

The Latest and Greatest: Supreme Court and Lower Court Case Law Update

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AMERICAN BANKRUPTCY INSTITUTE

CONSUMER BANKRUPTCY SEMINAR

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Case Law Update

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Table of Contents

I. Hot off the Press	1
II. Cases to Watch	1
III. Automatic Stay	1
A. Actions Stayed.....	1
3.1 Generally	1
3.2 Persons Protected	3
3.3 Co-debtor Stay	3
3.4 Utilities	3
3.5 Actions by Debtor	3
3.6 Appellate Proceedings.....	4
3.7 Foreign Property	4
B. Exceptions	4
3.8 Police Power	4
3.9 Police Power – Bad Checks	5
3.10 Police Power – Parking Tickets	6
3.11 Setoff	6
3.12 Injunctive Relief	7
3.13 Post-Petition Perfection of Lien	7
3.14 Domestic Support Obligations	7
3.15 Administrative Freeze – Financial Accounts.....	8
3.16 Administrative Freeze - State Actions.....	8
3.17 Final Judgment in Dischargability Proceedings	8
3.18 Estoppel Against Enforcement of Stay	8
C. Relief From Stay	9
3.19 Grounds Generally	9
3.20 Cause - Section 362(d)(1)	9
3.21 Lack of Equity - Section 362(d)(2)(A)	11
3.22 Necessity for Effective Reorganization - Section 362(d)(2)(B)	12
3.23 Leases – Section 365(p)(1).....	12
3.24 Expiration of Right of Redemption	12
3.25 Family Law Proceedings	12

3.26	Single Asset Real Estate – Section 362(d)(3)	13
3.27	<i>In Rem</i> Relief	13
3.28	Burden of Proof	13
3.29	Mootness.....	13
3.30	Party Entitled to Relief From Stay	14
3.31	Procedural Requirements	15
3.32	Termination – Dismissal and Reinstatement of Case	15
3.33	Termination – Failure to Reaffirm or Redeem	16
3.34	Post-petition Default on Residential Mortgage.....	16
3.35	Closing of Case Without Discharge	16
3.36	Setoff	17
D.	Violations of Automatic Stay	17
3.37	Effect of Violation.....	17
3.38	Particular Actions – Violations	17
3.39	Particular Actions – Not Violations	21
3.40	Surrendered Collateral.....	22
3.41	Domestic Support Litigation	22
3.42	Pre-petition Mortgage Escrow Claims.....	23
3.43	Sanctions.....	23
3.44	Void and Voidable	27
E.	Extension of Automatic Stay	27
3.45	When Necessary	27
3.46	Timing of Motion and Hearing	28
3.47	Grounds for Denial.....	28
3.48	Grounds for Extension	29
3.49	Effect of Expiration of Stay.....	29
3.50	“Re-imposition” of Expired Stay	29
F.	Imposition of Automatic Stay.....	29
3.51	When Necessary	29
3.52	Timing of Motion and Hearing	29
3.53	Grounds for Denial	29
3.54	Grounds for Imposition	30
3.55	Order Confirming No Stay in Effect	30

DETROIT CONSUMER BANKRUPTCY CONFERENCE

3.56	Effect of Failure to Impose Stay	30
3.57	Generally	30
3.58	Procedure	30
IV. Attorneys		30
A. Debt Relief Agency		30
4.1	Generally	30
4.2	Attorneys as Debt Relief Agency	30
4.3	Duties of Attorney as DRA	30
B. Necessity for		31
4.4	Corporations	31
4.5	Individuals	31
4.6	Partnerships.....	31
4.7	Other Entities	31
C. Pro Bono Appointment		31
4.8	Parties Entitled to Appointment	32
4.9	Limitations on Appointment	32
4.10	Termination of <i>Pro Bono</i> Appointment.....	32
D. Attorney Fees		32
4.11	Generally	32
4.12	Chapter 13 – “No Look” Fees	34
4.13	Fee Agreement	35
4.14	Rule 2016 Disclosure	35
4.15	Time for Filing Application	36
4.16	Notice	36
4.17	Content of Application	36
4.18	Burden of Proof	37
4.19	Lodestar	37
4.20	Billing Judgment	40
4.21	Hourly Rate.....	40
4.22	Hours Expended.....	41
4.23	Clerical Services	41
4.24	Excessive Number of Professionals	42
4.25	Benefit to Debtors	42

4.26	Billing Judgment	43
4.27	Fee Application – Time for Preparing	43
4.28	“Fees on Fees”	43
4.29	Disgorgement.....	43
4.30	Res Judicata	44
4.31	Costs	44
4.32	Travel Time	44
4.33	Overhead.....	44
4.34	Effect of Discharge	44
4.35	Post-Petition Services	44
4.36	Bankruptcy Court Review	45
4.37	Fee Enhancements	45
4.38	Surcharge	45
4.39	Attorney for Chapter 7 Trustee	45
E.	<i>Pro Hac Vice</i>	46
4.40	Grant and Withdrawal of Approval	46
F.	Withdrawal of Counsel	46
4.41	Procedure	46
4.42	Mootness.....	47
4.43	Standing to Request Withdrawal	47
4.44	Grounds to Request Withdrawal	47
G.	Professional Fees	47
4.45	Generally	47
4.46	Limitations	47
4.47	Retention of Professionals – Time for Application	48
4.48	Retention of Professionals – <i>Nunc Pro Tunc</i> Approval	48
4.49	Retention of Professionals – Standard for Approval Generally	48
4.50	Retention of Professionals – Disinterestedness	48
H.	Bankruptcy Petition Preparer.....	49
4.51	Disclosure	49
4.52	Allowable Services	49
4.53	Compensation	49
4.54	Disgorgement.....	50

DETROIT CONSUMER BANKRUPTCY CONFERENCE

4.55	Unauthorized Practice of Law	50
I.	Ethical Issues	50
4.56	Duty to Communicate With and Advise Client	50
4.57	Filing for Improper Purpose	51
4.58	Communication with Clients	51
4.59	Candor to Court	51
4.60	“Stand In” or Substitute Attorneys	51
4.61	Suspension and Disbarment	51
V.	Commencing Case	52
A.	Eligibility for Relief	52
5.1	Section 109 – Generally	52
5.2	Debt Limits	52
5.3	Prior Voluntary Dismissal	52
5.4	Simultaneous Estates	53
5.5	Petition - Name of Debtor	54
5.6	Corporate Authorization	54
5.7	Decedent’s Estate	54
5.8	Trusts	54
B.	Joint Cases	54
5.9	Generally	54
5.10	Improper Joinder	55
C.	Credit Counseling	55
5.11	Failure to Obtain	55
5.12	Exemption from Requirement	59
5.13	Joint Petition	60
5.14	Payment Advices	60
E.	Venue	60
5.15	Generally	60
5.16	Domicile	60
5.17	Location of Principal Assets	61
5.18	Residence	61
5.19	Principal place of business	61
5.20	Dismissal	61

5.21	Transfer - Venue Proper	61
5.22	Transfer - Venue Improper	62
F.	Filing Fee	62
5.23	Failure to Pay	62
5.24	Waiver	63
G.	Means Test	63
5.25	“Primarily Consumer Debts”	63
5.26	Calculation of Disposable Income – Generally	64
5.27	Calculation of Disposable Income – Income of Non-Filing Spouse	65
5.28	Calculation of Disposable Income – Surrendered Collateral	65
5.29	Calculation of Disposable Income - Lien Strips	66
5.30	Calculation of Disposable Income – Automobile Ownership Expense	66
5.31	Calculation of Disposable Income – Automobile Operating Expense	66
5.32	Calculation of Disposable Income – Home Maintenance Expense	67
5.33	Calculation of Disposable Income – Health Care Expenses	67
5.34	Calculation of Disposable Income – Education Expenses	67
5.35	Calculation of Disposable Income – Housing Deduction	67
5.36	Social Security Income	67
5.37	Pension Income	69
5.38	Disability Income	69
5.39	Unemployment Income	69
5.40	Railroad Retirement Income	69
5.41	Self-Employed Debtor	70
5.42	Debtor as Owner of Corporation	70
5.43	Household Size	70
5.44	Variance From IRS Allowances	71
5.45	Special Circumstances	71
5.46	Marital Adjustment – Non-filing spouse	72
5.47	Cases Converted From Chapter 13	72
5.48	Amendments to Schedules – Continuing Duty to Disclose	73
H.	Involuntary Petitions	73
5.49	Elements	73
5.50	Credit Counseling – Section 109(h)	74

DETROIT CONSUMER BANKRUPTCY CONFERENCE

5.51	Petitioning Creditors	74
5.52	Debts Subject to Bona Fide Dispute.....	74
5.53	Not Generally Paying Debts as They Come Due.....	74
5.54	Eligible for Relief Under Chapter in Which Involuntary Petition Filed	74
5.55	Burden of Proof	75
5.56	Sanctions.....	75
VI. Property of Estate.....		75
A.	Defined.....	75
6.1	Generally	75
6.2	Social Security Benefits	77
6.3	Jointly Owned Property	78
6.4	Community Property	79
6.5	Property Acquired Post-Petition.....	79
6.6	Tenants by Entireties.....	79
6.7	Corporations and LLCs.....	80
6.8	Leaseholds	80
6.9	Abandonment by Trustee	81
6.10	Technical Abandonment	81
6.11	Motion to Compel Abandonment.....	81
6.12	Effect of Abandonment	82
6.13	Revocation of Abandonment.....	82
6.14	Tax Refunds.....	83
6.15	Post-Foreclosure Interests	84
6.16	Property Settlements	84
6.17	Causes of Action	85
6.18	Titled Assets – Generally	85
6.19	Jointly Owned Bank Accounts	85
6.20	Contract Rights	86
6.21	Internet Domain Name.....	86
6.22	Commission Income	86
6.23	Unrecorded Interests	86
6.24	Equitable Interests.....	86
6.25	Restrictions on Alienation	86

6.26	Consignment Transactions	87
6.27	Cash Collateral and Assignment of Rents - Defined	87
6.28	Cash Collateral - Adequate Protection.....	87
6.29	Bare Possessory Interests	88
6.30	Incomplete Transfers.....	88
6.31	Pre-petition Transfers Generally	88
6.32	Fixtures and Personalty – Defined	88
6.33	Political Campaign Contributions	89
6.34	Trust Property	89
6.35	Spendthrift Trust – Beneficial Interest	90
6.36	Bonuses.....	90
6.37	Encumbered Property	90
6.38	Proceeds and Products	90
6.39	Mineral Interests and Rights	90
6.40	Criminal Forfeiture	91
6.41	Inheritance	91
6.42	After Confirmation of Chapter 13 Plan – Generally.....	91
6.43	After Confirmation of Chapter 13 Plan - Personal Injury Proceeds	91
6.44	After Confirmation of Chapter 13 Plan – Life Insurance Proceeds	91
6.45	After Confirmation of Chapter 13 Plan – Inheritance	92
6.46	Conversion From Chapter 13 to Chapter 7.....	92
B.	Turnover.....	93
6.47	Generally	93
6.48	Excusal – State Court Receiver	93
C.	Failure to Disclose Causes of Action.....	93
6.49	Future Prosecution Barred.....	93
6.50	Future Prosecution Not Barred	96
D.	Section 542 Turnover Actions	98
6.51	Generally	98
6.52	Defenses.....	98
E.	Sale of Assets	98
6.53	Approval Generally.....	98
6.54	Sale Free and Clear of Liens	98

DETROIT CONSUMER BANKRUPTCY CONFERENCE

6.55	Procedure	98
6.56	Objections	99
F.	Prosecution of Pre-petition Causes of Action	99
6.57	Role of Trustee and Debtor	99
VII.	Exemptions.....	99
A.	Exemptible Property	99
7.1	Time for Determining	99
7.2	Bankruptcy Only Exemptions	100
7.3	Amended Claim of Exemptions	101
7.4	Recovery of Avoided Transfers	102
7.5	Waiver of Exemptions	103
7.6	Statutory Basis for Exemptions	103
7.7	Choice of Laws	103
B.	Objections to Exemptions.....	103
7.8	Burden of Proof	103
7.9	Deadline for Objections	103
7.10	Valuation of Property Claimed as Exempt	104
7.11	Conversion of Non-Exempt Into Exempt Property	104
7.12	Proceeds of Wrongful Conduct	104
7.13	“In Kind” and Dollar Limitations on Exemptions	105
C.	Specific Property Exempt.....	106
7.14	Stock Account.....	106
7.15	Payments as Replacement for Lost Earnings	106
7.16	Undisclosed Assets	107
7.17	Homestead	108
7.18	Household Goods.....	111
7.19	Motor Vehicles	111
7.20	Unmatured Life Insurance Contracts.....	112
7.21	Insurance Proceeds.....	112
7.22	Annuities.....	112
7.23	Employee Buyout.....	113
7.24	Post-petition Assets.....	113
7.25	Property Owned by Third Party	113

7.26	Dower Interests	114
7.27	Tools of the Trade	114
7.28	Co-mingled and Segregated Funds	114
7.29	Salary and Bonuses	115
7.30	Consumer Credit Protection Act	115
7.31	Unemployment Compensation	115
7.32	Workers Compensation	115
7.33	Retirement Accounts	115
7.34	Inherited Retirement Accounts	116
7.35	Tax Refunds	117
7.36	College Savings Accounts and Student Loan Proceeds	117
7.37	Spousal Support	117
D.	Liens Impairing Exemptions – Avoidance	118
7.38	Procedure	118
7.39	Grounds – Generally	118
7.40	Valuation	118
7.41	Liens Avoidable – Judicial Liens	119
7.42	Liens Avoidable – Non-Possessory Non-Purchase Money	119
7.43	Liens Not Avoidable – Statutory Liens	120
7.44	Effect of Avoidance	120
E.	Effect of Claimed Exemptions	120
7.45	Generally	120
7.46	Setoff and Exempt Assets	120
7.47	Exemptions and Non-dischargeable Claims	120
7.48	Value of Claimed Exemption – Appreciation in Value	120
7.49	Surcharge of Exempt Property	120
VIII.	Claims	121
A.	Specific Claim Types	121
8.1	Administrative	121
8.2	Environmental	123
8.3	Secured - Generally	124
8.4	Secured – Failure to Record Generally	125
8.5	Secured – Method of Perfection	125

DETROIT CONSUMER BANKRUPTCY CONFERENCE

8.6	Secured – Description of Collateral	127
8.7	Secured – Proceeds of Collateral	128
8.8	Secured – Priority of Competing Secured Claims	128
8.9	Secured Claim – Allowed Charges Generally	129
8.10	Secured – Attorney Fees	129
8.11	Secured – Interest Rate.....	130
8.12	Secured – Cross Collateralization	130
8.13	Secured – Future Advance Mortgage	130
8.14	Secured – Assignment of Claim.....	130
8.15	Secured – Forged Mortgage	131
8.16	Secured – Equitable Mortgage.....	131
8.17	Secured – Waiver	131
8.18	Secured – Valuation	131
8.19	Landlord’s Lien	131
8.20	Default Interest Rate	132
8.21	Injunctions	132
8.22	Income Taxes	132
8.23	Corporate Tax Liabilities	133
8.24	Pre-Petition Attorney Fees	133
8.25	Pre-petition Divorce Judgment.....	134
8.26	Domestic Support Obligations	134
8.27	Priority – Qualifying Wages and Benefits	135
8.28	Priority – Tax Claims	135
8.29	Priority – Perishable Agricultural Commodities Act	135
8.30	Pre-Petition versus Post-Petition Claims	136
8.31	Contingent Claims.....	137
8.32	Guaranty Claims	137
8.33	Executory Contracts and Unexpired Leases – Assumed.....	137
8.34	Executory Contracts and Unexpired Leases – Rejected.....	137
8.35	Condominium and Homeowners Associations	137
8.36	Deficiency Claims.....	138
8.37	Subordination	138
8.38	Insider Claims	138

8.39	Pre-petition Interest – Unsecured Claims	138
8.40	Pre-petition Escrow Balances	138
B.	Proof of Claim	138
8.41	Standing to File Proof of Claim	138
8.42	Not Required – Secured Creditors	140
8.43	Contents of Proof of Claim	140
8.44	Informal Proof of Claim	140
8.45	Effect of Filed Proof of Claim	140
8.46	Deadline for Filing Proof of Claim	141
8.47	Late Filed Proof of Claim	141
8.48	Failure to File Proof of Claim – Court Jurisdiction	142
8.49	Amended Proof of Claim	142
8.50	Withdrawal of Proof of Claim	142
C.	Objections	142
8.51	Jurisdiction to Resolve	142
8.52	Standing to Object	142
8.53	Procedural Requirements	143
8.54	Burden of Proof	143
8.55	Calculation of Amount of Claim	144
8.56	Grounds – Fraud on Court	145
8.57	Grounds – Failure to Attach Documents	146
8.58	Grounds – Failure to Itemize Claim	147
8.59	Grounds – Form of Proof of Claim – Official Form 10	147
8.60	Grounds - Late Filed	147
8.61	Grounds – Personally Identifiable Information	148
8.62	Grounds – Surrender in Full Satisfaction of Secured Claim	148
8.63	Grounds – Failure to Comply With Administrative Requirements	149
8.64	Grounds – Payment and Credit Bid	149
8.65	Grounds – Mortgage Fees and Charges	150
8.66	Grounds – Conflict With Confirmed Chapter 13 Plan	150
8.67	Rule 3002.1	150
8.68	Grounds – Unconscionability	151
8.69	Judicial Estoppel	151

DETROIT CONSUMER BANKRUPTCY CONFERENCE

8.70	Equitable Subordination	152
8.71	State Law Claims	152
8.72	Insider Claims	153
8.73	Settlement of Objections	153
8.74	Sanctions Against Filing Creditor	154
8.75	Effect of Order Disallowing Claim	155
8.76	<i>Res Judicata</i> Effect of Confirmed Plan	155
8.77	Effect of Amended Claim	155
D.	Priority of Distribution	155
8.78	Generally	155
8.79	Exempt Assets	156
8.80	Unclaimed Funds	156
E.	Non-Dischargability	156
8.81	Standing	156
8.82	Generally	156
8.83	Section 523(a)(1)	157
8.84	Section 523(a)(2)(A) – False Pretenses and False Representations	158
8.85	Section 523(a)(2)(A) – Actual Fraud	159
8.86	Section 523(a)(2)(B) – False Financial Statements	177
8.87	Section 523(a)(2) – Cash Advances	177
8.88	Section 522(a)(2)(C) – Credit Card Debt	177
8.89	Section 523(a)(3)	178
8.90	Section 523(a)(4) – Larceny	178
8.91	Section 523(a)(4) - Embezzlement	178
8.92	Section 523(a)(4) – Fiduciary Relationship	180
8.93	Section 523(a)(5)	187
8.94	Section 523(a)(6)	189
8.95	Section 523(a)(7)	199
8.96	Section 523(a)(8)	200
8.97	Section 523(a)(9)	205
8.98	Section 523(a)(10)	205
8.99	Section 523(a)(11)	205
8.100	Section 523(a)(12)	206

8.101	Section 523(a)(13)	206
8.102	Section 523(a)(14)	206
8.103	Section 523(a)(15)	206
8.104	Section 523(a)(16)	207
8.105	Section 523(a)(19)	207
8.106	Other Grounds.....	208
E.	Deadline for Objecting to Dischargability	208
8.107	Generally	208
8.108	Extension of Time to Object	208
8.109	Construction of Pleadings	208
8.110	Amendment of Pleadings	208
IX. Chapter 7		209
A.	Dismissal	209
9.1	Cause and Bad Faith – Section 707(a).....	209
9.2	Presumed Abuse – Section 707(b)(2).....	211
9.3	“Safe Harbor” - Section 707(b)(7)	212
9.4	Non-presumed Abuse – Section 707(b)(3)	212
9.5	“Primarily Consumer Debts”	224
9.6	Failure to File Documents	225
9.7	Failure to Appear at 341 Meeting.....	226
9.8	Failure to Cooperate With Trustee	226
9.9	Dismissal for Cause – Procedure.....	226
9.10	Voluntary Dismissal	226
9.11	Dismissal With Prejudice to Re-filing	227
9.12	Filing in Violation of Bar	227
B.	Conversion to Chapter 11	228
9.13	Request of Debtor	228
C.	Conversion to Chapter 13	228
9.14	Request of Debtor	228
9.15	Reconversion	229
9.16	Based on Finding of Presumed Abuse	229
D.	Denial of Discharge – Grounds	229
9.17	Section 727(a)(1)	229

DETROIT CONSUMER BANKRUPTCY CONFERENCE

9.18	Section 727(a)(2)	229
9.19	Section 727(a)(3)	232
9.20	Section 727(a)(4)	236
9.21	Section 727(a)(5)	242
9.22	Section 727(a)(6)	243
9.23	Section 727(a)(7)	244
9.24	Section 727(a)(8)	244
9.25	Section 727(a)(9)	245
9.26	Section 727(a)(10)	245
9.27	Section 727(a)(11)	245
E.	Deadline for Objecting to Discharge	245
9.28	Generally	245
9.29	Section 727(a)(2)	246
9.30	Extension of Time	246
F.	Parties Entitled to Object to Discharge	246
9.31	Standing	246
G.	Discharge	247
9.32	Timing	247
9.33	Scope of Discharge	247
9.34	Discharge Injunction Generally	249
9.35	Discharge Injunction – Surrendered Collateral	252
9.36	Criminal Proceedings	252
9.37	Domestic Support Obligation	253
H.	Revocation of Discharge	253
9.38	Grounds	253
9.39	Deadline for Bringing Action	254
9.40	Standing	255
9.41	Procedure	255
I.	Executory Contracts and Unexpired Leases	255
9.42	Debtor’s Authority to Assume or Reject	255
9.43	Trustee’s Authority to Assume or Reject	255
9.44	Agreements Subject to Assumption or Rejection	255
9.45	Deadline to Assume or Reject	256

9.46	Failure to Assume or Reject	256
9.47	Procedural Requirements for Assumption	256
9.48	Effect of Rejection	256
9.49	Subleases and Assignments	256
J.	Statement of Intentions – Section 521(a)(6)	256
9.50	When Required	256
9.51	Effect of Filing	257
9.52	Failure to File	257
K.	Reaffirmation Agreements	257
9.53	Time for Execution and Filing	257
9.54	Form of Reaffirmation Agreement	260
9.55	Motion for Approval – Represented Debtor	260
9.56	Motion for Approval – Unrepresented Debtor	260
9.57	Court Review - Scope	261
9.58	Hearing Required	261
9.59	Effect of Denial	261
9.60	Effect of Approval	261
9.61	Rescission of Reaffirmation Agreement	261
9.62	Reinstatement of Rescinded Agreement	262
9.63	Relationship to Assumed Leases	262
L.	Redemption	262
9.64	Generally	262
9.65	Value of Property Being Redeemed	263
9.66	Enforcement of Order for Redemption	263
L.	Lien Strips	264
9.67	Permitted	264
9.68	Not Permitted	264
9.69	Value of Property	264
M.	Trustee	265
9.70	Duty to Assemble Assets	265
9.71	Final Report	265
9.72	Removal of Trustee	265
9.73	Retention of Attorney for Trustee	265

DETROIT CONSUMER BANKRUPTCY CONFERENCE

9.74	Fees for Attorney for Trustee	265
9.75	Sale Pursuant to Section 363	265
9.76	Distribution of Proceeds of Sale	265
X. Chapter 11		265
10.1	Classification of Claims.....	266
10.2	Best Interests of Creditors	266
10.3	Interest/Discount Rate	266
10.4	Valuation	266
10.5	Unfair Discrimination - Generally	267
10.6	Effect of Confirmation Order	267
10.7	Revocation of Confirmation Order.....	268
10.8	Interpretation of Confirmed Plan.....	268
10.9	Absolute Priority Rule.....	268
10.10	Final Decree	268
B. Assumption or Rejection of Executory Contracts		269
10.11	Definition of “Executory”	269
10.12	Standard of Review	269
10.13	Time for Assuming or Rejecting	269
10.14	Right to Assume.....	269
10.15	Right to Assign	270
10.16	Curing Defaults and Future Performance	270
10.17	Non-Competition Agreements	270
10.18	Effect of Assumption	270
10.19	Grounds for Rejection	270
10.20	Effect of Rejection	270
10.21	Failure to Timely Assume or Reject.....	271
C. Conversion to Chapter 7		271
10.22	On Request of Debtor	271
10.23	On Request of Creditor	271
10.24	On Request of United States Trustee.....	271
10.25	By Court	272
10.26	Burden of Proof	272
10.27	Defects in Petition	272

10.28	Cause for Dismissal	272
10.29	Dismissal With Prejudice to Re-filing	272
D.	Retention and Compensation of Counsel	273
10.30	Requirements for Retention	273
10.31	Lack of Authorization to Retain Counsel	273
10.32	Denial of Application to Retain Counsel – Effect	274
10.33	Compensation	274
XII.	Chapter 13	274
A.	Eligibility	274
11.1	Generally	274
11.2	Section 109 – Regular Income	274
11.3	Section 109 – Debt Limits.....	274
B.	Confirmation of Plan	275
11.4	Form of Plan	275
11.5	100% Plans	276
11.6	Requirements for Confirmation Generally	276
11.7	Projected Disposable Income – Non-Filing Spouse.....	276
11.8	Projected Disposable Income – Social Security Income.....	276
11.9	Projected Disposable Income – Railroad Retirement Act	278
11.10	Housing Expense	278
11.11	Projected Disposable Income – Litigation Recovery	278
11.12	Projected Disposable Income – “Reasonably Necessary” Expenses	278
11.13	Private School Tuition	279
11.14	Recreation Expense.....	279
11.15	Home Maintenance	279
11.16	Modification of Mortgage on Principal Residence	279
11.17	Modification of Mortgage on Property Other Than Principal Residence	280
11.18	"Cure and Reinstate"	281
11.19	Secured Claims Generally.....	281
11.20	Secured Claims – Interest Rate	281
11.21	Secured Claims – Adequate Protection	281
11.22	“Catch All” Provision in Hanging Paragraph	282
11.23	910 Car Claims	282

DETROIT CONSUMER BANKRUPTCY CONFERENCE

11.24	Surrender Generally	283
11.25	Surrender in Full Satisfaction	283
11.26	Deficiency Claims – Limiting Provisions	284
11.27	Applicable Commitment Period	284
11.28	Disposable Income Distinguished From Projected Disposable Income	285
11.29	Tax Refunds as Disposable Income	286
11.30	Exempt Assets as Disposable Income	286
11.31	Ambiguous Provisions	286
11.32	Retirement Contributions	287
11.33	Retirement Loans	288
11.34	Cramdown	289
11.35	Liquidation Analysis	289
11.36	Liquidation Discount Rate	289
11.37	Unfair Discrimination – Co-signed Debt	290
11.38	Unfair Discrimination – Student Loans	290
11.39	Good Faith	290
11.40	Good Faith – “Attorney Fee Only” Plans	292
11.41	Transfer of Property	292
11.42	Income Tax Claims	292
11.43	Other Tax Claims	293
11.44	Joint Cases – Substantive Consolidation for Plan Administration	293
11.45	Best Interests of Creditors	293
11.46	Feasibility	293
11.47	Feasibility – Plan Dependent on Sale of Property	294
11.48	60 Month Plan Length	294
C.	Objections to Confirmation	294
11.49	Procedural Requirements	294
11.50	Standing to Object	294
11.51	Deadline for Filing	294
11.52	Failure to Raise Objection	295
11.53	Burden of Proof	295
D.	Effect of Confirmation	295
11.54	Generally	295

11.55	Distribution of Payments	297
11.56	Vesting of Property of Estate	297
11.57	Surrender of Collateral Upon Confirmation	297
11.58	Discharge or Release of Secured Claims	298
11.59	Actions in Violation of Confirmed Plan – Remedy	298
E.	Revocation of Order Confirming Plan	298
11.60	Time for Bringing	298
11.61	Grounds	298
F.	Modification of Order Confirming Plan.....	298
11.62	Compliance With Code Generally.....	298
11.63	Grounds – Error in Order Confirming Plan	298
11.64	Altering Treatment of Secured Creditor	299
11.65	Surrender of Previously Retained Collateral in Full Satisfaction.....	299
G.	Modification of Plan Post-Confirmation.....	299
11.66	Generally	299
11.67	Good Faith	299
11.68	Feasibility	299
11.69	Change of Circumstances.....	299
11.70	Reclassification of Claims.....	300
11.71	60 Month Maximum Plan Length	301
11.72	Lien Stripping	301
11.73	Disposable Income	301
11.74	Procedural Requirements	302
11.75	Changing Plan Length.....	302
11.76	Curing Post-Petition Defaults on Secured Claims	302
H.	Lien Stripping.....	303
11.77	Discharge Required	303
11.78	Discharge Not Required	303
11.79	Procedure	304
11.80	Necessary Parties	304
11.81	Valuation and Secured Status	305
11.82	Partially Secured Mortgage – Maturity Within Plan Term.....	306
11.83	Following Chapter 7 Discharge – Deficiency Claim	306

DETROIT CONSUMER BANKRUPTCY CONFERENCE

I.	Discharge	306
11.84	Requirements Generally	306
11.85	Time Between Cases	306
11.86	Scope and Effect	306
11.87	Hardship Discharge	307
11.88	Early Payoff of Plan	307
11.89	Objections to Discharge	307
J.	Scope of “Super Discharge”	307
11.90	Domestic Support Obligation – Sections 523(a)(5) and (a)(15)	307
11.91	Section 1328(a)(2)	307
11.92	Section 1328(a)(4)	307
11.93	Discharge Injunction	308
K.	Dismissal	308
11.94	Voluntary Dismissal – Absolute Right to Dismiss	308
11.95	Voluntary Dismissal – No Absolute Right to Dismiss	308
11.96	Failure to File Documents	309
11.97	Death of Debtor – Pre-Confirmation	310
11.98	Death of Debtor – Post-Confirmation	310
11.99	Payment Default	310
11.100	ECF Deficiency	310
11.101	Good Faith – Section 1307	310
11.102	Failure to Prosecute – Section 1307(c)(1)	311
11.103	Nonpayment of Fees or Charges – Section 1307(c)(2)	311
11.104	Failure to File Plan Timely – Section 1307(c)(3)	311
11.105	Failure to Commence Payments – Section 1307(c)(4)	311
11.106	Denial of Confirmation – Section 1307(c)(5)	311
11.107	Material Default – Section 1307(c)(6)	311
11.108	Revocation of Confirmation – Section 1307(c)(7)	311
11.109	Termination of Confirmed Plan – Section 1307(c)(8)	311
11.110	Failure to File Documents – Section 1307(c)(9) and (10)	311
11.111	Failure to Pay Domestic Support – Section 1307(c)(11)	312
11.112	Failure to Comply with Orders of Court	312
11.113	Bar to Refiling	312

11.114	Distribution of Funds on Dismissal	313
L.	Conversion	313
11.115	Disposition of Funds by Trustee	313
M.	Borrowing Money Post-Petition	313
11.116	Motions Generally	313
11.117	Notice	313
11.118	Burden of Proof	313
XII.	Adversary Proceedings	314
A.	Jurisdiction	314
12.1	Dismissal of Bankruptcy Case	314
12.2	Relationship of Adversary to Bankruptcy Case	315
12.3	“Arising In”, “Arising Under” and “Related to”	316
12.4	Personal Jurisdiction Over Defendant	318
12.5	Particular Causes of Action	318
12.6	Authority of Bankruptcy Court to Enter Final Judgment	319
B.	Venue	321
12.7	Generally	321
12.8	“Small-dollar” Venue	321
12.9	Change of Venue – Chosen Venue Proper	322
12.10	Change of Venue – Chosen Venue Improper	322
C.	Trial	322
12.11	Generally	322
12.12	Arbitration	322
D.	Non-Bankruptcy Actions	323
12.13	Referral to Bankruptcy Court	323
E.	Withdrawal of Reference	324
12.14	Mandatory	324
12.15	Discretionary	325
12.16	Timing of Motion	327
12.17	Burden of Proof	328
12.18	Waiver of Right to Object	328
12.19	Appeal of Grant or Denial of Motion	329
12.20	Stay Pending Appeal	329

DETROIT CONSUMER BANKRUPTCY CONFERENCE

F.	Abstention and Removal	329
12.21	Actions Subject to Removal or Abstention.....	329
12.22	Grounds – Mandatory Abstention	330
12.23	Grounds – Permissive Abstention	330
12.24	Equitable Remand	334
12.25	Timeliness of Notice of Removal	334
12.26	Procedure	334
12.27	Burden of Proof	334
G.	Remand	334
12.28	Grounds	334
12.29	Appellate Review	335
H.	Standing to Prosecute	335
12.30	Generally	335
12.31	Ratification	338
12.32	Intervention.....	338
12.33	Joinder and Severance.....	338
12.34	Class Actions	339
I.	Time for Commencement.....	339
12.35	Generally	339
12.36	Extension of Time – Granted	340
12.37	Extension of Time – Denied.....	340
12.38	Ripeness.....	341
J.	Service of Process	341
12.39	Rule 7004.....	341
12.40	Failure to Serve	342
K.	Parties.....	342
12.41	Necessary and Indispensable Parties	343
12.42	FDIC as Receiver	343
12.43	Identity of Plaintiffs	343
L.	Pleadings	343
12.44	Calculation of Deadlines – Generally	343
12.45	Complaint	343
12.46	Third Party Complaint	345

12.47	Answer and Affirmative Defenses	345
12.48	Statute of Limitations	346
12.49	Laches	346
12.50	Cross Claims	347
12.51	Motion to Dismiss	347
12.52	Motion to Strike Pleadings	349
12.53	Amendments to Pleadings - Generally	350
12.54	Amendments to Pleadings – Relation Back	351
12.55	Scheduling Order	353
12.56	Attorney Fees as Element of Recovery	353
M.	Preemption	353
12.57	Bankruptcy Preemption of Non-Bankruptcy Law Causes of Action	353
N.	Financial Institutions Reform Recovery and Enforcement Act (FIRREA)	353
12.58	Generally	353
O.	Dismissal	354
12.59	Failure to Prosecute	354
12.60	Voluntary Dismissal	354
12.61	Lack of Subject Matter Jurisdiction	355
12.62	Dismissal as Moot	355
12.63	Dismissal by Court <i>Sua Sponte</i>	356
12.64	Failure to Pay Filing Fee	356
P.	Default	356
12.65	Generally	356
12.66	Entry – Discretion of Court	357
12.67	Setting Aside	357
Q.	Settlement	360
12.68	Approval by Court Required	360
12.69	Approval by Court Not Required	360
12.70	Limits on Jurisdiction	360
12.71	Standards for Approval	360
12.72	Standing to Object	362
12.73	Burden of Proof	363
12.74	Interpretation of Settlement Agreement	363

DETROIT CONSUMER BANKRUPTCY CONFERENCE

R.	Collateral Estoppel and Res Judicata	363
12.75	Elements	363
12.76	Based on Involuntary Dismissal of Complaint	371
12.77	Based on “True Default Judgment”	371
12.78	Default Judgment – Failure to Defend	371
12.79	Particular Claims Barred	372
12.80	Particular Claims Not Barred	374
S.	Stare Decisis	376
12.81	Defined Binding Effect of District Court Decisions	376
T.	Claim Preclusion	376
12.82	Defined	376
U.	Judicial Estoppel	376
12.83	Elements	376
12.84	Particular Claims Barred	379
12.85	Particular Claims Not Barred	381
V.	Equitable Estoppel	382
12.86	Elements – Governmental Action	382
12.87	Elements – Fraudulent Transfer	382
W.	Law of the Case	382
12.88	Elements	382
12.89	Particular Claims Barred	382
12.90	Particular Claims Not Barred	383
X.	Evidentiary Issues	383
12.91	Generally	383
12.92	Privilege – Time for Asserting Generally	383
12.93	Fifth Amendment Privilege	383
12.94	Attorney-Client Privilege	383
12.95	Work Product Privilege	384
12.96	Accountant-Client Privilege	384
12.97	Membership Lists	385
12.98	Expert Witnesses	385
12.99	Trade Secrets	386
12.100	11 USC Section 107(b)	387

12.101	Constitutional Limitations on Discovery	387
12.102	Hearsay – Government Report	387
12.103	Subsequent Remedial Measures	387
12.104	Parol Evidence Rule	387
12.105	Judicial Notice	388
II.	Discovery	388
12.106	Generally	388
12.107	Motion for Leave to Take Discovery	388
12.108	Depositions	388
12.109	Request for Admissions	388
12.110	Interrogatories	388
12.111	Request for Admissions	389
12.112	Protective Orders	389
12.113	Motion to Compel	389
12.114	Sanctions	390
JJ.	Pre-trial Disclosures	391
12.115	Generally	391
12.116	Failure to Make	391
KK.	Summary Judgment	391
12.117	Timing of Motion	391
12.118	In Favor of Non-Moving Party	392
12.119	Burden of Proof	392
12.120	Affidavits – Requirements	395
12.121	Affidavits – Motion to Strike	396
12.122	Presentation of Record	396
12.123	Particular Cases – Summary Judgment Granted	396
12.124	Particular Cases – Summary Judgment Denied	396
LL.	Jury Trial	397
12.125	Actions Subject to Jury Trial	397
12.126	Waiver of Right to Jury Trial	398
MM.	Motion for New Trial or Amendment of Judgment – Rule 9023	398
12.127	Grounds	398
12.128	Time for Bringing	398

DETROIT CONSUMER BANKRUPTCY CONFERENCE

NN. Motion for Relief From Judgment or Order – Rule 9024.....	398
12.129 Grounds Generally	399
12.130 Grounds – Fraud, Misrepresentation or Misconduct	399
12.131 Grounds – Mistake, Inadvertence or Surprise.....	399
12.132 Grounds – Excusable Neglect	400
12.133 Newly Discovered Evidence	400
12.134 Void Judgment	400
12.135 Satisfaction, Release or Discharge	400
12.136 Other Grounds.....	400
12.137 Time for Bringing Motion	401
OO. Enforcement of Judgment.....	401
12.138 Rate of Interest on Judgment.....	401
12.139 Garnishment.....	401
12.140 Statute of Limitations	401
PP. Specific Causes of Action.....	401
12.141 Tortious Interference with Contract	401
12.142 Innocent Misrepresentation	402
12.143 Punitive Damages	402
12.144 Conversion	402
12.145 Unjust Enrichment	402
12.146 Foreclosure Fraud	403
12.147 Legal Malpractice	403
XIII. Appeals	403
A. Parties.....	403
13.1 Standing to Appeal.....	403
13.2 <i>In Forma Pauperis</i>	405
13.3 Waiver of Right to Appeal	405
13.4 Cross-Appeal	405
B. Appellate Jurisdiction.....	405
13.5 Generally	405
13.6 Exceptions	405
13.7 Content of Notice of Appeal	406
C. Time for Filing Appeal.....	406

13.8	Filing Before Order Entered	406
13.9	Deadline for Notice of Appeal	406
13.10	Effect of Motion for New Trial or Amendment of Judgment	407
13.11	Motion to Leave to File Untimely Notice of Appeal	407
D.	Appealable Orders	408
13.12	Finality of Order	408
13.13	“Collateral Order” Doctrine	410
13.14	Interlocutory Appeal	410
13.15	Particular Orders Appealable	413
13.16	Particular Orders Not Appealable	413
E.	Stay Pending Appeal	414
13.17	Jurisdiction to Enter Stay	414
13.18	Elements of Stay	414
13.19	Scope of Stay	417
13.20	Effect of Failure to Obtain Stay - Mootness	417
13.21	Effect of Stay	418
13.22	Supersedeas Bond	418
F.	Appeal Costs	419
13.23	Filing Fee	419
13.24	Appeal Bond	419
13.25	Taxable Costs.....	419
13.26	Sanctions – Frivolous Appeal.....	419
G.	Dismissal	419
13.27	Voluntary Dismissal.....	419
13.28	On Motion by Party	419
13.29	Dismissal by Court <i>Sua Sponte</i>	420
13.30	Reconsideration of Dismissal	421
13.31	Vacatur.....	421
H.	Issues on Appeal.....	421
13.32	Mootness.....	421
13.33	Consideration by Lower Court	421
13.34	Specification of Issues	422
I.	Record on Appeal.....	422

DETROIT CONSUMER BANKRUPTCY CONFERENCE

13.35	Redaction of Transcript.....	422
J.	Standards of Review.....	422
13.36	Question of Law.....	422
13.37	Question of Fact.....	422
XIV.	Avoidable Transfers.....	423
A.	Trustee Strong Arm Powers.....	423
14.1	Trustee as Judicial Lien Creditor.....	423
14.2	Trustee as Holder of Unsatisfied Execution	425
14.3	Trustee as Bona Fide Purchaser	425
14.4	Trustee as Unsecured Creditor	426
14.5	Standing	426
14.6	Defenses - Earmarking	427
14.7	Defenses – Reasonably Equivalent Value	427
14.8	Defenses – Stockholder Distributions	427
14.9	Defenses – Constructive Notice	428
14.10	Defenses - Statute of Limitations	433
14.11	Defenses – Equitable Defenses	433
14.12	Defenses – Solvency	433
B.	Fraudulent Transfers.....	433
14.13	Actual Fraud	433
14.14	Constructive Fraud	434
14.15	Transfer of Property of Debtor.....	436
14.16	Payments Under Employment Contracts.....	436
14.17	Transfer of Property of Estate	436
14.18	Particular Transfers Avoidable.....	436
14.19	Particular Transfers Not Avoidable.....	437
14.20	Reasonable Equivalent Value.....	438
14.21	Insolvency.....	439
14.22	Defense – Leveraged Buyout	439
14.23	Defense – Wrongful Conduct of Debtor.....	439
14.24	Defense – Earmarking.....	440
14.25	Defense – Prepetition Return of Money to Third Party	440
14.26	Statute of Limitations	440

14.27	Damages	441
14.28	Complaint	441
14.29	Parties Liable – Initial Transferee	441
14.30	Mediate and Immediate Transferee of Initial Transferee	441
C.	Turnover of Property	442
14.31	Generally	442
14.32	Parties	442
14.33	Procedure	442
D.	Preferences	442
14.34	Standing to Bring Action	442
14.35	Transfers to “Insiders”	442
14.36	Parties Liable – Initial Transferee	443
14.37	Mediate and Immediate Transferee of Initial Transferee	443
14.38	Elements	443
14.39	Defenses – <i>De Minimis Transfers</i>	446
14.40	Defenses – Safe Harbor – 547(c)(3)	446
14.41	Defenses – Not Primarily Consumer Debts – 547(c)(9)	446
14.42	Earmarking	447
14.43	Defenses – Administrative Expenses	448
14.44	Defenses – Payments for Fines and Penalties	448
14.45	Defenses – Contemporaneous Exchange of Value	448
14.46	Defenses – Liquidation Amount in Chapter 7	448
14.47	Defenses – Ordinary Course of Business	449
14.48	Defenses – Constructive Notice	449
14.49	Particular Transfers – Avoidable	449
14.50	Particular Transfers – Not Avoidable	450
14.51	Procedure	451
E.	Post-Petition Transfers – Section 549	452
14.52	Elements	452
14.53	Defenses	452
14.54	Particular Transfers Avoidable	453
14.55	Particular Transfers Not Avoidable	453
14.56	Persons Liable	453

DETROIT CONSUMER BANKRUPTCY CONFERENCE

F.	Reformation of Mortgage	453
14.57	Standing	454
14.58	Requirements	454
14.59	Laches	454
G.	Effect of Avoidance.....	454
14.60	Preservation for Benefit of Estate.....	454
14.61	Damages	454
XV.	Collateral Attack – Final Orders	455
A.	Parties Bound	455
15.1	Successor Trustee.....	455
B.	Particular Orders	455
15.2	Confirmation Order.....	455
15.3	Sale Orders.....	455
XVI.	Closed Cases	456
A.	Reopening and Reinstatement	456
16.1	Reinstatement of Dismissed Case	456
16.2	Reopening Case	456
16.3	Filing Fee	457
XVII.	Post-Petition Financial Management Education.....	458
A.	Requirement	458
17.1	Generally	458
17.2	Waiver of Requirement	458
17.3	Attendance by Person Other Than Debtor.....	458
B.	Failure to Obtain.....	458
17.4	Closing Case Without Discharge.....	458
17.5	Reopening Closed Case	459
XVIII.	Judicial and Trustee Immunity	459
A.	Judicial Immunity	459
18.1	Generally	459
B.	Trustee Immunity.....	459
18.2	Generally	459
18.3	Limitations	460
XIX.	Bankruptcy Crimes.....	461

A.	Fraud	461
19.1	Generally	462
19.2	Failure to Disclose Names	462
19.3	Failure to Disclose Assets	463
19.4	Failure to List Creditors	463
19.5	Alteration or Destruction of Documents	463
19.6	Sanctions	463
XX.	Personally Identifiable Information	463
A.	Generally	463
20.1	Statutory Requirements	463
B.	Information Considered “Personally Identifiable”	464
20.2	Account Numbers	464
C.	Remedies	464
20.3	Disclosure in Proof of Claim	464
20.4	Damages	464
20.5	Contempt	465
20.6	Redaction from Transcript	465
XXI.	Real Estate Settlement Procedures Act	465
A.	Generally	465
21.1	Statutory Authority	465
21.2	Construction With Bankruptcy Code	465
B.	Qualified Written Request	465
21.3	Defined	465
21.4	Servicer’s Duty to Respond	466
XXII.	Other Current Issues	467
A.	Foreclosures	467
22.1	Standing to Foreclose	467
22.2	State Law Requirements	468
22.3	Redemption	468
B.	Specific Causes of Action	468
22.4	Piercing Corporate Veil	468
22.5	Continuation of Debtor	469
22.6	Federal Tort Claims Act	469

DETROIT CONSUMER BANKRUPTCY CONFERENCE

22.7	Injunctions and Temporary Restraining Orders	469
22.8	Recoupment	470
22.9	Fair Debt Collection Practices Act	470
22.10	Truth in Lending Act.....	472
22.11	Fair Credit Reporting Act.....	473
22.12	Equal Credit Opportunity Act	473
22.13	Interpleader	473
22.14	Michigan Consumer Protection Act	474
C.	Mediation	474
22.15	When Appropriate	474
D.	Expedited hearing.....	474
22.16	Procedure	474
E.	Disqualification of Judge.....	474
22.17	Grounds	474
F.	Rehearing or Reconsideration.....	476
22.18	Motion to Amend Versus Motion for Relief From Judgment	476
22.19	Orders Subject to Relief	476
22.20	Burden of Proof	476
22.21	Grounds Generally	476
22.22	Rule 60(b)(4) – Lack of Jurisdiction	487
22.23	Meritorious Defense.....	487
22.24	Clerical Error	487
22.25	By Court <i>Sua Sponte</i>	487
22.26	Defect in Notice	487
22.27	Mistake, Inadvertence, Surprise or Excusable Neglect	487
22.28	Newly Discovered Evidence	488
22.29	Fraud, Misrepresentation or Misconduct	488
22.30	Fraud on the Court	489
22.31	Void Judgment.....	489
22.32	Equitable Relief	489
22.33	“Catchall” Provisions	489
22.34	Failure to File Response	489
22.35	Time for Bringing Motion.....	489

22.36	Conditional Grant of Motion	490
G.	Federal Court Review of State Court Actions.....	490
22.37	Limitations	490
H.	Discrimination.....	492
22.38	Section 525	492
I.	Substantive Consolidation	493
22.39	Authority to Substantively Consolidate Cases	493
22.40	Standing to Request Substantive Consolidation	493
22.41	Grounds for Substantive Consolidation	494
22.42	Effect of Substantive Consolidation	494
J.	Duties of Debtor	494
22.43	Duty to Cooperate with Trustee	494
22.44	Schedules and Statements	494
K.	Loan Modifications	495
22.45	Chapter 7 Proceeding	495
22.46	Chapter 11 Proceeding	495
22.47	Chapter 13 Proceeding	495
22.48	Troubled Asset Relief Program (TARP)	495
22.49	Homeowners Assistance Mortgage Program (HAMP)	495
22.50	National Housing Act (NHA).....	496
22.51	Home Owners Loan Act	496
22.52	Home Ownership Equity Protection Act (HOEPA).....	496
L.	ECF Procedures.....	496
22.53	Electronic Filing Required	496
22.54	Electronic Filing Excused	496
22.55	Service by ECF	496
22.56	Sanctions.....	496
M.	Habeas Corpus.....	496
22.57	Authority to Issue Writ.....	496
22.58	Requirements	497
N.	Choice of Laws and Forum Selection Clauses	497
22.59	Foreclosure Proceedings	497
22.60	Exemption Statutes	497

DETROIT CONSUMER BANKRUPTCY CONFERENCE

O.	Governmental Sovereign Immunity.....	497
22.61	Governmental Agencies and Subdivisions	497
22.62	Entity Entitled to Immunity – Native American Tribe	498
22.63	Congressional Abrogation	498
22.64	Waiver	498
P.	Michigan Seller Disclosure Act.....	498
22.65	Generally	498
Q.	Rule 2004 Examinations.....	498
22.66	Parties Entitled to Conduct.....	498
22.67	Scope	499
22.68	Location of Examination.....	499
22.69	Motion for Examination – Granted.....	499
22.70	Motion for Examination – Denied	500
XXIII.	Sanctions.....	500
A.	Authority to Impose.....	500
23.1	28 USC §1927	500
23.2	Inherent Authority of Court.....	500
23.3	Rule 9011	502
23.4	Discharge Injunction	506
23.5	Contempt – Civil	507
23.6	Contempt – Criminal.....	509
23.7	Show Cause.....	509
23.8	Section 105 - Generally.....	509
23.9	Defense – Bad Faith and Unclean Hands of Moving Party	510

I. Hot off the Press

Rodriguez v. Countrywide Home Loans, Inc., Case No. 11-40056 (5th Cir. 2012) – Bankruptcy Court properly certified class action suit against mortgage lender and entered injunction prohibiting lender from adding into mortgage balance attorney fees and costs allegedly incurred during pendency of Chapter 13 but not sought or awarded pursuant to Federal Rule of Bankruptcy Procedure 2016. After completion of Chapter 13 plan and issuance of discharge, Lender would immediately threaten foreclosure unless borrower paid fees charged while bankruptcy cases were still pending. Bankruptcy Court correctly concluded that “under the plan language of Rule 2016, a mortgage lender must file a Rule 2016 application before collecting any reimbursable fees and costs while a chapter 13 case remains pending.” Rule 2016 applies to all fees that were assessed during the bankruptcy but not collected until post-bankruptcy.

Radlax Gateway Hotel, LLC v. Amalgamated Bank, ___ US ___ (2012) – Chapter 11 plan that proposed to cram down value of collateral and then sell collateral free and clear of liens could not be confirmed where plan purported to deprive secured creditor of right to credit bid at the bankruptcy sale. Sale of property pursuant to Section 1129(b) allows sale free and clear as part of confirmed plan as long as sale complies with Section 363(k) which expressly authorizes credit bid. Debtor cannot use Section 1129(b)(2)(A)(iii) “indubitable equivalent” provision to circumvent Section 363 requirement for credit bid if property is to be sold.

II. Cases to Watch

Fisette v. Keller, 455 BR 177 (8th Cir. B.A.P. 2011) - Bankruptcy court ruled that 11 U.S.C. Section 1322(b)(2) prevented the debtor from modifying the rights of the junior lienholders, precluding stripping of lien where value of property was less than amounts owed on senior liens and encumbrances. On appeal, the Eighth Circuit BAP reversed, concluding that Section 1322(b)(2) anti-modification provision did not apply to wholly undersecured junior lienholders, and their rights could properly be modified. On further appeal, Eighth Circuit concluded it lacked appellate jurisdiction as BAP reversed and remanded for further proceedings, rendering BAP order a non-final order. Order by definition contemplated further judicial activity rendering appeal at this point interlocutory.

Woolsey v. Citibank, N.A., Case No. 11-4014 (10th Cir. 2012) – Debtor cannot strip wholly underwater second mortgage in Chapter 13. Section 506(d) allows court to void a lien that is not an allowed secured claim. Creditor filed proof of claim, and claim was not subject to valid exception, rendering claim “allowed”. Claim cannot be disallowed under Section 502(b)(1) as the secured claim is enforceable under the mortgage documents pursuant to applicable state law. Citing *Dewsnup*, court concluded that an allowed secured claim for purposes of Section 506 is a claim that is allowed (as creditor’s claim was here) and “secured” by a lien that is valid under state law, as creditor’s lien is here. Value of collateral has no bearing on lien-voiding language of Section 506(d). In dicta, court indicated that Section 1322(b)(2) may provide separate way to strip lien by allowing modification of rights of holders if the limitation on modification of secured claims is interpreted to require some value to support the claim (citing, among other Circuits, *In re Lane*, 280 F.3d 663 (6th cir. 2002)).

III. Automatic Stay

A. Actions Stayed

3.1 Generally

Search Market Direct Inc. v. Jubber, Case no. 10-4190 (10th Cir. 2012) – Debtor’s ownership of Internet Domain Name became property of estate upon filing of Chapter 7 petition. Debtor’s purported post-petition sale of Domain Name constituted violation of stay as sale constituted attempt to obtain possession and control of property of estate.

TW Telecom Holdings, Inc. v. Carolina Internet, Ltd., Case No. 11-1068 (10th Cir. 2011) – Automatic stay applies to all appeals of civil cases that were originally brought against the debtor, including appeals in which the debtor is the appellant. Tenth Circuit reversed prior precedent and joined 9 other circuits that conclude that automatic stay prevents prosecution of an appeal regardless of whether the debtor is the appellant or the appellee.

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.

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Drilling & Exploration Co. v. Gunnison Energy Corp., 2011 WL 14461 (10th Cir. 2011) – Litigation in which Debtor is the plaintiff is not stayed by bankruptcy filing. Litigation can be dismissed by court for failure to prosecute where Debtor files bankruptcy and then fails to take steps to prosecute case or to comply with court orders and deadlines.

Cappuccilli v. Lewis, Case No. 10-11690 (E.D. Mi. 2010) – Debtor's action against bankruptcy counsel based on alleged pre-petition malpractice is property of estate. Debtor's commencement of state court proceeding against attorney post-petition constituted attempt to exert possession and control over property of estate in violation of Section 362, subjecting debtor to sanctions.

Saleh v. Bank of America, N.A., Case No. 08-36592 (Bankr. S.D. Ohio 2010) – Automatic stay does not stay actions against third party co-obligors. Automatic stay will not extend to debtor's wholly owned corporation on theory that corporation and debtor are the same entity. Corporation is separate entity not protected by stay in principal's bankruptcy case. Co-debtor stay under Section 1301 is read narrowly and applies only in certain very limited circumstances and does not apply to corporations or other non-individuals or to non-consumer debts.

Lewis v. Negri Bossi USA, Inc. 423 BR 643 (E.D. Mi. 2010) – Automatic stay prohibits actions by creditor to obtain payment of pre-petition obligations. Creditor's refusal to honor pre-petition contract to provide post-petition services to maintain machines constituted violation of stay where creditor's actions would result in diminution of value of property of estate. Automatic stay designed to protect both Debtor from loss of assets and also creditors from diminution of value of estate. Creditor's refusal to honor pre-petition maintenance contract would cause assets to decline in value, to the harm and detriment of other creditors.

In re Travel Agent Com'n Antitrust Litigation, 2009 WL 3151315 (6th Cir. 2009) – Airline's bankruptcy petition operated as automatic stay of travel agencies' appeal of adverse decision in antitrust litigation against airline.

Hitachi Simitomo Heavy Industries Const. Crane Co., Ltd. v. Midwest Specialized Transportation, Inc., - 2009 WL 2448458 (E.D. Ky. 2009) – Automatic Stay does not stay proceeding where all events that gave rise to the action occurred post-petition.

Gilchrist v. Bank of America, Adv. No. 09-4411 (Bankr. E.D. Mi. 2009) – Adversary proceeding stayed pursuant to Section 362. Adversary proceeding commenced while case was pending under Chapter 13. Case then converted to Chapter 7. Debtors did not claim any exemption in the causes of action and the Chapter 7 trustee has not abandoned the causes of action. Only the Chapter 7 trustee may prosecute the claim(s), and Debtors' continuing prosecution of these claims would violate the automatic stay. Adversary proceeding stayed unless and until the automatic stay no longer applies.

In re Grady, 2009 WL 3254435 (Bankr. W.D. Mi. 2009) – Property owned by Debtor's wholly owned corporate entity does not constitute property of Debtor's estate. Therefore, those assets are not protected by the Automatic Stay in Debtor's personal bankruptcy case.

Bays v. 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 course of action would have been to recover proceeds as post-petition transfer pursuant to Section 549.

Davison v. Kanipe, 410 BR 607 (Bankr. E.D. Tn. 2009) – Upon commencement of case, debtor's checking account and all funds in the account become property of estate. Creditor's action in cashing, post-petition, a check received pre-petition and in then retaining proceeds does not violate stay. Section 362(b)(11) does not prevent holder of negotiable instrument from presenting instrument to obtain payment. Holder of instrument can present instrument and obtain payment even with actual knowledge of pending bankruptcy proceeding. Correct cause of action would have been to recover proceeds as post-petition transfer pursuant to Section 549.

3.2 Persons Protected

Al-Shara v. Wal-Mart Stores, Inc., 2012 WL 1119339 (E.D. Mi. 2012) – Extension of stay to non-debtor co-defendant is rare exception to rule that non-debtor entities are not covered by stay. Court will extend stay to non-debtor if (1) there is such identity between the third party defendant and the debtor that a judgment against the third party defendant is in effect a judgment against the debtor; or (2) where pending litigation would cause irreparable harm to debtor, the estate or the reorganization plan. The presence of an indemnification agreement between the third party defendant and the debtor, without more, is not sufficient to warrant extending the stay. Court declined to extend stay to Wal-Mart in action by Plaintiff for sale of defective product. Suit originally filed against Wal-Mart and manufacturer. Manufacturer filed for bankruptcy protection. Claims against Wal-Mart were independent of claims against manufacturer, as claims were based on Wal-Mart's sale of a defective product without any independent risk assessment, knowledge of alleged defect, and independent input into alleged modification into the product. Where third party defendant's liability is or may be premised on independent basis such as third party's own breach of duty, automatic stay will not be extended. Although Wal-Mart may have claims against debtor arising out of litigation by plaintiff, there was no evidence that those claims would irreparably prejudice debtor's ability to reorganize. Fact that refusing to extend stay may require Wal-Mart to defend similar actions in multiple courts is not basis to extend stay.

Meoli v. Huntington National Bank, Case No. 07-80037 (Bankr. W.D. Mi. 2012) – Although defendant-bank was not the debtor, the automatic stay would be extended to prevent actions by third parties against bank where Trustee brought action against bank to recover allegedly fraudulent transfers and third-parties were suing bank for unjust enrichment for same transactions. Allowing both actions to proceed could result in double liability for bank to the extent the Trustee is successful.

In re Pearl Management Corp., Case No. 11-47422 (Bankr. E.D. Mi. 2011) – State Court Receiver appointed to take control of corporate property would be stayed by bankruptcy filing. Receiver is stayed from taking or attempting to take any action to exercise dominion or control over property of estate. Stay would also prevent any action by Receiver against Debtor's attorney or debtor's principals to the extent of any action taken in their capacities as members, principals, employees, officials, managers or agents acting on behalf of the corporation. However, stay does not prevent Receiver from seeking recovery from principals for actions taken in their individual capacities and from their individual assets, subject to further hearing to consider whether Court should enter injunction that would include principals.

Verdi v. Domino Logistics Co., 2011 WL 607133 (N.D. Ohio 2011) – Automatic stay applies only to actions against debtor. Stay does not operate as stay against separate legal entities such as corporate affiliates, partners in partnerships, or other co-defendants. Court can extend stay to third party only in unusual circumstances, usually where the non-bankrupt party is so closely related to debtor or stay would contribute to reorganization efforts. Non-debtor principal of debtor corporation would not be protected by stay merely because party's efforts to defend suit would interfere with duties to debtor estate, where party failed to demonstrate that allowing action to proceed against non-debtor would irreparably harm reorganization efforts.

3.3 Co-debtor Stay

In re Juliao, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Section 1301 extends protections of automatic stay to co-debtor on any consumer debt. Section 1301 is designed to protect the debtor for indirect coercion to pay debts that would otherwise be dischargeable.

3.4 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.

3.5 Actions by Debtor

Wolgast v. Richards, 463 BR 445 (E.D. Mi. 2012) – Debtor's Motion in non-bankruptcy forum for sanctions against opposing party pursuant to Rule 11 stayed by debtor's subsequent bankruptcy filing. Rule 11 Motion was response to

opposing party's Motion for Attorney Fees and Costs. Stay prevented opposing party from prosecuting Motion for Fees, requiring stay of Debtor's responsive Rule 11 Motion. deferring a decision on the Rule 11 motion until the automatic stay had been lifted was particularly appropriate, as the motion was, substantively, simply a means to challenge the merits of officer's motion for costs.

3.6 Appellate Proceedings

TW Telecom Holdings, Inc. v. Carolina Internet, Ltd., 661 F.3d 495 (10th Cir. 2011) – Automatic stay stops all appeals in proceedings that were originally brought against the debtor, regardless of whether debtor is appellant or appellee. Whether action would be subject to stay is determined at outset of litigation, not on the particular stage of the proceeding at the time the bankruptcy is commenced.

3.7 Foreign Property

In re Dietrich, Case No. 08-68294 (Bankr. E.D. Mi. 2011), *aff'd* 2012 WL 1854250 (E.D. Mi. 2012) – Automatic stay applies to property of 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

3.8 Police Power

California v. Villalobos, 453 BR 404 (D. Nv. 2011) – Police power exception is not limited to actions which are urgently needed for protection of public safety or health and there is no requirement for ongoing future harm for action to fall within police power exception to stay. Presence of civil penalties, disgorgement and restitution does not convert governmental unit's police power into a pecuniary action. Actions will fit within police power exception where government's action relates primarily to protection of government's pecuniary interest in debtor's property, or matters of safety and welfare; or where actions are taken to effectuate public policy versus adjudication of private rights. Criminal prosecution based on alleged violations of state securities laws and alleged fraud and unlicensed activities related to investments by California Public Employee Retirement Fund. Claims were designed to protect safety and welfare of state, and to enforce state licensing laws and Unfair and Deceptive Trade Practice statutes. Actions were also within scope of public purpose. Although party allegedly defrauded was private party (CALPERS), enforcement of laws governing securities fraud, unlicensed activities, and unfair trade practices are directed at addressing public harm. Although remedies included restitution, civil penalties and disgorgement in addition to injunctive relief, those remedies did not undercut conclusion that actions by state were intended to protect safety and welfare of state and protect citizens from unlawful activities, sufficient to bring action within scope of police powers.

In re D'Mello, 473 BR 207 (Bankr. E.D. Mi. 2012) – Automatic stay did not prevent Township, in exercise of police and regulatory power, from requiring debtor to abate what had been determined by state court to be "serious public nuisance", at least to extent abatement could be achieved by debtor without spending money. Stay did not preclude enforcement against debtor, through incarceration for contempt if necessary, but not through enforcement of any money judgment, of debtor's obligation to remove "all mail boxes, signs, dish satellites ... and landscape edging," to remove "all blight, garbage, rubbish, tires, furniture, appliances, toys" and the like, and to take other actions that he could personally, physically do without spending money.

U.S. v. Erpenbeck, 682 F.3d 472 (6th Cir. 2012) – Section 362(b)(1) excludes from the stay the commencement or continuation of a criminal action or proceeding against the debtor. Criminal forfeiture proceedings are part of a criminal action or proceeding against the debtor, and fall within the government's police and regulatory powers. Criminal forfeiture is an aspect of punishment imposed following conviction of a substantive criminal offense. Further, forfeiture proceedings are similar to criminal restitution hearings which are also exempt from the bankruptcy stay pursuant to Section 362(b)(1). Forfeiture actions are also exempt from the automatic stay pursuant to Section 362(b)(4) because they involve the enforcement of the government's police and regulatory powers. Bankruptcy stay does not divest the Court of jurisdiction over forfeiture proceedings concerning debtor's property.

In re Storozhenko, 459 BR 697 (Bankr. E.D. Mi. 2011) – Post-petition proceeding brought in state court by state court receiver to hold debtor in contempt for violating orders entered in state court divorce proceeding were criminal proceedings within exception to automatic stay, to the extent receiver sought payment of fine to court or imprisonment for fixed term. However, to the extent contempt proceedings sought to recover restitution plus receiver costs and expenses, proceedings were civil in nature and precluded by automatic stay.

S.E.C. v. Bluestein, 2011 WL 4043125 (E.D. Mi. 2011) – Involuntary petition filed against debtor does not stay proceedings by SEC to enjoin debtor from continuing Ponzi Scheme or to recover profits and civil penalties. Although Court may not enforce disgorgement order while Bankruptcy is pending, stay does not prevent litigation to determine amount of disgorgement.

In re T.S.P. Co., Inc., 2011 WL 1431473 (Bankr. E.D. Ky. 2011) – Where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay. OSHA process is created to protect workers from the hazards of an unsafe work environment. State administrative agency proceeding to determine damages for the violation of such safety laws is not prevented by the automatic stay. Automatic stay does not prevent the hearing officer from determining whether the evidence supports 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 adoption of affirmative action plan in Title VII case coupled with claim for back pay constitutes exercise of EEOC's police or regulatory power which is not subject to the automatic stay until monetary claims are reduced to judgment.

Commonwealth of Kentucky v. Young Oil Corp., 2009 WL 1475512 (E.D. Ky. 2009) – Action by governmental unit to enforce police or regulatory power is not stayed pursuant to Section 362. Action by governmental unit to enforce state Securities Act is not adjudication of private right but is effectuation of public policy and does not seek to recover or enforce money judgment. Action solely to determine whether Debtor's conduct violated Securities act is exempted from automatic stay. However, extent to which any judgment may be subject to automatic stay is to be determined only after judgment is entered, and may be determined by Kentucky Court adjudicating underlying action.

In re Hann, 2009 WL 2872813 (E.D. Mi. 2009) – Debtor's adversary proceeding constituted a convoluted but calculated attempt to circumvent the State of Michigan civil proceedings related to Debtors conviction and incarceration. Debtor's complaint that the State failed to "turnover" items which had been seized under the Michigan Forfeiture Act lacked any basis in law. State had right to enforce police and regulatory power which includes a state forfeiture action under Section 362(b)(4). Therefore, State's continuation of forfeiture proceedings did not violate automatic stay. State's exercise of its police powers furthers important state policy against criminal conduct. State would not be required to return forfeited assets under section 542(a). Finally, State enforcement of police power does not violate discharge injunction as State action is not one to collect or recovery debt but rather is enforcement of State criminal law.

3.9 Police Power – Bad Checks

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

Michalski v. Coulson, Case No. 10-3654 (6th Cir. 2011) – County Prosecutor did not violate stay by commencing criminal proceedings against debtor based on bad checks after entry of the discharge. Automatic stay is dissolved by operation of law upon entry of discharge and any action taken against debtor after discharge cannot violate stay as matter of law. Further, even if prosecution had been commenced prior to discharge, prosecution was designed to enforce criminal statute and not merely to collect debts. Evidence indicated that debtor offered to make checks good in exchange for dismissal of charges and County rejected that offer, indicating that County's interest in matter was not merely proceeding instituted primarily to collect debt.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

In re Fidler, 442 BR 763 (Bankr. D. Nv. 2010) – Bankruptcy court cannot enjoin prosecution of action for writing bad checks where debts themselves were discharged in bankruptcy. However, court can sanction complaining witnesses to extent that they are attempting “end run” around discharge by attempting to collect debts as restitution. Bankruptcy Court will not disrupt sovereign determination by state Prosecutor to bring charges simply because the Bankruptcy Court believes that there is economic motive behind statute or prosecution.

3.10 Police Power – Parking Tickets

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

3.11 Setoff

In re DeGroot, Case No. 05-12996 (Bankr. W.D. Mi. 2012) – Debtor’s ex-spouse who was indebted to debtor on petition date entitled to setoff amounts owed to debtor against unpaid child support as of petition date. Right of setoff does not depend on any perfected security interest or lien but arises as a matter of law.

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

Riley v. US Department of Agriculture, 472 BR 422 (Bankr. W.D. Ky. 2012) – For purposes of setoff by governmental agency, government is treated as single unit such that debt owed to debtor by one agency can be offset for debt owed to a separate agency. Tax refund for tax year that ended prior to commencement of case constitutes a debt of the government to the debtors that can be used to offset debt owed to FmHA. Section 553 allows trustee to recover any setoff that occurs within 90 days preceding commencement of case if the offset allows the creditor to improve its position. FmHA improved its position on January 1, when debtor became entitled to tax refund and debtor filed petition less than 90 days later. As of 90 days prior to the petition date, FmHA had no right of setoff as there was no debt owed by the government to the Debtors. Debt arose, and right of offset first accrued, on January 1. Same analysis does not apply to obligation owed for taxes for prior years. Debtor does not become entitled to refund until after IRS “nets” the tax refund against pre-existing tax liabilities, and only net amount of refund remaining becomes property of estate.

In re Houston, Case No. 11-60934 (Bankr. E.D. Mi. 2011) – Michigan Compiled Laws create rebuttable presumption that funds in multi-party account can be withdrawn by any one of the parties. Credit Union that holds claim against one of the parties must establish that the obligor is the owner of some or all of the funds in the account. Joint party will be the owner of the funds in the account in an amount that is proportionate to the net contributions by that party. Non-debtor third party filed affidavit stating that all of the funds in the account were hers. Credit Union provided opportunity to submit evidence to Court to establish amount of funds in account that Credit Union alleges belonged to debtor.

