees must be plead with specificity and must, at a minimum, plead the legal and factual basis for an award of attorney fees.

### M. Preemption

#### §13.50 Bankruptcy Preemption of Non-Bankruptcy Law Causes of Action

*Kline v. Mortgage Electronic Security Systems*, 2010 WL 3796584 (Bankr. S.D. Ohio 2010) – Bankruptcy Code preempts state law as to events and actions occurring in bankruptcy proceeding. Debtor not entitled to maintain non-bankruptcy causes of action based on Federal Truth In Lending Act, Ohio Consumer Protection Statutes or common law breach of contract and unjust enrichment based on proof of claim filed

that asserts amounts due for bankruptcy fees and accrued late charges. Bankruptcy Code is complex set of laws necessary to regulate the rights of debtors and creditors that protects the bankruptcy process from even slight incursions and disruptions that would result from non-bankruptcy causes of action.

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

§13.51 Generally

*Shirk v. JPMorgan Chase Bank, N.A.*, \_\_\_\_\_ (Bankr. S.D. Ohio 2010) – Creditors of financial institution that has been placed in receivership by FDIC are required to comply with administrative claims process of FIRREA. Creditor not permitted to assert claims against the bank that assumed the failed bank's assets as result of FDIC receivership. Negligence, misrepresentation, and Truth in Lending Act (TILA) claims which mortgage borrowers sought to assert against successor-in-interest to original mortgage lender, which had acquired their loan from the FDIC after original lender was placed in FDIC receivership, were subject to jurisdictional bar of FIRREA, and could not be pursued in federal court absent exhaustion of borrowers' administrative remedies; claims were all based upon acts or omissions of original mortgage lender.

*Jahn v. Bedford Consulting Group, LLC.*, 2010 WL 3632147 (Bankr. E.D. Tn. 2010) – Trustee could not institute action to recover fraudulent transfers against Federally Insured Depository Institution after institution had been taken over by FDIC as receiver. Pursuant to provisions of Financial Institutions Reform, Recovery and Enforcement Act of 1999, exclusive jurisdiction of all claims against failed institution must be brought through FIRREA administrative proceedings.

O. Dismissal

§13.52 Failure to Prosecute

*Kohut v. Lamos*, Case No. 10-6206 (Bankr. E.D. Mi. 2010) – Motion for Extension of Time to submit Order dismissing adversary case denied where failure to timely submit proposed Order would result in Court's entry of Order of Dismissal without prejudice. If the parties believe that further action is needed to approve a settlement agreement, the parties can request reopening of the case for that purpose.

*M-Tech Associates, LLC v. General Motors Company*, Case No. 09-6794 (Bankr. E.D. Mi. 2010) – Adversary Proceeding dismissed where parties advised court that matter had been settled but failed to submit a proposed Order embodying the resolution.

*Taj Graphic Enterprises, LLC v. LWD Creditors Committee*, Case no. 09-6952 (Bankr. E.D. Mi. 2010) – Adversary proceeding dismissed where Plaintiff failed to serve "Order Confirming Action Taken at October 25, 2010, Status Conference" as required.

*Lee Wholesale Supply, Inc. v. Strunk*, Case No. 09-7216 (Bankr. E.D. Mi. 2010) – Adversary Proceeding dismissed where Plaintiff failed to file an Application for Default Judgment within 14 days of Clerk's entry of Default.

*Morabito v. Cothorn*, Case No. 10-6046 (Bankr. E.D. Mi. 2010) – Adversary Proceeding dismissed where Plaintiff failed to file an adversary cover sheet, failed to issue a summons, failed to serve a summons or complaint, and failed to pay adversary filing fee within time permitted by Court.

*Merchants Credit Resource v. Yesayan*, Case No. 10-5268 (Bankr. E.D. Mi. 2010) - Adversary proceeding dismissed with prejudice where Plaintiff failed to file amended complaint within time permitted by Court.

*Dakmak v. Hutchinson*, Case No. 09-6941 (Bankr. E.D. Mi. 2010) – Adversary proceeding dismissed by Court sua sponte where parties failed to appear for final pretrial conference and failed to submit Joint Final Pretrial Order.



*Taunt v. Chebbani*, Adv. No. 08-5158 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed by Court sua sponte where parties failed to appear for final pretrial conference and failed to submit Joint Final Pretrial Order.

*Americredit Financial Services, Inc. v. Burgess*, Adv. No. 09-4549 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed by Court sua sponte where parties failed to appear for final pretrial conference and failed to submit Joint Final Pretrial Order.

#### §13.53 Voluntary Dismissal

*Toder-Stokes v. Wells Fargo Bank*, Adv. No. 09-4506 (Bankr. E.D. Mi. 2009) - Debtor's "Notice of Withdrawal of Adversary Complaint and Summons" filed in main bankruptcy case treated as Notice of Dismissal of adversary case. Adversary Complaint in this case was duplicate of already pending adversary proceeding

#### §13.54 Lack of Subject Matter Jurisdiction

*Superior Materials, Inc. v. Mehlhose*, Case No. 10-5811 (Bankr. E.D. Mi. 2010) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

*J.L. Gislason, II, Trust v. Hardcastle-Melhouse*, Case No. 10-5797 (Bankr. E.D. Mi. 2010) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

*Dye-Shelman v. Wells Fargo Bank*, Adv. No. 08-4902 (Bankr. E.D. Mi. 2008) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

*Huffman v. Chase Home Finance, LLC*, Adv. No. 09-4155 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

*Nathan v. Hendricks*, Adv. No. 08-4273 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

*Kyewski v. Countrywide Home Loans*, Adv. No. 09-4292 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

*Daniel v. LaSalle Bank*, Adv. No. 08-5276 (Bankr. E.D. Mi. 2008) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

*Huston v. First Mariner Bank*, Adv. No. 09-4178 (Bankr. E.D. Mi. 2009) - Adversary proceeding dismissed for lack of subject matter jurisdiction where main case dismissed after adversary complaint filed. Dismissal of underlying case resulted in no case pending under Title 11, depriving Court of jurisdiction under 28 USC §§1334, 157(a) and 15(b)(1).

## §13.55 Dismissal as Moot

*Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give meaningful relief, then the case is moot and must be dismissed. Voluntary cessation of conduct does not render moot action for injunctive relief unless events make it clear that conduct would never reoccur. Voluntary cessation, even if permanent, does not render moot action for damages or contempt for past conduct.

*Braun v. Citizens Bank*, Case No. 10-7116 (Bankr. E.D. Mi. 2011) – Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.

*Champney v. Comerica Bank*, Case No. 10-6841 (Bankr. E.D. Mi. 2010) - Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.

*Stewart v. Citifinancial, Inc.*, Case No. 10-6713 (Bankr. E.D. Mi. 2010) - Adversary proceeding to strip lien filed in Chapter 13 case dismissed after case converted to Chapter 7. Chapter 7 debtor may not strip off allowed junior lien, leaving court unable to grant effective relief.

*Pendley v. Regional Medical Center*, Case No. 10-4033 (Bankr. W.D. Ky. 2010) - Adversary proceeding to recover money garnished during preference period dismissed as moot where creditor voluntarily returned money to debtor.

*Superior Materials, LLC v. Mehlhose*, Case No. 09-6904 (Bankr. E.D. Mi. 2010) – Adversary Proceeding to declare debts non-dischargeable under section 523 dismissed as moot where court, in separate adversary proceeding, entered default judgment denying debtor a discharge under section 727.

*Carmody v. Citimortgage*, Case No. 09-6611 (Bankr. E.D. Mi. 2010) – Adversary Proceeding to strip second mortgage rendered moot by Debtor’s stated intention to convert proceedings to Chapter 7. Although Debtor had not yet filed a Notice of Conversion, Debtor failed to appear for hearing on Motion for Summary Judgment based on stated intention to convert where Debtor had absolute right to convert.

*Stokes v. Wells Fargo Bank, N.A.*, Adv. Case no 09-4483 (Bankr. E.D. Mi. 2009) - Adversary proceeding to determine extent of second mortgage lien rendered moot upon entry of a stipulated order determining the extent of the second mortgage.

*Scott v. Banks*, Adv. No. 09-4272 (Bankr. E.D. Mi. 2009) - Adversary proceeding to determine extent of second mortgage lien rendered moot upon entry of a stipulated order determining the extent of the second mortgage.

*Patterson v. Homecomings Financial, LLC*, Adv. No. 09-4466 (Bankr. E.D. Mi. 2009) - Adversary proceeding to determine extent of second mortgage lien rendered moot upon entry of a stipulated order declaring that upon entry of a discharge the second mortgage would be extinguished, terminated and discharged.

§13.56 Dismissal by Court *Sua Sponte*

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

## §13.57 Failure to Pay Filing Fee

*Ricci v. Grier*, Adv. Case No. 10-4727 (Bankr. E.D. Mi. 2010) – Adversary Proceeding dismissed where Plaintiff failed to pay filing fee within deadline established by Order of Court.

*In re Rutherford*, 427 BR 656 (Bankr. S.D. Ohio 2010) – Court would deem complaint timely filed although Complaint was filed in main case and not as separate adversary and creditor failed to pay the requisite filing fee. Creditor's attorney was obviously unfamiliar with administrative procedures for electronic case filing (ECF) in the Southern District of Ohio would be afforded opportunity to re-docket non-dischargability complaint in separate adversary proceeding and to pay required filing fee, so that creditor's non-dischargability claims could be decided on merits.

## P. Default

## §13.58 Generally

*IRS v. Hayes*, 2011 WL 2490945 (E.D. Mi. 2011) – Final Default Judgment must not differ in kind from, or exceed amount, demanded in pleadings. Government's complaint alleged outstanding tax debt of \$40,970.30. Actual tax debt was \$38,663.18, which was amount requested in Motion for Default Judgment. Discrepancy in amount did not preclude entry of default judgment, as amount requested did not exceed amount listed in complaint and was not different in kind from the debt described in the pleadings. However, actual amount remained unliquidated where IRS was also pursuing recovery from co-obligor. Until that action was completed and amounts recovered credited to debtor's account, exact calculation of liability was not possible. Motion for Default Judgment denied without prejudice to IRS renewing motion once liability is liquidated.

*Perkons v. American Acceptance, LLC*, 2010 WL 4922916 (D. Ariz. 2010) – Granting default judgment is within the Court's sound discretion. In exercising that discretion, the Court may consider such factors as (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action[,], (5) the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. Default judgment warranted where Defendant failed to file Answer to complaint and Defendant discharge attorney but failed to retain new counsel in time permitted by Court. Plaintiff would suffer prejudice if default judgment was not entered because she would be without recourse for recovery. Complaint adequately alleged several violations of the FDCPA and the defendant has not asserted that the complaint fails to state a FDCPA claim. The sum of money at stake is not completely disproportionate or inappropriate to the allegations made in the complaint. Court would construe all well-pled allegations in favor of plaintiff and defendant made no attempt to challenge the allegations in the complaint related to damages. Defendant's failure to file an answer was not due to excusable neglect given that the defendant, either through prior counsel or through notices sent directly to it by the plaintiff and the Court, has had notice of everything filed in this action, and the defendant's default has made it impossible to render a decision on the merits.

*In re Couch*, Case No. 09-30805 (Bankr. E.D. Mi. 2010) – Creditor failed to amend Proof of Claim within the time permitted but did amend the claim prior to entry of an Order disallowing the claim. Defaults are generally disfavored and are reserved for rare occasions where no doubt exists that default is proper. Where doubt exists as to whether default should be granted or vacated, doubt should be resolved in favor of defaulting party. Court would not disallow claim by default where amended claim was filed, although untimely. Court did award Debtor attorney fees incurred as a result of Creditor's failure to timely amend.

*Harmon Autoglass Intellectual Property, LLC v. Leiferman*, Case No. 10-6007 (8<sup>th</sup> Cir. 2010) – Bankruptcy Court correctly struck defendant's answer and entered default judgment in favor of plaintiff in non-dischargability action. Federal Rule of Bankruptcy Procedure 7037, which incorporates Federal Rule of Civil Procedure 37, permits Court to enter sanctions for failure to obey an Order regarding discovery. Court should resort to sanction of dismissal only when the failure to comply with Court's Orders regarding

discovery is due to willfulness, bad faith or fault of the non-responding party; and where non-compliance with Order is prejudicial to the other party. Defendant failed to cooperate in discovery for nearly one year while adversary was pending. Court repeatedly advised Defendant that lack of cooperation would lead to sanctions including striking pleadings and entry of default judgment. Notwithstanding multiple extensions of time to comply, Defendant never meaningfully complied with multiple court orders compelling discovery.

### §13.59 Setting Aside

*Rogan v. Litton Loan Servicing, LP*, 2011 WL 4445651 (6<sup>th</sup> Cir. BAP 2011) – Court can vacate default under Rule 55 for good cause, and may set aside default judgment under Rule 60(b) for good cause. Adversary defendant who had transferred any and all interest in the underlying mortgage had valid excuse for not responding to adversary complaint seeking to set aside mortgage, and defendant did not assert any interest and assumed defendant had no reason to file an answer. Default was not result of culpable conduct of defendant and defendant had valid defense to action, and plaintiff could not demonstrate prejudice as plaintiff had no valid cause of action in the first instance.

*Wheat v. Reiser*, 2011 WL 2559551 (S.D. Ohio 2011) – Bankruptcy Court properly entered default and denied motion to set default aside. Party did not attend scheduled pre-trial conferences, did not participate in Rule 26 conference, and did not respond to discovery requests, and failed to attend trial. To set aside default, party must demonstrate that default was not the product of the defaulted party's culpable conduct.

*Kohut v. Rigney*, 2011 WL 2693662 (E.D. Mi. 2011) – Bankruptcy Court properly vacated default under Rule 60(b)(4). Court concluded that service of process was improper and failed to comply with due process. Default also properly vacated under Rule 60(b)(6) where case presents an “unusual and extreme circumstance where principles of equity mandate relief and undue hardship will result if relief is not granted.” Trustee sought to seize Defendant's sole asset in which neither the Debtor nor the Trustee have a stake and as to which the Trustee lacked a viable legal theory.

*PNC Mortgage v. Rhiel*, 2011 WL 1043949 (S.D. Ohio 2011) – Rule 7012 requires that if a complaint is duly served, a defendant to serve a responsive pleading within 30 days after issuance of summons. If summons is not properly served, defendant has no obligation to respond and court cannot enter default based on failure to respond. Service by mail on a corporation must be addressed to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. Complaint mailed to the attention of “Officer, Managing or General Agent” without specific name of person to be served did not comply with Rule 7004. Although defendant undisputedly received notice, that was not sufficient to cure defective service.

*Kohut v. Rigney*, Case No. 07-6287 (Bankr. E.D. Mi. 2011) – Motion for Relief under Rule 60(b)(1-3) must be brought within one year of entry of default judgment. Judgment will be void under Rule 60(b)(4) only when the service of process was improper. Service by mail is controlled by Rule 7004(b) which permits service by mail to the individual's dwelling house or usual place of abode. Service is not proper where mailed to an address that is not Defendant's dwelling house or usual place of abode even if the address is the only address known to Plaintiff. Improper service results in a lack of due process as defendant was not properly notified of pendency or action, warranting setting aside default judgment. Defendant's “last known address” is not the address for proper service under Rule 7004. Further, Plaintiff's action was legally insufficient to sustain a judgment compelling relief from judgment under Rule 60(b)(6). Divorce judgment in 1998 conveyed ex-husband's property interest in marital homestead to ex-wife. Husband delivered quit claim deed to ex-wife contemporaneously with divorce decree, but Wife failed to record that deed until January, 2007. Delay in recording deed did not leave ex-husband with property interest as that interest ceased to exist by virtue of the divorce decree. Husband's bankruptcy filing within 90 days of date on which deed was recorded did not result in deed being fraudulent or preferential, because recording of deed did not operate to transfer title or divest debtor of interest in property.

*Town & Country Co-op, Inc. v. Ward*, 2010 WL 4286211 (Bankr. N.D. Ohio 2010) - Rule 7055 incorporates Rule 55 and Rule 60(b) as basis for setting aside a default. Section 60(b)(1) allows relief for

mistake, inadvertence, surprise or excusable neglect. Court must consider (1) prejudice to plaintiff if default vacated; (2) whether a meritorious defense exists; (3) whether the defendant should be held accountable for failure to respond to the complaint; and (4) whether the default is the result of culpable conduct by the plaintiff. Defendant advised plaintiff of desire to retain counsel only 4 days after complaint was served; defendant contacted counsel and thought counsel was going to represent him only to later learn the attorney declined; defendant contacted another attorney who could not undertake case because of a conflict; defendant filed motion for extension of time which contained detailed information on his attempts to obtain counsel and thought that motion had been granted based on a misunderstanding of a court order; and defendant did retain counsel who contacted Plaintiff's counsel before Plaintiff filed Motion for Default. Entry of default was not caused by any culpable conduct of Defendant and was the result of mistake or excusable neglect. Defendant filed Motion to Vacate Default only 4 days after entry, and there were at least 4 months remaining before the case was set for trial, resulting in no prejudice to plaintiff. Defendant's Motion demonstrated facially possible defenses based on lack of knowledge or intent and lack of and misrepresentations, raising clear issues of fact as to underlying causes of action.

*J.L. Gisalsen, III, Trust v. Mehlhose*, Case No. 09-6907 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reopen Case, etc., construed as Motion for Reconsideration of Default Judgment, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion failed to allege any facts from which the Court could determine whether there was any excusable neglect in the failure by Debtor or Debtor's attorney in failing to file answer. Further, attorney's failure to file answer is chargeable to Debtor and does not constitute excusable neglect for purposes of setting aside Default Judgment.

*In re Miller*, Case no. 06-32425 (Bankr. S.D. Ohio 2010) - Contested matter must be served in the same manner as a summons under Rule 7004. When service is to be made on an "insured depository institution," Rule 7004(h) requires service by certified mail addressed to an officer of the institution. Debtors' post-confirmation plan modification was not properly served where certificate of service acknowledging service on FDIC insured depository institution at three somewhat different addresses, only by regular mail and without direct service on any individual, officer or specific department. Order Modifying Plan based on defective service vacated pursuant to Rule 60(b).

*Duetsche Bank National Trust Company v. Rogan*, 2009 WL 3415462 (E.D. Ky. 2009) – Default Judgment must be vacated where record indicated that Defendant had never been served with the Complaint. Service of Complaint by mail must be addressed to the attention of an officer, managing or general agent, or to any other agent authorized by appointment or law to receive service of process. Creditor's Proof of Claim which listed "Bankruptcy Department" as agent for receipt of all notices regarding Bankruptcy Case constituted "appointment" for purposes of service of complaint. Mailing of complaint to a department other than that specified in the Proof of Claim did not constitute proper service of the complaint rendering default judgment void for lack of personal jurisdiction.

*Q Technology, Inc. v. Allard*, Case No. 08-14655 (E.D. Mi. 2009) – In deciding whether excusable neglect exists under Rule 60(b)(1), Court must consider the length of the delay, the reason for the delay, whether the movant acted in good faith, the potential impact of the delay on judicial proceedings, and the danger of prejudice to the other party. Excusable neglect sufficient to set aside default requires that default not result from Defendant's culpable conduct. Party will be culpable if is motivated by an intent to thwart judicial proceedings, or shows a reckless disregard for the effect of the movant's conduct on those proceedings. Defendant's conscious decision not to respond to complaint served by US Mail and decision to ignore that complaint because Defendant did not realize that service by mail was warranted and thought that personal service was required constitutes culpable conduct and therefore cannot constitute excusable neglect. Further, relief is not warranted under Rule 60(b)(6) where the factual basis is the same as Defendant's argument under Rule 60(b)(1). Rule 60(b)(6) requires extraordinary circumstances which must include that the defaulted party be faultless in the delay.



*Miller v. Fint*, 2009 WL 2913927 (Bankr. W.D. Ky. 2009) – Rule 7055(c) of the Federal Rules of Bankruptcy Procedure states that for good cause the court may set aside a judgment by default in accordance with Rule 60(b) of the Federal Rules of Civil Procedure. Rule 60(b) permits the court to relieve a party from final judgment in cases of mistake, inadvertence, surprise or excusable neglect. Defendant failed to demonstrate excusable neglect. The Summons and Complaint were sent to Defendant's mailing address as listed with the Court, which was Defendant's last known address and where he had been served with a copy of the Debtor's Petition. The Summons was not returned as incorrectly delivered. Defendant's claim that he did not receive notice of the adversary proceeding is not sufficient to overcome the presumption that it was received. Defendant admitted that during the course of the bankruptcy case, Defendant and his wife separated and he moved to a new address but never informed the Court of his new address. Defendant knew that he did not often receive all of his mail from his spouse but failed to diligently pursue whether he was receiving all of his mail. Whether Defendant has a meritorious defense is irrelevant where Defendant cannot meet the threshold standard of establishing excusable neglect.

*Rogan v. Countrywide Home Loans, Inc.*, 2009 WL 2959665 (6<sup>th</sup> Cir. BAP 2009) – Bankruptcy Court improperly vacated default judgment. Pursuant to Federal Rule 60, a default judgment may be vacated only upon a showing of “extraordinary circumstances”. Defendant failed to file an appearance in the action until 59 days after the answer to the complaint was due and 55 days after the default judgment had been entered. Defendant failed to file a motion to vacate the default judgment until 73 days after the response was due. Defendant's allegation that a change of statutory agent for service of process around the time the complaint was served may have resulted in delay in the complaint being properly routed did not demonstrate any exceptional circumstance to warrant relief under Rule 60(b)(6). Defendant, as moving party, bears burden of proof of facts to demonstrate unusual or extreme circumstances or how extreme or undue hardship would result from the failure to vacate the default judgment. Defendant's failure to timely respond to a properly served complaint, without more, does not constitute a basis to vacate a default judgment.

*In re Alfes*, Case No. 05-55084 (Bankr. E.D. Mi. 2009), *aff'd* 2011 WL 3651319 (E.D. Mi. 2011) – Federal Rule of Civil Procedure 60, incorporated by Federal Rule of Bankruptcy Proceeding 9024, sets forth 6 grounds to grant relief from a Judgment or Order: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. Rule 60(b)(6) applies only in exceptional or extraordinary circumstances not addressed by the other 5 enumerated grounds, and where principals of equity mandate relief and where extreme and undue hardship will result if the Order is not set aside. A meritorious defense, standing alone, does not constitute exceptional or extraordinary circumstances.

#### Q. Settlement

##### §13.60 Approval by Court Required

*Rankin v. Lavan*, Case no. 09-1087 (6<sup>th</sup> Cir. 2011) – Court has discretion to approve proposes settlement by virtue of Rule 9019(a) which directs that court may approve settlement or compromise on motion by the Trustee and after notice and hearing.

*Ames v. Rubin*, 2011 WL 1630139 (N.D. Ohio 2011) – Federal Rule of Bankruptcy Procedure 9019(a) governs procedure to obtain approval of settlement of adversary.

##### §13.61 Approval by Court Not Required

##### §13.62 Standards for Approval

*Rankin v. Lavan*, Case no. 09-1087 (6<sup>th</sup> Cir. 2011) – Bankruptcy Court has significant discretion in approve settlements. Court must make sure that the settlement is faire and equitable. Court must made independent judgment by review of all facts necessary for an intelligent and objective opinion of probabilities of ultimate success; and must form an educated opinion on the complexity, expense and likely duration of litigation, possible difficulties in collection on any judgment, and any other factor relevant to full and fair assessment of the wisdom of proposed compromise. Court approves settlement of litigation where prospects for success were exceedingly slim; debtors did not have sufficient funds to consummate transaction as required by contract; and any benefit to creditors would have been minimal as Trustee would have been required to immediately resell property at price that likely would not have produced net gain in excess of proposed settlement amount.

*In re SCBA Liquidation, Inc.*, 2011 WL 2636854 (Bankr. W.D. Mi. 2011) – To evaluate the fairness and equity of the proposed settlement, the court must weigh four major factors: (1) the probability of success in the litigation; (2) the difficulties of collecting any judgment; (3) the complexity of the litigation and the expense, inconvenience, and delay necessarily attending it; and (4) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. Court approved settlement of adversary where defendant paid estate \$5 million and withdrew claim in exchange for full release. After 65 days of trial, factual issues were substantial and there were significant questions of law regarding defendant's liability. Creditor's general opposition that the Trustee could not state with certainty the impact on the estate or the pro rata distribution to creditors would not preclude settlement, where these issues also depended on outcome of numerous other proceedings filed to liquidate claims. Alleged delay by the Chapter 7 Trustee in realizing difficulty in prevailing not basis to reject settlement that ultimately produced benefit (including withdrawn claims) of approximately \$9 million. Creditor's argument that in "hindsight" litigation was not warranted no basis to reject settlement that produced benefit to estate and creditors.

*Ames v. Rubin*, 2011 WL 1630139 (N.D. Ohio 2011) – Court must apprise itself of the underlying facts and make an independent judgment as to whether the compromise is fair and equitable. Court must weigh conflicting interests of all relevant parties, considering such factors as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors. settlement is fair and equitable and is in the best interests of the estate. Court would approve settlement where claims brought by Trustee were plausible but were not assured and Trustee faced risk that these claims could be dismissed on the pending motions to dismiss, on summary judgment, or that the claims may fail at trial leaving Trustee with no recovery for the estate while incurring great expense prosecuting the action. Director's and Officer's insurance policy had a declining balance, with over \$3 million having already been spent out of a \$10 million policy before even reaching discovery. Even if Trustee secured judgment there were substantial concerns about collectability given the financial state of the Defendants and the declining balance of the insurance policy. Trustee's determination that this settlement is in the best interest of the estate is entitled to great weight and no creditor objected to the settlement on the grounds that it is not in the estate's best interest.

*General Motors Acceptance Corporation v. Flynn*, Case No. 08-8109 and 08-8110 (6th Cir. BAP 2009) - Bankruptcy Courts have significant discretion to approve or reject proposed settlements and compromises. Court must consider probability of ultimate success and costs attendant to litigation including complexity, expense, inconvenience, delay, and the likely duration of a lawsuit and difficulties in collecting on judgment. Court improperly approved settlement that was predicated on an agreement between the Trustee and creditor regarding certain offsets notwithstanding that the Bankruptcy Court previously determined that creditor was not entitled to the offsets as a matter of law.

*Engman v. Boyd*, Case No. 1:09-cv-151 (W.D. Mi. 2008) – In determining whether to approve a proposed settlement, bankruptcy Court must consider whether the disposition proposed is fair and equitable including whether the proposed settlement is the best alternative available to the estate under the circumstances taking into particular consideration whenever other alternatives the objecting party or parties might pose. Court must consider the strength of the claim asserted, the difficulty, expense, and a way that may come from leading the client, and the core spun a net benefit to the state and creditors of settling the claim without litigation in order to determine whether the proposed settlement is reasonable and in the best interest of the estate. Implicit in that consideration must also be the Court's separate determination of

whether the proposed disposition is consistent with the Trustees duties as the estate fiduciary. District Court. may set aside Bankruptcy Court's decision only if that decision constitutes an abuse of discretion, as decision to approve a proposed settlement is bound up in the ever-changing facts and circumstances of the bankruptcy case. The bankruptcy Court need not conclusively determine whether and to what extent they claim will be successful or a proposed defense may be dispositive. The Court need only apprise itself of the relevant issues and make an informed judgment on the reasonableness of the proposed settlement.

*Bailey v. White*, 2009 WL 928595 (6<sup>th</sup> Cir. 2009) - Court should approve the settlement only after a hearing "and on finding that it is fair, reasonable, and adequate." Several factors inform this inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

*Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6<sup>th</sup> Cir. BAP 2009) – Bankruptcy Court has significant discretion to approve or disapprove a settlement with compromise. Bankruptcy Court is under affirmative duty to apprise itself of all necessary facts as to make informed and independent judgment as to whether the settlement is fair and equitable to the non-settling parties. Factors to be considered include probability of ultimate success should be claimed he litigated and costs attendant to such litigation in terms of complexity, expense, inconvenience, DeLay and the likely duration of a lawsuit including possible difficulties of collecting on any judgment. Court must compare the terms of a compromise with the likely rewards of litigation, but is not required to conduct mini-trial when evaluating a settlement. Proponent of settlement agreement bears burden of showing by preponderance of evidence that the proposed settlement is fair and equitable. Bankruptcy Court properly refused to approve the settlement by which defendant would have received credits far in excess of what the bankruptcy Court concluded was the maximum which defendant could sustain in that litigation. Proposed settlement which would have given defendant a credit of more than \$100,000 not fair and equitable report concluded that defendant could reasonably establish a credit of only \$20,000 and had "serious doubt" that Debtor owed defendant any credit as claimed by defendant.

#### §13.63 Burden of Proof

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

### R. Collateral Estoppel and Res Judicata

#### §13.64 Elements

*In re Damron*, 2011 WL 4442635 (Bankr. S.D. Ohio 2011) – Administrative Hearing determining that debtor fraudulently obtained workers compensation benefits was preclusive in action under Section 523(a)(2). Administrative hearings will be given preclusive effect if (1) the administrative body acted in a judicial capacity; (2) there is an identity of parties and issues; (3) the administrative body resolved factual disputes that were clearly relevant to the issues properly before it; and (4) the parties have had a full and fair opportunity to litigate and seek review of any adverse findings.

*Murtha v. Spencer*, 2011 WL 4101092 (Bankr. W.D. Mi. 2011) – Under Michigan law, collateral estoppel applies when: (1) there is identity of parties across the proceedings; (2) there was a valid, final judgment in the first proceeding; (2) the same issue was actually litigated and necessarily determined in the first proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. Judgment of divorce is valid and binding final judgment that determined whether obligations were in the nature of support or property settlement which was the very issue pending before this court.

*Simon v. JPMorgan Chase Bank*, 2011 WL 3701828 (Bankr. E.D. Mi. 2011) - In the Sixth Circuit, a claim is barred by the res judicata effect of prior litigation if each of these four elements are established: (1) a

final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies'; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action. Order granting creditor relief from stay is not *res judicata* on issue of validity of underlying lien or avoidability of lien under Sections 544 and 547. Order on stay relief motion is limited in scope and does not impact same legal or factual issues as are present in action under Section 544 and 547. Procedural differences – stay relief is contested matter done by motion versus preference litigation which requires adversary proceeding – preclude holding that stay lift is *res judicata* or collateral estoppel on adversary proceeding. Issues in stay lift are far more limited and based on different facts than preference litigation, defeating any allegation of “identity” of causes of action.

*Jones v. Leedey*, 2011 WL 3678925 (Bankr. E.D. Mi. 2011) – Collateral estoppel bars re-litigation by the same parties of legal or factual issues actually raised and determined in an earlier proceeding whereby the court's decision is conclusive against the parties in subsequent proceedings. Party asserting estoppels must prove (1) that the issue sought to be precluded is identical to an issue decided in an earlier proceeding; (2) that the issue sought to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding; (3) that the judgment in the earlier proceeding has become final; (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding; and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded. State court judgment that contained specific finding that debtor removed and converted money from Plaintiff without proper authority or justification, the amount of \$131,489.99 was sufficient to support collateral estoppel's judgment in adversary under Section 523(a)(4).

*Bell v. Sims*, Case no. 11-4802 (Bankr. E.D. Mi. 2011) – Collateral estoppel requires that issue be actually litigated and determination must be essential to the underlying judgment. Basis for underlying judgment must be clear, definite and unequivocal. Judgment would not be preclusive where State Court complaint alleged causes of action for breach of contract, promissory estoppel, unjust enrichment and fraud, and judgment did not specify on which of the causes of action the judgment was based.

*King's Welding & Fabricating, Inc. v. King*, 2011 WL 2837915 (Bankr. N.D. Ohio 2011) – Issue preclusion, also known as collateral estoppel, requires entry of final judgment determining the fact or matter sought to be precluded. Orders granting or denying partial summary judgment do not have preclusive effect because they are not final, appealable judgments on the merits.

*Old Republic National Title Insurance Co. v. Licavoli*, Case no. 084065 (Bankr. E.D. Mi. 2011) – Federal Court will give state administrative agency fact findings same preclusive effect as would applicable state courts. In Michigan, administrative determinations are adjudicative in nature and collateral estoppel applies when the parties are the same or substantially identical; the administrative proceeding resulted in a valid final judgment; and the issue in question was actually litigated.

*In re Mullins*, 2011 WL 1791090 (Bankr. S.D. Ohio 2011) – The doctrine of collateral estoppel applies in Ohio when a fact or issue (1) was actually and directly litigated in the prior action; (2) was passed upon and determined by a court of competent jurisdiction; and (3) when the party against whom collateral estoppel is asserted was a party to the prior action. State Court Judgment foreclosing judicial lien and decreeing that all other liens are extinguished collaterally estopped mortgage creditor from asserting secured status in Chapter 13 proceeding.

*Clark v. Springhart*, 450 BR 725 (Bankr. S.D. Ohio 2011) – Judicial proceedings of state court have same preclusive effect as judgment would be afforded under state law. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of *res judicata* in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit. Under South Carolina law, default judgment does not have preclusive effect as



issues were not actually litigated; and would not have res judicata effect because bankruptcy proceeding was one to determine dischargability which could not have been determined by State Court.

*In re Henney*, 2011 WL 1642853 (W.D. Mi. 2011) – Judicial proceedings of state court have same preclusive effect as judgment would be afforded under state law. Michigan law requires (1) a question of fact essential to the judgment must have been actually litigated and determined in a valid, final judgment; (2) the same parties must have had a full (and fair) opportunity to litigate the issue; and (3) “there must be mutuality of estoppel. State court judgment not preclusive on issue of debtor’s intoxication at time of accident where debtor was not a party to that action.

*Bowling v. Jones*, 2011 WL 204280 (Bankr. E.D. Tn. 2011) – Collateral estoppel, or issue preclusion, is an “extension” of the doctrine of res judicata, and its purposes are to relieve the parties of multiple lawsuits, conserve judicial resources, and promote finality by preventing inconsistent decisions. Federal courts must give state court judgments “the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered. State Court final judgment that evidenced all elements of non-dischargability of debt would be collateral estoppel in action under Section 523.

*POH Assisted Living, LLC v. Sunrise Assisted Living Management, Inc.*, Case No. 10-6097 (Bankr. E.D. Mi. 2010) – Full Faith and Credit Act, 28 USC Section 1738, requires federal court to give preclusive effect to state court judgment when the court of the state in which the judgment was entered would do so. Res judicata bars claims actually litigated plus all claims that arise from the same transaction and that could have been raised but were not. Order dismissing case with prejudice constitutes a judgment for purposes of res judicata; state court proceeding involved same parties; and arose out of same management agreement and alleged breaches that were the subject of the state court action. Where third party in second case asserts res judicata as a defense, res judicata can still apply even though third party was neither party in the prior suit nor in privity with one who was a party. Action against third party for conspiracy, based on the same events as formed the basis of the prior state court action, was precluded by res judicata.

*Thomas v. City of Detroit*, Case No. 10-5909 (Bankr. E.D. Mi. 2010), *aff’d*, Case no. 11-10639 (E.D. Mi. 2011) – Party owing a debt possesses right of recoupment if that party has a cognizable claim for damages against the party seeking to collect on the debt. Absent any legal obligation owed by the person seeking to collect debt, Debtor had no right of recoupment that could be asserted. Where District Court previously ruled that Debtor had no claims against City, Debtor’s alleged claims against City were res judicata and could not assert recoupment as defense to City’s Proof of Claim.

*Educational Credit Management Corporation v. Alfes*, Case No. 10-5557 (Bankr. E.D. Mi. 2010), *aff’d* 2011 WL 3651319 (E.D. Mi. 2011) – Res judicata requires final decision on the merits by a court of competent jurisdiction; subsequent action between same parties or their privies; issue in the subsequent action either was or should have been litigated; and identity of causes of action. Default judgment entered in adversary to determine dischargability of student loan was not res judicata in later action against separate student lender. Default against one defendant has no res judicata effect as to second defendant in same action. Order in favor of second defendant dismissing Plaintiff’s action as matter of law is res judicata in later action between plaintiff and second defendant for alleged violations by second defendant of discharge injunction where second defendant instituted collection proceedings on student loan debt post-discharge.

*Hudson & Muma, Inc. v. Muma*, Case No. 09-5227 (Bankr. E.D. Mi. 2010) – Bankruptcy Court required to afford state court judgment preclusive effect to the same extent a court in the state in which the judgment was rendered would give the judgment preclusive effect. Under Michigan law, state court judgment is entitled to preclusive effect if the state court proceedings culminated in a valid final judgment and the issue was (1) actually litigated and (2) necessarily determined. State court judgment finding that debtor did not commit fraud was not preclusive on issue where state court used “clear and convincing evidence” standard but standard under Section 523 is “preponderance of evidence”. Judgment for misappropriation of trade secrets did not require finding of either willfulness or malice as required for non-dischargability under Section 523(a)(6), so final judgment was not preclusive on that issue. Res Judicata bars a second action when (1) the prior action was decided on the merits, (2) both actions involved the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first action. Under



Michigan law, *res judicata* is broadly interpreted to preclude litigation of every claim arising out of the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Res judicata* did not preclude action to recover allegedly converted checks where Debtor had already been convicted and ordered to pay restitution. Action at state court that arose out of Debtor's relationship with former employer for other breaches of duty would not have included claims that were already subject to criminal court order of restitution for purposes of *res judicata*.

*In re McDowell*, 2010 WL 3790318 (Bankr. E.D. Tn. 2010) – Factual findings in State Court Judgment have collateral estoppel effect to the same extent as that Judgment would be afforded preclusive effect by law of state where judgment was entered. Under Georgia law, the Plaintiff may demonstrate the elements of collateral estoppel by showing that the issue was (1) raised in a prior proceeding, (2) actually litigated and decided, (3) necessary to final judgment and (4) the party to be estopped had full and fair opportunity to litigate the issue.

*Daniels v. Miller*, 2010 WL 3724780 (Bankr. E.D. Ky. 2010) – Default judgment must contain express findings of fact and conclusions of law to be given preclusive effect in subsequent litigation between the parties. The court being asked to give preclusive effect to a default judgment in a subsequent litigation must have some reliable way of knowing that the decision was made on the merits. The best evidence would be findings of fact and conclusions of law by the court entering the default judgment. State Court default judgment predicated on allegations of fraud would not have preclusive effect where State Court Judgment did not contain any findings of fact and stated only that the Debtor, “having filed no answer and made no objections in writing or in person, ... [the Court] finds that the Defendant committed fraud upon the Plaintiff” left the Bankruptcy Court with no way to determine whether the judgment of fraud was made on the merits of the case.

*Phillips v. Weissert*, Case No. 09-8032 (6th Cir. BAP 2010) - Where state court determines factual question using the same standards as the bankruptcy court would use, collateral estoppel should be applied to promote judicial economy. Default Judgment would be given preclusive effect where default determined only liability, and damages were subsequently actually litigated at which Debtor appeared and had a full and fair opportunity to litigate that issue. However, default judgment that determined only liability and damages, but did not consider whether conduct was “willful and malicious” as defined in the Bankruptcy Code would not constitute collateral estoppel on issue of non-dischargability.

*Fairdale Area Community Ministries, Inc. v. Hollingsworth*, 2010 WL 3447590 (Bankr. W.D. Ky. 2010) – Collateral estoppel may be used in the bankruptcy context to preclude parties from re-litigating issues previously litigated in a state court forum. Collateral estoppel may be applied in dischargability proceedings, such as this adversary proceeding. To invoke collateral estoppel, a party must (1) show the precise issue was raised in the prior proceeding between the same parties or parties in privity with them, (2) show it was actually litigated, and (3) show that its determination was necessary to the outcome in state court. State Court Judgment for conversion constituted collateral estoppel on issues pertaining to dischargability under Section 526(a)(6) where state court found not only that Hollingsworth converted Ministries property, but that he also intended to interfere with Ministries' possession. Issue of conversion was central finding in state court litigation; matter was actually litigated where Debtor participated in discovery and had opportunity to respond to Motion for Summary Judgment but chose not to do so, allowing Judgment to be entered unopposed; and issue of conversion was necessary to outcome in state court, were State Court needed to find that Debtor converted Plaintiff's property with intent to deprive Plaintiff of rightful possession.

*Willis v. Chase Home Finance, LLC.*, 2010 WL 3430712 (N.D. Ohio 2010) – In the case of a completed foreclosure action, plaintiff seeks to litigate matters which were raised or which should have been raised in the state court foreclosure and eviction proceedings, a federal court must give a state court judgment the same preclusive effect it would have in the courts of the rendering state. Under Ohio law, an existing final judgment or decree is conclusive as to all claims which were or might have been litigated in the first lawsuit. The doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action he files, or forever be barred from asserting it. Plaintiff's federal court action alleging loan fraud, illegal foreclosure and breach of loan modification agreement were issues that were or could have been raised in

state court foreclosure proceeding and so were barred from further review by *res judicata*.

*In re Perkins*, Case No. 09-32328 (Bankr. E.D. MI. 2010) - State Court Default Judgment in case where defendant did not appear was not "actually litigated" and is not entitled to preclusive effect.

*Kelly v. Aho*, Case No. 08-3101 (Bankr. E.D. MI. 2010) - Full Faith and Credit Act applies in dischargability proceedings. Court must determine whether a state court judgment would receive preclusive effect in the state where it was rendered. If so, Bankruptcy Court must give judgment preclusive effect unless an exception to the Full Faith and Credit Act applies. Preclusive effect depends on whether the question of fact raised in the later case was actually litigated in the prior case where both parties had full and fair opportunities to litigate the issue. A claim is "actually litigated" when put into issue in the pleadings, submitted to the trier of fact, and determined; and where the determination is essential to the prior judgment and can be clearly ascertained. Parties are precluded unless party against whom judgment to be imposed could not, as a matter of law, have appealed the judgment in the initial action; or the issue is one of law and the second action either presents claims that are unrelated to those in the prior action or there has been a change in controlling law; or new determination is warranted by differences in quality of procedures or extensiveness of jurisdiction; or party against whom preclusion is sought had a higher burden of proof in the first action than would be present in the new action or the burden of proof has been shifted to the party seeking to impose estoppel; or there is some other clear and convincing need to a new determination of the issue.

*Livingston v. Transnation Title Insurance Co.*, 2010 WL 1404530 (6<sup>th</sup> Cir. 2010) – Principles of collateral estoppel apply in non-dischargability actions. Michigan Supreme Court has held that collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined. Collateral estoppel applies only where the basis of the prior judgment can be ascertained clearly, definitely, and unequivocally. The inability of a court to determine the basis for the prior judgment precludes defense of collateral estoppel. A judgment affirmed on appeal has conclusive effect, but if the appellate court affirms on grounds that differ from those relied upon by the lower court, the conclusiveness of the judgment as *res judicata* and as collateral estoppel are governed by the appellate decision. Thus if the trial court rests its judgment on two grounds, each of which is independently adequate to support it, the judgment is conclusive as to both; but if the appellate court affirms on one ground without passing on the other, the second ground is no longer conclusively established under the collateral estoppel doctrine. The issue must be identical to that determined in the prior action to have been actually litigated. Court will look beyond the pleadings to consider both the "factual focus" of the prior proceedings and whether the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue. For an issue to have been "necessarily determined," it must have been essential to the judgment. Fraud for purposes of non-dischargability action is defined by federal bankruptcy law and by state common law in state court, requiring Bankruptcy Court to determine whether the state law counts adjudicated by the state trial court and the Michigan Court of Appeals require identical elements to an action under 11 U.S.C. Section 523(a)(2)(A). Under 11 U.S.C. Section 523(a)(2)(A), a creditor must prove: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false misrepresentation; and (4) its reliance was the proximate cause of the loss. Intent requires actual or positive fraud, not merely fraud implied by law, meaning that the debtor must have acted maliciously and in bad faith. Under Michigan law, actionable fraud requires: (1) That defendant made a material representation; (2) that it was false; (3) that when the defendant made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that the defendant made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that plaintiff thereby suffered injury. Under Michigan law, fraud will not be presumed but must be proven by clear, satisfactory and convincing evidence. Accordingly, the elements of a fraud claim under Michigan law are identical to those necessary to determine non-dischargability under 11 U.S.C. § 523(a)(2)(A). In affirming the state trial court on the fraud count, the Michigan Court of Appeals repeatedly invoked the Debtors' knowledge of their misrepresentations including the retention and expenditure of monies by defendants that should have been used to discharge the second mortgage; Debtors' unpersuasive arguments that they were uninformed or mistaken regarding their financial

obligations; Debtor-wife's purposeful ignorance of the terms of the documents she was signing; Debtor-wife's failure to take steps to make certain she was properly informed regarding the documents she was signing; and Debtor-wife retained the monetary benefit from her attorney-in-fact's exercise of authority and never disclaimed his actions. State court rulings and factual findings support finding of "bad faith" and "actual or positive fraud".

*Guerra & Moore, Ltd. v. Cantu*, 2010 WL 3059175 (5<sup>th</sup> Cir. 2010) – Parties may invoke collateral estoppel in certain circumstances to bar relitigation of issues relevant to dischargability and collateral estoppel can provide an alternate basis to satisfy the elements of Section 523(a)(6). Effect of judgment rendered by a Texas state court, determined by Texas rules of issue preclusion. Under Texas law, collateral estoppel bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based upon the same cause of action. Judgment finding Debtor has tortuously interfered with a contract was not collateral estoppel on issue of dischargability under Section 523(a)(6) where Texas law did not require proof of intent to injure as element of tortious interference claim. Where underlying state claim does not have as one of its elements one of the requirements for a finding of non-dischargability, state court judgment is not collateral estoppel on dischargability to the extent of the issues not covered by the state court judgment.

*State of Michigan v. Turner*, Case no. 09-5413 (Bankr. E.D. Mi. 2010) – Collateral Estoppel and res judicata require a pre-Bankruptcy finding by a Court or State or Federal Administrative Agency in a proceeding in which the party to be bound has had notice and an opportunity to appear. An internal determination by the Michigan Unemployment Agency that debtor improperly received benefits, where Agency did not conduct hearing and debtor was not provided notice or an opportunity to appear is not entitled to preclusive effect on that issue. Fact that debtor was given opportunity to contest or litigate factual determination only after the Agency had made its initial determination did not constitute an opportunity to contest or litigate the factual determinations prior the determination being issued.

*Hogan v. George*, Case No. 09-5065 (Bankr. E.D. Ky. 2009) – In order to determine if collateral estoppel applies, the Court must look to the law of the state which rendered the judgment to see if the courts of that state would give the judgment preclusive effect. Colorado courts apply the doctrine of collateral estoppel if (1) the issue precluded is identical to the issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted was a party in the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. Collateral estoppel may be employed in cases involving dischargability questions if the precise issue was raised in the prior proceeding between the same parties or parties in privity with them, if it was actually litigated, and if its determination was necessary to the outcome in state court.

*Heynen v. Webb*, Case No. 09-3182 (Bankr. E.D. Tn. 2010) – Plaintiff in adversary under Section 523(a)(2) and 523(a)(6) not entitled to preclusive effect of State Court Order that found Debtor liable but did not liquidate damages. Collateral estoppel requires (1) that the issue sought to be precluded is identical to an issue decided in an earlier proceeding; (2) that the issue sought to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding; (3) that the judgment in the earlier proceeding has become final; (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding; and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded. A final judgment that resolves all of the parties' claims and leaves the court with nothing to adjudicate is required for a finding of collateral estoppel. An interim order that adjudicates liability but does not resolve damages to which the Plaintiff was entitled remained to be decided is not and cannot support collateral estoppel.

*Ohio Truck & Trailer, Inc. v. Level Propane Gases, Inc.*, - 422 BR 93 (6<sup>th</sup> Cir. BAP 2010) – Confirmation of plan under Section 1141 binds all parties to terms of plan. Confirmation Order is res judicata on all issues raised or that could have been raised in confirmation proceedings. Action is barred by res judicata where (1) there has been a final decision on the merits in the first action; (2) the second action involves the same parties, or their privies; (3) the second action raises an issue actually litigated or which should have

been litigated in the first action; and (4) there is an identity of the cause of action. Confirmation Order is “final judgment” for purposes of res judicata. All creditors constitute parties to the first action for purposes of res judicata effect of confirmation order. Issues regarding alleged fraud in the confirmation process or leading up to confirmation are issues that were or should have been raised in confirmation process. Issues of fraud raised by Creditor after confirmation were substantially the same as were raised prior to confirmation.

*McDonald v. Redstone Federal Credit Union*, Case No. 09-12652 (11<sup>th</sup> Cir. 2010) – elements of res judicata in Alabama are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits. Res judicata prohibits party from relitigating the same cause of action against the same defendant or a different claim not previously litigated but which arises out of the same evidence.

*Double v. Cole*, Case No. 08-3371 (Bankr. N.D. Ohio 2009) – Collateral estoppel, also known as issue preclusion, precludes relitigation of a matter actually litigated and decided in another forum. Bankruptcy Court will give state court judgment the same preclusive effect that the judgment would have under the law of the State where the judgment was rendered. Under Ohio law, collateral estoppel requires: (1) A final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (2) The issue must have been actually and directly litigated in the prior suit and must have been necessary to the final judgment; (3) The issue in the present suit must have been identical to the issue involved in the prior suit; and (4) The party against whom estoppel is sought was a party or in privity with a party to the prior action. Agreements executed solely between private parties, even if accomplished within the framework of litigation, do not qualify as nor have the force of a judgment for purposes of collateral estoppel unless the agreement is incorporated into a final judgment. Dismissal of the prior suit after execution of a settlement agreement is fatal to collateral estoppel as the issue has never been actually litigated before the prior court. Thus, settlement agreement executed between plaintiff and debtor, following which case was voluntarily dismissed by plaintiff, would not support finding of collateral estoppel as to dischargeability of debt.

*Nehasil v. Grenier*, Case No. 09-14011 (E.D. Mi. 2010) – Collateral estoppel bars relitigation of issues previously decided in when the issues were raised in a different cause of action between same parties. Ultimate issues underlying first action must also be involved in the second action, and parties must have had full opportunity to litigate issues in prior case. State Court action for fraud required proof of (1) material misrepresentation; (2) that was false; (3) was known to be false, or made recklessly, without knowledge of truth, and as a positive assertion; (4) that was made with intention that other party should act on it; (5) that the other party acted in reliance on the statement; and (6) that the other party suffered injury. Michigan Fraud judgment is sufficient to support finding of non-dischargeability under Section 523(a)(2)(A) under doctrine of collateral estoppel.

*Sullivan v. Smith*, Case No. 10-4335 (Bankr. E.D. Mi. 2010) – Collateral estoppel can be applied by bankruptcy court to avoid re-litigating any grounds for non-dischargeability which were litigated in a prior proceeding. If a state court judgment would receive preclusive effect in the state where it was rendered, bankruptcy court must give that judgment preclusive effect. State court judgment rendered by default is entitled to same preclusive effect. However, Michigan courts do not give collateral estoppel to consent judgments. Court concluded that post judgment forbearance agreement which merely stated that judgment indebtedness “is not dischargeable and bankruptcy” did not have preclusive effect where forbearance agreement did not contain specific factual statements identifying the false representations and related facts which would be required for a determination under section 523(a)(2).

*Murawski v. Campbell*, Case No. 08-3178 (Bankr. E.D. Mi. 2010) – Res judicata refers to the preclusive effect of a judgment and prevents re-litigation of the very same claim. Collateral estoppel refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or different claim. Claim under Section 523(a)(2) is not precluded by res judicata where state court never entered judgment due to automatic stay. Res judicata does not control dischargeability action as Section 523 claims are solely within the jurisdiction of the Federal Court and the issues addressed in the



state court could not be identical with those of Section 523 as those issues did not exist at the time of the state court litigation because debtor had not yet filed for bankruptcy.

*Tomlin v. Crownover*, 2009 WL 2843370 (Bankr. E.D. Tn. 2009) – Full Faith and Credit Clause of the United States Constitution requires that judicial proceedings of any state had the same effect in every chord within the United States that they had in the originating court. Federal court must give state court judgment the same effect it would have under state law for purposes of res judicata and collateral estoppel. Res judicata deals with the effect of an earlier judgment on a claim asserted by a party in later litigation. Collateral estoppel deals with factual findings necessary to prove a claim. Plaintiff an action under section 523(a)(2) and (a)(6) can rely on state court judgment to establish claim that debtor violated Tennessee Consumer Protection Act. However, Tennessee judgment is not res judicata on issue of whether debt is accepted from discharge as federal courts have exclusive jurisdiction to determine discharge ability of claims. Collateral estoppel principles do apply to non-dischargability proceedings. When the state court has determined factual issues using standards identical to those in dischargability proceedings, collateral estoppel bars re-litigation of those issues in bankruptcy court.

*Sher v. Dunbar*, 2010 WL 4038741 (Bankr. W.D. Mi. 2010) – Final but unconfirmed arbitration award entitled to preclusive effect under doctrine of collateral estoppel. Effectiveness of arbitrator's decision does not depend upon confirmation by a state court. Collateral estoppel would apply where both parties had a full and fair opportunity to litigate the issues and it would be unfair to provide either party with a "second bite at the apple". We litigating the same issues in the context of a non-discharge ability action would be inconsistent with federal policy in favor of arbitration and would be wasteful of judicial resources. Collateral estoppel may be invoked where (one) the issue precluded is the same one involved in the prior proceeding; (two) the issue was actually litigated in the prior proceeding; (three) determination of the issue was a critical and necessary part of the decision in the prior proceeding; and (four) the prior form provided the party against whom estoppel is asserted a full and fair opportunity to litigate the issue. Record demonstrated that issue of fraud was actually litigated and that conclusion that party did not commit fraud with necessary part of arbitrator's decision.

*Winget v. JP Morgan Chase Bank*, 537 F.3d 565 (6<sup>th</sup> Cir. 2008) – Action is barred by res judicata if (1) a final decision on the merits has been reached by a Court of competent jurisdiction; (2) a subsequent action is brought between the same parties or their privies; (3) the issue in the subsequent action was or should have been actually litigated in the prior action; and (4) the current cause of action is identical to the cause of action in the prior case. Creditor precluded by doctrine of res judicata from challenging a bankruptcy sale in the bankruptcy Court had previously entered an order approving the proposed sale and that order had become final and non-appealable. A bankruptcy Court order authorizing sale of part of the estate constitutes a final judgment on the merits for res judicata purposes.

*Sanderson Farms, Inc. v. Gasbarro*, 2008 WL 4764118 (6<sup>th</sup> Cir. 2008) - State Court judgment is entitled to preclusive effect in a non-dischargability action if the law of the state would give collateral estoppel effect to the judgment. To assert collateral estoppel under Ohio law, a party must plead and prove the following: (1) the party against whom collateral estoppel is sought was a party-or in privity with a party-in the previous action; (2) there was a final judgment on the merits in the previous action after a full and fair opportunity to litigate the issue; (3) the issue was actually and directly litigated in the previous action and was necessary to the final judgment; and (4) the issue in the present action is identical to the issue involved in the previous action.

*ABS Industries, Inc. v. Fifth Third Bank*, 2009 WL 1811915 (6<sup>th</sup> Cir. 2009) – "[A] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." Claim preclusion consists of four elements: (1) prior final, valid decision on the merits by a Court of competent jurisdiction; (2) a second action involving the same parties or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action. Privity merely requires a mutuality of interest, including identity of desired result; and identification of interest of one person with another as to represent the same legal right. Principle-agency relationship is sufficient to establish privity.



*Collins & Aikman Corp. v. Valeo*, Adv. 07-5587 (Bankr. E.D. Mi. 2009) - Order confirming plan of reorganization constitutes a final judgment for res judicata purposes. Res judicata does not apply to claims asserted prior to entry of the Order Confirming Plan. Therefore, res judicata was not defense to adversary proceedings to avoid preferential transfers filed prior to entry of the Order Confirming Debtors' Plan of Reorganization.

*Huntington National Bank v. Moore*, 2009 WL 1974233 (Bankr. N.D. Ohio 2009) – State Court judgment entitled to same preclusive effect that the order would have in State Court proceeding. “Issue preclusion” prevents relitigation of issue that was actually and necessarily litigated and determined by Court of competent jurisdiction.

*Computer Business World v. Jamil*, Adv. No. 09-4419 (Bankr. E.D. Mi. 2009) - Factual findings of State Court decision that is on appeal are entitled to collateral estoppel effect, subject only to possible reversal of the decision. Bankruptcy Court must give preclusive effect to State Court Order to same extent that Order would receive in the State where the judgment was rendered. Collateral estoppel precludes the re-litigation of an issue in a subsequent, different action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was actually litigated and necessarily determined.

*Winget v. JP Morgan Chase Bank*, 537 F.3d 565 (6<sup>th</sup> Cir. 2008) – Claim is barred by res judicata if (1) a final decision on the merits has been reached by a Court of competent jurisdiction; (2) a subsequent action is brought between the same parties or their privies; (3) the issue in the subsequent action was or should have been actually litigated in the prior action; and (4) the current cause of action is identical to the cause of action in the prior case. A bankruptcy Court order authorizing sale of part of the estate constitutes a final judgment on the merits for res judicata purposes.