In re Hess, 2011 WL 3701798 (Bankr. E.D. Mi. 2011) – The right to set off is preserved where (1) there are mutual, pre-petition obligations owing between the debtor and the creditor and (2) a right to setoff the obligations exists under non-bankruptcy law. Michigan Compiled Laws Section 490.361(4) provides a credit union with a lien on “any share of a member” in deposit account or “any deposit account from which a member may withdraw funds without consent of another person”. Credit Union could not set off against account in name of debtor and debtor’s mother where evidence indicated that mother was member of credit union but Credit Union failed to produce evidence that debtor was member. Section 490.64 allows set off when any party to a multi-party account is indebted to the credit union. Debtor had interest in mother’s account even though mother had account in her name and intended to add debtor for estate planning purposes. Account documents signed by mother and debtor expressly added debtor as a joint account holder and demonstrated intention to change ownership from mother to mother and debtor. Account constituted “multi-party” account within scope of Section 490.64 permitting Credit Union to setoff for debt owed by debtor.

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

National Bank of Woodbury, Case No. 09-8049 (6th Cir. BAP 2010) – Bank that held perfected security interest forfeits right of setoff or status as perfected secured creditor when Bank honored check presented by Debtor four days after the filing of the bankruptcy petition, but does not forfeit properly perfected pre-petition security interest. Although Bank has ability to freeze account and preserve right of setoff, nothing requires Bank to exercise that right and failure to do so does not jeopardize the Bank’s security interest. Creditor’s security interest should not be prejudiced by post-petition delivery to the Trustee of money or property of the estate. However, turnover or release of funds does waive ability to

setoff pursuant to Section 553.

3.12 Injunctive Relief

Dominic's Restaurant of Dayton, Inc. v. Mantia, 2012 WL 2580741 (6th Cir. 2012) – The automatic stay protects interests in a debtor's property, not tortious uses of that property by the debtor. The automatic stay does not preclude post-petition suits to enjoin unlawful conduct. Automatic stay does not free debtor of contempt orders and the injunctions upon which the contempt was based. Congress did not intend automatic stay to strip court of power to enforce orders or to allow party to blatantly violate court orders and then seek shelter in the bankruptcy court, rendering prior court orders meaningless. Debtor's bankruptcy petition did not prevent non-bankruptcy court from using contempt power to compel debtor to comply with court order that debtor cease infringing on Plaintiff's trademarks and service marks. Debtor who continued to infringe after entry of restraining order subject to contempt action and sanctions.

3.13 Post-Petition Perfection of Lien

In re Michigan Biodiesel, LLC, 2012 WL 1941648 (Bankr. W.D. Mi. 2012) – Creditor violated automatic stay by filing, post-petition, a "correction statement" that sought to assert lien against property of estate. After filing, creditor attempted to record continuation statement but inadvertently recorded a termination statement. Within minutes, creditor realized the error and filed a "correction statement" indicating that the termination statement was error. Correction statement constituted attempt to perfect a lien against property of the estate post-petition.

In re Jackson, 403 B.R. 95 (Bankr. D. Idaho 2009) – Assets acquired by a Chapter 13 debtor after confirmation of a plan but before the case is closed, dismissed, or converted become property of the bankruptcy estate. Where plan provided for property to vest in debtors at confirmation, property ceased to be property of estate. Therefore, post-petition creditor who recorded judgment against debtor's residence did not violate stay, as creditor's actions were not attempt to collect pre-petition obligation and did not interfere with property of the estate.

Soto-Rios v. Banco Popular de Puerto Rico, Case No. 10-2270 (1st Cir. 2011) – Mortgagee and purported secured creditor held an "interest in property" as that term is used in both 11 U.S.C. sec. 362(b)(3) and 11 U.S.C. sec. 546(b)(1)(A) even though the mortgage deeds executed by the debtors were not recorded as of the date of the debtors' bankruptcy filing due to backlog at the Puerto Rico Registry. Puerto Rico's civil code provides that the act of presentment of a mortgage for recording is sufficient to put third-parties on notice of the existence of the mortgage. Puerto Rico's statutory "relation back" doctrine provides that the point a mortgage is presented to the Registry determines the priority of the mortgage over liens recorded in the intervening period between presentment and recording. Mortgagee's actions in perfecting its mortgages during the post-petition period would be excepted from the automatic stay by virtue of 11 U.S.C. sec. 362(b)(3).

Sovereign Bank v. Hepner, 2010 WL 2816472 (10th Cir. 2010) – Creditor did not violate stay by perfecting pre-petition security interest post-perfection. Automatic stay does not prohibit perfection of security interest in property to the extent that trustee's rights and powers were subject to such perfection. Under Colorado law, creditor has 20 days from delivery of automobile to buyer to perfect lien on title superior to any lien creditor including the trustee in his status as hypothetical lien creditor. Debtor's bankruptcy filing within that 20 day window does not permit trustee to avoid Bank's security interest which was properly perfected post-petition but within 20 day safe harbor.

3.14 Domestic Support Obligations

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

Rugiero v. Dinardo, Case No. 11-11549 (E.D. Mi. 2011) – Enforcement of domestic support order is within exception to automatic stay. State Court has authority to determine, post-petition, whether the debt is in the nature of support and is non-dischargeable within Section 523(a)(5) even in proceedings conducted post-petition. Bankruptcy Court has concurrent jurisdiction, not exclusive jurisdiction, over issue of dischargeability of domestic support order as within scope

of exception to stay.

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

3.15 Administrative Freeze – Financial Accounts

Turner v. First Community Credit Union, 2011 WL 2798907 (Bankr. S.D. Tx. 2011) – Bank freeze of debtor's account violated stay when bank did not promptly seek relief from stay to pursue setoff. Freeze may be maintained only for so long as is necessary to have a hearing on appropriate relief. Bank's freeze for over one year constituted exercise of control over property in violation of Section 362. However, debtor failed to establish any damages as a result of violation.

3.16 Administrative Freeze - State Actions

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

3.17 Final Judgment in Dischargeability Proceedings

In re Dietrich, Case No. 11-13905 (E.D. Mi. 2012) – Final Judgment denying debtor a discharge terminates stay as to actions against any action other than an action against property of estate. Ex-spouse violated stay by attempting to obtain possession and control over property located in Canada. Although stay had terminated as to actions against debtor by virtue of denial of discharge, property itself remained property of estate protected by stay.

In re Storozhenko, 2011 WL 4346691 (Bankr. E.D. Mi. 2011) – Automatic stay does not cease to come into existence and is not lifted merely by allegation that debt is not dischargeable under Section 523. All collection activities are stayed unless and until final judgment entered determining debt to be excepted from discharge.

In re Kabisch, Case No. 10-61626 (Bankr. E.D. Mi. 2011) - Entry of Final Judgment determining debts to be non-dischargeable under Section 523 terminates the stay based on Section 362(c)(2)(C) as to actions to collect that judgment, except that the stay remains in effect as to property of the estate. Motion for Relief From Stay denied as unnecessary.

3.18 Estoppel Against Enforcement of Stay

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

C. Relief From Stay

3.19 Grounds Generally

In re Michigan Biodiesel, LLC, 2012 WL 1941648 (Bankr. W.D. Mi. 2012) – Action taken in violation of stay is voidable and not void ab initio. After debtor filed bankruptcy, creditor attempted to record continuation statement but inadvertently recorded a termination statement. Within minutes, creditor realized the error and filed a “correction statement” indicating that the termination statement was error. Court would retroactively annul stay for purposes of ratifying correction statement where correction did not adversely affect any creditor or the trustee, as the status of a claim as secured is determined as of the petition date and the lien was indisputably perfected as of the petition date. Further, automatic stay does not prevent action to continue perfection by filing a continuation statement which relates back to the original perfection date as long as the secured claim has continuously been perfected. Correction statement was not intended to affect the estate but was intended to insure that the security interest, which was valid as of the petition date, remained in force and effect.

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 (10th Cir. 2011) – Bankruptcy Court has discretion to lift stay for cause to permit litigation pending in non-bankruptcy forum to continue. Stay relief appropriate to allow a creditor to establish its claims against a debtor in other forums, particularly in forums where the bankruptcy debtor is already a named party defendant or where the bankrupt debtor has instituted an action against the creditor, and to protect the creditor’s right of offset against debts the bankrupt debtor claims the creditor owes the bankrupt debtor.

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 Greentown 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.

3.20 Cause - Section 362(d)(1)

In re Tam, 2012 WL 3555416 (Bankr. W.D. Mi. 2012) – Bank evidenced cause for relief from stay. Debtor and her husband and others filed multiple removal notices and bankruptcy petitions in three separate federal courts to thwart foreclosure process after debtor and others were unsuccessful in state court foreclosure proceedings.

McSwain v. Williams, 2012 WL 2974914 (Bankr. W.D. Tn. 2012) – Section 362(d)(1) provides that court shall grant relief from the stay for cause. “Cause” is not defined in the Bankruptcy Code. In the context of a motion to modify the automatic stay to allow pending litigation in a non-bankruptcy forum to proceed to finality courts should consider judicial economy, trial readiness, the resolution of preliminary bankruptcy issues, the creditor’s chance of success on the merits, the cost of defense or other potential burden to the bankruptcy estate, the impact of the litigation on other creditors, and a general balancing of the hardships test. Additional factors include whether relief would result in a partial or complete resolution of the issues, whether litigation in another forum would prejudice the interests of other creditors, whether the

DETROIT CONSUMER BANKRUPTCY CONFERENCE

expertise of a state court is needed in resolving a question of state law, whether the estate can be protected by a requirement that creditors seek enforcement through the bankruptcy court, and whether the other proceeding involves the debtor as a fiduciary. Chancery Court lawsuit had been pending for more than three years before the Debtor's bankruptcy case was filed, the Chancery Court and its appointed Special Master were familiar with the state law claims, the Special Master had filed a report, and the Chancery Court had entered an interlocutory default judgment against the Debtor. Allowing Chancery Court to hear this case to finality would reduce the duplication of evidence. Comity and respect for state law in matters involving both the bankruptcy and state courts dictated that the automatic stay be modified to permit the state court to proceed with the case to finality. Hardship to the Debtor if the automatic stay is modified to permit the pending lawsuit to go forward and the hardship to the Movants if the automatic stay is not modified were equally burdensome. Risk that Debtor may be unsuccessful in Chancery Court, which could collaterally estop Debtor in Section 523 not sufficient reason to preclude state court action. Debtor's contentions regarding long history of chronic major depression and anxiety disorders may be made to the Chancery Court. The impact of the litigation on other creditors may be lessened by requiring that the enforcement and satisfaction of any judgment be through the bankruptcy court to be dealt with along with the claims of other creditors. The Chancery Court lawsuit involves state law issues and involves the Debtor as a fiduciary. Debtor had been represented for over a year in bankruptcy case by able counsel who can adequately represent debtor and to assert defenses and assert numerous errors that Debtor argues exist within the Special Master's Report. Motion for Relief from Automatic Stay is granted to permit them to proceed against Debtor in the pending Chancery Court lawsuit; however, enforcement or satisfaction of any judgment against the Debtor will be stayed until further order of bankruptcy court.

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 (10th Cir. 2011) – Bankruptcy Court has discretion to lift stay for cause to permit litigation pending in non-bankruptcy forum to continue. Stay relief appropriate to allow a creditor to establish its claims against a debtor in other forums, particularly in forums where the bankruptcy debtor is already a named party defendant or where the bankrupt debtor has instituted an action against the creditor, and to protect the creditor's right of offset against debts the bankrupt debtor claims the creditor owes the bankrupt debtor.

Aja v. Emigrant Funding Corp., 2011 WL 167034 (1st Cir. 2011) – Court correctly lifted stay for cause. Case was debtor's fourth filing under Chapter 11, with each of three prior cases dismissed without a confirmed plan. Debtor conceded lack of equity in property, and financial information at hearing indicated that debtor lacked any viable plan of reorganization.

In re Clements Manufacturing Liquidation Company, Case No. 09-65895 (Bankr. E.D. Mi. 2010) – factors to consider in granting relief from automatic stay for cause include whether relief would result in partial or complete resolution of disputes; lack of connection with or interference in the bankruptcy estate; whether the proceeding involves the debtor as a fiduciary; whether a specialized tribunal with necessary expertise exists; whether debtor's insurer has assumed full responsibility for defense; whether action primarily involves third parties; whether litigation in another forum with prejudice interest of other creditors; whether judgment arising from other action would be subject to equitable subordination; whether movant's success would result in a judicial lien avoidable by the debtor; interest of judicial

economy and expeditious resolution; whether parties are ready for trial in other proceeding; and the impact of the stay on the parties and the balance of the harms. Court would grant limited stay relief to permit creditor to file a third-party complaint against debtor and chapter 7 trustee to the extent that the claims are similar to counterclaims previously filed by creditor in state court action and to thereafter file a Notice of Motion to transfer entire adversary proceeding to state court. However, if notice of removal is not timely filed, stay would remain in effect as to all state court litigation.

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 (6th Cir. BAP 2010) – Section 362(d)(1) allows for stay to be lifted for cause. Lack of adequate protection is explicitly stated as cause, but that reference is only illustrative, not exclusive. “Cause” for relief from stay is determined on a case by case basis. Failure to make post-petition mortgage payments constitutes cause for relief from stay in Chapter 7 proceeding. Debtor's statements at the hearing on the Motion that she had been laid off from work and had no ability to make the post-petition payments constituted further cause for relief.

Mentag v. GMAC Mortgage, LLC., 430 BR 439 (Bankr. E.D. Mi. 2009) – Creditor lacks adequate protection in Chapter 7 proceeding where Debtor has no equity cushion and has not made a mortgage payment in over one year. Debtor's vague statements that he intended to seek a loan modification and that he hoped to keep the house if it made economic and practical sense to do so and that debtor was considering moving out of state for employment reasons were not sufficient to establish that debtor had increased his income or had the ability to pay the ongoing mortgage payment and where debtor had failed to pursue any loan modification.

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

In re Tam, 2012 WL 3555416 (Bankr. W.D. Mi. 2012) – Evidence indicated lack of equity in property. Bank had secured claim for \$2,411,000 and bank's appraiser testified that value was \$2.4 million. Debtor's appraisal showed higher value but was more than four years old. Further, property had actually been sold at state court foreclosure sale, although sale had not yet been confirmed by state court, for amount less than \$2.4 million. Debtor's appraisal was not sufficient to overcome evidentiary value of current appraisal and actual sale price.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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.

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

In re Tam, 2012 WL 3555416 (Bankr. W.D. Mi. 2012) – Debtor failed to demonstrate that property was necessary for effective reorganization. Debtor offered no information or forecast regarding any plan she has for reorganization, beyond emotional plea to get properties back from State Court Receiver. Proof that parcels are necessary to an effective reorganization requires that the property is essential for an effective reorganization that is in prospect. Debtor's own schedules indicated that Debtor's household has disposable income of \$290.00 per month evidencing a lack of ability to finance the administration of this case or to reorganize an estate.

In re Foxland Harbor Marina, LLC, 2010 WL 2521084 (Bankr. M.D. Tn. 2010) – Creditor seeking relief from stay bears burden of proof on lack of equity, while debtor bears burden on all other issues. Establishing that property is "necessary to an effective reorganization" requires not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect. There must be a reasonable possibility of a successful reorganization with a reasonable time. Properties were necessary to effective reorganization where properties were Debtors' sole assets, and were to be used as an integrated development. Parcels are crucial linchpins 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.

3.23 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.

3.24 Expiration of Right of Redemption

Lemaire v. Fannie Mae, 2012 WL 3841295 (E.D. Mi. 2012) – Property did not become property of estate where right of redemption post-foreclosure expired prior to commencement of case. Where redemption did not expire until after petition, redemption is extended for the longer of the statutory 6 month redemption or 60 days post-petition, whichever is longer. When debtor failed to redeem within 60 days post-petition, property ceased to be property of estate. Cause existed for stay relief as debtor no longer had any legal interest in the property; and based on lack of equity and property was not necessary to effective reorganization. If redemption had not expired and property remained property of estate, Bankruptcy Court could hear challenges to validity and scope of lien including counterclaims raised by debtor that would affect validity and amount of debt. However, Court properly exercised discretion not to entertain contests to validity of foreclosure process as redemption had expired. Bankruptcy Court properly granted relief from stay to purchaser without prejudice to debtor's right to assert in state court any alleged invalidity of the foreclosure process.

3.25 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.

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

In re Buttermilk Towne Center, LLC, 2010 WL 5185870 (6th Cir. BAP 2010) – Proposed replacement lien in future rents is not “adequate protection” for debtor to use cash collateral consisting of current rents and income. Giving lender a lien in future rents in which lender already holds perfected security interest does not add value to the creditor’s collateral and so cannot offset potential diminution in that collateral if debtor is permitted to use the cash collateral. Adequate protection requires the pledging of new or additional assets, not merely re-pledging those assets that are already pledged to the lender.

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

3.27 *In Rem* Relief

In re Lee, 467 BR 906 (6th Cir. BAP 2012) – Court can lift automatic stay and provide that automatic stay will not come into effect for specific property in the event of any subsequent filing by debtor or anyone in contractual privity with debtor. Debtor’s multiple bankruptcy filings over 4 years, all of which were dismissed, evidenced continued intent to thwart foreclosure process. Lender had not received any payment in more than 4 years. Debtor’s filings showed that debtor’s circumstances had not changed between bankruptcy petitions. Debtor’s “hopes” that her income would increase did not demonstrate any realistic ability to improve financial condition, particularly where debtor’s hopes were based on a business that had not been started and for which debtor lacked a license, equipment, a location, or customers. However, Court could not enjoin debtor from listing debt in any future case, as that would conceivably prevent debtor from listing any deficiency balance and establishing a *de facto* non-dischargeable debt.

In re Wesson, Case No. 10-49061 (Bankr. E.D. Mi. 2010) – *In rem* relief is appropriate to prevent an abuse of process. *In rem* relief proper where Debtor was mere tenant in property with no ownership interest; property had been sold at foreclosure sale and the redemption period had already expired, further divorcing Debtor from any claim to title or lawful possession; Debtor had already filed new case in effort to circumvent rulings of Court; Debtor’s sole purpose in filing multiple bankruptcy cases was to force the creditor to sell the property to her and her co-occupants; and there was substantial risk of filings by other occupants of the property that would further improperly delay secured creditor.

3.28 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.

3.29 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.

3.30 Party Entitled to Relief From Stay

Fuentes v. HSBC Bank, 2011 WL 3300933 (9th Cir. BAP 2011) – Confirmed plan did not bar contest to creditor's standing to request relief from stay. Although creditor took assignment of note and mortgage from MERS, there was no documentation to establish that MERS ever held the note or that MERS had right or power to assign note. Documents established that MERW was nominee for the mortgagee but did not convey to MERS an interest in the note itself; there was no independent evidence that payee of note ever assigned note to MERS; and debtors were neither obligated to make payments to MERS nor did debtors ever actually pay MERS. MERS did not have any economic interest in either the note or mortgage and therefore lacked constitutional and prudential standing to seek stay relief.

Thomas v. Federal National Mortgage Association, Case No. 11-037 (10th Cir. BAP 2012) – Creditor lacked standing to seek relief from stay where promissory note had been endorsed in blank and moving party failed to produce note or prove that it had possession of note.

Weisband v. First Horizon Home Loans, 2011 WL 3303453 (9th Cir. BAP 2011) - Lender had "constitutional standing" to seek relief from automatic stay. Lender's predecessor was the original lender on the note and beneficiary under deed of trust. Current lender was survivor of merger of prior lender and a third-party bank. Current lender was sufficiently able to trace ownership of note and deed of trust to establish lender as the current holder of the note entitled to relief from stay.

Veal v. American Home Mortgage Servicing Inc., 450 BR 897 (9th Cir. BAP 2011) - Lender lack standing to seek stay relief because documents failed to show colorable claim that lender had interested underlying note, either as a holder or as an "other person entitled to enforce the note". To establish "colorable claim" lender had to show some interest in the note. None of the exhibits attached to Motion for Relief from Automatic Stay established lender as the holder or person entitled to enforce the note. Absent evidence of a colorable claim to the property, lender lacked standing to seek relief from stay.

Commonwealth Property Advocates, LLC, v. Mortgage Electronic Registration Systems, Inc., Case No. 10-4182 (10th Cir. 2011) – Securitization of a note does not require the holder of the underlying trust deed and its nominees to obtain authorization from every investor holding an interest in the securitized note prior to commencing foreclosure. The deeds of trust at issue expressly gave MERS the authority to foreclose on behalf of the original lender and its successors. This express authority is as the "further agreement" of the investors to the commencement of foreclosure proceedings.

In re Rice, Case No. 11-8032 (6th Cir. BAP 2011) – "Party in interest" for purposes of requesting relief from stay is expandable concept based on factual context. Party in interest is generally held to be one who has an actual pecuniary interest in the case, anyone who has a practical stake in the outcome, and anyone who would be significantly impacted by the outcome. Party who has right to enforce obligation is party in interest. Secured creditor has standing to seek stay relief as long as the creditor shows it has an interest in the note and that it has been injured by the debtor's default. Assignment of secured claim is valid and enforceable by assignee even if assignment is not recorded or noted on certificate of title. Assignee of properly perfected lien on automobile is party in interest and holder of claim even where assignment is not noted on certificate of title.

In re Ferrell, Case No. 10-55771 (Bankr. E.D. Mi. 2010) - Motion denied where Motion failed to attach Statement of Corporate Ownership and corrected Motion not filed within additional time provided by Court Order to correct deficiency.

In re Stuart, Case No. 10-59403 (Bankr. E.D. Mi. 2010) - Motion denied Motion failed to attach Statement of Corporate Ownership and corrected Motion not filed within additional time provided by Court Order to correct deficiency.

In re Myers, Case No. 06-41065 (Bankr. E.D. Mi. 2010) - Motion denied where Statement of Corporate Ownership was internally inconsistent. In one place, the Statement indicated that there are two entities that directly or indirectly own 10% or more of the equity, but also placed an "X" in the box stating that there are no such entities.

Dunn v. Rund, Case No. 09-1176 (6th Cir. BAP 2010) – Conversion of case from Chapter 13 to Chapter 7 while Motion for Relief pending does not deprive moving party of entitlement to stay relief or mandate any delay in proceedings. Section 362(d)(1) applies with equal force in Chapter 13 and Chapter 7.

Mentag v. GMAC Mortgage, LLC, Case No. 09-15012 (E.D. Mi. 200) – Record failed to indicate whether creditor held promissory note on which claim was based. Debtor executed note to GMAC Mortgage and mortgage in favor of MERS as “nominee” for GMAC. Subsequent documents indicated that GMAC sold the mortgage and loan to an entity named RAMP, through GMAC as servicer, sold the loan to JP Morgan Chase. GMAC remained as servicer for the loans now apparently held by Chase. Debtor filed for relief under Chapter 7, and GMAC purportedly as servicer for MERS sought relief from the automatic stay. Mortgage expressly named MERS as mortgagee and vested in MERS the power of sale. Michigan law regarding foreclosure requires that the party foreclosing the mortgage is either the owner of the indebtedness or is the servicing agent for the mortgage. As MERS is the named mortgagee, GMAC lacks standing to pursue relief from the automatic stay unless GMAC also has an interest in the mortgage or the note. GMAC’s status solely as servicer for a note and mortgage that are owned by some combination of MERS, RAMP and Chase did not support standing for GMAC to either exercise the power of sale or to seek relief from the automatic stay. Documents were also unclear as to whether RAMP or Chase or MERS held any interest in the loan documents as the transfer agreement from RAMP to Chase did not attach any schedules of the loans transferred and so it could not be determined which entity actually owned either the note or the mortgage.

In re Davidge, Case No. 09-76812 (Bankr. E.D. Mi. 2010) – Creditor’s Motion for Relief From Stay accompanied by incomplete Statement of Corporate Ownership. Creditor failed to file Amended Statement within time specified by Court, requiring denial of Motion without prejudice.

In re White, Case No. 10-44789 (Bankr. E.D. Mi. 2010) – Creditor’s Motion for Relief From Stay accompanied by incomplete Statement of Corporate Ownership. Creditor failed to file Amended Statement within time specified by Court, requiring denial of Motion without prejudice.

In re Jones, Case No. 10-40323 (Bankr. E.D. Mi. 2010) – Creditor’s Motion for Relief From Stay accompanied by incomplete Statement of Corporate Ownership. Statement failed to check any box regarding whether any entities directly or indirectly owned more than 10% of any class of corporation’s equity interest. Creditor failed to file Amended Statement within time specified by Court, requiring denial of Motion without prejudice.

In re Lee, Case No. 10-41774 (Bankr. E.D. Mi. 2010) – Creditor’s Motion for Relief From Stay accompanied by incomplete Statement of Corporate Ownership. Statement failed to check any box regarding whether any entities directly or indirectly owned more than 10% of any class of corporation’s equity interest. Creditor failed to file Amended Statement within time specified by Court, requiring denial of Motion without prejudice.

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

In re Birmingham, Case No. 10-48959 (Bankr. E.D. Mi. 2010) – Motion for Relief From Stay denied where creditor failed to file required Statement of Corporate Ownership.

In re Halan, Case No. 10-46518 (Bankr. E.D. Mi. 2010) – Motion for Relief From Stay denied where creditor failed to file corrected Statement of Corporate Ownership.

3.31 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.

3.32 Termination – Dismissal and Reinstatement of Case

In re Jackson, 452 BR 818 (Bankr. D. Kan. 2011) – Automatic stay terminates at dismissal of case. Motion to reconsider dismissal order does not reinstate stay. Foreclosure sale occurring between case dismissal and reinstatement did not violate stay and was valid sale.

3.33 Termination – Failure to Reaffirm or Redeem

In re Vantrump, Case No. 11-55021 (Bankr. E.D. Mi. 2011) – Failure to enter into a reaffirmation agreement or to surrender vehicle within 45 days after 341 meeting lifts stay and specifically allows creditor to enforce *ipso facto* clause. Debtor's Motion for Entry of Order prohibiting Enforcement of *Ipso Facto* Clause denied as relief is prohibited by Section 521(d).

In re Richardson, Case No. 11-31806 (Bankr. E.D. Mi. 2011) – Section 362(h) terminates automatic stay as to personal property that secures an unexpired lease or a claim where debtor fails to timely file a statement of intention as required by Section 521 and fails to take timely action specified in the statement of intention. Debtor neither filed a statement of intention nor took any steps to reaffirm the debt resulting in termination of stay 45 days after commencement of case. Fact that creditor filed secured proof of claim does not alter debtor's obligation under Section 362. Section 521(a)(6) does not trump Section 362(h). Section 521(a)(6) does not impose or extend stay that would otherwise expire under Section 362(h). Section 521(a)(6) requires that debtor who desires to retain possession of personal property where a creditor asserts a purchase money security interest must within 45 days of the first meeting of creditors either redeem or reaffirm. Debtor neither reaffirmed nor redeemed within 45 days, resulting in debtor's loss of any right to possess the collateral. Further, Section 521(a)(6) applies only where the creditor has an allowed claim "for the purchase price". Creditor filed a proof of claim for \$15,000 balance owed on car with purchase price of \$31,000.00. As claim was for substantially less than "the purchase price" debtor could not use Section 521(a)(6) to maintain possession.

In re Reed, 2011 WL 6328677 (Bankr. E.D. Mi. 2011) – Section 362(h) terminates automatic stay as to personal property subject to purchase money security interest where debtor fails to file statement of intentions indicating intention to surrender, redeem or reaffirm for property secured by purchase money security interest and debtor fails to execute reaffirmation agreement or redeem. Section 362 did not operate to lift stay where implicated where debtor failed to file the statement of intention but did sign and file a reaffirmation agreement even if reaffirmation agreement rejected by Court. Section 362 states requirement in conjunctive, such that failure to complete one portion did not implicate Section 362(h) where other requirement has been fulfilled.

In re Baer, 2011 WL 3667511 (Bankr. E.D. Ky. 2011) – Motion to Redeem Collateral filed within time allowed under Section 362(h)(1) prevents automatic termination of stay under Section 362(h). Debtor's subsequent default under Order for Redemption, which allowed Debtor 45 days to redeem or surrender collateral, did not modify stay. When Debtor defaulted under Order for Redemption, Creditor's repossession of the vehicle constituted willful violation of automatic stay. Creditor's erroneous assumption that failure to redeem operated as relief from stay did not change conclusion that creditor acted willfully. Willful does not require proof of specific intent to violate stay, but only proof of intentional act at a time when creditor was aware of the bankruptcy filing.

In re Baer, 2011 WL 1832490 (Bankr. E.D. Ky. 2011) – Sections 362(h)(1) and 521(a)(2), require Debtor to (1) file a statement of intention indicating an intent to surrender, reaffirm, or redeem and (2) to perform this intention within at least thirty days after the date set for the first meeting of creditors. If Debtor fails to do either of these within the time frame required, the stay automatically terminates. Stay would have terminated where debtor filed statement of intentions to reaffirm but did not execute or file a reaffirmation agreement as required. However, where debtor timely amended Statement of Intentions to indicate that the debtor would redeem the property and timely filed Motion to Redeem within time permitted, automatic stay would not terminate. Estate had not been closed and Trustee had not abandoned collateral. Creditor violated stay by repossessing vehicle.

3.34 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.

3.35 Closing of Case Without Discharge

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

3.36 Setoff

Harchar v. IRS, 2012 WL 3968162 (6th Cir. 2012) – IRS did not violate terms of debtor’s confirmed plan or automatic stay by suspending electronic processing of debtor’s tax refunds and switching to manual processing. Although IRS switch may have slowed refund process, IRS had right to consider its rights and responsibilities before issuing refunds. IRS did not in any way attempt to modify plan or to recover debt owed in manner inconsistent with confirmed plan. IRS had right to implement administrative freeze on refund while seeking stay relief to exercise setoff of post-petition tax refunds against pre-petition tax claims. Short term freeze that did not delay refund for time far beyond when refund normally would have been paid is not act to obtain possession or control of property of estate. IRS issued refund immediately after it became clear that IRS’ request for setoff would be denied.

D. Violations of Automatic Stay

3.37 Effect of Violation

Kline v. Deutsche Bank National Trust Co., Case no. 11-088 (10th Cir. BAP 2012) – *Rooker-Feldman* precluded Bankruptcy Court from reviewing State Court determination of efficacy of foreclosure complaint served in violation of stay. Debtor argued to state court that service was improper and that plaintiff should be required to re-serve complaint. State court disagreed and entered foreclosure judgment. Bankruptcy court would not act as “super appellate” court to review State court determination as to validity of service of state court complaint in state court action.

Search Market Direct Inc. v. Jubber, Case no. 10-4190 (10th Cir. 2012) – Debtor’s ownership of Internet Domain Name became property of estate upon filing of Chapter 7 petition. Debtor’s purported post-petition sale of Domain Name constituted violation of stay as sale constituted attempt to obtain possession and control of property of estate. Sale of property in violation of stay is void and without effect.

In re Michigan Biodiesel, LLC, 2012 WL 1941648 (Bankr. W.D. Mi. 2012) – Action taken in violation of stay is voidable and not void ab initio. After debtor filed bankruptcy, creditor attempted to record continuation statement but inadvertently recorded a termination statement. Within minutes, creditor realized the error and filed a “correction statement” indicating that the termination statement was error. Court would retroactively annul stay for purposes of ratifying correction statement where correction did not adversely affect any creditor or the trustee, as the status of a claim as secured is determined as of the petition date and the lien was indisputably perfected as of the petition date. Further, automatic stay does not prevent action to continue perfection by filing a continuation statement which relates back to the original perfection date as long as the secured claim has continuously been perfected. Correction statement was not intended to affect the estate but was intended to insure that the security interest, which was valid as of the petition date, remained in force and effect.

3.38 Particular Actions – Violations

Kline v. Deutsche Bank National Trust Co., Case no. 11-088 (10th Cir. BAP 2012) – Lender did not willfully violate automatic stay by causing service of amended foreclosure complaint after debtor filed for relief under Chapter 13 where lender was unaware of bankruptcy filing and immediately ceased all actions upon learning of bankruptcy.

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

In re Tremblay, Case No. 11-52918 (Bankr. E.D. Mi. 2012) – Creditor’s post-petition garnishment constituted willful violation of stay warranting sanctions in the form of costs and attorney fees.

In re Webb, 2012 WL 3638005 (Bankr. N.D. Ohio 2012) – Secured creditor violated stay by scheduling foreclosure sale at time when bankruptcy case was open and discharge had not entered. Creditor had previously scheduled sale and been sanctioned, yet inexplicably re-set the sale yet again, also in violate of stay.

In re Thorpe, 2011 WL 5909403 (Bankr. E.D.N.C. 2011) – Lender willfully violates stay by sending contractor to

DETROIT CONSUMER BANKRUPTCY CONFERENCE

change locks at debtor's home before stay relief hearing.

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

In re Kallabat, Case no. 12-53744 (Bankr. E.D. Mi. 2012) – Debtor's estranged spouse violated stay where spouse proceeded with trial in proceeding for dissolution of marriage with actual knowledge of bankruptcy filing. To extent divorce proceeding sought to dissolve marriage, to address child custody and visitation, and to establish domestic support obligations, actions were within exception to automatic stay, and filing of bankruptcy petition would not prevent domestic relations action from proceeding as to those issues. However, spouse's request that the domestic relations court award spouse the marital home free and clear of any interest of debtor violated Section 362(a)(3). Whatever interest debtor had in the marital home as of the date of the petition became property of estate, and request that property be awarded to spouse constituted attempt to gain possession and control of property of estate. Spouse also violated stay by asking domestic relations court to hold debtor solely liable on credit card allegedly fraudulent opened by debtor in the name of spouse. Attempt to impose liability based on pre-petition fraud is based on pre-petition claim that is beyond request for support and violated Section 362(a)(1) and (6). Spouse further violated the stay by submitting a proposed order that incorporated the relief regarding the marital home and other assets and credit cards, and continuing to request that the State court enter that order.

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

Dietrich v. Tiernan, 2012 WL 1854250 (E.D. Mi. 2012) – Debtor's ex-spouse violated automatic stay by obtaining substantive modifications to terms of parties' divorce judgment during pendency of bankruptcy case.

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

In re Storozhenko, 459 BR 697 (Bankr. E.D. Mi. 2011) – Post-petition proceeding brought in state court by state court receiver to hold debtor in contempt for violating orders entered in state court divorce proceeding were criminal proceedings within exception to automatic stay, to the extent receiver sought payment of fine to court or imprisonment for fixed term. However, to the extent contempt proceedings sought to recover restitution plus receiver costs and expenses, proceedings were civil in nature and precluded by automatic stay.

In re Malloch, Case No. 11-53655 (Bankr. E.D. Mi. 2011) – Creditor knowingly violated automatic stay by sending demand letter to debtor 60 days after commencement of case and 30 days after creditor was provided with Notice of Commencement and copies of Debtor's schedules.

In re 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 (1st Cir. 2011) – Mortgage company willfully violated automatic stay by recording mortgage post-petition and with knowledge of bankruptcy filing. Violation is “willful” when conduct is intentional and committed with knowledge of the bankruptcy filing.

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 (11th Cir. 2010) - Personal notice of bankruptcy is not required for violation of stay if notice is delivered to attorneys or other representatives. Debtor’s ex-spouse violated stay by obtaining arrest warrant for failure to pay support and failed to take any action to vacate warrant notwithstanding imputed and later actual notice of bankruptcy filing. Party had affirmative duty to move to vacate state court contempt order and arrest order.

In re Kasubowski, Case No. 09-20128 (Bankr. E.D. Mi. 2010) – Creditor’s obtaining and serving a writ of garnishment post-petition and refusal to return to Debtor or the Chapter 13 Trustee funds received by Creditor on that writ violated automatic stay.

In re Markins, Case No. 10-30820 (Bankr. N.D. Ohio 2010) – Creditor’s refusal to remove electronic device that

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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.

3.39 Particular Actions – Not Violations

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

In re Riley, 472 BR 422 (Bankr. W.D. Ky. 2012) – Glitch in government's computer program, that resulted in withholding of funds that were payable to Chapter 7 debtors as refund of their prepetition overpayment of taxes for possible setoff against debtors' obligation to government on Farmers' Home Administration (FmHA) loan, did not place it in willful violation of automatic stay. Although at some point, government could no longer rely on failure of its computer software to excuse it from liability for violating automatic stay, inadvertent stay violation was merely "technical," and not "willful."

In re Jackson, 403 B.R. 95 (Bankr. D. Idaho 2009) – Where plan provided for property to vest in debtors at confirmation, property ceased to be property of estate. Therefore, post-petition creditor who recorded judgment against debtor's residence did not violate stay, as creditor's actions were not attempt to collect pre-petition obligation and did not interfere with property of the estate.

In re Storozhenko, 459 BR 697 (Bankr. E.D. Mi. 2011) – Post-petition proceeding brought in state court by state court receiver to hold debtor in contempt for violating orders entered in state court divorce proceeding were criminal proceedings within exception to automatic stay, to the extent receiver sought payment of fine to court or imprisonment for fixed term. However, to the extent contempt proceedings sought to recover restitution plus receiver costs and expenses, proceedings were civil in nature and precluded by automatic stay.

In re Juliao, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Creditor did not violate stay or co-debtor stay by furnishing information to credit bureaus. Actions were not designed to collect debt from either debtor or co-debtor. Information provided to bureaus included whether the contractually due payments were past due based on internal records of creditor. Debtor was delinquent in payments to Chapter 13 Plan resulting in delays in disbursements by Trustee. Debtor's incorrect understanding that where mortgage payments were made by Trustee, the creditors could not report late payments did not result in violation of stay. Fact that reporting was causing difficulties for co-debtor is not a violation of stay.

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 (11th Cir. 2011) – Creditor's recording of fees and costs on internal records without disclosing those fees and costs on proof of claim does not violate stay. Creditor made no attempt to collect these fees or to add them to the balance due on the mortgage.

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.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

McCrary v. City of Flint, Case No. 08-3097 (Bankr. E.D. Mi. 2011) – City of Flint did not violate automatic stay when actions were filed against co-debtor during pendency of Chapter 13 case. Any actions in the hearing of that action and the rendition of a judgment that allegedly violated Section 1301 were actions taken by the Judges of the 68th District Court. The Michigan Constitution and statutes make the Courts governmental agencies that are independent of the City and over which the City has no control or authority. Further, actions taken by District Judges would be within the scope of judicial immunity precluding action against Court and individual judges.

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 (10th Cir. 2011) – Litigation in which Debtor is the plaintiff is not stayed by bankruptcy filing. Defendants are not stayed from asserting defenses or seeking to have case dismissed. Court can dismiss case for failure to prosecute where Debtor fails to prosecute, failure produces material prejudice to defendants, Debtor’s actions short circuit judicial process as occurring on eve of trial and Debtor missed other deadlines, and Debtor was responsible for failure of case to proceed by discharging counsel on eve of trial and failing to make sufficient effort to obtain replacement counsel.

In re Bryner, 425 B.R. 601 (10th Cir. BAP 2010) - Automatic stay does not prevent purely defensive action by party that debtor has sued. Parties against whom Chapter 13 debtor had obtained a default judgment prepetition, which debtor attempted to satisfy by obtaining two separate writs of garnishment, one prepetition and the other post-petition, acted in purely defensive manner in moving to set aside default judgment post-petition, such that their conduct did not violate automatic stay.

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.

3.40 Surrendered Collateral

3.41 Domestic Support Litigation

McMaster v. Small, Case No. 11-40888 (5th Cir. 2012) – Ex-spouse violated stay where ex-spouse attempted to recover pre-petition support award from property of estate and sought to hold debt or in contempt of court for failing to pay pre-petition amounts without limiting collection efforts or determination of “ability to pay” without reference to property of estate.

Russell v. Caffey, Case No. 08-00450 (11th Cir. 2010) - Personal notice of bankruptcy is not required for violation of stay if notice is delivered to attorneys or other representatives. Debtor’s ex-spouse violated stay by obtaining arrest warrant for failure to pay support and failed to take any action to vacate warrant notwithstanding imputed and later actual notice of bankruptcy filing. Party had affirmative duty to move to vacate state court contempt order and arrest order.

In re Kallabat, Case no. 12-53744 (Bankr. E.D. Mi. 2012) – Sanctions are appropriate under Section 362(k) where non-bankrupt party knowingly takes actions in violation of stay. Debtor’s estranged spouse could not be held to have violated stay where all actions that constituted stay violation were taken by spouse’s attorney in State court action for dissolution of marriage. Spouse’s attorney’s request that the domestic relations court award spouse the marital home

free and clear of any interest of debtor violated Section 362(a)(3). Attorney also violated stay by asking domestic relations court to hold debtor solely liable on credit card allegedly fraudulent opened by debtor in the name of spouse. Attorney further violated the stay by submitting a proposed order that incorporated the relief regarding the marital home and other assets and credit cards, and continuing to request that the State court enter that order. Actions taken in violation of stay are voidable. Bankruptcy Court would declare void rulings made by State court that attempted to adjudicate property interest of debtor or to hold debtor liable for disputed claim. Debtor failed to present evidence of any actual damages, precluding award at this time, but permitted debtor additional time to submit affidavit itemizing damages allegedly suffered as result of stay violations.

3.42 Pre-petition Mortgage Escrow Claims

In re Rodriguez, 2012 WL 589553 (Bankr. D.N.J. 2012) – Following Third Circuit remand, Court concluded that lender violated stay when lender continued efforts post-petition to collect pre-petition escrow shortage. Escrow shortage that exists as of the filing of the petition is a pre-petition claim. Following commencement of case, lender sent letters to debtor increasing the mortgage payment and advising that the payment was necessary to keep the escrow account from falling below zero. Countrywide's act of sending these documents to the Debtors directly violated Section 362(a)(6), which stays any act to collect, assess, or recover a claim against Debtors that arose before the commencement of this case. Lender's actions were willful. Lender knew of bankruptcy filing but proceeded to send letters nonetheless. Debtor suffered actual damages in the form of attorney fees where lender was forced to litigate to protect their rights. Attorney fees are compensable even in absence of other actual damages or compensable harm. Debtors awarded fees in sum of \$85,000.

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.

3.43 Sanctions

In re Webb, 2012 WL 3638005 (Bankr. N.D. Ohio 2012) – Secured creditor and counsel violated stay by scheduling foreclosure sale at time when bankruptcy case was open and discharge had not entered. Creditor had previously scheduled sale and been sanctioned, yet inexplicably re-set the sale yet again, also in violation of stay. Counsel's alleged reliance on advice from clerk for state court magistrate did not excuse violation where counsel did not independently verify status of bankruptcy case or automatic stay and where attorney has extensive experience and knew he could review court dockets at no charge. Sanctions included \$5500 in fees through filing of the Motion with leave to file supplement for additional fees incurred through hearing.

McMaster v. Small, Case No. 11-40888 (5th Cir. 2012) – *Pro se* debtor entitled to attorney fees in prosecuting Motion for Sanctions for violation of stay. Fees were sought for attorneys handling domestic support action, and were necessitated by ex-spouse's attempts, in violation of stay, to collect support from property of estate and to have debtor held in contempt by state court for failing to pay.

In re Thorpe, 2011 WL 5909403 (Bankr. E.D.N.C. 2011) – Lender willfully violates stay by sending contractor to change locks at debtor's home before stay relief hearing. Debtors awarded attorney fees of \$1500 and punitive damages of \$5,000. Actions of lender would cause person of ordinary susceptibility to suffer significant emotional distress when faced with loss of home. Debtors suffered real emotional distress where husband was recuperating from recent surgery and wife had history of anxiety disorders.

In re Jha, 461 BR 611 (Bankr. N.D. Ca. 2011) – IRS notice of intent to levy violated stay, but debtor's attorney fees for processing motion for contempt are not compensable. Debtor entitled to attorney fees incurred in having 9 notice of levy lifted and to nominal award of \$20 for "stomach distress medication".

Florida Department of Revenue v. Diaz, 647 WL 1073 (11th Cir. 2011) – Debtor not entitled to damages for alleged violation of stay where debtor waited 4 years before filing motion, after discharge had already been entered. Stay was no longer necessary to any in rem function of the court and stay had no bearing on adjudication of state's filed proof of claim.

Schwartz-Tallard v. America's Servicing Company, Case No. 11-1429 (9th Cir. BAP 2012) – Debtor who successfully defends appeal of order determining that creditor violated stay entitled to attorney fees for defense of appeal. Creditor post-petition sold property at foreclosure sale. Debtor filed motion for sanctions under Section 362(k). Bankruptcy court determined that ASC violated stay, and ASC appealed. Bankruptcy Court Order was affirmed on appeal, and debtor sought award of attorney fees incurred in defending the appeal. Court stated that while fees are not awardable in connection with the debtor's prosecution of its Motion for Sanctions, once debtor prevailed and creditor appealed, debtor's incurrence of attorney fees for the appeal was no longer a voluntary process. Appellate attorney fees were incurred to

ensure continuity of stay and to protect the damage award for the initial stay violation, such that appellate attorney fees constitute actual damages for purposes of Section 362(k).

In re Baer, 2012 WL 2368698 (6th Cir. BAP 2012) – Section 362(k) authorizes award of actual damages, including attorney fees and costs, for willful violation of the automatic stay. Party must prove by preponderance of evidence that damages were proximately caused by and reasonably incurred as a result of violation of stay, and must be able to demonstrate amount of damages with reasonable certainty. Punitive damages may also be awarded where creditor's conduct was egregious, vindictive, or intentionally malicious. If creditor acted in good faith belief that the stay had terminated under Section 362(h), the recovery is limited to actual damages. Debtor's request for sanctions denied where debtor failed to request or to produce evidence of any actual damages. Punitive damages denied where debtor failed to produce evidence of malice or ill will and creditor acted in good faith, if erroneous, belief that debtor's failure to sign reaffirmation agreement within time permitted operated to lift stay without further order of court. Without ruling on whether a pro se debtor can recover attorney fees, Court noted that debtor did not present any evidence of reasonable fees including reasonable hourly rates, number of hours reasonably spent, or nature of the work done. If fees are appropriate under Section 362, the amount must be reasonable, based on customary compensation charged by comparably skilled practitioners, and fee must bear a reasonable relationship to the amount in controversy.

Dietrich v. Tiernan, 2012 WL 1854250 (E.D. Mi. 2012) – Section 362 authorizes sanctions in favor of any person injured by a willful violation of stay. Debtor constitutes a person who was injured by ex-spouse's actions in divorce proceedings in violation of stay, giving debtor standing to seek relief.

Cook v. Wells Fargo Bank, Case No. 11-082 (10th Cir. BAP 2012) – Creditor's actions in attempting to foreclose lien against property of estate did not give rise to action by debtors. Property involved was estate property. Creditor did not pursue recovery from debtors personally and did not seek to recover any assets owned by debtors. Any relief requested was limited to property owned by estate. Claim for damages for stay violation, if any, was exclusively estate property. Debtors lacked standing to pursue claim, as debtor could not demonstrate that actions of creditor resulted in any actual or threatened injury in fact to debtors or property of the debtors. Fact that debtor claimed exemption in underlying asset did not confer standing. Claim of exemption does not remove asset from estate until the exemption is allowed or by operation of law if no timely objection is filed. Creditor timely objected to claimed exemption and claimed exemption had not been determined as of date of alleged stay violation. As property remained property of estate, debtor lacked standing to pursue alleged stay violation. Purported abandonment by Chapter 7 Trustee of property allegedly involved in stay violation did not vest in debtors the claim for violation of stay where abandonment was pending but had not been approved by the court or properly noticed to creditors.

In re Storozhenko, 459 BR 697 (Bankr. E.D. Mi. 2011) – Post-petition proceeding brought in state court by state court receiver to hold debtor in contempt for violating orders entered in state court divorce proceeding were criminal proceedings within exception to automatic stay, to the extent receiver sought payment of fine to court or imprisonment for fixed term. However, to the extent contempt proceedings sought to recover restitution plus receiver costs and expenses, proceedings were civil in nature and precluded by automatic stay. Conduct was willful allowing Debtor to recover any actual damages and attorney fees and costs. However, punitive damages were not appropriate where conduct was not egregious and where there was no evidence that receiver acted with knowledge that conduct violated stay or acted with reckless disregard. Court would not enjoin future conduct where receiver now had clear understanding of allowable conduct.

In re Malloch, Case No. 11-53655 (Bankr. E.D. Mi. 2011) – Creditor knowingly violated automatic stay by sending demand letter to debtor 60 days after commencement of case and 30 days after creditor was provided with Notice of Commencement and copies of Debtor's schedules. Court would enjoin creditor from any further efforts to collect pre-petition balance owed. Court unable to award damages absent any evidence by debtor that debtor incurred any actual damages. Punitive damages not appropriate where Motion did not allege any facts that would rise to the level of "particularly egregious" or that creditor acted with actual knowledge that he was violating stay or that he did so with reckless disregard for stay.

In re Storozhenko, Case No. 11-57443 (Bankr. E.D. Mi. 2011) – Court can award fees as sanction for stay violation. Request for fees should contain itemization sufficient to permit the court to evaluate the necessity of services provided, the reasonableness of the time spent, and the reasonableness of the fee charged. Requested hourly rate of \$400 per hour was unreasonably high given lack of complexity or unusual nature of the matters involved. Court would reduce hourly rate to \$240 which is reasonable rate for services performed. Time spent on matters that were done as part of general representation of debtor is not compensable in stay violation action and included time spent attempting to settle underlying actions; and filing a response to a Motion for Reconsideration which could not have been filed unless Court ordered response to be filed, which it did not.

In re Dietrich, Case No. 08-68294 (Bankr. E.D. Mi. 2011) – Standing to complain of violations of Automatic Stay is not

limited to 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), *aff'd* 2012 WL 2368698 (6th Cir. BAP 2012) – Debtor entitled to actual damages incurred as result of creditor's repossession of vehicle in violation of stay. Plaintiff failed to quantify any actual expense or damage claim from alleged need to obtain alternative transportation, precluding award of actual damages. Burden is on debtor to prove existence and amount of any actual damage claim. Punitive damages not warranted where creditor violated stay but there was no evidence that conduct was egregious, vindictive or intentionally malicious, and was the result of creditor's mistaken belief that stay terminated when debtor failed to comply with Order for Redemption.

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

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

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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 9th Circuit holding in *Stenberg v. Johnston*, 595 F.3d 937 (9th Cir. 2009) that attorney fees are not recoverable in litigation for stay violation. If litigation is unnecessary to afford a complete remedy to a debtor, then the fees for commencing and prosecuting an action will not be compensable. Attorneys' fees may be awarded under Section 362(k) even if no other amounts are awarded as actual damages. Award must be reasonable, determined using “lodestar” method. The fees incurred in this case in sending Defendant the demand letter, then discussing the issue and negotiating a settlement with Defendant, are for the type of actions that this and other courts anticipate and expect that counsel will take on behalf of debtors in the situation faced by Plaintiffs. When that compromise fell through, not due in the court's view to the fault of Mack, the evidence shows that he afforded Defendant a final opportunity to settle without litigation. Plaintiffs were, therefore, entitled to have their attorney address Defendant's violation of the stay and Debtor-husband is entitled to be compensated for the reasonable attorney's fees and costs in doing so, both before filing the complaint initiating this adversary proceeding and afterward. Attorney's requested hourly rate of \$250 was not reasonable when viewed in light of prevailing rate in the relevant market-i.e., the rate that is customarily paid in the community to attorneys of reasonably comparable skill, experience, and reputation. The relevant market is “the venue of the court of record,” rather than the “geographical area wherein [counsel] maintains his office and/or normally practices. Hourly rate reduced to \$200 per hour where hourly rates in area generally ranged between \$125 and \$225 per hour and services were straightforward and routine. Court would reduce time by hours that did not relate to claims or that were excessive under the circumstances. Fee request of \$1,972 reduced to \$565.

Heers v. Gibson Realty, Inc., 2010 WL 3491169 (Bankr. W.D. Ky. 2010) – Employer violated stay by retaining portion of real estate commission earned post-petition to pay pre-petition obligation for rent and other office expenses and refused to pay Debtor notwithstanding actual notice of the bankruptcy filing and repeated requests by Debtor's counsel for turnover of the funds. Employer's actions constituted willful violation of automatic stay. Judgment entered against Employer for \$7,512 representing funds wrongfully withheld plus \$14,887 for Debtor's attorney fees and costs.

In re Kasubowski, Case No. 09-20128 (Bankr. E.D. Mi. 2010) – Sanctions are appropriate where Creditor served writ of

garnishment post-petition and refused to return to Debtor or the Chapter 13 Trustee funds received by Creditor on that writ. Creditor offered no plausible explanation of why Creditor did not return funds to 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 (9th Cir. 2010) – Debtor not entitled to sanctions for creditor acts in violation of stay where stay was later retroactively annulled.

Lewis v. Negri Bossi USA, Inc. 423 BR 643 (E.D. Mi. 2010) – Court properly entered mandatory injunctive relief against Creditor who violated stay by refusing to honor pre-petition contract to provide services to maintain machines. Court concluded that substantial irreparable harm would befall debtor if the machines were not maintained sufficient to warrant injunctive relief requiring Creditor to continue to maintain machines while estate attempted to liquidate the machines for the benefit of creditors.

In re Waldo, Case No. 09-30969 (Bankr. E.D. Tn. 2009) – Attorney “willfully” violated automatic stay by depositing post-petition checks for payment or unpaid attorney fees in Chapter 7 case liable for sanctions for violation of Section 362. Attorney required to disgorge all fees received both pre-petition and post-petition in connection with Chapter 7 filing and to return to debtors all remaining post-dated checks still in attorney’s possession.

In re Hickey, Case No. 07-23041 (Bankr. E.D. Mich. 2009) (unreported decision) - Appropriate sanctions for violation of automatic stay include attorney fees incurred on behalf of the Debtor and directly related to the violation are recoverable. Attorney fees for unrelated services or services in connection with non- Debtor entities are not recoverable. Attorney fees must also be reasonable when viewed from both a case specific basis and "a larger, universal perspective". Where the creditor's actions were particularly aggressive and the Debtor recovered substantial actual damages, an award of substantial attorney fees was also warranted to both compensate the Debtor and to send a message to creditors and Debtors for future cases.

3.44 Void and Voidable

In re Kallabat, Case no. 12-53744 (Bankr. E.D. Mi. 2012) – Sanctions are appropriate under Section 362(k) where non-bankrupt party knowingly takes actions in violation of stay. Debtor’s estranged spouse could not be held to have violated stay where all actions that constituted stay violation were taken by spouse’s attorney in State court action for dissolution of marriage. Spouse’s attorney’s request that the domestic relations court award spouse the marital home free and clear of any interest of debtor violated Section 362(a)(3). Attorney also violated stay by asking domestic relations court to hold debtor solely liable on credit card allegedly fraudulent opened by debtor in the name of spouse. Attorney further violated the stay by submitting a proposed order that incorporated the relief regarding the marital home and other assets and credit cards, and continuing to request that the State court enter that order. Actions taken in violation of stay are voidable. Bankruptcy Court would declare void rulings made by State court that attempted to adjudicate property interest of debtor or to hold debtor liable for disputed claim. Debtor failed to present evidence of any actual damages, precluding award at this time, but permitted debtor additional time to submit affidavit itemizing damages allegedly suffered as result of stay violations.

E. Extension of Automatic Stay

3.45 When Necessary

In re Lanphear Tool Works, Inc., 2012 WL 3686777 (Bankr. W.D. Mi. 2012) – Motion for Extension of Stay under Section 362(c)(3) filed by corporate debtor denied as unnecessary. Section 362(c)(3)(A) applies only to a debtor who is an individual.

In re Davis, Case No. 11-40907 (Bankr. E.D. Mi. 2011) – Motion to Extend Stay denied as unnecessary. Debtor’s prior case was not dismissed by Court, but had been closed by court without discharge.

In re Rankin, Case No. 10-68863 (Bankr. E.D. Mi. 2010) - Motion to Extend Stay denied as unnecessary where Debtor did not have any pending case within the past year that was dismissed. Prior case was filed as Chapter 13 and converted to Chapter 7 and resulted in discharge rather than dismissal.

In re Hunt, Case No. 10-51577 (Bankr. E.D. Mi. 2010) – Motion to Extend Stay denied as unnecessary where Debtor did

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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.

3.46 Timing of Motion and Hearing

In re Yatooma, Case No. 12-59348 (Bankr. E.D. Mi. 2012) – Motion must be filed within 7 days of petition in order to permit adequate time for hearing to be noticed and conducted before expiration of 30 days. Motion denied where motion was not filed until 25 days after petition, leaving insufficient time for count to properly notice and conduct hearing.

In re Lanphear Tool Works, Inc., 2012 WL 3686777 (Bankr. W.D. Mi. 2012) – Motion for Extension of Stay under Section 362(c)(3) filed by corporate debtor denied as untimely. Section 362(c) provides that stay terminates on 30th day unless extended by order of court. Motion filed on the 30th day following the petition did not provide sufficient time for notice and a hearing completed before expiration of the 30-day period.

In re Relitz, Case No. 11-42847 (Bankr. E.D. Mi. 2011) – Motion denied where Debtor failed to file Motion to Extend Stay until 29 days after petition filed. Section 362(c)(3) requires hearing to be concluded within 30 days of filing. Motion filed only one day before expiration of 30 day period did not provide sufficient time for Motion to be heard prior to expiration of 30 day period, requiring denial of Motion.

In re Hardeman, Case No. 10-65477 (Bankr. E.D. Mi. 2010) – Motion denied where Debtor failed to request a hearing on motion within time necessary to comply with 30 day requirement of Section 362(c)(3)(B). Petition filed August 12, Motion to Extend Stay filed August 26, but no hearing was set prior to September 13 resulting in automatic expiration of stay.

In re Robinson, 427 BR 412 (Bankr. W.D. Mi. 2010) – Automatic stay terminates with respect to debtor and property of 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 30th day after commencement of the case, leaving insufficient time to hold a hearing within the 30 day deadline. Motion to Extend Stay denied.

In re Dittman, Case No. 09-60009 (Bankr. E.D. Mi. 2009) - Extension of Stay requires hearing to be completed within 30 days of Petition date. Court lacks authority to extend stay if hearing is not completed within 30 days of commencement of case.

3.47 Grounds for Denial

In re Yatooma, Case No. 12-59348 (Bankr. E.D. Mi. 2012) – Motion must be served on all creditors as required by Rule 4001-5(a). Only certificate of service filed indicated that motion was served through Court's ECF system which means that only parties who received notice were those on ECF.

In re Leverette, Case No. 10-71000 (Bankr. E.D. Mi. 2010) - Motion to Extend Stay denied without prejudice where Debtor had two separate bankruptcy proceedings pending in the prior 12 months. There is no automatic stay to extend under the circumstances of this case. Debtor must file a Motion to Impose a stay under Section 362(c)(4)(B).

In re Conlin, Case No. 10-64036 – Motion denied where Motion filed too late to comply with 30-day hearing completion deadline in Section 362(c)(3)(B). Debtor filed petition on July 29 but did not file Motion to Extend until August 31, 2 days after deadline had already expired and stay had expired automatically.

In re Frazier, Case No. 10-59045 (Bankr. E.D. Mi. 2010) - Automatic stay did not come into effect where Debtor had two prior cases in preceding year. Motion to Extend Stay under Section 362(c)(3) does not apply. Motion denied without prejudice to Debtor filing Motion to Impose Stay under Section 362(d)(4).

In re Harris, Case No. 10-46451 (Bankr. E.D. Mi. 2010) – Motion to Extend Stay denied in Debtor's Third case within one year. Section 362(c)(4) provides that where there are two or more prior cases within the preceding year, there is no stay in effect. Party must file Motion to Impose Automatic Stay. Motion to Extend Stay denied where there was no stay in effect that could be extended.

In re Brock, Case No. 08-69720 (Bankr. E.D. Mi. 2009) - Motion to Extend Automatic Stay denied where counsel failed to attend 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.

3.48 Grounds for Extension

3.49 Effect of Expiration of Stay

Reswick v. Reswick, 446 BR 362 (9th Cir. BAP 2011) – Stay expires in total 30 days after filing of second case within one year. Expiration is not limited to actions against property of estate. Wage garnishment did not violate stay because stay expired 30 days after second case filing within a year pursuant to Section 362(c)(3)(A).

In re Magni, 2010 WL 5069553 (Bankr. D. Neb. 2010) - The stay would terminate only as to actions against 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.

3.50 “Re-imposition” of Expired Stay

FNB Bank v. Carlton, 2011 WL 3799885 (Bankr. N.D. Al. 2011) - Confirmed plan trumps expiration of automatic stay under section 362(c)(3)(B). Although automatic stay expired by operation of law 30 days after commencement of case, mortgage was properly treated in chapter 13 plan, mortgage company allowed plan to be confirmed without objection, and mortgage company received payments pursuant to confirmed chapter 13 plan. Pursuant to section 1327, confirmation of plan was binding on bank and bank was limited to remedies set forth in confirmed plan. The termination of the automatic stay, coupled with bank’s conduct and accepting plan payments and filing claims, and the express language of section 1327, precluded the bank from taking actions inconsistent with the terms of debtors chapter 13 plan. Lender’s pursuit of foreclosure action post-confirmation was in direct contravention of confirmed plan. Bank was guilty of contempt for willful violation of section 1327 entitling debtor to compensation for harm suffered as consequence of banks willful failure to abide by confirmation order.

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

F. Imposition of Automatic Stay

3.51 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.

3.52 Timing of Motion and Hearing

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

3.53 Grounds for Denial

DETROIT CONSUMER BANKRUPTCY CONFERENCE

3.54 Grounds for Imposition

3.55 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.

3.56 Effect of Failure to Impose Stay

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

G. Reinstatement of Automatic Stay

3.57 Generally

3.58 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.

4.3 Duties of Attorney as DRA

French v. Johnson Law Group, 2012 WL 3292854 (Bankr. N.D. Ohio 2012) – Section 526 sets forth certain restrictions on the conduct of debt relief agencies and provides a remedy for assisted persons where the debt relief agency “intentionally or negligently” failed to comply with its provisions or the provisions in Section 527, which addresses disclosures that a debt relief agency must make, and Section 528, which addresses both the contract that a debt relief agency is required to execute with the assisted person and its advertisement of bankruptcy assistance services. Sections 526, 527, and 528 by their express terms apply only to “debt relief agencies,” defined as “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110....” A “bankruptcy petition preparer” is defined as “a person, other than an attorney for the debtor ... who prepares for compensation a document for filing.” Thus, the restrictions set forth in Section 526 apply only to a person who for compensation provides bankruptcy assistance or prepares a document for filing in the

bankruptcy case. Complaint that alleged only that Defendant was a business purporting to offer debt relief and debt settlement services, without more, did not evidence that Defendant was Debt Relief Agency. Plaintiff did not allege that defendants prepared a petition for debtor and debtor was specifically told by defendants to seek other counsel if debtor wanted information on filing for bankruptcy.

In re Santiago, 2011 WL 4056700 (D.P.R. 2011) – Attorney, as “debt relief agency” must meet face to face with client prior to filing case and at every critical stage of the proceeding. Attorney had “personally trained and daily supervised paralegal” meet with clients and prepare all documents, although attorney did review documents before case filed. However, that procedure did not meet requirements under Section 526 through 528.

B. Necessity for

4.4 Corporations

First Chicago Bank & Trust v. Leibowitz, Case No. 11-2172 (7th Cir. 2011) – Prohibition against *pro se* corporate filings is not jurisdictional. Even though a *pro se* corporate filing is defective, it can be cured by an amended petition signed by an attorney pursuant to Rule 1009(a) of the Federal Rules of Bankruptcy Procedure. The amended petition may “relate back” to the original petition date pursuant to the equitable powers of the Court where the original defect was harmless. Subject-matter jurisdiction is intended to limit access to a federal tribunal in classes of cases that the Constitution or legislation declares off limits to the federal courts, it is not intended to punish litigants for errors or omissions made in the context of cases that are within jurisdictional limits (except for untimely notices of appeal). The “relation back” concept of Rule 15(c) of the Federal Rules of Civil Procedure, applicable to adversary proceeding complaints pursuant to Rule 7015 of the Bankruptcy Rules and applicable to involuntary petitions pursuant to Rule 1018 of the Bankruptcy Rules, may also be applied to voluntary petitions even though there is no express statute so requiring this result.

In re Richardson, Case No. 10-65958 (Bankr. E.D. Mi. 2010) – Motion for Relief From Stay filed by Corporation stricken where Motion not signed by attorney. Corporate officer or other individual who is not an attorney may not represent a corporation in federal court.

Carl Development v. Rickard, Case No. 10-4216 (Bankr. E.D. Mi. 2010) – Adversary complaint filed by “co-owner” of corporate plaintiff dismissed as party purporting to sign complaint was not an attorney. A legal entity such as a corporation must be represented by an attorney.

In re Kay Bee Properties, LLC., Case No. 09-52889 (Bankr. E.D. Mi. 2010) - Objections and Request for Hearing not signed by attorney stricken. Corporation cannot appear in court other than through an attorney.

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

In re Executive Business Corporation, Case No. 08-62865 (Bankr. E.D. Mi. 2008) - Corporation cannot file Petition without attorney. Petition not signed by attorney - case must be dismissed.

In re Beel Automotive, LLC., Case No. 09-63468 (Bankr. E.D. Mi. 2009) - Chapter 7 case dismissed where Voluntary Petition filed by individual who is not an attorney. A Limited Liability Corporation is governed by same rules as are applicable to corporations and partnerships, and may not file bankruptcy petition except through an attorney.

4.5 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.

4.6 Partnerships

4.7 Other Entities

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

C. *Pro Bono* Appointment

4.8 Parties Entitled to Appointment

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

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

In re Wilson, Case No. 05-54408 (Bankr. E.D. Mi. 2009) – Court's ability to appoint *pro bono* counsel is limited to providing legal services to Debtors involved in adversary proceedings related to discharge and non-dischargability of certain Debtor, and to the indigent former spouse of the Debtor regarding dischargability 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.

4.9 Limitations on Appointment

4.10 Termination of *Pro Bono* Appointment

D. Attorney Fees

4.11 Generally

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

In re Baer, 2012 WL 2368698 (6th Cir. BAP 2012) – Section 362(k) authorizes award of actual damages, including attorney fees and costs, for willful violation of the automatic stay. If fees are appropriate under Section 362, the amount must be reasonable, based on customary compensation charged by comparably skilled practitioners, and fee must bear a reasonable relationship to the amount in controversy.

In re McLean Wine Co., Inc., 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – Awards of fees are governed by 11 U.S.C. § 330. Bankruptcy court can award, after notice and hearing, reasonable compensation for actual, necessary services rendered and reimbursement for actual, necessary expenses. Court must consider nature, extent, and value of the services and to consider all relevant factors such as hours spent, the rates charged, and the necessity and benefit of the services at the time rendered. Bankruptcy court is precluded from awarding compensation duplicative services, services that were not reasonably likely to benefit the debtor's estate, or services that were not necessary to the administration of the estate.

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

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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 (6th Cir. BAP 2008) – Holder of oversecured claim entitled to reimbursement for fees and costs that are necessary to the collection and protection of creditor's claim. There is no formula or set rule by which the value of legal services may be appraised, and the amount which would represent reasonable compensation determined. The reasonableness is to be determined upon a consideration of all the facts and circumstances presented in the record, primarily the amount involved and available, the nature of the responsibility assumed by the attorney, the character and extent of the services. Opinion testimony by lawyers of experience and reputation is admissible as expert testimony on these issues. The final allowance is peculiarly within the discretion of the Court and represents an exercise of judicial discretion founded upon the knowledge of the Court making allowance for the real value of the service is performed. The Bankruptcy Court is not required to address in detail each line item of the fee application but must make findings, in such detail and exactness as the nature of the case permits, of facts on which an ultimate conclusion can rationally be predicated and give the Appellate Court a clear understanding of the basis of the Bankruptcy Court's decision. Bankruptcy Court did not err in concluding that charges for four different lawyers all working on an objection to confirmation or time spent litigating cash collateral matters in a later phase of the case were unreasonable.

In re Russell, 2009 WL 2849085 (E.D. Mi. 2009) – Bankruptcy Court has inherent authority to revisit prior fee award during pendency of case. Court must determine the benefit and necessity of counsel's services. Counsel will not be compensated for services that were not reasonably likely to benefit 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.

4.12 Chapter 13 – "No Look" Fees

Sikes v. Crager, Case No. 11-30982 (5th Cir. 2012) – "No look" fee is not an entitlement, but is an amount that the court can award absent objection. Trustee who objected to the "no look" fee on the basis of simplicity of the case did not bear the burden of proving reasonableness, as the party seeking fees always bears that burden, even if seeking the "no look" fee

where an objection has been lodged. However, fees were reasonable under circumstances. Even if case had otherwise been simplistic, Trustee's objections based on lack of good faith added sufficient complexity to warrant award of full "no look" fee.

4.13 Fee Agreement

In re Juliao, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Counsel not entitled to compensation for services in connection with co-debtor stay where agreement was that compensation, if any, would come from sanctions awarded against creditor, but claims against creditor were ultimately decided adverse to debtor and co-debtor.

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

4.14 Rule 2016 Disclosure

In re LaCourse, Case No. 11-9338 (Bankr. W.D. Mi. 2012) – Attorney must file supplemental 2016 statement within 14 days of any payment or agreement not previously disclosed. Original 2016 statement provided for fees of \$700 for services in Chapter 7. Attorney later demanded additional \$200 for "complications" arising from debtor's self-employment, and demanded another \$80 to add omitted creditors. However, Attorney never filed supplemental 2016 to disclose additional fees or charges. Failure to file amended 2016 warranted disgorgement of fees in excess of original

DETROIT CONSUMER BANKRUPTCY CONFERENCE

\$700.

4.15 Time for Filing Application

In re Alda, 2010 WL 4924615 (6th Cir. BAP 2010) – Counsel’s failure to file fee application within deadline established by Court Order and application, when filed, failed to contain all items required by Order, warranted denial of fees in their entirety. Counsel’s alleged “inadvertence” and “oversight” that caused application to be untimely filed did not excuse non-compliance with deadline for filing fee application.

In re Whyco Finishing Technologies, LLC, Case No. 08-69940 (Bankr. E.D. Mi. 2009) – Interim application denied as premature. Court entered Order directing that each professional may file only one final fee application. Interim application is not “final application” as required by Court’s scheduling order. Application denied without prejudice.