*RDM Holdings, Ltd. v. Continental Plastics Company*, Case No. 278912 (Mich. Ct. App. 2008) – Court must apply federal law in determining whether doctrine of res judicata requires dismissal of case where judgment on which res judicata would be based was entered by federal Court. Accordingly, where issue turns on impact of intervening bankruptcy case, federal claim preclusion law will apply in determining the preclusive effect of any actions in the bankruptcy Court.

#### §13.65 Particular Claims Barred

*Baumgart v. Laurie*, 2011 WL 3879507 (Bankr. N.D. Ohio 2011) – Property that is held by debtor as trustee is not property of the estate. Trustee’s recovery of property in adversary proceeding for fraudulent transfer precludes debtor from later arguing that property was held in trust for third person. Had property been held in trust, transfer to third party would not have been a transfer of an interest of the debtor in the property which would have precluded finding of fraudulent transfer. Judgment at least implicitly rejected argument for purposes of res judicata.

*Barracco v. JPMorgan Chase Bank, N.A.*, 2011 WL 3329755 (E.D. Mi. 2011) – Where state court has confirmed arbitration award that determined that debtor was not indebted to creditor, Full Faith and Credit Statute, 28 USC Section 1738, requires that Bankruptcy Court honor the arbitration award. State Court arbitration award entitled to same preclusive effect as would be given by State Court in which arbitration occurred. Ultimate issue in arbitration was amount, if any, of deficiency balance owed after foreclosure. Arbitrator’s decision that debtor was not further indebted to creditor was preclusive on issue and required disallowance of creditor’s claim.

*Livingston v. Transnation Title Insurance Co.*, 2010 WL 1404530 (6<sup>th</sup> Cir. 2010) – Elements of a fraud claim under Michigan law are identical to those necessary to determine non-dischargability under 11 U.S.C. § 523(a)(2)(A). In affirming the state trial court on the fraud count, the Michigan Court of Appeals repeatedly invoked the Debtors’ knowledge of their misrepresentations including the retention and expenditure of monies by defendants that should have been used to discharge the second mortgage; Debtors’ unpersuasive arguments that they were uninformed or mistaken regarding their financial obligations; Debtor-wife’s purposeful ignorance of the terms of the documents she was signing; Debtor-

wife's failure to take steps to make certain she was properly informed regarding the documents she was signing; and Debtor-wife retained the monetary benefit from her attorney-in-fact's exercise of authority and never disclaimed his actions. State court rulings and factual findings support finding of "bad faith" and "actual or positive fraud".

*Hogan v. George*, Case No. 09-5065 (Bankr. E.D. Ky. 2009) – State Court litigation established that Defendant's failure to list known defects in written Disclosure Form connection with sale of real property gave false information to the claimant in the course of a transaction in which the defendant had a financial interest or use of the claimant in a business transaction; that defendant was negligent in communicating the information; defendant gave information with the intent or knowing that the claimant would act or decide not to act in reliance on the information; claimant relied on the information supplied by the defendant; and reliance on the information supplied by the defendant caused damage to the claimant; supported final judgment under Section 523(a)(2)(A) as fraudulent representations and as actual fraud based on collateral estoppel

*McDonald v. Redstone Federal Credit Union*, Case No. 09-12652 (11<sup>th</sup> 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.

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

*MacDonald v. Gunther*, Case No. 08-8108 (6<sup>th</sup> Cir. BAP 2009) – Arbitration award confirmed by an appropriate court is entitled to same preclusive effect as would be given to a decision of that court. Res judicata and collateral estoppel prevent a party from attempting to relitigate in Federal Court matters that were or should have been advanced in the prior action. Allocation of costs and expenses of arbitration is necessarily one of the matters decided by the arbitrator. Although parties had pre-arbitration agreement concerning allocation of costs and expenses, parties failed to present that agreement to the arbitrator and the arbitrator did not award costs or expenses in the award. Creditor's claim for arbitration costs and expenses based on the pre-arbitration agreement is barred. Claim allowed for the amount awarded by the arbitration and denied as to any additional costs or expenses.

*ABS Industries, Inc. v. Fifth Third Bank*, 2009 WL 1811915 (6<sup>th</sup> Cir. 2009) – Where plaintiff previously sued lead Bank in loan syndication and that case was dismissed with prejudice, plaintiff's subsequent action against participant banks was barred by *res judicata*. Plaintiff alleged in prior lawsuit that lead bank was not agent for participant banks and was now prohibited from "about-face attempt to retract its allegations of agency".

*Baker v. Wentland*, 2009 WL 2132639 (Bankr. N.D. Ohio 2009) - Debtor who plead guilty to criminal fraud and ordered to pay criminal restitution collaterally estopped from denying liability or contesting damages in action to deny discharge under Section 523(a)(4). Full amount of criminal award deemed non-dischargeable.

*Computer Business World v. Jamil*, Adv. No. 09-4419 (Bankr. E.D. Mi. 2009) - Arbitrator's decision in action that alleged fraud in the inducement against Debtor constitute determination of all issues necessary to finding of non-dischargeability under Section 523(a)(2)(A). Fact that decision may have been on appeal does not prevent decision from being given preclusive effect until and unless reversed on appeal.

*Lewis v. McClatchey*, 2009 WL 1372945 (Bankr. S.D. Ohio 2009) - Action against Chapter 7 Trustee for allegedly fraudulent conduct in sale of property of estate barred by *res judicata* where Plaintiff's claims had already been rejected in multiple other actions.

*RDM Holdings, Ltd. v. Continental Plastics Company*, Case No. 278912 (Mich. Ct. App. 2008) –Chapter 7 trustee’s final report and final account and entry of order by bankruptcy Court closing estate constitutes final order of bankruptcy Court which can support finding of res judicata. Creditor could not assert fraudulent transfer claim against recipient of transfers from Debtor prepetition where those actions were not pursued in a bankruptcy proceeding, either by the trustee or by the creditor. Fraudulent transfer actions could have been brought in a bankruptcy Court.

*Lewis v. Countrywide Home Loans*, 2009 WL 2777005 (E.D. Mi. 2009) – Debtors confirmed Chapter 13 plan provided for the surrender of Debtor’s residence to the mortgage company. Debtor is prohibited by res judicata from post-confirmation, instituting legal proceedings against mortgage company for alleged violation of Truth in Lending Act. Res judicata bars the relitigation of any issue decided or which could have been decided at confirmation. Plaintiff could have asserted TILA claims prior to confirmation of their Chapter 13 plan. Plaintiff’s attempt to re-litigate the issue is barred.

#### §13.66 Particular Claims Not Barred

*In re McDowell*, 2010 WL 3790318 (Bankr. E.D. Tn. 2010) –Factual findings in State Court Judgment have collateral estoppel effect to the same extent as that Judgment would be afforded preclusive effect by law of state where judgment was entered. Under Georgia law, the Plaintiff may demonstrate the elements of collateral estoppel by showing that the issue was (1) raised in a prior proceeding, (2) actually litigated and decided, (3) necessary to final judgment and (4) the party to be estopped had full and fair opportunity to litigate the issue. Factual findings in State Court judgment did not conclusively demonstrate that Debtor’s actions were evidence of fraud as required for non-dischargability for embezzlement or that Debtor wrongfully obtained possession of Plaintiff’s property as required for non-dischargability for larceny. Parties entered into contractual arrangement and Debtor’s actions were the result of a dispute over contractual performance and entitlement to property or proceeds of sale of property.

*Hogan v. George*, Case No. 09-5065 (Bankr. E.D. Ky. 2009) –Action under Section 523(a)(6) requires that debt arise from willful and malicious injury. Debt must result from conduct that is both willful and malicious. Willfulness requires intent to cause injury, not merely intentional act that results in injury. State Court litigation that permitted finding based on finding of “willful *or* malicious” could not support entry of judgment based on collateral estoppel, as State Court did not find that actions were both willful and malicious.

*Walker v. Sallie Mae Servicing Corp.*, Case No. 09-6022 (8<sup>th</sup> Cir. BAP 2010) – Although Discharge Order generally is res judicata on all issues that are or could have been considered at time of entry, Discharge Order will not prevent later consideration of dischargability of student loan on basis of undue hardship. Student loans are only “self executing” exception to discharge where Debtor bears the burden of proving entitlement to a discharge. Debtor permitted to bring action for to determine dischargability of student loans for hardship more than 4 years after entry of Discharge Order.

*Sanderson Farms, Inc. v. Gasbarro*, 2008 WL 4764118 (6<sup>th</sup> Cir. 2008) - State Court action to pierce corporate veil did not conclusively establish that defendant's actions were willful and malicious. Ohio law permits piercing corporate veil where the defendant exercised control over the corporation but does not require that control be gained or exercised with malice or fraud.

*Collins & Aikman Corp. v. Valeo*, Adv. 07-5587 (Bankr. E.D. Mi. 2009) - Res judicata does not apply where a claim is expressly reserved by the litigant in the earlier bankruptcy proceeding. Therefore, res judicata not applicable to fraudulent transfer actions pending at time of confirmation of Debtor's Plan that specifically preserved “Causes of Action arising or permitted under chapter 5 of the Bankruptcy Code or applicable state law, including preferences under § 547 of the Bankruptcy Code and fraudulent transfers.” Res judicata cannot apply to claims asserted prior to entry of the Order Confirming Plan. Therefore, res judicata was not defense to adversary proceedings to avoid preferential transfers filed prior to entry of the Order Confirming Debtors' Plan of Reorganization.

*Collins & Aikman Corp. v. Valeo*, Adv. 07-5587 (Bankr. E.D. Mi. 2009) - Debtor's prior assertion in first day motion that cash management system that pooled money from various subsidiaries into one account and paid expenses for various subsidiaries out of that account would result in significant benefit to Debtor not clearly inconsistent with action to recover specific individual transfers to specific defendants out of that account.

*Huntington National Bank v. Moore*, 2009 WL 1974233 (Bankr. N.D. Ohio 2009) –Divorce judgment which was not clear as to whether Debtor had misrepresented assets to Creditor and lack of necessity to determine alleged misrepresentations to Creditor as part of divorce proceeding (although Court did need to address Debtor's alleged financial misconduct in order to divide marital assets) did not preclude litigation of that issue in action to determine dischargeability pursuant to section 523.

*RDM Holdings, Ltd. v. Continental Plastics Company*, Case No. 278912 (Mich. Ct. App. 2008) – Creditor not prohibited from bringing action to pierce the corporate veil of the Debtor's parent corporation. There is no legal basis for a subsidiary to attempt to pierce the corporate veil of its own parent. Accordingly, cause of action could not have been maintained by the Chapter 7 trustee and, therefore, survives the bankruptcy proceeding. Further, claims of "successor liability" against company which took over operations after Debtors Chapter 7 filing were not actions which could have been brought in a bankruptcy case. Those actions would constitute non-core proceedings as the actions would lie solely between creditors and the alleged successor corporation.

#### S. *Stare Decisis*

##### §13.67 Binding Effect of District Court Decisions

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

#### T. *Judicial Estoppel*

##### §13.68 Elements

*Official Committee of Unsecured Creditors v. Dwyer, Cambre & Suffern*, 2011 WL 3879501 (Bankr. N.D. Ohio 2011) – Judicial estoppel applies to prevent party from asserting inconsistent positions. Unsecured Creditors Committee is separate entity from Debtor. Committee is not responsible for statements made by Debtor in Bankruptcy Schedules and is not judicially estopped from asserting fraudulent transfer action based on alleged omissions in Schedules.

*Mark A. Goldman & Assoc. P.C. v. Kattouah*, 2011 WL 2533657 (E.D. Mi. 2011) – Isolated and contradictory statement in answer to complain filed by creditor is not a binding judicial admission to a material fact. To constitute "admission" statement must be deliberate, clear and unambiguous. Court has broad discretion to relieve party of consequences of admission in appropriate case.

*Whitten v. Fred's Incorporated*, 601 F.3d 231 (4<sup>th</sup> 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.

*Swanigan v. Northwest Airlines, Inc.*, 2010 WL 2465387 (W.D. Tn. 2010) - Judicial estoppel is an equitable doctrine that protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior

proceeding. Action is barred by judicial estoppel where: (1) the party's later position must be clearly inconsistent with its earlier position; (2) the party must have succeeded in persuading a court to accept its prior position, suggesting that either the first or the second court was misled; and (3) there must be the potential for the party to derive an unfair advantage on the opposing party if not estopped. Estoppel will not be appropriate where failure to disclose is result of mistake or inadvertence, evidenced by a lack of knowledge of the factual basis for the undisclosed claim or that debtor, aware of action, has no motive for concealment. Constant affirmative efforts to conceal action demonstrate that omission was not in good faith or inadvertent. Debtor filed petition with Title VII action pending before EEOC failed to list action on schedules. Debtor admitted that she failed to 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) – Judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding. Judicial estoppel is an equitable doctrine invoked by a court at its discretion. There are at least three questions that a court should answer in deciding whether to apply judicial estoppel: (1) Is a party's later position clearly inconsistent with its earlier position? (2) Has the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled? (3) Will the party seeking to assert an inconsistent position derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped? Judicial estoppel can bar a debtor from pursuing a cause of action in district court where that debtor deliberately fails to disclose the pending suit in a bankruptcy case if there is a meaningful connection between that proceeding and the judicial proceeding in which judicial estoppel is sought.

*G-I Holdings, Inc. v. Reliance Ins. Co.*, 586 F.3d 247 (3d Cir. 2009) – In diversity cases, whether an action is barred by judicial estoppel will be determined using federal law, not otherwise applicable state law. Under federal law, judicial estoppel generally applies where party asserts (1) irreconcilably inconsistent positions; (2) adopted in bad faith; and (3) where estoppel addresses the harm and no lesser sanction is sufficient. As a general rule, a party who asserts a position that is not accepted by a court will not be precluded from asserting an inconsistent or contrary position. There may be circumstances where judicial estoppel will apply even where a court has not adopted the prior position, where doing so is necessary to neutralize threats to judicial integrity, such as reliance on statements by a debtor in bankruptcy on which creditors relied.

*Sher v. Dunbar*, Case No. DT 09-06496 (Bankr. W.D. Mi. 2010) – Judicial estoppel is judicially created doctrine designed to protect court's integrity by preventing parties from playing fast and loose with judicial machinery. Judicial estoppel requires (1) the party's later position must be inconsistent with its earlier position; (2) the party asserting the inconsistent position must have successfully persuaded the court to accept that position so that acceptance of it later in consistent position would create the perception that the prior court was misled; and (3) the party asserting inconsistent positions would gain an unfair advantage. Debtor's counsel who previously argued that arbitration proceeding was flawed and award should not be confirmed later asserted inconsistent position by arguing that unconfirmed arbitration award should be afforded collateral estoppel effect. However, debtor's counsel's prior assertion was not the basis on which the court ruled in the prior matter – therefore, counsel was not precluded from asserting an inconsistent position. Further, debtors were not gaining an unfair advantage as creditor was seeking to confirm the arbitration award and, therefore, debtor's argument that the award should be considered binding was not inconsistent with relief that the creditor itself had requested.



*ABS Industries, Inc. v. Fifth Third Bank*, 2009 WL 1811915 (6<sup>th</sup> Cir. 2009) – Judicial estoppel prevents party from alleging and prevailing based on allegations from later making inconsistent allegations in another proceeding. Plaintiff that alleged in prior lawsuit that lead bank was not agent for participant banks was prohibited from “about-face attempt to retract its allegations of agency”.

*Lorillard Tobacco Co. v. Chester, Willcox & Saxbe, LLP*, 546 F.3d 752 (6<sup>th</sup> Cir. 2008) - Where party to action asserts a position and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Judicial estoppel is an equitable doctrine that preserves the integrity of the Courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment. Judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior Court adopted the contrary position ‘either as a preliminary matter or as part of a final disposition. A Court should also consider whether the party has gained an unfair advantage from the Court’s adoption of its earlier inconsistent statement. There is no set formula for assessing when judicial estoppel should apply but at a minimum, a party’s later position must be ‘clearly inconsistent’ with its earlier position. Judicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the Court because the doctrine precludes a contradictory position without examining the truth of either statement.

*Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Judicial estoppel does not prevent Trustee from asserting positions in current adversary proceeding that are inconsistent with allegations in prior adversary proceeding where Court rejected allegations in prior action. Judicial estoppel requires that the party against whom judicial estoppel is asserted must have successfully persuaded the Court to accept contradictory position.

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

#### §13.69 Particular Claims Barred

*Young v. Independent Bank*, slip op. No. 299192 (Mich. Ct. App. September 20, 2011) -the Michigan Court of Appeals affirmed dismissal of a lawsuit the plaintiff failed to schedule in her Chapter 7 bankruptcy case. Court of Appeals applied bankruptcy law and Sixth Circuit precedent that an unscheduled cause of action is not abandoned to the debtor and remains an asset of the bankruptcy estate. Thus the debtor did not have standing to pursue the lawsuit.

*Hamlin v. Baptist Memorial Hospital*, 2011 WL 901208 (W.D. Tn. 2011) – Plaintiff’s failure to disclose claim for discrimination in schedules or statement of financial affairs, although Debtor was simultaneously pursuing those actions in District Court, precluded by judicial estoppel. Debtor’s failure to list suit constituted assumption of inconsistent position on which the bankruptcy court relied. Failure to disclose was not inadvertent or result of mistake, as debtor had knowledge of claims when bankruptcy schedules

were filed and debtor had motive to conceal and debtor evidenced bad faith by failing to amend bankruptcy schedules to disclose the claims after the issue became known.

*Player v. Kansas City Southern Railway Co.*, 2011 WL 1790494 (W.D. La. 2011) – Debtor failed to list pending action for racial discrimination in schedules and at the 341 meeting denied being involved in any lawsuits where debtor was suing anyone. Debtor convinced the court and the trustee that debtor had no potential or pending claims, obtaining relief based on misrepresentations to the court. Debtor could not prove that omissions were inadvertent. It is not necessary that the omission be done with “deceitful motive”. Inadvertence applies only when debtor lacks knowledge of the claim or lacks motive to conceal it. Debtor admittedly knew of pending lawsuit when bankruptcy filed and had motive to conceal lawsuit in effort to protect proceeds from creditors.

*Pikeville Energy Group, LLC v. Spradlin*, Case No. 09-8074 (6th Cir. BAP 2010) - Post-petition lender who failed to obtain court permission before providing financing and then repeatedly stated to the court that lender would not seek administrative expense claim estopped from administrative claim. Subsequent conversion of case to Chapter 7 does not alter conclusion that creditor's repeated statements during Chapter 11 proceeding estopped administrative claim.

*Dorbeck v. Sykora*, 2010 WL 3245327 (Bankr. E.D. Mi. 2010) – Debtor barred from pursuing action against former employer for wrongful termination. Debtor’s schedules failed to disclose that debtor: (a) is a shareholder of Galleon International Corporation (“Galleon”) owning 178,000 shares of Galleon stock (44.5% of the total outstanding) having a book value as determined by debtor of \$7 million; (b) was the president and a member of the board of directors of Galleon from November 2005 through June 17, 2009; (c) is one of the inventors and co-owners of the patents related to Galleon's business; and (d) is entitled to salary and dividends from Galleon for his work on its behalf since Galleon's formation in November 2005. Debtor’s Schedules also failed to disclose that Debtor is, and has been since 2002, a principal of Pivotal Technologies. Debtor knowingly misrepresented several critical matters when filing his Chapter 13 petition, and now seeks to recover what could be a substantial amount of money for the assets the Debtor denied having when he filed the bankruptcy petition

*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.

*Kaufman v. Robinson Property Group, Ltd.*, Case No. 09-60758 (5th Cir. 2010) – Debtor who failed to disclose known personal injury claim in bankruptcy schedules creates “clear inconsistency” by stating that she “had no claims”, prohibited from pursuing action after completion of bankruptcy. Inconsistent positions result in judicial estoppel against later pursuit of personal injury action.

*ABS Industries, Inc. v. Fifth Third Bank*. 2009 WL 1811915 (6<sup>th</sup> Cir. 2009) – Judicial estoppel prevents party from alleging and prevailing based on allegations from later making inconsistent allegations in

another proceeding. Plaintiff that alleged in prior lawsuit that lead bank was not agent for participant banks was prohibited from “about-face attempt to retract its allegations of agency”.

*In re Blose*, 2009 WL 2982932 (Bankr. W.D. Ky. 2009) – A cause of action is an asset that must be scheduled pursuant to Section 521. Debtor’s failure to list a cause of action amounts to an affirmative statement that no such action exists. Debtor will be judicially estopped from pursuing an undisclosed cause of action after obtaining a discharge on the basis that no such action exists. Pursuing an undisclosed cause of action creates an inconsistency sufficient to support judicial estoppel. By granting a discharge and closing this “no asset” case, this Court adopted Debtor’s statement that she had no potential causes of action. Judicial estoppel does not apply where the prior inconsistent position occurred because of “mistake or inadvertence.” Failure to disclose a cause of action may be deemed inadvertent where (1) the debtor lacks knowledge of the factual basis of the undisclosed claim, or (2) the debtor has no motive for concealment of the claim. Debtor testified in State Court deposition that Debtor knew of her potential claims at the time of she filed for relief under Chapter 7 and admitted that although she had spoken with an attorney prior to the filing of the bankruptcy case, she never scheduled the claim nor amended the schedules to do so post-petition. Debtor clearly had motive to conceal claim, as any post-discharge recovery would come to her rather than to the estate. Debtor’s ongoing concealment also evidenced bad faith. Debtor did not disclose these claims to the Trustee or this court until after the Defendant moved for summary judgment in state court. Debtor waited over *seven years* before notifying the Trustee and the court as to her claims. Debtor did not orally notify the Trustee at the meeting of creditors or correspond with the Trustee with how to proceed with her claims. Only after Debtor realized that her state law claims were in peril did she move to reopen the case to list the lawsuit as an asset. Debtor immediately claimed the lawsuit exempt. Debtor’s actions were “too little, too late”. Debtor is judicially estopped from pursuing undisclosed causes of action.

*Whitten v. Fred's, Incorporated*, 601 F.3d 231 (4th Cir. 2010) - Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation. Debtor who suffered injuries and incurred medical expenses cannot recover those expenses from tortfeasor to the extent those expenses are discharged in subsequent bankruptcy proceeding. Debtor can recover medical expenses that are not discharged, such as future medical expenses after the bankruptcy case was closed, and she is free to argue that Fred's is liable for those post-bankruptcy medical expenses.

#### §13.70 Particular Claims Not Barred

*Reed v. City of Arlington*, 650 F.3d 571 (5<sup>th</sup> Cir. 2011) – Chapter 7 Trustee is not precluded by judicial estoppel from pursuing recovery of litigation that was not disclosed by debtor. Although grounds existed to find that debtor was judicially estopped, Trustee will not be estopped absent evidence of unusual circumstances demonstrating some element of fault of Trustee.

*Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – Borrower’s action contesting validity of foreclosure sale not barred by judicial estoppel. At time debtor filed first bankruptcy case, debtor did not know of grounds to file complaint against mortgage company and many of the facts underlying the action did not occur until after first bankruptcy case had been dismissed. Debtors did disclose potential cause of action in schedules in second case in “other liquidated debts owed to debtor”. Action may have been better disclosed under “suits and administrative proceedings” but disclosure was sufficient to place court and parties in interest on notice.

*Whitten v. Fred's, Incorporated*, 601 F.3d 231 (4th Cir. 2010) - Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation. Debtor not barred from asserting claim post-discharge where debtor listed potential claim and Trustee chose to abandon the claim. Debtor’s decision to institute litigation after abandonment of the asset without “supplementing” bankruptcy schedules to indicate suit had been filed did not constitute concealment as debtor had no duty to supplement the schedules at that point. Debtor’s actual disclosure of the claims precludes a finding that she acted in bad faith.

*Followell v. Mills*, 2009 WL 723132 (6th Cir. 2009) - Judgment obtained by fraud may be set aside by the Court where enforcement of the judgment would be manifestly unconscionable. The party attacking a judgment based on fraud on Court must prove by clear and convincing evidence (1) conduct, (2) on the part of an officer of the Court, (3) directed to the “judicial machinery” itself, (4) that was intentionally false or undertaken with either willful blindness to, or reckless disregard for, the truth; (5) that was either in the nature of a positive averment or a concealment under circumstances that gave rise to duty to disclose; and (6) that deceived the Court. Conduct must have actually subverted the judicial process” by preventing the judicial machinery from performing in the usual manner to impartially adjudicate the case presented. Chapter 11 representative's action to recover money paid to creditor where creditor's claim was based on an allegedly fraudulently obtained judgment failed to prove either that the creditor made any representations leading to entry of the judgment that the creditor knew were false or with reckless disregard for truth; and failed to prove how the Court rendering the judgment was misled or deceived

*In re Two Springs Membership Club*, 408 B.R. 475 (Bankr. N.D. Ohio 2009). Judicial estoppel only barred party from presenting argument on issue; it did not preclude resolution of the issue in its favor.

#### U. Equitable Estoppel

##### §13.71 Elements – Governmental Action

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

##### §13.72 Elements – Fraudulent Transfer

*Shapiro v. Jamil*, Case No. 08-70828 (Bankr. E.D. Mi. 2010) – Equitable estoppel requires (1) conduct or language amounting to a representation of material fact; awareness of the true facts by the party to be estopped; intention by party to be stopped that party asserting estoppel has a right to believe that the former's conduct is intended; unawareness of the true facts by the party asserting estoppel; and detrimental and justifiable reliance. Party must, by representation, admission or silence intentionally or negligently induce another party to believe certain facts, the other party justifiably relies and acts on this belief, and the other party will be prejudiced if the party to be estopped is permitted to deny the existence of the facts as represented. Debtor's conduct in listing assets in personal tax returns that Debtor later asserted he did not own would not form basis of equitable estoppel where there was no evidence that the debtors intended the Trustee to rely on the information in the tax returns or that the Trustee was aware of or actually relied on those statements. Statements made in Debtor's tax returns for the years 2003 through 2006 would not form basis for estoppel by Trustee where Debtor did not commence bankruptcy proceeding until 2009.

#### V. Law of the Case

##### §13.73 Elements

*Williams v. Franklin Towers Homeowners Association, Inc.*, 2010 WL 2780974 (9th Cir. 2010) - Under the law of the case doctrine, one panel of an appellate court will not reconsider questions that another panel has decided on a prior appeal in the same case.

*In re Lundeen*, Case No. 0951277 (Bankr. S.D. Ohio 2010) – “law of the case” applies only in the case in which the court made the decision on which law of the case is based. Party cannot rely on decision made in separate case, brought by separate plaintiffs, even if the other case involved identical issues against same defendant. Further, law of the case does not apply where the decision relied on recognized unresolved factual issues that could alter the decision.

*Kendrick v. CIT Small Business Lending Corp.*, 2009 WL 2835754 (Bankr. E.D. Ky. 2009) - When a court decides upon a rule of law, that decision governs the same issues in subsequent stages in the same case. The

doctrine precludes a court from reconsideration of issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition. When an appellate court issues a decision and remands the case to the lower court for further proceedings, the trial court is bound to proceed in accordance with the mandate and law of the case as established by the appellate court. The trial court is required to implement both the letter and the spirit of the appellate court's mandate, taking into consideration the appellate court's opinion and the circumstances it embraces. Law of the case may be disregarded only where one of three exceptional circumstances exists: (1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice.

#### §13.74 Particular Claims Barred

*Williams v. Franklin Towers Homeowners Association, Inc.*, Case No. 08-55109 (9th Cir. 2010) - Debtor's appeal of Bankruptcy Court remand order barred by law of the case where Debtor has previously appealed that order and the appellate court affirmed.

*Kendrick v. CIT Small Business Lending Corp.*, 2009 WL 2835754 (Bankr. E.D. Ky. 2009) – Bankruptcy Court bound by decision of Appellate Court that the notary statement contained in Defendant's mortgage did not comply with the requirements of KRS 423.130 and the mortgage was, therefore, unrecordable as a matter of law and so was avoidable as a preference. On remand, Creditor argued that the mortgage was also recorded as a “fixture filing” that should be considered a perfected security interest in the fixtures attached to the real estate. Bankruptcy Court concluded that prior holding of Appellate Court that mortgage was invalid rendered Mortgage invalid for all purposes. Creditor would not be permitted to circumvent Appellate Court's holding by attempting to re-characterize the invalid mortgage as a “fixture filing”.

#### §13.75 Particular Claims Not Barred

#### W. Evidentiary Issues

#### §13.76 Generally

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

#### §13.77 Fifth Amendment Privilege

*General Motors Corp. v. Heraud*, Adv. No. 07-5813 (Bankr. E.D. Mi. 2009) - Party to adversary proceeding can invoke Fifth Amendment privilege. Trier of fact can draw adverse implications from the invocation of privilege, and party invoking privilege cannot introduce any other evidence on the issue involved. Court is not required to abate adversary proceeding to await outcome of criminal proceeding.

#### §13.78 Attorney-Client Privilege

*In re Rapoport*, Case No. 11-45373 (Bankr. E.D. Mi. 2011) – Court would not prohibit or restrict Rule 2004 Examination based on possible attorney-client privilege issues. Privilege issues are more properly dealt with in the context of the examination and the specific questions posed. Attorney-client privilege does not attach to (1) the existence of the attorney client relationship or the identity of the client unless the identity of the client would somehow divulge the nature of the advice sought; (2) the purpose for which the



attorney was retained and the terms of the engagement including the fee arrangement; (3) the factual circumstances surrounding the alleged privilege including, the date the communication took place, the identities of the participants, and the names of persons who received allegedly privileged documents; and (4) billing statements and hourly records except to the extent those contain privileged information. Further, privilege may be asserted or waived only by the client or the attorney acting on behalf of the client.

*State Farm Mutual Automobile Insurance Company v. Hawkins*, 2011 WL 595810 (E.D. Mi. 2011) – crime-fraud exception to the attorney-client privilege is predicated on the recognition that where the attorney-client relationship advances the criminal enterprise or fraud, the reasons for the privilege fail. Crime-fraud exception applies where the party shows that there is a reasonable basis to (1) suspect the perpetration or attempted perpetration of a crime of fraud and (2) that the communications were in furtherance thereof. The crime-fraud exception applies only where the advice from an attorney refers to future, not past, wrongdoing and requires proof that client’s communication was seeking advice in furtherance of crime or fraud. Attorney’s unilateral actions in furthering crime or fraud does not trigger exception to privilege.

*GATX Corp. v. Appalachian Fuels, LLC*, 2010 WL 5067688 (E.D. Ky. 2010) - The attorney-client privilege attaches to confidential communications between an attorney and client that are made for the purpose of facilitating the rendition of professional legal services to the client. Documents that are primarily business related are not privileged. When communications contain both legal advice and non-legal considerations, a court must consider whether the predominant purpose of the communication is to render or solicit legal advice. The burden of establishing the existence of a privilege rests with the party asserting the privilege. The burden of showing that a privilege has not been waived also falls on the party claiming the privilege. A privilege is waived by a voluntary disclosure in a Federal proceeding, and extends to undisclosed materials if (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness be considered together. Inadvertent disclosure does not operate as a waiver if: (1) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (2) the holder promptly took reasonable steps to rectify the error. Party failed to identify any particular document that was allegedly “inadvertently” disclosed, leaving Court to assume the disclosure of these documents was not inadvertent. Only 25 pages out of over 200 that actually contained some form of privileged communication which does not necessarily support a finding of an intentional waiver of the attorney-client privilege and party producing documents timely sought the return of the documents it considers privileged once disclosure became known.

#### §13.79 Work Product Privilege

#### §13.80 Expert Witnesses

*Nelson v. Walnut Investment Partners, L.P.*, 2011 WL 2711318 (S.D. Ohio 2011) – Expert testimony is admissible under Rule 702 if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. A witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. The trial judge must act as a gatekeeper, admitting only that expert testimony that is relevant and reliable. Trial court must initially determine whether the reasoning or methodology used is scientifically valid and is properly applied to the facts at issue in the trial, considering: 1) whether the scientific knowledge can or has been tested; 2) whether the given theory or technique has been published or been the subject of peer review; 3) whether a known rate of error exists; and 4) whether the theory enjoys general acceptance in the particular field. Admissibility does not depend on the correctness of the expert's conclusions but the soundness of his methodology. Opinion of business valuation expert was admissible where expert was provided with extensive written materials. Although expert did not speak with the owner or visit the physical location of the property, these matters went to the credibility, rather than the admissibility, of the report.

*Hall v. Huntington National Bank*, 2011 WL 1135955 (N.D. Ohio 2011) – Bankruptcy Court properly permitted expert to testify although party proffering expert failed to fully comply with Federal Rule 26(a)(2) regarding pre-trial disclosures. Party provided notice that expert witness would be called and provided a preliminary judicial report, in compliance with an order of the Bankruptcy Court, that it would use as an exhibit at the evidentiary hearing and provided opponent with full opportunity to *voir dire* the witness regarding qualifications before permitting expert to testify. Any omissions, such as the failure to provide information on his prior opinion testimony, were not prejudicial, since they would not have been beneficial to opposing counsel or helpful to the court. Potential financial interest of expert in outcome of case goes to weight of evidence and credibility of witness and not admissibility *vel non*.

*In re Gainey Corporation*, Case No. GG 08-09092 (Bankr. W.D. Mi. 2008) - Bankruptcy Court can, on its own initiative, appoint an expert witness pursuant to Federal Rule of Evidence 706(a). Retained expert would not be appointed as a professional for either the Debtor or any specific creditor, although expert could be appointed as expert for Creditors Committee on request of that Committee where possible future retention could benefit the estate and assist in administration and eliminate delay and expense. Expert witness fees would be paid pursuant to Federal Rule of Evidence 706 and would be borne by Debtor and can use cash collateral for that purpose.

#### §13.81 Trade Secrets

*In re Waring*, 406 BR 763 (Bankr. N.D. Ohio 2009) - Court is required to protect trade secrets, confidential research and development, or commercial information, although Court has discretion to determine what type of protection is required. "Trade Secret" is process or device for continuous use in the operation of the business such as procedures related to the sale of goods or to other operations in the business. Factors include: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by employees and others involved in the business; (3) the measures taken to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of money or effort which was expended to develop the information; and (6) the ease or difficulty by which the information could be acquired or duplicated by others. "Commercial Information" is information that is so critical to an entity's operations that disclosing the information will unfairly benefit that entity's competitors.

#### §13.82 Hearsay – Government Reports

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

#### §13.3 Subsequent Remedial Measures

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

manufacture. Rule 407 prohibits evidence of subsequent remedial measures, not evidence of a party's analysis of its own product.

#### §13.84 Parol Evidence Rule

*Gordon v. Wehrle*, 2010 SL 3835223 (N.D. Ohio 2010) – Bankruptcy Court properly excluded oral testimony that would directly contradict terms of written agreement. Parties stipulated that underlying agreement was unambiguous, rendering parol evidence of meaning of agreement inadmissible.

*Lund v. Jevne*, Case No. 08-56655 (9<sup>th</sup> Cir. 2009) – Bankruptcy Court properly excluded oral testimony that would directly contradict terms of written agreement. Prior to bankruptcy, debtor signed promissory note promising to repay debt with interest. Debtor precluded from later introducing evidence that payee orally promised that he would not sue on the outstanding debt and would only use the 2001 agreement for purposes of obtaining a tax deduction. The parol evidence rule bars introduction of prior or contemporaneous oral representations that contradict integrated terms of a written agreement. Where fraud claim is based on alleged false promises that are excluded by parol evidence rule, evidence of the contrary terms is irrelevant as a matter of law. Fraud action cannot be based on alleged fraudulent promise not to sue that is inconsistent with written terms of agreement itself.

#### §13.85 Judicial Notice

*Buchanan v. Pilgrim's Pride Corp.*, 2011 WL 3047333 (E.D. Tn. 2011) - Court may take judicial notice of proceedings in other courts, including the related bankruptcy matter.

### X. Discovery

#### §13.86 Generally

*In re Merena*, Case No. 08-1342 (9<sup>th</sup> Cir. BAP 2009) – Defendant who failed to take discovery for over six months while adversary proceeding was pending would not be granted continuance or delay of trial to prepare. Party never sought to compel discovery and adversary proceeding had waited until either the trial before requesting continuance. Party was aware from entry of scheduling order a trial would occur approximately 4 months later. Party's failure to diligently pursue discovery does not constitute grounds to request an adjournment of the scheduled trial.

#### §13.87 Motion for Leave to Take Discovery

*In re Innatech, LLC.*, Case No. 10-49380 (Bankr. E.D. Mi. 2010) – Plaintiff's Ex Parte Emergency Motion for Leave to Take Discovery denied where Motion failed to state anything specific about what subject matter party sought discovery on, preventing Court from properly assessing party's need for discovery.

#### §13.88 Request for Admissions

*GATX Corp. v. Appalachian Fuels, LLC*, 2010 WL 5067688 (E.D. Ky. 2010) – Party to whom Request for Admissions is directed can assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny. Answers to Request for Admissions that stated that the party made a reasonable inquiry regarding the subject matter of the request for admission, and the information that the party has, or can readily obtain, was insufficient for it to answer the request conforms with Rule 36.

#### §13.89 Interrogatories

*GATX Corp. v. Appalachian Fuels, LLC*, 2010 WL 5067688 (E.D. Ky. 2010) – Federal Rule of Civil Procedure 33 states that an interrogatory may relate to any matter that is relevant and nonprivileged. The party upon whom interrogatories are served must answer each interrogatory separately and fully. Party did

not properly respond to interrogatory that stated “If you stated that you lack sufficient information to either admit or deny any Request for Admission served upon you ... then for each Request to which you gave such a response please describe in detail your method and scope of inquiry into its subject matter and describe in detail all information that is known or readily obtainable by you” by responding that the party “made a thorough search of its files and records. Plaintiff also made inquiries of former and current employees of both GATX and GE Capital Corporation. Plaintiff has propounded discovery requests upon Larry Addington in an attempt to gain information regarding the subject matter of this request. At the time Plaintiff answered this request, Addington had been uncooperative and almost completely unresponsive to Plaintiff's discovery. All information that was known or readily obtainable by Plaintiff at the time of its answer to these requests was provided to Defendant in Plaintiff's response to discovery. Discovery is not complete on the subject matters of these requests.” Responding party must provide details of party's attempt to comply with Rule 36 and identify any documents it has disclosed during discovery that may be responsive to the interrogatory.

### §13.90 Motion to Compel

*Silagy v. Pachan*, 2010 WL 4286218 (Bankr. N.D. Ohio 2010) - Before considering a motion to compel, the court requires sincere effort to resolve the dispute without court intervention. Plaintiff made satisfactory efforts where Plaintiff sent repeated communications to Defendant but Defendant refused to communicate. Order compelling discovery warranted where Defendant responded to the requests only after Plaintiff filed a motion to compel, Defendant offered no explanation for her failure to timely respond to the discovery, nor is an explanation given for her failure to communicate with Plaintiff. It appears the motion to compel was the catalyst for the discovery responses. Defendant failed to timely respond to the discovery requests without substantial justification. Defendant instructed to provide appropriate verification of discovery responses. Defendant's failure to timely respond to Plaintiff's request for admissions results in requested items being deemed admitted.

*Rhiel v. Hook*, 2009 WL 2182594 (Bankr. S.D. Ohio 2009) – Party not entitled to compel discovery where party has failed to make good faith effort to resolve dispute before seeking intervention of Court. Motion to Compel must certify that party has in good faith conferred or attempted to confer with opposing party and must state who, where, how and when the parties attempted to resolve the dispute. Certification that made only general allegations without specifics did not constitute certification of “good faith effort”. Letter that “demanded” compliance not good faith effort to resolve dispute but was threat to seek judicial involvement if opposing party did not accede to movant's demands.

*First Mutual Bank v. Burkett*, Adv. No. 09-4130 (Bankr. E.D. Mi. 2009) - Motion to Compel Response to Discovery denied where discovery not served until after deadline set forth in Court's Adversary Proceeding Scheduling Order. Defendant failed to demonstrate good cause as required to amend or modify Scheduling Order.

*In re Johnson*, 408 B.R. 115 (Bankr. S.D. Ohio 2009) - Movant did not satisfy “conferment” or “good faith” requirements for motion to compel discovery from plaintiff Chapter 7 trustee.

### §13.91 Sanctions

*Sequatchie Mountain Creditors v. Detweiler*, 2011 WL 2650591 (Bankr. N.D. Ohio 2011) – Court would not dismiss case for failure of plaintiff to comply with discovery rules. Although Plaintiff was more than one year late in responding, Defendant did acknowledge that Plaintiff ultimately had complied. Court would impose sanctions in the form of attorney fees and expenses incurred by Defendant in effort to obtain discovery and filing Motion to Compel.

*Rhiel v. Hook*, 2009 WL 2182608 (Bankr. S.D. Ohio 2009) – Sanctions imposed against party who failed to appear for deposition. Failure to attend is not excused unless party has filed Motion for Protective Order within reasonable time. Motion for Protective Order filed 2 hours prior to scheduled commencement of deposition did not excuse party's obligation to appear or prevent award of sanctions where party had notice

of deposition for more than one month yet failed to timely raise any objection to the deposition. Party would be required to pay Trustee's costs and expenses directly attributable to party's failure to appear.

*In re Johnson*, 408 B.R. 127 (Bankr. S.D. Ohio 2009). Defendant's last minute filing of motion for protective order did not excuse failure to attend deposition to be held by Chapter 7 trustee that had been noticed and scheduled.

Y. Pre-trial Disclosures

§13.92 Generally

§13.93 Failure to Make

Z. Summary Judgment

§13.94 Timing of Motion

*McTevia & Assoc. LLC v. United States Debt Recovery III, L.P.*, 446 BR 808 (\*E.D. Mi. 2011) – Where one party moved for summary judgment, Court could not enter summary judgment in favor of opposing party absent a timely filed cross-motion. Party against whom summary judgment is to be entered is entitled to notice and opportunity to come forward with evidence in response to motion.

*Swanigam v. Northwest Airlines, Inc.*, 2010 WL 2465387 (W.D. Tn. 2010) - Motion styled as Motion to Dismiss under Rule 12 may be treated as Motion for Summary Judgment at discretion of Court.

*Ferguson Enterprises, Inc., v. Hardy*, Case No. 10-80085 (Bankr. W.D. Mi. 2010) – Federal Rule 56 no longer requires Plaintiff to wait before filing Motion for Summary Judgment. However, Court retains considerable control over the timing of Motions and can deny a Motion where the opposing party has not been afforded a meaningful opportunity for discovery and entry of a judgment at that early stage may be hasty and ill-considered. Motion filed less than three weeks after filing of adversary complaint was premature and would be denied without prejudice to re-filing at a later date.

*Sher v. Dunbar*, Case No. DT 09-06496 (Bankr. W.D. Mi. 2010) – Motion to Dismiss adversary proceeding which reached beyond the four corners of complaint and relied on motion papers and transcripts of proceedings on a prior motion would be treated as a Motion for Summary Judgment under Federal Rule 56.

*Fox Brothers Company v. Slanec*, Adv. No. 08-4378 (Bankr. E.D. Mi. 2008) – Motion for Summary Judgment filed after deadline for filing dispositive motions in the Adversary Proceeding Scheduling Order denied as untimely.

*Allard v. Flanigan*, Adv. No. 08-4348 (Bankr. E.D. Mi. 2008) - Motion for Summary Judgment erroneously filed in main case (instead of adversary proceeding) on last day for filing dispositive motions would be treated as timely filed. Motion to Strike Motion for Summary Judgment as Untimely denied.

*SCS General Contractors, Inc. v. Wells Fargo Bank*, Case Nos. 08-8096 and 08-8097 (6<sup>th</sup> Cir. BAP 2009) – Court should not consider or grant summary judgment where the non-moving party has not been afforded a sufficient opportunity for discovery. Court must inquire as to (1) when the appellant learned of the issue that is the subject of the desired discovery; (2) whether the discovery would have changed the ruling below; (3) how long the discovery period lasted; (4) whether the appellant was dilatory in its discovery efforts; and (5) whether the appellee was responsive to discovery requests. The Bankruptcy Court did not abuse its discretion in denying Creditor's request for additional time to respond to the Motion where Creditor did not propound any discovery until nine months after the adversary proceeding was initiated and Creditor failed to demonstrate how the information it sought was material to the motion for summary judgment or how it would change the outcome of the ruling below.



## §13.95 Burden of Proof

*POH Assisted Living, LLC v. Sunrise Assisted Living Management, Inc.*, Case No. 10-6097 (Bankr. E.D. Mi. 2010) – Party seeking summary judgment must prove that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Summary Judgment denied where each party filed affidavits that were conflicting as to material issues, leaving court unable to conclude that party was entitled to judgment.

*Rogan v. Citimortgage, Inc.*, 2010 WL 2926050 (Bankr. E.D. Ky. 2010) - Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Only disputes over facts which might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment.

*Swanigam v. Northwest Airlines, Inc.*, 2010 WL 2465387 (W.D. Tn. 2010) - Motion styled as Motion to Dismiss under Rule 12 may be treated as Motion for Summary Judgment at discretion of Court. Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Hearsay evidence may not be considered on a motion for summary judgment, but evidence need not be in a form that would be admissible at trial. The evidence and justifiable inferences based on facts must be viewed in a light most favorable to the nonmoving party. Summary judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Once a properly supported motion for summary judgment has been made, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must be by affidavits or as otherwise provided in this rule-set out specific facts showing a genuine issue for trial. A genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. To avoid summary judgment, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts.

*Russell v. U.S.*, 2010 WL 2545182 (Bankr. N.D. Ohio 2010) - Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. All inferences must be viewed in the light most favorable to the party opposing the motion. Party moving for summary judgment always bears initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any which it believes demonstrate the absence of a genuine issue of material fact. Where the moving party has met its initial burden, the adverse party may not rest upon the mere allegations or denials of his pleading but must set forth specific facts showing that there is a genuine issue for trial. A genuine issue for trial exists if the evidence is such that a reasonable fact finder could find in favor of the nonmoving party.

*Himmelspach v. Hunter*, Case No. 09-2053 (Bankr. E.D. Mi. 2010) – Summary Judgment is proper where pleadings, discovery and disclosure materials and affidavits show there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. Court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Summary Judgment is appropriate where party fails to establish an essential element of that party's case and on which that party bears the burden of proof at trial. Moving party must inform the court of the basis of the motion and identify those portions of the record that establish the absence of a material fact. Once movant does that, non-moving party must come forward with specific facts showing a genuine issue of material fact. While all inferences will be drawn in favor of non-moving party, non-moving party must present sufficient evidence to support a jury finding in his favor; a mere scintilla of evidence is not sufficient.

*All Points Capital Corp. v. City of Cheyboygan*, Case No. 09-2007 (Bankr. E.D. Mi. 2010) – Summary Judgment is proper where pleadings, discovery and disclosure materials and affidavits show there is no

genuine issue of material fact and that movant is entitled to judgment as a matter of law. The moving party bears the burden to demonstrate the absence of a genuine issue of material fact as to an essential element of non-moving party's case which may be met by pointing out that non-moving party, having had sufficient time for discovery, has no evidence to support an essential element of the case. Once movant's burden is met, burden shifts to non-moving party to set forth specific facts showing a genuine triable issue. Non-moving party must present affirmative evidence to defeat a properly supported motion and cannot merely hope that the trier of fact will disbelieve the movant's denial of a material fact. Trial Court does not have the duty to search the entire record to determine whether material fact exists or not. Cases involving state of mind are not necessarily inappropriate for summary judgment.

*State of Michigan v. Turner*, Case no. 09-5413 (Bankr. E.D. Mi. 2010) – Party seeking summary judgment where pleadings, discovery and disclosure materials and affidavits show there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. The moving party bears the burden of proof, and the Court must construe evidence and draw all reasonable inferences in favor of non-moving party. Once movant's burden is met, burden shifts to non-moving party to set forth specific facts showing a genuine triable issue. A “genuine” issue is one where a reasonable jury could return a verdict for the non-moving party.

*Hagan v. Goldstein*, 2010 WL 2755742 (Bankr. W.D. Mi. 2010) – Defendant who was alleged hospitalized when the Motion for Summary Judgment was filed and claimed that hospitalization left her unable to respond to the Motion for Summary Judgment has burden to file affidavit or submit other proof to explain why Defendant is unable to respond. Defendant cannot simply ignore the Motion, let Judgment be entered, and then seek reconsideration based on hospitalization that was known, but not brought to the Court's attention, prior to entry of the judgment.

*Double v. Cole*, Case 08-3371 (Bankr. N.D. Ohio 2009) – A party will prevail on a motion for summary judgment when the pleadings, depositions, answers to interrogatories, and admission on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The moving party must demonstrate all the elements of the cause of action and the Court is directed to view all the facts in a light most favorable to the party opposing the motion. Determinations concerning a debtor's culpable state of mind are usually not appropriate on motions for summary judgment as it deprives the trier-of-fact of the opportunity to assess the debtor's credibility. Summary judgment may be appropriate where purely legal issues are involved.

*Unencumbered Asset Trust v. Hampton-Stein (In re National Century Financial Enterprises, Inc.)*, 426 B.R. 282 (Bankr. S.D. Ohio 2009) - Summary judgment is appropriate where pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Court views the evidence, all facts, and any inferences drawn therefrom, in the light most favorable to the nonmoving party. Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. Entry of summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Court may also enter interlocutory summary judgment on liability alone, even if there is a genuine issue on the amount of damages. Party opposing Summary Judgment may not rely merely on allegations or denials in pleading but must set out specific facts showing a genuine issue for trial. If party opposing Motion alleges specific reasons why it cannot present facts essential to justify its opposition, the court may (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order. The party must show that postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.

*Ferguson Enterprises, Inc., v. Hardy*, Case No. 10-80085 (Bankr. W.D. Mi. 2010) – Federal Rule 56 no longer requires Plaintiff to wait before filing Motion for Summary Judgment. Normally, when a moving party, through affidavits or other admissible evidence, establishes a lack of genuine issue of material fact, the non-moving party must present competent evidence to establish the existence of an issue. However, where the Motion is filed at the earliest stage of litigation and the opposing party has not been afforded a

meaningful opportunity for discovery the Court can deny the Motion if the non-moving party can demonstrate some reason to believe that discovery would establish the existence of material facts in dispute. Motion filed less than three weeks after filing of adversary complaint was premature and would be denied without prejudice to re-filing at a later date.

*Nehasil v. Grenier*, Case No. 09-14011 (E.D. Mi. 2010) – Summary judgment is proper where pleadings, discovery and disclosure materials and affidavits show there is no genuine issue of material fact and that movant is entitled to judgment as a matter of law. Court must construe evidence and draw all reasonable inferences in favor of non-moving party.

*Murawski v. Campbell*, Case No. 08-3178 (Bankr. E.D. Mi. 2010) - The central inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. Moving party must inform the Court of the basis of its motion and identify those portions of the record that establish the absence of a material issue of fact. Once the movant fulfills this responsibility, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. This requires the non-moving party to do more than simply show that there is some metaphysical doubt as to the material facts. A dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the non-moving party. To demonstrate a genuine issue, the non-moving party must present sufficient evidence upon which a jury could reasonably find for the nonmovant; a scintilla of evidence is insufficient. A material fact is one that would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties, and would necessarily affect the application of an appropriate principle of law to the rights and obligations of the parties. The court must believe the non-movant's evidence and draw "all justifiable inferences" in her favor.

*Dalvit v. United Airlines, Inc.*, Case No. 08-1283 (10<sup>th</sup> Cir. 2009) – Summary judgment is appropriate if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Court must examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' Affidavits submitted in support of Motion for Summary Judgment must be limited to information what would be admissible at trial. Affidavits that are replete with inadmissible hearsay and speculation, were cumulative and contained conclusory, unsubstantiated statements would be stricken. If portions of an affidavit are otherwise admissible, Court will disregard inadmissible portions and consider balance of affidavit.

*Tomlin v. Cronover*, 2009 WL 2843370 (Bankr. E.D. Tn. 2009) – The motion for summary judgment requires the court to view the evidence in the light most favorable to the debtor. The court can grant summary judgment only if it determines that there is no genuine issue as to any material fact, and based on the undisputed facts, the law entitles the plaintiffs to judgment in their favor. The movants have the burden of proving there is no genuine issue of material fact to be decided by a trial.

*Clark v. Walt Disney Co.*, 664 F. Supp. 2d 861 (S.D. Ohio 2009) – Summary judgment should be cautiously invoked, and only where the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. It must be quite clear what the truth is and that no genuine issue remains for trial. Summary Judgment is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. The court's duty is to determine only whether sufficient evidence has been presented to make the issue of fact a proper question for the jury. Moving party bears the initial burden of showing that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law. All the evidence and facts, as well as inferences to be drawn from the underlying facts, must be considered in the light most favorable to the party opposing the motion. Any "unexplained gaps" in materials submitted by

the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. A "material" fact is one that "would establish or refute one of essential elements of a cause of action or defense asserted by the parties, and would necessarily affect the application of the appropriate principle of law to the rights and obligations of the parties. An issue of material fact is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Once the moving party meets its burden, and adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. The nonmoving party must demonstrate that there is a genuine issue for trial. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

*Lewis v. Negri Bossi USA, Inc.* 423 BR 643 (E.D. Mi. 2010) - Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The movant has an initial burden of showing the absence of a genuine issue of material fact. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. The court must accept as true the non-movant's evidence and draw "all justifiable inferences" in the non-movant's favor. The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

*Kerr v. Hurd*, 2009 WL 2824556 (S.D. Ohio 2009) – Party seeking Summary Judgment must demonstrate that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law based on the pleadings, depositions, answers to interrogatories, admissions on file and affidavits. The existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment – the requirement is that there be no *genuine* issue of *material* fact. A fact is "material" if its resolution affects the outcome of the lawsuit. An issue is "genuine" if a reasonable jury could return a verdict for the nonmoving party. All inferences to be drawn from the underlying facts must be viewed in a light most favorable to the nonmoving party. The Judge must not weigh the evidence or determine the truth of the matter, but must determine only whether there is a genuine issue for trial. Summary Judgment is not warranted where underlying contract is ambiguous as to how compensation is to be determined and parole evidence will be necessary for resolution of dispute.

*Swope v. Scott*, 2009 WL 2877080 (Bankr. N.D. Ohio 2009) – Discharge will be revoked pursuant to Section 727(a)(3) where Debtor fails to obey a lawful order of the court, other than an order to respond to a material question or to testify. Court ordered Debtor to account for tax refund that Debtor improperly retained by paying Trustee \$1,535.78 per month for 10 months. Debtor allegedly paid only \$100.00. However, Trustee failed to accompany Motion for Summary Judgment with any affidavit or other evidence to support allegations. Motion for Summary Judgment denied without prejudice.

#### §13.96 Affidavits – Requirements

*Kaylor v. Holsinger*, 437 BR 260 (Bankr. S.D. Ohio 2010) - Affidavits used to support or oppose a motion for summary judgment must meet three requisite elements. The affidavit must (1) be made on personal knowledge, (2) set out facts that would be admissible in evidence, and (3) show that the affiant is competent to testify on the matters stated. Personal knowledge must be the basis for any facts or statements contained in the affidavit and may be inferred from the content of the affidavit, if no express basis for the knowledge is given. However, any statements based only on information communicated to the affiant or on a personal belief of the affiant, even if sincerely held, are not considered personal knowledge. Any statement not made solely on personal observations, experience, or factual knowledge is not admissible in an affidavit. Party may not attempt to create a genuine issue of material fact after a motion for summary judgment has been filed by submitting an affidavit which contradicts earlier deposition testimony. Factors the court should employ to determine the existence of a sham factual issue include: whether the affiant was cross-examined during the earlier testimony, whether the affidavit was based on newly discovered



evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain. Portions of an affidavit that explain or reveal information that was not fully explored during earlier testimony are not directly contradictory to the earlier testimony. Affidavit does not contain any new information discovered after the deposition testimony was given, it merely explains or explores the effect of Defendants' verbal communication on the Plaintiff more fully than the deposition testimony.

#### §13.97 Affidavits – Motion to Strike

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

#### §13.98 Presentation of Record

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

#### §13.99 Particular Cases – Summary Judgment Granted

*Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6<sup>th</sup> Cir. BAP 2009) – Bankruptcy Court properly granted summary judgment where record on appeal overwhelmingly supported Court's conclusion that defendant breached Purchase Agreement. Defendant paid only \$58,000 for assets for which he was contractually obligated to pay \$559,000. Purchase agreement did not allow defendant any right of set off against the purchase price.

*SCS General Contractors, Inc. v. Wells Fargo Bank*, Case Nos. 08-8096 and 08-8097 (6<sup>th</sup> Cir. BAP 2009) – Creditor filed Adversary Proceeding alleging that Creditor had pre-petition equitable liens against Debtor's real estate that were superior to Bank's Mortgage claims based on construction and repair services that Creditor claimed benefitted both Debtor as tenant and the Owners of the property. Validity and priority of equitable liens are determined by State law. Mississippi law provided an equitable lien can be created by express contractual language that grants a contractor a lien; or where necessary to prevent "unjust enrichment". However, as a general rule the rights of a materialman to assert a lien are limited to those set forth in the Mechanics Lien statute. Mississippi law afforded "abundance of protection for mechanics and materialmen" but also require the person seeking the benefits of those protections to comply with the statute, failing which their remedies are no better than any other creditor. Where a materialman or a mechanic such as Creditor fails to take steps to perfect a lien, the claims are subordinate to those who take for consideration and without notice. When Debtor filed for relief under Chapter 11, Debtor assumed position of hypothetical bona fide purchaser for value against whom an equitable lien cannot be enforced. As Creditor held neither an express contractual or properly perfected statutory lien nor an enforceable equitable lien, Creditor's rights were subordinate to the perfected lien interests of the Lender.



## §13.100 Particular Cases – Summary Judgment Denied

*All Points Capital Corp. v. City of Cheyboygan*, Case No. 09-2007 (Bankr. E.D. Mi. 2010) – Summary Judgment denied where agreements between the parties on which the claims were based were ambiguous and Court could not determine which party drafted the agreement or whether agreement was joint product of both parties based on extensive negotiations. Court could also not determine whether underlying agreement was assignable or whether such an assignment, if available, would violate public policy; and whether party now objecting to the assignment knew of the assignment at the time of execution and failed to object, thereby ratifying the assignment.

*In re Te-kon Travel Court, Inc.*, Case No. 04-01848 (Bankr. W.D. Mi. 2009) – Lender's Motion for Summary Judgment denied where record demonstrated genuine issue of material fact concerning Lender's breach of Joint Plan of Reorganization. Plan called for Debtor to give deeds to Lender to hold in escrow pending Debtor's effort to refinance property. Lender inadvertently released deeds from escrow and caused deeds to be recorded prematurely. Lender argues that premature recording did not cause harm to Debtor. Debtor countered with affidavits that Debtor had lined up bridge financing that would allow Debtor to sell property and repay loans to Lender, but premature recording of the deeds caused lender to pull out of the transaction. Genuine factual issues existed regarding Lender's actions and effect of those actions on Debtor, as well as Debtor's defenses of estoppel and excuse for non-performance.

*Kerr v. Hurd*, 2009 WL 2824556 (S.D. Ohio 2009) – Summary Judgment is not warranted where underlying contract is ambiguous as to how compensation is to be determined and parole evidence will be necessary for resolution of dispute.

*Attard v. American Home Mortgage Services, Inc.*, Adv. No. 08-5064 (Bankr. E.D. Mi. 2009) – Plaintiff not entitled to Summary Judgment invalidating foreclosure sale where record before Court did not establish beyond genuine issue of material fact that the Wayne County Sheriff did not appoint a specific person to conduct a foreclosure sale or that the specific written appointment was signed by someone other than the Sheriff himself.

## AA. Jury Trial

## §13.101 Actions Subject to Jury Trial

*Parker v. Barkan & Robon, Ltd.*, 2011 WL 3667638 (Bankr. N.D. Ohio 2011) – Seventh Amendment guarantees right to jury trial in suits at common law, which includes not only common-law causes of action but also statutory causes of action that are analogous to common law actions ordinarily decided by English Law Courts of the late 18<sup>th</sup> century. Further, remedy sought must be legal, not equitable, in nature. If these factors support a right to jury trial, court must then determine whether Congress has assigned jurisdiction for the claim to a relevant non-Article III court that does not use a jury as a fact finder. Actions under Bankruptcy Code, and in particular actions to recover fraudulent transfers and to avoid a mortgage under Section 549 are inherently equitable and are not subject to jury trial.

*In re ImagePoint, Inc.*, 2011 WL 1500124 (Bankr. E.D. Tn. 2011) – Supreme Court established three-part analysis to determine if the right to a jury trial exists in the bankruptcy context: (1) compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity; and (2) examine the remedy sought and determine whether it is legal or equitable in nature. If these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, Court must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as fact finder. a party may waive its right to a jury trial. Process of allowance and disallowance of claims is triable in equitable action triggered by a creditor's filing a proof of claim. Once a creditor files a proof of claim, he consents to the bankruptcy court's equity jurisdiction and waives any right to a jury trial. Proof of claim filed by creditor waives right of successor in interest to jury trial, as successor is invested with same rights and assumes same burdens as original creditor. However,

action of subsidiary corporation in obtaining cash collateral order in bankruptcy does not waive parent corporation's right to jury trial absent substantive grounds to pierce corporate veil.

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

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

##### §13.102 Grounds

*King v. Spivey*, 2010 WL 5154397 (Bankr. E.D. Tn. 2010) – Rule 59 is not intended to provide parties opportunity to re-litigate issues or present case under new theories. Alleged errors in interpretation or construction of disputed factual issues are not basis for Rule 59 relief.

*In re Solomon*, 2010 WL 3369146 (Bankr. W.D. MI. 2010) – Rule 59 allows alteration or amendment of a judgment only where there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. Motions for reconsideration are not an opportunity to re-argue a case and should not be used by the parties to raise arguments which could, and should, have been made before judgment issued. Debtor's case was properly dismissed when Debtor failed to obtain prepetition credit counseling prior to the filing of his bankruptcy case, as required by 11 U.S.C. Section 109(h)(1). Debtor was not exempt from 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).

*Hares v. Sage Financial, Ltd.*, 2010 WL 283410 (Bankr. S.D. Ohio 2010) - Motion to alter or amend the judgment is brought pursuant to Rule 59 which is made applicable to bankruptcy cases pursuant to Bankruptcy Rule 9023. Courts have established four grounds for a motion to alter or amend a judgment: (1) an intervening change in the controlling law; (2) newly discovered evidence; (3) to correct clear legal error; and (4) to prevent manifest injustice. Motion denied where Plaintiff failed to demonstrate any error in prior Judgment.

##### §13.103 Time for Bringing

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

#### CC. Motion for Relief From Judgment or Order – Rule 9024

##### §13.104 Grounds – Fraud, Misrepresentation or Misconduct

*King v. Spivey*, 2010 WL 5154397 (Bankr. E.D. Tn. 2010) – Rule 60(b)(1) allows court to grant relief from judgment (1) when the party has made an excusable litigation mistake or an attorney in the litigation has acted without authority; or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order. Moving party must demonstrate (1) that the party seeking relief lacks culpability due to mistake, inadvertence, surprise, or excusable neglect; (2) the party opposing relief will not be prejudiced;

and (3) the party seeking relief has a meritorious claim. Alleged errors of counsel in failing to follow the court's local rules and the Pretrial Order concerning the pre-marking and pre-filing of trial exhibits, untimely offering into evidence exhibits the Defendant required to be successful at trial, and failing to properly prepare for trial by not interviewing witnesses, taking the Plaintiffs' depositions, calling witnesses for trial, preparing the Defendant and his wife for trial examination, and preparing for cross-examination of the Plaintiffs, not sufficient for relief under Rule 60. Attorney's actions or inactions in preparing for trial were not excusable.

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

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

#### §13.105 Grounds – Mistake, Inadvertence or Surprise

*In re McKenzie*, 2010 WL 3386012 (Bankr. E.D. Tn. 2010) – In deciding whether relief is warranted under Rule 60, court will review the culpability of the party seeking relief; whether the party opposing relief will be prejudiced; and whether the party seeking relief has a meritorious defense or claim. A party demonstrates a lack of culpability by demonstrating mistake, inadvertence, supplies or excusable neglect. Debtor's alleged medical condition is not an excuse for failing to object to motion to approve sale and debtor's medical records where debtor was actively participating in bankruptcy case and debtor's medical records indicated that debtor had sufficient mental capacity at time of order approving sale. Disagreement concerning value of property to be sold is not a mistake for purposes of rule 60. Evidence indicated that there may have been a mistake in Sale Order concerning exact property being purchased. However, court could fashion effective relief by clarifying sale order where buyer and the Trustee agreed on property to be conveyed without need to set aside sale order.

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

#### §13.106 Grounds – Excusable Neglect

*In re Rutherford*, 427 BR 656 (Bankr. S.D. Ohio 2010) – Court would deem complaint timely filed although Complaint was filed in main case and not as separate adversary and creditor failed to pay the requisite filing fee. Creditor's attorney was obviously unfamiliar with administrative procedures for electronic case filing (ECF) in the Southern District of Ohio would be afforded opportunity to re-docket non-dischargability complaint in separate adversary proceeding and to pay required filing fee, so that creditor's non-dischargability claims could be decided on merits.

*In re Reiman*, 2010 WL 2802675 (Bankr. E.D. Mi. 2010) – Relief under Rule 60 is available only when the moving party shows that the underlying order is the result of: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. Rule 60(b) is circumscribed by public policy favoring finality of judgments and termination of litigation. After abandonment, the lender conducted a foreclosure sale, at which the foreclosure bid was significantly less than what the Trustee believed the value to be. Trustee sought to revoke abandonment and sell the property, redeem the mortgage, and return the surplus profit to the unsecured creditors. Court concluded that no basis existed to revoke abandonment of a properly administered and investigated asset in a fully administered case where the Trustee's request was based solely on the fact that the property was more valuable than originally believed. The Code's strong interest in finality is respected in all cases and applies to abandonment of assets.

*In re Lebbos*, Case No. 09-58805-wsd (Bankr. E.D. Mi. 2009) – Chapter 7 Trustee's lack of legal representation at the time of service of Motion for Relief from Stay does not constitute basis for setting aside Order Granting Relief from Automatic Stay. Trustee's failure to timely investigate basis for, and respond to, Motion for Lease is not excusable to collect. Failure to recognize potential misstatement of fact or incorrect legal conclusion does not amount to "excusable but collect" and should have been out with by way of timely objection or response to motion.

#### §13.107 Newly Discovered Evidence

#### §13.108 Void Judgment

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

#### §13.109 Satisfaction, Release or Discharge

#### §13.110 Other Grounds

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

#### §13.111 Time for Bringing Motion

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

#### DD. Enforcement of Judgment

#### §13.112 Rate of Interest on Judgment

*FCS Advisors, Inc. v. Fair Finance Company, Inc.*, Case No. 09-2609 (2d Cir. 2010) - In diversity cases such as this, post-judgment interest should ordinarily be calculated in accordance with the federal rate provided for under 28 U.S.C. § 1961(a). Although parties may agree to a different rate by contract, absent clear, unambiguous and unequivocal language expressing an intent that a particular interest rate apply to judgments or judgment debts, a general choice-of-law provision does not alter the application of the federal rate to the calculation of post-judgment interest.

#### §13.113 Garnishment

*Evangel Builders & Construction Managers, LLC. v. Upfall*, Case No. 06-5026 (Bankr. E.D. Mi. 2010) – Bankruptcy Court judgment that declared debt non-dischargeable under Section 523(a)(6) was not enforceable money judgment. Judgment only declared that a prior state court judgment was non-dischargeable and did not enter any money judgment on which garnishment could issue.

#### §13.114 Statute of Limitations

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



## EE. Specific Causes of Action

## §13.115 Tortious Interference with Contract

*Irwin v. Frankenmuth Credit Union*, Case No. 08-20212 (Bankr. E.D. Mi. 2009) – Action for tortious interference requires actions that are intentionally per se wrongful or are done with malice and without justification, all with purpose of invading a contractual or business relationship of another. Party who acts with legitimate business reason does not improperly interfere with contract or business relationship. Credit Union’s requirement that Debtor enter into written contracts with potential customers is not per se wrongful or without justification, where actions were justified and consistent with prudent lending practices. Credit Union’s actions were designed to determine if Debtor had the ability to repay loans.

## §13.116 Innocent Misrepresentation

*Irwin v. Frankenmuth Credit Union*, Case No. 08-20212 (Bankr. E.D. Mi. 2009) – Debtor borrowed money from third party to repay loan from Credit Union, which resulted in loan being paid in full. Third party then threatened Credit Union with litigation when Credit Union declined to advance additional funds to Debtor, which would have been used by Debtor to generate resources to repay third party. Credit Union settled with third party and attempted to charge the cost of that settlement back against the Debtor’s account. Record failed to establish that Debtor in fact owed any money to third party and purported assignment from third party to Credit Union was not valid absent proof of underlying enforceable obligation that could be assigned.

## §13.117 Punitive Damages

*Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – General rule is that punitive damages are not allowed against a municipality absent express statutory authority.

*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.

## §13.118 Conversion

*Boyd v. Direct Capital Corp.*, 2010 WL 4259981 (Bankr. W.D. Mi. 2010) – Security agreement was sufficient as matter of New Hampshire law to create security interest which included motor vehicle. Although Security Agreement did not expressly reference “motor vehicles” the general inclusion of “consumer goods” was sufficient as the vehicle was purchased primarily for personal, family or household use. Creditor’s seizure of the automobile prior to commencement of the bankruptcy case was not conversion as creditor had a lawful right of possession as the holder of a valid security agreement.

*Tyree v. Shrum*, 2010 WL 2851011 (Bankr. M.D. Tn. 2010) – Property may be converted in three different ways: 1) A person may personally dispossess another of tangible personal property; or 2) A person may dispossess another of tangible property through the active use of an agent; or 3) Under certain circumstances, a person who played no direct part in dispossessing another of property, may nevertheless be liable for conversion for receiving personal property. Debtor obtained money from third parties and used funds to purchase Certificate of Deposit in Debtor’s own name. Debtor then borrowed money and pledged CD as collateral. After Debtor defaulted, Bank exercised right to offset the default by taking the money out of the CD. Bank did not personally dispossess third parties of funds, as third parties paid funds

to Debtor, not Bank. There was no evidence that Debtor was acting as agent for Bank when Debtor obtained funds from third parties. Bank had no knowledge of involvement of third parties and had no knowledge that money deposited to purchase CD was not Debtor's rightful property. Bank could not be held liable for conversion of funds belonging to third parties.

#### §13.119 Legal Malpractice

*Kelsey v. Fitzgerald*, Case No. 08-80501 (Bankr. W.D. Mi. 2010) – Legal malpractice claim requires proof of an attorney client relationship, negligence in the legal representation, negligence that was the proximate cause of an injury, and the nature and extent of the injury suffered. Record on Summary Judgment did not clearly evidence existence of attorney-client relationship. Factual issues remained that precluded entry of summary judgment.

### XIV. Appeals

#### A. Parties

##### §14.1 Standing to Appeal

*Hock v. Stevenson*, 2011 WL 2173837 (E.D. Mi. 2011) – Buyer at foreclosure sale lacks standing to appeal Order Revoking Abandonment. Reopening case and revoking abandonment does not alter the rights or status of the buyer. The only change is that the trustee, rather than the debtor, would be the person redeeming the property. That trustee may be more likely to redeem than the debtor would have been does not change the legal rights or status of the buyer.

*Aja v. Emigrant Funding Corp.*, 2011 WL 167034 (1<sup>st</sup> Cir. 2011) – Chapter 7 debtor lacks standing to appeal order granting relief from automatic stay. Debtor acknowledged that there was no equity in property. Successful appeal would not affect her discharge and estate was insolvent so there would be no money left to pay Debtor after payment to creditors.

*Phillips v. Weissert*, Case No. 09-8032 (6th Cir. BAP 2010) - Court has jurisdiction to independently determining standing even when issue is not raised by either party. Plaintiff who prevailed in lower court lacked standing to bring appeal for other plaintiff in the action.

*Moses v. Howard University Hospital* – Case No. 08-7087 (D.C. Cir. 2010) – A trustee, as the representative of the bankruptcy estate, is the real party in interest, and is the only party with standing to prosecute causes of action belonging to the estate once the bankruptcy petition has been filed. An outstanding legal claim that is abandoned by the trustee reverts back to the original debtor-plaintiff. When Trustee abandoned interest in State Court litigation, Debtor reacquired standing to prosecute appeal of adverse State court Judgment.

*Ohio Truck & Trailer, Inc. v. Level Propane Gases, Inc.*, 422 BR 93 (6<sup>th</sup> Cir. BAP 2010) – Appellate standing is more limited than Article III standing or “federal” standing. Party has appellate standing only if the party is directly and adversely affected pecuniarily by the order. Known as “person aggrieved” doctrine, standing limited to one with a direct financial stake in the Bankruptcy Court’s order. Creditor whose Proof of Claim has been disallowed is not a creditor and so is not a person aggrieved by orders of Bankruptcy Court.

*Wilhelm v. Urich* – Case No. 09-8043 (6<sup>th</sup> Cir. BAP 2010) – Appellate standing is more limited than Article III standing or federal standing generally. Appellate standing requires appellant to be directly and adversely affected pecuniarily by the order. Known as “person aggrieved” doctrine, standing limited to one with a direct financial stake in the Bankruptcy Court’s order. Party who has not filed a Proof of Claim and who entered into a settlement agreement with Debtor that released all claims Party had against debtor lacked any pecuniary interest in the Order confirming Debtor’s Chapter 11 Plan and, therefore, lacked standing to appeal that Order.

*Maxus Capital Group, LLC, v. Uhrich*, Case No. 09-8047 (6<sup>th</sup> Cir. BAP 2010) – Appellate standing is more limited than Article III standing or federal standing generally. Appellate standing requires appellant to be directly and adversely affected pecuniarily by the order. Known as “person aggrieved” doctrine, standing limited to one with a direct financial stake in the Bankruptcy Court’s order. Party who has filed a Proof of Claim that has not been disallowed has sufficient pecuniary interest in the Order confirming Debtor’s Chapter 11 Plan and, therefore, has standing to appeal that Order.

*Stark v. Moran*, 566 F.3d 676 (6<sup>th</sup> Cir. 2009) – One co-shareholder of Corporation lacks standing to contest bankruptcy sale of stock on the other co-shareholder of Corporation. Order permitting the sale of stock of other co-shareholder does not “directly and adversely affect pecuniary interest” of the non-Debtor co-shareholder. Bankruptcy Trustee’s sale of stock back to Debtor did not harm any interest and co-shareholders shares or co-shareholders interest in the underlying Corporation. Further, Co. shareholder lack standing to appeal sale of stock back to Debtor on any “competing bidder” theory where stock was sold back to Debtor for a sum sufficient to pay off creditors in full. Co-shareholder in closely held corporation did not have interests aligned with those of bankruptcy estate’s creditors where no creditors were left unsatisfied as a result of the sale and any allegations of impropriety, even if true, could not increase any creditor’s recovery.

*Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc.*, 555 F.3d 231 (6<sup>th</sup> Cir. 2009) - Doctrine of “appellate standing” which is applicable only in Bankruptcy appellate matters, limited persons who can pursue an appeal to those directly and adversely affected pecuniarily. Persons such as shareholders or creditors of corporation lack standing to appeal decisions dealing with assets of corporation. However, where party at secondary level of appeal unquestionably had standing to participate in the appeal at the District Court level, that party has standing to appear in the appeal at the Circuit Court.

*LPP Mortgage, Ltd. v. Brinley*, 547 F.3d 643 (6<sup>th</sup> Cir. 2008) – To have standing, party must show (1) party has suffered injury that is actual or imminent, not conjectural or hypothetical and is concrete and particularized; (2) injury is fairly traceable to the challenged actions of the defendant; and (3) is likely rather than merely speculative that the injury will be redressed by a favorable decision. Unsecured creditor has economic interest in having unencumbered equity in property as a result the avoidance of judgment means preserved for benefit of bankruptcy estate.

*Moran v. LTV Steel Company, Inc.*, 560 F.3d 449 (6<sup>th</sup> Cir. 2009) - To have appellate standing, party must be directly and adversely affected pecuniarily by the order. Appellate standing requires direct financial stake in the order such that it diminishes Appellant’s property, increases burdens, or impairs rights. Possibility of future litigation is not enough to support appellate standing. Bankruptcy Court appointed Committee of Administrative Claimants to represent interests of administrative creditors. Company’s former CEO did not have standing to appeal the Court’s Standing Order where only interest of CEO was to prevent Committee from filing suit against CEO.

*Ford Motor Credit Co. v. Morton*, 410 BR 556 (6<sup>th</sup> Cir. BAP 2009) – Party has standing to appeal only if party has been “directly and adversely affected pecuniarily by the order”. A party may appeal in order only if the order diminishes their property, increases their burdens or impairs their rights. Creditor has standing to appeal order disapproving proposed reaffirmation agreement. Order denying reaffirmation agreement sufficiently affects creditor’s assets and detrimentally affects creditor’s rights.

*Baud v. Carroll*, Case No. 09-10673 (E.D. Mi. 2009) – Debtor has standing to appeal Order Confirming Plan in Chapter 13 proceeding where Debtor involuntarily altered the provisions of the plan to conform to the Court’s ruling. Debtor is an “aggrieved party” with standing to appeal.

#### §14.2 *In Forma Pauperis*

*In re Morris*, 2010 WL 4809107 (Bankr. M.D. Tn. 2010) – Court may waive the filing fee for an appeal if the party submits an affidavit that he is unable to pay the fee or give security therefore. An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith, lacks merit

or is frivolous. Failure to timely file Notice of Appeal resulted in appellate court lacking jurisdiction over appeal resulting in appeal being frivolous and lacking merit. Motion to proceed *in forma pauperis* denied.

*Lewis v. McClatchey*, 2009 WL 1607773 (S.D. Ohio 2009) – Motion for leave to appeal *in forma pauperis* and request to obtain transcripts at government expense denied where any appeal would be frivolous.

*In re Hall*, Case No. 08-51096 (5<sup>th</sup> Cir. 2009) – Motion for leave to proceed *in forma pauperis* denied where debtor failed to make sufficient evidentiary record to support request. Debtor filed bankruptcy petition and sought leave of the court to excuse the filing fee. Bankruptcy Court denied motion as financial documents filed by Debtor were insufficient to determine whether debtor was eligible for *in forma pauperis* relief. On appeal, debtor submitted the same insufficient financial documents to the appellate court. As documents were still insufficient, court dismissed appeal.

#### §14.3 Waiver of Right to Appeal

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

### B. Appellate Jurisdiction

#### §14.4 Generally

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

#### §14.5 Exceptions

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

#### §14.6 Content of Notice of Appeal

*Matthews v. Educational Credit Management Corp.*, 2011 WL 197835 (E.D. Ky. 2011) – Form of notice of appeal is jurisdictional. Form must (1) conform substantially to the appropriate Official Form, (2) contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys, and (3) be accompanied by the prescribed fee. Notice of appeal must designate the judgment, order, or part thereof being appealed. Imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court. Courts will liberally permit notices of appeal technically at variance with the letter of a procedural rule but that amount to the functional equivalent of what the rule requires. *Pro se* appellant’s Notice of Appeal was not perfect, but did comply with requirements of Federal Rule of Bankruptcy Procedure 8001. Plaintiff’s failure to designate in Notice of Appeal any of the Bankruptcy Court’s orders on

various motions challenging Defendant's standing did not preclude those issues from appeal – appeal of final judgment is sufficient to preserve for review all of the Bankruptcy Court's prior non-final rulings and orders, including those on Plaintiff's previous challenges to Defendant's standing.

### C. Time for Filing Appeal

#### §14.7 Filing Before Order Entered

*Moses v. Howard University Hospital* – Case No. 08-7087 (D.C. Cir. 2010) – Notice of appeal filed during pendency of timely filed Rule 59 Motion is timely and becomes effective upon entry of an order disposing of the Rule 59 Motion.

*Mentag v. GMAC Mortgage, LLC*, 430 B.R. 439 (E.D. Mi. 2010) – Notice of appeal filed after entry of Order Lifting Stay but before Order became effective not premature. Time for filing Notice of Appeal runs from date on which Order is docketed with the Clerk, not the date on which the Order becomes effective.

*Moran v. LTV Steel Company, Inc.*, 560 F.3d 449 (6th Cir. 2009) - Notice of appeal filed after Court issues oral ruling but before entry of judgment or order being appealed is premature. Under Federal Rule of Bankruptcy Procedure, 8002(a), Notice of Appeal will be deemed filed as of the entry of the judgment or order. District Court erroneously dismissed appeal of Bankruptcy Court Order as premature.

#### §14.8 Deadline for Notice of Appeal

*Baker v. Lyon*, 2011 WL 3515181 (E.D. Ky. 2011) – Notice of Appeal must be filed within 14 days of entry of Final Judgment. Judgment was final where it concluded all issues between the parties. Reservation of jurisdiction to consider awards of attorney fees and pre-judgment interest did not alter finality of judgment, as reservation of attorney fees does not impact resolution of substantive claims that underlie judgment.

*In re Caterbone*, 2011 WL 1226462 (3d Cir. 2011) – Pursuant to 28 U.S.C. § 158(c)(2) and the Federal Rules of Bankruptcy Procedure, an untimely filing such as the one at issue here deprives subsequent reviewing courts including both the District Court and Circuit Court of jurisdiction over appeal. Notice of appeal filed with District Court after expiration of time under Rule 8002 *sua sponte* dismissed as untimely causing District Court to lack subject matter jurisdiction. Where District Court never acquired jurisdiction of appeal, Circuit Court similarly would lack jurisdiction over appeal of dismissal by District Court.

*In re Morris*, 2010 WL 4809107 (Bankr. M.D. Tn. 2010) – Notice of Appeal must be filed within 14 days of order being appealed. Notice of Appeal filed 21 days after entry of order was untimely and appellate court therefore lacked jurisdiction.

*In re Jacobowitz*, Case no. 10-1369 (3d Cir. 2010) – Notice of Appeal must be filed within 14 days of order being appealed. Appellate court lacked jurisdiction to consider appeal where Notice of Appeal not filed until 30 days after entry of order sought to be reviewed.

*Mashburn v. Scrivner*, 2010 WL 1220730 (10th Cir. 2010) - Appeal of partial final judgment revoking discharge premature where Trustee had filed Motion to Alter or Amend Judgment as to second count which sought turnover of property from debtors. Timely Motion to Alter or Amend Judgment under Rule 59 operates to suspend finality of entire Judgment, even if Motion only directed to one part of the Judgment.

*Ultimate Appliance CC v. The Company*, 601 F.3d 414 (6<sup>th</sup> Cir. 2010) – Federal Rule of Appellate Procedure 4 requires Notice of Appeal to be filed within 30 days of entry of the Judgment or Order appealed. Party may move for extension up to 30 days after the expiration of the initial time. Rule 4 is jurisdictional. Appellate Courts lack jurisdiction and must dismiss appeal where Notice not filed within initial 30 days and did not seek an extension until 32 days after expiration of the initial 30 day time limit. District Court properly denied Appellant's untimely Motion for Extension of Time to file Notice of Appeal.



*Woosley v. Woosley*, 2009 WL 3064791 (Bankr. M.D. Tn. 2009) – Rule 9021 requires a separate document for every judgment entered in an adversary proceeding. Where a separate document is not entered, the time for taking the appeal did not run. A party may waive the “separate document” rule to allow an appeal to go forward, but such a waiver cannot be used to defeat appellate jurisdiction.

*Lassiter v. Grove-Merritt*, 406 BR 778 (S.D. Ohio 2009) – Notice of Appeal must be filed within 10 days of entry of order appealed. Notice of appeal filed 12 days after entry of order was untimely and appellant failed to establish excusable neglect to extend the time for filing an appeal. Accordingly, District Court lacked jurisdiction over appeal and appeal must be dismissed.

*Hann v. Michigan*, 2009 WL 2496666 (E.D. Mi. 2009) – Notice of Appeal must be filed within 10 days of entry of order appealed. A Motion for Rehearing filed within 10 days of rendition of order under Federal Rule of Bankruptcy Procedure 9023 extends the time for filing a Notice of Appeal until 10 days after entry of an Order on that Motion. An untimely Motion for Rehearing does not extend the time for filing a Notice of Appeal. Debtor’s Motion for Rehearing filed 14 days after entry of the order and Notice of Appeal filed 15 days from rendition of order left Appellate Court with no jurisdiction. Debtor’s appeal dismissed as jurisdictionally barred.

*Sunde v. Wells Fargo Home Mortgage*, 2009 WL 2447490 (E.D. Mi. 2009) - Notice of Appeal must be filed within 10 days of entry of order appealed. Motion to Amend Order filed two months after rendition of order does not extend time for filing notice of appeal of underlying Order. A timely motion to amend pursuant to Rule 9023 extends the time for appeal until 10 days after entry of the order disposing of that motion. Appellant’s Notice of Appeal and Motion for Leave to Appeal filed more than two months after entry of Order being appealed were untimely. Appeal dismissed for lack of jurisdiction.

*K & B Capital, LLC v. Official Unsecured Creditors’ Committee*, 2009 WL 1747834 (6<sup>th</sup> Cir. 2009) –Court lacked appellate jurisdiction over Order denying Rule 60 motion to vacate a Rule 60 Order entered two years previously. Any appeal from the prior rule 60 Order would have to have been brought within the appropriate time from entry of an Order and not by a collateral attack in the form of a second Rule 60 motion.

*Doucet v. Drydock Coal Co.*, 2009 WL 1687775 (6<sup>th</sup> Cir. BAP 2009) – Order denying Motion to Dismiss for lack of jurisdiction is not appealable. Appeal of order denying Motion to Dismiss was timely when filed within 10 days of entry of Final Judgment, at which time Order became final.

#### §14.9 Effect of Motion for New Trial or Amendment of Judgment

*Sunde v. Wells Fargo Home Mortgage*, 2009 WL 2447490 (E.D. Mi. 2009) - Notice of Appeal must be filed within 10 days of entry of order appealed. Motion to Amend Order filed two months after rendition of order does not extend time for filing notice of appeal of underlying Order. A timely motion to amend pursuant to Rule 9023 extends the time for appeal until 10 days after entry of the order disposing of that motion. Appellant’s Notice of Appeal and Motion for Leave to Appeal filed more than two months after entry of Order being appealed were untimely. Appeal dismissed for lack of jurisdiction.

#### §14.10 Motion to Leave to File Untimely Notice of Appeal

*In re Edward*, Case No. 99-51514 (Bankr. E.D. Mi. 2008) – Bankruptcy Court can extend time for filing Notice of Appeal on Motion filed (1) before expiration of time for filing Notice of Appeal or (2) within 20 days after expiration of time for filing Notice of Appeal upon showing of excusable neglect. Motion for Leave to file untimely Notice of Appeal did not support finding of excusable neglect where Notice of Appeal not timely filed due to misunderstanding by counsel of time for filing appeal. Counsel’s erroneous belief that deadline to file Notice of Appeal was 21 days does not constitute excusable neglect.

### D. Appealable Orders

#### §14.11 Finality of Order

*Baker v. Lyon*, 2011 WL 3515181 (E.D. Ky. 2011) – Judgment was final where it concluded all issues between the parties. Reservation of jurisdiction to consider awards of attorney fees and pre-judgment interest did not alter finality of judgment, as reservation of attorney fees does not impact resolution of substantive claims that underlie judgment.

*In re USA Baby, Inc.*, 2011 WL 2076342 (7<sup>th</sup> Cir. 2011) – Order denying Equity Holder’s Motion to pursue pre-petition claims that trustee was allegedly failing to pursue was final order for appellate purposes.

*In re McKenzie*, 2011 WL 2670208 (E.D. Tn. 2011) – Order appointing counsel for the Trustee is non-final, non-appealable order. Order did not award compensation to counsel and did not end any litigation on the merits. Appellant failed to demonstrate need for immediate appeal to warrant interlocutory appeal.

*BAC Home Loans Servicing v. Duong*, 2011 WL 1706615 (N.D. Ohio 2011) – Order to Show Cause that does not impose sanctions is not final, appealable order. Alleged creditor filed objection to confirmation and then sought to withdraw objection as alleged creditor was not actually a creditor in the case. Court entered Order to Show Cause why creditor should not be sanctioned and entered subsequent Order directing creditor to file an affidavit showing that creditor has taken steps to ensure that accurate information regarding identity of lenders and servicers is properly provided; and to educate employees as to these issues. Upon review of that report, Court would consider further actions or hearing. Although Order imposing sanctions, including non-monetary sanctions, can be an appealable final order, Court in this case did not impose a sanction or end the show cause hearing. Order only focused on steps creditor had taken or would take to prevent future errors and was in response to creditor’s offer to provide a satisfactory explanation to the Court. Court did not impose a fine, make any ruling, or even reprimand creditor.

*Cappuccilli v. Lewis*, 2010 WL 2870668 (E.D. Mi. 2010) - Order holding party in contempt but not imposing sanctions does not become final and appealable order until entry of order imposing sanctions. Order of Contempt entered February 18 did not impose sanctions. April 12 Order that imposed sanctions was final appealable order. Notice of Appeal timely filed April 26 properly appealed both initial finding of contempt and imposition of sanctions.

*French v. Shapiro*, 2011 WL 1357754 (E.D. Mi. 2011) – Order dismissing adversary proceeding without prejudice to re-filing is not a final, appealable order.

*In re Fleurantin*, Case no. 09-4376 (3d Cir. 2011) - Order converting case from 13 to 7 is final and appealable. Court lacked jurisdiction over appeal of conversion order where debtor waited until court ultimately dismissed Chapter 7 case to file appeal. Appeal of final order must be filed within time permitted in Rule 8002(a)

*BAC Home Loans Servicing, L.P. v. McDermott*, 2011 WL 1257209 (N.D. Ohio 2011) – Order Granting Motion for Rule 2004 Examination, like discovery orders in general, is not final, as order is not the end of any litigation, but more likely is the beginning of further proceedings.

*In re Donovan*, 2011 WL 1257965 (N.D. Ohio 2011) – Order Granting Motion for Rule 2004 Examination, like discovery orders in general, is not final, as order is not the end of any litigation, but more likely is the beginning of further proceedings.

*In re Gray*, 447 BR 524 (E.D. Mi. 2011) – Order is final for bankruptcy appellate purposes when the order finally disposes of discrete disputes within the larger case. A “discrete dispute” is one that is essentially separable from the main case and disposition would be final as a stand alone suit outside of the bankruptcy case. Order that merely resolves “discrete issue” within a case is not appealable. Order Granting Motion for Rule 2004 Examination, like discovery orders in general, is not final, as order is not the end of any litigation, but more likely is the beginning of further proceedings.

*Baker v. Simpson*, 2010 WL 2977329 (2d Cir. 2010) – Order denying Motion for Permissive Abstention is not a final order and is not appealable. Circuit Court lacks jurisdiction to consider appeal of district court's decision.

*American Express Bank v. Askenaizer*, 418 BR 495 (1<sup>st</sup> Cir. BAP 2009) – Appellate Courts have jurisdiction over final judgments, orders and decrees; and with leave of court from certain interlocutory orders. Decision is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. Interlocutory order decides some intervening matter but requires further steps to be taken in order to enable the court to adjudicate cause on the merits.

*Official Committee of Unsecured Creditors v. Anderson Senior Living Property, LLC*, Case No 09-8041 (6<sup>th</sup> Cir. BAP 2010) – Appellate Court has discretion to allow appeal of interlocutory order on Motion or based on a timely notice of appeal. Court will grant discretionary review where order involves controlling issue of law as to which there is substantial ground for difference of opinion and immediate appeal may materially advance ultimate termination of litigation. Order denying retention of advisor does not meet standard for interlocutory appeal.

*Mentag v. GMAC Mortgage, LLC*, Case No. 09-15012 (E.D. Mi. 2010) – Order Lifting Stay is “final order” for purposes of appellate jurisdiction.

*State of New Jersey v. Fuld*, Case No. 09-2891 (3d Cir. 2010) – Appellate Court has jurisdiction to hear appeals of “final decisions”, which are decisions that ended the litigation on the merits and leave nothing for the court to do but execute the judgment; or one by which the court disassociates itself from a case. Appellate Court may also have jurisdiction under “collateral order doctrine” for that small class of orders that finally determined claims of rights separable from, and collateral to, other rights asserted in the action through the rights are too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. Collateral Order Doctrine applies to decisions that do not in the litigation but nonetheless should be considered “final” for appellate purposes. Collateral Order Doctrine requires that order conclusively determine disputed question; resolve an important issue completely separate from the merits of the action; and be effectively unreviewable on appeal from a final judgment. Order denying three-man of action removed from state court to federal court conclusively determines the disputed question as to where the action will proceed and resolves an important issue completely separate from the merits of the action. However, an erroneous order denying a motion to remand can be adequately addressed on direct appeal from a final judgment. Appeal of order denying motion to remand dismissed for lack of jurisdiction.

*Hughes v. Jamestown Square, LLC.*, Case No. 09-11676 (11<sup>th</sup> Cir. 2009) – Court has appellate jurisdiction pursuant to 28 USC Section 158 only over final judgments, orders and decrees. “Final Order” is one that ends litigation on the merits and leaves nothing for the court to do but execute the judgment. Order dismissing Involuntary Petition without prejudice is not appealable order as dismissal did not end litigation on the merits.

*K & B Capital, LLC v. Official Unsecured Creditors' Committee*, 2009 WL 1747834 (6<sup>th</sup> Cir. 2009) – Appeal dismissed as the orders being appealed were not final orders and, therefore, the appellate Court lacked jurisdiction.

*Sparks v. HSBC Auto Finance*, 2008 WL 4694795 (6<sup>th</sup> Cir. 2008) – Appellate Court lacks jurisdiction to consider appeal of non-final order. Order is final only if Order terminates judicial labor and leaves only ministerial tasks to be performed.

*CIT Small Business Lending Corp. v. Kendrick*, 558 F.3d 482 (6<sup>th</sup> Cir. 2009) – “[A] decision by the district Court on appeal remanding the bankruptcy Court's decision for further proceedings in a bankruptcy Court is not final, and so is not appealable to this Court, unless the further proceedings contemplated are of a purely ministerial character.”

*Doucet v. Drydock Coal Co.*, 2009 WL 1687775 (6<sup>th</sup> Cir. BAP 2009) – Order denying Motion to Dismiss for lack of jurisdiction is not appealable. Order is final and appealable only when case is finally concluded and there are no matters pending before the Court. Appeal of order denying Motion to Dismiss was timely when filed within 10 days of entry of Final Judgment at which time Order became final.

#### §14.12 “Collateral Order” Doctrine

*In re Gray*, 447 BR 524 (E.D. Mi. 2011) – Collateral Order doctrine allows appeal of that small class of decisions that finally determine a right separable from and collateral to rights asserted in the action and which are too important to be denied review but too independent to defer appellate consideration until whole case is concluded. Order must (1) conclusively determine the disputed question; (2) resolve an important question completely separate from the merits of the action; (3) be effectively unreviewable on appeal from a final judgment. Discovery orders are generally not reviewable under collateral order doctrine because discovery order such as Rule 2004 Exam Order does not conclusively determine any disputed question or claim of right.

#### §14.13 Interlocutory Appeal

*Mecca-Tech, Inc. v. Lange*, 2011 WL 3847122 (W.D. Mi. 2011) – Order denying Motion for Summary Judgment is non-final Order. Court will authorize interlocutory appeal only where (1) question is one of law; (2) resolution of question is dispositive of underlying action; (3) there is a substantial ground for difference of opinion respecting correctness of decision; and (4) immediate appeal would materially advance ultimate termination of litigation. Bankruptcy Judge’s conclusion that matters within scope of request for admissions may be beyond the permitted scope of Rule 7036 was not strict question of law. Bankruptcy Court’s refusal to follow prior District Court decision on same issue of law was not subject to interlocutory appeal. Although binding nature of District Court decision is question of law on which there is substantial split of authority, outcome would not necessarily be controlling because, if Court determines that District Court decisions are not binding authority, interlocutory appeal would do nothing to bring matter to resolution.

*Murawski v. Campbell*, 2011 WL 768644 (E.D. Mi. 2011) – Court may permit an interlocutory appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion exists regarding the correctness of the decision; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. Motion to appeal denial of summary judgment on one count of multi-count complaint did not demonstrate substantial difference of opinion regarding correctness of underlying decision and appeal at this stage would not materially advance resolution of litigation where there were 2 remaining counts that still needed to be adjudicated.

*IRS v. Hayes*, 2011 WL 2490945 (E.D. Mi. 2011) – Order denying Motion to Dismiss Adversary Complaint is not final, appealable order. District court may hear an interlocutory appeal if (1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion exists regarding the correctness of the decision; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. Interlocutory appeal denied where immediate appeal would not materially advance ultimate termination of litigation and would instead prolong litigation. Debtor’s tax liability, if any, ultimately would have to be determined either by the Bankruptcy Court or the District Court even if the adversary proceeding is dismissed. Judicial economy is furthered by allowing adversary to proceed.

*BAC Home Loans Servicing v. Cuong*, 2011 WL 1706615 (N.D. Ohio 2011) – Court would not entertain interlocutory appeal of order that falls within the inherent case management powers of Bankruptcy Court. Creditor filed pleadings that incorrectly named the creditor holding the claim, which has potential to jeopardize bankruptcy case. Bankruptcy Court wanted to assure itself of accuracy of future filings by requiring creditor to take steps to ensure that accurate information regarding identity of lenders and servicers is properly provided; and to educate employees as to these issues.

*BAC Home Loans Servicing, L.P. v. McDermott*, 2011 WL 1257209 (N.D. Ohio 2011) – Court can grant discretionary review of interlocutory order where (1) question is one of law; (2) question of law is

controlling; (3) there is substantial difference of opinion respecting the correctness of the order; and immediate appeal would materially advance ultimate termination of the litigation. Interlocutory appeals are to be sparingly granted and only in the exceptional case. Order Granting Motion for Rule 2004 Exam is not reviewable interlocutory order. Questions presented are not pure questions of law and granting immediate review would not materially advance termination of litigation.

*In re Donovan*, 2011 WL 1257965 (N.D. Ohio 2011) – Court can grant discretionary review of interlocutory order where (1) question is one of law; (2) question of law is controlling; (3) there is substantial difference of opinion respecting the correctness of the order; and immediate appeal would materially advance ultimate termination of the litigation. Interlocutory appeals are to be sparingly granted and only in the exceptional case. Order Granting Motion for Rule 2004 Exam is not reviewable interlocutory order. Questions presented are not pure questions of law and granting immediate review would not materially advance termination of litigation.

*In re Gray*, 447 BR 524 (E.D. Mi. 2011) – Court can grant discretionary review of interlocutory order where (1) question is one of law; (2) question of law is controlling; (3) there is substantial difference of opinion respecting the correctness of the order; and immediate appeal would materially advance ultimate termination of the litigation. Interlocutory appeals are to be sparingly granted and only in the exceptional case. Order Granting Motion for Rule 2004 Exam is not reviewable interlocutory order. Questions presented are not pure questions of law and granting immediate review would not materially advance termination of litigation.

*Probuild Company, LLC. V. Doria*, Case No. 10-11914 (E.D. Mi. 2010) – Interlocutory appeals are permitted only when (1) the order involves a controlling issue of law; (2) there is a substantial ground for difference of opinion; and (3) immediate appeal may materially advance termination of litigation. Substantial ground for difference of opinion requires showing that the issue is of first impression and involves more than just a strong disagreement between the parties. Adversary Defendant's request for interlocutory appeal of Order denying Motion to Dismiss Adversary based on alleged untimely filing of complaint denied where 60-day deadline to file adversary fell on weekend or legal holiday and adversary was filed on first business day thereafter.

*Lewis v. Negri Bossi USA, Inc.*, Case Nos. 09-13148 and 09-13149 (E.D. Mi. 2009) –

In deciding whether to exercise jurisdiction over appeal of interlocutory order, courts typically consider (1) whether the appeal involves a question of law; (2) whether the resolution of that question controls the outcome of the case; (3) whether there exist substantial grounds for differences of opinion about the question; and (4) whether an immediate appeal would materially advance the ultimate termination of the litigation. Lower Court granted partial summary judgment and, based on that summary judgment, enjoined Defendant from certain actions. Defendant has appealed the injunction as a matter of right and seeks to appeal the partial summary judgment on which the injunction is based. Reversal of the summary judgment would mandate vacating the injunction. Simultaneous appeals will materially advance the ultimate termination of the litigation and immediate appeal of the summary judgment is appropriate because the appeal presents controlling questions of law.

*In re Carmona*, 2009 WL 2058587 (E.D. Mi. 2009) – District Court has jurisdiction to hear bankruptcy appeals of interlocutory orders and decrees. District Court authorized under 28 USC Section 158(a)(3) and 28 USC Section 1292(b) to accept appeal of interlocutory order where order involves a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

*Woosley v. Woosley*, 2009 WL 3064791 (Bankr. M.D. Tn. 2009) – In considering whether to certify an interlocutory appeal the Bankruptcy Court must consider whether this is a final judgment as to an individual claim in a multiple claim case, and whether there is no just reason for delay. Where multiple claims share a common factual background or arise out of a single transaction, they should be considered a single claim even though different theories of liability may have been asserted and neither claim will be final until both have been decided. To determine whether there is "just reason" for delaying the appeal, the Court must consider (1) the relationship between the adjudicated and unadjudicated claims; (2) the



possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. A complaint that sought to declare a debt to be non-dischargeable under Section 523(a)(5), (a)(15) and (a)(2)(A), although involving the same damages, require proof of distinct elements, as does that portion of the Complaint that seeks to deny a discharge under Section 727. Allowing an interlocutory appeal of the Court's Order finding the debt to be non-dischargeable is in the best interest of judicial economy where the Plaintiff won on summary judgment, and a trial on the remaining issues would require potentially unnecessary litigation and expense that will neither increase nor decrease the amount of the Plaintiff's claim. If the Summary Judgment is affirmed on appeal, the other issues will become moot and no further litigation will be necessary. If this Court's Summary Judgment is reversed on appeal, the Court will be able to hold one trial that would address all of the Plaintiff's claims then remaining.

#### §14.14 Particular Orders Appealable

*Rogan v. Litton Loan Servicing, LP*, 2011 WL 4445651 (6<sup>th</sup> Cir. BAP 2011) – Bankruptcy court order dismissing an adversary complaint for failure to state claim upon which relief may be granted, or on motion for judgment on the pleadings, is a “final,” appealable order.

*Cappuccilli v. Lewis*, 2010 WL 2870668 (E.D. Mi. 2010) - Order holding party in contempt but not imposing sanctions does not become final and appealable order until entry of order imposing sanctions. Order of Contempt entered February 18 did not impose sanctions. April 12 Order that imposed sanctions was final appealable order. Notice of Appeal timely filed April 26 properly appealed both initial finding of contempt and imposition of sanctions.

*Mentag v. GMAC Mortgage, LLC*, Case No. 09-15012 (E.D. Mi. 2010) – Order Lifting Stay is “final order” for purposes of appellate jurisdiction.

*American Express Bank v. Askenaizer*, 418 BR 495 (1<sup>st</sup> Cir. BAP 2009) – Order allowing or disallowing Claim is final order for purposes of appeal. Order denying trustee's request for fees is also a final order for purposes of appeal.

#### §14.15 Particular Orders Not Appealable

*Rogan v. Litton Loan Servicing, LP*, 2011 WL 4445651 (6<sup>th</sup> Cir. BAP 2011) – Bankruptcy court order granting motion to set aside default judgment is interlocutory order, reviewable after entry of final judgment in underlying adversary proceeding.

*LaBoy v. Doral Mortgage Corp.*, 2011 WL 2119316 (1<sup>st</sup> Cir. 2011) – Summary Judgment which determined liability but did reach issue of damages is not final judgment for appeal purposes.

*Cappuccilli v. Lewis*, 2010 WL 2870668 (E.D. Mi. 2010) - Order holding party in contempt but not imposing sanctions does not become final and appealable order until entry of order imposing sanctions. Order of Contempt entered February 18 did not impose sanctions. April 12 Order that imposed sanctions was final appealable order. Notice of Appeal timely filed April 26 properly appealed both initial finding of contempt and imposition of sanctions.

*French v. Shapiro*, Case No. 10-11333 (E.D. Mi. 2011) – Order adjudicating party to be in civil contempt for violation of Court's stay orders is not final order for purposes of appeal. Order holding non-party in contempt is final order for purposes of appeal. Order of civil contempt entered as part of ongoing adversary proceeding would not be appealable until final disposition of adversary proceeding as a whole.

*Mashburn v. Scrivner*, 2010 WL 1220730 (10<sup>th</sup> Cir. 2010) - Appeal of partial final judgment revoking discharge is not appealable where Trustee had filed Motion to Alter or Amend Judgment as to second count

which sought turnover of property from debtors. Appeal was premature as Judgment which Debtor sought to appeal was not yet final. Timely Motion to Alter or Amend Judgment under Rule 59 operates to suspend finality of entire Judgment, even if Motion only directed to one part of the Judgment.

*Official Committee of Unsecured Creditors v. Anderson Senior Living Property, LLC*, Case No 09-8041 (6<sup>th</sup> Cir. BAP 2010) – Order denying Committee’s application to retain financial advisor is not final order for purposes of direct appeal. Court will grant discretionary review where order involves controlling issue of law as to which there is substantial ground for difference of opinion and immediate appeal may materially advance ultimate termination of litigation. Order denying retention of advisor does not meet standard for interlocutory appeal.

*K & B Capital, LLC v. Official Unsecured Creditors’ Committee*, 2009 WL 1747834 (6<sup>th</sup> Cir. 2009) –Order substituting counsel for Committee of Unsecured Creditors over objection of one member of creditor’s committee is not a “final order” over which the Court would have appellate jurisdiction. Order partially determining damages which expressly contemplated further hearings to determine whether certain of the damages awarded would ultimately be refunded to the creditor is not a final order as the order expressly contemplates further proceedings on the issue of damages. Order denying motion to withdraw a reference and have preceding adjudicated in District Court is a non-final, non-appealable order.

*CIT Small Business Lending Corp. v. Kendrick*, 558 F.3d 482 (6<sup>th</sup> Cir. 2009) – Bankruptcy Appellate Panel’s reversal of summary judgment in favor of defendant in a preference action is not a final, appealable order. Determination of whether the elements of a preference action were met is not “final” order as Order does not terminate judicial actions. “[A] decision by the district Court on appeal remanding the bankruptcy Court’s decision for further proceedings in a bankruptcy Court is not final, and so is not appealable to this Court, unless the further proceedings contemplated are of a purely ministerial character. ... Proceedings to prove the elements of a preference action are not ministerial, but instead concern the merits of the claim.”

*Buckeye Retirement Co. v. Swegan*, 555 F.3d 510 (6<sup>th</sup> Cir. 2009) – Bankruptcy Appellate Panel’s reversal of summary judgment in favor of Debtor in action to deny a discharge under section 727 is not a final, appealable order. BAP’s decision to remand for further proceedings is not “final” and, therefore, the Sixth Circuit lacks appellate jurisdiction. Reversal of a summary judgment contemplates further fact-finding by the bankruptcy Court.

*Settembre v. Fidelity & Guaranty Life Insurance Co.*, 552 F.3d 438 (6<sup>th</sup> Cir. 2009) –United States District Court’s reversal of summary judgment in creditors adversary proceeding objecting to Debtors discharge under section 727(a)(3) is not “final”. “[A] decision by the district Court on appeal remanding the bankruptcy Court’s decision for further proceedings in a bankruptcy Court is not final, and so is not appealable to this Court, unless the further proceedings contemplated her on a purely ministerial character.” Proceedings to determine Debtors entitlement to a discharge are not ministerial, but instead concern the merits of the claim.

*Sparks v. HSBC Auto Finance*, 2008 WL 4694795 (6<sup>th</sup> Cir. 2008) – Order denying confirmation of Chapter 13 plan without also dismissing the case is not a final, appealed the order. Appellate Court lacks jurisdiction to review order that denies confirmation and orders Debtor to file amended plan.

*Doucet v. Drydock Coal Co.*, 2009 WL 1687775 (6<sup>th</sup> Cir. BAP 2009) – Order denying Motion to Dismiss for lack of jurisdiction is not appealable. Order is final and appealable only when case is finally concluded and there are no matters pending before the Court. Order denying Motion to Dismiss by definition contemplates further judicial involvement.

*Black Diamond Mining Co., LLC., v. Official Committee of Unsecured Creditors*, 400 BR 207 (6<sup>th</sup> Cir. BAP 2009) – Order denying Application for Retention of Counsel is non-final, non-appealable order.

#### E. Stay Pending Appeal

##### §14.16 Jurisdiction to Enter Stay

*In re Scarborough*, 2010 WL 2893626 (3d Cir. 2010) – Court lacks jurisdiction to consider stay pending appeal where court does not have jurisdiction over appeal itself. Debtor appealed Bankruptcy Court decision to dismiss case. Debtor sought stay from Bankruptcy Court which denied Motion. Debtor then sought stay from District Court where appeal was pending, which also denied Motion. Debtor then requested stay from Third Circuit Court. Court dismissed Motion as Circuit Court did not have jurisdiction to rule in appeal pending before District Court.

#### §14.17 Elements of Stay

*In re Rahim*, 2011 WL 833804 (E.D. Mi. 2011) – Motion for stay of dismissal of Chapter 7 case denied. Debtor failed to demonstrate any likelihood of success on merits where Bankruptcy Court dismissed case as abuse where debtors had income of \$39,000 per month and claimed expenses of \$39,000 per month including 3 homes, 3 luxury automobiles, and expensive private school tuition. Debtors also failed to demonstrate irreparable harm. Possible future collection activities by creditors are not “irreparable” harm. Creditors would suffer substantial harm from further delays in enforcing claims. Public interest would not be furthered where underlying bankruptcy case substantially challenged the integrity of the bankruptcy process.

*In re Seidel*, 443 BR 411 (Bankr. S.D. Ohio 2011) – When considering a motion for a stay pending appeal, Court must consider (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Attorney failed to demonstrate basis for stay of order that required Attorney to disgorge to the Debtor's credit card issuer the fees and costs which he received through credit card charge, (2) suspended the “no look fee” for Chapter 13 cases filed by Attorney, (3) required Attorney to complete six hours of bankruptcy ethics instruction satisfactory to the Court, (4) required Attorney to submit to the Court a list of all bankruptcy clients from the last five years who paid attorney's fees or costs using a credit card, and (5) directed the United States Trustee to investigate Attorney's practice to determine whether further action should be taken. Motion for stay denied where attorney failed to demonstrate any of required elements.

*Hock v. Stevenson*, 2011 WL 2173837 (E.D. Mi. 2011) – Motion for Stay Pending Appeal denied where appellant, Buyer at foreclosure sale, lacked standing to appeal Order Revoking Abandonment. Reopening case and revoking abandonment does not alter the rights or status of the buyer. Appellant could not demonstrate any likelihood of success where Appellant did not even have standing to prosecute the appeal.

*In re Forum Health*, 2011 WL 1680417 (Bankr. N.D. Ohio 2011) – In deciding whether to grant stay pending appeal from earlier order of bankruptcy court allowing debtors to voluntarily dismiss their Chapter 11 cases, court would consider the following: (1) likelihood that the party seeking stay would prevail on merits of appeal, (2) likelihood that moving party would be irreparably harmed absent a stay, (3) prospect that others would be harmed if stay were granted, and (4) the public interest in granting a stay; however, these factors were not prerequisites that had to be met, but interrelated considerations that had to be balanced together. Court denied stay where creditors could not prove harm would result if stay was denied and granting stay would have effect of forcing not-for-profit debtor to remain in case involuntarily in violation s letter and spirit of Bankruptcy Code which exempts non-profit corporations from involuntary petitions.

*In re Greene*, 2011 WL 1500120 (Bankr. E.D. Tn. 2011) – Request for Stay is based upon the same factors traditionally considered concerning preliminary injunctions: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Creditor could not demonstrate likelihood of success in appeal that voided lien where lien was never properly recorded prior to commencement of bankruptcy case. Creditor also failed to prove irreparable harm where debtor has not sought permission to sell property. If judgment is reversed on appeal, property will still be subject to Bankruptcy Court jurisdiction for purposes of preserving creditor's alleged mortgage interest.

*In re Mains*, 451 BR 428 (Bankr. W.D. Mi. 2011) – Stay of proceedings pending appeal is to be determined based on what best protects interests of all parties. Debtor seeking to stay dismissal of Chapter 13 case pending appeal must show strong or substantial likelihood of success; that debtor will suffer irreparable harm if the proceedings are not stayed; whether the stay would substantially injure other parties; and where the public interest lies. Debtors failed to demonstrate substantial likelihood of success. Although issue of whether debtors must include Social Security income for funding of plan has not been conclusively determined in Sixth Circuit, substantial body of case law exists to hold that good faith requires debtors to contribute Social Security notwithstanding exclusion from CMI calculation.

*In re Amir*, 2010 WL 3522474 (Bankr. N.D. Ohio 2010) – Debtor's Motion for Stay of BAP decision pending appeal to Sixth Circuit must be presented to BAP for consideration. Bankruptcy court lacks authority to stay BAP opinion pending appeal. To extent Debtor's Motion seeks to stay Bankruptcy Court Order that gave rise to BAP decision and to subsequent appeal to Sixth Circuit, Motion denied where Appellant failed to demonstrate any likelihood of success on merits. Appellant failed to timely file objections to claims. Debtor's belated amended objections failed to proffer evidence or a legal basis to defeat *prima facie* validity of a claim under Rule 3001(f). All of the grounds alleged by Debtor were presented to, and rejected by, the BAP in its August 5, 2010. Absence of a stay of a decision disallowing objections to claims will not irreparably harm the debtor where appeal will be decided before any funds are ever distributed to creditors. Public interest would be better served by having case go forward without a stay.