Peoples Bank of Kentucky v. U.S. Bank, 2009 WL 2984792 (Bankr. E.D. Ky. 2009) – Plaintiff not entitled to award of attorney fees based on Partial Summary Judgment that determined liability in favor of Plaintiff but did not resolve issue of damages. Court cannot award attorney fees to prevailing party until all issues have been resolved and there has been a final disposition in the action. Motion to Set Attorney Fees denied as premature.

4.16 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.

4.17 Content of Application

In re Hensel, Case No. 10-58001 (Bankr. E.D. Mi. 2011) – Local rule requires every fee application to provide a narrative summary explaining services performed and how the services benefitted the estate and, if the application seeks approval of more than \$3,500, to specifically identify the circumstances of the case that make the amount requested reasonable. Statements that are merely summary of services provided may satisfy the first requirement of a summary of services performed, but does not satisfy the separate and additional requirement to specifically identify circumstances of the case that make amount reasonable. Explanation must indicate what it was about this particular case that required more work than a typical Chapter 13 case. Paragraph that includes many items of work that occur in every Chapter 13 case did not meet requirement of rule. Court should not have to sift through lengthy summaries to separate ordinary from non-ordinary. Burden is on counsel to provide information on “non-ordinary services”, in a separate, clearly identifiable section.

In re Tack, Case No. 09-41251 (Bankr. E.D. Mi. 2010) – Counsel not entitled to “bonus” as compensation for time expended but not recorded on timesheets and not included in itemized time records attached to application.

In re NM Holdings Company, LLC, Case No. 03-48939 (Bankr. E.D. Mi. 2010) – Fee application that failed to provide itemized time records required by Local Bankruptcy Rule 2016-1(a)(15) required supplementing. Local Rule 2016-1(a)(15) requires itemized time records even where fee sought is on contingency fee basis.

American Express Bank v. Askenaizer, 418 BR 495 (1st Cir. BAP 2009) – Trustee who failed to include request for Attorney Fees in objection to claim and only perfunctorily raised request in reply to Creditor’s Response to Objection failed to properly raise issue before bankruptcy Court.

In re Kub, Case No. 09-52512 (Bankr. E.D. Mi. 2010) – Application that failed to provide the narrative summary required by Local Bankruptcy Rule 2016-1(a)(3) denied without prejudice where Applicant failed to file a supplement to its fee application to cure the deficiencies.

In re Bilewicz, Case No. 09-64800 (Bankr. E.D. Mi. 2010) – Application that failed to provide the narrative summary required by Local Bankruptcy Rule 2016-1(a)(3) denied without prejudice where Applicant failed to file a supplement to its fee application To cure the deficiencies.

In re 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.

4.18 Burden of Proof

In re McLean Wine Co., Inc., 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – Burden of proof as to entitlement to and reasonableness of a fee request is upon the moving party Bankruptcy court is afforded broad discretion in determining attorney’s fees but must expressly discuss the amounts that are not supported by the application and provide a reasoning to support the court’s decision. Bankruptcy court may award compensation that is less than the amount of compensation requested even absent an objection to the application.

In re Gaylord Hardware, LLC., Case No. 09-24018 (Bankr. E.D. Mi. 2010) – Burden of proof is on professional requesting compensation. Time records must contain description of services that is sufficient to substantiate time claimed.

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

In re CMC Telecom, Inc., Case No. 07-56001 (Bankr. E.D. Mi. 2009) – Burden of proof is upon the applicant to justify the requested fees. This burden is not to be taken lightly, especially given that every dollar expended on legal fees results in a dollar less than is available for distribution to creditors or used by Debtor. Bankruptcy Court must indicate amounts that are not supported by the Applicant and provide reasoning to support the Court’s decision.

In re Scarlett Hotels, LLC., 08-8002 (6th 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.

4.19 Lodestar

Berliner v. Pappalardo, Case No. 11-1830 (1st Cir. 2012) - Lodestar requires court to multiply number of hours productively spent by a reasonable hourly rate to calculate a base figure. Court must discount time spent on unnecessary, duplicative or overworked tasks. In evaluating fee application, bankruptcy court is not required to march mechanically through a checklist of the section 330 factors when fashioning a fee award. Court must merely make a fee calculation that takes the section 330 factors fairly into account. The fact that debtors were “above median income” which require preparation of means test, standing alone, does not make case unusually intricate or extraordinary so as to warrant a greater fee. Purported need for extensive communications with the client does not warrant substantial increase in fees.

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Lawyers have an obligation to keep handholding within reasonable limits in order to control costs. In reducing fees, bankruptcy court is not required to proceed line by line through the fee application or to explain a fee award with excessive precision. Court must provide explanation which is sufficiently detailed to allow a reviewing court to ascertain the lower courts thought process.

In re McLean Wine Co., Inc., 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – Bankruptcy courts should use the lodestar method in determining reasonable attorney fees. Starting point in the lodestar analysis is to determine a reasonable hourly rate and then to determine the lawyer's reasonable hours. Court has an obligation to ask whether the rate charged for the service is reasonable in light of the complexity and importance of the task. For Applicant's hours to be reasonably expended, time must relate to a service that is reasonably likely to benefit the estate or necessary to the administration of the bankruptcy case. The results obtained is a major factor in determining whether the services at issue bestowed a benefit upon the estate. Great amounts of time and energy with little result require greater scrutiny. When the attorney's efforts fail to produce a significant benefit, the task of proving the reasonableness of the fees is more difficult. Courts objectively consider whether the services rendered were reasonably likely to benefit the estate from the perspective of the time when such services were rendered and determine whether, when viewed under the circumstances in existence at the time, the services were reasonably calculated to benefit the estate. Court should resist the temptation to engage in '20/20 hindsight,' and focus on facts known or which should have been known to the applicant at critical points during the pendency of the case. Attorney's request for compensation of \$28,000 for services rendered in adversary proceeding that, at most, could have returned only \$30,000 to estate were not reasonable. Further, adversary actually ended up with Estate paying the adversary defendant \$5,000, thereby depleting, not enhancing, the estate. Reasonable cost-benefit analysis at some point or points would have indicated that its fees and costs were quickly rising to a level very near the maximum possible recovery. Once it becomes reasonably obvious that the prospective costs of commencing or continuing litigation will exceed any benefit to the estate, the attorney is duty bound to abandon the claim and Applicant should have considered either abandoning the claim or attempting to settle it. In second adversary, Application incurred fees of \$31,000 to recover alleged fraudulent transfer of pickup truck worth, at most, \$4,500.00. Applicant should have exercised critical, independent professional judgment, either initially or at some point during the proceedings, and refrained from pursuing the matter given that a predictable result would realize that, at most, it could recover at most only \$4,500. Applicant cannot justify excessive hours by indicating that Applicant was merely following directions from Debtor or from Creditors. Attorney has independent duty to exercise professional judgment and to not take on actions that are not reasonably likely to benefit parties.

In re Juliao, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Lodestar begins with determination of reasonable hourly rate and reasonable number of hours. Pivotal question is whether services rendered post-confirmation were beneficial to debtor or estate. Court must adjust lodestar based on benefit or lack of benefit of services. Court is statutorily prohibited from awarding compensation for unnecessarily duplicative services, services that were not reasonably likely to benefit estate, or services not necessary to administration of estate. Court must view services at the time they were rendered, not at the time the application is ruled on; and cannot award compensation for services that at the time they were rendered were not related to a realistically obtainable goal. Counsel is not entitled to compensation simply because counsel was only doing what client wanted it to do. Just because client wants counsel to embark on course of action does not mean attorney is obligated to take action if doing so is inconsistent with lawyer's independent exercise of professional judgment.

In re Smith, 2011 WL 2293261 (Bankr. N.D. Ohio 2011) – Lodestar multiplication of reasonable hourly rate times reasonable number of hours creates presumptive reasonable compensation, subject to adjustment. Counsel entitled to compensation for asserting unclear or debatable proposition of law, but not entitled to compensation for arguing against settled law.

Orlow v. Carroll, 2011 WL 1102821 (E.D. Mi. 2011) – Bankruptcy Court required to use lodestar method to determine fees for debtor's counsel. Court erred in reducing fees to presumptive "no look" amount without analyzing the hours expended by attorneys and paraprofessionals or the hourly rate of those attorneys and paraprofessionals as set forth in Appellant's fee application. The only rationale provided for reducing the fee award was a mistake in the Means Test which should not have been 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 recognized that the second mortgage could be avoided; debtors’ attorney should failed to correctly fill out the chapter 13 means test; debtor’s attorney should have resolved the trustee’s objection regarding the 2008 tax return more quickly; and debtors’ attorney should have attended the all-important hearing on debtor’s objection to proof of claim. Fees not warranted in a case where the debtors’ attorney has failed to identify, or attend to, the most obvious issues in the case. Court also considered customary fee is in similar cases that includes services of the sort usually performed by debtors’ attorneys in chapter 13 cases including routine objections to claims, responding to routine objections to plan confirmation, and filing amended plans. Any additional time required by this case occurred as a result of poor issue spotting, poor execution and inattention. There were no matters requiring unusual or unexpected work, difficulty or surprise.

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.”

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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.

4.20 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 non-legal matters in connection with sale of Debtor’s assets where Debtor had retained separate entity to engage in sale of Debtor’s primary assets. Counsel not entitled to compensation for services which duplicate or overlap services performed by other professionals. Counsel not entitled to any compensation for drafting Disclosure Statement and Plan of Reorganization where Plan was “so divorced from reality” that it was “futile to propose or pursue the Plan”. Promulgation of plan constituted pursuit of a strategy “that could not succeed from the moment it was proposed.”

4.21 Hourly Rate

In re Connolly North America, LLC, Case NO. 01-57090 (Bankr. E.D. Mi. 2012) – To determine reasonable hourly rate, court must consider customary rates in the venue of the court, taking into account rates for attorneys of reasonably comparable skill, experience and reputation. Chapter 7 Trustee was forced to look to attorneys in Chicago to find necessary experience and ability to investigate claims against, and if necessary, sue prior Trustee and who would also be willing to do so. Court did not have to resolve dispute over which geographic market controlled where rates were reasonable by standards of rates customarily paid in the Detroit market for comparable attorneys.

In re Storozhenko, Case No. 11-57443 (Bankr. E.D. Mi. 2011) – Requested hourly rate of \$400 per hour was unreasonably high given lack of complexity or unusual nature of the matters involved. Court would reduce hourly rate to \$240 which is reasonable rate for services performed.

In re Gaylord Hardware, LLC., Case No. 09-24018 (Bankr. E.D. Mi. 2010) – Hourly rate for associate with less than one year experience of \$235 was excessive and reduced to \$175.00.

In re Kasubowski, Case No. 09-20128 (Bankr. E.D. Mi. 2010) – Hourly rate of \$250 warranted for attorney with decades of experience in Chapter 13, and hourly rate was commensurate with degree of knowledge and skill of attorney.

In re Tack, Case No. 09-41251 (Bankr. E.D. Mi. 2010) – Attorney awarded fees at hourly rate of \$350, although this rate is at the “very high end” of hourly rates in the district for counsel to a Chapter 7 Trustee. However, Court denied additional charge for “upcharge/bonus” as counsel was adequately compensated without this additional “bonus”. Counsel not entitled to “bonus” as compensation for time expended but not recorded on timesheets and not included in itemized time records attached to application. Results were not so exceptional as to warrant upward enhancement in light of hourly

rate charged.

In re Hickey, Case No. 07-23041 (Bankr. E.D. MI. 2009) - Appropriate hourly rate determined with reference to ability and experience of attorney and rates charged by similar attorneys in the same geographic areas. The hourly rate actually charged by counsel in other actions does not control or limit the hourly rate in any particular case. Attorney who routinely charged only \$200 per hour for state Court litigation awarded \$250 per hour. Attorney had 20 years experience in federal and state Court litigation matters and the hourly rate of attorneys in Detroit and Flint routinely range from \$200 to \$350 per hour. High hourly rate also requires "corresponding requirement that attorneys be efficient in performing these services." Court found that request for 19.8 hours for certain services did not demonstrate the requisite efficiency and reduced the time to 8 hours.

In re CMC Telecom, Inc., Case No. 07-56001 (Bankr. E.D. Mi. 2009) – Major factor in determining what is a reasonable hourly rate for purposes of the lodestar is the rate charged by comparable attorneys in the local area. Where the case is of a complexity, size or scope sufficient to require participation of counsel from various parts of the country, consideration of hourly rates can also include a comparison of hourly rates on a national basis. High hourly rate carries with it a responsibility to be extremely efficient. Attorneys with substantial expertise can charge a higher hourly rate but will be more efficient than less experienced counsel. Attorneys with substantial experience must exercise billing judgment to assure that an appropriate fee is charged given the nature of the services, rather than presuming that a fee is reasonable simply by multiplying the rate charged by the individual who provided the service by the time spent.

4.22 Hours Expended

In re McLean Wine Co., Inc., 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – For Applicant's hours to be reasonably expended, time must relate to a service that is reasonably likely to benefit the estate or necessary to the administration of the bankruptcy case. The results obtained is a major factor in determining whether the services at issue bestowed a benefit upon the estate. Great amounts of time and energy with little result require greater scrutiny. When the attorney's efforts fail to produce a significant benefit, the task of proving the reasonableness of the fees is more difficult. Courts objectively consider whether the services rendered were reasonably likely to benefit the estate from the perspective of the time when such services were rendered and determine whether, when viewed under the circumstances in existence at the time, the services were reasonably calculated to benefit the estate. Court should resist the temptation to engage in '20/20 hindsight,' and focus on facts known or which should have been known to the applicant at critical points during the pendency of the case. Attorney's request for compensation of \$28,000 for services rendered in adversary proceeding that, at most, could have returned only \$30,000 to estate were not reasonable. Further, adversary actually ended up with Estate paying the adversary defendant \$5,000, thereby depleting, not enhancing, the estate. Reasonable cost-benefit analysis at some point or points would have indicated that its fees and costs were quickly rising to a level very near the maximum possible recovery. Once it becomes reasonably obvious that the prospective costs of commencing or continuing litigation will exceed any benefit to the estate, the attorney is duty bound to abandon the claim and Applicant should have considered either abandoning the claim or attempting to settle it. In second adversary, Application incurred fees of \$31,000 to recover alleged fraudulent transfer of pickup truck worth, at most, \$4,500.00. Applicant should have exercised critical, independent professional judgment, either initially or at some point during the proceedings, and refrained from pursuing the matter given that a predictable result would realize that, at most, it could recover at most only \$4,500. Applicant cannot justify excessive hours by indicating that Applicant was merely following directions from Debtor or from Creditors. Attorney has independent duty to exercise professional judgment and to not take on actions that are not reasonably likely to benefit parties.

In re Juliao, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Court must determine whether hours charged were reasonably incurred. When the services produce no significant benefit, task of proving reasonableness of fees becomes more difficult. Counsel is not entitled to compensation for hours that were not reasonably expended. Counsel spent too much time seeking sanctions that were inherently questionable for alleged violation of co-debtor stay given lack of showing that creditor took actions that were in any way harassing or coercive. Services rendered to benefit third party, not co-debtor, are not properly awarded. Counsel's compensation is limited to services representing interests of debtor. Services performed for non-debtor wife were not for benefit of debtor and do not constitute administrative fees in debtor's Chapter 13 case, particularly where any reasonably foreseeable benefit would not be for debtor or estate. . Counsel is not entitled to compensation simply because counsel was only doing what client wanted it to do. Just because client wants counsel to embark on course of action does not mean attorney is obligated to take action if doing so is inconsistent with lawyer's independent exercise of professional judgment.

4.23 Clerical Services

In re Connolly North America, LLC, Case No. 01-57090 (Bankr. E.D. Mi. 2012) – Attorney time spent to obtain copy of hearing transcript is clerical and is not compensable by attorney at attorney's hourly rate.

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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.

4.24 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.

4.25 Benefit to Debtors

In re McLean Wine Co., Inc., 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – The results obtained is a major factor in determining whether the services at issue bestowed a benefit upon the estate. Great amounts of time and energy with little result require greater scrutiny. When the attorney's efforts fail to produce a significant benefit, the task of proving the reasonableness of the fees is more difficult. Courts objectively consider whether the services rendered were reasonably likely to benefit the estate from the perspective of the time when such services were rendered and determine whether, when viewed under the circumstances in existence at the time, the services were reasonably calculated to benefit the estate. Court should resist the temptation to engage in '20/20 hindsight,' and focus on facts known or which should have been known to the applicant at critical points during the pendency of the case.

In re Storozhenko, Case No. 11-57443 (Bankr. E.D. Mi. 2011) – Time spent on matters that were done as part of general representation of debtor is not compensable in stay violation action and included time spent attempting to settle underlying actions; and filing a response to a Motion for Reconsideration which could not have been filed unless Court ordered response to be filed, which it did not.

In re Juliao, 2011 WL 6812542 (Bankr. E.D. Mi. 2011) – Court is statutorily prohibited from awarding compensation for unnecessarily duplicative services, services that were not reasonably likely to benefit estate, or services not necessary to administration of estate. Court must view services at the time they were rendered, not at the time the application is ruled on; and cannot award compensation for services that at the time they were rendered were not related to a realistically obtainable goal. Services related to debtor's motion for sanctions for alleged violation of co-debtor stay were not necessary and could not reasonably have benefitted debtor or estate. Alleged violation for co-debtor stay involved co-debtor's inability to obtain employment or start a new business, neither of which impacted debtor's plan payments or ability to consummate plan. Instead, claim for violation of co-debtor stay would have produced, at most, a personal benefit to debtor by allowing co-debtor to work fewer hours. Personal benefits derived by debtor do not constitute benefit to estate.

In re Nashville Senior Living, LLC, 2010 WL 4260034 (Bankr. M.D. Tn. 2010) – Services are compensable if, at the time the services were performed, there was a good faith basis to believe the services would produce a benefit. Counsel's services in an unsuccessful appeal of an Order permitting sale of assets were compensable notwithstanding counsel's inability to prevail in appeal because counsel had good faith basis for appeal.

In re Wheeler, Case No. 10-54111 (Bankr. E.D. Mi. 2010) – Lodestar requires court to determine reasonable number of hours for services performed and reasonable hourly rate to be applied to those services. Services necessary to correct errors that should not have been made in the first place are not compensable or in the alternative the time spent making the error in the first instance is not compensable. Although time spent in resolving good faith objections and disagreements over plan provisions will be compensable, time spent on a legal question that was resolved in prior cases years ago is not compensable.

In re Gaylord Hardware, LLC., Case No. 09-24018 (Bankr. E.D. Mi. 2010) – Counsel not entitled to compensation for services rendered after it became apparent that 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.

4.26 Billing Judgment

In re McLean Wine Co., Inc., 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – Applicants must exercise good faith billing judgment by reducing fees where the total amount of hours billed would be unreasonable in relation to the services performed. Attorney should write-off some of the hours actually expended in an effort to bring the bill in line with the economic value actually produced. The Michigan Rules of Professional Conduct specify taking into account as one of the factors to be used in determining the reasonableness of a fee “the amounts involved and the results obtained.” Amounts awarded would be drastically reduced primarily given amounts involved and results. The net recovery of the two actions was virtually zero. Fees must be limited to reasonable amount that reflects work done up to the point where it should have been clear that these matters should no longer be so zealously pursued and they should be brought to a close in some appropriate manner.

4.27 Fee Application – Time for Preparing

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

4.28 “Fees on Fees”

In re Makris, Case No. 11-1666, 2012 US App. Lexis 10359 (3d Cir. 2012) – Creditor is not entitled to recover attorney fees incurred in litigating amount of attorney fees. Bank pursued debtor for payment on a personal guarantee including fees associated with the guarantor litigation. Bank sought to recover fees incurred by the bank in determining whether the debtor was liable for the fees incurred in the guarantor. Provision of underlying note that authorized recovery of attorney fees associated with enforcement of note and guarantee did not encompass fees incurred in litigating entitlement and amount of fees themselves.

4.29 Disgorgement

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

In re Harwell, 2010 WL 4901787 (Bankr. W.D. Mi. 2010) – Disgorgement of fees warranted where attorney failed to attend first meeting of creditors and instead arranged for attorney who debtor never met to attend, coupled with attorney’s failure to supplement fee disclosure to reveal fees paid to other attorney in violation of rules against fee sharing; 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

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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.

4.30 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.

4.31 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.

4.32 Travel Time

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

4.33 Overhead

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

4.34 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.

4.35 Post-Petition Services

In re Carwile, 2011 WL 6176201 (Bankr W.D. Ky. 2011) – Attorney who continued to perform services for debtor post-petition without knowledge of bankruptcy filing not entitled to compensation from bankruptcy estate. Attorney who was never obtained court approval for employment by estate not entitled to recover in quantum meruit.

In re Wolff, 2010 WL 4959949 (Bankr. E.D. Tn. 2010) – Debtor’s attorney who continued to perform services for debtor post-petition not entitled to administrative claim against estate. Attorney hired by Trustee will be compensated as administrative expense, but attorney hired by debtor is not hired by Trustee and does not represent estate.

4.36 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.

4.37 Fee Enhancements

In re Trailer Source, Inc., 2012 WL 2603244 (Bankr. M.D. Tn. 2012) – Lodestar process requires determination of reasonable number of hours expended times reasonable hourly rate to determine reasonable fees. However, lodestar is not the end of the inquiry, and Court can adjust fees upward or downward according to other considerations. Enhanced fees are reserved only for rare and exceptional cases and, if warranted, should not exceed one-third of the lodestar amount. Attorney entitled to enhancement where efforts produced a settlement that increased the money received by the estate from \$50,000 to \$3 million, substantially in advance of any trial date and while minimizing costs. Attorney took case at substantial risk of non-payment; had case been unsuccessful, there would have been no assets available for payment. But for efforts of attorney, estate would likely have been insolvent instead of producing large recovery for benefit of creditors. Lodestar calculation produced fees that were at the low-end for attorneys with comparable experience in bankruptcy and litigation.

In re Arter & Hadden, LLP, 2011 WL 3422788 (Bankr. N.D. Ohio 2011) – Lodestar process permits court to enhance fees based on factors such as : (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment; (5) the customary fee; (6) whether the fee was fixed or contingent; (7) time limitations imposed; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. However, enhancement is appropriate only where factors underlying enhancement have not already been considered in reaching primary award. Moving party denied enhancement where party failed to present evidence to support enhancement for reasons not already considered by the court.

4.38 Surcharge

In re McLean Wine Co., Inc., 2011 WL 6348990 (Bankr. E.D. Mi. 2011) – Section 506(c) allows court to surcharge secured creditors for reasonable and necessary costs of preserving, recovering and disposing of property securing claims of creditors. Surcharge under § 506(c) is proper where the claimant establishes that the secured party directly or impliedly consented or caused the expense. Party seeking to surcharge bears burden of proof that (1) the expense must be necessary for the preservation or disposal of the collateral, (2) the amount of the expense must be reasonable, and (3) the secured creditor must benefit from the expense; or alternatively that the secured party directly or impliedly consented or caused the expense. Consent will not be inferred merely from the fact that the secured party cooperated with the debtor or that Creditors encouraged the performance of services, as the debtor and the Applicant ultimately bear responsible for deciding what actions to pursue.

4.39 Attorney for Chapter 7 Trustee

In re Hash, 2012 WL 2161621 (Bankr. W.D. Ky. 2012) – Chapter 7 Trustee’s application to retain counsel granted. Section 327(a) allows the trustee, with the court’s approval, to employ one or more attorneys. Trustee with the authority to hire professionals without the interference of creditors and should be deprived of his or her choice of professionals in “only the rarest cases. The Trustee clearly believed that attorney’s employment is in the best interest of the estate and that he has the expertise, familiarity and skill to proceed with representation of the estate. Attorney to be retained must not hold or represent an interest adverse to the estate, and must be disinterested. “Disinterested person” is defined under Section 101(14) as (a) a person who is not a creditor, equity security holder, or insider; (b) a person who is not and was not, within two years before the date of the filing of the Petition, a director, officer or employee of the debtor; and (c) a person who does not have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or for any other reason. Attorney was “disinterested” within the meaning of the statute. To the that any sums are possibly owed to the attorney due to his past representation of the Debtor, attorney waived any claim at the hearing eliminating any possibility that the

DETROIT CONSUMER BANKRUPTCY CONFERENCE

attorney could be considered, and disqualified as, a creditor of the estate. Creditor's contention that a conflict "may" arise, if the Debtor claims an exemption and a dispute arises over whether the exemption should be allowed did not demonstrate any actual conflict in existence Court would decline the Trustee's Application on mere possibility that a conflict may arise at some point in the future.

In re Alexander, 469 BR 684 (Bankr. W.D. Ky. 2012) – Chapter 7 Trustee who failed to seek court approval to retain attorney not entitled to *nunc pro tunc* authorization where litigation for which attorney had been retained had already been concluded. Failure to seek court approval to retain attorney for roughly three years after attorney was retained to prosecute avoidance action did not rise to level of "extraordinary circumstances" warranting *nunc pro tunc* approval.

In re McLean Wine Co., Inc., 2011 WL 6348990 (Bankr. E.D. Mi. 2011) - Trustee's attorney is not entitled to professional compensation for performing the statutory duties imposed on the trustee by 11 U.S.C. § 704. Professional skills of an attorney are required when there is an adversary proceeding or a contested motion that requires the trustee to appear and prosecute or defend, when an attorney is needed for a court appearance, or when other services are needed that require a law license. Preparation of an application for employment of a professional is a duty generally performed by a trustee without the assistance of an attorney. Absent a showing by applicant to the contrary, routine employment applications remain a trustee duty. Courts have denied requests for compensation by a trustee's counsel for time entries relating to routine telephone calls and correspondence with information seekers. Applicant's services to the Trustee for responding to the inquiries from parties in interest and creditors are not compensable.

E. *Pro Hac Vice*

4.40 Grant and Withdrawal of Approval

In re Hake, Case No. 08-8039 (6th Cir. BAP 2008) – Granting and revoking admission *pro hac vice* vested in sound discretion of Bankruptcy Court. Court properly revoked *pro hac vice* admission in light of argumentative, disruptive and antagonistic behavior of counsel. Counsel used disrespectful tone of voice toward Court, rolled his eyes at the Court, raised his voice, and made faces while the Court was speaking. Counsel violated pretrial order in limine by subpoenaing witnesses whom had previously been excluded from testifying and then engaging in "revisionist history" in a series of explanations which Court found "not credible". Counsel's antics far exceeded the standard of "zealous advocacy" and exhibited a deliberate disdain for the Bankruptcy Court. Bankruptcy Court acted appropriately and acting to preserve dignity and decorum of the Courtroom.

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

F. Withdrawal of Counsel

4.41 Procedure

JP Morgan Chase Bank, N.A. v. Taylor, Case No. 10-5469 (Bankr. E.D. Mi. 2010) - Defendant's Counsel's Motion to Withdraw as counsel was not excuse for failure to timely file response to Plaintiff Motion for Summary Judgment. Unless and until Court grants Motion to withdraw, counsel remains counsel of record in case.

Phillips v. Sallie Mae, Case No. 09-6573 (Bankr. E.D. Mi. 2010) – Motion to Withdraw denied without prejudice where the Notice of the Motion was defective. Notice incorrectly identified the party for whom counsel had appeared and instructed any opposing party to file responses in the incorrect Clerk's Office.

In re Davis, Case No. 05-57146 (Bankr. E.D. Mi. 2009) - "Notice of Withdrawal of Attorney" not effective to discharge counsel of record. Federal Rule of Bankruptcy Procedure 9014 and Local Rule 9024-1 require counsel to file a Motion to Withdraw with proper notice to Debtor, creditors and all other parties in interest.

In re Digital Gas, Inc., Case No. 08-54958 (Bankr. E.D. Mi. 2008) – Motion to Withdraw denied without prejudice where Notice of Motion did not comply with form on Court website and where Motion misstated deadline to respond by failing to allow 3 days for mailing on those creditors not receiving notice by ECF. Motion filed October 2 with 15

days notice incorrectly stated that last day to object was October 17. Notice deadline should have been October 20 pursuant to Federal Rule of Bankruptcy Procedure 9006(f).

4.42 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.

4.43 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.

4.44 Grounds to Request Withdrawal

In re LaCourse, Case No. 11-9338 (Bankr. W.D. Mi. 2012) – Grounds exist to withdraw where there has been a deterioration of attorney-client relationship. Client’s filing of grievance evidences breakdown. Debtor would not be prejudiced where debtor has already received a discharge and the only things necessary to do are to produce additional documents to the Chapter 7 Trustee and to file amendments, and debtor had the ability to perform those tasks without counsel.

In re Toney, 2012 WL 1854259 (Bankr. N.D. Ohio 2012) – Client filing grievance does not create per se conflict of interest between attorney and client. Court must look at facts of case including nature of grievance to determine what effect, if any, grievance may have on attorney-client relationship. Attorney failed to present any information on nature of grievance and debtor indicated desire that attorney remain counsel of record, indicating that relationship has not been harmed in such a way as to hinder future representation. Representation has continued for 9 years and it is reasonable for attorney to remain rather than requiring debtor to find new counsel and spend time getting up to speed. Debtor’s complaint with attorney stemmed from fact that Chapter 13 had been pending for 9 years. Record indicated that case had been pending because debtors failed to keep current in plan payments and not because of any fault of attorney. Motion to withdraw denied.

Burrage v. Homecomings Financial Network, Inc., 2010 WL 3239357 (Bankr. N.D. Ohio 2010) – Ohio Rules of Professional Conduct permit counsel to withdraw where withdrawal will not have material adverse 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.

G. Professional Fees

4.45 Generally

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

4.46 Limitations

Stickel v. SP Acquisition, LLC, 2008 WL 3153931 (6th Cir. 2008) – Asset Purchase Agreement capped Professional fees at \$1.25 million. Cap applied to total aggregate professional fees including fees charged by liquidating agent for

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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.

4.47 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.

4.48 Retention of Professionals – *Nunc Pro Tunc* Approval

In re Alexander, 2012 WL 1500247 (Bankr. W.D. Ky. 2012) – Chapter 7 Trustee who failed to seek court approval to retain attorney not entitled to *nunc pro tunc* authorization where litigation for which attorney had been retained had already been concluded. Court must strictly construe *nunc pro tunc* requests. Party seeking relief must prove by clear and convincing evidence that the trustee expressly contracted with the professional to perform services; that the party for whom the work was performed consents to *nunc pro tunc* relief; that the application has provided notice of the application to creditor and parties in interest, none of whom offer any reasonable objection to the *nunc pro tunc* relief; the professional satisfies all requirements for retention under Section 327 and remained qualified at all times while performing the services; the work was properly performed, efficiently and to a high standard of quality; no actual or potential prejudice would inure to any other party or to the estate; applicant's failure to seek pre-employment approval is satisfactorily explained; and failure did not evidence a pattern of inattention or negligence. Trustee's simple neglect does not rise to the level of exceptional circumstances". Failure to seek court approval to retain attorney for roughly three years after attorney was retained to prosecute avoidance action did not rise to level of "extraordinary circumstances" warranting *nunc pro tunc* approval.

In re Machinery Maintenance Specialists, Inc., Case No. 09-42060 (Bankr. E.D. Mi. 2010) – Section 327 requires court approval for debtor's retention of counsel in Chapter 11 case. In considering whether to grant *nunc pro tunc* approval for retention of professional, Court must consider whether approval would have been granted had request been filed timely, and must also consider "equitable factors" such as whether the applicant or some other person had the responsibility for applying for approval; whether the applicant was under time pressure to begin before approval was obtained; amount of delay before applicant tried to obtain *nunc pro tunc* approval; extent to which compensation to applicant would prejudice third parties; and any other relevant factors as found by the court. *Nunc pro tunc* approval denied where Counsel was solely responsible for filing the application, there was no time pressure that would have prevented filing at commencement of case, counsel delayed more than one year after filing the case to seek approval for retention and then did so only after the United States Trustee filed a Motion for Turnover of the pre-petition retainer, and allowing counsel to keep the unapproved retainer would adversely affect other parties.

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

4.49 Retention of Professionals – Standard for Approval Generally

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

4.50 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 adverse to a claim to

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

H. Bankruptcy Petition Preparer

4.51 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.

4.52 Allowable Services

In re Richards, 2012 WL 3870446 (Bankr. N.D. Ohio 2012) – BPP is allowed to type information on the official forms that has been provided by and at the direction of the debtor and providing the forms to the debtors for filing with the court. BPP is prohibited from unauthorized practice of law, BPP exceeded lawful bounds by providing debtor a list of documents to provide to BPP; explained credit counseling requirement; provided information to debtor on documents required at the meeting of creditors; analyzed, sorted and compiled information from credit reports; made decisions on what information should be included where on the schedules, statements, and means test, including what should be included on Schedule C; reminded debtor after first meeting of creditors of need to complete financial management class; and provided information and a cover sheet for debtor to file in connection with financial management.

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.

4.53 Compensation

In re Richards, 2012 WL 3870446 (Bankr. N.D. Ohio 2012) – Court *sua sponte* set case for order to show cause where documents indicated that petition preparer had charged \$500, which exceeded allowable maximum of \$125.

In re Ach, 447 BR 830 (Bankr. N.D. Ohio 2011) – Attorney who submitted to State Bar an Application for Retirement or Resignation on same date as bankruptcy petition filed would be limited in compensation to amount set for non-attorney Bankruptcy Petition Preparer.

In re Anthony, 447 BR 827 (Bankr. N.D. Ohio 2011) – Attorney who had previously submitted to State Bar an Application for Retirement or Resignation would be limited in compensation to amount set for non- attorney Bankruptcy Petition Preparer.

In re Amburgey, 446 BR 825 (Bankr. N.D. Ohio 2011) – Attorney who had previously submitted to State Bar an Application for Retirement or Resignation would be limited in compensation to amount set for non- attorney Bankruptcy Petition Preparer.

In re Warfield, Case No. 09-75993 (Bankr. E.D. Mi. 2010) - Petition Preparer who charged \$375 charged fee that was excessive in violation of Section 110. Court concluded that \$80 would be reasonable, allowing \$20 per hour for typing services.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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.

4.54 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.

4.55 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.

I. Ethical Issues

4.56 Duty to Communicate With and Advise Client

In re Burnett, 450 BR 116 (Bankr. E.D. Ark. 2011) – Attorney abdicated decision on whether to file bankruptcy to paralegals without meeting with or advising debtors. Debtors advise by paralegal to file bankruptcy two weeks after foreclosure sale. Attorney's failure to meet with debtors and advise allowed paralegals to practice law without license.

In re Monroe, 2011 WL 6010280 (Bankr. E.D.N.C. 2011) – Attorney has duty to effectively communicate with client and to provide advice and information to protect debtor’s interests. Attorney sanctioned for failing to properly communicate with debtor concerning stay relief consent order, failed to competently negotiate consent order, and negligently failed to timely modify confirmed plan. Attorney knew that consent order would require debtor to modify plan to reduce plan payments to allow debtor to retain car, but failed to take any actions to modify the plan, resulted in debtor’s default and repossession of car. Attorney ordered to pay sanctions in amount of vehicle repossession charges and creditor attorney fees.

In re Santiago, 2011 WL 4056700 (D.P.R. 2011) – Attorney, as “debt relief agency” must meet face to face with client prior to filing case and at every critical stage of the proceeding. Attorney had “personally trained and daily supervised paralegal” meet with clients and prepare all documents, although attorney did review documents before case filed. However, that procedure did not meet requirements under Section 526 through 528.

4.57 Filing for Improper Purpose

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

4.58 Communication with Clients

In re Landstreet, Case No. 12-0755 (6th Cir. 2012) – Attorney sanctioned for failing to conduct reasonable investigation. Attorney took over representation when prior attorney was suspended. Attorney never met with the clients, never assured himself that credit counseling had been completed, and did not review bankruptcy documents including Rule 2016 statements before filing. Attorney allowed staff to place his signatures on petitions and use personal log in information without personally confirming that the representations were correct as required by Rule 9011. Attorney compounded problems by failing to amend documents to correct information for 4 months after the errors were first brought to his attention.

4.59 Candor to Court

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

4.60 “Stand In” or Substitute Attorneys

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

4.61 Suspension and Disbarment

Parker v. Jacobs, Case No. 12-10599 (11th Cir. 2012) – Attorney disbarred from practice before Alabama Middle District Bankruptcy Court. Bankruptcy Administrator filed Motion for Sanctions based on false statements of debtor’s residence in at least 6 separate cases; 28 cases in which counsel failed to timely pay filing fees although in most of those cases the clients had paid counsel for the fees; and counsel’s numerous false and incomplete statements in counsel’s own Chapter 7 case. Counsel also consistently failed to appear or habitually came late and unprepared for scheduled hearings. Court found that counsel made practice of misappropriating funds and intentionally making false statements, with the conduct being so widespread that disbarment was only appropriate sanction.

In re Thav, 852 F.Supp.2d 857 (E.D. Mi. 2012) – Attorney suspended from practice in Western District is automatically suspended from practice in Eastern District for reciprocal time period. Western District suspension for repeated failure to appear for hearings notwithstanding repeated warnings from court warranted suspension that had not been modified or vacated. Western District suspension procedure did not constitute deprivation of due process and implementing same

discipline in Eastern District had not resulted in grave injustice. Court would consider vacating or modifying reciprocal order only on showing of “grave injustice” which focused on original suspension order and whether severity of punishment imposed by first court fit the misconduct.

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

V. Commencing Case

A. Eligibility for Relief

5.1 Section 109 – Generally

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 Debt Limits

In re Shen, 2011 WL 3236182 (Bankr. N.D. Ca. 2011) – Unsecured portion of undersecured debt is normally considered as unsecured debt for purposes of eligibility. However, where debtor’s personal liability on note had been discharged in prior Chapter 7 case, any alleged deficiency balance is unenforceable and therefore is not included in calculation of unsecured debts in Chapter 13.

In re Hannon, 455 BR 814 (Bankr. S.D. Fla. 2011) – Joint Chapter 13 Debtors with combined debts exceeding statutory limits are eligible for relief under Chapter 13 if each individual’s debts are within limits. Case dismissed where each debtor, standing alone, had debts that exceeded Section 109 limits.

In re Bowley, 2011 WL 4458928 (Bankr. D. Hawaii 2011) – Debtor not eligible for relief under Chapter 13 where schedules indicated claim secured by debtor’s mortgage exceeded \$6 million.

Liggett v. Schwartz, 2012 WL 1020011 (E.D. Mi. 2012) – Wholly unsecured debt is included in calculation of unsecured debts for purposes of eligibility, notwithstanding debtor’s classification of the obligation as a secured claim. Unsecured portion of under secured debt is counted as unsecured for eligibility purposes. Debtors schedules valued property at \$225,000, subject to first mortgage in excess of \$250,000 and a second mortgage of \$137,000. Adding entire unsecured balance of second mortgage to debtor’s scheduled unsecured debt would put debtor far beyond section 109 debt limit. Absent a good faith dispute as to the value of the property or the secured status of the debt, debtor would be deemed ineligible for chapter 13 relief.

In re Winters, 2012 WL 1067696 (Bankr. E.D. Tn. 2012) – Debtor’s liability on personal guarantee may be “contingent debt” to the extent that the underlying obligation is not yet in default. However, once a default in the underlying obligation arises, liability on personal guarantee is no longer contingent as debtors liability is no longer conditioned upon the occurrence or happening of any extrinsic event. Value of collateral securing loan was substantially less than the amount owed on the obligation, leaving a noncontingent unsecured balance owing substantially in excess of the debt limits under section 109, requiring dismissal of Chapter 13 case.

In re Frederick, 2011 WL 5908957 (Bankr. E.D. Mi. 2011) – Debt is “liquidated” if the amount can be ascertained. Dispute over underlying liability does not render debt unliquidated where amount of claim can be calculated. Consent judgment entered prior to commencement of case liquidated claim at \$950,000. Debtor’s opinion or “belief” that creditor would ultimately agree to accept far less in satisfaction of claim did not render debt unliquidated. Whether debt is liquidated is determined as of date petition is filed without regard to whether the amount of the claim may be later reduced or even eliminated.

5.3 Prior Voluntary Dismissal

In re Durham, 461 BR 139 (Bankr. D. Mass. 2011) – “Causal connection” analysis required to determine if debtor is precluded from filing where prior case had been voluntarily dismissed after request for stay relief. Debtors were ineligible where first case was voluntarily dismissed six days after stay relief granted to mortgage and car creditors, and second filing was attempt to thwart creditors’ efforts to liquidate collateral.

In re Riekens, 456 BR 365 (Bankr. C.D. Ill. 2011) – Section 109(g)(2) does not have any limitation on bar to refiling. Voluntary dismissal of case following request for relief from stay mandates bar to refiling, without regard to whether second filing would be prejudicial to the creditor receiving relief in prior case.

In re Sargent, Case No. 11-45499 (Bankr. E.D. Mi. 2011) – Debtors not eligible under Section 109(g)(2) where car finance creditor filed Motion for Relief and obtained an Order Granting Relief before debtors voluntarily dismissed. Voluntary dismissal after a Motion for Relief has been filed operates as dismissal with automatic bar for 180 days.

In re Donovan, Case No. 11-41734 (Bankr. E.D. Mi. 2011) – Debtors not eligible under Section 109(g)(2) where car finance creditor filed Motion for Relief and obtained an Order Granting Relief before debtors voluntarily dismissed. Voluntary dismissal after a Motion for Relief has been filed operates as dismissal with automatic bar for 180 days.

In re Moses, Case No. 11-40639 (Bankr. E.D. Mi. 2011) – Debtor is eligible for relief following voluntary dismissal of prior case where debtor and creditor in prior case filed stipulation for relief from automatic stay. Section 109(g)(2) applies only when the creditor in the prior case files a motion for relief and case is then voluntarily dismissed. Stipulation for relief is not “motion” and does not trigger Section 109(g)(2) bar against refiling.

5.4 Simultaneous Estates

In re Arceneaga, Case No. 12-50710 (Bankr. E.D. Mi. 2012) – Debtor filed second chapter 13 case after court converted prior case from Chapter 7 to Chapter 13 and prior case remained pending. Second case dismissed. Debtors may not have two simultaneously pending Chapter 13 cases.

In re Brunson, Case No. 11-66141 (Bankr. E.D. Mi. 2011) – Debtor may not have two separate Chapter 13 cases pending at same time. Second filed case dismissed.

In re Galloway, Case No. 11-66088 (Bankr. E.D. Mi. 2011) – Debtor may not have two separate Chapter 13 cases pending at same time. Second filed case dismissed.

In re Smith, Case No. 11-45460 (Bankr. E.D. Mi. 2011) – Debtor is not precluded from filing Chapter 13 case while prior Chapter 7 is still pending, where debtor has received discharge in Chapter 7 and that case remains pending solely to allow the Chapter 7 trustee to administer assets, debtor does not attempt in the Chapter 13 to deal with assets that are being administered by the Chapter 7 Trustee, and Debtor needs relief under Chapter 13 in attempt to save home from foreclosure.

In re Neely, Case No. 10-75800 (Bankr. E.D. Mi. 2010) – Debtor may not have two Chapter 7 cases pending at same time. Debtor's not eligible to file second Chapter 7 case while Debtor's prior case was still pending, requiring dismissal of second filed case.

In re Donovan, Case No. 10-75145 (Bankr. E.D. Mi. 2010) – Debtor may not have two Chapter 13 cases pending at same time. Debtor's not eligible to file second Chapter 13 case while Debtor's prior case was still pending, requiring dismissal of second filed case.

In re Corder, Case No. 10-74323 (Bankr. E.D. Mi. 2010) – Debtor may not have two Chapter 13 cases pending at same time. Debtor's not eligible to file second Chapter 13 case while Debtor's prior case was still pending, requiring dismissal of second filed case.

In re Huff, Case No. 10-52285 (Bankr. E.D. Mi. 2010) - Debtor may not have two Chapter 13 cases pending at same time. Debtor's not eligible to file second Chapter 13 case while Debtor's prior case was still pending, requiring dismissal of second filed case.

In re Basmajian, Case No. 10-58953 (Bankr. E.D. Mi. 2010) - Debtor may not have two Chapter 13 cases pending at same time. Debtor's not eligible to file second Chapter 13 case while Debtor's prior case was still pending, requiring dismissal of second filed case.

In re Coleman, Case No. 10-50324 (Bankr. E.D. Mi. 2010) – Debtor’s Motion to Dismiss first of two simultaneously

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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.

5.5 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".

5.6 Corporate Authorization

Byrd v. Arvest Bank, Case No. 10-8071 (6th Cir. BAP 2011) – Entity such as corporation or partnership can file bankruptcy only if properly authorized according to State law. Chapter 11 Petition filed by "Chief Manager" of limited partnership without proper authorization according to limited partnership documents dismissed and sanctions imposed against "Chief Manager" under Rule 9011.

5.7 Decedent's Estate

Estate of Gray v. McDermott, 2011 WL 3946729 (E.D. Mi. 2011) – Decedent's probate estate is not a "person" and is not eligible for relief under Chapter 11.

5.8 Trusts

In re Thomas Kuttkuhn Family Trust, Case No. 11-69390 (Bankr. E.D. Mi. 2011) – Trust is not eligible for relief unless the Trust constitutes a "business trust" within meaning of Section 101(9)(A)(v).

B. Joint Cases

5.9 Generally

In re Somers, 2011 WL 1709839 (Bankr. S.D.N.Y. 2011) – Chapter 7 petition filed by legally married same-sex couple. Motion to Dismiss did not establish "cause" for dismissal based on DOMA under Section 707.

In re Ziviello-Howell, Case No. 11-22706 (Bankr. E.D. Ca. 2011) – DOMA did not constitute cause for dismissal of joint petition filed by legally married same-sex couple.

In re Kandu, 315 BR 123 (Bankr. W.D. Wa. 2004) – Same sex couple not permitted to file joint petition, although parties were legally married in Canada pursuant to Canadian law.

In re Balas, 449 BR 567 (Bankr. C.D. Ca. 2011) – Section 302 authorizes joint filing by same-sex couple that is legally married as a matter of State law. Federal Defense of Marriage Act which would limit “married” to “man and woman” violates Federal guarantee of equal protection and cannot be used to defeat “married” status for purposes of Section 302.

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.

5.10 Improper Joinder

In re Percha, Case No. 11-68173 (Bankr. E.D. Mi. 2011) – Petition filed by individual debtors that also listed Limited Liability Company as “another name” constituted improper attempt to file joint case for debtors and a separate legal entity. Case dismissed where debtors failed to amend petition to delete improperly joined debtor-entity.

C. Credit Counseling

5.11 Failure to Obtain

In re Weeks, Case No. 12-60428 (Bankr. E.D. Mi. 2012) – Case dismissed where debtor received credit briefing 223 days prior to commencement of case.

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

In re Steinke, Case No. 12-54633 (Bankr. E.D. Mi. 2012) – Motion to Reopen Case treated as motion for relief from Order Dismissing Case. Motion must establish excusable neglect or other ground for relief under rule 60 and Federal Rule of Bankruptcy Procedure 9024. Motion must also demonstrate that judgment is result of palpable error, the correction of which must result in a different disposition. Dismissal of case was not error and Motion failed to establish any basis for rehearing. Debtor was not eligible for relief under Title 11 where debtor did not receive credit counseling until one day after filing of petition.

In re Logsdon, 2012 WL 3762513 (Bankr. W.D. Ky. 2012) – Case dismissed where debtors did not complete credit counseling until 6 days after filing petition. Court can grant temporary waiver and allow debtor to complete counseling post-petition only debtor files a certification describing exigent circumstances and stating that debtor attempted to obtain counseling but was unable to do so within 7 days of first request. Debtors did not demonstrate exigent circumstances. Allegations that debtors were not able to complete the counseling because of Debtor-Husband’s work schedule did not demonstrate an inability to obtain counseling prior to commencement of case.

In re Hartley, Case No. 11-46047 (Bankr. E.D. Mi. 2012) – Motion to Excuse Debtor’s Attendance at Consumer Credit Counseling Session denied where Motion did not state any reason why debtor could not complete course prior to or on the date of filing the petition. Case dismissed.

In re Stamos, Case No. 12-47872 (Bankr. E.D. MI. 2012) – Case dismissed where debtor obtained pre-petition counseling 5 days after case filed.

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

DETROIT CONSUMER BANKRUPTCY CONFERENCE

effort, to participate in person, telephone or internet. Debtor's Motion made conclusory allegation that debtor was disabled but did not provide any information to establish that debtor met statutory definition.

In re Houle, Case no. 11-69787 (Bankr. E.D. Mi. 2011) – Case dismissed where debtor obtained credit counseling three days after case filed. Section 109(h) requires counseling to occur prior to or on date petition filed.

In re Ingram, 460 B.R. 904 (6th Cir. BAP 2011) – Case dismissed where debtor obtained credit counseling one day after filing petition. Debtor commenced counseling prior to filing petition but did not complete that counseling until the next day. Debtor's alleged confusion, believing that on-line portion concluded prior to commencement of case constituted completion of session was insufficient to excuse debtor's admitted failure to complete all aspects of counseling pre-petition. Debtor was not eligible and case dismissed.

In re Key, Case No. 10-76608 (Bankr. E.D. Mi. 2011) – Debtor must obtain credit counseling during the 180 day period preceding commencement of case. Debtor not eligible for relief where Certificate of Credit Counseling indicated that counseling occurred 195 days prior to the commencement of the case.

In re Paul, Case No. 10-76000 (Bankr. E.D. Mi. 2010) – Debtor who obtained credit counseling after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.

In re Farah, Case No. 10-70577 (Bankr. E.D. Mi. 2010) - Debtor who obtained credit counseling after commencement of case was not eligible for relief pursuant to Section 109(h)(1). Case dismissed by Court *sua sponte*.

In re Lowry, Case No. 10-71363 (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

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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.

5.12 Exemption from Requirement

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

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

In re Vandoran, Case No. 11-65165 (Bankr. E.D. Mi. 2011) – Case dismissed where debtors failed to obtain credit counseling until day after filing petition. Motion for Approval of Certificate of Exigent Circumstances denied where Motion failed to allege any facts that would constitute exigent circumstance or otherwise warrant waiver of pre-petition counseling requirement. Motion alleged only that the Petition was filed on Sunday and Debtor’s counsel “was under the impression that the counseling had been completed.”

In re 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 (8th Cir. BAP 2009) – Failure to file a certificate of exigent circumstances when seeking temporary exemption from credit briefing requirement is fatal to the request. Debtor’s motion requested temporary

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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.

5.13 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.

5.14 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.

E. Venue

5.15 Generally

State Bank of Florence v. Miller, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6th 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.

5.16 Domicile

State Bank of Florence v. Miller, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* Case No. 11-8011 (6th Cir. BAP 2011) – Domicile is largely a matter of intention - what is the fixed location to which he intends to return when he is elsewhere? Domicile is an individual's permanent place of abode where he need not be physically present, and residence is where the individual is physically present much of the time. An individual consequently may have several residences, but only one domicile. Debtor's testimony is relevant but not determinative, and court will also consider objective evidence that establishes the Debtor's intent such as affidavits of intention, registration for driver's licenses, opening bank accounts, addressing tax returns, motive for establishing domicile, and other physical facts evidencing that the desire to remain will not expire. Some years earlier, Debtor filed a statement with the taxing authorities in Wisconsin declaring the Wisconsin Cottage to be his principal residence and paid a lesser amount of real estate taxes in Wisconsin; Debtor previously filed a chapter 13 case in the Eastern District of Wisconsin that was later dismissed; and Debtor had not filed for the Michigan Homestead Exemption. However, evidence established that Debtor has resided within seven miles of Iron Mountain, Michigan for his entire life. The Debtor was born in Michigan. The Debtor was employed in Michigan. The Debtor's parents were Michigan residents. The Debtor was educated in Michigan. The Debtor earned his certification as a union journeyman plumber and pipefitter in Michigan. The Debtor's stated subjective intention is overwhelmingly buttressed by the objective facts including that the Debtor offered the Wisconsin Cottage for sale and posted for sale signs on the property; all of the Debtor's real property was subject to the Bank's foreclosure except for the Michigan Cabin Property; Debtor hired contractors to substantially improve the Michigan Cabin Property, by doubling its size, adding a new roof, adding a deck, adding a generator to supply electricity, and adding a propane tank to cook food and heat the cabin; Debtor opened a bank account with the State Bank of Norway, Michigan, which he used exclusively thereafter; Debtor moved the vast majority of his personal property from the Wisconsin Cottage to Michigan, using it to furnish the Michigan Cabin Property and storing the balance in a Michigan storage facility; Debtor's dentist and doctor are both in Michigan and he regularly received his medical treatment at a hospital in Marquette, Michigan; Debtor's Wisconsin driver's license expired and Debtor immediately obtained a Michigan driver's license; all of the Debtor's vehicles were titled in Michigan; Debtor filed his 2008 state income tax return as a Michigan resident; Debtor receives most of his mail at the Michigan Cabin Property; Michigan Cabin Property has been the Debtor's address of record for the Social Security Administration and his union pension plan; and the Debtor resides approximately 50% of the time at the Michigan Cabin Property. Venue proper in the Western District of Michigan.

5.17 Location of Principal Assets

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

5.18 Residence

In re Carpenter, Case No. 11-33006 (Bankr. E.D. Mi. 2011) – Venue proper where debtor relocated from Virginia to Michigan more than 90 days before filing case. Although debtor spent time in both states and traveled back and forth to care for ill mother, debtor permanently relocated to Michigan and moved in with mother to care for her more than 90 days pre-petition.

5.19 Principal place of business

5.20 Dismissal

5.21 Transfer - Venue Proper

In re West, 2012 WL 1252984 (Bankr. N.D. Ohio 2012) – Party requesting change of venue in case where initially chosen venue was proper bears burden of showing that transfer would be in the interests of justice or for convenience of parties. Court uses 6 factors to determine whether transfer is in the interest of justice: (1) whether transfer would promote economic and efficient administration of case; (2) whether judicial economy would be served by the transfer; (3) whether parties would receive fair trial in both possible venues; (4) whether either forum has an interest in having the controversy decided within its borders; (5) whether enforceability of judgment would be impacted by a transfer; and (6) whether the original choice of forum should be disturbed. Debtor's Motion to Transfer denied where only grounds asserted was that Debtor was a city councilman who sought transfer "to avoid any semblance of impropriety or undue embarrassment

DETROIT CONSUMER BANKRUPTCY CONFERENCE

regarding his financial distress.” Debtor’s Motion did not address any of the 6 factors and failed to demonstrate that a transfer of the case to another district that has a significantly higher caseload would somehow promote efficiency. Motion failed to address convenience of creditors or impact on case administration. Debtor resided in the initially chosen county; bulk of assets are in initially chosen county; and more than half in number and amount of secured claims and debts in general are within initially chosen county. Debtor presented no evidence that transfer to another district, more than 30 minutes away, would in any way be more “convenient”.

5.22 Transfer - Venue Improper

F. Filing Fee

5.23 Failure to Pay

In re Johnson, 2012 WL 3644786 (Bankr. N.D. Ohio 2012) – Motion under Rule 9023 is not merely opportunity to reargue matters previously addressed. Motion requires proof of clear error of law, newly discovered evidence, or intervening change in controlling case law, or to avoid manifest injustice. Motion failed to demonstrate basis for relief from Order dismissing case for failing to appear at a Show Cause hearing resulting from Debtor’s failure to pay filing fees in this case plus two of debtor’s 4 prior filings. Debtor failed to demonstrate error in Court’s denial of Motion for Continuance of Hearing. Motion for Continuance did not provide sufficient facts to establish that debtor was unable to appear. Motion alleged only that debtor had a doctor’s appointment, with no explanation as to when debtor made the appointment or why it could not be changed to a different time or different date. Debtor had history of multiple filings, each of which exhibited a pattern of delay and debtor still had not paid filing fees. Motion did not evidence any manifest error of law, mistake of fact or other material reason that would support rehearing.

In re Bass, Case No. 11-61823 (Bankr. E.D. Mi. 2011) – Case reopened, discharge vacated and case dismissed where debtor failed to pay the filing fee for the current case or the as yet unpaid filing fee for debtor’s prior case. Discharge order entered in error where filing fee not paid as ordered by Court.

In re Anderson, Case No. 11-60818 (Bankr. E.D. Mi. 2011) – Case dismissed where Debtor failed to pay filing fee within time set by Order of Court.

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.

5.24 Waiver

In re McCann, Case No. 12-49259 (Bankr. E.D. Mi. 2012) – Debtor not entitled to waiver of filing fee where Schedule I discloses monthly income that exceeds 150% of the official poverty line.

In re Jackson, Case No. 11-65307 (Bankr. E.D. Mi. 2011) – Motion to Waive Filing Fee denied where Schedule B indicated that debtor was owed Federal Tax Refund of \$7,500 and Debtor's Schedule C claimed the tax refund receivable as exempt. Debtor's statement in the Motion that Debtor had already received and spend the tax refund directly contracted by statements in Schedules B and C.

In re Taylor, Case No. 11-64590 (Bankr. E.D. Mi. 2011) – Debtor's Motion to Waive Filing Fee denied where schedule B listed a savings account with \$1,599 balance and debtor claimed balance in account as exempt. Debtor's statement in the Motion that the funds in the account belonged to Debtor's minor son contradicted by Schedules B and C..

In re George, Case No. 11-67210 (Bankr. E.D. Mi. 2011) – Debtor's motion was not clear as to whether debtor had received and spent tax refund prior to filing case. Debtor's Motion indicated that debtor had done so but debtor's schedule B showed tax refund as receivable that had not been received. Debtor's statement on Schedule B, made under penalty of perjury, was inconsistent with any assertion the debtor made in the motion that the refund had been spent. Refund would have provided sufficient funds to pay filing fee.

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

G. Means Test

5.25 “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 (8th Cir 2010) – Debtor's non-recourse obligation on two mortgages on debtor's home would be considered consumer debts even though Debtor signed only the mortgages and not the notes themselves. Mortgages constituted claims against debtor's property and constituted claims in bankruptcy case. Debt secured by

lien on principal residence is generally consumer debt. Including amounts due on mortgages resulted in Debtor having consumer debt in excess of \$1 million versus non-consumer debt of only \$667,000.00, resulting in debtor having primarily consumer debt for purposes of Section 707.

In re Swartzentruber, 2009 WL 28730003 (Bankr. N.D. Ohio 2009) – Section 707(b)(2) applies only to debtors with “primarily consumer debts”. A “consumer debt” is one incurred by an individual primarily for a personal, family, or household purpose. A “business debt” is one incurred with an eye toward profit. Debtors testified that they acquired condominium in Florida for investment purposes, although the mortgage documents stated that the unit was being acquired as a “second residence”. Debt found to be business debt where Debtors did not have the means to finance and maintain the Florida condominium without rental income. Debtors did not list any expenses for the Florida condominium included on Schedule J making it impossible to conclude that Debtors would have been able to afford the condominium as a second residence. Debtor was told he would make \$4,000 per month and that the rental income from the property was imperative to pay the mortgage and the related expenses of the condominium. Debtor testified that his family had been vacationing in the area for fifteen years and they were aware of how rapidly the price of real estate increased from 1999 to 2005 in the area. Debtor always looked at the transaction as an investment. Debtor signed the rental agreement with the management company before he signed the mortgage and for at least two years the expenses were treated as business losses on Debtors' tax returns. Condo was only 400 square feet, not large enough for Debtor's family which included three small children and local ordinances prohibited him from occupying unit for more than 30 days in any year.

5.26 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 (6th Cir. 2010) – Starting point for calculating Disposable Income for above median debtor is Current Monthly Income less allowable expenses itemized in Section 707(b)(2)(A)(i). Debtor obtained new employment at lower salary during the 6 month look-back period. Because of gap in employment, CMI was significantly less than Debtor's actual income. Debtor's higher income was known or substantially certain as of the date of confirmation. Therefore, the Court could take into account this additional income in determining Debtor's Projected Disposable Income. Debtor's intent to surrender property was also known or substantially certain at the time of confirmation. Therefore, Court could disregard the mortgage and other payments and expenses attendant to that property in determining Projected Disposable Income.

Hildebrand v. Petro, 395 BR 369 (6th Cir. BAP 2008) – “Disposable income” is a backward looking determination based on the six months preceding the commencement of the bankruptcy case. Although Debtors “disposable income” calculation resulted in negative income, Schedules I and J indicated that Debtors had “projected disposable income” of \$1386.33. Section 1325(b)(1) would require Debtor to make monthly payments in the amount of \$1386.33 as 100% of Debtor's “projected disposable income”.

In re Welsh, 440 BR 836 (Bankr. D. Montana 2010) - Debtor could deduct the monthly payments on debts secured by three automobiles, two ATVs and an Airstream travel trailer in calculating disposable income, even where the retention of those items would not have been “reasonable” under pre-BAPCPA law. “The Trustee's good faith objection based on their payments to secured claims ignores the fact that payments to secured claims are authorized in the means test at 11 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 (7th Cir. 2010) – Debtor’s income was temporarily inflated pre-petition based on receipt of workers compensation payments. “Projected disposable income” would not include these amounts where debtor stopped receiving this income pre-petition, making it “known or substantially certain” as of confirmation that debtor would not have this income.

Hildebrand v. Wimberly, 2010 WL 2571977 (M.D. Tn. 2010) – Starting point for calculating Disposable Income for above median debtor is Current Monthly Income less allowable expenses itemized in Section 707(b)(2)(A)(i). However, Court must then adjust that calculation based on changes in income or expenses that are known or are virtually certain as of the date of confirmation of plan. Lower Court’s strict “mechanical approach” to calculation of projected disposable income was error where debtors were unemployed during prior 6 months but now had employment, making calculation of “disposable income” substantially lower than “projected income”.

5.27 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.

5.28 Calculation of Disposable Income – Surrendered Collateral

Morris v. Quigley, 673 F.3d 269 (4th Cir. 2012) – Debtor cannot deduct secured debt expenses on Form B22 for assets that are to be surrendered in the Chapter 13 Plan.

In re Grabarczyk, 2012 WL 909511 (Bankr. N.D. Ohio 2012) – In calculating disposable income, debtors could not deduct expense for ownership of vehicle or other secured debts that debtors chapter 13 plan proposes to surrender. Debtor not permitted to deduct mortgage obligation on rental property where amount of mortgage payment has already been deducted in determining the net rental income which is been used by debtor's in calculating Current Monthly Income. Allowing the debtors to deduct the mortgage debt in determining net income and then allowing debtors to again deduct the mortgage expense and calculate Current Monthly Income would oh resulted debtor's double deduction of this mortgage expense. To the extent that debtor's plan proposes to pay priority claims and chapter 13 administrative expenses through the chapter 13 plan, any deductions taken by debtor's on line 49 and line 50 of the form B22C must be added back into the disposable income calculated on line 59 in order to ensure that the total proceeds available to unsecured creditors is not less than the presumptively disposable income shown on line 59 times 60. Priority creditors are not “unsecured creditors” were paid from projected disposable income. Instead, those payments are deducted before determining projected disposable income which is then allocated to payment of general unsecured creditors.

Darrohn v. Hildebrand, Case No. 09-5499 (6th Cir. 2010) – Chapter 13 Debtor may not deduct expense on B22C relating to property that Debtor’s plan intends to surrender.

In re Phillips, 2009 WL 3019815 (Bankr. S.D. Ohio 2009) – Chapter 7 Debtor may deduct expenses on the means test form for payments on secured debt even when the collateral is surrendered as long as 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.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

In re Marchionna, 393 BR 512 (Bankr. N.D. Ohio 2008) – Chapter 13 debtor may not take deductions on Form 22C for future payments on debt secured by real estate which she plans to surrender.

In re Thomas, 395 BR 914 (6th Cir. BAP 2008) – Means test in Chapter 13 is no different than in Chapter 7. Means test is mechanical, formulaic test to calculate “disposable income”. Chapter 13 Debtors entitled to deduct on Means test payments that they were contractually obligated to make on petition date on their secured debt, even though Debtors intended to surrender collateral securing this indebtedness.

5.29 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.

5.30 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 (6th Cir. 2011) – Citing *Ransom*, Debtor who does not have an automobile payment (either loan or lease) cannot take standard “ownership” expense on the Means Test.

In re Meyers, Case No. 09-77897 (Bankr. E.D. Mi. 2010) – Debtor entitled to ownership expense for vehicle owned by debtor’s brother where brother resided with debtor and debtor provided most, if not all, of brother’s support. Any repairs to the vehicle, and its eventual replacement, would be paid by the debtor in light of brother’s lack of any income.

5.31 Calculation of Disposable Income – Automobile Operating Expense

In re Thiel, 446 BR 434 (Bankr. D. Idaho 2011) - Debtors are limited to transportation expenses allowed by Local Standards when actual transportation expenses are greater.

In re Reynolds, 2011 WL 3651347 (Bankr. N.D. Ohio 2011) – Debtor is not permitted to claim operating expenses for vehicles that do not run. Fact that “operating expense” is one of the items in the IRS Allowances does not mean that debtor automatically can take deduction where debtor does not have the corresponding expense. Court rejected Debtor claimed operating expense deduction for three cars, two of which did not run; and also claimed additional \$200 expense for two of the non-running vehicles based on ages of vehicles.

In re Hargis, 2011 WL 1651235 (Bankr. D. Utah 2011) – Above median debtor who owns unencumbered vehicle over 6 years old or with more than 75,000 miles may not claim additional \$200.00 monthly operating expense for old car. Additional “old car” allowance in IRS manual is not incorporated into the allowed deductions under Section 707(b)(2).

In re Schultz, Case No. 11-40490 (Bankr. W.D. Mo. 2011) – Above median debtor who owns unencumbered vehicle over 6 years old or with more than 75,000 miles may not claim additional \$200.00 monthly operating expense in calculating projected disposable income on B22.

In re VanDyke, 2011 WL 1833186 (Bankr. C.D. Ill. 2011) – Debtor who owns older, high mileage car that is paid in full is not permitted to take “old car” deduction of \$200.00. IRS Collection Guideline that generally allows deduction of up to \$200 where 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.

5.32 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.

5.33 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.

5.34 Calculation of Disposable Income – Education Expenses

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

In re Peterlin, 457 BR 630 (Bankr. N.D. Ohio 2011) – In the bankruptcy context private school tuition is considered a luxury expense that amounts to a debtor requiring his or her creditors to donate toward his children's education absent evidence that the available public schools are insufficient or that children have special needs that require private school. Debtor had at least one car loan that would be paid off within plan term, allowing for additional payments to creditors.

In re Wise, 2011 WL 2133843 (Bankr. S.D. Ill. 2011) – Creditors should not bear the burden of putting a debtor's adult child through college. Means test does not allow debtor to deduct future expenses for child's college tuition.

5.35 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*.

Sturm v. U.S. Trustee, 2012 WL 4344605 (Bankr. N.D. Ohio 2011) – On remand after district court ruling, see above, Debtor could not deduct mortgage/rent component of standard housing allowance where debtor did not have mortgage or rent expense. House owned solely by non-filing spouse with debt solely in non-filing spouse name did not constitute mortgage expense for purposes of triggering allowance.

5.36 Social Security Income

Baud v. Carroll, 2011 WL 338001 (6th Cir. 2011) – Social Security income does not have any role in calculating “disposable income” or “projected disposable income” in Chapter 13. However, Court did not determine whether Social Security income had some other role in Chapter 13, such as in calculating Schedule I or in determining “monthly disposable income” on Schedule J.

In re Tobias, Case No. 11-40453 (Bankr. E.D. Mi. 2011) – Debtor's social security income is excluded in determining disposable income and projected disposable income pursuant to Section 101(10A). Debtor not required including Social Security Income on B22C. Debtor should list Social Security Income on Schedule I but is allowed to then deduct that income on Schedule J. Court did not address issue of whether deduction of Social Security Benefits constituted lack of good faith.

Mains v. Foley, 2011 WL 2160890 (Bankr. W.D. Mi. 2011) – Debtor who receives Social Security Income is required to include that income in determining projected disposable income under Section 1325(b). Exclusion of Social Security from calculation of CMI does not remove that income from consideration of Debtor's good faith and must be considered with the rest of Debtor's circumstances to determine if Debtor sincerely intends to repay creditors.

In re Vandenbosch, 459 BR 140 (M.D. Fl. 2011) – Debtor cannot be required to include social security income on Schedule I or to include that in determining whether plan payment constitutes all disposable income. BAPCPA excludes social security from calculation. Because social security benefits are not a component of projected disposable income, a plan cannot be rejected for failure to include such benefits as projected disposable income. A necessary corollary is that a finding of bad faith may not be based upon such a failure.

In re Westing, 2010 WL 2774829 (Bankr. D. Idaho 2010) - Above-median-income debtor's failure to account for Social Security income on Schedule I resulted in a lack of good faith. Current Monthly Income exclusion of Social Security in calculating "projected disposable income" under Section 1325(b), does not preclude the Court's consideration of that income when evaluating a plan for good faith. Debtor's plan proposed a monthly payment of only \$165 and would produce dividend of 1.9% while debtor had disposable income of more than \$2,300 if the Social Security was included.

In re Thomas, 2010 WL 5630827 (Bankr. N.D. Ga. 2010) – Exclusion of Social Security income from Current Monthly Income does not provide a basis for a debtor to fail to disclose that income on Schedule I or monthly disposable income on Schedule J. Debtor's proposed retention of Social Security income would allow debtor to retain a substantial surplus at the expense of creditors, in violation of Section 1325(a)(3).

In re Welsh, 440 BR 836 (Bankr. D. Montana 2010) - Congress' express exclusion of Social Security income from the calculation of Current Monthly Income, buttressed by 42 USC Section 407 which prohibits subjecting Social Security income to the operation of any bankruptcy or insolvency law, acted as an absolute prohibition against compelling a debtor to include Social Security income in either the calculation of CMI or in calculating income on Schedule I. Section 101(10A)(B) and 42 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 Miller, 2011 WL 95335 (Bankr. D.S.C. 2011) – Section 101(10A) excludes all social security benefits, regardless of recipient and regardless of whether contributed to debtor's household expenses. Debtor's non-filing husband received Social Security which he contributed in full each month for payment of household expenses. Debtor also received Social Security. Debtor not required to include either her social security or that of her non-filing spouse in calculating Current Monthly Income or disposable income in Chapter 13.