*In re Grass*, 2010 WL 3553273 (Bankr. S.D. Ohio 2010) – When considering a motion for a stay pending appeal, Court must consider (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. Bank that admitted it had violated automatic stay did not present any likelihood of success on merits of appeal of Order imposing sanctions for stay violation. Denial of stay posed no risk to Bank where property could not be sold without notice to creditors and approval of court, which would afford Bank opportunity to be heard on issue. Granting of stay would adversely affect debtor and remaining creditor body as stay would prevent confirmation of debtor's Chapter 13 Plan and would delay commencement of payments to creditors.

*In re Davis*, Case No. 10-40065 (Bankr. E.D. Mi. 2010) – Rule 8005 allows court to stay order pending appeal if appellant has a strong or substantial likelihood of success on appeal and appellant would suffer irreparable harm if the stay is not granted, and where other parties would not suffer substantial injury from stay. Debtor's Motion denied where Motion failed to offer any explanation as to why Debtor did not respond to Creditor's Motion for Relief From Stay, thereby admitting essential elements of request for relief. Debtor's appeal was predicated on argument that sheriff sale was not conducted by a person duly appointed to conduct sales, but Debtor failed to produce any support for this allegation. Debtor would not be prejudiced as effect of order is only to grant stay relief, and Debtor is free to assert any defenses he has in the State Court proceeding. Granting stay would merely enable Debtor to continue to unnecessarily delay Creditor and increase litigation expenses.

*Syllabi v. US Bank, N.A.*, 2010 WL 2817187 (Bankr. N.D. Ohio 2010) Factors for Court to consider in evaluating Motion for Stay Pending Appeal are (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. The movant bears the burden of proof, providing specific facts and affidavit supporting assertions that these factors exist. Defendant's conclusory statement that "it has substantive issues of merit to present on appeal regarding the specific acknowledgment at issue in this adversary proceeding" falls short of demonstrating Defendant is likely to succeed on the appeal. Defendant's failure to show that it is likely to succeed on the appeal is not fatal because the balancing of the factors could still tip in Defendant's favor. Defendant's argument concerning irreparable harm focus on the loss of rights as a secured creditor, more specifically its inability to drive the foreclosure process fails to demonstrate harm that is both certain and immediate, rather than speculative or theoretical. If Trustee sells the property while the appeal is



pending, Defendant's lien will attach to the proceeds. Only upon final disposition of the appeal will the proceeds be distributed, thereby protecting Defendant's secured status. Defendant's arguments focused on speculation and conjecture, not specific and irreparable harm. The stay could hinder other creditors because there will be no immediate distribution regardless of whether the stay is approved. Delaying the sale could mean a decline in value, either through market forces or deterioration. Any expenses incurred in maintaining or securing the property would be funded by the estate, depleting resources. Motion for Stay denied.

*Spring Creek Airpark, Inc. v. Roswell Holding, LLC*, 2010 WL 2573745 (W.D. Ky. 2010) - A motion for a stay of the judgment, order, or decree of a bankruptcy judgment ordinarily be presented to the bankruptcy judge in the first instance. Only after the bankruptcy court has failed to grant the stay or has failed to grant it on terms acceptable to the appellant that the appellant may seek relief in the district court in accordance with the provisions of Rule 8005. Court must consider the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction - (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. A movant seeking a stay pending review will have greater difficulty in demonstrating a likelihood of success on the merits and must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal. Movant need not establish a high probability of success on the merits but must movant show serious questions going to the merits. Appellant not entitled to stay of Order Granting Relief From Stay. Decision to lift stay is committed to the discretion of the Court, and will be overturned only upon a showing of abuse of discretion.

*Countrywide Home Loans, Inc. v. McDermott*, 2009 WL 3259131 (N.D. Ohio 2009) – Appellate Court has authority to stay enforcement of a judgment to preserve the rights of the parties during the pendency of the appeal and to ensure that the Appellate Court can responsibly fulfill its role in the judicial process. A stay is an exercise of judicial discretion and not a matter of right. Court must consider : (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Bankruptcy Court sanctioned creditor who filed Proof of Claim and Objection to Confirmation in Chapter 13 Case notwithstanding that Creditor had satisfied loan more than 18 months prior to the Petition Date. Bankruptcy Court Order required Creditor to submit a four-page Worksheet, created by the bankruptcy judge, whenever Creditor submits a proof of claim in any case before that judge; and to file the same Worksheet as a supplement to all proofs of claim Creditor had filed in previous cases pending on that judge's docket. Creditor made “compelling arguments” that the bankruptcy judge exceeded her authority under any statute and/or federal or local bankruptcy rule to require Creditor to use a Worksheet that arguably amounts to an improper judicial amendment/revision of Official Bankruptcy Form 10. If a stay is not granted and Creditor ultimately prevails on its appeal, irreparable harm will have been suffered by Creditor as Creditor will have been required to implement a new protocol tailored specifically for cases pending before a single bankruptcy judge at considerable cost. Stay will be of relatively short duration as District Court “is committed to resolving the bankruptcy appeal as soon as possible after the briefing is complete”.

*Indiana State Police Pension Trust v. Chrysler, LLC.*, 129 S.Ct. 2275 (2009) – Supreme Court would not stay Order approving sale of assets pending appeal. In determining whether to grant a stay, Court considers whether the applicant has demonstrated (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay. In a close case Court will also balance the equities and assess the relative harms to the parties as well as the interests of the public at large. “A stay is not a matter of right, even if irreparable injury might otherwise result.” Party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.

*In re Noble International, Ltd.*, 2009 WL 1607704 (E.D. Mi. 2009) – In determining whether to grant a stay in a bankruptcy appeal, the Court must balance four factors: (i) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (ii) the likelihood that the moving party will be irreparably harmed



absent a stay; (iii) the prospect that others will be harmed if the Court grants the stay; and (iv) the public interest in granting the stay. Court has authority to impose a limited stay until Court can conduct a more thorough review of the Bankruptcy Court's actions where Court is waiting on transcript of bankruptcy proceedings. Debtor did not face high likelihood of harm in the event a stay is granted for a limited time.

#### §14.18 Scope of Stay

*In re Noble International, Ltd.*, 2009 WL 1607704 (E.D. Mi. 2009) – Court has authority to impose a limited stay until Court can conduct a more thorough review of the Bankruptcy Court's actions where Court is waiting on transcript of bankruptcy proceedings. Debtor did not face high likelihood of harm in the event a stay is granted for a limited time. Stay limited to actual closing of the sale and parties are free to take all steps and perform due diligence and conduct any necessary discovery in effort to prepare for closing.

#### §14.19 Effect of Failure to Obtain Stay - Mootness

*Coleman v. ANMP*, 2011 WL 1979855 (9<sup>th</sup> Cir. 2011) – Appeal of confirmation of plan of reorganization of Chapter 11 plan that called for sale of debtor's business rendered moot by Section 363 where appellant did not obtain stay of proposed sale pending appeal.

*Asset Based Resource Group, LLC v. United States Trustee*, Case no. 09-2860 (8<sup>th</sup> Cir. 2010) – Sale free and clear of liens with liens to attach to proceeds is a sale under Section 363(b) to which Section 363(m) applies. When sale closed without stay pending appeal, appeal must be dismissed as moot where effect of order reversing the order approving the sale would affect the validity of the underlying sale itself. Challenge to portion of order that permitted sale free and clear of liens, if reversed on appeal, would effectively unwind the sale. Appeal dismissed as moot.

*In re Hake*, Case No. 08-8039 (6<sup>th</sup> Cir. BAP 2008) – Bankruptcy Court Order to Show Cause why *pro hac vice* status should not be revoked did not become moot merely because Counsel agreed to voluntarily withdraw his *pro hac vice* admission. “A disciplinary action and consequent disqualification may expose counsel to further sanctions by the bar and portends adverse effects upon counsel's career and public image. The effects of disqualification will linger long after the closing of the case. The controversy thus remains live and demands consideration. ... [T]he ‘brand of disqualification’ on grounds of dishonesty and bad faith could well hang over his name and career for years to come.” Filing of Motion to Withdraw as Counsel did not moot Court's Show Cause Order regarding whether counsel had engaged in argumentative, disrespectful, and antagonistic conduct toward bankruptcy Court.

*City of Akron v. Akron Thermal, LP*, 2009 WL 1707907 (N.D. Ohio 2009) – In determining whether a bankruptcy appeal is equitably moot, Court must weigh: (1) whether a stay has been obtained; (2) whether the plan has been ‘substantially consummated’; and (3) whether the relief requested would affect either the rights of parties not before the Court or the success of the plan. Concept of “equitable mootness” is designed to protect parties relying upon the successful confirmation of a bankruptcy plan from a drastic change after appeal and is designed to protect parties settled expectations and the ability of a Debtor to emerge from bankruptcy. Equitable mootness will not prevent appeal of portions of Confirmation Order where outcome of appeal would not require abandonment of plan or substantially upset the plan of reorganization. Thus, appeal could proceed to determine amounts owed under assumed lease where outcome would not result in termination of lease and Court could fashion relief that would not disrupt confirmed plan. Issues dealing with whether plan should have been confirmed in the first instance and whether plan complied with Section 1129 were equitably moot where outcome of appeal would be to overturn confirmation order and eviscerate the plan.

*Official Committees of Unsecured Creditors v. Anderson Senior Living Property, LLC*, 2009 WL 1617860 (6<sup>th</sup> Cir. 2009) – Committee's appeal of a Court Order granting Debtor authority to sell property held as tenants in common is moot and must be dismissed where the Court Order was not stayed and the sale has closed. The requirement under section 363 (m) at a party seeking to appeal any sale of assets must obtain a stay in order to prevent the sale order from becoming moot does not create an exception where the

appealing party is one co-owner of the property being sold. Section 363(m) whenever a party fails to obtain a stay from an order permitting the sale of the Debtor's assets.

*Official Committees of Unsecured Creditors v. Anderson Senior Living Property, LLC*, Case No. 09-5817 (6<sup>th</sup> Cir. BAP 2010) – Committee's appeal of a Court Order granting Debtor authority to sell property held as tenants in common is moot and must be dismissed where the Court Order was not stayed and the sale has closed. The requirement under section 363(m) at a party seeking to appeal any sale of assets must obtain a stay in order to prevent the sale order from becoming moot does not create an exception where the appealing party is one co-owner of the property being sold. Section 363(m) whenever a party fails to obtain a stay from an order permitting the sale of the Debtor's assets.

*In re Nashville Sr. Living, LLC*, 407 B.R. 222 (6<sup>th</sup> Cir. BAP 2009). Unstayed order approving sale to good faith buyer mooted appeal from portion of order allowing sale of non-debtor's interest.

#### §14.20 Supersedeas Bond

*Newton v. Bank of America*, 2011 WL 2112410 (Bankr. E.D. Tn. 2011) – Federal Rule of Bankruptcy Procedure 7062 allows for an appellant to obtain a stay by posting a supersedeas bond only where the matter involves a money judgment. Where the judgment is non-monetary, Rule 62 does not apply. Court order allowing Trustee to sell property free and clear of holder of unrecorded lien was not "money judgment". Further, proposed bond of \$10,000 could not possibly cover the actual damages from the loss of a sale for \$170,000.00.

### F. Appeal Costs

#### §14.21 Appeal Bond

*In re Countrywide Financial Corp. Customer Data Security Breach Litigation*, 2010 WL 5147222 (W.D. Ky. 2010) – Federal Rule of Appellate Procedure 7 permits court to condition right to appeal on posting of bond to ensure payment of costs on appeal if appellee prevails. In determining necessity and amount of bond, court must consider '(1) the appellant's financial ability to post a bond, (2) the risk that the appellant would not pay appellee's costs if the appeal loses, (3) the merits of the appeal, and (4) whether the appellant has shown any bad faith or vexatious conduct.

#### §14.22 Taxable Costs

*In re Countrywide Financial Corp. Customer Data Security Breach Litigation*, 2010 WL 5147222 (W.D. Ky. 2010) – Prevailing party to appeal may recover taxable costs as specified in 28 USC Section 1920 and Federal Rule of Appellate Procedure 39, including (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; (4) the fee for filing the notice of appeal; (5) marshal and clerk fees; (6) court reporter fees; (7) printing and witness fees; (8) copying fees; (9) docket fees; and (10) compensation of court appointed experts and interpreters. Attorney fees are taxable as costs only if provided for in underlying statutes or contracts on which cause of action is based.

#### §14.23 Sanctions – Frivolous Appeal

*Smith v. Silverman*, 2011 WL 1901040 (2d Cir. 2011) – Appellate court had authority to impose sanctions for frivolous appeal. Bankruptcy Court and District Court both warned appellant that conduct in litigation and appeal were borderline sanctionable, yet appellant pressed same issue on further appeal to Circuit Court. Sanctions equal to double costs plus additional damages where appellant pursued patently frivolous appeal and forced appellee to defend vexatious litigation.

*In re Messina*, 2011 WL 2006903 (7<sup>th</sup> Cir. 2011) – Federal Rule of Appellate Procedure 38 allows Court to award sanctions against appellant who brings frivolous appeal. Debtor's third appeal of same issue, having

lost two prior appeals of the same issue, is patently frivolous. Sanctions included award of double attorney fees and costs incurred by appellee.

*WMS Motor Sales, Ltd. v. Reese*, 2011 WL 1882383 (6<sup>th</sup> Cir. BAP 2011) – Court would impose sanctions against attorney who filed frivolous appeal. Appeal from Order denying dischargeability was not timely filed and appeal was dismissed. Attorney then appealed that dismissal. Court held that the appeal of dismissal was frivolous as there was no basis in the law to allow an untimely filed notice of appeal. Further, appellee wrote letter to court advising that appellee had never authorized attorney to file appeal. Bankruptcy Court properly entered sanctions against attorney for frivolous appeal in the amount of attorney fees expended by appellee in dealing with frivolous appeal.

#### G. Dismissal

##### §14.24 Voluntary Dismissal

##### §14.25 On Motion by Party

*Spring Creek Airpark, Inc., v. Roswell Holding, LLC*, 2010 WL 2573745 (W.D. Ky. 2010) - Appellant's designation of record included entire bankruptcy court record and failed to timely file statement of issues on appeal. Blanket designation of the bankruptcy court record is improper. Purpose of designation is to afford the reviewing court a complete understanding of the case. Designation that provides for all documents filed in the Bankruptcy case amounts to no designation at all. District Court has discretion to dismiss appeal where appellant fails to comply with non-jurisdictional rules and requirements. Dismissal of an appeal, however, is rarely an appropriate action. Power to dismiss should not be exercised unless omission arose from negligence or indifference of appellant - where good faith is shown, the court may direct that the omission be corrected by a supplemental transcript or remand the cause for a finding on controverted fact questions. Usual practice is to direct that the omission be corrected.

*Stevenson v. Siciliano, Mychalowych, Van Dusen and Feul, P.C.*, 2010 WL 2671311 (E.D. Mi. 2010) - Rule 8006 requires appellant to file with the Clerk of the Appellate Court a designation of record and statement of issues on appeal within 14 days of filing Notice of appeal. Time limits under Rule 8006 are not jurisdictional. Dismissal of bankruptcy appeal is unjustified where the appellant filed a timely notice of appeal but an untimely designation of record and statement of issues absent evidence of bad faith, negligence or indifference. Case would not be dismissed where designation of record and statement of issues were timely but inadvertently filed with the Bankruptcy Court and error was corrected and designation and statement re-filed in District Court only 2 days later. Delay was minimal, resulted in no prejudice to any party, and was result of good faith error rather than bad faith or negligence.

*Cappuccilli v. Lewis*, 2010 WL 2870668 (E.D. Mi. 2010) - Delay in filing Designation of items to be included in the record not basis for dismissal of appeal. Rule 8006 requires designation to be filed within 14 days of the filing of the Notice of Appeal. Party incorrectly calculated time to run from date Clerk of Bankruptcy Court issued Notice of Requirement to File Designation and filed Designation 4 days after the time had expired under Rule 8006 but within 14 days of Bankruptcy Notice. Rule 8001 provides that any action other than timely filing a notice of appeal is not jurisdictional. Failure to timely comply with any other requirement may be a basis for dismissal but does not automatically require dismissal. Court should not dismiss appeal for technical non-compliance unless non-compliance results from negligence or indifference. Delay did not result from negligence or indifference but rather from a reading of the Bankruptcy Court Notice that appeared to require the Designating within 14 days of issuance of that Notice.

##### §14.26 Dismissal by Court *Sua Sponte*

*Hancock v. McDermott*, 2011 WL 1878240 (6<sup>th</sup> Cir. 2011) – District Court correctly summarily affirmed lower court's decision without consideration of merits. Appellant engaged in a clear pattern of delay and contumacious conduct and a lesser sanction would be insufficient. Appellant did not file any brief in the district court until more than 7 months after filing the notice of appeal; the brief as filed completely

disregarded both the district court filing requirements and the bankruptcy rules including being more than 100 pages in length notwithstanding rule limiting initial briefs to 50 pages; appellant ignored district court's first order to show cause and responded to second order to show cause with disrespectful remarks and unacceptable explanations for delays; and district court had acted with considerable leniency, giving appellant the opportunity to make proper filings. Summary affirmance by district court was not motivated by failure of technical compliance, but rather by pattern of flagrant non-compliance.

*In re Nora*, 2011 WL 1395566 (7<sup>th</sup> Cir. 2011) – Court properly dismissed appeal where appellant failed to file brief after extended delays and repeated extensions of time. Appeal can be dismissed where court finds that appellant is willfully failing to prosecute appeal. Court must balance seriousness of misconduct, potential for prejudice, and possible merits of action. Debtor's failure to file initial brief even after multiple extensions coupled with debtor's statement that her physical condition may prevent her from ever filing a brief essentially requested indefinite extension of time. Debtor also failed to explain why her physical condition prevented her from submitting a brief when debtor was simultaneously actively litigating in bankruptcy court and had filed numerous substantive motions in the Bankruptcy case.

*French v. Shapiro*, Case No. 10-11333 (E.D. Mi. 2011) – Appeal of Order Dismissing Adversary proceeding without prejudice to refile upon termination of stay imposed by Bankruptcy Court dismissed as moot. Bankruptcy Court subsequently lifted the stay to permit plaintiff to refile adversary proceeding. Appellate Court could not provide any meaningful relief where Appellate court could only confirm that plaintiff had the right to file the complaint, as plaintiff is now free from any prohibition against re-filing.

*In re Wathen*, 2011 WL 9042 (9<sup>th</sup> Cir. 2011) – Bankruptcy appeals became moot when Bankruptcy Court dismissed underlying bankruptcy case for reasons unrelated to issues on appeal. Appeal dismissed for lack of jurisdiction.

*In re Hann*, 2009 WL 2872813 (E.D. Mi. 2009) - Court has inherent authority to dismiss appeal sua sponte for lack of subject matter jurisdiction or where the allegations are totally implausible, attenuated, a substantial, frivolous, or devoid of merit.

*Hamel v. Lalliss*, 2010 WL 1141489 (9<sup>th</sup> Cir. 2010) - Appellant's failure to provide transcripts of lower court proceedings rendered it impossible to understand basis of bankruptcy court order, precluding effective review.

#### §14.27 Reconsideration of Dismissal

*Lewis v. McClatchey*, 2009 WL 1607773 (S.D. Ohio 2009) – Rule 60 permits Appellate Court to grant relief from Order dismissing appeal where dismissal is based on fraud, misrepresentation or misconduct by opposing party; or where Court lacked jurisdiction over the subject matter or over the parties or if it acted in a manner inconsistent with due process. Unintelligible allegations of alleged fraudulent conduct by purchaser of property from bankruptcy trustee constitute mere disagreements with Court's analysis of purchaser's Motion to Dismiss and do not demonstrate fraud by any opposing party. Motion for Reconsideration failed to allege any viable theory under which the Appellate Court would have lacked jurisdiction over the subject matter or the parties and Movant failed to demonstrate any alleged inconsistency with due process.

### H. Issues on Appeal

#### §14.28 Mootness

*Siolon v. Allard*, 2011 WL 2160267 (E.D. Mi. 2011) – Settlement of issue pending on appeal deprives court of “case or controversy” requiring dismissal of the appeal as moot.

*Alvarez v. Smith*, Case No. 08-351, \_\_\_\_ U.S. \_\_\_\_ (2009) – United States Constitution permits Federal Courts to decide legal questions only in the context of an actual case or controversy. If at any point during

the pendency of the case the “actual controversy” ceases to exist, the Court must dismiss the case. Action becomes moot for appellate purposes when appellate court can no longer fashion effective relief. In action between individuals and State regarding seized property, action became moot when State returned property to individuals and there were no pending claims for damages. When action becomes moot as a result of the passage of time or “happenstance”, appellate court should dismiss case as moot and also vacate the order being appealed, in order to avoid prejudicing any party in the event of future litigation. When case becomes moot as a result of a settlement between the parties, appellate court will not ordinarily vacate lower court order as the settlement constitutes a waiver by the losing party of their legal remedies.

*B-Line, LLC v. Wingerter*, 594 F.3d 931 (6<sup>th</sup> Cir. 2010) – Lower Court conclusion that creditor violated Rule 9011 is not rendered moot for appellate purposes where Lower Court has elected not to impose sanctions. Mootness results when subsequent events render court unable to grant effective relief. The Lower Court’s conclusion that creditor’s conduct violated Rule 9011 not rendered moot merely because no sanctions are imposed. Finding that creditor violated Rule 9011 has serious and significant consequences for the Creditor including potentially subjecting Creditor to future sanctions and would have necessitated complete restructuring of Creditor’s business operations.

#### §14.29 Consideration by Lower Court

*In re Mayer*, 41 BR 702 (E.D. Mi. 2011) – Ordinarily an appellate court does not give consideration to issues not raised in the Bankruptcy Court. Further, raising an issue at the Court below does not mean that all arguments related to that issue are preserved. Court may deviate from general rule in exceptional case, if declining to review issues for the first time on appeal would produce a plain miscarriage of justice, or if appeal presents a particular circumstance warranting departure; or if doing so would serve an overarching purpose other than simply reaching the correct result in this case. Court should address an issue presented with sufficient clarity and requiring no factual development if doing so would promote the finality of litigation in this case. Court permitted Debtor to raise additional issues regarding constructive trust where the challenged issues (1) are purely legal, (2) require no further factual development, and (3) have been fully briefed by the parties in their respective appellate pleadings; and a resolution of the contested issue would likely promote finality in the litigation.

*Ershowsky v. Freedman*, 2011 WL 2078644 (11<sup>th</sup> Cir. 2011) – Issues not presented to District Court on appeal from Bankruptcy Court Order are waived for purposes of further appeal. Appellate Court will only consider issues raised at lower court. Only exceptions are (1) whether the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice; (2) whether the appellant had an opportunity to raise the objection in the trial court; (3) whether the interest of substantial justice is at stake; (4) whether the proper resolution is beyond any doubt; and (5) whether the issue presents significant questions of general impact or great public concern.

*B.O.C. Law Group, P.C. v. Carroll*, 2011 WL 2148603 (E.D. Mi. 2011) – Appellee may, without taking cross appeal, urge affirmance on any basis appearing in record even if the argument is based on matters overlooked or ignored by the lower court. Party’s failure to advance at the lower court an argument raised by the lower court *sua sponte* does not amount to waiver of that issue on appeal.

*Gold v. Deloitte & Touche, LLP*, Case No. 0814567 (E.D. Mi. 2009) – Appellate Court ordinarily will not consider issues which were not raised and litigated below. Trustee did not raise argument that doctrine of “adverse domination” operated to toll applicable statute of limitations before lower Court. Although appellate Court can consider purely legal issues which were not raised at the lower Court, doctrine of “adverse domination” requires substantial factual inquiry.

#### I. Record on Appeal

##### §14.30 Redaction of Transcript

*In re Immanuel, LLC*, 2011 WL 1522335 (Bankr. W.D. Mi. 2011) – Court’s Administrative Order allows party to request that electronic transcript redact personally identifiable information within scope of Rule



9037. Party's request to redact information that does not constitute personally identifiable information denied without prejudice to party filing Motion for Protective Order if party believes grounds exist.

J. Standards of Review

§14.31 Question of Law

§14.32 Question of Fact

*Brock v. Hammonds*, 2011 WL 2646549 (6<sup>th</sup> Cir. BAP 2011) - The bankruptcy court's findings of fact are reviewed under the clearly erroneous standard, and its conclusions of law are reviewed de novo. Under the clearly erroneous standard, the Panel must give deference to the bankruptcy court as the finder of fact. If the court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

**XV. Avoidable Transfers**

A. Trustee Strong Arm Powers

§15.1 Trustee as Judicial Lien Creditor

*Gold v. Pasternak*, Adv. No. 11-5504 (Bankr. E.D. Mi. 2011) – Trustee could avoid under strong arm powers a security interest that is not properly perfected. Financing statement must be filed to perfect security interest in inventory. Financing statement must be filed in the name of the debtor. Financing Statement filed under name of Corporation's "registered trade name" is not filed under Corporate name and is not sufficient under Michigan law. Registration by Corporation of Assumed Name does not make Assumed name the Corporate Name.

*Rogan v. Litton Loan Servicing, LP*, 2011 WL 4445651 (6<sup>th</sup> Cir. BAP 2011) – Section 544(a)(1) allows the Trustee to avoid a security interest that is not perfected or is improperly perfected before the bankruptcy petition is filed. Under Kentucky law, a mortgage may not be enforced absent proof of a valid and enforceable debt. Mortgagee who holds mortgage but is not the holder of the underlying note holds unperfected security interest that can be avoided by Trustee. Trustee's complaint alleging that second mortgage holder did not hold note was sufficient to state cause of action, and could be defeated only by affirmative evidence that as of the date of the petition, the mortgage holder was also the holder of the underlying debt. Section 544 cannot be used to attack alleged post-petition transfers of the mortgage and note, as Section 544 applies only to the facts as they exist on the date of filing. Post-petition transfers may be contested, if at all, only as objections to a Proof of Claim.

*Vanderbilt Mortgage and Finance, Inc. v. Westenhoefer*, 2011 WL 4356358 (E.D. Ky. 2011) – To perfect lien in manufactured home that is not affixed to realty, title lien statement is submitted to the county clerk of the county of the debtor's residence which will then note the security interest on the certificate of title by entering the information into State computer system and produce a certificate of title. Lien not properly perfected where title lien statement was filed in county other than the one in which debtor resided. Trustee avoided lien under Section 544. Court cannot ignore plain language of statute to reach result which party contends "must have been intended" by legislature.

*Higgason v. Vanderbilt Mortgage and Finance, Inc.*, 2011 WL 4433620 (Bankr. E.D. Ky. 2011) – To perfect lien in manufactured home that is not affixed to realty, title lien statement is submitted to the county clerk of the county of the debtor's residence which will then note the security interest on the certificate of title by entering the information into State computer system and produce a certificate of title. Lien not properly perfected where lien was not noted on certificate of title prior to commencement of case. Further,

even if lien had been noted, lien was not properly perfected where title lien statement was filed in county other than the one in which debtor resided. Trustee avoided lien under Section 544.

*Lim v. Anton*, Case No. 10-41460 (Bankr. E.D. Mi. 2011) – Trustee could avoid sale of boat where certificate of title was not signed by the seller and the buyer never filed the Bill of Sale with the Coast Guard. Vessel was registered with Coast Guard. Ship Mortgage Act requires any transfer of an interest in a registered vessel to be recorded with the Coast Guard to be perfected. Buyer's attempt to record the transfer with the Coast Guard post-petition would not perfect transfer as recording did not occur within any "safe harbor" period for perfection.

*Westnhoefer v. Vanderbilt Mortgage & Finance, Inc.*, 2011 WL 1984061 (Bankr. E.D. Ky. 2011) – Lender's recording of lien on mobile home with the county clerk in a county other than the county in which the debtor resided failed to comply with State law regarding perfection, leaving lien unperfected and subject to avoidance under Section 544 and Section 550.

*Palmer v. Vanderbilt Mortgage and Finance, Inc.*, 2010 WL 5421148 (Bankr. E.D. Ky. 2010) – Lender's recording of lien on mobile home with the county clerk in a county other than the county in which the debtor resided failed to comply with State law regarding perfection, leaving lien unperfected and subject to avoidance under Section 544 and Section 550.

*Degirolamo v. Suntrust Mortgage, Inc.*, 2010 WL 3489059 (Bankr. N.D. Ohio 2010) – "Mere defect" in execution of mortgage results in the mortgage company holding an equitable lien against the property which cannot be avoided by judicial lien creditor. Therefore, Trustee cannot avoid mortgage under Section 544(a)(1).

*Rogan v. Mila, Inc.*, 2010 WL 3168094 (Bankr. E.D. Ky. 2010) – Trustee attacked validity and enforceability of mortgage where Note was payable to Mila, Inc., but Mortgage defined the mortgagee as MERS. Split between payee of note and named mortgagee did not render mortgage subject to avoidance by hypothetical judicial lien creditor where mortgage was properly recorded prior to the commencement of the bankruptcy case and provided record perfection of the mortgage as a matter of law.

*Sovereign Bank v. Hepner*, 2010 WL 2816472 (10<sup>th</sup> Cir. 2010) – State law controls priority of obligations and determines whether trustee status as lien creditor is superior to unrecorded interest. Under Colorado law, creditor has 20 days from delivery of automobile to buyer to perfect lien on title superior to any lien creditor attaching the collateral in the meantime. Debtor's bankruptcy filing within that 20 day window would not permit trustee to avoid Bank's security interest which was properly perfected post-petition but within 20 day safe harbor.

*Stockton Mortgage Corporation v. Schlarman*, 2010 WL 2667390 (Bankr. E.D. Ky. 2010) – Trustee has power under Section 544 to avoid any transfer of property that would be voidable against a creditor holding a judicial lien. Mortgage against property owned by Debtor and co-owner that defined "Borrower" only as the co-owner did not constitute a grant of the mortgage against Debtor's interest in the property. Under Kentucky law, party must be named in the body of the mortgage for the mortgage to be effective as to third parties. Signature by Wife as "Borrower" does not constitute identification of the Wife as a grantor in the body of the mortgage itself. Debtor's interest in the Property is not encumbered by the Mortgage executed by only Northcutt because the Debtor and Northcutt held the property as joint tenants, and one party could not encumber the Property as a single, indivisible estate. Accordingly, the Trustee holds superior title to the extent of that interest.

*Johnson v. BAC Home Loans Servicing, L.P.*, 2010 WL 2667393 (Bankr. E.D. Ky. 2010), *aff'd*, 2011 WL 3608095 (6<sup>th</sup> Cir. 2011) – Trustee has power under Section 544 to avoid any transfer of property that would be voidable against a creditor holding a judicial lien. Mortgage against property owned by husband and wife that defined "Borrower" only as the Husband did not constitute a grant of the mortgage against Wife's interest in the property. Signature by Wife as "Borrower" does not constitute identification of the Wife as a grantor in the body of the mortgage itself. Accordingly, Mortgage failed to provide records notice of any claim against Wife's interest in the property, rendering the mortgage avoidable pursuant to Section 544.

*Rogan v. Citimortgage, Inc.*, 2010 WL 2926050 (Bankr. E.D. Ky. 2010) - Mortgage that named MERS as mortgagee not subject to attack by judicial lien creditor where mortgage defined MERS as "nominee" for Lender and granted MERS the power of sale and enforcement. MERS later assignment of mortgage to Citimortgage was valid where assignment appeared regular on face and MERS passed corporate resolution ratifying signature on assignment. Attached promissory note included blank endorsement converting note into bearer instrument, and transfer of note operated to transfer security interest attached to note by operation of Kentucky law. Citimortgage held original note endorsed in blank, giving Citimortgage right to enforce mortgage.

*Limor v. First National Bank of Woodbury*, 2010 WL 2509176 (6<sup>th</sup> Cir. BAP 2010) – Bank that held perfected security interest forfeits right of setoff or status as perfected secured creditor when Bank honored check presented by Debtor four days after the filing of the bankruptcy petition, but does not forfeit properly perfected pre-petition security interest. Trustee's ability to defeat security interest under Section 544 is determined by facts as they existed on the date of the petition. Subsequent acts by Creditor could not release or adversely affect status of security interest or Trustee's ability to avoid interest under Section 544. Creditor's security interest should not be prejudiced by post-petition delivery to the Trustee of money or property of the estate. However, turnover or release of funds does waive ability to setoff pursuant to Section 553 was as of moment of petition not subject to attack by judicial lien creditor. Subsequent turnover of the funds to the Trustee does not alter the Bank's secured position.

*Drown v. Wells Fargo Bank, N.A.*, 424 BR 315 (Bankr. S.D. Ohio 2010), *aff'd* 2011 WL 1188434 (S.D. Ohio 2011) – Section 544(a)(1) grants each of the Trustees "the status of a hypothetical lien creditor who is deemed to have perfected his interest as of the date of the filing of the bankruptcy petition and also grants the Trustees the power to avoid transfers of property that could be avoided by a judicial lien creditor. Bankruptcy trustee cannot avoid a properly recorded mortgage even if the deed conveying title to the underlying property to the debtor was itself incorrectly executed. Although property transferred by a "defective deed" may not be sufficient to convey legal title, that defective deed is sufficient to transfer equitable title that is sufficient to support mortgage. Where the mortgage itself was properly recorded pre-petition, Trustee could not rely on defect in underlying conveyance to Debtor as basis to avoid perfected mortgage.

*French v. Luyben*, 2009 WL 2169217 (Bankr. N.D. Ohio 2009) – Judgment lien in personal property is deemed perfected when property is seized in execution of judgment. Where seizure of motorcycle did not occur until after bankruptcy petition had been filed, judgment creditor which held as of the moment of the filing only an unsatisfied execution held unperfected security interest as of the date of the filing which was subject to avoidance under section 544(a)(1).

#### §15.2 Trustee as Holder of Unsatisfied Execution

*Rogan v. Litton Loan Servicing, LP*, 2011 WL

#### §15.3 Trustee as Bona Fide Purchaser

*Rogan v. Fifth Third Mortgage Company*, 452 BR 591 (6<sup>th</sup> Cir. BAP 2011) – Bona fide purchaser of real property is put on constructive notice of a prior interest in property by the presence of a recorded deed or mortgage acknowledged according to law. Mortgage must name or sufficiently identify mortgagor in the body of the mortgage and must be signed at the end of the document by the party to be charged with it. Mortgage signed by non-borrower wife to secure debt of husband sufficiently identified wife as mortgagor. Although mortgage defined "borrower" solely as husband, wife signed both the mortgage and the Second Home Rider incorporated into the mortgage and the Second Home Rider identified wife as "borrower". Viewing documents as a whole sufficiently identified wife as a mortgagor for purposes of recording and validity of mortgage, defeating Trustee's attempt to avoid mortgage.

*Tibble v. Wells Fargo Bank, N.A.*, 2001 WL 3583278 (Bankr. W.D. Mi. 2011) – Mortgage containing incorrect legal description does not provide record notice to defeat Trustee's standing as bona fide

purchaser. Mortgage incorrectly referenced Lot 6 when debtor actually owned Lot 5. Nothing in mortgage would put hypothetical purchaser on notice that mortgage that unequivocally stated “Lot 6” was actually intended as mortgage on Lot 5.

*Ransier v. Countrywide Home Loans, Inc.*, 2010 WL 4057769 (Bankr. S.D. Ohio 2010) – Trustee, as hypothetical bona fide purchaser, avoid transfers to extent that the transfer would not be binding against a bona fide purchaser as a matter of state law.

#### §15.4 Trustee as Unsecured Creditor

*Onkyo USA Corp. v. Global Technovations, Inc.*, 2011 WL 1299356 (E.D. Mi. 2011) – Under Section 544(b), Trustee can avoid any transfer of property of debtor that is avoidable by an unsecured creditor who held a claim. Trustee can file action under Florida state fraudulent transfer statute as long as there was at least one actual unsecured creditor who could have pursued recovery under Florida law.

#### §15.5 Standing

*Borders v. King.*, 2011 WL 3352468 (Bankr. E.D. Ky. 2011) – Creditors have no standing to prosecute a fraudulent transfer action in their own right and for their own benefit during a bankruptcy even if they would have had standing to do so outside of bankruptcy. The Trustee has the exclusive right to bring an action for fraudulent conveyance pursuant to 11 U.S.C. § 548 and/or § 544 during the pendency of bankruptcy proceedings.

*Lewis v. Mortgage Electronic Registration Systems, Inc.*, Case No. 07-6381 (Bankr. E.D. Mi. 2010) - Debtor lacks standing to avoid a lien under section 544, adopting majority view that Chapter 13 debtor lacks standing to assert trustee's avoidance powers except to extent explicitly permitted by Bankruptcy Code.

#### §15.6 Defenses - Earmarking

*American Home Mortgage Investment Corp. v. Lim*, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547. Earmarking doctrine does not apply to a party who fails to record the mortgage within the 30 day safe harbor provision of section 547(e)(2)(A).

*Chase Manhattan Mortgage Corp. v. Shapiro*, 530 F.3d 458 (6<sup>th</sup> Cir. 2008) – Earmarking doctrine requires agreement between a new creditor and the Debtor for payment of a specific antecedent debt; the agreement must be performed according to its terms; and the transaction cannot diminish Debtor's estate. Creditor that refinanced a pre-existing mortgage was not a “new creditor” and, therefore, transaction could not be protected by earmarking doctrine. Further, refinancing is not a unitary transaction but consists of two transfers by Debtor, one of which is the transfer of proceeds which could be protected by the earmarking doctrine and the second being the granting of a new mortgage which is beyond the scope of the earmarking doctrine. Earmarking doctrine will not apply to any security interest which is not perfected within the grace period set forth in section 547(e). Refinancing transaction completed approximately 6 months prior to bankruptcy filing but not recorded until 77 days prior to the commencement of the bankruptcy case and 72 days after lender had distributed the funds was avoidable preferential transfer under section 547.

#### §15.7 Defenses – Reasonably Equivalent Value

*Onkyo USA Corp. v. Global Technovations, Inc.*, 2011 WL 1299356 (E.D. Mi. 2011) – Florida statute on fraudulent transfers does not define reasonably equivalent value. Courts generally consider many factors, including the good faith of the parties, the disparity between the fair value of the property and what the debtor actually received, and whether the transaction was at arm's length. Debtor who paid \$13 million to acquire assets worth only \$6.9 million did not receive “reasonably equivalent value” for stock acquisition.

*Solomon v. Felsner*, 2008 WL 3562465 (6th Cir. 2008) – Trustee contested transfer of property pursuant to Florida State Fraudulent Transfer Statute. Applying Florida State Law pursuant to section 544(b)(1), transfer of property by Debtor to former housemate and father of former housemate was contemporaneous transaction in exchange for reasonably equivalent value and was not avoidable. Debtor's fiancé sold home in Michigan and moved to Florida with Debtor. Debtor applied for mortgage and fiancé "gifted" to Debtor money for down payment. Eight days later, Debtor closed on sale of property and immediately quit-claimed property to fiancé and Debtor jointly. Quit claim deed was not recorded for over one year. More than 90 days after quit claim deed finally recorded, Debtor filed for Chapter 7. Court held that Quit Claim Deed was not avoidable transfer. Transaction was a part of a single, integrated transaction and money paid by fiancé to Debtor was "consideration for [Debtor's] subsequent execution of the quitclaim deed". Evidence also failed to demonstrate that transfer rendered Debtor insolvent or likely to incur debts beyond Debtor's ability to pay, as required by Florida law.

#### §15.8 Defenses – Stockholder Distributions

*Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Trustee's action to avoid preferential transfer under Section 544 is subject to defenses available under applicable state law. Fraudulent transfer based on payments by Corporations will be governed by Michigan Business Corporation Act and not Michigan Fraudulent Transfer Act if the payment constitutes "distribution" under MBCA. "Distribution" is a payment made to or for the benefit of shareholders that is made in respect to the corporate shares. Transfers made to or for the benefit of persons who are not shareholders cannot be "distributions" under MBCA. Payments will be "in respect to corporation's shares" if the distributions are made "in recognition of share ownership". Transfers to Chief Executive Officer and to Directors because of their status as officers and directors are not transfers "in recognition of share ownership" and so are not governed by MBCA.

*QSI Holdings, Inc., v. Alford*, 2009 WL 1905237 (6<sup>th</sup> Cir. 2009) – Payments made to shareholder in connection with leveraged buyout of Debtors stock and privately held corporation were not avoidable. Shareholder payments qualified as "settlement payment" for purposes of Section 546(e), which generally bars trustees avoidance of prepetition margin and settlement payments made by two commodity broker, forward contract merchant, stockbroker, financial institution, financial disciplined or securities clearing agency. Transaction had characteristics of common leveraged buyout involving merger of nearly equal companies, nothing in statute indicating congressional intent to restrict statutes protection to publicly traded securities, and there was no reason to conclude that unwinding settlement would have less of an impact on financial markets than a settlement involving publicly traded securities. Role played by bank and leveraged buyout of privately held securities satisfied requirement that payment be made to financial institution where bank collected shares of corporate Debtors stock from individual shareholders, transfer those securities to the acquiring company, and distributed consideration to individual shareholders.

#### §15.9 Defenses – Constructive Notice

*Rogan v. Fifth Third Mortgage Company*, 452 BR 591 (6<sup>th</sup> Cir. BAP 2011) – Bona fide purchaser of real property is put on constructive notice of a prior interest in property by the presence of a recorded deed or mortgage acknowledged according to law. Mortgage must name or sufficiently identify mortgagor in the body of the mortgage and must be signed at the end of the document by the party to be charged with it. Mortgage signed by non-borrower wife to secure debt of husband sufficiently identified wife as mortgagor. Although mortgage defined "borrower" solely as husband, wife signed both the mortgage and the Second Home Rider incorporated into the mortgage and the Second Home Rider identified wife as "borrower". Viewing documents as a whole sufficiently identified wife as a mortgagor for purposes of recording and validity of mortgage, defeating Trustee's attempt to avoid mortgage.

*Rogan v. American General Home Equity, Inc.*, 451 BR 421 (6<sup>th</sup> Cir. BAP 2011) – Inclusion of property description in attachment to mortgage after signatures of borrowers rather than body of mortgage itself and before signatures did not render mortgage invalid, where body of mortgage stated "Exhibit A Legal Description" and mortgage attached legal description denominated "Exhibit A". Statutory requirement that borrower sign mortgage at or near end of document did not abrogate doctrine of incorporation by reference.



*Fifth Third Bank v. JPMorgan Chase Bank, N.A.*, 2011 WL 30770 (W.D. Ky. 2011) – Defect in notary clause did not render mortgage invalid or unenforceable. Under Kentucky statute in effect at time of recording, mortgage recorded is deemed to provide constructive notice regardless of defects in execution.

*Wells v. CF Bancorp.*, Case no. 10-73332 (Bankr. E.D. Mi. 2011) – Recording copy of mortgage with affidavit of lost instrument is not sufficient to perfect mortgage under Michigan law. Michigan law requires recording of the original mortgage bearing original signature of mortgagors. Trustee could avoid mortgage where only copy of mortgage was recorded, leaving mortgage effectively unrecorded.

*Hardesty v. CitiFinancial, Inc.*, 2011 WL 693235 (6<sup>th</sup> Cir. 2011) – Mortgage execution was not defective so as to be avoidable under Trustee's power as bona fide purchaser where mortgage certification stated that the mortgage was "executed before me" rather than "acknowledged before me". Ohio law requires that notary clause state that the mortgage was "acknowledged before me" or the "substantial equivalent". Acknowledgement requires that person signing appear before the person taking the acknowledgement; that the person acknowledge that he signed the document; that the person signed the document for the purpose stated in the document; and that the person taking the acknowledgement had satisfactory proof of identification of the person signing. In this case, there was no dispute that debtor signed the mortgage in the presence of the notary who also signed and that debtor presented satisfactory identification. Additional language in the signature block stated that debtor examined and read the mortgage and signed of his own free act and deed, satisfying requirement that the document be signed for the purpose stated. Notary clause that referenced "executed" rather than "acknowledged" not so deficient as to allow Trustee to avoid mortgage as bona fide purchaser.

*Drown v. Kondaur Capital Corp.*, 2010 WL 4057814 (Bankr. S.D. Ohio 2010) – Mortgage recorded with defective acknowledgement provides no notice at all of the underlying obligation. Under Ohio law, mortgage must be signed by the mortgagor; the signing must be acknowledged before the notary public; the notary public must certify that acknowledgement; and the notary public must sign his or her name to the certificate of acknowledgement. The person whose signature is being acknowledged must also produce identification at the time of execution. Acknowledgement was not fatally defective where the acknowledgement did not include the name of the debtor but inserted the word "mortgagor" in the two places that called for identification of the party signing, where the mortgage elsewhere defined the debtor by name as the mortgagor. Failure of the notary public to circle the appropriate pronoun (his-her-their) alone did not result in a failure to substantially comply with Ohio law. The harm caused by the failure to circle the appropriate pronoun in this case is minimized because Debtor was the sole mortgagor and the failure to circle the appropriate pronoun would not mislead a subsequent purchaser as to who is acknowledging the Mortgage. Further, lender filed action to foreclose mortgage and obtained judgment of foreclosure prior to commencement of bankruptcy case. Filing state court action gave rise to *lis pendens* sufficient to place subsequent purchasers on notice and defeat bona fide purchaser status. Even if the mortgage had been defective and of no effect when it was recorded, the *lis pendens* standing alone serves as sufficient notice.

*Ransier v. Countrywide Home Loans, Inc.*, 2010 WL 4057769 (Bankr. S.D. Ohio 2010) – Under Ohio law, a mortgage must be properly executed for the recording to be effective. Recording a defective mortgage provides no notice as a matter of law. However, *lis pendens* that arises when mortgage creditor files action to foreclose does give rise to constructive notice sufficient to defeat status of subsequent purchaser as "bona fide purchaser". Although the mortgage was incorrectly executed, when Lender filed state court action pre-petition to reform the mortgage and then to foreclose the mortgage and had obtained Final Judgment reforming the mortgage and ordering the property sold at foreclosure sale, that suit gave rise to a *lis pendens* that defeats the Trustee's status as bona fide purchaser and renders mortgage unavoidable by Trustee.

*Helbling v. Cleary*, Case No. 09-1285 (Bankr. N.D. Ohio 2010) – Mortgage that was defective where notary block failed to recite the names of the parties whose signatures that were being acknowledged did not constitute constructive notice of the existence of the mortgage for purposes of defeating Trustee's status as Bona Fide Purchaser. However, Bank's mortgage foreclosure complaint filed before commencement of

Bankruptcy Case constitutes statutory notice of the pendency of the action and prevents any third party from acquiring an interest superior to that of the Plaintiff, preventing Trustee from acquiring status as Bona Fide Purchaser.

*Degiolamo v. Suntrust Mortgage, Inc.*, 2010 WL 3489059 (Bankr. N.D. Ohio 2010) – Under Ohio law, filing of complaint operates as *lis pendens* preventing any interest from being acquired that would be superior to Plaintiff's title. Bank filed foreclosure proceeding prior to commencement of bankruptcy case. Resulting *lis pendens* prevented Trustee from acquiring status as bona fide purchaser for value.

*Menninger v. Mortgage Electronic Registration Systems, Inc.*, Case No. 09-1097 (Bankr. W.D. Ohio 2010) - To comply with Ohio law, mortgage must be signed by the mortgagor; (2) the signing of the mortgage must be acknowledged before a notary public; (3) the notary public must certify the acknowledgment; and (4) the notary public must subscribe his name to the certificate of acknowledgment. Mortgage invalid as to debtor-wife where mortgage identified only debtor husband as the "borrower". Even though debtor-wife signed the mortgage, there was no predicate language in the mortgage itself to include debtor-wife as mortgagor.

*Felner v. Monticello Banking Co.*, Case No. 09-1050 (Bankr. W.D. Ky. 2010) - Trustee is not a bona fide purchaser if he has notice of facts which would cause a reasonably prudent person to make a further investigation to ascertain if there is an adverse interest in the property. A bona fide purchaser of real property is put on constructive notice of a prior interest in the property by the presence of a recorded deed or mortgage, acknowledged according to law. Debtor's mortgage given to secure loan to closely held corporation valid and enforceable where Debtor signed personal guaranty of the obligation. That Debtor did not personally sign the note does not control where Debtor did sign the guaranty of the Note. Mortgage was properly executed and recorded. Trustee's complaint to avoid lien dismissed.

*Stubbins v. Espenschied*, Case No. 08-2266 (Bankr. S.D. Ohio 2010) - Mortgage that was not properly perfected did not provide constructive notice sufficient to defeat Trustee's status as bona fide purchaser. Notary Acknowledgement did not name the party allegedly signing the mortgage as required by state law. Recording of defective mortgage does not constitute "notice" even if mortgage is otherwise properly executed by Debtor and recorded in the Public Records.

*Stockton Mortgage Corporation v. Schlarman*, 2010 WL 2667390 (Bankr. E.D. Ky. 2010) – Trustee's position as bona fide purchaser as of the petition date defeats any attempt by mortgage company to reform mortgage which had been effectively executed. Property was owned jointly by debtor and a co-owner. However, mortgage was executed only by the co-owner. Although Debtor had repeatedly represented prior to the filing of the bankruptcy case that the debtor had contributed substantial sums to the acquisition and maintenance of the property, mortgage company could not rely on these allegations to defeat superior interest of Trustee as bona fide purchaser as of the date of the petition.

*Johnson v. BAC Home Loans Servicing, L.P.*, 2010 WL 2667393 (Bankr. E.D. Ky. 2010) – Trustee has power under Section 544 to avoid any transfer of property that would be voidable by a bona fide purchaser for value. Mortgage against property owned by husband and wife that defined "Borrower" only as the Husband did not constitute a grant of the mortgage against Wife's interest in the property. Signature by Wife as "Borrower" does not constitute identification of the Wife as a grantor in the body of the mortgage itself. Accordingly, Mortgage failed to provide records notice of any claim against Wife's interest in the property, rendering the mortgage avoidable pursuant to Section 544.

*Richardson v. Wells Fargo Home Mortgage, Inc.*, 421 BR 426 (Bankr. W.D. Mi. 2009) *aff'd*, 2010 WL 3370071 (W.D. Mi. 2010) – Mortgage that failed to reference property lot number or plat number as required by Michigan law left mortgage invalid even though it contained property's street address. Recording of a defective mortgage does not provide constructive notice as a matter of law so as to defeat the interests of a bona fide purchaser. Michigan law requires all recorded sales, conveyances or mortgages, contain the caption of the Plat and Lot Number on all property located within a platted subdivision.

*Helbling v. Oberaitis*, Case No. 09-16122 (Bankr. N.D. Ohio 2010) – Defective certificate of acknowledgement in mortgage prevents mortgage from providing constructive notice. Trustee entitled to avoid mortgage as bona fide purchaser.

*Chase Manhattan Bank, USA, NA v. Taxel*, 594 F.3d 1073 (9<sup>th</sup> Cir. 2010) – Unrecorded mortgage arising out of refinance transaction is avoidable by Trustee under Section 544(a)(3). Debtor refinanced mortgage with same lender. Lender recorded satisfaction of prior mortgage but failed to record new mortgage. Debtor's listing of the unrecorded mortgage in the Bankruptcy Schedules does not provide notice to Trustee sufficient to defeat status as bona fide purchaser. Trustee's status is determined as of moment petition is filed. Schedules filed later, even if filed immediately after the petition, do not alter that status. State law required mortgage to be recorded to constitute constructive notice and unrecorded mortgage is void as against any subsequent purchaser in good faith. Equitable subrogation would not render mortgage unavoidable, as the prior lien was satisfied and revival would work prejudice to creditors and the estate and the Trustee as bona fide purchaser. Further, applicable state law provides that bona fide purchasers have priority even over a creditor holding a claim by equitable subordination.

*Miller v. LaSalle Bank N.A.*, 595 F.3d 782 (7<sup>th</sup> Cir. 2010) – Mortgage with technically defective acknowledgement that failed to identify individuals who appeared before the notary and executed the mortgage would nonetheless constitute “constructive” notice based on 2007 State Law that provided that recorded mortgage would be sufficient for notice purposes notwithstanding certain technical defects. State law amendment applied to all mortgages recorded in Indiana, regardless of whether the mortgage was recorded before or after the adoption of the 2007 law, as the law indicated an intent to operate retroactively to all mortgages of record, regardless of recording date.

*Drown v. National City Bank*, 420 BR 414 (6<sup>th</sup> Cir. BAP 2009), *aff'd*, 2011 WL 2899366 (6<sup>th</sup> Cir. 2011) – Mortgage was not defective for purposes of Section 544(a)(3) where notary block indicated that mortgage had been signed by both husband and wife, when the mortgage in fact had been signed by wife on her own behalf and also by wife on behalf of husband pursuant to valid power of attorney.

*Rogan v. New South Federal Savings Bank*, 2009 Fed. App. 001 (6<sup>th</sup> Cir. BAP 2009) – Mortgage not invalid where notary's bond was not signed by clerk as required. Nothing on the face of the mortgage indicated that the notary who witnessed the execution of the mortgage may have had a defect in the appointing paperwork. Requiring a borrower or lender to independently verify the credentials of the notary would serve no purpose and would only undermine reliability of public records. Further, alleged defect in paperwork was technical non-compliance – notary had been administered proper oath but the clerk failed to sign the appointing paperwork to confirm that oath. Kentucky state law allows a facially valid acknowledgement to be attached only for fraud or mistake by the notary. Later enacted Kentucky law which provided that instruments otherwise properly recorded would be valid for notice purposes even if not properly acknowledged or proved also supported validity of mortgage.

*Drown v. Wells Fargo Bank, N.A.*, 424 BR 315 (Bankr. S.D. Ohio 2010) – Under Section 544(a)(3), a trustee has the status of a bona fide purchaser of real property from the debtor that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case. The legal fiction created by Section 544(a) assumes a transfer from the debtor to a bona fide purchaser on the date of filing. The trustee is then clothed with whatever legal rights the bona fide purchaser would possess. Trustee has constructive notice of properly executed and recorded real-estate instruments only, not of improperly executed or unrecorded ones. Strong-arm power does not clothe a trustee with protective mantle of a bona fide purchaser if there was no way, under the applicable state law, that anyone could attain the status of a bona fide purchaser and does not immunize a trustee who has constructive knowledge of a prior mortgage. The Mortgagees will withstand the attacks from the Trustees if the mortgages are perfected. Whether a mortgage is properly perfected is an issue of State law. Under Ohio law, properly recorded mortgage constitutes perfected interest in property of the debtor even if the deed conveying title to the underlying property to the debtor was itself incorrectly executed. Although property transferred by a “defective deed” may not be sufficient to convey legal title, that defective deed is sufficient to transfer equitable title that is sufficient to support mortgage. Where the mortgage itself was properly recorded pre-petition, Trustee could not rely on defect in underlying conveyance to Debtor as basis to avoid perfected mortgage.

*Burden v. CIT Group/Consumer Finance, Inc.*, 2009 WL 723197 (6th Cir. 2009) - Certificate of Acknowledgement on mortgage failed to comply with Kentucky law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Accordingly, Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors. Immediately below the mortgage's signature block appears the certificate of acknowledgment, which stated: "The foregoing instrument was acknowledged before me this 08 day of MAY, 2001". The acknowledgement was insufficient as a matter of law because it did not identify the people who allegedly signed the mortgage itself, even though those signatures appeared immediately prior to the acknowledgement.

*Lewis v. Public Service Credit Union*, 406 BR 288 (Bankr. E.D. Mi 2009) – Recording an affidavit of lost mortgage and a copy of the original mortgage does not constitute perfection as a matter of Michigan law. Michigan law requires that the mortgage be received by the register of deeds, that the mortgage meet the technical requirements for recording, and in the recording fee be paid when the mortgages left for recording. A mortgage which does not satisfy these requirements is ineffectual for bankruptcy purposes. An affidavit of lost mortgage cannot serve as a substitute for a properly recorded mortgage. Therefore, trustee's status as a hypothetical judgment leading creditor under section 544 is superior to the creditors status as the holder of an unrecorded mortgage; and the mortgage is deemed to have been perfected immediately before the filing of the bankruptcy proceeding rendering the mortgage avoidable under section 547.

*DeGironlamo v. Countrywide Home Loans, Inc.*, 2009 WL 2169049 (Bankr. N.D. Ohio 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Accordingly, Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors. Certificate of Acknowledgment was blank in the field that should contain the name of the person whose signature is being acknowledged. Further, even if improperly executed mortgage gave rise to an equitable lien in favor of the lender, that unrecorded equitable interest is insufficient to negate the avoiding powers of the trustee under section 544(a)(3).

*Daneman v. National City Mortgage Co.*, 2009 WL 2179128 (Bankr. S.D. Ohio 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors regardless of any actual knowledge Trustee may have. Certificate of Acknowledgment was blank in the field that should contain the name of the person whose signature is being acknowledged. Failure to identify person signing the mortgage does not "substantially comply" with statutory requirements for recording a mortgage as mortgage failed to contain any indication that Debtor acknowledged the instrument before the notary.

*Rieser v. Fifth Third Mortgage Company*, 2009 WL 1910967 (Bankr. E.D. Mi. 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Recording mortgage that is not legally entitled to be recorded does not constitute record notice sufficient to defeat BFP status. Trustee can use strong arm powers under Section 544 to avoid the mortgage and recover the property for the benefit of creditors regardless of any actual knowledge Trustee may have. Mortgage apparently signed by husband and wife but Certificate of Acknowledgement referenced only the Wife's name and notary block did not use plural pronouns or language. Trustee could avoid Mortgage as to Husband's one-half interest. Mortgage effective only as to wife's one-half interest in the property.

*Shapiro v. Merchants Bonding Company*, Adv. No. 07-4083 (Bankr. E.D. Mi. 2008) – Claim of Lien that is not properly recorded provides neither actual or constructive notice of the lien and, therefore, cannot



prevail over subsequently recorded mortgage. The Indemnity Agreement executed by the Debtor provided that the Agreement count if recorded, would constitute a consensual lien upon any and all real estate owned by Debtors. Lender recorded a claim of lien but failed to attach a copy of the indemnity agreement. Failure to attach indemnity agreement constituted failure to comply with the contractual requirements for obtaining lien. Therefore, recording claim of lien without attaching Indemnity Agreement did not create a lien as a matter of law. Failure to comply with contractual requirements to obtaining lien could produce neither actual nor constructive notice of any alleged lien. Therefore, creditor's claim was unsecured and subsequently recorded mortgage constituted first lien against the property.

*In re Wahl*, 407 B.R. 883 (Bankr. S.D. Ohio 2009). Mortgage was invalid under Ohio law and could be avoided by Chapter 7 trustee using the “strong-arm” powers.

*In re Cornelius*, 408 B.R. 704 (Bankr. S.D. Ohio 2009). Mortgage was defectively acknowledged (because debtor/mortgagor's name was not on the acknowledgement) and avoidable in Chapter 7 trustee's strong-arm proceeding.

*Argent Mortgage Co., LLC. v. Drown*, 578 F.3d 487 (6<sup>th</sup> Cir. 2009) – Trustee cannot set aside a mortgage where, under state law, recorded mortgage was sufficient to give constructive notice of the mortgage to third parties. Under Ohio law, recorded mortgage that contained street address of residential property but not legal description was sufficient to give constructive notice of the mortgage. The mortgage documents, while not containing a formal legal description, indicated that they related to a specific street address. Nothing in the documents indicated that the mortgage company sought a lien on anything less than the full property and the description included a tax identification number that applied to the entire property. Therefore, the recorded mortgage provided sufficient notice such that the trustee could not avoid the mortgage using the trustee's strong-arm powers under section 544.

*Kohut v. New Century Mortgage Corp.*, Case No. 07-13256 (E.D. Mi. 2008) – Mortgage is deemed “recorded” under Michigan law which establishes the date on which creditors and security interest was perfected at the moment when the person who seeks the benefit of the recording laws completes all legal requirements for recording the instrument by delivering the mortgage to the register of deeds in a form that meets the technical requirements of Michigan compiled laws section 565.201 and in the recording fee is paid when the mortgage is left for record. A delay by county officials in performing statutory duty of assigning an official record book and page does not defeat or delay the effective date of the recording.

#### §15.10 Defenses - Statute of Limitations

*Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Statute of Limitations applicable to action under Section 544 to avoid fraudulent transfer is defined by state law. Under Michigan law an action for fraudulent transfer accrues when the transfer occurs regardless of when the damage results. Transfers made within 6 year statute of limitations but made pursuant to contractual agreements made more than 6 years prior to the commencement of the case are not barred by statute of limitations. Each payment of money by a Debtor was a separate “transfer” whether or not the payment was made under a pre-existing contract, and whether or not such contract was “divisible” or not.

#### §15.11 Defenses – Equitable Defenses

*Drown v. Dollar Bank, FSB*, 437 BR 253 (Bankr. S.D. Ohio 2010) – Trustee in action under Section 544 is not subject to equitable defenses that lender may have had to any action brought by debtor outside of bankruptcy. Lender could not assert defenses of estoppel by deed, equitable subordination, or “equitable restoration” in defense to action by Trustee. Trustee, as hypothetical bona fide purchaser, takes title free and clear of equitable defenses.

#### §15.12 Defenses – Solvency

### B. Fraudulent Transfers



## §15.13 Actual Fraud

*U.S. v. Krause*, 2011 WL 1206178 (10<sup>th</sup> Cir. 2011) – Debtor’s transfer of property to children’s trusts was fraudulent transfer. Using “badges of fraud” (1) a relationship between the grantor and grantee; (2) the grantee’s knowledge of litigation against the grantor; (3) insolvency of the grantor; (4) a belief on the grantee’s part that the transfer was the grantor’s last asset subject to execution; (5) inadequacy of consideration; and (6) consummation of the transaction contrary to normal business procedures, Court found that transfer was to debtor’s wife who then transferred them to trust for no consideration and after debtor knew that IRS had commenced audit and had already disallowed certain deductions. Trustee was debtor’s brother and debtor retained operational control over assets in trusts including using assets in trusts to pay debtor’s personal expenses.

*Steed v. Morgan*, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 548(a)(1)(A) permits the trustee to avoid any transfer made within two years preceding the date of the filing of the petition with actual intent to hinder, delay or defraud creditors. Debtor ran ponzi scheme in which debtor obtained money from investors with promises to invest the money into the foreign exchange market and produce significant returns. Debtor in fact invested only a small fraction of the invested money and used the balance to sustain the ponzi as well as to support Debtor’s extravagant lifestyle. Defendant was romantically involved with Debtor and received weekly paychecks of \$1000 although Defendant did not work; and also received checks and cash from the Debtor totaling over \$250,000.00; plus a 2008 Volkswagen Toureg priced at over \$82,000.00, a diamond engagement and wedding ring worth \$11,000.00; and furniture worth at least \$10,000.00; plus one final check for \$225,000 representing the last of the funds in Debtor’s business account. Defendant’s testimony that she had “forgotten” about these funds or the deposit into a bank account in Georgia (that Defendant also had forgotten about) was not credible. Proof was overwhelming that Debtor operated illegal ponzi scheme with full knowledge that company would eventually run out of money. Knowledge that future investors would not be paid is sufficient to establish actual intent to defraud those creditors.

*Slone v. Lassiter*, 406 BR 778 (Bankr. S.D. Ohio 2009) – Transfer of real property made with “intent to hinder, delay or defraud creditors” Debtor had been contemplating bankruptcy for a number of months and believed that transfer of property to “paramour” was only way to keep property out of hands of Debtor’s creditors. Debtor received no consideration for transfer as Debtor neither received any proceeds nor was Debtor relieved of any debt.

*Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Adversary proceeding based on actual fraud must be plead with specificity pursuant to Federal Rule of Civil Procedure 9. when a plaintiff’s intentional fraudulent transfer claim is premised on a Debtor’s actual intent “to defraud,” plaintiff must plead the “circumstances constituting fraud” with particularity including (1) the date of the transfer; (2) the amount of the transfer (or if the transfer was of property other than money, the property that was transferred and its value); (3) the name of the transferor; (4) the name of the initial transferee; and (5) the consideration paid.

## §15.14 Constructive Fraud

*Gold v. Marquette University*, 2011 WL 1344732 (Bankr. E.D. Mi. 2011) – “Constructively fraudulent transfer” requires transfer of interest of debtor in property. If debtor’s sole interest in property is that of trustee under express trust, then the property transferred is not property of the debtor but is the property of the beneficiary and the transfer cannot be fraudulent. An express trust can be written or oral as long as evidence establishes that title to the property was held by the debtor as trustee. Debtor who received proceeds of son’s student loan may have been holding funds as trustee. Although there was no written trust agreement, evidence was conflicting on whether oral trust existed where testimony was that money was held by parent for purposes of paying tuition expense but the debtor was actually a co-borrower on the loan and the loan check was payable to both debtor and son jointly and was deposited into the household bank account of debtor and spouse and co-mingled with other household funds rather than being segregated; and not an account in which son had any interest. Court unable to resolve on summary judgment status of loan proceeds as “trust corpus”. Creditor could not rely on constructive trust if no express trust existed, as

bankruptcy court recognized constructive trust only as remedy which does not exist until imposed by a court, and no such trust had been imposed on these funds prior to commencement of the case.

*Russell v. Little*, 2010 WL 4959948 (Bankr. E.D. Tn. 2010) – Under Section 548(b)(1)(B), a trustee may avoid any transfer made by the debtor within two years of filing for bankruptcy if the debtor received less than a reasonably equivalent value in exchange for such transfer and: (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; *or* (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business. Actions for Fraud must be plead with specificity. Complaint that failed to specifically plead that the debtor was insolvent failed to state cause of action and would be dismissed with leave to amend.

*Smith v. SIPI, LLC.*, 2010 WL 2899118 (7<sup>th</sup> Cir. 2010) – State Tax Deed sale did not vest title in purchaser until recordation of tax deed after expiration of statutory redemption period, at which point the deed becomes effective against bona fide purchaser as a matter of state law. Section 548(d)(1) applies only when the transfer become effective against a bona fide purchaser more than two years prior to the commencement of the bankruptcy case. Bankruptcy petition filed less than two years after recording of deed rendered transfer avoidable as a fraudulent transfer.

*Steed v. Morgan*, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 548(a)(1)(B) permits the trustee to avoid any transfer made within two years preceding the date of the filing of the petition where the debtor received less than reasonably equivalent value and was insolvent at the time of the transfer. Debtor ran ponzi scheme in which debtor obtained money from investors with promises to invest the money into the foreign exchange market and produce significant returns. Debtor in fact invested only a small fraction of the invested money and used the balance to sustain the ponzi as well as to support Debtor's extravagant lifestyle. Defendant was romantically involved with Debtor and received weekly paychecks of \$1000 although Defendant did not work and did not provide any services to debtor's company that provided any economic benefit that was reasonably equivalent to the transfers from debtor. Even if defendant provided services to warrant the salary, she did not provide any services to warrant the additional assets and property transferred by Debtor which included checks and cash from the Debtor totaling over \$250,000.00; plus a 2008 Volkswagen Toureg priced at over \$82,000.00; a diamond engagement and wedding ring worth \$11,000.00; and furniture worth at least \$10,000.00; plus one final check for \$225,000 representing the last of the funds in Debtor's business account. Defendant's testimony that she had "forgotten" about these funds or the deposit into a bank account in Georgia (that Defendant also had forgotten about) was not credible. Proof was overwhelming that Debtor operated illegal ponzi scheme with full knowledge that company would eventually run out of money. Knowledge that future investors would not be paid is sufficient to establish actual intent to defraud those creditors.

*Valley City Steel, LLC v. Liverpool Coil Processing Inc.*, 2009 WL 2017787 (6<sup>th</sup> Cir. 2009) – Plaintiff in constructive fraudulent transfer action must present affirmative proof of the value of the property transferred in order to support allegations that property was transferred for less than reasonably equivalent value. Where plaintiff is unable to establish value of property transferred, defendant is entitled to judgment as a matter of law.

*Collins & Aikman Corp. v. Valeo*, Adv. 07-5587 (Bankr. E.D. Mi. 2009) - Motion for Summary Judgment denied where evidence presented raises questions of whether Debtor received any value in exchange for the transfers or whether that value, if any, was "reasonably equivalent".

*Slone v. Lassiter*, 406 BR 778 (Bankr. S.D. Ohio 2009) – Transfer of real property not constructively fraudulent. Transferee, Debtor's live-in "Paramour" constituted "insider"; Debtor retained possession of property after transfer had occurred; transfer made while the property was involved in litigation; and Debtor was insolvent at time of transfer. Debtor received reasonably equivalent value for transfer by

allowing paramour to refinance property and relieving Debtor of obligation for underlying debt. Debtor relinquished \$11,000 in equity in exchange for being relieved of over \$135,000 in debt.

*Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Adversary proceeding based on constructive fraud is not required to be plead with specificity. Complaint needs only to state short and plain statement of the claim sufficient to provide Defendant with reasonable notice of plaintiff's claim and the grounds upon which it rests. Federal Rule 9 does not apply to action for constructive fraud because transferee is not accused of an act of fraud or deception; conduct and mental state of the transferee is irrelevant.

#### §15.15 Particular Transfers Avoidable

*Steed v. Morgan*, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 548(a)(1)(A) and 548(a)(1)(B) permitted the trustee to avoid transfers to Debtor's "significant other". Debtor ran ponzi scheme in which debtor obtained money from investors with promises to invest the money into the foreign exchange market and produce significant returns. Debtor in fact invested only a small fraction of the invested money and used the balance to sustain the ponzi as well as to support Debtor's extravagant lifestyle. Defendant was romantically involved with Debtor and received weekly paychecks of \$1000 although Defendant did not work and did not provide any services to debtor's company that provided any economic benefit that was reasonably equivalent to the transfers from debtor. Even if defendant provided services to warrant the salary, she did not provide any services to warrant the additional assets and property transferred by Debtor which included checks and cash from the Debtor totaling over \$250,000.00; plus a 2008 Volkswagen Toureg priced at over \$82,000.00; a diamond engagement and wedding ring worth \$11,000.00; and furniture worth at least \$10,000.00; plus one final check for \$225,000 representing the last of the funds in Debtor's business account. Defendant's testimony that she had "forgotten" about these funds or the deposit into a bank account in Georgia (that Defendant also had forgotten about) was not credible. Proof was overwhelming that Debtor operated illegal ponzi scheme with full knowledge that company would eventually run out of money. Knowledge that future investors would not be paid is sufficient to establish actual intent to defraud those creditors.

*Lewis v. Public Service Credit Union*, 406 BR 288 (Bankr. E.D. Mi 2009) – Recording an affidavit of lost mortgage and a copy of the original mortgage does not constitute perfection as a matter of Michigan law. Michigan law requires that the mortgage be received by the register of deeds, that the mortgage meet the technical requirements for recording, and in the recording fee be paid when the mortgages left for recording. A mortgage which does not satisfy these requirements is ineffectual for bankruptcy purposes. An affidavit of lost mortgage cannot serve as a substitute for a properly recorded mortgage. Therefore, trustee's status as a hypothetical judgment leading creditor under section 544 is superior to the creditors status as the holder of an unrecorded mortgage; and the mortgage is deemed to have been perfected immediately before the filing of the bankruptcy proceeding rendering the mortgage avoidable under section 547.

*Bash v. Sun Trust Banks, Inc.*, 2008 WL 3271090 (6<sup>th</sup> Cir. 2008) – Debtor's use of money in an account jointly owned by Debtor and third-party corporation to acquire essentially worthless stock warrants constituted transfer of Debtor's interest in property sufficient to sustain a cause of action for state law fraudulent conveyance. Debtor's ostensible ownership interest in the account was sufficient to grant Debtor a property interest in the account resulting in the funds transferred being "property of the estate" notwithstanding creditor's argument that the funds actually belonged entirely to the co-account holder.

*American Home Mortgage Investment Corp. v. Lim*, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547.

*Brennan v. Slone*, 2008 WL 4569946 (6<sup>th</sup> Cir. 2008) - Transfers of inventory from Debtor's closely held corporation to Debtor's significant other with intention that significant other sell the inventory and keep the proceeds are avoidable fraudulent transfers where corporation is found to be alter ego of Debtor. Corporation was Debtor's alter ego where Debtor frequently commingled his funds with corporation's and treated corporation's debts as Debtor's individual debts. Debtor put corporation's cash into Debtor's

accounts and paid corporation expenses from personal accounts. Debtor paid his own expenses from the commingled funds. Debtor had a difficult time remembering to distinguish between himself and his corporation during testimony.

*Slone v. Lassiter*, 406 BR 778 (Bankr. S.D. Ohio 2009) – Debtor’s transfer to “paramour” of one-half interest in Debtor’s real property was avoidable fraudulent transfer where Debtor had been contemplating bankruptcy for a number of months and believed that transfer was only way to keep property out of hands of Debtor’s creditors. Debtor received no consideration for transfer as Debtor neither received any proceeds nor was Debtor relieved of any further debt. Debtor’s contention that she received free housing did not constitute reasonably equivalent value in exchange for the transfer.

#### §15.16 Particular Transfers Not Avoidable

*Borders v. King*, 2011 WL 3352468 (Bankr. E.D. Ky. 2011) – Creditors have no standing to prosecute a fraudulent transfer action in their own right and for their own benefit during a bankruptcy even if they would have had standing to do so outside of bankruptcy. The Trustee has the exclusive right to bring an action for fraudulent conveyance pursuant to 11 U.S.C. § 548 and/or § 544 during the pendency of bankruptcy proceedings.

*Kohut v. Rigney*, Case No. 07-6287 (Bankr. E.D. Mi. 2011) –Divorce judgment in 1998 conveyed ex-husband’s property interest in marital homestead to ex-wife. Husband delivered quit claim deed to ex-wife contemporaneously with divorce decree, but Wife failed to record that deed until January, 2007. Delay in recording deed did not leave ex-husband with property interest as that interest ceased to exist by virtue of the divorce decree. Husband’s bankruptcy filing within 90 days of date on which deed was recorded did not result in deed being fraudulent or preferential, because recording of deed did not operate to transfer title or divest debtor of interest in property.

*Slone v. Lassiter*, 406 BR 778 (Bankr. S.D. Ohio 2009) – Debtor quit-claimed one-half interest in real property to “paramour” in order to allow paramour to refinance property and pay off prior mortgage that was in foreclosure was not fraudulent transfer. Debtor received reasonably equivalent value for transfer by allowing paramour to refinance property and relieve Debtor of obligation for underlying debt. Debtor relinquished \$11,000 in equity in exchange for being relieved of over \$135,000 in debt.

#### §15.17 Defense – Reasonable Equivalent Value

*Stevenson v. Leonard Turowski & Son Funeral Home*, 2011 WL 3290300 (Bankr. E.D. Mi. 2011) – Transfer is not avoidable if made for reasonably equivalent value. Transfer made to pay off antecedent debt is for reasonable equivalent value to the extent that the debt is satisfied in an amount equal to the amount of the payment.

*Walls v. Cocchini*, 2011 WL 2747377 (Bankr. E.D. Tn. 2011) – Transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation. Courts generally compare the value of the property transferred with the value of what the debtor received to ascertain whether there was a reasonably equivalent value, although a dollar-for-dollar equivalent is not required. Investors in Ponzi scheme who receive partial return of invested amounts in 90 days pre-petition are not liable for receipt of preferential transfers. In Ponzi schemes, investors will be liable for preferences only to the extent investor received payments in excess of the principal invested.

*Gold v. Marquette University*, Case No. 10-4608 (Bankr. E.D. Mi. 2011) – “Value” flowing to third party can constitute reasonably equivalent value to the debtor if the consideration ultimately ends up in the debtor’s possession or confers an economic benefit on the debtor such that the debtor’s net worth has been preserved. Debtor did not receive “value” in exchange for tuition payments for Son’s college education. Benefit of payments flowed directly to the son and did not confer any economic benefit to the debtor. Although debtor may have felt moral obligation to pay tuition, debtor lacked any legal obligation to do so.

Items such as “peace of mind” that son will have college education that and provide opportunities to son that he would not have absent college education is insufficient to constitute economic benefit to debtor.

*Weir v. Chadwick*, 2010 WL 3724823 (Bankr. E.D. Tn. 2010) – Action to recover under State Uniform Fraudulent Transfer Act for “constructive fraud” requires proof that debtor, as transferor, did not receive reasonably equivalent value. In determining whether value is reasonably equivalent, focus should be placed upon the consideration received by the debtor rather than the value given by the transferee to determine the net effect of the transfers on the debtor's estate and the funds available to unsecured creditors. As long as the unsecured creditors are no worse off because the debtor, and consequently the estate, has received an amount reasonably equivalent to what it paid, no fraudulent transfer has occurred. The debtor need not collect a dollar-for-dollar equivalent to receive reasonably equivalent value. Debtor transferred Debtor's interest in residence to Family Limited Partnership allegedly in exchange for interest in partnership and forgiveness of pre-existing debt owed to other members of partnership. Summary Judgment denied where Court was not able to determine value of debtor's fractional ownership interest in house that was transferred or the value of the either the partnership interest received or the debts allegedly satisfied.

*Solomon v. Felsner*, 2008 WL 3562465 (6th Cir. 2008) – Trustee contested transfer of property pursuant to Florida State Fraudulent Transfer Statute. Applying Florida State Law pursuant to section 544(b)(1), transfer of property by Debtor to former housemate and father of former housemate was contemporaneous transaction in exchange for reasonably equivalent value and was not avoidable. Debtor's fiancé sold home in Michigan and moved to Florida with Debtor. Debtor applied for mortgage and fiancé "gifted" to Debtor money for down payment. Eight days later, Debtor closed on sale of property and immediately quit-claimed property to fiancé and Debtor jointly. Quit claim deed was not recorded for over one year. More than 90 days after quit claim deed finally recorded, Debtor filed for Chapter 7. Court held that Quit Claim Deed was not avoidable transfer. Transaction was a part of a single, integrated transaction and money paid by fiancé to Debtor was "consideration for [Debtor's] subsequent execution of the quitclaim deed". Evidence also failed to demonstrate that transfer rendered Debtor insolvent or likely to incur debts beyond Debtor's ability to pay, as required by Florida law.

#### §15.18 Defense – Leveraged Buyout

*QSI Holdings Inc. v. Alford*, 571 F.3d 545 (6<sup>th</sup> Cir. 2009) – Section 546(e) precludes Trustee from recovering from shareholders payments made as part of a leveraged buyout of the Debtor as fraudulent transfers. Section 546(e) is applicable to transfers of both privately traded and publically traded securities and exempts from avoidance “settlement payments” made by or to a “financial institution”. Payment of funds to HSBC as financial intermediary on behalf of the individual stockholders qualified as a payment to a “financial institution” even though the institution was merely the conduit through which the money passed and did not have any ultimate interest in or right to retain the proceeds.

#### §15.19 Defense – Wrongful Conduct of Debtor

*Kirschner v. KPMG, LLP.*, 590 F.3d 186 (2d Cir. 2009) – State law governs whether of corporate insiders can be computed to Corporation which would result in trustee for debtor corporation lacking standing to recover against third parties for damages to creditors. Corporate insiders engaged in complicated structure which resulted in completion of corporate assets and expense of creditors. After Corporation filed bankruptcy, Liquidating Trustee sought to bring actions against corporate insiders, professionals and advisers for fraud, breach of fiduciary duty and malpractice. District Court concluded that Bankruptcy Trustee lacked standing to seek recovery on behalf of debtor company against third parties for injuries incurred by the misconduct of debtor's controlling managers. “Adverse-interest” exception will prevent imputation of insiders conduct to Corporation only where the corporate officers have “totally abandoned” the corporations interests and the insiders are acting entirely for their own benefit. District court concluded that at first interest exception applies only where insiders intended to benefit only themselves and that corporation was harmed by the scheme, not nearly that corporate management did not intend to benefit the company under circumstances where the company may have received some incidental benefit. The Second Circuit, noting that the controlling issues were once purely of New York State Law, certified the issues to the New York Court of appeals for further proceedings.



*Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6<sup>th</sup> Cir. BAP 2009) – Bankruptcy trustee is not in privity with the Debtor. Alleged wrongdoing of the Debtor cannot be imputed to the trustee or serve as a defense against the trustee’s fraudulent transfer claim. Affirmative defenses based alleged fraudulent conduct of Debtor, estoppel, waiver and negligence of the Debtor and its employees impermissibly attribute to the Trustee the wrongdoing of the Debtor. Defenses of and satisfaction and set off are not defenses to a fraudulent transfer action. Latches defense stricken where trustee brought avoidance action more than one year after case commenced but within the time permitted under section 546(a).

#### §15.20 Defense – Earmarking

*Chase Manhattan Mortgage Corp. v. Shapiro*, 530 F.3d 458 (6<sup>th</sup> Cir. 2008) – Earmarking doctrine requires agreement between a new creditor and the Debtor for payment of a specific antecedent debt; the agreement must be performed according to its terms; and the transaction cannot diminish Debtor’s estate. Creditor that refinanced a pre-existing mortgage was not a “new creditor” and, therefore, transaction could not be protected by earmarking doctrine. Further, refinancing is not a unitary transaction but consists of two transfers by Debtor, one of which is the transfer of proceeds which could be protected by the earmarking doctrine and the second being the granting of a new mortgage which is beyond the scope of the earmarking doctrine. Earmarking doctrine will not apply to any security interest which is not perfected within the grace period set forth in section 547(e). Refinancing transaction completed approximately 6 months prior to bankruptcy filing but not recorded until 77 days prior to the commencement of the bankruptcy case and 72 days after lender had distributed the funds was avoidable preferential transfer under section 547.

#### §15.21 Defense – Prepetition Return of Money to Third Party

*U.S. v. Moyer*, 2010 WL 4053982 (W.D. Mi. 2010) – Internal Revenue Service liable to Chapter 7 Trustee for fraudulent transfer where Limited Liability Company paid principals’ personal tax liabilities out of corporate funds, and corporation filed Chapter 7 six months after date of transfer. Where IRS pre-petition refunded to the corporate principal amounts that were deemed “overpayments” of taxes based on principal’s amended tax return, Chapter 7 Trustee is not entitled to also recover the amount of those payments. IRS had no discretion regarding the tax refund, and IRS never had dominion and control over the amount of the overpayment. The IRS was a mere conduit for the payment of the refund to principal and IRS was not a transferee at all, much less an initial or mediate transferee, with respect to the amount of the refund.

#### §15.22 Statute of Limitations

*Midway Motor Sales, Inc. v. Flynn*, 2009 WL 1940719 (6<sup>th</sup> Cir. BAP 2009) – Trustee can bring avoidance action within time permitted under Section 546(a) even if that period is longer than normally available under applicable state law.

*Slone v. Lassiter*, 406 BR 778 (Bankr. S.D. Ohio 2009) –Quit-claim deed recorded more than 2 years prior to Debtor’s Bankruptcy Petition was outside statute of limitations under Section 548. Action could still be prosecuted under Ohio law which had 4 year statute of limitations if the transfer occurred with actual intent to hinder, delay or defraud creditors. Although “paramour” constituted “insider”; Debtor retained possession of property after transfer had occurred; transfer made while the property was involved in litigation; and Debtor was insolvent at time of transfer; Debtor received reasonably equivalent value for transfer by allowing paramour to refinance property and relieving Debtor of obligation for underlying debt. Debtor relinquished \$11,000 in equity in exchange for being relieved of over \$135,000 in debt. However, Debtor’s later transfer to paramour of remaining one-half interest was avoidable fraudulent transfer where Debtor had been contemplating bankruptcy for a number of months and believed that transfer was only way to keep property out of hands of Debtor’s creditors. Debtor received no consideration for transfer as Debtor neither received any proceeds nor was Debtor relieved of any further debt. Debtor’s contention that she received free housing did not constitute reasonably equivalent value in exchange for the transfer. Trustee can recover from transfer the value of the property transferred as of the date of the transfer.

*Gold v. Deloitte & Touche, LLP*, Case No. 0814567 (E.D. Mi. 2009) – Trustee did not raise argument that doctrine of “adverse domination” operated to toll applicable statute of limitations before lower Court. Appellate Court ordinarily will not consider issues which were not raised and litigated below. Although appellate Court does have authority to consider purely legal issues which were not raised at the lower Court, doctrine of “adverse domination” requires substantial factual inquiry. Accordingly, appellate Court would not consider doctrine in affirming dismissal of fraudulent transfer action based on the applicable statute of limitations.

#### §15.23 Damages

*Steed v. Morgan*, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Pursuant to Section 550(a), Court can award judgment for the amount of money that is fraudulently transferred. Where the fraudulent transfer consisted of property, Court can enter judgment either for the return of the property itself or for the value of the property. Where the property transferred included an automobile that had subsequently been traded in, a diamond ring that had allegedly been stolen, and furniture that was subsequently sold, Court could not order the return of the property, and so entered money judgment against Defendant for the value of the property at the time of the fraudulent transfer.

*Brennan v. Slone*, 2008 WL 4569946 (6th Cir. 2008) - Debtor and "significant other" entitled to "net" transfers of money from significant other to Debtor against funds transferred by Debtor to significant other to determine total amount of funds allegedly fraudulently transferred. Over year preceding filing of case, significant other gave more money to Debtor than Debtor gave to significant other, constituting "reasonably equivalent value" for transfers from Debtor to significant other. Debtor's transfers into significant other's bank account were used to pay Debtor's share of ongoing household expenses. Significant other's use of these funds to pay household expenses constitutes reasonably equivalent value.

*Slone v. Lassiter*, 406 BR 778 (Bankr. S.D. Ohio 2009) – Debtor’s transfer to paramour of one-half interest in real property was avoidable fraudulent transfer. Trustee can recover from transfer the value of the property transferred as of the date of the transfer.

#### §15.24 Parties Liable – Initial Transferee

*U.S. v. Moyer*, 2010 WL 4053982 (W.D. Mi. 2010) – Internal Revenue Service liable to Chapter 7 Trustee for fraudulent transfer where Limited Liability Company paid principals’ personal tax liabilities out of corporate funds, and corporation filed Chapter 7 six months after date of transfer. “Initial transferee” requires more than the party be the one to whom the funds were initially paid, and must involve the right of the recipient to exercise dominion over the funds. Corporate officer who caused check to be issued would not be the “initial transferee” where funds were transferred directly from LLC to IRS without actually or constructively passing through hands of corporate officer individually. Fact that check paid corporate officer’s tax liability did not make the payment a constructive distribution to the officer and the subsequent transfer by the officer to the IRS for purposes of making the IRS a mediate, rather than initial, transferee.

### C. Turnover of Property

#### §15.25 Generally

#### §15.26 Parties

#### §15.27 Procedure

*In re Reynolds*, Case No. 09-79550 (Bankr. E.D. Mi. 2010) – Debtor’s Motion for Turnover of funds garnished pre-petition denied. Turnover action must be brought by Adversary Proceeding pursuant to Rule 7001.

### D. Preferences

## §15.28 Standing to Bring Action

*Jahn v. Carley Jewels, LLC*, 2010 WL 4607660 (Bankr. E.D. Tn. 2010) – Trustee’s Notice of Abandonment does not defeat standing of Trustee to pursue preferential transfer. Abandonment affects only property of the estate. The property that was the subject of the preferential transfer was not property of the estate as of the date of commencement of the case. Trustee can pursue either recovery of the items or the value of the items unaffected by the general abandonment of property of the estate.

*Jahn v. Joeb Enterprises, LLC*, 2010 WL 4607614 (Bankr. E.D. Tn. 2010) – Trustee’s Notice of Abandonment does not defeat standing of Trustee to pursue preferential transfer. Abandonment affects only property of the estate. The property that was the subject of the preferential transfer was not property of the estate as of the date of commencement of the case. Trustee can pursue either recovery of the items or the value of the items unaffected by the general abandonment of property of the estate.

*In re Reep*, 2010 WL 2933644 (Bankr. N.D. Ohio 2010) – Debtor has standing to obtain refund of money recovered by Trustee as alleged preferential transfer. Prior to filing, Debtor borrowed money from her Mother to pay student loan creditor. After petition was filed, Trustee made demand on student loan creditor for refund of apparently preferential transfer and student loan creditor returned the funds. Debtor then brought action against Trustee asserting that the transfer to the student loan creditor was not preferential under the Earmarking Doctrine. Court first concluded that transfer was protected by Earmarking Doctrine and so was not avoidable. Court then held that Debtor had standing to recover from the Trustee the funds that were returned to him in error by the creditor.

## §15.29 Parties Liable for Preferential Transfer

*Gold v. Rubin*, 2011 WL 3734912 (Bankr. E.D. Mi. 2011) – Defendant’s status as second cousin of Debtor’s corporate president does not make defendant an insider for purposes of Section 547. Section 101(45) defines “relative” as related within third degree as determined by common law. Under Michigan law, one determines degree of relation by starting at either of the persons claiming relationship, counting up to the common ancestor, and then down to the other person, with each step being one “degree”. Common relative was great-grandparent, resulting in three degrees of separation up and another three degrees down.

*In re Foley*, 2010 WL 3905987 (Bankr. E.D. Ky. 2010) – Garnishor of debtor’s income pre-petition liable for amount garnished where garnishment constituted preferential transfer. Because garnishor was also debtor’s sister, garnishor liable for all funds garnished within one year pre-petition.

*Wells Fargo Home Mortgage, Inc. v. Lindquist*, 592 F.3d 838 (6<sup>th</sup> Cir. 2010) – Trustee can recover preferential transfer from initial transferee or from any intermediate or mediate transferee of the initial transferee. Creditor could not avoid liability for avoided mortgage merely because creditor had assigned the mortgage to a third party. Although the third party may also be liable, Trustee is permitted to choose the defendant.

*Stevenson v. Genna*, Case No. 09-5490 (Bankr. E.D. Mi. 2010), *aff’d* Case No. 10-11353 (E.D. Mi. 2010) – Section 550 allows the Trustee to recover an avoidable transfer from the initial transferee or any immediate or mediate transferee but prohibits recovery from an immediate or mediate who takes for value, including satisfaction of a present or antecedent debt, in good faith and without knowledge of the voidability of the transfer. Knowledge of possible bankruptcy filing, without more, is not “knowledge of the voidability of the transfer”. Law firm was not “initial transferee” of proceeds recovered on a writ of garnishment where the Law firm received funds on behalf of client and deposited the funds in the Firm Trust Account pending further order of the State Court. State Court then ordered that a portion of the funds be paid to the Law firm and the balance to the Plaintiff, resulting in Law firm being an “immediate transferee”. Funds are not recoverable from Immediate transferee where initial transferee gave funds to immediate transferee in good faith and without intent to hide or shield funds from recovery by Trustee and the transfer is otherwise not tainted by fraud; or if the Law firm had been unequivocally advised that Debtor was filing bankruptcy, rather than merely considering filing and at a time when the parties were engaged in good faith settlement

negotiations. Law firm received money for payment of attorney fees owed and apparently received money in good faith. Transfer of funds to Law firm not avoidable under Section 547 and Section 550.

#### §15.30 Elements

*Simon v. JPMorgan Chase Bank*, 2011 WL 3701828 (Bankr. E.D. Mi. 2011) – In Michigan, perfection of interest in real property occurs upon recording. Notice of Lis Pendens recorded within 90 days of commencement of case avoidable as preference where lender failed to record mortgage.

*Kohut v. Rigney*, 2011 WL 2693662 (E.D. Mi. 2011) – Divorce judgment rendered in 1998 operated to transfer title to assets to ex-wife. Ex-wife's recording of deed in 2007 was not a transfer because, as of the date of recording of the ex-wife was not a creditor of debtor. Under Michigan law, a divorce award of real property has the same effect as a quit claim deed, passing all the estate which the grantor could lawfully convey by a deed of bargain and sale. When the divorce judgment awarded ex-wife the Michigan property, and the Debtor signed a quit claim deed, the Debtor effectively transferred all of his interest in the property to ex-wife. Failure to record the deed created an unnecessary cloud on title, but did not change the character of the transaction between the parties. As of date of divorce judgment and quit claim deed, ex-wife ceased to have any claims against debtor, so recording of deed could not have been preferential.

*Antioch Company Litigation Trust v. Morgan*, 2011 WL 1670952 (Bankr. S.D. Ohio 2011) – Complaint to recover preferential transfers failed to state cause of action where complaint failed to allege date on which transfer occurred.

*Minefee v. Perchka-Marion*, 2011 WL 66104 (Bankr. W.D. Ky. 2011) – Section 547 creates rebuttable presumption that debtor was insolvent during 90 days prior to commencement of case. Plaintiff did not overcome presumption of insolvency by affidavit alleging that Debtor spend significant sums of money on illegal drugs.

*Gocha v. Cooper*, Case No. 09-80349 (Bankr. W.D. Mi. 2010) – Transfer will be avoidable under Section 547 only if transfer is payment for antecedent debt. Agreement for payment entered into prior to bankruptcy filing constitutes "claim" and holders of claim are "creditors" for purpose of bankruptcy case. Debtors borrowed money from parents to construct improvements to their house, with the provision that when debtors sold the house, they would repay the loans. Debtors later defaulted on mortgage and withdrew money from 401-k loan to repay loan from parents. Although property was never sold, at the time of the repayment, parents had enforceable right to payment even if that right was contingent on future events. Debtors' repayment of that obligation within 90 days prepetition constituted payment of an antecedent debt which could be recovered under Section 547.

*Jahn v. Carley Jewels, LLC*, 2010 WL 4607660 (Bankr. E.D. Tn. 2010) – "Consignment" transaction vests title to the property in the consignee subject to a security interest in favor of the consignor. The return of consigned property by the consignee to the consignor is considered a transfer of property of the consignee for purposes of Section 547.

*Jahn v. Joeb Enterprises, LLC*, 2010 WL 4607614 (Bankr. E.D. Tn. 2010) – "Consignment" transaction vests title to the property in the consignee subject to a security interest in favor of the consignor. The return of consigned property by the consignee to the consignor is considered a transfer of property of the consignee for purposes of Section 547.

*In re Foley*, 2010 WL 3905987 (Bankr. E.D. Ky. 2010) – Funds garnished by debtor's sister during year preceding bankruptcy filing were recoverable where there was no dispute that debtor was, at all times, unable to pay debts as they came due and had liabilities in excess of assets, and garnishment permitted creditor to recover more than creditor would have receive in Chapter 7 as Chapter 7 estate was administratively insolvent.

*Helbling v. Cleary*, Case No. 09-1285 (Bankr. N.D. Ohio 2010) – Transfer occurs for purposes of preferential transfers when the secured creditor properly perfects security interest. Filing of suit to

foreclose mortgage constituted *lis pendens* which perfects the on the date foreclosure proceedings were commenced, which was within 90 days of commencement of case.

*In re Miller*, 428 BR 437 (Bankr. N.D. Ohio 2010) – Transfer occurs for purposes of preferential transfers when the secured creditor properly perfects security interest. If estate has sufficient assets to pay unsecured creditors in full, no preferential transfer occurs by perfection of secured claim as creditor will not receive more than creditor would have received had the lien not been perfected and the case had been liquidated under Chapter 7. Debtor’s financial statements are not dispositive but are admissible evidence as statements against interest. Summary judgment denied where financial information left genuine issue of material fact as to debtor’s solvency on date of transfer.

*In re Williams*, Case No. 10-53685 (Bankr. E.D. Mi. 2010) – For purposes of Section 547, a writ of garnishment constitutes a transfer that is perfected when the writ is served on the garnishee, not when the money is turned over by the garnishee to the garnishor.

*Browning v. Dyno Nobel, Inc.*, 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 547 allows the trustee to avoid a transfer of an interest of the debtor in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made (A) on or within 90 days before the date of the filing of the petition; or (B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables the creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title. Payment for goods on a “cash on delivery” basis is not payment for antecedent debt.

*Boyd v. Petrie*, 430 BR 453 (Bankr. W.D. Mi. 2010) – To prevail on a preference avoidance claim, the Bankruptcy Trustee must establish a transfer of an interest of the Debtor in property; (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made (A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title. Debtor and his then-wife borrowed money from Wife’s parents and gave a mortgage encumbering the Debtor’s and Wife’s residence. Debtor later transferred the Property to a Trust established by the Parents to satisfy the Mortgage Note in full. Shortly thereafter, the Debtor and Ms. Petrie were divorced and the Debtor filed a voluntary Chapter 7 bankruptcy petition. The transfer to a Trust controlled by the creditor constituted a transfer to or for the benefit of a creditor. Although the “Trust” would not be an insider as defined in Section 101, transfer to Trust would be deemed transfer to an insider for purpose of one-year look-back where the parties all acted as if the Parents were the actual creditor; Wife’s Mother handled all details of loan although wife was not a trustee of the Trust; and the circumstances surrounding the transaction from start to finish indicated that the loan was from the Parents to their daughter and the Debtor out of family concern, rather than for business or estate planning reasons. Court can find “insider” status even absent a relationship where the Transfer was not an “arms length” situation, given the familial ties between the Parents, their daughter, and their grandchildren-ties that survived the divorce. Status of property as tenancy by the entireties which, under Michigan law would not be an “asset” for fraudulent conveyance purposes (except with respect to joint creditors) is an interest in the property for purposes of preferential transfers. The transfer allowed Parents to recover more than Parents would have received in a Chapter 7 where Parents never recorded the mortgage and so the mortgage could have been avoided by a Chapter 7 Trustee.

*American Home Mortgage Investment Corp. v. Lim*, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547.



*Himmelspach v. Hunter*, Case No. 09-2053 (Bankr. E.D. Mi. 2010) – In action under Section 547(b), Plaintiff must prove (1) transfer; (2) of debtor’s interest in property; (3) to or for the benefit of a creditor; (4) on account of an antecedent debt; (5) made while the debtor was insolvent; (5) made within 90 days of the petition date or within one year if the transferee was an insider; (6) that enables the creditor to receive more than the creditor would have received in a chapter 7 liquidation.

*Wells Fargo Home Mortgage, Inc. v. Lindquist*, 592 F.3d 838 (6<sup>th</sup> Cir. 2010) – “Transfer” of property pursuant to unrecorded mortgage is deemed to “occur” as the moment prior to filing. Post-petition attempt to belatedly record mortgage does not alter status of mortgage as unperfected as of the moment of filing.

*Countrywide Home Loans v. Dickson*, 427 BR 399 (6<sup>th</sup> Cir. BAP 2010), *aff’d* 2011 WL 3768684 (6<sup>th</sup> Cir. 2011) – Lender’s lien against Manufactured Home would be avoided as preferential where Lender did not record the lien on the title to the Manufactured Home either by filing an affidavit of conversion of the Manufactured Home to real property or by recording the lien on the certificate of title. “Perfection” did not occur as a matter of public record until the State Court entered its Judgment imposing lien on Manufactured Home, which occurred less than 90 days prior to the commencement of the case. The *lis pendens* did not operate to perfect the transfer as a *lis pendens* does not create or perfect a lien under Kentucky State Law. The “transfer” would have the effect of allowing lender to recover 100% of the claim in a Chapter 13 case that provided for less than 100% of their allowed claims.

*Shapiro v. Art Leather, Inc.*, Adv. No. 03-5070 (Bankr. E.D. Mi. 2008) – To determine whether creditor received more than the creditor would have received in a Chapter 7, Court must construct “hypothetical Chapter 7 case” to determine what the creditor would have received in liquidation. For unsecured creditors, unless the estate is sufficient to pay 100%, any unsecured creditor who received payments during preference period will receive more than the creditor would have received in the hypothetical Chapter 7. To determine whether creditors would have received 100% in a hypothetical Chapter 7 case, Court must consider liquidation value of assets in estate when case was filed plus value of allegedly preferential transfers. Court must then determine amount of claims which would include claims of allegedly preferential transferee had the transfer not been made. Court must also deduct administrative expenses incurred in the Chapter 7 as well as any post-petition debt incurred.

*Kohut v. New Century Mortgage Corp.*, Case No. 07-13256 (E.D. Mi. 2008) – Mortgage is deemed “recorded” under Michigan law which establishes the date on which creditors and security interest was perfected at the moment when the person who seeks the benefit of the recording laws completes all legal requirements for recording the instrument by delivering the mortgage to the register of deeds in a form that meets the technical requirements of Michigan compiled laws section 565.201 and in the recording fee is paid when the mortgage is left for record. A delay by county officials in performing statutory duty of assigning an official record book and page does not defeat or delay the effective date of the recording for purposes of determining whether the mortgage was recorded within 90 days of the commencement of the bankruptcy case.

#### §15.31 Defenses – *De Minimis Transfers*

*In re Nelson*, 419 BR 338 (Bankr. W.D. Ky. 2009) – Section 547(c)(8) provides that a preference may not be avoided if the aggregate value of all property that constitutes or is affected by such transfer is less than \$600. Judgment entered against defendant in favor of four separate plaintiffs, apportioning recovery between four plaintiffs. Writ of garnishment served on defendant employer produced a total of \$862 in garnished funds distributed pro rata to the creditors. No individual creditor received more than \$600. Section 547(c)(8) limitation applies based on amount received by each creditor, not by aggregate amount paid to all creditors. Where no creditor received more than \$600, trustee could not recover alleged preferential transfers.

#### §15.32 Defenses – Safe Harbor – 547(c)(3)

*Brock v. Branch Banking and Trust Co.*, 2010 WL 2629704 (6<sup>th</sup> Cir. 2010) – Lender could not rely on a 20 day “safe harbor” provided by section 547(c)(3) where the Lien was not recorded on the motor vehicle

certificate of title until more than 20 days after the financing transaction occurred. Although lender forwarded documents to the Kentucky clerk's office nine days after the financing transaction occurred, two-week delay by clerk in uploading Lien for recordation with the Kentucky Transportation Cabinet resulted in perfection occurring more than 20 days after the financing transaction. As a matter of Kentucky law, perfection does not happen until physical notation is made on the title. Perfection is not accomplished as and when the required paperwork and fees are submitted to the clerk.

#### §15.33 Defenses – Earmarking

*In re Reep*, 2010 WL 2933644 (Bankr. N.D. Ohio 2010) – Earmarking is an equitable doctrine created to except transfers borrowed from but directed by a third party to a creditor, for the benefit of the debtor, to be excluded as transfers of interests in a debtor's property. Payment of property belonging to a third party to a particular creditor, even if it flows through the debtor, is not property of the debtor/estate. Debtor's mother gave debtor money to pay off student loan. Immediately after depositing the funds into Debtor's checking account, Debtor paid the student loans as agreed with Mother. Money property was that of a third-party and the transfer was directed by the third-party, Debtor's mother. Debtor's mother provided the funds specifically to pay Debtor's obligation to Nelnet and the funds were actually used for that purpose. The borrowed funds have been specifically earmarked by the lender for payment to a designated creditor, resulting in no transfer of property of the debtor even if the funds pass through the debtor's hands getting to the selected creditor. Earmarking doctrine rendered the transfer to student loan creditor to not be a transfer of an interest of the debtor.

*MBNA America Bank v. Meoli*, 561 F.3d 633 (6<sup>th</sup> Cir. 2009) - Chapter 7 Trustee could recover payments using so-called “convenience checks” as preferential transfers. “Earmarking doctrine” did not except the transfers from the operation of Section 547. Debtor had absolute control over convenience checks and was free to sue those checks as she chose. Debtor's decision to use those checks to pay one creditor constituted exercise of complete control over the funds in question. “Earmarking” applies only where the borrowed funds used to discharge the debt are specifically earmarked by the lender for payment to a designated creditor. Here, the funds were not restricted by Lender to be paid solely to MBNA to be credited against Debtor's credit card debt. The checks could have been used to transfer balances, pay bills, make a purchase, or get extra cash. In such an instance, the Debtor possessed sufficient control over the funds to determine where they would go once the credit was accessed.

*Yoppolo v. MBNA America Bank*, 560 F.3d 562 (6<sup>th</sup> Cir. 2008) – Bank-to-bank transfer of funds constituted avoidable preference. “Earmarking doctrine” did not except the transfers from the operation of Section 547. Debtor had absolute control over convenience checks and was free to use those checks as she chose. Debtor's decision to use those checks to pay one creditor constituted exercise of complete control over the funds in question. Debtor controlled disposition of the funds and determined to use those funds to pay first lender. Issuer of convenience check did not direct or require that the funds be paid to first lender, rendering earmarking doctrine is inapplicable.

*In re Wells*, 382 BR 355 (6<sup>th</sup> Cir. BAP 2008) - Bank-to-bank transfer of funds constituted avoidable preference. Transfer ordered by Debtor using “convenience check” drawn on second lender to pay loan owed to first lender constituted transfer of interest of Debtor even though Debtor was never in physical control of money transferred. “Earmarking doctrine” did not except the transfers from the operation of Section 547. Debtor had absolute control over convenience checks and was free to use those checks as she chose. Debtor's decision to use those checks to pay one creditor constituted exercise of complete control over the funds in question.

*American Home Mortgage Investment Corp. v. Lim*, Case No. 07-14384 (E.D. Mi. 2008) – Mortgage executed 45 days prior to bankruptcy filing recorded one day prior to filing was avoidable preferential transfer under section 547. Fact that mortgage was given as part of the refinancing of an existing mortgage did not protect mortgage from avoidance under “earmarking” doctrine. Earmarking doctrine does not apply to a party who fails to record the mortgage within the 30 day safe harbor provision of section 547(e)(2)(A).

*Chase Manhattan Mortgage Corp. v. Shapiro*, 530 F.3d 458 (6<sup>th</sup> Cir. 2008) –Earmarking doctrine requires agreement between a new creditor and the Debtor for payment of a specific antecedent debt; the agreement must be performed according to its terms; and the transaction cannot diminish Debtor’s estate. Creditor that refinanced a pre-existing mortgage was not a “new creditor” and, therefore, transaction could not be protected by earmarking doctrine. Further, refinancing is not a unitary transaction but consists of two transfers by Debtor, one of which is the transfer of proceeds which could be protected by the earmarking doctrine and the second being the granting of a new mortgage which is beyond the scope of the earmarking doctrine. Earmarking doctrine will not apply to any security interest which is not perfected within the grace period set forth in section 547(e). refinancing transaction completed approximately 6 months prior to bankruptcy filing but not recorded until 77 days prior to the commencement of the bankruptcy case and 72 days after lender had distribute the funds was avoidable preferential transfer under section 547.

#### §15.34 Defenses – Administrative Expenses

*Shapiro v. Meridian Automotive Systems, Inc.*, Adv. No. 08-4495 (Bankr. E.D. Mi. 2008) – Potentially preferential transfers made to a Chapter 11 Debtor during pendency of Chapter 11 case and prior to confirmation of Chapter 11 plan constituted administrative expenses of Chapter 11 estate. Transferor’s failure to file an administrative claim in the Chapter 11 prior to the administrative claim bar date precluded a later action in the transferor’s Chapter 7 bankruptcy proceeding to recover those transfers. Although administrative expense claims are generally limited to matters which directly and substantially benefit the estate, Courts have broadly interpreted Administrative expense claims to include claims based on tort including alleged preferential transfers. Liability on a preferential transfer claim is an ordinary cost of doing business, just as are product liability claims and claims for personal injury and, therefore, qualify as administrative expense claims which are waived if not asserted in the Chapter 11 proceeding.

#### §15.35 Defenses – Payments for Fines and Penalties

*In re Silverman*, 2010 WL 3169415 (9<sup>th</sup> Cir. 2010) - The plain language of Section 547(b) does not except criminal restitution payments. Allowing the Trustee to recover the restitution payment to State Fund will not interfere with California’s state criminal proceedings. Criminal restitution payments are non-dischargeable. Therefore, the Trustee’s recovery of the restitution payment will not eliminate Debtor’s obligation to pay the restitution money post-bankruptcy. Recovery of the preference does not compromise or dilute the Debtor’s state sentence. Excepting non-dischargeable debts like criminal restitution payments from Section 547(b) would allow a debtor to pay off this non-dischargeable debt during the preference period and leave other creditors with nothing, would, motivating debtors to pay off these non-dischargeable debts during the preference period, leaving all other debts to be extinguished in bankruptcy. An economically rational debtor would likely prefer this outcome over one where the debtor is left with non-dischargeable debts post-bankruptcy.

#### §15.36 Defenses – Contemporaneous Exchange of Value

*Browning v. Dyno Nobel, Inc.*, 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 547 allows the trustee to avoid a transfer for or on account of an antecedent debt owed by the debtor before such transfer was made. Payment for goods on a “cash on delivery” basis is not payment for antecedent debt.

#### §15.37 Defenses – Liquidation Amount in Chapter 7

*In re Miller*, 428 BR 437 (Bankr. N.D. Ohio 2010) – Transfer occurs for purposes of preferential transfers when the secured creditor properly perfects security interest. If estate has sufficient assets to pay unsecured creditors in full, no preferential transfer occurs by perfection of secured claim as creditor will not receive more than creditor would have received had the lien not been perfected and the case had been liquidated under Chapter 7. Debtor’s financial statements are not dispositive but are admissible evidence as statements against interest.

*Shapiro v. Art Leather, Inc.*, Adv. No. 03-5070 (Bankr. E.D. Mi. 2008) – To determine whether creditor received more than the creditor would have received in a Chapter 7, Court must construct “hypothetical

Chapter 7 case” to determine what the creditor would have received in liquidation. For unsecured creditors, unless the estate is sufficient to pay 100%, any unsecured creditor who received payments during preference period will receive more than the creditor would have received in the hypothetical Chapter 7. To determine whether creditors would have received 100% in a hypothetical Chapter 7 case, Court must consider liquidation value of assets in estate when case was filed plus value of allegedly preferential transfers. Court must then determine amount of claims which would include claims of allegedly preferential transferee had the transfer not been made. Court must also deduct administrative expenses incurred in the Chapter 7 as well as any post-petition debt incurred.

#### §15.38 Defenses – Ordinary Course of Business

*Stevenson v. Leonard Turowski & Son Funeral Home*, 2011 WL 3290300 (Bankr. E.D. Mi. 2011) – Transfer is not avoidable if (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or (B) made according to ordinary business terms. In determining “ordinary course of business”, court should consider timing, the amount and manner a transaction was paid and the circumstances under which the transfer was made. Transaction can be in the ordinary course of financial affairs even if it is the first such transaction undertaken by the customer if the transaction would not be out of the ordinary for a person in the borrower's position. Debtor's use of life insurance proceeds to pay for deceased husband's funeral expenses was “ordinary course of business”. Family member incurring debt in connection with funeral expenses is “perfectly normal” and it is the ordinary course of business of the funeral home to provide funeral services.

#### §15.39 Defenses – Constructive Notice

*Simon v. JPMorgan Chase Bank*, 2011 WL 3701828 (Bankr. E.D. Mi. 2011) – Recorded Claim of Interest was not sufficient to provide constructive notice of unrecorded mortgage. Claim of Interest is not within statutory definition of documents that can be recorded to create constructive notice. Perfection of mortgage requires recording of original mortgage bearing original signatures. Recording of another document that references or reflects mortgage does not constitute notice.

#### §15.40 Particular Transfers – Avoidable

*Brock v. Branch Banking and Trust Co.*, Case No. 08-5088 (6<sup>th</sup> Cir. 2010) – Purchase Money Security Interest avoidable under section 547 where the security interest is not properly perfected until more than 20 days after the security interest attached. Lender could not rely on a 20 day “safe harbor” provided by section 547(c)(3) where the security interest was not recorded on the motor vehicle certificate of title until more than 20 days after the financing transaction occurred. Although lender forwarded documents to the Kentucky clerk's office nine days after the financing transaction occurred, two-week delay by clerk in uploading security interest for recordation with the Kentucky Transportation Cabinet resulted in perfection occurring more than 20 days after the financing transaction. As a matter of Kentucky law, perfection does not happen until physical notation is made on the title. Perfection is not accomplished as or when the required paperwork and fees are submitted to the clerk.

*MBNA America Bank v. Meoli*, 561 F.3d 633 (6<sup>th</sup> Cir. 2009) - Chapter 7 Trustee could recover payments using so-called “convenience checks” as preferential transfers.

*Yoppolo v. MBNA America Bank*, 560 F.3d 562 (6<sup>th</sup> Cir. 2008) – Bank-to-bank transfer of funds constituted avoidable preference. Transfer ordered by Debtor using “convenience check” drawn on second lender to pay loan owed to first lender constituted transfer of interest of Debtor even though Debtor was never in physical control of money transferred. Economic substance of transaction was same as if the bank handed Debtor the currency which Debtor then used to pay the debt.

*In re Wells*, 382 BR 355 (6<sup>th</sup> Cir. BAP 2008) - Bank-to-bank transfer of funds constituted avoidable preference. Transfer ordered by Debtor using “convenience check” drawn on second lender to pay loan owed to first lender constituted transfer of interest of Debtor even though Debtor was never in physical control of money transferred.

*In re Ohio Business Machines, Inc.*, 2008 WL 3271090 (6<sup>th</sup> Cir. 2008) – Debtors use of money in an account jointly owned by Debtor and third-party corporation to acquire essentially worthless stock warrants constituted transfer of Debtor’s interest in property sufficient to sustain a cause of action for preferential transfers. state law fraudulent conveyance. Debtor’s ostensible ownership interest in the account was sufficient to grant Debtor a property interest in the account resulting in the funds transferred being “property of the estate” notwithstanding creditor’s argument that the funds actually belonged entirely to the co-account holder.

*Rieser v. Fifth Third Mortgage Company*, 2009 WL 1910967 (Bankr. E.D. Mi. 2009) - Certificate of Acknowledgement on mortgage failed to comply with Ohio law. Therefore, mortgage was not eligible to be recorded leaving mortgage avoidable by a bona fide purchaser for value. Mortgage apparently signed by husband and wife but Certificate of Acknowledgement referenced only the Wife’s name and notary block did not use plural pronouns or language. Trustee could avoid Mortgage as to Husband’s one-half interest. Therefore, mortgage as to husband’s undivided one-half interest deemed to have occurred immediately prior to the commencement of the case, rendering mortgage an avoidable preferential transfer.