In re Bartelini, 434 BR 285 (Bankr. N.D.N.Y. 2010) – Social security is excluded from CMI under 101(10A). CMI is starting point to calculate projected disposable income. Therefore, debtor cannot be compelled to list Social Security in PDI calculation for purposes of plan payment.

In re Herrmann, 2011 WL 576753 (Bankr. D.S.C. 2011) - Above-median-income debtor's failure to list his ongoing receipt of Social Security income in Schedule I resulted in Debtor's plan lacking good faith. Debtor contended that social security income is not subject in any way to the bankruptcy case, does not have to be disclosed, and can be applied or used by 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 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.

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

5.37 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.

5.38 Disability Income

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

5.39 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.

5.40 Railroad Retirement Income

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

5.41 Self-Employed Debtor

In re Grabarczyk, 2012 WL 909511 (Bankr. N.D. Ohio 2012) – Debtor not permitted to deduct mortgage obligation on rental property where amount of mortgage payment has already been deducted in determining the net rental income which is been used by debtor's in calculating Current Monthly Income. Allowing the debtors to deduct the mortgage debt in determining net income and then allowing debtors to again deduct the mortgage expense and calculate Current Monthly Income would oh resulted debtor's double deduction of this mortgage expense. To the extent that debtor's plan proposes to pay priority claims and chapter 13 administrative expenses through the chapter 13 plan, any deductions taken by debtor's online 49 and line 50 of the form B22C must be added back into the disposable income calculated online 59 in order to ensure that the total proceeds available to unsecured creditors is not less than the presumptively disposable income shown on line 59 times 60. Priority creditors are not "unsecured creditors" were paid from projected disposable income. Instead, those payments are deducted before determining projected disposable income which is then allocated to payment of general unsecured creditors.

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 (9th Cir. 2008) – Chapter 13 debtor engaged in business may not deduct ordinary and necessary business expenses from gross receipts for the purpose of calculating CMI. Business expenses are to be subtracted from CMI when calculating “disposable income.”

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”.

5.42 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.

5.43 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.

5.44 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.

5.45 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 reasonable 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- dischargeability of obligation is not “special circumstance”. Debtors’ ineligibility for relief under Chapter 13 is not “special circumstance” as Debtors still have available relief under Chapter 11.

In re Conlee, 2010 WL 3210974 (Bankr. N.D. Ohio 2010) – Required payments on non-dischargeable student loans are not “special circumstances” for above median debtor with a presumption of abuse under Section 707(b)(2).

In re Smith, 2010 WL 3270019 (Bankr. N.D. Ohio 2010) – Debtor may rebut presumption of abuse that results from “means test” calculation by proving special circumstances which justify an additional expense or adjustment to income coupled with the lack of any reasonable alternative to making the adjustment. Special circumstances normally involve circumstances beyond 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.

5.46 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.

Sturm v. US Trustee, 2012 WL 4344605 (Bankr. N.D. Ohio 2012) – following remand from district court (see above), Court found that deduction for expenses of non-filing spouse were proper where expenses were for personal use and not household expenses. Expenditures by spouse were for collectibles and comic books purchase on the internet, and charitable contributions which were personal in nature. Evidence did not indicate how much of expenses were household versus personal which precluded large reduction in amount claimed as marital adjustment. However, spouse could not claim marital deduction for expenses for operation of motor vehicle where debtor charged those expenses and was also claiming marital deduction for credit card payments.

In re Rable, 445 BR 826 (Bankr. N.D. Ohio 2011) – Debtor was not entitled to downward “marital adjustment” in his household income based on first and second mortgage payments made by non-debtor spouse made from her monthly income even though non-debtor spouse was the sole owner of the property and was solely responsible for the payments. Debtor lived with spouse and the mortgage payments represented payments regularly made by non-debtor party toward household expenses of debtor. Non-debtor mortgage payments on home where debtor also resided were not expenses that were “purely personal” to 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.

5.47 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 (8th Cir. BAP 2011) - Section 707(b)(1) provides, in pertinent part, that: the court, . . . may dismiss a case *filed by an individual debtor under this chapter* [Chapter 7] whose debts are primarily consumer debts, or,

with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter [Chapter 7]. Section 707(b)(1) identifies the type of debtor ("filed by an individual debtor"), rather than limits how the case arrived in Chapter 7. Further, limiting the abuse analysis only to individual debtors who originally "filed under" Chapter 7 would create a potential loophole for debtors to "abuse" the system by filing and failing under Chapter 13 in order to avoid the § 707(b) analysis upon conversion. Courts would be left with using "equitable powers" to curb such abuses. Cases, that were filed under Chapter 13 and later converted to Chapter 7, are considered to be "filed under" Chapter 7 for the purposes of § 707(b)(1).

5.48 Amendments to Schedules – Continuing Duty to Disclose

Dickerson v. Federal Express, 2010 WL 8747316 (W.D. Tn. 2010) – Debtor has continuing duty to disclose changes in financial conditions and affairs during pendency of case. Debtor's duty to disclose financial condition does not end when schedules are filed with court. Debtor failed to advise court or trustee of employment discrimination claim that arose after confirmation of plan but prior to completion. Debtor judicially estopped from pursuing cause of action post-discharge.

H. Involuntary Petitions

5.49 Elements

In re Hicks, 2011 WL 6000861 (Bankr. E.D. Tn. 2011) – Involuntary petition requires at least three petitioning creditors including any additional creditor who timely joins the petition, who hold claims that are not contingent as to liability or the subject of a bona fide dispute as to liability or amount, and where the non-contingent undisputed claims aggregate at least \$14,425.00 more than the value of any liens on property of the Debtor securing the claims; and that as of the petition date, debtor was not generally paying debts as they came due; and that the alleged debtor be eligible for relief under the chapter in which the involuntary petition was filed.

Huszi v. Huszi, 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 debt or'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

DETROIT CONSUMER BANKRUPTCY CONFERENCE

an order for relief under chapter 7.

5.50 Credit Counseling – Section 109(h)

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

In re Diloreto, 2008 WL 141922 (Bankr. E.D. Pa. 2008) - Credit counseling requirement of Section 109(h)(1) does not apply in involuntary case.

In re Knight, 2007 WL 4365592 (Bankr. M.D. Fla. 2007) - Credit counseling requirement of Section 109(h)(1) does not apply in involuntary case.

In re Allen, 378 BR 151 (Bankr. N.D. Texas 2007) - Credit counseling requirement of Section 109(h)(1) does not apply in involuntary case.

5.51 Petitioning Creditors

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

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.

5.52 Debts Subject to Bona Fide Dispute

In re Hicks, 2011 WL 6000861 (Bankr. E.D. Tn. 2011) – Claim is subject to bona fide dispute if there is either a genuine issue of material fact that bears on liability or a meritorious contention as to the application of law to the undisputed facts. Congress intended to disqualify a creditor if there is any legitimate basis for the debtor not paying the debt. Deficiency balances remaining after foreclosure sales will not be subject to bona fide dispute absent evidence of irregularity, misconduct, fraud or unfairness. Fact that successful bid is far less than appraised value, without more, is not sufficient to create bona fide dispute.

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

5.53 Not Generally Paying Debts as They Come Due

5.54 Eligible for Relief Under Chapter in Which Involuntary Petition Filed

5.55 Burden of Proof

In re Hicks, 2011 WL 6000861 (Bankr. E.D. Tn. 2011) – If an involuntary petition is not timely controverted, the court shall order relief under the chapter in which the petition was filed. If the petition is controverted, Court must determine whether requirements of Section 303 are met. Petitioning creditors bear burden of proof.

In re Lundeen, Case No. 09-51277 (Bankr. S.D. Ohio 2009) – Petitioning creditors bear burden to prove that they are qualified to file the Petition. Creditors must establish prima facie case that they hold debts and that are not subject to a bona fide dispute. If creditors meet this burden, putative debtor then bears burden to prove ineligibility of creditors.

5.56 Sanctions

Adell v. John Richards Homes Building Company, LLC, 2012 WL 3029643 (E.D. Mi. 2012) – Section 303(i) allows award of reasonable attorney fees when involuntary petition is dismissed. All costs incurred in litigating the fees actions are compensable, including those spent to enforce the judgment or collect the fees. Involuntary debtor entitled to award of fees incurred in having involuntary petition dismissed, and also to fees incurred in attempting to collect that award including fees incurred in having the petitioning creditor's subsequent bankruptcy proceeding dismissed. Recoverable fees including the fees incurred in the first instance in the bankruptcy case to have the involuntary petition dismissed plus fees incurred in "collateral" actions in other bankruptcy and non-bankruptcy forums to collect that fee award.

In re Huszti, Case No. 10-65758 (Bankr. E.D. Mi. 2011) – Section 303 allows Court discretion to award reasonable attorney fees and costs where involuntary petition is dismissed. Section 303 creates presumption that fees and costs should be awarded unless petitioning creditor rebuts presumption. Court will consider (1) merits of involuntary petition; (2) reasonableness of actions of petitioning creditors; (3) motivations and objectives behind filing the petition; and (4) any improper behavior of the debtor. Creditor's allegation that debtors were dishonest in pre-petition dealings with creditors was not sufficient to overcome presumption.

Irwin v. Frankenmuth Credit Union, Case No. 08-20212 (Bankr. E.D. Mi. 2009) – Debtor not entitled to punitive damages against creditor where damages emanate from contractual relationship. Punitive damages may be awarded only when the actions that give rise to the claim arise from a tort. Punitive damages also available only for willful or wanton act that demonstrated reckless disregard for Debtor's rights. Credit Union's actions in attempting to collect debt that was seriously past due did not rise to level of punitive damages where Debtor failed to establish that Credit Union ever agreed to extend new loan or terms of any such loan including amount, term or interest rate. Credit Union's ultimate decision not to enter into new loan relationship was not willful or wanton act that demonstrated reckless disregard for Debtor, but only commercially reasonable effort to collect outstanding obligation.

In re Lundeen, Case No. 09-51277 (Bankr. S.D. Ohio 2009) – Court has the discretion under § 303(i) to award costs or a reasonable attorney's fee and for damages, including punitive damages, against a Petitioning Creditor who files an involuntary petition in bad faith. Court exercised discretion not to award fees or damages considering the totality of the circumstances, including the credibility of the witnesses and the complexity of the bona-fide-dispute issue in the context of this case. Debtor did not rebut presumption of good faith in favor of the petitioning creditor based on totality of circumstances. Although the Petitioning Creditors were not successful after trial, there was no evidence that they believed when they filed the involuntary petition that the allegations in the petition were untrue.

VI. Property of Estate

A. Defined

6.1 Generally

In re Creekside Senior Apartments, LP, Case No. 11-8072 (6th Cir. BAP 2012) – "Property of the estate" includes real property and all rights and privileges attached to, and covenants running with, the land. Property consisted of low income apartment complexes, each of which had Low-Income Housing Tax Credits attached to the property. Tax credits provide incentive to develop low-income housing properties in exchange for stream of tax credits, and are conditioned on property maintaining compliance with Tax Credit program requirements. If the property is sold during the term of the tax credits, the purchaser acquires the remaining stream of tax credits as if the prior owner had not sold the property. Tax credits are attached to the property and belong to the owner of the property. Tax credits could not be severed from the property and do not exist separate from ownership of the property, and must be considered in valuing the property itself.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

Elswick v. Miller, 2012 WL 2122170 (E.D. Ky. 2012) – Property of the estate is broad and far-reaching concept and includes every conceivable interest of the debtor, future, non-possessory, contingent, speculative, and derivative. Even a contingent future interest is a legally cognizable interest and is property of the estate. Under Kentucky law, husband had dower interest in property inherited solely by wife during marriage. Although dower interest does not vest or become present interest until and unless wife dies intestate, making it difficult to determine what property may actually be subject to husband's dower interest and impossible to value that interest, the husband's dower interest is nonetheless property of the husband for purposes of property of the estate.

Rankin v. Lavan, Case No. 09-1087 (6th Cir. 2011) – Undisclosed property rights of debtor become property of estate upon filing. Trustee does not abandon undisclosed property merely by failing to administer property as trustee had no opportunity to pursue or liquidate property.

In re O'Brien, 2011 WL 10077 (Bankr. W.D. Mi. 2011) – Potential tax refunds to the extent attributable to events prior to commencement of case are property of estate.

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

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 of intent to convey a security interest in wife’s undivided one-half interest where mortgage signed solely for purposes of releasing wife’s dower interest. Further, wife did not sign and is not obligated on underlying promissory note. Therefore, there is no consideration to support mortgage as to her one-half interest in the property.

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

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

6.3 Jointly Owned Property

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 Community Property

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

6.5 Property Acquired Post-Petition

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

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

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

6.6 Tenants by Entireties

U.S. v. Barczyk, Case No. 10-1498 (6th Cir. 2011) – United States can foreclose tax lien and sell real property owned by husband and wife as tenants in the entireties even where only one of the owners is liable for the unpaid taxes. Non-liable owner is entitled to one-half of the net proceeds with taxing authority retaining half of proceeds, up to amount necessary to satisfy tax lien.

Jahn v. Bank of America, 2011 WL 1167115 (Bankr. E.D. Tn. 2011) – Deed naming vendees as Husband and Wife, “both unmarried persons with Right of Survivorship for and during their joint natural lives, with the remainder over upon the death of either of them to the survivor of them” sufficient to establish entireties estate. Law presumes real estate acquired by husband and wife during marriage is held as entireties but presumption can be overcome by evidence that parties intended acquisition as joint tenants or as tenants in common. Mistake in deed that reflected “unmarried” when parties were admittedly married on date of deed would not overcome presumption. Reference to “rights of survivorship”, standing alone, did not defeat presumption or create clear inference that other method of ownership was intended, particularly in light of references to remainder passing on death and ownership for “their joint natural lives”.

In re McKain, 2011 WL 3022542 (Bankr. E.D. Tn. 2011) – Property owned as Tenants in the Entireties is exempt from estate of bankruptcy of one spouse to the extent that debts are not joint debts of Debtor and Spouse. Entireties requires proof of unities of interest, title, time, possession, and marriage. Property owned by Debtor and “significant other” as joint tenants with right of survivorship prior to marriage is not converted into entireties property by later marriage. Bank accounts denominated “joint with survivorship” are owned jointly with right of survivorship but are not entireties accounts. Presumption that property is owned by entireties applies only to real estate acquired during the marriage. Stock account captioned “joint-tenant by entirety” sufficient to establish ownership of account as entireties account beyond scope of Husband's individual bankruptcy where schedules disclosed no joint debt with non-filing spouse.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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.

6.7 Corporations and LLCs

In re Hopkins, Case No. 10-13592 (Bankr. W.D. Mi. 2012) – Estate's interest where debtor was sole member of LLC is the debtor's ownership interest in the LLC and not the property and assets of the LLC themselves. Court lacked jurisdiction to allow Trustee to sell assets of LLC "free and clear of liens and encumbrances" as the property owned by the LLC was not property of estate. However, court could authorize Trustee, in his capacity as sole member of LLC, to sell property subject to claims and obligations of the LLC, with any proceeds remaining after payment of LLC's creditors and obligations becoming property of estate for purposes of distribution to debtor's creditors.

In re Liber, 2012 WL 1835164 (Bankr. N.D. Ohio 2012) – Debtor's interest in property for determining property of estate is debtor's ownership interest in Corporation or LLC and not the property of the entity itself. Although Debtor was sole member of single-member LLC, law recognizes separate corporate existence of LLC apart from Debtor. When debtor filed for Chapter 7 relief, Debtor's ownership interest in the LLC became property of estate, but property that was owned by LLC did not. Creditor of LLC had first claim to proceeds of sale of property of LLC ahead of any claim of the Chapter 7 Trustee in debtor's personal case. When corporation or LLC sells assets, proceeds must first be used to pay creditors. Debtor, as principal, would receive only what is left after payment of all business debts and claims.

6.8 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.

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.

6.9 Abandonment by Trustee

In re DeGroot, Case No. 05-12996 (Bankr. W.D. Mi. 2012) – Section 544 deems any property that is scheduled under Section 521 is abandoned if not administered at the closing of the case. Property that is not abandoned and is not administered remains property of estate. Court can order otherwise based on circumstances of case. Debtor never properly scheduled receivable owed by ex-wife, and trustee’s knowledge of unscheduled asset, without more, does not revest asset in debtor at closing. Debtor must strictly comply with obligations to schedule asset in order to earn the return. However, Trustee also failed to take steps to administer the receivable before filing “no asset” notice and notice to close case. Trustee would be judicially estopped from now administering receivable. Trustee took position that receivable was fully administered in response to pressure from UST to close cases, thereby inducing Court to close case. Trustee then sat quietly for several years with no contact with ex-wife and no effort to collect receivable. Unique circumstances of case indicated that trustee was engaged in “cynical gamesmanship” by failing to administer asset of which trustee was well aware. Evidence also indicated that ex-wife relied on trustee’s inaction in making financial decisions over years since closing of bankruptcy case including substantial expenditures for family needs and efforts to renegotiate mortgage.

Cook v. Wells Fargo Bank, Case No. 11-082 (10th Cir. BAP 2012) –Purported abandonment by Chapter 7 Trustee of property allegedly involved in stay violation did not vest in debtors the claim for violation of stay where abandonment was pending but had not been approved by the court or properly noticed to creditors.

In re Alexander, 2011 WL 3626420 (Bankr. W.D. Ky. 2011) – Debtor received notice of Trustee’s intent to abandon pre-petition malpractice case against Debtor’s counsel and did not object to abandonment. Debtor prohibited from later arguing that cause of action should not have been abandoned or attempting to force Trustee to prosecute claim.

Rankin v. Lavan, Case No. 09-1087 (6th Cir. 2011) – Undisclosed property rights of debtor become property of estate upon filing. Trustee does not abandon undisclosed property merely by failing to administer property as trustee had no opportunity to pursue or liquidate property.

In re USA Baby, Inc., 2011 WL 2076342 (7th Cir. 2011) – Bankruptcy Court denied Equity Holder’s motion to allow holder to pursue pre-petition claims that Trustee allegedly unjustifiably refused to pursue. Trustee has duty to exercise sound business judgment in determining whether to pursue actions. Trustee did not have funds available to finance action and could not find attorney who would take action on contingency basis given remote possibility of success.

Maloof v. Level Propane, Inc. 2011 WL 2515970 (6th Cir. 2011) – Bankruptcy Trustee can abandon any property that is burdensome of inconsequential value. Abandonment requires notice and a hearing to allow interested parties to object. Letter from trustee to debtor’s principal questioning whether cause of action exists or has any value does not constitute clear notice by trustee of intent to abandon but merely questions whether allegations could support claims.

In re Reiman, 2010 WL 2802675 (Bankr. E.D. Mi. 2010) – Section 554 of the Bankruptcy Code permits the trustee to abandon any property that is burdensome to the estate or is of inconsequential value. The Trustee can abandon property, or any party in interest can request that the Court compel abandonment.

6.10 Technical Abandonment

Rankin v. Lavan, Case No. 09-1087 (6th Cir. 2011) – Undisclosed property rights of debtor become property of estate upon filing. Trustee does not abandon undisclosed property merely by failing to administer property as trustee had no opportunity to pursue or liquidate property.

In re Reiman, 2010 WL 2802675 (Bankr. E.D. Mi. 2010) – Section 554(c) provides that any property scheduled by 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.

6.11 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.

6.12 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.

6.13 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 (6th Cir. 2008) – Bankruptcy Court has authority to set aside technical abandonment of assets that were not administered prior to the closing of the bankruptcy case. Federal Rule of Civil Procedure 60(b) permits Bankruptcy Court to reopen case and set aside technical abandonment where abandonment is the result of clerical error or other ground which would justify relief under Rule 60. Technical abandonment resulted from trustee's failure to administer property on which Debtors sought to avoid judicial lien. At time case closed and property technically abandoned, Trustee believed there was no equity in the property for the benefit of the estate. Later decisions by District and Circuit Court rendered Trustee's understanding incorrect as equity in property after avoidance of judgment liens could be administered for benefit of creditors. Equities dictated that any windfall go to bankruptcy estate rather than Debtor.

In re Pioch, Case No. 08-61473 (Bankr. E.D. Mi. 2010) - Section 544 provides for automatic abandonment to 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.

6.14 Tax Refunds

In re Bowles, Case No. 11-35340 (Bankr. E.D. Mi. 2012) – Tax refunds for year in which case is filed are allocated pre- and post-petition on per diem basis, with only that portion accruing before the petition date being property of estate. Where debtor is married and spouse does not file joint case, court must allocate tax refund between spouses. Allocation is governed by state law. Michigan Consolidated Law Section 557.151 holds that a tax refund is "other evidence of indebtedness" that are jointly and severally owned. Tax refunds must be allocated between debtor and non-filing spouse on 50-50 basis.

In re McCrory, 2011 WL 4005455 (Bankr. N.D. Ohio 2011) – Where an overpayment of a tax obligation results in a tax refund that derives solely from one debtor's income, debtor's spouse has no property interest in the refund even if a joint return was filed and the refund check is made jointly payable to both the husband and wife. Debtor's non-filing spouse had minimal income and had no taxes withheld from her pay. That portion of the tax refund attributable to over-withholding from Debtor's income is property of the estate and must be turned over without reduction. However, First Time Home Buyer Tax Credit is refundable credit even if the taxpayer had no income at all. Had debtor and his wife filed separate returns, the wife would have received \$4,000 of the tax credit as a refund, even though she had no income. Therefore, \$4,000 of the refund is property of the non-filing spouse and is not property of the estate. Tax credits for Making Work Pay, Earned Income and Additional Child Tax credits would be allocated proportionate to gross income of debtor and wife. Where Debtor earned 96.65% of the household income, debtor's estate included 96.65% of the credits in calculating the amount of the tax refund obligation.

In re Zingale, 2011 WL 2330271 (6th Cir. BAP 2011), *aff'd* 2012 WL 3764693 (6th Cir. 2012) – Non-refundable portion of

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

In re 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 (10th Cir. 2010) – Chapter 7 Trustee’s interest in pre-petition tax refunds limited to extent of Debtor’s interest. Debtor who pre-petition irrevocably assigned tax refund as prepayment of taxes for following year held only contingent right to receive refund of any taxes that were overpaid for the following year. Trustee could not compel turnover of pre-petition portion of current year tax refund as debtors had no interest, as of the date of filing, in that refund. Trustee would be entitled to recover the pre-petition refund if and to the extent Debtors received a tax refund for the year to which the pre-petition refund was applied.

In re Meyers, 2010 WL 2990826 (7th Cir. 2010) - Tax refunds received after the petition may, in some cases, represent pre-petition assets and thus are part of the estate. Pro rata by days method is presumptively the correct way to apportion tax refunds attributable to the year of the filing of the case, absent some evidence that the allocation may not correctly reflect the refund as determined on a pro rata by days method such as a debtor who has not been employed for the entire year or one who has income spikes such that the income received post-petition may be disproportionate to the income received pre-petition. Pro ration by days applied to debtor who had steady employment at fairly constant rate of pay. Debtor who filed on September 25 filed after 73.42% of the year had gone by required to remit to the Trustee 73.42% of the tax refund for that year.

6.15 Post-Foreclosure Interests

Scott v. Bierman, 2011 WL 1807330 (4th Cir. 2011) – Maryland law provides that the combined acts of a completed foreclosure sale, a ratification of the sale by the circuit court, and a conveyance of the property to the purchaser passes all the title which the borrower had in the property at the time of the recording of the mortgage or deed of trust. At this point, a borrower also loses the right to possess the property. Debtors did not object to the foreclosure sale before it occurred, or during the 30-day time period before the sale was ratified by the circuit court. Debtors held no interest in the property when Debtor later filed his bankruptcy petition and the property was not part of Debtor’s bankruptcy estate.

Greer v. Gateley, 2010 WL 4817993 (Bankr. M.D. Tn. 2010) – Property does not become property of estate where foreclosure proceedings were completed, purchase at foreclosure sale had paid consideration and foreclosure deed had been recorded 9 days before petition filed. Foreclosure was effective to transfer title leaving no interest in debtor to become property of estate.

Wisotzke v. Ontario County, 2010 WL 2588192 (2d Cir. 2010) – Debtor’s rights in property are extinguished when the redemption period expires. Bankruptcy Code Section 1322 does not extend time to redeem property.

6.16 Property Settlements

In re Mayer, 451 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.

6.17 Causes of Action

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

Simmerman v. Ocwen Financial & Mortgage Services, Inc., 463 BR 47 (Bankr. S.D. Ohio 2011) - Property of the estate encompasses a broad range of assets, including a debtor's lawsuits and causes of action that arose prior to the petition filing date. In determining when a cause of action arises, so as to determine whether it is property of the estate, the court looks not to when it accrued, but whether it is sufficiently rooted in debtor's pre-bankruptcy past to constitute property of the estate. Chapter 13 debtors' cause of action against bank serving as trustee for registered holders of mortgage pass-through certificates and mortgage loan servicer for alleged violation of Equal Credit Opportunity Act (ECOA) arose prior to debtors' previous bankruptcy case, and thus should have been scheduled as part of estate created in that case; debtors alleged that mortgage lenders and its representatives violated ECOA by failing to provide debtors with written notification that their loan application had been rejected and was supplanted with loan offer that included materially different terms, which allegedly occurred in conjunction with loan closing that took place prior to debtors' first petition filing.

Rankin v. Lavan, 2011 WL 3701441 (6th Cir. 2011) – Causes of action that accrue pre-petition are property of estate and only trustee can pursue those unless the cause of action is abandoned by the trustee. Debtor's asserted contingent interest in real property pursuant to unconsummated purchase and sale agreement is contingent interest that becomes property of estate.

Lincoln Electric Company v. Manahan, 2011 WL 3516201 (N.D. Ohio 2011) – Causes of action for alleged fraudulent transfers by debtor and alleged civil conspiracy to defraud creditors constitute property of estate. Actions are not individual as to any creditor but constitute actions which benefit creditor body as a whole.

Prifogle v. Goodyear Tire & Rubber Co., 2011 WL 1466457 (E.D. Tn. 2011) – Debtor's cause of action against former employer for violation of Equal Pay Act became property of estate when case filed. Trustee entitled to substitute in as plaintiff and to then settle the underlying claim.

Cappuccilli v. Lewis, 2010 WL 4683932 (E.D. Mi. 2010) – Debtor's action against bankruptcy counsel based on alleged pre-petition malpractice is property of estate.

Kleven v. Walgreen Company, 2010 WL 1252892 (7th Cir. 2010) - Debtor's action for employment discrimination and wrongful termination became property of the estate upon filing of the petition. Chapter 7 Trustee was properly substituted as party plaintiff and had full authority to settle the action and dismiss with prejudice.

6.18 Titled Assets – Generally

In re Harvey, 2012 WL 1865426 (Bankr. N.D. Ohio 2012) – Debtor's ex-spouse did not have legally recognizable interest in boat. Boat was titled solely in debtor's name. Although boat was allegedly purchased with marital funds and was intended to be jointly owned, certificate of title issued solely in debtor's name. Ex-spouse did not have legally recognizable interest in boat or in proceeds of sale of boat. All proceeds remained property of Chapter 7 estate.

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

6.19 Jointly Owned Bank Accounts

In re Houston, Case No. 11-60934 (Bankr. E.D. Mi. 2011) – Michigan Compiled Laws create rebuttable presumption that funds in multi-party account can be withdrawn by any one of the parties. Credit Union that holds claim against one of the parties must establish that the obligor is the owner of some or all of the funds in the account. Joint party will be the owner of the funds in the account in an amount that is proportionate to the net contributions by that party. Non-debtor third party

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filed affidavit stating that all of the funds in the account were hers. Credit Union provided opportunity to submit evidence to Court to establish amount of funds in account that Credit Union alleges belonged to debtor.

6.20 Contract Rights

Shapiro v. Harajli, 2012 WL 255326 (Bankr. E.D. Mi. 2012) – Unexercised right to draw on line of credit is not property interest for purposes of property of estate.

In re Wise, 2010 WL 3430849 (Bankr. N.D. Ohio 2010) - Chapter 7 Trustee acquires all contract rights which 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.

6.21 Internet Domain Name

Search Market Direct Inc. v. Jubber, Case no. 10-4190 (10th Cir. 2012) – Debtor's ownership of Internet Domain Name became property of estate upon filing of Chapter 7 petition.

6.22 Commission Income

In re Facione, Case No. 10-75538 (Bankr. E.D. Mi. 2012) – Debtor's right to receive commission income that is earned but unpaid as of petition date becomes property of estate. Commissions must be paid to Chapter 7 Trustee. Debtor worked as commission salesman. Debtor became entitled to receive payment when sales were recorded, but was not actually paid commissions until customer made payments. Commissions on sales that occurred pre-petition but were not paid for until post-petition are contract rights that pass to Chapter 7 Trustee. Although the exact amount of each commission could not be determined until the customer made the payment and the employer conducted an audit to determine correct amount, Debtor had fully completed his duties pre-petition and there was nothing left for him to do post-petition as a condition of earning commissions. Debtor's right to payment fully vested as of date of sale, subject only to final determination of amount and not contingent on any further actions or performance by Debtor. Trustee entitled to turnover of commission payments from employer.

6.23 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.

6.24 Equitable Interests

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

6.25 Restrictions on Alienation

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

“permanent” to “temporary.” Trustee authorized to sell debtor’s interests in companies free and clear of agreement not to transfer without consent of all other shareholders.

6.26 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.

6.27 Cash Collateral and Assignment of Rents - Defined

In re Williams, Case No. 10-70559 (Bankr. E.D. Mi. 2011) – Proceeds of disposition of collateral constitutes cash collateral for purposes of Section 363. Insurance proceeds from destruction of automobile in accident that was itself subject to a properly perfected security interest constitutes lender’s cash collateral. Debtor is not permitted to use cash collateral without consent of creditor absent showing that lien is adequately protected.

Far East National Bank v. US Trustee, Case No. 11-1508 (9th Cir. BAP 2012) – Loan secured by Assignments of Leases and Rents did not encumber green fees and driving range fees. Bank held security interest in all of Debtor’s real and personal property and all proceeds thereof. Green fees and driving range fees are not “rents, proceeds or profits” of lender’s security interest. “Rents” consists of income produced by the real property, but does not include income generated as a result of business conducted on the property. Green fees and driving range fees were not directly tied to or wholly dependent on the property, but were the result of the operation of the golf course business. Green fees and driving range fees are not proceeds or profits. Although proceeds are derived from “licenses” granted to each golfer, allowing each golfer the temporary right to enter upon the real property, and are considered personal property subject to a security interest under the UCC. However, “proceeds” do not include compensation for goods and services provided by debtor in its everyday business performance, but are limited to after-acquired property that is directly attributable to the pre-petition collateral. Fees are considered money and not general intangibles. Fees are not “profits” as they do not relate to the sale of the property to which a perfected security interest attached. Fees are not within scope of collateral and so are not cash collateral.

In re Senior Housing Alternatives, Inc., 2010 WL 165991 (Bankr. E.D. Tn. 2011) – “Absolute Assignment of Leases, Rents, and Profits” that purported to be absolute and unconditional assignment of rents and income and not just as assignment as security, but then granted to the borrower the right to collect as agent for the Assignee absent default in underlying loan agreement did not divest Debtor of title to income and proceeds received post-petition. Income and right to receive income remained property of estate and constituted cash collateral subject to Section 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 (6th Cir. BAP 2010) – Under Kentucky law, mortgage that assigns rents and profits operated to grant security interest in rents and profits in favor of lender, but the rents and profits remain property of the estate subject to lien. Debtor cannot use those rents and profits absent authority of court to use cash collateral. Notices to tenants exercising right to receive rents sent pre-petition operates only to perfect the lien against future rents and does not divest debtor of title to the rents in the first instance.

6.28 Cash Collateral - Adequate Protection

In re Williams, Case No. 10-70559 (Bankr. E.D. Mi. 2011) – Proceeds of disposition of collateral constitutes cash collateral for purposes of Section 363. Insurance proceeds from destruction of automobile in accident that was itself subject to a properly perfected security interest constitutes lender’s cash collateral. Debtor is not permitted to use cash

collateral without consent of creditor absent showing that lien is adequately protected.

In re SI Grand Traverse, LLC, 450 BR 703 (Bankr. W.D. Mi. 2011) – Chapter 11 debtor-hotel franchise operator failed to establish adequate protection in seeking permission to use cash collateral consisting of post-petition hotel rents to fund hotel's operations where expert's appraisal of hotel did not establish existence of equity cushion that adequately protected interest of secured creditor that held first and third liens on hotel and rents, debtor did not sufficiently establish second lienholder's purported guaranty of third lien position, and concerns regarding debtor's prepetition management and underfunded allocation for property improvement plan payments required under franchise agreement, among other factors, weighed against disengaging rents from creditor's security interest. Unauthorized use of cash collateral to make payroll by Chapter 11 debtor-hotel franchise operator, in violation of court order, and debtor's inability to fund hotel operations in light of court's denial of its request to use cash collateral provided cause for dismissal or conversion of case.

In re Williams, Case No. 10-70559 (Bankr. E.D. Mi. 2011) – Debtor who seeks to use secured lender's cash collateral must provide creditor with adequate protection. Adequate protection may consist of an additional or replacement lien to the extent that the use of the cash collateral decreases the value of the creditor's security interest. Debtor proposed to use insurance proceeds from automobile accident, which constituted lender's cash collateral, and to provide lender with lien on newly acquired vehicle. Proposed purchase price for new vehicle was 100% of the amount of lender's cash collateral, placing lender at serious risk of loss as the automobile will depreciate immediately upon being purchased, leaving lender with collateral that is worth significantly less than the amount of the cash collateral. Proposed replacement lien would be unlikely to protect secured creditor from diminution in value of collateral.

6.29 Bare Possessory Interests

Litinger v. Farmers Deposit Bank, 2012 WL 1190695 (Bankr. E.D. Ky. 2012) – Bare possessory interest in property constitutes property of estate for bankruptcy purposes. Prior to commencement of case, debtor delivered to bank a deed in lieu of foreclosure pursuant to a settlement of possible foreclosure proceedings. Bank did not record deed because of subordinate liens and instead filed foreclosure proceedings that were pending at time Bankruptcy petition filed. Even if as Bank alleged conveyance of deed operated to divest debtor of title, debtor remained in possession of the property as the foreclosure proceeding had not been completed. Debtor's possessory interest sufficient to constitute property of estate and Bankruptcy Court could exercise jurisdiction over property and claim.

6.30 Incomplete Transfers

Litinger v. Farmers Deposit Bank, 2012 WL 1190695 (Bankr. E.D. Ky. 2012) – Debtor did not divest himself of title to property by delivery of deed in lieu of foreclosure where lender did not accept the deed. Bank received deed in lieu but determined that subsequent liens required foreclosure. Bank never recorded deed but did institute foreclosure proceedings. To be effective conveyance, deed must be delivered by the vendor and accepted by the vendee sufficient to divest vendor of title and vest title in vendee. Bank never evidenced any intent to accept deed. Bank did not record deed and did not credit the debtor's account for the value of the property. Instead, Bank chose to pursue foreclosure which would be entirely unnecessary if Bank had accepted deed. As deed, while tendered by debtor, was never accepted by Bank, title to property remained vested in debtor subject to Bank's rights under the mortgage documents.

6.31 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.

6.32 Fixtures and Personalty – Defined

US Bank, NA v. Barbee, 2011 WL 6141648 (6th Cir. BAP 2011) – Property interests are created and defined by state law. In Kentucky, manufactured home is personalty for which certificate of title is issued in which lien may be perfected solely by notation on certificate of title. State law does allow for conversion of mobile home into fixture by filing an affidavit of conversion, or by creditor obtaining pre-petition state court judgment converting mobile home to improvement to real property, on which lien would be mortgage recorded in appropriate public records. Debtors did not file affidavit and

creditor did not avail itself of option to seek state court declaration, leaving mobile home “personalty” for purposes of perfection. Lien not recorded on certificate of title could be avoided as unperfected security interest under Section 544.

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.

6.33 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.

6.34 Trust Property

White Family Companies, Inc. v. Dayton Title Agency, Inc., 468 BR 258 (S.D. Ohio 2012) – Funds that had been deposited in debtor/real estate title agency's interest on lawyers trust account (IOLTA) to complete loan closings, were held in express trust, and did not constitute funds in which debtor had interest. Any transfer of funds from that account could not be avoided as fraudulent transfers as transfers did not involve a transfer of debtor's interest in property.

In re Harvey, 2012 WL 1865426 (Bankr. N.D. Ohio 2012) – Property in which debtor holds as trustee is not property of estate. Express trust will exist where there is a manifestation of intent to create a fiduciary relationship with regard to property that subjects the person in whom title is vested with equitable duty to deal with property for benefit of another. Party proving express trust can claim in titled asset even though name is not on the title documents. Debtor's ex-spouse failed to prove existence of express trust in titled boat where there was no evidence of intent to have spouse own boat for the benefit of the ex-spouse. That boat was purchased using marital assets and marital funds were used for storage fees and expenses, debtor did not take title until after the parties separated and there was no evidence that ex-spouse used the boat or that it was even available for her use once the boat was titled in debtor's name. Cases supporting an express trust in a titled vehicle generally require that debtor agreed to take title simply as an accommodation in order to overcome a problem raised by the dealer in titling the vehicle, such that the “beneficiary” was intended as the actual owner and the beneficiary actually paid for and used the vehicle. Bankruptcy Code recognizes constructive trusts solely as remedies and not an independent claim, and must have been created by judicial order prior to commencement of bankruptcy case. Divorce court did not impose any constructive trust as part of the divorce proceeding, as order stated that if the bankruptcy court did not take possession of the boat, then the boat would be sold with the proceeds distributed between the parties. At

the time of the bankruptcy filing, there was no unconditional status of the ex-spouse as a constructive trust beneficiary. In fact, the bankruptcy court did take possession of the boat and sold the boat.

Baumgart v. Laurie, 2011 WL 3879507 (Bankr. N.D. Ohio 2011) – Property that is held by debtor as trustee is not property of the estate. Trustee's recovery of property in adversary proceeding for fraudulent transfer precludes debtor from later arguing that property was held in trust for third person. Had property been held in trust, transfer to third party would not have been a transfer of an interest of 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.

6.35 Spendthrift Trust – Beneficial Interest

Bendon v. Reynolds, Case No. 11-1433 (9th Cir. BAP 2012) – Beneficiary's interest in spendthrift trust is protected from claims of creditors as long as the income and principal remain in the trust. However, once income or principal is distributed to the beneficiary, the distributed funds are no longer protected and can be seized by creditors.

6.36 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.

6.37 Encumbered Property

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

6.38 Proceeds and Products

In re Williams, Case No. 10-70559 (Bankr. E.D. Mi. 2011) – Proceeds of property of estate are themselves property of estate. Insurance proceeds received after destruction of automobile in accident were themselves property of the estate where the underlying automobile itself was property of estate.

6.39 Mineral Interests and Rights

In re Cassetto, 2012 WL 3193555 (Bankr. N.D. Ohio 2012) – Oil and gas rights that underlie property owned by debtors

and that have not previously been severed are property of the estate. Trustee is required to administer those rights for the benefit of the estate, which can include execution of oil and gas leases. Mineral rights attendant to debtor's homestead were nonetheless property of estate subject to administration. Trustee could enter into mineral lease even where exploration may produce noise and require access to the property where debtors did not present any evidence that debtors would be unable to continue to use and enjoy the homestead.

In re Loveday, 2012 WL 1565479 (Bankr. N.D. Ohio 2012) – Oil and gas interest are not part of the real property owned by debtor. Oil and gas move freely from place to place. While it may form a part of a tract of land at one point or another, if it moves to an adjoining tract then it becomes part of that tract. It remains a migratory item until it is actually raised to the surface through a well, at which time it becomes personal property subject to distinct ownership separate from the realty. Debtor's scheduling of the real property without any separate listing of oil and gas rights does not constitute proper disclosure of oil and gas rights. Therefore, debtor's scheduled valuation of the real property would not include the value, if any, of the separate oil and gas rights. Valuation of real property is assumed to be the value given to the top surface rights unless debtor specifically schedules retention of other rights associated with the real property. Debtor's failure to disclose oil and gas rights means that rights remained property of estate post-confirmation of Debtor's Chapter 13 plan, and the proceeds and profits received from oil and gas leases are property of estate available for additional funding of Debtors plan.

6.40 Criminal Forfeiture

U.S. v. Erpenbeck, 682 F.3d 472 (6th Cir. 2012) – Forfeiture proceedings allow government to seize property and proceeds of criminal offense. If assets connected to the offense cannot be located despite due diligence, government can forfeit substitute assets, which is any property owned by the criminal defendant that is not otherwise a product of the criminal activity. Proceeds of criminal activity that occurred pre-petition and are later forfeited are not property of estate, as forfeiture of criminal proceeds is deemed to have occurred at the moment of the crime, such that debtor did not have title to those assets as of the date of commencement of the bankruptcy case. However, "substitute assets" to not become subject to forfeiture proceeding until government can establish that it cannot locate proceeds of criminal activity. Trustee of criminal defendant's bankruptcy estate has a cognizable interest in "substitute property" and has a right to direct notice of criminal forfeiture proceedings against defendant's cash and an opportunity to contest forfeiture proceeding. Notice by publication is sufficient as to any person whose interest is unknown to the government. However, when the government knows of a competing interest, government must provide actual, direct notice. Although government knew of trustee's potential interest, government failed to provide actual, direct notice. Trustee entitled to set aside order of forfeiture and to commence ancillary proceedings to determine right to "substitute property".

6.41 Inheritance

6.42 After Confirmation of Chapter 13 Plan – Generally

In re Williams, Case No. 10-70559 (Bankr. E.D. Mi. 2011) – Property of the estate in a confirmed Chapter 13 plan depends on the intersection of Sections 1306, 1327, 363 and 541. Code as a whole is most consistent with "estate preservation" interpretation. Confirmation does not affect status of property as property of estate. Status of property can change only on dismissal, conversion or closing of case. "Vesting" under Section 1327(b) does not mean a transfer or conveyance of title but fixes in the debtor the right to use and possess property of the estate, but the property itself remains property of the estate.

In re Jackson, 403 B.R. 95 (Bankr. D. Idaho 2009) – Assets acquired by a Chapter 13 debtor after confirmation of a plan but before the case is closed, dismissed, or converted become property of the bankruptcy estate. Where plan provided for property to vest in debtors at confirmation, property ceased to be property of estate. Therefore, post-petition creditor who recorded judgment against debtor's residence did not violate stay, as creditor's actions were not attempt to collect pre-petition obligation and did not interfere with property of the estate.

6.43 After Confirmation of Chapter 13 Plan - Personal Injury Proceeds

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

6.44 After Confirmation of Chapter 13 Plan – Life Insurance Proceeds

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

DETROIT CONSUMER BANKRUPTCY CONFERENCE

6.45 After Confirmation of Chapter 13 Plan – Inheritance

In re Tinney, 2012 WL 2742457 (Bankr. N.D. Ala. 2012) - Inheritance received more than 180 days after petition date was property of the estate. Section 1306 sweeps in all property of any kind that is acquired after commencement of the case but before case is closed or dismissed or converted. Broad language of Section 1306 operates to expand 180-day time period of Section 541. Trustee's plan modification to require remittance of inheritance granted.

In re Wiggins, 2012 WL 3889099 (Bankr. E.D. Tn. 2012) – Inheritance to which debtor became entitled more than a year after confirmation of plan was property of estate. Debtor's expenditure of funds received constituted improper conversion of property of estate by debtor.

In re Zeitchik, 2011 WL 5909279 (Bankr. E.D.N.C. 2011) – Inheritance received more than 180 days after commencement of case became property of Chapter 13 estate. Section 1306 extends 180 day period found in Section 541(a)(5) to include all property received before closing, conversion or dismissal. Debtor must modify plan to account for new property for purposes of best interests of creditors.

In re Walsh, 2011 WL 2621018 (Bankr. S.D. Ga. 2011) – Inheritance to which Debtor became entitled more than 180 days after petition date did not become property of estate in Chapter 13 proceeding. Section 1306 sweeps in after-acquired property to extent that property would have been included in property of estate in Chapter 7 proceeding, which includes 180 day limitation on inherited property.

In re Key, 2012 WL 315446 (Bankr. S.D. Ga. 2012) - Inheritance to which Debtor became entitled more than 180 days after petition date did not become property of estate in Chapter 13 proceeding. Section 1306 sweeps in after-acquired property to extent that property would have been included in property of estate in Chapter 7 proceeding, which includes 180 day limitation on inherited property.

In re Wetzel, 381 BR 247 (Bankr. E.D. We. 2008) – Property inherited by Chapter 13 debtor during pendency of case becomes property of estate regardless of when during case property is inherited. Property must be included in liquidation analysis and income derived from property must be contributed to the plan.

6.46 Conversion From Chapter 13 to Chapter 7

In re Wiggins, 2012 WL 3889099 (Bankr. E.D. Tn. 2012) – Upon conversion of case from Chapter 13 to Chapter 7, property of Chapter 7 estate includes property of the estate as of the date of the filing that remains in possession or control of debtor as of date of conversion. However, if debtor converts case in bad faith, property of Chapter 7 estate is all property in estate as of date of conversion, including property acquired post-petition. Inference of bad faith does not rise solely because debtor acquired assets post-petition that would be excluded from converted estate. Court must ascertain whether debtor is merely seeking advantage over creditors or whether debtor is honest in dealing with creditors and truly needy in sense that financial predicament warrants discharge of debts in exchange for liquidation of assets. Evidence indicated lack of good faith. Although debtor received inheritance in October, 2011, he did not tell his attorney until February, 2012. Debtor testified that he contacted attorney because he was concerned that property and money would go into Chapter 13 estate and debtor wanted to keep land out of hands of creditors and debtor had already used portion of inheritance to pay off second mortgage. Debtor's desire to keep the property and the \$48,000 in cash outweighed any consideration for unsecured creditors. Further, after conversion, although debtor disclosed real estate, he did not disclose receipt of \$48,000 in cash proceeds, which would have been sufficient to pay unsecured creditors in full leaving over \$12,000 surplus. Case did not have any significant change in circumstances other than inheritance that would have prompted conversion. Debtors consciously attempted to manipulate the bankruptcy system to the detriment of their unsecured creditors when they converted their case to Chapter 7, thus necessitating a finding that their case was converted in bad faith. Accordingly, pursuant to § 348(f)(2), all property acquired during the pendency of the Debtors' Chapter 13 bankruptcy case, including the Hubbard Road Property and the remaining \$10,000.00 from the \$48,000.00 cash inheritance, is property of their Chapter 7 bankruptcy case and subject to administration by the Trustee.

In re Smith, 2012 WL 43647 (Bankr. N.D. Ohio 2012) – Life insurance proceeds received by debtor where non-filing spouse died during pendency of Chapter 13 case are property of estate per Section 1306. However, when case is later converted to chapter 7, insurance is not property of Chapter 7 estate. On conversion, only property of the estate that existed as of the date of the filing of the petition that remains in possession or control of the debtor on the date of conversion is included. Only exception is where case is converted in bad faith under Section 348, in which case property of estate includes all property of the estate as of the date of conversion. Bad faith depends on nature of debt, whether debt would be dischargeable in Chapter 7, timing of petition, how debt arose, debtor's motive in filing petition, how

actions will affect creditors, treatment of creditors both pre- and post-petition, and whether debtor has been forthcoming. Evidence indicated lack of good faith in conversion. Debtor falsely alleged that debtor sought to convert because debtor could not afford payments, when debtor had substantial assets in form of life insurance proceeds to use for payments. When debtor received insurance, debtor selectively decided to pay creditors that were close to her and used between \$14,000 and \$18,000 on new furniture and gifts to charity. Debtor also failed to completely account for use of insurance proceeds. Debtor's expenses substantially increased after death of spouse with no explanation and in spite of smaller household size. Debtor had paid nothing to unsecured creditors by the time of conversion although insurance proceeds would have allowed debtor to complete Chapter 13 case and pay 50% dividend to unsecured creditors while retaining significant portion of proceeds.

B. Turnover

6.47 Generally

In re Damman, Case No. 09-03185 (Bankr. W.D. Mi. 2012) – Debtor held in contempt of court for failing to cooperate with Chapter 7 Trustee regarding sale of real property that was asset of estate. Although Court had ordered Debtor to cooperate in Trustee's efforts to sell Florida property, Debtor intentionally interfered with Trustee by refusing to allow property to be shown and by refusing to cooperate with broker's efforts to procure buyer. Property was not exempt and was property of estate. Debtor had duty to turn over property to the Trustee for liquidation for benefit of estate.

Vining v. Comerica Bank, Case No. 03-4950 (Bankr. E.D. Mi. 2011) – Documents belonging to Debtor but in the hands of third party constitute property of the estate that must be turned over. Motion to Compel Turnover rendered moot when documents were turned over to Chapter 7 Trustee after filing of Motion but before hearing.

In re Driesenga, Case No. 09-0925 (Bankr. W.D. Mi. 2010) – Trustee cannot bring Motion for Turnover where there is a dispute as to debtor's ownership of property. Trustee must first begin adversary to determine validity, priority and extent of debtor's interest in the property to determine ownership of property and extent to which property is subject to turnover.

6.48 Excusal – State Court Receiver

In re Tam, 2012 WL 3555416 (Bankr. W.D. Mi. 2012) – Court will generally require turnover where there is a likelihood of successful reorganization, subject to overall consideration of interests of creditors. Debtor's turnover motion denied where state court receiver had been in possession of and managing 72 unit apartment project for more than 16 months. Foreclosure sale had recently been completed although not confirmed by state court as a result of stay. Lender who caused appointment of receiver in first instance was successful bidder and would have received title but for bankruptcy petition. Court had already lifted stay to allow completion of foreclosure proceedings, so removal of receiver would, at best, be fruitless and meaningless. Debtor failed to demonstrate even a hint of a possible reorganization, as debtor had virtually no income from which to fund reorganization. Although there was no evidence of any misconduct by debtor in managing property before appointment of receiver, to require turnover now would just cause unnecessary delay and would create risk of confusion to tenants who had been sending rent payments to receiver for 16 months.

C. Failure to Disclose Causes of Action

6.49 Future Prosecution Barred

Jones v. US, 2012 WL 833320 (11th Cir. 2012) – Debtor judicially estopped from pursuing toxic tort claim against Federal government. Debtor failed to disclose the claim during pendency of chapter 13 case, or when debtor sought to convert case to Chapter 7. Disclosure would have materially impacted debtor's Chapter 7 case which was discharged as "no asset" case. Debtor seeking shelter under the bankruptcy laws must disclose all assets, or potential assets, to the bankruptcy court. Duty to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court; debtor must amend financial statements if circumstances change. Creditors rely on debtor's disclosure statements in determining whether to contest or consent to a no asset discharge; and Bankruptcy courts rely on accuracy of the disclosure statements when considering whether to approve a no asset discharge. Accordingly, the importance of full and honest disclosure cannot be overstated.

EEOC v. CRST Van Expedited, Inc., 2012 WL 1583026 (8th Cir. 2012) – Debtor's failure to schedule sexual harassment claim estopped debtor from recovering, but did not preclude action by EEOC to enforce statutes.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

Guay v. Burak, Case No. 10-2513 (1st Cir. 2012) – Debtor’s failure to disclose causes of action in Chapter 11 Schedules or in supplemental schedules filed after conversion to Chapter 7 precluded later prosecution of actions after entry of discharge. Debtor had numerous opportunities to amend schedules to disclose causes of action, although Debtor did provide Trustee with copies of relevant pleadings and the lawsuits were discussed among the parties and the Bankruptcy Trustee.

Young v. Independent Bank, slip op. No. 299192 (Mich. Ct. App. September 20, 2011) - Michigan Court of Appeals affirmed dismissal of a lawsuit the plaintiff failed to schedule in her Chapter 7 bankruptcy case. Court of Appeals applied bankruptcy law and Sixth Circuit precedent that an unscheduled cause of action is not abandoned to 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 (6th Cir. 2010) – Judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition. To support a finding of judicial estoppel, Court must find that: (1) Debtor assumed a position that was contrary to the one asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) Debtor’s omission did not result from mistake or inadvertence. In determining whether Debtor’s conduct resulted from mistake or inadvertence, court considers whether: (1) Debtor lacked knowledge of the factual basis of the undisclosed claims; (2) Debtor had a motive for concealment; and (3) the evidence indicates an absence of bad faith. In determining whether there was an absence of bad faith, court will consider Debtor’s attempts to advise the bankruptcy court of her omitted claim. Debtor’s failure to schedule a harassment claim constituted an affirmative statement that no claim existed although debtor had already filed a Notice of Claim with the EEOC, had received a Notice of Right to Sue from the EEOC, had hired an attorney, and had earlier filed complaints with the EEOC and Tennessee Human Rights Commission. Court adopted these misrepresentations when Court directed debtor to attend first meeting of creditors and to commence payments to the Chapter 13 Trustee. Debtor had motive to conceal claim in effort to keep proceeds for herself rather than paying proceeds for benefit of creditors. Evidence indicated that Debtor’s attorney advised Trustee of claim as early as first meeting of creditors but did not indicate what may have been discussed with whom from the Trustee’s office it was discussed, or whether the omission from the schedules was emphasized. Transcript of 341 meeting did not indicate any discussion of claim. Debtor’s application for retention of non-bankruptcy counsel failed to indicate whether Debtor was the plaintiff or the defendant in the action, the amount of the lawsuit, the facts giving rise to the lawsuit, or even when the actions giving rise to the lawsuit took place; and did not indicate that the harassment claim had been omitted from Debtor’s initial filings. Debtor did not update her inaccurate filing statements until after the Defendants filed their motion to dismiss. Debtor’s schedules did list a different action to which Debtor was party, further evidencing that the omission of this action was intentional. Allegation that Debtor advised attorney of action and attorney inadvertently omitted action from schedules would not preclude judicial estoppel. Debtor has obligation to review the documents for accuracy, and Debtor is held responsible for actions of attorneys.

Swanigam v. Northwest Airlines, Inc., 2010 WL 2465387 (W.D. Tn. 2010) - Judicial estoppel is an equitable doctrine that protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. Action is barred by judicial estoppel where: (1) the party’s later position must be clearly inconsistent with its earlier position; (2) the party must have succeeded in persuading a court to accept its prior position, suggesting that either the first or the second court was misled; and (3) there must be the potential for the party to derive an unfair advantage on the opposing party if not estopped. Estoppel will not be appropriate where failure to disclose is result of mistake or inadvertence, evidenced by a lack of knowledge of the factual basis for the undisclosed claim or that debtor, aware of action, has no motive for concealment. Constant affirmative efforts to conceal action demonstrate that omission was not in good faith or inadvertent. Debtor filed petition with Title VII action pending before EEOC failed to list action on schedules. Debtor admitted that she failed to Debtor disclose the action until after Court confirmed Chapter 13 Plan. Court’s confirmation of the Plan constitutes adoption of Debtor’s statement that she has no potential causes of action. Plaintiff does not dispute that she had such knowledge. Debtor’s argument that because she will pay her creditors at one hundred percent (100%), she possessed no motive to conceal the claims where Debtor did not amend the Plan to increase the percentage paid to Debtor’s unsecured creditors until after the Defendant filed a Motion to Dismiss for judicial estoppel. Amending the plan

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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.

6.50 Future Prosecution Not Barred

Cannata v. Wyndham Worldwide Corp., 798 F. Supp. 2d 1165 (D. Nv. 2011) – Judicial estoppel did not prevent debtor from pursuing Title VII claim, but recovery would be limited to amounts necessary to pay creditors in full, with debtor to receive nothing. Evidence indicated that failure to disclose was not inadvertent oversight or mistake. Motion filed by Chapter 13 Trustee to convert case to Chapter 7 demonstrated that undisclosed claims resulted in prejudice to creditors.

EEOC v. CRST Van Expedited, Inc., 2012 WL 1583026 (8th Cir. 2012) – Debtor's failure to schedule sexual harassment claim estopped debtor from recovering, but did not preclude action by EEOC to enforce statutes.

Rainey v. United Parcel Service, 2012 WL 753680 (7th Cir. 2012) – Debtor has continuing duty to disclose causes of action acquired post-petition Debtor could re-open bankruptcy case to inform trustee of undisclosed claims and if debtor can pursue recovery for benefit of creditors unless trustee elects to abandon asset. Debtor cannot profit from action but can pursue to the extent recovery benefits creditors.

Kelso v. Pilot Travel Centers, 2011 WL 6130919 (W.D. Mo. 2011) – Judicial estoppel not appropriate where debtor amends schedules to disclose post-petition employment discrimination action, even where amendment not filed until after Motion to Dismiss filed in the litigation. Amendment would put all parties in same position as parties would have been in had disclosures been timely made and plan had not been concluded allowing creditors and Trustee to seek to modify plan if asset has value. Amending schedules to disclose would not prejudice either the estate or the defendant in the litigation.

Simmerman v. Ocwen Financial & Mortgage Services, Inc., 463 BR 47 (Bankr. S.D. Ohio 2011) - Judicial estoppel is an equitable doctrine which bars a party from asserting a position that is contrary to one the party has asserted under oath in a prior proceeding, where the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition. Doctrine should be applied with caution to avoid impinging on truth seeking function of court. Judicial estoppel applies in bankruptcy to bar a debtor from pursuing a cause of action for his own benefit after the debtor intentionally failed to disclose the cause of action, which was properly part of the bankruptcy estate. Judicial estoppel is inappropriate if the failure to disclose the cause of action was inadvertent, such as when a debtor lacks knowledge of the factual basis for the undisclosed claim, or the debtor had no motive to conceal the potential claim. Court could not determine on Motion to Dismiss what was disclosed in the prior Chapter 13 case or whether any failure to disclose in the prior case was inadvertent or without motive.

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 (4th Cir. 2010) – Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation. The purpose of the doctrine is to prevent a party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process. Judicial estoppel generally requires: the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation; the position at issue must be one of fact as opposed to one of law or legal theory; the prior inconsistent position must have been accepted by the court; and the party against whom judicial estoppel is to be applied must have intentionally misled the court to gain unfair advantage. This bad faith requirement is the determinative factor. Debtor not estopped where debtor disclosed the possibility of a lawsuit in her bankruptcy petition and bankruptcy trustee later abandoned all scheduled assets. Debtor did not conceal or deny owning an asset. Even if Debtor should have supplemented her bankruptcy pleadings after she actually filed this action, her initial disclosure of the claims finding that she acted in bad faith.

Crouch v. Guardian Angel Nursing, Inc., 2009 WL 2960757 (M.D. Tn. 2009) – Judicial estoppel is an equitable doctrine that bars a party from asserting a position that is contrary to one the party has asserted in a prior proceeding ready prior Court adopted the contrary position as either a preliminary matter or a part of a final disposition. Judicial estoppel is designed to prevent parties from “playing fast and loose with the Courts to suit the exigencies of self-interest”. Debtor who 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.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

D. Section 542 Turnover Actions

6.51 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.

6.52 Defenses

Shapiro v. Henson, 449 BR 109 (D. Nv. 2011) – Trustee could not compel debtor to turnover balance in debtor's checking account as of the date of the bankruptcy petition where checks written pre-petition were ultimately honored post-petition. Debtor no longer had possession or control over funds that had been in the account as of the petition date. Section 542 allows turnover only of assets that are in the possession of the debtor as of the date on which the turnover motion is filed. Court disagreed with 6th Circuit BAP opinion that held that right of turnover does not depend on continued possession of the asset by the debtor.

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

6.53 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.

6.54 Sale Free and Clear of Liens

Allen Group Partners v. Golden, Case No. 10-55227 (9th Cir. 2011) – Motion to approve the sale of the real property free and clear of liens and interests granted over creditor objection that creditor maintained an equitable interest (or lien) on the subject property, notwithstanding the Bankruptcy Court's ruling in the earlier adversary proceeding avoiding alleged lien. Creditor could not collaterally attack the judgment in the adversary proceeding but objecting to the proposed sale.

In re Sumner Regional Health Systems, Inc., 2010 WL 2521081 (Bankr. M.D. Tn. 2010) – Chapter 11 debtor-in-possession, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate and can sell all a Chapter 11 debtor's assets when a sound business purpose. Section 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.

6.55 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.

6.56 Objections

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

F. Prosecution of Pre-petition Causes of Action

6.57 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

Leicht v. Anspach, 475 BR 612 (Bankr. S.D. Ohio 2012) – Exemptions are determined as of the date of the bankruptcy filing.

Cook v. Wells Fargo Bank, Case No. 11-082 (10th Cir. BAP 2012) – Fact that debtor claimed exemption in underlying asset did not confer standing for purposes of alleging violation of automatic stay. Claim of exemption does not remove asset from estate until the exemption is allowed or by operation of law if no timely objection is filed. Creditor timely objected to claimed exemption and claimed exemption had not been determined as of date of alleged stay violation. As property remained property of estate, debtor lacked standing to pursue alleged stay violation.

In re Pellegrini, 2012 WL 129842 (Bankr. W.D. Mi. 2012) – Exemptions are determined on the bankruptcy filing date.

Only the facts as they existed on the filing date are relevant to determination as to whether debtor qualifies for claimed exemption, without reference to any subsequent changes in the character or value of the property.

In re Wengerd, 453 BR 243 (6th Cir. BAP 2011) – Debtor’s admitted intent to abandon homestead after filing does not defeat status of property as homestead as of moment of bankruptcy filing. Debtors’ entering into pre-petition contract for sale of homestead does not defeat homestead status where, as of petition date, Debtors occupied their home and intended the property to be the homestead.

Williamson v. Hall, Case No. 08-088 (10th Cir. BAP 2009) – Homestead exemption is determined as of the date of the bankruptcy petition.

In re O’Guinn, 2009 WL 2132619 (Bankr. N.D. Ohio 2009) – Exemptions are governed by law in effect at the time of the filing of the petition. Subsequent conversion of case from Chapter 13 to get chapter 7 does not permit Debtor to avail herself of higher exemption limits which came into effect during the pendency of the chapter 13 proceeding. Debtor’s exemptions are limited to those in effect when the chapter 13 case was originally commenced.

7.2 Bankruptcy Only Exemptions

In re Schafer, 2012 WL 3553294 (6th Cir. 2012) – Bankruptcy specific exemption statute MCL 600.5451 is constitutional. State exemption statutes that create special exemptions that apply only in bankruptcy do not violate either the supremacy clause or the Bankruptcy clause on uniform laws. Debtor in Michigan can elect federal exemptions or can elect Michigan exemptions to the extent those exemptions apply in all cases and are not “bankruptcy specific”.

In re Reinhart, 460 BR 466 (Bankr. E.D. Mi. 2011) – 11 USC Section 522(b)(3)(A) does not authorize a state to create bankruptcy-specific exemptions. Congress authorized state exemptions only to the extent the exemptions are available to a debtor if the bankruptcy had not been filed. Further, limiting exemptions to those available to debtors outside bankruptcy avoids the constitutional issues presented in *In re Schafer*.

Sticka v. Applebaum, 422 B.R. 684 (9th Cir. BAP 2009), California bankruptcy only exemption did not violate the Uniformity Clause. Uniformity Clause required only that federal bankruptcy laws apply equally to all creditors and debtors. California bankruptcy only exemption applied equally to all debtors and creditors in bankruptcy, resulting in no violation of the Uniformity Clause.

In re Westby, 2012 WL 1144412 (Bankr. D. Kn. 2012) – State “bankruptcy only” exemptions are not unconstitutional. Uniformity Clause of Constitution requires only that exemptions apply equally to all debtors and creditors in bankruptcy, not to all debtors and creditors in general.

In re Pontius, 421 BR 814 (Bankr. W.D. Mi. 2009) – Michigan State Exemptions which apply solely in context of bankruptcy is unconstitutional. Congress’ attempt to delegate to states the authority to enact bankruptcy exemptions in Section 522(b)(1) is unconstitutional as Constitution gives sole authority to Congress to enact uniform laws” regarding bankruptcy. Congress cannot constitutionally delegate its legislative powers or attempt to transfer these legislative powers to the States. Section 522 does authorize non-federal exemptions that states extend generally to individuals in their jurisdiction, but cannot constitutionally authorize “bankruptcy specific” exemptions. Michigan Compiled Laws Section 600.5451 is an attempt by the Michigan Legislature to write part of the Bankruptcy Code. Constitution mandates “uniform” bankruptcy laws. Any attempt by Congress to delegate to the States the power to make bankruptcy law destroys the constitutionally mandated uniformity. Uniformity requires that the property available to be taken by the Trustee be the same property that would have been available to creditors had the bankruptcy never ensued. State statutory exemptions that apply only in bankruptcy “ensure that that bankruptcy trustee” not be able to reach all of the property that would have been available to creditors outside bankruptcy. Homestead exemption in Section 600.5451 purports to exempt in bankruptcy an amount far in excess of the generally available homestead exemption under non-bankruptcy Michigan State law and is unconstitutional and unenforceable against Bankruptcy Trustee.

In re Jones, Case No. DK 09-9415 (Bankr. W.D. Mi. 2010) – Michigan exemptions statute Section 600.5451 is constitutional exercise of lawfully delegated authority. Section 522 permits a state to choose the exemption scheme available to a debtor filing for bankruptcy in that state. States and Federal Government hold concurrent legislative authority in area of bankruptcy exemptions. Section 522 is not delegation of authority, but merely recognition of the concurrent powers of the Federal and State governments. Supremacy Clause will invalidate state statutes to the extent they are inconsistent with or contrary to federal law. Michigan exemption laws do not actually conflict with or object the federal Bankruptcy Law. The Bankruptcy Code expressly recognizes state authority to concurrently legislate exemptions. That Michigan’s bankruptcy exemptions are broader than non-bankruptcy exemptions does not actively encourage or discourage anyone from seeking bankruptcy protection. States can enact exemptions that are more, or less, protective than the Federal exemptions without running afoul of the Supremacy Clause.

Sticka v. Applebaum, 422 BR 684 (9th Cir. BAP 2009) – California state statute that created exemptions available only in bankruptcy is not inconsistent with either the Supremacy Clause of the Uniformity clause of the United States Constitution. The Supremacy Clause and the doctrine of preemption invalidate state statutes to the extent they are inconsistent with, or contrary to, the purposes or objectives of federal law. A state law may be preempted when federal legislation expressly declares its intent to do so; when Congress has legislated comprehensively so as to "occupy the field" of regulation leaving no room for states to supplement federal law; or, when the state law actually conflicts with federal law. Federal bankruptcy law is not so pervasive, nor is the federal interest so dominant, as to wholly preclude state legislation in the area. Congress has not occupied the field of bankruptcy regulation to the point of preempting state exemption statutes. State statute will be in actual conflict with federal law only if it obstructs the basic objectives of the federal law. Section 522 specifically permits states to opt out of the federal exemption scheme and implement their own exemptions. Congress did not limit the exempt property to a state's applicable non-bankruptcy law. There is no requirement that the state or local law referenced in §522(b)(3)(A) be the same as the law that applies to nonbankruptcy debtors. The uniformity requirement pertains only to Congress. States have the authority to enact exemption laws even if they produce varying effects on its citizens, so long as the laws do not conflict with federal law.

7.3 Amended Claim of Exemptions

In re McConnaughay, Case No. 11-32155 (Bankr. E.D. Mi. 2012) – Debtor will be permitted to amend Schedules and SOFA absent bad faith or concealment of property. Debtor not permitted to amend exemption to claim interest in property that debtor inherited and then transferred to his brothers one year prior to commencement of case. Debtor failed to list transfer in SOFA question 10 as required. Failure to list property transferred as required constituted evidence of concealment. Debtor listed and exempted that portion of inheritance that debtor was still entitled to receive but did not disclose that portion already received and transferred, further evidencing intent to conceal true intentions regarding estate. Debtor's failure to disclose transfer frustrated Trustee's investigation of assets and determination as to possible action or liquidation of asset until issue came to light at first meeting of creditors. Although debtor ultimately did disclose assets orally, Trustee should not have to resort to questioning at first meeting of creditors to discover assets and transfers that should have been disclosed in schedules.

In re Stiltner, 2012 WL 1805423 (Bankr. E.D. Tn. 2012) – Judicial estoppel sufficient to preclude post-petition amendment to claimed exemptions requires more than mere inadvertence in failing to disclose cause of action. Although debtor told attorney of cause of action, attorney erroneously determined that cause of action was barred by statute of limitations and chose not to disclose on schedules or claim as exempt. Debtor voluntarily disclosed cause of action at Section 341 meeting and continued to apprise Chapter 7 Trustee of developments concerning claim. Debtor's bankruptcy case remained open and has never been closed. Other than the fact of the initial omission itself, there was no evidence that the Debtor was acting in bad faith or in an attempt to conceal his possible malpractice claim. Debtor informed his bankruptcy attorney prior to filing his bankruptcy case about the claim and it was his attorney who erroneously concluded that the claim should not be scheduled. The Debtor also advised his personal injury attorney, before the bankruptcy filing, that he was seeking bankruptcy relief. At his meeting of creditors Debtor fully disclosed in sworn testimony on the record that he had a potential medical malpractice claim, and then subsequent to the meeting he followed up this disclosure by continuing to answer and provide any information requested by the Trustee. Debtor's delay in amending claimed exemptions and schedules resulted from confusion regarding paperwork and reliance on attorneys to advise of necessary steps. Creditor's objection to claimed exemption overruled.