#### §15.41 Particular Transfers – Not Avoidable

*Kohut v. Rigney*, Case No. 07-6287 (Bankr. E.D. Mi. 2011) –Divorce judgment in 1998 conveyed ex-husband’s property interest in marital homestead to ex-wife. Husband delivered quit claim deed to ex-wife contemporaneously with divorce decree, but Wife failed to record that deed until January, 2007. Delay in recording deed did not leave ex-husband with property interest as that interest ceased to exist by virtue of the divorce decree. Husband’s bankruptcy filing within 90 days of date on which deed was recorded did not result in deed being fraudulent or preferential, because recording of deed did not operate to transfer title or divest debtor of interest in property.

*In re Williams*, Case No. 10-53685 (Bankr. E.D. Mi. 2010) – For purposes of Section 547, a writ of garnishment constitutes a transfer that is perfected when the writ is served on the garnishee, not when the money is turned over by the garnishee to the garnishor. Post-petition turnover of Debtor’s State Tax Refund to creditor not avoidable where the writ of garnishment was served on the State more than 90 days pre-petition.

*Himmelspach v. Hunter*, Case No. 09-2053 (Bankr. E.D. Mi. 2010) – In action under Section 547(b), Plaintiff must prove (1) transfer; (2) of debtor’s interest in property; (3) to or for the benefit of a creditor; (4) on account of an antecedent debt; (5) made while the debtor was insolvent; (5) made within 90 days of the petition date or within one year if the transferee was an insider; (6) that enables the creditor to receive more than the creditor would have received in a chapter 7 liquidation. Trustee could not avoid fixing of security interest where UCC-1 failed to contain debtor’s full legal name but had a sufficient description to allow one searching the public records to locate the UCC-1 Financing Statement. Although Section 440.9503 requires financing statement to contain the name of the debtor, Section 440.9506 also excuses minor error or omissions that do not make the financing statement seriously misleading. Search of public records using Debtor’s exact name would not disclose financing statement, but search based only on Debtor’s last name or last name and first initial would disclose financing statement. Financing Statement that identified the debtor as “Jon Wardin” instead of Debtor’s legal name, “Jonathan P. Wardin” was not sufficiently misleading that a party conducting a reasonable search would not locate the Financing Statement. As the creditor held valid security interest, any payments to the creditor up to the value of the collateral could not be preferential as a matter of law, as the transfers did not permit the creditor to receive more than the creditor would have received in a hypothetical Chapter 7 case.

*Fitzpatrick v. Toyota Motor Credit Corp.*, 2009 WL 2971762 (Bankr. E.D. Tn. 2009) – A secured claim is deemed perfected according to and at the time dictated by State law. Under Tennessee law, a lien in a motor vehicle is perfected when by delivery to the department or the county clerk of the existing certificate of title, if any, title extension form, or manufacturer’s statement of origin and an application for a certificate of title containing the name and address of the holder of a security interest or lien with vehicle description and the required fee. The security interest is perfected as of the date of delivery to the county clerk or the



department. When the security interest is perfected, it constitutes notice of all liens and encumbrances against the vehicle described in the security interest to creditors of the owner, to subsequent purchasers and encumbrances. Constructive notice dates from the time of first delivery of the request for the notation of the lien or encumbrance upon the certificate of title by either the department or the county clerk acting as agent for the department, as shown by its endorsements of the date of delivery on the document. The Creditor properly delivered the necessary documents to the appropriate governmental agency. The failure of the governmental agency to note the lien on the certificate of title did not prevent the security interest from being perfected. Further, the later request by the Creditor for a Duplicate Certificate of Title that reflected the lien did not delay perfection of the lien until the date of issuance of the Duplicate Title. Where the original documents were delivered to the appropriate governmental agency well prior to the preference period, the issuance of the Duplicate Title less than 90 days prior to commencement of the Bankruptcy case did not constitute a preferential transfer, as the Duplicate Title did not accomplish either a transfer of title or perfection of a security interest.

*St. James, Inc. v. Cananwill, Inc.*, Adv. No. 07-6329 (Bankr. E.D. Mi. 2009) – Transfer of Debtor’s right to a refund of unearned premiums paid for Debtor’s insurance policies were subject to creditor’s security interest. Creditor’s receipt of those premiums could not constitute preferential transfer. Creditor provided financing to Debtor for payment of insurance premiums. Security Agreement executed by Debtor and creditor expressly assigned to creditor the right to receive any unearned premiums or other amounts with respect to the policies assigned as security. Creditor’s right to receive unearned premiums is vested at the time the policies are funded by the creditor. Creditor’s right to receive refunds does not constitute an attempt to assign a mere contingent or future right to unearned insurance premiums. Premium Finance Agreement was governed by M.C.L. Sections 500.1501 – 500.1514 which expressly authorize and permit the creation of a perfect security interests in the right to receive unearned premiums.

*Kohut v. New Century Mortgage Corp.*, Case No. 07-13256 (E.D. Mi. 2008) – Mortgage is deemed “recorded” under Michigan law which establishes the date on which creditors and security interest was perfected at the moment when the person who seeks the benefit of the recording laws completes all legal requirements for recording the instrument by delivering the mortgage to the register of deeds in a form that meets the technical requirements of Michigan compiled laws section 565.201 and in the recording fee is paid when the mortgage is left for record. A delay by county officials in performing statutory duty of assigning an official record book and page does not defeat or delay the effective date of the recording for purposes of determining whether the mortgage was recorded within 90 days of the commencement of the bankruptcy case.

*Shapiro v. Meridian Automotive Systems, Inc.*, Adv. No. 08-4495 (Bankr. E.D. Mi. 2008) – Potentially preferential transfers made to a Chapter 11 Debtor during pendency of Chapter 11 case and prior to confirmation of Chapter 11 plan constituted administrative expenses of Chapter 11 estate. Transferor’s failure to file an administrative claim in the Chapter 11 prior to the administrative claim bar date precluded a later action in the transferor’s Chapter 7 bankruptcy proceeding to recover those transfers. Although administrative expense claims are generally limited to matters which directly and substantially benefit the estate, Courts have broadly interpreted Administrative expense claims to include claims based on tort including alleged preferential transfers. Liability on a preferential transfer claim is an ordinary cost of doing business, just as are product liability claims and claims for personal injury and, therefore, qualify as administrative expense claims which are waived if not asserted in the Chapter 11 proceeding.

#### §15.42 Procedure

*In re Berry*, Case No. 09-43489 (Bankr. E.D. Mi. 2009) - Motion to Avoid Preferential Transfer denied without prejudice. Action to avoid preferential transfer pursuant to Section 547 must be by adversary proceeding pursuant to Federal Rules of Bankruptcy Procedure 7001(2).

*Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Complaint to avoid preferential transfers is not required to itemize each allegedly preferential transfer and can allege just a summary or total of the alleged preferences. Complaint needs only to state short and plan statement of the claim sufficient to provide Defendant with reasonable notice of plaintiff’s claim and the grounds upon which it rests.

## E. Post-Petition Transfers – Section 549

## §15.43 Elements

*In re Wengerd*, 2010 WL 3257835 (Bankr. N.D. Ohio 2010) – Trustee ordinarily can avoid transfer of property of the estate that occurs after commencement of the case and that was not authorized by Order of Court.

*Browning v. Dyno Nobel, Inc.*, 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 549 allows the trustee to avoid a transfer of property of the estate (1) that occurs after the commencement of the case; and (2)(A) that is authorized only under section 303(f) or 542(c) or (B) that is not authorized under this title or by the court. Defendant’s lack of notice of the filing at the time of the transfer does not apply as Section 549 excludes only good faith purchasers of real estate and does not protect sellers of goods. Payments for good sold to debtor after the filing of the case for goods purchased on a “cash on delivery” basis were avoidable transfers under Section 549.

*Steed v. Morgan*, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 549 permits the Court to recover any transfer of property of the estate that occurs post-petition. After Debtor filed for relief, Debtor transferred \$225,000 to Debtor’s “significant other” which she used to purchase a house. Judgment entered against “significant other” for \$225,000 transferred post-petition.

*Buckeye Check Cashing, Inc., v. Meadows*, 396 BR 485 (6th Cir. 2008) - Property of estate consists of all legal or equitable interests of the Debtor in property as of the commencement of the case, including all money in Debtor's checking account as of the moment of commencement. Creditor's post-petition presentment of Debtor's check (received pre-petition) did not violate Automatic Stay pursuant to 11 USC Section 362(b)(11). Creditor did not violate the automatic stay when the creditor refused to return to the Debtor the proceeds received as a result of the post-petition presentment. When the creditor lawfully presented the check and received the proceeds, the proceeds ceased to be property of estate. Therefore, creditor's refusal to return the funds did not constitute an attempt by creditor to assert dominion or control over property of estate. Correct cause of action would have been to recover proceeds as post-petition transfer pursuant to Section 549.

## §15.44 Defenses

*Barbacci v. Wengerd*, 2010 WL 3257835 (Bankr. N.D. Ohio 2010) – Section 549(c) prevents avoidance of post-petition transfer of real property where the transferee is a good faith purchaser without knowledge of the commencement of the case; the transfer is for fair equivalent value; and the Trustee had not recorded a copy of the bankruptcy petition with the county recorder of deeds. Bankruptcy Petition is not a “complaint” for purposes of Ohio statute that provides that a complaint acts as a *lis pendens* for purposes of placing parties on record notice. Even if a complaint in an Adversary Proceeding would comply with Ohio law and constitute a *lis pendens*, the transfer happened before any adversary proceedings were filed.

*Browning v. Dyno Nobel, Inc.*, 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Defendant’s lack of notice of the filing at the time of the transfer does not apply as Section 549 excludes only good faith purchasers of real estate and does not protect sellers of goods.

## §15.45 Particular Transfers Avoidable

*Browning v. Dyno Nobel, Inc.*, 2010 WL 3123132 (Bankr. E.D. Ky. 2010) – Section 549 allows the trustee to avoid a transfer of property of the estate (1) that occurs after the commencement of the case; and (2)(A) that is authorized only under section 303(f) or 542(c) or (B) that is not authorized under this title or by the court. Defendant’s lack of notice of the filing at the time of the transfer does not apply as Section 549 excludes only good faith purchasers of real estate and does not protect sellers of goods. Payments for good sold to debtor after the filing of the case for goods purchased on a “cash on delivery” basis were avoidable transfers under Section 549.

*Steed v. Morgan*, Case No. 08-12333 (Bankr. E.D. Tn. 2010) – Section 549 permits the Court to recover any transfer of property of the estate that occurs post-petition. After Debtor filed for relief, Debtor transferred \$225,000 to Debtor’s “significant other” which she used to purchase a house. Judgment entered against “significant other” for \$225,000 transferred post-petition.

#### §15.46 Particular Transfers Not Avoidable

*In re Fleming*, 424 BR 795 (Bankr. W.D. Mi. 2010) – Trustee cannot recover property from the debtor pursuant to Section 549 where the debtor has already transferred that property to a third party. Section 550, which provides the remedy for post-petition transfers, allows recovery only from the transferee. Nothing in Section 550 implies that the transferor who no longer owns or holds the property can nonetheless be required to turn that property over to the Trustee.

### F. Reformation of Mortgage

#### §15.47 Standing

*DeGirolamo v. U.S. Bank*, 2009 WL 2827949 (Bankr. N.D. Ohio 2009) – As a matter of State law, one who does not hold the Mortgage is not entitled to bring an action to reform the Mortgage. Acquisition of the Mortgage after commencement of an action to reform the mortgage cannot cure a lack of standing in the first instance. In Bankruptcy, however, where the Trustee brought the action, the Defendant can bring as a defense a request for reformation of the mortgage to clarify the ownership and extent of the lien. Standing in Bankruptcy Court is not limited by State Court, and Bankruptcy Court will construe standing as appropriate to adjudicate merits of claims before it.

#### §15.48 Requirements

*DeGirolamo v. U.S. Bank*, 2009 WL 2827949 (Bankr. N.D. Ohio 2009) – Reformation of a mortgage is governed by State law where the property is located. Ohio law permits reformation of a mortgage where there is an error, omission or other defect by reason of inadvertence of an officer, party, person or “body corporate”. The mortgage can be reformed to give effect to the true, manifest intention of the parties. The fact that the error was made by the party now seeking reformation does not defeat the ability of the Court to reform the instrument.

#### §15.49 Laches

*DeGirolamo v. U.S. Bank*, 2009 WL 2827949 (Bankr. N.D. Ohio 2009) - Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. The elements of a laches defense are (1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for such delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party. Although more than two years passed from the execution of the mortgage to the institution in State Court to reform the mortgage, there was no evidence as to when the creditor actually discovered the error or any other evidence of undue delay. Further, the Trustee cannot demonstrate any prejudice resulting from the delay as Trustee would have been required to deal with the issue whether the Creditor had brought the action earlier or later. Absent evidence of undue delay and prejudice, Creditor’s claim for reformation was not barred by laches.

### G. Effect of Avoidance

#### §15.50 Preservation for Benefit of Estate

*Tribble v. Wells Fargo Bank, N.A.*, Case no. 10-80005 (Bankr. W.D. Mi. 2011) – Mortgage containing incorrect legal description does not provide record notice to defeat Trustee’s standing as bona fide purchaser. Mortgage incorrectly referenced Lot 6 when debtor actually owned Lot 5. Nothing in mortgage

would put hypothetical purchaser on notice that mortgage that unequivocally stated “Lot 6” was actually intended as mortgage on Lot 5. Avoided mortgage is preserved for benefit of estate.

*Smith v. U.S. Bank*, 2010 WL 3277795 (Bankr. E.D. Ky. 2010) – Avoidance of unrecorded security interest in mobile home did not vest mobile home in debtor free and clear of avoided lien. Avoided lien is preserved for the benefit of the estate and the estate has full power and authority to enforce the lien.

*In re Neal*, 424 BR 235 (Bankr. E.D. Mi. 2010) – Unrecorded Mortgage avoided by Chapter 7 Trustee under Section 544 does not affect relative priority of lien. Avoidance only transfers ownership of the mortgage from the mortgagee to the Trustee, who has full authority to then enforce the mortgage. Trustee can either foreclose the mortgage or, alternatively, exercise power to sell property of the estate. The mortgage as avoided preserves its status vis-à-vis debtors’ claimed exemptions. Where the mortgage is superior to the exemptions, the Trustee is entitled to full satisfaction of the mortgage before remitting to the Debtors the value of the exemptions.

#### §15.51 Damages

*Rodriguez v. Daimler Chrysler Financial Americas, LLC*, Case no. 09-1332 (10<sup>th</sup> Cir. 2010) – Section 551 permits Trustee to avoid security interest and preserve interest for benefit of estate. Section 550 permits the Trustee to recover either the property transferred or the value of the property transferred. Although Section 550 and section 551 are not mutually exclusive, Court will not award relief under Section 550 where avoidance of lien under Section 551 is adequate to make the estate whole. Relief under Section 550 is appropriate where avoidance of lien does not produce recovery for estate, such as where underlying property has been destroyed or sold. Lender whose lien was avoided could not also be charged with value of the lien itself as doing so would amount to a double recovery for the estate.

### XVI. Collateral Attack – Final Orders

#### A. Parties Bound

##### §16.1 Successor Trustee

*Solomon v. Duncan*, 2009 WL 1421115 (6<sup>th</sup> Cir. 2009) – Chapter 7 Bankruptcy Trustee cannot use Rule 60 to collaterally attack a Chapter 11 sale order that had become final before Trustee was appointed. While in Chapter 11, Debtors sought permission to sell assets to satisfy creditors. One condition of sale was a release of all claims against co-founder of Debtor which was agreed to by the unsecured creditors committee. Court approved sale which included release of cofounder. After subsequent conversion of case, chapter 7 Trustee sought to bring action against cofounder alleging that he owed the estate over \$1 million. Court concluded that the release in the Sale Order barred the Chapter 7 Trustee’s claims. Chapter 7 Trustee failed to set forth any basis to set aside the sale order under Rule 60 as all parties in interest were present at the hearing on the sale order and had the opportunity to object to the release on the record and an opportunity to be heard at the hearing to consider the sale order and no party filed an appeal of that order. Arm’s-length negotiation and agreement between well represented parties does not constitute unusual or extreme situation where principles of equity mandate relief. The Chapter 7 Trustee is bound by the res judicata nature of the Sale Order entered prior to appointment of the Trustee.

#### B. Particular Orders

##### §16.2 Confirmation Order

*Travelers Indemnity Co. v. Bailey*, 129 Sect. 2195 (2009) – Debtor’s confirmed Chapter 11 Plan included release of Debtor’s insurers and precluded any subsequent actions against the insurance companies including any actions based on the conduct of the insurers themselves. Where Court’s Order confirming Debtors Chapter 11 Plan was not timely appealed and the order became final, terms were binding on all parties even if the Confirmation Order included provisions that, had an objection been raised to confirmation, would have prevented confirmation. An order which became final is no less preclusive in

effect merely because the attack on the order is based on the Court's alleged lack of underlying subject matter jurisdiction – "[e]ven subject-matter jurisdiction ... may not be attacked collaterally." Confirmation Order which included provision had long become final and could not be collaterally attacked.

*Storey v. Pees*, Case No. 07-8049 (6<sup>th</sup> Cir. BAP 2008) – Trustee's Motion to Modify confirmed plan based on pre-confirmation miscalculation of plan length would be denied. Under section 1327, a confirmation order is res judicata and not subject to collateral attack. Section 1329 permits the plan to be modified for one of four specific reasons. Section 1329 sets no standard as to when a post confirmation modification is permitted. Section 1327 precludes modification of a confirmed plan under section 1329 to address issues that were or could have been decided at the time the plan was originally confirmed. Modification under section 1329 is limited to matters that arise post confirmation and is based on the premise that, during the life of the plan, circumstances may change, and parties should have the ability to modify the plan accordingly. Trustee would not be permitted to modify plan to address an issue that could have been decided that confirmation had the trustee or an unsecured creditor with an allowed claim objected.

### §16.3 Sale Orders

*Solomon v. Duncan*, 2009 WL 1421115 (6<sup>th</sup> Cir. 2009) – Chapter 7 Bankruptcy Trustee cannot use rule 60 to collaterally attack a Chapter 11 sale order that had become final before Trustee was appointed. While in Chapter 11, Debtors sought permission to sell assets to satisfy creditors. One condition of sale was a release of all claims against co-founder of Debtor which was agreed to by the unsecured creditors committee. Court approved sale which included release of cofounder. After subsequent conversion of case, chapter 7 Trustee sought to bring action against cofounder alleging that he owed the estate over \$1 million. Court concluded that the release in the Sale Order barred the Chapter 7 Trustee's claims. Chapter 7 Trustee failed to set forth any basis to set aside the sale order under Rule 60 as all parties in interest were present at the hearing on the sale order and had the opportunity to object to the release on the record and an opportunity to be heard at the hearing to consider the sale order and no party filed an appeal of that order. Arm's-length negotiation and agreement between well represented parties does not constitute unusual or extreme situation where principles of equity mandate relief. The Chapter 7 Trustee is bound by the res judicata nature of the Sale Order entered prior to appointment of the Trustee.

*Lewis v. McClatchey*, 2009 WL 1372945 (Bankr. S.D. Ohio 2009) - Proper procedure for contesting validity of Bankruptcy Court order approving sale of property is by appeal of that order within 10 days of entry. Court lacked jurisdiction over sale once sale order became final without any timely appeal and could not be collaterally attacked in adversary proceeding.

*Winget v. JP Morgan Chase Bank*, 537 F.3d 565 (6<sup>th</sup> Cir. 2008) – Claim is barred by res judicata if (1) a final decision on the merits has been reached by a Court of competent jurisdiction; (2) a subsequent action is brought between the same parties or their privies; (3) the issue in the subsequent action was or should have been actually litigated in the prior action; and (4) the current cause of action is identical to the cause of action in the prior case. Creditor precluded by doctrine of res judicata from challenging a bankruptcy sale in the bankruptcy Court had previously entered an order approving the proposed sale and that order had become final and non-appealable. A bankruptcy Court order authorizing sale of part of the estate constitutes a final judgment on the merits for res judicata purposes.

## XVII. Closed Cases

### A. Reopening

#### §17.1 Basis to Reopen

*In re Hopkins*, 2011 WL 1542079 (Bankr. E.D. Tn. 2011) – Court clerk erroneously closed case prior to filing of final report or discharge of trustee. Case would be reopened to allow Trustee to continue to liquidate assets and pursue recoveries for unsecured creditors.



*In re Price*, Case No. 10-44070 (Bankr. E.D. Mi. 2010) - Chapter 7 case reopened, discharge vacated, and case dismissed where Debtor failed to pay filing fees in two prior Chapter 7 cases notwithstanding Court's Order to pay those fees within specified time.

*In re R & D Contracting, LLC*, Case No. 02-43540 (Bankr. E.D. Mi. 2008) - Court clerk closed case prematurely while there was a pending fee application. Court reopened case for purposes of adjudicating fee application.

*In re Staten*, Case No. 08-60408 (Bankr. E.D. Mi. 2009) - Motion to Reopen Closed Case under Section 350(b) to file Financial Management Course Certificate denied where Debtor was not eligible to be a Debtor under Section 109(h)(1) as Debtor failed to obtain pre-petition credit counseling until 3 days after case commenced.

#### §17.2 Filing Fee

*In re Kissinger*, 2011 WL 2632856 (Bankr. W.D. Mi. 2011) – Court could not waive filing fee to reopen case to allow debtor to file Certificate of Financial Management Class. Guidelines promulgated by Judicial Conference specifically prohibit waiving filing fee to reopen a case where the court declined to enter a discharge because debtor failed to certify completion of financial management program. Court would give debtor additional time to pay the filing fee and have case reopened.

*In re Gibson*, Case No. 10-63612 (Bankr. E.D. Mi. 2010) - Debtor's Motion to pay filing fee to reopen case in installments denied as unnecessary. Case will not be reopened unless and until debtor pays the filing fee and Court will not consider any other motions filed in the case until case is re-opened. Order permitting debtor to pay filing fee in installments would be of no effect.

*In re Bauml*, 2010 WL 3585412 (Bankr. N.D. Ohio 2010) – Waiver of filing fees is specifically addressed by 28 U.S.C. Section 1930(f). Subsection (f)(1) does not apply to fee to reopen case as that fee is not a fee “payable to the clerk upon the commencement of a case under chapter 7”. Subsection (f)(2) grants a bankruptcy court authority to waive other filing fees for in forma pauperis debtors. Court would not grant a waiver where reopening was necessary to deal with a judgment lien that was recorded prior to the bankruptcy filing and could have been addressed before the case closed. Debtors failed to produce evidence that debtors would meet the standards for proceeding in forma pauperis where one year passed since the case was filed and Debtors' financial situation has most likely changed.

*In re Arini*, Case No. 04-74744 (Bankr. E.D. Mi. 2010) – Request to waive filing fee to reopen case denied. Motion failed to state any legal basis on which Court could waive filing fee in connection with a Motion to Reopen Case.

*In re Scales*, Case No. 09-58926 (Bankr. E.D. Mi. 2010) – Court lacked authority to waive filing fee to reopen case where Court did not waive initial filing fee and debtor paid that fee.

*In re Kinsey*, Case No. 09-34245 (Bankr. N.D. Ohio 2009) – Motion to Waive Filing Fee to Re-open Case for purposes of filing post-petition Certification regarding post-petition financial management course denied. Party seeking substantive relief required to pay filing fee before case can be re-opened. Judicial Conference generally prohibits waiver of the filing fees due upon filing a motion to reopen a case except where reopening is necessary either to correct an administrative error by the clerk or the court itself or to commence an action relating to discharge. Court can waive the filing fee if a debtor qualifies for in forma pauperis status under 28 U.S.C. § 1930(f) and an application completed on the appropriate Official Form is filed and granted. Debtors do not qualify for IFP status where debtor has income significantly greater than 150% of the income official poverty line as defined by the Office of Management and Budget for a household of the debtor's size.

*In re Matthews*, Case No. 09-51127 (Bankr. E.D. Mi. 2009) - Court lacks authority to waive filing fee in connection with Motion to Reopen Case.

*In re Isquith*, Case No. 08-66945 (Bankr. E.D. Mi. 2009) - Debtor who seeks to reopen case for purpose of filing Certificate of Financial Management Course must pay filing fee before case can be reopened.

## **XVIII. Post-Petition Financial Management Education**

### **A. Requirement**

#### **§18.1 Generally**

*In re Denger*, 2009 WL 2824872 (Bankr. N.D. Ohio 2009) - After filing for bankruptcy relief, an individual debtor seeking to obtain a discharge under Chapter 7 of the Bankruptcy Code is required to complete an instructional course concerning personal financial management and must file with the Court a statement regarding completion of the course. A debtor who does not file with the court the requisite statement is subject to having their case administratively closed without the entry of a discharge.

#### **§18.2 Waiver of Requirement**

*In re Denger*, 2009 WL 2824872 (Bankr. N.D. Ohio 2009) – Debtor’s completion of a Financial Management Court can be waived only if (1) the United States Trustee determines for a particular judicial district that a waiver of the course is appropriate; or (2) if the debtor is incapacitated by mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; or is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing; or (3) is on active military duty in a military combat zone. Debtor’s incarceration in a correctional facility does not constitute any of the three grounds for waiver. If Debtor cannot complete the Financial Management course while incarcerated, Debtor can, after being released, move the Court to reopen the case to file the statement regarding the financial management course, at which time Debtor could receive the discharge.

### **B. Failure to Obtain**

#### **§18.3 Closing Case Without Discharge**

*In re Amos*, 08-54842 (Bankr. E.D. Mi. 2009) - Case closed without discharge due to Debtor's failure to file required Certification of Completion of Post-petition Instructional Course Concerning Financial Management. Court would grant relief and enter the discharge upon Debtor filing Motion to Reopen Case and paying \$260 filing fee.

*In re Staten*, Case No. 08-60408 (Bankr. E.D. Mi. 2009) - Motion to Reopen Closed Case under Section 350(b) to file Financial Management Course Certificate denied where Debtor was not eligible to be a Debtor under Section 109(h)(1) as Debtor failed to obtain pre-petition credit counseling until 3 days after case commenced.

*In re Denger*, 2009 WL 2824872 (Bankr. N.D. Ohio 2009) - After filing for bankruptcy relief, an individual debtor seeking to obtain a discharge under Chapter 7 of the Bankruptcy Code is required to complete an instructional course concerning personal financial management and must file with the Court a statement regarding completion of the course. A debtor who does not file with the court the requisite statement is subject to having their case administratively closed without the entry of a discharge.

#### **§18.4 Dismissal**

## **XIX. Trustee**

### **A. Actions Against Trustee**

#### **§19.1 Generally**

*Smith v. Silverman*, 2011 WL 1901040 (2d Cir. 2011) – Court would not reinstate dismissed case to permit debtor to file action against chapter 7 trustee and trustee’s attorney for failure to pursue assets. Underlying claims were entirely without merit, such that reopening case would be futile effort. Chapter 7 trustee is immune from suit for personal liability for acts taken as a matter of business judgment in acting in accordance with statutory or other duty or complying with orders of Court. Trustee’s decision not to pursue actions were well within scope of business judgment.

*Warren Investments, Inc. v. General Casualty of Wisconsin*, Case No. 10-7092 (Bankr. E.D. Mi. 2011) *aff’d*, 2011 WL 3319864 (E.D. Mi. 2011) – Chapter 7 Trustee is liable in personal capacity only for willful and deliberate acts. Proposed Amended Complaint that sought to allege gross negligence of trustee did not state cause of action for willful and deliberate act and would be dismissed.

## §19.2 Limitations

*Grant, Konvalinka & Harrison, P.C. v. Banks*, 2011 WL 3439081 (Bankr. E.D. Tn. 2011) – *Barton* doctrine precludes actions against Trustee absent prior approval by the Bankruptcy Court in which Trustee served. Limited exception applies only to actions taken by Trustee in carrying on business connected with property of the estate, but does not apply to actions taken while administering the estate or in preserving, holding or liquidating assets. In determining whether to permit action to be prosecuted in non-bankruptcy forum, bankruptcy court should consider: 1. Whether the acts or transactions relate to the carrying on of the business connected with the property of the bankruptcy estate. If the proceeding is under 28 U.S.C. Section 959(a) as one for damages while carrying on business connected with property of estate, then no court approval is necessary. However, the moving party may request this initial review by the bankruptcy court. 2. If approval from the appointing court appears necessary, do the claims pertain to actions of the trustee while administering the estate? By asking this question, the court may determine whether the proceeding is a core proceeding or a proceeding which is related to a case or proceeding under Title 11. 3. Do the claims involve the individual acting within the scope of his or her authority under the statute or orders of the bankruptcy court, so that the trustee is entitled to quasi-judicial or derived judicial immunity? 4. Are the movants or proposed plaintiffs seeking to surcharge the trustee; that is, seeking a judgment against the trustee personally? 5. Do the claims involve the trustee’s breaching her fiduciary duty either through negligent or willful misconduct? Trustee’s prosecution of state court action for legal malpractice, although admittedly a non-core proceeding, was one within the trustee’s duty to collect and reduce to money the property of the estate and to investigate financial affairs of the debtor. Further, as actions were taken within scope of Trustee’s duties, issues of Trustee immunity compel resolution of issues in Bankruptcy Court. Policy concerns also favor resolution in Bankruptcy forum. Court must be concerned about discouraging a trustee from pursuing his statutory obligations to investigate the financial affairs of a debtor and collect assets of the estate in an expeditious manner. Subjecting a trustee to multiple state court lawsuits relating to his actions taken pursuant to his statutory duties might well inhibit a trustee from forcefully seeking to protect creditors by vigorously pursuing possible claims of the estate. Motion to permit action to proceed in non-bankruptcy forum denied.

*Grant, Konvalinka & Harrison, P.C. v. Banks*, 2011 WL 3585622 (Bankr. E.D. Tn. 2011) – Immunity protects Trustee and staff and attorneys for Trustee from suit for actions taken within scope of duties of Trustee. Actions will be presumed within scope of Trustee duties. Court cannot impose liability on the Trustee for carrying out his duties in good faith and based on his business judgment. Trustee can be held personally liable for actions outside the scope of his authority as trustee such as seizing property that is not property of the estate; or breached a fiduciary duty owed to some claimant such as failure to collect estate property or failure to preserve it. Trustee sued to recover property from third party. Court concluded that property was not property of estate and dismissed action. Creditor sued Trustee for malicious prosecution. Immunity required dismissal of case as Trustee’s actions, although unsuccessful, were within scope of Trustee’s duties to marshal assets even if in hindsight the Trustee’s action was unsuccessful and legally incorrect. Case did not involve rogue trustee who actually seized assets that were not property of estate. Strong policy reasons protect a trustee from liability for exercising his judgment in how to maximize the assets available for creditor or how to collect possible assets of the estate.

*Cappuccilli v. Lewis*, Case No. 10-11690 (E.D. Mi. 2010) – Creditor violated *Barton* doctrine by filing suit in state court against Chapter 7 Trustee’s attorney without prior approval of Bankruptcy Court.

*Unencumbered Asset Trust v. Hampton-Stein*, 2009 WL 2015395 (Bankr. S.D. Ohio 2009) – Supreme Court’s decision in *Barton v. Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881) ( the “Barton Doctrine”) requires leave of the bankruptcy Court before instituting an action in a non-bankruptcy forum against a trustee, for acts done in the trustee's official capacity and within the trustee's authority as an officer of the Court. Barton Doctrine encompasses acts by counsel or others performing as functional equivalent of trustee or where they act at the direction of the trustee for the purpose of administering the estate or protecting its assets. Action seeking to hold agents of Liquidating Trust liable for actions taken in official capacities as the Court-approved trustee of the Chapter 11 Debtor’s liquidating trust are entitled to protection under the Barton Doctrine. Counsel for trustee is also Court appointed officer who represents the estate is also protected by Barton Doctrine.

*Unencumbered Asset Trust v. Hampton-Stein (In re National Century Financial Enterprises, Inc.)*, 426 B.R. 282 (Bankr. S.D. Ohio 2009) – Party may not commence state action against bankruptcy court appointed trustee without prior consent of Bankruptcy Court under the Barton Doctrine. Court will presume that court appointed trustee is acting within the scope of authority unless the party bringing the action processes information rebutting that presumption at the time of commencement of the state court action. Where state court plaintiff needed additional discovery concerning scope of authority of the court appointed trustee, state court plaintiff must either file action Enid the Court that appointed the trustee or obtain permission from that court to commence the action elsewhere. Failure to do so will result in entry of a permanent injunction against plaintiff pursuing the action in any court other than the court that appointed the trustee in the first instance. Party who commences action in state court in violation of Barton Doctrine can be held liable for damages incurred by other parties to action as a result of having to defend a state court action. Further, court that appointed trustee can enter permanent injunction against prosecution of action in any form other than appointing court where state court action seeks to hold Trustee liable for actions taken after commencement of bankruptcy case.

*In re Amir*, 2009 WL 1748701 (Bankr. N.D. Ohio 2009) – Creditor’s State Court action against Trustee to determine title to property which is alleged to be property of estate barred under Barton doctrine. Trustee cannot be sued without leave of Bankruptcy Court for actions taken in administration and liquidation of estate. Party who continues to pursue litigation after being advised that actions are prohibited liable for sanctions including attorney fees.

*In re National Century Financial Enterprises, Inc.*, 407 B.R. 895 (Bankr. S.D. Ohio 2009). Preliminary injunction against prosecution of adversary defendant’s state court action against Chapter 11 trustee and debtor’s counsel was warranted, as they showed a strong likelihood that *Barton doctrine* was violated.

## XX. Bankruptcy Crimes

### A. Fraud

#### §20.1 Generally

*U.S. v. James*, 2010 WL 4513799 (S.D. Ohio 2010) – False statements in bankruptcy petition constitutes violation of 18 USC Section 152. Defendant’s argument that false statements in petition cannot constitute false statements in a bankruptcy case as there is no case in existence until the petition is filed, and that only post-petition statements can constitute bankruptcy fraud, rejected by Court. Signing Bankruptcy Petition constitutes verification under oath that the statements are true and correct.

*U.S. v. Hyatt*, Case No. 08-12610 (11<sup>th</sup> Cir. 2010) – Debtors’ repeated bankruptcy filings did not match information disclosed on debtors’ tax returns. Debtors convicted of (1) conspiring fraudulently to conceal information from a bankruptcy court; (2) committing bankruptcy fraud; and (3) making false statements during the course of the six bankruptcies. Jury rejected defense that falsehoods were mistakes; that they lacked criminal scienter; that they had wrongly "guesstimated" their income; or

their attorneys had made scrivener's errors. Omissions included failing to disclose tens-of-thousands of gambling winnings.

*U.S. v. Boulware*, Case No. 09-5125 (4<sup>th</sup> Cir. 2010) – Debtor's failure to disclose at least 9 prior bankruptcy filings including at least one that resulted in bar to refiling constituted knowingly and fraudulently making a false declaration, certification, verification, and statement under penalty of perjury in violation of 18 U.S.C.A. § 152(3).

*U.S. v. Hayat*, Case No. 09-10296 (5<sup>th</sup> Cir. 2010) – Debtor's failure to disclose unexpired lease in bankruptcy schedules constituted bankruptcy fraud sufficient to enhance criminal sanctions in related conviction for bank fraud and wire fraud.

*U.S. v. Diekemper*, Case No. 09-2081 (7<sup>th</sup> Cir. 2010) – Debtor and spouse engaged in 4 year scheme to conceal assets from bankruptcy court, including undervaluing property by \$2.5 million, hiding farm equipment on friends' properties, titling and selling vehicles and equipment in others' names, using the mail service to effectuate these transfers, failing to disclose financial information to the bankruptcy trustee, fraudulently obtaining agricultural subsidies from the USDA, and urging others to lie under oath during his bankruptcy proceedings.

## §20.2 Sanctions

*U.S. v. Hyatt*, Case No. 08-12610 (11<sup>th</sup> Cir. 2010) – Debtors convicted of (1) conspiring fraudulently to conceal information from a bankruptcy court; (2) committing bankruptcy fraud; and (3) making false statements during the course of the six bankruptcies. Wife sentenced to 12 months and Husband to 60 months in prison and ordered \$4,020,243.22 in restitution.

*U.S. v. Boulware*, Case No. 09-5125 (4<sup>th</sup> Cir. 2010) – Debtor's failure to disclose at least 9 prior bankruptcy filings including at least one that resulted in bar to refiling sentenced to 15 to 21 months in jail.

*U.S. v. Diekemper*, Case No. 09-2081 (7<sup>th</sup> Cir. 2010) – Debtor who engaged in 4 year scheme to conceal assets from bankruptcy court, including undervaluing property by \$2.5 million, hiding farm equipment on friends' properties, titling and selling vehicles and equipment in others' names, using the mail service to effectuate these transfers, failing to disclose financial information to the bankruptcy trustee, fraudulently obtaining agricultural subsidies from the USDA, and urging others to lie under oath during his bankruptcy proceedings, sentenced to 10 years in prison and ordered not to have contact with spouse for 24 months as condition of spouse's probation.

*United States v. Mason*, 2008 WL 4280123 (6<sup>th</sup> Cir. 2008) - Defendant sentenced to 42 months in prison for bankruptcy fraud.

*United States v. Johnson*, 2009 WL 1707484 (N.D. Ohio 2009) - Defendant sentenced to three years of probation, six months of location monitoring, payment of restitution in the amount of \$14,745.05, and other terms and conditions, as a result of her plea of guilty to one count of concealing assets in bankruptcy.

## XXI. Personally Identifiable Information

### A. Generally

#### §21.1 Statutory Requirements

*Lentz v. Bureau of Medical Economics*, 405 BR 893 (Bankr. N.D. Ohio 2009) –Gramm-Leach-Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, imposes on financial institutions an affirmative and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those customers' nonpublic personal information.



*French v. American General Financial Services*, 401 B.R. 295 (Bankr. E.D. Tn. 2009) – Gramm-Leach-Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, imposes on financial institutions an affirmative and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those customers' nonpublic personal information. The E-Government Act of 2002, 44 USC Section 3501 *et. seq.* directs adoption of rules by Courts to protect privacy.

B. Information Considered “Personally Identifiable”

§21.2 Account Numbers

*In re Chubb*, 426 BR 695 (Bankr. E.D. Mi. 2010) – Utility company account number constituted “personally identifiable information” that must be redacted in proof of claim. Claim filed with full account number would be stricken and restricted from public view without prejudice to creditor filing an amended proof of claim that omitted personally identifiable information.

C. Remedies

§21.3 Disclosure in Proof of Claim

*Holloway v. Community Bank*, 2011 WL 4500042 (E.D. Tn. 2011) – Creditor’s inclusion in proof of claim of social security number constituted improper disclosure of personally identifiable information as defined in Section 101(41A). However, Section 107(c) does not authorize private cause of action for disclosure and filing of claim, standing alone, does not constitute actionable invasion of privacy absent evidence of intent to convey information to public at large.

*Lentz v. Bureau of Medical Economics*, 405 BR 893 (Bankr. N.D. Ohio 2009) – Disclosure of “personally identifiable information” is not a basis to disallow a proof of claim under Section 502. Section 502 specifies the grounds on which a claim can be disallowed. Procedural violations alone are not one of the bases on which a proof of claim can be disallowed.

*French v. American General Financial Services*, 401 B.R. 295 (Bankr. E.D. Tn. 2009) – Disclosure of “personally identifiable information” is not a basis to disallow a proof of claim under Section 502. Section 502 specifies the grounds on which a claim can be disallowed. Procedural violations alone are not one of the bases on which a proof of claim can be disallowed.

*Bailey v. Salyersville National Bank*, 2009 WL 936956 (Bankr. E.D. Ky. 2009) – Debtor does not have a private cause of action against creditor who files documents with Court containing “personally identifiable information”. Gramm-Leach-Bliley Financial Modernization Act, 15 U.S.C. §6801 *et. seq.* does not provide for private cause of action and Debtor failed to produce any evidence showing that bank intended any harm to Debtor or the Debtor has suffered any harm by the creditor’s filings.

§21.4 Damages

*Lentz v. Bureau of Medical Economics*, 405 BR 893 (Bankr. N.D. Ohio 2009) –Gramm-Leach-Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, does not provide private right of action and Court will not imply one in light of clear provisions of Act. Bankruptcy Code Section 105 does not authorize Court to create private right of action unless a private right of action otherwise exists in connection with another section of the Code.

*French v. American General Financial Services*, 401 B.R. 295 (Bankr. E.D. Tn. 2009) – Debtor does not have private right of action against creditor who files proof of claim which includes “personally identifiable information” as defined in 11 USC Section 101(41A). Section 107 of the Bankruptcy Code, entitled “Public access to papers”; Federal Rule of Bankruptcy Procedure 9037 which requires “personally identifiable information” be redacted from papers filed with the Court; the Gramm-Leach-Bliley Financial Modernization Act, 15 USC Section 6801 *et. seq.*, which imposes on financial institutions an affirmative

and continuing obligation to respect the privacy of its customers and protect the security and confidentiality of those customers' nonpublic personal information; and the E-Government Act of 2002, 44 USC Section 3501 *et. seq.* which directs adoption of rules by Courts to protect privacy; do not individually or collectively create a private cause of action for disclosure of “personally identifiable information”.

*Bailey v. Salyersville National Bank*, 2009 WL 936956 (Bankr. E.D. Ky. 2009) – Debtor does not have a private cause of action against creditor who files documents with Court containing “personally identifiable information”. Gramm-Leach-Bliley Financial Modernization Act, 15 U.S.C. §6801 *et. seq.* does not provide for private cause of action and Debtor failed to produce any evidence showing that bank intended any harm to Debtor or the Debtor has suffered any harm by the creditor’s filings.

#### §21.5 Contempt

*French v. American General Financial Services*, 401 B.R. 295 (Bankr. E.D. Tn. 2009) –Court will not use civil contempt power to punish disclosure of personally identifiable information absent clear and convincing evidence that the offending party “violated a definite and specific order of the Court requiring [them] to perform or refrain from performing a particular act or acts with knowledge of the Court's order”. Contempt action may lie under Section 105 if Debtor can prove that creditor filed a proof of claim disclosing “personally identifiable information” willfully or in deliberate disregard of Federal Rule of Bankruptcy Procedure 9037.

*Bailey v. Salyersville National Bank*, 2009 WL 936956 (Bankr. E.D. Ky. 2009) – Debtor does not have a private cause of action against creditor who files documents with Court containing “personally identifiable information”. Gramm-Leach-Bliley Financial Modernization Act, 15 U.S.C. §6801 *et. seq.* does not provide for private cause of action and Debtor failed to produce any evidence showing that bank intended any harm to Debtor or the Debtor has suffered any harm by the creditor’s filings.

#### §21.6 Redaction from Transcript

*In re Immanuel, LLC*, Case no. 10-11585 (Bankr. W.D. Mi. 2011) – Court’s Administrative Order allows party to request that electronic transcript redact personally identifiable information within scope of Rule 9037. Party’s request to redact information that does not constitute personally identifiable information denied without prejudice to party filing Motion for Protective Order if party believes grounds exist.

## XXII. Real Estate Settlement Procedures Act

### A. Generally

#### §22.1 Statutory Authority

*Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – RESPA action is based on 12 USC Section 2605(e) and 24 CFR 3500.21. Mortgage servicer is required to respond to requests for information. Action for payment or acceptance of referral fees without disclosure is subject to one year statute of limitations.

### B. Qualified Written Request

#### §22.2 Defined

*Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – On receipt of inquiry for information related to a mortgage loan, the servicer must acknowledge request within 20 days and must respond within 60 days of receipt. Qualified Written Request includes a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the

account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

*Conley v. Central Mortgage Co.*, 2009 WL 2498022 (Bankr. E.D. Mi. 2009) – A QWR is any written correspondence, other than a notice on a payment coupon or payment media, and includes or enables the servicer to identify the name and account of the borrower and includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provide sufficient detail to the service or regarding other information sought by the borrower.

#### §22.3 Servicer's Duty to Respond

*Tann v. Chase Home Finance, LLC*, 2011 WL 3799841 (E.D. Mi. 2011) – RESPA authorizes a borrower of a federally related mortgage loan to submit a qualified written request (QWR) to a lender seeking correction of an account believed to be in error or requesting specific information pertaining to the servicing of a loan. Lender must acknowledge the borrower's request within twenty days and substantively respond to the inquiry within sixty days by providing the information requested or an explanation why the information is unavailable; or the lender may make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction.

*Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – Mortgage servicer is required to respond to requests for information. Loan servicing is defined as receiving scheduled periodic payments from borrower pursuant to terms of a loan and making payments in principal and interest payments received from borrower. Loan servicer must acknowledge request within 20 days and must respond within 60 days of receipt. Servicer must make any appropriate corrections in the account and advise borrower of corrections and provide borrower with a written explanation or clarification that includes a statement of the reasons that the servicer believes the account is correct and provides the name and telephone number for borrower to contact.

*Conley v. Central Mortgage Co.*, 2009 WL 2498022 (Bankr. E.D. Mi. 2009) – RESPA requires any servicer of a federally related mortgage loan to respond to a Qualified Written Request for information by a borrower concerning the servicing of the loan. A servicer must provide a written response acknowledging receipt of the QWR within 20 days. Servicer has 60 days to conduct an investigation and either make appropriate corrections and notify the borrower of those corrections; or provide a written statement of the reasons the service or believes the account is correct; or provide a written statement indicating reasons why that information is not available.

#### §22.4 Remedies

*Lessl v. CitiMortgage, Inc.*, 2011 WL 4351673 (E.D. Mi. 2011) – Owner's written request for escrow statement constituted Qualified Written Request under RESPA. Lender must acknowledge request within 20 days and respond substantively within 60 days. Complaint dismissed where owner alleged violation of RESPA but did not allege any actual damages from the violation.

*Tann v. Chase Home Finance, LLC*, 2011 WL 3799841 (E.D. Mi. 2011) – Damages flowing from a RESPA violation are limited to a borrower's actual damages plus additional damages up to \$1000 if the borrower shows the lender engaged in a pattern and practice of committing violations. Complaint that alleged only that Plaintiff sent QWR to lender and that Plaintiff thereafter called lender multiple times did not demonstrate factual basis for violation of RESPA. Further, allegations of complaint demonstrated that lender acknowledged receipt of letter within 20 days, and sent the plaintiff a substantive response letter within the 60-day response time allowed by the statute that included most of the information requested, as well as an explanation regarding why some information was not included and contact information if the plaintiff had any further concerns. Dispute over status of mortgage, standing alone, is not violation of RESPA.

*Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – On receipt of inquiry for information related to a mortgage loan, the servicer must acknowledge request within 20 days and must respond within 60 days of receipt. RESPA applies only to loan servicers. Action against lender for failure to respond to QWR fails to state cause of action and must be dismissed. Remedy against servicer who fails to comply include actual damages plus “any additional damages” not to exceed \$1,000 pursuant to Section 2605(e) if the borrower can prove pattern or practice of non-compliance. Complaint that failed to allege actual damages and failed to allege pattern or practice dismissed.

#### §22.5 Construction With Bankruptcy Code

*Conley v. Central Mortgage Co.*, 2009 WL 2498022 (Bankr. E.D. Mi. 2009) – Real Estate Settlement Procedures Act and Bankruptcy Code do not irreconcilably conflict. Chapter 13 Debtors not precluded by Bankruptcy Code or Rules from sending Qualified Written Request to mortgage loan service even if confirmation of Debtors’ Chapter 13 Plan was in dispute at time QWR was sent. RESPA requires any servicer of a federally related mortgage loan to respond to a Qualified Written Request for information by a borrower concerning the servicing of the loan. Although Debtor can obtain the same information through the Bankruptcy Code under the supervision of the Bankruptcy Court, Debtor may use the procedures afforded in RESPA. The Court cannot arbitrarily enforce the Bankruptcy Code in preference to RESPA.

### XXIII. Other Current Issues

#### A. Foreclosures

##### §23.1 State Law Requirements

*McRary v. Jarrard*, 2011 WL 3566279 (E.D. Mi. 2011) – Michigan law permits non-judicial foreclosure only if lender has not instituted proceedings at law to enforce the underlying obligation. Lender violated statute when lender initiated non-judicial foreclosure process after debtor had filed adversary proceeding to determine validity of debt and lender asserted affirmative defense of “set off”. Asserting defense of set off constituted attempt by lender to recover on note triggering prohibition against non-judicial foreclosure.

*Attard v. American Home Mortgage Services, Inc.*, Adv. No. 08-5064 (Bankr. E.D. Mi. 2009) – Plaintiff not entitled to Summary Judgment invalidating foreclosure sale where record before Court did not establish beyond genuine issue of material fact that the Wayne County Sheriff did not appoint a specific person to conduct a foreclosure sale or that the specific written appointment was signed by someone other than the Sheriff himself.

*In re Finley*, Case No. 09-44480 (Bankr. E.D. Mi. 2010) – Sheriff’s foreclosure sale may not be set aside absent fraud, accident or mutual mistake. Creditors attempt to circumvent sheriff’s sale by filing “Affidavit Expunging Sheriff’s Deed” was of no effect as the affidavit failed to contain any allegations of fraud, accident or mutual mistake. Mortgage ores alleged “mistake” in credit getting the full amount of the note is not “fraud” or a “mistake” sufficient to warrant setting aside the foreclosure sale where the foreclosure sale otherwise complied with all statutory requirements.

##### §23.2 Redemption

*McRary v. Jarrard*, 2011 WL 3566279 (E.D. Mi. 2011) – Redemption price is determined by successful bid price plus per diem interest calculated on the bid amount. Interest is not calculated based on full loan balance as borrower can redeem merely by paying bid amount plus interest on that bid.

#### B. Specific Causes of Action

##### §23.3 Piercing Corporate Veil

*In re Geiger*, 2010 WL 2756760 (Bankr. N.D. Ohio 2010) – Under Ohio law, corporate veil will be pierced where it would be unjust to allow the shareholders to hide behind the fiction of the corporate entity. Party

seeking to pierce veil must prove that shareholder used his control over corporation in such a manner as to defraud the third parties. Mere control over a corporation is not in itself a sufficient basis for shareholder liability. Plaintiff must prove “egregious shareholder misdeeds” and “egregious wrongs” and “extreme shareholder misconduct”. Court would not pierce corporate veil where there was no evidence of intent to mislead or defraud creditors, notwithstanding that corporation did not follow virtually any other corporate formalities: there are no officers, no corporate bank accounts, no liability insurance with the corporation as the insured party, no corporate books or minutes of corporate meetings, no business stationery; most of the assets used in the Corporation's business are titled in Debtor's name; all monies from the business are deposited into Debtor's personal account, from which corporate and personal obligations are paid. Debtor receives revenue from operation of the business in his name, as well as invoices for business expenses; and there is minimal separation of Corporate and personal affairs.

*Brennan v. Slone*, 2008 WL 4569946 (6th Cir. 2008) - Transfers of inventory from Debtor's closely held corporation to Debtor's significant other with intention that significant other sell the inventory and keep the proceeds are avoidable fraudulent transfers where corporation is found to be alter ego of Debtor. Factors in deciding whether to disregard the corporate fiction under the *alter ego* theory include: (1) grossly inadequate capitalization, (2) failure to observe corporate formalities, (3) insolvency of the Debtor corporation at the time the debt is incurred, (4) shareholders holding themselves out as personally liable for certain corporate obligations, (5) diversion of funds or other property of the company property for personal use, (6) absence of corporate records, and (7) the fact that the corporation was a mere facade for the operations of the dominant shareholder(s). Court correctly concluded that corporation was Debtor's alter ego where Debtor frequently commingled his funds with corporation's and treated corporation's debts as Debtor's individual debts. Debtor put corporation's cash into Debtor's accounts and paid corporation expenses from personal accounts. Debtor paid his own expenses from the commingled funds. Debtor had a difficult time remembering to distinguish between himself and his corporation during testimony.

#### §23.4 Continuation of Debtor

*Per-Co, Ltd. v. Great Lakes Factors*, 2008 WL 4791434 (6<sup>th</sup> Cir. 2008) - Purchaser of assets from Debtor constituted “mere continuation” of Debtor, allowing creditors of Debtor to assert claims against buyer of assets on same priority as those creditors held claims against Debtor. Buyer will be “mere continuation” where buyer acquired all or substantially all of the Debtor's assets; principal of seller is also principal of buyer; assets sold consisted of virtually all assets of Debtor that had value, leaving Debtor with only worthless or virtually worthless assets; new company had same officers, directors and shareholders as seller; buyer engaged in same business operation with same physical plant and product lines; and buyer pays inadequate consideration for purchase of assets.

#### §23.5 Federal Tort Claims Act

*Lewis v. McClatchey*, 2009 WL 1372945 (Bankr. S.D. Ohio 2009) - Federally insured bank is not an agency of United States Government and therefore cannot be sued under the Federal Tort Claims Act. FTCA applies only to claims against persons acting on behalf of federal agency.

#### §23.6 Injunctions and Temporary Restraining Orders

*In re Lundeen*, 442 BR 659 (Bankr. S.D. Ohio 2011) – Anti-injunction act, 28 USC 2283, prohibits Bankruptcy Court from enjoining city or state from commencing or continuing criminal proceeding in state court. Exception that allows court to enter injunction to protect court's exercise of jurisdiction does not apply as case was ready to be closed and continuation of criminal proceeding would not impact progress of case. Section 105 does not provide authority to enter injunction in violation of Anti-injunction act. Injunction pursuant to Section 105 is radical measure to be used only in unusual circumstances where judgment against third party would in effect be judgment against debtor. Criminal proceedings against debtor affected only debtor and would not result in any judgment against any third party.

*Homkes v. Vilsack*, 2011 WL 1453819 (W.D. Mi. 2011) – Debtor whose house was about to be sold at foreclosure sale demonstrated cause for Temporary Restraining Order.



*Turchan Technologies Group, Inc. v. Internal Revenue Service*, Case no. 10-4315 (Bankr. E.D. Mi, 2010) – Party seeking preliminary injunction must demonstrate (i) likelihood of success on merits; (ii) irreparable harm if the injunction is not granted; (iii) probably that granting injunction will not cause irreparable harm to others; and (iv) whether public interest is advanced by injunction. In action seeking to enjoin IRS from collection of taxes, 26 USC Section 7421(a) requires clear demonstration that there are no circumstances under which the United States will prevail in tax collection efforts and that collection activities will irreparably harm the taxpayer. Debtor not entitled to injunctive relief where debtor admittedly failed to make tax deposits required by Debtor’s confirmed Chapter 11 plan. IRS actions in attempting to collect priority tax claims provided for in Chapter 11 plan were proper and appropriate after debtor defaulted and IRS provided notice of default as required by Confirmation Order, and all steps taken by IRS were permitted by the Confirmation Order. Plaintiff’s likelihood of success on merits of claims against IRS were “zero”, mandating denial of injunctive relief.

*Saleh v. Bank of America, N.A.*, 427 BR 415 (Bankr.S.D.Ohio 2010) – Automatic stay does not extend to third party co-obligors. Debtor can request injunction against actions against third party, and Court has authority to grant injunctive relief under Section 105. However, requests for injunctive relief that would effectively extend the stay to a non-debtor are viewed with a great deal of skepticism. Although action against third party, Debtor’s wholly owned corporation, would produce adverse consequences, debtor did not demonstrate any reason why the corporation could not file its own bankruptcy. Further, extending the stay via injunction in a Chapter 13 proceeding would contravene the express provisions of Section 1301 which provide for a co-debtor stay in very limited circumstances. Debtor and corporation did not share such an identity of interests that the legal separation could be ignored. Corporation kept separate records and accounts and filed separate tax returns from debtor. Corporation owned assets separate from those owned by debtor including real property adjacent to corporation’s principal place of business, accounts, inventory, equipment and a liquor license.

*Unencumbered Asset Trust v. Hampton-Stein*, 2009 WL 2015395 (Bankr. S.D. Ohio 2009) - When considering motion for preliminary injunction, Court must balance four factors: (1) whether movant has a strong likelihood of success on the merits, (2) whether movant would suffer irreparable injury without the injunction, (3) whether issuance of the injunction would cause substantial harm to others, and (4) whether the public interest would be served by the issuance of the injunction. Trustee, trustee’s principal, and counsel for trust, demonstrated strong likelihood of success on the merits of claim that adversary defendant violated Supreme Court’s decision in *Barton v. Barbour*, 104 U.S. 126, 26 L. Ed. 672 (1881) (the “Barton Doctrine”) doctrine, which required leave of bankruptcy Court to bring state-court action against bankruptcy trustees or trustee’s functional equivalents for acts done in their official capacity and within their authority as Court officers where plaintiffs action sought to hold defendants liable for actions in liquidating Debtors assets which constitute actions within the official capacities and authority as officers of bankruptcy Court. Irreparable injury requires more than possibility of some remote future injury. Defendant demonstrated irreparable injury where litigation in non-bankruptcy forum as Defendants would be distracted from their duties and non-Bankruptcy forum litigation could lead to an order that effectively sets aside the underlying Bankruptcy proceeding and threatens to directly contravene the Confirmation Order and transactions effectuated thereunder. Public interest served where preliminary injunction protects the integrity of the Debtor’s bankruptcy estate and the bankruptcy process. Public interest is served by allowing bankruptcy Courts to retain control over the administration of the bankruptcy estates.

*Travelers Indemnity Co. v. Bailey*, 129 Sect. 2195 (2009) – Debtor’s confirmed Chapter 11 Plan included release of Debtor’s insurers from any and all claims, demands, allegations, duties, liabilities and obligations which have been or could have been or might be asserted by any person against any of the insurance companies. Scope of provision in Chapter 11 Plan precluded subsequent actions not only against Debtor, but also precluded any subsequent actions against the insurance companies including any actions based on the conduct of the insurers themselves or which are otherwise not derivative of the Debtor’s wrongdoing, where Court’s Order confirming Debtors Chapter 11 Plan was not timely appealed and the order became final.

*In re National Century Financial Enterprises, Inc.*, 407 B.R. 895 (Bankr. S.D. Ohio 2009) - Preliminary injunction against prosecution of adversary defendant's state court action against Chapter 11 trustee and debtor's counsel was warranted, as they showed a strong likelihood that *Barton doctrine* was violated.

#### §23.7 Recoupment

*Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – TILA does not support affirmative claim for equitable recoupment, which can be raised only as defense in action commenced by other party.

*Thomas v. City of Detroit*, Case No. 10-5909 (Bankr. E.D. Mi. 2010), *affd.*, Case no. 11-10639 (E.D. Mi. 2011) – Party owing a debt possesses right of recoupment if that party has a cognizable claim for damages against the party seeking to collect on the debt. Absent any legal obligation owed by the person seeking to collect debt, Debtor had no right of recoupment that could be asserted. Where District Court previously ruled that Debtor had no claims against City, Debtor's alleged claims against City were res judicata and could not assert recoupment as defense to City's Proof of Claim.

#### §23.8 Fair Debt Collection Practices Act

*Turner v. American Express Centurion Bank*, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Filing of erroneous or inflated proof of claim is not violation of FDCPA. FDCPA is designed to protect defenseless debtors and to give them remedies against abuse by creditors. There is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself.

*Tann v. Chase Home Finance, LLC*, 2011 WL 3799841 (E.D. Mi. 2011) – FDCPA does not apply to actions of creditor collecting debt owed to it. Mortgage Servicing Company is not "debt collector" if debt was current at time Servicer acquired the servicing rights.

*Poteet v. eCast Settlement Corp.*, 2011 WL 3626696 (Bankr. E.D. Tn. 2011) – Proof of claim in Bankruptcy Court cannot constitute abusive debt collection practice proscribed by FDCPA. If claim is incomplete or fails to attach necessary documentation, proper remedy is to object to claim. Adversary proceeding for FDCPA violation dismissed for failure to state cause of action.

*Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – Letter to mortgage servicer cannot form basis of action under FDCPA against lender. Further, FDCPA does not apply to actions against lender collecting debts in its own name or to third parties collecting debtors that was not in default when obtained by the collector, but applies only to persons collecting debtors owed to another that are first acquired by collector post-default. Mortgage servicer that assumed servicing when mortgage was not in default could not be liable under FDCPA for subsequent alleged violations.

*Fambres v. Nuvel National Auto Finance, LLC*, 2011 WL 2133538 (Bankr. E.D. Ky. 2011) – Bankruptcy court lacks jurisdiction over Adversary complaint seeking damages for violating FDCPA. All actions occurred post-petition and are not property of the estate and outcome cannot affect administration of estate. FDCPA action arises under non-bankruptcy law and neither "arises in" nor "arises under" bankruptcy code, and in light of lack of impact on estate or administration of case, is not "related to" bankruptcy case.

*Rine v. Ocwen Loan Servicing, LLC*, 2011 WL 1327358 (W.D. Mi. 2011) – FDCPA distinguishes between "debt collectors" and "creditors." Creditor is broadly defined as one who "offers or extends credit creating a debt or to whom a debt is owed, while debt collector is one who attempts to collect debts owed or due or asserted to be owed or due another. Entity that acquires a current, non-defaulted debt to continue servicing it is creditor. Entity that acquires the debt for collection is debt collector. FDCPA looks at the status of the debt at the time it is acquired by the would-be collector to differentiate parties which ought to be treated as debt collectors from those which ought to be treated as creditors: Defendant is not removed from scope of FDCPA merely by calling itself a mortgage servicer. Complaint sufficiently alleged that loan was in default when acquired by Ocwen to cause Ocwen to be "debt collector" for purposes of FDCPA.

*Greer v. Gateley*, 2010 WL 4817993 (Bankr. M.D. Tn. 2010) – FDCPA applies only to those who meet the statutory definition of “debt collector”, which turns on whether the person “regularly” attempts to collect debts. Business that principally focuses on enforcement security interests but who does not otherwise regularly attempt to collect debts is exempt from FDCPA except for Section 1692f(6) which prohibits taking or threatening to take property where there is no lawful right to possession or whether there is no intention to take property. Deed of Trust holder was not debt collector as only role was to enforce security agreement after default and there were no allegations that Deed of Trust holder took or threatened to take any action that would violate 1962f(6).

#### §23.9 Truth in Lending Act

*Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – Borrower’s right to rescind is subject to three year statute of limitations from date of execution of promissory note. 15 USC Section 1635 precludes any claim for equitable tolling of the statute of limitations. Balance of claims under TILA are subject to one-year statute of limitations pursuant to 15 USC Section 1640(e), but this statute is subject to equitable tolling. Fraudulent concealment to support equitable tolling requires that : 1) defendant concealed the conduct that constitutes the cause of action; 2) defendant’s concealment prevented plaintiff from discovering the cause of action within the limitations period; and 3) until discovery, plaintiffs exercised due diligence in trying to find out about the cause of action. Where the doctrine of fraudulent concealment is applied, the one year period will begin to run when the borrower discovers or had reasonable opportunity to discover the fraud involving the complained of TILA violation. Plaintiff’s failure to plead fraud with particularity precluded court from finding equitable tolling of statute of limitations. TILA does not support affirmative claim for equitable recoupment, which can be raised only as defense in action commenced by other party.

*Hill v. Tribeca Lending Corp.*, Case No. 09-2214 (3d Cir. 2010) – Federal Truth in Lending statute, 15 USC Section 1601, does not apply to loan principally for business, not consumer, purposes. Borrower re-financed home to obtain funds to infuse into borrower’s struggling business. Although collateral was borrower’s home, the loan was primarily for business or commercial purposes which is excluded from the requirements of TILA.

#### §23.10 Fair Credit Reporting Act

*Evans v. Mercedes Benz Financial Services, LLC.*, 2011 WL 2936198 (E.D. Mi. 2011) – FCRA contains no provision requiring creditors to report the mere filing of a bankruptcy petition to credit reporting agencies. Creditor did not violate FCRA by continuing to report default on debt prior to entry of discharge.

*Kowall v. GMAC Mortgage, LLC*, Case no. 10-3221 (Bankr. E.D. Mi. 2011) – Fair Credit Reporting Act, 15 USC Section 1681b, prevents person from obtaining credit report for improper purpose. Plaintiff must prove that there was a consumer report as defined; defendant obtained or used it; and did so with no statutorily permissible purpose. Complaint that alleged that defendant obtained credit report without proper purpose stated cause of action and would survive Motion to Dismiss.

#### §23.11 Equal Credit Opportunity Act

*Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – ECOA, 15 USC Section 1691(e), prohibits discrimination against any applicant with respect to any credit transaction. ECOA has two year statute of limitations from date of alleged violation. Terms of loan were clearly disclosed when loan closed and any alleged violation occurred at closing. Action brought more than two years after closing barred.

#### §23.12 Interpleader

*Plan Administrator for the Bail & Rice, Inc., Profit Sharing Plan v. Gail & Rice, Inc.*, 2011 WL 110904 (E.D. Mi. 2011) – Federal Rule of Civil Procedure 22 permits a party to invoke interpleader if the plaintiff

may be subject to double or multiple liabilities. Interpleader allows a party to join all other claimants as adverse parties. Court must first determine: (1) whether the stakeholder has properly invoked interpleader, including whether the court has jurisdiction over the suit, (2) whether the stakeholder is actually threatened with double or multiple liability, and (3) whether any equitable concerns prevent the use of interpleader. If so, then the court determines the respective rights of the claimants to the fund or property at stake via normal litigation processes, including pleading, discovery, motions, and trial.

#### §23.13 Michigan Consumer Protection Act

*McRary v. Jarrard*, 2011 WL 3566279 (E.D. Mi. 2011) – Action violates MCPA, Section 445.901, when action favors party taking action and causes probability of confusion or misunderstanding of legal rights and obligations of other party. Lender violated MCPA by sending notice of non-judicial foreclosure sale after lender had asserted defense of set-off in adversary filed by debtor to determine validity of debt. Lender’s notice incorrectly stated that “no legal or equitable proceedings had been instituted to recover the debt” which caused likelihood of confusion regarding status of action in violation of MCPA.

#### C. Mediation

##### §23.14 When Appropriate

*In re St. James Incorporated*, Case No. 07-48680 (Bankr. E.D. Mi. 2009) – Creditor’s Motion to Appoint Mediator denied where certain parties were unwilling to participate in mediation and because mediation did not appear likely to be fruitful and would not serve a useful purpose

#### D. Expedited hearing

##### §23.15 Procedure

*In re Bowlson*, Case No. 08-44081 (Bankr. E.D. Mi. 2011) – Motion for Expedited Hearing denied where exigency was result of debtor’s or counsel’s failure to act in timely manner. Debtor failed to demonstrate exigency for Motion to Incur Debt to purchase new vehicle where debtor’s lease of her prior vehicle expired more than 2 months prior to filing the instant Motion. Plan confirmed more than 2 years earlier acknowledged that lease being assumed would expire in October, 2010, leaving debtor and counsel with a full two years’ knowledge that lease would expire.

*In re Miles*, Case No. 09-78811 (Bankr. E.D. Mi. 2010) - Debtor’s Motion for Expedited Hearing on Motion to Modify Conditions of Order Imposing Stay denied where Motion was filed too late to hold a hearing. The requested hearing date would give less than two-days notice to creditors and the Trustee and no reason was given why Motion was filed so late where Debtor had known about circumstances motivating the hearing for some time.

*In re Elliott*, Case No. 09-50231 – Motion for Expedited Hearing denied without prejudice where Debtor’s underlying motion failed to include the statement of concurrence as required by local bankruptcy loan 9014-1(g). Debtor is permitted to renew request for expedited hearing only after filing a supplement to the underlying motion showing compliance with local rule 9014-1.

#### E. Disqualification of Judge

##### §23.16 Grounds

*Morris v. Paine*, 2010 WL 4272868 (Bankr. M.D. Tn. 2010) – Debtor filed Motion to disqualify all of the Bankruptcy Judges in Tennessee and also the Chapter 13 Trustee and his staff attorney alleging that “they are not judges, they are “criminals dressed in black, including the officers of the clerks’, reigning terror upon the people of this state and are hereby forever disqualified from this and any other case that has to deal with Jimmy Marcell Morris for their failure to be impartial, unbiased and do fair & honest service and case fixing; abandonment of oath & duty in the bankruptcy court”. Debtor’s complaint in this Chapter 11

case arose out of debtor's prior sequential failed Chapter 13 cases, the most recent of which was dismissed based on debtor's failure to file the credit counseling certificate, failure to submit a plan that was feasible, and failure to file a plan that met liquidation. Debtor's current adversary proceeding joined all of the judges and Chapter 13 Trustee as defendants, alleging that the defendants acted together against him in proceeding over and dismissing his cases, confirming no stay was in effect as to the Smyrna Property, and failing to pursue the alleged violations of the Fair Debt Collection Practices Act. Debtor sought relief under 10 U.S.C. § 333, 11 U.S.C. § 523(a)(6), Federal Rule of Bankruptcy Procedure 7001(6), 18 U.S.C. §§ 1346 and 1918, 42 U.S.C. § 2000d, the Eleventh Amendment to the U.S. Constitution, and fraud.

*LaBankoff v. United States Trustee*, Case No. 09-1300 (9<sup>th</sup> Cir. BAP 2010) – Party asserting judicial bias has an exceptionally heavy burden to overcome a presumption of honesty and integrity in the Judge. Bankruptcy Court comments to *pro se* Chapter 11 Debtor that Debtor had failed to comply with procedural requirements of case and that Court did not believe that Debtor could confirm a plan while entering order giving Debtor 120 days to attempt confirmation were observations were consistent with Court's duty to advise that Debtor's lack of legal knowledge, as demonstrated by his multiple mistakes made thus far in the case, would inevitably lead to expenses and aggravation for all concerned, and that disaster was] looming. Comments signal bankruptcy court's sympathetic concern for Debtor, and its willingness to exercise its discretion by affording Debtor time to propose and confirm a proper plan, or to at least secure competent legal advice. Disqualification based on "extrajudicial sources" is implicated when Court's bias originates outside the courtroom and must result in an opinion on the merits on some basis other than what the judge learned from participating in the case. Nothing in the record indicated that Judge had any personal interest, financial or otherwise, in this case. There is also no indication in the record that the bankruptcy judge's opinions expressed in the transcripts or written documents were based on any information or events other than those originating in the bankruptcy court proceedings. Disqualification for "pervasive bias" is based on events that occur within the proceeding are particularly strong and clearly indicate judge's inability to render fair judgment. Bankruptcy Court was not hostile or antagonistic toward Debtor. Although Court would have been warranted in dismissing case earlier, Judge afforded Debtor one last opportunity to either confirm plan or hire competent counsel. This act of discretion by the bankruptcy court is not consistent with a pattern of deep-seated antagonism against Debtor.

*LaBankoff v. GMAC Mortgage. LLC.*, Case no. 09-1294 (9<sup>th</sup> Cir. BAP 2010) – Record failed to disclose any evidence of bias. Comments made by a court in the course of judicial proceedings are rarely sufficient to establish bias requiring recusal. "Extrajudicial source" rule is implicated when bias originates outside the courtroom. Bankruptcy judge had no personal interest, financial or otherwise, in this case and there was no indication that the bankruptcy judge's opinions, expressed during hearings or in written memoranda in the case, were based on any information or events originating outside the bankruptcy court proceedings. Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. This pervasive bias arises when a judge's favorable or unfavorable disposition toward a party, although stemming solely from the facts adduced or the events occurring at trial, nonetheless becomes so extreme as to indicate the judge's clear inability to render fair judgment.

*U.S. v. Diekemper*, Case NO. 09-2081 (7<sup>th</sup> Cir. 2010) – Defendant in prosecution for bankruptcy fraud failed to raise issue of recusal before trial court. 28 USC Section 455 requires bias concerns to be raised either before the trial judge or promptly thereafter by writ of mandamus upon becoming aware of alleged bias. Judicial bias concern can be raised between trial and sentencing if bias did not become known until trial's cessation. Further, mere fact that trial judge forms negative opinion of litigant during proceeding is not bias for purposes of recusal. Recusal appropriate only where Court voices opinions that display a deep-seated favoritism or antagonism that would make fair judgment impossible. Trial Court's statement that defendant is "manipulative, narcissistic, and twisted," similarly is a reflection of the facts before the district court. This statement further served to explain why the judge imposed the sentence that he did and did not evidence improper bias.

*In re Hake*, Case No. 08-8039 (6<sup>th</sup> Cir. BAP 2008) – Judge can be required to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Judge shall disqualify himself where



Judge has personal bias or prejudice concerning a party or personal knowledge of the disputed evidentiary fact. Judicial rulings alone almost never constitute a valid basis for bias or partiality. Opinions formed by the Judge on the basis of facts introduced or events occurring in the course of the proceedings or prior proceedings do not constitute a basis for bias or partiality unless Judge displays a deep-seated favoritism or antagonism that would make fair judgment impossible. Judicial remarks during course of trial that are critical or disapproving of or even hostile to counsel, the parties or their cases ordinarily do not support a bias or partiality challenge unless comments reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. Motion for recusal properly denied where record did not demonstrate that Judge's opinion of counsel was derived from an extrajudicial source or that Judge possessed such a high degree of antagonism as to make fair judgment impossible. Spirited exchanges between Judge and counsel do not rise to level of antagonism necessary to mandate recusal.

*Rhiel v. Hook*, 2009 BR 2182602 (Bankr. E.D. Mi. 2009) - Bankruptcy Judge may be disqualified from presiding over particular proceeding or contested matter or, if appropriate, from presiding over the case as a whole. Judge should recuse himself when impartiality might reasonably be questioned or where Judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. Standard for recusal is an objective one: whether a reasonable person with knowledge of all facts would conclude that the Judge's impartiality might reasonably be questioned. Extrajudicial Source Doctrine is invoked when the Judge forms opinions of the litigants based on information learned outside the course of judicial proceedings. Opinions formed by the Judge on the basis of facts introduced or events occurring in the course of the current proceedings, or prior proceedings, do not constitute a basis for bias or partiality. Pervasive Bias Exception requires recusal when Judge forms a favorable or unfavorable opinion so extreme that fair judgment appears impossible. Adverse ruling on evidentiary matter accompanied by comment regarding truthfulness of defendant's testimony does not reflect deep-seated antagonism sufficient to require recusal. Adverse decision on one issue in Bankruptcy case does not demonstrate antagonism or detract from impartiality.

*In re Johnson*, 408 B.R. 123 (Bankr. S.D. Ohio 2009). Bankruptcy judge's recusal was not required on "extra judicial source" theory, since an evidentiary hearing before the court is not "extra judicial". And a single comment on the party's previous testimony, in ruling against the party, was not sufficient for recusal based on "pervasive bias" theory.

#### F. Rehearing or Reconsideration

##### §23.17 Grounds Generally

*In re Hardy*, 2011 WL 2112020 (Bankr. N.D. Ohio 2011) – Chapter 7 trustee failed to demonstrate basis for reconsideration under Rule 59 of Court's Order Dismissing Chapter 7 Case. Motions to alter or amend judgment may be granted if there is a clear error of law, newly discovered evidence, an intervening change in the controlling law, or to prevent manifest injustice. A motion for reconsideration is not designed to give a dissatisfied litigant an opportunity to relitigate matters already decided, nor is it a substitute for appeal. Trustee's argument that creditors would fare better in Chapter 7 was considered and rejected in dismissing case in first instance. Trustee failed to produce any new evidence to demonstrate that dismissal was result of clear error or change in controlling law.

*Meoli v. Hoffman*, Case No. 09-80269 (Bankr. W.D. Mi. 2011) – Defendants who failed to respond to complaint seeking to deny discharge under Section 707 and allowed default judgment to be entered could not demonstrate basis for relief under Rule 60(b)(6). Rule 60(b)(6) requires party to demonstrate extraordinary or exceptional circumstances not present in any of the other five subsections of Rule 60(b). Defendants failed to offer any explanation for failure to plead or respond in adversary proceeding, precluding relief under Rule 60.

*In re Harvey Goldman & Co.*, Case No. 10-62501 (Bankr. E.D. Mi. 2010) – Local Rule 9024-1 precludes Motion for Rehearing or Reconsideration based on the same issues previously litigated. Motion is not an opportunity to retry the case just because the party does not like the outcome. Motion must demonstrate palpable defect by which the Court was misled and also show that a different disposition of the case must

result from a correction thereof. Motion that does nothing more than re-argue the same evidence and testimony as was presented at trial does not warrant relief under Rule 59.

*In re Faraj*, Case No. 10-76937 (Bankr. E.D. Mi. 2011) – Debtor's Motion to Reinstate Chapter 13 Case construed as motion for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Any neglect or mistake that may have resulted in dismissal was caused by Debtor's counsel and is attributable to Debtor for purposes of Rule 60, and Motion failed to allege any basis to determine that counsel's errors were "excusable".

*JP Morgan Chase Bank, N.A. v. Taylor*, Case No. 10-5469 (Bankr. E.D. Mi. 2010) - Debtor's Motion for Reconsideration of Order Granting Plaintiff's Motion for Summary Judgment construed as motion for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Court was aware of Defendant's response to Motion for Summary Judgment in granting Motion. Defendant's Counsel's pending Motion to Withdraw as counsel was not excuse for failure to timely file response to Plaintiff's Motion and Motion for Reconsideration failed to offer any explanation as to why response was not timely filed.

*In re Stewart*, Case No. 10-52347 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Reinstate Chapter 7 Case construed as motion for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to file Chapter 7 Means Test form until three weeks after the deadline and two weeks after the case was dismissed.

*In re Adams*, Case No. 07-59818 (Bankr. E.D. Mi. 2010) - Debtor's Amended Motion to Reopen Case construed as motion to reopen case and for reconsideration of order dismissing case. Motion denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion not filed within reasonable time as required by Rule 60(c) where Motion filed more than one year after order dismissing case.

*In re Evans*, Case No. 10-67920 (Bankr. E.D. Mi. 2010) - Debtor's letter requesting reinstatement of case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to obtain credit counseling prior to commencement of case, rendering debtor ineligible for relief.

*In re Grass*, 2010 WL 3553273 (Bankr. S.D. Ohio 2010) – Second Motion for Stay Pending Appeal is treated as Motion for Reconsideration under Rule 9023 and Federal Rule 59. Motion denied where Motion failed to allege any of the established four grounds for a motion to alter or amend a judgment: (1) an intervening change in the controlling law; (2) newly discovered evidence; (3) to correct clear legal error; and (4) to prevent manifest injustice. Motion merely sought to reargue same issues and facts argued in first Motion for Stay Pending Appeal.

*In re Price*, Case No. 10-41890 (Bankr. E.D. Mi. 2010) – Debtor's letter requesting reinstatement of case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate

excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to timely file numerous documents as outlined in Notice of Deficient Filing within time permitted by Court.

*In re Smith*, Case No. 10-42015 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Bankruptcy construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Case dismissed for failure to file matrix or Declaration Under Penalty of Perjury for Debtor Without an Attorney within time permitted by Court.

*In re Penland*, Case No. 09-64082 (Bankr. E.D. Mi. 2010) – Debtor's letter requesting reinstatement of case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order.

*J.L. Gisalsen, III, Trust v. Mehlhose*, Case No. 09-6907 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reopen Case, etc., construed as Motion for Reconsideration of Default Judgment, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion failed to allege any facts from which the Court could determine whether there was any excusable neglect in the failure by Debtor or Debtor's attorney in failing to file answer. Further, attorney's failure to file answer is chargeable to Debtor and does not constitute excusable neglect for purposes of setting aside Default Judgment.

*In re Turchan Technologies Group, Inc.*, Case No. 09-67671 (Bankr. E.D. Mi. 2010) - Motion for Reconsideration of Order Denying Debtors Motion to Approved Compromise of Claims construed as Motion for Reconsideration, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Creditor lacks standing to seek rehearing of Order on Motion to Approve Compromise as only Debtor has standing to file that Motion and so only Debtor has standing to seek rehearing. Motion to Approve Compromise denied where creditor failed to appear at hearing and Motion for Rehearing failed to offer any justification.

*In re McKenzie*, Case No. 10-46513 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Bankruptcy Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Case dismissed where counsel failed to file corrected Rule 2016(b) statement within time permitted by court; and Motion contained several typographical errors including wrong Judge's name in caption and Motion requested the court to reschedule the confirmation hearing although the case was a proceeding under Chapter 7.

*In re Leach*, Case No. 10-45468 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reopen Case construed as Motion for reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed although to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Case dismissed where counsel failed to file upload matrix or to file schedules, statement of financial affairs, or means test form.

*In re Schweitzer*, Case No. 10-65115 (Bankr. E.D. Mi. 2010) – Debtor's Motion to Reinstate Case construed as Motion for reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different

disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Any neglect or mistake by Debtor's counsel is generally attributable to Debtor for purposes of determining whether the neglect or mistake was excusable. Motion failed to demonstrate excusable neglect where Debtor failed to file Chapter 7 Means Test form.

*In re Scales*, Case No. 09-58926 (Bankr. E.D. Mi. 2010) – Motion to Reopen Case denied where Motion was unnecessary. Discharge includes unscheduled creditors in a "no asset" case where the Court does not set a bar date for filing of claims, to the same extent as the claim would have been discharged had the claim been scheduled. Chapter 7 Case was a "no asset" case and obligations owed to omitted creditors would nonetheless be discharged. Re-opening case would produce no benefit to the Debtor that Debtor did not already receive.

*In re Bailey*, Case No. 05-41609 (Bankr. N.D. Ohio 2010) - Rule 59 does not contain express grounds for amending a judgment. Generally, a Rule 59(e) motion will only be granted only for: an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or to prevent manifest injustice. Debtor's Motion that merely restated arguments that were rejected, without any new evidence or change in the law, will be denied.

*Ausilio v. US*, 2010 WL 2868821 (E.D. Mi. 2010) - Court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. Movant must demonstrate a palpable defect by which the court and the parties have been misled and also show that correcting the defect will result in a different disposition of the case.

*In re Szymanski*, Case No. 10-53553 (Bankr. E.D. Mi. 2010) – Debtor's Motion for Reconsideration and Reinstatement of Bankruptcy Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Chapter 12 proceeding dismissed as to Debtor-wife where Credit Counseling Certificate indicated that she received credit counseling only after case filed, although Debtor-husband received counseling prior to commencement of case. Each debtor must obtain credit counseling. Failure to do so mandates dismissal under Section 109(h).

*In re Hall*, Case No. 10-53494 (Bankr. E.D. Mi. 2010) - Debtor's Motion for Reconsideration and Reinstatement of Bankruptcy Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor who obtained credit counseling 24 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1).

*In re Lyons*, Case No. 07-43671 (Bankr. E.D. Mi. 2009) - Discharge includes all claims owed to scheduled creditors that were owed as of the date of the Petition, not just the specific claims that may have been referenced in the Schedules. Discharge also discharges even unscheduled creditors in a "no asset" case where the Court does not set a bar date for filing of claims, to the same extent as it would have been had the claim been scheduled. Debtor's Motion to Reopen Case to add creditor denied where Motion was unnecessary. Although Creditor was not included in the schedules, unscheduled debts are discharged in a no asset case to the same extent as if they had been discharged. Re-opening case would produce no benefit to the Debtor that Debtor did not already receive.

*In re Harris*, Case No. 10-55770 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Set Aside Order of Dismissal and to Extend the Time for Filing Documents construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from

order. Debtor who obtained credit counseling 34 days after commencement of case was not eligible for relief pursuant to Section 109(h)(1).

*In re Alva*, Case No. 10-55780 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Reinstate Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Any neglect or mistake by Debtor's counsel is generally attributable to Debtor for purposes of determining whether the neglect or mistake was excusable. Motion failed to demonstrate excusable neglect where numerous documents were not timely filed.

*In re Champney*, Case No. 10-57311 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Reinstate Case construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtors were not eligible for relief because Debtors failed to obtain credit counseling within 180 days prior to commencement of case. ECF records showed case filed on May 26 at 11:10 a.m. and credit counseling certificate indicated that the briefing occurred on May 26 at 2:55 p.m., almost 4 hours later.

*In re Williams*, Case No. 08-41485 (Bankr. E.D. Mi. 2010) - Debtor's Motion to Reopen Case to add two creditors denied where Motion was unnecessary. Creditors to be added were in the original schedules and were bound by the discharge. Even if creditors had not been listed, Chapter 7 Case was a "no asset" case and obligations owed to omitted creditors would nonetheless be discharged. Re-opening case would produce no benefit to the Debtor that Debtor did not already receive.

*In re Jenkins*, Case No. 08-59973 (Bankr. E.D. Mi. 2009) - Debtor's Motion to Reopen Case to add two creditors denied where Motion was unnecessary. Creditors to be added were in the original schedules and were bound by the discharge. Even if creditors had not been listed, Chapter 7 Case was a "no asset" case and obligations owed to omitted creditors would nonetheless be discharged. Re-opening case would produce no benefit to the Debtor that Debtor did not already receive.

*Allan Falk, P.C. v. Mirch*, Case No. 03-4196 (Bankr. E.D. Mi. 2010) - "Adversary Proceeding Plaintiff's Motion to Entry of an Order Re-Opening This Adversary Proceeding and for Entry of an Order Reinstating This Court's April 8, 2010 Order of Contempt and for Other Relief Directed Against Adversary Proceeding Defendant" denied for failure to demonstrate a palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result for a correction of the error. Motion also failed to establish excusable neglect under Rule 60(b)(1) and Federal Rule of Bankruptcy Procedure 9024. Neglect or error by counsel is attributable to the party for purposes of determining whether neglect or mistake was excusable. Adversary proceeding had been repeatedly closed and reopened because of inactivity by Plaintiff. Motion failed to demonstrate any reason to set aside most recent dismissal.

*Hagan v. Goldstein*, 2010 WL 2755742 (Bankr. W.D. Mi. 2010) – Reconsideration of judgments and orders is available only in three limited circumstances: (1) in cases involving newly discovered evidence which could not have been discovered prior to entry of the order under review; (2) in cases involving changes in controlling law; and (3) to prevent manifest injustice. Motions for reconsideration are not an opportunity to re-argue a case and should not be used by the parties to raise arguments which could, and should, have been made before judgment issued. Nor are motions for reconsideration appropriate merely to let the losing party supplement the evidentiary record that was before the court. Defendant's Motion for Reconsideration that merely sought to supplement record with additional bank statements would not warrant relief, particularly where materials, even if considered, would not have altered outcome of Motion for Summary Judgment; and Defendant's alleged hospitalization which Defendant claimed left her unable to respond to the Motion for Summary Judgment was not raised by Defendant or counsel prior to entry of judgment.



*In re Dexter*, Case No. 10-42155 (Bankr. E.D. Mi. 2010) – Debtor’s Motion to Reinstate Bankruptcy construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to file creditor matrix and numerous other required documents were blank and failed to contain any required information including the Statistical Summary; Schedules I and J; Statement of Financial Affairs; and Chapter 7 Statement of Current Monthly Income and Means-Test Calculation.

*In re Farah*, Case No. 09-59067 (Bankr. E.D. Mi. 2010) – Debtor’s Motion to Reopen Case construed as Motion for Reconsideration of Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion was also untimely filed. Rule 60(b) requires motion for reconsideration to be brought within a reasonable time. Debtor waited over six months after Court dismissed case to file Motion and failed to present any good excuse or explanation or delay.

*In re Wesson*, Case No. 10-49061 (Bankr. E.D. Mi. 2010) – Debtor’s Motion to Reinstate Chapter 7 Bankruptcy construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to file correct statement of social security number and failed to file Credit Counseling Certificate; Statement of Financial Affairs; Statistical Summary; Summary of Schedules; Chapter 7 Means Test; and Chapter 13 Plan, nor did Debtor file a motion for an extension of the April 5, 2010 deadline prior to deadline established in Court’s Notice of Deficiency.

*In re Sinanovic*, Case No. 10-44217 (Bankr. E.D. Mi. 2010) – Debtor’s Motion to Reinstate Chapter 7 Bankruptcy construed as Motion for reconsideration or Order Dismissing Case, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Debtor failed to pay filing fee within time set by Order of Court and neither Debtor nor counsel appeared at hearing on Order to Show Cause.

*Persall v. Citibank*, Case No. 09-44381 (Bankr. E.D. Mi. 2009) – Motion to Set Aside Order Dismissing Adversary and Request for Reinstatement construed as Motion for Reconsideration, denied where Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Motion also failed to demonstrate excusable neglect under Federal Rule 60(b) or any other valid ground for relief from order. Motion for Reconsideration filed 11 weeks after entry of Order of Dismissal was not filed within a reasonable time as required by Rule 60(c). Plaintiff filed Motion for Default Judgment but failed to submit proposed Order notwithstanding Court Order requiring submission of an Order by specific date. When the Order was submitted, it did not comply with requirements of Court Guideline 12 and Court again requested submission of Order that complied with Court requirements. Plaintiff never submitted another order, resulting in dismissal of adversary.

*In re McRoy*, Case No. 10-45477 (Bankr. E.D. Mi. 2010) – Debtor’s letter to Court construed as Motion for Reconsideration of Order denying Debtor’s Application for waiver of Chapter 7 filing fee, denied where motion failed to demonstrate palpable defect by which the Court and parties have been misled and that a different disposition of the case must result for a correction thereof. Debtor’s budget reflected charitable contributions of more than \$1500 per month and Debtor’s income exceeded 150% of poverty line, preventing Court from waiving filing fee.

*Orlanski v. American Bank*, Case No. 10-4880 (Bankr. E.D. Mi. 2010) – Plaintiff’s Ex Parte Motion to Reopen Adversary Complaint for Purposes of Filing an Amended Proof of Service construed as Motion for

reconsideration of Order Dismissing Adversary Proceeding. Motion failed to demonstrate palpable defect by which the Court and parties have been misled and that a different disposition of the case must result for a correction thereof. Allegations also did not establish excusable neglect under Rule 60(b)(1) or Bankruptcy Rule 9024. Dismissal of adversary proceeding was without prejudice, allowing Plaintiff to file a new adversary proceeding.

*Visteon Corp. v. Collins & Aikman Corp.*, Case No. 07-13714 (E.D. Mi. 2009) – A party that seeks reconsideration of a Bankruptcy Court ruling must “demonstrate a palpable defect by which the Court and the parties have been misled,” and “show that a different disposition of the case must result from a correction thereof.” To establish a “palpable defect,” the moving party generally must point to “(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice. Court would not grant reconsideration of Order Confirming Chapter 11 Plan where party seeking reconsideration never objected to confirmation in the first instance. Creditor alleged that prior to the confirmation hearing, Debtor “promised” to include certain provisions in the Plan but never actually included those provisions. Creditor failed to object to confirmation or otherwise complain prior to confirmation about any alleged omitted provisions or agreements. Creditor failed to allege any “palpable defect” where Creditor had full notice of the terms of the Plan, a full opportunity to object to the Plan, and a full opportunity to participate at the confirmation hearing, but failed to raise those issues prior to confirmation. Although a court can grant rehearing for “excusable neglect”, excusable neglect does not include the failure to timely file a pleading even where that failure is the result of misplaced reliance on other parties or other strategic miscalculations.

*In re Barnett*, Case No. 08-70815 (Bankr. E.D. Mi. 2009) - "Request for Bankruptcy Reinstatement" treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor did not receive credit counseling until 19 days after bankruptcy petition filed in violation of Section 109(h)(1).

*Sims v. US Bank Home Mortgage*, Adv. No. 08-5066 (Bankr. E.D. Mi. 2008) - Motion to Reconsider Order Regarding Improper Service of Summons and Complaint treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Service failed to comply with Bankruptcy Rule 7004(b)(3) where Plaintiff mailed summons and complaint to corporation but failed to specify any particular, named individual who is an officer, managing or general agent, or agent authorized to receive service.

*In re Haines*, Case No. 09-42613 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy Case treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor failed to file Schedules and other documents within time permitted and had failed to file the missing documents even as late as the date of filing of the Motion to Reinstate.

*In re Lasenby*, Case No. 08-47560 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration must demonstrate "palpable defect by which the Court and the parties have been misled, and that a different disposition of the case must result from a correction thereof." Motion failed to demonstrate palpable defect as Motion only alleged that Court did not give affidavit appropriate weight in determining underlying action.

*In re Brewster*, Case No. 08-61818 (Bankr. E.D. Mi. 2009) - Motion to Reopen Bankruptcy Case considered as Motion for Rehearing, denied where Debtor was not eligible to be Debtor because Debtor received pre-bankruptcy credit counseling more than 180 days prior to the commencement of the case. Fact that Debtor received counseling after the case was filed did not solve lack of eligibility when the case was initially commenced.

*In re Davis*, Case No. 08-69676 (Bankr. E.D. Mi. 2009) - Motion to Reconsider Re-opening Case constituted a Motion for Rehearing. Motion failed to demonstrate a palpable defect by which the Court and the parties were misled or that a different disposition of the case must result from a correction thereof. Allegations in the Motion did not establish excusable neglect or any other valid ground for relief from the order dismissing the case.

*In re Hicks*, Case No. 09-41591 (Bankr. E.D. Mi. 2009) (unreported decision) - Motion failed to demonstrate palpable defect but which the Court and parties were misled or that a different disposition of the case must result from a correction thereof. Debtors obtained credit counseling more than 180 days prior to the commencement of the case, leaving Debtors ineligible for relief pursuant to Section 109(h)(1). Debtors obtaining new counseling after the case was commenced does not cure the lack of eligibility at the time case was commenced.

*In re Webster*, Case No. 05-85963 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration of Order Dismissing Chapter 13 Case denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction thereof. Motion also failed to establish any substantive basis for relief from the Order under Federal Rule of Civil Procedure 60(b); Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor's failure to file a plan modification or to seek a hardship discharge in the two months between the service of a Notice of Default and the ultimate dismissal of the case without cause for the delay prevents the Debtor from seeking a hardship discharge post-dismissal.

*In re McMahon*, Case No. 07-62863 (Bankr. E.D. Mi. 2008) - Motion for Reconsideration of Order Dismissing Case denied where Motion failed to demonstrate any palpable defect and failed to allege any facts showing that the dismissal order was erroneously entered. Debtor did not allege that he had cured the default in payments in a timely manner as required by the Trustee's Notice of Default.

*In re Rahman*, Case No. 09-47242 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy Case treated as Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor did not receive credit counseling until 11 days after bankruptcy petition filed in violation of Section 109(h)(1).

*In re Depew*, Case No. 09-56915 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration of Dismissal of Case denied where Motion failed to demonstrate any palpable defect or that a different disposition would result from a correction; and Motion failed to demonstrate any substantive basis for relief under Federal Rule of Bankruptcy Procedure 9024, Federal Rule of Civil Procedure 60(b)(1) or any other valid ground for relief. Case properly dismissed where Debtor did not obtain credit counseling until after case filed. Debtor failed to demonstrate any basis for a waiver of credit counseling or authority to obtain post-petition counseling as Debtor failed to comply with Section 109(h)(3) and failed to file a Motion for Approval of Certification of Exigent Circumstances as required by Local Rule 1007-6.

*In re Paris*, Case No. 09-56564 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration denied where Motion failed to demonstrate palpable defect or that a different result would occur from a correction. Motion for Reconsideration of Order regarding payment of filing fees in installments moot where case dismissed in interim based on Debtor's failure to pay filing fees. Rehearing also not appropriate where Motion sought only authority to pay the filing fees in installments and did not seek to waive filing fees in their entirety and Debtor failed to pay the filing fees in any event.

*In re Parent*, Case no. 09-55888 (Bankr. E.D. Mi. 2009) - Court denied Motion to Vacate Order Dismissing Chapter 7 Case where Motion failed to allege any palpable defect or that a different disposition would occur from a correction; and failed to allege any substantive basis for relief under Federal Rule of Civil Procedure 60(b)(1), Federal rule of Bankruptcy Procedure 9024, or any other substantive basis for relief. Case was dismissed because counsel failed to file required documents within 15 days of the petition

date. "Any neglect or mistake by Debtor's counsel, such as that alleged in the Motion, is generally attributable to the Debtor, for purposes of determining whether any such neglect or mistake was excusable ...."

*In re United Robotics*, Case No. 09-50376 (Bankr. E.D. Mi. 2009) - Court denied Motion for Reconsideration of Order Enforcing Automatic Stay where Motion failed to demonstrate any palpable defect by which the Court and the parties have been misled. Creditor's Motion merely reargued matters previously argued in response to Debtor's Motion for Order Enforcing Automatic Stay and which had been fully considered by Court in entering Order in the first instance. Legal arguments raised in Motion for Reconsideration did not compel the Court to reach a different conclusion as a matter of law.

*In re Culbert*, Case No. 09-47894 (Bankr. E.D. Mi. 2009) – Motion to Reinstate Chapter 7 bankruptcy construed as Motion for Reconsideration. Motion denied as motion failed to demonstrate a palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Further, motion failed to establish excusable neglect under Federal Rule of Civil Procedure 60, Federal Rule of Bankruptcy Procedure 9024 or any other valid grounds for relief. Court properly dismissed Debtors case where certificate credit counseling indicated that Debtor did not receive credit counseling until 17 days after bankruptcy petition filed. Therefore, Court properly concluded that Debtor was not eligible for relief under title 11.

*In re Rhodes*, Case No. 09-43128 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration denied as motion failed to demonstrate a palpable defect by which the Court and the parties have been misled or that a different disposition of the case must result from a correction thereof. Further, motion failed to establish excusable neglect under Federal Rule of Civil Procedure 60, Federal Rule of Bankruptcy Procedure 9024 or any other valid grounds for relief. Court properly dismissed Debtor's case where certificate credit counseling indicated that Debtor did not receive credit counseling until 17 days after bankruptcy petition filed. Therefore, Court properly concluded that Debtor was not eligible for relief under title 11.

*In re Little Rock Baptist Charity Care Center, Inc.*, Case No. 08-69445 (Bankr. E.D. Mi. 2009) – "Request for New Hearing Date for Debtor's Motion for Summary Judgment and Objection to Claim" treated as Motion for Reconsideration of Order Granting Debtor's Motion for Summary Judgment and Sustaining Debtor's Objection to the Claim of Interest of Joseph M. Wright". Motion failed to demonstrate a palpable defect by which the Court and parties have been misled or that a different disposition of the case must result from a correction thereof. Further, Motion did not allege any excusable neglect under Federal Rule of Civil Procedure 60(b)(1) or Federal Rule of Bankruptcy procedure 9024 or any other valid ground for relief. Debtor and counsel both had actual notice of the hearing date but failed to appear for the hearing and failed to demonstrate any excuse for the failure.

*In re Williams*, Case No. 04-40824 Bankr. E.D. Mi. 2008) - Debtor's Motion to Reinstate Chapter 13 Proceeding construed as a Motion for Reconsideration of Order Dismissing Case or, alternatively, a Motion for Relief from the Order Dismissing Case. Motion denied where motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof. Counsel for Debtor was served with the Trustee's Motion to Dismiss but did not file a response. Any neglect or mistake by Debtor's counsel in failing to respond is generally attributable to the Debtor for determining whether excusable neglect exists. Motion also failed to demonstrate any exceptional or extraordinary circumstances to warrant reinstatement as required by Rule 60(b)(6).

*In re McGill*, Case No. 04-67742 (Bankr. E.D. Mi. 2008) - Debtor's Motion for Reconsideration of Order Dismissing Case denied as Motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof; and Motion failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Order of dismissal was properly entered when Debtor failed to comply with terms of Court Order adjourning a hearing on the Trustee's Motion to Dismiss.

*In re Cantor*, Case No. 05-65812 (Bankr. E.D. Mi. 2008) – Motion for Relief From Order, construed as a Motion for Reconsideration of order dismissing case, denied for failure to demonstrate a palpable defect by



which the Court and the parties have been misled in any different disposition of the case must result from a correction thereof. Motion further failed to establish excusable neglect as required by Federal Rule of Civil Procedure 60(b), Federal Rule of Bankruptcy Procedure 9024, or any other valid grounds for relief from the order.

*In re Bell*, Case No. 08-57409 (Bankr. E.D. Mi. 2009) - "Motion for Relief From The Judgment Dismissing Case Under FRCP 60(b)(1) & (6)", construed as a Motion for Reconsideration of order dismissing case, denied for failure to demonstrate a palpable effect by which the Court and the parties have been misled in any different disposition of the case must result from a correction thereof. Motion further failed to establish excusable neglect as required by Federal Rule of Civil Procedure 60(b), Federal Rule of Bankruptcy Procedure 9024, or any other valid grounds for relief from the order. Debtor failed to be 100% paid in plan payments by agreed deadline. Debtor was also at fault for not scheduling payday lender as creditor in the first instance. But for Debtor's failure to schedule payday lender, lender would not have obtained money from Debtor's bank account as alleged which caused Debtor's inability to make plan payments as agreed.

*In re Sandhu*, Case No. 08-57203 (Bankr. E.D. Mi. 2008) - "Motion to Reopen Case and File Certificate of Counseling" denied as motion failed to demonstrate that any purpose would be served by re-opening case. Debtor did not receive credit counseling until 12 days after bankruptcy petition filed in violation of Section 109(h)(1).

*In re Hutchinson*, Case No. 08-59442 (Bankr. E.D. Mi. 2008) - Debtor's Motion for Relief from Order Dismissing Chapter 13 Case for Failure to Comply With Order" denied where motion failed to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof. Counsel for Debtor was served with the Trustee's Motion to Dismiss but did not file a response. Any neglect or mistake by Debtor's counsel as alleged in Motion is generally attributable to the Debtor for determining whether excusable neglect exists. Motion also failed to demonstrate any exceptional or extraordinary circumstances to warrant reinstatement as required by Rule 60(b)(6).

*In re Walker*, Case No. 09-55153 (Bankr. E.D. Mi. 2009) - Debtor's letter treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof. Court denied Motion to waive filing fee where schedules indicated that Debtor had sufficient exempt assets from which to pay the filing fee. Debtor's letter did not dispute this finding. Further, Debtor's schedules also indicated that Debtor has tax refunds totaling over \$4000 all of which are claimed as exempt. Court's earlier determination that Debtor not eligible for fee waiver was correct.

*In re Thomas*, Case No. 08-57989 (Bankr. E.D. Mi. 2008) - Debtor's letter treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate any other substantive basis for relief. Court properly dismissed Debtors case where certificate credit counseling indicated that Debtor did not receive credit counseling until 26 days after bankruptcy petition filed. Therefore, Court properly concluded that Debtor was not eligible for relief under title 11.

*In re Ayres*, Case No. 08-59822 (Bankr. E.D. Mi. 2008) - Motion to Reinstate Chapter 7 Bankruptcy Petition treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate any other substantive basis for relief. Court properly dismissed Debtors case where Debtor's counsel "for some reason" failed to sign the Statement of Social Security Number as required by ECF Procedure 11(d)(1).

*In re Mathson Industries, Inc.*, Case No. 09-42894 (Bankr. E.D. Mi. 2009) – Motion for Reconsideration denied where Motion failed to demonstrate any palpable defect by which the Court or the parties were misled or that a different disposition must result from a correction thereof; and allegations failed to demonstrate any excusable neglect under Federal Rule of Civil Procedure 60(b) and Federal Rule of



Bankruptcy Procedure 9024 or any other valid ground for relief. Trustee served creditor with a copy of the Motion to Approve Sale and provided the required 20 day notice. Creditor filed no objection to the sale motion until it filed the Motion for Reconsideration over one month after the objection deadline passed and 10 days after the order was entered.

*Attard v. American Home Mortgage Services, Inc.*, Adv. No. 08-5064 (Bankr. E.D. Mi. 2009) – Motion for Reconsideration denied where Motion failed to demonstrate palpable defect by which the Court and the parties were misled or that a different disposition of the case must result from a correction thereof. Order denying Motion for Summary Judgment correctly entered where record before Court did not establish beyond genuine issue of material fact that the Wayne County Sheriff did not appoint a specific person to conduct a foreclosure sale or that the specific written appointment was signed by someone other than the Sheriff himself.

*In re Lyons*, Case No. 08-43750 (Bankr. E.D. Mi. 2009) - Motion to Reopen and Waive Reopening Fee denied where Court had denied prior Motion to Waive Filing Fee and the filing fee still had not been paid.

*In re Camacho*, Case No. 08-59975 (Bankr. E.D. Mi. 2008) - Motion to Reinstate Chapter 13 Case constituted Motion for Reconsideration of Order dismissing case. Motion denied where Motion failed to demonstrate any palpable defect by which the Court or the parties were misled or that a different disposition must result from a correction thereof; and allegations failed to demonstrate any excusable neglect under Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024 or any other valid ground for relief. Debtor failed to appear for either the status conference or the contested confirmation hearing and failed to provide any proof that Debtor had mailed payments to the Trustee that had not yet posted on the Trustee records. Debtor's Motion to Reinstate did not present any excuse for failure by Debtor that was prejudicial to creditors.

*In re Bacevicius*, Case No. 08-66257 (Bankr. E.D. Mi. 2008) - Motion to Reinstate Chapter 7 Bankruptcy Petition treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate any other substantive basis for relief. Debtor did not file a Bankruptcy Petition Cover Sheet until three weeks after case dismissed and never filed a Certificate of Credit Counseling, making it impossible for Court to determine if Debtor was even eligible for relief. Vague allegation that required documents were not timely filed due to a "computer problem" does not constitute grounds to set aside dismissal.

*In re Maiuri*, Case No. 08-69430 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Further, Motion was untimely where Motion was not filed until more than 60 days after entry of Order dismissing case and failed to allege any good excuse for delay.

*In re Rusch*, Case No. 08-69518 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy Case treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Counsel's failure to address filing deficiencies after being advised that several documents including Means Test form, Schedules, Statement of Financial Affairs and Credit Counseling Certificate had not been filed is not "cause" to reinstate case.

*In re Thornton*, Case No. 08-64703 (Bankr. E.D. Mi. 2009) - "Objections to Order Dismissing Debtors' Bankruptcy and Motion to Vacate Order" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground

for relief. Case was dismissed at the time of the confirmation hearing because Debtor failed to appear at the confirmation hearing and failed to give the Chapter 13 Trustee copies of tax returns making it impossible to complete the § 341 meeting of creditors on two different occasions.

*Greenhill v. Beneficial Michigan, Inc.*, Adv. No. 08-5668 (Bankr. E.D. Mi. 2009) - "Motion To Reopen Case On The Grounds That The Default Which Caused the Dismissal Has Been Or Can Be Cured" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Plaintiff had three chances to properly serve Defendant with the adversary but failed to do so and has offered no excuse or explanation for failure.

*In re Zia*, Case No. 09-55685 (Bankr. E.D. Mi. 2009) - "Emergency Motion for Reconsideration Due to Procedural Defect, to Vacate Order for Relief From the Automatic Stay, and to Reinstate Stay as Default on Which Entry of the Order Was Based Has Been Cured" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Any neglect or mistake by Debtor's counsel is generally attributable to the Debtor, for purposes of determining whether any such neglect or mistake was excusable.

*In re Smith*, Case No. 09-40132 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Case treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to file Statement of Social Security Number and Petition did not reflect signatures of either Debtor or Debtor's Attorney resulting in dismissal of case and Debtor failed to correct these deficiencies within time permitted by Court.

*In re Johnson*, Case No. 09-43191 (Bankr. E.D. Mi. 2009) - Letter to Court treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to pay filing fee in prior, dismissed case and failed to file a Matrix in this case and failed to cure these defects within time permitted by Court.

*In re Rutherford*, Case No. 09-51427 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Case treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to pay filing fee after Court entered Order denying Motion to Waive Filing Fee notwithstanding ample notice and opportunity.

*In re Harris*, Case No. 09-60790 (Bankr. E.D. Mi. 2009) - Motion to Reinstate Chapter 7 Bankruptcy for Failure to File a Matrix treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to file Certificate of Budget and Credit Counseling and signed Bankruptcy Petition Cover Sheet within time allowed required dismissal of case.

*In re Dittman*, Case No. 09-60009 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration Pursuant to F.R.B.P. 9024 treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Court denied Motion to Extend

Automatic Stay and Court now lacks authority to extend stay as hearing cannot be completed within 30 days of commencement of case. Therefore, even if Movant demonstrated grounds for relief, Court could not grant effective relief.

*In re Staten*, Case No. 08-60408 (Bankr. E.D. Mi. 2009) - Motion to Reopen Closed Case under Section 350(b) to file Financial Management Course Certificate denied where Debtor was not eligible to be a Debtor under Section 109(h)(1) as Debtor failed to obtain pre-petition credit counseling until 3 days after case commenced.

*In re Henderson*, Case No. 09-55303 (Bankr. E.D. Mi. 2009) - Debtor's "Reinstatement Letter" treated as Motion for Rehearing, denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Debtor failed to file credit counseling certificate and failed to file Schedules D, F, G and H and Debtor's Schedules E, I and J were blank.

*In re Brock*, Case No. 08-69720 (Bankr. E.D. Mi. 2009) - Motion for Reconsideration of Order Denying Motion to Extend Automatic Stay denied for failure to demonstrate palpable defect by which the Court and the parties have been misled or that a different disposition must result from a correction thereof and failed to demonstrate excusable neglect under Federal Rule of Civil Procedure 60(b)(1), Federal Rule of Bankruptcy Procedure 9024, or any other valid ground for relief. Counsel's failure to attend the hearing based on alleged "internal office scheduling error" did not demonstrate cause to set aside Order. Counsel calendared hearing for Thursday, December 26 when Thursday was, in fact, December 25 and the hearing was scheduled for December 22.

#### §23.18 Clerical Error

*In re Merkl*, Case No. 06-48377 (Bankr. E.D. Mi. 2008) - Order Granting Relief From Stay vacated pursuant to Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60(a) where order was entered as a result of clerical error. Debtor filed response to Motion for Relief but clerk failed to enter response into docket in timely manner, resulting in Order Granting Relief From Stay by default.

*In re Eatmon*, Case No. 07-65731 (Bankr. E.D. Mi. 2008) - Application for Attorney Fees erroneously filed in wrong case and Order erroneously entered in that case. Order contained wrong case number and was signed by Judge not assigned to that case. Order Awarding Attorney Fees vacated pursuant to Federal Rule of Civil Procedure 60(a) and Federal Rule of Bankruptcy Procedure 9024 as entered through clerical error.

*Americredit Financial Services, Inc. v. Burgess*, Adv. No. 09-4549 (Bankr. E.D. Mi. 2009) – Order dismissing adversary case entered in error and would be set aside. Clerk inadvertently issued two separate notices of initial scheduling conference. Court's dismissal for failure of plaintiff to appear for the first of those scheduling conferences was result of error of Court.

*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.

#### §23.19 By Court *Sua Sponte*

*In re Smith*, Case No. 08-70461 (Bankr. E.D. Mi. 2009) – Case reopened by Court *sua sponte* and discharge vacated and case dismissed where Debtors had previously filed a petition under Chapter 7 and that prior case was still pending. Discharge in this case would be vacated as Debtors received discharge in the prior, simultaneously pending case.

#### §23.20 Defect in Notice

*In re Hoskins*, Case No. 08-62613 (Bankr. E.D. Mi. 2009) – Order Converting Case to Chapter Thirteen vacated. Debtor filed Notice of Motion but failed to file Certificate of Service evidencing timely notice on all creditors and parties in interest.

*In re Miller*, Case no. 06-32425 (Bankr. S.D. Ohio 2010) - Contested matter must be served in the same manner as a summons under Rule 7004. When service is to be made on an "insured depository institution," Rule 7004(h) requires service by certified mail addressed to an officer of the institution. Debtors' post-confirmation plan modification was not properly served where certificate of service acknowledging service on FDIC insured depository institution at three somewhat different addresses, only by regular mail and without direct service on any individual, officer or specific department. Order Modifying Plan based on defective service vacated pursuant to Rule 60(b).

#### §23.21 Newly Discovered Evidence

*In re Grady*, 2009 WL 3254435 (Bankr. W.D. Mi. 2009) – Motion for Rehearing based on newly discovered evidence must demonstrate that (1) the new evidence was not discovered until after judgment and that movant was excusably ignorant of the facts at the time of trial despite due diligence; (2) the evidence discovered must be of a nature that would probably change the outcome of the case; and (3) the evidence must not be merely cumulative or impeaching. Debtor did not exercise due diligence to obtain the “newly discovered” documents where Debtor did not make any formal discovery requests in an effort to obtain the documents prior to the evidentiary hearing and failed to request an adjournment of the evidentiary hearing to allow the documents to be obtained once their existence was disclosed at the hearing. Party’s lack of diligence in conducting discovery insufficient grounds for a new trial.

#### §23.22 Time for Bringing Motion

*Meoli v. Hoffman*, Case No. 09-80269 (Bankr. W.D. Mi. 2011) – Motion for Relief under Rule 60(b)(1) - (3) must be brought within one year of entry order from which relief is sought. Motion under Rule 60(b)(4) – (6) must be brought within reasonable time, not limited to one year.

*In re Harvey Goldman & Co.*, Case No. 10-62501 (Bankr. E.D. Mi. 2010) – Local Bankruptcy rule 9024-1 requires any motion for reconsideration to be filed within 14 days of entry of Order. Court lacked authority to extend deadline based on alleged “technical failure” with ECF that prevented filing of document. Court would extend time moving party waited until last minute to file Motion and then was prevented from doing so by ECF shutdown. Although Court had previously announced that ECF filing would be down for approximately 3 hours and yet moving party waited until 10:40 p.m. on last date to file Rule 59 motion and then attempted to do so only during the previously published shut down of ECF, the inaccessibility of the ECF system warranted extension to next business day for filing Motion.

*In re Bailey*, Case No. 05-41609 (Bankr. N.D. Ohio 2010) - Motion for Reconsideration was filed within 14 days after entry of the Exemption Order, the Court will consider the Motion for Reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure (incorporated by Rule 9023 of the Federal Rules of Bankruptcy Procedure).

### G. Federal Court Review of State Court Actions

#### §23.23 Limitations

*In re Mayer*, 41 BR 702 (E.D. Mi. 2011) – *Rooker-Feldman* is implicated when a plaintiff complains of being injured by a state court decision. *Rooker-Feldman* is not implicated simply because a party attempts to litigate an issue in federal court that has already been litigated in state court. Where a federal plaintiff presents some independent claim, even if that claim denies a legal conclusion that a state court has reached in a case to which he was a party, *Rooker-Feldman* does not prevent Federal Court from asserting jurisdiction. Court will then look to state law to determine whether the defendant prevails under principles of preclusion. Action to avoid alleged preferential transfer of property, created when State Court imposed constructive trust, was not attack on validity of Final Judgment but only sought to determine effect of

judgment in light of principals of bankruptcy law. Debtor's attack on provision of Divorce Judgment that purported to impress constructive trust was attack on prohibited by *Rooker-Feldman*. However, where Divorce Judgment was not clear as to whether specific property was subject to constructive trust, Bankruptcy Court can review matter to determine whether Divorce Judgment was sufficient to impose constructive trust.