Rossi v. Westenhoefer, Case No. 11-8048 (6th Cir. BAP 2012) - Debtors will not be barred by doctrine of judicial estoppel from amending schedules and exemptions to increase asset valuation if debtor can establish that differing valuations were due to mistake or inadvertence rather than bad faith. Fire destroyed the house of Cary and Dana Rossi ("Debtor") while their Chapter 7 bankruptcy was pending. On the schedules, household goods, furnishings and wearing apparel were valued at \$2,200. On the insurance claim the same assets plus medical equipment and living expenses were valued at \$45,924.88. Debtor then amended the schedules, increasing the value of the property in question to \$24,309.88, adding the medical equipment valued at \$13,145.00, and claiming all of these assets as exempt. Bankruptcy court erred in denying debtor's request to modify exemptions without providing debtor an opportunity to explain the substantial discrepancy in values as well as debtors apparent failure to list all assets.

In re Rice, 2011 WL 3290312 (Bankr. E.D. Mi. 2011) *aff'd* 2012 WL 3870587 (E.D. Mi. 2012) – Debtor may amend petition and schedules at any time before the case is closed, provided there is no bad faith or concealment of property. Debtor's admitted failure to read schedules and statements before signing evidences that omissions were reckless and evidenced improper disregard of duty of disclosure. Debtor's failure to disclose Cashier's Check and garnished funds on schedules precluded later disclosure and amendment to claim as exempt.

In re Clark, 2011 WL 2837478 (Bankr. W.D. Mi. 2011) – Debtor's request to amend Schedule C to add previously undisclosed tax refund denied. Debtors did not list anticipated tax refund in Schedule B or claim as exempt on

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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 Shell, 2012 WL 3578657 (Bankr. N.D. In. 2012) – Debtor who resided in Indiana less than three months prior to filing case must use exemptions from state where debtor lived for the 180 days that is more than 730 days prior to commencement of case. Prior to moving to Indiana, Debtor resided continuously in Illinois. Debtor limited to exemptions available under Illinois law. Illinois opted out of Federal exemptions, leaving debtor with requirement to use Illinois state exemptions exclusively. Court recognized three separate lines of cases on the issue of extra-territorial reach of exemptions. First line holds that state exemption laws can never extend beyond state borders, and debtor who did not reside in one state for 730 days preceding filing is limited to federal exemptions. Second line, adopted by majority of cases, holds that state exemptions apply extra-territorially to extent state exemption laws provide. Third line holds that state exemptions are applied extra-territorially and to out-of-state property regardless of whether state exemption laws provide for extra-territorial effect of not. Court adopted third line of cases – exemptions are based on applicable state law regardless of residence of debtor or location of property. Debtor must use Illinois state exemptions that were in effect on date of filing of petition.

In re Beckwith, 448 BR 757 (Bankr. S.D. Ohio 2011) – Debtors who had resided in Ohio for only 180 days prior to filing case must use exemptions applicable to residence for 180 days preceding 730 days before the filing of the petition. Debtors resided in Florida for 180 days that preceded 730 day lookback, and must use Florida exemptions. Florida statutory exemptions do not have extra-territorial application. Although Florida law “opts out” of federal exemptions for Florida residents, Florida Statutes do not control exemptions for debtors who live outside state. Therefore, debtors are entitled to claim Federal exemptions notwithstanding Florida “opt out”.

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 (6th Cir. BAP 2010) – Party objecting to debtor's claim of exemption bears burden of proving that exemption is not properly claimed and must produce evidence which rebuts prima facie presumption that exemption is correct.

Williamson v. Hall, Case No. 08-088 (10th Cir. BAP 2009) – Party objecting to claimed exemptions bears burden of proof that exemption is improperly claimed. Court will construe exemption statutes in light most favorable to Debtor.

In re Vickers, 2009 WL 1544459 (Bankr. E.D. Tn. 2009) – Party objecting to claimed exemptions bears burden of proof that exemption is improperly claimed. Court will construe exemption statutes in light most favorable to Debtor.

7.9 Deadline for Objections

Leicht v. Anspach, 475 BR 612 (Bankr. S.D. Ohio 2012) – Trustee's failure to object to debtor's claimed exemption for 100% of workers compensation benefits waived Trustee's right to later object after court concluded that proceeds were not properly exempted under State statute covering workers compensation. Trustee contended that funds lost their characteristic as workers compensation when debtor received check. Therefore, debtor's claimed exemption for workers compensation did not include these funds as these funds were now cash, and not workers compensation. Court concluded

that the funds, after receipt, were not entitled to Ohio exemption that was limited to workers compensation that had not been received, but funds did not lose their status as workers compensation after receipt.

In re Miller, 2011 WL 3741846 (Bankr. N.D. Ohio 2011) – Trustee’s failure to object to amended claim of exemptions within 30 days of filing barred later objection. Although debtor’s amended Schedule C claimed exemptions in excess of the allowable amount, Trustee’s failure to object rendered entire property exempt. Debtor did not have to turn over the excess amounts to the Trustee.

In re Messina, 2010 WL 2712141 (3d Cir. 2010) *affd after remand* Case No. 11-1426 (3d Cir. 2012) - 30 day deadline to object to claimed exemption applies only to (1) the description of the exempted property; (2) the Code provisions governing the claimed exemptions; and (3) the amount "listed in the column titled 'value of claimed exemption.' When the objection is based on other elements in that case, the debtor's market value estimation and the estate's right to retain any value in the property beyond the value of the exempted interest the thirty-day time limit does not apply. Debtors' Schedule C valued Debtors' homestead at \$250,000, encumbered by two mortgages, the first of which exceeded the value of the property. Debtors' claimed exemption for \$36,000, pursuant to Section 522(d)(2). Trustee later successfully avoided lien of first mortgage and sold property, netting about \$42,000. Debtors claimed a right to \$36,000 as the exempt portion of the proceeds, and the Trustee filed a Motion to Determine Value of Exemption as \$0 as debtors, on the date of the filing of the case, had no equity in the property and, therefore, nothing to which an exemption could attach. Debtors responded that *Taylor* precluded Trustee's belated objection to exemption. Court held that Trustee's objection was not time barred as possible objection was not discernable from face of schedules and that issue did not arise until after avoidance action had been successful. Court also concluded that Trustee's Motion to Value Exemption at \$0 would be granted because, as of the date of the petition, debtors had no equity in the property. To extent lien is avoided, benefit is preserved for estate and debtors are not entitled to receive the benefit of that avoidance under Section 522(g).

In re Schewe, Case No. 09-75270 (Bankr. E.D. Mi. 2010) – Request for extension of deadline to file objections to exemptions must be filed before expiration of initial deadline. Stipulation between Trustee and Debtor to extend deadline disapproved by Court where stipulation was not filed until 2 days after expiration of the deadline to object under Rule 4003.

McDonald v. Redstone Federal Credit Union, Case No. 09-12652 (11th Cir. 2010) – Failure to timely object to claim of exemptions is res judicata on exempt status of assets. Creditor prohibited from later arguing in State Court that exemption was improper or that amount claimed exceeded amount allowable by law.

Moyer v. Dutkiewicz, 408 BR 103 (6th Cir. BAP 2009) – Objections to exemptions must be filed within 30 days of conclusion of Section 341 meeting. Where trustee ended 341 meeting without a definite statement that the meeting is not concluded, the Trustee impliedly concluded the meeting. If the Trustee seeks to hold the meeting open to a future date, the Trustee must announce that before ending the meeting. Trustee's request at the Section 341 meeting that 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 Conversion of Non-Exempt Into Exempt Property

Soule v. Willcutt, Case No. 11-023 (10th Cir. BAP 2012) – Section 522(o)(4) requires reduction in value of interest in homestead to extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with intent to hinder or delay or defraud a creditor and where the debtor could not have exempted if the debtor still owned the property as of the date of the petition. Debtors sold non-exempt property for \$100,000 and used proceeds toward purchase of new home. As of petition date, new home had market value of \$425,000 subject to mortgage of at least \$415,000, leaving "no realizable equity in the home". Section 522(o)(4) provision applies only where there is increased economic equity in property as a result of the transfer. Where debtor has no equity in the property as a result of mortgages on the property, there is no "value" that was enhanced by the transfer and so no basis to offset the claimed exemption.

7.12 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.

7.13 "In Kind" and Dollar Limitations on Exemptions

In re Orton, Case No. 11-4157 (3d Cir. 2012) – Debtor's claimed exemption of specific dollar amount of value in asset limits amount exempted to amount claimed. Any additional value, whether existing at time of petition or accruing during pendency of case, accrues to benefit of Trustee and estate. Debtor scheduled interest in royalties from oil and gas lease, valued interest at \$1 and exempted \$1. Trustee entitled to any future income stream from the royalties beyond \$1 that was the value claimed as exempt. Debtor, by valuing asset at \$1 and exempting \$1 did not exempt entire asset but only value of asset to extent claimed. Section 522(d)(5) allowed the debtor to exempt only the value of an asset and not the asset itself, leaving asset as property of estate with appreciation in value accruing to estate.

In re Massey, 455 BR 17 (Bankr. D. Mass. 2011) – Debtor's Schedule C improperly claimed exemption as to "100% of FMV" for asset where exemption was allowable only to specified dollar amount and was not "in kind" exemption. Trustee's objection to exemption was untimely where trustee missed objection deadline but objected to confirmation of plan. "Had the trustee timely objected to the debtors' attempt to exempt their home and automobile in the amount of '100% of FMV', the objection would certainly have merited serious consideration. The term '100% of FMV' on a debtor's Schedule C should be like catnip to a trustee. It should grab the trustee's attention and warrant an analysis to determine whether the asset in question could conceivably be worth more than the statutory exemption ceiling. If the trustee determines there is potential value in the asset beyond the exemption ceiling he must object to the exemption within the time allowed by Rule 4003 or lose the right to sell the asset later or, in the case of a Chapter 13 plan, lose the right to object to the plan based on Schedule C.

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 discernible from face of Schedule C, such as where amount claimed as exempt is "unknown" or exceeds statutory limits, parties must timely object to preserve the issue.

In re Gebhart, 2010 WL 3547641 (9th Cir. 2010) – Debtor who claimed only part of available exemption based on incorrect assumption of value of property limited to amount claimed. Debtor owned home which debtor valued at \$210,000, encumbered by mortgage of \$120,297.00, leaving equity of \$89,703. Although state law permitted debtor to exempt up to \$100,000, debtor claimed only \$89,703 as exempt, believing that to be 100% of the available equity. Trustee permitted to sell house and to retain equity to extent that exceeded \$89,703 properly claimed as exempt. Asserting exemption for amount that is equal to value of property claimed as exempt does not exempt entire property regardless of value and does not impose on creditors or trustee duty to object to preserve claim to excess value.

In re Stoney, 2011 WL 577338 (Bankr. E.D. Va. 2011) – Debtor's purported claim of exemptions for 100% of FMV subject to objection where value of property allegedly claimed as exempt exceeded statutory limits on amount of exemptions under applicable State law. If the trustee fails to timely object, then trustee will be deemed to have waived exemption.

In re Moore, 2010 WL 5397193 (Bankr. N.D. Tx. 2010) – Debtor's claimed exemption of "100% of FMV" of asset triggered Trustee's duty to object to claimed exemption. If Trustee files objection, Debtor bears burden to prove that value of "100% of FMV" is within statutory limits.

C. Specific Property Exempt

7.14 Stock Account

Segovia v. Schoenmann, 2011 WL 52481 (9th Cir. 2011) – Unexercised stock options under former employer's long term incentive compensation plan are not exempt as retirement funds. Under ERISA, a retirement plan that is exempt must be established or maintained by the employer and must provide either for retirement income to employees or results in deferral of income by employees for a period extending beyond the termination of employment. Employer's incentive plan designed to motivate employees and to recruit and retain talented employees by providing additional compensation during term of employment.

In re Musilli, Case No. 06-55963 (Bankr. E.D. Mi. 2009) – Debtor's interest in Cash Management Account qualifies for exemption under M.C.L. Section 557.151. Trustee's argument that CMA account is really only a fund on deposit with a financial institution which the institution uses to purchase stocks does not deprive CMA account of status as "Stock Account" qualified for exemption.

7.15 Payments as Replacement for Lost Earnings

Redd v. JPMorgan Chase, NA, Adv. No. 10-7106 (Bankr. E.D. Mi. 2012) – Debtor's claimed exemption in sick pay overruled where debtor failed to demonstrate whether the sick pay accrued prior to or subsequent to commencement of case. Debtor can exempt only property of estate. To extent right to sick pay accrued post-petition, that pay would not be property of estate. Further, there is no Michigan statutory basis for an exemption of sick pay.

In re Holstine, 2012 WL 2891220 (Bankr. E.D. Mi. 2012) – Lump sum workers compensation benefits can be exempted under Section 522(d)(11)(E). Section 522(d)(11)(E) is not limited to tort awards, but includes any award that is traceable to payment of compensation for loss of future earnings to the extent reasonably necessary for support of the debtor. Sections (d)(11)(E) and (d)(10)(C) are not mutually exclusive. That award falls within scope of both (d)(11)(E) and (d)(10)(C) as a disability or unemployment benefit and may be claimed as exempt under either section. Fact that benefits were paid as lump sum does not deprive debtor of right to claim funds as exempt under (d)(11)(E) subject only to requirement that funds be reasonably necessary for debtor's support.

In re Dang, 2012 WL 2175778 (Bankr. W.D. Mi. 2012) – Lump sum workers compensation benefits that designated the award as compensation for lost wages can be exempted under Section 522(d)(11)(E) where the funds have not been received at the time the debtor files the petition. Although Debtor's entitlement to compensation and the amount of that compensation had been finally determined prior to commencement of the case, debtor did not actually receive the check until one day after petition filed.

In re Bailey, 2011 WL 834016 (6th Cir. BAP 2011) – Debtor's pre-petition settlement of wrongful termination claim did not constitute loss of future earnings. Settlement did not award money for lost employment. Settlement permitted debtor to resign employment and to receive money for prior lost wages and debtor would be permitted to seek disability retirement. Debtor's contention now that his resignation precluded him from obtaining different position with same agency does not transform settlement into payment for lost future wages, where debtor had no lost future wages as debtor was not employed by state at time bankruptcy case was filed and had no reasonably likelihood of ever being employed there in the future.

In re Bates, Case No. 09-67133 (Bankr. E.D. Mi. 2010) – Asset is exempt under Section 522(d)(11)(E) only if the asset is payment in compensation of loss of future earnings and only to the extent the asset is reasonably necessary for the support of 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 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 (6th Cir. 2010) - Debtor's right to receive, for up to four years, tuition reimbursement up to \$15,000.00 per year, continued health care benefits, and an annual living expense stipend, which is equivalent to 50% of the participant's annualized straight-time hourly wage at the time of termination properly claimed as exempt under 11 USC Section 522(d)(11)(E) which exempts a Debtor's right to receive “payment in compensation of loss of future earnings of the Debtor or an individual of whom the Debtor is or was dependent, to the extent reasonably necessary for the support of the Debtor or a dependent of the Debtor.” Section 522(d)(11)(E) does not require bodily injury as prerequisite for exemption. Section 522(d)(11)(E) exempts all compensation for loss of future earnings. Section 522(d)(11)(D) which contemplates payment on account of personal bodily injury is clearly delineated from subsection (E) by the word “or”. Any limitation under Subsection (D) to personal bodily injury does not carry through to subsection (E). Debtor's termination of her employment constitutes an event that resulted in a “loss of future earnings.” The buyout was offered as compensation for such termination. It is immaterial whether the buyout was negotiated by the parties, or whether such termination was voluntary. In either case, the buyout benefit constitutes “compensation” for loss of future earnings which are properly claimed exempt under Section 522(d)(11)(E).

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.

7.16 Undisclosed Assets

In re Waller, 424 B.R. 306 (Bankr. S.D. Ohio 2010), *aff'd*, 2010 WL 3521956 (6th Cir. BAP 2010) - Neither Chapter 7 debtors' failure, in their initial schedules, to list or claim interest or exemption in any tax refund, nor their subsequent failure, after voluntarily amending schedules prior to meeting of creditors and without any prompting from trustee, to disclose that income tax refunds were anticipated in as-yet “unknown” amounts, to promptly amend schedules yet another time to disclose amount of claimed exemptions once they had completed their income tax

returns and it became possible to calculate exemption amounts, provided permissible basis to deny debtors an exemption in refunds, where trustee did not introduce evidence of any bad faith, concealment or improper disclosure, and it appeared that debtors, in disclosing anticipated refunds, preparing tax returns and mailing copies of returns to trustee from which exemption amounts could have been calculated, had done everything they could to perform their duties under the Bankruptcy Code, and that trustee's objection to debtors' claimed exemptions was based principally on actions of debtors' counsel in not calculating exemption amounts; to deny debtors their exemptions due to standoff between their counsel and trustee was unconscionable and an inappropriate use of bankruptcy process.

Corcoran v. Publow, 418 BR 231 (E.D. Mi. 2009) – Debtors are permitted to amend schedules to disclose and exempt assets as long as non-disclosure in first instance was not the result of bad faith or intentional concealment. Federal Rule of Bankruptcy Procedure 1009 allows a debtor to amend schedules at any time before the case is closed, subject to Court's authority to refuse to allow an amendment where debtor has acted in bad faith or with intent to conceal assets. Debtor's Chapter 7 filing in October, 2008, failed to disclose potential tax refund for 2008. Chapter 7 Trustee made demand on IRS for turnover of 2008 refund. Debtors filed Amended Schedules B and C to disclose and exempt the tax refund. Debtors' failure to list tax refund was not bad faith but resulted from unusual circumstances and misunderstanding by Debtors as to status of a future tax refund as an asset. Debtors' delay in disclosing the tax refund did not prejudice any creditor as Debtors would have been entitled to exempt the tax refunds in the first instance.

In re Steiner, Case No. 08-33717 (E.D. Mi. 2009) – Debtors are permitted to amend schedules to disclose and exempt assets as long as non-disclosure in first instance was not the result of bad faith or intentional concealment. Federal Rule of Bankruptcy Procedure 1009 allows a debtor to amend schedules at any time before the case is closed, subject to Court's authority to refuse to allow an amendment where debtor has acted in bad faith or with intent to conceal assets. Debtors' Chapter 7 Attorney did not inquire about or list tax refunds as counsel believed that tax refunds were not assets of the Bankruptcy estate. Debtor's Chapter 7 filing in October, 2008, failed to disclose potential tax refund for 2008. Chapter 7 Trustee filed two separate Interim Reports indicating that the Chapter 7 Trustee was pursuing tax refunds. Debtors finally amended Schedule B to disclose the 2008 tax refund and amended Schedule C to claim the refund as exempt. Debtors' failure to list tax refund was not bad faith but resulted from misunderstanding by Debtors, caused by advice of counsel, as to status of a future tax refund as an asset. Evidence indicated that Debtors did not intend to mislead. Court sanctions Debtors' counsel \$900 to be paid to the estate to compensate the Trustee for efforts to recover tax refunds.

In re LaRoche, 409 BR 862 (Bankr. E.D. Mi. 2009) - After Chapter 7 Trustee filed an Interim Report abandoning most of the assets of the estate, Debtors amended Schedule B to disclose a Federal Tax Refund and also amended Schedule C to claim that refund exempt. Debtor is not permitted to amend Schedule C to claim a previously undisclosed asset as exempt if the failure to disclose the asset in the first instance results from bad faith or intent of 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.

7.17 Homestead

In re Carlew, 469 BR 666 (Bankr. S.D. Tx. 2012) – Debtor could claim homestead exemption in insurance proceeds received for damages caused to debtor's homestead. Insurance proceeds did not lose homestead characterization simply because they were not used for repairing homestead.

In re Holland, 474 BR 826 (Bankr. E.D. Mi. 2012) – As of the petition date, debtors were not using cabin in northern Michigan as residence. At the first meeting of creditors, debtors both affirmed that they lived in Garden City. Debtors described the cabin property as a one bedroom cabin and pole barn and stated that nobody lived in the cabin. Cabin was just a shell sitting there, with no plumbing or windows, and the barn contained just building materials, some windows,

and a few odds and ends. Debtors testified that they intended to move to cabin property but, as of a month and a half after the petition date, debtors still had not done so. Even then, debtors testified that they intended to live with friends and not in the cabin itself. Debtors had not been to property for at least 6 months prior to first meeting of creditors. Debtors' later affidavit, unsigned and not notarized, was not evidence and would be discounted given direct contradictions between affidavit and testimony at 341 meeting. Cabin property was not residence as of petition date as required for exemption as homestead.

In re Demeter, 2012 WL 3780534 (Bankr. E.D. Mi. 2012) – Homestead exemption under Section 522(d)(1) is not limited to debtor's primary or principal residence. Debtor can apply exemption to any property that debtor uses as residence, even if principal residence is elsewhere. Since 1972, Debtor's principal residence has been in Riverview and debtors were physically occupying that residence on the petition date. In 1996, debtors bought second home in Cheboygan. Cheboygan property had utilities operating year round, and debtors kept personal property and clothing at that residence. Debtors lived in the Cheboygan property about 6 months each year since purchasing, and planned to ultimately live there full time. The Cheboygan property was never rented out and was never winterized and was used on winter holidays including Christmas and New Year. Property was one of debtors' two residences as of the petition date. If Congress intended to limit Section 522 to "principal" or "primary" residence, it could have used those terms, as it does in other sections of the Bankruptcy Code. "Residence" in Section 522 is not qualified or limited.

Condit v. McKeithan, Case No. 11-41305 (5th Cir. 2012) – Abandonment of homestead requires both cessation of use of property as homestead coupled with intent to permanently abandon property as homestead. Evidence indicated that although debtor had not resided in property for 9 years while debtor resided with debtor's daughter, debtor's absence was due to debtor's medical condition including emergency surgery, and that debtor remained with her daughter as the primary care giver. Daughter repeatedly encouraged debtor to sell home, but debtor refused, stating that debtor intended to return when her health would permit. Debtor maintained property, paid taxes, maintained the utilities, kept the insurance, and even kept an active land-line telephone account. Debtor's use of daughter's address as mailing address and listed daughter's address on her driver's license, evidence did not indicate any intent to permanently abandon her homestead, and it was equally plausible that debtor used daughter's address solely to ensure that important correspondence reached her.

In re Cassetto, 2012 WL 3193555 (Bankr. N.D. Ohio 2012) – Oil and gas rights that underlie property owned by debtors and that have not previously been severed are property of the estate. Ohio homestead exemption does not apply to oil and gas interests as oil and gas that have not been recovered do not belong to anyone. Fact that oil and gas currently may be located under debtor's property does not vest in debtor title to that oil and gas unless and until it is recovered. Exemption did not allow debtors to exempt proceeds of oil and gas lease to be signed by Chapter 7 Trustee.

Studensky v. Morgan, Case No. 11-51180 (5th Cir. 2012) – Where debtor fails to claim homestead as exempt and then sells homestead post-petition but fails to timely assert exemption in proceeds as permitted by state law, debtor forfeits any exemption. Proceeds of sale are property of estate and must be turned over to Trustee.

In re Young, 471 BR 715 (Bankr. E.D. Tn. 2012) – Petition date controls date of valuation for purposes of exemptions as well as actions to avoid liens that impair exemptions. Under Tennessee law, both Husband and Wife are entitled to \$25,000 exemption in homestead. In joint case, Husband and Wife are permitted to aggregate exemptions, allowing exemption of total of \$50,000.00.

In re Beck, 2012 WL 1889789 (Bankr. W.D. Ky. 2012) – Debtor could not claim vacant land as exempt under homestead exemption. Debtor claimed as exempt the property on which debtor resided as well as a 22 acre parcel located across the road from debtor's home. The separate parcel was not contiguous to debtor's residence and had a separate street address. Debtor not entitled to claim homestead exemption on parcel that is separated from debtors residence and on which there were no structures.

In re Kaplan, 468 BR 246 (Bankr. W.D. Ky. 2012) – Homestead requires actual intention to live permanently in a place, coupled with actual use and occupancy. Homestead is equivalent to residence and debtor can have only one residence. Mere intention to reside at property is insufficient to make property homestead where debtor does not actually reside there. Debtor who owned two parcels of property could not claim second parcel as homestead where debtor listed first property as address on petition; debtor's license had first property address listed; debtor testified that he needs one or more of his children to live with him for health reasons, but second property had only one bedroom and was not sufficient for two people to live in; debtor's health precluded anything but an occasional stay at second property; second property had no air-conditioning, stove or refrigerator; and although debtor may have stayed overnight from time to time, the limited occupancy coupled with a lack of intent or ability to use the property as a permanent residence defeated claim of homestead.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

In re Young, 2012 WL 1717868 (Bankr. E.D. Tn. 2012) – Homestead exemption applies as against real property owned by the Debtors, with the caveat that they use the real property as their principal place of residence, which this court has defined as “his or her home, the place where the debtor lives with his family, inclusive of any real property acquired therewith.” Homestead exemption does not apply simply to a debtor's principal place of residence itself; the “real property” is the necessary prerequisite, and any improvements on the real property upon which a debtor's principal place of residence is located are included within the scope of the homestead exemption. Debtor entitled to claim entire property as homestead where real estate was contiguous parcel improved by the home in which debtor resided plus a second residential property that was vacant. Fact that property contained non-residential unit or improvement does not defeat status of property as homestead as long as improvements on property are actually used by debtor as homestead.

In re Kane, 2011 WL 2119015 (Bankr. D. Mass. 2011) – Debtors could not claim exemption in homestead that was owned by debtors' Limited Liability Company. Debtors can claim exemption only in property owned by debtors, not property owned by third party, even where debtors were the sole members of the LLC. Dissolution of the LLC, without more, does not affect a transfer of the property to the members and the property remains in the LLC subject to state law requirements for winding up and liquidating assets of LLC.

Corcoran v. McDonald, 471 BR 194 (E.D. Mi. 2012) - Debtors can claim Homestead exemption in vacant lot that is adjoining or continuous to the property where debtor's home is located. Although vacant lot had separate property tax identification number, local taxing authority granted debtors a homestead exemption on the vacant property; there were no natural or artificial boundaries, such as a river, a man-made road, or a fence separating the two parcels; debtors use of the vacant lot was consistent with debtors claim of Homestead and was used in a manner consistent with residential purposes; and the debtor's did not use the vacant lot for any commercial purpose.

In re Whitney, 459 BR 712 (Bankr. N.D. Ohio 2011) – Debtor not allowed to claim homestead exemption for both parcel on which homestead was located and parcel of land adjacent to parcel where homestead was located where debtor failed to produce any evidence that debtor actually used both parcels as a contiguous parcel for a single purpose. Homestead can extend to multiple adjacent parcels only where parcels are occupied and used for a single purpose such that their separate identities become merged into one. Once Trustee carried burden of proof that property claimed as homestead consisted of two parcels and that family residence was located entirely on only one of the parcels, burden shifted to debtor to prove that multiple parcels were used for single purpose as debtor's homestead.

White v. Commercial Bank and Trust Co., Case No. 11-6032 (8th Cir. 2011) – In determining potential exemption of property that is subject to potentially avoidable judicial lien, Court must first determine whether property would be exemptible in the absence of the judicial lien. Debtor properly claimed exemption in homestead consisting of 80 acres where applicable state law allowed homestead with a value not to exceed \$2500 but in any event not less than 80 acres.

In re Wengerd, 453 BR 243 (6th Cir. BAP 2011) – Debtor's admitted intent to abandon homestead after filing does not defeat status of property as homestead as of moment of bankruptcy filing. Debtors' entering into pre-petition contract for sale of homestead does not defeat homestead status where, as of petition date, Debtors occupied their home and intended the property to be the homestead.

Osborne v. Dumoulin, 2011 WL 1772160 (11th Cir. 2011) – Under Florida law, debtor who did not claim or receive benefit of homestead exemption permitted to take expanded exemption for personal property. Debtor who indicated that homestead was to be surrendered in Chapter 7 proceeding does not “receive” benefit of exemption even though debtor could have claimed homestead exemption. Debtor has option to receive homestead exemption. If debtor declines that option by not electing homestead exemption, debtor can claim expanded personal property exemption.

In re Jackson, 2011 WL 1741965 (Bankr. E.D. Tn. 2011) – Debtor properly claimed exemption of \$7500 in homestead even though secured debt exceeded value of property. However, exemption can attach only to equity in property. Trustee's subsequent avoidance of the mortgage does not create equity to which exemption can attach, as debtor is not permitted to exempt property that debtor voluntarily conveyed when that property is recovered by the Trustee. Where trustee later sold property for less than amount owed on the now-avoided mortgage, there was no equity as to which debtor could assert an exemption.

In re Ellis, 2011 WL 1457258 (Bankr. S.D. Tx. 2011) – Debtor's allowable homestead exemption is reduced to the extent that the value is attributable to proceeds of the disposition of non-exempt property with intent to hinder or defraud creditors under Section 522(o). Objecting party must prove (1) 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 (10th Cir. BAP 2009) – Wife and Husband owned parcel of real property on which there was a residence in which Debtor-wife resided and a separate mobile home occupied by Debtor-husband. Kansas statute permits a Debtor to exempt property in which he lives or, in the alternative, property in which the debtor’s family resides. Accordingly, Husband could exempt either his one-half interest in the mobile home in which he resided, or his one half interest in the home in which his family resided, but not both. Similarly, Wife could exempt either her one-half interest in the residence where she resided with her family or her one-half interest in the mobile home where her husband resided. The exemption statutes did not permit either debtor to individually claim as exempt an interest in both properties, as each debtor is entitled to only one homestead, but a Debtor-Husband and Debtor-Wife who are separated and have separate residences can each elect their individual homestead exemption.

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”.

7.18 Household Goods

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

7.19 Motor Vehicles

Leavitt v. Alexander, Case No. 11-1114 (9th cir. BAP 2012) – Debtor’s Mobile Kitchen Trailer that debtors used in their mobile barbeque sandwich business is exempt as “vehicle”. “Vehicle” is an instrument of transportation or conveyance, or a means of transporting passengers or things by land, air or water. Mobile Kitchen was used to transport things and was a device for carrying goods and equipment. Attempt to limit scope to devices used to transport people was too narrow. Further, Mobile Truck was registered with State Department of Motor Vehicles and had a Vehicle Registration Number, indicating that state considered the Truck a vehicle. Further, although “vehicle” was not defined in the exemption statute, Court could look to other state statutes to determine definition. State motor vehicle statute defined “vehicle” as any device in, upon or by which any person or property it or may be transported or drawn on a public

highway; while “trailer” was defined as a vehicle without motive power. Mobile Kitchen was designed to carry people and property and could be used on highways. Although Mobile Kitchen lacked motive power and had to be towed, exemption statute required only that asset constitute “vehicle” and not “motor vehicle”. Absence of motive power was not fatal to classification of Mobile Kitchen as “vehicle”.

In re King, 2011 WL _____ (Bankr. N.D. Iowa 2011) – Motor vehicle is not “tool of the trade” although debtor uses the vehicle to commute to work.

In re Likes, 406 B.R. 749 (Bankr. N.D. Ohio 2009) - Trailer that lacked any propulsion was not a “motor vehicle” for purposes of Ohio’s exemption statute.

7.20 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.

7.21 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 (6th Cir. BAP 2010) – Ohio law does not create exemption for life insurance paid on death of debtor’s spouse. Ohio law protects proceeds of life insurance policy from creditors of the insured, not creditors of the beneficiary. Debtor’s husband died 19 days after couple filed joint petition. Proceeds of husband’s life insurance policy became property of Debtor’s estate and could be used to pay creditors even though some of those creditors were also creditors of the deceased on joint accounts with Debtor. Ohio law does not allow exemption of proceeds from creditors of beneficiary. Although Federal exemptions protect proceeds from creditors of a 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.

7.22 Annuities

In re Abbott, 466 BR 118 (Bankr. S.D. Ohio 2012) - Annuity which was purchased by hospital in order to fund its obligations to Chapter 7 debtor pursuant to prepetition settlement of her wrongful death claims, and which was owned and controlled solely by hospital, was not included among assets of Chapter 7 estate, and could not be reached by trustee; as of commencement of her bankruptcy case, debtor did not have any ownership interest in annuity and had no control over annuity or payment of benefits. Benefits to which Chapter 7 debtor was entitled under annuity purchased by hospital as part of prepetition settlement of debtor’s wrongful death claims against it, unlike annuity itself, were included in property of the estate. Debtor could exempt these annuity benefits, to extent reasonably necessary for her support, under Ohio exemption for debtor’s right to receive, or for moneys received, on account of wrongful death of individual on whom debtor was dependent. Annuity benefits were to compensate debtor for death of her husband while under hospital’s care, and debtor, as stay-at-home wife, was plainly dependent on husband at time of death.

In re Ellis, 2011 WL 1457258 (Bankr. S.D. Tx. 2011) – Annuity is exempt if the annuity qualifies under Section 403(b) of the Internal Revenue Code. Debtor must prove that the annuity (i) for an employee by an employer described in section 501(c)(3) which is exempt from tax under section 501(a); (ii) for an employee (other than an employee described in clause (i)), who performs services for an educational organization described in section 170(b)(1)(A)(ii), by an employer which is a State, a political subdivision of a State or an agency or instrumentality of any one or more of the foregoing, or; (iii) for the minister described in section 414(e)(5)(A) by the minister or by an employer. Annuity is not covered by Section 403 where debtor used money received from retirement to purchase annuity, as the employer did not purchase the annuity. However, where annuity is purchased with “roll over” funds from qualified IRA, the annuity will retain its exempt status as a right to receive payment under an annuity purchased with pension or retirement funds.

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

7.23 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 (6th Cir. 2010) - Debtor’s right to receive, for up to four years, tuition reimbursement up to \$15,000.00 per year, continued health care benefits, and an annual living expense stipend, which is equivalent to 50% of the participant’s annualized straight-time hourly wage at the time of termination properly claimed as exempt under 11 USC Section 522(d)(11)(E) which exempts a Debtor’s right to receive “payment in compensation of loss of future earnings of the Debtor or an individual of whom the Debtor is or was dependent, to the extent reasonably necessary for the support of the Debtor or a dependent of the Debtor.” Section 522(d)(11)(E) does not require bodily injury as prerequisite for exemption. Section 522(d)(11)(E) exempts all compensation for loss of future earnings. Section 522(d)(11)(D) which contemplates payment on account of personal bodily injury is clearly delineated from subsection (E) by the word “or”. Any limitation under Subsection (D) to personal bodily injury does not carry through to subsection (E). Debtor’s termination of her employment constitutes an event that resulted in a “loss of future earnings.” The buyout was offered as compensation for such termination. It is immaterial whether the buyout was negotiated by the parties, or whether such termination was voluntary. In either case, the buyout benefit constitutes “compensation” for loss of future earnings which are properly claimed exempt under Section 522(d)(11)(E).

Gold v. Lewis, Case No. 09-1777 (6th Cir. 2010) – Debtor’s interest in Ford Employee Buyout is exempt under Section 522(d)(11)(E). “Loss of future earnings” is not limited to losses based on tort claims in light of separate provisions of Section 522(d)(11)(E) that exempts payments “on account of personal bodily injury”, reparation benefits, death benefits and life insurance. Debtor accepted right to receive future payments including tuition reimbursement, health care benefits, and an “annual living expense stipend” equal to 50% of debtor’s straight-time hourly wage as of the date of termination in exchange for waiving all future earnings with Ford. Payment under Employee Buyout is exempt as “future earnings”.

7.24 Post-petition Assets

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

7.25 Property Owned by Third Party

Elswick v. Miller, 2012 WL 2122170 (E.D. Ky. 2012) – In joint case under Section 302, each debtor is presumed to

have a separate estate. The exemptions available to each co-debtor may be claimed only from his or her separate estate. Husband in joint case cannot claim exception in property owned by debtor-wife. Court must determine whether husband has interest in property separate and apart from the interest of debtor-wife in the property to determine whether, and to what extent, husband can claim exemption.

In re Kane, 2011 WL 2119015 (Bankr. D. Mass. 2011) – Debtors could not claim exemption in homestead that was owned by debtors' Limited Liability Company. Debtors can claim exemption only in property owned by debtors, not property owned by third party, even where debtors were the sole members of the LLC. Dissolution of the LLC, without more, does not affect a transfer of the property to the members and the property remains in the LLC subject to state law requirements for winding up and liquidating assets of LLC.

In re Young, 468 BR 818 (Bankr. E.D. Mi. 2012) - Debtor-wife cannot claim an exemption in a vehicle that is titled solely in debtor-husband's name. Debtor's testimony that they considered the cars to be "ours" with "no sent thing" about who would be on the title for any car, and that both debtors jointly used the vehicles did not overcome titled ownership as shown on certificate of title. There was no evidence that debtor-wife paid for the vehicle, nor that debtor-husband and debtor-wife attempted to have the vehicle titled either jointly or in debtor-wife's name. There was no evidence that the name as shown on the certificate of title was in any way erroneous were the result of fraud. As vehicle was titled solely in debtor-husband's name, debtor-wife did not have any interest in the property under section 541 and, therefore, debtor-wife could not exempt any interest in the property pursuant to section 522.

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

7.26 Dower Interests

Elswick v. Miller, 2012 WL 2122170 (E.D. Ky. 2012) – Under Kentucky law, husband has dower interest in property inherited by wife during marriage. Husband's dower interest is property of the estate which can properly be claimed as exempt under Section 522(d)(5) to the extent of the allowable dollar limitations under that section. Husband may claim as exempt this inchoate dower interest to the extent of the fair market value of that contingent interest.

7.27 Tools of the Trade

In re Neff, 2012 WL 3063141 (Bankr. N.D. Ohio 2012) – Debtor's claimed exemption in 1996 Piper aircraft as "tool of the trade" disallowed where debtor was unemployed and had no business operations.

In re Gaydos, 441 BR 102 (Bankr. N.D. Ohio 2010) – Truck driver who used a Semi-Truck for his daily employment could exempt truck as tool of the trade under Ohio state exemption statute. Fact that Ohio has separate exemption for motor vehicles does not prevent debtor from claiming vehicle as "tool of the trade". Truck was "absolutely necessary" for debtor's employment.

In re Montgomery, 2010 WL 3369829 (Bankr. N.D. Ohio 2010) – Ohio statute that permits exemption of implements, professional books, or tools of the person's profession, trade, or business does not include real estate in which Debtor's business is owned. Tools of the trade are limited to personal property used in the course of business, not the real estate itself.

7.28 Co-mingled and Segregated Funds

In re Neff, 2012 WL 3063141 (Bankr. N.D. Ohio 2012) – Statutorily exempt funds do not lose their exempt status when deposited in a personal checking account so long as the source of the exempt funds is known or reasonably traceable. Spousal support and child support deposited into debtor's checking account was exempt where funds were in segregated, separate account and were not co-mingled with any non-exempt funds.

In re Perkins, 2011 WL 4458961 (Bankr. N.D. Ohio 2011) – In attempting to trace co-mingled funds, Court will use the accounting method that is most beneficial to 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.

7.29 Salary and Bonuses

In re Larkins, 2012 WL 1378470 (Bankr. N.D. Ohio 2012) – Ohio statute that permitted debtor to exempt "personal earnings" did not include discretionary bonuses received by debtor. "Personal income" is limited to "money or other consideration or value paid or due to a person in exchange for work, labor or personal services. Debtor's right to receive a bonus was not attributable to debtor's services, but were entirely discretionary with the employer. Debtor was not automatically entitled to a bonus and depended entirely on employer's determination of profit and decision to pay.

7.30 Consumer Credit Protection Act

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

7.31 Unemployment Compensation

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

7.32 Workers Compensation

Leicht v. Anspach, 475 BR 612 (Bankr. S.D. Ohio 2012) – Under Ohio law, workers compensation benefits lose exemption applies only to benefits that have not been paid. Once benefits are paid, benefits are no longer exempt under Ohio law governing exemption for workers compensation. Evidence indicated that debtor received check for lump sum benefits prior to filing bankruptcy, but that debtor had not deposited the check as of the date of the filing. Workers compensation benefits were "paid" when debtor received the check, not the date on which debtor cashed the check.

In re Dang, Case No. 11-10091 (Bankr. W.D. Mi. 2012) – Lump sum workers compensation benefits can be exempted under Section 522(d)(10)(C) where the funds have not been received at the time the debtor files the petition. Although Debtor's entitlement to compensation and the amount of that compensation had been finally determined prior to commencement of the case, debtor did not actually receive the check until one day after petition filed. Further, the award designated 100% of the proceeds as compensation for lost wages. Debtor could also exempt the payment as a right to receive compensation for loss of future wages under Section 522(d)(11)(E) as debtor had not received the check as of the petition date.

In re Holstine, 458 BR 392 (Bankr. E.D. MI. 2011) – Workers Compensation award that debtor had received and deposited into bank account was traceable to payment in compensation for loss of future earnings that is exempt to extent reasonably necessary for support of debtor and dependents. Section 522(d)(11)(E) is not limited to tort recoveries and does not exclude other sources of replacement income such as workers compensation. Appellant also failed to demonstrate irreparable harm. If Appellant prevails on appeal, debtor will be required to pay money to appellant. Monetary harm is not irreparable injury, even if delay would allow debtor to dissipate funds and render debtor unable to answer to any judgment.

7.33 Retirement Accounts

In re Lawless, 2012 WL 2974759 (Bankr. E.D. Tn. 2012) – Debtor's interest in deferred compensation plan was property of the estate subject to debtor's right to claim exemptions under 11 U.S.C. Section 522. Tennessee state exemption statute allowed debtor to exempt a right to receive payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of death, age or length of service if the account or plan qualifies under Internal Revenue Code sections 401(a), 403(a), 403(b), 408, 408A, or 409 and where employee could not accelerate payments "so as to receive

payment in a lump sum or in period payments over a period of sixty (60) months or less.” Compensation Plan falls within the definition of being paid out “on account of” or “because of” death, age, or length of service where Plan may only be paid out at death, total and permanent disability, or retirement. Plan was funded by employer, was not maintained in individually designated accounts for specified employees, and was a general debt of employer that is owed to the employee from the general assets of employer. Debtor exercised zero control over the funds which are contributed and held exclusively by employer until an agent's death, total and permanent disability, or retirement. Although account was not qualified under Internal Revenue Code, debtor had not yet begun to receive payments. Condition that plan be qualified applied only to payments received by the debtor under the plan. Failure of those conditions such that the plan was not qualified under the Internal Revenue Code did not prevent debtor from claiming value of deferred compensation plan exempt. However, Plan allowed debtor to accelerate benefits to one lump sum payment or in as few as three annual installments. Both options fell outside statutory requirement that debtor not have the option to accelerate payments. That debtor did not actually elect either option and had elected to receive benefits over 10 years did not alter fact that debtor had the right to accelerate benefits, precluding debtor's exemption of the assets in the plan.

In re Pellegrini, 2012 WL 129842 (Bankr. W.D. Mi. 2012) – Debtor could not claim judgment against “investment company” as exempt retirement funds, even if judgment resulted from embezzlement of debtor's retirement account. Debtor transferred his IRA to Florida company that was Ponzi scheme. When debtor was not able to recover funds from company, debtor sued and obtained judgment against company and principals. Debtor then hired collection agency to collect judgment but efforts were largely unsuccessful. To be exempt, funds must be retirement funds in account that is exempt from taxation. Final Judgment is not “retirement funds” held in “qualified” account. Judgment is not money and is, at best, a right to collect money from third party. Debtor's stated intention to transfer any money recovered under the judgment into a retirement account does not put money into a qualified account as of the petition date. Court cannot use equitable arguments to override express requirement of statute.

In re Rice, 2011 WL 3290312 (Bankr. E.D. Mi. 2011) *aff'd* 2012 WL 3870587 (E.D. Mi. 2012) – Section 522(d)(12) allows debtor to exempt amounts in fund or account that is exempt from taxation under specified sections of the Internal Revenue Code. Debtor who received lump sum payout on retirement benefits and used those funds to purchase cashier's check could not exempt proceeds as they were no longer in a fund or account that was exempt from taxation but were instead in debtor's possession

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

7.34 Inherited Retirement Accounts

In re Stephenson, 2011 WL 6152960 (E.D. Mi. 2011) – In determining whether inherited IRA may be claimed as exempt, court must first decide whether the funds constitute “retirement funds” and, if so, must determine whether the funds are exempt from taxation. Statute does not require that funds be “debtor's” retirement funds, and can be retirement funds of others. Funds cannot be withdrawn by debtor and debtor is not taxed until funds are withdrawn, meaning funds must be considered tax exempt. “Overwhelming authority” supports claim of inherited IRA as exempt. Debtor properly claimed interest in inherited IRA as exempt.

In re Taber, 2011 WL 4048521 (Bankr. N.D. Ohio 2011) – Ohio law allowed Debtor to exempt inherited IRA.

In re Kalso, 2011 WL 3678326 (Bankr. E.D. Mi. 2011) – Debtor's inherited IRAs can be exempted under Section 522(d)(12). The language of Section 522(d)(12) does not make a distinction as to who contributed the funds to the IRA.

In re Clark, 2011 WL _____ (Bankr. W.D. Wis. 2011) – Inherited Individual Retirement Account was not exempt under Section 522(b)(3) or 522(d)(12). Debtor claiming exemption under State Law must comply with Section 522(b)(3) which requires (1) the amount 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).

7.35 Tax Refunds

In re Zingale, 2011 WL 2330271 (6th Cir. BAP 2011) *aff'd* 2012 WL 3764693 (6th Cir. 2012) – Non-refundable portion of Child Care Tax Credit is not a "payment" as defined in Ohio statute on exemptions and may not be claimed exempt. Non-refundable tax credit can be used only to satisfy tax liabilities and is not, itself, ever refunded to the taxpayer.

7.36 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.

7.37 Spousal Support

In re Traut, 2012 WL 909550 (Bankr. N.D. Ohio 2012) - Ex-spouse's obligation to pay debtor pursuant to a division of property was not "spousal support" and therefore, was not exempt under Ohio's statute which permits debtor to exempt a right to receive spousal support, child support, and allowance, or other maintenance.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

D. Liens Impairing Exemptions – Avoidance

7.38 Procedure

White v. Commercial Bank and Trust Co., Case No. 11-6032 (8th Cir. 2011) – In determining potential exemption of property that is subject to potentially avoidable judicial lien, Court must first determine whether property would be exemptible in the absence of the judicial lien. Debtor properly claimed exemption in homestead consisting of 80 acres where applicable state law allowed homestead with a value not to exceed \$2500 but in any event not less than 80 acres.

In re Berry, Case No. 09-43489 (Bankr. E.D. Mi. 2009) - Motion to Avoid Judicial Lien denied without prejudice. Action to avoid judicial lien pursuant to Section 522(f) must be by adversary proceeding pursuant to Federal Rules of Bankruptcy Procedure 7001(2) and 4003(d).

7.39 Grounds – Generally

In re Young, 2012 WL 1717868 (Bankr. E.D. Tn. 2012) – Judgment lien avoidable as impairing homestead exemption. Judgment lien may be avoided to extent that the sum of that lien plus all other liens on the property plus the amount of exemptions that could be claimed exceeds total value of property. Property valued at \$143,700.00 encumbered by mortgage of \$96,000 and exemption of \$50,000 left no equity to which judgment lien could attach, leaving entire lien avoidable.

In re Hettinger, 2011 WL 6148623 (Bankr. W.D. Ky. 2011) – Judgment lien is avoidable to the extent the total of the lien to be avoided plus all other liens plus allowed exemptions exceeds the value of the property. Evidence indicated that value of property was \$410,000. Total liens and exemptions equaled \$512,000. Judgment lien avoidable to the extent of \$112,000, leaving \$22,000 of lien unavoidable.

In re King, 2011 WL _____ (Bankr. N.D. Iowa 2011) – Lien on Motor vehicle not avoidable under Section 522(f)(1) – motor vehicle used by debtor to commute to work is not “tool of the trade” or “household good”.

Gilchrist v. United Bank & Trust Co., 467 BR 113 (E.D. Ky. 2012) – Under Kentucky law, mortgage must identify property being encumbered, the interest that is being encumbered, and the party signing the mortgage. Although “not a model of clarity”, mortgage which did not identify mortgagor in body of mortgage sufficiently identified mortgagor through reference to various riders to the mortgage all of which were incorporated in the mortgage by reference and which identified Debtor-husband as the party signing the mortgage, and including property description itself which states that property being encumbered was the property “acquired by John I. Gilchrist, a single person, by deed dated July 7, 1995”. There was no dispute that husband executed mortgage and intended to encumber his interest in the property by doing so. As mortgage was valid and enforceable, bankruptcy court erred in excluding amounts owed on mortgage in determining whether judicial lien encumbered exemptions.

Johnson v. Cach, LLC, 2010 WL 5296944 (E.D. Mi. 2010) – Debtor entitled to avoid lien and recover tax refund seized by creditor pursuant to Writ of Garnishment served on State of Michigan within preference period. Perfection of lien by service of Writ would be avoidable under Section 547. Under Section 522, Debtor is permitted to exempt property that is recovered under Section 547 as long as initial transfer was involuntary. Garnishment constituted involuntary transfer that would be avoidable and, if not avoided, would result in creditor receiving more than creditor would have received in Chapter 7 had transfer not been made.

In re Kuykendall, Case No. 10-10358 (Bankr. W.D. Ky. 2010) - Section 522(f)(1) permits debtor to avoid security interest if the lien is a non-possessory non-purchase money obligation, to the extent it impairs an exemption. Debtor's Motion denied where Motion failed to demonstrate value of jewelry subject to security interest and debtor's exemption limited to jewelry with a fair market value in excess of \$600.

Akers v. Citimortgage, Inc., 427 B.R. 408 (Bankr. W.D. Ky. 2010) - Sections 522(f) and 522(h) permits debtor to avoid non-consensual liens. Debtor cannot avoid voluntarily conveyed security interest in Manufactured Home as granting of security interest is a voluntary act.

7.40 Valuation

In re Lavine, 2012 WL 4106749 (Bankr. N.D. Ohio 2012) – Valuation of property for purposes of avoiding judicial lien where property is owned as joint tenants but judgment is against only one of the owners is based on one-half of the value

of the property. As joint tenant, debtor had the right to use and possess one-half of the property versus tenancy-by-entirety in which each tenant owns the property in full. Property was also subject to first mortgage signed by both debtor and spouse. To determine whether lien impairs exemption, and to what extent, court would divide mortgage by two and charge only half of the mortgage balance plus the judicial lien against the value of debtor's one-half interest in the property.

In re Young, 471 BR 715 (Bankr. E.D. Tn. 2012) – Petition date controls date of valuation for purposes of exemptions as well as actions to avoid liens that impair exemptions. Under Tennessee law, both Husband and Wife are entitled to \$25,000 exemption in homestead. In joint case, Husband and Wife are permitted to aggregate exemptions, allowing exemption of total of \$50,000.00.

In re Hettinger, 2011 WL 6148623 (Bankr. W.D. Ky. 2011) – Valuation of property for purposes of avoiding exemptions is value of property on date petition is filed. Debtor's appraisal discounted as prepared more than one year after the petition was filed and debtor listed value in schedules as of petition date at significantly higher amount. Lender appraisal discounted because lender's appraisal was dated more than 4 years prior to the petition date, before the housing market crash. Court took into account scheduled value as well as court's knowledge of general market conditions and impact of market crash to determine value of property.

7.41 Liens Avoidable – Judicial Liens

White v. Commercial Bank and Trust Co., Case No. 11-6032 (8th Cir. 2011) – Judicial lien avoided in its entirety where debtor could lawfully exempt full value of homestead. By definition, any amount of the judgment lien would impair the otherwise unlimited exemption. Debtor and spouse owned property jointly when the lien attached. Later divorce and severance of title did not break chain of title or result in divestment of all title with title then reattaching, such that the lien would have attached to the property before the exemption attached.

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

7.42 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.

7.43 Liens Not Avoidable – Statutory Liens

In re Cunningham, 2012 WL 3588723 (Bankr. N.D. In. 2012) – Mechanics Lien arises automatically once notice of lien is recorded and is a “statutory” lien that is not subject to avoidance. Nature of lien as “statutory” versus “judgment” is determined by basis of lien, not method of enforcement. Commencement of judicial proceeding to enforce mechanic lien does not convert lien into judicial lien for purposes of lien avoidance.

7.44 Effect of Avoidance

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

E. Effect of Claimed Exemptions

7.45 Generally

In re Wolf, 2012 WL 1856973 (Bankr. E.D. Ky. 2012) – If no objections are filed to claimed exemptions within 30 days of conclusion of First Meeting of Creditors, exempt property automatically reverts in debtor and removes the property from the estate.

7.46 Setoff and Exempt Assets

Riley v. U.S. Department of Agriculture, 472 BR 422 (Bankr. W.D. Ky. 2012) – Debtor’s tax refund for tax year ending prior to commencement of case constitutes prepetition obligation of government to debtors, against which debtors’ prepetition debt could potentially be set off. Chapter 7 debtors’ exemption rights in prepetition tax refund trumped any right of setoff that federal government possessed against tax refund on account of debtors’ prepetition liability on Farmers’ Home Administration (FmHA) loan, where government had not exercised right of setoff prepetition. Obligation to FmHA distinguished from obligation owed to IRS. Debtors cannot claim exemption in tax refund to extent of pre-existing obligations owed to IRS as refund does not become property of the estate subject to exemption until after government nets out overpayment and tax from prior tax years; however, this does not apply preexisting debts that debtors had to other federal agencies.

7.47 Exemptions and Non-dischargeable Claims

In re Wolf, 2012 WL 1856973 (Bankr. E.D. Ky. 2012) – Once exemption is taken and allowed, property ceases to be property of estate. Creditors holding non-dischargeable obligations can then levy on that property. IRS properly issued levy to Chapter 7 Trustee and Trustee required to honor levy where property had been deemed exempt but was still in possession of Chapter 7 Trustee when levy served. Levy did not violate stay as levy was limited to property as to which exemption was allowed and so was no longer property or estate and parties agreed that tax debt was non-dischargeable.

7.48 Value of Claimed Exemption – Appreciation in Value

In re Orton, Case No. 11-4157 (3d Cir. 2012) – Debtor’s claimed exemption of specific dollar amount of value in asset limits amount exempted to amount claimed. Any additional value, whether existing at time of petition or accruing during pendency of case, accrues to benefit of Trustee and estate. Debtor scheduled interest in royalties from oil and gas lease, valued interest at \$1 and exempted \$1. Trustee entitled to any future income stream from the royalties beyond \$1 that was the value claimed as exempt. Debtor, by valuing asset at \$1 and exempting \$1 did not exempt entire asset but only value of asset to extent claimed. Section 522(d)(5) allowed the debtor to exempt only the value of an asset and not the asset itself, leaving asset as property of estate with appreciation in value accruing to estate.

7.49 Surcharge of Exempt Property

Malley v. Agin, Case No. 11-2042 (1st Cir. 2012) – Section 105 allows court to surcharge otherwise exempt property where debtor conceals assets resulting in loss of assets to the estate. Debtor sold marital residence shortly before filing. Debtor represented that all of the proceeds had gone to his ex-wife. Trustee later determined that debtor had received

\$25,000 of the proceeds but failed to list those funds. By the time the Trustee discovered the concealed funds, Debtor had spent those funds and the money was no longer available for turnover to the Trustee. Court ordered that debtor's exempt assets would be surcharged to the extent necessary to allow Trustee to recover the concealed funds. Relief was necessary to vindicate Section 521 which required honest disclosure of non-exempt assets.

VIII. Claims

A. Specific Claim Types

8.1 Administrative

In re Connolly North America, LLC, 2012 WL 4096256 (Bankr. E.D. Mi. 2012) – Court lacks authority to grant administrative claim status to creditor who makes a substantial contribution in a Chapter 7 case. Section 503(b)(3)(D) allows administrative status to creditor who makes substantial contribution only in Chapter 9 or Chapter 11. Although efforts of creditor substantially benefitted the estate and unsecured creditors, and resulted in there being a significant increase in funds available for payment of claims, creditor had no basis to assert administrative claim. Section 105 does not permit court to award administrative claim as section 503(b) precludes allowance of administrative claims in circumstances other than those designated. Allowance of claims under Section 105 would directly contravene another provision of the Code, precluding application of Section 105.

In re Kazi Foods of Michigan, Inc., 473 BR 711 (Bankr. E.D. Mi. 2012) – Bankruptcy Code provides for administrative expense claim for actual, necessary costs and expenses of preserving the estate. Debt qualifies as an actual, necessary administrative expense only if (1) it arose from a transaction with the bankruptcy estate and (2) directly and substantially benefitted the estate. Pre-petition Advertising Agreement on which creditor relied was not in effect between NACA and Kazi Michigan during the relevant post-petition time period. KFC Corporation terminated debtor's franchise agreement more than a year before debtor filed bankruptcy case. Debtor never requested creditor to provide any national advertising, or assistance with local advertising, or any other services and creditor did not prove that debtor actually received a benefit from the national advertising services that creditor provided. Creditor did not prove that it would be inequitable for debtor to retain any such benefit, without payment, where creditor knew or should have known long before the relevant period that it had no contractual obligation to provide any services debtor; (2) debtor had stopped paying creditor and informed creditor pre-petition that it would not make any further payments; and (3) creditor did not cut off all national advertising services to debtor because it would have been prohibitively expensive to block the nationwide advertising for KFC restaurants in particular areas of the country. Creditor could have terminated services but chose not to do so to save itself money.

In re Haven Manor, Inc., 2012 WL 1301228 (Bankr. D. Ne. 2012) – “Straddle” tax claims for unemployment taxes accruing during fourth quarter of year are not “administrative claims”. Section 503(b)(1)(B) affords administrative status only for actual, necessary costs and expenses of preserving the estate including any tax incurred by the estate. Business ceased operations prior to commencement of bankruptcy case. Any tax claims incurred pre-petition and prior to the existence of any estate.

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

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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

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

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

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

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 (6th Cir. 2008) - Court denied administrative expense status for claim for "estimate of deductible portion of the claims that [insurer] believes it will pay in the future for injuries that occurred during the coverage period but were not the subject of insurance claims until after confirmation" of the plan. Administrative expense claims are limited to those for actual, necessary costs and expenses of preserving estate. Potential future deductible claims would not arise until after confirmation of plan and not constitute claims or expenses of the estate.

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

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.

US Bank, N.A. v. US Environmental Protection Agency, 563 F.3d 199 (6th Cir. 2009) – Debtor is responsible for environmental waste releases that occurred before Debtor acquired the plant that produced the waste under statutory obligation of successor liability. Further, the asset purchase agreement by which the Debtor acquired the plant provided that Debtor expressly assumed all liabilities and obligations of the seller, which would include all environmental claims that arose under seller's control. Court may apportion environmental liability where two or more entities contribute to an environmental waste issue and the harm is divisible. Here, Debtor failed to demonstrate that its contribution to the environmental harm was divisible or could be calculated independent of the harm caused by other entities or where there was a reasonable basis to determine the contribution of separate causes to a single harm. Therefore, Debtor was fully responsible for all clean up costs, jointly and severally with other entities that also contributed to the waste but whose contribution was not divisible. Bankruptcy Court properly allowed EPA claim for already incurred costs of clean up plus estimated future costs of clean up.

8.3 Secured - Generally

Terlecky v. National City Mortgage Co., 2012 WL 3838767 (Bankr. S.D. Ohio 2012) – Promissory Note and Mortgage must be construed together to determine intent of parties. Although Mortgage defined only the husband as the “borrower”, wife signed in a second blank over the word “borrower” and also signed the mortgage, leaving only reasonable interpretation that wife was also “borrower”. However, ambiguity remained sufficient to avoid summary judgment. Court would schedule evidentiary hearing to determine intent of parties.

Teague v. Taylor, 2012 WL 2320898 (Bankr. E.D. Ky. 2012) – Properly perfected lien continues in collateral notwithstanding sale, lease, license, exchange or other disposition. Buyer of equipment subject to perfected security interest takes subject to security interest even if buyer did not have knowledge of interest at time of purchase. A buyer in the ordinary course takes free of even properly perfected security interests. BIOC is a person that buys goods in good faith without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged. Exception is designed to protect buyers in the very limited set of circumstances where a lender takes a security interest in goods and then leaves the goods in the possession of a debtor who sells goods of that kind. Buyer of heavy equipment could not qualify as BIOC where seller was not in the business of selling heavy equipment. Seller was in business of commercial landscaping. Although commercial landscaper may use heavy equipment, commercial landscapers are not considered sellers of heavy equipment.

Gilchrist v. United Bank & Trust Co., 467 BR 113 (E.D. Ky. 2012) – Under Kentucky law, mortgage must identify property being encumbered, the interest that is being encumbered, and the party signing the mortgage. Although “not a model of clarity”, mortgage which did not identify mortgagor in body of mortgage sufficiently identified mortgagor through reference to various riders to the mortgage all of which were incorporated in the mortgage by reference and which identified Debtor-husband as the party signing the mortgage, and including property description itself which states that property being encumbered was the property “acquired by John I. Gilchrist, a single person, by deed dated July 7, 1995”. There was no dispute that husband executed mortgage and intended to encumber his interest in the property by doing so.

Mostoller v. Dover Mortgage Company, 2012 WL 1565125 (Bankr. E.D. Tn. 2012) – Action ostensibly brought pursuant to section 506 did not contest validity or priority of mortgage but only questioned whether named claimant was entitled to enforce the note and mortgage. Although face of note contained two endorsements, one was voided on the face of the note and the second contained initialed deletion of Wells Fargo and insertion of US Bank. Plaintiff did not call into question validity of any signature on note. As creditor was the holder of the note, by its very terms creditor had right to pursue foreclosure and enforce note.

In re Alexander Property Investments, LLC, Case no. 11-52624 (Bankr. E.D. Mi. 2011) – Claim cannot be both unsecured priority and secured. City Water Department claim was secured claim. Plan that defined claim as allowed under Section 507(a)(8) and as allowed secured claim could not be confirmed.

U.S. v. Oscher, Case No. 10-15627 (11th Cir. 2011) – IRS filed secured claim that was not objected to. IRS could not receive distribution from pot set aside for payment of unsecured claims where proof of claim did not show any portion of the claim was unsecured. Nothing in Section 506 creates an automatic unsecured deficiency claim after liquidation of collateral.

Rhiel v. BAC Home Loans Servicing, LP, 448 BR 914 (Bankr. S.D. Ohio), *aff'd* 458 BR 391 (6th Cir. BAP 2011) – Mortgage sufficiently described debtor-wife as “borrower” for purposes of creating a valid security interest in her half ownership of property. Although the Mortgage defined “Borrower” only as Husband, the signature page of the Mortgage

included signatures of both Husband and Wife with “borrower” preprinted under each; both Husband and Wife initialed each page of Mortgage; and Notary block included references to both Husband and Wife. Further, Adjustable Rate Rider attached to the Mortgage defined Borrower as both Husband and Wife. Documents would be construed together to give effect to the intentions of the parties at the time the mortgage transaction was executed.

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

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 – Failure to Record Generally

Bullard v. IndyMac Bank, 2012 WL 4134839 (E.D. Mi. 2012) – Mortgage that is signed by not recorded is enforceable against mortgagor and any subsequent purchaser with notice. Mortgage is void only as against a good faith purchaser for value. Mortgage signed by debtor and her husband was valid and enforceable secured obligation as against husband even if not recorded. Later amended mortgage that was signed by wife alone also valid where wife acquired property prior to marriage can, after marriage, continue to deal with property as if owner never married. Thus, mortgage signed by wife alone on property owned by wife prior to marriage and still owned in wife’s name alone was enforceable and valid.

8.5 Secured – Method of Perfection

DETROIT CONSUMER BANKRUPTCY CONFERENCE

Mason v. Szerwinski, 467 BR 893 (6th Cir. BAP 2012) - perfection of security interest in "chattel" requires filing of financing statement with Secretary of State. Perfection of security interest in fixture accomplished by filing mortgage with the County recorder of deeds. A "chattel" is defined as movable goods or goods that are, for temporary purposes, somewhat attached to the land. A "fixture" is an article which was a chattel, but which by being physically annexed or affixed to the Realty, became an accessory to the Realty and a part and parcel of the Realty. Three-story "cottage" built on leased land constituted a fixture where the evidence indicated that the owner intended the cottage to be permanently affixed to the Realty and could not be readily severed from the Realty. Mortgage contained all requirements for a financing statement and was properly recorded in County in which cottage and underlying leasehold were located.

Soto-Rios v. Bancol Popular de Puerto Rico, Case No. 10-2270 (1st Cir. 2011) – Mortgagee as purported secured creditor held an "interest in property" as that term is used in both 11 U.S.C. sec. 362(b)(3) and 11 U.S.C. sec. 546(b)(1)(A) even though the mortgage deeds executed by the debtors were not recorded as of the date of the debtors' bankruptcy filing due to backlog at the Puerto Rico Registry. Puerto Rico's civil code provides that the act of presentment of a mortgage for recording is sufficient to put third-parties on notice of the existence of the mortgage. Puerto Rico's statutory "relation back" doctrine provides that the point a mortgage is presented to the Registry determines the priority of the mortgage over liens recorded in the intervening period between presentment and recording. Hence it held that under Section 546(b)(1)(A), the debtors' strong-arm powers could not be used to avoid the un-recorded mortgages - a bona-fide purchaser of the debtors' property would take the property subject to the mortgagee's interest in the debtors' property. Likewise, the mortgagee's actions in perfecting its mortgages during the post-petition period would be excepted from the automatic stay by virtue of 11 U.S.C. sec. 362(b)(3). Finally, the First Circuit ruled that the debtors could not avoid the mortgages as preferential transfers since the mortgages were presented for recording well outside of the 90 day preference period of 11 U.S.C. sec. 547(b).

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), *aff'd* 471 BR 876 (6th Cir. BAP 2012) – To perfect lien in manufactured home that is not affixed to realty, title lien statement is submitted to the county clerk of the county of the debtor's residence which will then note the security interest on the certificate of title by entering the information into State computer system and produce a certificate of title. Lien not properly perfected where lien was not noted on certificate of title prior to commencement of case. Further, even if lien had been noted, lien was not properly perfected where title lien statement was filed in county other than the one in which debtor resided. Trustee avoided lien under Section 544.

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.

8.6 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.

8.7 Secured – Proceeds of Collateral

Ferry Road Properties, LLC v. RL BB Acq II-Tn, LLC, 2012 WL 3888201 (Bankr. E.D. Tn. 2012) – Proceeds of cause of action for damages to property are, in equity, treated as the land itself. Mortgaged land, in its present damaged condition, together with money awarded for injury to the land, stand in the place of the original uninjured land. Debtor filed suit against company that negligently constructed deficient improvements to property. During pendency of that action, lender foreclosed and purchased property at the foreclosure sale. To extent suit sought recovery for damages to property, that action passed from debtor to lender at foreclosure. However, to extent suit sought recovery of "commercial tort", consisting of claim that arose in operation of business, action is not "proceeds" under mortgage and action remains property of debtor.

8.8 Secured – Priority of Competing Secured Claims

Citizens Commerce National Bank v. Republic Bank & Trust Co., 2012 WL 3028466 (E.D. Ky. 2012) – Future advance clause in mortgage is valid if the clause describes the amount of additional indebtedness with reasonable certainty. nature and amount of permitted advances must be described such that terms can be determined with exercise of ordinary discretion and diligence. Future advance clause sufficiently described allowable amount of indebtedness by stating. "At no time shall the principal amount of the indebtedness secured by this mortgage, not including sums advanced in accordance herewith to protect the security of this mortgage, exceed the original amount of the Note, plus \$____. All additional advances secured by this mortgage shall be due and payable on or before the Final Maturity Date of the Note, or such time as demand for payment may be made by Mortgagee." Including of blank resulted in future advances permitted up to total amount of original note. As note is paid down, additional advances would be allowed as long as those did not exceed the stated principal amount of the note.

Brown Commercial Construction Co. v. Corbin Park, LP, Case No. 10-084 (10th Cir. BAP 2012) – Mechanics lien did not trump recorded first mortgage where mortgage was recorded before contractor performed first lienable work, although contractor had provided other, non-lienable services, prior to date of recording of mortgage. Further, contractor-appellant who had done work on the subject property for a different owner under a different contract previously (which was satisfied), could not use that work to tack work performed under a different contract with the current owner (the Debtor) to achieve priority of its mechanic's lien.

Smoky Mountain Title, Inc. v. Tennessee State Bank, 2012 WL 122539 (Bankr. E.D. Tn. 2012) – Court can use vehicle of equitable lien to restore a released deed of trust to its priority position. Plaintiff must show a clear intent to make particular property security for debt and that money has been parted with in reliance on the lien. However, court cannot restore lien where intervening rights of third parties would be adversely affected. Deed and mortgage cannot be restored where doing so would be adverse to status of trustee as bona fide purchaser. However, inquiry notice can defeat subsequent interest even absent actual or constructive notice if party had sufficient facts and information from which actual knowledge can be inferred. Where information known to person would be sufficient cause person of ordinary prudence to make further inquiry, law presumes that party made inquiry and determined true state of facts. Although mortgage fell outside of chain of title for purposes of constructive notice, the deed to the principal and the quit-claim from the principal to the debtor both referenced the mortgage itself. These documents, of which the trustee had constructive notice, contained sufficient information to place trustee on inquiry notice of the existence of the mortgage, sufficient to defeat trustee status as BFP.

Lange v. Mutual of Omaha Bank. Case No. 11-6062 (8th Cir. BAP 2012) – Lender's security interest terminates automatically when loan is paid in full. Lender cannot use previously recorded financing statement to secure later advance but must record new financing statement. Further, Termination Statement to a UCC financing statement filed by a third-party was authorized and effective in terminating a lender's security interest in the debtor's personal property where the debtor refinance the loan through a new lender and prior lender authorized new lender to file termination of "all liens" on the debtor's property. Mutual's loan was paid and the refinancing lender terminated all of Mutual's outstanding financing statements. Although old lender contended that the new lender was authorized to terminate liens only on property described on a list of items of collateral attached to its release letter, nothing in the text of the authorization letter conveyed such a limitation and an officer of prior lender testified that the authorization letter mistakenly gave the new lender

authority to release all of its liens. Lien was unperfected and subject to avoidance.