*Edwards v. Thornton*, 2011 WL 134894 (6<sup>th</sup> Cir. 2011) – Action alleging violation of automatic stay violated *Rooker-Feldman*. Defendant transferred property pursuant to State Court Final Judgment. Court precluded from considering argument that underlying State Court judgment was void as Federal Court lacks subject matter jurisdiction to review validity of State Court judgment. Attack is not one on method used to enforce judgment, but on validity of judgment itself, which is matter which Federal Court cannot collaterally review.

*Miller v. Deutsche Bank National Trust Co.*, 2011 WL 1807015 (10<sup>th</sup> Cir BAP 2011) – Debtor prohibited from contesting lender's standing to enforce mortgage where issues had previously been addressed by State Court in proceeding to confirm non-judicial foreclosure sale.

*Essek v. Vanderbilt Mortgage, Inc.*, 2011 WL 97716 (E.D. Ky. 2011) – *Rooker Feldman* precludes District Court action for damages resulting from state court foreclosure proceeding.

*In re Bunting*, Case No. 07-20864 (Bankr. E.D. Mi. 2010) – *Rooker-Feldman* doctrine prohibits party losing in state court from seeking what in substance would be appellate review of the state court judgment in Federal Court based on the claim that the state court judgment violates the loser's federal rights or claims based on alleged state court errors in construing federal law or constitutional claims. State and federal claims need not be identical as long as the relief requested in federal court would effectively reverse the state court decision or void its ruling. Bankruptcy Court precluded from looking behind state court divorce judgment that resulted from long and extensive trial proceedings and multiple appellate proceedings including determination of amounts owed by debtor to ex-spouse. However, Court is not precluded for reviewing debtor's claim of credits owed and offsets to the judgment amount using standards set under Rule 3001.

*Willis v. Chase Home Finance, LLC.*, 2010 WL 3430712 (N.D. Ohio 2010) – *Rooker-Feldman* doctrine prohibits Federal Court from reviewing propriety of state court judgment of foreclosure. Where federal relief can only be predicated upon a conviction that the state court was wrong, action constitutes a prohibited appeal of the state court judgment. *Rooker-Feldman* doctrine precludes a district court's jurisdiction where the claim is a specific grievance that the law was invalidly or unconstitutionally applied in plaintiff's particular case as opposed to a general constitutional challenge to the state law applied in the state action.

*In re Perkins*, Case No. 09-32328 (Bankr. E.D. Mi. 2010) - *Rooker-Feldman* does not preclude Bankruptcy Court from reconsidering amount of claim where State Court Judgment was a default judgment and the State Court calculations of damages appears to result from mistake. State Court Judgment contained numerous mathematical errors as restful of Court's failure to calculate "cost to cover" for undelivered goods, failed to credit debtor certain amounts, and failed to account for payments made by debtor.

*Jones v. Federal National Mortgage Association*, Case No. 10-1042 (Bankr. N.D. Ohio 2010) - *Rooker-Feldman* prohibits Federal Court review of the proceedings already conducted by lower tribunal to determine whether it reached its result in accordance with law and applies to interlocutory orders and judgments of lower state courts. If the state court decision is the source of the injury, the doctrine bars jurisdiction in Federal court. If, on the other hand, the plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached then Federal Court has jurisdiction subject to state law determination principles of preclusion. State court denial of Motion to Dismiss based on alleged lack of standing does not preclude Federal Court from considering standing as state court order determined only that complaint stated cause of action and did not constitute final order on issue.



*Williams v. Franklin Towers Homeowners Association, Inc.*, Case No. 08-55109 (9th Cir. 2010) - *Rooker-Feldman* prohibits Federal Court appellate review of State Court Order denying Motion to disqualify judge.

*Madera v. Ameriquest Mortgage Co.*, 586 F.3d 228 (3d Cir. 2009) – *Rooker-Feldman* doctrine prevents Chapter 13 Debtor's action to rescind mortgage under TILA where State Court has already issued Judgment of Foreclosure. *Rooker-Feldman* prevents Federal Court for exercising appellate jurisdiction over State Court judgments. Rescission action effectively seeks finding that mortgage was invalid which would negate effect of foreclosure judgment in State Court. In foreclosing mortgage, State Court expressly or implicitly deemed mortgage valid.

*Hunt v. LAJ, Inc.*, 2009 WL 2601921 (Bankr. E.D. Tn. 2009) – A State Court Judgment that purports to modify the discharge is void *ab initio*. However, where State Court Judgment is based on a debt that was not discharged, the State Court Judgment is not void and the *Rooker-Feldman* doctrine prevents Federal Court review of the State Court Judgment. Debtor defaulted under the confirmed Chapter 11 Plan and the creditor obtained a judgment in State Court. Debtor sought injunction in Bankruptcy Court claiming that Creditor was attempting to recover the entire claim and not just that portion of the claim that Debtor was to pay pursuant to the confirmed Chapter 11 Plan. Confirmation of the Plan discharged the pre-petition liability and replaced that with a "new" claim based on the treatment in the confirmed Plan. Creditor's action to recover amounts owed under the confirmed Plan did not constitute attempt to collect discharged debt, but only debt owed pursuant to the confirmed Plan as to which the discharge injunction did not apply. *Rooker-Feldman* would bar any effort by Debtor to dispute in the Bankruptcy Court the amount properly owed to Creditor pursuant to the confirmed Plan where the action had already been brought in and ruled on by State Court.

*Hamilton v. Herr*, 540 F.3d 367 (6th Cir. 2008) - *Rooker-Feldman* doctrine prevents Federal Court from looking behind state Court judgment and acting as "super-appellate Court" for matters within the State Court jurisdiction. However, effect of discharge in bankruptcy is entirely federal matter, and State Court lacks jurisdiction to enforce a claim that has been discharged in Bankruptcy. Therefore, *Rooker-Feldman* does not preclude Bankruptcy Court from entering orders to enforce discharge. "State Courts are allowed to construe the discharge in bankruptcy, but what they are not allowed to do is construe the discharge incorrectly, because an incorrect application of the discharge order would be equivalent to a modification of the discharge order. Similarly, the state-Court judgment in the case at hand would constitute a modification of the discharge in bankruptcy only if the debt was actually discharged pursuant to the bankruptcy Court's discharge order." Action remanded to the bankruptcy Court to determine whether the debt was discharged. If the debt was discharged, then the state-Court judgment was a modification of the discharge order and is void *ab initio*. If the debt was not discharged pursuant to the bankruptcy Court's discharge order, then the state-Court judgment was not a modification of the discharge order and the *Rooker-Feldman* doctrine would bar federal-Court jurisdiction.

#### H. Discrimination

##### §23.24 Section 525

*Myers v. Toojay's Management Corp.*, 640 F.3d 1278 (11<sup>th</sup> Cir. 2011) – Bankruptcy Code's antidiscrimination provision does not prohibit a private employer from denying employment to an individual on the ground that he is or has been in bankruptcy; although subsection (a) of the provision expressly prohibits a government employer from refusing to hire someone based on a bankruptcy filing, subsection (b), which applies to private employers, is conspicuously different, in that it forbids the private sector from discriminating against those persons who are already employees but says nothing about denying employment because of bankruptcy.

*Burnett v. Stewart Title, Inc.*, 2011 WL 754152 (5th Cir. 2011) - Section 525(a) specifically prohibits denial of employment based on bankruptcy only with respect to governmental employers, private employer can refuse to hire solely based on Chapter 13 case.

*Rea v. Federated Investors*, 2010 WL 5094250 (3d Cir. 2010) – Antidiscrimination provision of Section 525 does not prohibit private employer from discriminating against prospective employee on basis of prior bankruptcy filing. Although Section 525(a) prohibits a governmental agency from denying employment based on bankruptcy, Section 525(b) which applies to private employers does not contain that provision. Section 525 only prohibits private employers from discriminating against debtors who are already employed.

*Davis v. Crumbley Backhoe Service*, Case No. 09-16031 (11<sup>th</sup> Cir. 2010) – Section 525 does not apply to conduct that occurred prior to the commencement of the bankruptcy proceeding. Section 525(b), which prohibits discrimination in employment, applies only to “an individual who is or has been a debtor” and does not apply to an individual who “will be” a debtor at the time of the alleged discrimination. Debtor terminated from employment prior to filing bankruptcy has no cause of action against Employer under Section 525.

*In re Richard*, Case No. 07-51319 (Bankr. E.D. Mi. 2009) – Section 525 applies only to governmental units. A governmental unit is generally limited to the United States; States; Commonwealths; Districts; Territories; municipalities; foreign states; or other foreign or domestic government. “Government” does not include any entity that owes its existence to state action such as the granting of a charter or license. Otherwise private entity can be “government” if it carries out some governmental function or if there is a significant entwinement with governmental policies, management and control. Merely receiving public money and being subject to governmental control is not enough. Inquiry is whether the private entity is performing traditional and important governmental functions and whether there is evidence of entwinement with governmental policies, management or control. Lender which is member of Farm Credit Association, an independent agency of the executive branch that serves US agricultural interests, is sufficiently entwined with the US Government policies, management and control qualifies as governmental unit. However, lender’s refusal to pay patronage dividend does not seriously affect Debtor’s livelihood or the “fresh start”, which is the measure for whether actions constitute discrimination within Section 525. Further, implementation of standard practices and procedures that apply to all customers generally do not constitute discrimination in violation of Section 525 as the decision does not single out the Debtor for adverse treatment based on the discharge.

## I. Substantive Consolidation

### §23.25 Authority to Substantively Consolidate Cases

*In re Cyberco Holdings, Inc.*, 2010 WL 2720794 (Bankr. W.D. Mi. 2010) – Section 105 is statutory grant of authority to substantively consolidate cases and traces equitable origin to Bankruptcy Act of 1898. Substantive consolidation is the shorthand reference for a “long recognized” process that allows a court to exercise summary jurisdiction over all of the debtor’s property, and is accomplished thru the application of Section 542 regarding turnover and Section 502(j) regarding treatment of claims as dictated by equities of case. When consolidation is sought, Court should view the effort as actually a process that involves specific Code sections that, when applied, result not in the merger of entities, but rather in nothing more than the realignment of assets and liabilities within the affected group.

*Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Section 105 is statutory grant of authority for the Court to exercise equitable remedies including substantive consolidation over non-Debtor parties. Bankruptcy Code creates an overriding federal interest in the equitable and efficient distribution of a Debtor’s property among its creditors which is consistent with purpose of substantive consolidation. Chapter 7 Trustee has standing to request Substantive consolidation as an equitable remedy under federal law.

*Simon v. ASIMCO Technologies, Inc.*, Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Section 105 is statutory authority on which Court can substantively consolidate cases and includes ability to consolidate non-debtor and debtor entities. However, substantive consolidation is extraordinary remedy to be used sparingly, as doctrine expressly disregards legal separateness of otherwise legally distinct entities.

### §23.26 Standing to Request Substantive Consolidation

*First State Bank of East Detroit v. Welsh*, Case No. 10-4795 (Bankr. E.D. Mi. 2010) – Although Creditor lacked standing to seek substantive consolidation, Trustee’s later intervention in adversary proceeding and joinder in creditor’s request resolved standing issues.

*In re Cyberco Holdings, Inc.*, 2010 WL 2720794 (Bankr. W.D. Mi. 2010) – Creditor lacks standing to seek substantive consolidation. Consolidation has its roots in Section 542 regarding turnover of property. Creditors do not have any direct right to seek relief under Section 542, as those powers are reserved to the estate. Even if Court could authorize derivative standing, Court would not do so where there was no evidence that Trustees had avoided pursuing whatever rights their respective estates would have had to take control of property of the estate.

*Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Chapter 7 Trustee has standing to request Substantive consolidation as an equitable remedy under federal law. Consolidation appropriate in action to recover allegedly fraudulent transfers made by related Debtor entities to multiple recipients, as consolidation will further efficient administration of case.

### §23.27 Grounds for Substantive Consolidation

*First State Bank of East Detroit v. Welsh*, Case No. 10-4795 (Bankr. E.D. Mi. 2010) – Complaint failed to state cause of action for substantive consolidation of debtor with non-debtor entities where complaint alleged only in conclusory terms that it was impossible segregate assets and liabilities of debtor and the non-debtor entities. Court would permit Trustee additional time to investigate and amend complaint if Trustee determined further prosecution of adversary complaint appeared warranted.

*Simon v. ASIMCO Technologies, Inc.*, Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Substantive consolidation requires a substantial identity between entities to be consolidated and that consolidation avoid some harm or produce some benefit. Benefit must “heavily” outweigh harm that would result from consolidation. Court will substantively consolidate non-debtor entity with debtor only where either: (i) the debtor and the non-debtor entity in their pre-petition conduct disregarded the separateness of their respective entities so significantly as to lead their creditors to treat them as one legal entity; or (ii) that post-petition, the assets and liabilities of the debtor and the non-debtor entity sought to be consolidated are so hopelessly scrambled and commingled that it is impossible to separate them and tell them apart thereby resulting in harm to all creditors. That two companies conduct joint board meetings or use consolidated financial statements is not sufficient to warrant substantive consolidation.

*Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Substantive consolidation is employed in cases where the interrelationships of the Debtors are hopelessly obscured and the time and expense necessary to attempt to unscramble them is so substantial as to threaten the realization of any net assets for all of the creditors. Consolidation appropriate in action to recover allegedly fraudulent transfers made by related Debtor entities to multiple recipients, as consolidation will further efficient administration of case.

### §23.28 Effect of Substantive Consolidation

*In re Cyberco Holdings, Inc.*, 2010 WL 2720794 (Bankr. W.D. Mi. 2010) – – When consolidation is sought, Court should view the effort as actually a process that involves specific Code sections that, when applied, result not in the merger of entities, but rather in nothing more than the realignment of assets and liabilities within the affected group.

*Simon v. ASIMCO Technologies, Inc.*, Adv. No. 08-5622 (Bankr. E.D. Mi. 2009) – Substantive consolidation is judicially created doctrine that treats separate legal entities as if they were merged into a single entity, pooling assets and liabilities to produce common fund to satisfy creditors of consolidated entities. A cause of action for substantive consolidation is not the same as a cause of action to pierce a corporate veil, nor is it the same as a cause of action to determine whether, under state corporate law, there is a basis to find that two or more corporations are alter egos of one another.

*Gold v. Winget*, Adv. No. 04-4373 (Bankr. E.D. Mi. 2009) - Substantive consolidation treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities and claims of creditors against separate Debtors morph to claims against the consolidated survivor.

#### J. Duties of Debtor

##### §23.29 Duty to Cooperate with Trustee

*In re Wengerd*, 2010 WL 4054322 (Bankr. N.D. Ohio 2010) – Section 521(a)(3) imposes continuing duty to cooperate with trustee as necessary to allow trustee to perform duties. Debtor required to provide documents and accounting of debtor's pre-petition business activities to enable trustee to perform duty to investigate financial affairs of the debtor of whether the information relates to exempt assets, whether the information relates to property of the estate and whether, in the debtors' opinion, the information is interesting.

*In re Neal*, 424 BR 235 (Bankr. E.D. Mi. 2010) – Debtor has a duty to cooperate with the Trustee in the performance of Trustee's duties. Debtor who occupied house that was property of the estate refused to cooperate with the Trustee in the marketing of the property. Court ordered Debtor to vacate the property immediately to permit Trustee to market and sell the property.

##### §23.30 Schedules and Statements

*Swanigan v. Northwest Airlines, Inc.*, 2010 WL 2465387 (W.D. Tn. 2010) - Debtor seeking bankruptcy protection must file a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs including a legal causes of action. Duty of disclosure is a continuing one, and a debtor is required to disclose all potential causes of action. The importance of this disclosure duty cannot be overemphasized.

#### K. Loan Modifications

##### §23.31 Chapter 7 Proceeding

*In re Rutledge*, Case No. 10-61031 (Bankr. E.D. Mi. 2010) – Motion to Approve Loan Modification denied where Motion failed to indicate basis for Court's subject matter jurisdiction or statutory authority to approved or disapprove a proposed loan modification in a Chapter 7 case and failed to demonstrate basis for approval or denial assuming Court has jurisdiction.

*In re Spanski*, Case No. 10-52452 (Bankr. E.D. Mi. 2010) - Motion to Approve Loan Modification denied where Motion failed to indicate basis for Court's subject matter jurisdiction or statutory authority to approved or disapprove a proposed loan modification in a Chapter 7 case and failed to demonstrate basis for approval or denial assuming Court has jurisdiction.

##### §23.32 Chapter 13 Proceeding

*In re Wofford*, 2011 WL 2200611 (Bankr. W.D. Wis. 2011) – Loan modification agreement negotiated by Chapter 13 debtors and lender whose claim was secured solely by interest in real property that was debtors' home did not have to be approved by bankruptcy court in order to be effective, and bankruptcy court would not grant lender's request for advisory opinion on propriety of modification solely to provide comfort to lender.

*In re Alva*, Case No. 10-58152 (Bankr. E.D. Mi. 2010) – Motion to approve loan modification is in essence a request for a plan modification as Motion sought to change treatment of Class 2 and Class 4 creditor. Relief must be requested in form of Plan Modification.

*In re Kipling*, 2010 WL 2584191 (Bankr. E.D. Ky. 2010) – Motion to approve loan modification is in essence a request for a plan modification. Court would deny Motion where record was incomplete and proposed modification did not appear to advance purposes of Chapter 13.

§23.33 Troubled Asset Relief Program (TARP)

*Shirk v. JPMorgan Chase Bank, N.A.*, \_\_\_\_\_ (Bankr. S.D. Ohio 2010) – Alleged violation of provisions of the Troubled Asset Relief Program (TARP) by financial institution that accepted TARP funds, in purportedly failing to assist mortgage borrowers by making mortgage loans more affordable, did not give rise to private right of action against financial institution by borrowers.

§23.34 Homeowners Assistance Mortgage Program (HAMP)

*Lessl v. CitiMortgage, Inc.*, 2011 WL 4351673 (E.D. Mi. 2011) – Owner had no cause of action under either HAMP or Section 600.3205c where mortgage holder offered owner a loan modification which owner declined. Mortgage holder is not required to reduce principal balance to amount shown in appraisal, particularly where Owner contends that property had significantly higher value. Although loan modification at value somewhat higher than the appraised amount may have been “shrewd”, lender was not unreasonable in using a higher principal value than owner would accept. Further, HAMP discussions did not give rise to cause of action for promissory estoppel or misrepresentation. Statements regarding future conduct cannot form the basis of misrepresentation. Lender’s statements that lender would consider matter further were not statements of existing fact but were at best only statements of future actions. Promissory estoppels also fails because lender never made promise that one would reasonable expect to produce action of definite and substantial character, and on which owner actually relied. Lender stated that lender would make good faith review of owner’s loan modification request. Lender thereafter made two separate loan modification proposals which were rejected by owner.

*In re Pauli*, Case No. 08-64252 (Bankr. E.D. Mi. 2010) – HAMP requires that borrower initially qualify by demonstrating that monthly mortgage payment (including taxes and insurance) ratio is greater than 31% of borrower’s monthly gross income. HAMP contemplates an initial “trial” period. If borrower fully complies with trial program, borrower will be offered a permanent modification if the borrower still qualifies. Borrowers initially qualified for HAMP because mortgage payment plus taxes and insurance exceeded 31%. However, by the end of the trial period, Borrower’s income had risen and interest rate changes caused mortgage payment to fall so that Borrower no longer met 31% ratio. Lender had right to withdraw HAMP modification and to reinstate mortgage on original terms. Trial period did not vest in Borrower any right to a permanent modification if Borrower no longer met qualification requirements.

§23.35 National Housing Act (NHA)

*Shirk v. JPMorgan Chase Bank, N.A.*, \_\_\_\_\_ (Bankr. S.D. Ohio 2010) – National Housing Act and its attending regulations do not expressly or implicitly create private right of action to mortgagors for mortgagee’s noncompliance with the NHA or NHA regulations

§23.36 Home Ownership Equity Protection Act (HOEPA)

*Famatiga v. Mortgage Electronic Registration Systems, Inc.*, 2011 WL 3320480 (E.D. Mi. 2011) – 15 USC Section 1639 prohibits lender from extending credit recklessly and without regard to ability to repay. Statute of limitations runs one year from date of transaction.

M. ECF Procedures

§23.37 Electronic Filing Required

*Bajas v. Wahrman*, Case No. 10-5831 (Bankr. E.D. Mi. 2010) - Defendant’s Answer to Adversary Complaint stricken where Defendants filed paper copy of answer without permission to file in traditional paper form.



## §23.38 Electronic Filing Excused

## §23.39 Service by ECF

*In re Menden*, 2011 WL 4433621 (Bankr. N.D. Ohio 2011) - Electronic Case Filing system registered user consents to receiving electronic service of papers in lieu of mail service. ECF service of Amended Plan on Creditor's attorney who had filed Notice of Appearance was sufficient service pursuant to Rule 2002(g).

## N. Habeas Corpus

## §23.40 Authority to Issue Writ

*Barlow v. McGee*, 2010 WL 3831387 (Bankr. W.D. Mi. 2010) – Bankruptcy Court, as Article I Court, has authority to enter Writs of Habeas Corpus to require person having custody over another to produce the other person for judicial proceedings.

## §23.41 Requirements

*Barlow v. McGee*, 2010 WL 3831387 (Bankr. W.D. Mi. 2010) – Bankruptcy Court denied habeas petition where Defendant also filed Motion under Rule 78 to dispense with hearing and rule on the issues on the briefs submitted. Defendant already acknowledged that Court could rule without the need for a hearing, making it unnecessary put the government to the extraordinary burden, risk, and expense of transporting the Defendant for a hearing at which even he does not regard his appearance as necessary; the court would not be taking evidence eliminating any need for the Defendant to appear for purposes of testifying; and the court has afforded the Defendant ample opportunity to obtain counsel to represent him in this civil proceeding. Defendant's incarceration undoubtedly hampers his participation in this proceeding, but this is but one of the many consequences of his criminal activity, part of the liberty he lost upon conviction.

## O. Choice of Laws and Forum Selection Clauses

## §23.42 Foreclosure Proceedings

*State Bank of Florence v. Miller*, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6<sup>th</sup> Cir. BAP 2011) – evaluating force and effect of mortgage foreclosure action, outcome is determined by law of state in which property is located, notwithstanding separate forum selection clause in Promissory note. Note executed in Wisconsin with Wisconsin law stated as controlling did not control outcome or effect of foreclosure of property located in Michigan.

## §23.43 Exemption Statutes

*Comfort Control Supply Company, Inc. v. Smith*, Case no. 07-80005 (Bankr. W.D. Mi. 2011) – Law of foreign state will control garnishment issued by Michigan Bankruptcy Court where debtor lives in foreign state and funds to be garnished would be exempt under law of foreign state. Post-discharge collection efforts on Consent Judgment holding debt to be non-dischargeable. After the discharge, debtor moved to Colorado but was unable to secure employment and applied for and received unemployment compensation. Creditor obtained Writ of Garnishment from Bankruptcy Court and garnished Debtor's bank accounts. Debtor objected to attempt to garnish funds that were derived from unemployment compensation based on Colorado statute exempting unemployment funds. Colorado has sufficient interest in having its exemption law applied to overcome presumption that Michigan law should apply. Funds received and traceable to unemployment compensation exempt from Michigan garnishment. Funds that were co-mingled and could not be traced to unemployment versus some other source were not exempt.

## P. Governmental Sovereign Immunity

## §23.44 Waiver

*IRS v. Hayes*, 2011 WL 2490945 (E.D. Mi. 2011) – Governmental sovereign immunity has been abrogated with respect to action to determine amount or legality of any tax, and any fine or penalty relating to a tax. Sovereign Immunity is also waived if the governmental unit files a proof of claim for any claim against the governmental unit arising out of the same transaction or occurrence, which includes determination of tax debts where the IRS filed a proof of claim. Bankruptcy Court can adjudicate post-discharge dispute between IRS and debtor concerning amount of admittedly non-discharged tax debt.

## Q. Rule 2004 Examinations

## §23.45 Parties Entitled to Conduct

*In re Rapoport*, Case No. 11-45373 (Bankr. E.D. Mi. 2011) – Any party in interest can request an examination under Rule 2004. Party in interest is anyone who has a financial state in the proceedings. Creditor, a state court appointed receiver and plaintiff in pending state court fraudulent conveyance action, had standing to conduct financial investigation in his status as a creditor in the case.

*In re Michalski*, 449 BR 273 (Bankr. N.D. Ohio 2011) – United States Trustee has the authority to conduct an examination under Rule 2004, including the ability to compel the production of documents relating to components of Creditor's Proof of Claim in the Debtors' case. UST does not have to articulate a basis to dispute the Proof of Claim before exercising his right to conduct a Rule 2004 examination.

*In re Davis*, 452 BR 610 (Bankr. E.D. Mi. 2011) – United States Trustee has the authority to conduct an examination under Rule 2004, including the ability to compel the production of documents. Settlement between Debtor and creditor of Motion for Sanctions based on creditor's alleged violation of automatic stay did not render moot the subject of the UST examination. UST has interest in investigating the policies and actions of creditor regarding the accuracy, preparation and filing of proof of claim.

*In re DeShetler*, 2011 WL 2746003 (Bankr. S.D. Ohio 2011) – United States Trustee has the authority to conduct an examination under Rule 2004, including the ability to compel the production of documents.

## §23.46 Scope

*In re Michalski*, 449 BR 273 (Bankr. N.D. Ohio 2011) – Document requests that covered Creditor's internal policies and procedures represent the highest potential for intrusion into private business affairs and require a higher level of good cause before disclosure will be required. UST did not state sufficient cause for production of generally applicable policies and procedures because the Subpoena was issued in support of the Rule 2004 examination relating only to the Debtors; and did not demonstrate good cause for the production of the agreements between Creditor and third parties engaged in default servicing, property inspection and property preservation.

*In re Davis*, 452 BR 610 (Bankr. E.D. Mi. 2011) – Although extremely broad, the scope of Rule 2004 is not unlimited. the Court can limit the scope of the exam where the harm to the party to be examined greatly outweighs those of the examiner such that the examination should be quashed or limited. UST's request for production of documents and for an examination limited to documents, policies and procedures that relate to the Debtor's account is not open-ended examination but instead is carefully tailored to those documents, policies and procedures.

*In re DeShetler*, 2011 WL 2746003 (Bankr. S.D. Ohio 2011) – Rule 2004 examination is not permitted for matters not related to the financial condition of a debtor or a debtor's estate. Upon a creditor objection, the examiner must establish "good cause," taking into consideration the totality of the circumstances, including the importance of the information to the examiner and the costs and burdens on the creditor. Section 586 is broad enough to allow the UST to monitor the claims process, including through the investigation of proofs of claim filed by creditors, to assist in his duty of monitoring the progress of cases. Issues, with proofs of claims filed by mortgage lenders, affect the administration of cases. The level of good cause required to be

established by the UST will vary depending on the potential intrusiveness involved. UST is entitled to review the original Note and any such documents that establish creditor as the holder of the Note under the Ohio Uniform Commercial Code and the date on which creditor came into possession of the original Note. To the extent that the “contemporaneously-kept transactional mortgage loan history on the Debtors' mortgage loan” is intended by the UST to capture documents in creditor’s possession relating to the transfer of the Note or interests in the Note from one entity to another including documents pertaining to the chain of assignment of the mortgage and chain of endorsement of the note which would tend to support claimant's right to make the within claim in Debtor's bankruptcy case are clearly relevant to the UST's inquiry into creditor’s legal basis and standing to file the proof of claim. Loan history relating to the payments made by the Debtors, charges made by the lender on the account, and other debits and credits relating to the loan evidenced by the Note and Mortgage are not properly within scope of Rule 2004 where UST is not challenging the amount of the claim filed.

#### §23.47 Location of Examination

*In re Davis*, 452 BR 610 (Bankr. E.D. Mi. 2011) – General rule is that depositions of corporate agents and officers should be taken at the principal place of business. Court would limit examination to the extent that the examination would take place in the district of creditor’s principal place of business, or telephonically on terms to be agreed upon by the parties.

### XIV. Sanctions

#### A. Authority to Impose

##### §24.1 28 USC §1927

*In re Ashford*, 2011 WL 3606687 (Bankr. E.D. Ky. 2011) – Section 1927 is not applicable to actions or representations taken in state court proceedings. Court has no authority to impose sanctions against Trustee for actions taken by Trustee in state court employment litigation. For actions taken in Bankruptcy Court, sanctions under Section 1927 are warranted when an attorney has engaged in some sort of conduct that, from an objective standpoint, falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party. When an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney. Bad faith is not required to support a sanction under Section 1927. Trustee’s erroneous determination that certain assets had not been abandoned by the estate was not unreasonable or lacking in legal basis notwithstanding that the Court later determined Trustee’s position to be incorrect and Trustee thereafter immediately terminated actions which Debtor contended were vexatious.

*Followell v. Mills*, 2009 WL 723132 (6th Cir. 2009) - Attorney who multiplies proceedings in any case unreasonably and vexatiously may be sanctioned by the Court. Sanctions are warranted when attorney objectively falls short of the obligations owed by a member of the bar to the Court and which causes additional expense to the opposing party. Sanctions are to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy. Sanctions require a showing of something less than subjective bad faith, but something more than negligence or incompetence. Attorney is sanctionable when he intentionally abuses the judicial process or knowingly disregards the risk that his actions will needlessly multiply proceedings. Attorney has pre-filing duty to make reasonably inquiry. Where documents readily available to counsel would have disclosed strong reasons to doubt merits of claim, counsel should at least have conducted further investigation. Sanctions appropriate where pleading excesses are not result of mere negligence or incompetence but instead reflect reckless lawyering that Courts must be vigilant to admonish, correct, and deter through sanctions.

*Maloof v. Level Propane Gasses, Inc.*, 316 Fed.Appx. 373 (6<sup>th</sup> Cir. 2008). Bankruptcy court did not abuse its discretion in imposing sanctions on a shareholder in the form of attorney's fees and costs, when it was the third motion, asking for the same relief.

## §24.2 Inherent Authority of Court

*Wells Fargo Bank, N.A. v. Stewart*, 647 F.3d 553 (5<sup>th</sup> Cir. 2011) – Court lacked authority to *sua sponte* impose sanctions against creditor that would have required creditor to (1) to audit every proof of claim it has filed in any case pending on or filed after April 13, 2007; (2) to provide a complete loan history on every account and to file that history with the appropriate court; and (3) to amend any proofs of claim already on file to comply correct errors or inaccuracies.

*In re Ashford*, 2011 WL 3606687 (Bankr. E.D. Ky. 2011) – Court has inherent authority to impose sanctions when party acts in bad faith, vexatiously, wantonly or for oppressive reasons. Bad faith for purposes of sanctions requires (1) the claims advanced were meritless; (2) counsel knew or should have known the claims were meritless; and (3) the motive for filing the suit was for an improper purpose such as harassment. Mere lack of success is not basis for sanctions. Trustee's opposition to Motion to Enforce Abandonment did not constitute pursuit of meritless claim or action where Trustee had good faith belief that asset had not been properly disclosed and could not have been abandoned; and once Court determined that asset had been abandoned, Trustee immediately terminated any effort to pursue recover of asset.

*Dorbeck v. Sykora* 2010 WL 4923215 (E.D. Mi. 2010) – Complaint filed in District Court alleged that Plaintiff held ownership interest in corporation. Plaintiff was also Debtor in Chapter 13. Bankruptcy documents failed to disclose any ownership or other interest in corporation. Court has inherent authority to assess attorney fees where claims advanced were meritless, counsel or the party knew or should have known this, and filing the suit was for an improper purpose. Plaintiff's complaint was devoid of legal or factual merit as it clearly violated concept of judicial estoppel; Plaintiff was well aware at start of proceedings of factual inconsistencies in pleadings filed at District Court versus those filed in Bankruptcy Court; and Plaintiff demonstrated utter disregard for sanctity of judicial process by failing to disclose assets in Bankruptcy court and then filing complaint based entirely on interests that he denied having in Bankruptcy proceeding.

*In re Wilson*, 2010 WL 3061741 (Bankr. N.D. Ohio 2010) - Court's contempt powers derive from Bankruptcy Code Section 105(a) and the inherent power of a court to enforce compliance with its lawful orders. Contempt must be shown by clear and convincing evidence that the alleged contemnor violated a definite and specific court order which required the performance or the nonperformance of an act with knowledge of that court order. Willfulness is not an element of civil contempt and intent to disobey the order is irrelevant. However, the alleged contemnor may defend by showing an inability to comply with the order.

*In re Denison*, 2010 WL 3061715 (Bankr. N.D. Ohio 2010) - Court's contempt powers derive from Bankruptcy Code Section 105(a) and the inherent power of a court to enforce compliance with its lawful orders. Contempt must be shown by clear and convincing evidence that the alleged contemnor violated a definite and specific court order which required the performance or the nonperformance of an act with knowledge of that court order. Willfulness is not an element of civil contempt and intent to disobey the order is irrelevant. However, the alleged contemnor may defend by showing an inability to comply with the order.

*Fokkena v. Countrywide Home Loans, Inc.*, 2008 WL 3932153 (N.D. Ohio 2008) – Bankruptcy Court has inherent power to sanction vexatious conduct presented before the Court. US Trustee's Motion for monetary sanctions for vexatious filing falls within the authority of the Bankruptcy Court. Bankruptcy Court could sanction creditor for filing proof of claim where creditor failed to ensure the accuracy of its filings. Creditor filed proof of claim and objected to confirmation although Debtor did not own the property which was the subject of creditor's mortgage. Bankruptcy Court could impose both monetary sanctions and enter an injunction to prevent creditor from engaging in "similar conduct".

*In re Steiner*, Case No. 08-33717 (E.D. Mi. 2009) –Debtors' Chapter 7 Attorney failed list tax refunds based on erroneous belief that tax refunds were not assets of the Bankruptcy estate. After Debtors amended to disclose and exempt the tax refund, the Court set an evidentiary hearing on the issues of good faith, but Debtors' counsel failed to advise Debtors to attend, requiring an adjournment of that hearing Court

sanctions Debtors' counsel \$600 to pay to the estate to compensate the Trustee for time spent preparing for the evidentiary hearing that had to be adjourned and an additional \$300.00 for failing to understand that tax refunds are part of the estate and must be scheduled as such thereby causing the Trustee to expend time and effort to recover those tax refunds for the estate.

### §24.3 Rule 9011

*In re Taylor*, 2011 WL 3692440 (3d Cir. 2011) – Attorney who blindly relied on computerized information without contacting creditor directly or taking any other steps to verify data violated Rule 9011 in filing proof of claim, response to objection to claim and Motion for Stay Relief. Proof of claim contained factual errors; the wrong mortgage was attached, debtors' monthly payment was incorrect and the value of the debtors' home was understated by \$100,000. Computerized data base did not reflect payments received by creditor and attorney lacked ability to contact creditor to investigate debtor's assertions. Attorneys also served requests for admissions for matters that attorneys knew or should have known were false, including request for debtor to admit that debtor had not made payments when debtor had made payments and creditor accepted those payments. While it is "usually reasonable for a lawyer to rely on information provided by a client, especially where that information is superficially plausible and the client provides its own records which appear to confirm the information", reliance assumes a reasonable attempt at eliciting information from the client. Attorney must exercise independent professional judgment and make reasonable effort to determine what facts are likely to be relevant to a particular court filing and to seek those facts from the client. Attorney cannot settle for only the information that the client that attorney should be provided with. Attorney preparing the court papers did not have information about the debtors' equity in the home, yet the signed documents stated no equity. A minimal inquiry to creditor would have revealed the dispute over the flood insurance and that the debtors were continuing to make payments, yet the papers indicated that the debtors were in default, with no reference to the insurance issue. Attorney preparing the signed documents ignored clear warning signs in the debtors' claim objection and response to the stay motion. "At that point, any reasonable attorney would have sought clarification and further documentation from her client, in order to correct any prior inadvertent misstatements to the court and avoid any further errors."

*Byrd v. Arvest Bank*, Case No. 10-8071 (6<sup>th</sup> Cir. BAP 2011) – Sanctions under Rule 9011 are based on whether the conduct was reasonable under the circumstances as they existed when the potentially sanctionable conduct occurred. Bankruptcy Petition filed for corporate entity without authorization is sanctionable under Rule 9011. Once Court finds violation of Rule 9011, Court has broad discretion in fashioning sanctions with the twin goals of deterrence of the offending party and compensation to the injured party, and may include reasonable attorney fees taking into account the sanctioned party's ability to pay. Court properly awarded injured secured creditor sanctions of more than \$42,000 against person who signed petition on behalf of limited partnership without authorization.

*Turner v. American Express Centurion Bank*, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Motion for sanctions under Rule 9011 may not be filed or presented to the court unless the alleged offending party has been provided with twenty-one days to withdraw or correct the improper pleading. Debtor failed to comply with Rule 9011 in requesting attorney fees for first time as a part of Amended Complaint.

*Rankin v. Lavan*, 2011 WL 3701441 (6<sup>th</sup> Cir. 2011) – Debtor's repeated filings against numerous entities, including request for Grand Jury investigation to charge various parties with violations of Civil Rights and RICO, without evidence and with "a marked absence of coherence", and Debtor's general litigious behavior which culminated in Bankruptcy Court injunction against Debtors filing any further pleadings warranted imposition of sanctions for abusive conduct.

*In re Ashford*, 2011 WL 3606687 (Bankr. E.D. Ky. 2011) – Rule 11 requires the moving party to provide notice to the other party with the other party having 21 days to withdraw the challenged document or argument, before any sanctions can be awarded. Prior notice is "mandatory prerequisite" to sanctions. Debtor's failure to provide notice to the Trustee prior to filing Motion for Sanctions precludes award under Rule 11/



*IRS v. Hayes*, 2011 WL 2490945 (E.D. Mi. 2011) – Rule 11 authorizes sanctions for a complaint that is presented for an improper purpose such as harassment or unnecessary delay or expense. Government’s complaint in District Court to determine tax debt filed while there was also adversary proceeding in Bankruptcy Court to determine same issue was not done with intent to harass. Government had legitimate interest in filing action in District Court where there was non-debtor co-obligor and government intended to have Bankruptcy Court abstain so that all matters could be adjudicated at one time in one proceeding. Further, movant failed to serve notice of intent to file the Rule 11 motion 21 days in advance as required. Although movant may have believed that any demand would only have been ignored, Rule 11 requirements for notice must be strictly complied with.

*Proctor v. Educational Credit Management Corp.*, 2010 WL 4919670 (Bankr. S.D. Ohio 2010) – Plaintiff’s conduct in pursuing second complaint against debtor was unreasonable where plaintiff had previously filed identical complaint against same defendant and lost the prior action on Summary Judgment. Sanctions appropriate under Rule 11. Sanctions should be measured by goal of deterrence and must impose the least severe sanction that is likely to deter. Motion to Dismiss clearly identified complaint as offending pleading and plaintiff was repeatedly informed by letter that the complaint needed to be dismissed or sanctions would be sought. Defendant sufficiently identified pleading that Defendant contended should be withdrawn. Sanctions can include all attorney fees incurred after identification of the offending pleading, including fees incurred in discovery, that are naturally incurred as a result of defending the suit. It is not necessary for party to provide an expert witness regarding the reasonableness of its attorneys fees because the court is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value. Plaintiff’s history of filing frivolous claims warranted award of defendant’s attorney fees in full, as anything less will not provide a sufficient deterrence of future conduct.

*Burns v. George Basilikas Trust*, 599 F.3d 673 (D.C. Cir. 2010) - Rule 9011 sanctions were improperly imposed against counsel whose argument was supported by unreported district court case.

*Cappuccilli v. Lewis*, 2010 WL 2870668 (E.D. Mi. 2010) - The test for imposing Rule 11 sanctions is “whether the attorney’s conduct was reasonable under the circumstances.” Trustee’s Motion to Dismiss Appeal was not unreasonable where Debtors’ designation and statement of issues were not filed on time. Untimely filing has been a basis for dismissal in the past, rendering Trustee’s motion for dismissal reasonable under the circumstances.

*D.A.N. Joint Venture III, L.P. v. Shekerjian*, Case No. 07-55859 (Bankr. E.D. Mi. 2010) – Court dismissed adversary seeking to deny discharge after concluding that Plaintiff failed to prove that it held assignment promissory notes and, therefore, lacked standing to maintain the action and that promissory notes had been satisfied by Debtor before Plaintiff purported to acquire an interest in the notes. Sanctions under Rule 9011 are appropriate only where the attorney’s conduct was unreasonable under the circumstances. A good faith belief in the merits of the action, standing alone, is not sufficient to avoid sanctions. However, where there appeared to be evidentiary support for Plaintiff’s claims, Plaintiff’s ultimate failure to prevail in the action does not warrant imposition of sanctions. Plaintiff made a reasonable investigation before instituting the proceeding and Plaintiff’s complaint and supporting evidence was sufficient to survive pre-trial motions and to proceed to trial.

*In re Lundeen*, Case No. 09-51277 (Bankr.S.D.Ohio 2009) – Imposition of sanctions under Rule 9011 is discretionary with the court. Sanctions should only be imposed if it is patently clear that a claim has absolutely no chance of success, and all doubts should be resolved in favor of the signing attorney. Court refused to impose sanctions where it would not have been patently clear to counsel at the time the involuntary petition was filed that the petition had no chance of success. Alleged personal liability was a close question and that the Petitioning Creditors and their counsel had a good faith (albeit wrong ) belief that debtor’s personal liability was not in bona fide dispute.

*Followell v. Mills*, 2009 WL 723132 (6th Cir. 2009) - By signing pleading, Counsel certifies that to the best of counsel’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) pleading is not being presented for any improper purpose, such as to harass or to cause

unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. The test for imposition of sanctions under rule is whether individual attorney's conduct was reasonable under the circumstances. A good faith belief in merits of case is not necessarily sufficient to avoid sanctions and proof of bad faith is not required for award of sanctions. Attorney has pre-filing duty to make reasonably inquiry. Where documents readily available to counsel would have disclosed strong reasons to doubt merits of claim, counsel should at least have conducted further investigation. Sanctions appropriate where pleading excesses are not result of mere negligence or incompetence but instead reflect reckless lawyering that Courts must be vigilant to admonish, correct, and deter through sanctions.

*Maloof v. Level Propane Gasses, Inc.*, 316 Fed.Appx. 373 (6<sup>th</sup> Cir. 2008). Bankruptcy court did not abuse its discretion in imposing sanctions on a shareholder in the form of attorney's fees and costs, when it was the third motion, asking for the same relief.

*Fokkena v. Countrywide Home Loans, Inc.*, 2008 WL 3932153 (N.D. Ohio 2008) – Bankruptcy Court has authority under Rule 9011 to sanction vexatious conduct presented before the Court. US Trustee's Motion for monetary sanctions for vexatious filing falls within the authority of the Bankruptcy Court. Bankruptcy Court could sanction creditor for filing proof of claim where creditor failed to ensure the accuracy of its filings. Creditor filed proof of claim and objected to confirmation although Debtor did not own the property which was the subject of creditor's mortgage. Bankruptcy Court could impose both monetary sanctions and enter an injunction to prevent creditor from engaging in "similar conduct".

*Countrywide Home Loans, Inc. v. McDermott*, 426 B.R. 267 (N.D. Ohio 2010) - Rule 9011 allows a court to award sanctions on its own initiative only after entering an order describing the specific conduct that appears to violate the rule and directing an attorney, law firm, or party to show cause why it has not violated the rule. Bankruptcy court's imposition of sanctions without the requisite show cause order resulted in creditor lacking notice that the bankruptcy court, on its own initiative, would be considering sanctions. Creditor's "errors" consisted of the filing of *one* proof of claim and *one* objection to confirmation, neither of which was supported by the actual facts. Record was devoid of evidence of similar errors in any other bankruptcy case. Bankruptcy Court's statement that Creditor's systemic inefficiencies had caused it to file a proof of claim and an objection to confirmation of plan was not supported by the record evidence and it was an abuse of discretion for the bankruptcy court to hold that the mistaken filing of two documents amounted to sanctionable conduct. Although Court may have been frustrated by what the court perceived as a systemic problem in the mortgage servicing industry, evidence in this case did not support sanctions including sweeping directive that Creditor completely change policies and procedures for filing proofs of claim and attach documents not required by the Rules and Code.

*In re Depew*, Case No. 09-56915 (Bankr. E.D. Mi. 2009) - Debtor falsely filed Exhibit D attesting to credit counseling when Debtor had not received counseling. Debtor ordered to pay \$200 to clerk of Court as sanction for violation of Rule 9011.

*B-Line, LLC v. Wingerter*, 594 F.3d 931 (6<sup>th</sup> Cir. 2010) – Creditor did not violate Rule 9011 by filing Proofs of Claim without attaching originating documents and in relying on warranties and representations provided by original creditor when purchasing debt obligations. Under the Creditor's standard Contract, the seller of the debts warrants that the debt is legal, valid and binding and that it has not been disputed by debtor or a Trustee and that no objection to a claim has been lodged. At the time Creditor filed the Proof of Claim, creditor had no reason to believe that the warranties and representations were false or that the debt was not valid and enforceable. Selling creditor had a strong track record – of 1,017 claims sold by this creditor to B-Line, only 2 were ever found to be invalid and only 5 were ever disputed. B-Line also conducted independent review before purchasing accounts, reviewing documents to ensure completeness and consistency, and only then filed a Proof of Claim. Thus, B-Line made a reasonable inquiry into the validity and enforceability of the debt before filing the Proof of Claim, satisfying its obligations under Rule 9011. Although Debtor objected to the Proof of Claim and B-Line ultimately withdrew the claim as it

could not find the original loan documents, this does not establish that the claim was filed in bad faith in the first instance.

*B-Line, LLC v. Wingerter*, 594 F.3d 931 (6<sup>th</sup> Cir. 2010) – Creditor did not violate Rule 9011 by filing Proofs of Claim without attaching originating documents and in relying on warranties and representations provided by original creditor when purchasing debt obligations. Under the Creditor's standard Contract, the seller of the debts warrants that the debt is legal, valid and binding and that it has not been disputed by debtor or a Trustee and that no objection to a claim has been lodged. At the time Creditor filed the Proof of Claim, creditor had no reason to believe that the warranties and representations were false or that the debt was not valid and enforceable. Selling creditor had a strong track record – of 1,017 claims sold by this creditor to B-Line, only 2 were ever found to be invalid and only 5 were ever disputed. B-Line also conducted independent review before purchasing accounts, reviewing documents to ensure completeness and consistency, and only then filed a Proof of Claim. Thus, B-Line made a reasonable inquiry into the validity and enforceability of the debt before filing the Proof of Claim, satisfying its obligations under Rule 9011. Although Debtor objected to the Proof of Claim and B-Line ultimately withdrew the claim as it could not find the original loan documents, this does not establish that the claim was filed in bad faith in the first instance.

*In re Wingerter*, 2008 Fed App 0014P (6<sup>th</sup> Cir. BAP 2008) *reversed* 594 F.3d 931 (see above) – Bankruptcy Court imposed sanctions against debt purchasing company for filing a proof of claim without making any investigation as to the validity or enforceability of the underlying obligation and for filing proof of claim which contain erroneous information and was in complete and fail to attach an itemized statement of the account. Debt purchasing company stated that Asset Purchase Agreement pursuant to which company acquired debt required seller to confirm that the Debtor is in a Chapter 13 proceeding; the debt has not been disputed or discharge; the amount owed is accurate; the statute of limitations in the claim is not expired; and the debt is not fraudulent. Debt purchasing company relied on statements and warranties set forth in Asset Purchase Agreement without conducting any independent investigation of the validity or enforceability of the obligation. Bankruptcy Court concluded that debt purchasing companies procedures for filing proves of claim were not based on a reasonable inquiry, prior to filing, as to whether there is admissible evidence to support the claim. Debt purchasing company, before filing a proof of claim with the bankruptcy Court, must obtain originating documentation or, when such documents are not available, a clear understanding of the nature of the original dealings that support the assertion of a claim against the Debtor. The purchaser should then attach to the proof of claim form the originating documents or an affidavit explaining the non-availability of those documents so the Debtor and other interested parties are given fair notice of the source and particulars of the claim. Bankruptcy Court did not impose monetary sanctions, any expenses incurred by debt purchasing company to be a sufficient sanction.

#### §24.4 Discharge Injunction

*Palazzola v. City of Toledo*, 2011 WL 3667624 (Bankr. N.D. Ohio 2011) – Violation of Discharge Injunction can be remedied through contempt proceedings. Once contempt is established, injured party can recover damages and, if necessary to effectuate purposes of injunction, attorney fees. Proper vehicle for contempt is contested matter under Rule 9014. However, Adversary Complaint for damages for contempt would not be dismissed where adversary proceeding provided more, not less, due process protection for defendant and defendant cannot allege any prejudice because action filed as adversary rather than Motion.

*In re Baer*, 2011 WL 3667511 (Bankr. E.D. Ky. 2011) – There is no private cause of action for violation of the discharge injunction.

*Frambes v. Nuvel National Auto Finance, LLC.*, 2011 WL 2133538 (Bankr. E.D. Ky. 2011) – There is no private right of action for alleged violation of discharge injunction. Party allegedly aggrieved can seek sanctions through Motion for Contempt. However, remedy must be sought by Motion rather than by Adversary Proceeding. Adversary dismissed for lack of jurisdiction.

*Lassiter v. Moser*, Case No. 09-8067 (6<sup>th</sup> Cir. BAP 2010) – Creditor's commencement of litigation in state court following entry of discharge violated discharge injunction and subjected creditor to sanctions for

contempt. Although the discharge injunction does not, of itself, present a private cause of action for damages, debtor who suffers injury can seek sanctions for contempt. Damages, including attorney fees, are appropriate where creditor instituted suit post-discharge based on events that occurred pre-petition and were discharged.

*Pickrel v. Household Realty Corp.*, 2010 WL 2301190 (Bankr. N.D. Ohio 2010) – Properly signed reaffirmation agreement becomes fully enforceable once filed with Court. Creditor action in foreclosing on reaffirmed debt and later suit to collect deficiency did not violate Discharge injunction.

*In re Greenspan*, Case No. 07-10774 (Bankr. N.D. Ohio 2010), *aff'd*, 2011 WL 310703 (6<sup>th</sup> Cir. BAP 2011) – Creditor violated discharge injunction filing two state court lawsuits against debtors in an attempt to collect a discharged debt. Although there is no private right of action for breach of discharge injunction, court can award sanctions for contempt of court. Sanctions awarded in the amount of \$12,510.00 representing attorney fees incurred in defending state court litigation on behalf of debtors. Court denied additional fees incurred in defending non-debtor co-defendants in state court litigation. Extraordinary amount of fees appropriate given creditor's persistence in pursuing the state court litigation, his opposition to the motion to reopen Chapter 7 case, his opposition to the debtors' request for a show cause order, and his position that the dispute be resolved through an evidentiary hearing.

*Dalvit v. United Airlines, Inc.*, Case No. 08-1283 (10<sup>th</sup> Cir. 2009) – Court refused to decide whether discharge injunction is jurisdictional, such that a court lacks jurisdiction to address claims that were subject to the discharge; or merely an affirmative defense that must be plead or is waived. Appellate Court can consider merits of claim even in the absence of subject matter jurisdiction where consideration of merits results in affirmation of lower court holding. Court may rule on the merits that appellant loses where merits of the claims have already been decided by lower court in action where that court did have jurisdiction.

#### §24.5 Contempt – Civil

*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.

*In re Rose*, 2010 WL 3733858 (Bankr. N.D. Ohio 2010) – Creditor held in contempt of court where creditor refused to cancel lien of record and surrender title to debtor upon tender of court determined redemption amount. Court has broad discretion to award sanctions including damages and attorney fees in contempt action. Court awarded damages measured by lost income of debtor having to attend hearing on contempt motion and attorney fees incurred by debtor in attempt to obtain compliance with court order. Court further ordered creditor to satisfy lien and surrender title without debtor being required to pay previously determined redemption amount and authorized debtor to obtain clean title if creditor continued to refuse to comply. To the extent additional sanctions including attorney fees exceed redemption amount, court would offset the redemption amount against those sanctions to avoid "double recovery" by debtor.

*In re Moser*, Case No. 05-38518 (Bankr. S.D. Ohio 2010) – Court has authority to issue contempt sanctions pursuant to Section 105. Purpose of civil contempt is to coerce compliance with a court order and to compensate the complainer for its losses. Moving party must prove by clear and convincing evidence that the respondent violated a court order that was clear and unambiguous and that required responded to perform or refrain from performing a specific act. Court order sealing particular document is not an order to



respondent to refrain from publishing, discussing or using the document in court proceedings. Respondent's reference to the sealed document in an appellate brief did not violate any specific court order precluding dissemination or citation.

*In re Wilson*, 2010 WL 3061741 (Bankr. N.D. Ohio 2010) – Petition preparer had been previously prohibited from preparing or assisting in the preparation of bankruptcy petitions pending further order based on Preparer's improper activities as a petition preparer, its failure to disgorge excessive petition preparer fees to the debtors in that case as required by a previous court order, and its failure to appear at hearing. Preparer nonetheless prepared documents for Debtor and charged fee in excess of presumptively reasonable fee. Preparer failed to appear on Court's Order to Show Cause why it should not be held in contempt for violation of prior Order. Preparer had knowledge of both orders and failed to comply with them and was given adequate notice and an opportunity to be heard on the contempt issue, yet failed to appear and has not provided any explanation for its failure. A coercive fine is an appropriate remedy for civil contempt. The totality of the circumstances must be considered in determining the amount of the fine, including: the type of actions that led to the issuance of the order, and the consequences of non-compliance with the order; reasons advanced for non-compliance and any good faith issues, even if those factors do not serve as a defense to the contempt charge; whether the contemnor expresses an intention to promptly comply; the amount of time that has elapsed since the order was entered; and the contemnor's financial circumstances. Petition preparer fined \$1,000.00 per day until Preparer files a request for a hearing to explain its failure to comply.

*In re Denison*, 2010 WL 3061715 (Bankr. N.D. Ohio 2010) – Bankruptcy Petition Preparer held in civil contempt for disregard of Court Orders. Court issued first Show Cause for Preparer to explain why Preparer charged more than the presumptively allowable fee. Petition Preparer responded with amended statement of compensation that disclosed a different social security number and different address than was stated in prior statement. Court issued second Show Cause for Preparer to explain why she filed documents listing two different social security numbers, and stated that court would consider whether she should be held in contempt for failure to obey a lawful court order and/or barred from participating as a bankruptcy petition preparer in the Northern District of Ohio and/or be referred to the United States Attorney for such action as he deems appropriate. After Preparer failed to appear, Court concluded that civil contempt finding was appropriate where Preparer was served with and had knowledge of the order and the terms of the order were specific and required her to appear on July 29, 2010. A coercive per diem fine is appropriate to encourage compliance with the court's order. The totality of the circumstances must be considered in determining the amount of the fine, including: the type of actions that led to the issuance of the order, and the consequences of non-compliance with the order; reasons advanced for non-compliance and any good faith issues, even if those factors do not serve as a defense to the contempt charge; whether the contemnor expresses an intention to promptly comply; the amount of time that has elapsed since the order was entered; and the contemnor's financial circumstances. Petition preparer fined \$10.00 per day until Preparer complies with the order and is barred from participating as a bankruptcy petition preparer in any case absent further order of this court. Finally, the issue of the different social security numbers is referred to the U.S. trustee for such action as he deems appropriate.

#### §24.6 Contempt - Criminal

#### §24.7 Show Cause

*In re Hermiller*, Case No. 10-70825 (Bankr. E.D. Mi. 2010) – There is no procedure under either Federal Rules or Local Rules for a party to move for Order to Show Cause. If party believes the stay has been violated, appropriate action is motion under Section 362(f).

*In re Lee-Blue*, Case No. 10-42861 (Bankr. E.D. Mi. 2010) - There is no procedure under either Federal Rules or Local Rules for a party to move for Order to Show Cause. If party believes a court order has been violated, party may file a motion asking the court to hold the allegedly violating party in contempt through the mechanism in Local Rule 9014-1.

#### §24.8 Section 105 - Generally



*Turner v. American Express Centurion Bank*, 2011 WL 4352158 (Bankr. E.D. Tn. 2011) – Debtors do not have a private right of action under section 105 against creditor for filing proofs of claim for time-barred debts. Section 105 does not provide a private right of action for damages for filing a false proof of claim.

*In re Lundeen*, 442 BR 659 (Bankr. S.D. Ohio 2011) – Injunction pursuant to Section 105 is radical measure to be used only in unusual circumstances where judgment against third party would in effect be judgment against debtor. Criminal proceedings against debtor affected only debtor and would not result in any judgment against any third party.

*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.