Thomas v. Citimortgage, Inc., 459 BR 708 (Bankr. E.D. Mi. 2011) – Court is not bound by respective priorities of mortgages at time case filed. Creditors' post-petition subordination agreement by which second recorded mortgage was elevated over first recorded mortgage effectively adjusted priorities to reflect priorities intended by Debtor and creditors at time new first mortgage was granted.

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.

8.9 Secured Claim – Allowed Charges Generally

Ginn v. CitiMortgage, Inc., 365 BR 84 (Bankr. D.S.C. 2012) – Section 506(b) allows oversecured creditor to add reasonable post-petition interest, costs and charges to the amount of the secured claim, to the extent permitted by the underlying contract. However, Section 506 is inapplicable to Chapter 13 Plans that propose to cure and maintain under Section 1325(b)(5). Court must determine whether and to what extent post-petition fees and charges are property under the loan documents without regard to oversecured versus undersecured.

First Tennessee Bank, NA v. Hansen, 2012 WL 1156409 (Bankr. E.D. Tn. 2012) – Bank could include in secured claim damages to property that resulted from activities of debtors' grandson. Grandson was producing methamphetamines in basement without knowledge of debtors, causing substantial damage to house and requiring house to be gutted post-foreclosure to remediate. Mortgage imposed duty to preserve, maintain and protect property. Damages would be included in the allowed claim.

8.10 Secured – Attorney Fees

RNPC, LLC v. Alvarez, Case No. 11-080 (1st Cir. BAP 2012) – Pursuant to Section 1322(e) of the Bankruptcy Code, the amount of an arrearage under a mortgage secured by the debtor's principal residence, including the amount of the mortgagee's attorneys fees and costs recoverable under the mortgage, is determined by applicable nonbankruptcy law, and not the reasonableness, lodestar-based standards of Section 506(b) or Bankruptcy Rule 2016, which are overridden by Section 1322(b). Since applicable Puerto Rico law provides that the amount of attorneys' fees and costs recoverable under “penal clauses”—which permit recovery of attorneys' fees and costs as a percentage of the original principal of the mortgage note—is subject to adjustment on equitable grounds, the Bankruptcy Court properly considered those grounds in reducing the mortgagee's claim for attorneys' fees from \$7,600 (the contract rate, equal to 10% of the original principal amount) to \$2,000.

In re Ware, 2011 WL 5975269 (Bankr. E.D. Ky. 2011) – Fees incurred in adversary proceeding that contested validity of mortgage and future advance clause were expended to protect the security of the mortgage and were properly recoverable as additional sums under the mortgage.

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

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

8.11 Secured – Interest Rate

McDonald v. Credit Acceptance Corp., 2011 WL 6643074 (E.D. Mi. 2011) – Interest rate that exceeds 3% risk factor not prohibited by *Till*. *Till* did not impose ceiling over prime as risk factor. Plan that provided for interest to secured creditor at 15% approved when contract rate was 24% and car was purchased only one week prior to filing.

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

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.

8.12 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.

8.13 Secured – Future Advance Mortgage

In re Ware, 2011 WL 5975269 (Bankr. E.D. Ky. 2011) – Future Advance Clause in mortgage valid and enforceable where Future Advance Clause did not specify maximum amount of future advances but body of mortgage contained cap on amount secured. First mortgage secured to full amount including future advances as long as total indebtedness did not exceed amount stated in mortgage as overall cap on amount.

8.14 Secured – Assignment of Claim

In re Rice, Case No. 11-8032 (6th Cir. BAP 2011) – Assignment of secured claim is valid and enforceable by assignee

even if assignment is not recorded or noted on certificate of title. Assignee of properly perfected lien on automobile is party in interest and holder of claim even where assignment is not noted on certificate of title.

8.15 Secured – Forged Mortgage

Sutter v. US National Bank, 2012 WL 5734 (6th Cir. 2012) – Lender’s assignee did not have secured claim based on forged mortgage. Although borrowers signed the promissory note and the lender advanced the proceeds to pay off the prior liens on the property, borrowers never signed the mortgage itself. Mortgage was apparently signed by originating lender as notary indicated that mortgage was signed in Michigan on date when borrower was in California. Forged mortgage is void ab initio; therefore, there can be no bona fide purchaser for value. Subsequent holder of mortgage could not enforce otherwise void mortgage.

8.16 Secured – Equitable Mortgage

Sutter v. US National Bank, 2012 WL 5734 (6th Cir. 2012) – Equitable mortgage is generally imposed when one party intended to grant security interest but instrument actually transferred property in total to third party. Equitable mortgages can be imposed where the underlying mortgage is void, particularly where the party purportedly giving the mortgage received the benefits of the mortgage. However, equity prevents imposition of equitable mortgage where party seeking to impose mortgage lacks clean hands. Actions of originating lender in forging signatures of borrowers on mortgage would be imputed to subsequent purchaser of the note and mortgage, resulting in unclean hands and precluding imposition of equitable mortgage, even where borrower would not be harmed by imposition of mortgage and borrower unquestionable received benefit in form of payoff of prior mortgage.

8.17 Secured – Waiver

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

8.18 Secured – Valuation

Central State Bank v. Volas, Case No. 12-75 (W.D. Mi. 2012) – Bankruptcy Court ruling was not clearly erroneous in classifying property as residential rather than commercial. Property was zoned residential and was actually used by debtor as his principal residence. Fact that property had greenhouse on it was not inconsistent with residential use as zoning allowed greenhouse only as “incidental” to property’s residential use. Although property constituted “family farm” for purposes of Chapter 12, classification was based on income and expenses and not on actual use of property. Court’s conclusion of value not erroneous where court provided multiple reasons for the value, even though value ultimately derived solely from comparables that were all bank-owned properties.

In re Creekside Senior Apartments, LP, Case No. 11-8072 (6th Cir. BAP 2012) – Section 506(a) requires valuation of the collateral for purposes of determining extent of secured claim. In valuing property, court must first determine the extent of the creditor’s interest in debtor’s interest in the collateral; and must then determine how to value the collateral. Where the debtor proposes to retain and use the collateral, valuation is based on amount which willing buyer in debtor’s trade or business would pay to acquire like property from a willing seller. Collateral consisted of low income apartment complexes, each of which had Low-Income Housing Tax Credits attached to the property. Tax credits provide incentive to develop low-income housing properties in exchange for stream of tax credits, and are conditioned on property maintaining compliance with Tax Credit program requirements. If the property is sold during the term of the tax credits, the purchaser acquires the remaining stream of tax credits as if the prior owner had not sold the property. Tax credits are attached to the property and belong to the owner of the property. Tax credits could not be severed from the property and do not exist separate from ownership of the property, and must be considered in valuing the property itself. Bankruptcy Court properly valued property, by reviewing appraisals submitted by each party, reviewing evidence and testimony, and concluding that the creditor’s appraiser more accurately reflected market conditions. Bankruptcy court engaged in thorough review of qualifications of appraiser for debtor and appraiser for creditor and made detailed analysis of why Court gave more weight to creditor’s appraisal. Debtor failed to demonstrate clear error or abuse of discretion in Court’s determination of value of collateral.

8.19 Landlord’s Lien

Huntington National Bank v. Bruinsma, 475 BR 602 (Bankr. W.D. Mi. 2012) – Where tenant enters into sub-lease, Landlord holds lien on rents to be paid under the sublease to the tenant in the event tenant fails to pay rent under the main lease. Rents from the subtenant to the tenant cannot be used to first pay tenant’s creditors where tenant is in default under the main lease. However, there is no general common-law lien on tenant’s property to secured payments under the

DETROIT CONSUMER BANKRUPTCY CONFERENCE

main lease. To have lien to secure payment of rent, lease must contain express grant of lien and lien must be properly perfected.

8.20 Default Interest Rate

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

8.21 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.

8.22 Income Taxes

In re Pavone, Case No. 11-70927 (Bankr. E.D. Mi. 2012) – Debtor cannot treat post-petition tax liability in Chapter 13 plan over objection of taxing authority. Case filed late in 2011 could not treat 2011 tax liability in plan over objection of State even if plan not confirmed until early 2012. "Straddle" tax claims are limited to those where the tax year ended prior to commencement of the case but where the return has not yet been filed.

In re Hight, 426 BR 258 (Bankr. W.D. Mi.) *aff'd* 434 BR 505 (W.D. Mi. 2010), *Michigan Department of Treasury v. Hight*, 670 F.3d 699 (6th Cir. 2012) – Debtor has standing to file proof of claim on behalf of governmental unit for "straddle" tax claims. Under section 502, a tax on earnings for a taxable year ending on or before the date of the filing of the petition is a priority claim. Debtor filed for bankruptcy protection in January, 2009, prior to filing debtors 2008 State Tax Return. Debtor then filed a Proof of Claim on behalf of the State for the 2008 tax year. Section 1305 does not exclusively govern filing of post petition claims where section 501, section 502 and section 507 established that debtor could treat the post petition claim for a tax debt arising from the immediately preceding tax year as if it were a prepetition claim.

In re Haven Manor, Inc., 2012 WL 1301228 (Bankr. D. Ne. 2012) – "Straddle" tax claims for unemployment taxes accruing during fourth quarter of year were entitled to priority status where business shut down and filed bankruptcy during the quarter. Although the returns were not due until after the petition date, Section 507(a)(8)(D) affords priority status to employment taxes earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition. Section is not limited to taxes for which returns are required only pre-petition. The plain meaning of the phrase "after three years before the date of filing the petition" includes all dates that occur after the date set three years before the filing of the bankruptcy petition, including those that occur after the date of the petition. The language does not limit the period exclusively to the three-year period between the lookback date and the date the petition was filed.

Hayes v. Internal Revenue Service, Case No. 10-6573 (Bankr. E.D. Mi. 2011) – 26 USC 6672 provides that person who willfully fails to account for and pay overwithholding taxes is liable for the full amount not paid. Taxpayer bears burden of proving that he is not a responsible person or that he did not act willfully in failing to pay. Responsible person is one who exercises influence and control over financial affairs of corporation, focusing on duties of person as outlined by corporate by-laws; ability of person to sign checks; identity of officers, directors and shareholders; identity of individuals who hire and fire employees; and identity of individuals in control of financial affairs. Willfulness is established if the person makes a knowing and voluntary choice to pay creditors other than the IRS or engages in course of conduct with reckless disregard for whether taxes are paid. Knowledge of payments to other creditors including employees with knowledge of unpaid withholding taxes is willfulness as matter of law. Debtor was responsible party for business owed by Debtor and his brother where testimony indicated that Debtor and brother made financial decisions jointly. However, once debtor was called to active military duty and deployed, he no longer was responsible party. Although debtor continued to be shareholder and officer and maintained signatory party on business bank account, evidence was uncontroverted that debtor no longer had any contact with business and that debtor's brother made all future financial decisions individually.

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

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), *aff'd* 2012 WL 441177 (E.D. Mi. 2012) - The State's "right to payment" did not arise until April 15 and, therefore, the "claim" did not arise until April 15, well after the commencement of the cases. Section 507(a)(8) gives priority status to any claim that is measured by income for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due after three years before the date of the filing of the Petition. "Straddle" tax liabilities are "measured by income" for a tax year ending prior to the commencement of the Case - the Debtor's income in 2009 certainly predates the filing of the case in 2010. The last date on which the Debtor could timely file a return would have been April 15, 2010, a date is that is after a date that was three years prior to the commencement of the. Thus, the Debtor's tax obligation for the year 2009 constituted a "priority" tax claim under Section 507. Section 502 provides that any claim that arises after commencement of the case for tax that is otherwise entitled to priority is determined and allowed as if the claim had arisen before the date of the Petition. Section 1322 requires that the Debtor's Plan provide for full payment of all allowed priority claims over the life of the Plan.

8.23 Corporate Tax Liabilities

California v. Hansen, Case No. 11-1320 (9th Cir. BAP 2012) – Unemployment Insurance tax levied on corporation and on principal as "responsible party" is not a tax that debtor is required to collect from third parties and to remit to state. Tax is not of a type specified in Section 507(a)(8)(C).

Quiroz v. State of Michigan, 450 B.R. 699 (Bankr. E.D. Mi. 2011), *aff'd* 472 B.R. 434 (E.D. Mi. 2012) – Michigan's Single Business Tax is an excise tax on a "per transaction" basis and is entitled to priority status under Section 507(a)(8)(E). Michigan law allows assessment of corporate taxes against corporate officers who have control or supervision of, or are responsible for paying, corporation's taxes. Debtor, as principal of corporation, was personally responsible for payment of Corporate Single Business Tax.

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.

8.24 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 (7th Cir. 2010) – Chapter 7 Trustee has standing to object to claim by debtor's pre-petition state court counsel for unpaid attorney fees based on contingency fee agreement. Attorney entitled to contingency calculated on amount recovered as a result of acts of attorney. Attorney is not entitled to contingency fee based on partial recovery achieved by debtor before he retained attorney.

8.25 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.

8.26 Domestic Support Obligations

In re Micek, 2012 WL 1854280 (Bankr. E.D. Ky. 2012) – Obligation payable to third party can nonetheless be in the nature of support. Court will focus on nature of debt rather than identity of payee. Attorney fees owed to former spouse's attorney as awarded in final judgment of divorce may be non-dischargeable.

In re Traut, 2012 WL 909550 (Bankr. N.D. Ohio 2012) - Ex-spouse's obligation to pay debtor pursuant to a division of property was not "spousal support" and therefore, was not exempt under Ohio's statute which permits debtor to exempt a right to receive spousal support, child support, and allowance, or other maintenance.

Faircloth v. Hapner, 2011 WL 6941489 (Bankr. N.D. Tn. 2011) – To qualify as DSO, obligation must meet 4 requirements of Section 101(14A) – obligation must be (1) owed to spouse or child or debtor or governmental unit; (2) in the nature of alimony, maintenance or support; (3) established or subject to establishment before, on or after date of order for relief, in a separation agreement, divorce decree or property settlement agreement, or established by order of court, or other determination made by governmental unit; and (4) must not have been assigned to non-governmental unit other than for purposes of collection. Divorce decree required debtor to sell marital home and pay mortgage on which both debtor and ex-spouse were obligated. Debtor sold house but did not pay off debt. Obligation to pay mortgage was not included in divorce judgment as alimony or support and obligation does not otherwise qualify under Section 101(14A). Obligation is with the scope of Section 523(a)(15) as obligation owed to former spouse which is dischargeable under Section 1328.

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

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 dischargeability of the obligation serves the purpose of federal bankruptcy law. State court orders clearly did not award alimony to either party and court never labeled amounts owed to ex-wife as alimony, support or maintenance. Amounts owed to ex-wife were not in the nature of alimony or support and were not entitled to priority status.

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.

8.27 Priority – Qualifying Wages and Benefits

In re Tristar Fire Protection, Inc., 466 BR 392 (Bankr. E.D. Mi. 2012) – To be entitled to priority as administrative expense, wages and benefits must be awarded pursuant to a judicial proceeding or a proceeding of the NLRB and award must be made as a result of a violation of Federal or State law. Union not entitled to priority claim based on alleged unfair labor practice for engaging in lockout of union employees. Although union filed unfair labor practice charge with NLRB, neither NLRB nor judicial proceeding had resulted in any award and bankruptcy court lacked jurisdiction to rule on unfair labor practice claim.

8.28 Priority – Tax Claims

In re Calabrese, Case No. 11-3793 (3d Cir. 2012) – Sales taxes are considered “trust fund” taxes for purposes of priority and dischargeability under Section 507(a)(8)(C) rather than excise taxes under 507(a)(8)(E). Excise taxes are dischargeable if they are more than three years old as of the date of the petition, while trust fund taxes are never dischargeable.

In re Alexander Property Investments, LLC, Case no. 11-52624 (Bankr. E.D. Mi. 2011) – Claim cannot be both unsecured priority and secured. City Water Department claim was secured claim. Plan that defined claim as allowed under Section 507(a)(8) and as allowed secured claim could not be confirmed.

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.

8.29 Priority – Perishable Agricultural Commodities Act

Ruby Robinson Co. v. Herr, Case No. 10-20788 (5th Cir. 2011) – PACA liability attaches first to the licensed commission merchant, dealer, or broker of perishable agricultural commodities. If the assets of the licensed commission merchant, dealer, or broker are insufficient to satisfy the PACA liability, then others may be held secondarily liable if they had some

role in causing the corporate trustee to commit the breach of trust. Individual shareholders, officers, or directors of a corporation who are in a position to control trust assets, and who breach their fiduciary duty to preserve those assets, may be held personally liable under PACA. Stock Purchase Agreement granted purchasing shareholders authority over certain business and financial matters and entitled them to sit on the Debtor's board of directors gave them legal authority to control the trust assets for purposes of imposing PACA liability.

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.

8.30 Pre-Petition versus Post-Petition Claims

First Tennessee Bank, NA v. Hansen, 2012 WL 1156409 (Bankr. E.D. Tn. 2012) – Attorney fees and costs expended by Bank in remediating damages to home after commencement of bankruptcy and surrender of home were pre-petition claims that were included in, and discharged as part of, the Chapter 13 case. Claim was result of pre-petition relationship between debtor and creditor such that creditor could fairly contemplate possibility of a claim against bankruptcy estate at time bankruptcy petition was filed. Bank's basis for the claim is the pre-petition note and mortgage.

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.

Bank of America v. Pigg, 453 BR 728 (Bankr. M.D. Tn. 2011) – Bankruptcy Code § 523(a)(16) provides that a debtor shall not receive a discharge for condominium fees and assessments that become due and payable after the bankruptcy petition is filed as long as the debtor or the trustee "has a legal, equitable or possessory ownership interest" in the unit. In amending Section 523(a)(16) Congress "could not have foreseen the world and United States financial crisis that crashed Wall Street, sunk the real estate market, and affected, to some degree, almost every American". Lenders choose not to foreclose on their collateral leaving homeowners in limbo. A chapter 7 debtor who has surrendered her home in bankruptcy and been relieved of any personal liability on the mortgage cannot truly be given a fresh start where HOA fees accumulate until lender chooses to foreclose. If the lender never forecloses, that homeowner's liability for the HOA fees continues in perpetuity, thwarting the goals of the entire Bankruptcy Code. Court Ordered that the Chapter 7 trustee sell the property pursuant to 11 U.S.C. § 363 and distribute the proceeds to administrative expenses incurred by the chapter 7 trustee; then the claim of the HOA for all fees and expenses covered by their first priority lien; then the Bank to the extent of its lien; then to the Second mortgage holder to the extent of its lien; then to the chapter 7 estate. Bank and the HOA consented to the sale by their inaction as equity demands that court fashion remedy that balances rights of the lienholders and the right of a debtor to a fresh start.

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.

8.31 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 (6th Cir. 2011) – Loan Guarantee agreement that provided that guarantor's obligations were "not ... in any way affected by ... bankruptcy" of the corporate borrower remained fully liable for debt following bankruptcy of corporate borrower. Guarantor's unauthorized filing of bankruptcy petition on behalf of obligor was a "springing recourse event" which rendered debt fully recourse under loan agreement, and guarantors thereby became personally liable for debt under terms of guaranty of recourse obligations. Although guarantor may have lacked corporate authority to file petition on behalf of obligor without consent of other guarantor, the loan and guaranty were governing documents with respect to whether filing was springing recourse event, not obligor's internal documents, and loan agreement clearly provided that debt became fully recourse when "any Guarantor" filed a bankruptcy petition, and other guarantors' objection to filing were thus irrelevant.

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.

8.32 Guaranty Claims

In re Kaid, 2012 WL 1929906 (Bankr. E.D. Mi. 2012) – Secured creditor who sold note and mortgage but excluded from sale the claim based on personal guarantee had standing to file proof of claim in individual corporate officer's Chapter 13 case. Guarantee was separate document from note and mortgage given by corporation and transfer documents to creditor's successor expressly excluded the guarantee from the interests and rights being transferred.

Michigan Commerce Bank v. Palms Investments, LLC, Case No. 299168 (Mi. Ct. App. 2011) – Creditor who consented to sale of collateral conditioned on creditor waiving right of deficiency claim against obligor discharged liability of guarantors on the underlying debt. Although discharge in bankruptcy of principal obligor does not discharge liability of guarantors, sale of property was not "discharge" but was consented to sale and payment in exchange for release of deficiency claims against borrower.

8.33 Executory Contracts and Unexpired Leases – Assumed

8.34 Executory Contracts and Unexpired Leases – Rejected

Tencup Property, LLC v. Riley, Case No. 09-065 (1st Cir. BAP 2010) - Section 365(d) imposes two obligations on a trustee with respect to unexpired nonresidential real property leases. First, § 365(d)(3) requires the trustee to perform timely all obligations required under the lease, particularly the obligation to pay rent at the contract rate until the lease is rejected, and gives the lessor an administrative claim for such amounts. Second, Section 365(d)(4) requires the trustee to decide whether to assume or reject a lease within 120 days after the entry of the order for relief. If the trustee fails to act within 120 days, the lease is deemed rejected and the trustee must immediately surrender the leasehold to the lessor. However, no provision in the Bankruptcy Code or Rules requires the trustee to file a specific motion entitled "motion to reject." Therefore, the trustee can give notice of intent to reject a lease in another kind of formal motion, such as a sale motion or a settlement motion. The critical question is one of adequate notice — parties to the contract or lease must be given adequate notice of the proposed rejection or assumption. Court can order retroactive rejection where aggregate of facts indicates lessor had ample notice of intent to reject leases and debtor had actually vacated premises and returned premises to the landlord prior to entry of formal order rejecting lease.

8.35 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.

8.36 Deficiency Claims

Fifth Third Bank v. Dial Properties, LLC., Case No. 11-5300 (6th Cir. 2012) - Under Tennessee law, successful bid a properly conducted foreclosure sale is presumed to be the value of the property for purposes of determining a deficiency claim. Alleged "value" of the property sold is not relevant absent evidence of fraud or irregularity in the conduct of the sale. While a "gross inadequacy" of the price may constitute evidence of fraud, party contesting deficiency claim carries burden of overcoming presumption that attaches to a sale free of irregularity. Successful bid at foreclosure sale was \$500,000. Defendant did not rebut presumption merely by providing appraisal that valued the property at \$625,000. Discrepancy in appraised value versus sale price was not "grossly inadequate", and appraisal was dated more than two months before the foreclosure sale where the general real estate market was in substantial decline. Merely because the defendant comes up with an alternative value does not rebut the presumption or shift the burden onto the plaintiff to establish the fair market price.

State Bank of Florence v. Miller, 442 BR 621 (Bankr. W.D. Mi. 2011), *aff'd* 459 BR 657 (6th Cir. BAP 2011) – Bank that purchased property at foreclosure sale by credit bid must credit entire amount of bid against obligation owed. Bank that inadvertently bid full amount of debt, which was more than double actual value of property, cannot escape consequences of its decision to bid. Party who overbids at foreclosure sale through its own unilateral mistake bears the consequences of its actions. Bank would not be permitted to attack its own foreclosure sale, where Bank unilaterally decided to bid full amount of debt, debtor took no part or role in foreclosure, and Bank failed to take any steps to set aside the foreclosure sale for more than one year. Bank's debt was fully satisfied by the credit bid, and Bank no longer held any debt or obligation as to debtor.

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.

8.37 Subordination

8.38 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).

8.39 Pre-petition Interest – Unsecured Claims

Diamond v. Bakay, Case No. 11-1372 (10th Cir. 2011) – Creditor not entitled to pre-judgment interest where creditor unduly delayed in attempting to enforce obligation. Creditor did not take any steps to collect loan that had been in default for more than 4 years prior to commencement of bankruptcy case by debtor.

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

8.40 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

8.41 Standing to File Proof of Claim

Simmerman v. Ocwen Financial & Mortgage Services, Inc., 463 BR 47 (Bankr. S.D. Ohio 2011) – Only real party in interest may file a proof of claim in a debtor's bankruptcy case. Real party in interest is creditor entitled to payment on claim or creditor's authorized agent at the time the bankruptcy petition is filed. The real party in interest with respect to a mortgage proof of claim “is the party entitled to enforce the note and its accompanying mortgage as determined by applicable nonbankruptcy law. In general, the holder of a negotiable instrument, including a promissory note, has the right to enforce it. The “holder” is either: a) a person in possession of the instrument if the instrument is payable to bearer; or b) the person identified in the instrument when that person is in possession of the instrument if the instrument is payable to an identified person. Debtors have standing to object where documents attached to the proof of does not bear Creditor's name nor any endorsement of the instrument from the original lender to the Creditor. However, Debtors lack standing to contest transfer of note and mortgage based on failure to comply with the terms of a pooling and servicing agreement. Debtors lack standing to challenge the ownership of the note and mortgage based on the failure to comply with the terms of a third party PSA.

Mostoller v. Dover Mortgage Company, 2012 WL 1565125 (Bankr. E.D. Tn. 2012) – Action ostensibly brought pursuant to section 506 did not contest validity or priority of mortgage but only questioned whether named claimant was entitled to enforce the note and mortgage. Although face of note contained two endorsements, one was voided on the face of the note and the second contained initialed deletion of Wells Fargo and insertion of US Bank. Plaintiff did not call into question validity of any signature on note. As creditor was the holder of the note, by its very terms creditor had right to pursue foreclosure and enforce note.

Gordon v. Royal Manor Management, Inc., 2012 WL 1605910 (6th Cir. 2012) – Creditor lacked standing to file claim in corporate bankruptcy where documents attached to claim indicated that the loans were made to the corporate principals individually and not to the corporation, and documents did not indicate that corporation agreed to guarantee or otherwise undertake obligation to repay loan.

In re Hunter, 466 BR 439 (Bankr. E.D. Tn. 2012) – Under Tennessee law, party in possession of allonge to deed of trust and original deed of trust note endorsed in blank presumptively has standing to enforce note and deed of trust, including filing of proof of claim based on note and deed of trust. Promissory note is negotiable instrument governed by State adoption of Uniform Commercial Code.

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 Sencyszyn, 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.

8.42 Not Required – Secured Creditors

Christo v. Wells Fargo Bank, 2012 WL 3839238 (Bankr. N.D. Ohio 2012) – Secured creditor not required to file proof of claim to preserve security interest. Security interest passes through bankruptcy unaffected. Only unsecured creditors are required to file claims.

8.43 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.

8.44 Informal Proof of Claim

In re Roman, 2012 WL 2921507 (Bankr. N.D. Ohio 2012) – Court imposes four requirements for an informal proof of claim: (1) The proof of claim must be in writing; (2) The writing must contain a demand by the creditor on the debtor's estate; (3) The writing must express an intent to hold the debtor liable for the debt; and (4) The proof of claim must be filed with the bankruptcy court. Claim filed on pre-December, 2011, Proof of Claim form more than fulfilled requirement for "informal" claim. Even if failure to use new claim form was itself a failure to "substantially comply", court would not exalt form over substance and disallow claim.

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

8.45 Effect of Filed Proof of Claim

In re B & P Holdings, Inc., 2011 WL 5909669 (Bankr. W.D. Mi. 2011) – Proof of claim is prima facie evidence of validity and amount. Claim based on properly entered final judgment has preclusive effect in the bankruptcy court.

U.S. v. Oscher, Case No. 10-15627 (11th Cir. 2011) – IRS filed secured claim that was not objected to. IRS could not receive distribution from pot set aside for payment of unsecured claims where proof of claim did not show any portion of the claim was unsecured. Nothing in Section 506 creates an automatic unsecured deficiency claim after liquidation of collateral.

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 forth 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 (11th Cir. 2010) – Bankruptcy court order allowing plaintiff's claim did not constitute a money judgment that enabled plaintiff to execute levy against assets held in trust for debtor.

8.46 Deadline for Filing Proof of Claim

In re Stone, 473 BR 465 (Bankr. M.D. Fl. 2012) – Court cannot exercise equitable discretion to allow late filed claim in Chapter 13 case.

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.

8.47 Late Filed Proof of Claim

Michigan Funds Administrator v. DPH Holdings Corp., Case no. 11-3782 (2d Cir. 2012) – Court has discretion to determine whether to allow creditor to file claim after bar date. Court must consider whether late claim produces prejudice to debtor or creditors or whether, if late claim is disallowed, other creditors would receive windfall, and whether creditor acted in good faith and whether the delay was justified. Court concluded that State's attempt to file late claim would be disallowed where State failed to provide any reasonable explanation for failure to timely file a claim, even if contingent and unliquidated and subject to amendment when the actual tax liability was determined.

In re Rivas, 2012 WL 122412 (Bankr. E.D. Tn. 2012) – Under Section 726, claims that are not filed by the bar date can be considered "timely" and paid at the same priority as timely filed claims if the creditor did not have notice or actual knowledge of the case in time to timely file a proof of claim. Creditor had actual knowledge of bankruptcy case in time to file proof of claim. However, Court had issued "no asset" notice advising creditors not to file claims and creditor did not file either a claim or a notice of appearance. Court later issued notice of bar date but did not mail copy of that notice

to creditors which was not sent to creditor. Claim was untimely and would be treated as late filed claim. Court's notice of no assets does not relieve the claimant of the burden to determine the claims bar date and to ensure that a claim is timely filed. Plain language of Section 726 indicates that notice of the case is sufficient to trigger duty to file claim, not notice of a specific bar date. Creditor cannot rely on lack of notice of the bar date, or even a notice not to file claims, to avoid consequences of failure to timely file proof of claim.

8.48 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.

8.49 Amended Proof of Claim

Michigan Funds Administrator v. DPH Holdings Corp., Case no. 11-3782 (2d Cir. 2012) – Court must carefully review amended proof of claim filed after claims bar date to ensure that amended claim is not a new claim filed under the guise of an amendment. Court must examine whether there was a timely assertion of a similar claim or demand, such that the amendment either corrects a defect in the form of the original claim; describes the original claim with greater particularity; or pleads a new theory of recovery on the same facts set forth in the original claim. State's claim for unpaid taxes for 2010 did not relate back to state's earlier, timely filed, claim for unpaid taxes for 2009. Workers compensation assessments depend on total indemnification payments for prior year and aggregate payments made by all self-insurers over same year. Thus, assessment in any one year is not "continuously accruing" but constitute separate, discrete claims from year-to-year.

In re Roten, 2011 WL 3809946 (Bankr. N.D. Tx. 2011) - Ability of creditor to amend proof of claim following post petition modification of plan which surrendered collateral and after expiration of claims bar date requires exercise of Court's equitable jurisdiction. Creditors amended proof of claim to assert deficiency balance on surrendered automobile would be disallowed where creditor waited two years following entry of order approving modification before filing amended from claim. Further, substantial delay in filing amended proof of claim would cause prejudice to other unsecured creditors as claim would be filed on Eve of expiration of debtors chapter 13 plan and would consume most of base amount which had been set aside for payment of unsecured claims (other than potential deficiency claim) in full.

8.50 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

8.51 Jurisdiction to Resolve

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

8.52 Standing to Object

Simmerman v. Ocwen Financial & Mortgage Services, Inc., 463 BR 47 (Bankr. S.D. Ohio 2011) – Debtor may object to a proof of claim when the debtor has a valid basis for questioning the creditor's alleged ownership of the claim or the enforceability of the claim against the debtor outside of bankruptcy. Debtor is not judicially estopped from objecting to

claim where debtors received notice of change in servicer after prior bankruptcy case had been filed. Debtor's mere failure to object does not constitute an affirmative statement by debtor on which the prior court relied, which is the standard for judicial estoppel.

In re Liber, 2012 WL 1835164 (Bankr. N.D. Ohio 2012) – Trustee could not object to creditor's claim where claim was subject of valid state court judgment. Although Trustee may have had valid argument as to why debtor should not have been liable for debts arising out of corporation's liquidation of ERISA qualified pension plan, as it appeared that debtor did not have "effective control" over corporate entity, Trustee precluded from disputing debt as creditor had already obtained Judgment in United States District Court against Debtor individually as a person in "effective control". Default judgment is nonetheless entitled to res judicata effect where there was no evidence that the District Court judgment was improper or the result of fraud or collusion and defendant had full knowledge of pendency of action but chose not to appear or defend.

Richardson v. Deutsche Bank National Trust Co., 2012 WL 1941846 (Bankr. W.D. MI. 2012) – Trustee lacks standing to contest validity of assignment of mortgage.

Kahn v. Regions Bank, 2011 WL 6179941 (Bankr. E.D. Tn. 2011) – Debtor in "no asset" Chapter 7 lacks standing to object to claims. Creditor's filing of proof of claim does not create standing in favor of debtor to either object to claim or to seek to void lien held by creditor. Filing of proof of claim does not create or enhance rights or positions of creditors. Fact that lien is against property that debtor claimed as exempt and will retain following bankruptcy does not create standing in favor of debtor. Based on debtor's schedules, debtor's estate has no possibility of producing surplus as debtor's assets are clearly insufficient to satisfy creditors.

In re B & P Holdings, Inc., 2011 WL 5909669 (Bankr. W.D. Mi. 2011) – Shareholder of corporate debtor has standing only if shareholder can show that outcome of objection will directly impact shareholder's pecuniary interest. Where corporate is insolvent regardless of outcome of claim objection, Shareholder lacks standing and objection will be summarily denied.

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

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.

8.53 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.

8.54 Burden of Proof

In re Borin, Case No. 11-3122 (Bankr. W.D. Mi. 2011) – Although Proof of Claim carries prima facie evidence of claim,

that can be rebutted by evidence offered by debtor. If debtor rebuts presumption, then burden shifts back to creditor to establish validity, priority and extent of claim.

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

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

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

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

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.

8.55 Calculation of Amount of Claim

In re Borin, Case No. 11-3122 (Bankr. W.D. Mi. 2011) – Debtor rebutted presumption of validity of proof of claim by producing evidence of payments totaling \$14,400 made by debtor but not credited by the mortgagee. Mortgagee also failed to produce evidence to show how late charges may have been calculated or how failure to credit payments may have impacted that calculation, particularly where testimony of debtor established that payments were not late but were only reduced in accordance with lender's instructions regarding trial loan modification. Debtor made earnest and honest effort to meet obligations to lender by seeking modification of mortgage following serious injury and fire at property. Lender returned favor by dodging inquiries, failing to apply payments, imposing late fees after they induced debtor to make reduced mortgage payments, ignoring counsel's inquiries, and finally failing to send a witness to the claim objection hearing.

In re Kaid, 2012 WL 1929906 (Bankr. E.D. Mi. 2012) – Amount owed on guarantee depends on amount owing on underlying obligation, even if State court has already entered judgment liquidating amount owed on guaranty. Debtor entitled to credit against balance owed on guarantee by amount of successful bid at foreclosure sale. Debtor entitled to full credit of bid amount even where creditor holding the guarantee was not the creditor holding the note and mortgage and even though creditor did not receive benefit of sale price at foreclosure sale.

In re Brooks, 2011 WL 5593084 (Bankr. N.D. Ohio 2011) – Debtor could not object to proof of claim based on alleged pre-petition agreements by creditors to accept a reduced amount in exchange for regular payments. Pre-petition agreement to reduce balance is not legally enforceable as the borrower does not give any valid consideration for agreement. Borrower's agreement to pay what borrower already owes is not consideration to support agreement. Even if agreements had been enforceable, Debtor made only one payment before filing bankruptcy, constituting breach of the agreement and allowing creditors to fully enforce claims.

Bauer v. Gilmartin, Case No. 11-6014 (8th Cir. 2011) – Plaintiff supported action under Section 523 for fraud. Debtor

made fraudulent representations concerning investment in LLC where Debtor, the managing partner of the LLC, represented that the LLC was financial sound when, in fact, the LLC was experiencing severe cost overruns and financial distress and at the same time Debtor removed \$20,000 from LLC without authorization and without informing Plaintiff. Plaintiff was unable to prove measure of damages using “benefit of bargain” test as Plaintiff could not prove whether or to what extent LLC would have been profitable but for the actions of the Debtor. Court concluded that where Plaintiff could not prove “benefit of bargain”, Court could use “out of pocket” rule for determining amount of non-dischargeable claim. Court would liquidate claim amount based on funds invested following Debtor’s alleged fraudulent conduct.

Barracco v. JPMorgan Chase Bank, N.A., 2011 WL 3329755 (E.D. Mi. 2011), *aff’d* 2012 WL 3198531 (6th Cir. 2012) – Where state court has confirmed arbitration award that determined that debtor was not indebted to creditor, Full Faith and Credit Statute, 28 USC Section 1738, requires that Bankruptcy Court honor the arbitration award.

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

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 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. 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 (6th Cir. BAP 2009) – Arbitration award confirmed by an appropriate court is entitled to same preclusive effect as would be given to a decision of that court. Res judicata and collateral estoppel prevent a party from attempting to relitigate in Federal Court matters that were or should have been advanced in the prior action. Allocation of costs and expenses of arbitration is necessarily one of the matters decided by the arbitrator. Although parties had pre-arbitration agreement concerning allocation of costs and expenses, parties failed to present that agreement to the arbitrator and the arbitrator did not award costs or expenses in the award. Creditor’s claim for arbitration costs and expenses based on the pre-arbitration agreement is barred. Claim allowed for the amount awarded by the arbitration and denied as to any additional costs or expenses.

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

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.

8.56 Grounds – Fraud on Court

Followell v. Mills, 2009 WL 723132 (6th Cir. Tn. 2009) – Bankruptcy Court has authority to inquire into the validity of the claim which is based on a judgment of another Court to the same extent that Bankruptcy Court could have reconsidered or vacated its own prior judgment. If Bankruptcy Court finds that claim is based on judgment which had been procured by fraud on Court, Bankruptcy Court has the power to retroactively refuse to allow the claim. Fraud on Court argument requires conduct on the part of an attorney or other officer of the Court directed to the “judicial machinery” that was either intentionally false or undertaken with willful blindness to one reckless disregard for the truth and constituted either a positive allegation or a concealment under circumstances that gave rise to a duty to disclose and where the fraud actually deceived the Court. Fraud on the Court will be sufficiently serious to set aside a judgment only if the fraud “actually subvert[ed] the judicial process”. Record failed to disclose that Florida bankruptcy judgment

entered in Chapter 7 proceeding of Debtor's husband was invalid or unenforceable. Proposed settlement of claims against wife in husband's Chapter 7 proceeding was not binding where settlement was expressly made conditional upon approval by Florida bankruptcy Court and Florida bankruptcy Court never approved that settlement. Therefore, alleged settlement which would have resulted in claims substantially less than the amount asserted did not prohibited or limit creditor's assertion of a claim for the full amount allegedly due and creditor's claim for the full balance did not amount to "fraud on Court".

8.57 Grounds – Failure to Attach Documents

In re MacFarland, 462 BR 857 (Bankr. S.D. Fl. 2011) - debtors counsel suspended from practice of law for 31 days as sanctioned for filing objections to proofs of claim based on lack of supporting documentation, despite fact that debtors had scheduled, as undisputed, debts in amounts that equal or exceed amounts set forth in proof of claim. Failure to attach supporting documentation may rob claim of evidentiary presumption of validity, but where debtor's schedules independently establish prima facie case of debtors liability, there is no legal basis to support and objection to claim based solely on a failure to attach documents.

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

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

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.

8.58 Grounds – Failure to Itemize Claim

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

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

In re Roman, 2012 WL 2921507 (Bankr. N.D. Ohio 2012) – Rule 3001 requires a proof of claim “substantially conform” to the appropriate official form, Form B10. Use of the pre-December, 2011 form B10 substantially complies. Old form is largely identical to new form. New form makes three primary changes – an option uniform claim identifier; check boxes to show whether the interest rate on a secured claim is fixed or variable; and check boxes to identify the relationship of the person filing the claim to the named creditor and additional specific information about the filer.

8.60 Grounds - Late Filed

In re Stone, 473 BR 465 (Bankr. M.D. Fl. 2012) – Court cannot exercise equitable discretion to allow late filed claim in Chapter 13 case.

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 (6th Cir. BAP 2009) – Motion to Extend proof of Claim Deadline filed almost 1 year after deadline expired denied where creditor failed to establish excusable neglect to justify any extension of the deadline.

8.61 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.

8.62 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 (6th Cir. 2009) - "Hanging paragraph" added to section 1325(a)(5) does not preclude a creditor from asserting a deficiency claim when the Debtor surrenders a vehicle purchased within 910 days of the filing of bankruptcy. The amendment of section 1325 did not change the applicability of section 506 where the vehicle is being surrendered.

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 (7th Cir. 2007) - 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.

In re Rodriguez, Case No. 06-41999 (9th Cir. BAP 2007) - Collateral could not be surrendered in full satisfaction of the debt.

In re Newberry, Case No. 06-60241, 2007 WL 1308318 (Bankr. W.D. Tex. 2007) - Collateral could not be surrendered in full satisfaction of the debt.

In re Osborn, 07-1726, (8th Cir. 2008) – “Trend” is to allow the creditor an unsecured deficiency claim. “Nothing in §1325(a)(5) provides that [the] ‘allowed secured claim’ is satisfied by the debtor choosing the surrender option in subparagraph (C).” 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.

In re Moore, No. 07-1315, (8th Cir. 2008) – Debtor not permitted to surrender collateral in full satisfaction of debt.

DaimlerChrysler Financial Services, LLC, v. Ballard, Case No. 07-5109 and 07-5112, (10th Cir. 2008) – Vehicle may not be surrendered in full satisfaction of the claim. “The hanging paragraph does not abrogate a creditor’s right to asset 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 §1325(a)(5)(B).

Tidewater Finance Company v. Kenney - Case No. 07-1664 (4th 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.

8.63 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.

8.64 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.

8.65 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.

8.66 Grounds – Conflict With Confirmed Chapter 13 Plan

In re Tirone, 2012 WL 3249551 (Bankr. N.D. Ohio 2012) – Debtor’s objection to proof of claim based on alleged conflict with confirmed plan sustained and claim disallowed to extent of conflict. Plan proposed to bifurcate claim secured by debtor’s automobile into a secured claim in amount of \$6,000 plus interest at 4%; with the balance to be paid as unsecured claim. Prior to confirmation, Creditor filed a proof of claim alleging that he collateral value was \$10,250 and asserting an interest rate of 14.95%. However, creditor did not object to confirmation of plan. After confirmation, debtor objected to proof of claim to extent inconsistent with confirmed plan. Court concluded that confirmed plan controlled. Debtor was not required to object to claim prior to confirmation of plan. After *Espinosa*, claims allowance process cannot trump confirmation process, and creditor cannot sit back and rely on filed claim while allowing plan to be confirmed with inconsistent terms or treatment.

8.67 Rule 3002.1

In re Adkins, 2012 WL 3860593 (Bankr. N.D. Ohio 2012) – Court cannot excuse compliance with Rule 3002.1 even for second mortgage that is Home Equity Loan of Credit on which interest rate changes frequently. Rule applies to any mortgage secured by principal residence and does not permit court to create exceptions even if compliance with rules produces hardship or where compliance with rule is difficult.

In re Bolden, Case No. 07-30132 (Bankr. E.D. Mi. 2012) – Creditor holding lien on debtor’s vehicle not required to file response to Trustee’s Notice of Final Cure. Rule 3002.1 applies only to loan secured by principal residence and where mortgage continues beyond life of plan. Car financing did not involve car and did not involve “continuing” secured debt.

In re Wright, 461 BR 757 (Bankr. N.D. Iowa 2011) – Mortgage servicer’s failure to provide notice of payment changes to trustee, debtor and debtor’s attorney, and failure to respond to debtor’s request for payment information and failure to prepare and distribute annual statements showing activity on account constituted willful violation of terms of confirmed plan that contained provisions imposing obligations on creditor and creditor failed to object to confirmation.

In re Sheppard, 2012 WL 1344112 (Bankr. E.D. Va. 2012) – Creditor is not required to file notice of post-petition fees and expenses where sums have already been approved in separate court order. Creditor filed motion for relief from stay. In consent order resolving motion, stay remained in place and creditor was awarded attorney fees and costs incurred in prosecution of motion. Creditor later filed Rule 3002.1 notice seeking same fees and costs. Rule 3002.1 notice struck by court as sums had already been awarded by court. Although Rule 3002.1 appears absolute in requiring notice, purpose of rule is fulfilled by court order in lieu of notice.

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

In re Rusch, Case No. 11-67578 (Bankr. E.D. Mi. 2012) – Secured creditor cannot include in pre-petition arrearage claim charges for post-petition attorney fees, even if services were rendered prior to confirmation. Pre-petition arrearage claim by definition excludes any and all post-petition fees and costs. Creditor required to request recovery of post-petition fees and costs by filing Notice of Post-Petition Mortgage Fees, Costs and Expenses pursuant to Rule 3002.1.

In re Carr, 2012 WL 930337 (Bankr. E.D. Va. 2012) – Creditor may not charge a debtor a fee for filing a response to the Chapter 13 trustee’s Notice of Final Cure Payment, which is required under the bankruptcy rule governing notice relating to claims secured by security interest in a debtor’s principal residence; the response is not a pleading, but is simply a statement by the creditor as to the status of the loan at the conclusion of the plan, the statement can be derived simply and quickly from creditor’s records and poses no significant burden on creditor, as it is a business function, akin to issuing a receipt for payments received under the plan or providing an annual escrow statement, that can be done by a claims

administrator in creditor's own office, and no legal analysis is generally required. If the Chapter 13 trustee or debtor contests the creditor's response to the Notice of Final Cure Payment, the matter becomes a contested matter and would proceed as any other contested matter, with the creditor entitled to legal representation, and, if the underlying loan documents and non-bankruptcy law permit the recovery of attorney fees, and the Bankruptcy Code does not prohibit those fees, attorney fees in successfully defending creditor's response to trustee's notice would be recoverable.

In re Kraska, 2012 WL 1267993 (Bankr. N.D. Ohio 2012) – Court declined to waive compliance with Rule 3002.1 in connection with Order Granting Relief From Stay. Although debtor's plan provided for the surrender of the property, nothing in Rule 3002.1 limits its applicability to cases where debtor retains property. Rule applies to all claims secured by a mortgage on the principal residence, and whether debtor intends to keep or surrender property does not change fact that as of the petition date and as of the confirmation date, the mortgage does encumber the principal residence and will continue to do so until foreclosure proceedings are complete. Mortgage company likely will be filing claim and Rule is designed to assist in evaluating and implementing claim and to account for payment changes and costs and advances that may be incurred prior to completion of foreclosure proceedings.

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

In re Lee, Case No. 07-34173 (Bankr. N.D. Ohio 2012) - Chapter 13 Trustee's Notice and Motion of Intent to Declare Debtor Current and Reinstated on Wells Fargo Bank., N.A., c/o Chase Home Finance, LLC's Secured Claim denied. Trustee also filed a Notice of Final Cure Mortgage Payment pursuant to new Rule 3002.1. Intent of both of the Trustee's filed documents is the same: to provide of record evidence that Debtor has cured the default on the mortgage on his principal residence being paid through his confirmed Chapter 13 plan. Trustee's separate Motion was "belt and suspenders" attempt to obtain separate Order that is no longer permitted under Rule 3002.1. Rule 3002.1 is a comprehensive procedural path for reaching the result sought by the Trustee. The Motion is not provided for under and now conflicts with that procedural path and creates procedural confusion for the court and the parties and threatens the creditor's entitlement to at least 21 days for response. Because the Motion conflicts with and confuses that procedure, the creditor's objection will be sustained and the Motion will be denied, without prejudice. The Notice and the process set forth in Rule 3002.1 of the Federal Rules of Bankruptcy Procedure will control.

8.68 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.

8.69 Judicial Estoppel

Bullard v. IndyMac Bank, 2012 WL 4134839 (E.D. Mi. 2012) – Judicial estoppel precluded debtor from contesting validity of mortgage following bankruptcy discharge. Debtor's schedules listed secured debt and did not list in bankruptcy schedules any alleged claim to invalidate mortgage and failed to disclose claim at Section 341 meeting. Based on debtor's representations as to secured claims, trustee closed case as no asset case and did not administer property for benefit of estate. Pursuing cause of action that was not disclosed as an asset in prior bankruptcy filing is inconsistency sufficient to support judicial estoppel. Court adopted debtor's representations by entering discharge and closing case without administering asset. Debtor did not disclose possible cause of action until day after discharge entered and even then never advised trustee that she believed that property was not subject to mortgage and never amended Schedule D to list mortgage as disputed or contingent.

In re Reynolds, 470 BR 138 (Bankr. D. Colo. 2012) – Debtor is judicially estopped from seeking disallowance of claims which did not attach copies of credit agreements where debtor scheduled debts as undisputed in similar claim amounts.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

In re Oparaji, 458 BR 881 (Bankr. S.D. Tx. 2011) – Mortgage creditor estopped from asserting claims in Chapter 13 case where the claims were inconsistent with claims asserted by mortgage creditor in Debtor's prior Chapter 13 case. Creditor took a clearly inconsistent position in the current bankruptcy from that taken in the first bankruptcy because the total dollar amount claimed for arrearages in the current bankruptcy differed substantially from the total dollar amount claimed for arrearages in the first bankruptcy.

8.70 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.

8.71 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 (9th Cir. BAP 2010) – Promissory note given in contemplation of marriage that did not comply with State law requirements for a pre-nuptial agreement unenforceable. Further, Promissory note delivered in contemplation of marriage not supported by consideration where Promissory note was delivered as an inducement for recipient to accept proposal of marriage. Although the parties ultimately did get married, promises intended to induce marriage must be in the form of a pre-nuptial agreement that meets the requirements of State law to be enforceable. Representation in Promissory Note that note was given "for value received" does not bar finding that no consideration was actually received.

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.

8.72 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.

8.73 Settlement of Objections

In re Marcola, 2011 WL 7789569 (Bankr. E.D. Mi. 2011) – Court must form an educated estimate of complexity, expense and duration of litigation, possibility of collecting on judgment which might be obtained, and any other factors relevant to full and fair assessment of wisdom of proposed compromise. Interests of creditors and proper deference to their reasonable views are paramount. Debtor's proposed resolution of claims, which included dismissal of chapter 13 case, was reasonable. Debtors understood nature of the agreement and the effect that dismissal would have on agreements with other creditors.

In re B & P Baird Holdings, Inc., 2011 WL 5909669 (Bankr. W.D. Mi. 2011) – In evaluating Trustee's proposed settlement of claims, court will apprise itself of underlying facts, weigh interests of all competing parties, consider the probability of success on the merits, and consider complexity and expense of litigation. Outcome of dispute was unclear and estate's largest creditor supported the settlement. Court would not substitute its judgment for that of Trustee where trustee presented evidence to support reasonableness of settlement considering all relevant factors.

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

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

8.74 Sanctions Against Filing Creditor

Wells Fargo Bank, N.A. v. Stewart, 647 F.3d 553 (5th Cir. 2011) – Debtor lacks standing to seek injunctive relief against Mortgage Creditor where Debtor failed to demonstrate any risk of future harm or injury. Debtor's objection to Creditor's Proof of Claim had already been sustained and Creditor had been sanctioned for filing incorrect proof of claim, and there was no evidence that Creditor would attempt to file another incorrect claim. Court lacked authority to *sua sponte* impose sanctions against creditor that would have required creditor to (1) to audit every proof of claim it has filed in any case pending on or filed after April 13, 2007; (2) to provide a complete loan history on every account and to file that history with the appropriate court; and (3) to amend any proofs of claim already on file to comply correct errors or inaccuracies.

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

8.75 Effect of Order Disallowing Claim

Hahn v. Educational Credit Management Corporation, Case No. 11-084 (1st Cir BAP 2012) – Order disallowing student loan claim on basis that debtor had paid non-dischargeable student loans prior to commencement of bankruptcy precluded post-discharge efforts to collect alleged balances owed. Court Order sustained debtor’s objection to proof of claim and filed and stated, “This [c]ourt allows the claim of ECMC in the amount of \$0.00.” Order sustaining objection to claim was *res judicata*, precluding creditor for later arguing that findings were in error and there remained a balance owed. Court rejected argument that order disallowing proof of claim may not preclude creditor holding non-dischargeable claim from pursuing collection, as that order may not mean that no sums are owed, but only that there is a basis to disallow the claim for bankruptcy distribution purposes only. Where Court enters order disallowing claim, by definition there is no debt and, therefore, nothing that could be discharged. Debtor properly invoked bankruptcy procedure that resulted in order holding that balance owed to creditor was \$0.

Elkhoueiry 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.

8.76 *Res Judicata* Effect of Confirmed Plan

In re Tirone, 2012 WL 3249551 (Bankr. N.D. Ohio 2012) – Debtor’s objection to proof of claim based on alleged conflict with confirmed plan sustained and claim disallowed to extent of conflict. Plan proposed to bifurcate claim secured by debtor’s automobile into a secured claim in amount of \$6,000 plus interest at 4%; with the balance to be paid as unsecured claim. Prior to confirmation, Creditor filed a proof of claim alleging that he collateral value was \$10,250 and asserting an interest rate of 14.95%. However, creditor did not object to confirmation of plan. After confirmation, debtor objected to proof of claim to extent inconsistent with confirmed plan. Court concluded that confirmed plan controlled. Debtor was not required to object to claim prior to confirmation of plan. After *Espinosa*, claims allowance process cannot trump confirmation process, and creditor cannot sit back and rely on filed claim while allowing plan to be confirmed with inconsistent terms or treatment.

In re Wright, 461 BR 757 (Bankr. N.D. Iowa 2011) – Mortgage servicer’s failure to provide notice of payment changes to trustee, debtor and debtor’s attorney, and failure to respond to debtor’s request for payment information and failure to prepare and distribute annual statements showing activity on account constituted willful violation of terms of confirmed plan that contained provisions imposing obligations on creditor and creditor failed to object to confirmation.

Ginn v. CitiMortgage, Inc., 365 BR 84 (Bankr. D.S.C. 2012) – Preclusive effect of confirmation of Chapter 13 Plan precluded debtor from contesting assignee’s status as holder of mortgage. Chapter 13 plan expressly provided that purported mortgage assignee would be paid in the Chapter 13 case, affirmed continued applicability of pre-petition mortgage agreement, addressed acknowledged default, and provided for continued payment of contractual mortgage payments.

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

8.77 Effect of Amended Claim

In re Milano, 2012 WL 1965661 (Bankr. N.D. Ohio 2012) – Filing of amended proof of claim while objection to original claim is pending renders prior objection moot. As debtors did not file objection to amended proof of claim, the amended proof of claim is deemed allowed and there is no dispute before the court as to the validity of the amended claim.

D. Priority of Distribution

8.78 Generally

Old West Annuity and Life Insurance Company v. Apollo Group, 605 F.3d 856 (11th Cir 2010) – Judgment lienholder’s secured claim had to be paid from excess proceeds remaining after sale of collateral and payment of superior mortgages

and liens. Government's administrative expense claim for taxes incurred in connection with sale of property could not trump properly perfected judgment lien.

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

8.79 Exempt Assets

In re Wolf, 2012 WL 32480 (Bankr. E.D. Ky. 2012) – Code does not authorize Chapter 7 Trustee to disburse exempt proceeds to IRS for payment of non-dischargeable tax debt. Although holder of non-dischargeable tax claim can enforce debt against otherwise exempt property, this does not permit Trustee to depart from Code requirement that exempt proceeds be returned to the debtor.

8.80 Unclaimed Funds

In re Checker Flag Lighting, LLC, 2012 WL 3561969 (Bankr. W.D. Mi. 2012) – Funds deposited into court registry by Chapter 13 Trustee resulting for joint check issued to two creditors but never cashed could not be released on request of only one creditor or agent for one creditor. Single creditor could not establish entitlement to funds or provide full proof of the right to the funds as required by 28 USC Section 2042. Further, any request must be noticed to the US Attorney. Failure to serve the US Attorney precluded entry of an order allowing release of the funds.

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

8.81 Standing

Hulsing Hotels Tennessee, Inc. v. Steffner, 2012 WL 3563978 (Bankr. E.D. Tn. 2012) –

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

8.82 Generally

Belfor USA Group, Inc. v. Williams, 2011 WL 8197409 (Bankr. E.D. Mi. 2011) – Plaintiff in action under Section 523 bears burden of proof by preponderance of evidence. Plaintiff failed to sustain burden where plaintiff proved only that defendant possibly received funds but did not produce evidence that defendant ever actually received funds allegedly converted or the amount of money allegedly received and retained by defendant.

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 (9th Cir. BAP 2010) – Party objecting to discharge bears burden of proving by a preponderance of the evidence that the discharge should be denied. Section 727 is to be construed liberally in favor of debtors and strictly against parties objecting to discharge.

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

8.83 Section 523(a)(1)

Rizzo v. State of Michigan, Adv. No. 11-7032 (Bankr. E.D. Mi. 2012) – Michigan’s Single Business Tax is an excise tax on a “per transaction” basis and is entitled to priority status under Section 507(a)(8)(E). Michigan law allows assessment of corporate taxes against corporate officers who have control or supervision of, or are responsible for paying, corporation’s taxes. Debtor, as principal of corporation, was personally responsible for payment of Corporate Single Business Taxes which is not dischargeable under Section 523(a)(1)(A).

In re Calabrese, Case No. 11-3793 (3d Cir. 2012) – Sales taxes are considered “trust fund” taxes for purposes of priority and dischargeability under Section 507(a)(8)(C) rather than excise taxes under 507(a)(8)(E). Excise taxes are dischargeable if they are more than three years old as of the date of the petition, while trust fund taxes are never dischargeable.

California v. Hansen, Case No. 11-1320 (9th Cir. BAP 2012) – Unemployment Insurance tax levied on corporation and on principal as “responsible party” is not a tax that debtor is required to collect from third parties and to remit to state. Tax is not of a type specified in Section 507(a)(8)(C). Tax liability not entitled to priority treatment under Section 507(a)(3) or (a)(8), and so is not within scope of Section 523(a)(1). Debtor’s liability for unpaid unemployment taxes is discharged in Chapter 7 proceeding.

Fagan v. State of Michigan Department of Treasury, 465 BR 472 (Bankr. E.D. Mi. 2012) – Debtor’s obligation to pay fuel taxes under International Fuel Tax Agreement is non-dischargeable under Section 523(a)(1)(A). International fuel tax is an excise tax on a transaction, and therefore is a priority claim under § 507(a)(8)(E), which is a type of nondischargeable tax specified in Section 523(a)(1)(A). IFTA imposes 15 cent per gallon charge on fuel consumed by commercial vehicles. Obligation to governmental agency is “tax” if obligation is (1) an involuntary pecuniary burden; (2) imposed by the state legislature; (3) for a public purpose; (4) under the police or taxing power of the state; (4) that the pecuniary obligation be universally applicable to similarly situated entities; and (5) that according priority treatment to the government claim not disadvantage private creditors with like claims. Tax is “excise tax” as it is paid as a condition of carrying on occupation or privilege of engaging in business. Taxes are based on “a transaction” as it is based on amount of fuel consumed – the transaction being the operation of a commercial motor carrier on state roads and consumption of fuel in that operation.

McCoy v. Mississippi State Tax Commissioner, Case No. 11-60146 (5th Cir. 2012) – Unless a late-filed tax return is filed under a “safe harbor” provision similar to Section 6020(a) of the Internal Revenue Code, a state income tax return that is filed late under the applicable nonbankruptcy state law is not a “return” for bankruptcy discharge purposes under Section 523(a)(1). Therefore, Debtor was not entitled to discharge her state tax liabilities and failed to properly state a claim for relief.

Quiroz v. State of Michigan, 450 B.R. 699 (Bankr. E.D. Mi. 2011), *aff’d* 472 B.R. 434 (E.D. Mi. 2012) – Michigan’s Single Business Tax is an excise tax on a “per transaction” basis and is entitled to priority status under Section 507(a)(8)(E). Michigan law allows assessment of corporate taxes against corporate officers who have control or supervision of, or are responsible for paying, corporation’s taxes. Debtor, as principal of corporation, was personally responsible for payment of Corporate Single Business Taxes which is not dischargeable under Section 523(a)(1)(A).

Storey v. United States, 640 F.3d 739 (6th Cir. 2011) – Section 523(a)(1)(c) excepts from discharge taxes that the debtor

willfully attempted to evade or defeat. Government must prove that debtor did not pay taxes and that debtor “knowingly and deliberately” sought to avoid payment. Mere non-payment, standing alone, is not sufficient. Debtor timely filed tax returns which acknowledged the obligations. Debtor’s purchase of a residence in the same year debtor stopped paying taxes did not demonstrate a voluntary or intentional choice to purchase a home rather than pay taxes, where home was not lavish or unnecessary. Government could not demonstrate that at the time debtor purchased the home, she was even aware that she would later have a tax liability. Debtor did not engage in excessive recreational, philanthropic or other discretionary activities such as expensive vacations or private school expenses.

8.84 Section 523(a)(2)(A) – False Pretenses and False Representations

Miller v. Frazier, Adv. No. 09-2183 (Bankr. E.D. Mi. 2012) – False pretenses or false representations requires proof of statement that is known to be false, is relied on by the other party, and which causes damages. Section 523(a)(2)(A) action based on fraud prevents any debt respecting property, money, services or credit that debtor has obtained by fraud. Once it is established that specific money or property has been obtained by fraud, any debt arising from that fraud is non-dischargeable. State Court judgment established all elements of action for fraudulent misrepresentation. Debtor represented to plaintiffs that if they invested in his business, the business would grow to benefit all parties and that Debtor would work with plaintiffs to produce income and that plaintiff would share in profits generated. State court found that at the time the statements were made, debtor had no intention of sharing profits or giving plaintiffs an interest in the business. Debtor made representations that he knew were false with intent to deceive; plaintiffs were in fact deceived; and reliance was proximate cause of loss. Damages include amounts obtained by Debtor from plaintiffs plus “lost profits” based on debtor’s earnings from operation of the business that were not shared with plaintiffs as promised.

Americredit Financial Services, Inc. v. Metzger, Adv. No. 12-3052 (Bankr. E.D. Mi. 2012) – Debtor obtained financing to purchase new automobile. Debtor made application in his own name alone, and application stated that debtor would own the collateral and would not sell, transfer, grant a license in, lease or dispose of all or any part of the vehicle. At the time debtor made the application and purchased the vehicle, debtor had no intention of making payments. Debtor at all times was acting as “straw buyer” for third party. The third party took possession of the vehicle and was supposed to make all payments. Debtor did not make the first payment and immediately fell into default. Debtor’s representations that he would make payments and that he would be in possession of the vehicle were false when made and were known by debtor to be false. Fact that dealership may have known of debtor’s intent did not translate into notice to the lender and there was no evidence that lender knew anything other than that debtor was the purchaser and would make the payments and possess the vehicle. Lender established that it would not have made the loan had it known that debtor intended to immediately transfer the vehicle to a third party and that debtor had no intention of ever making a payment.

DSC National Properties, LLC v. Johnson, Case No. 11-105 (10th Cir. BAP 2012) – Fraud requires subjective intent to deceive. Subjective intent may be inferred from totality of circumstances, and statement made with reckless disregard for truth may, in narrow circumstances, evidence subjective intent. However, statement made by debtor that debtor believed to be accurate is not actionable, even if statement is made negligently. Fraud requires that the speaker know, at the time the statement is made, that it is false; or that the speaker did not have confidence in the accuracy of the statement to the extent stated or implied; or that the speaker knows that he does not have a sufficient basis for the statement as stated or implied. Carelessness without more is not evidence of subjective intent. Evidence indicated that debtor relied on state records in making representations concerning debtor’s water rights. Debtor relied on the same state records that his attorney had previously relied on in other transactions. Further, the title company retained by debtor for the transaction independently reviewed the state records and confirmed debtor’s water rights. Debtor did not have any reason to believe that state records were incorrect when he made the representations. Although Debtor perhaps should have reviewed additional records beyond those of the state agency, failure to do so would be, at worst, merely negligent. Evidence indicated that debtor genuinely, if inaccurately, believed that debtor had the water rights at the time of the representation, defeating any inference of subjective intent to defraud.

Astera Credit Union v. Russell, 463 BR 464 (Bankr. W.D. Mi. 2012) – Debtor obtained loan from credit union to purchase new vehicle. Although loan application stated that debtor was purchasing the vehicle in her name and that she was personally responsible for payment and that debtor was not relying on the income or assets of another person as the basis for repayment, debtor acknowledged that at the time she obtained the loan, she had no intention of making payments and that she was purchasing the truck for her father as debtor had better credit and that father was to make all payments. Debtor never disclosed on the loan application that debtor would not be making payments or that debtor had no intention of using the vehicle. Credit union established that had it known that debtor had no intention of using or paying for the truck, it would never have agreed to extend the loan, as it was reasonable to assume a borrower will be more inclined to pay for a vehicle that borrower is actually using than to make payments on a car that is solely in a third party’s control. Debtor’s statements in the loan application that debtor was the purchaser and would make the payments, made at a time when debtor admittedly had no intention of ever making a payment, constituted material misrepresentation that was known to be false when made; was made with intent to deceive; credit union relied; and reliance was proximate cause; resulting in debt being excepted from discharge.

Teague v. Taylor, 2012 WL 2325695 (Bankr. E.D. Ky. 2012) – If proceeding under a false pretenses theory, a plaintiff must prove an omission or implied misrepresentation which the defendant knowingly and willingly promoted thereby creating a misleading understanding of the transaction on the part of the plaintiff causing plaintiff to wrongfully suffer a loss. If proceeding under a false representation theory, a plaintiff must prove (1) defendant obtained money (2) through a material representation (3) that, at the time, defendant knew was false or made with gross recklessness as to its truth, (4) defendant intended to deceive plaintiff, (5) plaintiff justifiably relied on the false representation, and (6) plaintiff's reliance was the proximate cause of loss. False pretenses and false representations describe statements which falsely claim to portray current or past facts. Under both theories a plaintiff must show justifiable reliance and the reliance was the cause of the loss. Promise to take future action is not a statement of current or past fact. Debtor's promise to make payments is not a statement of future or past fact and cannot support action under Section 523(a)(2).

Automotive Finance Corp. v. Leonard, 2012 WL 1565120 (Bankr. E.D. Tn. 2012) – Under “false pretenses” or “false representations”, plaintiff must allege and prove (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of the loss. As general rule, fraud by company of which debtor is a member or for whom he guaranteed debt may not be imputed for purposes of Section 523(a)(2). Mere promise to repay or issuance of a worthless check (even with knowledge that funds are not available) without more, does not constitute fraudulent pretense or fraudulent representation for purposes of 523(a)(2). However, debtor can be held liable if he personally participated in the fraud. Complaint that alleged only in general terms that corporation made representations, with no detail as to any alleged participation by debtor, failed to state cause of action. Further, complaint did not allege that debtor knowingly made the statements with intent to defraud.

8.85 Section 523(a)(2)(A) – Actual Fraud

Frost & Co., Inc. v. Smithey, 474 BR 830 (Bankr. N.D. Ohio 2012) – Fraud requires that debtor make fraudulent statements on which creditor justifiably relied. Justifiable reliance is subjective standard and requires only that creditor act appropriately according to his individual circumstances. Party can justifiably rely even where truth could have been determined with investigation, but reliance is not justified if creditor turns blind eye away from things that would clearly show that reliance was misplaced. Fraud allegedly committed by Chapter 7 debtor in his capacity as 50% shareholder of holding company and officer both in it and in related corporate entities that it owned, in allegedly causing payments to be made from holding company's accounts for what were not legitimate corporate obligations, or in fraudulently concealing material facts as they related to business of one of the held corporations prior to its being spun off and acquired by the other 50% shareholder in holding company, was not something on which this other 50% shareholder could “justifiably rely,” as required to except any resulting debt from discharge on “fraud” theory, given that he had equal access to corporate accounts, in which payments and financial information on corporations was recorded, and knew that corporations were financially distressed, yet chose to remain ignorant of matters important to continued existence of corporations that he could have easily discerned.

Bakdaleyeh v. Warpup, Adv. No. 11-3041 (Bankr. E.D. Mi. 2012) – Complaint stated cause of action under Section 523 for actual fraud against debtor-wife. Although wife was not contractor within scope of Michigan Builders Trust Fund Act, complaint sufficiently alleged that wife made independent statements regarding construction of residence; that plaintiff relied on those statements and paid money to debtors; and that wife directly and indirectly benefitted in the form of checks written by her and by use of money to pay household expenses.

Hulett v. Rowe, Adv. No. 11-4924 (Bankr. E.D. Mi. 2012) – Later default on promissory note does not evidence fraud. Debtor signed agreement to purchase business from plaintiff. Debtor paid \$20,000 down and signed a note for the balance of the purchase price to be paid over 8 years; and signed employment agreement that required debtor to use best efforts in management of business. Debtor made payments on the note for 15 months before defaulting. Plaintiff also alleged that after defaulting, debtor continued to represent that he would make efforts to catch up the payments. Evidence did not support finding that debtor, at the time of execution of the promissory note, did not intend to make payments, where debtor did make payments for 25 months before defaulting and then made periodic payments even after default. Financial information indicated that debtor defaulted when debtor's business declined and debtor no longer had ability to make payments.

Becton, Dickinson & Co. v. Sterling, 2012 WL 3257841 (Bankr. E.D. Mi. 2012) – Fraud includes misleading omissions and misrepresentations, but also includes intentional scheme to deprive or cheat another of property or legal right and can include “silent fraud” if defendant intended to induce reliance on non-disclosure where party had affirmative duty to disclose. Plaintiff must prove course of conduct intended to deceive; justifiable reliance; and proximate cause. Debtor did not commit fraud by retaining funds erroneously overpaid as salary. Upon receipt of first erroneous paycheck, Debtor immediately contacted payroll department in effort to correct the error. Debtor had no further duty to disclose continued errors, where employer had at least the same level of notice and knowledge based on employer's repeated efforts to correct

the problem. Further, employer did not rely on any statement or omission by debtor, where debtor promptly advised employer of problem. Ultimate loss was caused not by debtor but by failure of employer's third-party payroll company to properly process payroll.

Morsey v. Semer, 2012 WL 2998783 (Bankr. N.D. Ohio 2012) – Plaintiff must prove (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. Debtor sold home to plaintiff. Plaintiff later discovered significant structural issues as well as extensive mold, requiring repairs that reduced home to a skeleton. Debtor knew of the defects but chose not to repair the defects, instead performing cosmetic repairs that disguised the defects. Debtor furthered fraud by signing seller disclosure statement that stated that no material defects existed in the property. Disclosure statement that falsely represented condition of property, where buyer relied on the statement, and the reliance caused damages, constitute fraud for purposes of Section 523(a)(2)(A).

Tweedie v. Semeniuk, Case No. 10-5605 (Bankr. E.D. Mi. 2012) – Judicially confirmed arbitration award is entitled to preclusive effect in action to except debt from discharge for false representations under Section 523(a)(2). Complaint in arbitration action alleged at least 17 separate false representations made by debtor and alleged that representations were made with intent to deceive and that debtor failed to disclose falsity of statements, and that based on the false representations debtor obtained money from plaintiff. Although arbitration complaint did not specifically allege that reliance was justifiable, complaint did make sufficient factual allegations to support justifiable reliance as parties were close personal friends since childhood, spanning more than 50 years; that parties had socialized and done business together over the years; and that because of existing relationships plaintiff placed great confidence and trust in debtor. Arbitration award also supported determination that debt was non-dischargeable based on fraudulent pretense, where award made extensive factual findings regarding debtor's failure to disclose material information and non-disclosures at a time when debtor knew that information would have been material to plaintiff's decision to invest in debtor's business. Findings of fact also established that plaintiff relied on debtor's failure to disclose; that debtor knew and intended that plaintiff would rely; and that plaintiff advanced funds to debtor based on debtor's failure to disclose. Arbitrator's findings of fact established total amount of plaintiff's claim and established the amount of that total that was attributable to the false representations, and bankruptcy court was bound by that amount in entering judgment declaring debt to be non-dischargeable. Judicially confirmed arbitration award not entitled to preclusive effect in action to except debt from discharge for fraud under Section 523(a)(2). Arbitration award did not establish any fraudulent conduct by debtor independent of misrepresentations and false pretenses. Record did not indicate that the parties litigated issue of actual fraud where findings of fact by arbitrator, while lengthy, did not address factual issues surrounding fraud claim. Factual findings were also insufficient to establish breach of fiduciary duty where factual findings did not establish that funds advanced by plaintiff were placed in trust or were intended to be placed in trust or were intended for purposes other than as an investment in business to be used in business.

Teague v. Taylor, 2012 WL 2325695 (Bankr. E.D. Ky. 2012) – allegations of fraud must include a representation that a debtor knew was false which induced the plaintiff to act, and reliance by and an injury to the plaintiff. Alleged failure to pay debt does not constitute fraud where record lacked any evidence that debtor made any representation concerning payment of any particular debt when debtor and plaintiff entered into transaction.

Hussein v. Shugarman, 2012 WL 2150335 (Bankr. N.D. Ohio 2012) – Confirmed arbitration award was collateral estoppel in action under Section 523(a)(2)(A) and (a)(6). Arbitration award against the Defendant, awarding the Plaintiffs compensatory damages of \$332,254.55; and punitive damages of \$191,761.01 for attorneys' fees and costs. Plaintiffs hired debtor to build Plaintiff's new home. At end of the project, debtor presented Plaintiffs with contractor affidavits from suppliers and subcontractors, and Plaintiff paid debtor balance of contract price. After subcontractors and suppliers placed numerous mechanic liens on property, Plaintiffs discovered that debtor had forged contractor affidavits for purposes of obtaining final payment without making payment to suppliers and subs. Arbitration award found that Plaintiffs paid twice to have work performed because they were forced to pay subcontractors which the Defendant failed to pay, resulting in mechanics liens. Defendant fraudulently requested and received payments from the Plaintiffs' lender. Defendant exhibited a conscious disregard for the rights of the Plaintiffs in their contractual relationship, thereby warranting an award of punitive damages. Debtor intentionally used false and forged contractor affidavits to deceive the Plaintiffs, the Plaintiffs were deceived and damaged by the Plaintiff and Plaintiffs then had to pay the unpaid suppliers, causing Plaintiffs to pay for the same work twice, the Defendant acted with the willful intent to injure the Defendant and the Defendant acted with actual malice toward the Plaintiffs. Factual findings in confirmed arbitration award met each requirement under Section 523(a)(2)(A) for finding of actual fraud, sufficient to warrant judgment of non-dischargeability.

Kapetanakis v. First National Insurance Company of America, 2012 WL 2105407 (5th Cir. 2012) – Debt owed to Surety Bond Issuer was not dischargeable under Section 523(a)(2)(A) where debtor forged signatures of spouse, his brother and his brother's spouse as indemnitors under surety agreement, where surety company required those indemnifications before issuing the bonds to debtor's closely held corporation. Settlement agreement and consent judgment entered in state court

did not convert non-dischargeable claim into dischargeable claim, where consent judgment was based on complaint that met all requirements for non-dischargeability. Evidence indicated that surety would not have issued bonds without the indemnity agreement signed by all shareholders and spouses of shareholders. Debtor allegedly transferred all of the corporate stock to his own name prior to signing indemnity agreement but did not inform surety of the change of stock ownership. Indemnity agreement did not require that parties signing the agreement remain shareholders and expressly stated that any new bonds would be subject to original indemnity agreement which would include liability of brother and spouses but for forged signatures. Debtor's intent to defraud could be deduced where debtor forged signatures contemporaneously with his own, but used different cursive styles and different colored inks.

Farmers National Bank v. Lockridge, 2012 WL 1969254 (Bankr. E.D. Ky. 2012) – Section 523(a)(2)(A) requires proof that debtor obtained money through material misrepresentation that, at the time, debtor knew was false or made with gross recklessness; intent to deceive creditor; creditor justifiably relied; and misrepresentation was proximate cause of loss. Evidence did not indicate that debtor intended to deceive creditor. Debtor listed value of assets on financial statement based on appraisal, unaware of a second appraisal that had also been obtained that showed markedly different values. Statements by debtor that he would use proceeds of sales commission on property to pay down loan were not false but were hopeful promises of future activity that did not come to fruition as the property was not sold and was later lost in foreclosure. Debtor genuinely believed that he would be able to sell the property for sufficient sum to cover loan as debtor had previously been offered an amount that would have been sufficient to do so but elected not to sell at that point, and later decline in value was not anticipated.

Hardin v. Eason, Case No. 11-6139 (Bankr. E.D. MI. 2012) – Section 523(a)(2) requires proof that debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; debtor intended to deceive creditor; creditor justifiably relied on the representation; and reliance was proximate cause of loss. Plaintiff failed to evidence fraud where alleged fraudulent statements were directly contrary to statements and agreements in written contract between the parties. Plaintiff failed to demonstrate that defendant had no intention of performing pursuant to written agreement where defendant was not obligated to take any steps until certain conditions in the contract occurred and conditions never occurred through no fault of defendant.

Humphrey v. Morgan, 2012 WL 1390246 (Bankr. E.D. Tn. 2012) – Section 523(a)(2) action based on false pretenses or false representations requires proof that debtor obtained money through material misrepresentation that debtor knew was false or made with gross recklessness; that debtor intended to deceive creditor; that creditor justifiably relied on the false representation; and that reliance was proximate cause of loss. “Actual fraud” consists of any intentional scheme to deprive or cheat another of property or a legal right. Actual fraud is broader than misrepresentation and includes any deceit, artifice, trick or design involving direct and active operation of the mind used to circumvent and cheat another; some deception intentionally practiced to induce another to part with property or surrender some legal right and that achieves that end, and undertaken with intent to deceive or defraud. Complaint against Debtor-Husband did not state cause of action where complaint did not allege any false pretenses or false representations by Husband to creditor, where all communications with creditor were carried out exclusively by debtor-wife. Further, complaint did not demonstrate that husband conspired with wife to perpetrate any fraud or that husband collaborated with his wife in planning or executing the fraud.

Tweedie v. Hermoyian, 466 BR 348 (Bankr. E.D. Mi. 2012) – Judicially confirmed arbitration award is entitled to preclusive effect in action to except debt from discharge for false representations under Section 523(a)(2). Complaint in arbitration action alleged at least 17 separate false representations made by debtor and alleged that representations were made with intent to deceive and that debtor failed to disclose falsity of statements, and that based on the false representations debtor obtained money from plaintiff. Although arbitration complaint did not specifically allege that reliance was justifiable, complaint did make sufficient factual allegations to support justifiable reliance as parties were close personal friends since childhood, spanning more than 50 years; that parties had socialized and done business together over the years; and that because of existing relationships plaintiff placed great confidence and trust in debtor. Arbitration award also supported determination that debt was non-dischargeable based on fraudulent pretense, where award made extensive factual findings regarding debtor's failure to disclose material information and non-disclosures at a time when debtor knew that information would have been material to plaintiff's decision to invest in debtor's business. Findings of fact also established that plaintiff relied on debtor's failure to disclose; that debtor knew and intended that plaintiff would rely; and that plaintiff advanced funds to debtor based on debtor's failure to disclose. Arbitrator's findings of fact established total amount of plaintiff's claim and established the amount of that total that was attributable to the false representations, and bankruptcy court was bound by that amount in entering judgment declaring debt to be non-dischargeable. Judicially confirmed arbitration award not entitled to preclusive effect in action to except debt from discharge for fraud under Section 523(a)(2). Arbitration award did not establish any fraudulent conduct by debtor independent of misrepresentations and false pretenses. Record did not indicate that the parties litigated issue of actual fraud where findings of fact by arbitrator, while lengthy, did not address factual issues surrounding fraud claim. Factual findings were also insufficient to establish breach of fiduciary duty where factual findings did not establish that funds advanced by plaintiff were placed in trust or were intended to be placed in trust or were intended for purposes other than

as an investment in business to be used in business.

Farmers Bank of Milton v. Roberts, 2012 WL 1357555 (Bankr. E.D. Ky. 2012) – Debt resulting from debtor's cosigning loan for daughter and son-in-law can be non-dischargeable under Section 523(a)(2). Debt is non-dischargeable where debt is obtained using written financial statement that is (i) materially false; (ii) respecting debtor's financial condition; (iii) on which the Bank reasonably relied and (iv) debtor caused the Financial Statement to be made or published with intent to deceive. Financial statement is materially false if information influences creditor's decision to extend credit and matter is important or substantial untruth. Debtor's daughter applied for mortgage and was advised that daughter needed co-signor. Debtor agreed to co-sign loan and provided financial statement to lender. Evidence indicated that statement was false and that lender would not have extended loan had debtor disclosed true financial condition. Lender reasonably relied on statement as credit score and information available did not provide any contradictory or conflicting information. Debtor's statement listed assets that did not exist; substantially overvalued other assets that debtor did own; overstated debtor's gross income by almost 50%. Debtor admitted that she knew the Bank was not going to make the loan unless she qualified as the cosigner and gave a personal guarantee because her daughter had previously filed bankruptcy and she and her husband were having problems meeting their financial obligations. At no time did debtor inform the Bank she gifted her real property, representing her primary asset of value, to her mortgage lender as the debtor was substantially in default on her own mortgage, thereby changing debtor's financial condition and her ability to serve as a cosigner and guarantor.

Washington Mutual Bank v. Carlson, Case No. 11-13314 (11th Cir. 2012) – Chapter 7 Debtor and her non-debtor spouse entered into a refinancing mortgage with Washington Mutual Bank of their first mortgage. Washington Mutual Bank conditioned financing upon satisfaction of the second and third mortgages. At the closing for the refinancing mortgage, two satisfactions of mortgage were presented for the second and third mortgages, which were later discovered to be forgeries. The facts also showed that the Debtor and non-debtor spouse gave their mortgage broker a Rolex watch before the closing, and they received an undisclosed kickback from the broker after the closing. After finding it was in third position on the property, Washington Mutual Bank suffered over \$1.1 million in losses in redeeming the property from the third mortgagor's foreclosure and satisfying the second mortgage.

Oster v. Clarkston State Bank, Case No. 11-1388 (6th Cir. 2012) – Debtor obtained loans using false financial statements. Statements provided to lender indicated that debtor and wife jointly owned \$8 million in marketable securities. In fact, debtor had previously transferred all of these securities to wife individually and debtor had no interest in those securities when providing statement to lender. Bank actually and reasonably relied on debtors representations concerning ownership. Alleged discrepancy between named ownership on loan application and named ownership on account statements was not sufficient to constitute clear indication to lender that there may be issues concerning debtor's ownership of securities or to place lender under obligation to further investigate. Debtor's actions in signing the loan application under his own name when he knew that only his spouse had an interest in the securities and permitting his accountant to provide financial statements to lender that debtor did not review amounted to gross recklessness at a minimum, which is sufficient to establish intent to deceive.

Sloan Development, LLC v. Gill, 2012 WL 909513 (Bankr. N.D. Ohio 2012) - Adversary proceeding to determine debt to be nondischargeable governed by doctrine of collateral estoppel, where state court final judgment had previously determined that debtor, a contractor who performs services for plaintiff, had obtained payment from plaintiff using fraudulent contractor affidavits. State court final judgment constituted judgment on merits in the case after a full and fair opportunity to litigate the issue; the issue was actually and directly litigated; the current adversary proceeding presented issues which were identical to the issues in the state court litigation; and the debtor was a party to the state court litigation. State court final judgment establishes all facts necessary to determine that obligation was obtained as a result of fraudulent activities of debtor.

First Horizon Home Loan Corporation v. Apostle, 467 BR 433 (Bankr. W.D. Mi. 2012) - Section 523(a)(2)(A) requires that debtor obtain money through material misrepresentation that debtor knew was false or made with gross recklessness as to truth; that the debtor intended to deceive the creditor; that the creditor justifiably relied on the false statements; and the reliance was the proximate cause of the loss. Seller's omission from closing statement of identity of holder of mortgage constituted statement made to title company or escrow agent and not to prospective purchaser. Even if it had been reasonable to expect that the representations in the closing statement would be shared with the buyer, there was no evidence at trial that the buyers were ever aware of the contents of the closing statement or that the buyers had ever seen the closing statement. The seller never spoke to the buyer or made any other representations, either directly or indirectly which could form the basis of a claim for fraud. Evidence also indicated a lack of intent to defraud. Although seller signed the closing statement which was inaccurate, there was no evidence that seller knowingly made the representation or that the omission in the closing statement was anything other than a good-faith mistake. Further, when seller discovered the error after closing, seller contacted the title insurance company and the purchaser to disclose the problem.

FIA Card Services, N.A. v. Muller, 2012 WL 32570 (Bankr. E.D. Tn. 2012) – Debtor incurred more than \$85,000 in credit card debt shortly before filing, including charges and cash advances to pay other credit card debts which debtor would

then use to pay other cards, engaging in credit card “kiting”. At time debtor incurred debts, debtor and spouse had total income of less than \$1200 per month, which was woefully short of what would have been required even to make minimum payments on cards. Financial condition at time charges incurred were such that debtor had no reasonable possibility to repay.

Forsyth v. Heinz, 2012 WL 127536 (Bankr. E.D. Tn. 2012) – Contractor falsely represented that contractor was licensed and insured. At time of signing final contract, insurance had been cancelled for non-payment. Although contractor had previously been licensed, at time final contract signed, the license had expired and had not been renewed, and although licenses were in place before construction actually commenced, the licenses did not allow contractor to construct house with a total cost of more than \$150,000.00, yet contractor’s contract with plaintiff called for a total cost of \$700,000.00. Contractor’s corporate status had previously been administratively dissolved but was reinstated as part of the re-licensing process but again not until after contracts had been signed with the Plaintiff. Multiple misrepresentations created substantial inaccuracy as to qualifications of contractor that would have been material to both the owner and the construction lender. Plaintiff entitled to non-dischargeable judgment for amount spent by Plaintiff where construction services performed by Debtor were of no value; plus treble damages under Tennessee law for unfair and deceptive trade practices.

Cornwell Quality Tools Company v. Paavo, 2011 WL 6780720 (E.D. Mi. 2011) – Court correctly granted summary judgment for defendant/debtor where evidence did not indicate any misrepresentation. Evidence indicated that when parties entered into franchise agreement, Debtor in good faith fully intended to operate the business. Debtor’s alleged failure to disclose transfers or to maintain proper records, while potentially leading to causes of action under Section 727, could not support Section 523 action where there was no evidence that alleged failure to disclose transfers or to maintain records had anything to do with initial decision to sell tools on credit. Debtor’s listing in Bankruptcy Schedules substantial unsecured debt that was not on loan application that debtor provided to creditor was not evidence of fraud as creditor failed to present any evidence concerning either the existence or balance on any of these undisclosed accounts as of the date on which creditor entered into agreement with debtor.

Jacobs v. Versa Corp., Case No. 460 BR 149 (Bankr. E.D. Mi. 2011) – Section 523(a)(2)(A) requires fraud other than a statement respecting debtor’s or an insider’s financial condition. Section 523(a)(2)(B) applies only to statements in writing that respect debtor’s or an insider’s financial condition. Section 523(a)(2)(A) requires proof that debtor obtained money or property through a material misrepresentation that the debtor knew was false or was made with gross recklessness as to truth; made with intent to deceive; that the creditor justifiably relied upon; and the reliance was proximate cause of loss. Statements of financial condition are not actionable unless the statements are in writing, and reliance must be “reasonable” as opposed to merely “justifiable” under Subsection A. Statements respecting financial condition include any communication that has a bearing on debtor’s financial condition. Any communication addressing even a single asset or single liability qualifies. Business plan that represented potential corporate profits and statements by corporate president that if business was unsuccessful that president had sufficient assets to pay corporate debts constituted statements regarding financial condition of insider within scope of Section 523(a)(2). Plaintiff failed to demonstrate any written statements as required by Section 523(a)(2)(B).

Cole v. Wood, 458 BR 898 (E.D. Mi. 2011) – To establish actual fraud, Plaintiff must show a course of conduct intended to deceive, justifiable reliance and proximate causation. Intent to deceive may be inferred from a reckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation. If there is room for an inference of honest intent, the question of nondischargeability must be resolved in favor of the debtor. Plaintiff, purchaser of a home from debtor, failed to demonstrate fraud concerning condition of foundation of property. Debtor had property repaired in 2000 and had not experienced any problems since the repairs were completed. Michigan Seller Disclosure Act requires that seller of real estate make disclosure of condition of property including whether seller aware of any settling, flooding, drainage, structural or grading problems; and that a seller disclose any pending litigation that could affect the property or the Seller’s right to convey the property. Seller has a duty to disclose the condition or information to the degree indicated by the question on the disclosure form. Court may not impose on a seller a duty to disclose beyond what is plainly required by the statutory disclosure form. Seller had no duty to disclose litigation against prior owner for deficiencies in property where Seller had subsequently repaired those issues and was only seeking to recover the costs of repairs, where there was no evidence that repairs were inadequate or that Seller knew problems would recur.

Ohio Bureau of Workers’ Compensation v. Damron, 457 BR 662 (Bankr. S.D. Ohio 2011) – Intentional failure to disclose a material fact can constitute material misrepresentation that, at the time, debtor knew was false or made with gross recklessness. Debtor concealed fact that she was employed during time she was receiving Workers’ Compensation even though Debtor signed forms that clearly prohibited debtor from working while receiving workers’ compensation benefits. Failure to disclose employment was material to debtor’s eligibility for temporary total disability benefits and was done with intent to have Workers’ Compensation Bureau rely and to continue to pay workers compensation when debtor was not eligible. Administrative Law Judge ruling that debtor obtained benefits through fraud sufficient to collaterally estoppel debtor from rearguing issue where ALJ ruling included all findings of fact necessary for determination under Section

523(a)(2).

McCallum v. Pixley, Case No. 10-6665 (Bankr. E.D. Mi. 2011) – Under Michigan Law, a “true default judgment”, defined as one entered without the defendant having participated in defending the case, is entitled to preclusive effect in later action between the same parties. Court must determine what issues were “actually determined” as part of default judgment. Legal standards for judgment in Michigan for Fraud meets requirements of legal standards under Section 523(a)(2)(A). However, factual allegations in State Court Complaint, even if assumed to be true, failed to support action under Section 523(a)(2) where complaint never alleged any reasonable reliance by Plaintiff on any representation by Debtor. Allegations of complaint established that even minimal investigation would have uncovered alleged fraudulent statements, making any reliance, although actual, not reasonable as required for action under Section 523(a)(2).

First American Title Insurance Company v. Pazdzierz, 2011 WL 5039867 (E.D. Mi. 2011) – Title Insurer, as assignee of claims from lender could maintain non-dischargability action against debtor based on debtor’s fraudulent representations to original lender from whom Title Company took assignment of claims. Debtor submitted fraudulent financial statements to lenders to obtain mortgages that were then insured by First American. Title agent that issued policies never recorded mortgages, precluding lender from foreclosing. Lender brought claims against Title Company which paid off on insurance policies and obtained assignment of claims from Lender against debtor. Title Company had standing to pursue action under Section 523. Although basis of action would be alleged fraud of debtor, assignment of action by Lender to Title Insurance Company did not violate Michigan prohibition against assignment of causes of action for fraud. Title Company, as assignee, could assert same cause of action as assignor could. Assignee could sustain action under Section 523(a)(2) based on misrepresentations made to creditor that induced creditor to make loan. Lack of representations to Title Company itself not fatal to action brought by Title Company as assignee.

Samuel J. Temperato Revocable Trust v. Unterreiner, Case No. 11-7039 (8th Cir. BAP 2011) – False statements made to lender in loan application and security agreement do not give rise to non-dischargability action in favor of guarantor of loan. Section 523(a)(2) requires that the debtor obtain property or money from the creditor. Borrower made false representations to bank and obtained money from bank. Debtor did not receive any money, property or services from guarantor that could support action under Section 523(a)(2). Further, guarantee was blanket guarantee of all business debts, both current and after-extended, and had been in place for a number of years pre-dating false statements to bank. Guarantor could not link false statements to guarantee or prove that guarantor “reasonably relied” in executing the guarantee where the statements were not made until well after the guarantor signed the guarantee.

Bauer v. Gilmartin, Case No. 11-6014 (8th Cir. 2011) – Plaintiff supported action under Section 523 for fraud. Debtor made fraudulent representations concerning investment in LLC where Debtor, the managing partner of the LLC, represented that the LLC was financial sound when, in fact, the LLC was experiencing severe cost overruns and financial distress and at the same time Debtor removed \$20,000 from LLC without authorization and without informing Plaintiff. Plaintiff was unable to prove measure of damages using “benefit of bargain” test as Plaintiff could not prove whether or to what extent LLC would have been profitable but for the actions of the Debtor. Court concluded that were Plaintiff could not prove “benefit of bargain” Court could use “out of pocket” rule for determining amount of non-dischargable claim. Court would liquidate claim amount based on funds invested following Debtor’s alleged fraudulent conduct.

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 estoppel 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-dischargability 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) *affd* 2012 WL 3732514 (N.D. Ohio 2012) – Employee’s actions in engaging in competing business to perform services that employer could not or would not perform, even if proven to constitute breach of fiduciary obligation, does not amount to fraud for purposes of

Section 523(a)(2).

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), *aff’d* 2012 WL 2161623 (6th Cir. BAP 2012) – Debtor husband’s debt to wife’s former employer resulting from wife’s embezzlement of funds was not within Section 523(a)(2). Evidence indicated that wife embezzled funds but did not indicate that wife used any material misrepresentations to employer or that employer relied on any statements by debtor wife that produced an injury.

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

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 dischargability 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.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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

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 to 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 arbores 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.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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) *aff'd* Case No. 10-2242 (6th Cir. 2012) – Complaint that does not specifically cite Section 523(a)(2)(A) nonetheless states cause of action where Complaint is predicated on State Court fraud judgment. State court judgment for fraud which required that Defendant have obtained money as a result of the fraud. State Court action for fraud required proof of (1) material misrepresentation; (2) that was false; (3) was known to be false, or made recklessly, without knowledge of truth, and as a positive assertion; (4) that was made with intention that other party should act on it; (5) that the other party acted in reliance on the statement; and (6) that the other party suffered injury. State Court Jury made specific findings on verdict form that Debtors had actual knowledge of material facts that debtors did not disclose; and that purchasers of property relied on those misrepresentations when determining how much to offer for purchase of property, thereby conferring an economic benefit on debtors based on fraudulent statements. Michigan Fraud judgment is sufficient to support finding of non-dischargeability under Section 523(a)(2)(A) under doctrine of collateral estoppel.

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-dischargeability 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

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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 is "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.

8.86 Section 523(a)(2)(B) – False Financial Statements

Farmers National Bank v. Lockridge, 2012 WL 1969254 (Bankr. E.D. Ky. 2012) – Section 523(a)(2)(B) requires that debtor publish statement of debtor’s financial condition that is knowingly false or made with gross recklessness and with intent to deceive creditor. Debtor listed value of assets on financial statement based on appraisal, unaware of a second appraisal that had also been obtained that showed markedly different values. Statements by debtor that he would use proceeds of sales commission on property to pay down loan were not false but were hopeful promises of future activity that did not come to fruition as the property was not sold and was later lost in foreclosure. Debtor genuinely believed that he would be able to sell the property for sufficient sum to cover loan as debtor had previously been offered an amount that would have been sufficient to do so but elected not to sell at that point, and later decline in value was not anticipated.

8.87 Section 523(a)(2) – Cash Advances

FIA Card Services v. Wagner, 2012 WL 1605945 (Bankr. N.D. Ohio 2012) – Section 523(a)(2)(C) creates presumption of fraud in favor of the creditor where debtor obtains more than \$875 in cash advances from a single creditor in the 70 days preceding petition date. Debtor must then produce evidence that debt was not incurred in contemplation of bankruptcy and, therefore, was not fraudulent. Complaint sufficiently alleged that debtor obtained cash advances in excess of \$875. Debtor’s answer admitted that she obtained advances but alleged that she did so only until she could obtain assistance in setting up payment plans. Debtor consulted with credit counseling service and was advised for the first time that she lacked sufficient income to make a payment arrangement. Debtor’s answer was sufficient to create factual issue preventing entry of summary judgment in favor of creditor.

8.88 Section 522(a)(2)(C) – Credit Card Debt

Discover Bank v. Ferguson, Adv. No. 11-5854 (Bankr. E.D. Mi. 2012) – Debt was not within scope of Section

522(a)(2)(C) where credit card was used more than a prior to commencement of case and the relevant charge was posted to the account more than 200 days pre-petition. Debtor used the card to repair debtor's vehicle. When debtor received the statement, debtor disputed the charge. Over the next 7 months, creditor at various times credited debtor's account and on other occasions credited the account. The last adjustment was on September 10, when creditor charged debtor's account. More than 200 days later, debtor filed for relief. Adversary proceeding alleged that the debtor incurred the debt on December 30, which was within the 90 day framework, relying on what turned out to be an inaccurate transaction record. Upon dismissal of complaint, debtor entitled to recover attorney fees and costs pursuant to Section 523(d). Section 523(d) requires showing that debtor was defendant in adversary proceeding under Section 523(a)(2) requesting that the debt be excepted from discharge; that the debt was a consumer debt; and that the debt was ultimately discharged. Creditor then bears burden of proving that position was substantially justified or that special circumstances exist to make award of fees unjust. Plaintiff's good faith reliance on its own, faulty business records was not justified; and debtor's alleged concealment of errors in plaintiff's records was not special circumstance.

8.89 Section 523(a)(3)

Seibert v. Horton, Adv. No. 11-6651 (Bankr. E.D. Mi. 2012) - Unscheduled debt is generally dischargeable in no asset chapter 7 case. However, unscheduled debt that is not otherwise non-dischargeable under section 523(a)(2), (4), or (6), is not automatically discharged if the potential creditor did not have knowledge of the bankruptcy case. Unscheduled creditor did not violate discharge injunction by filing post discharge state court complaint alleging nondischargeable debt based on alleged theft of money. If proven, debt would be nondischargeable under section 523(a)(6) notwithstanding the general discharge for otherwise unscheduled debts.

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 dischargeability of debt to be filed no later than 60 days after the date set for the first meeting of creditors. However, where debt is neither scheduled nor listed, debt is not discharged unless creditor acquires actual knowledge of bankruptcy and time to file a complaint to determine dischargeability. Where creditor did not receive actual knowledge of bankruptcy case until almost one year after commencement of the case and well after the deadline to file an adversary proceeding, creditor's adversary proceeding to determine dischargeability was not time-barred.

8.90 Section 523(a)(4) - Larceny

Dean v. Hunter, 2012 WL 4343869 (Bankr. E.D. Tn. 2012) - Debtor, a building contractor, committed larceny when debtor removed building materials from Plaintiff's property that plaintiff had paid for in connection with construction contract between Plaintiff and debtor. State court judgment in favor of Plaintiff supported finding of larceny. Although judgment did not state that debtor acted fraudulently or intentionally, State court award of punitive damages supported finding of intent where state law required showing of actual malice for an award of punitive damages.

Hulett v. Rowe, Adv. No. 11-4924 (Bankr. E.D. Mi. 2012) - Plaintiff's action against debtor for alleged diversion of corporate assets failed to evidence any damages based on that alleged diversion. Only damages suffered by plaintiff resulted from debtor's failure to pay promissory note by which debtor purchased business from plaintiff. Damages for failure to installments on promissory note does not equate to larceny for purposes of non-dischargeability. Plaintiff did not offer any evidence of any particular asset that was allegedly converted or taken or the value of any such asset. Absent evidence of damages from the alleged larceny independent of damages for breach of the promissory note, judgment would be entered in favor of debtor.

Ewers v. Cottingham, 2011 WL 2118247 (Bankr. E.D. Ky. 2011) *aff'd* 2012 WL 2161623 (6th Cir. BAP 2012) - Debtor husband's debt to wife's former employer from whom wife embezzled funds was not within Section 523(a)(4). Husband was not employee of employer and did not owe employer any fiduciary obligation and husband did not personally engage in any act of embezzlement or larceny.

8.91 Section 523(a)(4) - Embezzlement

Dean v. Hunter, 2012 WL 4343869 (Bankr. E.D. Tn. 2012) - Debtor, a building contractor, committed larceny when debtor removed building materials from Plaintiff's property that plaintiff had paid for in connection with construction contract between Plaintiff and debtor. Even if materials had properly come into debtor's possession as the contractor

performing the construction, debtor's action in removing the materials constituted embezzlement. State court judgment in favor of Plaintiff supported finding of embezzlement. Although judgment did not state that debtor acted fraudulently or intentionally, State court award of punitive damages supported finding of intent where state law required showing of actual malice for an award of punitive damages.

Frost & Co., Inc. v. Smithey, 474 BR 830 (Bankr. N.D. Ohio 2012) – To prevail on complaint to except debt from discharge as one for debtor's embezzlement: (1) creditor must have entrusted his property to debtor; (2) debtor must have appropriated the property for use other than that for which it was entrusted; and (3) the circumstances must indicate fraud. Chapter 7 debtor, in his capacity as 50% shareholder of holding company and officer both in it and in related corporate entities that it owned, committed embezzlement of corporate funds as against other 50% shareholder where debtor wrongfully used corporate funds to pay \$24,994.36 for personal legal services, \$8,856.76, for country club membership, and \$7,120.00 for painting work at debtor's home.

Dantone v. Dantone, Case no. 12-8006 (6th Cir BAP 2012) – Embezzlement requires proof that plaintiff entrusted property to debtor; debtor appropriated property for use other than that for which it was entrusted; and circumstances indicate fraud or deceit. Michigan judgment for statutory conversion established that plaintiff entrusted property to debtor and that debtor appropriated property for purpose other than that for which it was entrusted. However, state court complaint did not allege any indicia of fraud and indicia of fraud is not element of statutory conversion. Final Judgment in state court awarding damages for statutory conversion was not collateral estoppel in action under Section 523(a)(4) because one necessary element under Section 523(a)(4) was not necessary or essential to state court judgment.

Hulsing Hotels Tennessee, Inc. v. Steffner, 2012 WL 3563978 (Bankr. E.D. Tn. 2012) – Creditor failed to demonstrate any property interest in property allegedly embezzled. Debtor caused LLC to engage in various loans and other inter-company transfers with sister corporation. Funds and property allegedly transferred were not those of creditor nor did creditor have any interest in those assets. Creditor, as creditor of LLC, did not have specific right to or interest in any particular piece of corporate property or corporate asset.

Schofield v. Prentice, 2012 WL 3564020 (Bankr. E.D. Mi. 2012) – Plaintiff failed to demonstrate that debtor embezzled funds of Plaintiff. Debtor was principal of corporation that owed money to Plaintiff. Debtor allegedly embezzled funds belonging to corporation and used those for debtor's personal use. Plaintiff did not demonstrate any interest in funds embezzled and failed to join the corporate entities involved which is required for derivative action.

Automotive Finance Corp. v. Leonard, 2012 WL 1565120 (Bankr. E.D. Tn. 2012) – Embezzlement requires fraudulent appropriation of property by a person to whom the property has been entrusted or into whose hands it has lawfully come. A debtor cannot embezzle his own property for purposes of a § 523(a)(4) embezzlement action, even if a creditor has a security interest in that property. Debtor who allegedly sold inventory without remitting payments to floor plan lender did not embezzle, as the assets being sold and the proceeds of those sales belonged to debtor and not to creditor.

Humphrey v. Morgan, 2012 WL 1390246 (Bankr. E.D. Tn. 2012) – Embezzlement requires fraudulent appropriation of property by a person to whom the property has been entrusted or into whose hands it has lawfully come. Creditor must prove that he entrusted property to debtor; that debtor appropriate the property for a use other than that for which it was entrusted; and that the circumstances indicate fraud. "Fraud" requires some element of moral turpitude or intentional wrong and is much broader than just misrepresentations or misleading statements, although misrepresentations or omissions can be relevant to illuminate fraudulent intent. Complaint failed to state cause of action against debtor-husband where complaint alleged that creditor entrusted property to debtor-wife.

Bello Paradiso, LLC v. Hatch, 465 BR 479 (Bankr. W.D. Mi. 2012) - Plaintiff who conspired with debtor to engaging alleged fraudulent scheme to obtain property from third-party could maintain action against debtor to have debt declared nondischargeable where debtor misappropriated funds provided by plaintiff to debtor for use in the underlying fraudulent scheme. Plaintiff and debtor conspired to wrongfully obtained jewelry from third-party jewelry manufacturer which debtor would then sell to plaintiff. Under manufactures standard wholesale agreement, plaintiff was not allowed to purchase jewelry directly from manufacturer, a restriction which was known to both plaintiff and debtor. Instead, plaintiff the debtor enter it into transaction were plaintiff would provide funds to debtor for purpose of acquiring jewelry (which debtor could properly acquire under the manufactures standard wholesale agreement) and the debtor would then forward the jewelry to the plaintiff. Debtor obtained funds from plaintiff but did not use those funds for purchase of jewelry as acquired. Although underlying scheme was, itself, fraudulent, nature of underlying scheme did not provide a defense to plaintiff's action to declare obligation from debtor to plaintiff nondischargeable based on embezzlement and conversion.

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

Ewers v. Cottingham, 2011 WL 2118247 (Bankr. E.D. Ky. 2011) *aff'd* 2012 WL 2161623 (6th Cir. BAP 2012) – Debtor husband's debt to wife's former employer from whom wife embezzled funds was not within Section 523(a)(4). Husband was not employee of employer and did not owe employer any fiduciary obligation and husband did not personally engage in any act of embezzlement or larceny.

8.92 Section 523(a)(4) – Fiduciary Relationship

First American Title Insurance Company v. Gaskill, Adv. No. 11-80230 (Bankr. W.D. Mi. 2012) – Section 523(a)(4) requires a pre-existing fiduciary relationship; a breach of that relationship; and a resulting loss. Fiduciary relationship requires express or technical trust that results from specific property being placed in hands of debtor. Michigan law creates an express fiduciary trust relationship between insurance agency and underwriter. Title Agency had fiduciary relationship with Title Insurer. Title Agency, through its president, agreed to receive premiums for insurance policies written by Agency for policies issued by underwriter and to remit to underwriter the appropriate amount of the premium. Corporate Officers and Directors will also be deemed fiduciaries if they personally cause the Agency to fail to remit premiums. Individual debtor in this case did not have fiduciary relationship with underwriter. Although a 50% shareholder of the Agency, debtor had very limited relationship with underwriter. Debtor was not signatory to Agency Agreement between Agency and Underwriter. Debtor did not personally guaranty any obligations of Agency to Underwriter. Debtor played no role whatsoever in failure to remit premiums. Debtor handled real estate closings and turned over funds to Agency President who was to remit premiums to Underwriter. Underwriter dealt solely with President and not with debtor. Debtor had no involvement in financial dealings of business until after President left town, at which time it was discovered that President had embezzled Agency funds. Status of Debtor as Vice-President and Treasurer of Agency and as insurance agent under Michigan Law, without more, did not result in requisite fiduciary relationship. Even if debtor was fiduciary, evidence did not support finding of defalcation by debtor, which required embezzlement or misappropriation by a fiduciary or failure to properly account for funds. Defalcation requires that debtor be “objectively reckless” in failing to properly account for or allocate funds. Debtor's actions were not objectively reckless. Agency President, and not Debtor, caused and controlled Agency's failure to remit premiums. Division of duties between Debtor and President were reasonable and losses resulted from President's embezzlement of funds, not any actions of Debtor. Although Debtor perhaps could have been more informed about Agency's financial situation, it was not objectively reckless for Debtor to rely on President to properly manage funds where Debtor did not have any reason to suspect that President was embezzling funds rather than using funds to pay corporate debts.

Frost & Co., Inc. v. Smithey, 474 BR 830 (Bankr. N.D. Ohio 2012) – Existence of fiduciary relationship is one of federal, not state, law. Exception to discharge requires express or technical trust, arising from placement of specific res in hands of debtor. Chapter 7 debtor, in his capacity as 50% shareholder of holding company and officer both in it and in related corporate entities that it owned, did not stand in express trust relationship to his fellow officer and other 50% shareholder, as required for debt that arose from debtor's alleged misapplication of corporate funds to be excepted from discharge on “fiduciary defalcation” theory.

Hulsing Hotels Tennessee, Inc. v. Steffner, 2012 WL 3563978 (Bankr. E.D. Tn. 2012) – Fiduciary capacity requires pre-existing fiduciary relationship; breach of that relationship; and resulting loss. Fiduciary relationship requires express or technical trust arising from placing of specific res in hands of debtor. Statute which makes officers and directors of corporation “fiduciaries” for benefit of corporate creditors did not create fiduciary relationship sufficient for Section 523(a)(4). Tennessee Revised Limited Liability Company Act did not express intent to create an express or technical trust relationship between a limited liability company and its creditors. No language establishes a trust res in the dissolved company's assets or requires that those assets be held as a trust fund. Similarly, no statute imposes fiduciary obligations on a party, notwithstanding the specified distribution scheme.

Bakdaleyeh v. Warpup, Adv. No. 11-3041 (Bankr. E.D. Mi. 2012) – Plaintiff's complaint under Michigan Builders Trust Fund Action against debtor-wife dismissed where complaint did not establish that wife agreed to perform or oversee building activities. Although debtor-wife may have been signatory on business bank account, that status without more did not trigger MBTFA.

Becton, Dickinson & Co. v. Sterling, 2012 WL 3257841 (Bankr. E.D. Mi. 2012) – Fiduciary capacity is narrowly defined as express or technical trust relationship arising from placement of a specific res in hands of debtor. Debtor's receipt of salary in excess of correct amounts did not constitute defalcation in fiduciary capacity. Debtor's employer did not entrust debtor with any specific res as required for trust relationship. Debtor was not “trustee” and was never designated as trustee. Mere status of debtor as employee, without more, does not create trust relationship between employer and employee.

Schofield v. Prentice, 2012 WL 3564020 (Bankr. E.D. Mi. 2012) – Fiduciary relationship requires existence of express or statutory trust. Plaintiff failed to demonstrate fiduciary relationship merely because debtor was an owner and manager of businesses in which part owner.

Tweedie v. Semeniuk, Case No. 10-5605 (Bankr. E.D. Mi. 2012) – Absent evidence of pre-existing express or technical trust relationship, plaintiff cannot prevail under Section 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity. State arbitration award demonstrated that while plaintiff invested in debtor’s business, there was no agreement that funds invested would be placed in trust or used for a specific purpose, rather than being invested for general business use.

Automotive Finance Corp. v. Leonard, 2012 WL 1565120 (Bankr. E.D. Tn. 2012) – Defalcation in a fiduciary capacity requires proof of pre-existing express or technical trust coupled with either a misappropriation of funds or a failure to account for funds. Floor plan finance agreement that required amount received from disposition of inventory to be held and paid to creditor established a subject matter for the trust and a beneficiary for whom the trust was created. However, the floor plan agreement did not specify the nature of the interests held by the beneficiary or any manner for the implementation and administration of the alleged trust. Floor plan financing is contractual relationship that does not constitute “trust”. Debtor who allegedly sold inventory without remitting funds did not commit defalcation while in fiduciary capacity.

Humphrey v. Morgan, 2012 WL 1390246 (Bankr. E.D. Tn. 2012) – Fraud or defalcation by fiduciary requires pre-existing fiduciary duty; breach of that duty; and resulting loss. “Fiduciary relationship” requires express or technical trust and does not encompass a common law fiduciary relationship. Ordinary agent-principal relationships, while involving fiduciary obligations, is insufficient to establish the type of fiduciary duty contemplated by Section 523(a)(4). Trust relationship requires intent to create a trust; a trustee; a trust res; and a definite beneficiary. Complaint against debtor-husband did not demonstrate existence of pre-existing trust relationship between creditor and husband. Debtor-wife held a power of attorney and accepted appointment as a representative of creditor, potentially creating a fiduciary obligation between debtor-wife and creditor, but evidence indicated that debtor-husband never signed either the power of attorney or any acceptance of appointment, precluding finding of trust relationship between debtor-husband and creditor.

Tweedie v. Hermoyian, 466 BR 348 (Bankr. E.D. Mi. 2012) – Absent evidence of pre-existing express or technical trust relationship, plaintiff cannot prevail under Section 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity. State arbitration award demonstrated that while plaintiff invested in debtor’s business, there was no agreement that funds invested would be placed in trust or used for a specific purpose, rather than being invested for general business use.

Great American Insurance Company v. Poynter, 459 BR 679 (Bankr. W.D. Ky. 2011) – Fraud or defalcation while acting in fiduciary capacity requires failure to produce funds entrusted to fiduciary but does not necessarily require proof of fraud, embezzlement or misappropriation. Defalcation must occur in course of express or technical trust arising from placement of specific res in hands of debtor. Indemnity agreement between contractor’s sole owner and issuer of payment and performance bond created trust where agreement stated that funds received under construction contract were trust funds, identified the beneficiaries of the trust funds, and designated the company and its principal as trustees. Debtor breached fiduciary obligation by receiving funds for bonded construction projects and used funds to pay lender and debtor’s former company rather than paying job creditors and suppliers.

Astro Building Supplies, v. Slavik, 2011 WL 6157348 (6th Cir. 2011) – Michigan Builders Trust Fund Act requires proof that the contractor received money for labor or materials provided on a construction project but failed to use those funds to first pay laborers or materialmen who performed labor or furnished materials for the specific project. Labor or materials must be provided for a specific, identifiable project and only the funds from that specific project are impressed with the trust under MBTFA. Plaintiff could not prevail under MBTF where evidence did not indicate that materials had been sold to debtor for a specific project. Instead, evidence indicated that materials were generally sold to debtor on an open account, which is not sufficient to support non-dischargability.

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

DETROIT CONSUMER BANKRUPTCY CONFERENCE

Tickets were not sold but were stolen by former employee before debtor could remit the proceeds to the Lottery.

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) *affd* 2012 WL 3732514 (N.D. Ohio 2012) – Employee owes fiduciary obligation to employer, the breach of which can result in the obligation being non-dischargeable.

Ewers v. Cottingham, 2011 WL 2118247 Bankr. E.D. Ky. 2011) *affd* 2012 WL 2161623 (6th Cir. BAP 2012) – Debtor husband's debt to wife's former employer from whom wife embezzled funds was not within Section 523(a)(4). Husband was not employee of employer and did not owe employer any fiduciary obligation and husband did not personally engage in any act of embezzlement or larceny.

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

Follett Higher Education Group, Inc. v. Berman, 2011 WL 181482 (7th Cir. 2011) – Chapter 7 debtor did not stand in “fiduciary capacity” to creditor of his wholly-owned corporation, as that term was used in dischargability 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 (5th Cir. 2011) – Section 523(a)(4) barred discharge of obligations that result for fraud or defalcation while acting in a fiduciary capacity and includes debts arising from debtor's acquisition or use of property that is not the debtor's. Debtor breached fiduciary obligation to partnership in which debtor was the president and chief operating officer of limited partnership when debtor obtained loans to himself from limited partnership funds without disclosing these loans to the other partners. Office of corporate general partner owed fiduciary obligations to both the corporate general partner and to the limited partnership itself, where debtor was charged with the day to day management of the limited partnership and exercised operational control over affairs and business of partnership.

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 (6th Cir. BAP 2010) – Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted. Creditor seeking to declare debt non-dischargeable under Section 523(a)(4) must prove that he entrusted his property to the debtor, the debtor appropriated the property for use other than that for which it was entrusted, and the circumstances indicate fraud. Fraudulent intent may be proven through circumstantial evidence including suspicious timing of events, insolvency, transfer to family members or other insiders. Court must review all of the facts and circumstances surrounding the transaction and determine whether the evidence leads to the conclusion that it is more probable than not that debtor had fraudulent intent. Debtor was president of car dealership that sold the vehicles without paying the floor plan lender. Dealership transferred vehicles to family members and affiliates will shortly before dealership filed for bankruptcy without remitting any of the funds to the floor plan lender. Debtor was causing dealership to repay loans from debtor's friends and family members and affirmatively misrepresented that dealership was paying floor plan lender when dealership was not making any payments. Debtor's alleged motivation of survival of business did not defeat finding a fraudulent intent. Fax indicated concerted effort to liquidate large amount of inventory in abbreviated period of time, just prior to filing for bankruptcy, with our remaining any of the proceeds to floor plan lender know, warranting conclusion that death resulted from embezzlement under Section 523(a)(4).

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

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.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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

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.

8.93 Section 523(a)(5)

Taylor v. Taylor, Case No. 11-103 (10th Cir. BAP 2012) – Obligation owed to debtor's ex-spouse arising out of ex-spouse's overpayment of support is not “support obligation” within Section 523(a)(5). Domestic Support Obligation under Section 523(a)(5) must be owed to spouse, former spouse; be in the nature of support or alimony; and must be established as part of a separation agreement, divorce decree, or property settlement agreement. Although obligation itself arose out of payment of a Domestic Support Obligation, the debt resulting from the overpayment did not retain that same character where there was no evidence that ex-spouse had any need for support or that court intended repayment to constitute support. Obligation to pay alimony was to terminate when spouse co-habited. Spouse (now debtor) began to cohabit but did not disclose this to either her ex-spouse or to the court, resulting in continued payments of alimony to which debtor was not entitled.

In re Peake, 2012 WL 3262747 (Bankr. E.D. Mi. 2012) – Chapter 7 discharge does not discharge obligations for alimony, support or maintenance. Obligation will constitute support only if parties intended to create a support obligation; obligation must have actual effect of providing necessary support; court must determine if obligation is so excessive as to be unreasonable; and if amount is unreasonable, amount is dischargeable to the extent necessary to serve purposes of bankruptcy code. Although judgment expressly waived any rights to support, judgment provided for property settlement that stated that property settlement was to provide Wife “with support and maintenance in lieu of direct alimony, this obligation is determined to be nondischargeable in bankruptcy”. Wife testified that debtor took most of the furniture,

appliances and household goods when he moved out, and wife considered award to be support to allow her to purchase new furnishings and to repair damages to home caused by debtor. Award had actual effect of support as Wife continued to pay mortgage on marital home and utility expenses while Debtor was living in home during course of divorce, and Wife, living elsewhere, had to pay her own living expense in addition. Once Wife returned home, she had to purchase items to replace those taken by debtor. Money awarded by state court had actual effect of providing support. Amount was not unreasonable or excessive given Wife's expenses and need to replace items taken by debtor and repair damages caused by debtor.

Baer v. Cabrian, 2012 WL 1430934 (Bankr. E.D. Ky. 2012) – State Court has concurrent jurisdiction with Bankruptcy Court to determine dischargeability of debt under Section 523(a)(5). Adversary proceeding dismissed where Bankruptcy Court had already abstained from ruling on issue pursuant to 28 USC Section 1334 to allow parties to proceed in State Court.

In re Lee, 465 BR 469 (Bankr. W.D. Ky. 2012) - Debtor's obligation to pay ex-spouses attorney fees incurred in divorce constituted "domestic support obligation" that is excepted from automatic stay. Ex-spouses action in obtaining an award of attorney fees in the domestic relations action did not violate automatic stay. Further, domestic court order requiring debtor to pay \$1506 per month "toward his share of the marital debts" also constituted award of support as award was intended to assist ex-wife with payment of monthly household obligations and, therefore, entry of order was also excepted from automatic stay.

Rugiero v. Dinardo, Case No. 11-11549 (E.D. Mi. 2011) – Enforcement of domestic support order is within exception to automatic stay. State Court has authority to determine, post-petition, whether the debt is in the nature of support and is non-dischargeable within Section 523(a)(5) even in proceedings conducted post-petition. Orders to reimburse creditor for attorney fees was debt owed to or recoverable by a child or parent and that is in the nature of support and established by order of court. Fact that debtor was never married to creditor does not change nature of obligation as one for child support. Section 101(14A) does not require marriage as condition of DSO. State Court Order established that reimbursement was intended as support and took into consideration relative financial positions of the parties.

Hollington v. Ruf, Case No. 10-8086 (6th Cir. BAP 2011) – Debtor's obligation to pay third party obligations are non-dischargeable. The precedent, *Gibson v. Gibson*, 219 BR 195 (6th Cir. BAP 1998), although pre-BPCPA, is still good law. Divorce obligation that required debtor to pay private school tuition for children is not dischargeable.

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 dischargeability of the obligation serves the purpose of federal bankruptcy law. State court orders clearly did not award alimony to either party and court never labeled amounts owed to ex-wife as alimony, support or maintenance. Amounts owed to ex-wife were not in the nature of alimony or support.

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 dischargeability of the debt turns on whether it is payable to or recoverable by a person or entity described in section 101(14A); (2) the view that, if a debt is in the nature of support, it is non-dischargeable even if payable directly to a third party and even if the debtor's spouse, former spouse or parent of the child would not be financially harmed if the debtor discharged the obligation; and (3) a more limited approach that requires some ongoing liability of the debtor's spouse, former spouse, or parent of the debtor's child on the support obligation owing to a third party (so that its non-payment might have a financial impact on those parties) before it may be excepted from discharge. 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).

8.94 Section 523(a)(6)

In re Glenn, 2012 WL 3775977 (Bankr. M.D. Pa. 2012) – Debtors who removed fixtures from home after secured lender had obtained stay relief to foreclose mortgage willfully caused injury. Debtors intentionally removed cabinets, built-in furnishings, ceiling fans, and other property without just cause. Debtors knew that removal of fixtures was substantially certain to cause damages to lender. In the process of ripping out cabinetry and removing lighting and plumbing fixtures, debtors exposed wires, drains and pipes and left behind holes in walls and ceilings. Harm to property was impossible to ignore and debtors had to have been aware that their actions would force lender to incur substantial repair costs. Debtor's testimony that they needed these items in order to secure new, habitable residence did not excuse actions. Debtor's "need" for the items, no matter how dire their financial predicament, did not justify actions or blind debtors to consequences. Debtors' stated ignorance that the items constituted fixtures did not justify removal from property, nor did debtors' testimony that the cabinetry was "gift" from debtors' brother.

Bowers v. Rogers, 2012 WL 3929813 (Bankr. S.D. Ohio 2012) – Willful requires deliberate or intentional injury, not that intentional action leads to an injury. Malice requires that act be taken in conscious disregard of debtor's duties or without just cause or excuse. Mere recklessness is not sufficient to fall within willful and malicious. Actor must intent consequences of act or act in such a way that consequences are substantially certain. Not all claims arising from alleged conversion are *per se* willful and malicious. Conversion may not rise to standard under Section 523(a)(6) where actor honestly believes that his actions were lawful and proper. Evidence did not establish non-dischargeability as matter of law where debtor testified that he genuinely believed that he was entitled to hold title to property until paid in full by purchaser and while there may have been a dispute, debtor believed that he had not been paid in full.

Hulsing Hotels Tennessee, Inc. v. Steffner, 2012 WL 3563978 (Bankr. E.D. Tn. 2012) – Funds in corporate bank account on date garnishment is served remain property of corporation free of garnishment until night of service date of writ. Debtor's acts in causing single member LLC to transfer funds from corporate account to account of sister corporation on date writ of garnishment served did not constitute action to interfere with perfected writ of garnishment, as writ did not perfect or attach to LLC's account until after funds had been transferred, even though transfer occurred on same date as service of writ. As creditor had no interest in funds as of moment of transfer, transfer could not have caused harm or loss to creditor sufficient to support action under Section 523.

McClary v. Powell, Adv. No. 10-3823 (Bankr. E.D. Mi. 2012) – In action under Section 523(a)(6), court must allow recovery of attorney fees and costs when those fees are allowable by state law. Prior to bankruptcy filing, plaintiff sued debtor and proceeded through case evaluation process. Debtor rejected case mediation and failed to obtain lower verdict,

entitling plaintiff to award of attorney fees. Debtor filed bankruptcy prior to state court assessment of fees. Court would not attempt to apportion fees between counts in which Plaintiff recovered more than evaluation amount from those where the recovery was less, where the counts were all based on same facts and were inherently intertwined. Expenses and fees would have been incurred even if plaintiff, with remarkable insight, would have filed only a two count complaint, precluding apportionment of fees. At most, only a portion of one day of trial would possibly have been avoided had complaint not included counts that were not excepted from discharge, such that fees would be reduced by \$600 representing 4 hours of trial time. Court awarded fees of \$13,339.25 plus costs of \$3,094.18 plus interest of \$5,113.93 and \$1,406.12 respectively.

Hulett v. Rowe, Adv. No. 11-4924 (Bankr. E.D. Mi. 2012) – Plaintiff’s action against debtor for alleged diversion of corporate assets failed to evidence any damages based on that alleged diversion. Only damages suffered by plaintiff resulted from debtor’s failure to pay promissory note by which debtor purchased business from plaintiff. Damages for failure to installments on promissory note does not equate to larceny for purposes of non-dischargeability. Plaintiff did not offer any evidence of any particular asset that was allegedly converted or taken or the value of any such asset. Absent evidence of damages from the alleged larceny independent of damages for breach of the promissory note, judgment would be entered in favor of debtor.

Keeley v. Bumprecht, Adv. No. 11-5909 (Bankr. E.D. Mi. 2012) – “Willful” requires proof that debtor desired to cause the consequences of his act, or that he believed that consequences were substantially certain to occur. Standard is not “reasonable person” but is based on debtor’s subjective intent. Automobile accident caused by debtor’s reckless driving does not evidence that debtor intended to cause the harm to the plaintiff or that such harm was substantially certain.

Flagstar Bank, FSB v. Reddy, 2012 WL 3257817 (Bankr. E.D. Mi. 2012) – Although agents and officers of corporation can be held liable for torts such as conversion based on their active participation, not every act which might be found to be a state law conversion is necessarily willful and malicious as required by Section 523(a)(6).

Miller v. Frazier, Adv. No. 09-2183 (Bankr. E.D. Mi. 2012) – Section 523(a)(6) requires that the debt be for an injury that as the result of actions intended to cause injury, not simply actions that are performed intentionally but happen to result in injury. Debtor willfully caused injury to plaintiff by retaining trucks purchased by plaintiff yet refusing to share profits or make payments to plaintiff and refused to return trucks upon demand. Debtor stated that he never intended to provide interest or profits for the use of the vehicles, rendering actions willful and malicious.

Becton, Dickinson & Co. v. Sterling, 2012 WL 3257841 (Bankr. E.D. Mi. 2012) – Employee’s receipt and retention of erroneous salary, while perhaps a technical conversion, was not sufficiently willful and malicious. Debtor reported overpayment first time it happened. Any later failure to disclose receipts was mere silence that did not rise to level of willful and malicious. Employer failed to demonstrate any evidence of legal duty of employee to do more than what employee did – notify employer on occasion of first overpayment. While debtor may have lacked any excuse or justification for using the overpayments, lack of justification does not make action willful or done with intent to cause specific harm.

Eaton v. Ford Motor Credit Co., LLC, 2012 WL 3579644 (M.D. Tn. 2012) – Debtor acting as an officer of a corporation who actively converts property that is subject to a security interest is personally liable to the injured creditor. Auto dealer that sold vehicles without paying floor plan financing willfully and maliciously converted the proceeds resulting in non-dischargeable debt to floor plan financier. Debtor had many years experience in auto sales and state court had previously entered order directing dealership to remit proceeds upon sale of vehicles. Debtor was fully aware of state court orders yet willfully disregarded those orders as well as the obligations under the floor plan agreement.

Schofield v. Prentice, 2012 WL 3564020 (Bankr. E.D. Mi. 2012) – Plaintiff’s allegation that debtor misappropriated funds of corporation that was indebted to Plaintiff stated cause of action. Agents and officers of a corporate entity may be found personally liable for torts committed in the name of the entity. Allegations that debtor personally participated in misappropriation of funds, causing harm to Plaintiff as a result of the corporation’s inability to answer for its debt to Plaintiff, stated cause of action.

Synergeering Group, LLC v. Jonatzke, Adv. No. 11-4387 (Bankr. E.D. Mi. 2012) – State Court Order determining liability of debtor for violations of Michigan Uniform Trade Secrets Act based on Debtor’s willful refusal to comply with discovery orders and willful, deliberate and repeated pattern of obfuscation and mendacity, including destruction of computers, storage devices and files, was collateral estoppel as to debtor’s liability under MUTSA. State court findings that debtor’s actions were willful done with no reasonable justification. Debtor’s actions demonstrated willful and malicious injury to Creditor’s cause of action against Debtor, which is a protected property interest of creditor. State court action involved same parties; state court judgment was valid, final judgment; issue of debtor’s willfulness in spoliation of evidence was actually litigated; state court order determined that debtor maliciously damaged creditor’s action with no justification or reasonable excuse; and debtor had full and fair opportunity to litigate issue of willfulness and

maliciousness in spoliation. Measure of damages would be equal to amount creditor would have recovered based on Debtor's violation of MUTSA assuming debtor had not destroyed evidence. Debtor originally worked for creditor. After being let go, Debtor formed new company that directly competed with plaintiff, using same distinct and unique techniques and directly working off plaintiff's customer lists and pricing information that Debtor obtained in course of employment with plaintiff. Plaintiff showed that once debtor left, plaintiff lost business to debtor's company as there were only two companies in the country – plaintiff and defendant's – that produced the specific products and techniques. Evidence supported damages for lost profits and reasonable attorney fees totaling 576,000 less amounts paid to plaintiff by debtor prior to commencement of bankruptcy case.

Morris v. Brown, 2012 WL 2989236 (6th Cir. 2012) – Plaintiff's action against defendants alleged only that defendants trespassed on plaintiff's land. Defendants' action against debtor for intentional and willful injury did not establish any injury or damage to property of co-defendants or that debtor acted in such a way as to either intend to cause injury to co-defendants or that debtor's actions were substantially certain to cause harm to co-defendants. Defendants did not claim that debtor acted with intent to harm defendants but only that debtor's actions evidenced "substantial and foreseeable certainty of [debtor's] failure to meet any of his contractual, statutory, or, for that matter, commonsense, duties". Debtor's alleged failure to obtain general liability insurance and his failure to provide notice to landowner did not constitute evidence that debtor intended to cause injury or that injury was substantially certain that defendants would be liable to landowner if debtor removed timber from land.

Tweedie v. Semeniuk, Case No. 10-5605 (Bankr. E.D. Mi. 2012) – Arbitration award not collateral estoppel on issue of willful and malicious injury under Section 523(a)(6). Arbitration complaint did not allege that debtor's actions were willful and malicious, but alleged only that actions were "wanton and willful", precluding finding that issues of willful and malice were actually litigated. Arbitration award also did not find that debtor ever intended to injure plaintiff. Although award made numerous findings that debtor intended to deceive plaintiff, that does not equate to finding the debtor intended that plaintiff would lose those funds or that debtor was substantially certain that plaintiff would suffer injury.

Peebles v. Hayes, 2012 WL 2682788 (Bankr. M.D. Tn. 2012) – Debtor caused willful and malicious injury to neighboring property owner where Debtor intentionally built home higher than required, graded lot so as to drain toward neighbor, and turned all of the downspouts toward Plaintiff's property, causing water to literally cascade onto Plaintiff's property when it rained. Debtor's actions, at a minimum, caused a nuisance that resulted in damages to Plaintiff. State court's judgment that "more likely than not" the actions were intentional and done with intent to cause harm to plaintiff was sufficient to apply collateral estoppel in adversary action.

Hussein v. Shugarman, 2012 WL 2150335 (Bankr. N.D. Ohio 2012) – Confirmed arbitration award was collateral estoppel in action under Section 523(a)(2)(A) and (a)(6). Arbitration award against the Defendant, awarding the Plaintiffs compensatory damages of \$332,254.55; and punitive damages of \$191,761.01 for attorneys' fees and costs. Plaintiffs hired debtor to build Plaintiff's new home. At end of the project, debtor presented Plaintiffs with contractor affidavits from suppliers and subcontractors, and Plaintiff paid debtor balance of contract price. After subcontractors and suppliers placed numerous mechanic liens on property, Plaintiffs discovered that debtor had forged contractor affidavits for purposes of obtaining final payment without making payment to suppliers and subs. Arbitration award found that Plaintiffs paid twice to have work performed because they were forced to pay subcontractors which the Defendant failed to pay, resulting in mechanics liens. Defendant fraudulently requested and received payments from the Plaintiffs' lender. Defendant exhibited a conscious disregard for the rights of the Plaintiffs in their contractual relationship, thereby warranting an award of punitive damages. Debtor intentionally used false and forged contractor affidavits to deceive the Plaintiffs, the Plaintiffs were deceived and damaged by the Plaintiff and Plaintiffs then had to pay the unpaid suppliers, causing Plaintiffs to pay for the same work twice, the Defendant acted with the willful intent to injure the Defendant and the Defendant acted with actual malice toward the Plaintiffs. Factual findings in confirmed arbitration award met each requirement under Section 523(a)(6)(A) for finding of willful and malicious injury. Debtor knew that affidavits were forged and presented them with intent to obtain money, with full knowledge that Plaintiffs would later be required to pay for same services and materials again, constitute willfulness; and debtor's actions were without any colorable legal basis or justification, supporting finding of malice; sufficient to warrant judgment of non-dischargeability.

Ewers v. Cottingham, 2012 WL 2161623 (6th Cir. BAP 2012)) – Ordinarily, one spouse will not have debt declared non-dischargeable based solely on conduct of other spouse. However, where debtor was aware of and participated in spouse's scheme, debtor can be liable and debt can be non-dischargeable. Debtor's spouse embezzled money from her employer. When debtors filed bankruptcy, employer sought judgment that the debtor was liable for embezzled funds as debtor conspired with the spouse as part of the embezzlement, seeking to convert the employer's funds, which constitutes willful and malicious injury. Court concluded that debtor was obligated to spouse's employer and that debt was no-dischargeable as willful and malicious injury. Debtor knew that debtor and spouse were spending amounts far in excess of their combined earnings. Debtor had full access to joint bank account into which spouse deposited embezzled funds and periodically withdrew large sums that debtor knew or had to have known far exceeded combined incomes. Debtor and wife made large purchase and spent hundreds of thousands of dollars on home improvements and renovations at a time

when debtor and spouse had combined annual income of about \$50,000.00. The significant disparity between income and expenses; debtor's access to and participation in the family finances; the cost of the home improvements; and debtor's knowledge that spouse had also embezzled large sums from a prior employer provided ample evidence that debtor was active participant in the scheme.

Savage v. Murphy, 2012 WL 2006310 (Bankr. W.D. Ky. 2012) – Debtor hired people to “physically harm Plaintiff and these others did in fact cause physical harm and injury to the Plaintiff.” Defendant was arrested, indicted and pled guilty to assault. Plaintiff then filed action in state court and received default judgment for actual and punitive damages. Judgment held non-dischargeable. “Assault is almost the very definition of willful and malicious injury. ... There is no doubt that the defendant committed assault upon the Plaintiff, having plead guilty to that crime.”

D.T. McCall & Sons v. Martelle, 2012 WL 1833906 (Bankr. E.D. Tn. 2012) – Willful and malicious requires an intentional act done with intent to cause injury or where consequences are substantially certain to result from act. Malice can be demonstrated by a debtor acting in conscious disregard of duties or without just cause or excuse, but does not require evidence of ill-will or specific intent. Creditor sustains burden by showing that debtor committed wrongful act; that debtor undertook the act intentionally; the act necessarily caused injury; and debtor lacked any just cause or excuse for the act. Debtor committed willful and malicious act when debtor received insurance proceeds in connection with items destroyed in fire but did not use the proceeds to pay the secured creditor holding a properly perfected lien on the destroyed items. Debtor knowingly obtained and used the insurance proceeds even though funds were proceeds of insurance on debtor's household goods on which creditor held security interest. Debtor cashed insurance check and kept proceeds in safe at neighbor's house to keep funds out of reach of creditors; debtor had experience in construction business and knew how insurance proceeds worked for payment of claims; debtor had significant business experience handling books and records and preparing tax returns for construction business; and debtor offered no explanation of justification for use of proceeds other than to pay secured claims.

Automotive Finance Corp. v. Leonard, 2012 WL 1565120 ((Bankr. E.D. Tn. 2012) – Willfulness requires deliberate act that intentionally causes injury. Malicious requires that act be done in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent to do harm. Conversion of a secured creditor's collateral may constitute willful and malicious injury. Complaint that alleged that corporation, through or at the direction of the Debtor, intentionally did not pay creditor the sales proceeds despite knowledge of its security interest in the proceeds and that the Debtor knew that injury was substantially certain to occur; and that the Debtor “appropriated” and “converted” the sales proceeds, “with fraudulent intent,” “for his own use or benefit,” and that the wrongful acts were “without just cause or excuse” stated cause of action for willful and malicious injury.

Tweedie v. Hermoyian, 466 BR 348 (Bankr. E.D. Mi. 2012) – Arbitration award not collateral estoppel on issue of willful and malicious injury under Section 523(a)(6). Arbitration complaint did not allege that debtor's actions were willful and malicious, but alleged only that actions were “wanton and willful”, precluding finding that issues of willful and malice were actually litigated. Arbitration award also did not find that debtor ever intended to injure plaintiff. Although award made numerous findings that debtor intended to deceive plaintiff, that does not equate to finding the debtor intended that plaintiff would lose those funds or that debtor was substantially certain that plaintiff would suffer injury.

BCC Holding, Inc. v. Alexander, 212 WL 1122952 (Bankr. W.D. Tn. 2012) – Conversion requires proof that defendant wrongfully obtained or exercised possession or control over property of plaintiff. Complaint sufficient under *Twombly* standard to state cause of action by alleging that Defendants collected rent from tenants in property that had been foreclosed on and was now owned by Plaintiff. Complaint alleged that Plaintiff was the owner of the property; that the property was occupied and used as rental property; that upon foreclosure, Plaintiff became entitled to all rental income and that Defendants lost all rights to the rental income; and that Defendants nonetheless continued to collect and keep the rents, thereby converting over \$128,000 of rental income that belonged to Plaintiff. Allegations that Defendants received rents that belonged to Plaintiff and did not pay the rents to Plaintiff sufficient to establish that Defendants exercised control over property of Plaintiff. Allegation that Plaintiff made demand on Defendants evidenced Defendants' exercise of control was intentional and in defiance of true owner's rights. Plaintiff not required to plead with exactitude specific dates of the underlying promissory notes and mortgages, notices of default that lead to the foreclosure, specific addresses of properties involved, or specifically how Plaintiff calculated damages. Complaint fairly apprised Defendants of primary factual allegations, and parties could through discovery process.

First Tennessee Bank, NA v. Hansen, 2012 WL 1156409 (Bankr. E.D. Tn. 2012) – Section 523(a)(6) requires evidence that debtors intentionally and willfully caused injury. Willful requires that the act be voluntary, intentional or deliberate, with intent to cause injury or where injury is substantially certain to result, not merely an intentional act that leads to injury. Malice requires that debtor engage in willful conduct without cause or excuse, or in conscious disregard of duties. Malice does not require determination of ill-will or specific intent, but does requires something beyond negligence or recklessness. Failure to act can constitute willfulness where intentional acts were done by another over whom the debtor had control but failed to exercise control and knowingly or negligently allowed third party to cause harm. Bank failed to

demonstrate willfulness sufficient to support finding of non-dischargability. Debtors' grandson lived with debtors in house that secured the Bank's loan. Grandson engaged in production of methamphetamines that so contaminated house that, after foreclosure, Bank had to gut house to cure contamination, resulting in substantial losses. Evidence did not indicate that debtors were aware of, directed, condoned or ever benefitted from grandson's illegal activities. Bank also did not demonstrate willfulness. Bank could not demonstrate that debtors knew of or condoned grandson's illegal activities, or that debtors knew or reasonably should have known that activities were causing damages to property.

Clearview Designs, Inc. v. Angelilli, 2012 WL 76033 (Bankr. N.D. Ohio 2012) – Plaintiff must establish that the injury is both willful and malicious. Willful requires deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury and includes injury is substantially certain to result from the debtor's actions. Malicious injury requires action taken in conscious disregard of the debtor's duties or without just cause or excuse. State Court Judgment in favor of Plaintiff for violation of State Trade Secrets Act constitutes judgment between same parties for purposes of Collateral Estoppel. State Court judgment found that Debtor caused injury and intended to cause injury or that injury was substantially likely to occur when Debtor misappropriated trade secrets. Judgment further determined that Debtor had no legal right to misappropriate the trade secrets constituting malicious actions. Issues in Section 523(a)(6) action were determined in State Court Judgment. Collateral estoppel required summary judgment in favor of Plaintiff determining debt to be non-dischargable.

McCurdie v. Strozewski, 458 BR 397 (Bankr. W.D. Mi. 2011) – Determination as to whether debt results from willful and malicious injury and whether debt should be excepted from discharge lies solely in bankruptcy court. However, court will apply collateral estoppel where there is prior final judgment that incorporates findings of fact and determine whether, based on the facts that were actually and necessarily determined in the other tribunal, matter rises to level of willful and malicious. State court judgment for intentional infliction of emotional distress established that debtor either intended to cause harm or was so reckless that reasonable person would now harm would result, and that actions were extreme and outrageous demonstrated that actions were willful and malicious.

Busenhart v. Repass, 2011 WL 6013089 (Bankr. E.D. Ky. 2011) – State Court Judgment holding that actions of debtor, although potentially libelous, did not cause any damage to Plaintiff collaterally estopped Plaintiff from recovering under Section 523(a)(6). Once the issue of damages had been fully and fairly litigated in state court action, bankruptcy court would give preclusive effect to state court judgment.

Kenneth E. Watts Real Estate Management v. Lister, 2011 WL 6908967 (Bankr. E.D. Ky. 2011) – Courts have identified a non-exclusive lists of misconduct that qualifies as willful and malicious, including intentional infliction of emotional distress, malicious prosecution, conversion, assault, false arrest, intentional libel, and deliberately vandalizing the creditor's premises. Evidence indicated that Debtor intentionally vandalized rented residence. Debtor caused serious damage a. extensive damage to the garage door which required replacement; b. window screening removed in such a manner to require replacement; c. fecal matter on the toilet lid and in the bathtub; d. broken incandescent bulbs in overhead fixtures leaving the screw cap in the socket; e. vandalism to the electric system of the house, including cross wiring of the thermostat; f. a substance spilled on the carpet throughout the house which could not be cleaned and required replacement; g. a towel rod removed; and h. filth and discarded furniture throughout the house and yard. Damage went well beyond "normal wear and tear". Debtor failed to offer any evidence to rebut willful and malicious nature of harm. Debt excepted from discharge.

McCallum v. Pixley, Case No. 10-6665 (Bankr. E.D. Mi. 2011) – Under Michigan Law, a "true default judgment", defined as one entered without the defendant having participated in defending the case, is entitled to preclusive effect in later action between the same parties. Court must determine what issues were "actually determined" as part of default judgment. State Court complaint for conversion could meet requirements of "willful and malicious" under Section 523(a)(6) if conversion under Michigan is based on willful and intentional deprivation of another of property. However, allegations of complaint failed to demonstrate willful and malicious where complaint alleged only that debtor converted property, as Michigan also allows action for conversion for unwittingly converting property or for use of property in improper way or improper purpose, even where use did not actually deprive another of possession. Judgment for conversion, that did not expressly find willful and malicious conversion as opposed to "unwitting" conversion, did not establish all elements of willful and malicious injury.

Higbe v. Debaeke, 2011 WL 5563543 (Bankr. E.D. Mi. 2011) – Section 523(a)(6) requires willful and malicious injury by the debtor to another entity or to the property of another entity. Conversion may constitute willful and malicious injury depending on whether the debtor intended to cause the harm or was substantially certain that the harm would occur. Conversion does not require intent to violate property rights of another or knowledge that one is violating property rights of another. Conversion requires only that party intentionally retain the property even if the holder of the property is unaware of another person's property interest. Debtor converted personal property belonging to plaintiff where Debtor alleged that Debtor held a possessory security interest in the property but could not evidence that parties intended to create security interest as required by Uniform Commercial Code. Instead, it appeared that Debtor's possession of the property

and Debtor's later loan to Plaintiff were unrelated transactions and Debtor's alleged security interest was an "afterthought" by the Debtor rather than an agreement between the parties at the time of the loan transaction. Although Debtor may not knowingly or intentionally converted property, Debtor did exert domain over property by refusing to return property to Plaintiff. Further, although Debtor converted property, Debtor's actions did not constitute willful and malicious injury as Debtor believed, albeit mistakenly, that he had the right to withhold possession until repaid. Debtor did not act with intent to cause harm or that Debtor's actions were willful within the scope of 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) *aff'd* 2012 WL 3732514 (N.D. Ohio 2012) – Employee's actions in engaging in competing business to perform services that employer could not or would not perform, even if proven to constitute breach of fiduciary obligation, does not amount to 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) *aff'd* 2012 WL 2161623 (6th Cir. BAP 2012) – 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-dischargeability.

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-dischargeability 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 dischargeability 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-dischargeability 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-dischargeability 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-dischargeability 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 dischargeability under Section 523(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 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 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 dischargeability 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 (5th 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 intentionally 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 (9th 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 (6th 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

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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 (9th 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 (6th 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.

8.95 Section 523(a)(7)

Commonwealth of Pennsylvania v. Styer, 2012 WL 3717953 (Bankr. E.D. Pa. 2012) – Restitution obligation imposed on defendant as condition for probation are dischargeable. Recognizing split of circuits on issue where restitution is designed to reimburse crime victims, court concluded that although restitution is paid to the government, restitution order was based on specific amounts to be reimbursed to each person harmed, with a specific amount owed to each victim. Section

523(a)(7) requires that the pecuniary benefit of the restitution must flow to the government. Where the government was merely collecting, and would pass along sums to victims themselves, amounts are not excepted from discharge as penalty or fine.

Michigan Attorney Grievance Comm'n v. Stasson, Adv. No. 11-6930 (Bankr. E.D. MI. 2012) - Order issued by Michigan Attorney Discipline Board required attorney to pay restitution and costs does not create nondischargeable obligation under section 523(a)(7). Section 523(a)(7) excepts from discharge a fine, penalty or forfeiture that is not intended as compensation for actual pecuniary loss. An Order to pay restitution to a former client is not a dead "payable to" or "for the benefit of" a governmental unit. Further, any award of restitution is clearly intended to compensate the former client for the client's actual pecuniary loss, and is not intended to be penal nature. Order to pay costs incurred by State Bar, although constituting a debt payable to a governmental unit, constitute an effort to reimburse the State Bar for the out-of-pocket expenses incurred in disciplinary proceedings.

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.

8.96 Section 523(a)(8)

Educational Credit Management Corporation v. Jorgensen, Case No. 12-1055 (9th Cir. BAP 2012) – Courts have equitable authority to partially discharge student loans and to determine amount and terms of payment of partial discharge. However, discretion is not unlimited and must meet good faith effort to repay as much of debt as possible while maintaining minimal standard of living. Undue hardship must be more than temporary financial adversity but does not require finding of "utter hopelessness". Debtor met *Brunner* test for undue hardship supporting partial discharge of student loans. Debtor held a PhD but suffered pancreatic cancer that substantially reduced her ability to work and increased her medical costs. Debtor had average monthly income that was less than average monthly expenses. Expenses were larger than would normally be considered "minimal" because debtor had serious health issues. Debtor's purchase of new car would not constitute unreasonable expense where old car was quite old and in disrepair and needed thousands of dollars in repairs. Food budget, while higher than normal for one person, resulted from health problems that required special diet and debtor resided in Hawaii where food costs were higher. Debtor's clothing expense of \$150- per month was also higher than normal because debtor's cancer resulted in substantial weight loss that required her to replace entire wardrobe. Evidence did not indicate that problems were temporary or transient. Health issues were constant risk given possibility or recurrence and debtor's employment was tenuous because health issues may preclude her from continuing to work. Evidence indicated that debtor was optimally employed and maximized her income. Debtor had made student loan payments prior to becoming ill and had entered into loan repayment plan in good faith. Debtor rejected later Graduate Payment Option because debtor believed that she would not be able to make the payments given budget and health issues. However, evidence also indicated that while Debtor's schedule J included a rent expense, debtor would not have an actual rent expense for the next year as debtor would be a visiting professor at a school where an apartment would be provided; and while debtor's purchase of a vehicle was not improper, debtor should not have done so immediately before leaving on her visiting professorship and then placing car in storage while she was gone. Car payments would have been unnecessary and debtor could have used those payments for her student loans until her return, and purchased a car at that point. Debtor's rejection fo a proposed payment arrangement, without more, is not evidence of lack of good faith. Total of car payments that debtor made on the car while the car was in storage, and the amount budgeted for rent for the time that debtor would not have a rental expense were funds that could be available to creditor. Student loans excepted form discharge to extent of total rent and car payments during visiting teaching assignment, with balance being discharged.

Bene v. Educational Credit Management Corp., 474 BR 56 (Bankr. W.D.N.Y. 2012) - Student loan nondischargeability provision forgives most of a debtor's prior bad or immoral choices, lapses in judgment, or mistakes; what it does not excuse is debtor's decision either to become or remain poor after bankruptcy petition is filed and while better earning options are available and student loan debt remains unpaid. *Brunner* "undue hardship" test looks to the present and the future, not to the distant past. Debtor's moral choice 24 or more years earlier not to complete her studies and to forego opportunities that she then had to improve herself and optimize her potential to earn more money, so that she could care for her infirm parents, was not relevant. "Minimal standard of living" is safe and decent standard of living and may be approximated by average family income of twice the government-set poverty figure. Sixty-four-year-old Chapter 7 debtor who had worked on assembly line for past twelve years at hourly wage less than \$13.00 and who, as result of leaving school early to care for her infirm parents, had never obtained degree, professional diploma or license and had no prospects of financial improvement satisfied "undue hardship" test. Debtor's current income was insufficient to allow her to maintain minimal standard of living and still make normal payments on student loans. Debtor, while having paid little on her student loan debt, had paid what she could afford and sought to discharge this debt only late in life, more than 24 years after debt was incurred

In re Rumer, 469 BR 553 (Bankr. M.D. Pa. 2012) – Debtor's claim that student loan debt did not qualify for exception under Section 523(a)(8) because loan was used for purposes other than educational expenses, rejected. In determining whether loan is "student loan", analysis focused on initial purpose of loan, not actual use of loan proceeds.

Smyth v. Edamerica, Inc., Case No. 11-8035 (6th Cir. BAP 2012) – Fact that debtor listed student loans on Schedule F and received discharge does not discharge student loans where debtor did not file adversary proceeding and did not otherwise request finding of undue hardship. Debtor's reliance on *Espinosa* misplaced, as *Espinosa* was Chapter 13 case that turned on confirmation of plan, neither of which occurred in this Chapter 7 case.

Haney v. Educational Credit Management corp., 2011 WL 6000886 (Bankr. E.D. Ky. 2011) – Confirmed Chapter 13 Plan did not result in discharge of student loans where Plan did not have any provision that addressed age or discharge of student loans and discharge order was generic and did not provide for the discharge of the student loans. Absent some express provision in Plan providing for discharge of student loans, determination of dischargeability could be made only through adversary proceeding.

Malone v. Higher Education Student Assistance, 469 BR 768 (Bankr. N.D. Ohio 2012) – "Minimal standard of living" centers on debtor's income and expenses which are reasonably necessary for debtor to meet basic needs. Debtor is not expected to live in abject poverty but must use best efforts to maximize income and do some belt-tightening by eliminating amenities to which debtor may have become accustomed. Debtor had income of \$45,000 per year which was not "minimal". Expenses of \$249 per month for household supplies included \$125 per month for diapers which is reasonably necessary expense. Recreation of \$150, while "stretching the envelope" is not unreasonable or extravagant and constituted simple items such as movies or outings to YMCA. However, debtor's \$100 per month "charity" expense was not reasonable where expense was not actually charity but was gifts for children and close family members which are not reasonably necessary for minimal standard of living. However, even adding back in the charity produces minimal positive cash flow, certainly not enough to make any meaningful payment on debtor's student loans. That debtor, his girlfriend and their son resided in low-income government subsidized housing was some evidence of financial hardship and debtor's overall budget was very tight, evidencing an inability to repay student loans while maintaining minimal standard of living. Debtor did not demonstrate that nay financial hardship was actually "undue" or beyond scope of hardship normally faced by debtors in bankruptcy. Debtors children did not appear to have any special needs. Debtor did not evidence a serious medical condition and was only 30 years old. Debtor had recently obtained new employment that appeared stable and provided the opportunity for future increases, and was consistent with what debtor anticipated earning when he went to school, indicating that financial condition is not the result of events beyond the debtor's control such as illness, disability, lack of usable job skills or existence of large number of dependents, and which are not borne of the free choice of the debtor. Debtor made only a single payment and used a credit card to make that payment. Debtor has not made all efforts to pay where debtor filed for bankruptcy shortly after filing; and student loans consisted of virtually all of debtor's debts, which cut against discharge. Debtor filed bankruptcy only a year after graduating. Taken as a whole, evidence indicated that debtor was fiscally sound and was attempting to use the bankruptcy process to quickly receive a free education. Debtor's failure to meet the last two requirements of the *Brunner* test precluded discharge of student loans.

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 (1st 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 dischargeability 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 (8th Cir. BAP 2010) – Discharge Order does not include discharge of student loan unless debtor affirmatively secures a hardship determination. Action to determine dischargeability 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 (6th Cir. 2008) – Debtor’s complaint to determine dischargeability 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 dischargeability 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.

8.97 Section 523(a)(9)

Bridges v. Grange Mutual Casualty Company, 2011 WL 5837053 (Bankr. W.D. Ky. 2011) – Section 523(a)(9) does not require formal action in Bankruptcy Court to declare debt non-dischargeable. Creditor, as the holder of a claim by subrogation as a result of insurance payouts, did not violate discharge injunction by filing suit in state court after entry of discharge, where complaint alleged that debtor caused injury while operating a motor vehicle while intoxicated.

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.

8.98 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.

8.99 Section 523(a)(11)

8.100 Section 523(a)(12)

8.101 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).

8.102 Section 523(a)(14)

8.103 Section 523(a)(15)

Bringham v. Adams, 2012 WL 2467084 (Bankr. E.D. Ky. 2012) – Order directing debtor to “buy out” ex-spouse’s interest in marital property, entered in course of divorce proceeding, was non-dischargeable under Section 523(a)(15). Ex-spouse’s later reduction of obligation to money judgment when debtor failed to make payments did not “convert” obligation into something other than obligation incurred in divorce proceeding.

Taylor v. Taylor, Case No. 11-103 (10th Cir. BAP 2012) – Plain and unambiguous language of Section 523(a)(15) includes any obligation arising out of a separation agreement, divorce decree or order of court of record. Obligation arising out of inadvertent overpayment of support obligation is, itself, a non-dischargeable obligation. The obligation arises out of a domestic support obligation and is owed to an ex-spouse and is not an obligation for support. Obligation to pay alimony was to terminate when spouse co-habited. Spouse (now debtor) began to cohabit but did not disclose this to either her ex-spouse or to the court, resulting in continued payments of alimony to which debtor was not entitled.

Baer v. Cabrian, 2012 WL 1430934 (Bankr. E.D. Ky. 2012) – State Court has concurrent jurisdiction with Bankruptcy Court to determine dischargeability of debt under Section 523(a)(5). Adversary proceeding dismissed where Bankruptcy Court had already abstained from ruling on issue pursuant to 28 USC Section 1334 to allow parties to proceed in State Court.

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.

8.104 Section 523(a)(16)

Bank of America v. Pigg, 453 BR 728 (Bankr. M.D. Tn. 2011) – Bankruptcy Code § 523(a)(16) provides that a debtor shall not receive a discharge for condominium fees and assessments that become due and payable after the bankruptcy petition is filed as long as the debtor or the trustee "has a legal, equitable or possessory ownership interest" in the unit. In amending Section 523(a)(16) Congress "could not have foreseen the world and United States financial crisis that crashed Wall Street, sunk the real estate market, and affected, to some degree, almost every American". Lenders choose not to foreclose on their collateral leaving homeowners in limbo. A chapter 7 debtor who has surrendered her home in bankruptcy and been relieved of any personal liability on the mortgage cannot truly be given a fresh start where HOA fees accumulate until lender chooses to foreclose. If the lender never forecloses, that homeowner's liability for the HOA fees continues in perpetuity, thwarting the goals of the entire Bankruptcy Code. Court Ordered that the Chapter 7 trustee sell the property pursuant to 11 U.S.C. § 363 and distribute the proceeds to administrative expenses incurred by the chapter 7 trustee; then the claim of the HOA for all fees and expenses covered by their first priority lien; then the Bank to the extent of its lien; then to the Second mortgage holder to the extent of its lien; then to the chapter 7 estate. Bank and the HOA consented to the sale by their inaction as equity demands that court fashion remedy that balances rights of the lienholders and the right of a debtor to a fresh start.

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.

8.105 Section 523(a)(19)

Barton v. Stalter, Adv. No. 11-6058 (Bankr. E.D. Mi. 2012) – Section 523(a)(19) requires a violation of federal securities law or common law fraud in connection with purchase or sale of security; and liability results from judgment or order, settlement agreement, or court or administrative order. Statute requires both that there must be securities violation and a settlement or final resolution. State Court consent judgment was not res judicata on issues where debtor in state court judgment expressly did not admit liability or guilt. Neither state court judgment nor settlement agreement contained any determination of culpability for violation of any securities law or regulation or any fraud. State court complaint contained multiple counts that were not based on securities violation and judgment did not allow court to determine which count on which agreed judgment was predicated.

Oklahoma Department of Securities v. Wilcox, Case No. 10-6056 (10th Cir. 2012) – Non-dischargeability under Section 523(a)(19) precludes discharge of debt that results from securities law violation. Judgment for unjust enrichment that results from someone else's violation of securities laws is not within scope of Section 523(a)(19). Debtor was investor in what proved to be ponzi scheme. Debtor received distributions from operation of scheme before scheme collapsed. Oklahoma sued debtor to recover the distributions under theory of unjust enrichment. There was no evidence that debtors themselves engaged in any conduct that would constitute violation of securities laws or that debtor conspired with the operator of the ponzi scheme to violate securities laws. Judgment against debtor discharged.

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 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).

8.106 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 Dischargability

8.107 Generally

Davis v. Castro, Adv. No. 11-7082 (Bankr. E.D. Mi. 2012) - Adversary proceeding contesting dischargeability under section 523(a)(2), (4), or (6) must ordinarily be brought within 60 days after first date set for meeting of creditors. However, deadlines are not jurisdictional in nature and are generally subject to defenses of waiver, estoppel and equitable tolling. Adversary proceeding dismissed where plaintiff did not file within 60 days although plaintiff had actual notice of the commencement of the bankruptcy case. Plaintiffs alleged misunderstanding concerning the impact of the bankruptcy proceeding on personal relationships between plaintiff and defendant did not excuse plaintiffs lack of diligence or failure to timely commence the adversary proceeding.

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. Any 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-dischargability 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. Plaintiffs 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.

8.108 Extension of Time to Object

In re Abdallah, Case No. 12-45446 (Bankr. E.D. Mi. 2012) – Court lacks jurisdiction to extend deadline to file objections under Section 52 once the deadline expires. Deadline elapsed three days before Debtor and Trustee submitted stipulation to court for entry of order extending deadline. Court would not enter stipulated order.

8.109 Construction of Pleadings

In re Logan, 2012 WL 3628771 (Bankr. N.D. Ohio 2012) – Pro se creditor who was sued by Debtor “intended” response to complaint to be both an answer and a counterclaim. Pleading was captioned “Complaint to Determine Dischargability and Answer”. Creditor accompanied pleading with request to be treated as indigent and to be relieved of filing fees. Clerk’s docketing only as an answer and not a counterclaim based on creditor’s failure to tender the filing fee did not change fact that pleading was intended as both. Clerk instructed to treat pleading as answer and to open separate adversary proceeding to determine dischargeability of debt.

8.110 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 Mehlhose, 469 BR 684 (Bankr. E.D. Mi. 2012) – Debtors' case dismissed with 2 year bar to re-filing as case filed in bad faith. Almost all of the listed debts had been excepted from discharge in prior bankruptcy case, such that Chapter 7 proceeding could not serve any legitimate purpose and appeared to be continuation of debtor's state and bankruptcy court course of conduct designed solely to hinder, delay and defraud creditors. Debtors' filing under Chapter 7 was a waste of time, and caused undue and unnecessary delay of at least three months and caused the Trust to incur unnecessary expense in filing a motion to dismiss what was then a senseless Chapter 7 case. Debtors lied under oath substantially understating actual income on Schedule I. Given magnitude of difference between stated income and calculated income based on pay stubs, debtors must have known, and in fact did know, that Schedule I was false when debtors signed and certified its accuracy. Had Schedule I been accurate, it would have disclosed substantial income that could have been used to fund Chapter 13 plan. Belated conversion of case to Chapter 13 would not avoid dismissal where petition itself was tainted with fraud and lack of good faith, itself warranting dismissal under Section 1307(c).

Farmers National Bank v. Lockridge, 2012 WL 1969254 (Bankr. E.D. Ky. 2012) – Cause for dismissal can be based on pre-petition conduct alone. Court will evaluate 14 factors: whether debtor reduced creditors to a single creditor in the months prior to filing; debtor failed to make lifestyle adjustments or continued living and expensive or lavish lifestyle; debtor filed case in response to judgment or collection action with intent to avoid large single debt; debtor made no effort to repay debts; unfairness of use of Chapter 7; debtor has sufficient resources to pay debts; debtor is paying debts to insiders; schedules inflate expenses to disguise financial well-being; debtor transferred assets; debtor is over-utilizing protections of code to unconscionable detriment of creditors; debtor employed deliberate and persistent pattern of evading single major creditor; debtor failed to take candid and full disclosures; debts are modest in relation to assets and income; and debtor has multiple bankruptcy filings or other procedural gymnastics. Motion to Dismiss denied where case was first bankruptcy filing; although debtor filed on eve of collection procedures, they had already satisfied large portion of debt owed to moving creditor through foreclosure of mortgage; debtor could have filed earlier and stopped foreclosure but did not do so; debtors have large unsecured debt beyond that owed to moving creditor. Record contained no evidence that debtor intended to abuse bankruptcy system or defraud moving creditor. Debtor did not undervalue assets as prior efforts to market assets were unsuccessful and assets were held in trust in which debtor held minority interest, making family members the only likely purchaser in any forced sale. Record did not indicate any effort to conceal or maintain lavish lifestyle or that debtor did not attempt to make appropriate lifestyle adjustments.

In re Smith, 468 BR 235 (Bankr. W.D. Ky. 2012) – Debtor's petition did not evidence bad faith requiring dismissal. Debtor filed Chapter 7 to discharge single debt, consisting of deficiency obligation on mortgage that debtor stopped paying. Debtor did not suffer any sudden calamity, but walked away from house that was "underwater" and on which debtor no longer desired to continuing paying. Debtor had made mortgage payments for more than three years before walking away and had attempted to negotiate either a short sale or deed in lieu of foreclosure. There was no evidence of any suspicious transfers to insiders or any intentional undervaluing of assets or overstatement of expenses and debtor did not live lavish or excessive lifestyle, but lived modestly within means.

In re Burton-Katzman Development Company, Inc., Case No. 10-66734 (Bankr. E.D. Mi. 2012) – Chapter 7 proceeding dismissed where schedules showed no assets or liabilities and were, in fact, completely blank; and case was allegedly filed pursuant to a corporate resolution dated 2 years after debtor had filed Certificate of Dissolution with State of Michigan. Petition filed in bad faith effort to stall litigation between City of Dearborn as Plaintiff and Debtor and its principals as defendants. Court imposed sanctions against Debtor and its principals for fees and expenses incurred by City in having case dismissed.

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 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.

In re Vandenbosch, 459 BR 140 (M.D. Fl. 2011) – Debtor cannot be required to include social security income on Schedule I or to include that in determining whether plan payment constitutes all disposable income. BAPCPA excludes social security from calculation. Because social security benefits are not a component of projected disposable income, a plan cannot be rejected for failure to include such benefits as projected disposable income. A necessary corollary is that a finding of bad faith may not be based upon such a failure.

In re Westing, 2010 WL 2774829 (Bankr. D. Idaho 2010) - Above-median-income debtor's failure to account for Social Security income on Schedule I resulted in a lack of good faith. Current Monthly Income exclusion of Social Security in calculating "projected disposable income" under Section 1325(b), does not preclude the Court's consideration of that income when evaluating a plan for good faith. Debtor's plan proposed a monthly payment of only \$165 and would produce dividend of 1.9% while debtor had disposable income of more than \$2,300 if the Social Security was included.

In re Thomas, 2010 WL 5630827 (Bankr. N.D. Ga. 2010) – Exclusion of Social Security income from Current Monthly Income does not provide a basis for a debtor to fail to disclose that income on Schedule I or monthly disposable income on Schedule J. Debtor's proposed retention of Social Security income would allow debtor to retain a substantial surplus at the expense of creditors, in violation of Section 1325(a)(3).

In re Welsh, 440 BR 836 (Bankr. D. Montana 2010) - Congress' express exclusion of Social Security income from the calculation of Current Monthly Income, buttressed by 42 USC Section 407 which prohibits subjecting Social Security income to the operation of any bankruptcy or insolvency law, acted as an absolute prohibition against compelling a debtor to include Social Security income in either the calculation of CMI or in calculating income on Schedule I. Section 101(10A)(B) and 42 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 Kuhns, 2011 WL 4713225 (Bankr. N.D. Ohio 2011) – Married debtor must include income of non-filing spouse on Schedule I unless debtor and non-filing spouse are separated. Debtor must also include on Schedule J the full monthly expenses of debtor and his family. Information is required by forms, and is necessary to evaluate possible dismissal under Section 707(b)(3) as well as whether a presumption of abuse arises under Section 707(b)(2). Spouse's refusal to share financial information is not a basis to fail to provide that information on Schedules I and J or on the Means Test form. Debtor's failure to provide complete information on Spouse's income and expenses constitutes a violation of Section 521, constituting cause for dismissal under 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 pater 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-dischargeability 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)

Ng v. Farmer, 2012 WL 3890063 (9th Cir. BAP 2012) – Case found to be abusive where debtor's expenses included contribution of \$520 per month to 401-k account and \$340 per month repayment of 401-k loan. Retirement contributions were not reasonably necessary where debtor and his wife were in their early 40's and in good health, and debtor already was already receiving a military pension. Debtor intended to work at least another 20 years, such that a 3-5 year interruption in contributions would not have substantial impact on retirement savings and debtor, after completing Chapter 13, would still have ample time to find a second pension fund. 401-k loan repayments are not deductible. Loan payment to retirement income is considered disposable income because debtor is in essence repaying a loan to himself. It would be unfair to allow debtor to commit part of earnings to repayment of debtor's own retirement fund. Debtor's proposed deduction of \$400 per month to pay a back tax debt was excessive where debtor in Chapter 13 could repay that debt in full with a payment of only \$170 per month, freeing up substantial funds for distribution to other creditors. Court is also permitted to consider post-petition increases in income in determining ability to repay. Evidence indicated that debtor received increase in income post-petition which, when combined with disallowed expenses, would produce substantial dividend to unsecured creditors in Chapter 13.

In re Walterhouse, Case No. 11-32645 (Bankr. E.D. Mi. 2012) – Court's order denying motion to dismiss not erroneous. Debtor's testimony that he pays money to parents in various amounts to help parents financially when they needed it did not evidence any wrongful payment of pre-petition debts. Debtor's pre-petition transfer of property to brother was in connection with brother's agreement to provide financial help to parents and did not indicate any intent to defraud. Debtor did not have lavish lifestyle. Although creditor did not agree to certain items in budget, overall budget was not unreasonable. Fact that debtor used money borrowed from creditor to pay other debts did not support dismissal as creditor made loans to debtor without restrictions on use of money and the funds were under debtor's sole control.

Debtor did not have ability to repay debts, where debtor's income with Merrill Lynch was highly speculative and not remotely sufficient to pay debts. Evidence did not indicate any attempt to evade debt to creditor. Although debtor at first disputed debt, and thereafter attempted to negotiate a settlement, debtors' actions were reactionary and the bankruptcy resulted from debtor's inability to deal with the debt owed to creditor.

In re Farkas, 2012 WL 3257855 (Bankr. E.D. Mi. 2012) – Case dismissed as abusive where debtor's expenses included retirement loan repayments that are not reasonable necessary. Retirement account contributions are not per se allowed or disallowed but must be evaluated on case by case basis looking at totality of circumstances including amount of existing savings, debtor's age, and years left until retirement. Debtor's 401-k loan payments were not reasonably necessary where debtor, age 39, already had \$127,000 in retirement savings plus separate pension plan through employer. Debtor was relatively young and had many years remaining before retirement. Disallowing retirement loan payments as reasonably necessary would produce plan that repaid 29%. Even assuming debtor's testimony of need to replace vehicle during Chapter 13 case was accurate, debtor could still produce 14% dividend. Filing was abusive and would be dismissed unless debtor elected to convert to chapter 13.

In re Golematitis, 2012 WL 3583154 (Bankr. E.D. Mi. 2012) – Court must consider disposable income, defined as income that is not reasonably necessary for maintenance or support of debtor or a dependent. While debtor will not be required to live in poverty, debtor must engage in belt-tightening. Debtor had disposable income. Debtor would not be allowed to deduct cost of private school expenses absent compelling circumstances, such as a special educational need or proof that the public school alternative would be academically inadequate. Mere preference for private or religious schooling is not sufficient. Expenses for children's sports, figure skating, baseball and soccer were not excessive where debtors' total family recreational budget was \$200 including these activities. Debtor-wife's 401-k contributions were not unreasonable where debtor-wife was 45 years old and had only \$14,000 in total retirement savings. Home maintenance expenses of \$266 were not unreasonable where \$120 was payment on a balance owed for roof repairs and \$146 was for general maintenance. Without the roof repair, house would have been uninhabitable; and balance of \$146 was "far less" than what other courts have concluded is excessive. Proposed payments to one unsecured creditor that resulted from debtor's purchase of law practice while simultaneously paying nothing to other unsecured creditors would not be permitted in chapter 13, requiring court to add back into income the amount of this payment. After adjusting expenses, debtors could pay a 100% dividend over a 60 month chapter 13 plan. Chapter 7 petition was abusive, requiring dismissal or conversion.

In re Pearce, 2012 WL 3042305 (Bankr. E.D. Ky. 2012) – Case was abusive under Section 707(b)(3). Debtors had \$542,610.00 in exempt retirement assets and a \$43,250 homestead exemption. Husband earned \$8,432.67 gross monthly income and Wife received \$1600 in unemployment benefits. Debtors purchased three separate vacant lots ranging from \$80,000 to over \$300,000 as possible locations for a retirement home. Debtors then decided to purchase home for \$432,000.00, although at the time debtors were renting a substantially less expensive residence. Debtors also used borrowed 401(k) funds to pay off their sons' student loans, Debtors' other debts and some living expenses in order to qualify for the mortgage loan with a payment of \$1,009.67 per month. In September 2010, Debtors purchased a 2010 Toyota Prius for \$35,664.80 and also purchased a 2010 Honda CR-V for \$30,892.39. As soon as debtors closed on their new home, debtors stopped paying on the mortgages on the three prior lots. In October 2010, as the mortgage payments for their newly constructed home began, Debtors ceased payments on the debts on the lot in Russell County and the two lots in South Carolina. Prior to this time, Debtors had timely paid and were current on their obligations, including the mortgage debts for the three vacant lots. Debtors clearly are not needy. Debtors were a family of two enjoying an annual gross income in excess of \$100,000.00. Debtors have the ability to repay a portion of their debt in a Chapter 11 plan. Majority of debt arose as result of poor decision making with regard to the purchases of three different parcels of real property on which Debtors intended to build retirement homes. Debtors built a larger, more expensive home and moved out of their smaller rented home. They purchased two new vehicles and in the following month stopped servicing the debt on the three "retirement" lots. Debtors could reduce their spending in any number of areas allowing for a meaningful repayment to creditors. Debtors spend more than double the average housing expense servicing the two mortgages, paying maintenance and homeowners association dues on their personal residence. Debtors also spend more than \$1,100.00 each month servicing vehicle debt. Debtors spent \$300 each month for the care of adult children with college educations, paid for by Debtors. Several debt payments will be fully repaid within a five year term of a Chapter 11 repayment plan.

In re Modiri, 474 B.R. 511 (Bankr. E.D. Mi. 2012) – Section 707(b)(3) requires court to view totality of circumstances to determine if debtor's financial situation indicates abuse. It is an abuse of Chapter 7 for a debtor to seek a discharge of debts that the debtor can pay, as the purpose of Chapter 7 is to provide relief to debtors who cannot pay debts. While ability to repay debts is not the sole factor, debtor's overall financial situation including income, expenses, assets and liabilities may demonstrate abuse. Abuse found where debtor moved to California and rented apartment on beach facing Pacific Ocean at excessive cost of \$3,000 per month. Rental of ocean-view apartment at a premium rental is not reasonable. IRS local standards for California county where debtor resided had housing and utility expense of \$1,999.00. Using that would create extra \$1,000 in disposable income. Debtor's transportation expense was also unreasonable. Debtor chose the most expensive means of obtaining transportation – short term car rentals and purchasing insurance through the rental company. Transportation cost of \$1000 per month exceeded IRS allowance for operating and

ownership costs by more than \$200.00. Unnecessary expenses for these two items would free up \$1200 per month which, over 60 month plan term, would produce significant dividend on \$81,000 of scheduled unsecured debt.

In re Smith, 468 BR 235 (Bankr. W.D. Ky. 2012) – Debtor’s petition did not evidence abuse for purposes of Section 707(b)(3). There was no evidence of any suspicious transfers to insiders or any intentional undervaluing of assets or overstatement of expenses and debtor did not live lavish or excessive lifestyle, but lived modestly within means. Debtor had only \$54 per month remaining after paying reasonable living expenses. Even if tax refunds were factored into income, those averaged less than \$2,000 per year and would still not allow debtor to make meaningful payments to unsecured creditors.

In re Beckerman, 381 BR 841 (Bankr. E.D. Mi. 2008) – Retirement contributions are not per se included or excluded in calculating disposable income for purposes of Section 707(b)(3). Retirement contributions must be reasonably necessary for maintenance or support of debtor or a dependent of the debtor. Debtors’ contribution of \$469 per month was reasonably necessary where debtors were 55 years old, had no savings for retirement and had no significant personal or real property. Although both debtors enjoyed stable employment and neither planned on retiring for a number of years, combination of age and lack of any meaningful retirement savings demonstrated that debtors would not be able to sustain retirement without continuing contributions. Amounts contributed were reasonably necessary and would be deducted in determining disposable income for purposes of Section 707(b)(3).

In re Elias, Case No. 11-55426 (Bankr. E.D. Mi. 2012) – Case was abusive under Section 707(b)(3) where schedules I and J as filed showed monthly surplus of \$540.00. Further, budget contained unnecessary or unreasonable expenses including payments on a boat; maintenance expenses for a surrendered condominium; and continued payments for a back tax liability would end in approximately 17 months which would make an additional \$1000 per month available for creditors. Debtors had ability to pay reasonable Chapter 13 case with no changes to lifestyle or any meaningful belt tightening. There was no evidence of any bad-faith conduct by debtors pre-petition, but pre-petition good faith or bad faith is not a factor under Section 707(b)(3). Debtor’s concern of possible loss of employment at some unspecified date in the future did not change the outcome where debtor had no information as to whether, or when, any loss of employment may ever occur, and Section 1329 allowed for modification of a confirmed plan if debtor did at some point lose employment.

In re Mathis, 2012 WL 909517 (Bankr. N.D. Ohio 2012) - Case would be dismissed under section 707 where debtors had monthly disposable income of approximately \$400 plus had an additional \$400 which budget contributed to payment of student loans which would not be entitled to priority under chapter 13. Debtors had reasonably stable income and, using \$800 per month as disposable income, had the opportunity to pay a meaningful portion of unsecured debts out of future income without depriving debtors or their dependents of adequate housing, food, clothing, or other necessities.

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.

In re Vandenbosch, 459 BR 140 (M.D. Fl. 2011) – Debtor cannot be required to include social security income on Schedule I or to include that in determining whether plan payment constitutes all disposable income. BAPCPA excludes social security from calculation. Because social security benefits are not a component of projected disposable income, a plan cannot be rejected for failure to include such benefits as projected disposable income. A necessary corollary is that a finding of bad faith may not be based upon such a failure.

In re Westing, 2010 WL 2774829 (Bankr. D. Idaho 2010) - Above-median-income debtor’s failure to account for Social Security income on Schedule I resulted in a lack of good faith. Current Monthly Income exclusion of Social Security in calculating “projected disposable income” under Section 1325(b), does not preclude the Court’s consideration of that income when evaluating a plan for good faith. Debtor’s plan proposed a monthly payment of only \$165 and would produce dividend of 1.9% while debtor had disposable income of more than \$2,300 if the Social Security was included.

In re Thomas, 2010 WL 5630827 (Bankr. N.D. Ga. 2010) – Exclusion of Social Security income from Current Monthly Income does not provide a basis for a debtor to fail to disclose that income on Schedule I or monthly disposable income on Schedule J. Debtor’s proposed retention of Social Security income would allow debtor to retain a substantial surplus at the expense of creditors, in violation of Section 1325(a)(3).

In re Welsh, 440 BR 836 (Bankr. D. Montana 2010) - Congress’ express exclusion of Social Security income from the calculation of Current Monthly Income, buttressed by 42 USC Section 407 which prohibits subjecting Social Security income to the operation of any bankruptcy or insolvency law, acted as an absolute prohibition against compelling a debtor to include Social Security income in either the calculation of CMI or in calculating income on Schedule I. Section 101(10A)(B) and 42 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 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 Meyers, Case No. 09-77897 (Bankr. E.D. Mi. 2010) – Reasonableness of 401-k contributions must be determined with reference to amount of existing retirement savings; debtor's age and time left until retirement; annual income and overall budget; amount of monthly contributions; and needs of dependents. Court would disallow 401-k deduction where debtor increased contribution on eve of bankruptcy in an effort to facilitate early retirement and debtor had second pension provided directly by employer as well as social security benefits that, combined, would permit debtor to adequately fund her retirement.

In re Kehl, Case No. 10-65068 (Bankr. E.D. Mi. 2011) – Court must view request for dismissal under Section 707(b)(3) using totality of circumstances and determine whether debtor is honest and needy. Honest requires that debtor have been honorable and undeceptive in dealing with creditors. Needy requires that debtor's financial predicament warrants discharge of debts in exchange for liquidation of assets. Debtors are not needy where income is stable and debtors are eligible for relief under Chapter 13, and debtors could reduce monthly expenses to produce dividend to unsecured creditors of as much as 60%. Voluntary retirement contributions are not per se unreasonable and must be evaluated on case by case basis, looking to factors such as amount of existing retirement savings, debtor's age and expected time until retirement, annual income and overall budget, amount of monthly retirement contributions, and needs of any dependents. Contributions were not reasonable where debtors were in their early 30s and had \$22,000 in retirement savings. Debtors had annual income in excess of \$97,000 and proposed contribution was \$423 per month. If the debtors stopped contributing only during Chapter 13 plan and then resumed contributions, debtors would have more than \$230,000 in retirement savings by age 60. Debtors also had historically received tax refunds of \$4,000 per year that would be available for funding of a plan, further indicating a lack of need. Debtor testified that income decreased in the prior year but did not present any credible evidence that future decreases were likely or anticipated, and even if those occur, debtors can deal with that decrease either by modifying plan or by reconverting if decrease warrants.

In re Divazio, Case no. 10-74441 (Bankr. E.D. Mi. 2011) – Retirement contributions are not per se necessary, and depend on amount of existing retirement savings, debtor's age and time left to retirement, annual income and overall budget, amount of monthly contributions, and needs of dependents.

In re Peterlin, 457 BR 630 (Bankr. N.D. Ohio 2011) – Chapter 7 case that would produce no dividend to unsecured creditors dismissed as abusive where debtor and non-filing spouse earned over \$120,000 per year and annually received large tax refunds Court is not justified in concluding that debtor is needy and worthy of discharge where disposable income permits liquidation of debts with relative ease. Factors include whether debtor enjoys a stable source of future income, whether debtor is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease financial predicament, the degree of relief obtainable through private negotiations, and whether expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities. Debtor and spouse had stable employment. Debtor sought to retain home valued at more than \$300,000 and with a mortgage payment in excess of \$3,000 per month. Expenses included more than \$550 per month for parochial school tuition which, if eliminated, could produce more than \$30,000 for unsecured creditors. In the bankruptcy context private school tuition is considered a luxury expense that amounts to a debtor requiring his or her creditors to donate toward his children's education absent evidence that the available public schools are insufficient or that children have special needs that require private school. Debtor had at least one car loan that would be paid off within plan term, allowing for additional payments to creditors.

In re 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 (4th 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 that 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 Stampey, 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 have 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 (8th 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-dischargeability 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 (8th 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 Coppenville, Case No. 11-65164 (Bankr. E.D. Mi. 2011) – Motion for Extension of Time denied for failure to comply with local rules. Motion failed to indicate whether attorney attempted to obtain concurrence of Trustee in the relief requested; and failed to indicate that objections must be filed within three days. Further, debtor did not file required documents even after filing motion and before motion date requested in motion for extension.

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]bent 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

In re Moore, 2012 Bankr. LEXIS 3897 (Bankr. S.D. Ga. August 24, 2012) - Incarcerated debtor's appearance at Section 341 meeting of creditors could not be waived.

Sicherman v. Warner 2011 WL 6140856 (Bankr. N.D. Ohio 2011) – Debtor's failure to appear for 341 meeting constitutes unreasonable delay that is prejudicial to creditors, constituting cause for dismissal under section 707(a). Debtor failed to appear at three of four re-scheduled first meetings of creditor and failed to provide requested financial records and documents requested by Trustee. Failure to cooperate was prejudicial to creditors as debtor's failure to provide the trustee with the requested records compelled the trustee to file his adversary proceeding and incur costs that will constitute administrative expenses against the estate pursuant to section 503(b)(2). If no assets are recovered, the trustee as creditor will have incurred administrative expenses that will go unpaid. If assets are recovered, creditors with claims that are lower in priority will likely receive less as a result of the trustee having to initiate this adversary proceeding. Further, the debtor's unreasonable delay in producing the requested documentation prevented the trustee from ascertaining the extent of the debtor's interest in Warner's World of Cars and whether the debtor had any unreported income.

Dunn v. Rund, Case No. 09-1176 (6th 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 Failure to Cooperate With Trustee

Sicherman v. Warner 2011 WL 6140856 (Bankr. N.D. Ohio 2011) – Debtor's failure to provide documents requested by Trustee constitutes grounds for dismissal. Debtor failed to appear at multiple adjourned meetings of creditors, and appeared at the third adjourned meeting without requested documentation. In response to discovery requests in this adversary proceeding, the debtor only provided his Form 1099 from 2009 and undated W-2 information from one of the businesses for which he had previously worked. The debtor failed to provide the majority of the requested records. Debtor's attorney reported that the debtor appeared to be unable or unwilling to produce the requested records which were necessary to complete the section 341 examination. Trustee lacked any information as to debtor's business activity went on as a broker, and had no way of finding out. Trustee unable to administer estate when Trustee unable to determine what the estate consist of.

9.9 Dismissal for Cause – Procedure

Dunn v. Rund, Case No. 09-1176 (6th 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.

9.10 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.

9.11 Dismissal With Prejudice to Re-filing

In re King, Case No. 12-60371 (Bankr. E.D. Mi. 2012) – Debtor’s tenth bankruptcy case dismissed with prejudice. Debtor failed to pay filing fees in 5 of the prior 9 bankruptcy cases and sought waiver of filing fee in this case as well. All 9 of debtor’s prior cases were dismissed based on debtor’s failure to perform duties under bankruptcy code in addition to failure to pay filing fees totaling over \$1,000.00. Debtor’s case dismissed with prejudice to debtor filing any further petitions until balance of filing fees from prior cases are paid in full.

In re Rice, Case No. 11-68514 (Bankr. E.D. Mi. 2011) – Debtor’s case dismissed with prejudice where debtor had four prior cases within preceding 15 months, each of which was dismissed for failing to pay filing fees. Debtor’s actions racked up large amounts of unpaid filing fees. Allowing debtor to file another case would be an abuse of the bankruptcy process.

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 sixth 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.

9.12 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*.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

In re Nln, Case No. 09-43126 (Bankr. E.D. Mi. 2009) – Case filed in violation of bar to refile 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.

B. Conversion to Chapter 11

9.13 Request of Debtor

Levesque v. Shapiro, Case No. 11-1742 (9th Cir. BAP 2012) – Debtor in Chapter 7 does not have absolute right to convert case to proceeding under Chapter 11. Chapter 7 Trustee has standing to oppose conversion. Debtor not entitled to convert when conversion would be in bad faith or done with intent to abuse letter and spirit of Code. Debtor was involved in auto accident pre-petition. Debtor did not disclose in the bankruptcy schedules any potential causes of action and reaffirmed at the first meeting of creditors that the schedules were accurate. Several months after obtaining a discharge, debtor instituted suit to recover damages arising from the accident. After the defendant learned of the non-disclosure, debtor sought to convert the case to Chapter 11. Court concluded that after *Marrama*, there is no absolute right to convert to Chapter 11. Conversion would reward debtor for non-disclosure of claim and would sanction debtor's failure to accurately disclose assets.

C. 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.

Marrama v. Citizens Bank of Mass., 549 US 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007) – Section 707 does not afford debtor absolute right to convert to Chapter 13 where debtor's conduct constitutes pre-petition bad faith. Section 707 allows conversion only to chapter under which debtor could have proceeded initially. Section 1307 allows a debtor in chapter 1 only where debtor proceeds in good faith and allows dismissal or conversion of proceeding filed in bad faith. Section 1307 prevents conversion of case from Chapter 7 to Chapter 13 where converted case would be in bad faith and would result in case being immediately re-converted back to Chapter 7. Debtor's bankruptcy schedules materially undervalued or omitted assets and debtor entered into numerous pre-petition transfers that were allegedly fraudulent or otherwise avoidable. When the Chapter 7 Trustee advised debtor that the Trustee would pursue recovery of the transferred assets, Debtor sought to convert proceeding to Chapter 13. Court concluded that concealment and undervaluation constituted lack of good faith that would supersede otherwise apparent right to convert under Section 707.

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 (8th 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.

D. 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)

Barcume v. Fox, Case no. 11-12036 (E.D. Mi. 2012) – Intent to hinder, delay or defraud can be found based on lack or inadequacy of consideration; transferee is family, friend or close associate; debtor retains possession, benefit or use of property; financial condition of the recipient both before and after the transaction; existence of cumulative pattern of transfers after incurring debtor onset of financial difficulties; and general chronology of events and transactions. Creditor did not establish intent to hinder, delay or defraud creditors by debtor’s pre-petition sales of assets where creditor did not present evidence that transfers were for less than reasonably equivalent value and any lingering relationship between debtor and business that debtor sold was “insignificant”. Transfer of Jeep to debtor’s daughter did not evidence intent to hinder, delay or defraud where Jeep was purchased by former spouse specifically for daughter and was titled in debtor’s name solely for insurance purposes, and debtor transferred title when daughter graduated from college.

Hulsing Hotels Tennessee, Inc. v. Steffner, 2012 WL 3563978 (Bankr. E.D. Tn. 2012) – Section 727(a)(2)(A) requires disposition of property, such as concealment; and subjective intent to hinder, delay or defraud creditor through act of disposing of property. Creditor’s complaint did not allege that debtor concealed any property. Creditor’s allegations were based entirely on actions taken by debtor’s single member LLC including alleged concealment by LLC of assets and transfers of LLC’s assets. Creditor failed to present sufficient evidence to pierce corporate veil/ Absent piercing, Bankruptcy Court recognizes distinction between corporate and shareholders or members individually. Section 727(a)(7) would allow denial of discharge to debtor who, as insider, causes entity to engage in concealment of assets where the entity is also a debtor in bankruptcy. In this case, Debtor’s single member LLC did not file for relief and was not a debtor in bankruptcy, precluding application fo Section 727(a)(7).

U.S. Trustee v. Zhang, 2012 WL 75432 (Bankr. S.D. Ohio 2012) – Debtor’s use of multiple corporations to hide cash and conceal transfers supported denial of discharge. Debtor manipulated wholly-owned corporations in such a way as to transfer large amounts of money from those corporations into other corporations and into debtor’s own accounts for purposes of hindering creditors of the transferring corporations. Debtor also retained funds in corporate accounts that were then used for personal and family purposes, demonstrating that the funds in these accounts, although titled in corporate names, were actually personal funds that were knowingly concealed from creditors. Court would look past corporate formalities to determine actual intent of debtor. Debtor also “shifted” salary income from wholly owned corporations to debtor’s wife and then claimed substantially lower income on bankruptcy schedules. Debtor was the only person who performed meaningful services for businesses and scheme to transfer salary to wife was clearly scheme to keep debtor’s income from the reach of creditors. Debtor continued to conceal assets and use corporate funds for personal use post-petition, continuing the pre-petition pattern of conduct.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

Cornwell Quality Tools Company v. Paavo, Case No. 11-10831 (E.D. Mi. 2011) – Debtor’s failure to disclose “business credits” for goods purchased from supplier and later returned for credit was not failure to disclose income. Credits represented sales by debtor that were financed by creditor and for which customers paid creditor directly. Debtor did not fail to disclose proceeds that were not paid to debtor. Record did not show that debtor failed to disclose tools and equipment where uncontroverted testimony at trial was that debtor had sold all tools and equipment prior to filing bankruptcy.

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. Nouveau 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 (9th 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 (9th 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 (11th 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 (6th 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."

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)

McDermott v. Swanson, Case No. 12-6028 (8th Cir. BAP 2012) – Denial of discharge requires proof that debtor concealed, destroyed, mutilated, falsified or failed to keep or preserve recorded information unless the act or failure to act was justified under the circumstances. Once the party objecting to the discharge shows that records are inadequate, burden shifts to debtor to offer justification. However, ultimate burden of proof remains on the objecting party. Plaintiff's naked allegation that debtor failed to keep and maintain records, without more, was not sufficient to meet initial burden. Therefore, Debtor's failure to offer evidence of justification would not support denial of discharge.

Lim v. Storozhenko, Case No. 11-6552 (Bankr. E.D. Mi. 2012) – Court will deny discharge where debtor either failed to

keep or preserve recorded information and books, or that someone acting for the debtor destroyed, falsified or concealed records; as a result of which it is impossible to ascertain financial condition and material business. Although debtor settled personal injury action only three months prior to commencement of case, debtor failed to produce any records regarding how she allegedly spent the proceeds or, in fact, whether she actually spent it or still has it in her control. Although debtor allegedly sent more than \$33,000 to her mother in Russia in the two months pre-petition, debtor had no records and no receipts for any of those transfers.

U.S. Trustee v. Welling, 2012 WL 1965664 (Bankr. N.D. Ohio 2012) – Section 727(a)(3) requires proof that debtor failed to keep or preserve adequate records and that the failure makes it impossible to ascertain debtor's financial condition. Once plaintiff presents evidence on these two issues, burden shift to debtor to demonstrate justification for lack of records. Debtor is not required to maintain impeccable system of bookkeeping, but must be sufficient to allow one to review financial condition of debtor and his business transactions for a reasonable period of time. Debtor must run over records in debtor's possession plus records in possession of third parties from whom debtor could obtain those records. Types of records that must be preserved are those of a type kept by a reasonably prudent debtor with the same occupation, financial structure, education and experience as debtor, based on (1) volume of debtor's business; (2) amount of debtor's debts and obligations; (3) whether failure to keep books and records was fault of debtor; (4) debtor's education, experience and sophistication; (5) customary practices for record keeping in debtor's type of business; (6) degree of accuracy in existing books and records; (7) extent of any egregious conduct of debtor; and (8) debtor's courtroom demeanor. Evidence indicated that debtor's bookkeeper maintained significant records that were not turned over to the UST until after litigation commenced, and that records that were turned over were incomplete, fulfilling UST's burden of proof. Bank statements produced by debtor had significant gaps and omitted records of accounts being used for debtor's business entirely. Debtor used bank accounts in the names of third parties to avoid garnishments, but failed to produce any records for those accounts. Debtor produced tax returns which differed materially from the returns actually filed with the IRS. Debtor's business was small, and debtor left financial issues to bookkeeper who managed all financial aspects and maintained 100% of the financial records of debtor's business. Justification for failure to produce documents requires an objective standard. Debtor's honest belief that the records did not need to be kept is not sufficient justification. Debtor's failure was justified under circumstances, where it appeared that the bookkeeper was refusing to cooperate with debtor and refusing to provide books and records notwithstanding requests by debtor, where bookkeeper (as co-obligor on business debts) would benefit from denial of debtor's discharge. Debtor failed to produce records not because he did not want to, but because of continued "stonewalling" by bookkeeper. Debtor was as cooperative as possible with Chapter 7 trustee, producing numerous records that debtor did have including police reports on stolen property, all records for four years on transactions with one particular company, information on vehicles, and authorized Chapter 7 Trustee to speak directly to IRS in connection with an ongoing federal tax audit. Failure to produce records was not fault of debtor, but was entirely caused by bookkeeper, establishing justification for debtor's failure to comply.

U.S. Trustee v. Zhang, 2012 WL 75432 (Bankr. S.D. Ohio 2012) – Discharge denied where debtor failed to maintain any personal or business records from which financial condition could be determined. Although debtor had complex series of corporations and was sophisticated businessman, debtor could not produce even minimal records of either corporate or personal financial dealings. Debtor's explanation that business records had been seized by another governmental agency was not sufficient as debtor also testified that records were in car that had been stolen. Also, even if corporate records were not available, debtor also failed to produce any personal records even from immediately prior to commencement of bankruptcy case. Without records, it was impossible to determine debtor's true financial status.

Cornwell Quality Tools Company v. Paavo, Case No. 11-10831 (E.D. Mi. 2011) – Debtor did not fail to maintain records where records were maintained on computer that later crashed. Debtor's destruction of hard drive from computer that crashed was not unreasonable where hard drive contained personal information on customers including credit card numbers and social security numbers. Debtor did not destroy any paper backup records that contained accounting or business information or which were necessary for legal purposes or federal and state tax records.

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 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) *aff'd* Case No. 10-2206 (6th Cir. 2011) – 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)

Barcume v. Fox, Case no. 11-12036 (E.D. Mi. 2012) – Section 727(a)(4) requires proof that debtor made a statement under oath; that the statement was false; that the debtor knew the statement was false; that debtor made the statement with fraudulent intent; and the statement materially related to bankruptcy case. Debtor inadvertently stated on SOFA that debtor sold Toyota Yaris for \$12,000 when vehicle sold was actually Toyota Spyder. Debtor was fully candid about circumstances of later transfer of Yaris for \$5,700. There was no evidence that Debtor knew of error or that error was anything other than miscommunication between debtor and attorney.

Kaler v. Charles, Case No. 12-6016 (8th Cir. BAP 2012) – Debtor willfully undervalued debtor's interest in two separate businesses owned by debtor; substantially undervalued residence and overstated debt against it, making it appear that debtor had no equity in property; debtor failed to disclose income in the two years pre-petition including \$15,000 in distributions from company that debtor valued at \$1.00. Debtor purchased interest in business for \$25,000 less than 2 years prior to filing, and valued interest at \$63,000 approximately one year before filing; and business owned real estate worth over \$600,000. Existence of buy-sell agreement did not indicate that interest was worth only \$1.00. Accounting for marketability of interest and minority ownership discounts, business interest was worth substantially more than \$1.00. Statements made in schedules constitute statements made under oath for purposes of Section 727(a)(4). Statements were made with reckless indifference to truth sufficient to regard statements as intentionally false. Statements that bear relationship to business transactions or estate, or concerns the discovery of assets, business dealings, or existence and disposition of property are "material" for purposes of Section 727. Omission of even a relatively modest asset will merit denial of discharge if made with knowledge and fraudulent intent. Debtor's representations that business interests were worth only \$1.00 were made with intent to "sen[d] a message to the Trustee that there was no need to inquire further."

Lim v. Storozhenko, Case No. 11-6552 (Bankr. E.D. Mi. 2012) – Bankruptcy requires complete financial disclosure. Presentation of information that debtor knows to be false or is omission that creates false impression constitutes misrepresentation. False misrepresentation can be result of intentional acts of statements made in reckless disregard of truth. Debtor made false oath sufficient to deny discharge. Debtor's schedule B failed to disclose proceeds of personal injury settlement of \$5,400 that debtor still had in her possession as of petition date. Statements in Schedules are considered to be under oath. Debtor's statement that she had only \$30 in cash on hand, rather than the \$5,500 she actually had, constitutes a false statement. Statement related materially to bankruptcy case as it bore a relationship to business transactions or estate, and concerned discovery of assets, business dealings, and existence or property. Debtor knew the statements were false and were made intentionally and were not the result of mere mistake or inadvertence.

Humphrey v. Morgan, 2012 WL 1390246 (Bankr. E.D. Tn. 2012) – Statements made in schedules, statement of financial affairs, and at the 341 meetings are all statements made under oath. Debtor's statements were materially false where statements indicated that debtor-husband and debtor-wife had total monthly income for past 3 years of only \$3,000 per month, yet bank statements and other documents showed deposits that substantially exceeded that amount and withdrawals totaled more than \$100,000 per year. Circumstantial evidence supported intent to deceive where there were substantial errors made in disclosure of income for three years and a total failure to disclose any income for debtor-wife. Allegations supported finding that omissions were done knowingly, where levels of deposits into and withdrawals from the joint bank account combined with debtors' joint purchase of a new residence allowed inference that debtor-husband had knowledge of falsity of statements. Schedules also failed to disclose hundreds of thousands of dollars transferred to debtors' children in the one year preceding the bankruptcy petition, transfers that were made by gifts and payment of expenses from the joint bank account maintained by debtor-husband and debtor wife.

U.S. Trustee v. Zhang, 2012 WL 75432 (Bankr. S.D. Ohio 2012) – Debtor's use of multiple corporations to hide cash and conceal transfers supported denial of discharge. Debtor manipulated wholly-owned corporations in such a way as to transfer large amounts of money from those corporations into other corporations and into debtor's own accounts for purposes of hindering creditors of the transferring corporations. Debtor also retained funds in corporate accounts that were then used for personal and family purposes, demonstrating that the funds in these accounts, although titled in corporate

names, were actually personal funds that were knowingly concealed from creditors. *De minimis* discrepancies in bank balances that were disclosed would not support denial of discharge where discrepancy was explained by mat error and failure to account for deposit made shortly before filing. Debtor's statement of income on schedule I was materially understated. Debtor had monthly income of \$17,000, not \$2,600 listed on schedule I. Debtor's testimony that schedule I was debtor's "anticipated" income was not credible where evidence showed that debtor's income had consistently been the higher amount. Scheduled values of corporations as "unknown" and "\$100" were not deceptive where value of one corporation was unclear as assets were primarily patents that may or may not have had market value; and schedules disclosed assets owned by corporation sufficient to place parties on notice of existence and potential value of assets. Debtors' failure to list debts owed to family members indicated a failure to carefully review schedules but did not demonstrate an intent to defraud those family creditors.

Lincoln Savings Bank v. Freese, Case No. 11-6055 (8th Cir. BAP 2011) – Debtor knowingly omitted material information from schedules and SOFA sufficient to warrant denial of discharge. Debtor failed to disclose and failed to satisfactorily explain the omissions of: (1) the existence of the debtor's livestock business; (2) the gross income from his livestock business; (3) income from 2007; (4) transfers of certain equipment which constituted part of the bank's collateral; and (5) co-ownership of the car his wife drove. Evidence supported findings under Section 727(a)(4)(A) that: (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) the statement related materially to the debtor's bankruptcy case. Some of the reasons given by the debtor were simply not the law, such as his argument that his failure to disclose gross income from his livestock business was excused by the fact that the operation did not generate a profit. Court would not adopt a subjective standard that would allow each individual debtor to make their own determination of what is meant by the questions on the Schedules and Statement and make disclosures accordingly. Debtor's omissions were material. Value of the undisclosed asset does not determine whether the subject matter of the false oath is material and failure to disclose an asset with a minimal value may be material. Even if discovery of the debtor's property interests results in no recovery for his estate omissions in this case were directly related to the debtor's business and his assets, defining them as "material" for purposes of Section 727(a)(4)(A).

Stevenson v. Taylor, 2011 WL 5075693 (E.D. MI. 2011) – Debtor, an attorney, failed to disclose in Bankruptcy Schedules debtor's 2009 state and federal tax refunds; accounts receivable associated with law practice; certain gas royalties and rental incomes; and a potential cause of action against Detroit Police Department. Section 727(a)(4) met where debtor made material representation known to be false with intent to create erroneous impression. Reckless disregard for truth will satisfy element of intent as will pattern of reckless or cavalier disregard for truth, but mistake or inadvertence will not. Although debtor's failure to list any one of these omitted assets may have been "innocent mistake", cumulative effect evidenced disregard for truth. Debtor, an attorney practicing 19 years, was not unsophisticated and understood obligation to accurately disclose information to court. Debtor never attempted to amend schedules to disclose omitted assets once assets were discovered and failed to provided documents such as Accounts Receivable ledgers, which indicated intent to cover up misrepresentations, furthering cavalier attitude.

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,

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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 (9th 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 (9th 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 (6th 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."

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)

McDermott v. Swanson, Case No. 12-6028 (8th Cir. BAP 2012) – Denial of discharge requires proof that debtor failed to explain satisfactorily any loss of assets or deficiency of assets to meet liabilities. Debtor's burden to explain the loss is not triggered until plaintiff establishes that actual loss of assets has occurred. Plaintiff's naked allegation that debtor lost

assets, without more, was not sufficient to meet initial burden. Therefore, Debtor's failure to offer evidence of justification would not support denial of discharge.

U.S. Trustee v. Zhang, 2012 WL 75432 (Bankr. S.D. Ohio 2012) – UST failed to demonstrate basis to deny discharge based on debtor's alleged failure to disclose various military contracts to which debtor, or a corporation wholly owned by debtor, were parties. Although debtor failed to list the contracts, UST did not establish the value of those contracts. Burden is on plaintiff to demonstrate both failure to list assets and that assets were significant or material.

Retz v. Samson, Case No. 08-60023 (9th 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)

Parker v. Banks, 2012 WL 1966138 (Bankr. N.D. Ohio 2012) – Section 727(a)(6) requires that debtor refused to abide by a court order, not just that the debtor failed to do so. Debtor must have known of the order; must have violated the order; and the order must have been definite and specific. Debtor must then explain non-compliance. Court order properly mailed to debtor required debtor to produce specific records and documents. Order was presumed to have been received and had not been returned by the Post Office as undeliverable. Order was definite and specific on documents to be turned over and debtor failed to produce any of the listed documents. Discharge denied.

Jahn v. Clayton, 2012 WL 112940 (Bankr. E.D. Tn. 2012) – To deny discharge under Section 727(a)(6), plaintiff must establish that debtor knew of court order and an ability to comply. Trustee failed to demonstrate that debtor knew of Order compelling debtor to appear at adjourned Section 341 meeting where record showed that Order was mailed to address that was not used by debtor. Although the address was the one listed by the debtor in the petition, it was

substantially certain debtor no longer resided there as debtor's Chapter 13 plan surrendered the property more than two years prior to case being converted to Chapter 7. Trustee failed to demonstrate willful refusal to comply where debtor, upon being advised of initial post-conversion 341 meeting, contacted trustee to advise that debtor would not attend the first meeting as debtor lacked sufficient funds to pay for gas for the trip; and debtor was not aware of subsequent order requiring debtor to appear.

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 (10th 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.

E. 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

DETROIT CONSUMER BANKRUPTCY CONFERENCE

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 (11th 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.

F. 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.

G. 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 Baer, 2012 WL 2368698 (6th Cir. BAP 2012) – Discharge prevents any attempt to collect personal liability of debtor on discharged debt. Discharge does not prevent creditor from exercising rights in collateral post-discharge. Creditor’s actions in repossession automobile post-discharge did not violate the discharge injunction. Creditor did not violate discharge injunction by answering debtor’s question as to why the vehicle was being repossessed by informing debtor of amount of arrearage owed. Creditor did not demand payment nor indicate that creditor would forego repossession if debtor paid amounts owed. Creditor did nothing more than provide answer to debtor’s question.

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 (8th 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 (10th 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 S.Ct. 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 Prince's 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 Generally

Myers v. Asta, 2012 WL 2501124 (Bankr. E.D. Wi. 2012) – Discharge entered in Chapter 7 proceeding did not discharge obligations from debtor’s wholly owned company. Debtors did not have personal guarantee and creditor was not attempting to collect from debtors. Creditor’s collection proceedings, directed solely at corporate entity, not barred by discharge injunction.

Hahn v. Educational Credit Management Corporation, Case No. 11-084 (1st Cir BAP 2012) – Section 105 provides court broad authority to exercise equitable powers where necessary or appropriate to implement Order or other Code provisions. However, power must be used cautiously and only if, and to the extent that, the equitable remedy dispensed by the court is necessary to preserve an identifiable right conferred elsewhere in the Code. Sanctions were appropriate where creditor repeatedly called debtor post-discharge in effort to obtain payment, although Bankruptcy Court had determined that debtor had paid non-dischargeable student loans prior to commencement of bankruptcy and debtor was no longer indebted to creditor. Sanctions properly awarded for attorney fees and costs incurred in responding to creditor’s post-discharge collection actions.

In re Moore, 2012 WL 3561973 (Bankr. W.D. Mi. 2012) – Creditor violated discharge injunction by garnishing debtor’s state tax refund post-discharge. Creditor ordered to refund garnished funds to debtor and, if creditor fails to pay by date specified, amount would increase by \$10 per day until paid in full.

In re Baer, 2012 WL 2368698 (6th Cir. BAP 2012) – There is no private cause of action for alleged violation of discharge injunction. Debtor has standing to seek contempt against creditor who repossessed vehicle post-discharge. Discharge injunction prevents any attempt to collect personal liability of debtor on discharged debt. Discharge does not prevent creditor from exercising rights in collateral post-discharge. Creditor’s actions in repossession automobile post-discharge did not violate the discharge injunction. Creditor did not violate discharge injunction by answering debtor’s question as to why the vehicle was being repossessed by informing debtor of amount of arrearage owed. Creditor did not demand payment nor indicate that creditor would forego repossession if debtor paid amounts owed. Creditor did nothing more than provide answer to debtor’s question. Fact that debtor may have had equity in the collateral does not alter creditor’s right to repossess the collateral or to otherwise enforce the security interest post-discharge.

Taylor v. Javitch, Block & Rathbone, LLC, 2012 WL 2375494 (N.D. Ohio 2012) – There is no private cause of action for alleged violation of discharge injunction.

Chastain v. Bank of America Home Loans, 2012 WL 2377476 (Bankr. E.D. Tn. 2012) – Remedy for alleged violation of discharge injunction is motion for contempt. Neither Section 524 nor Section 105 creates private cause of action for violation. Adversary proceeding requesting finding of civil contempt and award of attorney fees and costs dismissed. Proper vehicle for seeking contempt is by motion for contempt, not by adversary proceeding.

Seibert v. Horton, Adv. No. 11-6651 (Bankr. E.D. Mi. 2012) - Unscheduled debt is generally dischargeable in no asset chapter 7 case. However, unscheduled debt that is not otherwise non-dischargeable under section 523(a)(2), (4), or (6), is not automatically discharged if the potential creditor did not have knowledge of the bankruptcy case. Unscheduled creditor did not violate discharge injunction by filing post discharge state court complaint alleging nondischargeable debt based on alleged theft of money. If proven, debt would be nondischargeable under section 523(a)(6) notwithstanding the general discharge for otherwise unscheduled debts.

In re Martin, Case No. 11-8052 (6th Cir. BAP 2012) - Creditor willfully violated discharge injunction when he filed a post-discharge state court lawsuit where the parties had not entered into a reaffirmation agreement during the pendency of the debtor’s case. Debtor’s voluntary post-petition payment did not obligate her to continue making payments to the creditor or somehow waive benefit of discharge of underlying obligation. Parties did not enter into a new contract for payment of the debt because mutual assent and consideration independent of the discharged debt were both lacking. The creditor’s mistaken belief that his actions were somehow outside the scope of 524(a)(2) does not remedy a violation of the discharge injunction. Debtor was entitled to an award of actual damages for the violation, including attorneys’ fees.

DETROIT CONSUMER BANKRUPTCY CONFERENCE

Stevens v. Citizens Tri-County Bank, 2011 WL 6812807 (Bankr. E.D. Tn. 2011) – Section 524 does not create a private right of action for damages. Remedy for alleged violation is through Motion for contempt for violation of injunction. Adversary complaint for damages dismissed.

Bridges v. Grange Mutual Casualty Company, 2011 WL 5837053 (Bankr. W.D. Ky. 2011) – Section 523(a)(9) does not require formal action in Bankruptcy Court to declare debt non-dischargeable. Creditor, as the holder of a claim by subrogation as a result of insurance payouts, did not violate discharge injunction by filing suit in state court after entry of discharge, where complaint alleged that debtor caused injury while operating a motor vehicle while intoxicated.

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), *aff'd*, 2012 WL 2368698 (6th Cir. BAP 2012) – Creditor did not violate discharge injunction by repossession of 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 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 (10th 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 (6th Cir. BAP 2010) – Creditor's commencement of litigation in state court following entry of discharge violated discharge injunction and subjected creditor to sanctions for contempt. Although 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 (7th 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 cause 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 (10th 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 (10th Cir. 2009) – Court refused to decide whether discharge injunction is jurisdictional, such that a court lacks jurisdiction to address claims that were subject to the discharge; or merely an affirmative defense that must be plead or is waived.

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 (6th 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.

9.35 Discharge Injunction – Surrendered Collateral

Canning v. Beneficial Maine, Inc., 462 BR 258 (1st Cir. BAP 2011) – Mortgage lender did not violate discharge injunction by refusing to foreclose after debtors stated intention to surrender. Surrender does not require secured creditor to accept possession, foreclose or repossess. Surrender only means that debtor will make collateral available to secured creditor.

9.36 Criminal Proceedings

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